

present pursuer say in her libel, that her two brothers, who are now dead, survived both John and Jean, which she must allege in order to support her conclusion, it is incumbent upon her to prove her libel.

No 335.

“THE LORDS found it incumbent upon the pursuer to prove the death of James and Alexander her two brothers, and it was thought sufficient for her to prove that they were habite and repute to be dead. But as to the other point about the time of their death, they were not clear, that it was incumbent upon her to prove the same. And therefore they superseded this point till a proof should be brought of the first point.”

*Sel. Dec. No 34. p. 37.*

1755. February 28.

JAMES MACPHERSON *against* JAMES GRANT, Deputy-Factor on the estate of Lovat.

THE defender's wife purchased a horse from one Clerk, tenant in Urquhart, but as she did not know him, she demanded burgh and hamahald; and Macdonald, also a tenant in Urquhart, became his burgh or cautioner.

Some time after, the pursuer having claimed the horse, as his property, stolen from him, the defender sent for Clerk and Macdonald, they denied that the horse was stolen, and they accompanied the pursuer to the bailie of Urquhart, who ordered restitution of the horse to the pursuer. Soon afterwards the pursuer brought action against the defender for the damages incurred in recovering the horse.

*Pleaded* for the defender; That his character and his wife's put them above any suspicion of being accessory to theft; in this case, no circumstances are against them; as soon as the horse was claimed, he delivered up the thief to the pursuer, and therefore, as nothing could be laid to his door, nothing could be demanded of him more than the restitution of the horse, which he had made accordingly.

*Replied* for the pursuer; That he had a like right to his damages as to his horse; that the person, in whose custody the horse was found, was liable to him *primo loco*. The taking of burgh and hamahald; showed that the defender suspected the horse was stolen; it was optional for him to have bought the horse or not, and it was not unreasonable he should be put to seek relief from the person on whose faith or caution he had relied. This was further supported by reasons of public utility, for discouraging the receipt of theft.

The Court was of opinion, that the taking of burgh and hamahald was no presumption against the defender, that he was accessory to the theft, or was a resetter of theft.

“THE LORDS assolizied the defender.”

*Act. Ch. Hamilton Gordon.*

*Alt. Alex. Boswel.*

*Clerk, Forbes.*

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*Fol. Dic. v. 4, p. 132. Fac. Col. No 143. p. 214.*

No 336.

The person in whose possession a stolen horse was found, who had taken burgh and hamahald, when he bought him, not liable to the owner of the horse in the expense of recovering him, as the taking burgh and hamahald afforded no presumption that he was accessory to the theft.