Which the LORDS found relevant, unless there had been a special agreement, in which case, they found the defender, or his servant, should have shown what was in the placard. No 10.

Fol. Dic. v. 2. *p.* 56. *Stair, v.* 1. *p.* 487.

*** Dirleton reports this case:

1667. *November* 14.—ROBERT WHITEHEAD of Park pursued John Straiton tacksman of the park of Holyroodhouse, for the price of a horse put in the said park, to be pastured for four shillings per night, which after search cannot be found.

It was *alleged*, That by a placard affixed upon the gate of the park, it was intimated, that the keeper of the park would not be answerable for any horses put therein, although they should be stolen, or break their neck, or any other mischief or hazard should overtake them. It was *replied*, That by the law *nautæ caupones*, &c. the keeper *ex conducto* is liable, unless it were alleged, that it had been expressly agreed that he should not be liable; or at the least, that it was known to the pursuer, that such a placard was affixed when he put in his horse.

THE LORDS, before answer, ordained the Reporter to enquire, and hear the parties upon the terms of the agreement, when the horse was put in, whether it was told or known to the pursuer, that the keeper would not be answerable.

Reporter, *Castlehill.*

Dirleton, No 124. *p.* 43.

1668. *November* 17. WILLIAM DUNCAN *against* The TOWN of ARBROATH.

No 11.
The Magistrates of a town borrowed some cannon, which they obliged themselves to restore, free from hurt, skaith, or damage. They were taken by an invading enemy. The magistrates were not found liable.

WILLIAM DUNCAN, skipper in Dundee, having lent the Town of Arbroath three cannon, in June 1651, to be made use of for the defence of their town against the English, got from the Magistrates of Arbroath a bond of this tenor, that they did acknowledge them to have received, in borrowing, three guns, and obliged them to restore the same within 24 hours after they were required, without hurt, skaith, or damage; and in case of hurt, skaith, or damage to be done to them, obliged them to make payment of the sum of L. 500, as the price agreed upon for them. Upon this bond William Duncan pursues for the price: It was *alleged* for the Town of Arbroath, Absolvitor; because the cannon were lost, *casu fortuito et vi majori*, in so far as the English, after they had overcome the whole country, and taken Dundee, did seize upon their cannon, after the defenders had carried them the length of Barri-Sands, before they were taken, and chased back again by the English ships, and thereupon buried the cannons in the sand, within the sea-mark, and hid the carriages in

No 11. a laigh cellar, wherein they were covered; and it being clear by the tenor and nature of the bond, that the guns were received in borrowing, and that it was *contractus commodati*, or loan; which, by the consent of all Lawyers, does not put the peril of *vis major*, or *casus fortuitus*, upon the borrower, but upon the lender, who is *dominus et res perit suo domino*: The pursuer *answered*, *first*, That, albeit by the nature of *commodatum*, the borrower hath not the peril, yet the law makes this exception, *si commodatum sit estimatum*; in which case, the peril is the borrower's, and it is no proper loan, but rather sale; which is clear, *l.* 5. *D. Commodati*; but, by this bond it is evident, that it is *commodatum estimatum*, and here not only a value agreed upon, but a sum expressly declared to be the price; *2dly*, There is no question but loan may consist with that, that the borrower will undertake all peril: *Ita est*, By this bond the defenders are obliged to restore, without hurt, skaith, or damage, which must import all perils, especially such perils as were then imminent; *viz.* the taking of the cannons by the enemy; otherwise this clause should operate nothing; seeing, without it, the naked name of a contract would oblige to restitution; *3dly*, Albeit the borrower were free of *casus fortuitus*, yet that is defined and understood to be, *quia a nemine potest prævideri*; but nobody could have been ignorant of this chance, to have been taken by that enemy who were then imminent, and against whom particularly the cannons were borrowed; *4thly*, By all consents, *commodatarius tenetur pro levissima culpa et summa diligentia*, whereinto the defender failed; for they alleged only an attempt, for carrying back the cannons to the pursuer; but they should have used other attempts, other days, and other ways; and likewise they were negligent, that they buried the cannon to the knowledge of their whole town; whereas they should have entrusted some few to have done it in the night; likeas, they failed in this, that they made no application, as others did, who got back their cannon by a public proclamation by the Usurper, that all cannons taken off ships should be restored, to enable the shipping against the Spainiards and Dutch. The defender *answered* to the *first* allegeance, That he did not deny but in *commodato estimato*, the whole peril was upon the borrower, but denied that this was *commodatum estimatum*; for all Lawyers do define *commodatum estimatum* in the same way as *dos estimata*, to be where the obligation is alternative, either to restore the thing borrowed or the price, at the option of the borrower; so that the lender is no more *dominus*, nor can demand the thing borrowed, which becomes the borrower's, unless he please to give it back, *et res perit suo domino*; but where the value is only liquidated in case of deterioration, or in case of failzie, the borrower cannot free himself by offering the price, but the lender may call for the thing, although it were deteriorated; but here the liquidation of the price is only in case of deterioration, and the dominion is unquestionably in the lender: To the *second*, it was *denied*, That the borrower had here undertaken the peril; for the words of the contract, being hurt, skaith, and damage, in the proper and vulgar use, do not

signify peril or hazard, but only deterioration, and have this equipollent positive, to restore the guns in as good case as they receive them, which would never import force or accident; and for the expressing of that clause, nothing is more ordinary than to express clauses, *quæ natura contractus insunt*; and the adjection of this clause may have these uses, *first*, It liquidates the value, in case the borrower fail, without putting the lender to prove the same; *2dly*, Whereas a simple loan might only have obliged the borrower to diligence, so that, if, without his fault in making the use, for which the thing was borrowed, it had been detoriorated and lost, the borrower would not have been liable, as he that lends clothes to be worn, must not demand the deterioration by that ordinary wearing without fault; or he who lends a horse to a battle must not require reparation if he be wounded or killed in the battle, unless he have a special obligement, to have him restored without hurt; so, in this case, the parties having foreseen the ordinary case of the cannons, being hurt in defending the town, by much shooting, or by the shot of the enemies, hath provided, that even the damage in that use should be repaired, which can never be extended to an accidental loss of the cannon, not in defence of the town, but after the enemy had over-run the nation, and taken Dundee, and Arbroath was dismantled, the cannons were taken out of the sand: To the *third*, *Casus fortuitus* is not that which cannot be foreseen to be possible, but that which cannot be foreseen to have a sufficient, at least a very probable cause, otherwise there should be no *casus fortuitus*; but this case which happened had been most ominous for any Scotsman to have supposed, as most probable, that, before breaking of the army, or the English coming over Forth, the kingdom should have been lost: To the *fourth*, The defenders were noways *in culpa* or *mora*, but did more than they were obliged; for they were obliged to restore but upon demand, and before demand they endeavoured to have restored, and then they buried the cannon within the sea-mark in the night; and, though there was a proclamation to give up all arms, under the pain of death, they did not discover their cannon, albeit, upon their discovery otherwise, one of their Magistrates ran the hazard of his life; and as for the proclamation alleged, it meets not this case, their cannon not having been taken off ships; and if it was public, the pursuer behoved equally to know it, and should have made his address for his own cannon, neither would the defenders have refused their concourse, if it had been useful, or desired. The pursuer opponed his former answers, and added, that the law cited spoke expressly of *commodatum estimatum*, to transfer the peril on the borrower; and there is no law adduced to restrict it, not to take place in that which is estimated only in the case of deterioration, *et ubi lex non distinguit nec nos*; and as to the meaning of the clause, *in dubiis interpretatio facienda est contra proferentem qui potuit legem sibi apertius dixisse*. So this bond being the defender's words, blame himself if he made not that clear. The defender *answered*, That, albeit that be one rule of interpretation, yet there are others stronger making for him, *viz. In dubiis*

No 11.

No 11. *respondendum pro reo, in dubiis pars mitior et æquior sequenda.* Now, it cannot be thought that parties would have been so unreasonable, as to have demanded restitution, if the kingdom were lost, and the cannon taken, after all diligence done to keep them; but this is the most special rule, *In dubiis respondendum secundum naturam actus aut contractus.*

THE LORDS found, that, by the nature and tenor of this contract, the defenders were not liable for this accident that happened; and that they were not *in mora* nor *culpa*, but had done all diligence; and, therefore, found the cannon lost to the pursuer and lender; and suspended the letters *simpliciter.*

Thereafter, upon pronouncing of the interlocutor, the pursuer offered to prove, by the writer and witnesses inserted in the bond, that it was expressly treated and agreed, and that the meaning of the clause was, that the defender should be liable to all hazard, and desired the witnesses at least to be examined *ex officio.* The defender *alleged*, That the pursuer having got a term already to examine witnesses *ex officio*, and the parties being examined, he could not now demand a new term, neither could a clear clause in a bond be altered by witnesses. The pursuer *answered*, That the clause was at best but dubious; and so the meaning was not to prove against the writ, but to clear the same, which is ordinary.

THE LORDS would not give any further term for leading witnesses; but found the allegeance only probable by the oath of the party.

Fol. Dic. v. 2. *p.* 57. *Stair, v.* 1. *p.* 563.

*** Gosford reports this case.

WILLIAM DUNCAN being assignee constituted by Alexander Carmichael, skipper in Dundee, in and to a bond granted by the Bailies of Arbroath, whereby they had granted that they had received, in borrowing, some ship guns, which they were obliged to re-deliver, free of all hurt, harm, or skaith; and, in case they should incur any hurt, harm, and skaith, to pay the sum of L. 500; the said Bailies being charged for payment of the sum, did suspend upon this reason, that it being clear by the bond, that they being in the case of *commodatum*, they could not be liable; because, they having done exact diligence to preserve the guns, having buried them in the sand within the sea-mark and flood, from whence they were taken by the English army, after they were masters of all Scotland; this reason was found relevant, notwithstanding that it was *alleged*, That, by the civil law, *D. De commodato*, where *commodatum est æstimatum commodatarius tenetur in omne periculum*; and by the bond itself, the borrowers being obliged, as said is, did make themselves liable *ob casus fortuitos et vim majorem:* For the LORDS found, that the suspender being neither *in culpa* nor *mora*, and the guns not being lost in the making use thereof for their defence against the English ships, for which end they were borrowed, but that they were taken by the land forces, which was such a case

as could not be foreseen; and that, if the guns had remained with the lenders, they had been lost with that same prevalent power; and, therefore, they could not be liable. No 11.

Gosford, MS. No 51.

1679. *July* 16.

JOHN BINNY, Postmaster, *against* Monsieur ANDREW VEAUX, Dancingmaster.

No 12.

THE LORDS found, where a man hires a horse, if it die, or fall sick or crooked by the way, (though he can prove that he rode *modo debito*, and no farther than the place agreed upon,) yet the rider must further prove the *casus fortuitus quem nulla præcessit illius culpa*, nor negligence, and the defect or latent disease it had before he hired it; and if he succumb in proving this, he must pay the price of the horse, or the party's damage and interest. The Chancellor's vote cast this decision, *viz.* that the rider should prove the accident, and his own diligence, which is *perquam durum*. This is a difficult probation to burden the rider with, since horses may have latent diseases before the hiring.

Fol. Dic. v. 4. p. 57. Fountainhall, v. 1. p. 51.

1680. *December* 21.

Mr ALEXANDER BIRNIE, Advocate, *against* The KEEPER of the Park of HOLYROODHOUSE.

No 13.

THE LORDS assoilzied the defender from the price of the horse, because of the printed placards, unless he would say they were accessory to the loss of the horse, by fraud or negligence; and found it not in the case of the edict *nautæ, caupones, stabularii.*

Fol. Dic. v. 2. p. 56. Fountainhall, MS.

1684. *February* 20. PATRICK MAXWELL *against* Mrs TODRIGE.

No 14.

PATRICK MAXWELL, one of the King's guard, pursuing Mrs Todrige, keeper of the King's Park of Holyroodhouse, for the price of a horse he gave in to be grazed there, and which was stolen or lost: *Alleged*, She cannot be liable, *nisi pro dolo et culpa*; and by a placard, or printed program, she had intimated the conditions on which she took them in, *viz.* that the inputter took his hazard of all chances, as breaking their neck, taking out one horse for another