

1627. July 14.

NOBLE *against* NOBLE.

No. 96.

A tutor having obtained decree for the custody of his pupil against his mother, pursued her and her husband, who enjoyed the liferent of all the pupil's lands, for an aliment, and they having offered to entertain him *gratis*, the Lords did first prefer the mother to the custody of her child, upon this offer, though she was married to a second husband; but thereafter this was altered, and the child ordained to remain with the tutor, and the action for aliment sustained.

Fol. Dic. v. 2. p. 485. Durie.

* * * This case is No. 37. p. 407. *voce* ALIMENT.

1628. January 16.

MR. JAMES STEWART *against* COMMISSARY OF DUNKELD.

No. 97.

A tutor dative, although he has made faith *de fideli administratione*, and thereafter has neither found caution nor intromitted with the pupil's goods nor gear, cannot be pursued at the pupil's instance, nor his curators for a tutor count as he that might have intromitted.

Auchinleck MS. p. 243.

* * * The following seems to be the same case :

1628. January 26.

THE COMMISSARY OF DUNKELD *against* ROBERT ABERCROMBY.

No. 98.

The Commissary of Dunkeld, as assignee constituted by N. pursued Robert Abercromby, as heir, at least lawfully charged to enter heir, to his umquhile father, who was tutor to the foresaid N. to hear and see him decerned to make payment to him, as assignee foresaid, of the mails and duties of certain lands pertaining to N. cedent, which the defender's father, as tutor, had intromitted with, by virtue of his tutory. The pursuer, in absence of the party defender, who would not compear, produced for verifying of his libel, the act of tutory, and sicklike where the tutor had made faith before the Sheriff of Perth *de fideli administratione*; but there was no act of curatory produced. The Lords, though there was no compearance, would not sustain that alternative of the libel, "at the least might have intromitted with," in respect it was not shown that the tutor had found caution, before the doing whereof he was not lawful tutor, neither could intromit with his pupil's goods, if it had been opposed to him by the tenants, or others in whose hands they were, that he had not yet found caution: Sicklike he might have repented himself, *cum res adhuc essent integræ*, before caution found.

Spottiswood, p. 345.

* * * See Durie's report of this case, No. 38. p. 3502. *voce* DILIGENCE.