

1677. November 13. The TOWN of ABERDEEN against DIVVIE.

No 22.

A cautioner, not bound conjunctly and severally with the principal, found not conveyable without the principal.

THE TOWN of Aberdeen having given commission to Gilbert Divvie to collect a stent on the Town, as appears by their act produced; William Divvie, his father, becomes cautioner for his fidelity and duty in that commission; whereupon the Town pursues Patrick, as representing William, his father, for payment of the sum; who *alleged* no process, because his father was only cautioner, and not bound conjunctly and severally; and so but liable *subsidiarie* after the principal party is discussed.—It was *answered*, That the principal is a known bankrupt, and nothing can be condescended on that he hath to affect; and therefore, as heirs of provision are liable, without calling the heirs of line, unless it be condescended on what estate the heirs of line have; so must it be here.—It was *replied*, That the case is not alike; for here the principal party, whatever estate he hath, may compt and produce discharges, if he were called.

THE LORDS found no process, and assoilzied from this libel; and would not continue the same against the principal party, though bankrupt, but did put them to a new process.

*Stair, v. 2. p. 557.*

1697. November 30.

SIR JAMES DICK against ADAM NISBET, and PROVAND and MORE, his Cautioners.

No 23.

A principal was bound to account quarterly. His cautioner was found to be bound only for one quarter of a year, altho' the principal was in arrear a large sum.

ARBRUCHEL reported Sir James Dick of Prestonfield against Adam Nisbet, clerk to his brewerie, and Provand and More, his cautioners, for payment of the damage and loss sustained through the said Adam's intromissions, or trusting irresponsible people with his ale.—*Alleged* for the cautioners, They cannot be liable, because by the contract they can only be charged conform to the fitted accounts under Nisbet, the clerk's hands; and *ita est* there are no such accounts produced: *2do*, In the said contract there is a clause, that Nisbet should make his accounts quarterly with Sir James, his master, to be exhibited to the cautioners; upon which quality Sir James cannot subsume; *ergo* the cautioners must be free.—*Answered* to the *first*, Though there was no fitted account, yet Sir James had the equivalent; for he had discharged his clerk during the whole eight years service, of the hail subject of his intromission, except the sum of L. 23,000 not yet instructed by his clerk, and had taken an *antapocha*, or counter-discharge from him, acknowledging the said balance: To the *second*, it was *answered*, The clause obliged Nisbet to compt quarterly, but laid no obligation on Sir James; so it was optional for him to fit accounts every quarter, or let them go on longer as he pleased; and if the cautioners thought themselves concerned, they should have interpellated Sir James, and required it; which they did omit for five years together; and they might have known his state, if they had called at Nisbet, the

clerk, for a sight of his store-books, which would have discovered his condition, without the necessity of any formal stated account between his master and him; which they neglecting to do, *sibi imputent*.—THE LORDS considered only the last defence, and found that clause of compting quarterly was not merely a clause of relief between the clerk and his cautioners, but that Sir James was likewise obliged thereby, and was introduced in favours of the cautioners, who having engaged for the clerk's fidelity and honesty, they could not know the same without fitting quarterly accounts; which method not being observed, the LORDS found the cautioners liberate, except for the first three months allenary.

*Fountainball, v. 1. p. 798.*

No 23.

1706. June 18.

SIR GEORGE HAMILTON and FLEMING of Farm, his Son-in-law and Assignee,  
against SIR JAMES CALDER of Muirton.

SIR GEORGE and MUIRTON being tacksmen of the King's customs from 1686 to 1688, John Murray was their cash-keeper, and Sir James Calder his cautioner. Murray falling short in his counting, and dying in 1693, Sir George pursues his heirs; and after a tedious count and reckoning, extracts a decret against them for L. 9000 or L. 10,000 Scots of balance he was owing them; and on this decret, he registrated Muirton's bond of caution to pay him that sum; who suspends on these reasons, That the bond of cautionry was never a delivered evident, but in Murray's custody the time of his decease.—*Answered, imo*, Oppones the bond now in my own hands; and *esto* it had been lying beside Murray, he was Sir George's trustee and factor.—THE LORDS repelled the first defence.—*2do*, *Alleged*, he had arrested effects of Murray's, and so cannot recur on the cautioner.—*Answered*, A creditor may use all legal diligence till he be paid, and the one does not exclude the other, and on payment he shall be assigned.—This was also repelled.—*3tio*, *Alleged*, by John Murray's count-books, the tacksmen are debtors to him in a balance of L. 3000.—*Answered*, If Sir George were using his books *in modum probationis*, this might be obtruded, otherwise his own books can never prove for him.—THE LORDS found his books not probative in this case.—*4to*, *Alleged*, Sir James, as cautioner, cannot be bound, considering the terms of his obligation, to wit, that they should fit accounts with the said Murray the cash-keeper monthly, quarterly, and yearly; and Sir George having neglected this, his fault cannot be profitable to him, nor prejudicial to the cautioner, *nam socius tenetur socio etiam ob culpam levem*; likewise, he was solvent if diligence had been done against him before his death; and if you have suffered my relief to perish by your delay, that must not be imputed to me; which was so decided on the 30th November 1697, Sir James Dick against one who became cautioner for the clerk to his brewerie, and was assolizied, because he was obliged to count every three months with him, (*limitata fideijussio limitatam pro-*

No 24.

A cautioner for a public collector's cashier, being bound that the cashier should account 'monthly, quarterly, and yearly,' was found liable for the whole arrears, although the cashier had not been called to account in terms of the contract, and had become bankrupt.