

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.

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