No 7.

yet THE LORDS thought he should not have given it up, till he had tried a suspension, else any fide-commissary might evacuate his trust; and therefore THE LORDS found he ought either to deliver up the bond to the pursuer, on her renouncing, *ut supra*, or pay the sums therein contained *nomine damni*, reserving his recourse of warrandice and relief against Robertson's heir.

Some thought this interlocutor hard, in regard illiterate burgesses think themselves obliged to obey their magistrates, and know not when they proceed legally, and when not, and will not lie in prison till they get a suspension; and the bailie ought rather in that case to be punished for abusing his power; and here *non constabat* she had any right to the bond, it being acknowledged by all to have been conceived in the father's name, and there was an assignation of it to her; and Gow being interrogate, whether the bond bore a substitution to her, he declared he could not tell; and the naked depositation could not convey a right, and so she wanted a title; but if the bond had been extant, that would have been soon cleared. Then Robertson's heirs *alleged* they had the best right to it, having affected it by an arrestment, and obtained a forthcoming. THE LORDS declared they would hear them further on this defence. THE LORDS afterwards granted diligence to recover the bond, and to examine witnesses anent the tenor of it, and sundry particulars, to clear the matter of fact.

Fol. Dic. v. 1. *p.* 234. *Fountainhall, v.* 1. *p.* 732.

1711. *January* 9. WATSON *against* M'KENZIE.

No 8.
A person intromitting with goods deposited, without permission of the owners, was found liable for the market price at the time of requisition.

ROBERT WATSON of Muirhouse and his partners sent in 1706, two several barks to the isle of Lewis, with a great quantity of Spanish salt, casks, and other materials for the herring-fishing; but it proving very bad and unsufficient that year, they leave the salt and materials with Alexander M'Kenzie of Applecross, then at Stornoway in the Lewis, and take two several receipts from him; the 1*st* was in these terms, that he shall either re-deliver the salt, or else the equal quality and quantity at the port of Leith, when demanded. The 2*d* obligation to the other skipper precisely bore, that he should keep the salt therein mentioned as he did his own, and dispose of it as they should order. This lying over till 1709, that the price of salt rose considerably, they require Applecross to deliver back their salt. He having disposed upon it by curing herrings, offered to pay them such current rates as salt gave at the time he received it; which they judging unreasonable, raise a process against him either for the salt itself, or the prices it gave in 1709, when they required it, and for their damages in wanting it so long. *Alleged*, The first ticket contained a plain alternative either to restore the salt, or the like quantity upon demand, which gave Applecross his election either to preserve the individual salt, or use it as he pleased: So from a *contractus depositi* it turns a *mutuum*; and this is clear from

No 8. *l*, 1. §. 34. *D. depositi, Si pecunia apud te ab initio hac lege deposita sit ut si voluisses utereris, priusquam utaris depositi teneberis ; Ergo*, after you have made use of it, the *actio depositi* ceases, and the *actio ex mutuo* arises ; and he is willing to count so at the price of salt when he received it. As to the second receipt, it is acknowledged to be a mere *depositum* and custody, and that regularly a depositary cannot make use of the thing entrusted to him without the owner's warrant and allowance, yet there be no rules so general and peremptory but equity suggests exceptions ; and here the very nature of the thing depositate affords one. If they be things *quæ servando servari possunt*, such as silver-plate, jewels, or the like, the depositary's disposing upon such would be unwarrantable ; but where quantities and fungibles, as wine, salt, &c. which are the subject of commerce, and perish, diminish, and grow worse in keeping, there may be a greater latitude, as containing a tacit mandate to dispose rather than to lose it. Suppose meal were sent from the north to Leith, and it began to corrupt, may it not be sold as long as it is good market stuff? Even so here, salt after some years keeping melts and turns watery, and he is willing to count to them conform to the price of the herrings he cured by that salt, as being the product of the same : And though the market price of salt rose by the union, and the Queen's proclamation for the drawbacks in 1709, yet that event cannot burden him, being a *casus incogitatus* whereof advantage ought not to be taken : As Huber. *ad tit. D. de condict.* very well says, *non fortuiti et exquisiti casus quibus res justo majore pretio vendi potest inspicienda est, sed æstimatio communis et forensis in foro currens sequenda est :* And the learned and ingenious author of *lois civiles dans leur ordre naturelle*, speaking, *de contract de vente* distinguishes the nature of damage and interest arising from *une suite naturelle et ordinaire*, and those that are more remote and unforeseen, and are the effect of some extraordinary event and conjuncture, as truly the rising of the price of the salt here was, and therefore, *l.* 21. § 3. *D. de act. empt.* reduces the *utilitas* and profit *quæ in emptionem venit* to that *quæ circa rem ipsam consistit*, which excludes extrinsic and adventitious circumstances, which may enhance and raise the value of a commodity to an endless and arbitrary taxation. *Answered*, Merchants contracts relating to trade must not be left arbitrary, indefinite, and uncertain, which would be destructive of commerce, and ruin credit, by immerging them in processes ; but have fixed and unalterable rules which are not to be perverted by the absurd glosses which lawyer's witty imaginations can suggest ; and of which principles this is one, that the value and estimation of goods must be taken at the time they are demanded and required, otherwise all trading is subverted. *Sic Vinnius ad tit. instit. quib. mod. re contrab. obligat.* where he determines that *æstimatio ineunda est ut valet tempore litiscontestatæ et post moram in reddendo.* And it is against natural equity for Applecross *lucrari cum nostro damno.* THE LORDS found, that as to the salt contained in the first receipt, where he had the power of disposal, he was liable for the price of the

salt at the time of its delivery, or at the time of his making use of it, or the product of the herrings that were cured with that salt, and gave Mr Watson his election of any of the three; and for that first ticket, refused to find him liable in the price salt was giving the time of the requisition. But as to the 2*d* receipt, where there was a clear *depositum*, and no power given him to intromit therewith, THE LORDS found, he having intromitted and disposed on it at his own hand, without any warrant or allowance from the owners, he must be liable for that price salt was giving the time of the requisition, though it was then risen to a very great rate, far above what it gave before; his intromission being unwarrantable. No 8.

Fol. Dic. v. 1. *p.* 234. *Fountainhall, v.* 2. *p.* 622.

*** Forbes reports the same case:

THE masters of two vessels, sent with salt and other materials for fishing to the Lewes in anno 1706, finding that the fishing proved unsuccessful that year, deposited their loading in the hands of Alexander M'Kenzie of Applecross living there, who granted two receipts thereof; in one of which 'he obliged himself to preserve and restore the goods to the skipper and his freighters, or their order, (incident hazards excepted,) or to deliver to them, upon demand, goods of the same quantity and quality at the port of Leith;' and by the other receipt, 'obliged himself to keep the goods as he would do his own, to be disposed of by the owners order.' Robert Watson and his partners, (to whom the consigned salt and other goods belonged,) failing to call for them the next fishing season, Applecross employed the salt in curing fishes. These owners, in November 1709, required re-delivery, and pursued him either to restore or deliver in the terms of the obligement, or to pay the current prices at the time of requisition, when, by the accident of the Union, salt was at the highest value.

Answered for the defender; He having undertaken the care and custody of the pursuer's salt and other goods, merely to do them a good office, ought not to be charged for any higher price or value for the salt, than what it could have been sold for at the time it was deposited, or when it was made use of, or what profit was made of it; and it were a bad return of his kindness to require from him extraordinary prices, that could not be foreseen or thought of at the time of the transaction. His undertaking the custody of the salt could not oblige him to keep it perpetually useless, till it should consume and melt away, but only till the ensuing year's fishing; and since the pursuers did not call for it then, it being a perishable commodity, the defender acted profitably for them by employing it in curing fishes.

Replied for the pursuer; By the first ticket, the defender, had he restored the same individual goods, was only to be liable as a depositary, but his making use of them made him liable as *in mutuo*, for the like goods in quantity and quality,

No 8. *L.* 1. § 34. *ff. Depositi.* And he being obliged to deliver them on demand, the value is to be considered at the time of the demand, *L.* 22. *ff. de Rebus creditis.* Again, the defender having no power to dispose of the salt by the second receipt, the counteracting his trust by employing it to his own use, made him certainly liable for the current prices at the time he was required to perform his obligement. The pursuers cannot be said to have been *in mora* to demand the salt before it was at the highest value; seeing no time was prefixed for their requiring it; and the defender might have obliged them to receive it, by offering when it was at the lowest rate; and his converting the salt to his own use, hinders him to be looked upon as *negotiorum gestor.*

Duplied for the defender; Persons bargain indeed with hazard of the rising or falling of the value of goods, arising from the usual occurrences by the difference of seasons or trade, which they are supposed to have in view; but *casus incogitatus* happening by supervening laws, or a change of government, is always excepted, *L.* 23. § 1. *ff. de Actione Empti. Huber. Comment. in Pandect. de Condict. triti.* § 11. *Les Loix civiles, Sect.* 2. § 18. of the said title. Yea, suppose the defender had truly borrowed some bushels of foreign salt before the Union, to be restored on demand; it is doubted if he would have been obliged to restore it at the extraordinary value it was raised to by the supervening act of Parliament; this not being like the raising or lowering of money, whereof the entire value depends upon the regulation of law, and any alteration so made therein is not *casus improvisus*, but *circa rem ipsam consistit.*

Triplied for the pursuer; The alteration in the value of goods is more owing to the Parliament's imposing higher and lower duties, than to any accidental difference in the method of commerce. Huber's authority is misapplied; for he in the place cited means only that in stating the estimation of his goods, a single instance is not to be the rule, but a middle estimation to be made, by comparing all the several prices through the country; as the fiars of several shires used to be settled with us. And here the price of salt is not claimed according as it sells in one single place, but according to the general estimation of it. It is well known that debtors in money are liable to perform their obligements in the precise terms thereof, though money be heightened at the term of payment. And albeit our coin, in consequence of the Union, was brought up to the English standard, debtors are obliged to pay according to the reformed value, which is 8 per cent. more than they were liable to before.

The Lords found, That by the first obligement the defender is bound to make the like quantity and quality of salt furthcoming to the pursuer at the time of the requisition, or the Queen's price, conform to the act of Parliament 1709; and found, the salt being deposited by the second obligement, the defender's intromission therewith without a warrant, is relevant to make him liable for the said price. *Forbes, p.* 480.

See Appendix.