No 2. 1685. *February.* AITCHISON *against* DICKSON.

IN the action February 1684, Aitchison against Dickson in Kelso, *voce* SUPERIOR AND VASSAL, the house in controversy being burned, the LORDS found, that the dominion and property being transferred to Aitchison, in respect he was infeft, and that the keys of the house were offered, that therefore the loss and prejudice by the burning, which was accidental, must follow Aitchison the buyer, who was a proprietor of the tenement; albeit there was a part of the price not paid, there being a difference about it that was referred to certain friends to be determined, which was not determined the time of the burning.

Fol. Dic. v. 2. *p.* 56. *Sir P. Home, MS. v.* 2. *No* 700.

No 3. 1687. *February* 25. SPENCE, &c. *against* ORMISTON.

A TEIRCE of brandy was to be delivered at a merchant's shop in Edinburgh, but was seized as run goods, so that the buyer was constrained to redeem it by paying treble excise. In the question on whose peril the brandy was, the LORDS found, that it was on the seller's, he being obliged to deliver it in the buyer's shop in Edinburgh.

Fol. Dic. v. 2. *p.* 56. *Fountainhall.*

*** This case is No 6. p. 3153. *voce* DAMAGE AND INTEREST.

No 4. 1711. *June* 13. BEATRIX LINGCLATER *against* BOSWELL.

A person, altho' not proprietor, yet being *creditor speciei*, was found obliged to bear the accidental loss of the subject.

BY contract of marriage betwixt Captain Boswell in Kirkaldy and Beatrix Lingclater, he having got several shares of ships and other considerable moveables by her, obliged himself to add to what he had got with her, the sum of of his own proper means and estate, and to take it to him and her in liferent and conjunct-fee; and she pursuing on the contract for having a sum filled up in the blank, it being by simplicity and ignorance omitted in her husband's lifetime, *qui non debet lucrari ex sua culpa; alleged,* That the very principal contract produced by herself *in modum tituli* is not only blank, but is scored; which clearly evinces that she and her friends have passed from it; especially seeing she is largely provided without it, a posterior clause bearing, that in case of no bairns (which case has existed) the half of her tocher is to return to herself, so she is at no great loss. *Answered,* If they have imposed on her weakness by scoring it, yet that can never deprive her of the *arbitrium boni viri,* which comes in place of the parties contracters, who certainly meant

some provision by that clause; for *verba non debent esse otiosa, sed aliquid operari;* No 4.
and therefore the Lords may insert such a sum as was suitable to the husband's circumstances and estate; for to think I would subscribe a contract without some equal compensation on my husband's part, were to declare me a fool with a witness. *Replied*, The clause being blank and scored, must of necessity presuppose to have been done of consent, unless she can prove it done *viis et modis* indirectly; and it is without the Lords power to make up a new contract here, more than in the case where parties have forgot to insert a clause at whose instance execution shall pass, the Lords, though applied to, never ventured to supply it. Some thought that a small and moderate sum might be decerned, the Lords being sensible that it was a mere oversight and neglect on her friends part. Yet this being a stretch to supply so great a defect, they found the blank in the contract, not being filled up in Captain Boswell's lifetime, and the same being now produced by the defender herself, and found scored, his heir was not liable in payment of any liferent upon account of the said blank clause now scored.'

Then she *insisted* for the value and price of her share in Balfour's ship, which she had in her contract assigned to her husband, but with this quality, That in case of no children she should have the fee of the half, and liferent of the whole; and therefore craved her husband's heir might be decerned in a sum for her part of that ship, seeing she had her election to take herself either to the goods disponed, or their price. *Alleged*, She had exhausted and declared her option already, and so could not alter now, nor recur to his prejudice; for she had taken herself to the ship itself, in so far as, after her husband's death she had subscribed the ship's compt-book, and took in her proportion of the balance of the profits, and signed a commission to Robert Todd to navigate the ship as skipper; and that in his first voyage the ship was accidentally burnt at Harwich, and so being lost *casu fortuito* it must fall upon her; seeing *res unaquæque perit suo domino*. *Answered*, Her contract fully divested her of the property of the ship, so that her husband could have sold it, and his executrix could have done the same, so it must perish to them and not to her; and the deeds condescended on noways prove her election of the ship rather than the price; for *per eam non stetit* but you might have sold it, in which case I would have got the half of the price, and the liferent of the other; and my necessary deeds of administration did not hinder you, and your delaying till the ship perished must prejudge yourself and not me. THE LORDS found, though she was not proprietor, yet being *creditrix speciei*, and that individual species perishing, the loss must fall upon her; and that neither her husband's heir nor executor was bound to make it up; but there being some remains of the wreck preserved after the burning, she might claim a share in these. If the ship had not perished, there had been no place for this debate; but the general rule of law

No 4. in these cases is ejus est periculum cujus est dominium: Qui habet commodum æquum est eum etiam pati incommoda rem ipsam sequentia.

Fol. Dic. v. 2. p. 56. Fountainhall, v. 2. p. 644.

*** Forbes's report of this case is No 11. p. 5017. *voce* GENERAL ASSIGNATION.

1744. *July 6.*

DANIEL M'DONALD, Supervisor of Excise in Montrose, *against* ROBERT HUTCHESON, Merchant there.

No 5.
A bill was granted for goods bought but not delivered; the purchaser allowing them to remain some time with the seller. They perished during that time; but the bill was found due.

ON the 7th June 1743, the charger exposed a quantity of spirits to sale, which was purchased by the suspender, as the highest offerer at the roup, who immediately gave his bill for the price. Next day when he demanded delivery, the charger told him, that the custom-house of Montrose had been broken open the night before, and the spirits, which was lodged there, carried off; and that after the sale, he did not consider himself answerable therefor. Hutcheson, being charged for payment of the bill, suspended, and *pleaded*, That as the same was granted for the price of the spirits which was not delivered to him, it would be against the principles of equity to make him liable for the price, when the thing sold had perished by no fault of his, or any delay on his part in demanding delivery; for as it was past custom-house hours, on the evening of the 7th June, when the sale was, he could not have got out the spirits that night: That whoever brings his action on a mutual contract, must lay it on this, that that he has fulfilled his part; and as a contract of sale is a mutual contract, and a contract *bona fide*, there is nothing in the law of Scotland to difference it from the general rule of equity, which is received in all mutual contracts. When the seller sues for the price, he ought to show that the subject sold is delivered; and if it cannot be delivered, the obligation for payment of the price is dissolved. If, indeed, the subject sold perishes, without the fault of either party, which sometimes may be the case, then each should bear his own loss; the seller has no action for the price, and the buyer possibly may have none for damages. It is true, the Doctors of the civil law have pretty generally laid it down for a rule, That, by the sale, the risk of the subject sold is transferred from the seller to the buyer; and that if it perishes before delivery, it perishes to the buyer; though at the same time some of the greatest authorities are of a contrary opinion; in particular, Cujacius ad l. 33. in locat. But whatever be the civil law in this matter, it is believed, it was never received to be the law of this country, that, by the sale alone, the risk is transferred from the seller to the buyer, as is observed by Lord Stair, lib. 1. tit. 14. § 7.

2*dly*, Suppose the general rule stood so, yet as the time of sale was after the