

1698. June 21. DAME CHRISTIAN WHITE *against* MRS. HAY.

DAME Christian White, relict of Sir James Turner, and Robert Colvill, executor-creditor to the deceased Lord Sinclair, against Mrs. Hay, as representing Colonel Patrick Hay, her Father, who granted their authors a bond for £.800 Sterling out of the first and readiest of the 50,000 rix dollars the Town and Senate of Hamburgh owed him. Alleged, She was but one of more daughters heirs-portioners, and so could be liable only *pro rata* effeiring to her proportion. Answered, She must be decerned *in solidum*, in regard her share of her father's succession amounts to more than all the sum acclaimed, which they restrict to 3000 merks, especially seeing the other sisters are discussed and found insolvent; and if she condescended on any estate belonging to them, the pursuers are willing to discuss and affect the same, before they insist in this subsidiary action to make her liable for their insolvent deficiency. Replied, If you have been silent till they failed, that taciturnity should rather prejudice you, the creditor, than me; and by the Common Law, wherever the prestation and debt is divisible, as money is, there the action divides, *et unius inopia ceteros non onerat*, L. 1. C. *Si plures una sententia condemnati sint*. The Lords found heirs-portioners not liable *in solidum*; but if the rest prove insolvent and be discussed, and no other estate can be condescended upon, then the shares of the insolvent fall upon the rest, but so as to extend no farther than to their proportion and benefit of the succession; even as an executor is only liable *in valorem inventarii*; and one may be decerned so far as his share reaches.

*Fol. Dic. v. 2. p. 382. Fountainhall, v. 2. p. 4.*

1775. August 4.

THOMAS M'MILLAN, *against* MARGARET TAIT, THOMAS MOFFAT, and ALEXANDER MOFFAT.

THE above named persons, and Thomas Waugh, being all grand-children of the deceased Thomas Mitchelson, by three of his daughters, who, with a fourth, the wife of Robert M'Millan, became heirs-portioners to him, were called in a process at the instance of Thomas M'Millan, son of Robert, concluding against them, conjunctly and severally, for payment of £. 250 Scots, being three-fourth parts of the sum of 500 merks Scots contained in a bond of provision; the other fourth share of this debt, for which Robert M'Millan and his wife were liable, having been already made good to the pursuer; and the Lord Ordinary having decerned against the defenders, a reclaiming petition was preferred for Margaret Tait, Thomas and Alexander Moffat, on which the following deliverance was given: "The Lords refuse the same, so far as it prays to find, that the petitioners are only liable for their own proper share of the debt libelled on, and not for any part of the loss arising from the insolvency of Thomas Waugh; and, as to

No. 66.

After insolvent heirs-portioners are discussed, their shares fall upon the rest, but so as to extend no farther than their proportion, and benefit of succession.

No. 67.

Heirs-portioners how liable for the predecessor's debt?—Whether those solvent, when sued for payment of three fourths of the debt still due, could be subjected for the loss arising from the insolvency of another likewise called as