in their Accounts, but not for the pecuniary Mulcts to which they may be liable on Account of their Misdemeanour l. 68. ff. de Fidejuss. l. un. C. de peric. eor. qui pro mag. interven. A Cautioner for a Merchant's Factor is not liable for Goods sent by the Merchant to the Factor after he knew the Factor to be Bankrupt; But his Knowledge thereof can be proven only by his own Oath or Writ, and not by the Oaths of these who intimated to him the Factor's Bankruptcy 4 March 1630 Richie contra Paterson. Cautioners for a Collector of the Customs that he should make just Count and Reckoning of his Intromissions to the Tacksmen, and do exact Diligence for bringing in thereof quarterly monthly or oftener if required; were liable for what the Collector came short of in his Accounts, tho' the Tacksmen had not used any Diligence against them for Payment till all the three last Quarters of his Management 20 Feb. 1707 Wallace and Baillie contra Lauders &c. Because the Obligation to count and pay monthly or oftener was in Favour of the Tacksmen, and did not oblige them to take the Collectors Accounts monthly off his Hands, unless they had been required to do it. But the Cautioners of a Clerk to a Brewery obliged to count quarterly to his Constituent, who was bound to take these Accounts quarterly off his Hand, having required the Constituent under Form of Instrument so to do, were for his Neglect to do it not liable to him for his Clerk, further than for the first three Months 30 Novemb. 1697 Dick of Priestfield contra More Brown and others. Cautioners in Suspensions must oblige themselves not only for the Sums in the Charge but also for what shall be decerned by the Lords at discussing the Suspension: For which they will be liable, whether the Decreet against the Principal be turned into a Libel or not. Act of Seder. 27 Decemb. 1709. Attesters of Cautioners in Suspensions or Sureties for their Sufficiency, were formerly liable only for the Cautioners being solvent, or held and reputed solvent at the Time of the Attestation 17 July 1710 Ramsey contra Spalding of Ashintillie. But now Attesters of Cautioners in Suspensions, must engage not only for their Sufficiency at the Time of the Attestation, but as Cautioners for the Cautioners, and be liable subsidiarie in their Order as the Cautioners themselves are. Act of Seder. 27th Decemb. 1709. Because when the Attesters were obliged for the Cautioner's Solvency only at the Time of the Attestation, the Lieges were put to a tedious Proof of the Cautioner's Condition then. Cautioners in the loosing Arrestment of a Debtor's Effects, being liable only so far as the Person in whose Hand the Arrestment was laid had of these Effects, what that Person had in his Hand must be proved before the Cautioner in the loosing can be insisted against 25 June 1626 L. Balmerino contra L. Lochinvar. And this may be done by Oath or Writ of the Person in whose Hand the Arrestment was used 2 Feb. 1627 inter eosdem.

Cautioners cannot, as such be sued till after the Creditor has used all necessary Diligence against the principal Debtor, or such Effects as he had which is called beneficium ordinis or beneficium discussionis the Benefit of Discussion Nov. 4. Cap. 1. Stair Lib. 1. Tit. 17. § 5. Because the Obligation of the Surety being only accessory to, and coming in Aid of that of the principal Debtor, and for satisfying what he shall fail to acquit, the said Obligation is as it were conditional, not to have its Effect except in the Case where the Debtor is not able to pay. The principal Debtor is understood to be discussed by Horning and Caption against his Person, poinding of his Moveables, arresting and obtaining a Forthcoming of Debts owing to him, and apprizing or adjudging his Lands if he any had 12 Feb. 1623 Arnot contra Exers of Hume; Hope Maj. Pract. Tit. Exers Stewart contra Fisher. If no such Effects of his can be found, Horning and Poinding sufficeth tho' he be not apprehended. So that the Diligence of discussing must be suited to the State of the principal Debtor Stair ibid. A Decreet against the Principal is not a sufficient discussing without a registred Horning, albeit the Principal have no Lands and is Bankrupt 24 July 1662. Brisbane contra Monteith. Nor was it held equivalent to discussing that the Principal had acknowledged in his Letters to the Creditor that he was not then able to give him Satisfaction 8 July 1626 Smith contra   But there is no Necessity in discussing a Cautioner, to cite the Principal discussed of whom Payment could not be recovered 5 Decemb. 1623 Macneal contra his Debtors Exer [illegible]. A Cautioner was not excluded from proponing a Defence sustained for the Principal, in proving whereof he succumbed, the same not having been intimated to the Cautioner nor he called in the Process 12 Decemb. 1673 E. Kinghorn contra E. Weems least the Negligence or Collusion of the Principal might hurt the Cautioner.

The Rule that Cautioners are liable only subsidiarie after the principal is discussed, holds especially where the principal performance undertaken for is a Trust or Deed proper to him self. Thus, Cautioners for Exers 24 July 1662 Brisbane contra Monteith 9 December 1623 Hendersons Bairns contra Debtors. For fidalious Exers 14 December 1711 Bonnor & Smiltoun contra Maxwel, Tutors and Curators 9 Decemb. 1623 Hendersons Bairns contra Debtors, Factors 8 July 1626 Smith contra   Messengers, M'Kenzie Inst. Lib. 3. Tit. 3. § 25. are not liable till both Sentence be recovered against the principal Debtor, finding him to be Debtor in a particular Sum upon Account of the Trust, for his faithful discharge whereof Caution was found, and the principal discussed. Tho' the Rules have sometimes decerned against such Cautioners superseding Execution, till the principal be discussed, 2 Decemb. 1662 Douglasses contra Lindesay. 20 November 1627 Rollock contra Dersbies. Which is not only profitable to the Cautioner who may concur with the principal in defence, who is best able to clear what he hath paid or is not owing; and also advantagious to the creditor that he may not be put to a new process, wherein the Cautioner might resume Allegations and proof omitted by the principal.

The Rule aforesaid that Cautioners are liable only subsidiarie after discussion of the principal, is liable to some Exceptions. 1st Those who are judicial Sureties may be prosecuted without a previous discussion of the principal Debtor l. 1. ff. Jud. Solvi. Not only because they oblige themselves to the Court of Justice, the Authority whereof requires it should be so; but also because of the nature of the Debts in which this Security may be found to be necessary: For they are such that ought not to allow in them the delay of a discussion Les Loix civiles &c. Tom. 1 part. 1 Lib. 3. Tit. 4.