

No 69.  
the office ac-  
cresces to the  
shriving  
executor.

thairefter happins to deceise, the hail office of executorie aucht and sould pertene to the uthar as executour *in solidum*, and na part thairof to the executour of the executour that is deceist.

*Fol. Dic. v. I. p. 277. Balfour, (EXECUTOR.) No 14. p. 221.*

1567. February 26. LOVAT against FRASER.

No 70.

THE executor that is livand may be callit without the heir or executor of him that is deid.

*Balfour, (EXECUTOR.) No 14. p. 221.*

1625. July 23. AITKIN against HEWART.

No 71.  
Found as  
above.

IN an action betwixt Aitkin and Mr Peter Hewart, who was convened as being one of three executors to umquhile Janet Wood, to make payment of a legacy left by the said Janet to the pursuer, to be paid by her executors; the LORDS found, That where there is more executors confirmed to any defunct, and all the rest are deceased but one, that that one surviving, hath good right to pursue for the whole gear pertaining to the defunct, even as if all the other executors were living, and might pursue; likeas that executor surviving may be lawfully pursued at any of the defunct's creditor's or legatar's instance, for the whole debt or legacy *in solidum*, in case his part of the executry would extend to as much as would satisfy that debt acclaimed, albeit the rest of the executors deceased had intromitted with their own parts of the defunct's goods; and that the said executor was not subject in his own part of that legacy only, as if it should divide proportionally among all the executors, but that he was subject *in solidum* for the whole, if his part of the executry would be so much as might satisfy the whole debt; which whole debt, in case foresaid, the one executor was holden to pay, albeit he had not intromitted with as much of the defunct's goods as might pay the same, if there was as much in the testament belonging to his part as would extend thereto, and so had right to intromit with and seek the same; for he ought to do diligence to recover the same; and not doing diligence, he is alike answerable to the creditors and legatars as if he had uplifted the same; and all the defunct's goods are affected for payment of the defunct's debt, the payment whereof may be sought out of any part thereof, either from all the executors, or any one of them that hath intromitted, or may intromit with as much as may satisfy that debt; and albeit one of more executors had paid out to other creditors or legatars, as much as would exhaust his own part of that legacy, yet that he remains debtor to any other creditor or legatar of the defunct's, so far as the rest of the gear of the testament, pertaining to the other executors deceased, will extend to, if any part thereof remain unexhaus-

ted and unmiddled with by them, or for the which diligence is not done; and that the said executor surviving, stands debtor to the creditors in place of the other executors deceased, if they have not intromitted or done diligence as said is, seeing the said executor surviving hath right to all which was not executed; but if the other executors have intromitted fully with their own parts, or done diligence therefore, the executor surviving is not liable but for the proportion of the debt acclaimed, according to his own part of the executry, and the other executors stand debtors likewise for their parts thereof.

No 71.

Act. Aiton & Lermontb. Alt. Hope & Lawrie. Clerk, Scot.

Fol. Dic. v. 1. p. 277. Durie, p. 180.

\* \* Spottiswood reports the same case :

ANY co-executor may be convened *in solidum* by a creditor or legatar, the rest being dead, if his intromission hath been above the value of the debt sought for, albeit the executors have made division among themselves, and he ought only to have his relief against his co-executors and their heirs.

Spottiswood, (EXECUTORS.) p. 112...

1627. February 20. DUKE OF LENOX against CLELAND.

In an action of transferring, at the instance of the Duke of Lenox, as executor to umquhile Esme Duke of Lenox his father, and also as executor to Ludovick Duke of Lenox his uncle, against Sir James Cleland, for transferring of an act of lisiscontestation, in a process intented by the said umquhile Esme, as executor decerned to the said umquhile Ludovick, against the said Sir James; the LORDS found, That seeing Esme was executor decerned to Ludovick, and that he died *pendente lite*, and so that debt pursued for was not executed, therefore, that that office of executry to Ludovick, which was in Esme's person, became extinct by Esme's decease; and that the pursuer, as executor to Esme, could not seek transferring of that action, and as executor to Ludovick, he could not seek transferring, because no action was pursued at Ludovick's instance; and so, albeit the pursuer was executor to both, yet that he had no interest to seek transferring of that action, but that the right of executry whereto he succeeded, furnished him a ground of a new pursuit.

No 72.  
An executor having raised a process, and died *lite pendente*, it was found that his executor could not obtain transference of that process.

Act. Hope & Stuart. Alt. Aiton & Nicolson. Clerk, Hay.

Fol. Dic. v. 1. p. 276. Durie, p. 279.