

No. 114.

1642. *January 24.* SMITH *against* WILLIAMSON.

ONE of the Magistrates of a town, who himself, upon the creditor's charging, had imprisoned a rebel, being dead after the rebel's escape out of prison, the Lords sustained action against the other Magistrates surviving, conjunctly and severally, and that without any necessity of pursuing the representatives of the deceased.

*Fol. Dic. v. 2. p. 386. Durie.*

\* \* This case is No. 33. p. 11705. *voce* PRISONER.

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SECT. XIX.

Upon a Decree against several, if each can be charged IN SOLIDUM?—  
Can two creditors conjoined in a Decree, charge IN SOLIDUM?

1626. *February 28.* ———— *against* DOUGLAS.

No. 115.

Heir and executor sued and decerned to pay, without adding severally or *in solidum*, were found liable each for the half, though they might have been decerned for the whole.

IN an action of suspension ———— and Douglas of Cashogill, for suspending of a decret obtained against the heir and executor of a defunct, debtor to the obtainer of the sentence; in this process and summons whereupon that sentence was pronounced, both the heir and the executor of the defunct were called *unico contextu*, without distinction, to pay the debt owing by the defunct, viz. the heir as heir, and the other who was executor, was *hoc nomine* called; and the summons was referred to the defender's oath, viz. that the one was heir, and the other was executor; and they both were holden as confessed, being summoned to give their oaths, and not compearing; whereupon sentence followed, decerning them to pay, conform to the tenor of the summons, whereby, as said is, they were both called and desired to make payment; and wherein it was not libelled, that each one of them was debtor *in solidum*, and that therefore they, and every one of them, was holden to make payment of the whole, but the tenor of the summons and conclusion thereof, bore only, that they should be decerned to pay the debt; likeas, the words of the sentence were so conceived; and it being disputed in this suspension, if the sums should divide betwixt the heir and the executor decerned, and that each one of them was subject to pay the half of the sum, or if the creditor might exact the whole, either from the heir or the executor, seeing they were both debtors to him, and every one of them by the law, in the whole sum: The

Lords found, that albeit by the law, the heir, or the executor, and each one of them remained subject to the creditor in the whole debt; yet, in respect of the conception of the summons and pursuit, and of the sentence following thereupon, being of the tenor foresaid, neither the heir alone, nor yet the executor alone, could be charged for the whole debt; but that in respect of the same sentence, each one of them was only subject to pay the equal half of the sum decerned, whereas the creditor might of law have craved the whole from any of them, if the pursuit had been so intended and conceived, and decret so given.

Act. *Mowat & King.*

Alt.

Clerk, *Gibson.**Fol. Dic. v. 2. p. 386. Durie, p. 186.*

No. 115.

1626. November 16. CHALMERS against MARSHALL.

A DECRET being obtained at the instance of James Chalmers against Marshall and White, as intromitters with the gear of a defunct who was his debtor, this decret being suspended by one of the defenders, upon this reason, that he could not be charged for the whole debt, but only for the equal half thereof, seeing the sentence was given against them both as intromitters, which was proved by the sentence, and was not given against them and each one of them conjunctly and severally, the sum therefore behoved to divide; the Lords found, that the sum contained in the said sentence should divide betwixt the two defenders; for albeit if any of them had been pursued alone for the whole, and that it had been proved that that one person convened had intromitted, that person alone would have been decerned *in solidum* to pay the whole debt; yet seeing there were two convened, and proved against them both, and decret given against them both; therefore the Lords found, that the sum should divide betwixt them, seeing the pursuer had elected them both to be pursued. The Lords, notwithstanding of this decision, used to decide where two executors are decerned to pay to a creditor, yet that creditor may seek execution upon that sentence against any of the two executors, decerned *in solidum* for the whole debts, without division *in hoc casu*, viz. if the creditor do prove, that that executor, against whom he seeks execution for the whole, intromitted with as much of the defunct's goods as will satisfy his whole debt, and no otherwise. But this was not sustained against any one of the two intromitters as said is.

Clerk, *Scott.**Fol. Dic. v. 2. p. 386. Durie, p. 233.*

No. 116.

One of two intromitters was not found liable *in solidum*, although, if deeree had been insisted for in these terms, it would have been given.