

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.*