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

No 45. Leckie, No 48. p. 2118., marked by President Gilmour. *Replied*, That the contrary has been found in a co-cautioner taking assignation, and recurring against the other cautioner, that he could acclaim no more from him than what he had paid out, 27th July 1672, Brodie *contra* Keith, No 44. p. 3393.; and therefore *a paritate rationis* the same ought to hold in a cautioner taking assignation against the principal. THE LORDS found he ought to declare and elect his title, and if he insisted under the reduplication as assignee, he behoved first to use requisition; and that the raising this process was not equipollent thereto, as was contended by Fodderance; and if he pursued as cautioner distressed, though they inclined to think he ought to communicate the eases he got, yet they allowed him to be further heard thereupon.

Fol. Dic. v. 1. *p.* 227. *Fountainhall, v.* 2. *p.* 143.

1712. *January* 23. GORDON *against* AGNEW.

No 46.
A procurator fiscal, by the judge's written warrant, poinded goods without a previous charge. He was found liable in damages. The person to whom the damages were found due accepted of a lesser sum, and granted an assignation of the decree; on which the procurator fiscal pursued the judge by whose warrant he acted. The Lords found he could not recur in warrandice for more than he himself paid.

SIR James Agnew of Lochnaw, sheriff of Wigton, being informed that one Douglas of Garrary had cut and carried away some trees, he caused William Gordon of Balmeg, his procurator fiscal, indict him for theft and cutting of green wood; and by his decreet fined him in 200 merks; and of the same date he gives Balmeg an order to this purpose, 'Fail not on sight to go and secure so 'much of Douglas's goods as will pay the 200 merks of fine, and dispose of 'them according to my order given you this day; and thir presents shall be 'your warrant.' In obedience to this order, the procurator fiscal, without getting any precept on the decreet, or biding till the days of the charge were run, poinded twelve or thirteen nolt of Douglas's, and brought them to the sheriff, who disposed on them. This execution being so summary and contrary to law, Douglas pursues Balmeg for a spuilzie before the Lords; and referring the fact to his oath, which he could not deny, he is decerned in the value, and the violent profits, amounting to a vast sum; and being distressed is forced to transact; and taking an assignation, he raises a process against Sir James Agnew the sheriff, for refunding his damages, in respect that what he did was by his warrant. *Alleged*, 1*mo*, The warrant is null, as wanting the writer's name and witnesses. *Answered*, Custom, the best interpreter of laws, has sufficiently explained this, that warrants and sentences of judges require no such solemnities, the character and authority of the judge and clerk supporting these deeds without any other formality. 2*do*, *Alleged*, The warrant relates to another order given him of the same date, and so cannot oblige till that be produced; for it might regulate and qualify his procedure. *Answered*, This is a chimerical objection; for he is ready to give his oath that there was no separate order but the decreet, and a verbal commission to bring the poind to the sheriff. 3*tio*, *Alleged*, Words are to be taken in a legal sense; so that the warrant to secure