

*de jure*, was *negativum circum scriptum*, and resolved in a positive; but what length of diligence he was tied to, whether decret, horning, and caption, as to moveables, and comprising as to heritage, they have not as yet determined. For in law *tutores tenentur de culpa levi et lata*, but not *levissima*.

*Act.* Dinmuire. *Alt.* Lockhart.

*Advocates' MS. folio 57.*

*June 29.*—In the foresaid cause, Bailie Boyd and his stepson, *1mo*, Found that a tutor is not bound in diligence against irresponsal debtors, whether absolutely so, or so reputed and holden. *2do*, They found that irresponsality probable *prout de jure*. *3tio*, They found the burden of the probation of irresponsality incumbent to the tutor who alleged the same. *4to*, They found tutors liable in this length of diligence, viz. horning, caption, and poinding, for moveables, and apprising for heritage and lands. *5to*, They found the tutor liable in annualrents for debts not bearing annualrent, and that within a year after the confirming of the father's testament wherein the pupil was executor. *6to*, They found that legacies paid by the tutor, though without a sentence, relevant to exoner him, if they were due in law. All thir points were discussed *in præsentia, referente Domino Newbyth*.

*Act.* Dinmuire. *Alt.* Lockhart.

*Advocates' MS. folio 58.*

1667. *December.*

A SUM of money being provided to a man and his wife, and their heirs; which failing, to the longest liver of them two; FOUND, The heir of the marriage is fiar.

*Advocates' MS. folio 59.*

1666, 1667, and 1668. The TOWN of DUNDEE *against* The TOWN of ARBROATH.

1666. *December 20.* The bailies of Aberbrothock having borrowed some cannons from their neighbours in Dundee, for defence of their town against the English, *in anno 1651*, for which they gave bond either to deliver the same unhurt, or else to pay 500 merks as their price; and the hail maritime towns of Angus being subdued, thir cannons were taken away *vi majore*. Whereon the merchants of Dundee having charged the Arbroathmen either to deliver or to pay the 500 merks, they suspend on this reason, that by the bond it is clear to be *contractus commodati*; by the nature of which contract, *commodatarius non tenetur prestare casus fortuitos, nisi culpa precedat casum*; and the cannons being taken away without any fault of theirs they cannot be liable to the sum charged for.

ANSWER,—Here *pacto susceperant in se casum fortuitum*, and so must be liable for the same, though by the nature of *commodatum* they would not be liable;

for here, in case of failyie of redelivery, they oblige them to pay 500 merks as the price.

The Lords found the reason of suspension relevant to assoilyie them, unless the chargers would condescend on some neglect on their part to deliver the cannon; and found them not liable to pay the price contained in the bond, which was rather adjected *nomine pœnæ*.

*Act.* Balfour and M'Keinzie. *Alt.* Lockhart and Dinmuire.

*Advocates' MS. folio 57.*

1668. *November 1.* Thereafter this cause came to be debated in P. D. upon the clause contained in the bond, that they should deliver the guns without any hurt or scaith, which comprehends fortuitous cases *præter naturam commodati*.

*2do, ALLEGED,*—This was not *commodatum simplex et regulare, but æstimatum*, where *per L. 3. D. commodati omne damnum est præstandum*.

The Lords found that clause in the bond, “without hurt or scaith,” did not comprehend fortuitous cases; and that it was not *commodatum æstimatum* properly, but a liquidation of the value in case of scaith, for *in commodato æstimato pretium est in traditione*.

*Advocates' MS. folio 57.*

1667. *December.*—In the forementioned case betwixt some honest men in Dundee and Arbroath, the question ran, whether the bond granted by Arbroath was *commodatum* or *mutuum*.

The Lords found it was conceived in the terms of a *commodatum*; and the said *vis major* being *casus fortuitus*, Arbroath was not bound *præstare istum casum, nisi culpa precesserit casum*. They also found they were bound, *ex natura commodati, in exactissimam diligentiam* for preservation of the guns. And in suit of this question, there did arise another, *viz.* if the diligence required behoved to be antecedent to the fortuitous case or subsequent, the obligation to do diligence for recovery thereof still remaining after that accident. Thus Arbroath were forced to condescend on some acts of diligence; and the Lords before answer ordained Dundee to condescend on particular acts of neglect: and then to consider, at the advising of the cause, if the diligence done was relevant to assoilyie from restitution.

Then on Nov. 1668, when thir diligences came to be advised, the cause was again debated on the clause of the bond, and the nature of *commodatum æstimatum*: after which, the Lords found as is before set down.

*Advocates' MS. folio 59.*

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1668. *January 4.* — KER'S CREDITORS *against* JAMES KER.

KER having granted a disposition to Ja. Ker of some bonds, for security of several sums of money, as 3000 merks, 9000 merks, &c. whereon the creditor being infest, and that infestment made public, as to some of the sums therein contained, but not as to all: thereafter, there being a competition of rights be-