No 49. which he had not notified to the complainer;—the Lords "found him liable in damage and expense, and remitted to the Ordinary on the bills to tax the same;" and he not being in good circumstances, "they fined him only in ten shillings Sterling to the poor."

Fol. Dic. v. 4. *p.* 232. *Kilkerran,* (Reparation.) *No* 1. *p.* 484.

1748. *November* 29. Liddel *against* Ure.

No 50.
A bond by a tutor in law, that he should exercise the office, found not to imply that he should complete his title, and therefore the clerk to the service not found liable for neglecting to take caution, as the cautioner would not have been liable.

Andrew Liddel obtained brieves for serving himself tutor-in-law to his niece Christian, daughter to John Liddel of Easter Clachary, and a verdict was found accordingly, before the regality court of Montrose, which he never retoured to the Chancery, but proceeded, without further title, to administer the pupil's affairs.

Christian Liddel, with concourse of John Donaldson, tenant in Craigannat, her husband, pursued him to account, and obtained decreet against him; and failing to recover, pursued James Ure, who acted as clerk to the service, by commission from the clerk to the regality, for his alleged neglect of taking caution, as no bond of caution appeared; and upon James Ure's death, transferred the process against John Ure of Shirgarton, his brother and representative.

The Lord Ordinary, 8th July 1747, "found the defender liable to the pursuer in the balance of Andrew Liddel's intromissions with her means and effects."

Pleaded in a reclaiming bill, It is not incumbent on the clerk to a service to take caution; it is one of the heads of the brieve, to inquire if the agnate is *potens idonie cavere*, but it does not require that caution be actually found; and therefore it would seem that the caution ought to be found at the Chancery, when the service is retoured, and in consequence of it a nomination taken out; or if this must be done in the court where the service is expede, that the inquest ought to see it done, and be satisfied that he is *potens cavere*, by seeing the caution actually found: But supposing it the duty of the clerk, the pursuer in this case suffered no prejudice; as the cautioner, if taken, would not have been bound, the prosecutor of the brieves having never been tutor, as he never retoured them, but acted without a title.

Answered, The caution is never taken at the Chancery, but in the court where the service is expede; and constant practice has fixed it to be the duty of the clerk to take it, which being done, is the evidence given to the inquest, that the agnate is *potens cavere*; and the stile of the bond is, that he shall exercise the office, which Andrew Liddel having failed in, his cautioners would have been liable; and consequently the clerk who has neglected to take, or has lost the bond of caution,

No 50.

The Lords did not think the obligation, that the agnate should exercise the office, implied that he should complete his title, by retouring the service; but supposing that done, that he should faithfully administer.

"The Lords found the defender not liable."

Act. *Haldane.* Alt. *Lockhart.* Clerk, *Justice.*

Fol. Dic. v. 4. *p.* 232. *D. Falconer, v.* 2. *No* 16. *p.* 18.

*** Kilkerran reports this case:

The Lords were of opinion, that where a tutor of law is served, it is the duty of the clerk to the service to take the bond of caution.

Yet where, as the fact was in this case, the service was never retoured, nor any gift of tutory expede, although the tutor proceeded to administrate, and in the event became insolvent, after having dissipated the pupil's effects; the clerk was not liable in damages on account of his neglect to take the bond. And the Court was farther of opinion, that though a bond had been taken, yet if the service was not retoured, and gift expede, the cautioner would not have been liable. See Tutor and Pupil.

Kilkerran, (Tutor and Curator.) *No* 12. *p.* 589.

1756. *December* 3. Aitkenson *against* Evan M'Bean.

No 51.

In a complaint against a messenger for neglecting or delaying to put a caption in execution, the Court found him liable for the debt, as the proper reparation to his employer for the damage occasioned by his neglect of duty.

Sel. Dec. No 120. *p.* 172.

1757. *January* 4. Goldie *against* M'Donald.

No 52.

The Lords found an agent liable in damages, who being employed to expede a confirmation, neglected it till his client died, by which means his widow sustained a loss of L. 212 Sterling.

Fol. Dic. v. 4. *p.* 232. *Fac. Col.*

*** This case is No 64. p. 3527., *voce* Diligence.

1770. M'Harg *against* M'Lamerick.

No 53.

Where the damage arises solely from error in judgment in nice or difficult cases, the claim of reparation is not easily admitted. M'Harg, a writer, brought action for payment of expenses laid out by him in making up titles for