*** Harcarse reports this case.

No 16.

ONE being pursued for the price of a horse hired from the Pans to Leith, where the conductor delivered him to a stabler, and he was stolen away, without the stables, by some who broke the stable;

THE LORDS assoilzied the defender; because, *conductor non tenetur præstare casus fortuitos.*

Harcarse, (COMMODATUM.) *No* 251. *p.* 59.

1749. *June* 2. ——— *against* DAVIDSON.

No 17.
A wood of great extent was employed in grazing, and some cattle were amissing. The keeper was considered to be liable for ordinary diligence, in looking after them.

THE wood of Darnway, belonging to the Earl of Moray, being employed for grazing cattle, put in by the country for a certain small grass-mail, brought a process before the Sheriff-substitute of Elgin against Davidson, the Earl's servant, who had received from him six beasts to be grazed in the wood, either to restore his beasts that were amissing, or to pay the value.

The defender acknowledged the receipt of the beasts; but *pleaded* in defence, That, as the wood was of a great extent, fenced on one side only by the water of Findhorn, which, in many places, was fordable, and the rest of it very insufficiently inclosed, and well known to be so by the country, who put in their cattle; such as put cattle into it a-grazing were presumed to run the hazard of their straying or being stolen: And further, that, as the defender was in use to certify such as put in cattle, that they were to run all hazards, so the pursuer had been certified thereof. And the Sheriff having allowed a proof, before answer, on this last allegeance, and on the value of the cattle, a proof was brought, in general, of the park-keeper's being in use so to certify the inputters, as alleged; but no proof being brought, that the pursuer, in particular, had been so certified, the Sheriff-substitute "Found the defender liable in the sum of as the value of the cattle; and decerned."

The debate, at discussing the suspension of this decree, being reported by Lord Easdale, Probationer, his opinion was, That the edict *nautæ, caupones*, under which the charger argued the case to fall, was noways applicable to this case, as it was a constitution limited to the particulars therein expressed, and proceeding on special reasons; but that the case was to be determined by the rules of law *in locationibus*; and the LORDS, upon advising, were of the same opinion.

But having further given it as his opinion, That, as the locator was only liable for the *culpa levis*, and such ordinary diligence as a man adhibits in his

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