

S E C T. XX.

Competent and Omitted.

1627. February 27. MUIR against L. ROWALLAN.

No 359.

IN a suspension, Muir *contra* L. Rowallan, the LORDS sustained a reason of suspension founded upon a promise made by the L. Rowallan, and referred to his oath, albeit there was a decret of removing given *in foro contentioso* against the same suspender, for failzie in proving of an exception, which was founded also upon a promise, and referred to the party's oath, and found not proved, and albeit the promise now admitted, was also alleged made before the sentence. This was against the order after sentence given, *partibus comparentibus*, but was done in favours of a poor person.

Clerk, Gibson.

Fol. Dic. v. 2. p. 208. Durie, p. 283.

1627. November 14. CRAWFURD against GRIER.

No 360.

IN a suspension betwixt Crawford and Grier, wherein Grier being decerned by the Commissary of Aberdeen, as executor to his father, to pay to Crawford the defunct's relict her third part of the moveables, and the executor suspending, that the whole gear was exhausted by a sentence, recovered at the instance of a creditor of the defunct's, which extended to a greater quantity than all the defunct's goods extended to, so that there could be no third; this reason was not found relevant, but the relict's decret for her third, notwithstanding of the debt, was found should have effect, in regard that the exception upon that debt was competent to have been proponed by the suspender before the sentence was obtained by the relict, and was then known to him; so that his omission then to propone the same was found a cause to exclude him now, that he could never propone any argument upon that debt, to stay the payment of the third to the relict; and this was the rather found, because the debt was owing by the defunct to this suspender's self, he being a bairn of the defunct's, begotten upon a prior wife, and having an obligation made to him by his father of a sum of money, which was the debt acclaimed, and which exhausted the gear confirmed, and to the which obligation and debt therein contained, he had made another of his brethren assignee, after litiscontestation was made in the relict's

An executor pursued by a relict for her third, suspended, because the whole was exhausted. The reason repelled, being competent and omitted.