

1778. February 14. ANDREW WELSH against JAMES WELSH, and Others.

Andrew Welsh became security for the curators of Nathian Cornfoot, viz. Elizabeth Robertson, mother to the minor, and James Welsh, her second husband, curators chosen by the minor.

No. 30L.
Curators re-
moved as sus-
pect.

Andrew Welsh, apprehending danger to himself and the minor, from the bankruptcy of James Welsh, soon after his nomination, and the mismanagement of the minor's effects by both curators, required the minor, and his nearest of kin, under form of instrument, to bring an action for having his curators removed as suspect, offering to be at the expense of the action, and of new to become bound for any responsible persons to be chosen in their room.

This not being complied with, the cautioner himself brought an action, calling the curators and the minor, and his next of kin, for having it found, that, in respect of this requisition, he was no longer liable in the cautionary obligation: And, in behalf of the minor, inserted a conclusion, that the curators should be removed as suspect.

The cause was advised on an information *ex parte* for the cautioner; but the minor and his curators had appeared, and litigated before the Lord Ordinary.

The Court had no doubt that Andrew Welsh was entitled to be relieved of his cautionary obligation *in futurum*. But a difficulty occurred, how far the action to remove these curators as suspect could be sustained, in the law of Scotland, at the instance of Andrew Welsh, who was no relation to the minor:—though, by the civil law, this was *actio popularis*.

Observed on the Bench: When a minor names curators, it is *pars judicis* to require caution, whether the minor and his next of kin demand it or not. As the Court, therefore, have in this case relieved the cautioner of his obligation, it is a consequence of the judgment, that the curators must be required to find new caution by the Court; and, if they do not, that they should be removed.

The Court “found Andrew Welsh free of his cautionary obligation from the date of his protest and requisition and in time coming. And, in respect of the above, ordain the tutors, on or before the 24th current, to lodge in process a bond, with a sufficient cautioner, or cautioners, for the faithful administration of the minor's estate during the curatory; with certification, if they fail in lodging the bond, the Lords will remove them from their curatory.”

The curators having failed to lodge the bond, the Court “removed them from their office as suspect.”

Act. G. Ferguson.

Fac. Coll. No. 14. p. 27.