

by their doing justice to the pursuer ; on the contrary, will be facilitated by it, and they will thence acquire a good ground for operating it against the representative of Robert M'Millan.

No. 67.

“ The Lords find, that the defenders are not liable for any part of the loss arising from the insolvency of Thomas Waugh, effeiring to the share of M'Millan, one of the heirs-portioners, without calling him into the field.”

Thomas M'Millan, rather than call James M'Millan into the field, agreed to allow out of the sum libelled, a sum effeiring to James M'Millan's proportion of the loss sustained by Thomas Waugh's insolvency ; on which footing the amount of the debt resting by the defenders was ascertained by the Lord Ordinary.

Act. Geo. Wallace.

Alt. Edward M'Cormick.

Clerk, Kirkpatrick.

Fac. Coll. No. 194. p. 126.

 SECT. XIV.

Executors how liable?—In a Process must they all concur, or have they Action PRO RATA ?

1557. April 11. EARL OF MORTON *against* THE DUKE.

No. 68.

IF there be divers and sundry executors, one of them cannot be called or pursued without the rest, except the rest be deceased, and an executor allenary living, because he is in place of all them that are deceased ; and any one of them may not pursue without the remainder.

Balfour, No. 7. p. 220.

* * Maitland reports this case :

ANENT the action pursued by the Earl of Morton as executor to his father, against my Lord Duke, it was alleged by the said Duke, that the said Earl might not pursue as executor foresaid, because there were more executors confirmed in the testament, without whom the Earl might not pursue alone ; which allegiance of the Duke was admitted by the Lords.

Maitland MS. p. 121.