

S E C T. X.

Act 14th, Parl. 1617, relative to retention of a Third.

1626. July 15. OLIPHANT *against* OLIPHANT.

IN an action betwixt Oliphant and Oliphant, wherein Thomas Oliphant, as brother and nearest of kin to umquhile James Oliphant, pursues Margaret Oliphant, who was left executrix and universal legatrix to the said umquhile James, who died without bairns, wife, sister, or brother, except the said pursuer, to make payment to him of the two parts of the defunct's gear, as nearest of kin to him, conform to the act of Parliament *anno* 1617; against the which pursuit, the defender *alleged*, That the pursuer could have no part of the defunct's gear, in respect the defunct not only left the defender his executrix, but also made her his universal legatrix, whereby she had the only undoubted right to his whole goods; and the pursuer *replying*, That the act of Parliament foresaid gave the legatrix only right to the defunct's third; so that if it exceeded the third, the foresaid act did so limit the same, that the legatar should only have the third, and should not be heard to claim both the third and legacy also, whereby it is manifest, that the universal legatrix could seek no more by virtue of the legacy, albeit alleged to be universal, but only the third, and no more, and that the two parts pertained only to the nearest of kin. This exception was repelled, and the right to the gear totally was found to pertain to the defender, but any deduction, by reason of the said universal legacy, notwithstanding of the act of Parliament foresaid, which act was found not to debar any person in testament to leave all his gear, whereupon he might dispone of the law to any person he pleased, and which being done, his nearest of kin was thereby fully debarred.

Act. ———.

Alt. *Aiton*.Clerk, *Gibson*.*Fol. Dic. v. 1. p. 278. Durie, p. 219.*1626. November 29. FORSYTH *against* FORSYTH.

IN an action at the instance of one Forsyth, one of the bairns of Forsyth, his father's brother, who was left executor by the pursuer's father, for payment to this pursuer, as one the four bairns of the defunct, of his fourth-part of the defunct's third, intromitted with by the defender executor foresaid; the LORDS sustained this action at the pursuer's instance, for his part of the said third, without

No 97.

A man having left a stranger executor and universal legatee; in a process against him, at the instance of the defunct's nearest of kin, the Lords found the whole gear to belong to the defender, notwithstanding the act of Parliament 1617. c. 14.

No 98.

Stranger-executors have a third of the defunct's part, for executing the testament; but this is

No 98.
only in case
there is so
much free,
all debts and
legacies be-
ing deducted.
See No 101.
p. 3925.

any defalcation to be taken therefrom in favour of the defender, who alleged that he had right to retain the third of the defunct's third, he being left executor to him, in respect of the act of Parliament 1617 anent executors, which provides the same; and that the bairns of the defunct have only right to the two parts of the third; which allegiance was repelled, in respect that the defunct had left in legacy to his bairns all which his own third would extend to, which being so exhausted with the legacies made by the defunct, the LORDS found that the executor *hoc casu* had no right to any part of the third by virtue of that act of Parliament. In this process also the LORDS found, that any one of the bairns might pursue for their own part, albeit the rest of the bairns were neither summoned in this pursuit, nor yet assisted the pursuit.

Act. ———.

Alt. *Rollock.*

Clerk, *Hay.*

Fol. Dic. v. 1. p. 278. Durie, p. 239.

1631. July 9.

WILSON against L. TINTO.

No 99.
Found as
above.

A DEFUNCT having nominated executors, and in the same testament having left all his gear in legacies to his bairns, one of the bairns pursuing the executors for the legacy left by his father to him for his own part; and the defender *alleging*, That he had retention of a third part thereof, conform to the act of Parliament 1617, which gives that proportion of the defunct's third to the executor nominated, the LORDS repelled this allegiance; for they found, That where any defunct in his testament nominates executors, and in that same testament leaves all his gear to legatars, others than the executor nominated by him; in such cases the executor has only *nudum officium*, and has no right by that act to any part of the goods of the defunct; in which cases, the act of Parliament foresaid militates not, and cannot be drawn beyond the cases expressed in the act, which provides for the bairns of the defunct, and the nearest of kin pretermitted in the defunct's testament, wherein he had nominated executors, and declared what quantities of the goods *eo casu* shall pertain to the executor; for this act of Parliament puts not the executors in better case than wherein they were before that act; and before that act, when the defunct left his whole goods in legacy, the executor then could have no part thereof; even so after the making of this act, the same should stand; and as if the debt should exhaust the whole gear, the executor by this act could retain nothing to himself, *eo casu* the like reason is where all is left to legatars, specially to the defunct's own bairns; for in this case the nomination of executors is but the granting of a naked office and burden, which the executor has liberty to accept or refuse as he pleaseth; and, if he hold himself free, cannot be compelled to embrace the same, and needs not to confirm, if he please to renounce the office.

Act. *Gilmour.*

Alt. ———.

Clerk, *Gibson.*

Fol. Dic. v. 1. p. 278. Durie, p. 593.