No. 129. delivered to the pursuer, because he had chosen curators. Replied, The act of curatory was null, in respect the minor was yet within pupillarity, which he offered to prove by the mother's oath, by whose means the curators were chosen only to defraud the tutor. Duplied, Her oath cannot be taken in prejudice of the curators, who are not called here, neither can the act of curatory be taken away *hoc ordine*, but it must be reduced. The Lords repelled the allegeance, in respect of the reply.

Spotiswood, p. 348.

1634. *December* 20. A. *against* B.

No. 130.

A tutor being pursued by the curators to exhibit and deliver to them the pupil, alleges, The pupil is minor, which he offers him to prove. It is answered by the curators, Ought to be repelled, in respect of the act of curatory standing, which ought to be reduced. The Lords sustained the allegeance for the tutor.

Auchinleck MS. p. 246.

1635. *July* 18. EDMISTON *against* L. EDMISTON.

No. 131.
Liability of the factor of a tutor.

One Edmiston, sister to the Lady Lugton, being executrix decerned to umquhile Edmiston her brother, who was provided by umquhile Andrew Edmiston of that ilk his father, to certain lands of Mellerstains, Fala, and others, being the son, and she one of the daughters, gotten by the said umquhile Andrew in his second marriage, with one Gordon his second wife, and whereto he was obliged to provide the bairns of that second marriage, by the contract of marriage made betwixt them; the said brother being deceased, this pursuer being one of the defunct's sisters, and she being only decerned executrix to him, and having licence to pursue, convenes ——— Edmiston now of that ilk, as heir to Sir John Edmiston of that ilk, his father, which Sir John was the eldest son of the said umquhile Andrew Edmiston of that ilk, begotten of the first marriage, and who survived the pursuer's brother, the only son of the second marriage, as said is; and which umquhile Sir John half brother to his defunct brother, surviving his said half brother, and for his non-age, not being capable of the office to be tutor to him, acquired a right of factory, to intromit with the said pupil's rents from him, who was served tutor lawful, and according to that factory intromitted with the rents and duties of the lands, whereto he was appointed to be provided by the contract of marriage foresaid, and in the which intromission the said umquhile Sir John continued, being factor after he was major, and so after he was capable of the office of tutory continually, to the time of his said half brother's decease; the pursuer being executrix, and having licence, as said is, pursues the heir of the said factor, for payment of all the duties of the saids lands, intromitted with by the said factor,

of all years since the decease of the said umquhile Andrew Edmiston their father, to the time of the decease of the minor. And the defender alleging, that the minor was not infeft in the said lands, whereby that as he not being seised could not have action for the mails of the lands, no more can his executor be heard to pursue therefore, unless he had been infeft; and this he alleged, was most competent to be proponed for him, who was both a minor, and only convened as heir to the factor of a tutor, the tutor's self never being convened, nor discussed, as ought to be first done; attour he alleged, that the lands libelled were in non-entry in the superior's hands, the gift of which non-entry was granted to the defender's father, and declared, and by virtue whereof he intromitted; and as the superior's self might have intromitted, after declarator, *quo casu* the minor could never have repeated these duties, no more can they be repeated from the donatar, even as they could not have been repeated from any stranger, that had been donatar. The Lords repelled both these allegeances, for they found, that the factor was liable to all that the tutor's self was liable in law to the minor, his heirs and executors; and the rather in this case, because the said factor had obliged himself to relieve the tutor of all, which might be in law exacted from him; and the Lords found, that the tutor ought to have obtained the pupil infeft in these lands, whereto his father had provided him, and wherein his father died infeft; which being the tutor's fault, in not doing the same, ought alike to burden the factor; and the rather also, because it was offered to be proved, that the factor had intromitted with the duties of the lands libelled, all the years acclaimed; neither was the non-entry respected to elide the pursuit, because the same becoming in the factor's person, was esteemed, as if the tutor had obtained the same, *quo casu* the tutor could never have obtruded the same against the pupil, seeing in law it would have been presumed to have been acquired to the minor's use; and if a stranger had obtained it, yet the tutor in law was obliged to have relieved the pupil of all prejudice he might have sustained thereby, seeing in law he might have compelled the superior to enter the minor, and thereby have purged all non-entry, which if he omitted to do, ought to prejudge himself, and not the minor, and consequently the factor was in that same case as the tutor, whom he was obliged to relieve, as said is; for albeit there might be some question in a ward, if the tutor, or his factor had purchased the minor's ward from the superior, yet it is not alike in non-entry; for in the one, viz. the ward, the pursuer cannot be compelled to dispone the ward to the minor by no law, but he has the same in his power to retain it to himself, or otherwise, at his pleasure, to dispone it to whom he pleases; but in non-entries, it is not so; for the superior in law may be compelled to enter the minor, where there is no ward, and so by diligence to charge the superior to enter him, whereby the non-entry may be evited.

No. 131.

Act. *Stewart.* Alt. *Nicolson.* Clerk, *Scot.*

Durie, p. 772.