

Magdalen Scot assigned this claim to John Fife her husband, who pursued the relict and executrix of Sir James Nicolson, to make good the inventory which had been dilapidated, he alleged, by his wife's father and administrator in law.

No. 285.

Answered : An administrator in law is not bound to find caution, and the caution in the confirmation is not found for him to the infant, but for the infant, to all having interest in the defunct's effects ; and accordingly she is taken bound to relieve him.

Replied : Although the confirmation is made in the name of the infant having right, yet when the inventory is to be given up by, and the intromission committed to another, the caution is understood to be for the intromitter, and in favour of the person having interest ; to which purpose Sir Thomas Hope gives his opinion expressly, Min. Pract. fol. 30. § 97.

The Commissaries, before whom the action was first brought, had found Sir James Nicolson, the cautioner in the confirmation, was not cautioner for the administrator in law to the minor ; and therefore sustained the defence."

The Lords, 7th December 1749, found that Sir James Nicolson was cautioner in the confirmation for Scot of Maleny, the administrator in law ; and therefore repelled the defence ; and on bill and answers this day, adhered.

Act. Lockhart. Alt. R. Craigie and H. Home. Reporter, Shewalton. Clerk, Pringle,
D. Falconer, v. 2. No. 129. p. 145.

* * See No. 52. p. 2309. voce CLAUSE.

1751. January 23.

WEIR against HAMILTONS.

Charles Weir, and the deceased William Hamilton, having been appointed by Thomas Dunning, tutors to his children, were afterwards removed as suspect. In the action brought against them to account, during the dependence whereof William Hamilton died, Charles Weir was *inter alia* found liable, for omission to recover payment from the debtors to the defunct, in the sum of ———, in consequence of an interlocutor of the Ordinary, in which he acquiesced, " Finding it presumed, that the debtors, who were then insolvent, were solvent at the commencement of the tutory ; but finding it relevant for the tutors to prove they were insolvent at the commencement of the tutory, or became insolvent within six months thereafter."

In the action now pursued by Weir against the representatives of William Hamilton the co-tutor, for relief of the said sum, a defence was proponed, that the defender's father having died before any procedure had in the process, on which the said decree followed against Weir, it must be competent to the defenders to plead every defence against Weir which it was competent to him to have pleaded in the original process, whose omission cannot prejudice them, as their father was

No. 286.

Qui incumbit probatio that the debtors to the pupil were insolvent at the commencement of the tutory ?

No. 286.

no party to it; and they alleged that Weir had omitted to plead, That there lies no presumption against a tutor, that the defunct's debtors, who were then insolvent, were solvent at the commencement of the tutory: That the rule in all cases is, that the pursuer must prove his libel; and as the libel, by the minor and his new tutor, was, That the minor had sustained damage by the omission of his tutors, it was incumbent upon the then pursuers to prove, that the debtors were become in worse circumstances than they were in when the tutory commenced.

The Lords "Repelled the defence."

It was thought to be rightly judged in the process against Weir, That the presumption is for the solvency of the debtors at the commencement of the tutory, and that the tutor can only be exonerated for not doing diligence, upon proof brought by him that they were insolvent at the commencement of the tutory, or became such within six months thereafter.

Kilkerran, No. 14. p. 590.

1755. December 12.

HENRIETTA, DUCHESS DOWAGER of GORDON, *against* His MAJESTY'S
ADVOCATE.

No. 287.

Furnishings
by a curatrix
to a minor
beyond the
interest of his
patrimony,
sustained as
an article of
discharge to
the curatrix.

Lord Lewis Gordon having been attainted of high treason by statute 19th of the King, and his estates surveyed, the Duchess of Gordon, his mother, entered a claim for £.1433 Sterling. Of this sum £.1345 Sterling had been advanced by the claimant in payment of bills drawn by Lord Lewis, from the 7th of January, 1740, to the 8th of June, 1745, upon merchants with whom the Duchess had given him credit. And the remaining £.87 was made up of accounts of furnishings which she had likewise paid for him.

Objected for the Crown: *1mo*, The bills were all drawn by the late Lord Lewis when a minor, and the Duchess his curatrix ought not to have advanced more for his annual expense than the yearly interest of his fortune, which did not exceed £.1000 Sterling capital; so was found 17th November, 1680, Sandilands against Telfer, No. 201. p. 16300. which judgment ought to be followed *a fortiori* in the present case; for that during a great part of the time in which these bills were drawn, Lord Lewis enjoyed a lucrative employment in his Majesty's service, being a Lieutenant on board a ship of war.

2do, As these advances made by the Duchess exceed the total amount of her son's patrimony, it cannot be imagined she intended that a debt was thereby to be created against him, to reduce him to bankruptcy, or that she had any view to repetition from him of a sum greater than all he had in the world; more especially, as she took no obligation from him to repay these sums, it must be presumed that they were advanced by her *ex materna pietate et animo donandi*. And further, as his Majesty, in the year 1735, granted to the Duchess a pension of £.1000 Sterling per annum for the better support of herself and children, which pension she