

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.*

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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.

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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.