

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 precessit 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. Fountainball, v. 1. p. 51.*

1680. December 21.

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

No 13.

THE LORDS assolized 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 *naütæ, caupones, stabularii*.

*Fol. Dic. v. 2. p. 56. Fountainball, 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 inputer took his hazard of all chances, as breaking their neck, taking out one horse for another

- No 14. by mistake, by false tokens, or the like; and that this was sustained already in a pursuit against her by Mr Alexander Birnie, Advocate, *supra*, and the Bailie of the Abbey Court having decerned against her, and she having suspended, the LORDS, on Forret's report, reduced the said decret, and assoilzied her, unless they would prove she was accessory.

*Fol. Dic. v. 2. p. 56. Fountainhall, v. 1. p. 272.*

1687. June.

DAVID JOHNSTON *against* RANKIN.

No 15.

IN a pursuit for the hire of a horse, it was *alleged* for the defender, That he having ridden him the length of Dunbar, in company with others, very soberly, the horse fell sick and lame, so as he was forced to leave the beast there, which he intimated to the hirer.

THE LORDS found the defender free of the hire, and of the charges of the horse at Dunbar;

*Fol. Dic. v. 2. p. 57. Harcarse, (SUMMONS.) No 930. p. 261.*

1688. February 28.

TROTTER *against* BUCHANAN.

No 16.

ONE Trotter having hired a horse from Buchanan in Cockenzie, there is a decret obtained against him for the horse, or its price; which was suspended on this reason, that having ridden to Leith with him, he was stolen out of a stable there. *Answered*, This was not sufficient, seeing he might pursue the stabler. *Replied*, The *casus fortuitus* must defend both, there being neither *dolus* nor *culpa* qualified against them—THE LORDS, on Boyne's report, found the reason of suspension relevant to assoilzie him, that the suspender did deliver the horse to the keeper of a common stable, to be kept in his stable; and that the horse was stolen out of that stable: And also sustain the charger's answer, that the suspender, either *scripto vel juramento*, promised to satisfy the charger for the horse. But it may be considered how far the edict *nauta, caupones, stabularii*, may reach at least the stabler; seeing Patrick Steel was made liable for the Master of Forbes's cloak stolen in his house, though it was not proved that his servants did it. No 2. p. 9233.

*Fol. Dic. v. 2. p. 57. Fountainhall, v. 1. p. 501.*