1633. *November* 16. A. *against* B.

No. 59.

Two daughters, apparent heirs portioners to their father, are pursued by their father's creditor for payment of a debt. One of the daughters renounces. The other, being pursued for the whole debt, alleges, she being but apparent heir to the half, cannot be pursued but for the half, and the creditor may seek adjudication for the other half renounced by her sister. To which it was answered, that her sister renouncing, the whole debt would fall to her who had not renounced; and so she ought to be subject to the whole debt *in solidum*. To which it was duplied, That the renunciation made by her sister was only profitable to the creditor and chargers, and made not the half of the heritage renounced to accresce to her other sister, for there was no such form of succession:—Which exception and duply the Lords found relevant.

*Fol. Dic. v.* 2. *p.* 381. *Auchinleck MS. p.* 4.

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1635. *July* 3. DUNCAN *against* OGILVIE.

No. 60.

JAMES OGILVIE, as principal, and Mr. David Ogilvie, as cautioner for him, were addebted in a certain sum to John Duncan. James Ogilvie dies, and leaveth behind him only three daughters, one whereof was married to the said John Duncan, who afterwards charged the said Mr. David Ogilvie, cautioner, for payment of the sum. He suspended on this reason, That the charger having married one of the principal's three heirs portioners, who would be obliged to relieve him, "frustra petebat quod mox erat restiturus." Answered, His wife being but one of the three, would not be liable to his relief *in solidum*, but only *pro portione hæreditatis*. Replied, "Si sit tantum in hæreditate ejus," as the debt owing by the cautioner, it must be all subject to his warrandice, even as in executors, who may be convened *in solidum* any of them, if their intromission be as much as the debt which they are convened for. Duplied, The case is not alike in executors, "qui habent tantum nudum officium," and by virtue thereof every one of them represents the defunct severally, in so far as they have intromission, and in heirs who do not represent the defunct altogether. The Lords found the letters orderly proceeded, and found the charger no further subject to relieve the suspender but for his own part.

*Fol. Dic. v.* 2. *p.* 381. *Spottiswood, p.* 143.

*** Auchinleck reports this case:

MR. JOHN DUNCAN, who had married one of the daughters of umquhile Mr. John Ogilvy, pursues David Ogilvy, cautioner for his father-in-law, for the sum of 6000 merks. It was excepted for the cautioner, that the pursuer having married

one of the heirs of the principal debtor, cannot charge the cautioner for the sum of which he ought to relieve him. It is replied, that his wife is but one of the heirs of the defunct, and is not obliged of the law to relieve him, but *pro rata parte hæreditatis*. It is duplied, that the pursuer's wife has as much of the heritage as may relieve the defender, and ought rather to pursue the co-heirs, nor put the defender to such execution against them. The Lords find, that the charger should relieve but for his own part, and the suspender should pursue his relief against the rest of the heirs; and suspended the execution of this charge to a certain day, that in the meantime the suspender may pursue for his relief. No. 60.

In the same action, the executor of the defender's father compears, and desires to be admitted for his interest, because he offers himself to prove the debt for which he pursues: The heir is paid, at least he has as much in his hands of mails and duties resting by him to the defunct, and confirmed in the defunct's testament, as will exceed the debt that he pursues for, which he is content to refer to the pursuer's oath. To this it is answered, that the executor is not called in this process, and so has not interest to compear. The Lords admitted him for his interest, and to propone the said exception of payment to be proved by the defender's oath.

*Auchinleck MS. p. 5.*

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1642. *January* 24. SCOT *against* HART.

No. 61.

UMQUHILE William Hart, being obliged to pay Scot the sum of £.77 for furnishing of aliment and clothes to the said William, and his bond being registrated against one of the two daughters, and heirs of the said William reserving her defences against the execution; whereupon the daughter being charged, she suspends that she was but one of the two heirs, and her other sister should be convened, who was co-heir. It was answered, that she who was convened, ought to be convened *in solidum*, in respect the other sister was a poor woman, *non solvendo*, likeas the other sister disponed all her right which she had to her father's lands, in favours of this sister, which was convened; which reply the Lords sustained, to make this sister liable *on solidum*, for the whole debt, seing also it was a matter but of a mean consequence; but here both the sisters would appear necessary to have been convened in the process, as representing the defunct, who was debtor, and who cannot be represented by any one of the two, and who being both convened, might have been heard to dispute, why the one should pay all, and the other be freed.

Clerk, *Scot.*

*Fol. Dic. v. 2. p.* 381. *Durie, p.* 888.