

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; *1mo*, 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; *2do*, 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 opposed, 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 obligation 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 obligation. 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 obligation for that effect, and that any one of them being distress 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 cre-  
ditor, upon  
payment  
by one, to  
assign against  
the other for  
the one half,  
because with-  
out such as-  
signation 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 *effractorum 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