

No 4. in these cases is ejus est periculum cujus est dominium : Qui habet commodum æquum est eum etiam pati incommoda rem ipsam sequentia.

*Fol. Dic. v. 2. p. 56. Fountainhall, v. 2. p. 644.*

\* \* Forbes's report of this case is No 11. p. 5017. *voce* GENERAL ASSIGNATION.

1744. July 6.

DANIEL M'DONALD, Supervisor of Excise in Montrose, *against* ROBERT HUTCHESON, Merchant there.

No 5.

A bill was granted for goods bought but not delivered; the purchaser allowing them to remain some time with the seller. They perished during that time; but the bill was found due.

ON the 7th June 1743, the charger exposed a quantity of spirits to sale, which was purchased by the suspender, as the highest offerer at the roup, who immediately gave his bill for the price. Next day when he demanded delivery, the charger told him, that the custom-house of Montrose had been broken open the night before, and the spirits, which was lodged there, carried off; and that after the sale, he did not consider himself answerable therefor. Hutcheson, being charged for payment of the bill, suspended, and *pleaded*, That as the same was granted for the price of the spirits which was not delivered to him, it would be against the principles of equity to make him liable for the price, when the thing sold had perished by no fault of his, or any delay on his part in demanding delivery; for as it was past custom-house hours, on the evening of the 7th June, when the sale was, he could not have got out the spirits that night: That whoever brings his action on a mutual contract, must lay it on this, that that he has fulfilled his part; and as a contract of sale is a mutual contract, and a contract *bona fide*, there is nothing in the law of Scotland to difference it from the general rule of equity, which is received in all mutual contracts. When the seller sues for the price, he ought to show that the subject sold is delivered; and if it cannot be delivered, the obligation for payment of the price is dissolved. If, indeed, the subject sold perishes, without the fault of either party, which sometimes may be the case, then each should bear his own loss; the seller has no action for the price, and the buyer possibly may have none for damages. It is true, the Doctors of the civil law have pretty generally laid it down for a rule, That, by the sale, the risk of the subject sold is transferred from the seller to the buyer; and that if it perishes before delivery, it perishes to the buyer; though at the same time some of the greatest authorities are of a contrary opinion; in particular, Cujacius ad l. 33. in locat. But whatever be the civil law in this matter, it is believed, it was never received to be the law of this country, that, by the sale alone, the risk is transferred from the seller to the buyer, as is observed by Lord Stair, lib. 1. tit. 14. § 7.

*2dly*, Suppose the general rule stood so, yet as the time of sale was after the

custom-house hours, when the seller could not have made tradition till the next day, the intervening risk in this case ought not to lie on the buyer.

*Answered* for the charger; That the risk of the thing sold lay upon the buyer, after the sale was completed and the price paid; or, which is the same thing, a bill granted therefor. Neither was there any ground in equity, upon which the suspender could be relieved in this case, as the spirits were ready instantly to be delivered upon the sale; and were it necessary, the charger could prove, that the suspender could have got the spirits out of the custom-house, and a permit with them, the moment after the sale was completed; and that his delaying to take them away, was only for his own conveniency, in respect he had purchased the spirits for another (as he gave out) who was not in Montrose at the time.

In the next place, In the course of this process, the suspender referred the onerous cause of granting the bill to the charger's oath. In consequence whereof, he deponed, that it was granted for the said spirits, and that he had no further risk of them, than the hour he received Hutcheson's bill; and that he told the suspender, immediately after the sale, he would have no further trouble of them; and that next day when he demanded payment of the bill from the suspender, he said he would pay it in a little time. From all which it is plain, the bargain was completed the time of the sale, and the risk transferred, whereby the charger had no further concern with what afterwards happened; and that the breaking open the custom-house, and carrying off the spirits by thieves, was an accident which cannot affect the suspender, and afford him no sufficient ground to be freed from payment of the price.

THE LORDS found the letters orderly proceeded.

*Fol. Dic. v. 4. p. 56. C. Home, No 270. p. 436.*

1748. July 15. CAMPBELL against BARRY.

DUNCAN CAMPBELL drover, upon the 16th December 1745, sold and delivered 58 cows then going in the inclosures of Kilsyth, whereof he was tacksman, to William Barry of Balshannan, and got bill for the price payable at Candlemas thereafter; and the cows were allowed to remain in the inclosures for some short time till Barry should dispose of them.

Barry being charged upon this bill at the instance of Hugh Campbell indorsee in trust for said Duncan, suspended on this ground, That Patrick M'Doual, who had the charge of the inclosures, as servant to Duncan Campbell, and under whose care and keeping the said cattle were, had informed a party of the rebels of them, conducted them to the ground, and assisted them in carrying off 26 cows which then remained undisposed of; that the charger was answerable for said trespass of his servant, and that the suspender ought to have allowance of the value of the 26 cows out of the sum in the bill.

No 5.

No 6.

The fault of a servant found not chargeable on the master, although goods in his custody, but belonging to another, are lost by means of the servant.