

* * * The Heir of a person who had subscribed the minutes of a meeting of creditors, as cautioner for the trustee, found not to be liable, the minutes not being probative. Shirra against Douglas, 6th June 1798; Fac. Col. No 79. p. 184., (*voce* WRIT.)

See No 18. p. 487. *See* No 149. p. 803.

See Welsh against M^cVeaghs, 18th January 1781, Fac. Col. No 16. p. 30.
voce MESSENGER.

S E C T. V.

Benefit of Discussion.

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

No 35.

A cautioner, in loosing arrestment, has not the benefit of discussion.

It was *pleaded* for a cautioner in the loosing of an arrestment, That cautioners, by the law of Scotland, have the benefit of discussion, as well as by the Roman law; and that a cautioner, in loosing of arrestment, is entitled to this 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. On the other hand, it was *urged*, That caution in loosing of arrestment comes in place of the arrestment; and therefore that the cautioner must be liable in the same manner as the arrestee would be upon a decree of furthcoming recovered against him.

' Found, That a cautioner, in loosing an arrestment, has not the benefit of discussion.'

Fol. Dic. v. 3. p. 116. Rem. Dec. v. 2. No 49. p. 77.

1757. *December 7.*

JOHN and ROBERT ELAMS of Leeds, *against* JAMES FISHER.

No 36.

When the principal is abroad, and cautioner in the kingdom, it is not necessary first to discuss the principal.

ADAM FISHER, when at New York, having commissioned a quantity of broad cloths from John and Robert Elams of Leeds; and they having informed his father, James Fisher of Inveraray, thereof; James, in answer to their letter, wrote them, ' That he would stand good for the price, upon twelve months credit from the time of shipping the goods, in case his son failed in his circumstances.'

Upon this letter, Messrs Elams furnished the goods, which arrived at New York.

When the price of the goods fell due, which was in a year, Messrs Elams wrote several letters to Adam Fisher for payment; but had no answer. When

they inquired for his funds in Britain, they found he had none there; and there appeared on record some arrestments and hornings against him, subsequent to the furnishing. Upon this they brought a suit against Adam on the furnishing, and against James on the above letter; in which decret went in absence against Adam.

No 36.

But James's *defence* was, That though Adam had no effects in Britain, it was incumbent on Messrs Elams to pursue Adam in America; and until they showed, that they could not recover payment from him there, they could not come upon James.

Answered, Where a creditor has a cautioner for his debt in Britain, there is no necessity for him to discuss the principal debtor, except in Britain.

'THE LORDS found James Fisher liable for the debt.'

Act. *J. Dalrymple.*

Alt. *Alex. Hay, Montgomery.*

J. Dalrymple.

Fol. Dic. v. 3. p. 117. Fac. Col. No 64 p. 110.

See Dunbar against E. of Dundee, Gilmour, p. 115. p. voce DISCUSSION.

See DISCUSSION.

See LEGAL DILIGENCE.

S E C T. VI.

Cautioners right to Assignation of the Debt.

1665. *January 10.* NORMAND LESLY *against* GILBERT GRAY.

NORMAND LESLY charges Gilbert Gray, Provost in Aberdeen, to pay 2000 merks, for which he was cautioner for William Gray. He suspends, and *alleges*, that the charger had gotten an assignation from the said William Gray, to a bond granted by the Earl of Errol to him; and therefore craved, that the charger might be decerned to transfer that assignation to him, being given for the security of the same sum. It was *answered*, that the charger was only obliged to give a discharge to his cautioner, and not an assignation of the bond itself, and much less of any security *ex post facto* he had gotten therefor.

THE LORDS declared, they would not give the charger process, till he assigned the bond, and all security gotten therefor, to the cautioner.

Stair, v. 1. p. 247.

No 37.

A cautioner found not liable to pay, unless the creditor would assign to him the debt and all security he had from the principal debtor.