1787. *November* 15. JOHN HAY BALFOUR of LEYS, &c. *against* Miss HENRIETTA SCOTT and her CURATORS.

COLLATION.

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.

An heir is not bound to collate heritage in Scotland on account of succeeding to executry funds of the predecessor in a foreign country.

[*Fac. Coll. X.* 1, *No I.*; *Dict.* 2379.]

BRAXFIELD. The first question is as to the Scottish executry, whether collation takes place among collateral? I do not think that the law ever made any distinction between direct and collateral succession. We cannot always discover the reasons of introducing particular regulations into the law. Collation seems to go on the supposition that the defunct meant to provide for all his successors equally near in kin. The second question is, whether Miss Scott is obliged to collate, being *an heir of provision?* Miss Scott is heir of investiture. When a man conveys part of his estate to the heir, that heir takes by *special deed*, and he is not bound to collate. But here Scotstarvet executed no deed; and Miss Scot can take nothing by him.

ESKGROVE. I am clear as to the first question. As to the second, every man possessed of an estate may regulate his succession. If he does not, it is presumed that he meant to let it go according to the regulation of the law. If he gives part of it to a next in kin, it is understood as a gift, which will not deprive the heir of his intestate part of the succession. There is a difference in the case of *præceptio hæreditatis*, where the heir is certain, as the eldest son; but a daughter is never heir until the death of the father, for she may, at the last moment of his life, be excluded by a male heir. There is no presumption that Scotstarvet meant to deviate from the legal succession. He suffered Miss Scot to take according to it, that is, the whole heritable subjects, and no part of the moveables, unless upon collation. It is no answer, that she cannot comply with the condition of the law by collating: *that* is no argument. If she does not choose to hold by the heritable estate, she may be received to a share of the moveables.

MONBODDO. Were I to make law, I should follow the rule of the Roman law, and limit collation to the direct succession. As to the second point, had the last Scotstarvet given Miss Scott the whole estate, when she was only entitled to a third, I should have thought that she would not have been bound to collate. *That*, however, is not the case here.

JUSTICE-CLERK. I doubt as to the second point. The eldest son is *alioqui successurus* at any rate, and he must collate; but Miss Scot was not *alioqui successura* from the beginning, and therefore I hesitate in equiparating this case to that of a *præceptio hæreditatis*. Collation is a creature of the law, obliging

one to throw into the mass whatever he gets by the law, but not what is acquired by deed.

MONBODDO. Had the moveables belonged to old Scotstarvet I should have been of the Justice-Clerk's opinion; but here the question is as to the moveables of the late Scotstarvet.

ESKGROVE. Miss Scot takes as heir to the person to whom the moveables belonged, and therefore she must collate.

BRAXFIELD. If the late Scotstarvet had not been infeft, the case would have been different. Here Miss Scot takes by the act of the law. Collation has place in collateral succession; and Miss Scot cannot draw a share of the moveables without collating. As to the English funds, even supposing the case of *Brown of Braid* to have been rightly judged, the succession must be by the law of England, for Scotstarvet *resided* in England. *Locus originis* is nothing: you must go to the court of law of that country where the funds are.

ESKGROVE. I have great respect for the opinion of Lord Hardwicke; but I still adhere to the opinions of this Court in the cases of *Elcherson* and *Henderson*. Scotstarvet had a *forum* in Scotland, but his domicile was in England: so even the case of *Brown* does not contradict my opinion.

SWINTON thought that Lord Hardwicke's opinion was misunderstood.

DUNSINNAN thought that the question was, What effect should Miss Scot's taking the English funds have upon the right to the estate in Scotland?

On the 15th November 1787, "The Lords found that Miss Scott could not take the moveables in Scotland without collating, and found that the succession as to the English funds must be determined in England."

For Miss Scott,—J. M'Laurin. *Alt.* R. Blair.

Reporter, Justice-Clerk.

1787. *November* 16. ROBERT CARMICHAEL and Messrs. STIRLINGS *against* Sir JAMES COLQUHOUN.

PART AND PERTINENT.

The right of trout fishing understood as conveyed under the description of part and pertinent, but may be expressly reserved from the grant, or transferred to a third party.

[*Fac. Coll. X.* 10; *Dict.* 9645.]

JUSTICE-CLERK. Salmon fishings require grants: trout fishings go along with a grant of the lands as part and pertinent. It has been said that trouts were *res nullius*. In one sense they may be said *cedere occupanti*; for, if I have a right to lands, it does not follow that I have a right to trouts swimming in the river; but I have a right to take and kill them. This right may be renounced, or it may be acquired by others. The Crown has no right to trout