

der Piper, who granted bond for the price to the Admiral-Clerk, and his successors in office; and Daniel Hamilton, present Clerk, having charged Alexander Piper for payment, he suspended upon this ground, that the goods were sold by inventory, and betwixt the inventoring and the rouping of them, they enlaked and were embezzled, as also all that were rouped were not delivered, or were not delivered in so good condition as they were in at the roup.

THE LORDS found, That the goods are presumed to have been in the same condition, the time of the roup, in which they were the time of the inventory, unless the suspender prove intervening embezzlements; and found, That the goods are presumed to have been in the same condition the time of delivery, in which they were at the time of the roup: Albeit it was *alleged* for the suspender, That the *onus probandi*, that the whole goods contained in the act of sale were delivered, lies upon the seller, because in all mutual contracts, such as sale, the party demanding performance should first instruct that he hath fulfilled his part: In respect it was *replied* for the charger, That seeing the goods were exposed some days before the roup, to be seen to all who had a mind to offer for them, and the suspender who offered, did, after the roup, give a simple bond for the price without protestation or complaint, it is presumed, that he visited the goods, and found them to be such as the inventory mentioned; and no alteration in them betwixt the roup and delivery is to be presumed.

*Forbes, p. 513.*

1714: January 27.

JOHN LESLIE of Findrassie *against* JOHN and HUGH MILLERS in Rose-markie.

In a process at the instance of John Leslie, as executor confirmed to Adam Leslie of Findrassie, against John and Hugh Millers, for payment of 152 bolls 2 firlots of bear sold by the said Abraham Leslie to the defenders, conform to their receipt subjoined to a particular account bearing the tenants' names from whom the victual was received; the LORDS sustained the receipt as probative, though wanting writer's name and witnesses, being *in re mercatoria*; and found the defenders liable for the ordinary prices bear gave in that place of the country where the bargain was made; albeit it was *alleged* by the defenders, that the price should be regulated by the fiars as the only standard where a certain price is sanctioned; because, though the fiars might be the rule betwixt master and tenant, when their farm is not demanded in due time, yet merchants are presumed to contract according to the current prices of the country where the bargain is made.

*Fol. Dic. v. 2. p. 356. Forbes, MS. p. 18.*

No 33.  
warrant of the Admiral, and the highest offerer having given bond for the price, the goods were presumed to have been in the same condition at the roup as at the inventoring, unless the contrary was proved, and to have been in the same condition when delivered to the buyer, as they were in when rouped.

No 34.  
Parties who had bought grain, without fixing a price, found liable for the ordinary prices, without regard to the fiars.