

preserving the Thing sold, or if he sustains any Damage by the Delay of the Buyer to take it away, the Buyer is bound to reimburse this Charge, and make good this Damage, l. 13. §. 22. l. 9. ff. de act. empt. The Estimation of Things which have not been delivered at the Time and Place appointed, as of Wine, Corn and other Things of the like Nature is made according to the Value they had at the Time, and in the Place, where they ought to have been delivered, l. 4. ff. de condit. lictic. l. 22. ff. res. cred. But if the Buyer is in Delay to receive the Thing sold, whether it be after the Term fixed for Delivery, or after giving the Buyer warning where no Term is fixed: The Seller is discharged from his Obligation to take Care of it; and is no further liable than for what may happen to his Knavery, l. 17. ff. de per. et comm. rei vend. Some Merchants who sold a considerable Quantity of Wines to one having purchased him some Wine, supplied the Lords for a Warrant to sell them, lest they should perish; and that they might be declared liable only for the Price they would get for these Wines: The Desire of the Petition was refused, because the Day of Appearance in the Sellers Summons not being come, and the Buyer neither present nor obliged to be present; Nothing could be done against him more than if he had not been cited. But tho' the Wines could not be sequestered, nor a Warrant given to sell them; yet the Sellers were allowed to protest that they had done all Diligence to hinder the Wines from spoiling, whereof the Lords would take notice in any: Upon that might be moved against them for such Wines 3 Novemb. 1666 Merchants in *Judex contra Spruce &c.*

The Buyer stands to all Loss happening to the goods while undelivered, without the Seller's Fault or Negligence, tho' the Property is not transferred to the Buyer till Delivery, §. 3. Inst. de empt. vend. So that here the Rule *res perit suo domino*, admits of an Exception. Because the Contract being finished, the Buyer may force the Seller to deliver the Thing sold, who possesses it only precariously with the Buyer's Consent, and is under a Obligation of delivering it up to him: For *omnis debitor speciei extincta specie liberatur* l. 23. l. 23. §. 5. l. 9. §. 1. ff. de verb. oblig. And the Buyer is nevertheless bound to pay the Price, d. §. 3. de empt. vend. Thus the Peril of a House sold and thereafter accidentally burnt, was found to be the Buyers, and he liable to pay the Price contracted in his Bond, Albeit it bore, that the Sum should not be paid, till he was put in Possession, for Respect he was in fact before the Burning and did voluntarily after the Burning take Possession of the Ground, and rebuilt the House 13 Decemb. 1664 *Hunter*

*Hunter contra Wilfons.* But the Lord Stair (Inst. Lib. 5. Tit. 14. §. 7.) seems to give into Cujacius Opinion, that the Seller should not obtain the Price, unless he deliver or offer the Thing sold, in like Manner the Buyer keeps all Charges which made the goods sold better; As the Julian Auctioneers Fruits Profits &c. §. 3. Inst. de empt. vend. l. 17. ff. de per. et comm. rei vend. according to the Rule *Cujus est Commodum eius est incommodum* l. 30. ff. de reg. jur. By the Law of England, the Peril is the Sellers, and consequently the most Profits of the Thing, in the Sales of Things which are sold by Number Weight or Measure, all the Diminutions and all the Losses, which happen before the Things are counted weighed and measured fall upon the Seller, for as then there is no Sale. And the Charges which happen afterwards remain the Buyers. l. 1. §. 1. ff. de per. et comm. rei vend. If a Thing is sold upon Trial for a certain Time on Condition that it shall not be sold, unless it pleases the Buyer, all the Charges and the Profit or Loss which happen before during the Time of the Trial, the Seller bears, yet afterwards, with accretion to the Seller, the Seller bears the Loss, tho' not yet accomplished, with accretion to the Seller, l. 20. §. 1. ff. de prescript. verb. l. 2. §. 1. ff. de comm. Where of two Things one is sold, whether in Price or not to the Seller or Buyer, and if for the Sale one of the two perishes during the Delay required for the Sale, the Seller is bound to give the other altho' it should appear to be the best, for he owes one of the two. And if both perish, the Buyer may never demand the Price; for had it not been for this Engagement, the Seller might receive himself of both the Things, and that which the Buyer was to have had is lost to him, l. 24. §. 6. ff. de contrah. empt. If a Thing sold upon a Condition perishes before the Event of the Condition, the Seller bears the Loss, altho' the Condition should come to pass afterwards; For he was still the Master, and the Thing being destroyed it cannot be any more sold, and that was only sold which should be in being at the Time of the Condition's coming to pass, l. 50. §. 5. ff. de jur. dot. If in such a Case the Condition comes to pass after the Thing sold is not destroyed but commencing, the Loss falls upon the Buyer, for whom the Seller was obliged to keep the Thing till the Event of the Condition, which made the Buyer Master of it, l. 8. ff. in fin. ff. de per. et comm. rei vend. If the goods sold happen to be destroyed or diminished, after the Seller is in Fault for not delivering them, he bears the Loss: Altho' the Charges should happen without any Fault of his, or even by mere Chance, §. 5. Inst. de empt. vend. l. 12. l. 14. ff. de per. et comm. rei vend. l. 4. c. 100. and he loses both the Thing and the Price which he ought to restore if he had received it, l. 15. §. ult. ff. de rei vend. For if the Thing had been delivered, the Buyer might have either sold it, or prevented the Loss some other Way; and the Seller ought to blame himself for not delivering it in due Time, *Culpa cuiusque sua non alteri nocere debet*. If the Buyer and Seller are equally in Delay, the one in receiving and the other in delivering