

## 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