

ables is properly *ab intestato*, where the heir-male is preferred in the heritage to the younger sons or daughters. It is true, if a tailzie were made in favours of the heirs-male, who would have the preference *ab intestato*, the express will of the father would not alter the destination of law as to the moveables, which was left to the legal succession: But suppose a father should tailzie his heritable estate to a second or third son not *alioqui successurus*, such an heir of tailzie, would not be excluded from his share of the moveables, as nearest of kin.

'THE LORDS found, That the pursuer and defenders being equally entitled to the succession of heritage and moveables *ab intestato*, the tailzie did not exclude the pursuer from her legal claim to the executry.'

Fol. Dic. v. 1. p. 149. Rem. Dec. v. 1. No 20. p. 42.

No 15.

1737. November 18. **BEG against LEPRACK.**

No 16.

It was provided in a Lady's contract of marriage, 'That she should be a child of the house at the time of her father's decease.' Collation was thus in effect prohibited; consequently it did not take place. See No 4. p. 2367.

Fol. Dic. v. 1. p. 149.

** See This case *voce* FORISFAMILIATION.

1742. December 2.

CHANCELLOR against JEAN CHANCELLOR his Sister, and her Husband.

No 17.

THE heir is, upon collating the heritage, entitled to his share of the moveables, not only in the case of children succeeding to their father, but also in the collateral succession; and therefore it was FOUND, that a brother, who was heir to his sister in a sum heritably secured, was, upon collating said heritage, entitled to his equal share of her moveables with his surviving sister.

Fol. Dic. v. 3. p. 133. Kilkerran, No 1. p. 124.

1787. November 15.

JOHN HAY BALFOUR, and Others, against Miss HENRIETTA SCOTT.

No 18.

MR SCOTT of Scotstarvet executed a settlement, by which he disposed his estate 'to himself in liferent, and to David, his eldest son, &c. in fee; whom failing, to his second son, John, &c.; whom failing, to his own other heirs and assignees whomsoever; 'the eldest heir-female excluding heirs-portioners, and succeeding without division,' through the whole course of succession in all time coming.' And a proviso was subjoined, that the several male-heirs, and the husbands of the female heirs, were to bear the name and arms of the disposer's family.

Heirs, whether *alioqui successuri*, or not, and whether *ab intestato*, or *provisione hominis*, must collate, in order to claim any share of the moveable succession.

A charter, with infeftment, having followed on this disposition, David Scott possessed the estate till his death under that title. His property then, besides this landed estate, consisted of government-securities to a large amount, of some

An heir is not bound to collate heritage in Scotland,

No 18.
on account of
succeeding to
executory-
funds of the
predecessor,
in a foreign
country.

other moveable effects situated in England, and of certain personal funds in Scotland. He having no heirs of his body, his succession devolved to Miss Scott, and other daughters of his brother, and Mr Hay Balfour, and the other issue of a sister.

Miss Scott, by virtue of the clause recited above, became sole heiress; her sisters, Mr Hay, and the rest, being executors. As such, Miss Scott likewise claimed a share of the whole moveable succession; upon which Mr Hay, and others of the executors, instituted a process, 'for having it found and declared, that in consequence of asserting her title to the moveables, whether English or Scotch, she was bound to collate the heritage.'

The English and Scotch executry, as being governed by different rules, fell to be distinguished in the argument.

With respect to the *English* executry, the defender

Pleaded: It is now a point so much fixed as to admit no farther discussion; That succession in moveables ought to be regulated by the *lex loci rei sitæ*; 13th January 1778, Davidson *contra* Elcherson; *eod. die*, Henderson *contra* Maclean; 19th January 1785, Morris *contra* Wright*. The law of collation being unknown in England, the defender became entitled to her share of the executry situated there, without incurring that obligation. It is a right thus absolutely acquired that the pursuers are seeking to wrest from her; and the ground of their claim is singular. Because the law of England has, in their opinion, given too much, the law of Scotland ought to correct this injustice, by forfeiting the defender of a part of her property under its power. By parity of reason, the property of every one may be seized in like manner, who has effects in England, or in any foreign country. There is another point of view, in which this absurdity is glaring. The right of claiming, on collation, a share of executry, is a benefit indulged to heirs. Had it not existed, such a demand could not possibly have been made on the defender. Now, why should her situation be rendered worse by the mere existence of the privilege?

Answered: The rule of our law, that an heir who takes a part of the succession as one of the next of kin, must collate the heritage, being founded on the principle of equality, its application is evidently the same, whether such succession has opened in this country or in any other. And accordingly, in a similar case, it is established, that children who claim legitim are obliged to collate whatever they have already received from their father, notwithstanding that it may have consisted of debts or effects situated in England or elsewhere.

That rule ought to determine the present action, the subject of it being land-property in Scotland, though the cause from which it has arisen be the defender's taking a share of a personal estate in England. For land-property is ever to be governed by the laws of the country where it is situated. Thus, suppose the landed estate in question to be in England, and that the defender had claimed it after obtaining her share of the Scotch moveables, it is plain, that the English law would have kept to its own maxims, and disregarded the Scotch plea

* See these cases, *vide* FOREIGN, (Succession, by what law regulated).

of collation; in the same manner as the law of Scotland is here to be adhered to by admitting collation. Or, suppose a wife to accept from her husband a special provision of subjects situated in England, or any foreign country, that surely, whatever contrary law might prevail in such country, would as effectually preclude her legal claim of terce in this, as if the subject of her provision had been locally here.

'THE LORDS found, That the succession to David Scott of Scotstarvet his personal estate in England, falls to be regulated by the law of England; and therefore, so far as respects it, assoilzies the defender from the process of declarator.'

With respect to the *Scotch* executry, it was

Pleaded: The obligation to collate does not properly extend to collateral heirs, who are never deemed *alioqui successuri*. The end and the essential principle of collation is, that a perfect equality among the successors may be effected; Voet, ad tit. 6. lib. 37. digest. § 27. Wherever this is impracticable, as the reason of collation ceases, the thing itself ought likewise to cease. In the direct line of those *alioqui successuri*, the law has destined an exact distribution; so that, whatever advanced payments have been made to any of them, must be imparted to the common funds; whereas, in the collateral line, an heir who should collate might not perhaps draw a tenth part of what some of the other collaterals may have already received by advancement from the predecessor, of which they could not be required to communicate any share. Thus collation appears inapplicable to collateral heirs. The decision, however, in the case of Chancellor *contra* Chancellor, 2d December 1742, No 17. p. 2379. may seem to contradict this reasoning; but as it refers only to heirs *ab intestato*, it still cannot affect the defender, taking her succession *provisione hominis*. For, as is now to be shewn on other principles, the obligation to collate can never reach to heirs by destination.

Our law will not bestow upon an heir, in prejudice of other next of kin, both heritage and moveables. In order to obtain a share of the latter, he must restore the former. But he who acquires heritage by the deed of the predecessor receives nothing from the law, and so has nothing to restore. Hence, when he claims his part of the executry, there can be no room for the demand of collation, agreeably to the following authorities; Balfour, *voce* HEIRS and SUCCESSORS; Stair, b. 3. tit. 8. § 48.; Mackenzie, b. 3. tit. 9. § 11.; Bankton, vol. 2. p. 385.; Erskine, p. 600. *in fine*.; and more especially, 19th November 1720, Ricart *contra* Ricarts No 15, p. 2378. Now the defender is called to the succession by the disposition of her grandfather and of her uncle, it having been framed by the one, and preserved in force by the other; a settlement which lays her under restraints that may be regarded as the price of the grant.

Were it even admitted, that a settlement on an heir *ab intestato* may be held as intended to save the making up of titles, without any purpose of departing from the legal order, (an admission not very consistent with the decision, Cath-

No 18. cart *contra* Rocheid, 1773, *voce* HEIRS PORTIONERS), it would not affect the present case. The defender and her two sisters were all three jointly the heir *ab intestato*. The unity of the right was essential to it; so that it was annihilated as soon as any separation was made by disinheriting. She therefore could not be heir *ab intestato*, even as to a third share; and as to two thirds, it will not be supposed; besides, that she may be deemed a purchaser with regard to the whole.

Answered: It was perhaps never before maintained, that collateral heirs were invested with a privilege above all others; insomuch that while they may claim a share of the moveables along with the other nearest of kin, they are alone exempted from the equitable condition of collating the heritage, 7th June 1709, Chiesly *contra* Chieslies, *voce* NEAREST OF KIN; Bankton, b. 3. tit. 8. § 28.; Erskine, b. 3. tit. 9. § 3.; Chancellor *contra* Chancellor, 2d December 1742, No 17. p. 2379.

Nor is there any ground for the argument, that the obligation to collate being confined to heirs *ab intestato*, affects not the defender, who succeeds in virtue of a special destination. In fact, as to a third part of the estate she is clearly heir *ab intestato*; and her being likewise called by a deed concurring with and enforcing the legal course of succession, can make no essential difference in the case. Fathers often execute dispositions of their lands in favour of their eldest sons; and eldest sons take up estates as heirs under the provisions of marriage-contracts. These are more simple or more easy modes of completing titles; but were never thought to create to the heir any additional claim to the moveable succession; Bankton, vol. 2. p. 385. § 28.; 23d July 1678, Murray *contra* Murray, No 10 p. 2374.

Considered as heir *provisione hominis*, the defender is equally bound to collate. Whether succession devolves in the one way or in the other, the distinction between the heritable and the moveable branches continues invariable. Any one of the nearest of kin being likewise executor by testament, is equally excluded from the heritage, and equally entitled to relief from the heritable debts, as if he had succeeded *ab intestato*. In the same manner, persons succeeding to heritage as heirs of provision, are obliged to relieve the executor from heritable debts, and have a title to be relieved by him from moveable debts, as much as those who succeed *ab intestato*. In short, heirs of provision, whether with respect to privileges, as those of apparençy, reduction *ex capite lecti*, the *annus deliberandi*, and the like; or with respect to the regulations made against them for the security of creditors, and obviating their frauds, stand exactly on the same footing as heirs *ab intestato*; Bankton, b. 3. tit. 8. § 100.—Accordingly, the decision in the case of Ricarts, quoted on the other side, is not applicable to the present question. The parties there were heirs-portioners, and as such equally vested with the character both of heirs and executors, of which character the special destination in favour of one of them was not understood to divest her;

whereas the present defender is heir, while the pursuers are exclusively the executors.

No 18.

THE LORDS found, That the defender Miss Scott was not entitled to claim any part of the executry of her uncle David Scott of Scotstarvet in Scotland, without collating his heritable estate, to which she succeeds as heir.

See SUCCESSION—FOREIGN.

Reporter, *Lord Justice-Clerk.* Act. *Dean of Faculty, Rolland, Blair.*
 Alt. *Lord Advocate, Solicitor-General, Maclaurin, Ross, Honyman, J. Anstruther, junior.*
 Clerk, *Robertson.*

S.

Fol. Dic. v. 3. p. 134. Fac. Col. No 1. p. 1.

* * * This cause was appealed.—1793. *March 11.*—The House of Lords ‘ORDERED and ADJUDGED, That the original appeal be dismissed, *i. e.* at the suit of Hay Balfour and others, and that the interlocutor complained of by the cross-appeal for Henrietta Scott be reversed; and it is declared, that the said Henrietta Scott is entitled to claim her distributive share in the whole personal estate of her uncle David Scott, to which he succeeded as heir by the law of England, where he had his domicil at the time of his death.’

1787. *November 28.*

JAMES DREW M'CAW against MARY and ANNE M'CAWS.

AFTER the death of David M'Caw, his heritage, consisting of a small house, descended to James Drew M'Caw, his nephew by a brother deceased; while his executry, or moveable estate, which was of much greater value, devolved to Mary and Anne M'Caws, his sisters and nearest in kin.

James Drew M'Caw, the heir, insisted in an action for having it found, that he was entitled, upon collating the heritage, to draw a rateable proportion of the whole effects which had belonged to the deceased. In support of this action, he

Pleaded, The right of collation is inseparable from the character of heir. Whenever the person on whom, as the *persona predilecta*, our law has conferred the right of succeeding to the heritage, finds it more advantageous to claim a share of the moveable effects, he is at liberty to do so. This is the opinion of Mr Erskine; and it seems to have met with the approbation of the Court, in a case collected by Lord Fountainhall; although there, on account of specialties, the right of the heir was held to be barred. Other lawyers of eminence, it is true, have adopted a different sentiment. But this apparent inconsistency may be easily removed, by confining the doctrine last stated to another case of collation, occurring between children laying claim to the legitim, which stands on a footing altogether different from that of which we are now speaking; the legitim being due to descendants, and those in the first degree only, and the right to collate, as applicable to it, suffering a corresponding limitation; Erskine, b. 3. tit. 9. § 3.; Fountainhall, v. 1. p. 825. 16th February 1698, Dick of Grange *contra* Dicks, *voce* SUCCESSION.

No 19.

An heir cannot insist for collation, if he be not at the same time one of the nearest in kin.