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the time of the said Marjory her decease; wherein the Lords found, that the said relict, nor her executors, had no right to the half of the said goods, but only to the third part, seeing there was one bairn living the time of the relict's decease, whereby her husband's gear could not fall in a two-fold division, but in a threefold division. Neither was it respected, as the pursuer replied, that this bairn was not a bairn of the second marriage; and also he *alleged*, that she is that person that is heir, and hath gotten a great inheritance, so that she cannot claim any part of the moveables, being heir by her heirship. This was not respected, for it was found nevertheless, that the testament ought to have a threefold division; and albeit she be heir now since her father's decease, yet her father being then living when Marjory Murray, the second wife, died, she could not be then respected as heir, but as a bairn; for heir she could not be, her father being in life; and seeing there are no more bairns but she, she ought to have a bairn's part also; though it were proper to other bairns, if any had been, to have excluded the heir, as is not in this case. And it being also *alleged*, that by contract of marriage betwixt the said Thomas Gibson and his second spouse, it was provided, that the husband's goods should pertain to him and his executors, and the wife's to her and her executors, and none of them should seek or have right to any of others gear, but to their own allenarly; this contract being alleged not to be obligatory to prejudge the defunct, nor her executors, in her part of the husband's goods, because he alleged it to be a contract *contra bonos mores, et contra leges, et consuetudinem patriæ*, and against the right and division of goods, observed ever in this kingdom betwixt man and wife; this allegeance against the contract was repelled, and the contract found good and lawful, and the allegeance thereon sustained.

Act. ——. Alt. *Craig*. Clerk, *Gibson*.

Fol. Dic. v. 1. *p.* 543. *Durie, p.* 591.

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Found in conformity with Chapman against Gibson, No 4. *supra.*

1634. *July* 18. Hendersons *against* Sanders, Minister.

One Henderson's Bairns pursuing their mother's second husband, which mother was executrix to her first husband, their father, likeas her second husband was executor to his wife, their mother, for payment to them of their bairn's part of the gear, and of their part of the money pertaining to them, falling by their father's decease, together with the annualrent of the said money continually since the father's decease, and since the time of their mothers intromission therewith; and also for payment of the equal half of the goods and gear contained in their mother's testament, whereto they had right as bairns, and nearest of kin to their mother; this pursuit being moved before the Commissary of Murray, and sentence given thereupon against the defender, viz. the bairn's goodfather, the second husband of their mother, as

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executor to her, he compearing; which decreet being suspended by him, upon this reason, viz. That he, nor yet his umquhile spouse, could not be subject to annualrents, they being only executors, who by the law are not subject to pay annualrents, specially before sentence, for any terms before they were decerned; and there being nine or ten years betwixt the first husband's decease and the time of the sentence, and also two or three years betwixt their mother's decease and the said decreet, no reason can make either her, if she were living, or him, liable in annualrent, seeing executors cannot be subject, but at most from the time of the sentence; and the chargers opponing, that they having meddled with the monies, and employed the same to their use, and they being but minors all this time, they are excusable not to have pursued more timely for their monies; and the suspenders, and their mother's intromission therewith, ought not to be profitable to them to their prejudice; and they opponed the decreet given against them *in foro contradictorio*; the Lords, in respect of the sentence given *parte comparente*, found the letters orderly proceeded, albeit most of the Lords were of different judgments, some thinking that executors are not subject to pay annualrent, specially before sentence; and others were of a contrary judgment in this case, where the bairns were minors, and the mother and father-in-law had intromitted with the money; but because of the sentence standing *parte comparente*, decreet was given as said is. *Item*, where the decreet decerned the father-in-law to pay the half of the gear to the bairns, as having right to that half by their mother's decease, the Lords found, that the bairns could not claim the half, because the mother's testament, by whose decease they sought the same, could give them only right to a third of the goods and gear which belonged to her husband convened; for although there were no bairns procreated betwixt the said second husband and her, yet the said husband had bairns living of a prior marriage, who behoved to be reputed to have their own interests, and a third part of their father's goods; and consequently they found the wife's testament should not been confirmed as it was, by a two-fold division, giving the wife the one half, and the husband the other, but that there ought to have been a division in three parts, viz. the wife one third, the husband another third, and the third third to the husband's bairns; so by this decision, the wife and the husband, albeit having no bairns betwixt them, yet where the husband has bairns of another marriage, the wife dying transmits right only to her nearest of kin, to the third part of their gear allenarly; and the bairns of the husband, although not gotten of that marriage, have right to a third *fictione juris*. For their father living, they cannot have right to any bairns' part of gear, so long as he lives; but it was reputed as a right in their person, to exclude the wife from any right further than a third, seeing the whole gear being *de jure in bonis mariti*, and he *dominus*, it was not thought reasonable to give the wife the half, thereby to exclude the bairns, and to give them no

No 5. right to their father's gear; and albeit this was considered by the LORDS, yet it could not be effectual to give the bairns any right thereto, so long as the father lived; and albeit also the chargers alleged, that seeing the father is living, the bairns could not have right, and that the husband is truly reputed in law to be *dominus omnium bonorum*, as the party alleged, therefore, with the mere reason, and in law, should his wife have the half of all which he had the time of his decease; which allegeance was repelled, and the wife's part resricted to a third, as said is.

Act. *Ja. Gibson.* Alt. ——. Clerk, *Gibson.*

Fol. Dic. v. 1. *p.* 543. *Durie, p.* 728.

No 6. 1737. *November* 10. JUSTICE *against* HIS FATHER'S DISPONEES.

A man who had only one son who succeeded to him in his land estate, and no other children, made a disposition of his moveables *mortis causa* to certain trustees for the behoof of his grand-children, which, after his death, being quarrelled by his son, as in prejudice of his legitim, the LORDS "found the pursuer entitled to a legitim, and reduced the disposition in so far as it was prejudicial thereto."

The heir is no less entitled to a legitim than the other children, though, if he insist on it, he must collate; and if he was not *de jure* entitled to it, he could no more claim a share of the moveables upon collating, than the younger children can claim the heritage upon collating. It is also *triti juris*, that though there be but one child who is heir, and a relict, the testament is tripartite as well as where there are more children; but if the heir were not *de jure* entitled to a legitim, it should be only bipartite. But why then should not he have been obliged to collate the heritage with the disponees? For this reason, that the right to demand collation is a privilege personal and peculiar to the executor at law, and to no other.

Fol. Dic. v. 1. *p.* 543. *Kilkerran, No* 1. *p.* 332.

No 7. 1747. *February* 25. MARSHALL *against* FINLAYS.

Questioned, where a man left two children, one his heir, what should be the division of the moveables. *Urged*, That legitim is the portion allotted by law to younger children otherwise unprovided, to which the heir can have no claim. *Answered*, the heirs being provided, is no bar to his claim of legitim, for the younger children, as well as he, have their legal succession, viz. the deads part in the moveables; and the legitim is a separate portion, which the