

the said Jean being charged to pay, she suspends, and desires, seeing she is a minor, and that her father was only a cautioner for that principal debtor, who sinsyne became her tutor ; and so seeing she is distrest for her tutor's debt, therefore that she might be free of any personal execution to be used against her by caption, or warding of her person during her minority. THE LORDS superseded all personal execution of caption and warding of the person of the said Jean, for the space of a year after this date ; after the expiring whereof, they would consider, if any further prorogation should be granted, but prejudice of all other lawful execution against her goods and lands ; this woman was past 14 years of age.

Act. *Cunninghame.*

Alt. _____

Clerk, *Hay.**Durie, p. 129.*

No 5.

1628. *January 9.*AITKEN *against* HEWAT.

IN an exhibition of evidents, the LORDS found no process against John Hewat, who was convened as haver of the evidents, because it was alleged that he was within ten years of age, and so could not be called as haver.

Fol. Dic. v. 1. p. 575. Kerse, MS. fol. 186.

No 6.

. Spottiswood reports this case :

IN the action pursued by Aitkin against Mr Peter Ewart, the defender having raised an incident for recovery of some writs that were in the keeping and custody of umquhile Alexander Mowat, and now were in the hands of John Mowat his eldest lawful son, the LORDS would not sustain the incident against John Mowat, because he was a pupil within the age of 12 years, for it was thought that a pupil could not be convened as haver, seeing he had not himself (so to say) not being *sui potens*, and it was holden *pro confesso*, that a pupil could not *inchoare possessionem rei alienæ* ; but the question was, whether the pupil might continue his father's possession (as was in this case), and so might be convened as haver of any writs which were in his father's hands the time of his decease ; which sundry of the Lords thought might be, because otherwise it might be prejudicial to them that had writs or evidents lying in other men's hands. Yet the most part thought a pupil could not *teneri de facto non magis alieno quam proprio*, unless he were heir to his father ; or if he have tutors, they may be convened *nomine tutorio* as havers, and not the pupil.

Spottiswood, (MINORS AND PUPILS.) p. 211.

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.