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-

No 34. tatives, and George Bogle his cautioner, for payment of them. In defence, the latter

Pleaded: The defender did not become cautioner for all the debts which Robert Bogle might owe to his son. The sums now sued for were due by him in a character altogether distinct from that of tutor, and the defender is no more bound to warrant them than any other debt in the tutorial inventories, which, without any fault of the tutor, may have been lost by the supervening bankruptcy of the debtor. The defender's obligation went no further than that his brother should faithfully account for all his intromissions with the estate of his grand-children. But he did not intromit with either of the above sums. The L. 3022 : 10 : 7 were already in his hands when he accepted the office, and the other sum of L. 4000 he could not possibly intromit with, as it was not payable till after his death. If a creditor of the pupils had found it necessary to attach either of these sums for his security, it would have been competent to have arrested them in the hands of Robert, which proves, that he possessed them not in the character of *tutor* but of *debtor*. Or, if Robert had died a few days after the date of the bond of caution, without having taken any step in the character of tutor, the defender surely could not have been subjected in this claim, and there is no material difference betwixt that case and the present.

Answered: The defender not only became bound, that Robert Bogle should account for his intromissions with the estate of the pupils, but likewise that he should account for 'what he ought and should intromit with,' and 'that he should faithfully exercise the said office.' But, even if his obligation had been limited to intromissions, the construction put upon that term is much too confined. By intromissions are understood, all that one person has got into his hands of the funds of another, and therefore it is of no moment that Robert Bogle, in place of getting the sums in question, by payment from others, after the commencement of the tutory, had them in his own hands before that time. The defender might as well plead, that no debt due to the pupil by third parties came under his obligation, although it should have been lost by the tutor's negligence, unless the security had been at least once changed during the tutory; for it was the duty of the tutor to have lent out the L. 3022 : 10 : 7 upon sufficient security, at the commencement of his office, or at least, when he first apprehended a decline in his circumstances; *Voet, lib.* 26. *t.* 7. § 8.; *l.* 9. § 1. *ff. de administ. et peric. tutor, &c.* The cases put by the defender do not apply. If Robert Bogle had died bankrupt within a few days after accepting of the tutory, he would not probably in that short time have been guilty of mismanagement, and of consequence no claim would have lain against his cautioner. And, admitting the competency of an arrestment, at the instance of a creditor of the pupils, in the hands of their grand-father, it affords no aid to the defender's plea. Mr Bogle was accountable to his pupils in two characters: As proper debtor in the sums, an arrestment might have been used in his hands: As tutor, it is equally clear, that his cautioner is bound to make them good.

With respect to the L. 4000, as it was not payable till Robert Bogle's death, it cannot perhaps be said that it came under his intromissions. Still, however, as soon as *facultatibus labi cœpit*, it was incumbent on him to have secured it to his pupils; *l.* 9. § 1. *ff. de adminis. et peric. tutor. Quod si in diem, &c.* No 34.

Replied: Robert Bogle was indebted to many other persons beside his pupils. He would therefore have acted most unjustly, if he had taken steps to have given them a preference for family-provisions, at the expense of onerous creditors.

Duplied: It cannot hurt the interest of the pupils, that their tutor contracted other debts. As he neglected to fulfil his obligation of securing their estate, it of consequence devolves upon his cautioner.

THE LORD ORDINARY, 'in respect of the importance of the cause, in point of precedent,' reported it upon informations.

Two of the Judges were for sustaining the cautioner's defence, even as to the L. 3022 : 10 : 7, payable by Robert during his own life, because he did not get possession of that sum in the character of tutor, but, on the contrary, had it in his hands long before he held that office. And the whole Bench (one Judge excepted) were clear that the cautioner was not liable for the L. 4000, as it could not be said that he had intromitted with a sum which was not payable till after his death. Nor was he blameable in not securing his pupils, when he felt his circumstances declining; as such an attempt would probably have had no other effect than to have forced all his creditors instantly to take measures to have prevented the intended preference.

But with respect to the debt payable in his own lifetime, a great majority were clear that the cautioner must be subjected; as it was undoubtedly an intromission, and therefore ought to have been secured by him in such a way as to have prevented any hazard of loss. It was further observed, That if the pursuer had been in possession of moveable goods belonging to his pupils, which he had allowed to perish, the cautioner would have been liable; and that the present case fell to be decided on the same principles.

THE COURT accordingly 'repelled the defences pleaded for the defender George Bogle, *quoad* the L. 3022 : 10 : 7 Sterling of the pupils' funds, for which the said Robert Bogle was debtor to them when he was appointed their tutor. But *quoad* the claim for L. 4000, which was not payable till the first term of Whitsunday or Martinmas after the death of Robert Bogle, they found that this did not fall under the cautionary obligation.'

Lord Ordinary, *Eskgrove.* Act. *Rolland, Archibald Campbell*, junior.
Alt. *Solicitor-General Blair, Archibald Campbell.* Clerk, *Menzies.*

R. Davidson. *Fac. Col. No 94. p. 209.*

*** The Heir of a person who had subscribed the minutes of a meeting of creditors, as cautioner for the trustee, found not to be liable, the minutes not being probative. Shirra against Douglas, 6th June 1798; Fac. Col. No 79. p. 184., (*voce* WRIT.)

See No 18. p. 487. *See* No 149. p. 803.

See Welsh against M'Veaghs, 18th January 1781, Fac. Col. No 16. p. 30. *voce* MESSENGER.

SECT. V.

Benefit of Dicussion.

No 35.
A cautioner, in loosing arrestment, has not the benefit of discussion.

1743. *December.* AGNES DICKIE *against* THOMSON and LANG.

IT was *pleaded* for a cautioner in the loosing of an arrestment, That cautioners, by the law of Scotland, have the benefit of discussion, as well as by the Roman law; and that a cautioner, in loosing of arrestment, is entitled to this privilege by the very conception of his bond; for he only becomes bound for the common debtor, that his goods arrested shall be made furthcoming. On the other hand, it was *urged*, That caution in loosing of arrestment comes in place of the arrestment; and therefore that the cautioner must be liable in the same manner as the arrestee would be upon a decree of furthcoming recovered against him.

'Found, That a cautioner, in loosing an arrestment, has not the benefit of discussion.'

Fol. Dic. v. 3. *p.* 116. *Rem. Dec. v.* 2. *No* 49. *p.* 77.

No 36.
When the principal is abroad, and cautioner in the kingdom, it is not necessary first to discuss the principal.

1757. *December* 7.

JOHN and ROBERT ELAMS of Leeds, *against* JAMES FISHER.

ADAM FISHER, when at New York, having commissioned a quantity of broad cloths from John and Robert Elams of Leeds; and they having informed his father, James Fisher of Inveraray, thereof; James, in answer to their letter, wrote them, 'That he would stand good for the price, upon twelve months 'credit from the time of shipping the goods, in case his son failed in his cir-'cumstances.'

Upon this letter, Messrs Elams furnished the goods, which arrived at New York.

When the price of the goods fell due, which was in a year, Messrs Elams wrote several letters to Adam Fisher for payment; but had no answer. When