1677. *July* 5.
JANET M'MILLAN and THOMAS DUNLOP *against* JOHN SMELLIE.

No 9.
Found in conformity with No 2. p. 3346.

JOHN SMELLIE being charged upon a bond, for payment of 100 merks to the said Janet, and Robert Dunlop her husband, for his interest, did suspend upon these reasons; 1*mo*, That the bond was made to James Wilson her son, and failing of him and his heirs, to the said Janet and her heirs; and the said James being yet on life, and now major and fiar, the mother being only substitute, can never crave payment; 2*do*, The suspender being only one of three cautioners for James Schaw, who was principal debtor, of which three Thomas Dunlop, the said Janet's husband, was one, the charge ought to be suspended for the half of the debt for which he was con-cautioner with the suspender. It was *answered* to the *first*, That the bond was opponed, bearing to be paid to the said Janet, at any time she should require ever during her son's life time, likeas, she was willing to re-employ in the same terms. It was *answered* to the *second*, That there being no obligement of relief in the bond, it was in the option of the creditor to charge any he pleased; and upon distress they can never seek relief, having subscribed cautioner without any such obligement. THE LORDS did repel the first reason, in respect of the conception of the bond, notwithstanding that the money was lent when the son was minor; and now the reason raised by his majority, which might give her power to uplift; but ordained caution to be found for re-employment for the son, as the first fiar, and failing of him and his heirs, to the mother; only they did likewise repel the second reason, and found that all co-cautioners were bound to relieve others without any special obligement for that effect, and that any one of them being distrest for the whole, may seek his relief, as being founded in *jure communi*, as if they were conjunct debtors, seeing the law presumes, that every one of them did only engage to be cautioners *intuitu* of those that were conjunct with them.

Fol. Dic. v. 1. *p.* 221. *Gosford, Nos* 990. & 991. *p.* 667.

No 10.
Two persons being found liable, *in solidum*, to pay a fine, the Lords decerned the creditor, upon payment by one, to assign against the other for the one half, because without such assignation the law does not

1680. *July* 15. ANDERSON of Dowhill *against* BLACKWALL and STIRLING.

THE criminal Lords in July 1673, in the case betwixt the Magistrates of Aberdeen and Francis Irvine of Hilton, found malefactors that were not *effractores carcerum*, but came out in women's-clothes, were only liable for an arbitrary punishment at most. THE LORDS found them both liable *in solidum* to pay the said fine of 10,000 merks, and decerned each of them to be assigned to the half, that so they might relieve one another proportionally, because without

this assignation, the law will furnish no relief where they are liable *ex delicto* per l. 46. D. *de regulis juris.*

Fol. Dic. v. 1. *p.* 122. *Fountainhall, MS.*

No 10.
furnish relief betwixt the *correi*, who are liable *ex delicto.*

1695. *December* 12. WOOD *against* GORDON.

No 11.
A discharge to a cautioner operates the same effect, *quoad* his relief, that an assignation would do, except as to a summary charge and present execution.

MERSINGTON reported Major Wood and the Laird of Spot against Mr William Gordon, advocate; who being pursued for 1000 merks, propones compensation, that you Major Wood, by your bond of relief, was bound to free Mungo Wood, your uncle, and my father-in-law of an equivalent debt, and which Mungo being forced to pay, assigned to the said Mr William. *Objected*, 1*mo*, That he produced no assignation to the debt, but only a simple discharge, which could only extinguish the debt, but never produce an action or ground of compensation. *Answered*, Some creditors are so scrupulous, they will not grant an assignation, and to which they cannot be forced by law; but a discharge to a cautioner operates the same effect *quoad* his relief, that an assignation would do, except as to a summary charge and present execution. THE LORDS repelled the objection in respect of the answer. The 2*d* defence was, that posterior to the bond of relief, he had obtained a general discharge from Mungo Wood, on the back of a bond for L. 340 Scots, not only discharging that particular sum, but also all preceding demands, which must necessarily comprehend this debt; and that the Lords, in the case of Forbes against Gordon, *voce* GENERAL DISCHARGE, &c. had sustained such a general discharge to cut off all precedings. *Answered*, That these words, 'of all preceding demands,' could never extend to comprehend a bond of relief for a sum much greater than the particular sum discharged, especially seeing it was not after a stated count and reckoning (as that of Gordon's was,) and that it appeared there was a current trade and correspondence between the Major and his uncle, which might be the meaning why these words 'of prior demands,' were insert; and in the case of Law and Baird, 16th and 22d November 1695, *voce* POSSESSORY JUDGMENT, the Lords would not allow a renunciation, though in most comprehensive terms, to go beyond the comprising therein narrated; 14th February 1633, Haliburton against Hunter, *voce* GENERAL DISCHARGE and RENUNCIATION; and 24th February 1636, Lawson against Ardkinlass, IBIDEM. THE LORDS repelled also the second defence, and found this general clause could not extend to a bond of relief, unless he could prove it was *deductum in computo*, and expressly treated and communed on at the time. As to the first point, the Romans allowed their cautioners, besides the *exceptio ordinis et discussionis*, likewise *beneficium actionum cedendarum;* as to which our practice is not yet arrived at a full consistency.

Fol. Dic. v. 1. *p.* 221. *Fountainhall, v.* 1. *p.* 687.