

1680. June 10.

The ANNA of CHRISTIANA against CAPTAIN MORTOUN.

No. 49.

Found in conformity with the above.

THIS ship, called the Anna of Christiana, having been found free, and the adjudication reduced, last session, the strangers would not take out the decret, unless the owners of the privateer were decerned for the whole price *in solidum*; which not being expressed in the sentence, the clerk refused to add the same; whereupon the Lords called the parties; and it was alleged for the owners, That they could not be liable *in solidum*, but *pro rata*, because they were neither liable *ex contractu*, nor *ex delicto*; not *ex contractu*, for they had made no contract with the strangers, and were not answerable for the deeds of the captain, who had his commission from the Admiral, and had found caution; for though owners be liable for the deeds of a master of a ship, *actione exercitoria*, yet that extends only to merchandizing; and not *ex delicto*, because the Lords found there were probable grounds to bring up the ship, and the owners did not meddle with her, until she was adjudged prize, and roused; and though the adjudication was reduced thereafter, yet the owners can only be liable *in quantum lucrati*, each for his share received. It was answered for the strangers, That the owners were liable, as those who furnished and set out the privateer, and so were authors, or accessory to the unwarrantable seizure of a free ship; and though the captain found caution *ad majorem cautelam*, it hinders not but that both the captain, his cautioner, and owners, were liable *in solidum*, to restore the ship and loading, which is *factum indivisible*, and the persons obliged cannot liberate themselves, by offering a part of the ship, or a part of the loading; no more can they by offering a part of the price liberate themselves, seeing it comes in place of the ship; otherwise friends and neuters might be destroyed, by the owners taking in insolvent partners; and the captains are ordinarily insolvent, and the cautioners are taken, in course, by the Admiral's clerk, oft-times insufficient; and therefore the Lords have all along found the owners liable *in solidum*.

The Lords found all the owners liable *in solidum*.

*Fol. Dic. v. 2. p. 381. Stair, v. 2. p. 769.*

1725. December 2. M'GIVAN against BLACKBURN.

No. 50.

AN owner found liable *in solidum* to the value of his interest in the ship, for furnishing bestowed upon the ship by the commission of another party, now bankrupt. Here no more was claimed than that he should be found liable to the value of his interest. See APPENDIX.

*Fol. Dic. v. 2. p. 381.*