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. No 50.

"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

No 53. his client M'Lamerick to a land estate. The defence was, That the titles were erroneously made up, as the defender had been served heir in general to his grandfather, in place of heir of provision under a contract of marriage. The Court repelled the defence. See Appendix.

Fol. Dic. v. 4. p. 233.

1770. *November* 19.

Angus Sinclair in Hunthill, *against* John M'Farlane, Officer of Excise, and James Cargill, Constable.

No 54.
Officers of excise not authorised, in virtue of a writ of assistance, to make a forcible entry, for the purpose of executing a poinding, in implement of a decree of the Justices, in an excise matter.

Sinclair having been fined for retailing foreign spirits without a licence by the Justices of the Peace for the shire of Lanark, and his effects having, in virtue of their decreet, been poinded, he brought an action of oppression and damages against the Justice, the Collector, and Supervisor, and against M'Farlane the Officer, and Cargill the Constable, who had executed the distress.

The Court, 17th January 1769, pronounced the following judgment: "Sustain the defence proposed for the Justice of Peace, the Collector, and Supervisor; assoilzie them, and decern; but sustain action against John M'Farlane, officer of Excise, and James Cargill constable; and remit to the Lord Ordinary to allow a proof with respect to the execution of the poinding, entering the house, and maltreatment of the pursuer."

A proof having been led, the cause was taken to report upon informations—when it was

Pleaded for the pursuer,

1*mo*, That the poinding was illegal, and directly in contravention of the statute 1669, c. 4. which requires, that before proceeding to poind, a charge be given; and farther, that the days of said charge be expired. But neither of these requisites had been observed; no charge had been given; and, instead of 15 days, two had not elapsed. The decreet was dated 2d July, was endorsed on the back of the same date, to be forthwith put in execution; and was actually executed the next day, viz. the 3d of July.

2*do*, Though an officer executing a poinding could not break open doors without letters for that purpose, yet the defenders, after having repeatedly attempted to force the doors, had at last broke in at a window. These facts were proved; as also that the defenders' conduct had been harsh and violent; and, in particular, at the time they broke into the house, that the pursuer's wife was in bed, and either in actual labour, or very near the time of her delivery. The writ of assistance authorised no such procedure. The writ authorised a forcible entry only when a search was made for smuggled goods upon due information given; no such pretence was alleged in this case: and hence, perverting the use of it on this occasion, was illegal, and, in fact, converting it into a general search-warrant, for the purpose of breaking into any person's house the officers possessed of that writ might think proper.