1711. *December* 14.

ALEXANDER SWINTON, Factor for MARY BONNAR, *against* JAMES MAXWELL of Leckiebank.

No 36.
A cautioner for an executor has the benefit of discussion.

JAMES MAXWELL, tutor dative to Mr John Bonnar of Greigston, a fatuous person, having confirmed Mr John sole executor *qua* nearest of kin to the deceased William Bonnar his brother, and given up in inventory a share of his capital stock in the African Company, and bound himself as cautioner for Mr John, he uplifted that share, and was thereafter removed from his office by sentence of the Lords, substituting Moncrieff of Mornipea in his room. Alexander Swinton, as factor for Mary Bonnar, Mr William's sister, pursued James Maxwell for her part of the sum confirmed.

Answered for the defender; Mr John Bonnar is principal executor, and liable in the first place to the pursuer as nearest of kin; but the defender cannot be liable as tutor, because he is exauctorated; unless it could be instructed that he hath of the pupil's effects in his hand; nor can he be insisted against as cautioner for the executor, till the principal be first discussed.

Replied for the pursuer; A fatuous person confirmed executor is but *nomine tenus* such, the tutor being in effect executor; for no furious or fatuous person can be bound in law *nisi ex re*, or *quantum locupletior factus est;* and by the civil law he could not enter heir, because incapable to consent, *L.* 63. *ff. de acquir. vel om. Hæred.*; consequently cannot be an executor, who is *hæres in mobilibus;* therefore one becoming cautioner for an executor he knows to be fatuous, is either not bound at all, or bound *tanquam reus principalis;* and if such an executor were, he might be ruined by the faults of a malversing tutor. 2*do*, Though an executor or his tutor may have *jus exigendi*, they have not the property of the defunct's goods and gear. Bonds granted to executors for the defunct's means, are affectable by his creditors, who are preferable to the creditors of the executor, Stair, Inst. p. 516. (538.); 16th December 1674, L. Kelhead *contra* Irving, No 2. p. 3124.; 24th Nov. 1675, Elies *contra* Hall, *voce* HUSBAND and WIFE. The defunct's moveables fall not under the executor's single escheat, in prejudice of the defunct's creditors, relict, nearest of kin, &c. but only in so far as the executor's own share and interest therein can extend, 21st December 1671, Gordon *contra* L. Drum, *voce* EXECUTOR; Stair, Inst. p. 516. (538.) & p. 413. (431.); whence it is evident, that Leckiebank, who uplifted the defunct's money, is liable to the pursuer, one of his nearest of kin, for her share, either as having the same in his hand, or as *dolo desiens possidere.*

Duplied for the defender; *Furiosus et pupillus obligantur ubi ex re actio venit, L.* 46. *de Obli. et Act.;* as in the action *communi dividundo*, or, which is of the same nature, *in actione familiæ herciscundæ.* Whatever doubt there was by the old Roman law as to the capacity of furious persons to be heirs, *L.* 63. *ff. de acq. vel om. hæred.;* yet *jure novo* they might not only *adire hæreditatem*, or *petere*

No 36. *bonorum possessionem*; but there lay a necessity upon their curators to do it for them, *L.* 7. § 3. *C. de Curat. Furiosi et Prodigi. Bruneman, ibid.* and the furious persons thereby become bound both to *creditores hæreditarii*, and to the rest of the heirs. The fancied absurdities that the pursuer would infer from such an obligation, are no other than what all pupils are exposed to, whose tutors may dilapidate their effects; but the minors lesed may be redressed by restitution, and action against their tutors and their cautioners. 2*do*, Whatever right a defunct's creditors may have in his effects while extant, in a competition with the creditors of the executor; it is plain, that the executor stands principally bound to the defunct's creditors or nearest of kin, and his cautioners only *subsidiarie*. Where an executor is *sub tutela*, the tutor acts but *tutorio nomine*, and can only be pursued by the defunct's creditor or nearest of kin *eo nomine*, or *in quantum* he has of the pupil's effects; and though a nearest of kin might *rei vindicatione* recover any part of an extant *species* belonging to the defunct, he hath only a personal action for *nomina et quantitates* against the executor; so that by payment of the money to the defender as tutor, his pupil became owner thereof, and it mixed with his other effects, for which the defender was accountable to his pupil.

The Lords found, That Mr John Bonnar, the fatuous person, was principal executor, and liable in the first place to the pursuer; and that the defender could only be pursued *tutorio nomine*, or as cautioner for the executor; and found, that he could not be liable *tutorio nomine*, now after he is exauctorated, unless the pursuer instruct that the defender hath the pupil's effects in his hand; and he could not be insisted against as cautioner for the executor, till he and his present tutor be first discussed.

Fol. Dic. v. 1. *p.* 248. *Forbes, p.* 553.

*** Fountainhall reports the same case:

Mr John Bonnar of Greigston having a share in the African Company, put in by a deceased brother; and himself being by an inquest found fatuous and furious; and James Maxwell of Leckiebank being his tutor dative, he confirmed his fatuous pupil executor, as nearest of kin to his brother, and by that title uplifted the share. Mary Bonnar his sister being equally near, she and Bailie Swinton her factor pursue Maxwell the uplifter and intromitter, for her half.—*Alleged*, That Moncrieff of Mornipaw, as nearer in blood, has reduced my tutory, and got himself installed in the office, as marked, *voce* Idiotry and Furiosity; so he and the fatuous person are the direct parties you ought to pursue, for I only acted as his tutor at the time, and am now exauctorate; and though I uplifted it, yet the office was in Greigston's person, and he is the true contradictor. And *esto* I uplifted it, yet I am accountable to him, and *de facto* wared it out upon his affairs, and am super-expended, and so have retention in my own hands till my accounts be cleared and you are to blame for your

negligence in not compearing when the edict of executry was served; for then you would have been conjoined in the office; and I was not removed for any malverse, but only because Mornipaw was nearer.—*Answered*, When infants or furious persons are confirmed executors, they have only the name, but the tutors have truly the office and administration, and are bound to distribute the effects to all having interest; and though he be now *functus*, yet he intromitted, and so ought *susceptum perficere munus*; and he can have no action against the fatuous man, seeing he does not instruct he has paid it to his present tutor; and such are only liable in *quantum locupletiores facti sunt*, and no further; and therefore he is under the same obligation to count to the nearest of kin, as if he had been actually confirmed executor himself; and if he had suffered it to perish for want of diligence, he, and the idiot fatuous person would have been liable. *Vide l.* 25. *D. de fidejuss.* and Vinnius *ad* § 1. *Instit. dict. tit.* who says, *qui pro prodigo fidejussit*, (as Leckiebank is here cautioner in the testament) *obligator non ut fidejussor sed ut principalis reus, in cujus persona sciebat obligationem non consistere, ideo donare voluisse videtur.*——THE LORDS found he could have no action against Leckiebank, the former tutor, till he first discussed the fatuous person and Mornipaw his present tutor. No 36.

Fountainhall, v. 2. *p.* 688.

1714. *June* 17. MR PATRICK STRACHAN *against* DAVID FORBES.

No 37.
A cautioner in a suspension, after the letters are found orderly proceeded, may be charged summarily upon the bond of caution, without discussing the principal debtor.

MR PATRICK STRACHAN being charged upon a bond of cautionry in a suspension, after the letters had been found orderly proceeded, he offers a bill of suspension on this reason, that he being a cautioner in a suspension he has *beneficium ordinis*, and the principal having an estate which can be condescended upon, the same ought to be discussed; for albeit charges do ordinarily proceed against cautioners in a suspension, without discussing the principal, yet it cannot be instanced, where ever it was found that a cautioner had not *beneficium ordinis*, which the law provides to all cautioners where it is not renounced.

It was *answered*, 1*mo*, By the common custom charges do proceed against cautioners in a suspension so soon as the letters are found orderly proceeded; and though there were no decision to support the practice, yet constant custom and acquiescence of parties is sufficient, there being no decision in the contrary; and if this were sustained, the same would hold in the case of cautioners *judicatum solvi*, which is regularly exacted before the Admiralty, and in many courts of justice abroad. But this allegeance has been repelled in a stronger case, Hume *contra* Hume, No 69. p. 2142. where the attester of a cautioner in a second suspension *alleged*, that he was not convenable till the cautioner in a first suspension was discussed, which the Lords repelled.

2*do*, A cautioner in a suspension is not properly a cautioner in the sense of law, bound with and for the principal debtor, which is reckoned a subsidiary