

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

1000 pounds, contained in the laird of Wedderburn's bond, addebted to the minor and his father before, notwithstanding that it was contended, that he should be answerable therefor, in regard that the cutator alleged, that the tutor had done no diligence against the debtor, neither personally by horning, or caption, nor really by comprising, without which doing of diligence, by the space of three years within his tutory, he *alleged* that he cannot be freed of that sum; for albeit the tutor *answered*, that he spared to deburse any of his pupil's money against the debtor, who was then irresponsal, and from whom he would not have gotten any better payment, for all the execution that might have been used, and so he might have done the pupil prejudice, by debursing and spending of his money needlessly; and which possibly, in respect of the event, would not have been allowed to him; yet the curators *replied*, that he ought to have done diligence, because he can never be freed, except he had used horning and caption, at least against the debtor, whereby to have discharged that duty, which was incumbent to him in his office, and he cannot excuse himself, by the insufficiency of the debtor, and the wasting of the pupil's goods thereon, seeing the debtor was not then bankrupt. THE LORDS found, that the tutor was not astricted to be answerable for this debt, for his said negligence, and that he needed not, neither to have used horning or caption, or comprising against the said debtor, except that the curators might shew, and make it known and alleged, that by the doing of the foresaid diligence, he would have recovered payment of the debtor; and that so the debtor is in worse case now, than he was in the foresaid time of the tutory.

Act. *Nicolson.*Alt. *Belsbes.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 241. Durie, p. 379.*

1667. July 9.

STEVEN against BOYD.

No 40.

If the pupil's debtors be unquestionably *solvendo*, the tutor can have no occasion to do diligence, but if a debtor or his cautioner be *vergens ad inopiam*, the tutor is bound to do all diligence for uplifting the sums, unless the debtor become entirely bankrupt suddenly, which the tutor could not foresee, in which case he is not liable.

A tutor is bound to do diligence according to the circumstances of the debtor; if there is land, he must apprise; if goods, poind; if sums, arrest; and, *in subsidium*, to use personal execution.

Fol. Dic. v. 1. p. 241. 242. Stair.

. See this case, No 35, p. 500.