

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, ~~as~~ 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-

sion, by a registrate horning, was not enough; for, with us, in the case of cautioners, of tutors, executors, factors, &c. who have the *beneficium ordinis et discussionis*, where the pursuer condescends on a real estate in lands or goods, the principle must be discussed really, by apprising or pointing; December 2. 1662, (*see* LEGAL DILIGENCE;) and it is always so decided in the discussing of heirs.

THE LORDS found, that the defender-cautioner condescending on goods or lands belonging to the messenger, and giving his oath of calumny on the condescendence, the pursuer ought to discuss the same, by pointing or apprising.

Fol. Dic. v. 1. p. 249. Harcarse, (CAUTIONERS) No 242. p. 58.

No 48.

1748. December 6. GALL against TOWN of FORFAR.

A MAGISTRATE being pursued for a debt, as having failed to imprison a debtor who was taken by caption, the defender was found liable, and the other Magistrates *subsidiarie* for the debt, annualrent, and expenses. Urged in a reclaiming petition, That a charge, given the community, ought to be suspended; because a registrated horning and denunciation was not a sufficient discussion of the Magistrate, who was primarily liable.—THE LORDS refused the petition.

Fol. Dic. v. 3. p. 183.

No 49.

* * * Kilkerran-reports the same case :

IN the case mentioned January 29. 1747, *voce* PRISONER, the LORDS having, by their final decree, upon the 12th July 1748, ' Found John Jaffray, bailie of Forfar, liable for the debt due to Agnes Gall, in respect of his letting Provost Binning the debtor escape; and found the other Magistrates as representing the community liable *subsidiarie*.' And on this decree the Magistrates being charged, they presented a bill of suspension, on this ground, That though Bailie Jaffray ought to be first discussed, not one step had been taken towards recovering payment from him, although he was possessed of the property of houses and acres in and about the town,

But it being *answered*, That these subjects were already incumbered by inhibitions and other diligence, the Ordinary ' refused the bill;' and, on advising a reclaiming petition, the LORDS ' adhered,' in respect the petitioners could not condescend on a free subject.

Kilkerran, (DISCUSSION) No 1. p. 166.

Discussion of Principal Debtors; *see* SOLIDUM ET PRO RATA.

Whether a Debtor who has the benefit of discussion, may be pursued in the same process with the Principal; *see* LEGAL DILIGENCE.

See CAUTIONER.

See APPENDIX.