answer till diligence were done against the donatar, or other intromitters with the moveables. No 9.

Fol. Dic. v. 1. p. 357. Stair, v. 1. p. 150.

1673. *June* 10. WHITE *against* WHITE.

No 10.
A man dying, left a daughter of one marriage, a son and a daughter of another. The son, after making up titles to part of the estate, also died. His full sister entered heir to him in that part, and she and her half-sister made up titles to the remainder, as heirs-portioners to their father. Found, that the relief of the father's debts, betwixt the two sisters, ought to be in proportion to the respective parts to which they succeeded, whether immediately to the father, or mediately by representing the brother.

JOHN WHITE having been infeft in the lands of Nether Whillonhill, and having had a several right to the teinds thereof, died, leaving a son and two daughters; after his death the son obtained himself infeft in the lands, by a precept of *clare constat*, but did not establish the right of the teinds in his person, and died without issue; after his decease Janet White, who was his sister by both bloods, is infeft as heir to her brother in the land, excluding Christian, who was but only sister by the father; and both Christian and Janet entered heirs-portioners to John their father, and thereby had right to the teinds; whereupon Christian pursues Janet, who possest both land and teind, to pay her the half of the teind-duty; who *alleged* compensation, in so far as Janet the defender had paid 1000 merks of their father's debt, and thereby had recourse against Christian the pursuer, as one of the two heirs-portioners to her father, for the half of that debt. It was *answered* for Christian the pursuer, That her sister the defender could not seek recourse or relief against her as heir-portioner for the equal half, but only proportionably effeiring to the heritage of the father, both in land and teind; for albeit a creditor of the father's might have recovered payment against the pursuer for the half, as one of the two heirs-portioners, so a creditor might also have obtained payment from the defender Janet, of the whole debt as heir to her brother, who was heir *passive* to his father; so that as the pursuer is heir immediate to her father in a half, so the defender is not only heir immediate in the other half of the teinds, but is sole heir by progress to her father in the land; and, in either case, when either party were pursuing for relief, they are in the condition as different heirs of the same defunct; and law and custom hath cleared the order and relief of all heirs and successors amongst themselves, viz. that heirs of line must relieve heirs of tailzie and provision; and as to heirs-portioners, when they come to divide their succession, or to get relief of the defunct's debt, they must have collation of what portion or provision they got from the defunct, and according thereto the division and relief must proceed; and albeit a case of this nature hath never occurred to be decided till now, it must be decided according to equity, and to like cases already determined; and there can be no doubt, but that, in equity, the benefit and burden of the father's estate and debt should proceed proportionally, and that all that represent him should pay his debt, according to the benefit they have received; for, upon the same ground of equity, the collation of goods amongst heirs-portioners was introduced. It was *answered* for the defender, That equity cannot rule this case; but it is determined by the course of law,

No 10. which makes heirs portioners to succeed, as in the benefit, so in the burden of the defunct's debts equally; neither are they obliged to confer any more than what they had from the defunct, whose heirs-portioners they are, and that immediately, and so they are not obliged to confer the succession of the brother, nor to have regard thereto in relief of the father's debt; neither is there by the law of Scotland any succession, active or passive, by inventory or proportion, but all either *in solidum*, or for a determined *quota*, according to the number of the heirs-portioners.

THE LORDS found, that the relief of the father's debt betwixt his two daughters, ought not to be equally, though they were heirs-portioners, but proportionally, according to the proportion of the father's whole estate, to whom both succeeded, either mediately or immediately in the whole; and therefore ordained probation *hinc inde* of the worth of the land, and of the teind, that the pursuer might bear only burden for the half of the teind, and the defender for the other half of the whole land.

Fol. Dic. v. 1. *p.* 356. *Stair, v.* 2. *p.* 183.

*** Gosford reports the same case:

MARGARET WHITE being decerned heir to her father William White, to pay a debt contracted by him, did pursue her sister, who was likeways served heir-portioner, for her relief of the equal half of the said debt as heir portioner. It was *alleged*, That the defender could not be made liable for the equal half, because the pursuer not only being heir-portioner to her father in the teinds of the lands belonging to him, but likeways being heir by progress in the stock and fee of the estate, in so far as the father having infeft his eldest son, who, after his father's death, died without children, the said Margaret being his sister-german, and the defender only sister by the father, the whole stock of the land did belong to the pursuer, and as heir-portioner the half of the teinds; so that, according to that proportion, she ought only to be liable for relief of her father's debt, which was founded on justice and equity; seeing in the cases of several heirs of tailzie and provision and conjunct executors, albeit they be all liable to creditors *in solidum*, yet as to the relief, they have action only according to their several proportions. It was *replied*, That the debt paid by the pursuer being the father's debt, and none being served heir to him but the pursuer and defender, who were equal heirs-portioners, they were equally liable for relief; and the pursuer, as heir to her father, having nothing more than the defender, there was no ground in our law to make her farther liable to the debt, seeing her right to the rest of the estate was as heir to her brother, to whose debts she was solely liable, and could seek no relief.——THE LORDS having considered this as a new case, wherein there had been no decision, and that it might be a practique hereafter, did find that the defender was only liable for her

No 10.

proportion, to be calculated *intuitu* of the whole estate, stock, and teind, which was once in the person of the father; being moved thereto upon these reasons, that this debt being the father's debt, the pursuer was heir by progress to the whole stock, having succeeded to her brother as heir, and who was successor *titulo lucrativo* to her father, by a right of infeftment granted in his own time; and as her brother, if he had lived and paid the debt, could have craved no farther relief, so the pursuer, being heir to him, and in law *una et eadem persona*, could be in no better condition; and besides, heirs-portioners, or all those who are conjoined in societies, whereby they have interest by succession or contract *in re communi*, and all benefit or burden, they ought to share according to their several interests or proportions, upon that principle, *quem sequitur commodum eundem et incommodum*, which is a principle founded on common equity and reason; and therefore, as she succeeded to more than four parts of the father's estate more than the defender, she was liable to as much more of the debts, and could crave no farther relief.

Gosford, MS. No 588. *p.* 333.

1716. *July* 12.

MARION and MARGARET WRIGHTS *against* WILLIAM and GEORGE SMITHS.

No 11.

In a process at the instance of two heirs-portioners against the third, for payment of a debt due to them by the defunct *singulari titulo*, the Lords found, that the debt was extinguished by confusion as to two third parts, to which they succeeded as heirs-portioners, but granted decree for the other third.

THOMAS WRIGHT, merchant in Dumfries, having been twice married, obliges himself, in the contract of marriage with the first wife, to secure her in L. 1000 in liferent, and the children in fee; and to the second 2000 merks in the same manner: The only child of the first marriage being married to Mr Patrick Smith, the second wife of Thomas, after his decease, paid the said L. 1000 to the said child of the first marriage, and Smith her husband; after which, the said child of the first marriage, with consent of her said husband, granted bond to Sir Patrick Maxwell, whereupon he led an adjudication against her, as lawfully charged to enter heir to her father, and adjudged from her some lands, &c. in Dumfries; which adjudication was disponed by Sir Patrick to William Smith, son procreated betwixt the said Mr Patrick Smith and the said deceased Agnes Wright; and the Magistrates of Dumfries are charged to infeft the said William upon the said adjudication.

Upon this there is a process upon the passive titles, raised at the instance of the children of the second marriage, after serving heirs-portioners to their father, against the said William Smith a minor, upon the ground of the act of Parliament 1695, cap. 24. concerning the obviating the fraud of apparent heirs.

Answered for the defenders; That the pursuers being served heirs-portioners, their claim is extinct *confusione*.

Replied for the pursuers; That, as they succeed to the two-thirds of their father's inheritance, so far indeed the debt is extinguished *confusione*; and