therein, otherwise the defence is *super jure tertii*, and there is nothing more ordinary than that cautioners having paid, make use of the name of the creditor, even without an assignation, and if the principal debtor allege payment, it is ordinary to reply *non relevat*, except the payment were made by the debtor, because the charge, albeit in the name of the creditor, is declared to be to the behoof of the cautioner, which was ever sustained; and in this case, the discharge is only to the cautioner, and not a simple discharge, and hath a provision in it 'to be renewed in ample form,' which therefore ought to be in the terms that discharges to cautioners are usually granted, viz. 'discharging the 'debt as paid by the cautioner, assigning him thereto for recovering his relief,' and all cautioners have *beneficium actionum cedendarum*, which though it be not at the first granted, yet *ex post facto* the creditor may be compelled to give an assignation by way of action as well as exception, and in this case the creditor hath given an assignation, which is produced; and it were of extreme rigour that the pursuer for a small sum should bruik an estate of five times more value by an expired apprising, upon account of a discharge to a cautioner, and wording thereof. It was *replied*, That an assignation to a cautioner, and a discharge to him are very consistent *in continenti*, because thereby there is no solution, but qualified in favours of the cautioner, who might renounce or give up his discharge, if there were no more concerned but the creditor and himself, but this he cannot do in this case, because there is *medium impedimentum*, and *jus acquisitum tertio, viz. to the pursuer another creditor*, and that *beneficium cessionis* is not competent *ex intervallo*, *l.* 76. *ff. de solutionibus*.

No 8.

THE LORDS having called the pursuer to know, whether she would declare the apprising redeemable, and that being refused, found that unless the cautioner did concur with the principal debtor, he could not found upon the discharge, and that therefore the creditor or cautioner deriving right from him, might distress the principal or his lands notwithstanding thereof.

Stair, *v.* 1. *p.* 343.

1682. *February*. EARL of MARSHALL *against* LAIRD of STREICHAN.

No 9.

FOUND, that three consecutive discharges for three several years, granted by a chamberlain, put in by the English the time of my Lord Marshall's sequestration, did not cut off bygones, but that the pursuer might pursue for the same. Here the discharge for one of the years was two partial discharges for 24 bolls of victual, which was full teind-duty for that year; which the LORDS thought did not alter the case, seeing the presumption is from the party's having had bygones thrice under consideration when he granted the three discharges, (which one discharge for three years would not operate) and here bygones were four times under consideration.

Harcarse, (DISCHARGES.) *No* 416, *p.* 111.