

No 1.

her bill thereupon, and so be present payment or consignment of the said soume, quantity deliverit be her oath and conscience, he might be put to libertie. To this was *answerit* again, that, or the quantity be referred to her oath, she behoved to prove the molestation; for, there was no other probabilitie of the molestation, but the narrative of her supplication. To this was *answerit*, That the matter was here *in executione parata* upon ane contract registrate and execution raised thereupon, and for not fulfilling of the whilk, the cautioner had passed to the horne, and where that the party is obliged to prove molestation that *in nova actione inchoata*, and also after the meaning of the law *ut expresse fact. in L. in actio. ff. de in lit. juran. et Alex. consil. 214. lib. sept. quod contra dolosum juramentum probatur interesse*, and the said L. of Ruthvens who had committed so many spoliations and depredations, and also his cautioner, who had gone to the horn for the same, could not be esteemed others but *dolosi committendi contra quos ex sententia predict. jurament. partis probatur interesse*. The matter being reasoned and dissented among the Lords, *pomeridianis horis magna contentione domini maxima ex parte* refused the desire of the said Mr Archibald, albeit the day before it was granted, *nam coram dominis consilii unusquisque sua habet fatalia*.

Fol. Dic. v. 1. p. 207. Colvil, MS. p. 377.

No 2.

A carrier's horse, hired to carry 16 stone, dying by being overloaded, the merchant having put 20 stone on his back, the Lords sustained process for the price, but not for the profits that might have been made of the horse.

1610. July 10.

STRATON against —.

A CARRIER having agreed to carry a merchant's packs to Wigton, pursued the merchant for the price and profits of his horse, because he died and was bursen in default of the merchant, who promised only to make the packs of 16 stone weight, and yet made them of 20 stone weight;—THE LORDS sustained the summons (albeit the owner of the horse laid on the packs and drove the horse,) for the price of the horse, but not the profit; it being verified by the merchant's oath, that he promised to make the packs only of 16 stone weight, and no heavier, and that in contrary thereof he made them of greater weight.

Fol. Dic. v. 1. p. 208. Haddington, MS. v. 2. No 1947.

1670. February 19. LAUCLAN LESLY against GUTHRIE.

No 3.

A cargo of wheat being damaged by the shipmaster's fault; yet as the victual remained *in specie*, and was not

LAUCLAN LESLY having fraughted a ship belonging to Bailie Guthrie in Dundee, to carry a loading of wheat and oats from Athole to Leith, the skipper did put in by the way at Dundee, and there the ship received a crush by another ship, whereby the salt-water entered amongst the victual; and thereupon the owners and skipper caused disloaden the victual, and put it up in lofts; and Bailie Guthrie, the next day after the crush, gave notice to Robert Lesly in Dundee, Lauchlan's correspondent, and who made the bargain with him, to

make it known to Lauchlan what had befallen the ship and loading ; who, within two days after, came to Dundee, and was required to receive the victual, which he refused ; and, by the probation adduced in this cause, it was found that it was the skipper's fault, that he had put in to Dundee ; and so he and the owners were found liable for the damage and interest of the merchants ; and that the merchants should be obliged to take back that part of the victual that was unspoiled, and the owners should be liable for the price of the whole, as it would have given at Leith, if the skipper had kept his course, deducting the price of the sufficient victual as it now gives ; and a commission being granted to certain persons in Dundee, to visit the victual, and to see what condition it was in, they reported that 36 bolls of it were sufficient marketable wheat, and that the oats was damnified in 20s. the boll ; and as to the rest, two reported that it would yet be bisket for ships, or household servants, two reported it was spoiled but spake nothing further. The question arose to the LORDS, upon the commission, at the advising thereof, whether the owners and skipper should be liable for the damage that was done before the advertisement given to the merchant, or for the damage that ensued thereafter ; because the victual being laid together, without separating the wet from the dry, had het and spoiled thereafter ; and if it had been separated at first, the damage would have been very little ; and so the question was, whether the owners and skipper were obliged to have separated the wet from the dry, and so to have offered it to the merchant ; or if the offer in general to the merchant to receive the victual, was sufficient, though he did not desire them to separate the wet from the dry ; or that they did not offer satisfaction, or security for the damage of what was wet.

THE LORDS found, That seeing the damage had fallen after, and through the occasion of the skipper's delay, he and the owners were obliged to separate the wet from the dry, and to have used diligence to prevent future damage ; wherein having failed, they found them liable for the whole damage, both before and after the offer ; the next question arose was, whether the skipper and owners were obliged to take the spoiled victual, and pay the price thereof, as if it had been sufficient ; or if the merchant was obliged to take it, and the owners to make up the damage.

THE LORDS found, That seeing the victual remained yet *in specie*, and was not wholly corrupted, but by the report appeared to be useful for ship bisket, and seeing the property thereof still remained in the merchant, and the owners were only liable for damage ; they ordained the merchants to receive the wet victual, and gave commissson to some persons to report what was victual, and gave commission to the same persons to report what it was worse than the price it would have given at Leith, if the voyage had held.

Fol. Dic. v. 1. p. 208. Stair, v. 1. p. 672.

No 3.
wholly corrupted, but appeared to be useful for ship bisket, and as the property of it still remained in the merchant, and the owners were only liable for damage ; the Lords ordained the merchant to receive the wet victual, and the owners to pay him what it was worse than the price it would have given at Leith, if the voyage had held.