No 17. own affairs, and that no man could be answerable, in the nature of the thing, for beasts that might stray or be stolen from this wood, which was admitted to be of the extent of many miles, and insufficiently inclosed, the decree fell to be suspended:—THE LORDS, on advising, agreed in the main with the opinion given; but they thought it too general to find that the park-keeper was obliged to give no sort of account of the care taken by him to preserve the cattle put into the wood, as what might be a dangerous precedent, and even of bad consequence to the proprietors of grounds, which, in that part of the country, are often employed in grazing cattle, without having any inclosures at all about them, as nobody would thereafter deal with them: That it was at least the duty of the keeper, frequently, if not once every day, to see whether or not the cattle were safe:

They, therefore, "Recommended to the Ordinary, to order the defender to condescend, what was the care usually taken of the cattle put a-grazing into that wood, and what care was by him taken in this case; and to allow a proof to either party, before answer; and, particularly, to the pursuer to prove any acts of negligence which he might allege:" Plainly enough insinuating, that, if the defender should prove, that he had found the cattle in the park in a short time before they were amissing, and that either himself made diligent search for them when they were missed, or timeously acquainted the pursuer therewith, he would be safe; but that, if he had no more to say, but that though the cattle were away, he was not bound to answer what had become of them, he would be found liable.

Fol. Dic. v. 4. *p.* 57. *Kilkerran,* (PERICULUM.) *No* 6. *p.* 379.

SECT. III.

Periculum between Mandant and Mandatary.—Postmaster, whether answerable for Money sent by Post.

1583. *July* —. ANDERSON *against* ———.

No 18.
A person received money to be lodged with a merchant beyond seas. The money being lost by shipwreck, he was not liable for it.

THERE was a burgess in Aberdeen, called Anderson, who pursued another burgess for the delivering to him of the sum of six score-crowns, the which he gave command to the defender, to receive from J. M. factor, and thereafter to carry the same to B. and to deliver them to one Peter M. there, to the effect, that they might be employed in the buying of wines. It was *answered* by the defender, That he fulfilled the command of the pursuer, in receiving of the crowns from the factor, and took them to B. and could not find the said Peter

there, and therefore he brought the said crowns away with him, and did bestow his labour, trouble, and diligence upon them, as he did with his own, and in the meantime, the ship that he was into was striken into Portsmouth in England, by storm of weather, and there into the road in a stormy night the cables and the ship driven upon shore suffered *naufragium*, so that the crowns with the rest of the defender's gear, which was in a coffer, perished, *et sic mandatarius ille non tenebatur prestare casum fortuitum, prout in L. 26. D. Mandati, verba textus in § 6. non omnia quæ impensurus non fuit, mandatori imputabit; veluti quod spoliatus sit a latronibus aut naufragio res amiserit; et in L. 13. C. Mandati.* To this was *answered*, that the defender ought not to have transported the said crowns forth of B., because the pursuer offered him to prove, that there were sundry Scots merchants, who being in B. at that present time, offered to take the said crowns *omni periculo*, and to give so much advantage upon the frank, and pay the same to the pursuer; and so it appeared, that in so far as the defender refused the same *non eam fidem et diligentiam adhibuit in negotio quam diligens paterfamilias adhibuisset, et in L. 3. D. Mandati, causa mandantis melior fieri potest, nunquam deterior*, and so the defender in so far as he did not give forth the crowns to the utility and profit of the pursuer, was *in lata culpa*. To which it was *answered*, that the defender in no manner of way ought to have given forth the crowns to the said pursuer's profit, *quia fuit ultra fines mandati*, and the pursuer might have found fault with that, as well as with the other *et de jure in L. Si procuratorem, § Dolo D. procurator tenetur tantum de lata culpa quando quis curat alienas res ita ut proprias, arg. L. 32. D. Depositi, ut in presente casu*, the defender used the crowns and the pursuer's gear, in all respects as his own, and alike to the peril and danger, and so by this dealing, it was clear and manifest, *quod non fuit in lata culpa, quia nulla fuit suspicio fraudis aut doli, quia æquiparantur fraus dolus et lata culpa.* THE LORDS, after long reasoning, found by interlocutor, that the exception should be admitted, the defenders proving that the ship suffered *nuafragium*, and that his own gear that was therein perished.

Fol. Dic. v. 2. p. 57. Colvil, MS. p. 372.

No 18.

1675. *June* 4. HAY *against* GRAY.

No 19.
A shipmaster who sold goods for a merchant, and bought others for him of a different kind from those ordered, was found liable; the goods ha-

A MERCHANT having given a commission to a skipper, to carry a parcel of salmon to Bourdeaux, and upon the sale of the same there, to bring home wines and prunes; pursued the said skipper for the said salmon and profit thereof, and referred the libel to the skipper's oath; and the defender having qualified his oath on these terms, viz. that being upon his voyage to France, he was forced to go into Holland by storm of weather, so that he could not go to Bourdeaux, and that he was forced to sell the salmon in Holland, and with