

No. 283. without farther title. The pupil sued him to account, and obtained decree, but failed to recover. She then sued the clerk of the service for having neglected to take caution. Found not liable.

*Kilkerran. D. Falconer.*

\* \* This case is No. 50. p. 13964. *voce* REPARATION.

1749. *November 24.* JAMES HALY *against* WILLIAM SANDS.

No. 284.

The tutors of William Haly of Kinneddar advertised his mansion-house, and some land with it, to be set by roup for eleven years; and accordingly a roup was held; the articles wrote by one of the tutors, and William Sands of Langside pronounced by the Judge the highest offerer, who signed his offer, and was put in possession; and the tenants, by order, furnished him with some carriages agreed on. But the articles had not been signed by any tutor, nor the roup itself by the Judge who acted, who also was not appointed by writ.

James Haly, goldsmith in Edinburgh, one of the tutors, and factor for the rest, executed a warning, and pursued the tenant to remove, as he had no written tack.

The defence was laid upon the circumstances of the roup; and that the tutors were not consulting their pupil's interest, but the private advantage of James Haly, who wanted the house for himself.

The Lords sustained the defence, and found expenses due, and ordained them to be paid by the pursuer himself, and not stated to his pupil.

Act. *R. Craigie.* Alt. *Ferguson.* Reporter, *Strichen.* Clerk, *Kirkpatrick.*

*D. Falconer, v. 2. No. 101. p. 116.*

1750. *February 6.* JOHN FIFE *against* The LADY NICOLSON.

No. 285.

An administrator in law confirmed a legacy left to his child. The caution found for him was found to be to the child, as well as to others interested in the subject.

Sir John Lauder of Fountainhall, Senator of the College of Justice, assigned to his grandchild Magdalen Scot, the infant daughter of Thomas Scot of Maleny, a bond for 2,000 merks Scots, which he afterwards received payment of. Thomas Scot confirmed his daughter, executrix-creditrrix to her grandfather; and gave up in inventory another bond for the like sum, which the Commissaries granted the power of intromitting with, "to the said Thomas Scot, as administrator of the law to, and for the use and behoof of the said Magdalen Scot;" providing she should render just count and reckoning of her intromissions. The cautioner was Sir James Nicolson of that ilk; and Thomas Scot "bound himself, and the said executrix, for their said cautioner's relief."

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 ?