

custom of all the trading nations, the latent insufficiency of goods affording redhibition can never oblige the furnisher, as is clear by the Roman law, *tit. Dig. et Cod. De edicto adilitio, Si venditor vitium ignoraverit, non tenetur ad damnum ex re vitiosa provenientem*, especially, *si gratuito intervenierit*; and although a man should, in selling a slave, commend him, that will not import he is endued the philosophical virtues, *et consilii non fraudulentum nulla est obligatio*; and where a loss is ascribeable either to fault or fatality, law presumes it rather to be *ex casu quam ex culpa*; and he cannot be supposed to have undertaken sea hazard. But the LORDS, on advising the probation, found it proved, that Mr Gordon had undertaken to furnish the cask; and that the cask was insufficient, and through its insufficiency the wine had run out; and so found him liable; which would import, if he had received the price, then to restore it, and if not, then to assolvie my Lord from payment of it. Some thought all that Mr Gordon did in this case was *nudum ministerium* to accommodate and serve my Lord, and that *officium nemini debet esse damnosum*, unless *culpa vel dolus* can be qualified; but here the LORDS found he had interposed to uphold and warrant it, and had said a double cask was needless.

*Fol. Dic. v. 2. p. 48. Fountainball, v. 2. p. 356.*

1711. January 2.

GEORGE GIBSON, Skipper in Borrowstounness, and ANDREW WILSON, Writer his Assignee, against ROBERT LEITH, Writer in Edinburgh.

ROBERT LEITH, writer in Edinburgh, and others, gave a commission to George Gibson to buy for them a ship in Holland, and accepted bills for the price of their respective shares; particularly Robert Leith accepted a bill of L. 50 Sterling, payable to George Gibson or order, at Martinmas 1709, as the price of a twelfth part of the ship, upon his delivering a vendition thereof to Mr Leith. Sometime after the ship was bought and brought home to Scotland, and had there suffered a disaster in breaking of her back. George Gibson offered a vendition of the twelfth part to Robert Leith; upon payment of the L. 50, his share of the price, and upon his refusal protested the bill, and charged him to pay. Robert Leith suspended upon this ground, That the vendition not being offered *debito tempore*, while *res* was *integra*, he is not obliged to accept of a damnified ship in place of a sound one for his money. And Gibson being *dominus* by buying the ship, and taking the right thereof in his own name, the *periculum* was his till he denuded by a vendition. For the commission gave not the suspender *jus in re*, but only *jus ad rem*, to claim a vendition by an ordinary action; notwithstanding whereof Gibson, having a complete right to the ship in his person, might have sold her effectually to another; and *res perit suo domino*.

No 22.

No 23.

A party accepted a bill for a sum, as the price of a part of a ship he had commissioned the drawer to buy for him, payable to the drawer or order, upon his delivering a vendition to the acceptor. The bill found due, although the ship was bought by the drawer in his own name, and he never offered the vendition till after the

No 23.  
ship had been damaged; the constituent never having offered the money, or demanded the vendition.

*Replied* for the charger; Mr Gibson having bought the ship by the suspender's order, the latter was properly *dominus*; for *mandatarius* may take the right to be acquired either in his own, or the constituent's name. It was not reasonable for Mr Gibson to take the original right to the ship in the suspender's name, who had not paid the price; nor was he obliged to transmit the vendition, till he got payment. However, the same was in his name only as *fiduciarius* for the suspender; consequently, any damage the ship sustained must fall upon him.

THE LORDS repelled the reason of suspension, and found the letters orderly proceeded.

*Fol. Dic. v. 2. p. 58. Forbes, p. 472.*

1716. July 28. JOHN YOUNG against COLIN FINLAY.

No 24.  
A shipmaster who had exceeded his commission, by buying goods with the proceeds of a cargo, which goods were lost, was found liable for the price of the first cargo.

JOHN YOUNG having shipped on board the Phoenix of Glasgow, Colin Finlay master, a parcel of salmon, whereof Colin grants receipt, and obliges them to deliver the goods to John Young's at Bilboa; thereafter Young gives him commission to dispose of them when he should come there, and takes his obligation, subjoined to the receipt, wherein he binds him to be comptable for the goods, sea-hazard excepted, and he receiving factor-fee: The skipper accordingly sells the salmon at Bilboa, but sent no advice to Mr Young, either at what rate they were sold, or how he should be paid of the proceeds; and having thereafter bought wines with the money, the ship coming from Bilboa, was taken up to England, and there condemned; so that these wines, bought with Mr Young's money, on his account, run the same fate with the rest of the cargo.

The question turning upon this, Whether, in the case above mentioned, the skipper was peremptorily tied down to return money for the salmon, or if, by his commission, he had the liberty, at discretion, to purchase for them such goods as were usually imported from that country, and to be comptable for these?

It was *alleged* for the defender Finlay; That the commission being general, seemed to lay no other tie upon him than what was incumbent to be done by factors in the like case; and, in that view, Young the pursuer ought to prove, that that was to center the salmon precisely into money; and then he behoved also to prove that the defender was obliged to remit the money by bills, or to carry it home in specie; if the last, then the ship having been taken without the defender's fault, and so it being indifferent what was the return he made, he was free. And, as to the first, the defender's commission was general. That it is impossible he could be made liable to do otherways than he did for himself and the rest of his employers; or, if the pursuer had inclined that his salmon should be managed in any singular manner from the rest of the cargo outward