

No 38.

The Lords found a tutor liable in omissions, and for whole duties of the lands wherein the minor's father died infest, although he never intromitted therewith, and although the minor was not infest; since that was the tutor's fault.

1628. *January 26.* The COMMISSARY of Dunkeld *against* ABERCROMBIE.

THE Commissary Dunkeld pursues one Abercrombie as heir to his umquhile father, which father was tutor-dative to a minor, for payment of the duties of the minor's lands the years of his tutory, and which were craved either as intromitted with by the tutor, or *propter omissionem*, for not meddling with them, were sought from him, to which duties the commissary was made assignee. In this pursuit the defender being convened by sundry alternatives, one whereof was, that he behaved himself as heir to his father, by payment of sundry of his father's debts since his father's decease to his creditors; THE LORDS would not sustain this alternative, for they found the paying of the father's debts by the eldest son, *qui erat apparens hæres*, could not make him to be that person to represent his father as heir, nor as *gerens se tanquam hæres*; sicklike THE LORDS found, that the minor's father being infest in lands, and being by virtue thereof in possession of the same divers years, and at the time of his decease, the tutor ought to be countable for the duties of the said lands, although never intromitted with by him, seeing he ought to have intromitted therewith, or to have done diligence, and shew where he was debarred lawfully; and wherein THE LORDS found the tutor to be liable to the minor, albeit the minor was not infest, for that behoved to be repute the tutor's fault, who ought to have procured the minor to be infest, his father dying infest and in possession; also it was found, that no process could be granted against the heir of this tutor-dative for any omission of the tutor's, seeing the tutor had never found caution *de fide-li administratione* after his tutory; and as without caution the tutor could never have pursued *active*, so it was found, that except he had found caution, he could not be pursued by the minor *passive*; which decision is hard, because it was seen and shewn to the Lords, that the tutor had accepted the office, and had sworn and made faith before a judge, that he should do his duty, so that his omission to do that which was his own fault, ought not to have been found profitable to him: But so THE LORDS found, albeit no defender was compearing to dispute in this cause, but occurred to the Lords allanerly in considering the process.

Act. *M'Gill.*

Alt. _____

Clerk, *Hay.*

Fol. Dic. v. 1. p. 240. Durie p. 333.

1628. *July 2.*

HAMILTON *against* HAMILTON.

No 39.

Found in conformity with No 37. p. 3501.

IN an action of tutor compts, betwixt James Hamilton, and John Mean his curator, against Robert Hamilton in Preston, who was his tutor; THE LORDS found, that the tutor was not comptable in law to the minor, for the sum of