

negligence in not compearing when the edict of executry was served ; for then you would have been conjoined in the office ; and I was not removed for any malverse, but only because Mornipaw was nearer.—*Answered*, When infants or furious persons are confirmed executors, they have only the name, but the tutors have truly the office and administration, and are bound to distribute the effects to all having interest ; and though he be now *functus*, yet he intromitted, and so ought *susceptum perficere munus* ; and he can have no action against the fatuous man, seeing he does not instruct he has paid it to his present tutor ; and such are only liable in *quantum locupletiores facti sunt*, and no further ; and therefore he is under the same obligation to count to the nearest of kin, as if he had been actually confirmed executor himself ; and if he had suffered it to perish for want of diligence, he, and the idiot fatuous person would have been liable. *Vide l. 25. D. de fidejuss.* and Vinnius *ad § 1. Instit. dict. tit.* who says, *qui pro prodigo fidejussit*, (as Leckiebank is here cautioner in the testament) *obligator non ut fidejussor sed ut principalis reus, in cujus persona sciebat obligationem non consistere, ideo donare voluisse videtur.*—THE LORDS found he could have no action against Leckiebank, the former tutor, till he first discussed the fatuous person and Mornipaw his present tutor.

Fountainhall, v. 2. p. 688.

1714. June 17. MR PATRICK STRACHAN *against* DAVID FORBES.

MR PATRICK STRACHAN being charged upon a bond of cautionry in a suspension, after the letters had been found orderly proceeded, he offers a bill of suspension on this reason, that he being a cautioner in a suspension he has *beneficium ordinis*, and the principal having an estate which can be condescended upon, the same ought to be discussed ; for albeit charges do ordinarily proceed against cautioners in a suspension, without discussing the principal, yet it cannot be instanced, where ever it was found that a cautioner had not *beneficium ordinis*, which the law provides to all cautioners where it is not renounced.

It was *answered, imo*, By the common custom charges do proceed against cautioners in a suspension so soon as the letters are found orderly proceeded ; and though there were no decision to support the practice, yet constant custom and acquiescence of parties is sufficient, there being no decision in the contrary ; and if this were sustained, the same would hold in the case of cautioners *judicatum solvi*, which is regularly exacted before the Admiralty, and in many courts of justice abroad. But this allegiance has been repelled in a stronger case, Hume *contra* Hume, No 69. p. 2142. where the attester of a cautioner in a second suspension *alleged*, that he was not convenable till the cautioner in a first suspension was discussed, which the Lords repelled.

2do, A cautioner in a suspension is not properly a cautioner in the sense of law, bound with and for the principal debtor, which is reckoned a subsidiary

No 36.

No 37.

A cautioner in a suspension, after the letters are found orderly proceeded, may be charged summarily upon the bond of caution, without discussing the principal debtor.

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