

1627. February 27.

ROSS against KELLIE.

No 2.
Collation
takes place
only among
brothers and
sisters, and
not when
they compete
with the re-
lict.

JANET ROSS, daughter to Archibald Ross, baxter in Edinburgh, pursues Marion Kelly, relict of the said Archibald, as executrix and universal legatrix left by him, to make payment to him of her bairns-part of gear, viz. the third of the whole gear contained in the defunct's testament confirmed, seeing she was the only bairn of the said umquhile Archibald her father; in this process the LORDS sustained the pursuer's action, for her third part of the saids goods confirmed, albeit the defender had confirmed the testament wherein the goods was parted, only by a twofold division, viz. betwixt the relict for her own half, and the defunct's half; and found, that albeit this testament so authorized, with this division done by a Judge, was a decreet, which was alleged could not be taken away by this manner of process without reduction, yet that the pursuer needed not to reduce, but the pursuit might come in *hoc ordine* without reduction, seeing she was not called to the confirmation; and also found, that albeit the pursuer was married by the defunct her father, in his own time, and tochered by him, yet thereby she was not secluded from the legitim portion, which fell to her by her father's decease, the same not being discharged the time of her contract and tochering; for albeit that might have been a cause to have debarred her from her legitim as thereby being forisfiliate, if there had been any more bairns unprovided, yet there being no bairns but herself, it was found no cause to exclude her from that portion against the relict, but that the testament ought to have a three-fold division; neither was it found, that the pursuer ought to offer, and give in the tocher received, with the rest of the goods confirmed, to be divided therewith; but it being *alleged*, that the goods confirmed were exhausted by decreets, obtained by the defunct's creditors. This allegiance was sustained, to exclude the third, so far as the debts should defalk; but it is here to be considered, that the special reason of this division was, because the pursuer's contract of marriage, whereby the father had given her a tocher, bore, 'That the father gave that sum to her, for satisfying her of her right, which she had to her mother's goods, the first wife of her father, to whom he acknowledged, that she was executrix.' And so the tocher was not given *ex patrimonio patris*.

Act. Nicolson & Lawrie.

Alt. Stuart & Mowat.

Clerk, Hay.

Durie, p. 282.

* * * Spottiswood reports the same case :

IN the action betwixt Ross and Lilly, the one being her father's only child, pursued the other that was relict for the dead's third, and her own likewise. *Alleged*, The testament was divided only in two parts, likeas it could not be otherwise, because the pursuer was tochered in her father's time, and so forisfiliate. It was found, That notwithstanding of the tochering, she had not

renounced the benefit of her legitim, which was due unto her after her father's decease, especially there being no other child. And where it was alleged, that she behoved then to confer, it was thought that collation should only be among brethren or sisters, and not betwixt these parties.

Fol. Dic. v. 1. p. 149. Spottiswood, p. 133.

No 3.

1631. February 19.

CORSAN against CORSAN.

THIS cause being mentioned the 9th of February 1631*, and it being further *alleged* by the defender, That the pursuer, by virtue of the clause libelled in the contract†, would have right to no more, but to her part of the dead's part of his goods and gear, and could not acclaim a portion natural thereof, with these two daughters defenders; for albeit by that contract, she might have right to her equal part of all, both for bairns-part, and for the dead's part, with her two sisters named in that contract, now deceased, yet that might lawfully have holden, where both she and these two sisters were all forisfiliate, before this contract; but it is not alike, for these two defenders who are begotten since, and have received no part of their father's goods, and who want their portion natural, so that of reason they ought to have their portion natural, as the pursuer got, and as the two defunct sisters got; and after that, the pursuer might be partner of the rest; otherwise if she acclaimed to be portioner of all the defunct's goods, she ought to confer with the defenders, that portion she got from her father before. This allegiance was repelled, and the LORDS found, that the pursuer ought to have her equal part of the defunct's goods, with these defenders, without any collation of that which she received before, to which the LORDS found, that she could not be compelled.

Fol. Dic. v. 1. p. 149. Durie, p. 573.

No 4.

Collation takes no place where it is prohibited; as, for example, where a father, in his daughter's contract of marriage, besides her tocher, made this provision, "that she should have an equal proportion of his goods at his death with his other children."

1663. February 18. DUMBAR of Hemprigs against LADY FRAZER.

My Lady Frazer, being first married to Sir John Sinclair of Dumbeath, next to the Lord Arbuthnot, and last to the Lord Frazer, Dumbar of Hemprigs, as executor confirmed to Dumbeath, pursues her, and the Lord Frazer her husband, for his interest, for delivery, or payment of the moveables of Dumbeath, intromitted with by her. It was *answered*, That she had right to the half of Dumbeath's moveables, as his relict, and her intromission was within that half. It was *replied*, That she had only right to a third; because Dumbeath had a bairn of the former marriage, who survived him, and so the executry must be imparted. It

No 5.

An only child being forisfiliate by marriage, and having got a tocher, but not bearing "in satisfaction of children's part," was found notwithstanding obliged to collate that

* The case alluded to is, McMillan, &c. against Corsans, Durie, p. 566., *voce* PROVISIONS TO HEIRS AND CHILDREN.

† The terms of the contract are stated on the margin above.