

No 6.

*** This case is also reported by Durie :

IN an action pursued by John Aitkin, as legatar to his mother, against Mr Peter Hewart one of the executors testamentars, for payment of the legacy ; litiscontestation being made, and some exceptions admitted to the defender's probation, upon diligence done by him and the rest of the defunct's executors, there being three executors of all, whereof he was only one, for the recovering in of the defunct's gear ; and upon payment made to sundry of the defunct's creditors, of debts owing by her to them, and incident being used by this defender against the son of umquhile Alexander Mowat, who was one of the said three executors, which umquhile Alexander had the keeping of the said writs, both discharges and diligences done ; likeas the incidents bore, that the writs foresaid were in the hands of the said umquhile Alexander when he died, and were intromitted with sinsyne by his said son, who was convened as haver thereof, for production of the same with his tutors and curators generally ; THE LORDS would not sustain this incident against this minor, being then not of the age of 11 years, but past 10 years of age ; seeing they found, that he, nor no other of that age, being within 12 years, could be convened as haver ; for in that age they found that he could not be capable of intromission, and so that neither incident nor principal action could be pursued against him *hoc nomine* as intromitter ; and this was found, albeit it was *replied* and libelled also in the summons *specificce*, that the writs libelled were in the minor's father's hands the time of his decease, and then were in his custody, and that sinsyne the same were in the defender's hands, who meddled with these writs *per expressum*, and retained the possession thereof, and had them still in his custody ; likeas also, in fortification thereof, the pursuer offered to prove, with the summons of the tenor foresaid, that the defender was heir to his father, and so was subject in law to make the writs forthcoming, which his father had when he died, and wherewith he himself had intromitted ; all which were repelled, seeing it was found that one of that age could not be capable of intromission ; neither was it respected, that he was convened with his tutors and curators generally, and could not be otherwise summoned, seeing he had neither tutor nor curator specially given to him.

Act. Hope.

Alt. Aiton, Stuart, Mowat et Lermonth.

Clerk, Scot.

Durie, p. 324.

1633. Narch 8. LORD ERSKINE against LAIRD of EDMISTON.

No 7.

THE Lord Erskine having incarcerated in the tolbooth of Edinburgh the Laird of Edmiston, being a pupil of 12 years of age only ; upon his supplication, the LORDS gave warrant to set him at liberty.

Fol. Dic. v. 1. p. 575. Spottiswood, (MINORS AND PUPILS.) p. 213.

. Auchinleck reports this case :

1633. *March 18.*—THE LAIRD of Edmiston being minor, is, by letters of caption, taken by the Lord Erskine, and incarcerated within the tolbooth of Edinburgh. He means himself by bill that he is content to renounce to be heir to his father, for whose debts he is incarcerated, and together with this bill produces a renunciation. THE LORDS ordain him to be put to liberty, in respect of his age, being but a bairn of 14 years of age, without prejudice to his creditors to pursue his lands and gear.

Auchinleck, MS. p. 136.

No 7.

1677. *January 31.* ———. *against MURRAY.*

THERE being a decret obtained against Patrick Murray, an infant of four years old, as charged to enter heir to his father,

THE LORDS decerned against him, but superceded execution till his pupillarity were past, in respect he had no tutor.

Fol. Dic. v. 1. p. 575. Stair, v. 2. p. 501.

No 8.

. Dirleton reports this case :

A PUPIL of four years of age, being pursued upon the passive title of a charge to enter heir, and the friends conceiving that it were fit to renounce, none of them being curators, nor being willing to meddle, and to authorise the pupil to renounce; the LORDS decerned, but superceded personal execution until the pupil should be past pupillarity.

Reporter, Castlebilk.

Dirleton, No 446. p. 217.

1707. *July 17.*

THE TUTORS of Sir ROBERT GORDON of Gordonston, Supplicants.

THE LORDS, upon a representation given in by the Tutors of Sir Robert Gordon of Gordonston, found that neither he, nor his Tutors were bound, in the ranking of the Creditors on Sir Patrick Ogilvy of Boyn's estate, to depone upon the verity of a debt for which he the pupil was a creditor by adjudication. And therefore stopped any certification against his interest for not deponing, until he were of age to depone; and allowed his interest to be ranked in the mean time.

Fol. Dic. v. 1. p. 575. Forbes, p. 184.

No 9.