

No. 12. service, from the time of their meddling, to the King's return, and the other parties in the mean time becoming insolvent,

The Lords found George Morison liable *in solidum* for the eighth part of the ship; but as to the wines and others that were in the ship, whereanent there was no co-partnership proved, and but one witness of George Morison's intromission, and Captain Strachan's own oath in supplement, the Lords found the same not sufficient; and yet allowed Captain Strachan, in fortification of the decret, to adduce further probation.

Fol. Dic. v. 2. p. 378. Stair, v. 1. p. 531.

1710. December 16. MUSHET against HARVEY.

No. 13.

Two persons bought a wood, without adjecting in the contract conjunctly and severally. One having become insolvent, the other was found liable *in solidum* for the price.

In 1703 Mushet of Calliquhat sells his wood to Stewart of Craigton, and Harvey of Blackhouse, for £.1060 Scots. Stewart being dead and broke, Mushet pursues Harvey for the price. He contends, That, by the conception of the contract betwixt them, he was only liable to the one half, because they were only simply bound, without adjection of the clause, "conjunctly and severally," which must be interpreted to have been *de industria* omitted, and that they would not condescend thereto; *et verba sunt contra proferentem sumenda, qui potuit apertius dicere*; and if a bond run in that stile, wanting these words, the obligants will not be liable *in solidum*, but only *pro rata*, and even so in a contract of victual. Answered, It is so in ordinary cases; but here is a plain copartnery and society, which, by the nature of the contract, binds each of them *in solidum*, that he may not be put to seek in his price by parcels; neither would he have trusted Stewart without him; and as he makes one party-contractor in the writ, so they two make the other *pro indiviso*; and in selling of woods, they are always understood liable *in solidum*. Replied, There be many sorts of communion in law which do not amount to a society, such as heirs-portioners *pro indiviso*, yet each is only liable for their own part; where a house, or other *corpus*, is legated to two several persons, there is a *communio*, but no copartnery; and even take the case in hand. Two buy the same thing. L. 31. D. *Pro socio*, lays it down for a rule, *non sufficere rem esse communem nisi et societas intercedat*; and was so found by the Lords in 1707 betwixt Graham, Pyper, and Chiesly (not reported.) And Stair, Lib. 1. Tit. 16. tells, there may be a communion by accident without society; as among legatars, heirs, and acquirers of the same thing *pro indiviso sine affectione societatis*. The Lords found, by the nature of this contract, Harvey was bound *in solidum* for the whole price. Then Mushet insisted to have his damage liquidated for the wrong cutting of his birks even over, whereby a hole being left in the middle of the trunk, the water stood there, and sinking into the root, made them to rot and decay, that it never springs out again; but, in regard the witnesses had neither been special in the number nor value of the skaith, they could put no estimate thereon without a farther probation.

Fol. Dic. v. 2. p. 378. Fountainhall, v. 2. p. 609.

* * Forbes reports this case :

No. 13.

By contract betwixt Calliquhat, on the one part, and Alexander Stewart of Craigtoun, and John Harvey of Blackhouse, on the other part, 10th April, 1703, Calliquhat disposed his wood to them, for which they obliged them and their heirs to pay to him £.1060 Scots, at the terms therein mentioned. After Craigtoun turned insolvent, and died, Calliquhat charged John Harvey for payment of the whole sum ; who suspended, upon this reason, that he could only be liable for the half of the price of the wood, in respect he was not bound conjunctly and severally with Craigtoun.

Answered for the charger : The suspender and Craigtoun, being co-partners in the bargain, and *correi debendi*, are both liable *in solidum*.

Replied for the suspender : Copartnership is not to be presumed without express consent of parties ; which cannot be alleged here. For every communion infers not a society ; there is no society betwixt heirs-portioners, who are owners of the heritage *pro indiviso* ; nor is there a copartnership betwixt two persons buying, or giving commission to buy, one and the same thing ; L. 31. L. 32. D. Pro socio ; Stair, Instit. Lib. 1. T. 16. § 1. ; albeit there is an accidental communion betwixt these.

Replied for the charger : Albeit, in the case of bonds of borrowed money, which is divisible *eo momento*, that it is received, the co-obligants not being bound conjunctly and severally, are liable *pro rata* only, each being presumed to have drawn his own share ; yet the delivery of a bargain of victual to one of two or more buyers, purifies the contract, though it mention not what quantity each was to receive ; and, in this case, the wood being bought by both *pro indiviso*, each of the buyers is liable *in solidum* for the price.

The Lords found the suspender liable *in solidum* for the whole price, in respect the wood was sold to them *pro indiviso*.

Forbes, p. 452.

1721. July 6.

GRANT *against* STRACHAN.

No. 14.

Two being bound as principal debtors, without mention of conjunctly and severally, the bond importing, that the money went entirely to the use of one, he becoming bankrupt, the other, as cautioner, was found convenable *in solidum*.

Fol. Dic. v. 2. p. 378. Rem. Dec.

* * This case is No. 11. p. 14633.