

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.