

allegiance of the pursuer the Lords found relevant, and repelled the defender's allegiance. No. 71.

Fol. Dic. v. 2. p. 382. Colvil MS. p. 250.

* * Balfour reports this case :

IF there be divers and sundry executors, and one of them, without consent of the rest, compone, transact, or give quit, renounce, and discharge, any sum of money or debt owing to the dead the time of his decease, the same is null in the self, and of no avail.

Balfour, No. 7. p. 220.

1617. February 20. HALLIDAY against HALLIDAY.

No. 72.

IN an action pursued by Halliday against Halliday, upon the old dative *ad omnia*, the Lords admitted this exception for the one half, that there being two executors confirmed, the one who had intromitted with the just half was deceased, and so the other could not be pursued for the whole.

Fol. Dic. v. 2. p. 382. Kerse MS. p. 133.

* * A similar decision was pronounced in the case of Peacock against Peacock, 16th July, 1628, No. 26. p. 2189. *voce* CITATION.

1625. January 13. M'MITCHEL against M'QUHARG.

No. 73.

FOUND that the executors are not liable *in solidum* to pay legacies, but *pro virili*.

Fol. Dic. v. 2. p. 382. Kerse MS. p. 133.

Durie reports this case :

IN an action betwixt M'Mitchell and M'Quharg, where two executors of a defunct were convened, for payment of a sum of money, left by the defunct to the pursuer, the Lords found, that where there are more executors to a defunct than one, that any one of them cannot be convened by the defunct's creditors *in solidum*, for the whole debt owing by the defunct ; but that they ought all to be convened, each one proportionally, for their own parts, according as they are in number ; except that where there is one of more only convened, that that one convened had in-

No. 73. tromitted with as much of the defunct's goods as would pay the whole debt acclaimed without defalcation completely.

Act. *Nicolson & Mowat.*

Alt. *Laurie & Hope.*

Clerk, *Gibson.*

Durie, p. 155.

A similar decision was pronounced 12th July, 1626, Turnbull against Matheson, No. 285. p. 7574. *voce* JURISDICTION.

1630. *March 24.*

SEMPLE *against* DOBIE.

No. 74.

As one of several executors may be sued alone, if he has intromitted with as much as will pay the debt, so may payment be made to one, of the whole debt, when the others have intromitted as far beyond their share.

THIS is mentioned in the 17th of March, 1630, No. 75. p. 2739. *voce* COMPETENT, where the payment alleged made to one of the two conjunct executors, was sustained to liberate from the whole; and that the other executrix, who acclaimed her own half of that debt alleged paid, could not seek any part thereof, nor oppose to that discharge, because she had intromitted with her own half of the whole goods, and with also much more, as the debt now paid to the other executor extended to, which allegiance was sustained to maintain the said payment and discharge; and it was not respected what the said executrix answered, that this was not pertinent to this debtor to allege, that an executor had intromitted with more than his own part, and more than the others; for that was proper to the executors among themselves to count thereon, and which they would do in their own competent time; but this not being alleged by the co-executor, it could not be proposed by the debtor; which was repelled, and the said allegiance sustained: For as an executor may be convened alone, where there are two or more executors, by the creditor for the whole debt, if he has intromitted with as much as may pay it, so may payment be made to one of the whole debt, where the other executor has intromitted with the like quantity more than his own part.

Fol. Dic. v. 2. p. 382. Durie, p. 514.

1630. *July 22.*

WILLIAM SALMON *against* EXECUTORS OF JOHN ORR.

No. 75.

Two executors being confirmed, one of them cannot be pursued *in solidum*, except it be replied, that the executor pursued intromitted, or might have intromitted with as much as might have satisfied the pursuer.

Fol. Dic. v. 2. p. 382. Auchinleck MS. p. 75.

Durie reports this case:

JOHN ORR being infeft in an annual-rent out of a tenenement pertaining to Salmon, redeemable upon 800 merks, and the said John Orr thereafter resigning the