

1677. November 13. The TOWN of ABERDEEN against DIVVIE.

No 22.

A cautioner, not bound conjunctly and severally with the principal, found not conveyable without the principal.

THE TOWN of Aberdeen having given commission to Gilbert Divvie to collect a stent on the Town, as appears by their act produced; William Divvie, his father, becomes cautioner for his fidelity and duty in that commission; whereupon the Town pursues Patrick, as representing William, his father, for payment of the sum; who *alleged* no process, because his father was only cautioner, and not bound conjunctly and severally; and so but liable *subsidiarie* after the principal party is discussed.—It was *answered*, That the principal is a known bankrupt, and nothing can be condescended on that he hath to affect; and therefore, as heirs of provision are liable, without calling the heirs of line, unless it be condescended on what estate the heirs of line have; so must it be here.—It was *replied*, That the case is not alike; for here the principal party, whatever estate he hath, may compt and produce discharges, if he were called.

THE LORDS found no process, and assoilzied from this libel; and would not continue the same against the principal party, though bankrupt, but did put them to a new process.

*Stair, v. 2. p. 557.*

1697. November 30.

SIR JAMES DICK against ADAM NISBET, and PROVAND and MORE, his Cautioners.

No 23.

A principal was bound to account quarterly. His cautioner was found to be bound only for one quarter of a year, altho' the principal was in arrear a large sum.

ARBRUCHEL reported Sir James Dick of Prestonfield against Adam Nisbet, clerk to his brewerie, and Provand and More, his cautioners, for payment of the damage and loss sustained through the said Adam's intromissions, or trusting irresponsible people with his ale.—*Alleged* for the cautioners, They cannot be liable, because by the contract they can only be charged conform to the fitted accounts under Nisbet, the clerk's hands; and *ita est* there are no such accounts produced: *2do*, In the said contract there is a clause, that Nisbet should make his accounts quarterly with Sir James, his master, to be exhibited to the cautioners; upon which quality Sir James cannot subsume; *ergo* the cautioners must be free.—*Answered* to the *first*, Though there was no fitted account, yet Sir James had the equivalent; for he had discharged his clerk during the whole eight years service, of the hail subject of his intromission, except the sum of L. 23,000 not yet instructed by his clerk, and had taken an *antapocha*, or counter-discharge from him, acknowledging the said balance: To the *second*, it was *answered*, The clause obliged Nisbet to compt quarterly, but laid no obligation on Sir James; so it was optional for him to fit accounts every quarter, or let them go on longer as he pleased; and if the cautioners thought themselves concerned, they should have interpellated Sir James, and required it; which they did omit for five years together; and they might have known his state, if they had called at Nisbet, the