

No 6.

This reason of suspension " the LORDS repelled, and found the letters orderly proceeded."

They were of opinion, that the charger would not have been answerable for the fault of his servant, though he had knocked the cattle in the head; the cattle were allowed to remain as a favour to the buyer, and the *dolus* of the servant was *casus fortuitus* as to the master.

*Fol. Dic. v. 4. p. 57. Kilkerran, (PERICULUM.) No 3. p. 377.*

\*\*\* D. Falconer reports this case :

DUNCAN CAMPBELL, tacksman of the parks of Kilsyth, sold, December 1745, 58 cows to William Barry of Balshannan, upon his bill for the price, allowing them to continue in the parks, which they did, till the beginning of January, when 26 of them were carried away by the rebels, conducted by Patrick Macdouall servant to the tacksman.

Hugh Campbell writer in Edinburgh, indorsee to the bill, charged thereon, and it was suspended, for that the cattle being in the drawer's custody, were taken away by the fault of his servant, for whom he was liable.

*Answered*; The cattle being allowed to continue gratuitously in his parks for the buyer's conveniency, he was not liable for custody, nor to make up that theft of his servant, more than if he had taken cattle out of any other park in the neighbourhood.

THE LORD ORDINARY, 6th June 1747, " Found that Patrick Macdouall was at the time attending the parks at Kilsyth, as servant to Duncan Campbell, and was accessory and assisting in carrying off the cows, and found Duncan Campbell liable for his servant."

On bill and answers,

THE LORDS found the seller not liable. See REPARATION.

*Act. H. Hom.*

*Clerk, Gibson.*

*D. Falconer. v. I. No 277. p. 372.*

No 7.

*Periculum rei  
vendita est  
emporis.*

1749. January 31.

MELVIL and LIDDEL against ROBERTSON.

MELVIL and Liddel farmers, bought a quantity of barley and oats from Robertson of Eyemouth in the year 1745, at 12 s. the barley, and the oats at 10s. 8d. the boll; and by the bargain, the seller was to deliver the victual at the Salt Pow in Carron-water, free of all charges and risk. Accordingly the ship arrived at the port on the 27th of March; but having met with a storm, 91 bolls of the oats were somewhat damnified, which therefore the buyers were not obliged to take, as the seller run the sea-risk; nevertheless, they took them off the hand of John Kincaid, to whose care the seller had directed them, not

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.

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## 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-