

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 allegiance, 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 allegiance 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,