

S E C T. III.

What understood Sufficient Discussion.

1610. *June 27.* SCROGIE *against* The CONSTABLE of DUNDEE.

No 44.

HE who has decret against an executor, discusses him sufficiently by horn-
ing, and needs no further diligence before he have recourse to the cautioner for
the confirmation of the testament.—THE LORDS will not grant an allowance
of large funeral expenses to the executor, if the defunct had not free gear more
than might pay his debts.

Fol. Dic. v. 1. p. 249. Haddington, MS. No 1924.

1623. *February 12.* ARNOT *against* ABERNETHY.

No 45.

IN an action pursued by John Arnot against Patrick Abernethy, the LORDS
found that the creditor of a defunct testator could have no action against him
who was cautioner for the confirmed executor, to make the testate goods furth-
coming, albeit the executor was put to the horn upon a decret obtained by
the creditor; unless the said creditor had shown where he had searched and
sought the goods of the executor to have poinded them, and his lands, to have
comprised them; and that decret and horning was no lawful discussion, albeit
the cautioner defender condescended not upon any particular lands or goods
pertaining to the defender, which I thought absurd.

Fol. Dic. v. 1. p. 249. Haddington, MS. No 2760.

A creditor
can have no
action against
a cautioner
in a confirm-
ed testament,
till he discuss
the execu-
tors, and it
is not suffi-
cient discus-
sion to put
them to the
horn. He
must also
poind, and
if there are
no moveables,
apprise.

* * Durie reports the same case :

JOHN ARNOT having recovered decret against the executors of umquhile
John Home, who was his debtor, and having denounced them to the horn,
thereafter pursues Patrick Abernethie, who was cautioner in the confirmed tes-
tament for the executors, to make the goods confirmed furthcoming; to hear
him decerned to make the said goods furthcoming, seeing he had discust the
executors, by putting them to the horn.—THE LORDS would not sustain the
process against the cautioner upon that ground, because the executors were
denounced rebels, seeing thereby they found the executors not sufficiently dis-
cuss; for the creditor ought to have sought the executors moveable goods, and
poinded them, if they had any; and if they had none, he ought to have com-

No 45. prised their lands, which ought all to have preceded, and been done, before he could have recourse against the cautioner in the testament; or if they had no moveable goods, nor heritage, they ought to have lawfully searched the same, and after diligence, if they had none to poind or apprise, then they might come upon the cautioner, and no otherways; for without that diligence the executors were not discust sufficiently, albeit they were denounced upon the sentence obtained against them.

Act. *Nicolson.*

Alt. ———.

Clerk, *Gibson.**Durie, p. 45.*

No 46.

Found as
above.1623. *December 10.* ROBERT STEWART *against* THOMAS FISHER.

Found the cautioners in a testament cannot be convened, while the executor be discussed *et in persona et in bonis*; and the LORDS fand, that horning and caption was not sufficient discussing. The like found before between Arnot and Rochied.

Fol. Dic. v. 1. p. 249. Kerse, MS. fol. 133.

No 47.

A decree against a principal, is not sufficient discussion to come at the cautioner, there must be at least a registered horning.

1662. *July 24.* JAMES BIRSBANE *against* JOHN MONTEITH.

JAMES BIRSBANE pursues John Monteith, as cautioner for John Birsbane, who was executor to the pursuer's father, for payment of the pursuer's legacy. The defender *alleged* no process, because the executor himself is not discussed, and the cautioner is only liable *subsidiarie*. The pursuer *replied*, There is a decreet obtained against the executor produced, *et* there was no further discussing requisite, because he is broken, and the pursuer is content to assign the debt to the cautioner. The defender *answered*, *Non relevat*, for a decreet is no sufficient discussing, but there must be registrate horning at least, albeit the executor had neither lands nor moveables to poind or apprise.

THE LORDS sustained the defence, and found the reply not relevant till the registrate horning were produced.

Fol. Dic. v. 1. p. 249. Stair, v. 1. p. 134.

No 48.

1684. *March.* MILNE *against* GRÆME.

CAUTIONERS for a messenger found *subsidiarie* liable *in solidum*, as other cautioners are.

1685. *January 15.*

Thereafter it was *alleged*; That the cautioner for a messenger was but liable *subsidiarie*, after the messenger was sufficiently discussed; and personal discus-