at any settled price, but upon an obligation to hold compt to the seller for the same.

No 7.

A difference arising between Robertson and the buyers about these 91 bolls of oats, he brought a process against them for L. 5 Scots for each boll thereof, which they did not controvert to be the value. But their defence was, that out of the said L. 5, they ought to have deduction of the damage they had sustained by the oats not coming safe, in which case they would have gained the the difference between 10 s. 8 d. the stipulated price, and L. 7 : 10 s. Scots, at which they could have sold them. And so the ORDINARY "found," in respect as his interlocutor bore, " That if the whole victual had perished, the seller would have been liable in the buyer's damages."

But upon advising petition and answers, the LORDS "Found no damages due to the buyers."

The notion the Ordinary had conceived of the matter was, That the seller was bound effectually to deliver the victual to the buyers free of damage, so as to make good to the buyers whatever loss they might sustain by the not delivery. But the Lords had a different notion of it; they considered, that as by the Roman law, so by ours, *periculum rei venditæ est emptoris*, and who therefore, if the thing sold perish *casu*, must nevertheless be liable in the price; as a few years ago was found in the case of spirits robbed from the custom-house of Kirkcaldy, the night after they had been sold and bill given for the price, which nevertheless the buyer was found obliged to pay; (No 5.) and they considered the seller's undertaking the risk in this case to have meant no more than that the buyers should be free of the risk, and not be liable, unless the cargo should arrive safe.

Fol. Dic. v. 4. p. 57. Kilkerran, (PERICULUM.) *No 5. p. 378.*

*** D. Falconer's report of this case is No 42. p. 2289. *voce* CLAUSE.

SECT. II.

Periculum rei Locatæ et rei Commodatæ.

1624. *June 29.* MOFFAT *against* MOFFAT.

No 8.

WHERE a stabler pursuing for the price of his horse and profit, it was *alleged*, That the defender conducted the pursuer's horse to Falkirk, and he failed in riding and sat about Corstorphine, so that the defender was forced to go to Fal-

No 8.

kirk on his foot, where he offered the pursuer his horse; and it is not libelled what wrong he did to the horse; *replied*, He rode him extraordinary, by galloping him, and rode further than condition to Dumblane, being only hired to Stirling: Found relevant.

Clerk, *Durie*.

Fol. Dic. *v*. 2. *p*. 57. *Nicolson, MS. No* 327. *p*. 228.

1626. *November* 28. ——— *against* MOWAT.

No 9.

IN an action for the price of a horse, pursued at the instance of a stabler in Edinburgh, against James Mowat writer, the LORDS found that the defender was subject to pay the price of the horse hired by him, and not restored again; albeit he *alleged*, That he ought not to be found subject therein, in respect that he having hired his horse to a part agreed upon, he was not holden nor astricted to keep him, but the pursuer ought to have sent for his horse again, or to have sent any boy with him to have brought him back, which not being done, but the horse having strayed away, or being stolen by the defender's fault or knowledge, it cannot be imputed to him; which exception was repelled, for conductor equi, of the law; non tenetur ad estimationem, si equus per casum moriatur sine culpa sua, et quamvis de casu non teneatur, tamen de culpa tenetur etiam levissima, ut est in Bart. ad Leg. Si ut certo. §. Nunc videndum, et § Sed interdum D. Commodat. Et conductor rei mobilis retinendo ultra tempus, non videtur reconducere, imo tenetur fur.

Fol. Dic. v. 2. *p*. 57. *Durie, p*. 238.

1667. *November* 16. WHITEHEAD *against* JOHN STRAITON.

No 10.
The proprietor of inclosures having put up a placard, that he was not to undertake the hazard of the cattle in them, was found not liable.

WHITEHEAD of Park pursues John Straiton for restitution of a horse which he delivered to his servant, to be put in the park of Holyroodhouse to the grass, and which now cannot be found. The defender *alleged*, That he was liable for no loss or hazard, because at that time, and long before, there was a placard fixed upon the port of the park, that he would be answerable for no hazard or loss of any horse put in there, by stealing or otherwise, which was commonly known at, and long before that time. It was *answered*, That this action being founded upon the common ground of law, Nautæ, caupones, stabularii, ut quæ receperint restituant, the same cannot be taken away but by paction; and the putting up of a placard is noways sufficient, nor was it ever shown to the pursuer. The defender *answered*, That the pursuer having only delivered his horse to his servant to be put in the park, without any express communing or conditions, it behoved to be understood on such terms as were usual with others, which were the terms expressed in the placard.