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

would have been competent to the principal against the cautioner, in the original bond, were competent to him against the cautioner in the bond of corroboration. This case is parallel; for the pursuer having intervened as cautioner for Lewis, if Lewis were pursuing, the defender would allege, that being a co-principal, bound conjunctly and severally, he could not have insisted against the defender but for the one half. No. 30.

It was replied: That the pursuer interposing, as cautioner, in a new and corroborative security, he interposed in contemplation of relief, from all the obligants, in the original bond, as has been several times found.

It was duplied, That a cautioner interposing in a corroboration may recur upon all the former obligants for whom he interposes as cautioner; but he who becomes cautioner for any one, and pays, does only come in place of the person for whom he becomes cautioner.

"The Lords sustained the defence as to the one half, and found that all defences competent against Lewis were competent against the pursuer his cautioner; and the pursuer having reclaimed by a bill, the Lords, on the 11th, adhered."

Fol. Dic. v. 2. p. 379. Dalrymple, No. 186. p. 242.

1722. *December 15.*

ALEXANDER MURRAY, of Broughton, *against* the HEIR and CREDITORS of ORCHYARDTOWN.

No. 31.
Obligation of mutual relief has place amongst cautioners, tho' not bound at the same time, or by the same deed.—See Ker *against* Gordon, No. 21. p. 14641.

IN the year 1674, Sir Alexander Macculloch, and Godfrey his eldest son, as principals, and with them Sir Robert Maxwell of Orchyardtown, as cautioner, became bound to Alexander Macghie of Balmaghie, in a bond of 2000 merks, with an annual-rent from Whitsunday of the same year. In the year 1679, Sir Godfrey the son, as principal, and with him the Viscount of Kenmuir, and Alexander Murray of Broughton, as cautioners, grant a bond of corroboration, reciting the former bond, and subsuming (according to the usual form in such cases) "That Balmaghie was content to supersede execution, upon granting the security aftermentioned; therefore the saids principal and cautioners, in further corroboration of the foresaid bond, bind and oblige them to make payment of the said principal sum allenarly, with the annual-rent from Martinmas 1679." And this bond contains a clause of relief from the principal to the cautioners, and a relief *pro rata* betwixt the two cautioners themselves. Alexander Murray of Broughton having made payment of this sum to the creditor, takes assignation against the principals and cautioner in the original bond; and by reason of the insolvency of the principals and their representatives, insists against the representatives of the cautioner for the whole sums contained in the assignation.

It was alleged for the defenders, That they could only be liable in the half, by reason, that in the construction of law, the cautioner in the first bond, and the cautioner in the bond of corroboration, were co-cautioners, which implied a mutual relief.