No 381. thought payment could never come too late, therefore they allowed him to be heard thereupon before the Ordinary, though some moved he should raise a separate process for it. But the Lords took it in summarily upon his suspension of the decreet *in foro*. There is another case occurs sometimes, and is mistaken by the lawyers and parties; and it is this; there is a bill given in representing sundry points, and in the petitory parts they sum up their demands into several heads, and crave a distinct categoric answer to each of them: The Lords take notice only of what they judge material, and adapt their interlocutor thereto, without giving a specific answer to the rest; and when the decreet is afterwards extracted, this has been contended to be a nullity, as if the Lords overlooked and forgot these particulars: But this has not been sustained as a nullity, for what gets no special answer is supposed to be rejected and refused, as deserving no special consideration or notice.

Fol. Dic. v. 2. p. 208. Fountainhall, v. 2. p. 672.

1715. *July* 19. Dame Barbara Jaffery *against* Scot of Brothertoun.

No 382.
Two brothers being decerned conjunctly and severally in a decree, as representing their predecessor, the Lords repelled this reason of suspension, that they could only be liable *pro rata*, as competent and omitted.

The deceased Sir John Falconer of Balmakelly having a fishing upon the water of North Esk, belonging to his lands of Galraw, and John Scot of Comistoun having the cruives a little below the said fishing, they entered into a mutual contract, by which Sir John obliges himself not to quarrel any irregularities about the said cruives, by which his fishing was prejudged; and Comistoun bound him, his heirs, &c. to pay to Sir John, his heirs, &c. L. 24 Scots yearly, with a provision, that in case by a legal sentence at the instance of any person, the said cruives should be altered, and Comistoun necessitated to observe the distance of the hecks, height, and breadth of the dam-dyke, Saturday's Slop, &c. that then he should be free as to all terms thereafter, till the obtainer of the decreet shall discharge the same, intimation being always made to Sir John of the said action before litiscontestation. The Lady Galraw, as being infeft in the lands and fishing, *insisted* against Brothertoun, and Colonel Scot his brother, as representing Comistoun their uncle upon the passive titles, and at length recovered decreet against them for the L. 24 Scots, as the agreed tack-duty betwixt Sir John and their uncle: And they suspended upon several reasons, and among others these two, viz, 1*mo*, That they being decerned in general to make payment of the sum, it behoved to divide betwixt them *pro rata*, as if they had been bound conjunctly in one bond: And adduced two decisions observed by Durie, the one the last of February 1626, where the Lords found, "That two persons pursued upon the passive titles, the one as heir, and the other as executor, were only liable each for his own share, in respect it was not libelled that ilk one of them should be liable *:" and another case, the 16th of November 1626, betwixt two vitious intromitters †. 2*do*, Comistoun's contract with Sir John Falconer was *ad diem*, viz. until a decreet was

* ——— against Douglas, *voce* Solidum et pro rata.

† Chalmers against Marshall. Ibidem.

recovered at the instance of one of the upper heritors for regulating the cruives; and now Brothertoun produces one, so that the term of the obligation is expired. No 382.

Answered for the charger, 1mo, That these objections, however competent, yet were omitted out of the first decreet charged on, at which time the suspenders should have pleaded that they could only be liable *pro rata*; and though the libel bears not that ilk one of them should be liable, yet the title whereon they are convened being such as would have subjected each of them, they cannot now found upon this defence, far less can Brothertoun, who is successor in this very fishing; and as to the decision adduced, Durie adds, That notwithstanding this decision, the LORDS used to decide, where two executors are decerned to pay a creditor, yet that the creditor may seek execution upon that sentence against any of the two; conform to which the LORDS have ever since decided, particularly 9th December 1628, Sutor *voce* SOLIDUM ET PRO RATA. To the second, besides competent and omitted, the said decreet was not in terms of the contract, which required intimation to be made of any pursuit to Sir John, his heirs, &c.

THE LORDS repelled both these reasons of suspension, as being competent and omitted.

Act. *Horn.* Alt. *John Ogilvie.* Clerk, *Roberton.*

Fol. Dic. v. 2. *p.* 208. *Bruce, v. No* 121. *p.* 157.

1727. *December* 6. STRACHAN *against* FARQUHARSON.

No 383.

A MISSIVE letter being founded on *per modum probationis* by the pursuer, and excepted against as improbative, not being holograph, an act was pronounced for proving holograph, the result of which was, that the verity of the subscription was astructed, but no proof that the letter was holograph; and the pursuer then recurring to another plea, that the letter was probative, though not holograph, which he alleged he might do, because competent and omitted cannot be opponed to pursuers; the LORDS found it still competent to the pursuer to be heard upon this point, that the verity of the subscription being proved, it is sufficient to support his claim, without proving holograph. See APPENDIX.

Fol. Dic. v. 2. *p.* 207.

1772. *January* 16. ADAM and SHAW *against* ALSTON and FLEMING.

No 384.
Defender's claim for expenses incurred in a suc-

IN a contract with the Town of Glasgow for building a bridge over the river Clyde, Adam and Shaw, the undertakers, had got communicated to them a servitude to dig for stone quarries, &c. within the lands of Alston and Fleming;