

1710. July 11.

MR ROBERT DUNBAR of Myreland, and other Tutors of Sir ROBERT GORDON of Gordonston, Supplicants.

No 10.

A pupil whose tutors were appointed in terms of the act 1696 to continue curators, not allowed to be sequestrated some days before his pupillarity expired, to prevent his being influenced in the election of curators, unless these tutors would positively renounce to be curators.

ALBEIT the Lords are in use to sequestrate a pupil some days before his pupillarity expires, to prevent his being influenced to his prejudice, in the election of his curators; yet they refused, upon the application of Myreland and other tutors of Sir Robert Gordon of Gordonston, to sequestrate Sir Robert any days before expiring of their tutory; in respect the tutors were appointed by the pupil's father, in the terms of the act 8th Parl. 1696, to continue curators; unless these would positively renounce to be curators. Albeit it was *alleged* for them, That they were not bound to declare their mind in that matter, till the ish of their office of tutory; but probably they would decline to be curators; and then the pupil would be in the same case as if he had no curators named; therefore he ought to be sequestrated some days before he go out of his pupillarity, to qualify him for making a good choice of curators in the event of the nominees refusing to accept.

Forbes, p. 419.

1747. January 27.

THOMSON against KER.

No 11.

A minor may be imprisoned on a decree for debt.

EDWARD KER having obtained a decree against Katharine Thomson while pupil *et indefensa*, soon after her pupillarity he charged her thereon; and, on a caption, imprisoned her in the tolbooth of Edinburgh.

In the suspension and reduction of this decree, and action of damages therewith conjoined, the question only turned upon the formality of the decree and regularity of the extract; but supposing the decree regular, it was no part of the complaint, nor thought illegal that the imprisonment was of a minor. Nay, it would rather appear from the act 41st, Sess. 6th, Parl. 1st, of King William, that before that act, even minors under pupillarity might have been imprisoned for a civil cause.

Fol. Dic. v. 4. p. 3. Kilkerran, (MINOR.) No 6. p. 348.

No 12.

Power competent to the Lords, in case of undue influence on a minor in the election of his curators.

1750. July 29.

BOWER, Complainer.

BOWER of Kincaldrum settled his estate, failing heirs of his own body, upon Alexander Bower eldest son of Bower of Easter Methney, and the heirs-male of his body; whom failing, upon Patrick Bower, eldest son to Bower of Kinnettles, &c.

About a year thereafter, Kincaldrum died without issue, whereby the succession opened to Alexander Bower, son of Easter Methney, an infant, whose affairs were managed by his father during his life; but upon his father's death, while he was about ten years of age, Archibald Bower, author of the History of the Popes, his nearest agnate, residing in England, and not being in a situation that made it fit for him to claim the office of tutor, Bower of Kinnettles, the next agnate, and whose family had the next interest in the estate, obtained a gift of tutory dative; but means were found to disappoint him of the custody of the pupil's person, by certain of his relations of the Popish religion, who carried him to France, where he was settled in the Scots College at Paris; and as soon as he arrived at the age of 14, a project was formed for their getting the management of his estate, which till now remained with Kinnettles the tutor-dative.

On July 12th 1749, there was a nomination signed by the boy at Paris, whereby he named and elected to be his curators five or six persons, and the accepters or survivors of them; and because he could not himself attend, he authorised an agent to raise the proper precepts or summonses for expeding the act of curatory. Accordingly such process was carried on before the Court of Session, where, as a matter of course passing among the regulations, it goes on with less observation than if it were before the Judge Ordinary; and at the same time, the persons summoned as nearest of kin of the father's side were really not the nearest but very remote relations; but on the mother's side there was no hazard in taking the nearest, they being of the popish religion.

But when the matter was brought so far, that at a calling on the 23d June 1750, the pursuer's procurator represented that the whole curators had accepted and given their oath *de fidei*, and craved they might be authorised, Kinnettles, from whom, though the nearest agnate, the matter had been kept a dead secret, having got notice of these proceedings, appeared by his procurator, representing, That he was nearest agnate, and objected to the proceedings as all null, in respect he, though a nearer agnate than any of those cited as such, had not been called; and here the process was dropped; the plot hatched in the Scots College at Paris was now discovered, and could not be carried into execution.

Upon this Kinnettles, whose interest in the minor and his estate has been above stated, applied to the Lords, setting forth the case, with a variety of other circumstances in relation to the singular management of the process, and craving that the Lords would, in terms of their act of sederunt of February 13th 1730, appoint a factor upon the minor's estate, signifying his own willingness to accept of the office, and craving that the Lords would at the same time authorise him to bestow such expense as should be proper or necessary towards recovering and bringing home the person of the minor; and give such other relief to the petitioner, on behalf of the minor his late pupil, as to their Lordships should seem meet.

No 12.

On advising this petition, the LORDS, on June 29th 1750, " Appointed the petitioner *curator bonis* to the said minor, upon his finding caution in terms of the act of sederunt; and in the mean time empowered him to lay out such sums of money as he should be advised were necessary towards recovering the person of the minor; and in the mean time stopped all further procedure in the process for election of curators."

The ground of law on which the Lords sisted further procedure in the process for election of curators was this, that wherever there is suspicion of undue management, or of imposition on the minor, it is competent to the Court *ex officio*, in order to prevent undue influence, to sequestrate the person of the minor for some time; whereof there is a precedent in the case of Sir Robert Gordon, No 10. p. 8910. And accordingly the doers for the minor in this case were let to know, that no curator of his choice could be appointed till he should appear in Court.

Kilkerran, (MINOR.) No 13. p. 354.

* * * D. Falconer reports this case :

1750. *July 31.*—WILLIAM BOWER of Kinnettes shewed, that his relation Alexander Bower, son of Alexander Bower of Easter Methney, had, by disposition made by Alexander Bower of Kincaldrum, succeeded to the said estate, the management whereof was taken up by his father Easter Methney, as his administrator in law, who continued it till his death in 1746, when he succeeded also to Easter Methney; whereupon the petitioner, being his nearest agnate, except Mr Archibald Bower, author of the History of the Popes, who was not in Scotland, obtained a gift of tutory, and entered upon the administration; but that an aunt of the pupil's, who had his person in her custody, deceived the petitioner, and carried the pupil abroad, and placed him in the Scots College in Paris, to be educated in the Popish religion.

That Alexander Bower's pupillarity being now expired, an action was brought in his name, before the Court of Session, for the choice of curators, wherein were called certain persons, not his nearest relations on the father's side; and as the said action had proceeded, so far as it was carried on, without the appearance of any defender, several other irregularities had been committed; the intent thereof being, that by getting a nomination authorised, without the knowledge of the minor's relations on the father's side, his estate might be put into a management, whereby he might be supported in the said scheme of a Popish education. That when no more remained but the authorising of the curators, the petitioner having got notice of what was carrying on, appeared, and alleged he himself was a nearer agnate than any cited, and offered to object to the nomination, whereupon he was appointed to prove his propinquity and there the process stopt.

That, as there was no authority to manage the minor's estate, he now prayed the Lords to name him factor *loco curatoris*, and to empower him to lay out money for bringing home the minor.

No 12.

"THE LORDS discharged any further procedure in the action, and appointed the petitioner factor, granting warrant to him to lay out a sum of money for bringing home the minor." See TUTOR AND PUPIL.

Petitioner, *W. Grant*.

D. Falconer, v. 2. No. 156. p. 180.

S E C T. II.

Minor's privileges.—Oath.—Process at a minor's instance to sell land for payment of his debt.—*Privilegiatus contra privilegiatum*.—How far liable for goods and money furnished to him.—And for money borrowed by his tutor.—May chuse the place of his residence.—Entitled to examine the state of his affairs.—Can a minor pupil contract marriage?—Can a minor be a tutor?—An arbiter?—or a Commissioner of Supply?

1548. June 9.

Mr JOHN HENRYSON of —, against JAMES HENRYSON of Fordel.

NA persoun may be ane tutor to ane pupill be the law of this realme, except he be of 25 zeiris compleit; zit nevertheless, albeit he be within the said age, and zit of sufficient judgment, and qualiteis, the King may dispense with him touching his les age; and gif he be tutor of law, the King may charge all persounis that sall happin to pass upon the inqueist for service of the brief of tutorie, to serve him tutor, notwithstanding of his les age; certifying thame, that throw doing of the samin thay sall incur na danger or errour thairthrow.

Fol. Dic. v. 1. p. 576. Balfour, (TUTOR.) No 21. p. 118.

No 13.

The King may dispense with the minority of a tutor in law, and may charge the inquest to serve him notwithstanding the act 51. Parl. 1474.

1558. May 9.

DISHINGTON against HAMILTON.

ANENT the action pursued by Thomas Dishington, tutor testamentar of Andrew —, against Matthew Hamilton for deliverance of the heirs of Andrew to the said Thomas as tutor foresaid, it was desired by the said Matthew, that the said Thomas should produce his title where he was tutor. The said

No 14.

The nomination of a minor to be a tutor is not null, but he may commence his