

law gives to the children *proprio jure*. THE LORDS found the heir entitled to a legitim. No 7.

Fol. Dic. v. 3. p. 381. D. Falconer. Rem. Dec. Kilkerran.

*** See Kilkerran's report of this case, No 7. p. 3948, *voce* EXECUTRY, and Lord Kames, and Falconer's, No 132. p. 5928, *voce* HUSBAND and WIFE.

1749. February 22. MARTIN against AGNEW.

ANDREW AGNEW, late of Scheuchan, died widower, leaving two sons, Robert the eldest, now of Scheuchan, and James; and Robert having confirmed executor dative *qua* nearest of kin, and intromitted with the whole moveables, a process was brought against him at the instance of Gilbert Martin, as assignee by James the younger son, to account for his intromissions.

It was *pleaded* for Robert, That James had in his father's lifetime accepted of a provision in satisfaction of his legitim and bairn's part of gear, and that therefore his claim was to be restricted to the dead's part; and that he could have no part of the legitim, which, by his forisfiliation, did wholly belong to the defender.

But it being *answered* for the pursuer, That the defender being heir, could have no claim to any part of the executry, unless he would collate; the Ordinary "repelled the defence, in respect of the answer;" and the LORDS once and again "adhered," notwithstanding the reply for the defender, that collation can only be sought from the heir by those who have a right in the subject which the heir claims, as where he claims to concur in the dead's part with the nearest of kin, or in the legitim with the other children who have title to a legitim; but where the children have renounced their legitim, they can no more require the heir, claiming his legitim, to collate, than the relict, or the executors, or legataries named by the defunct, can do. The reason is all the same, that they have no interest in the legitim, the subject which the heir claims.

It was admitted on all hands to be an established point, that where the heir is the only child, he is entitled to the legitim in a question with the relict, or with the disponees, to whom the father may have conveyed his moveables, as in Justice's case, No 6. p. 8166. And the LORDS, who differed from the judgment here given, could see no reason why the heir should not have the same title to it, where all the other children had renounced; as children who have renounced their legitim, are, with respect to the legitim, to be considered as not in being. And further, where there is a relict and no heritage, and all the children have renounced their legitim or bairn's part of gear, the division is bipartite between the relict and dead's part; and so it must be, because there is no person in being entitled to a legitim. But as

No 8.

Legitim not due to the heir without collating, where all the other children have accepted provisions in satisfaction.

No 8. that cannot be said, where besides the younger children who have renounced, there is also an heir, who, *ex concessis*, is *proprio jure* entitled to the legitim when the only child, they could not see a reason why he should be excluded from it by the other children, where themselves had no interest in it; or why, by and through them, the relict's interest should be extended from a third to a half. The case was also figured, that the father, after having forisfamiliarated all his younger children, should bequeath his whole moveables to a stranger, no challenge would lie against this deed to the younger children, in respect they had renounced their legitim; but would the heir therefore be barred from claiming his legitim from the stranger disponee? This was thought not pleadable.

But all this notwithstanding, the plurality found as above, putting the whole upon this one proposition, That wherever an heir claims any part of the moveables, he is bound to collate; and that where he is the only child, he is just in the case as if he had collated; but with which the minority were not satisfied, for the reason above given from the nature of collation.

There was an argument pleaded by the procurators for the pursuer, from the import of the younger childrens' renunciation, as what had no operation in favour of the heir, but only enabled the father to test upon the whole; or, in other words, that thereby the legitim accresced to the dead's part. But as no notice was taken of this by the LORDS, and that it is a construction altogether imaginary, such renunciation being truly an extinction of the right renounced, as if it had never existed, it is enough to have just mentioned it.

Fol. Dic. v. 3. p. 383. Kilkerran, (LEGITIM.) No 4. p. 334.

* * * D. Falconer reports this case.

JAMES, son of Andrew Agnew of Scheuchan, granted receipt to his father for 4500 merks, and discharged him thereof as his bairn's part of gear.

Scheuchan died leaving two sons, Robert, his heir, who intromitted with his whole effects, and James, who assigned his claim on the executry to Gilbert Martin in Stranraer; and upon this a process was brought against Robert, wherein he pleaded, that the dead's part belonged indeed to James, as executor, but he having renounced his legitim, that belonged to the heir, as legitim is due to an heir when he is an only child; but the pursuer insisted, that the discharge of the legitim operated in favour of the dead's part, which it was allowed he had right to.

The LORD ORDINARY, 4th June 1748, "repelled the defence. in respect that the said James Agnew, the second son, was the only child that survived the father, Andrew Agnew, except Robert the heir, and that the said Andrew, the father, died intestate."

Pleaded in a reclaiming bill, The discharge granted by the pursuer's cedent ought to be of some effect; which it will not be according to his claim,

for it cannot be available to give the right of testing to the father, as it is settled such discharges, where there are more children, do not increase the dead's part; but the whole legitim is due to the other children, 18th November 1737, Begg against Lapraick, No 16. p. 2379.; and a single child *in familia*, though heir, was found to have right to legitim, in Mr Justice's case, No 6. p. 8166.

No 8.

A discharge by a daughter of all she could ask or crave, was found to exclude from the executry, though her brother was heir, 4th December 1694; Foubister, No 22. p. 8181., reported by Lord Newhall.

Answered, In no case can the heir concur with another child, as to the moveables, without collating the heritage; and the effect of renouncing the legitim is to increase the right of the other younger children; or if they all renounce the dead's part, as has been decided 13th July 1672, Chisholm against Chisholm, No 29. p. 5046 and No 20. p. 8180. In Mr Justice's case, there was but one son, who was found entitled to Legitim; and in Foubisters, the renunciation was of all the daughter could ask and claim.

THE LORDS, 18th January, "adhered."

Pleaded in another bill, The heir has in him both a child's right, and the right of next of kin; only he cannot use either of these against the persons who concur with him in them, without collating the heritage; but against those who do not concur, he has the full advantage of these rights; as for instance, against the relict, or the executors of the defunct, either testamentary, or *ab intestato*, other than the children *in familia*; for children who have renounced their legitim, or right of executry, do not concur and against them he can use his right.

Decisions cited; — June 1728, Henderson against Henderson, No 24. p. 3187.; 15th July 1622, Kennedy against his Father's Relict, No 3. p. 8163.; 12th January 1681, Lady Craighleith against Lady Prestongrange, No 12. p. 2375.; 16th July 1678, betwixt the Children of Murray, No 9. p. 2372.

Answered, The heir has no right to legitim, where there are other children, and the effect of their renouncing is the extinguishing it, so as the whole becomes the dead's part, and he cannot touch the executry without collating.

Decisions cited, Chisholm *contra* Chisholm, No 29. p. 5046. and No 20. p. 8180. and the above case of Henderson's Children.

THE LORDS adhered.

Act. *A. Macdouall.*

Alt. *Ferguson & Hamilton-Gordon.*

Clerk, *Justice*

D. Falconer, v. 2. No 62. p. 655.