

had, and as if she had been *in familia*: And it is true, that the rest of the bairns had both a portion-natural and a part of the defunct's third, he dying intestate; *ergo*, &c. THE LORDS repelled the allegiance, and found, that the clause of the contract gave the pursuer right both to the portion-natural and to a part of the dead's third, in respect of the clause in the said contract, which appointed her to have her bairn's part and portion-natural with the rest of the bairns, as if she had not been forisfamiliated, which the LORDS found comprehended the defunct's third, as well as the portion-natural: Sicklike the LORDS found, that the same parts were due to the pursuer, at the decease of the father, albeit the clause of the contract was conceived in these terms, viz. that the said Janet should have the said bairn's part at the decease of her father and mother, and that the defender alleged that the pursuer could not seek the same while the mother were dead, who was then living; which allegiance the LORDS repelled, and found the same, as said is, due to be paid at the father's decease, seeing it could not hang *in pendente* in the mean time, while the mother died, and that the mother nor no other had right thereto, being that part of the gear which pertained to the defunct of his third and the bairns' legitim.

Act. Hope.

Alt. Henrison & Aiton.

Clerk, Gibson.

Fol. Dic. v. 2. p. 276. Durie, p. 16.

No 11.

1631. February 18.

JOHN MACMILLAN and ELIZABETH CORSAN against AGNES and MARION CORSANS.

By contract of marriage between John Macmillan and Elizabeth Corsan, Adam Corsan her father obliged himself, that at his death his daughter Elizabeth should have an equal portion of his goods with his other two daughters Janet and Isabel. Adam being dead, John Macmillan and his wife pursue Agnes and Marion Corsans, only daughters alive to umquhile Adam, and executrixes confirmed to him, for the third part of the goods contained in their father's confirmed testament. *Alleged*, The pursuers could have no third part, because Janet and Isabel, with whom she was to have an equal portion, were both dead before their father, and the defenders are other two daughters born after their decease, with whom, not being then *in rerum natura*, it was not provided by the said contract that the pursuers should have an equal portion. This allegiance was repelled. Next *alleged*, That Isabel and Janet, with whom the pursuer should have an equal portion of the defunct's goods, were both forisfamiliated before their decease; so that if they were presently alive, they could have no portion with their sisters the defenders, in respect of their forisfamiliation foresaid; and so likewise no more could the pursuer have, if nothing could be due to them. This allegiance was likewise repelled; for the meaning of the

No 12.

A man bound himself in his daughter's contract of marriage, that at his death she should have an equal portion of his goods with other two daughters. These died before their father, and other two were born. The first was still allowed her proportion.

No 12.

defunct was thought to be, that Elizabeth should be a bairn of his house, if she were alive at his decease. Next they questioned about the quantity, *alleging*, That the pursuer could not have the third of the whole goods contained in the testament, but only the third of the dead's part, because she was tochered before; and it were unreasonable, that she should have as much yet of her father's gear as his sisters, who had got no tocher, unless she would come in and make collation of her tocher with the rest of the gear, that altogether might be equally divided in three parts. THE LORDS found she should have the third of the whole contained in the testament, notwithstanding of her former tocher.

Fol. Dic. v. 2. p. 276. Spottiswood, (TESTAMENT.) p. 339.

* * * Durie reports this case :

1631. February 9.—CORSAN the father being bound in his daughter's contract of marriage with John Macmillan her spouse, that his said daughter should have an equal portion of his goods at his decease, suchlike as his other two daughters shall have; and they two dying before the father, and the father having begotten other two daughters upon a second wife, after the foresaid contract, the said — Corsan and John Macmillan, after the father's decease, pursue the said two daughters procreated in the second marriage, as being executors confirmed to him, to make payment of the equal third part of the defunct's gear, viz. both the third part of her bairns' part, and the third part of the defunct's part, conform to the clause of the said contract; which action the Lords sustained, and found that the pursuer had right thereto, albeit that the defenders *alleged*, That she had no right to seek the same, seeing the contract gave her right only to such part as her two sisters named in the contract should have after their father's decease, and they dying before their father, they could have no part of their father's goods, and consequently neither this pursuer. This allegiance was repelled; for albeit these two sisters were deceased before their father, yet that clause was not extinct, but that she should have her equal part with the bairns surviving; and if he had no bairns but the pursuer, the whole would have befallen to her, far more this part which was less.

Act. —.

Alt. *Lawrie*.

Clerk, *Hay*.

Durie, p. 566.

* * * See a subsequent branch of this case, No 4. p. 2367. *voce* COLLATION.

1686. *March*.

IRVINE *against* Mr WILLIAM CRAWFURD.

No 13.

A FATHER having provided his eldest daughter, in her contract of marriage, to 3000 merks, and also obliged himself, that she and her children (should) suc-