

1751. February 5. DAVID SLOAN *against* JOHN MACMILLAN.

No. 7.

A letter promising to bind conjunctly for a bargain, was found to bind the writer conjunctly and severally.

JOHN MACMILLAN in Glenlaggan, sent by Alexander Macguffock to David Sloan in Forrest, a missive, in these terms :—" Sir, I desire you may sell your tups and ewes as cheap as possible, for your wedders is too dear ; delay taking security till I come home, and I shall bind conjunctly with him for your sheep." Macguffock bargained for the tups and ewes, and took them away, together with the wedders which had been formerly agreed for : Sloan obtained a decret before the Steward of Kirkcudbright for the whole price in so far as resting. And in a suspension, the Lord Ordinary, 4th January, 1750, " Found the letter did subject the suspender in payment of the whole price of the sheep."

Pleaded in a reclaiming bill, he is bound only conjunctly.

2dly, Whereas the charger has alleged, that the suspender has already paid more than the half, which explains his letter ; this is not true, for he has paid within the half ; and the charger is paid something more, which exceeds the half, by a draught of Macguffock's

Answered : The suspender delivered in Macguffock's draught, which was payment by him : The meaning of the letter is, that he should pay the whole ; it promises that he should become bound ; and if they had accepted a bill for the price, each would have been bound for the whole.

The Lords adhered.

Act. Boswell.

Alt. Macdowal.

Clerk, Forbes.

Fol. Dic. v. 4. p. 294. D. Falconer, v. 2. No. 190. p. 229.

SECT. III.

Indivisible Prestation.

1669. July 15.

MR. ARCHIBALD DENNISTON *against* SEMPLE of Fullwood.

No. 8.

Three overseers of a minor became bound to cause the minor grant a certain relief.

MR. ARCHIBALD DENNISTON being left tutor to the three daughters of Denniston of Cowgrain, and Fullwood, elder and younger, and the tutor's brother, being left overseers, by articles of agreement betwixt the overseers and the tutors, they are bound to cause the minors' curators give security for 4,000 merks, and to relieve him of the sum of 17,000 merks, which he had paid, and was engaged for

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.