

*de jure*, was *negativum circum scriptum*, and resolved in a positive; but what length of diligence he was tied to, whether decreet, 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;