1724. *November* 25.

JOHN CAMPBELL, Grandchild to the deceased JOHN REID of Merkland, *against* JAMES FARQUHAR of Gilmilscroft.

No. 3.
Where there is the term "conjunctly" only, without "severally," or "co-principal or full debtor," parties liable only *pro rata*.

JAMES FARQUHAR of Gilmilscroft, Mr. John Reid of Balochmyle, advocate, and Robert Farquhar of Townhead, by their bond acknowleged them to have borrowed and received from Mr. John Reid of Merkland, 2,000 merks, which they bound and obliged them conjunctly, and their heirs, executors, and successors, to pay to him at the term therein mentioned.

Though all three were bound, yet the money was borrowed for the use of Balochmyle, who failed in his circumstances; and the said John Campbell, as assignee to the bond, charged Gilmilscroft for the whole sum in it; which charge he suspended, alleging, that by the conception of the bond, he was only liable for a third of the sum.

The Lords found Gilmilscroft only liable *pro rata*, or for a third part of the sum; but found it relevant to prove by Gilmilscroft's oath, that it was the intention of the parties, and so understood by him, that he, and each of the two obligants, should be liable *in solidum*.

Act. *Ja. Boswell.* Alt. *Arch. Hamilton, sen.* Reporter, *Lord Grange.* Clerk, *Dalrymple.*

Edgar, p. 119.

SECT. II.

Divisible Prestation.

1630. *January* 20. L. URIE *against* CHEYNE.

No. 4.
Two parties being bound conjunctly to re-deliver a particular *corpus*, or, in lieu of it, a certain sum, the obligation was found divisible, and each liable *pro rata*.

Two persons by their bond granting the borrowing of a powder-mill, and the furniture thereof, and obliging them and their heirs, to re-deliver the same, when they should be required upon so many days warning preceding, and if they did not, to pay a certain sum therefore, specified in their bond; and it being questioned, if every one of these two borrowers were subject in the whole sum conditioned in the case of failzie foresaid, or if the same should divide betwixt the two obliged; for the bond bore not, That they were obliged conjunctly and severally; and therefore, the one of the two persons convened, alleged, that he could not be found addebted in the whole, but for his own half, for which half he alleged, that com-

pensation should be only received, (for this cause was a suspension of a decreet obtained by this person, one of the two borrowers of the mill, against the suspender lender thereof, wherein the suspender offered to compense the charge with this sum liquidated, for not delivery thereof;) and which compensation, he alleged, was relevant against him for the whole sum, and ought not to be divided, albeit they were not bound conjunctly and severally, seeing *unicum et individuum corpus*, viz. the powder-mill was principally deduced in the obligation, which not being divisible, but as the party stands debtor therein for delivery without partition, so the price which is liquid, in place thereof, should be also indivisible; notwithstanding whereof the Lords found the price should divide betwixt the persons bound; for albeit the mill was not divisible, yet the worth and price was divisible; and as he could not seek the mill from one of them, by virtue of that bond, no more could he seek the price, except one had been tried to have the same, or for some other cause, but not by the conception of the bond, no more than if any had been debtor of one bond to two persons; as when one leaves a legacy, a horse, or such like, to two persons, the debtor cannot be compelled to give the same, or in case that be not prestable, the avail thereof is, to any one of the legatars, *et quod tenet in creditoribus, idem tenendum in duobus debitoribus.* No. 4.

Clerk, *Gibson.*

Fol. Dic. v. 2. p. 377. Durie, p. 482.

Spottiswood reports this case:

N. CHEYNE having borrowed from the Laird of Urie a powder-mill, he and N. Keith, as cautioner for him, obliged themselves to re-deliver the said mill to Urie when they should be required; and if they failed in delivery thereof, in that case they obliged themselves to pay him 500 merks. Upon their failing, he craved the 500 merks from the principal. Alleged, He could not seek but the one half of the 500 merks from him: For, although in the principal obligation for re-delivery of the mill, the pursuer might crave any of them, *cum ambo tenerentur in solidum, ac res in obligationem deducta non potest dividi.* Yet, in the other point, which was a different obligation from the former, it behoved to divide, *cum rei natura id pateretur*, seeing they were not conjunctly and severally bound. Replied, The obligation was but one, contained within the bounds of one writ, and the 500 merks were only a penalty adjected, which is accessory to the principal bond, and cannot be of another nature. The Lords found the allegeance relevant, and thought it should divide.

Spottiswood, (CONTRACT) *p.* 66.