

Cowgrain. Whereupon, having charged Fullwood to fulfil the articles, he did suspend upon that reason, That the three overseers not being bound, conjunctly and severally, he could not be liable *in solidum*, but only *pro rata portione*. This reason was sustained, notwithstanding it was answered, that the obligation being *ad faciendum*, and not to pay a liquid sum, every one of the overseers being protutors, were liable *in solidum*; and this was the rather found, that the charger did not insist against his own brother, but intended to put the whole burden upon the other two overseers, who had not so near an interest in the pupil.

Fol. Dic. v. 2. p. 378. Gosford MS. p. 72.

* * Stair reports this case :

July 16.—THE Lairds of Fullwood, elder and younger, and Denniston, being appointed overseers by Cowgrain to his daughters, the eldest daughter being married to Mr. Archibald Denniston's son, there is a contract betwixt Mr. Archibald and the three overseers taking burden for the daughters, by which the estate of Cowgrain, and Mr. Archibald's estate, are both settled in the person of his son; and the overseers are obliged to cause the minors, and their curators, become obliged to relieve Mr. Archibald of 17,000 merks. Mr. Archibald charges Fullwood upon the contract, who suspends, alleging, that the clause can only import that he is liable for his own part, but not *in solidum*, seeing the clause bears not the overseers to be bound conjunctly and severally. It was answered, that the obligation is not for payment of a sum, which is divisible, but for doing a fact which is indivisible, viz. the minors being become bound to relieve, which is all one, as if the overseers had been obliged to cause the minors subscribe a bond of relief, which could not divide, but would have obliged every one of them *in solidum*. It was answered, that the result of the obligation being relief of sums which are divisible, the obligation, at least the damage and interest succeeding in place thereof ought to be divisible, for the obligation being *factum alienum* imprestable to the overseers, and the third overseer that refuses to concur, being the charger's own brother, there is no reason that the overseers, who had no office or obligation, but were only overseers, which is not *nomen juris*, should be liable for the charger's own brother, his third part thereof.

The Lords found them only liable *pro rata*.

Stair, v. 1. p. 641.

1672. June 14.

GROTT against SUTHERLAND.

Two owners of a ship being obliged by a contract to transport goods to a certain part; the Lords sustained action against one of them *in solidum*, for implementation of the obligations in the contract being *facti* which is indivisible; and they

No. 8.

He having failed to grant it, the obligants were found liable *pro rata*.

No. 9.

No. 9. being *socii et exercitores*, so that the freight might have been paid to one of them; and *eadem ratione*, any one of them is liable, and may be pursued *in solidum*.

Clerk, *Gibson*.

Fol. Dic. v. 2. p. 378. Dirleton, No. 166. p. 68.

* * * Stair reports this case :

SUTHERLAND having by a minute with Grott and Elatt, two owners of a ship, agreed for the freight of some barrels of beef, belonging to Sutherland and his partners, which they were obliged to carry to Leith; and having failed; he pursued them for damage and interest, concluding against both to be liable, conjunctly and severally, for the whole damage. The defenders being absent, and the clerk having advised the relevancy of the libel with the Lords; this occurred to their consideration, whether that member of the libel was relevant, concluding against them both *in solidum*, or whether they were only liable *pro rata*, seeing the minute bears not conjunctly and severally; whereupon some were of opinion, that they were only liable *pro rata*, especially seeing the fact to which they were obliged *principaliter*, viz. to transport goods from one port to another, was divisible; and if it had been performed by the defenders severally, and by several vessels, the pursuer could not have refused the performance was sufficient, much more now when damage and interest was only pursued, for that terminating in a liquid sum, was unquestionably divisible.

The Lords found both the defenders liable *in solidum*, for they found that the damage and interest, albeit it terminate in a sum, yet seeing *subiit vicem facti*, it behoved to be ruled conform to the principal obligation, which being *in facto*, they found, that according to the meaning of parties in trade, who contract most summarily and plainly, it was not to be understood that every owner should only be obliged for his part of the cargo, and thereby oblige the merchant to attend and accept of payment by parts; and though, if all of them had brought their parts at the same day to the Port, and offered them together, the merchant could not challenge any of them for more than his own part, because he had nothing wanting to him; yet that inferred not, that when they all failed, each should only be answerable for his part.

Stair, v. 2. p. 84.

1697. December 24. DICKSON against TURNER and RUTHERFORD.

No. 10.

THE question was about a man whom Ker of Cavers had hired to be his levy-man, to be sent to Flanders, *anno* 1694, whom afterwards the parish of Abbot-rude took on, and put out as their man, and forced Cavers to conduce with another to be his militia man, and pay him £.10 Sterling; so he pursues them for