

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 replied, 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.

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