1710. *December* 21.

SIR WILLLIAM CRAIGIE of Gairsey, *against* JAMES GRAHAM of Grahamshall, and the other Heritors of Orkney.

No. 29.
One of several *correi debendi* bound conjunctly and severally, (of whom some were insolvent) having paid the debt upon the creditor's discharge without getting an assignation, was entitled to repetition from the rest of the solvent co-obligants, only *pro rata* of what he paid more than his own share, and for their proportions of those who were insolvent at the time of payment.

IN an action at the instance of Sir William Craigie, against Grahamshall, and other heritors of Orkney, for payment of 1,000 merks, with annual-rent thereof, and penalty, contained in a bond, granted by the pursuers and defenders conjunctly and severally, to Sir Archibald Stuart of Burrow, *in anno* 1684; which Sir William paid upon distress, and took a discharge, January 23, 1703, to himself and the other co-obligants, against each of whom he insisted for relief and re-payment *in solidum*, deducing his own proportion.

Alleged for the defenders: Though every one of them was liable *in solidum* to Sir Archibald Stuart the principal creditor, yet that obligement being extinguished by his receiving payment and giving a discharge, they are liable to the pursuer only *pro rata* of what he paid more than his own share of the whole, and his proportion of the shares of such of the *correi* as were insolvent at the time of the payment. Because, *correi debendi* do not engage so much upon the desire of one another as of the creditor, upon which account, by the civil law, no mutual relief was competent, *nisi ex pacto*, *L.* 39. *D. De Fidejuss. L.* 11. *C. Eod.* And whatever the pursuer might have pleaded *super jure authoris*, as coming in place of the principal creditor, had he got an assignation to himself, he having taken a simple discharge of the debt, can only seek relief as arising *ex natura rei et negotii.*

Replied for the pursuer: If there be any action competent to him upon the bond, it must be competent in the same manner, and as fully, as it would have been to the original creditor, in whose place by the construction of law the pursuer is substituted. There is no reason why the pursuer should be in a worse case than any third party, who, by paying the debt upon a discharge without taking an assignation, would have had recourse *actione negotiorum gestorum* against the co-obligants *in solidum.* And *Voet. Comment. in Pandect. Tit. de Fidejuss.* § *ult.* is of opinion, that one of the *correi* paying the whole, may, without any assignment from the original creditor, have recourse *in solidum* against the rest.

The Lords found the defenders liable only *pro rata* of what the pursuer paid more than his own share, and for their proportions of the shares of those co-obligants who were insolvent at the time of the payment.

Fol. Dic. v. 2. *p.* 379. *Forbes, p.* 459.

Fountainhall reports this case:

1710. *December* 22.—SIR WILLIAM CRAIGIE of Gairsay, Graham of Grahamshall, with three or four other Orkney gentlemen, having borrowed 2000 merks from Stewart of Burray, he distresses only Gairsay, and on payment would give him no more but a discharge, upon which he pursues Grahamshall, and some of

No. 29.

the other co-obligants for repayment of the whole, deducing his own 5th or 6th part. The defenders finding some of the rest dead, others broke, they contend they can be only liable *pro virili*, each for his own part. They acknowledge they were all bound *in solidum* to Burrow, the creditor; and if the pursuer had got an assignation, his claim would have been somewhat stronger; but having only a discharge, the sole ground in law to make them liable is the natural obligation of recompence and relief, whereby you having paid my share of the debt as well as your own, it is not to be presumed you did it *animo donandi*, and therefore I must refund you my own share: Likeas, the dead and insolvent their parts must divide among the living and solvent, and you must bear a proportional share of them as well as I. *Vid. L.* 39. *D. De Fidejuss.* Answered, Though his discharge gives him no direct action upon the bond, yet law is not here defective, but gives him the *utilis actio negotiorum gestorum;* and though the ancient state of the Roman law was narrow if there was no *cessio*, yet in process of time they gave recourse against co-cautioners, though he had no assignation from the orignal creditor *L.* 36. *D. De Fidejuss. et L.* 2. *C. De doub. reis stip.* and both Grotius and *Voet. ad d. Tit.* says, *in æquitate fundatur quoad pragmatici tradunt uni solidum solventi adversus reliquos regressum dari, aliquando in solidum, nonnunquam pro virili tantum, etiam sine actionis cessione;* 13th July, 1675, Scrimgeor *contra* the Earl of Northesk, No. 8. p. 3549. *voce* DISCHARGE. The Lords found the co-obligants only liable *pro rata* and not *in solidum;* 5th and 27th January, 1675, No. 7. p. 3351. *voce* DEBTOR and CREDITOR.

Fountainhall, v. 2. *p.* 613.

1717. *December* 3. ABRAHAM GODFREY *against* ABRAHAM QUESNEY.

No. 30.

He who interposes as Cautioner for one of two co-obligants, and pays, comes only in place of the obligant, for whom he became cautioner, and is only entitled to his relief.

LEWIS and Abraham Quesney, having granted an English bond for £.35 Sterling, to one De Foy, Lewis enters into a submission, in Holland, with one Lereaux, as having right to that bond, and found Abraham Godfrey cautioner. There followed a decreet-arbitral decerning him to pay the sum in the English bond and others.

Abraham Godfrey having obtained a discharge, narrating that he had paid the said sum, as cautioner for Lewis, pursues Abraham Quesney for payment *actione negotiorum gestorum.*

It was alleged by the defender: *Absolvitor* for the one half; because the pursuer had paid the sum as cautioner for Lewis Quesney, who was liable to him in relief *ex mandato.* And in so far the defender could not be liable *actione negotiorum gestorum;* because *ejus negotium non gessit*, the defender being no submitter. And, in a parallel case, observed by Spottiswood, Libraik against David Vane, No. 47. p. 2118. *voce* CAUTIONER; where a bond being granted by a principal and cautioner, and a bond of corroboration granted by the cautioner, with another cautioner; the last cautioner recurring against the principal, it was found that all exceptions that