

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 hereditatis*. It is replied, 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 compares, 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 compare. 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.*

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 solvenda*, likeas the other sister disposed 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.*