

No 45. prised their lands, which ought all to have preceded, and been done, before he could have recourse against the cautioner in the testament; or if they had no moveable goods, nor heritage, they ought to have lawfully searched the same, and after diligence, if they had none to poind or apprise, then they might come upon the cautioner, and no otherways; for without that diligence the executors were not discust sufficiently, albeit they were denounced upon the sentence obtained against them.

Act. *Nicolson.*

Alt. ———.

Clerk, *Gibson.**Durie, p. 45.*

No 46.

Found as
above.1623. *December 10.* ROBERT STEWART *against* THOMAS FISHER.

Found the cautioners in a testament cannot be convened, while the executor be discussed *et in persona et in bonis*; and the LORDS fand, that horning and caption was not sufficient discussing. The like found before between Arnot and Rochied.

Fol. Dic. v. 1. p. 249. Kerse, MS. fol. 133.

No 47.

A decree against a principal, is not sufficient discussion to come at the cautioner, there must be at least a registered horning.

1662. *July 24.* JAMES BIRSBANE *against* JOHN MONTEITH.

JAMES BIRSBANE pursues John Monteith, as cautioner for John Birsbane, who was executor to the pursuer's father, for payment of the pursuer's legacy. The defender *alleged* no process, because the executor himself is not discussed, and the cautioner is only liable *subsidiarie*. The pursuer *replied*, There is a decreet obtained against the executor produced, *et* there was no further discussing requisite, because he is broken, and the pursuer is content to assign the debt to the cautioner. The defender *answered*, *Non relevat*, for a decreet is no sufficient discussing, but there must be registrate horning at least, albeit the executor had neither lands nor moveables to poind or apprise.

THE LORDS sustained the defence, and found the reply not relevant till the registrate horning were produced.

Fol. Dic. v. 1. p. 249. Stair, v. 1. p. 134.

No 48.

1684. *March.*MILNE *against* GRÆME.

CAUTIONERS for a messenger found *subsidiarie* liable *in solidum*, as other cautioners are.

1685. *January 15.*

Thereafter it was *alleged*; That the cautioner for a messenger was but liable *subsidiarie*, after the messenger was sufficiently discussed; and personal discus-