No 31.

neral rule; 5th February 1703, Gordon *contra* The Heirs of Johnston of Polton; Fountainhall, v. 2. p. 178. *voce* Presumption.

It was further *contended* for the defenders, That, at least to the extent of the sums paid to the builder, after the erroneous report of the tradesmen appointed by the heritors, the claim should be disallowed. This circumstance, however, had no weight with the Court, no precaution of this sort having been stipulated in the bond granted by the cautioners.

'The Lords found the cautioners liable.'

Reporter, *Lord Dreghorn.* Act. *Blair.* Alt. *Wight.* Clerk, *Gordon.*

Craigie. *Fol. Dic. v. 3. p. 119. Fac. Col. No 44. p. 74.*

1790. *November* 18.

No 32.
A cautionary obligation must be limited strictly to the terms in which it was expressed, though the meaning of the parties may appear to extend further.

The University of Glasgow, *against* The Earl of Selkirk, and Others.

The University of Glasgow, in 1745, appointed a factor over the estates belonging to it; and, on this occasion, a contract was executed between the University and the factor, to which, in the character of cautioners for him, the Earl of Selkirk, William Miller, and Alexander Stirling were parties.

In this contract, the subjects of the factory were specially enumerated and described, and particularly the following: 'All and sundry the fruits, rents, 'teind-duties, casualties, and emoluments, real or casual, belonging to the 'Archbishoprick of Glasgow, which the said University has been in use to re-'ceive formerly, and has right to uplift and receive, *by virtue of a lease granted* '*by the Crown, to endure for nineteen years after Whitsunday* 1736:' Which rents and emoluments the factor was empowered to levy 'for the crop and year of 'God 1745, and in time coming thereafter, *ay and until these presents be recalled,* 'by a writ under the hands of the principal and professors of the University.'

On the expiration of this lease in 1755, a new one was obtained; and for many years afterwards the factor continued in the management.

At length, upon his resignation, and a final settlement of his accounts, it appearing, that during the period posterior to the expiration of the above-mentioned lease, there was a considerable deficiency as to those rents in particular, the University raised an action against Lord Selkirk and the heirs of the other cautioners, for payment of that sum; in defence against which, they

Pleaded: A particular tack having been referred to in the contract, the cautioners were not liable for intromissions subsequent to its expiration; since obligations of that sort ought to be strictly limited by the terms in which they are conceived.

Although of deeds of settlement *mortis causa*, or of *bonæ fidei* contracts where mutual value is given, a latitude of interpretation may be allowed, conformable to the will of the granter, when clearly discovered, though not fully

expressed; cautionary engagements being *strictissimi juris*, admit no such license. In them, no higher or more extensive obligation on the cautioners, than that which the terms clearly import, can be inferred from any other circumstances. Rem. Dec. v. 2. p. 296. 2d June 1749, Colt *contra* Angus, (*voce* WRIT,) Princ. of Equity, p. 42. No 32.

Answered: The same motives that induced the cautioners to interpose at all, would naturally incline them to continue their engagement as long as the factory was to last; and that the University, of whose revenue the Archbishoprick was always considered as a permanent portion, so understood the matter, is evinced, by their not requiring a renewal of the caution when the lease came to expire. The particulars of this, were mentioned merely in the way of description; while the endurance of that obligation was sufficiently intimated by the expression, relative to the duration of the factory, 'ay and until these presents be recalled.'

Nor is there any ground for applying to cautionary obligations the same strictness of construction that distinguishes the limitations or fetters of an entail. Even in cases where writing is required as a solemnity, effect has been given to the meaning of the parties, though not completely expressed in the instrument. Thus teinds, a subject distinct from lands, have been found to be implied in a disposition where they were not mentioned. Dict. of Dec. (*voce* TEINDS;) Kilkerran, (*voce* TEINDS.)

Neither is there any solidity in the distinction, founded on the supposition of no value being given for a cautionary obligation; for, by the creditor, value is plainly given, which otherwise would have been with-held. Such a mode of construction, by which a mere imperfection or inaccuracy in description is made to limit the obligation, would lead to the most unreasonable consequences. For example, part of the rents of the Archbishoprick are described as payable to the town of Glasgow, which is true; but suppose they had been conveyed to another, then that inaccuracy would thus have so far annulled the cautionary obligation. The same may be said of teinds described as set to the Duke of Montrose, supposing them to have been in fact set to some other person. As no doubt could have been entertained of the meaning of parties, the defenders doctrine applied to such cases appears in its true light; and yet the present admits as little question with respect to intention.

Of the contrary and more reasonable interpretation of cautionary engagements, the following cases are examples: 23d January 1711, Creditors of Park Hay *contra* Falconer, No 27. p. 2097.; Fountainhall, 18th June 1706, Hamilton *contra* Calder, No 24. p. 2091.; Kilkerran, 6th December 1749, Scot *contra* Carnegie, No 15. p. 2080.; 5th July 1743, Hamilton and Baird *contra* Hunter, Kilkerran, p. 188. (*voce* FALSA DEMONSTRATIO;) 8th July 1758, Grant *contra* Forbes, No 16. p. 2081.

The cause was reported by the Lord Ordinary, when it was

Observed on the Bench: The cautioners certainly intended to continue bound during the subsistence of this factory. But that intention is not sufficient.

No 32. Cautionary engagements are not, from ideas of the views of parties, to be extended beyond the precise import of the words by which they are expressed.

'THE LORDS sustained the defence, that the defenders can only be liable for the intromissions of the factor with the rents, profits, and teind-duties of the Archbishoprick of Glasgow, during the period of the lease thereof, mentioned in the factory and contract; but for none of the intromissions had by him under any subsequent leases of that Archbishoprick, that may have been procured by the pursuers.'

A petition reclaiming against this judgment, was refused without answers.

Reporter, *Lord Swinton.* Act. *Rolland, Jo. Miller.* Alt. *Wight.* Clerk, *Menzies.*
Stewart. *Fol. Dic. v.* 3. *p.* 119. *Fac. Col. No* 150. *p.* 299.

1790. *November* 18.

The UNIVERSITY of GLASGOW, *against* Sir WILLIAM MILLER and Mrs JANET STIRLING.

No 33.
A cautionary obligation does not fall by the cautioner's death, but continues upon his heirs.

ALEXANDER STIRLING and William Miller, along with the Earl of Selkirk, who, as mentioned in the preceding report, interposed as cautioners in behalf of a factor for the University of Glasgow, 'Bound and obliged themselves, conjunctly and severally, their heirs, executors, and successors, that the factor 'should make payment to the University, of his whole intromissions with the 'rents of its estate.'

Upon a final settlement of accounts, a balance arose against the factor; but that debt was not incurred till after the deaths of Messrs Miller and Stirling. In the action instituted against their Representatives and the Earl of Selkirk, the surviving cautioner, the former, in defence,

Pleaded: The cautionary engagement ceased when the cautioners died. If any loss had then arisen, the obligation of relief would have been a debt that the deceased had owed, and of course would have been transmitted against their heirs; but no such debt could be transmitted, when none existed.

Had the obligation made no mention of heirs, it is not likely that the present claim would have been thought of; and yet if an effect altogether singular be not given to this circumstance, it cannot in the least vary the case. The sole import of the obligatory words respecting heirs uniformly is, to devolve on them the debt previously incurred by the ancestor; as, for instance, in the case of a bond for money lent, and in such a one as the present, if during the cautioner's life the failure against which he is surety has taken place. But those words never have the effect of creating a new obligation or debt against the heir, after that which lay on the ancestor has been extinguished.