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have satisfaction out of the whole before any division betwixt them, as heirs or portioners to their father. It was *alleged* for the said Margaret, That by her contract of marriage, her father being obliged to dispone to her, and her heirs, the half of his salmon fishing upon the water of Dae, with the sum of 2000 merks to be paid after his decease, she ought to be first satisfied of that debt, and have a right made to her by her two sisters, in so far as she might be secured in the half of the salmon fishing; and, thereafter, have the just third part of the whole remainder of the estate, as one of the three heirs portioners with them. It was *answered*, That the said Margaret being provided and forisfamiliate, ought to have no share of the remainder of their father's estate, unless she were willing to collate and bring in what she was provided to by her contract; as was clear where heirs female, being provided and forisfamilitate, could crave no part of the moveable estate belonging to their father, unless they would collate with their sisters, who remained *in familia;* especially there being no provision in the contract, whereby she was to come in and have an equal share of the remainder of the estate beside the tocher. THE LORDS did find, that the eldest sister, besides the provision in her contract of marriage, ought to have an equal share with her two sisters, who were not forisfamiliate as to all lands and heritages; and that there was not, by our law, any necessity to offer to collate, as in succession to moveables, the elder sister not being secluded, nor her tocher declared to be in full satisfaction of all that she could ask or claim; and that notwithstanding that reason seems alike in both, and that there hath been no practique in the contrary. But it being looked upon as a constitute custom, without all controversy or debate, they did decern as said is.

Gosford, MS. No 656. p. 384.

1677. *February* 14.

DUKE and DUTCHESS of BUCCLEUGH *against* The EARL of TWEEDDALE.

No 8.
A second son insisting for his legitim, was not obliged to collate a provision of land which he got from his father; for collation is introduced to keep equality among the children, only as to the moveables; and since the moveables

THERE was an agreement betwixt the Duke and Dutchess of Buccleugh and the Earl of Tweeddale, by interposition of the King, whereby the Duke and Dutchess 'renounced to the Earl a wadset of his lands for L. 44,000, and certain bygone annualrents, and the Earl gave a bond to them of L. 15,000, and discharged all right his Lady had as executrix to David her brother, who was one of the four children of Buccleugh, beside the heir; the inventory of the testament being L. 188,000; and did likewise dispone the right of Bassenden, unto which he had an ancient claim reserved by interruptions, being worth 3000 merks yearly, and the expence of reducing the Dutchess's eldest sister's contract of marriage with the E. of Tarras, and two London voyages.' This agreement was made in the Duke and Dutchess's minority, and the King took burden to cause them ratify; but the Duke and Dutchess do now pursue reduction of this agreement upon minority and lesion; and condescend, that the

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suffered no diminution, by giving a provision of land to the second son, there could be no reason for the collation.

pursuers having renounced a clear liquid and established right of wadset, cled with possession, for illiquid and uncertain pretences, which had never been claimed for 20 years and above.—It was *answered*, That it is not every lesion that is sufficient to reduce an agreement or contract engaged in by minors, but it must be enorm, and exorbitant lesion; and therefore quitting a decreet, or bond having ready execution for a clear sum, for a debt due to a defunct, upon which no decreet followed, or of intromissions with rents, sums, or goods, if the matter could be instructed to be proportionable without enorm lesion, was never, nor can be sustained, as a cause of reduction, much less so solemn a transaction as this by arbitriment, the King having interposed, and become obliged for the minors' performance.——The Lords found the reasons of reduction, as thus qualified, not relevant, if by the event of this process, the right communicated by the defenders, were now liquidated, and imported not enorm lesion in the matter.—The pursuers then *insisted*, That there was enorm lesion in the matter, because all that was given to the pursuer for so considerable a right of wadset, was but the Countess of Tweeddale's interest in her brother David's share of his father's executry, as being the fourth bairn, beside the heir, and as having a fourth part of his sister Lady Mary's fourth part, who died unmarried, and the right of Bassenden, which were all of no moment; for as for David's share of his father's executry, he could pretend nothing either for his portion natural, as being his share of dead's part, or for his bairn's part, because the defunct did infeft David in fee in the lands of Cannobie, worth L. 5 or L. 6000 a-year, which was a competent provision; and though it bore, 'not 'to be a portion natural, or provision, or in satisfaction of the bairn's part,' yet being so considerable, it must be presumed to have been given in satisfaction. 2*do*, David in his life never claimed any part of the executry, nor would he have obtained any share of it, *nisi per collationem*, by conferring and communicating the right of the lands he had gotten from his father, to the rest of the bairns, that so they might all be equal, which is ever presumed to be the mind of the father, unless the contrary appear by his express deed; and by our known custom, bairns married, and provided with portions, if it be not expressly in satisfaction of their portion natural, and bairn's part, they may claim a share, *ad supplementum legitimæ*, to make up what they had received already, equivalent to the rest of the children un-forisfamiliate; but here David's provision is much more considerable than any the rest of the children.—It was *answered*, That David was never forisfamiliate, or married, but remained as a bairn of the family till his father's death; and if there had been no more bairns, he would have had right to the whole bairn's part; neither was he, nor any representing him, obliged to confer the lands his father infeft him in, because, whatever was the course of the Roman law, where there was no distinction of heritable and moveable rights, the feudal law, and our customs, have differenced the succession of moveables and heritables altogether; and though our custom allows collation, or imputation of bonds of provision, or tochers granted to bairns, as a part of their

share; yet lands were never, by our custom, brought in by collation, but only sums of money, as having been employed out of the moveable estate, and so did diminish the same, and therefore ought to be accounted in the division thereof.—It was *replied*, That it is beyond question, that though by our law the heir hath no share of the moveables, yet, if he pleases to communicate his heritable rights of lands, or others, with the other children, they will all get equal share; and therefore, *a pari*, if a brother provided to land craved a share of the moveables with the rest of the bairns, he behoved to communicate the right of these lands, that all might be equal; which David did not, and the Dutchess, who is his heir, will not. No 8.

THE LORDS found, That the lands provided to David, not bearing 'to be for 'his portion or provision, or in satisfaction thereof;' did not exclude him from his share of the moveables, and that he had no necessity to confer or communicate the right of the lands; and that the Countess of Tweeddale, as executor to David, had right to his share of his father's moveables.

The pursuer further *alleged*, That my Lady Tweeddale, as executrix to David, had no right to any part of Lady Mary's share, because there is no testament of Lady Mary confirmed, which is the only way to establish what right was in her person; for her share by her death could not accresce to the remanent children, seeing thereby they would not represent her *passive* in her debts, and therefore her goods could only belong to an executor, that represented her both *active* and *passive*; for it is a common rule in law, *hæreditas non addita non transmittitur*; and therefore in heritage, there must be a service, which, if omitted, the apparent heir hath no right, and his creditors will have no access against the estate; but there is place for the next apparent heir, passing by the former; and the like must be in succession of moveables, for the executor is *hæres in mobilibus*, and for the most part, is *hæres fidei-commissarius*, who, whether he be executor nominate or dative, he is obliged to restore to the wife her part, to the bairns their part, and to the nearest of kin their part; and any of all these have interest to procure an executor dative confirmed, which is *additio hæreditatis mobilium* for them all, which is suitable to the act of Parliament 1617, making executors comptable for the nearest of kin; so that if there be no executor confirmed, the nearest of kin have no interest, and such nearest of kin have only interest, who are alive the time of the confirmation, and for whom *hæreditas est addita* by the executor. It is true, the right of the relict, and the bairn's part, are rather rights of division *jure proprio*, than of succession; and therefore, though a bairn die before confirmation, the bairn's part is transmitted; but the *jus agnationis* of the nearest of kin, is merely a succession, *quæ non addita non transfertur*, and belongs only to the nearest of kin who are in being the time of the confirmation. This does also agree with the decision of the Lords in the case of Bell and Wilkie,* where the three sisters of Patrick Bell being confirmed executors to their brother, one of them dying before the execution of the testament, the other two were found comptable for her share to her children,

* Stair, v. 1. p. 96. 12th February 1662. *voce* NEAREST of KIN.

No 8.

as executors confirmed to her.—It was *answered*, That the right of blood ought not to be diminished by forms, and the act of Parliament bears expressly, That it is against law, equity, and conscience, to exclude the nearest of kin from their share; and therefore, if any of the nearest of kin should die before they can confirm, there were no reason to exclude their children.—It was *replied*, That the nearest of kin can never suffer but by their own negligence; for they may, immediately after the defunct's death, publish edicts, and obtain confirmation, and the law never provideth for such extraordinary cases, such as the dying before confirmation can be; for seeing the nearest of kin transmit their share by naked confirmation, there is no necessity of executing the testament, as sometime the custom was, which required a very long time.

THE LORDS found, That David having died before Lady Mary's testament was confirmed, no part of her share did accresce to him, nor did belong to the Countess, as executrix; and if she should enter executrix to Lady Mary, she is excluded by her contract of marriage, 'renouncing all right she can have to 'Lady Mary's share.'—The defender further *alleged*, That the pursuers had homologated this transaction, by requiring their commissioners to call for payment of the L. 15,000 bond, which was a part of the defender's obligement by the transaction; and likewise, that the Duke's commissioners had demanded the money from the defender: 2*do*, In a pursuit against the Dutchess, at the instance of Scott of Bassenden, to denude herself of these lands in favour of him, conform to a back-bond granted by the Dutches's predecessor, a defence was proponed after minority upon Tweeddale's right to Bassenden, as belonging to the Dutchess, which was a part of the said transaction.—It was *answered*, That the calling for the money, *non relevat*, because they might, and did refuse *re integra*, before it was received; and as to the proponing upon Tweeddale's right of Bassenden, it was but of course, by a procurator, without special mandate, and was not sustained, nor did the pursuers obtain any benefit thereby.——THE LORDS repelled both these defences. *See* NEAREST of KIN.—PRESUMPTION.

Fol. Dic. v. 1. *p.* 148. *Stair, v.* 2. *p.* 504.

1678. *July* 16. MURRAY *against* MURRAY.

No 9.
The heir collating his heritage, has a title to a share of the childrens part.

UMQUHILE Thomas Murray, bailie of Edinburgh, having children of two marriages, did marry all the children of the first marriage, and gave them tochers, in full satisfaction of their portions-natural, and bairns part; he did also give bonds of provision to the bairns of the second marriage, wherein the sums were all equal, bearing 'to be for their better provision:' And at last, by his testament, has appointed, 'That after payment of his debts, and bonds of provision to his bairns, that all his bairns, of the first and second marriage, should have equal share of his goods and gear;' and, in an account amongst the bairns, those of the second marriage craved their bonds of provision as debt, which