

the debtor to offer the money, and demand a discharge, or on the creditor, to tender the discharge and demand the money.

THE LORDS altered the interdictor, and found annualrent not due from the term of payment.

Act. H. Home.

Alt. A. Macdowal.

Clerk, Kirkpatrick.

D. Falconer, v. r. No 188. p. 252.

No 41.

1749. January 31. ROBERTSON against MELVILL and LIDDELL.

ROBERT ROBERTSON, merchant in Eymouth, by his missive to John Melvill, tenant in Stonehouse, and James Liddell, tenant in Dalders, 'accepted of their offer for his old oats he had on hand, which might be about 150 bolls; and promised by the first opportunity to ship them off for Carron-water, where they were to be delivered free of all charges and risk, upon their paying for each boll 10s. 8d.' And he accordingly shipped off and insured them, and they arrived at the destined port, 91 bolls being damaged by a storm they had met with; whereupon the seller's correspondent applied to the Judge Ordinary for having them valued, in order to liquidate the damage against the insurers; and citing the purchasers as witnesses, they deponed they were only worth L. 5 Scots; whereas, had they come safe, they would have been worth L. 7 : 10s.; but refused to take them at that price; and took them, as they said, to dispose of for the benefit of the seller.

Robertson pursued Melvill and Liddell for the price, who pleaded retention for the damages due to them, on account of the failure of the delivery; the seller having undertaken the risk.

THE LORD ORDINARY, 5th July 1748, 'found the defenders liable for the price that they themselves had put upon the spoiled oats, in the question betwixt the pursuer and the insurers, since they could produce no account of sales; and found the seller liable for the difference between the L. 5 and the L. 7 : 10s. in regard that if the victual had perished entirely, the seller would have been liable in the buyer's damages.' And 22d, 'Having considered the letter signed by the pursuer, whereby he was bound to deliver the victual free of all charges and risk, in pursuance whereof he insured the victual, whereof part was damaged, adhered.'

*Pleaded* in a reclaiming bill, By the letter no more is imported, than that if the goods were lost or damaged before delivery, the seller was to suffer the loss thereof; but not that he was to be liable in damages, if the loss happened through no fault of his; especially as it was not a sale of a *genus*, but a *species*, to wit, his victual on hand; and his subsequent insuring the cargo could not alter the terms of the bargain, which were made by his letter.

No 42.

A letter from a seller to a buyer, promising to deliver goods free of all risk, found to import only, that the seller was to suffer the consequences, if lost before delivery, but not to be liable for damage if delivered.

No 42.

*Answered,* According to this interpretation, no greater prestation is undertaken by the express stipulation in the letter, than is incumbent on every seller by law; for though it is generally affirmed, § 3. *Inst. de emptione venditione*, that the risk is the buyer's; yet when the accident happens in the course of what was incumbent on the seller, in order to delivery, or by the nature of the thing sold, in that case the bargain is dissolved; as is explained by *Cujacius, tractatu octavo ad Africanum*, and proved from l. 13, 14, et 15. ff. *de periculo et commodo*; and therefore the seller having undertaken the risk, and not delivered sufficient victual, must be liable in damages.

THE LORDS found, That the seller was not liable in any damages.

Act. H. Home.

Alt. Haldane.

Clerk, Justice.

D. Falconer, v. 2; No. 50. p. 49.

1756. March 2.

EMILIA and MARGARET FARQUHARSONS *against* JAMES FARQUHARSON.

No 43.

The words of a deed, disposing 'all lands which should pertain to the granter at the time of his death, to his brother's heirs and assignees whatsoever,' were not found to comprehend a subject to which the granter afterwards succeeded, that from circumstances appeared not to have been within the granter's intention.

THE lands of Inverey and Tullich, holding of subjects superiors, belonged to John Farquharson. He had issue, by his first marriage, two sons, Patrick and Charles; by his second, James the defender.

The ancient destination of the lands aforesaid was to heirs-male; but the lands were evicted from John, and purchased by his son Patrick.

Patrick obtained charters of resignation from his superiors, and took the succession of the said lands, devised 'to the heirs-male of his body; whom failing, to his heirs-male whatsoever; whom failing, to his heirs and assignees whatsoever.'

Patrick was married twice; by his first marriage he had issue, daughters only. In the 1714, by marriage-contract with his second wife, he provided the said lands 'to the heir-male of that marriage; whom failing, to his heirs-male whatsoever; whom failing, to his heirs and assignees whatsoever.' This contract contains a procuratory of resignation in the terms above mentioned.

Of this marriage he had issue, two sons, Joseph and Benjamin, and two daughters, the pursuers.

In the 1737 Patrick died, and was succeeded by his son Joseph, who died also in the same year, without completing his titles. He was succeeded by his brother Benjamin, who, in 1738, made up titles to the lands of Inverey and Tullich; and dying soon after, was succeeded by his uncle Charles, brother-german of Patrick.

This Charles, in the 1721, executed a deed of the following tenor: 'For certain reasonable causes, he sells, assigns, and disposes to, and in favour of Patrick his brother, *his heirs and assignees whatsoever*, all lands, heritages, tenements, annualrents, debts, sums of money, heritable and moveable, and all goods