1672. *July* 27. BRODIE *against* KEITH.

No 44.
A cautioner transacted an old debt for a less sum, and took assignation in a third party's name for his behoof. That party was found entitled to no more, than the share of what was truly paid.

THE laird of Innes and Alexander Keith being co-cautioners in a bond, Innes being distressed, did pay the whole sum, and took an assignation to the bond, blank in the assignee's name, which he filled up with the name of Joseph Brodie; who having charged the said Alexander Keith, he suspended upon this reason, that the charge was to the behoof of the Laird of Innes, who being co-cautioner, was obliged to relieve the suspender of the one half. It was *answered* for the charger; that he was content to restrict the charge to the one-half of the sum contained in the bond. It was *replied* for the suspender; that the one co-cautioner, albeit assignee, could not distress the other co-cautioner further than for a proportionable part of his own true distress, of what he really paid; for, as in warrandice, how ample soever, recourse is only effectual for the true distress; so likewise it ought to be betwixt co-cautioners by the clause of relief, which is a mutual warrandice. The charger *duplied*, that the creditor might have gifted to him the whole sum, which ought not to be profitable to any other. The suspender *triplied*, that there is no donation, but the debt being very old, and doubtful whether it was paid by the principal, there was a transaction by the one cautioner for a lesser sum.

Which THE LORDS found relevant, and restricted the charge to the one half of the sum agreed for, and paid by Innes.

Fol. Dic. v. 1. *p.* 227. *Stair, v.* 2. *p.* 111.

1702. *February* 6. HALIBURTON *against* HALIBURTON.

No 45.
A cautioner upon paying a debt obtained an ease from the creditor. The Lords inclined to think he ought to communicate the eases he got, yet they allowed him to be further heard.

HALIBURTON of Fodderance, having been cautioner for the deceased Haliburton of Pitcur, to one Paton, in the sum of 2000 merks, and Pitcur being forfeited, Fodderance pays the debt, and takes an assignation, and thereon pursues this Pitcur, as representing on the passive titles. *Alleged*, You must declare *quo titulo* you pursue; for if it be *qua* assignee, then no process can be sustained at your instance, because the bond assigned to you being heritable, it bears a clause of requisition on forty days, which has not been used; and if you insist as cautioner, then you cannot have the whole, because I offer to prove you got an ease, whereof I must have the benefit, for you can exact no more than you gave. *Answered*, He is not obliged to declare nor elect, but may use any of his titles as he sees them most convenient for him; for he pursues here *tanquam quilibet et emptor nominis*, and neither as cautioner nor *negotiorum gestor:* And though he insisted as cautioner, it has been found that a co-cautioner taking assignation, though he got an abatement, yet he was not bound to communicate the benefit thereof to the cautioner, as Stair observes, 8th July 1664, Nisbet *contra* Leslie, No 43. p. 3392.; and 7th February 1665, Kincaid and