

1558. May 9. THOMAS DISCHINGTON *against* MATHOU HAMILTOUN.

No. 40.

Ane minor beand past sevin zeiris of age, sould not be in the keiping of his mother thairefter; because his tutor, gif the pupill have allanerlie blanche landis, and the tutor be not narrest to succeid to him, sould have the keiping of his persoun, togidder with his tour, fortalice and manor-place, gif ony he hes, until his age of xiiij. zeiris compleit, except the tutor do dilapidat and waist the said pupil's gudis and geir; for he, beand a manifest abuser and waister thairof, sall not have his persoun in keiping; and it is to wit, that the tutor dative has the keiping of the pupill, and is preferrit thairintill to the narrest kinnisman, as to the father brother; bot the pupil's persoun sould not be in the keiping and custodie of the tutor, gif the tutor be narrest to succeid to him, or gif he has movit ony action or pley aganis him, tending ony wayis to the depriving him of his heritage or landis.

Balfour, p. 337.

* * The names of other cases are here given by Balfour, by which these propositions had been ascertained; viz. 1551, February 18, George Clepan against the Laird of Weymis; 1561, March 29, June 7, James Spalding against James Fleshour; 1548, May 16, Johne Crawford against Elizabeth Hunter.

* * The following is a branch of the same case.

1558. May 12. DISHINGTON *against* M. HAMILTON.

No. 41.

Anent the action pursued by Thomas Dishington, tutor testamentar of _____ for deliverance of the heirs of _____ to the said Thomas as tutor foresaid. It was desired by the said M. that the said Thomas should produce his title where he was tutor. The said Thomas produced an instrument; that he was made tutor by him, whom—to the bairns succeeded as heirs. It was alleged by the said M. that that was no sufficient title without he had been made tutor testamentar in a confirmed testament, or else that the said instrument had been confirmed and ratified by the Judge Ordinary; which allegiance of the said M. was repelled by the Lords, and the said title found good enough by the said instrument allenarly.

The Lords refused to deliver a pupil in custody to the tutor-testamentar, because he had intented a process of bastardy against the pupil.

And also it was alleged in the said action for the part of the said M. That howbeit the said Thomas was made, when he was made, tutor, as said is, yet he may nowise be tutor of the law, because he was not of fit age when he was made tutor required of the law. It was answered by the said Thomas, that howbeit he was not of perfect age at the time when he was made tutor, yet he was now of perfect age, and long before the moving of the plea; and howbeit the time of his minority the administration of his office was suspended; yet the office in itself was never null; but how soon he came to perfect age, he came to the dutiful administration of the said office; which allegiance of the said Thomas was found rele-