

creditor either to allege or to prove it was in *rem minoris versum*, seeing no credit would be given to minors, nor no traffic could be held with them hereafter.

The Lords found the creditor behoved to say the sum lent was *in rem versum*, otherwise that they would suspend the letters simpliciter, notwithstanding the bond was signed by the minor and his curators.

Many of the Lords were of another mind ; especially my Lord Advocate.

*Act.* Sinclair. *Alt.* Lockhart.

*Advocates' MS. folio 58.*

1667. *June 29.* Jo. LIDDELL *against* THE HERITORS of Fordungennie.

MR. JO. LIDDELL being in March 1667, transported from the parish of Fordungennie to Scoone, and charging the heritors for the half year's stipend due from Martinmas 1666 to Whitsunday 1667, my Lord Advocate, who heard the cause, was of opinion that he could not have that half year's stipend from which he was transported, because it inferred plurality of benefices, which was reprobated by the canon law, and that he could not be minister at both kirks. Urged on the other hand, a minister was not in the case of a liferenter, who dying before the term, had no right. And yet the Lords in the very like case betwixt Mr. Thomas Kirkcaldie and the heritors of Carnwath, found the minister to have right to both stipends, and that it did not infer plurality of benefices.

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

*Advocates' MS. folio 58.*

The same minister pursuing for the price of his house, which he had builded by order from the bishop, after a previous visitation ; ALLEGED, by act of Parliament, the heritors having made the manse once free, the minister was bound to uphold it on his own charges ; and having ruined by the fault of the last incumbent, he ought to pursue him and his representatives.

The Lords inclined to make the heritors liable for the superplus of 500 merks, being 1000 merks.

*Advocates' MS. folio 58.*

1667. *January —, and June 29.* ADAM STEVIN *against* BAILIE BOYD.

*January.*—BAILIE BOYD being pursued by his stepson, Adam Stevin, for count, reckoning, and payment-making to him of his portion natural, the Bailie being his tutor and curator :—

Wherein the Lords found a tutor not liable in diligence for such debts as either the debtor thereof was known to be irresponsal, or were so reputed and holden the time of his office ; because he was not bound to expend his pupil's estate unprofitably, or whereof he would get no allowance, nor was he bound to expend his own. And they found this allegiance relevant to be proven *prout*

*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;