

1713. *June 18.*ALEXANDER MONTGOMERY of Kirktonholm, *against* ENSIGN WILLIAM BROWN.

No 41.

Found in conformity with Dunbar against Lord Dundee, No 33. p. 3584.

IN a process at the instance of Alexander Montgomery against Ensign William Brown, for payment of 1000 merks, contained in a bond granted to the pursuer, by the deceased Alexander Moodie as principal, and Adam Brown, late Provost of Edinburgh, as cautioner; THE LORDS sustained process against the defender, as representing the said Adam Brown his father, without necessity to discuss previously the principal debtor; albeit Adam Brown the cautioner was not bound conjunctly and severally with the principal; in respect he was bound as full debtor with and for him, and the principal died insolvent; now the benefit of discussion is not competent to a cautioner, but where the creditor may have *paratam executionem* against the principal debtor; and by the Novel. 4. c. 1. the privilege of discussion is not necessary, in case of the principal debtor's absence or insolvency.

Fol. Dic. v. 1. p. 248. Forbes, p. 678.

1743. *December.* DICKIE *against* THOMSON and LANG.

No 42.

Cautioner in loosing an arrestment, has not the benefit of discussion.

PLEADED for a cautioner in the loosing of an arrestment, that cautioners by our law, as well as the Roman, have the benefit of discussion; and that a cautioner, in loosing an arrestment, is entitled to that privilege, by the very conception of his bond; for he only becomes bound for the common debtor, that his goods arrested shall be made furthcoming.—*Answered*, Caution in loosing an arrestment comes in place of the arrestment; and therefore the cautioner must be liable in the same manner as the arrestee would be, upon a decree of furthcoming recovered against him.—THE LORDS found, That the cautioner in loosing an arrestment had not the benefit of discussion.

Fol. Dic. v. 3. p. 184. Rem. Dec.

* * * See This case, No 35. p. 2110.

1757. *December 27.* ELAMS *against* FISHER.

No 43.

It is not necessary to discuss the principal abroad, when the cautioner is in the kingdom.

Fol. Dic. v. 3. p. 184. Fac. Col.

* * * See This case, No 36. p. 2110.