

CAUTIO MUTIANA.

1662. July 25. NASMITH *against* JAFFRAY.

No 1.

A LEGACY being left conditionally, 'if the legatar follow the executor's advice,' the legacy was found due; but the LORDS declared, in case the legatar followed not the executor's advice, he should be liable to refund; but they would not oblige him to find caution to that effect, the condition being so general.

Fol. Dic. v. I. p. 123. Stair, v. I. p. 125.

. See The particulars of this case, *voce* HERITABLE and MOVEABLE.

1695. December 23. CANON *against* CANON.

No 2.

The acceptor of a disposition *omnium bonorum*, with the burden of all the granter's debts, but under the *proviso*, that the debts do not exceed the value of the estate, found not obliged to find *cautionem mutiam*.

CANON of Barley pursuing Canon of Headmark, to pay a sum due to him by his predecessor, as he who accepted a disposition with the burden of his debts; and the disposition being produced, at advising of the cause, he alleged that it bore this quality, providing the debts due do not exceed the value of the estate, which cannot be cognosced till all the creditors were cited, and their debts compared with the heritage; at least, if he be decerned to pay this pursuer, as he who had done most diligence, (laws not being made for the negligent) he ought to find him *cautio mutiana* to refund proportionally, if more debt emerged than the heritage can pay.—THE LORDS found this desire unreasonable, and refused his bill; for then he who shall now enter heir *cum beneficio inventarii*, conform to the late statute 1695, may refuse payment till all the creditors be discussed, and an executor might propone the same exception; whereas all the remedy by law provided was, if a less preferable creditor got first payment, no action lay at the other creditor's instance against the executor, if the inventory was exhausted by prior sentences; but they were left to their action of repetition from these other creditors, *l. ult. C. de jure delib.*

Fol. Dic. v. I. p. 123. Fountainhall, v. I. p. 680.

See APPENDIX.