

No 37.

security, but he is *adpromissor*, and interposed as accessory to the principal obligation, and by the stile, the suspender ought to be bound to relieve him, so that at the passing of the suspension he is reckoned as a principal obliged to pay what shall be found due at discussing.

' THE LORDS refused the bill of suspension.'

*Fol. Dic. v. 1. p. 249. Dalrymple, No 105. p. 148.*

\* \* \* Forbes reports the same case :

MR PATRICK STRACHAN being cautioner for Charles Menzies writer to the signet, in the suspension of a charge against him at the instance of David Forbes, for payment of a debt owing to him by the Lady Gight as principal, and the said Charles Menzies as cautioner; and the letters being found orderly proceeded, Mr Strachan the cautioner was charged with horning to pay, who offered a bill of suspension upon this ground, that he ought not to be distressed till the principals and their effects be discussed.

To which it was *answered*; Though a cautioner directly for the payment of a debt be liable only *subsidiarie*; yet a cautioner in a suspension, where the main question is about the legality of the charge given by the creditor, whether the person charged is truly debtor or not, stands conditionally bound as debtor for the sum, and precisely liable in payment as *correus debendi* to the creditor in the event of discussing the suspension, albeit *quoad* the debtor he is only cautioner because of his obligation of relief.

THE LORDS unanimously refused the desire of the bill.

*Forbes, MS. p. 61.*

---

## S E C T. II.

### Cautioners who have not the benefit of Discussion.

1665. July. DUNBAR *against* The EARL of DUNDEE.

No 38.

A cautioner bound as surety and full debtor, though not conjunctly and severally, has not the benefit of discussion.

By contract betwixt George Dunbar and Margaret Carnegie, David Carnegie of Craig, her brother, as principal, and the Earl of Dundee as cautioner, sovereignty, and full debtor, are obliged to pay to the said George the sum of 8000 merks; whereupon George charges the Earl, who suspends upon this reason, That he is but cautioner, and not obliged conjunctly and severally, and therefore the principal ought to be first discussed.—*Answered*, That he is bound as

full debtor, and therefore there is no necessity of discussing, unless it had been so provided. No 38.

THE LORDS found the letters orderly proceeded. See No 41. p. 3586.

*Fol. Dic. v. 1. p. 248. Gilmour, No 162. p. 114.*

1693. January 20. DOUL against HOME.

No 39.

A THIRD party having granted an obligation to the creditor, to cause the debtor pay, or else to pay the debt himself; though he was only found to be a cautioner, yet he was refused the benefit of discussion; only he was allowed a diligence to call the debtor into the process, in case he had any defences against the debt.

*Fol. Dic. v. 1. p. 249. Fountainball.*

\* \* \* See This case, No 2. p. 2702.

1708. February 11.

JOHN BALFOUR, Skipper in Kirkaldy, against WILLIAM HUTTON, Tenant in Kilgraston.

JOHN BALFOUR having charged William Hutton, who was cautioner, and took burden on him for James Menzies, apprentice to the charger, in his calling of navigation, for payment of the penalty in the indentures, in respect the apprentice had deserted the charger's service, William Hutton suspended upon this reason, That he was but a cautioner, and could not be discussed before the principal.

*Answered* for the charger; A cautioner in an indenture, taking burden upon him for the apprentice's dutiful behaviour, was never allowed to plead *beneficium ordinis* in the point of discussing; for apprentices being ordinarily minors, their obligation is principally relied upon; which would subsist though the principal's obligation should fall, upon the account of some special privilege.

*Replied* for the suspender; There may be many defences competent to the principal, which cannot fall under the cautioner's knowledge; upon which account the benefit of discussion was never denied to cautioners taking burden upon them for others, who stand bound *ad factum præstandum*.

THE LORDS found, That the cautioner in the indentures had not *beneficium ordinis*, but might be insisted against without discussing the apprentice.

*Fol. Dic. v. 1. p. 248. Forbes, p. 238.*

No 40.  
A cautioner in an indenture found not to have *beneficium ordinis* in a pursuit for the penalty incurred by the apprentice deserting his master's service.