1701. *June* 24. GUTHRIE and his TUTORS *against* EDGARTON.

No. 241.
Formalities of making up the inventory.

Guthrie and his tutors pursued Edgarton for payment of a sum contained in his bond. Alleged, He was not obliged to pay, because, by the 2d act 1672, it is competent to the minor's debtors to allege, that inventories are not made; *ergo*, if they be not *debite et legitime* given up, the same objection will take place: *Ita est* these inventories are null, because the nearest of kin on the mother's side are not cited for upgiving thereof. Answered, 1*mo*, They are not in the case of the said act of Parliament, which is only where inventories are not made: But here, not only are they given up, but this very debt pursued for is inserted therein; and though the nearest of kin on the mother's side are not cited, yet that was done by a pure mistake, because some of the tutors are the nearest of kin themselves on the mother's side. 2*do*, This objection is wholly *jus tertii* to the debtor, who will be fully secure, his debt being *per expressum* mentioned in the inventory. The Lords thought the inventory informal for want of the citation; and though some of the tutors were nearest of kin on the mother's side, yet they ought to have cited those who were next in degree to them *ex parte matris*: Yet the Lords found this debt being in the inventory, the debtor had no interest to propone this nullity, without prejudice to the tutors to cite the nearest of kin, as accords.

Fountainhall, v. 2. *p.* 115.

1702. *July* 14. BARGANY *against* HAMILTON.

No. 242.
A pupil sequestrated by the Court, in order to insure a free election of curators.

Mrs. Joanna Hamilton, niece to the Lord Bargany, being past twelve years old, and about to choose her curators, and in custody of the Lady Swinton, her aunt by the mother's side, and her father's relations apprehending she might be influenced in her nomination and election of curators to neglect her father's friends, there is a petition given in by my Lord Bargany, her uncle, craving she may be removed out of Swinton's family, and put and sequestrated with some indifferent person, where she may be at absolute freedom and liberty to choose her curators, without influence and imposition, and with due regard to her father's relations as well as her mother's, and that all may have free access to her, and none be debarred nor denied access till she make her nomination, and then she may be placed where the major part of her curators shall think fit to put her; and till then, that she be not enhanced nor monopolized as a property to either of the two contending parties. It was alleged for her, That the sequestration of pupils was more proper for the Privy Council than the Session; and that regard is always had, that they were not to be given to the custody of those who had the hope of succession; and that she had already raised and executed her brieves against the nearest of kin, both on her father's side and mother's, and

No. 242. ought not to be stopped therein. The Lords found they had been in use to sequestrate minors as well as the Council, and that my Lord Bargany could not claim her custody, being her nearest heir; and that minors have been oft imposed on in their elections, and that it merited the Parliament's consideration, that minors should not have that unbounded liberty to their own prejudice; therefore, they prorogated the diet of her election till November next, and ordained her to be delivered up to James Hamilton of Pencaitland, one of the Clerks of Session, to stay in his house till the 11th of November next, and all her friends indifferently to have access to her, and that she chuse betwixt the 1st and 10th of the said month.

Fountainhall, v. 2. p. 154.

1704. *November* 7.

WILLIAM DRUMMOND *against* COLONEL MENZIES'S HEIR.

No. 243.
May a pupil be sued for a debt?

William Drummond, writer in Edinburgh, pursued Colonel Menzies's heir for payment of 500 merks, contained in his predecessor's bond, on this passive title, That he had accepted a disposition with the burden of debts, and so *præceptione hæreditatis* was liable. Answered, I am only a pupil of seven or eight years old, and so can neither accept, repudiate, nor possess, law presuming that age to have no will or deliberate knowledge in such things, and therefore cannot be universally liable, unless he prove the minor to be *locupletior factus* by it. Replied, It is confessed, by a late act of Parliament, pupils are exeemed from personal execution by caption, till their age of fourteen; but to exeem their estates till then, is contrary to the analogy of all law; for if he be lesed by his tutors accepting a right, he can be reponed against their deed; but it were absurd to postpone creditors' diligence on that pretence, for if it be *hæreditas damnosa*, they may renounce and repudiate; and if they do not, they must be liable. The Lords considered, that pupils had two remedies; one by the *actia tutelæ* against their tutors; and the other by restitution against deeds done to their lesion; and that they could not burden the pursuer to prove the pupil was *lucratus*, but the tutors ought to repudiate, if they would free the pupil of this pursuit; and seing they did not, they repelled the defence, and found the minor liable for the debt.

Fountainhall, v. 2. p. 238.

1705. *February* 16. BALFOURS *against* FORRESTERS.

No. 244.
What is sufficient cause to remove tutors as suspect?

William Forrester, writer to the signet, having a considerable estate in money, near 100,000 merks, he, by his testament in 1705, names Mr. James Forrester, advocate, his brother, and others of his own friends, to be tutors to his children, but with the privileges of the 8th act of Parliament 1696; and these tutors having accepted, and managed by the space of two years and an half, there is a process