

1698. June 21. DAME CHRISTIAN WHITE *against* MRS. HAY.

DAME Christian White, relict of Sir James Turner, and Robert Colvill, executor-creditor to the deceased Lord Sinclair, against Mrs. Hay, as representing Colonel Patrick Hay, her Father, who granted their authors a bond for £.800 Sterling out of the first and readiest of the 50,000 rix dollars the Town and Senate of Hamburgh owed him. Alleged, She was but one of more daughters heirs-portioners, and so could be liable only *pro rata* effeiring to her proportion. Answered, She must be decerned *in solidum*, in regard her share of her father's succession amounts to more than all the sum acclaimed, which they restrict to 3000 merks, especially seeing the other sisters are discussed and found insolvent; and if she condescended on any estate belonging to them, the pursuers are willing to discuss and affect the same, before they insist in this subsidiary action to make her liable for their insolvent deficiency. Replied, If you have been silent till they failed, that taciturnity should rather prejudice you, the creditor, than me; and by the Common Law, wherever the prestation and debt is divisible, as money is, there the action divides, *et unius inopia ceteros non onerat*, L. 1. C. *Si plures una sententia condemnati sint*. The Lords found heirs-portioners not liable *in solidum*; but if the rest prove insolvent and be discussed, and no other estate can be condescended upon, then the shares of the insolvent fall upon the rest, but so as to extend no farther than to their proportion and benefit of the succession; even as an executor is only liable *in valorem inventarii*; and one may be decerned so far as his share reaches.

*Fol. Dic. v. 2. p. 382. Fountainhall, v. 2. p. 4.*

1775. August 4.

THOMAS M'MILLAN, *against* MARGARET TAIT, THOMAS MOFFAT, and ALEXANDER MOFFAT.

THE above named persons, and Thomas Waugh, being all grand-children of the deceased Thomas Mitchelson, by three of his daughters, who, with a fourth, the wife of Robert M'Millan, became heirs-portioners to him, were called in a process at the instance of Thomas M'Millan, son of Robert, concluding against them, conjunctly and severally, for payment of £. 250 Scots, being three-fourth parts of the sum of 500 merks Scots contained in a bond of provision; the other fourth share of this debt, for which Robert M'Millan and his wife were liable, having been already made good to the pursuer; and the Lord Ordinary having decerned against the defenders, a reclaiming petition was preferred for Margaret Tait, Thomas and Alexander Moffat, on which the following deliverance was given: "The Lords refuse the same, so far as it prays to find, that the petitioners are only liable for their own proper share of the debt libelled on, and not for any part of the loss arising from the insolvency of Thomas Waugh; and, as to

No. 66.

After insolvent heirs-portioners are discussed, their shares fall upon the rest, but so as to extend no farther than their proportion, and benefit of succession.

No. 67.

Heirs-portioners how liable for the predecessor's debt?—Whether those solvent, when sued for payment of three fourths of the debt still due, could be subjected for the loss arising from the insolvency of another likewise called as

No. 67.  
 a defender,  
 without call-  
 ing into the  
 field the re-  
 presentatives  
 of one of  
 heirs, whose  
 fourth had  
 formerly been  
 paid?

that point, adhere to the interlocutor reclaimed against; but, *quoad ultra*, ordain the petition to be seen and answered," &c.

The other point insisted on was, at least to find, that, after discussing the insolvent debtor, the pursuer ought to call James M'Millan, his own brother, and the representative of one of the heirs-portioners, that he may bear, along with the defenders, his proportion of the loss arising from the insolvency of Waugh.

Argued: In this proposition, that, if the whole sum pursued for must be paid by the representatives of the heirs-portioners, the loss ought to fall equally on all the solvent representatives, and not on the defenders only, the defenders are supported not only by the great principles of reason and equity, but by the most respectable authorities; Lord Stair, B. I. Tit. 17. § 20; Erskine, B. III. Tit. 8. § 53.; Bank. B. III. Tit. 3. § 5. Upon these authorities, it was contended, that, in the case of the insolvency of an heir-portioner, or her representative, the law requires that the bankrupt be first discussed, and that the loss arising from such bankruptcy shall fall proportionally upon the remaining heirs-portioners, or their representatives who are solvent. If this is the doctrine of our law, it follows as a necessary consequence, that the brother of this pursuer, being the representative of one of the heirs-portioners of Thomas Mitchelson, falls to be subjected to a proportional share of the loss arising from the insolvency of Thomas Waugh, and ought to be regularly called in an action for this purpose.

Answered: It is vain in the defenders to insist, that the pursuer is obliged to discuss Thomas Waugh, himself a party to the process, and against whom decret is pronounced, finding him jointly and severally liable with the defenders.—A creditor to whom several persons are justly liable, lies under no necessity to discuss a debtor, admitted to be insolvent. His having acknowledged insolvency is sufficient discussion; and the other debtors, on paying, will be entitled to operate all the relief which can be obtained out of his effects, but with that the creditor cannot be troubled; he is entitled to his money.

The other demand made by the defenders, that the pursuer ought to call his brother, who is said to represent one of the heirs, seems equally ill-founded. The pursuer's father, a little time after the pursuer's majority, paid the proportion of the debt to which he was liable; and as he performed his obligation *debi to tempore*, the defenders, who not only have not performed their part, but have protracted payment by a very unjustifiable litigation, cannot make their own breach of duty a ground of throwing an additional burden on his representatives. At any rate, the pursuer is not interested in that question, or bound to enter into it. He, the creditor, has nothing to do with the relief, to which his debtors are entitled among themselves; and his payment cannot be delayed on that pretext. All the defenders are indisputably liable to him; and, as he has insisted against them for no more than three-fourths, which they ought to have paid many years ago, his decret cannot be staid on pretence that another person, after a long discussion and tedious litigation, might perhaps be found liable to some small proportion of the debt. The defender's relief, in case they are entitled to it in law, will not be hurt

by their doing justice to the pursuer ; on the contrary, will be facilitated by it, and they will thence acquire a good ground for operating it against the representative of Robert M'Millan.

No. 67.

“ The Lords find, that the defenders are not liable for any part of the loss arising from the insolvency of Thomas Waugh, effeiring to the share of M'Millan, one of the heirs-portioners, without calling him into the field.”

Thomas M'Millan, rather than call James M'Millan into the field, agreed to allow out of the sum libelled, a sum effeiring to James M'Millan's proportion of the loss sustained by Thomas Waugh's insolvency ; on which footing the amount of the debt resting by the defenders was ascertained by the Lord Ordinary.

Act. Geo. Wallace.

Alt. Edward M'Cormick.

Clerk, Kirkpatrick.

Fac. Coll. No. 194. p. 126.

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 SECT. XIV.

Executors how liable?—In a Process must they all concur, or have they Action PRO RATA?

1557. April 11. EARL OF MORTON *against* THE DUKE.

No. 68.

IF there be divers and sundry executors, one of them cannot be called or pursued without the rest, except the rest be deceased, and an executor allenary living, because he is in place of all them that are deceased ; and any one of them may not pursue without the remainder.

*Balfour, No. 7. p. 220.*

\* \* Maitland reports this case :

ANENT the action pursued by the Earl of Morton as executor to his father, against my Lord Duke, it was alleged by the said Duke, that the said Earl might not pursue as executor foresaid, because there were more executors confirmed in the testament, without whom the Earl might not pursue alone ; which allegiance of the Duke was admitted by the Lords.

*Maitland MS. p. 121.*