[12*th May* 1837.]

ARCHIBALD WISHART, Writer to the Signet, residing in Edinburgh, Appellant.—*Sir William Follett*—*A. M'Niel.*

Mrs. LOUISA MELVILLE WILSON or WISHART, Widow of John Henry Wishart, Esquire, Surgeon in Edinburgh, Respondent. — *Dr. Lushington* — *Shaw* — *Stuart.*

Cautioner.—Circumstances in which (reversing the judgment of the Court of Session) a remit was made to pass a bill of suspension by a cautioner pleading the privilege of discussion, although the principal obligant was dead, and also relief from liability by negligence.

1ST DIVISION.
Lord Cockburn.

IN the year 1810 the respondent was married to John Henry Wishart, surgeon in Edinburgh, the brother of the appellant, at which time she was possessed of 3,333*l.* 6*s.* 8*d.* sterling in three per cent. government stock.

An antenuptial contract was executed, by which Mr. Wishart disponed a house in Nicolson Square, Edinburgh, to himself and the respondent in conjunct fee and liferent, for her liferent use allenarly in case she should happen to survive him, and to the children to be procreated; whom failing, to Mr. Wishart, his heirs and assignees in fee; and he bound and obliged himself, &c. "to provide and secure the sum of 1,500*l.* sterling in "good and sufficient security, heritable or moveable, or "in the purchase of lands or houses, and to take the

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" rights and titles thereof to himself and the said Louisa " Melville Wilson in conjunct fee and liferent use allen- " arly, in case she shall happen to survive him, and to " the children to be procreated betwixt them; whom " failing, to himself, and his heirs and assignees whom- " soever in fee; and that so soon as he or they shall be " called upon to do so by the persons at whose instance " action and execution for implement of the provisions " made in favour of the wife and children of the mar- " riage by these presents are herein-after appointed to " pass."

In consideration of these provisions the respondent renounced " all terce of lands, half or third of move- " ables, and every other claim of provision whatever " which she could by law ask or demand by and through " the decease of the said John Henry Wishart, in case " she should survive him and in full of all that her " heirs, executors, or nearest of kin could ask, claim, or " demand on any account whatever by and through " her decease, in case she shall predecease her husband." She assigned, transferred, and made over " to and in " favour of James Wilson, esquire, advocate, John " Alexander Wilson, cadet at the Royal Academy, " Woolwich, her brothers, John Whyte Melville of " Strathkenness, esquire, John Balfour of Pilrig, " esquire, James Balfour younger, of Pilrig, writer to " the signet, John Balfour junior, merchant in Edin- " burgh, Patrick Wishart of Foxhall, esquire, writer to " the signet, and Archibald Wishart, writer in Edin- " burgh" (the appellant), and obliged herself, her heirs, executors, and successors, to " execute and grant all " and every deed or deeds, writing or writings, power " or powers which may be necessary for effectually

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" vesting in their persons all and whole the property or
" stock in the funds of Great Britain known by the
" name of the consolidated three per cent. annuities,
" presently belonging to her and standing in her name,
" and amounting to the sum of 3,333*l.* 6*s.* 8*d.* sterling
" of stock, but in trust always for the uses and purposes
" following: viz., that the dividends or profits arising
" or falling due upon the said stock, or the interest of
" such part thereof as may be sold and lent out in
" manner herein-after permitted, shall be paid regularly
" as received to the said John Henry Wishart during
" all the days of his life, and thereafter to the said
" Louisa Melville Wilson, in case she shall survive him,
" during all the days of her life. Secondly, upon and
" after the death of the longest liver of the said John
" Henry Wishart and Louisa Melville Wilson, the
" said stock, in so far as then unsold, and the produce
" of such part of it as may have been sold, and dividends
" and interest which may be due thereon, shall belong
" to the children procreated of the marriage and then
" in existence, and the said stock and produce shall
" be accordingly then transferred and paid to them by
" the said trustees, in such proportions as the said John
" Henry Wishart, or failing, of his doing so as the said
" Louisa Melville Wilson, in case she shall survive him,
" shall appoint; and failing of any such appointment,
" to them equally share and share alike. Thirdly, in
" the event of there being no children procreated of
" the said marriage, or of the failure of them and the
" heirs of their bodies at the time of the death of the
" said Louisa Melville Wilson, then the said stock
" or produce thereof shall belong in fee to the said
" John Henry Wishart, his heirs and assignees what-

" soever, and be transferred or paid to him or them " accordingly; but declaring, that it shall be in the " power of the said trustees, or quorum of them after " mentioned, in case the said John Henry Wishart " should have occasion for the use of the money, and " shall require them to do so, to sell all or any part of " the foresaid stock, and to give him the loan of all " or any part of the produce thereof or value received " for the same, upon his granting good and undoubted " security, heritable or moveable, to the satisfaction of " the said trustees or their quorum, for the repayment " thereof to them in trust for the purposes aforesaid; " and for the better enabling the said trust to be " carried into execution, it is declared that any three of " the said trustees accepting shall be a quorum, so long " as that number shall exist, after which the full powers " of acting under this trust shall devolve upon the " survivors or survivor of the said accepting trustees; " and the said trustees shall not be liable for omissions, " nor for each other, but each only for his own intro- " missions; and the said Louisa Melville Wilson " hereby binds and obliges herself, in case she shall " survive the said John Henry Wishart, to aliment, " maintain, clothe, and educate the children that may " be procreated of the marriage in a manner suitable to " her and their situation in so far as they may not be " able to do so themselves from other means left them " by their father or derived from others." Execution for behalf of the respondent was authorized to proceed at the instance of four of the trustees, not including the appellant.

On the same day the appellant granted a bond on the following terms:—

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"I Archibald Wishart, writer in Edinburgh, con-
" sidering that by contract of marriage of even date
" herewith, entered into betwixt John Henry Wishart,
" surgeon in Edinburgh, my brother, on the one part,
" and Miss Louisa Melville Wilson, daughter of the late
" Major James Wilson, of the royal regiment of
" artillery, on the other part, the said John Henry
" Wishart in contemplation of the said marriage dis-
" poned, conveyed, and made over to and in favour of
" himself and the said Louisa Melville Wilson in con-
" junct fee and liferent, for her liferent use allenarly,
" in case she should happen to survive him, and to the
" children to be procreated betwixt them, whom failing
" to the said John Henry Wishart, his heirs and
" assignees whomsoever in fee, all and whole the
" dwelling house and other subjects particularly therein
" described; as also the said John Henry Wishart bound
" and obliged himself, his heirs and successors, to pro-
" vide and secure the sum of 1,500*l.* sterling in good
" and sufficient security, heritable or moveable, or in
" the purchase of lands or houses, and to take the rights
" and titles thereof to himself and the said Louisa
" Melville Wilson in conjunct fee and liferent, for her
" liferent use allenarly in case she should happen to
" survive him, and to the children to be procreated be-
" twixt them, whom failing to himself, and his heirs and
" assignees whomsoever in fee; but always under the
" declarations mentioned in the said contract of mar-
" riage, as the same in itself more fully bears; and
" seeing that at the time of adjusting the terms of the
" foresaid contract of marriage it was agreed that I
" should become bound as cautioner with and for the
" said John Henry Wishart for payment of the fore-

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" said sum of 1,500*l.* sterling in manner underwritten.
" Therefore wit ye me the said Archibald Wishart
" to be bound and obliged, as I do hereby, in the event
" of the said John Henry Wishart's failing to imple-
" ment the provision above mentioned, by providing
" and securing the foresaid sum of 1,500*l.* sterling in
" the manner provided by the said contract of marriage,
" allenarly and no otherwise, bind and oblige myself,
" my heirs, executors, and successors whatsoever, to
" make payment to the said Louisa Melville Wilson, in
" case she shall happen to survive the said John Henry
" Wishart, of the legal interest of the foresaid sum of
" 1,500*l.* sterling, beginning the first payment of said
" interest at the first term of Whitsunday or Martinmas
" that shall happen after his death for the half year
" preceding, and so forth half-yearly thereafter during
" all the days of her life, with a fifth part more of each
" half-yearly payment of liquidate penalty in case of
" failure, and the due and ordinary annual rent thereof
" from and after each respective term of payment
" during the not-payment of the same. As also,
" in the event of there being two children procreated of
" the foresaid marriage, and alive at the time of the
" death of the said John Henry Wishart and Louisa
" Melville Wilson, I oblige myself and my foresaids
" to make payment to such children of one third part
" of the foresaid principal sum of 1,500*l.* sterling; and
" in case there shall be three or more children procre-
" ated of the foresaid marriage, and alive as aforesaid,
" I oblige myself and my foresaids to make payment to
" them of the whole of the foresaid sum of 1,500*l.* sterling;
" and that at the first term of Whitsunday or Martinmas
" after the decease of the longest liver of the said John
" Henry Wishart and Louisa Melville Wilson, with a

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" part more of the principal sum that may happen to " be payable of penalty in case of failure, and the legal " interest thereof, from and after the term of Whit- " sunday or Martinmas next to and immediately pre- " ceding the decease of such longest liver, and in time " coming during the not-payment of the same. And " I oblige myself and my foresaids to grant security for " the payment of the foresaid sums of principal and " interest, to the satisfaction of the persons at whose " instance action and execution are by the foresaid " contract of marriage stipulated to pass for implement " of the provisions in favour of the said Louisa Melville " Wilson and children of the marriage; and that so " soon after the death of the said John Henry Wishart " as they may require us to do so, in case it shall be the " opinion of Robert Dundas and James Balfour, " esquires, writers to the signet, or failing of them or " either of them by death, of any other person or " persons to be nominated in their or either of their " places mutually by me and the persons at whose " instance execution is to pass as aforesaid, and in " case of difference between the said referees, of any " person they may appoint to decide between them, " that I ought to grant other security than these " presents under the circumstances of the case. But " declaring that the whole foresaid sums of money, in so " far as I shall have paid the same, shall revert to me, " my heirs and successors, in the event of such chil- " dren dying without leaving issue of their bodies, or " of their not disposing of the same. And farther de- " claring, as it is hereby expressly provided and " declared, that if the children who may be procreated " of the said marriage shall happen to succeed to any " property, heritable or moveable, which would have

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"fallen to the said John Henry Wishart (otherwise "than through the said Louisa Melville Wilson) in "consequence of being her husband, had he been alive "at the time of such succession opening, then and in "that case such child or children shall in the above "event be bound to relieve me and my foresaids pro "tanto from this obligation, and we shall be entitled to "operate our relief therefrom to the extent of such "succession accordingly."

This deed was written by the appellant.

His brother died on the 9th July 1834, and in December of that year a charge was given to the appellant on the bond for payment of one half year's interest of the above sum of 1,500*l.* He presented a bill of suspension, in which, besides stating certain penal objections[1], he pleaded, first, that the heir and estate of Mr. Wishart had not been discussed; and, second, that the trustees under the marriage contract had been guilty of such negligence as released him of his obligation. Lord Cockburn passed the bill on caution, but the Court, on the 16th May 1835, altered and refused the bill.[2]

Mr. Wishart appealed.

Appellant. — The question is, whether the appellant shall be permitted to enter into Court for the purpose of having the merits of his case investigated. The Judges below have assumed all the statements of his adversary to be true, while they have denied him the means of establishing his own allegations, or inquiring into the truth of those made on the other side.

In offering to come into Court he found caution,

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[1] These were abandoned at the bar of the House.

[2] 13 S. & D. 769.

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not only for the sums demanded, but also for the costs; and he was ready, if he had been ordered, to consign in Court the sums charged for. The Lord Ordinary thought he had made out a case for investigation, and accordingly his Lordship had no difficulty in passing the bill of suspension on caution. This of itself was a sufficient reason for going into the inquiry proposed, even although the Court had been right in entertaining an opposite opinion on the points of law and fact involved in the cause.

The Bill Chamber is the initiative tribunal of all causes in which it is necessary to proceed by way of injunction. A suitor cannot apply to the Court at once, and he cannot have his bill introduced into the Court without the leave of the Lord Ordinary. All that is required in this tribunal is, that the party shall make out a primâ facie case; but the Judge sitting in this tribunal has no power to take any species of evidence except a mere reference to oath. If a litigant chooses to be content with this means of proof, or if no other be competent, then the Judge has it in his power to allow such proof, but he can allow no other; he cannot grant a commission to examine witnesses; he can make no remit to a jury; he cannot even grant a commission to recover writings. The course is, if proof or farther investigation be required to pass the bill, by which means it becomes a summons, and the opposite party is brought into Court, as in the case of an ordinary action, the bill is not passed parte inaudita; for if the respondent is able instantly to verify his answers to the bill by written documents it may be refused; but if his answer resolve into counter allegations the bill must be passed.

Such was the nature of the respondent's averments in this case. In the first place, she alleged that her

husband died insolvent, and on this assumption contended that the appellant was not entitled to the privilege enjoyed by all cautioners, that of the discussion of the primary obligant or his estate. But no evidence was produced of this allegation, and the appellant denied that it was true. Parties being then at issue on a material fact, and there being no means of testing proof in the Bill Chamber, the bill ought to have been passed.

It is the undoubted law of Scotland that a creditor cannot proceed against a cautioner for the debt without first discussing the principal, or, in the event of his death, the heirs of the principal, who are in law the same person as the predecessor.[1] The respondent does not deny that this is the general rule, but alleges that it does not apply when the principal obligant is dead. For this proposition no authority was produced, and the appellant denies that such is the law of Scotland.

The heir is in law the same person as his ancestor,—hæres est eadem persona cum defuncto,—and it would be preposterous to hold that when a man has left a large succession, which is open to attachment, the creditor shall be relieved from the necessity and duty of discussion merely because the principal has died. The death of the principal makes no difference whatsoever on the legal position and obligations of the parties.

In the second place, the appellant made allegations of neglect on the part of the respondent, and those to whom she intrusted her interests, which were relevant to release him from all liability as a cautioner. It is true the appellant was a co-trustee in one part of the marriage contract, but he was not one of the parties at

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[1] 3 Ersk. 361.

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whose instance action or execution could pass for implement of the obligation in favour of the respondent. Her nearest relatives were appointed the trustees for the very purpose of enforcing this obligation. The respondent herself was entitled to enforce it at any time she thought proper; yet during the whole twenty-five years of the subsistence of the marriage these trustees and the respondent never once called upon the late Mr. Wishart to make the necessary investment. By the terms of the deed Mr. Wishart was only bound to make the investment so soon as he or they (that is, his representatives) shall be called upon to do so by the persons "at whose instance action and execution for "implement of the provisions made in favour of the "wife and children of the marriage by these presents "are herein-after appointed to pass." The appellant only became bound to make payment on the failure of his brother to implement his obligation on being called to do so. For any thing that appears, Mr. Wishart may have been perfectly ready the moment he was called upon.

In point of fact it was within the knowledge of the respondent, and those she had authorized to enforce implement of the condition of the contract, that the late Mr. Wishart was acquiring property, — was passing large sums of money through his hands, and yet neither she nor they called upon him to implement the obligation; and the appellant is quite ready to go to proof upon the allegation that without difficulty or inconvenience Mr. Wishart might at any time have fulfilled this obligation. It is settled law that negligence upon the part of creditors to call upon the principal obligant to perform his duty will liberate a cautioner from the performance of his subsidiary obli-

gation.[1] Nay, the respondent and her trustees were so very remiss in the discharge of their duty as not to be aware that in point of fact the late Mr. Wishart had actually implemented the obligation to the extent of 300*l.*

Respondent. — If a party attempt to come into Court on irrelevant statements, or if he be met by statements the truth of which he cannot deny, it would be worse than useless to allow him to involve his creditor in an expensive and tedious litigation. Accordingly the appellant does not deny the competency of the Court to refuse his bill, although passed by the Lord Ordinary; nor can he deny that at the bar of the Court below he, when called on, did not venture to dispute the fact that his brother died insolvent. If he had then alleged (which he did not in his bill) that he had died solvent the bill might have been passed; but, although pressed on that point, he would not do so. His plea of discussion is, both for that reason and because he now stands in the position of a principal obligant, totally irrelevant. It may be true that generally a cautioner is entitled to the benefit of discussion, but to this there are various exceptions. If the principal obligant be beyond the jurisdiction of the Court so that the diligence of the creditor cannot be made effectual against him, a cautioner is not entitled to say that his obligation is to lie dormant till the principal come within reach of the law. But in the case where the principal obligant has died the same rule applies à fortiori, and it does so more especially where the obligation is one of an alimentary nature, to take effect on the death of the

[1] Pringle v. Tate, 10th July 1834; 12 S. & D., 918, Nairne v. Barclay, 18th Nov. 1712, Mor. 3154.

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principal obligant, which is the nature of the provision made in favour of the respondent. Another exception is, where there are no tangible funds against which the diligence of the law can proceed. Indeed, the party who pleads discussion states, if not explicitly, at least by implication, that there are funds out of which the debt may be made effectual by the execution of diligence. But whatever the appellant may now say at the latest stage, and when he finds that otherwise he has no footing on which to rest as to solvency, he did not even pretend in his bill that his brother was solvent.

The appellant is not entitled to say to the respondent that she must incur the expense of charging the heir-at-law to enter,—of raising actions of constitution,—of obtaining decrees of adjudication,—and of proceeding by arrestment and poinding, in order to ascertain whether there be funds or not; and that in the meantime she must be deprived of her alimentary provision, which he guaranteed should be paid to her at the first term after her husband's death, and so left to starve. In truth, to require her to incur such expense and such delay would be not only compelling her to attempt to operate the appellant's relief (which he himself is entitled to do), but would in fact be defeating both the spirit and the letter of his obligation.

The present case is one of a peculiar nature, and is clearly distinguishable from that of an ordinary cautionary obligation. It is no doubt true that the appellant stands in the position of a subsidiary obligant; but he becomes bound immediately and directly to make payment to the respondent of her alimentary interest at the first term that shall happen after her husband's death in the event of his "failing to implement the provision "above mentioned, by providing and securing the fore-

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" said sum of 1,500*l.* in the manner provided by the " said contract of marriage;" and by that contract it is provided that this should be done so that in case of her survivance she might have the immediate enjoyment of the liferent interest. It is plain, therefore, that the meaning and intention was, that the provision should be made during the currency of Mr. Wishart's life; and the obligation which the appellant undertook was, that if this was not done he would pay to her the alimentary interest, beginning the first term's payment immediately after Mr. Wishart's death.

On the merits of the appellant's liability it will not be necessary to say much. He appears to dispute it on two grounds: 1st, That his obligation was qualified to the effect that it was only to subsist until Mr. Wishart succeeded to an aunt, who, he says, had promised to leave to him a house in George Square, and that she accordingly did so. Now the short answer to this is, that the respondent knows nothing as to its truth, that the marriage contract and the bond make not the slightest allusion to it, and that she entered into the marriage on the faith of what appeared on the face of these documents, and had nothing to do as to the private considerations which may have passed between the appellant and his brother; and that it is utterly incompetent to qualify the appellant's written obligation by such statements.

The second ground assigned for holding him not liable is, that the trustees under the marriage contract (of whom he himself was one) were negligent in the execution of their duty, and that by that neglect his liability is discharged. To this there are several answers: 1st, The respondent was not a trustee; and therefore the allegation, whether true or false, has no relevancy in any question with her. 2dly, The appel-

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lant himself being a trustee cannot plead the negligence of himself and his co-trustees to exonerate himself from personal liability. 3dly, He contemplated the possibility of Mr. Wishart not implementing his obligation during his life; for it is upon that supposition that the appellant becomes bound to pay to the respondent at the first term of her husband's death her alimentary interest.

Lord Brougham. — This was an appeal from an interlocutor of the First Division of the Court of Session, and the consequential interlocutor of the Lord Ordinary, pronounced in a suspension brought by the appellant of a charge given by the respondent for payment to her of 37*l.* 10*s.*, being one half-year's interest due on the sum of 1,500*l.*, for which the appellant was alleged to have become liable on his cautionary obligation. The Lord Ordinary having in the first instance passed the bill, their Lordships recalled that interlocutor, and remitted to him to refuse the bill, with expenses to the charger, which his Lordship did accordingly. The facts of the case were these: —

J. H. Wishart, the respondent's husband, previous to and in contemplation of his marriage with her in 1810, bound himself, by contract, to provide and secure 1,500*l.* on good heritable or moveable security, or in the purchase of lands or houses, and to take the titles to himself and his intended wife, in conjunct fee and liferent use allenarly, in case of her surviving, and to her children of the marriage; whom failing, to himself, his heirs and assignees, in fee. "He bound himself to "do so, when called upon by James Wilson, John "Wilson, John Melville, and John Balfour, or the "eldest sons of either of them." These, with others,

and among them Archibald Wishart, the present appellant, were the trustees of the settlement; and in them were vested the marriage portion of Mrs. Wishart for the trusts of the settlement, with a power to the trustees, or their quorum of three, to advance the whole or part of it to J. H. Wishart, on good real or personal security. Of the same date A. Wishart granted his bond of caution, by which he bound himself, "in the "event of J. H. Wishart failing to provide and secure "the 1,500*l.*, in the manner provided by the mar-"riage contract," to pay to Mrs. Wishart the interest of 1,500*l.* half-yearly, if she survives her husband, and to pay the principal sum to the children of the marriage after the death of the survivor of the husband and wife. He further bound himself to grant security for principal and interest when required by the same parties, who were authorized by the marriage contract to call upon J. H. Wishart to secure the sum contracted to be settled. There is also the clause of registration, for letters of horning on six days charge, and all other execution on decree to be interponed.

After the decease of J. H. Wishart, and upon the alleged ground of his not having implemented the conditions of the marriage contract, by providing and securing the sum of 1,500*l.*, Mrs. Wishart, after recording the bond, raised letters of horning, and gave upon them the charge to suspend which the bill was presented, out of which these proceedings have arisen.

The first observation to be made touching the interlocutor of the First Division under appeal is, that if it can stand at all it certainly must be upon grounds other than those assigned in the reported Cases, 13th volume of Shaw & Dunlop, 771, the only account with which your Lordships have been furnished of what passed below when the case was decided: "All the Judges," it

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is there said, " were of opinion that no relevant grounds " were stated for refusing to perform the obligation, " more especially as the suspender (the appellant) was " himself a trustee under the marriage contract, and he " did not allege that his brother died solvent."

Now the two reasons here given are equally unfounded, the one in fact and the other in law. The first reason is that the appellant was a trustee under the settlement, by which is plainly intended, adopting the argument of the respondent (the charger below), that A. Wishart ought to have obtained implement of the marriage contract, and not having done so has himself to blame. But this proceeds upon an entire mistake of the fact, which runs through the respondent's statements both in the Court below and in her printed case before your Lordships, and into which mistake the Court has been led by these repeated mis-statements of the party, perhaps not sufficiently corrected on the other side. It is all along assumed by the respondent that the trustees were the parties on whom was thrown the duty of calling upon J. H. Wishart to perform the conditions of the marriage contract; and that A. Wishart (the appellant), being one of those trustees, ought to have seen to the performance of those conditions. This is, however, altogether a mistake. He was a trustee, certainly; but he was not one of those four persons on whom that duty fell. The persons who are to call for performance are those four whom I before mentioned, and who are no doubt also trustees, but trustees with others, of whom A. Wishart is one. A. Wishart, therefore, had nothing to do with calling for performance, for he was not one of the four named. This mistake, in point of fact, is adopted by the first of the reasons said to have been given for the judgment.

Equally plain is it that the other ground on which the judgment is said to have been rested will not support it, namely, that A. Wishart does not allege his brother's solvency; for it certainly lay not on him to show the solvency; but if the case depended on the question of J. H. Wishart's solvency or insolvency it was for the respondent (the charger) to show his insolvency. However, the main question here is, upon the course taken by the respondent and sanctioned by the Court, of attaching the surety, the cautioner, in the first instance, without going against the principal debtor, or his estate; that is, depriving the cautioner of his *beneficium ordinis,* his right to have the principal obligant first discussed.

Another but a subordinate question is raised upon the investment of 300*l.* made by the principal obligant. That this was made in implement of the contract, and not as an additional provision for the children, there cannot be any doubt; and if it was adopted by those whose duty it was to attend to the interest of the children, the appellant's subsidiary liability would, to that extent at least, be discharged, or to speak more correctly would never have attached, whether the security on which the investment was made be now an available one or not. This would be true, even if the judgment on other grounds and in other respects were allowed to stand,—if there were no impeachment of it on account of the right of discussion having been disregarded. The investment of the sum of 300*l.* was certainly brought before the Court below by the pleadings; but the matter does not appear to have been taken into consideration,—that is, as to the 300*l.*—But now as to the main question.

In the peculiar circumstances of this case I will own that I have endeavoured, if possible, to support the de-

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cision of the Court below, with even more than the anxiety which a court of appeal always feels to sanction the judgment under review; and I have searched for some ground upon which an affirmance might be rested, the grounds upon which it was placed below appearing plainly to be insufficient for its support; but I am obliged to add that I have sought in vain. If it be said that the bond in suit is not properly a cautionary obligation, inasmuch as A. Wishart does not bind himself that J. H. Wishart shall invest the money, but only that he, A. Wishart, shall pay the interest, and eventually the principal, in the event of J. H. Wishart's failing to make the investment,—then it must be answered, that this is only an expanded form of stating what is meant, and indeed what alone can be meant, by the more ordinary form of one person binding himself for the performance of a given thing by another person: all that the one can do is to make good the other's deficiencies, — to pay, if he does not pay, or perform what he has undertaken. Again, if it be said that the present obligation is not cautionary at all, but only a conditional obligation,—that is, an obligation by one party to do one thing if the other fails to do a different thing, —A. Wishart binding himself to pay if J. H. Wishart fails to invest,—this distinction clearly cannot hold; for every cautionary obligation *ad factum præstandum* comes or may come within the same description. It is to make up the loss arising from nonperformance of the principal; and surely the obligation is not the less of a cautionary nature because the damages are as it were liquidated in the bond of caution, which they here are by A. Wishart undertaking to pay a specific sum; and Erskine, in tit. 3, sect. 62, plainly considers the case of subsidiary obli-

gation as one more peculiarly effectual than others in giving the *beneficium ordinis*, — the right of discussion. There is a difference, no doubt, between caution *ad factum præstandum* and caution for the payment of money; and such a distinction may be taken in the present case, because the principal obligation was to invest money as security, and not to pay it. But this works nothing for the respondent. On the contrary, the law gives the benefit of discussion more absolutely in this than in the other case; for in obligations *ad factum præstandum*, even where the cautioner is bound *in solidum* with the principal, he has the benefit of discussion, which he certainly has not where the joint or several obligation is for the payment of money by the principal. Again, if it is said that the contract binds J. H. Wishart, and his heirs and successors, to invest the money, while the bond only binds A. Wishart to pay in the event of J. H. Wishart failing to perform, without mentioning his heirs and successors, then the answer is, that supposing J. H. Wishart's failure to be completed, the right of A. Wishart to the *beneficium ordinis* does not at all depend upon J. H. Wishart's heirs and successors failing or not failing to implement, but is applicable to the estate of J. H. Wishart after his death, as well as to his estate and person during his life, upon the supposition or assumption that there has been such a failure as makes A. Wishart liable. To contend that the death of the principal obligant has the effect of his absence from the realm, or his bankruptcy, in defeating the right of discussion, is warranted by no authority whatever, and is against all principle. Indeed, even absence from the realm has this operation only when the party is not merely abroad, but has no estate or effects within the jurisdiction; and bankruptcy only

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operates the like defeasance of the *beneficium ordinis*, by carrying away the whole property to the use of the creditors, and leaving nothing on which the right of discussion can attach. As to the ground of this being an alimentary provision, (which, after all, it is not stated to be in its constitution,) there has been no authority whatever cited for allowing an exemption on this head.

It appears impossible, therefore, in any view which can be taken of the case, (and I have anxiously gone over every point which I thought could in any way be presented, and some that have not been presented,) to support the decision of the Court below; and the interlocutor of the 16th May 1835, with the consequential interlocutor of the Lord Ordinary of 20th May 1835, must be reversed; the effect of which will be to restore the Lord Ordinary's interlocutor of 20th February 1835, passing the bill on caution.

Had the judgment below been affirmed there must have been a declaration reserving the rights of the parties in all points beyond the subject of the suspension and charge in any action of declarator, count and reckoning, or other action, and all defences to such action. But there are no means of avoiding a reversal, and any further declaration is unnecessary. Nevertheless, one question having been raised in the appellant's favour, it is necessary to dispose of it, in case reliance should be placed upon it by him below. I allude to the construction put upon the clause in the contract, that J. H. Wishart shall invest " so soon as he shall be called " upon to do so" by the four persons named. I have no doubt at all that this is not a restriction of J. H. Wishart's obligation to invest. He was before firmly bound; and then it is added, " and that" (in addition) " so soon as he shall be called." This is not a restric-

tion of J. H. Wishart's liability, but on the contrary rather an extension of it. It is not a postponement of his duty to invest until he shall be required, but a power given to the persons named to accelerate his performance of the obligation.

In consequence of what has passed since the recommendation was strongly given to make an end of these painful disputes, by which the peace of a family, respectable both in its present and its former members, has so long been disturbed, it is to be expected that the course will now be taken of a reference to some common friend, who shall, as far as the interests of the infants will permit, finally settle the rights of all the parties. But if unhappily further litigation should be determined upon, surely on the bill passing the suspender may consign the interest, and the charger be allowed to take it up, finding security to repay if eventually the estate of J. H. Wishart should be found sufficient to screen the suspender from the payment. This suggestion, however, contemplates an event which I cannot allow myself to suppose possible. Mr. A. Wishart's character remains wholly untouched by these proceedings, and no blame at all is cast on the conduct of the respondent. Both parties, therefore, are in circumstances which render it safe for their reputation and easy for their feelings to take the course which their common interests equally recommend, and which the duties arising out of their near relationship distinctly prescribe.

The House of Lords ordered and adjudged, That the said interlocutors complained of in the said appeal be and the same are hereby reversed.

ANDREW M'CRAE—GEORGE WEBSTER, Solicitors.