

1632. December 6. DOUGLAS *against* LUMISDEN and HAMILTON.

ANNA DOUGLAS Lady Cavers, charges the Lady Preston, D. Helen Lumisden, to pay, conform to her bond, that part which by law may fall to Anna, as one of Whitinghame's sisters, to whom the Lady Preston is executrix nominate, and to add thereto as meikle of her own.—*Suspended*, Because the dead's part is exhausted, part thereof by legacies, and the rest pertains to the suspender, as executrix nominated; she not being a stranger, and so not subject to the act of Parliament in *anno* 1617 anent executors, but in the contrary, being one of those in whose favours the strangers are ordained to be accountable.—*Answered*, Oppones the bond, and the meaning of the act includes the wife as if she were a stranger, so far as concerns the dead's part.

Find the letters orderly proceeded, notwithstanding of the reason.

Relict, now executrix, as she were a stranger, has only the third of the dead's part, and her own relict's part.

Farder against the special charge *answered*, The third of the dead's part may be defalked, because due to the suspender (as executrix nominated) by the act 1617. Oppones the bond, and that she cannot obtrude any impediment upon any right in her person, because the bond bears to pay, notwithstanding of any impediment may occur.

Find the third due to the suspender, and should therefore be defalked.

*Fol. Dic. v. 1. p. 278. Nicolson, MS. No 131. p. 93.*

1674. January 15. PATON *against* LEISHMAN.

JAMES PATON having pursued James Leishman, as executor nominated by the pursuer's father, for an account of his means; the executor craved allowance of a third of the dead's part, due to him for executing the office by the act of Parliament 1617 anent executors.—It was *answered*, That the dead's part was exhausted by an universal legacy left to the pursuer; and it was in the option of the executor nominated to embrace the office, or refuse it. Neither doth the act of Parliament 1617 extend the executor's benefit, but restricts it, that whereas the executor, before that act, had the whole benefit of the executry, deducting debts and legacies, so, after the act, he is restricted to a third of the dead's part, which must still be in so far as remains free of debts and legacies, which hath always been the Lords practice.

THE LORDS found that the executor could retain nothing, but was excluded by the universal legacy.

*Fol. Dic. v. 1. p. 278. Stair, v. 2. p. 253.*

No 100.

A relict being executrix nominated, has right to a third of the dead's part. See No 104. p. 3928.

No 101.

Found in conformity with Forsyth *against* Forsyth, No 98. p. 3923.