

- No 8. kirk on his foot, where he offered the pursuer his horse; and it is not libelled what wrong he did to the horse; *replied*, He rode him extraordinary, by galloping him, and rode further than condition to Dumblane, being only hired to Stirling: Found relevant.

Clerk, *Durie*.

*Fol. Dic. v. 2. p. 57. Nicolson, MS. No 327. p. 228.*

- No 9. 1626. November 28. ——— against MOWAT.

IN an action for the price of a horse, pursued at the instance of a stabler in Edinburgh, against James Mowat writer, the LORDS found that the defender was subject to pay the price of the horse hired by him, and not restored again; albeit he *alleged*, That he ought not to be found subject therein, in respect that he having hired his horse to a part agreed upon, he was not holden nor astricted to keep him, but the pursuer ought to have sent for his horse again, or to have sent any boy with him to have brought him back, which not being done, but the horse having strayed away, or being stolen by the defender's fault or knowledge, it cannot be imputed to him; which exception was repelled, for conductor equi, of the law; non tenetur ad estimationem, si equus per casum moriatur sine culpa sua, et quamvis de casu non teneatur, tamen de culpa tenetur etiam levissima, ut est in Bart. ad Leg. Si ut certo. §. Nunc videndum, et § Sed interdum D. Commodat. Et conductor rei mobilis retinendo ultra tempus, non videtur reconducere, imo tenetur fur.

*Fol. Dic. v. 2. p. 57. Durie, p. 238.*

1667. November 16. WHITEHEAD against JOHN STRAITON.

No 10.  
The proprietor of inclosures having put up a placard, that he was not to undertake the hazard of the cattle in them, was found not liable.

WHITEHEAD of Park pursues John Straiton for restitution of a horse which he delivered to his servant, to be put in the park of Holyroodhouse to the grass, and which now cannot be found. The defender *alleged*, That he was liable for no loss or hazard, because at that time, and long before, there was a placard fixed upon the port of the park, that he would be answerable for no hazard or loss of any horse put in there, by stealing or otherwise, which was commonly known at, and long before that time. It was *answered*, That this action being founded upon the common ground of law, Nautæ, caupones, stabularii, ut quæ receperint restituant, the same cannot be taken away but by paction; and the putting up of a placard is noways sufficient, nor was it ever shown to the pursuer. The defender *answered*, That the pursuer having only delivered his horse to his servant to be put in the park, without any express communing or conditions, it behoved to be understood on such terms as were usual with others, which were the terms expressed in the placard.

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 *nauta 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, *Castlebill*.

*Dirleton, No 124. p. 43.*

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

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.

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.