

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-

twixt this Ker and some others of the disponder's creditors, the question was, If an infestment, granted for several sums of money, and made public as to some of the sums, if that was a public infestment.

The Lords found that an infestment being indivisible *quid*, could not *ex parte* be public, and *ex parte* not ; and therefore found the same public.

*Act. Sinclar. Alt. Lermont. Referente Domino Advocato.*

*Advocates' MS. folio 59.*

1668. *January 20.* LORD LYON *against* \_\_\_\_\_.

THERE was a comprising led at my Lord Lyon's instance against one Johnston, as lawfully charged to enter heir to his father : and he dying before the Lyon was infest upon his comprising, another serves himself heir to him who was last infest, and procures himself infest ; and both contending for preference, it was found that the person who was lawfully charged to enter heir, and comprised from, was so denuded by that diligence, that he who served himself heir, and was infest, could not be preferred to him who had comprised, though not infest till after the other's infestment was expedite.

*Act. Maxwell. Alt. Lockhart. Referente Advocato.*

*Advocates' MS. folio 59.*

1668. *January 24.* BOWAR *against* GRAHAME, minister at Inneraritie.

THEY found that the relict of the deceased minister might convene the entrant or the heritors for the price of the manse, either built or repaired ; notwithstanding the act of Parliament 1661 be expressed that the heritors ought to be bound and liable for that. It is true, before that act of Parliament entrants were infallibly liable to the relict or heritors ; and that act does not exclude the entrants from being liable, though it declares the heritors to be bound, and makes no mention of entrant ministers.

*Act. Dinmuire. Alt. Thoires. Referente D. Staires.*

*Advocates' MS. folio 59.*

1668. *February 4.*

ONE Mr. Wm. Somervell being condemned in a criminal court for usury, and having raised a reduction of the verdict of the assize, before the Lords of Session,