

1670. *February 21.*      *ERSKINE against WILSON.*

IN a reduction of a tutory-dative, pursued by Erskine against Wilson, upon this reason,—That Erskine was nearest agnate, and was to serve himself tutor-of-law : It was ANSWERED for the defender, That not only year and day was elapsed, but several years, during which there was another tutor-dative, who served until his death.

It was REPLIED, That the pursuer, within year and day, did come from Flanders of purpose to have administrate ; but, being employed during the war in one of the King's ships, he was taken, and so made prisoner of war, until of late that he was liberated, and immediately after came home to serve himself tutor-of-law ; and, therefore, being absent *reipublicæ causa, jure post liminii*, he hath right to the said office.

The Lords did sustain the answer, notwithstanding of this reply ; and would not find, that every private person, who engaged in the war willingly for his own advantage, could be said to be absent *reipublicæ causa*. But thereafter, the defender offering to renounce, upon sufficient caution to the pupil, and a discharge to himself, his tutory was reduced.

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1670. *February 22.*      *SCOT against SCOT of THIRLSTOUN.*

SIR Francis Scot of Thirlstoun being pursued, as heir to his father, for payment of 1000 merks, upon this ground, That his father, to whom he was heir, did attest a cautioner in a suspension, who was altogether insufficient, and is now bankrupt : It was ALLEGED for the defender, That the cautioner was *ten-tus et reputatus*, sufficient and responsible for the time ; in so far, that he offered to prove that he had a room stocked with his own goods, which paid 600 merks of tack-duty.

To this it was REPLIED, That the defender's father, who did attest the cautioner, could not but know that he was insufficient ; because he was his own chamberlain, or officer ; and was debtor to him in considerable sums of money, near the worth of the goods he had in stock.

The Lords did sustain the reply to elide the defence ; albeit it is sufficient to liberate the attestor, to condescend that the cautioner whom he attests has a visible estate : but here the knowledge of the debts did make a specialty.

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1670. *February 22.*      *The LAIRD of MELDRUM against JAMES and ALEXANDER LUMSDENS.*

The said Lumsdens having a wadset of Meldrum's lands, worth 16 chalders victual of yearly rent, for the sum of 10,000 merks, wherein he was obliged to be accountable for the surplus of the rent, which did exceed the annualrent of the