[Heard, 17th May, 1841. — Judgment, 9th May, 1842.]

HUGH BREMNER, Writer to the Signet, *Appellant.*

SIR GEORGE CAMPBELL and Others, executors dative *qua* nearest in kin of ANN MAXWELL, *Respondents.*

Cautioner. — A bond by a cautioner for a judicial factor, binding himself, his heirs, executors and successors; does not expire *ipso facto* on the death of the cautioner, but will bind his representatives for the intromissions of the factor had subsequent thereto.

Cautioner. — The septennial limitation will not affect the liability of a cautioner for the performance of an office, so long as the office continues, and the extent of liability is unascertained.

Cautioner. — *Mora.* — Omission by the relatives of a lunatic to control the actings of his curator throughout a series of years, will not affect the liability of the cautioners for the curator.

Process. — Under a summons, seeking to make the defender liable on a universal representation under the passive titles, it is competent to decern against him on a limited liability.

Passive Titles. — *Minor.* — Whether the vitious intromission of a factor for a minor, will impose on the minor a liability, under the passive titles, in respect of advances made by the factor for his maintenance, education, and otherwise, *Query.*

THIS case was formerly heard upon appeal, and is reported in the 2d volume of *Shaw* and *M'Lean*, p. 895, under the title Bremner *v.* Ker.

The facts of the case were shortly these: — In 1795, James Bremner was appointed factor to Mrs Maxwell, a lunatic, and he and Hugh Bremner gave bond, binding themselves jointly and severally, their "heirs, executors, and successors," that James Bremner should "do exact diligence in performing his duty as "factor *loco tutoris* foresaid, and that in conformity to, and in "terms of the said Lords their Acts of Sederunt thereanent in "all points."

BREMNER *v.* CAMPBELL, &c. — 9th May, 1842.

James Bremner, the factor, continued in that office until his death, which happened on the 24th of June, 1826. Soon after his death, Ker was appointed curator *bonis* to the lunatic. During the whole period of his factorship, James Bremner had neither lodged any inventory of the lunatic's estate, nor annual accounts of his intromissions. On ascertaining this, Ker brought an action against the trustees of James Bremner, and obtained an interim decree against them for L.3941, 17s. 8d, as the balance of his intromissions with the lunatic's estate.

Hugh Bremner, the cautioner of James, died on the 20th day of February, 1804, leaving a widow and four children all in pupillarity, the youngest of whom was the appellant, then only two years of age. Francis, the eldest son of Hugh Bremner, died in infancy, shortly after his father. John, the next child, died in 1814, while in minority. Jessie, the next child, married Sanderson, and died, leaving one child, Grace Sanderson. The appellant was then the only child surviving.

At his death, Hugh Bremner left a deed, appointing Alexander Greig, and several other persons, tutors and curators to the children. These persons executed a deed of factory in Greig's favour. No one expede confirmation, or in any way perfected a legal representation to Hugh Bremner; but Greig, acting under the factory of his co-tutors, intermeddled with his estate, and realized funds to the amount of L.7486, 1s. 11d. Out of this, he paid debts owing by the deceased to the amount of L.3123, 3s. 2d., leaving a balance in his hands of L.4362, 18s. 9d. According to a state which was produced by Greig in the course of the action, which will presently be mentioned, it appeared that Greig had expended towards the maintenance, clothing, and education, of Hugh Bremner's widow and children, sums amounting to L.7910, 15s. 7d. while his expenses of management amounted to L.1309, 12s. 9d., shewing an expenditure of L.9220, 8s. 4d. or an excess of expenditure over L.4362, 18s. 9., the balance of his receipts amounting to L.4857, 9s. 7d.

In this state, Greig took credit for payments to the appellant to the amount of L.1511, 9s. 4d., and for money expended for his board, clothing, &c., to the amount of L.1440.

On the occasion of Jessie Bremner's marriage with Sanderson, a deed had been entered into on the 8th April 1818, to which the appellant, his tutors and curators, Mr and Mrs Sanderson, and Greig, were parties. That deed narrated the death of Hugh Bremner, the elder, intestate, the nomination by him of tutors and curators to his children, the appointment, by these tutors and curators, of Mr Greig as their factor, "with power to uplift, "receive and discharge all debts and sums of money due, or to be-"come due, to them, and to call, charge, and pursue for the same, "and generally to do all acts and deeds with regard to the real-"izing, securing, and managing of the means and estate of the said "deceased Hugh Bremner's children, which the said tutors and "curators could do themselves, or which to the office of factor in "similar cases, was known to belong." The deed then proceeded: "And considering that the principal proportion of the "said deceased Hugh Bremner's succession was contingent "upon the winding up of the affairs of a copartnery between "the since deceased Francis Farquharson, Esquire, of Haugh-"ton, accountant in Edinburgh, and himself, which had sub-"sisted for a number of years before his death, but which was "terminated by that event; as also that owing to the nature "of the concern, and other causes, the affairs of the said co-"partnery were not finally winded up during the survivance of "the said deceased Francis Farquharson, and that no settlement "of accounts has hitherto taken place with his heir and repre-"sentative, John Farquharson, Esquire, now of Haughton." The deed then narrated, that pending the settlement of accounts, certain bonds had been granted for debts due to the company, as falling under the share of the profits belonging to Mr Bremner, but "subject to the result of an accounting and final "adjustment with the heir of Mr Farquharson." That Greig

had advanced L.1000 to Mrs Sanderson, " and that with a view " to the reimbursement of any superadvances by the said Alex- " ander Greig, on behalf of the said deceased Hugh Bremner's " representatives, and for enabling him to realize their funds, " and to settle accounts with the heir of the said deceased " Francis Farquharson, it has been deemed expedient to con- " clude an agreement to the effect afterwritten: Therefore, the " said Hugh Bremner, junior, with the concurrence of his cura- " tors, and the said Janet or Jessie Bremner, with consent of the " said Thomas Sanderson, and he as taking burden for her, and " for his own right and interest, and both of them with one ad- " vice and assent, hereby agree and declare, that notwithstanding " the tenor of the foresaid bonds, and of the said marriage con- " tract, the said Alexander Greig is, and shall be intrusted with " the charge of settling accounts with the heir of the said deceased " Francis Farquharson, of uplifting the contents of the said " bonds, and of realizing the other means and estate of the said " deceased Hugh Bremner's representatives: And, accordingly, " the said other parties to this agreement hereby authorize and " empower the said Alexander Greig, for them and in their be- " half, to uplift, receive, recover, and realize the whole estate, " funds and effects of the said deceased Hugh Bremner, and his " representatives, and particularly, without prejudice to the said " generality, the contents of the beforementioned bonds, with " the interest due, or to become due, thereupon, and in their " names, or his own, to grant discharges, acquittances, or con- " veyances of the premises, in whole or in part, which shall be " sufficient to the receivers, to call, charge, and pursue, for re- " covery of the said estate, funds and effects, to compound, tran- " sact, and agree with relation to the premises, and in general to " do whatever is competent to the said other parties, or any of " them thereanent: Moreover, the said Hugh Bremner, junior, " with consent of his curators, and the said Janet or Jessie

" Bremner, with the consent of the said Thomas Sanderson, " hereby authorize and empower the said Alexander Greig to " purchase brieves, and expede and retour services, to obtain or " expede charters, precepts of *clare constat*, and instruments of " sasine, to expede confirmations, to give up inventories, and to " expede or obtain all other titles of whatever description, and " grant all writs and deeds, which may be requisite for vesting " the said Hugh Bremner, junior, and Janet or Jessie Bremner, " or either of them, with the estate, property, funds, or effects of " the said deceased Hugh Bremner, Francis Bremner, and John " Bremner, or any of them, or for realizing the said property, " funds, or effects, or any part thereof: Ratifying hereby and " confirming whatever the said Alexander Greig may lawfully " do, or cause to be done thereanent."

Ker being unable to recover payment of the sum in the decree obtained by him against Bremner's trustees, brought action against the appellant, as heir served, or as charged to enter heir, and him and his mother as executors confirmed to his father, or as vitious intromitters with his estate, or as representing him on one of the passive titles, concluding among other things, that the defenders should be decerned " to produce a full and particular " state of accounts of the whole intromissions of the said deceased " James Bremner, as factor foresaid," and " to make payment to " the pursuer of the foresaid sum of L.3941, 17s. 8d. sterling, " contained in, and due by the interim decree before recited; " together with the farther sum of L.10,000 sterling, or such " other sum, less or more, as shall appear to be the balance due " by the said deceased James Bremner upon his said intromis- " sions, with the legal interest of said sums from the said 24th " day of June 1826, being the date of his death, and during the " non-payment."

Kerr also brought a supplementary action against the trustees of Greig, who had died, and Grace Sanderson, the daughter of

Jessie Bremner, who had also died, and her father, Thomas Sanderson, as representing Jessie Bremner. From this action the Sandersons were assoilzied by an interlocutor on the 3d March, 1831.

In the original action, and the supplementary action, so far as directed against Greig's trustees, the proceedings which took place in the Court below are detailed in the report in *Wil.* and *Sh.* already referred to. The result of the judgment in the Court below was, — 1st, By an interlocutor on the 6th July, 1832, to repel an objection upon the form of Hugh Bremner's bond of caution for James Bremner, that it only bound him to warrant that the factor should do exact diligence for recovery of money due to the lunatic, but not that he should duly account for his receipts; and to remit to ascertain what was due by James Bremner at the death of Hugh Bremner, and what payments had been made by James subsequent to Hugh's death; 2d, By an interlocutor of the 17th December, 1835, to find the appellant liable for a balance of L.1033, 14s. 9d., due by James Bremner, at the death of the appellant's father, with interest; and, *quoad ultra*, to assoilzie the whole defenders; 3d, By an interlocutor of 19th December, 1835, to find Greig's trustees liable conjunctly and severally with the appellant for the L.1033, 14s. 9d., and to refuse expenses.

The order made upon an appeal and cross appeal from these interlocutors was in these terms: — "It is ordered and adjudged, "by the Lords spiritual and temporal in Parliament assembled, "That the said interlocutor of the 6th of July, 1832, (on report "of the Lord Ordinary, Fullerton) be, and the same is, hereby "affirmed, in so far as it 'repels the objections pleaded to the "'form of the bond granted by the late James Bremner as "'principal, and the late Hugh Bremner as cautioner, and "'remits to the accountant to ascertain what sum, if any, was "'due by James Bremner, as factor *loco tutoris* at the death of

" ' Hugh Bremner, and to report the result to the Court.' But " this House doth not pronounce any judgment on the residue " of the said interlocutor, the inquiry of the accountant being " completed, and his report made to the Court upon both the " matters remitted to him, this House holding the said bond to " be valid and binding on Hugh Bremner, deceased, the " cautioner, to the extent of the whole intromissions, adminis- " tration, and management of James Bremner, in his character " of factor *loco tutoris* ; and that, consequently, Hugh Bremner, " the cautioner, was, at the time of his death, liable to that " extent under his cautionary obligation. And it is farther " ordered, that so much of the said interlocutor of the 19th " December, 1835, as refuses expenses, be, and the same is, " hereby also affirmed. And it is farther ordered and adjudged, " that the said interlocutor of the 17th December, 1835, the " residue of the said interlocutor of the 19th December, 1835, " and the whole cause, save and except so much of the said " interlocutors of the 6th of July, 1832, and 19th December, " 1835, as are hereby affirmed, be, and the same are, hereby " remitted back to the said Court of Session, and the said Court " are hereby directed to cause the opinions of the whole Judges " of both Divisions thereof, and of the Lords Ordinary, to be " taken on the following questions arising in the said appeals, — " viz., on the question of the septennial prescription, and on " the question of the several liabilities of Hugh Bremner, the " younger, Grace Sanderson, and Thomas Sanderson, and the " said Alexander Greig, deceased, both in respect of, and " assuming the liability of the late Hugh Bremner, to be as " found by the said interlocutor of the 6th of July, 1832, and in " any other respect, regard being had to the statement of the " respondent's counsel at the bar of this House, that Hugh " Bremner, the younger, was liable for the moneys received by " him, after attaining twenty-one years of age, from the estate

" and effects of Hugh Bremner, the elder. And it is farther " ordered and adjudged, that the said Court of Session do pro- " ceed in the said cause as may be just and consistent with this " judgment."

The Court below decerned in terms of this judgment, and ordered cases on the points remitted for consideration.

In the case for the defenders they argued the following pleas: —

1st, That the bond of caution covered only the intromissions of the factor during the lifetime of the cautioner.

2d, That as the factory was a temporary office, the caution could not subsist for a longer period.

3d, That assuming the obligation to be so limited, the *media concludendi* of the action did not warrant decree against the defenders.

4th, That in regard to the defender, Hugh Bremner, the judgment appealed from was farther incompetent, as proceeding on a ground of liability different from that libelled on.

5th, That the claim as for a debt due at the death of the cautioner was barred by the septennial limitation.

6th, That it was also barred by neglect on the part of those whose duty it was to superintend the actings of the factor.

7th, That the arrears due at the death of the cautioner were extinguished by the factor's subsequent payments. —

Lastly, assuming the debt under the bond not to be extinguished, the defenders were in no respect vitious intromitters, or in any degree liable in that character.

Along with his case the present appellant printed a note given in by the respondents to the House of Lords on the former hearing of the cause, which was in these terms: — " It is respectfully " submitted, on the part of the respondents, that the judgment " of the House of Lords should be as against Mr Alexander " Greig's representatives, for L.6055, 14s., with interest thereon " from 24th June, 1826, being the sums found due in the action

" against James Bremner's representatives; and, as against Hugh " Bremner, for whatever sum he shall be ascertained to have " received from the estate of his father, Hugh Bremner, the " cautioner, after he (Hugh Bremner, the son) attained the " years of majority."

On the other hand, the pursuer, (present respondent,) argued: —

1. That the cautionary obligation undertaken by Hugh Bremner not having been recalled, continued in force till the termination of the factory by James Bremner's death in 1826, and remained as effectual against the estate and representatives of the cautioner, *subsequent to his death* in 1804, as it was against himself in his lifetime.

2. That there was no ground for the distinction founded on by the defenders, that *vitious intromitters* are not subject to this obligation, whatever liability might be held by law to attach to the proper heirs and representatives of the deceased cautioner.

3. That the defenders had so placed themselves in regard to the succession of the deceased by their intromissions, as to be responsible for the debt claimed by the pursuer, arising, as it did from the express obligation of the party with whose effects they had intromitted.

4. That the septennial limitation act had no application to the case, in whatever light the liability of the defenders under the obligation undertaken by Hugh Bremner should be regarded; whether it should be held to have terminated in 1804, or to have continued down to the factor's death in 1826.

5. That the claim against the defenders was not barred by *mora* or neglect.

6. That there was no room for the plea, that the balance due on the factorial accounts in 1804 was extinguished by subsequent payments, or that the effect of those payments was to diminish that claim to any extent.

BREMNER *v.* CAMPBELL, &c. — 9th May, 1842.

The Court below, in conformity with the order of the House of Lords, required the opinions of the whole Court. That opinion, which was drawn by Lord Corehouse, but not signed by him, on account of indisposition, was in these terms: —

" Without resuming the facts of the case, or the proceedings " either in this Court or in the House of Lords, we proceed to " answer the questions proposed in the remit: —

" 1. The opinion of the Court is directed to be taken ' on the " ' question of the septennial prescription.' The act 1695, c. " 5, by which that prescription was introduced, provides, ' That " ' no man binding and engaging for hereafter, in any bond or " ' contract for sums of money, shall be bound for the said sums " ' for longer than seven years after the date of the bond.' It is " manifest that this act cannot apply to a bond of caution granted " for the faithful exercise of an office, because at the date of the " bond there is no specific sum due. The bond is not granted " for money at all, but to secure the performance of the officer's " duties; and though his malversation or neglect may give rise " to a claim of damages, which comes to be estimated in money, " the obligation of the principle in its nature is purely *ad factum* " *præstandum*. Farther, the limitation of the right of action " cannot be restricted to a period of seven years from the date " of the bond, because the office, as in this case, may be of inde- " finite endurance, and may exist for half a century. Accord- " ingly, the point is no longer open for discussion, having been " decided as early as the case of Fleet, January 5, 1709; and it " is laid down as settled law by all the authorities since the date " of that decision.

" The defenders try to evade the rule in this way. They say " that the cautionary obligation of Hugh Bremner the elder, " ended by his death in 1804; that the sum which was due in " consequence of the curator's intromissions might then have

" been ascertained; and that an obligation as for a liquid sum,
" ought in equity to be held as commencing at that period, and
" subject to the septennial prescription afterwards. We are of
" opinion, for reasons which will be immediately stated, that the
" obligation of the cautioner did not end by his death, but was
" transmitted against his representatives. Farther, although it
" had ended, which might have been the case if his representa-
" tives had withdrawn from the suretyship, which, like himself,
" they were entitled to do, the debt was not then liquidated, nor
" any attempt made to do so, before the present action was
" raised. Lastly, although the debt had been liquidated at that
" time, as no new bond was granted for the sum, from the date
" of which the currency of the septennial prescription could com-
" mence, there is no room for the operation of the statute. If
" the cautioner or his representatives had wished to have the
" benefit of the Act 1695, the course which they ought to have
" followed was obvious. They ought to have intimated that
" they withdrew their security; a settlement of accounts would
" then have taken place; the sum for which the factor was liable
" would have been ascertained; and for that specific sum he and
" his cautioners should have granted a bond. In that way the
" original obligation would have been extinguished by novation;
" and that which was substituted in its room would have been
" valid for seven years only from its date. But the present ac-
" tion is exclusively laid on the original bond to execute the office,
" and it could be laid on no other ground, — a bond incapable
" of suffering the septennial prescription, and the amount of
" liability under which is even yet undetermined. The cases of
" Anderson and Moreland, to which the defenders have referred,
" give no countenance to their argument. In Anderson's case,
" the cautioner was bound for the payment of a specific sum, due
" under a composition-contract, and for nothing more, an obli-
" gation which falls expressly under the words of the statute;

" and the case of Moreland did not relate to the septennial pre-
" scription at all.

" In answer to the first question, therefore, we are clearly of
" opinion that the claim of the pursuer is not extinguished by
" virtue of the Act 1695.

" II. The opinion of the Court is directed to be taken 'on
" ' the question of the several liabilities of Hugh Bremner the
" ' younger, Grace Sanderson and Thomas Sanderson, and the
" ' said Alexander Greig, deceased, both in respect of and
" ' assuming the liability of the late Hugh Bremner, to be as
" ' found by the said interlocutor of the 6th of July, 1832, and
" ' in any other respect, regard being had to the statement of
" ' the respondent's counsel at the bar of this House, that Hugh
" ' Bremner the younger was liable for the moneys received by
" ' him, after attaining twenty-one years of age, from the estate
" ' and effects of Hugh Bremner the elder.'

" It will be observed, that Grace Sanderson and Thomas
" Sanderson were called as defenders merely *pro forma*, and have
" long since been assoilzied by a final interlocutor. It is unne-
" cessary, therefore, to say any thing of their liabilities.

" Whether the statement of the pursuer's counsel at the Bar
" of the House of Lords implied an admission that Hugh Brem-
" ner the younger was liable no farther than for the moneys
" received by him after attaining the age of twenty-one years, it
" is for their Lordships to judge. As the minute given in by
" the pursuer's counsel is not before us, we shall assume that
" no such admission was made.

" With regard to Hugh Bremner the younger, the first point
" for consideration is, Whether the cautionary obligation un-
" dertaken by his father ended at his father's death? We are
" of opinion that it did not, but that it was transmitted against
" his representatives. The words of the bond itself appear to us
" conclusive upon this point. The factor, and Hugh Bremner

" the elder, his cautioner, ' bind and oblige us, jointly and
" ' severally, our heirs, executors, and successors whomsoever,
" ' that I, the said James Bremner, shall do exact diligence in
" ' performing my duty as factor *loco tutoris* foresaid.'

" Farther, it is a general rule in the law of Scotland, that all
" obligations undertaken or incurred by the ancestor transmit
" against his representatives. There are some exceptions to
" that rule: for example, penal actions do not transmit, unless
" there has been litiscontestation in the lifetime of the ancestor.
" There are others which it is unnecessary to mention, because
" they have no connection with the present case. Under the
" term ' obligation,' is comprehended not only pure debts, that is,
" sums of money due and payable at the ancestor's death, but
" future and contingent debts; also all burdens or liabilities to
" which he is subject, either as principal or cautioner. In the
" case of heirs and executors properly so called, the extent of
" the obligation so transmitted is or may be limited; for if the
" heir enters *cum beneficio inventarii*, or if the executor is regu-
" larly confirmed, neither is bound beyond the amount of the
" inventory. But if these precautions have been neglected, the
" representation is universal and unlimited.

" To get quit of this responsibility, which the express words
" of the bond of caution, as well as the general principle of the
" law of succession, imposed upon him, Mr Bremner, junior,
" has resorted to various pleas, all of which, in our opinion, are
" groundless.

" He maintains, that an obligation undertaken by the cautioner
" for the performance of an office, is one out of which no claim
" arises until a violation of the duty has been committed; and as
" there was no violation of duty in this case before the death of
" the cautioner, there was no obligation then existing which
" could transmit against his representatives. In support of this
" plea, passages are cited from Stair and Erskine, in which it is

" said that conditional obligations are but obligations in hope,
" and do not begin to oblige until the condition exists.

" The obvious answer is, that the defender is here confound-
" ing the consequence of an obligation with the obligation itself.
" The cautioner for the performance of an office cannot be
" called upon to pay any thing until the duties of the office have
" been neglected or transgressed. But the obligation to pay
" when that contingency arises, exists from the date of his bond.
" The responsibility is undertaken at that time, and it is that
" responsibility which transmits from the ancestor to his repre-
" sentatives. Accordingly, there is not only no authority to be
" found in the books, that obligations of this kind do not stand,
" in respect of transmission, in the same situation with every
" other species of obligation, but there is a long and uninter-
" rupted series of decisions by which the reverse is established.

" The citations from Stair and Erskine to which the defenders
" refer, are plainly misapplied. Both authors, in the passages
" quoted, are treating of the incompetency of raising the dili-
" gence of inhibition upon contingent debts; and they state
" what in the ordinary case is manifest, that it would be incon-
" sistent with equity to place the heritable property of a contin-
" gent debtor under an embargo, and to deprive him of the
" use of it for an indefinte period, while it was yet uncertain
" whether he would ever have any thing to pay to his contingent
" creditor. Accordingly, inhibition is always recalled in such
" circumstances, unless the debtor is bankrupt, or *vergens ad*
" *inopiam*. But although a contingent debt is in the general
" case not a good ground for that diligence, there is no reason
" why a contingent obligation should not be transmissible like
" any other obligation against representatives.

" It is unnecessary to detail all the precedents upon this point.
" They are stated at great length in the pleadings for the pur-
" suer; and we think the defender's attempt to explain them

" away, has been eminently unsuccessful. We shall advert to " some of those cases in the sequel.

" It appears from what passed in the House of Lords, that " the defender, in aid of his argument, had referred to a maxim, " that representation in moveable goods is unknown in the law " of Scotland. There is indeed such a maxim, but it is entirely " foreign to the matter now under consideration. When we " say, that there is no representation in moveables, we mean " that succession in moveables proceeds *per capita*, and not as in " heritage, *per stirpes*. If a man has three daughters, and one " of them predeceases him, leaving a child, the child comes into " the mother's place, and gets the same share of the heritage as " her mother would have had. It is not so in moveables. In " the case put, the two surviving daughters would be the only " executors, while the child of the predeceasing daughter would " take nothing: or to state it in the antiquated, but perspicuous " language of Sir Thomas Hope: — ' In testaments *non est jus* " ' *representandi*, as there is in lands, and heritage; but the " ' nearest in degree of kindred excludes all others of a farther " ' degree, albeit more near *quoad successionem* to lands and " ' heritages; for in heritage there is *jus representandi*, and the " ' son, oye, &c. has the same place or right that their father " ' had; but, in testaments, the father-brother, or father-sister, " ' will exclude all the brethren and sisters' bairns, and will have " ' the sole benefit of the executry.' But while the successors of " the executor do not represent him actively, that is to say, are " not entitled to his rights and privileges, nothing is more cer- " tain than that they represent him passively, or, in other words, " are responsible for his debts and liabilities.

" But the main plea on which Mr Bremner relies is, that he " is not sought to be subjected as the heir or executor of his " father, but on the passive title of vitious intromission with his " father's estate. He maintains, that whatever may be the case

" as to heirs and executors, the vitious intromitter is liable only " for debts payable by the deceased at the period of his death, " and he says that no debt was payable when his father died, " because there had been no violation of duty by the judicial " factor at that time; that although a current and unprestable " obligation may transmit against heirs and executors, there is " no authority for holding that it transmits against vitious intro- " mitters; and that the words of the bond, by which his father " imposed the cautionary obligation, not only upon himself, but " his heirs, executors, and successors, does not comprehend those " who are sued on this passive title.

" We are of opinion, that not one of these propositions is " well founded. It is true, that the liability of a vitious intro- " mitter is not exactly co-extensive with that of an executor. " For example, as this passive title was introduced for the pro- " tection of creditors, it is not available to donees. On that " ground, legatees, or children for provisions purely gratuitous, " cannot take benefit by it; nor can widows for their *jus relictæ*, " or children for their *legitim*, because they are not creditors, " but held to have joint rights in the estate of the deceased with " his representatives. But, in other respects, a vitious intro- " mitter stands in the same relation to creditors as an executor " unconfirmed. It is true that both Stair and Erskine use the " expression, that vitious intromitters are liable *in solidum* for the " debts of the defunct. But it will be observed, that the term " ' debt ' is taken in these passages in its most extensive sense, " comprehending not only debts due, and prestable at the death " of the ancestor, but all obligations and liabilities whatever. It " has the same signification as in the Roman law; — ' *Hoc verbum* " ' DEBUIT *omnem omnino actionem comprehendere intelligitur;* " ' *sive civilis, sive honoraria, sive fideicommissi fuit persecutio.*' " Therefore Mr Bell, with strict correctness, says: — ' When- " ' ever any one, having access to the effects and moveable

" ' estate of a person deceased, unwarrantably takes possession
" ' of, and intermeddles with those funds, the law infers a uni-
" ' versal responsibility from the uncontrolled intromission.' It
" may be added, that nearly two centuries and a half have
" elapsed, since it was settled in the law of Scotland, that in
" questions with creditors, the liabilities of the vitious intromitter
" are as extensive as those of the executor, while he has not the
" protection which a confirmation duly expeded gives to the
" latter. ' Ante hunc confirmationem,' says Craig, ' si se bon-
" ' orum administrationi commiscuerit universalis tum habetur
" ' intrommissor, in eumque non minus quam in verum execu-
" ' torem *omnes actiones*, *competunt* ; ipse tamen agere non
" ' poterit, donec in executorem fuerit confirmatus' — ' itaque
" ' executor nomen juris est, intromissator nomen facti: hic in
" ' solidum pro debitis hereditatis tenetur, ille tantum pro viribus
" ' hereditatis.'

" The defender having laboured to prove that the transmis-
" sion of a prospective cautionary obligation against the heir and
" executors of the cautioner, arises solely from the circumstance,
" that it is imposed in express terms in the bond of caution, the
" principal binding not only himself, but his heirs, executors, and
" successors, tries to escape upon the plea, that he, as a vitious
" intromitter, is neither heir, executor, nor successor, and
" therefore not falling under the words of the bond. But this
" pretence is singularly unfortunate; for we are told by the
" author last quoted, that the term successor in such obligations
" applies especially to intromitters. Speaking of adjudication as
" a depending action, he says, ' Itaque si alterius persona morte,
" ' vel rebellione, vel juris cessione mutata sit, et actionem vel
" ' hæres, vel executor, vel successor (quem intromissorem dici-
" ' mus,) vel quilibet alius particularis successor, qui jus actionis
" ' nactus fuerit ex ea sententia, velit ad actionem procedere
" ' non potest,' &c.

" If an express obligation, therefore, were requisite, which " we do not consider it to be, it is clear that Hugh Bremner the " elder, under the designation of 'successors,' imposed an obliga- " tion on vitious intromitters, as well as every other species of " successor, not included in the terms heir and executor.

" But it is farther pleaded, in point of fact, that the defender, " Hugh Bremner the younger, is not to be held as a vitious in- " tromitter. Certainly there would be room for that inference, " if his intromission had been confined to the advances made to " him out of the estate before he attained the age of fourteen " years.

" No pupil can be a vitious intromitter, because such intro- " mission is a delinquency which a pupil is incapable of com- " mitting. A defence of somewhat the same nature might have " been urged also, if the intromission had taken place during " the defender's minority; for though he would thereby have " been rendered liable in the first instance, he might have ob- " tained relief by a *restitutio in integrum* raised during his " minority, or the *quadriennium utile* which followed it. In " both cases his liability could not have extended farther than " in *quantum lucratus fuit.* But neither of these pleas is sup- " ported by the fact. The intromission of his guardian, of which " he had the benefit, was neither confined to his pupillarity nor " minority; no action of reduction or restitution was brought " within the *anni utiles;* and what is of still more importance, " it appears from Mr Greig's accounts, that the intromission " was continued by the defender, Bremner, himself for several " years after he had attained majority. He took benefit from " his father's succession to the amount of L.1511, 15s. 4d.; part " of that was board, at the rate of L.60 per annum, for the " period of twenty-four years, during three years at least of " which period, therefore, he was of age. In the years 1823, " 1824, and 1825, after he attained majority, he received nearly

" L.900 from his father's estate. As an intromitter, therefore, " of full age, he neither was nor could be restored against his " own acts, and he is in exactly the same situation as if he had " been major at his father's death. Neither is there the slightest " pretence for pleading a colourable title, on the ground that " Mr Greig, from whom he received these sums out of his father's " estate, had been his tutor and curator; for Mr Greig's intro- " missions did not merely proceed from his office of tutor or " curator, but the defender, Bremner, granted also a commission " to Mr Greig to uplift the whole estate, funds, and effects of " his father, an act against which he never sought or obtained " restitution. This, therefore, is a manifest case of intromission " by a person of full age, and which inferred a universal repre- " sentation.

" There are other pleas on the part of Mr Bremner to which " it is scarcely necessary to advert. Thus, we are of opinion " that the claim against the defenders is not barred by *mora* " or neglect. The lunatic could not call the parties to account, " and it is not clear that any of her relations had either title or " interest to do so. The case is altogether different from that " of a judicial factor in a process of sequestration or ranking and " sale, acting for behoof of a body of creditors, and under their " control. It is their duty to see that the factor executes his " office correctly, and if they neglect to do so for a long period, " or abandon it altogether, it is possible the cautioner may have " grounds for pleading a personal exception against them. It is " otherwise with the judicial factor of a lunatic.

" Still less is there room to argue that the balance due on " the factorial accounts at the cautioner's death was extin- " guished by subsequent payments. The balance due in 1804 " went on from year to year increasing.

" Equally unavailing are the objections of the defenders to " the form of the action. They say that Hugh Bremner the

" younger, voluntarily undertook the obligation of cautioner at " his father's death, because he did not withdraw from it, which " he had a right to do, and therefore the summons ought not to " have been laid on the passive title of vitious intromission, but " on the ground that he was *lucratus* by the succession. We are " of opinion, that the defender Bremner was a vitious intro- " mitter; that the summons was correctly laid on that title, and " could be laid on no other ground, for it was in consequence " of his intromission alone that he became liable for his father's " obligation as cautioner, and exactly to the same extent as his " father was liable; and that the restriction of the claim (assum- " ing it to have been restricted) whether by the consent of the " pursuer, or on some equitable consideration, is no impeachment " of the competency or correctness of the summons.

" With regard to authorities, it is enough to refer to Mr Bell, " who has collected the substance of them, as applicable both to " caution for the performance of an office, and for a cash-account " to a bank. He states, that in both the obligation transmits " against representatives, not merely for the debt as it stood at " the cautioner's death, but prospectively, as if they were the " original obligants.

" The case of the Commissioners of Excise *v.* Mitchell, is a " direct precedent. A person had farmed the excise duties, " and *quoad hoc* was an excise-officer. The heir of his cautioner " was found liable in what fell due after the cautioner's death. " The tack endured for six years, and a doubt was started *obiter* " on the Bench, whether the decision would have been the same " if the officer had been removeable at pleasure. Whether " that doubt was well founded or not, is of no consequence here, " for the judicial factor was not removeable at pleasure. His " office continued till the lunatic's death or reconvalescence, " and he could not be removed but for misconduct.

" Equally conclusive is the case of Erskine. The obligation

" is said to have been directed against the cautioner and his " heirs, though that is not expressly stated in the report. But " if it was so, the same circumstance occurs in this case, for " the cautioner binds himself, his heirs, executors, and suc- " cessors; and we have seen that an intromitter, by the law of " Scotland, represents the defunct as universally as either heir " or executor, and that the term successor is peculiarly appli- " cable to him.

" A third precedent is the case of the University of Glasgow " *v.* Sir William Miller, which is also in every material circum- " stance identical with the present, holding, as we have just " metioned, a vitious intromitter to be a successor and universal " representative.

" Farther citation is unnecessary. There is not one precedent " of a different aspect.

" The late Mr Greig, as a vitious intromitter, was in the same " predicament as Mr Bremner the younger, with this exception, " that he was of full age when his intromission commenced.

" Therefore, upon a review of the whole case, we are of " opinion that both defenders are universally liable for the whole " sum due by the late James Bremner at his death, with interest.

" It is for the House of Lords to judge whether this claim, as " against Mr Bremner, was restricted expressly, or by implica- " tion, to the extent of the sums which he received. With " regard to Mr Greig's trustees, there is no pretence for such " restriction.

" C. HOPE.
" AD. GILLIES.
" J. H. MACKENZIE.
" JOHN FULLERTON.
" JAMES W. MONCREIFF.
" F. JEFFREY.
" H. COCKBURN.
" JOHN CUNNINGHAME."

BREMNER *v.* CAMPBELL, &c. — 9th May, 1842.

The Judges of the Second Division, to whom the remit was made, in the absence of the Lord Justice Clerk, expressed their concurrence in this opinion, and, on the 5th March, 1839, pronounced the following interlocutor: — "Find the defender, Hugh "Bremner, and the defenders, Hamilton Pyper, the said Hugh "Bremner, and Alexander David Fraser, as the acting testa- "mentary trustees of the late Alexander Greig, and as such, "sisted in his room in this action, as defenders, liable, conjunctly "and severally, for the balance remaining due on the factorial "accounts of the deceased James Bremner, at the close of his "office of factor, and amounting to L.6055, 14s. sterling, as at "the 24th day of June, 1826, with the legal interest thereof from "said date till paid, under deduction always of such sums as the "said defenders, or either of them, may have already paid to "account thereof, or which the pursuer may have drawn or re- "ceived from the estate of the said James Bremner; Repel the "plea of septennial limitation, and whole other defences: Find "no expenses due, and decern: Declaring, that in pronouncing "this judgment, the Lords, in respect that the Minute, if any, "given in, is not before them, and they cannot, in the circum- "stances, assume an admission of restricted liability to have been "made, have been unable to take into consideration what is said "to have been stated at the Bar of the House of Lords. And "with respect to the other defenders, Grace Sanderson and "Thomas Sanderson, find it incompetent to pronounce any "judgment or decerniture, in respect they stand already assoil- "zied by an interlocutor long since final."

The appeal was by Hugh Bremner alone, and was against this interlocutor, and the interlocutors previous to the remit.

Lord Advocate and Follett for appellants. — I. It has never been alleged that the appellant was either served heir or con-

firmed executor to his father, Hugh Bremner. The only ground of liability, therefore, is vitious intromission with his father's estate, and the right to enforce his liability can be maintained only on the terms of H. Bremner's bond. That binds him, "his "heirs, executors, and successors," that is, those who represent him. Possibly it might, under an ordinary bond of caution, be maintained against an heir or executor, that the bond imposes a continuing obligation after the death of the cautioner, and imposes a liability on the heir or executor in respect of his representation of the deceased; but the bond here was judicial, requiring the approval of the Court as to the sufficiency of the cautioner, and therefore, in the case supposed, of the heir or executor, and, even in the case of an ordinary bond, the right of the creditor to insist on the liability, has always been rested on the terms of the bond, as actually binding heirs and executors, University of Glasgow *v.* Miller, *Mor.* 2104; Excise *v.* Mitchell, *Elchies*, *voce* Cautioner, No. 3; Erskine *v.* Erskine, *Mor.* 9002. But a vitious intromitter does not in any way represent the deceased; he merely subjects himself to a passive liability for the debts of the deceased, and that only for such debts as were actually due, *Ersk.* III. 9, 49; and the bond was not conceived in terms which could bind him at his death, or create against him an obligation continuing after the cautioner's death. On the ground of vitious intromission, therefore, there may be liability for H. Bremner's receipts up to his death, in 1804, but at that date all such liability ceased. A vitious intromitter is liable for the debts of the deceased, but not for the debts of his representatives.

II. Waving, for the present, the extent of the liability, the appellant is not a vitious intromitter; he never at any time intermeddled with the estate of his father; it was Greig alone who intermeddled, no doubt, holding at the time the character of tutor to the appellant, but without any authority from the

appellant, direct or implied, to intermeddle in any way, either lawfully or unlawfully, at least, until the making of the deed on the marriage of Mrs Sanderson. Vitious intromission, however, is a powerful delict, whose consequences affect only the intromitter himself, *Ersk.* III. 9, 54. And so far as regards the fact of Greig having expended the money uplifted by him, in payments for behoof of the appellant, the appellant, so long as any of these payments could in strictness be said to have been made out of his father's estate, was in pupillarity, and incapable of binding himself by any act of his. By the time the appellant had reached puberty, Greig had more than exhausted his receipts; his payments thenceforth, on behalf of the appellant, were in truth out of his own proper funds, so that during the period of puberty, if in that period the appellant could have bound himself, there was no act of his bearing the character even of constructive intromission. As to the deed on Mr Sanderson's marriage, it was made not after the appellant's majority, as supposed by the consulted judges, but during his minority, and it does not, in its terms, either sanction past vitious intromission, or authorize its commission for the future; it only, by its terms, authorizes acts consistent with law, and, in the absence of any evidence to the contrary, this must be held to have been its intention, whatever use Greig may have made of it.

During his minority, the appellant could not be bound to inquire how Greig acquired the money which he expended on him, nor whether it had been obtained by proper legal title, nor even where it came from at all.

III. Assuming that the bond could continue the obligation after the death of the cautioner, and that the appellant is liable, in respect of his receipts from Greig, that liability cannot be as a vitious intromitter, but only in respect of his being *tantum lucratus*, and can attach only to such payments as were made to the appellant after he had attained majority. This limitation of

the liability was admitted by the respondent at the former hearing, and the terms of the remit did in truth direct the Court below to give effect to that admission. The respondent, therefore, was not entitled to enlarge his claim after the remit.

IV. If the appellant be not a vitious intromitter, and if his liability must be limited to the period after he reached majority, then there are no *media concludendi* in the summons, under which that liability can receive effect. The averments of the summons are, that the defendant is a vitious intromitter, and the conclusions are directed against him in that character, and are not confined to any particular period of the cautionary obligation, but cover the whole extent of its duration.

The appellant also maintained an argument, that the bond was cut off by the septennial limitation, and that the respondent's claim was barred by the neglect of those whom he represented to controul the acting of the factor, and several other grounds of defence, but those in the view which was taken by the House, did not form the subject of adjudication.

Tinney and Pemberton for the respondents. — I. The bond by H. Bremner was for the due performance of an office, not for any limited part of its endurance, but throughout until its termination; the liability immediately attached, although its extent was contingent upon the defaults of the factor, and as through the cautioner's interposition, the factor received power to intermeddle with the estate, so the cautioner's liability remained until that power ceased, or until the liability was put an end to by the court on a proper application to that effect. And after the death of the cautioner, the liability continues against his heir or executor, not as if it were his own personal obligation, but in respect of his representation of the deceased; Commissioners of Excise *v.* Mitchell, *ut supra*, where the heir of a cautioner for a tenant

of excise was found liable for receipts after the death of the cautioner. And Erskine *v.* Erskine, *Mor.* 9002, where representatives were found liable for moneys received entirely after the death of the cautioner. So again in University of Glasgow *v.* Miller, *Mor.* 2106. The liability was not because of the bonds in these cases being in terms against heirs and executors, otherwise it would be absolute to the full amount of the deficiency, whereas it is according to the nature of the representation, *cum beneficio inventarii*, or otherwise.

But this liability of the representative, like that of the cautioner, might have been put an end to at any time. It was open to his representatives, as it was to H. Bremner, at any time to have determined the duration and extent of liability by an application to the Court to that effect, thereby giving an opportunity at the same time for the protection of the lunatic's estate, by the appointment of new cautioners. The bond did not therefore expire on H. Bremner's death in 1804, but continued effective until James Bremner's death in 1826.

II. The bond does not bind vitious intromitters *per expressum*, but it binds "successors" as well as heirs and executors, and is sufficient to attach a liability upon the cautioner's estate had it remained *in hereditate jacente*. The heir or executor is liable in respect of his representation, and in this respect the vitious intromitter is in the same predicament. He is not like the heir or executor liable under any direct personal obligation in the bond, but in respect of his possession, and intermeddling with the estate, he subjects himself to a liability which attached upon the cautioner's estate, into whose hands soever it might come, and in this respect he may be in a worse, but he can never be in a better situation than an heir or executor duly entered or confirmed.

III. Assuming that the appellant is protected from the passive title of vitious intromission, he must at all events be liable to the

extent of the moneys actually received by him, or paid on his account; to this extent he has been *lucratus*, and must refund to the estate of the lunatic. The acts of Greig, as his tutor, bind him, Fraser *v.* Lovat, *Mor.* 16298; Drummond *v.* Menzies, *Mor.* 16320. He may no doubt be reponed against these acts on the head of minority and lesion, but that must be within the limited period of four years after majority, *Ersk.* I. 7. 35, and can only be done on the minor offering to restore to the extent of the intromissions, Farquhar *v.* Campbell, *Mor.* 9023; Tailors in Leith *v.* Dennistones, *Mor.* 9001; Barclay, *Mor.* 9031.

IV. It has in more than one case been held competent, where defenders to an action on the passive titles have been able to avoid the penal consequences of the action, to hold them under the same summons liable *in quantum lucratus*, Maxwell, *Mor.* 9971; Brown, *Mor.* 2734. The conclusions of the summons are in no way departed from, or exceeeded by so doing. They are more than sufficient to cover such a finding, and are in truth only restricted to that extent.

LORD COTTENHAM. — My Lords, In this case the summons claimed against the representatives of a cautioner who died in 1804, the amount due by the curator at the termination of his office, in 1826. By the original interlocutor of 1832, the cautioner's liability was held to have ceased at his own death. Both parties having appealed, this House, by the order of 1837, as I understand that order, left the question open.

All the Judges of the Court of Session have now held, that the liability of the cautioner, notwithstanding his own death in 1804, continued up to the termination of the office of the curator for whom he was surety, in 1826, and of this I entertain no doubt. The terms of the obligation are, I think, conclusive; but how ar the appellant, Hugh Bremner. the son of the cautioner, is

liable to make good this liability of his father the cautioner, is a question of more difficulty. He was two years old when his father died, in 1804, therefore his age of pupillarity terminated in 1816, and his minority in February, 1823.

By the summons, the claim against the appellant was made "as executor decerned and confirmed to him, or as vitious "intromitter with his means and estates, or as otherwise repre- "senting him on one or other of the passive titles known in law, "to implement the obligation," &c.

The defender, the appellant, denied that he was heir or executor, or that he had represented his father on any passive title, or that he had intromitted with his estate; but he admitted that Mr Greig had, and that he had himself received certain sums of money from Mr Greig. But in the joint statement of facts for the defendant, Hugh Bremner, and Mr Greig, it is alleged that he, the defendant, Hugh Bremner, had resided with Mr Greig (who was his uncle) since 1805, with the exception of six months, during which he went to Malta, and that Mr Greig had defrayed the whole expenses of his board, maintenance, and education for that period, his expenses to and from Malta, and also the expenses of his apprenticeship and admission into the society of Writers to the Signet, besides making him sundry other advances. And in order to shew that Mr Greig had paid more than he had received from the estate of the appellant's father, a statement of his receipts and payments is set out, in which, under the head of payment to and for the children, "board, clothing, education," &c. there are two items, Mr Hugh Bremner, L.1511, 19s. 4d. and L.1440.

I have not been able to find any other evidence against the appellant, Hugh Bremner, touching his intromissions with the estate of his father; but if the abstract of account printed in the appendix to the respondent's case, No. 2, which appears to have been produced by Mr Greig, were receivable as against the

appellant, it would only shew, that of the L.1511, all but L.840, were payments by Mr Greig on account of the appellant before he attained twenty-one, and L.840 since that time; and that the L.1440, were charges or payments for his board, clothing, education, and other necessary expenses from 1805 to 1829.

When the case first came before the Court of Session, in 1832, the doubt appears to have been as to the extent of the obligation, for none of the learned Judges considered that the appellant could be liable for the whole demand as a vitious intromitter. Lord Cringletie, indeed, is made to say that he thought the appellant liable, in so far as he had received part of the money. But the Lord Justice Clerk asked how the obligation could be enforced against infant children. And Lord Glenlee said, that a child could never be made to pay all his ancestor's debts on the ground of vitious intromission. And in one report, 14 *S.* & *D.* 182, Lord Glenlee is made to say, that although the son cannot be liable as a vitious intromitter, he must be liable for what he got from the estate of the deceased.

When the case came before the Court again in 1835, Lords Meadowbank and Medwyn expressed similar opinions. The Court were of opinion that the liability was restricted to the period of the death of the cautioner, in 1804, but they held the appellant bound to pay L.1038, the balance then due, with interest: upon what ground, consistently with the opinions so expressed, and upon the evidence before the Court, does not appear.

When the case came before this House in 1837, both the learned counsel for the respondent, the pursuer, limited their demand against the appellant to what he had received of his father's estate after he had attained twenty-one; and the respondent having been required to hand in a sketch of the judgment he prayed, submitted in writing, that the judgment of the House of Lords should be "as against Hugh Bremner for whatever

" sum he shall be ascertained to have received from the estate " of his father, the cautioner, after he attained the years of " majority."

This statement of claim was accordingly incorporated in the order of this House of the 14th of July, 1837, the remit being on the question of the septennial prescription, and on the question of the several liabilities of Hugh Bremner and others, " both in " respect of, and assuming the liability of, the late Hugh Brem- " ner to be as found by the said interlocutor of the 6th July, " 1832, and in any other respect, regard being had to the state- " ment of the respondent's counsel at the bar of this House, that " Hugh Bremner the younger was liable for the moneys received " by him after attaining twenty-one years of age, from the estate " and effects of Hugh Bremner the elder."

The respondent, the pursuer, accordingly, in the paper prepared for the Court of Session upon the remit, confined his claim as against the appellant to what he had so received, for after shortly alluding to the general title of claim, he says, — " The pursuer, however, shall at preseut assume, that the defen- " dant is so far protected against such passive title; and that his " liability cannot be extended beyond the funds which he has " actually received, or which have been expended on his behalf;" and he concludes, by submitting, that judgment ought to be pronounced " against the defendants, the trustees of Mr Greig, " for the full balance due on the factorial accounts, and against " Bremner, conjointly and severally with them, if not to the " same extent, at least, in so far as he had derived benefit from " his deceased father's estate, but alternatively, and at all events, " against both defendants, conjointly and severally, for the balance " due on the factorial accounts at the date of the cautioner's death " in 1804, and, in either case, with interest and expenses."

This claim was certainly a departure from the claim made at the bar of this house, and of the judgment then asked, and con-

tained manifest inconsistencies, but it was not a distinct abandonment of the claim as against the appellant, of unlimited liability as a vitious intromitter.

The object of the order of this house, is, I think, sufficiently explicit. The house required the opinion of the judges, as to the extent of the liability under the bond, whether the obligation upon the cautioner was determined by his own death, or whether it extended to the transactions of the party for whom he was surety for the subsequent period. But whatever might be the result of that question, the house considered the liability of the defendant, the appellant, as restricted to repayment of such sums as he had received from his father's estate, after he had attained twenty-one.

I think this the necessary result of what has taken place in the proceedings in this suit, and I think it equally clear, that the defendant has not made any available defence against this restricted liability.

The holding that the obligation extended to the period beyond the death of the cautioner, necessarily excludes the defence from the septennial prescription, and from the delay.

And as to the objection, that the summons is not such as to entitle the pursuer to compel him to restore what he has received of the estate since he had attained twenty-one, I am of opinion, that it cannot be maintained. The summons seeks to make the defendant responsible to all the creditors upon the ground of his having so intromitted with the estate as to incur a passive responsibility. A decree holding the defendant liable to the creditors for what he has received, is not inconsistent with the case sought to be established by the summons. It is, indeed, a much more restricted liability, but his intromission with the property is the foundation of both. Under certain circumstances, such intromission subjects the intruder to a general liability, but under other circumstances, only to a responsibility to refund so much

of the estate as he has received. A plaintiff is never bound to state the *minimum* of what he is to be found entitled to; but under a larger claim may recover any smaller relief which is consistent with, and grows out of the facts stated. Such is the general principle, and the cases referred to, appear to me to shew that the courts in Scotland have properly applied that principle to such cases as the present.

That the appellant received certain sums of money after he had attained twenty-one, from Mr Greig, on account of his supposed interest in his father's estate, is admitted, and he cannot be heard to say, that these sums were not part of his father's estate, because Mr Greig had at that time paid more in debts, and to the family of the appellant's father, than what he had received from the estate. Had Mr Greig been a proper executor, he could not have protected himself against creditors, by proving that he had exhausted the estate in payments to the family. I do not, however, find any sufficient proof as against the appellant of the amount of what he so received, after he had attained twenty-one.

Unless, therefore, the parties can, to avoid farther litigation, agree upon the amount, I think that the course for this house to adopt, will be to reverse the interlocutor appealed from, and to declare that the defendant is liable to repay with interest the amount of all sums received by him, from or on account of his father's estate since he attained twenty-one, and to remit it to the Court of Session to ascertain what sums were so received, and to calculate interest thereon, and to make such order therein as shall be necessary to carry this declaration into effect, but without expenses. This is not a case in which costs can be given, here, or in the Court below.

It is not necessary, for the purpose of the order which, I think, this house ought to make, that any decided opinion should be expressed, as to the grounds upon which the judges of the Court of Session formed their judgment upon the subject remitted to their

consideration by the order of 1837. This judgment is entitled to the highest consideration. It is the unanimous opinion of eleven of the Scotch judges, three of whom, Lords Meadowbank, Medwyn, and Glenlee, had in 1832 and 1835, together with the Lord Justice Clerk, and Lord Cringletie, according to the report, expressed directly opposite opinions upon the subject of vitious intromission by the appellant, which certainly gives additional weight to the conclusion to which they ultimately came. I am, however, anxious to guard myself against the supposition that I am, in the present state of information, prepared to concur in the reasoning upon this part of the case, referring such reasoning to the facts proved in the cause. All the judges concur in stating, that no pupil can be a vitious intromitter, but they seem to think, that what took place between the appellant's attaining the age of fourteen and twenty-one, did subject him to the consequences of vitious intromission, because he did not during his minority or the *quadriennium utile*, obtain relief by *restitutio in integrum*. What was proved in the cause amounted at the most to this, that the appellant during his minority had been maintained and educated by his uncle Mr Greig, who had been appointed his tutor and curator by his father, and who had, without authority, intromitted with the father's estate. Such, at least, was the whole of the case in evidence up to the date of the 6th August, 1818.

The appellant had attained the age of sixteen in the preceding month of February, and appears to have executed the deed on the marriage of Mr Sanderson. If it were necessary to consider, whether the being a party to this deed, at the age of sixteen, subjected the appellant to the consequences of a vitious intromission, the first consideration would be, whether it authorized any future illegal act by Alexander Greig; and whether, if he had duly performed the duty undertaken by this deed, he ought not to have procured legal authority for realizing the property; for, if such be the true construction and real object of this deed, it

is difficult to comprehend how any liability could arise from the appellant having been a party to it. Another subject for consideration would be, how far the acts of Alexander Greig, during the minority of the appellant, or this deed itself, was a matter from which it was incumbent upon the appellant to apply to be relieved by *a restitutio in integrum.*

It appears, however, that the opinion of the Judges was principally founded on the assumed fact, that the intromission had been continued by the appellant himself, for several years after he had attained majority. Had it been necessary to come to any conclusion upon this part of the case, the first consideration would have been, whether the facts upon which this opinion was founded were proved in the cause; whether Mr Greig's accounts, if proved, could be used as evidence against the appellant; and whether they established any intromission against the appellant; or whether the true result of the statement of such accounts was not, that Alexander Greig had alone intromitted with the estate of the father, and that all that the appellant had received had been by allowances, payments, or advances, by his uncle, Mr Greig; and, in that case, the question ultimately to be decided would have been, whether the taking the benefit of such allowances, payments, and advances, would subject the appellant to the penal consequences of a vitious intromission.

I hope I shall be understood as not expressing any decided opinion upon any of these points, contrary to the opinions of the Judges of the Court of Session, but as intending only to guard against the supposition, that the order I propose to this House to make, affirms or negatives any conclusion upon any of these points, and to suggest, that when they shall arise for judgment they will deserve and require the most grave consideration.

Lord Brougham. — My Lords, I entirely concur with my noble and learned friend in this case, nor should I have troubled your Lordships with one word upon the subject, as I had not an

opportunity of hearing the arguments; but, for the reference it was necessary I should make to the remit made five years ago, when this cause was before me, and when I moved your Lordships, to which you assented, to remit the case, with instructions, to Scotland, I having then occasion, of course, to direct my attention to that remit, and to the manner in which it should be conducted in the Court below, and I think, certainly some little misapprehension appears to have existed, with respect at least to part of the terms of the remit; I allude particularly to the part which says, "regard being had to the statement of the respon- "dent's counsel at the bar of this House, that Hugh Bremner "the younger is liable for the moneys received by him." When the case was before your Lordships, in the year 1837, I took exactly the same view of the case as my noble and learned friend, and if he does not move, I will move your Lordships' judgment.

Lord Cottenham. — I will therefore move your Lordships, that the interlocutor appealed from be reversed, and another interlocutor substituted in its place, by which it shall be declared, that the defendant is liable to repay, with interest, the amount of all sums received by him, from or on account of his father's estate, since he attained twenty-one, and to remit it to the Court of Session to ascertain what sums were so received, and to calculate interest thereon, and make such order therein as shall be necessary to carry this order into effect, without expenses.

Lord Brougham. — It is highly expedient that the parties should come to an arrangement among themselves, as my noble and learned friend suggests.

Lord Cottenham. — If the parties come to any arrangement as to the sum, it will save the expense consequent upon the House ordering it back; otherwise, I should propose that that be your Lordships' order.

Mr Deans. — My Lord, with regard to the expenses of the appellant, supposing it should turn out, upon investigation in

the Court of Session, that no sum has been paid to the appellant since twenty-one, is it clear that the Court are at liberty to find him entitled to expenses?

Lord Cottenham. — No. I consider, under all the circumstances, and the nature of the claim made, he cannot be entitled to expenses. It is very desirable that the parties should agree upon the sum, there can be no difficulty about it; and if they can, it will be put into the order.

It is Ordered and Adjudged, that the interlocutors complained of in the said appeal be, and the same are hereby reversed in so far as they declare any liability in the defender, the said Hugh Bremner: And it is declared that the defender, (appellant,) the said Hugh Bremner, is liable to repay with interest the amount of all sums received by him from or on account of his father's estate since he attained the age of twenty-one years: And it is farther ordered, that with this declaration the cause be remitted back to the Court of Session in Scotland; and that the said Court be directed to ascertain what sums were so received, and to calculate interest thereupon, and to make such order therein as shall be necessary to carry this declaration into effect.

DEANS & DUNLOP. — RICHARDSON & CONNELL, Agents.