

No. 4. Monypenny entered the lists of competition. The bidding continued between these two parties, while the judge incessantly admonished them that the half hour was at the moment of expiry, and the offers succeeded each other with rapidity. Before Mr. Monypenny had finished bidding, and abandoned the competition, the half hour elapsed; and the petitioner, who was the highest offerer at the instant of its expiry, was declared by the judge to be the successful competitor, at the price of £275 Sterling.

Thus no means were taken, by stopping the watch, to prolong the period, although competition had not ceased. Mr. Monypenny protested against this procedure, and presented a bill of suspension and interdict, and the kirk-session raised a multiplepoinding, in which the two competitors were called. On the part of the kirk-session, no objection to the regularity of the sale was stated.

The Lord Ordinary pronounced the following interlocutor (13th February 1807): " Finds it to have been provided by the articles of roup, that the superiority should be exposed at the upset price therein mentioned, during the running of a half hour sand-glass, and the highest offerer at the outrunning thereof should be preferred to the purchase: Finds, that if such sand-glass had been used, it was competent for, and indeed the duty of the judge of the roup, by laying the sand-glass on its side, or making it run backwards to prevent it from running out so long as there appeared offerers bidding against each other: Finds that in this case, as the judge of the roup, for want of a sand-glass, made use of his watch, he ought to have managed it in some such way as the sand-glass might have been; but finds, as he did manage it, he made the time to expire, while the two competitors Mr. Burns and Mr. Monypenny were keenly bidding against each other, and the judge declared Mr. Burns to be the last and highest bidder, and so preferred him to the purchase: Finds that this was occasioned by the judge's misapprehension of what was his duty in such a case; therefore finds that the proceedings at the roup were irregular, and cannot have effect."

And the Lords (27th November 1807) refused a reclaiming petition, without answers.

Lord Ordinary, *Polkemmet.*

Act. *Monypenny.*

Alt. *John Fullarton.*

J. W.

Fac. Coll. No. 10. p. 31.

1808. June 28. THOMAS STEVENSON *against* JAMES DALRYMPLE.

No 5.

Delay in notifying the rejection of goods sent on commission, and using part of them,

DONALD MARTIN, agent for James Stevenson, merchant in Greenock, sold to James Dalrymple, soap-boiler in Falkirk, 22 tons of kelp, at £8 per ton, the selling price being at that time from £7 to £10. In the letters he wrote to Dalrymple, offering this kelp for sale, he mentions that it was " pretty good, " but not of the best quality," that he must deliver it at Greenock; and that,

“ to prevent reflection, he would be glad to have a correspondent there to examine the quality.” Dalrymple directed the kelp to be shipped for Leith without any inspection on his part. It was shipped accordingly on the 5th of August 1803; and Dalrymple received it certainly not later than the 21st of that month. On the 22d he accepted bills for the price of it. He made no objection to the quality of it till the 10th of September, when he wrote to Martin that he had tried the kelp, that it was so bad as to be unfit for making soap, and that he was willing to allow any soap-boiler to be fixed on by Martin himself, and sent there at their mutual expense, to try it in his own manufactory in any way he pleased. Martin, in reply, refused to have any thing more to do with it. He indorsed the bills for the price to Stevenson, who raised diligence upon them against Dalrymple. Dalrymple presented bills of suspension, which were passed. The action came, in the usual way, into the Outer-house. The Lord Ordinary (June 27th, 1804,) remitted to Mr. Jamieson, Professor of Natural History, to report on the quality of the kelp, and authorised it to be sold by public roup. Mr. Jamieson reported, that “ it had lost about two thirds of its value, and was therefore useless to the soap-maker: That it appears originally to have been indifferently manufactured, and had since suffered from exposure.” The kelp was sold; and the price obtained was only £3. 16s. per ton. But it appeared that 6 tons 8½ cwt. had been used by the defender before he made the objection to its quality.

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will take away the right of rejecting them, though the quality be bad.

The suspender averred, that he notified his refusal of the kelp as soon as he discovered its quality; but that this did not appear till he had occasion to make soap with it exclusively, and that he had no such opportunity till some other kelp he was using was exhausted. That the quantity used by him had been used in this making of soap, and in some prior makings, where it had been mixed with kelp, so good as to cover its bad quality. That it had been kept in a dry place, and exposed to no injury till used in making soap, and had, when tried by itself, been found quite unfit for that purpose.

The Lord Ordinary's interlocutor was, (December 6th, 1805,) “ Finds, that the kelp in question, for which the bills charged upon were granted, was of a very inferior quality, and unfit for soap making, for which purpose it was sold and bought. Finds that 16 tons 1½ cwt. of said kelp, when sold by public roup under authority of the Lord Ordinary, only produced £3. 16s. per ton. Finds the suspender must be liable for 6 tons 8¼ cwt. at the rate which it appears had been used or consumed by the suspender of the original quantity of 22½ tons, amounting to £24. 8s. 3d. Finds the letters orderly proceeded to that extent, but, *quoad ultra*, suspends the letters simpliciter, and decerns.”

The cause came before the Inner-house by petition and answers—at advising which the Court adhered to the interlocutor of the Lord Ordinary.

On advising a second petition and answers, the Court “ altered the interlocutor reclaimed against, and found the letters orderly proceeded.

No. 5. A petition reclaiming against this interlocutor was presented by Dalrymple; but the Court, (June 28th, 1808,) “refused it without answers.”

The opinion of the majority of the Judges appeared to be, that there was sufficient reason to believe, or at least to allow a proof, that the kelp had been of bad quality originally, and not such as answered the description “of pretty good kelp at £8 per ton,” or was fit for making soap. But they thought that by receiving the article, and giving bills for the price, keeping it so long, and using part of it without objecting to its quality, the suspender had lost all right of refusing to pay the price upon any such objection; and that it would be dangerous, by admitting such exceptions, to shake the established and salutary rule of practice on that head.

Lord Ordinary, *Balmuto.*

Act. *J. A. Murray.*

Alt. *John Cunningham.*

W. Whyte and Ja. Gibson, W. S. Agents.

W. Clerk.

M.

Fac. Coll. No. 63. p. 233.

1808. July 9. JAMES RALSTON *against* ROBERT ROBB.

No. 6.

The disease called the Running-thrush, affecting the feet of a horse, constitutes unsoundness.

ON Saturday 5th September 1805, the pursuer, a horse-dealer in Edinburgh, sold to the defender, a farmer at Meadowhead, a young gray horse, warranted sound, at the price of 51 guineas. Before concluding the purchase, the defender gave the horse a short trial, and employed a farrier to inspect him.

The defender, after taking home the horse, discovered that its feet were affected with the disease called the *running-thrush*, which rendered it unsound. The animal remained in the possession of the purchaser during the intervening Sunday; and was returned on the morning of Monday the 7th September to the pursuer's stables. The defender having thus declined to keep the horse, and refusing to pay the price, the pursuer instituted an action to recover it.

On the 24th October 1805, the defender, on being served with the summons, applied to the Sheriff for a warrant to sell the horse by public roup. The warrant was granted accordingly; the horse was exposed to sale; and was purchased by a Mr. Craig, merchant in Edinburgh, at the price of £36 Sterling.

The action came before the Lord Justice-Clerk, Ordinary. The pursuer offered to prove that the horse was sound at the time of sale, had been sound from the period of its birth, never had been known to be lame while in the possession of the various individuals to whom in succession he had previously belonged, and was at that moment the property of a gentleman who considered him to be perfectly sound.—On the other hand, the defender offered to prove that the animal was unsound at the time of the sale, in consequence of being affected with the disease in his feet called the *running-thrush*.