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.

No 33.

Indeed, as all cautionary obligations are in their nature voluntary, it should seem, that they cannot be imposed on an heir without his consent.

Answered: In this case, the Representatives are expressly bound, as well as the cautioners themselves, The import of this obligation is best explained by the universal practice in similar instances; as, for example, that of messengers, the heirs of whose cautioners are always understood to continue bound. Nor does the case of banking-houses afford any real exception; for if, on the death of a cautioner for a cash-credit, it be their custom to require a new one, this is only for the sake of summary execution, which cannot take place against heirs.

'THE LORDS repelled the defence pleaded for the Representatives of the deceased cautioners, of their not being liable for any intrommissions of the factor subsequent to the death of the said cautioners, and found the cautionary obligation to be equally effectual against them as the Earl of Selkirk, the only original cautioner now in life.'

A reclaiming petition against this judgment was refused without answers.

Reporter, *Lord Swinton.* Act. *Rolland, Jo. Millar.* Alt. *Wight.* Clerk, *Menzies. Stewart.*

Fac. Col. No 151. *p.* 302.

1794. *January* 17.

ROBERT and ALLAN-JAMES BOGLES, and their FACTOR *loco tutoris, against* GEORGE BOGLE and Others.

No 34.
A cautioner for a tutor in law found liable for debts due by the tutor himself to his pupils, payable in his own lifetime, but not for those which only became payable at his death.

ROBERT BOGLE, in the contract of marriage of his son Allan, became bound to pay him L. 6000 immediately on his marriage, and L. 4000 at the first term of Martinmas or Whitsunday after his (Robert's) death.

Allan Bogle afterwards died, leaving two sons, to whom Robert Bogle their grandfather was served tutor in law. On this occasion George Bogle his brother became surety, 'that the said Robert Bogle shall make just count, reckoning, 'and payment to the said Robert and James *qlias* Allan-James Bogle his grand-'children, pupils aforesaid, and to their heirs, executors, or assigns, of his hail 'intromissions with their means, estate and effects, heritable and moveable, and 'of *what thereof he ought and should intromit with* by virtue of his office of 'tutory to them, and that *he shall faithfully exercise the said office.*'

At the time of Allan Bogle's death, there remained a balance of L. 3022 : 10 : 7 owing to him by his father, of the above L. 6000; and this sum, together with the L. 4000 payable at his own death, Robert Bogle inserted in the tutorial inventories.

Robert Bogle afterwards died insolvent, without having laid out or granted security for either of these sums. And a factor *loco tutoris* having been appointed to the grand-children, he brought an action against Robert Bogle's Represen-