

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.

No 360.

cause for her third, and which assignee had obtained sentence against the suspender before the relict's sentence; so that the exception upon the sentence for the debt being emergent since litiscontestation in the relict's cause, and being competent to have been proponed before the relict's sentence, the decret for the debt being obtained before it, and being omitted to be proponed as said is by the executor, who might have proponed that exception upon that same debt, for retention of the goods for satisfying thereof, and so not proponing the same, that omission was found to exclude him therefrom in all time coming, although nothing could be said against the verity of the debt, or that it was not owing, and albeit the suspender also was a poor ignorant man, in whom *ignorantia juris et in damno vitando* is excusable; and the Lords understood, that the Commissaries of Edinburgh are ever in use to decide, that where an executor is confirmed, at the time of confirmation, if he as executor protests not that his accepting of the office be without prejudice of any debt owing to himself by the defunct, that the omitting to make such a protestation excludes him ever from seeking of that debt thereafter; which I think should not be sustained where the debt is true.

Act. Hay.

Alt. Baird.

Clerk, Hay.

Fol. Dic. v. 2. p. 208. Durie, p. 311.

1631. March 18. RAGUEL BENNET *against* BENNET.

No 361.

It was pleaded, that one could not renounce to be heir, because he had sold land belonging to the predecessor. Although he had been convened before *super eadem re*, as successor in general, it was found relevant to prove the allegation now made, not formerly libelled and insisted on.

THE defender being convened as heir to her predecessor, or as successor to him in his lands, or as lawfully charged to enter heir, and by some other alternatives, as use is, and she for eliding of that member, where she was convened as lawfully charged to enter heir, offering to renounce; the other *replying*, That she could not be suffered to renounce, seeing *res* was not *integra*, because she had behaved herself as heir, by selling of the lands of wherein her father died infest, since his decease; and it being *duplied*, That this alienation, if it were true, yet could make her only liable as successor to her father, but did not hinder her but she might renounce to be heir, and thereby she might by her renunciation elide that member; for this deed, as said is, tended only to prove her successor, which alternative the pursuer could never be heard to prove against her, because she being convened by the same pursuer in another process *super eadem re*, as successor to her father, and the same being admitted to his probation, he failed to prove her successor, and she is assoilzied, so that he cannot be heard to qualify the same, and this alleged disposition is only a qualification thereof. THE LORDS found, that albeit the pursuer failed to prove this defender successor, yet that secluded him not but that he might reply upon this disposition made by her of lands, wherein her father died infest, and seized, to whom she was apparent heir, and that the pursuer