

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, 1709, That these objections, however competent, yet were omitted out of the first decret 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 decret 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.

Att. John Ogilvie.

Clerk, Robertson.

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 opposed 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.

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;

No 384.

Defender's claim for expenses incurred in a suc-