

1697. February 4. JOHN GILES and SIR ALEXANDER ANSTRUTHER *against* DUFF of BRACCO.

CROCERIG reported John Giles and Sir Alexander Anstruther, against Duff of Bracco, for the price of some 100 bolls of meal he was to send, from his interest in the North, to Leith. His defence was, He did accordingly ship the same; but the vessel, by storm of weather, being broken, the cargo was lost.

ANSWERED,---That must be on your peril; because, by the charter-party, the port of loading was Doun, but you shipped the meal at Bamf.

REPLIED,---The port was not essential here; but, on the contrary, the victual should have been delivered in June, in which time Doun was a safe enough harbour; but you delayed sending for it till September, after which time Bamff is the better of the two; the first being a rocky channel, and the second mud and sand; and you gave me a full commission by your letter.

DUPLIED,---The bark was cast away ere it came the length of Doun, and the mandate, *cum libera*, was only as to the lie-days.

The Lords considered, That the conveniency of the two harbours behoved to be tried by the advice of skippers ere they could determine on whom the loss of the victual should fall, and who was *dominus* of it the time it perished, and so on whose risk and peril it was shipped. But, finding it a matter capable of accommodation, (as all those fatalities are,) they recommended to some of their number to endeavour to settle the parties.

On a second report, the Lords found the letters imported a full commission to Bracco, and therefore assoilyied him. And, on a third application, a probation of the conveniency of either harbours was granted.

*Vol. I. Page 763.*

1697. February 5. MURRAY of AUCHTERTYRE *against* MURRAY of ABERCAIRNY and his TENANTS.

CROCERIG reported Murray of Auchtertyre, against Murray of Abercairny and his Tenants, for abstracted multures; wherein the debate arose on that member of the libel, craving Abercairny to be decerned, as he who ordered and commanded his tenants to go to another mill.

ALLEGED,---In criminal cases, a mandate made the giver of it equally liable *in pœnam* with the executor; but in civil processes that was never sustained.

ANSWERED,---The tenants break or remove from the ground, and are not able to refund my damage; and, therefore, it is most just and congruous to the principles of law that you answer for the deeds done by your direction.

The Lords considered this was *damnum injuria datum*; in which case the *mandans* is as liable as the *mandatarius*; and, therefore, found that part of the libel relevant, even against the master, upon his order and commission.

*Vol. I. Page 764.*