Tit. 4. Sect. 2. Art. 2. Thus, a Cautioner in a suspension may after the Letters are found orderly proceeded, be charged summarily without first discussing the principal Debtor. 17 January 1713 Forbess contra Strachan. Because, tho' where Bonds are granted by — as principal and another as Cautioner directly for the payment of debt; the Cautioner is only subsidiarly liable: yet Cautioner in a suspension who doth not become obliged with the principal but for the principal, that he shall pay what shall be decerned and found truly due by the person charged, stands condionally bound as debtor for the sum, and precisely liable as Correus debendi to the creditor, in the Event of the Letters being found orderly proceeded against the debtor: he is only cautioner, because of his obligation of Relief; the Question in a suspension being about the Legality of the Charge against the Cautioner in a second suspension, is a liable after the Letters are found orderly proceeded against the principal, tho' the Cautioner in the first suspension be not distressed: In which case the creditor, is ordained to assign the first Bond of Caution to the second cautioner upon payment. 6 January 1671 Hume contra Hume: So that my Lord Stairs opinion (Inst. Lib. 1 Tit. 17 § 7) that cautioners in suspension are not liable till after discussing the principal debtor, is now obsolete. But a cautioner in a suspension of a Decreet pointing the Ground for the bygones of an Infeftment of Annualrent cannot be prosecuted charged with Warning to pay the sums contained in the Decreet, but is obliged only to warrant the Infeftment of annualrent in case the Creditor got not satisfaction of his Annualrents out of the Ground by pointing or apprising. 18 Feb. 1623 Blackburn contra Dr Stale. Because he could not be obliged as Cautioner to do more than the principal debtor who could not be charged personally upon the Decreet of pointing the Ground which is only real for pointing. 2. A Cautioner in an Indentures was found not to have the Benefit of Discussion in a pursuit for the penalty incurred by the Apprentices deserting his Master's service and allowed to be insisted against without discussing the principal. 11 Feb. 1708 Balfour contra Hutton. Because Apprentices being ordinarily Minors, the Cautioners obligation for their dutiful Behaviour is principally relied upon, and would subsist, tho' the principals obligation should fall upon the Account of some special privilege.

When there are several Cautioners for one debt who are all solvent, the creditor can demand from each of them only his share of the debt, which is called the Benefit of Division, L. 10 § 1. C. de Fidej. § 4 Inst. Eod. Stair Lib. 1 Tit. 17 § 1. That is, the obligation of several Cautioners bound together at the same time, or with Relation to one another for the same debt or divisible thing, without the words jointly and severally, is divided in the same manner, and for the same Reason as that of principal Debtors who are joyntly bound for the same Debt or thing. But the Shares of insolvent Cautioners are thrown upon the rest who are solvent proportionably, and every one bears his part thereof upon the foot of his own portion of the whole debt. § 4 Inst. de Fidej. L. 26 ff. Eod. If Cautioners oblige themselves (as is usual) jointly and severally with the principal, they and every one of them are, in respect of his full debtor, bound with him, with Regard to the Creditor, in the same condition as the debtor, and understood to have renounced the privilege of Discussion and Division. 5 July 1665 Dunbar contra L. Dundee. 18 June 1713 Montgomery contra Ensign Brown. So that the Creditor may pursue any one of them for the whole debt without looking after the principal debtor, or other Cautioners, tho' all of them be able to pay. For in such a case they are no more to be considered as sureties.

Neither of the privileges aforesaid of discussion or division is indulged to sureties in England. Wood Impor. Inst. pag. 226.

By the Civil Law, sureties have not only the Benefits of Discussion and Division for lessening their Engagement and facilitating their Relief. Nov. 4 cap. 2. Nov. 10 § 1. C. de Fidej. § 4 Inst. Eod. L. 26 ff. Eod. But also they have a third privilege called Beneficium cedendarum actionum, the Benefit of Cession of the Rights of the Creditor, whereby one of several

several ~~Cautioners~~ fellow-Cautioners pursued for the whole debt, cannot be forced to pay, till the Creditor assign over to him his Actions against the rest. By which subrogation to the creditor, the Cautioner will have his Right for recovering the Shares of every one of the other sureties: For it is as a mere sale which the Creditor makes of his Rights to the surety who pays the Debt. L. 13. L. 17. L. 36 ff. de Fidej. In Scotland sureties use not to pay, till the creditor for their speedy Relief, assign the Debt to them, with any other Right he hath from the principal Debtor. 10 January 1565 Leslie contra Gray. But the Creditor is not bound to assign, if he hath a distinct Interest for retaining the Security to himself; Stair Lib. 1. Tit. 17 § 4. This Benefit of Cession of Rights of the Creditor takes no place in England: where it is a Maxim in their Common Law, that no Action can be granted over; least such a practice should be used to maintain oppression by pretending pretended Titles to great Men. Coke 1 Inst. 214 a.

All the real Defences which the Debtor has are Common to the sureties, as if the obligation or a part of it happens to be acquitted; it is perished; if the debt was referred to the debtors oath, and he had sworn, or rather that he never did any thing or that he had paid it; or if he has other Exceptions of the like Nature: For the surety is answerable only for what shall be legally due: And what lessens or diminishes the obligation of the Debtor, annulls or diminishes the obligation of the surety, which is an accessory to the other. He may make use of those Defences, altho' the principal Debtor should Decline to use them himself. L. 7 § 1. L. 19 ff. de pacts. L. 32 ff. de Fidej. But if the Defences of the principal Debtor are drawn only from his person, as if he may obtain Relief because he was Minor when he contracted the Obligation. L. 1. C. de Fidej. olim. If he cannot be sued because he has made over all his Effects to his Creditors § 4 Inst. de Replic. or because they have been confiscated. L. 1. C. de Fidej. Those sorts of Exceptions will not avail the surety: For it was to guard against them that the Creditor got the surety bound.

If the Debt is innovated between the ~~principal~~ Creditor and the Debtor, without sureties obliging themselves anew, his obligation does not subsist any longer as being accessory only to the Debtors first extinct obligation. L. 60 ff. de Fidej. L. 4 C. Eod.

Where the Creditor becomes Heir or Executor to the Debtor, or the Debtor to the Creditor, the confusion which is made in the person of the said Heir or Executor, of the Qualities of the Creditor and Debtor, doth not only make that the principal Debtors obligation does not subsist any more; but also annulls the obligation of the surety. For he cannot owe to the Heir or Executor a Debt against which the Heir or Executor himself is bound to indemnify him; and there is no longer either Debt or Debtor. L. 3 § 1. L. 21 § 3 ff. de Fidej.

A cautionary obligation being only accessory to that of the principal Debtor, positive proof against him by Witnesses or oath of party, is effectual against his Cautioner: And where the principal proponed a Defence, and for instructing it produceth Witnesses who do not probe, the Cautioner is not afterwards allowed to probe the same by other Witnesses. Stair Lib. 1 Tit. 17 § 9. Nor was an Executors Cautioner allowed to found upon Exhausting of the Testament, after that Defence had been proponed by the Executor himself who failed to probe the Allegation. 4 March 1623 Wood contra Executors of Ker. But a Cautioner cannot suffer prejudice by the Collusion, Negligence or wilful omission of the principal Debtor. Stair Ibid. Therefore an Executors Cautioner was allowed to make and bring in standing the Defence of Exhausting, omitted by the Executor. 9 July 1623 Arnot contra Hume of Mandersloun. Nor was the holding the principal as convicted for not deponing de Calumnia upon a point, sustained to exclude the Cautioner from probing thereof. 22 January 1629 Fairbairn contra Kello. Nor yet was a cautioner hindered to found a Defence upon