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, 1*mo*, 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;

No 384. cessful opposition to a bill of advocation at the pursuer's instance, ought to be made in the original action still pending, and not by a separate one, though before the same judge.

and, having opened and wrought a quarry in Fleming's ground, two several complaints of these operations were, by Alston and Fleming, preferred to the Sheriff of Lanark; and, after various procedure before him, Alston and Fleming did severally present bills of advocation, which, after a keen litigation, were ultimately refused by the Court: For the expense of which, and likewise for damages sustained by their operations being stopped, Adam and Shaw instituted an action before the Sheriff, who having decerned for payment of the accounts given in by the pursuers, together with the expense of the present action, Alston and Fleming complained of this judgment by bill of advocation: And the cause having been advocated, and taken to report, the Court went upon the point of form, whether it was regular to bring a new action for expenses incident in one that was still depending, and where they might be claimed, and awarded, if just.

"THE LORDS dismissed this process, reserving to insist in the original process before the Sheriff, and therein to claim the expenses."

Reporter, *Kennet*. Act. *M'Laurin*. Alt. *Ilay Campbell*. Clerk, *Ross*.

Fac. Col. No 1. *p.* 1.

SECT. XXI.

Powers of the Lord Ordinary.

1677. *January* 27. DONALDSON *against* RINN.

No 385. The Lord Ordinary may judge of all that is produced before litiscontestation *in modum probandi*.

IN a reduction betwixt Donaldson and Rinn, wherein a Sheriff's decreet was questioned, as wanting sufficient probation; the testimonies of the witnesses adduced before the Sheriff being produced, for satisfying of the production, and a warrant to discuss the reasons in the Outerhouse; it was *alleged* for the defender, That the Ordinary could not be Judge to the probation, but the whole Lords only. It was *answered*, That the Ordinary may, and ordinarily doth judge all that is produced before litiscontestation, though writs of the greatest intricacy or importance were produced; but if litiscontestation be made, nothing adduced for probation can be advised by the Ordinary; yea, if any thing be referred to the oath of the party at the Bar, without an act, the Ordinary takes the oath immediately, and determines accordingly; and in this case, the witnesses' oaths adduced before the Sheriff being produced before litiscontestation, and being patent to both parties, and subsumed in the reason and nullity,