[14*th July* 1837.]

HUGH BREMNER, Esquire, Writer to the Signet, and the Trustees of the late ALEXANDER GREIG, Accountant in Edinburgh, Appellants.—*Sir William Follett—Pyper.*

CHRISTOPHER KERR, Curator bonis for Mrs. Ann Haliburton, Widow of David Maxwell, Esquire, Advocate, Respondent.—*Tinney—Dr. Lushington.*

Judicial Factor—Cautioner.—Held (affirming the judgment of the Court of Session) that a bond of caution for a factor loco tutoris was effectual to compel him to account for the factor's intromissions, though it contained no express obligation that the factor should account for intromissions.

Septennial Prescription — Cautioner.—Question, Whether the septennial prescription applies to a bond of caution for a judicial factor where the cautioner died pending the factory? remitted for the opinion of all the judges.

Payment—Cautioner.—Where a cautioner for a judicial factor died in 1804, at which time a debt was due by the factor, and the factory continued till the death of the factor in 1826, and in the meantime payments were made by the factor sufficient to extinguish the debt in 1804, but ultimately a balance was due by him,—Question remitted for the opinion of all the judges, Whether the obligation of the cautioner came to an end by his death, and if so, whether his representatives were entitled to have the subsequent payments applied in extinction of that debt.

Expenses—Process.—No expenses having been moved for at the time of pronouncing a judgment in the Inner House of

the Court of Session, and a petition craving them having been subsequently presented,—Held (affirming the interlocutor of the Court of Session) that the petition was incompetent.

2D DIVISION.
Lord Fullerton.

BY an ante-nuptial contract entered into in 1778 between David Maxwell esq., advocate, and Miss Ann Haliburton, Mr. Maxwell bound himself to infeft Miss Haliburton in life-rent, after his decease, in case she should survive him, in an annuity of 180*l.* to be restricted, in the event of a child or children being procreated of the marriage; and he conveyed to her the half of what household furniture and plenishing should belong to him, and be possessed by them in common, or the value thereof. She, on the other hand, disponed to him the lands of Scotstown. The marriage was afterwards solemnized, but during the subsistence of it Mrs. Maxwell became incapable of managing her own affairs; and Mr. Maxwell having died in 1795, a petition was presented to the Court of Session by Mrs. Maxwell's relatives, praying for the appointment of a factor loco tutoris on her estate. As this petition was presented on 9th July 1795, there was no time for going through the regular forms before the rising of the Court for the summer session of that year; and the Court appointed James Bremner, solicitor of stamp duties, Edinburgh, to be interim factor, on finding caution in terms of the act of sederunt. He accordingly, along with Hugh Bremner, accountant in Edinburgh, as his cautioner, subscribed a bond dated the 20th of July 1795. Afterwards, in November 1795, the Court having appointed James Bremner to be factor loco tutoris, he and Hugh Bremner granted another bond, dated the 1st of December 1795. James Bremner thereupon took and

continued in the management of the estate till his death, The obligatory clause of these bonds was in these terms: "Therefore witt ye me, the said James Bremner, as "principal, and the said Hugh Bremner, accountant in "Edinburgh, as cautioner, surety and full debtor with "and for me, to be bound and obliged, like as we do "hereby 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, and "that in conformity to and in terms of the said Lords, "their acts of sederunt thereanent, in all points."

Hugh Bremner, the cautioner, died on the 20th of February 1804; and James Bremner died on the 24th June 1826; whereupon the respondent, Christopher Kerr, was appointed factor loco tutoris. In that character he raised an action against certain parties representing James Bremner, concluding for count and reckoning, and payment of a sum of money as the amount of his intromissions with Mrs. Maxwell's estate. These parties, however, were assoilzied from the action on the ground that they had not intromitted with the funds of Mr. Bremner, and had incurred no representation of him.

Thereafter, Mr. Kerr brought an action against the appellant, Hugh Bremner, as the representative of his father, and against Alexander Greig, the cautioner, accountant in Edinburgh, who had acted as factor on the cautioner's estate, and was alleged to have intromitted with his funds.[1] In this action Mr. Kerr

[1] He also brought a supplementary summons against Grace Sanderson, the grand-daughter of the cautioner, and Thomas Sanderson, her father, as her administrator; but the appeal was not in their names, they having been assoilzied.

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concluded that the appellants should be ordained "to "implement the obligations incumbent on said deceased "James Bremner, as factor loco tutoris to the said "Mrs. Ann Haliburton or Maxwell, in terms of the "said before-recited bond of caution granted by the "said deceased Hugh Bremner; and that by deliver-"ing up to him, the said pursuer, the title deeds and "other writings, as well as the paraphernalia, which "belonged to the said Mrs. Ann Haliburton or Max-"well, and the household furniture and plenishing, to "which she became entitled on her husband's death, "and failing their doing so to make payment to the "pursuer of damages, as after mentioned, and to hold "just count and reckoning with him for the funds "belonging to the said Ann Haliburton or Maxwell, "recovered or which ought to have been recovered by "the said deceased James Bremner, to pay over to him "the sum of 3,941*l.* 17*s.* 8*d.* (contained in a certain "interim decreet), and such farther balance as may "appear to have been due by the said deceased James "Bremner, with interest," &c. In defence, besides certain preliminary pleas unnecessary to be noticed, the appellants stated that the cautioner died in 1804, leaving several children in pupillarity, of whom the appellant, Hugh Bremner, was now the only survivor; that Mr. Greig had been nominated by him one of the tutors to his children, and was appointed by the tutors to be their factor, and that in that capacity he had intromitted with funds belonging to the cautioner, but that he had paid them away bonâ fide. They pleaded, in point of law,—

1. That the bond imposed on the cautioner the duty only of seeing that the factor should do exact diligence,

and not that he should account to those having interest for the sums which he might recover; and that the summons, so far from libelling that the factor had failed to do such diligence, proceeded on the assumption that he had actually recovered the property of his ward.

2. That the bond was prescribed, whether prescription should be held to run from the date of the bond, or from the period at which the several sums upliftable during the lifetime of the cautioner became due, and ought to have been recovered and secured by the factor.

3. That Mrs. Maxwell's next of kin being the parties on whose application the factor was appointed, and for whose behoof the action was carried on, were bound to have attended to the mode in which the factor conducted himself; to take care that a new cautioner was appointed on the death of Hugh Bremner; to intimate to those acting for the appellants that the factor was neglecting his duty: and having, during twenty-five years, taken no one step in relation to the matters now mentioned, but violated their own duty in them all, they were not entitled to the benefit of the obligation, whatever its effects otherwise might have been.

4. Supposing the bond to be available to any extent, it could be made effectual only for the sums which became due by the factor during the lifetime of the cautioner, the proper construction of the bond being, that the heirs, executors, and successors of the cautioner should be liable only for what became due during the cautioner's life.

5. That the claim could not exceed the amount by which the appellant, Hugh Bremner, had been benefited by the proceeds of his father's estate; seeing that he was neither heir, executor, nor successor of his father, had

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had no active intromission, and, being in pupillarity and minority at the time when the intromissions of others took place, was incapable of incurring the passive title of vitious intromission.

On the other hand it was pleaded by the respondent,—

1. That the obligation on Hugh Bremner, the cautioner, was, that the factor should do his duty in terms of the acts of sederunt, and the most important part of that duty was to account for his intromissions.

2. That the bond, being a judicial one, did not prescribe till the lapse of forty years from the date of the obligations in it, and no such period had expired.

3. That the cautionary obligation continued in effect against the legal representatives of the cautioner, not only in so far as regarded the past, but in so far also as regarded the future intromissions, and administration of the factor; and it was not incumbent on the next of kin of Mrs. Maxwell to exercise any control over him.

4. That the bond, being obligatory on the heirs and executors of the cautioner, was not discharged, or the accounting brought to a conclusion by the cautioner's death.

5. That all of the defenders, but more especially Mr. Greig, had incurred an universal passive title, and were liable for the whole debts of Hugh Bremner; and even if they had not incurred such universal title, they must be liable in the debt libelled, as having actually intromitted with more than its amount.

The Lord Ordinary ordered and reported Cases to the Court, who, on the 6th July 1832, pronounced this interlocutor:—"The Lords having, upon report by "Lord Fullerton, advised the cases for the parties, and "other proceedings, and heard counsel thereon, repel

" the objections pleaded by the defenders to the form of " the bond granted by the late James Bremner as " principal, and the late Hugh Bremner as cautioner; " but before further answer remit to Thomas Robert- " son, accountant in Edinburgh, to inquire and ascer- " tain what sum (if any) was due by James Bremner as " factor loco tutoris at the death of the said Hugh " Bremner, and to report the result to the Court; and " further authorize the accountant to inquire and " report what payments, if any, have been made by the " factor subsequently to the death of his said cautioner."[1]

The accountant made a report, stating that the sum due by the factor as at 20th February 1804, the time of the death of his cautioner, was 1,038*l.* 14*s.* 9*d.*; that, subsequently, payments had been made by the factor on account of his ward, amounting, exclusive of interest, to 1,928*l.* 12*s.* 7*d.* In the meantime, Mr. Greig having died, his trustees were sisted in his place, and on advising the above report the Court pronounced this interlocutor on the 17th December 1835:—" The Lords " having resumed consideration of this process with the " accountant's report, and heard counsel thereon, find " the defender, Hugh Bremner, liable to the pursuer " for the amount of the admitted balance of 1,033*l.* " 14*s.* 9*d.* due by the factor, James Bremner, at the " death of the late Hugh Bremner, the defender's " father, with interest thereon, until payment. Quoad " ultra, assoilzie the whole defenders, and decern."[1]

On the following day the respondent lodged a petition to the Court, stating that the last interlocutor did not correctly express and embody the judgment which the

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[1] 14 D. B. & M. 180.

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Court meant to pronounce, more particularly as regarded the claim against the trustees of Mr. Alexander Greig, who was concluded against conjunctly and severally with Mr. Hugh Bremner; that the interlocutor, as it stood, assoilzied these trustees in toto; whereas the intention of the Court was to decern against them as well as against Mr. Bremner; and, besides, nothing had been said as to expenses. He therefore prayed the Court "to resume consideration of the said interlocutor, and "to amend or explain the same, in so far as, in the "above or in any other particulars it may not have "accurately expressed and embodied the true intent "and meaning of the Court; and further, to dispose of "the point of expenses."

On considering this petition the Court, on the 19th of December, pronounced the following interlocutor:—"The Lords, having considered this petition, "allow the clerical error in the interlocutor referred "to to be amended as craved; but in respect that "expenses were not moved for at the time of pro-"nouncing that judgment, refuse the petition as "incompetent." The former interlocutor was then altered so as to run in these terms: — "The Lords "having resumed consideration of this process, with "the accountant's report, and heard counsel thereon, "find the defenders conjunctly and severally liable to "the pursuer for the amount of the admitted balance of "1,038*l.* 14*s.* 9*d.* due by the factor, James Bremner, at "the death of the late Hugh Bremner, the defender's "father, with interest thereon until payment. Quoad "ultra, assoilzie the defenders, and decern. (One "word delete and one word interlined.)"

Both parties appealed; Bremner and Greig's trustees

against all the interlocutors, and Kerr against those of the 17th and 19th December 1835, in so far as they did not decern simpliciter in terms of the libel.

Appellants.—(*Bremner and Greig's Trustees*). 1. It was incompetent, due regard being had to the media concludendi and the conclusions of the summons, to decern against the appellants for a debt arising due at 20th February 1804, the time of the death of the cautioner, in respect that the summons was libelled for a debt arising due at 24th June 1826, the time of the expiry of the factory of James Bremner, the principal.

The summons was libelled exclusively on an alleged liability for the whole intromissions of the factor, and consequently for the debt arising due on those intromissions at the expiry of the factory in 1826, and the record was framed consistently with and in support only of that conclusion. But the Court below have pronounced their decree, not for the debt due in 1826, but for a debt due in 1804, which the summons did not allege to be due, and the amount of which it afforded no materials for ascertaining. Besides, the summons concludes against the appellant, Hugh Bremner, "only "surviving son of the said deceased Hugh Bremner, as "heir served and retoured to him, at least as lawfully "charged to enter heir to him, within forty days, con-"form to act of parliament, and him and Grizel Greig "or Bremner (now deceased), relict of the said deceased "Hugh Bremner, as executors decerned and confirmed "to him, or as vitious intromitters with his means and "estate, or as otherwise representing him on one or "other of the passive titles known in law." But the only ground of liability insisted in (as it was admitted

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that the appellant was neither the heir nor the executor of his father, nor otherwise represented him,) was vitious intromission—a liability which is incurred quasi ex delicto by the party who, without a proper title, withdraws the moveable succession of a party deceased from the hæreditas jacens, where it falls to be taken up by the proper representative, and under legal authority.

But it was clearly established that the appellant Hugh Bremner was not a vitious intromitter, nor an intromitter at all with his father's succession, and the judges in the Court below unanimously held that there had been no vitious intromission by him. But, if so, there was no other question before them; and whatever might be the justice of the claim on the ground of the appellant being liable in quantum lucratus, this matter could not competently be decided under the action before the Court.[1]

For a similar reason the judgment is incompetent also as to the other appellants, Greig's trustees. It would appear that the Court below held them to be liable subsidiare to Hugh Bremner, which is exclusive of the principle of liability, on the ground of vitious intromission committed by Mr. Greig; and indeed as Mr. Greig intromitted quâ factor for the tutors and curators of the minor children of the deceased Hugh Bremner, this species of liability could not be enforced against him.

2. The judgment of the 19th of December altering that of the 17th, which assoilzied Mr. Greig's trustees, and decerning against them, was incompetent. The latter judgment was signed by the presiding judge, and

[1] Shaw's Digest, voce Process, p. 373.

the Court had no power to touch it without the consent of parties.

3. The bond of caution contained no obligation binding the cautioner that the factor should account for his intromissions, and make payment of what should become due thereon to the person or persons having right thereto. Cautionary obligations being strictissimi juris, the bond must receive the most limited construction which its terms can be held to import; but the obligation being simply that the factor should "do exact diligence in performing his "duty as factor loco tutoris," the present claim cannot be maintained upon it.[1] "Exact diligence" is a nomen juris in the law of Scotland, importing the careful observance and use of the means ordained by law for recovery of debts; and, taking the obligation in this sense, Hugh Bremner bound himself no farther as cautioner than that James Bremner should, in his office of factor, take the proper steps for realizing the property of his ward. It may or may not be true, that to construe the obligation in this sense is to deprive it of what the parties at whose instance the appointment was made intended or supposed to be a part of its efficacy; but this may be said in every case where a strict construction is applied instead of a liberal one, and is altogether irrelevant with reference to a cautionary obligation. Thus a bond of corroboration by a cautioner was found to be null where the obligatory clause omitted to mention the sum for which it was granted, though the preamble of the déed narrated correctly the original bond, the amount of the debt, and the postponement of payment, as the reasons why the accessory obligation was granted.[2]

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[1] 1 St. 17. 7. [2] Coult v. Angus, July 11, 1749, Mor. p. 17040.

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Neither can the respondent succeed in obviating the difficulty by maintaining that the obligation of the cautioner, as it is contained in the same bond which was subscribed also by the factor, must be co-extensive with the obligations incurred by the latter; for the responsibilities of the factor arise virtute officii, and he is bound to do diligence and to account for his intromissions whether there is or is not a bond of caution, which, so far as it goes, is merely expressive and corroborative of the obligation already subsisting against him. And it can be no relevant ground for subjecting the cautioner beyond the terms of the bond, that the principal who has joined with him in granting the bond, and who under it is no farther bound than himself, is, independently of that document and virtute officii, bound to a greater extent.

The appellants are not asking that a different construction should be put on the words from what they are in practice understood to bear in obligations of this description; for these words, as applicable to the duties of a factor loco tutoris, are in practice understood to provide only for the performance of those duties to which the appellants contend that they must be limited; while the duty of accounting for the funds recovered is embraced in an ulterior provision, which the bond does not contain, according to the style universally employed, and which is to be found exemplified in all the style books. A bond of this description first takes the principal and cautioner bound that the factor shall do exact diligence in recovering the means and estate of his ward, and then proceeds to take them bound that the factor shall account for his intromissions to those having interest as follows:—" Therefore wit ye me, the said

" A. as principal, and we C. and D. as cautioners, " sureties, and full debtors with and for the said A., to " be bound and obliged, as we by these presents bind " and oblige us, jointly and severally, our heirs, " executors, and successors whomsoever, that I the said " A. shall do exact diligence in performing my duty as " factor foresaid, that I shall render a just account of " my intromissions and management in relation to the " premises, and make payment of what shall be justly " due and resting by me to the said E. the pupil, or to " any other person or persons who shall be found to " have the best right thereto, and that I shall observe " and perform every other duty incumbent on me as " factor foresaid; and that in conformity to and in " terms of the rules and instructions appointed and " ordained by the said Lords, their acts of sederunt " thereanent, in all points, or that I shall be otherwise " liable to in law."[1] But this clause is omitted in the bond libelled on.

4. Assuming that the bond of caution was rightly construed as importing an obligation on the cautioner, that the factor should account for and pay the amount of his intromissions, as these might have arisen at the time of the cautioner's death, the claim under this obligation was barred by neglect on the part of those whose duty in relation to the cautioner it was to attend to the manner in which the factor performed the duties of his office, and give the cautioner notice if these were grossly violated.

The universal rule in questions of this nature is, that wherever security has been taken for the intromissions of

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[1] Juridical Styles, vol. ii. p. 80.

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a factor, whether voluntary or judicial, the constituents of such factor in the one case, and the parties at whose instance his appointment has taken place in the other, are bound to the cautioner for at least ordinary care in observing the mode in which the factor conducts himself, and to give notice whenever they have ascertained that he has been guilty of malversation. The principle of the decisions is, that the caution is intended not to supersede but as a security additional to the superintendence and vigilance of the parties themselves directly interested in the faithfulness of the management.[1]

Now it is admitted that during the whole period of the cautioner's lifetime, subsequent to the execution of the bond, and thereafter down to the close of the factory, by the death of the factor in 1826,—a period of thirty-three years,—the factor never either rendered an account or lodged a farthing of the trust monies in bank; and that during the whole of that period no attention whatever was paid to his management by the parties on whose application he had been appointed.

5. At all events the claim is barred by the septennial prescription.

The statute 1695, chap. 5, declaring that cautioners in obligations for sums of money shall not be bound for more than seven years, has been held not to apply to

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[1] Pringle v. Tait, 10th July 1834 (12 Shaw, 918); A. S. 22d Dec. 1711, s. 6; Ersk. iii. 3. 66; Dick v. Nisbet, 30th Nov. 1697 (2090); Fell on Mercantile Guarantees, p. 178–185, 2d edit.; 1 Bell, 276–7; Dicta in Smith v. Bank of Scotland, in House of Lords (1 Dow, 296); and Thomson v. Bank of Scotland, 11th June 1824 (2 Shaw's Appeals, 316); Duncan v. Porterfield, 13th Dec. 1826 (Shaw, vol. v. p. 111); Smith v. Campbell, 24th June 1829 (Shaw, vol. vii. p. 789); Mein v. Hardie and others, 19th January 1830, (Shaw, vol. viii. p. 346.)

cases where, from the conditional nature of the obligation or otherwise, it cannot be enforced within the prescriptive period.[1]

But although this be the rule, it is assumed in all the authorities, that where the condition is purified, so that it results in a money obligation of a certain amount, the benefit of the statute does take place, and the term of prescription commences to run.[2]

But as the arrears of the factor's intromissions at the death of the cautioner formed, on the footing of the judgment complained of, the specific amount due under the bond of caution, and exigible at that date, the septennial limitation applies, and had run nearly four times over between that date and the institution of the present action.

6. Supposing the construction of the bond adopted by the Court below to be well founded, the arrears due by the factor at the date of the cautioner's death were extinguished by the factor's subsequent payments.

The rule contended for is, that wherever there has been a current course of dealing or management, so that the claims of the parties interested come to be settled upon the statement of an account current at the close of such dealing or management, the articles on the credit side of the account are to be applied in the order of their dates to extinguish first the claims appearing on the other side of the account. This rule is followed in Scotland as well as in England.[3] It was exemplified in the Scottish case of Houston v. Speirs, in which it was

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1 3 Ersk. iii. 7. 23.

2 Brothwick, 4th Feb. 1715, Mor. p. 11008; Anderson, 25th May 1821, Shaw, vol. i. p. 31.

3 Devaynes and Noble, 1816, 1 Merivale, p. 605, and Simson v. Cook, 1824, 8 Moore, p. 588.

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decided by this House[1], (reversing the judgment of the Court of Session,) in relation to an account current with a bank which had been operated on by the principal for several years, but from the liability for which the sureties were held, in consequence of certain deviations in the mode of dealing, to be liberated, except for the balance of the first year,—"That although there was at the end "of the first year a large balance in the account current "against A., yet as by subsequent remittances made by "him it was extinguished, and the ultimate balance "arose out of posterior transactions, the sureties were "not liable for that ultimate balance." In that case there had not been any specific appropriation by either party of the payments made; but it was held that, according to the ordinary rules of accounting, they were applicable in extinction of the earliest items of the debit side of the account. The present case comes clearly within this principle, and if applied it extinguishes the claim.

Even, however, upon the assumption that the indefinite payments should not be applied according to the ordinary mode of stating accounts current, the cautioner would be entitled to a proportional benefit from those indefinite payments.[2]

In the case of the Duchess of Buccleuch[3] a claim was made against the cautioner for the factor on the estate of Dalkeith. The same party was also factor on the estate of Inveresk, and he had drawn the rents of both, and made indefinite payments to his principal. Having become insolvent, he made up a statement of his accounts

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[1] 3 Wilson and Shaw's Cases, p. 392.

[2] Ersk. book iii. tit. 4. sec. 2.

[3] Duchess of Buccleuch, February 1725, Dic. p. 6807.

with the person transacting for the Duchess, on the footing of applying the indefinite payments in satisfaction of the rents drawn from Inveresk. But the Court decided that this was unjust to the cautioner, and that the payments must be applied proportionally in satisfaction of the one debt which was secured, and the other which was not secured by the cautioner.

7. But supposing the appellants to be mistaken in these pleas, and the cautionary obligation to subsist unextinguished, they maintain that it cannot be enforced against either of them: And first, as to Mr. Greig, it is true that he was the only person who, under the authority of the tutors and curators, intromitted with the effects of the cautioner; but there are no grounds for alleging vitious intromission on his part. This passive title, says Erskine, is not "incurred where the intro-" mission is necessary; that is, where it is barely custodiæ " causa, or for preservation[1];" and no authority can be found for holding that the intromission by Mr. Greig was in the eye of law vitious, such as inferred fraud, and as the penalty of that fraud liability for the whole of the debts of the deceased, known or unknown, without regard to the amount of his funds, or to the period at which those debts might be claimed. There was such a title as gave Mr. Greig fair and proper grounds for the intromission which he had, and which was at all events sufficient to exclude the remotest idea of that fraud, the presumed existence of which forms the ground of the passive title in question. He was himself named one of the tutors and curators of the children of the deceased, to whom, by the very act of

[1] Ersk. b. iii. tit. 9. sec. 53.

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nomination, the deceased had entrusted the duty of taking the management of his estate for behoof of his children. The powers of the other tutors were delegated to him by a regular deed of factory. This was not a case of ultroneous interference by a stranger, or one unnamed by the deceased, and whose title therefore, as there was no presumption in favour of his capacity or integrity, it was requisite scrupulously to complete according to the forms of law. The tutors were at least in as favourable a situation as if they had held a general disposition. Mr. Greig was farther sanctioned by the deed of factory. His management and proceedings were of the most regular description. He caused to be inventoried and valued what was capable of being so. He kept accurate accounts. He expended all and more than he realized for the benefit of those for whose sake the appointment of tutors had taken place, and on whose account he undertook the laborious office of factor. But as in such circumstances it would have been undoubtedly competent, had the present action been raised before the effects of the deceased were not merely realized, but distributed, that the tutors and curators should obtain confirmation to avoid the consequences of the passive title, it cannot better the situation of the creditor, nor render worse their own or that of their factor, that the action has been delayed for a long period of years till confirmation is out of the question, in consequence of the effects of the deceased having been not merely realized, but all long ago paid away.[1]

Again, secondly, as to the appellant, Mr. Bremner, as vitious intromission is the only ground of passive title

[1] Ersk. b. iii. tit. 9. sec. 52.

libelled on in the summons, and no intromission of any kind being condescended on against him, he is entitled to be assoilzied, even if any other ground of responsibility could be maintained against him in a different form. It is too much to call children in pupillarity or minority, who are under the entire control of others, vitious intromitters.

But no intelligible ground of any kind has ever been stated as against him on the merits of the claim; and indeed, from the terms of the appellant's pleas on record, and the whole tenor of his argument, he appears to rely exclusively on his claim against Mr. Greig.

Respondent.—The situation in which the appellants stand with reference to Mr. Hugh Bremner's estate is as follows:—It is in the first place admitted, that at the time of his death he left personal property and effects to a very large amount. The exact amount is disputed; but the appellants themselves lodged a state of affairs, in which the value is estimated at 7,000*l.* With that estate the appellants have intromitted; they did so without any legal title having ever been made up in their persons. The chief intromission was by Mr. Greig. That gentleman accordingly did not deny that the funds came into his hands; but defended himself on the ground, that having so come, they were afterwards bonâ fide paid away by him. Even were this to be conceded, it is not pretended that the estate, or almost any part of it, was exhausted by payment of debts; though, had it been so, such a circumstance would not have saved Mr. Greig from the universal liability incurred by his vitious intromission. The payments for which he takes credit are chiefly voluntary payments

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to the members of the cautioner's family, which not even a regularly confirmed executor would have been justified in making so long as any debts remained unsatisfied.

Such, therefore, being the facts of the case, it is apparent, that whatever has since become of the estate of the cautioner, there was undoubtedly left by him, and in existence at the period of his death, more than sufficient to pay all his debts, including his debt under the bonds in dispute.

Now the question is, whether any thing has occurred which should prevent the respondent from recovering payment out of his estate, or at least out of the hands of those who have intromitted with it, and who are at this moment lucrati to a much greater extent in consequence of their intromissions.

The appellants have resisted this on pleas chiefly of a technical nature.

1. There is nothing in the alleged incongruity between the summons and the judgment. It is sufficiently broad to comprehend every ground assigned by the judges for the decision, and the judgment itself is not placed on a specific ratio.

2. It is quite competent for the Court, where an error has been committed by the clerk in writing out the judgment of the Court, to correct that error, and in this case nothing more was done.

3. The objections to the bond are unfounded. It is conceived in the usual style of all such documents at the time. The respondent has caused inquiry to be made, and finds that there are many other instances in which bonds have been taken in precisely similar terms. It sets forth the application for the appointment of factor. It gives the prayer of that application, — that the Court

would appoint some person in that character "for "managing the affairs of Mrs. Maxwell, with the usual "powers." It specially narrates the two interlocutors appointing the factor, "with the usual powers, while she "continues unfit to manage her own affairs; I always "finding caution, before extract, in terms of the act of "sederunt." And it takes the factor and his cautioner expressly bound, "that I, the said James Bremner, "shall do exact diligence in performing my duty as "factor loco tutoris foresaid, and that in conformity "to and in terms of the said Lords their acts of sede-"runt thereanent in all points, and the daily practice "of Scotland."

It is clear, that if the factor, under a bond so conceived, should fail "in performing his duty,"—not "in "all points," but in any one point which happens to be required of a factor loco tutoris either by the "acts "of sederunt," or "the daily practice of Scotland," his cautioner would be liable for such breach of duty. To maintain that the bond of caution merely bound the cautioner to see that the factor got the estate of his ward into his own hands, but was no ways bound to see that he should pay it out again, or that he should in any way "account to those having interest "for the same which he might recover," is plainly untenable.

4. But it is said that Mrs. Maxwell's next of kin being the parties on whose application and for whose behoof the factor was appointed, they were bound at stated intervals to have called him to account, and to have enforced the performance of his duty; and that having failed to do so, they must now submit to the consequences of their own negligence.

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The appellants forget, that though the factor loco tutoris was appointed on the suggestion of Mrs. Maxwell's friends, there is nothing in their conduct that can affect her patrimonial interests. The respondent does not insist in the present action as in right of the relations, but as representing Mrs. Maxwell herself. It may be that Mrs. Maxwell shall yet recover; in which case, can there be a doubt that she would be entitled to call the factor loco tutoris to account, and to make good her claims also against his cautioner, in case the funds of the principal should turn out to be insufficient? It would be no answer to Mrs. Maxwell, that her relatives, pending her lunacy, had failed to take a proper charge of her matters; nor, pari ratione, can such an answer be maintained against the respondent, who is the mere factor and administrator of Mrs. Maxwell, — in other words, eadem persona with her, and who may even at some future day be himself called to account by her in her own person.

The appellants confound the present case with a class of cases to which it has no sort of relation. They cite as authorities decisions in the many questions which have of late arisen as to the cautioners of bank agents and others, who were directly under the control of and at all times liable to account to the parties who named them to their offices. But there is a clear distinction between the case of a factor immediately under the control of the party who appointed him, and that of another judicially nominated as an officer of court in behalf of a person incapable of exercising any control whatever over him, and whose concerns are placed under his charge, not merely without any act of his own will, but expressly because he is

incapable of looking after them himself. In the former case, if loss arises through the negligence of the party, sibi imputet; the cautioner is liable only for such malversations of the factor as are in no respect to be traced to the fault of the party who appointed the factor, but in the latter the party is in a situation which altogether excludes the idea of fault; and, at any rate, it is not the negligence or fault of the party upon which the appellants here raise the argument, but the negligence of a third party, who is in no respect creditor to or connected with the factor.

5. Another objection which the appellants take to the cautioner's liability is, that prescription has run on the bond. But the statute introducing the septennial prescription applies only to bonds for sums of money; cautioners ad facta præstanda have not the benefit of it,—nor judicial cautioners, as in suspensions or loosing arrestments,—nor cautioners in marriage contracts, nor for the discharge of an office.[1]

It is said that the bond, being "in itself of a "temporary nature," was therefore not "intended or "calculated to subsist in force" during so long a period as the pursuer's claim extends over. It is true that the office of factor is in its own nature temporary; but it is temporary only in this sense, that the Court may recall it on a change of circumstances, or that it may be superseded by the more formal appointment of a tutor-at-law. Accordingly, what was found in the case of Bryce[2] was, "That the Court has power to ap-"point a curator bonis, whose appointment, although "in its own nature temporary, must continue either till

[1] 1 Bell, 358, and authorities there referred to.
[2] Bryce v. Graham, 25th Jan. 1828, 6 S. & D. 425.

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"evidence of convalescence be adduced, or a tutor-at-"law has been served." Now this decision distinctly assumes, that unless the lunatic reconvalesce, or a tutor-at-law be served, the factory must of necessity remain in force, whatever be the length of time that the lunatic survives, provided only that the malady which originally called for the appointment continues.

But if such be the law, its application is fatal to the appellants argument. It is not pretended either that Mrs. Maxwell reconvalesced, or that any tutor-at-law has served to her. The factory, of course, must have continued in force till Mr. Bremner's death put an end to it; and, in point of fact, Mr. Bremner did continue in uninterrupted possession of the office during all that period, and of course the relative bond of caution must also have endured during the whole of the same period.

6. There are no grounds here for applying the principles of the English case of Devaynes and the Scotch one of Houston. In these cases the liability of the surety was brought to a final termination at a specified period; and, of course, any payments made posterior to that time fell to be applied in extinction of that obligation. But here the cautionary obligation continued in full force till the death of the factor in 1826.

7. Both the appellants, Mr. Bremner and more especially the late Mr. Greig, incurred an universal passive title, and became liable for the whole debts of the deceased Hugh Bremner. The deceased left personal estate to the amount of 7,000*l.* and upwards. As that estate was intromitted with and spent by them, without a title by confirmation or otherwise, it is clear that they did so by vitious intromission.

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But a distinction is attempted to be drawn between the two parties. That distinction, at all events, leaves the liability of Mr. Greig untouched. It is said that he alone intromitted directly, and that any intromission which the appellant, Mr. Bremner, may have had, was merely through his medium. But if Mr. Greig took the whole funds into his hands, and then the parties, in concert with each other, divided the proceeds, every one who received a portion became thereby just as much a vitious intromitter as Mr. Greig himself.

It is not necessary here that there shall be fixed upon any of the parties a burden, beyond the actual funds which came into their possession, for the deceased left ample funds to pay all his debts. There is therefore no hardship in the present case, such as has occurred in many others, where parties thoughtlessly intromitting with a mere trifle of estate have thereby made themselves liable for an enormous load of debt, which there were no funds whatever to pay. The respondent is not asking the appellants to refund more than they have received; he is merely asking payment out of a fund with which they have intromitted without any title, and out of which, had they let it alone, his right of payment would have been undoubted. Even if they had regularly confirmed to the deceased, they must have paid his just debts, and they would not have been allowed to intromit without finding security so to do. Viewing them as vitious intromitters, this is the very minimum of liability which they could in any event have looked for.[1]

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[1] Maxwell, Mar. 28, 1632, Dict. 9971; Brown, July 16, 1671, Dict. 2734.

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In regard to the cross appeal, the respondent maintained,

1. That the appellant, Hugh Bremner, ought to have been found liable to the extent at least of the payments actually received by him out of the estate of the cautioner, with interest on these payments from their respective dates; and that in so far as there might have been any dispute as to the amount of these payments, the necessary accounting should have been ordered between the parties; that the other appellants, Mr. Greig's trustees, ought to have been subjected in the whole amount of loss occasioned by the factor's misconduct, and which by a separate process against the factor's trustees had been found to amount to 6,055*l.* 14*s.*, with interest thereon from 24th June 1826.

2. That the respondent ought to have had decree given in his favour for expenses; and at all events ought not, in the circumstances, to have been held precluded from moving for them, and so decided against sine causâ cognitâ.

LORD BROUGHAM.—My Lords, in the case of Bremner v. Kerr, which was argued at very great length, and I may say with consummate ability, upon both sides of the bar, both by Sir William Follett and his learned coadjutor on the one side, and Mr. Tinney and his learned coadjutor on the other, there were very great difficulties arising, from the extraordinary proceedings which had taken place in the Court below respecting the principle of the judgment pronounced, which had been altered after the Court pronounced it; the alteration of which had been varied,—but at any rate the judgment had been varied in what was deemed a clerical error.

The variation did not make it conform to what appeared to be the object of the Court in pronouncing it. Upon the whole it was admitted on both sides of the bar that very great irregularities had taken place, and those irregularities made it impossible to say that some alteration should not be made in the form of the judgment.

But, my Lords, it appeared to me that the parties having come to the bar for the purpose of having your Lordships decision, and being prepared to argue the case, and having incurred all the expense, it was advisable to go into the argument, instead of sending it back, for the purpose, if possible, of making an end to a question which had been very long agitated in the Court below,—in which are many parties, some of them being infants, and persons who certainly could not easily afford to continue litigation and lie out of their money,—it appeared highly desirable that we should go into the case with a view, if possible, of finally settling it in substance, and remitting it to the Court below to set right the decree. Accordingly we did go into the whole, and upon the fullest consideration which I have been able to give to the case, I am sorry to say that I am unable to see my way to such a recommendation as would entitle me to ask your Lordships to send back the case with a peremptory direction to a certain extent, and only to leave their Lordships to alter the judgment in the matter of form.

My Lords, my inability so to advise your Lordships, and to put an end to this long and vexatious and expensive litigation, arises very much from the sudden close of the present session. If it had continued a few days longer I might have made up my mind, and offered my advice to your Lordships to that effect. But it is exceedingly possible,—it is even more likely, that I should

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still have recommended you to take the course which I am now about humbly to suggest.

Upon one point which was much argued in the Court below I am quite prepared to advise your Lordships to affirm the judgment,—that is, upon the validity of the bond of surety, which is called in Scotland a cautionary bond, in which the late Hugh Bremner joined with the late James Bremner as principal obligor, or, as they call it in Scotland, obligant, and that that cautionary obligation is valid and effectual to all intents and purposes in respect to the intromission, administration, and management of James Bremner deceased. Making Hugh Bremner liable for those intromissions, administrations, and that management of the principal obligant, James Bremner deceased, down to the period of Hugh Bremner's death, as far as that goes, I am prepared to advise your Lordships to affirm the judgment of the Court below, which held the liability against Hugh Bremner deceased by that bond of cautionary obligation. I am also prepared to advise your Lordships to affirm another finding of the Court below, refusing the expenses upon the last application which was made by the respondent in the original appeal, and the appellant in the cross appeal.

But there were other questions, and particularly two of most serious importance; one of them not perhaps encumbered with any great difficulty or clouded with any considerable doubt, but of great importance nevertheless; the other encumbered with very considerable difficulty, in my apprehension, and involved, in some of its branches, with considerable doubt. And upon those two questions, if further time had been given for considering the advice I should offer to your Lordships

respecting them, and respecting the course to be taken in this case, in all probability I should have been of the opinion that I now hold, that it would have been expedient to remit it to the Court below for reconsideration, and with directions to have the benefit of the opinion of the other Judges of that Court. The right of executors—the liabilities of executors, the rights and liabilities of heirs, and of persons representing deceased parties, and the subject of vitious intromission, which were argued at great length upon both sides of the bar, are all questions of such great importance,—the principles of the Scotch law connected with which are somewhat different from our own,—and above all those are questions of such constant occurrence in practice and affecting interests of such large pecuniary amount and such great importance, that it is undoubtedly the best course that can be taken in a case like the present, when we think there is any doubt raised, to have those questions more carefully considered.

The course therefore that I should recommend your Lordships to take is this, that the interlocutor of the 6th of July 1832, on the report of my Lord Fullerton, Lord Ordinary, should be 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 in so far as it 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 then I should recommend that your Lordships should add, " But this House does not pronounce any " judgment on the residue of the interlocutor, directing " the inquiry of the accountant into the amount which

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" became due subsequent to the death, to inquire and " report what payment had been made, if any, subse- " quently to the death of Hugh Bremner;" and my reason for wishing that nothing should be said either way upon that subject is this, that it might possibly lead to an inference that the opinion of this House leant one way as to the other part of the liability, namely, the liability accruing in respect to the period subsequent to the death of Hugh Bremner, and that is intended by what I am about to suggest to be left entirely open: " That this House does not pronounce any judgment " upon the residue of the interlocutor; the inquiry of " the accountant being completed, and his report " made to the Court upon both the matters remitted " to him."

Even if your Lordships had been of opinion that it was immaterial, if your view of the liability of the cautioner ceasing at that period had been different from the opinion of the Court below, and if you had been even prepared to reverse any part of the judgment below which rested upon that different opinion, I still could not have recommended to your Lordships that it would have been necessary to alter that part of the interlocutor, because the accountant has already made the inquiry, and made up his mind upon the subject and reported upon it; and therefore to reverse that part of it would have been useless:—" This House holding the bond to " be valid and binding on Hugh Bremner the cautioner " to the extent of the whole intromissions, administra- " tion, and management of James Bremner in his " character of factor loco tutoris, and that consequently " Hugh Bremner at the time of his death was liable to " that extent under his cautionary obligation."

Then I recommend your Lordships to remit the other interlocutors of the 17th December 1835 and 19th December 1835, that is, desiring the clerical error to be corrected, and the whole cause, save the interlocutor of the 6th day of July 1832, already dealt with; and save also the refusing of the expenses in the interlocutor of the 17th of December 1832; affirming so much of that interlocutor as refuses expenses.

Then I would recommend to your Lordships to direct the opinion of the whole of the Judges to be taken on the question of the septennial prescription, and on the question of the several liabilities of the following parties, standing in different situations; the liabilities of Grizel Greig (or Bremner), Hugh Bremner the younger, Grace Sanderson, and Thomas Sanderson, and also the late Alexander Greig (who is represented by the present appellants), both in respect of and assuming the liability of the late Hugh Bremner to be as found by the interlocutor of the 6th of July 1832, and which is here affirmed, and in any other respect.

[The agent for the appellant here stated that Dr. Lushington admitted that Mr. Hugh Bremner, the son of the deceased, was liable only to such sums as he received after his majority, and that there being no record of the statement of counsel the admission stood unrecorded.]

LORD BROUGHAM.—It is a very dangerous matter to attempt to bind counsel to their admissions in argument. I directed both parties to give in a sketch or scheme of the decree that each required, in which plan there is great convenience. Your objection is grounded upon

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that admission, and merely applies to the extent to which the remit should enable the Court to go.

Both parties will be furnished with a note of what I have just now read; then the one party having referred to the alleged admission on the one hand, and the other having referred to the paper which has been given in, which he says is grounded upon some admission which allows the withdrawal of some claim, let both parties give in a note of what effect that admission in their opinion ought to have upon the terms of this remit, and what they suggest by way of alteration in the remit, and I will consider it. That must be done in the course of this afternoon, for this must be disposed of to-morrow.

LORD BROUGHAM.—My Lords, the case of Bremner v. Kerr stood over for to-day for the purpose of having, at the request of one of the parties (the agent for the appellant), an opportunity of embodying in the judgment to be pronounced by your Lordships the admission which it was said had been made by the respondent's learned counsel at the bar, limiting the extent of Hugh Bremner the younger's liability; restricting it to a liability in respect of the sums received by him, Hugh Bremner the younger, from and after the time when he attained the age of twenty-one. I have looked into my notes in this case, and I do not find in my note of the argument of the respondent's counsel any such admission. I do not find any thing distinct or indistinct in that note which can be construed into such an admission; I only find that in the argument of the learned counsel for the appellant, in reply, he states what looks as if there had been some such admission, namely, " It is said that Hugh Bremner

" the younger is liable in respect of sums received by " him after he attained majority." I have that note; that leads me therefore to suppose that there must have been some such admission made on the opposite side by the respondent's counsel. In the paper given in by the respondent, at the desire of your Lordships, as a statement of the decree which they claim, they have said, " claiming judgment against Hugh Bremner for what- " ever sum he shall be ascertained to have received " from the etate of his father Hugh Bremner de- " ceased, after he, Hugh Bremner the son, attained " the years of majority." Therefore, that being given in by them, there can be no objection to annexing that statement to your Lordships order, after stating the liability of Hugh Bremner the younger; regard being had to the statement of the respondent's counsel, that Hugh Bremner the younger is liable to the amount of whatever sums he may be ascertained to have received from the estate of his father Hugh Bremner deceased, after Hugh Bremner the younger attained the age of twenty-one years."

I think it may be put as a statement, because it is a statement that you claim that; and probably your counsel, if he made that statement here bonâ fide, which I have no doubt he did, will be instructed to agree to the same statement when you call his attention to it. Then, as to that part of the remit which relates to the liability of Grizel Greig or Bremner, that may be omitted, for I understand she has died, and left no personal representative.

I now move your Lordships that this remit stand, adding these words:—" Regard being had to the statement " of the respondent at the bar of the House, that Hugh

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" Bremner the younger is liable to the amount of what-
" ever sums he may be ascertained to have received
" from the estate of his father, Hugh Bremner deceased,
" after Hugh Bremner the younger attained the age
" of twenty-one."

The House of Lords, accordingly, ordered and adjudged, 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 Brem-
" ner as principal and the late Hugh Bremner as cau-
" tioner; 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, administration, 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 further ordered and adjudged, That so much of the said interlocutor of the 19th of December 1835 as refuses expenses be and the same is hereby also affirmed: And it is further 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 of 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; videlicet, 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 monies received by him, after attaining twenty-one years of age, from the estate and effects of Hugh Bremner the elder: And it is further ordered, That the said Court of Session do proceed further in the said cause, as may be just and consistent with this judgment.

DEANS and DUNLOP—RICHARDSON and CONNEL—Solicitors.