

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.

* * Gosford reports the same case :

No 101.

In a pursuit at James Paton's instance against Leishman, who was left executor by the pursuer's father, for making count and reckoning for the whole inventory of the testament, deducting debts and legacies, it was *alleged* for the defender, That he ought to have retention of the act of Parliament 1617, anent executors, whereby it is expressly provided, that whereas, before that time, executors had right to the whole third, whereupon the defunct could dispoise by legacy, albeit he were only nominated executor, and not left universal legatar, he being a stranger, that as to the future, they should only have right to a third part of the defunct's third, as to which they are secured by the said act of Parliament. It was *replied*, That the act of Parliament did only militate and take effect where the defunct did not exhaust his third part of the free goods by legacy, and so did not hold in this case, where the legacies did amount to the whole third, as had been found by several practicks in the year 1638, and others.—THE LORDS having seriously considered the act of Parliament, and the common law before the act of Parliament, whereby testators had full power to exhaust their third by legacies, as also the former practicks, did find, that the act of Parliament did not derogate from the former law, and that, accordingly, it hath been since decided, and never controverted since these decisions; as also, that the act of Parliament did not restrain testators to dispose by legacy of their whole third part, and was only corrective of the former custom giving to strangers-executors, the full right of the whole third, where no legacies were left; and therefore they found, that the act of Parliament could only be in force in that same case where the defunct's third was not exhausted by legacies, and so repelled the defence; and found the defender could not crave retention upon that ground, especially seeing executors nominated for strangers have it in their power to accept of the office, or refuse the same.

Gosford, MS. No 674. p. 398.

* * See 25th January 1681, Bathgate against Bowdown, No 140. p. 1049.

1676. November 28.

KER against KER.

No 102.

Executors-
dative *qua*
nearest of kin
have no right
to a third of
the dead's
part.
See No 34.
p. 3498.

JOHN KER, as having right by assignation from Robert Ker, and also as having the gift of the escheat of Mark Ker, and being confirmed executor-creditor to Mark, pursues Jean Ker as executrix confirmed to James Ker her brother, for payment of the shares of the executry befalling to Robert and Mark Kers. The defender *alleged* no process upon the pursuer's title as executor-creditor, because it is posterior to the summons. It was *answered*, That he having pur-