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BALFOUR, &c. *v.* SCOTTS.

[Mor. p. 2379 and 4617.]

DAVID HAY BALFOUR of Leys, and LUCY HAY or MONCRIEFF, &c. - - } *Appellants;*

HENRIETTA SCOTT, LUCY SCOTT, JOANNA SCOTT, Daughters of JOHN SCOTT, } *Respondents.*

House of Lords, 10th April 1793.

EXECUTRY—COLLATION—DOMICILE—FOREIGN.—A party, by birth a Scotsman, having a family estate in Scotland, and possessing a lucrative government appointment there, had, for eleven years before his death, lived in London, and died there intestate, possessing £60,000 of personal estate in England, and a small personal estate in Scotland: Held, his niece, who succeeded by special deed (not of him, but of her grandfather,) to the heritable estate in Scotland, was also entitled to claim her distributive share of the deceased's whole personal estate, without collating the heritable estate to which she had succeeded, insomuch as, she claimed the said share of the personal estate by the law of England, where the deceased had his domicile at the time of his death.

Mr. David Scott of Scotstarvet, on his marriage with Lucy Gordon, had settled his estate to himself and the heirs male of the marriage, whom failing, to his other heirs and assignees whatsoever.

Of this marriage there were issue, 1. David Scott, last of Scotstarvet; 2. John Scott; 3. Elizabeth Scott.

1743. In 1743 he resigned his estate into the hands of His Majesty, and obtained a charter "to himself in liferent, and to "David Scott, his eldest son, in fee, and the heirs male of "his body, whom failing, to the said John Scott his second "son, and the heirs male of his body, whom all failing, to "his *heirs and assignees whatsoever, the eldest heir female, "excluding all other heirs portioners.*"

Mr. Scott the elder died in 1767, and was succeeded in his estate of Scotstarvet, worth £1500 per annum, by his son David Scott.

1774. The son David Scott, now of Scotstarvet, continued to reside on his estate in Fife until the year 1774. In this year he quitted it, and went to reside in London for the remainder of his life, with exception of an occasional visit to Scot-

1785. land. He died in London in 1785 without issue, leaving his estate of Scotstarvet in Scotland, with some personal estate there of inconsiderable value, and £60,000 of personal

estate in England. Before going to London, he had been in possession of his estate in Scotland for six years, and at his death he had been 11 years in London. In the meantime, his brother John, mentioned in the above destination, had died, leaving issue the respondents. His sister Elizabeth was also dead; but she was represented by the appellants, her children.

Henrietta Scott, eldest daughter of John Scott, was the heir female entitled to succeed without division to the estate of Scotstarvet, in terms of the destination in the deed of 1743; but, besides this, she also took, and had actually recovered her share with the other next of kin, of the personal estate in England and Scotland; and the question raised by the appellants, in an action of declarator, was, Whether she was entitled, besides the heritable estate, also to take a share of the personal estate without collating? In defence to the action raised, and in answer to this question, the respondent, Henrietta Scott, maintained that she was entitled to take both; 1. Because collation was confined to descendants, and did not extend to collaterals; 2. Because collation only applied to an *ab intestato* succession, and not to the respondent Henrietta Scott, who took the estate of Scotstarvet by special destination under the deed 1743; and, 3. It could not apply to the personal estate in England, because collation had no place there; and the personal estate in England was distributable according to the law of that country, which allowed the heir to take a share of the moveable estate along with the next of kin. 4. That the deceased died domiciled in England: that his personal estate was also there, and, therefore, whether the English estate was to be considered *ratione rei sitae* or *ratione domicilii*, in either event, it was to be regulated in succession, according to the law of England.

The appellants answered, 1. That there was no difference recognised in the law of Scotland, in applying the principles of collation, between direct and collateral succession. That collation applied equally to both lines—the descending as well as the collateral line; and there was no reason, and no authority in law for making a distinction. 2. That Henrietta Scott, as one of the three heirs portioners of John Scott, was entitled to take up one-third part of that estate as heir at law *ab intestato*. It is only therefore as to the other two-thirds that the legal rule of succession *ab intestato* has been altered

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in her favour by the deed of 1743, declaring, that the eldest heir female shall exclude all other heirs portioners. She is therefore heir *alioque successura*, in which case collation applies, whether she takes by service, as heir whatsoever, or by virtue of special destination. But, separately, although she takes these two-thirds by special destination of her grandfather, yet the whole succession is *ab intestato* as to her uncle. It is a share of her uncle's personal estate she claims, and, by the law of Scotland, she is not entitled to this without collating the heritable estate descending to her by the deed of her grandfather. 3. That the deceased David Scott's estate in England, under all the circumstances, was to be regulated by the law of Scotland; because, in the eye of law, he was domiciled in Scotland. He was by birth a Scotsman; his family estate was there; he enjoyed a lucrative government office there (Director of Chancery); and although, for eleven years previous to his death, he had resided in London, and had died there, there was no reason to suppose that he had left Scotland *animo remanendi.*

Nov. 16, 1787. The Court of Session found that "the defender, Miss "Scott, is not entitled to claim any part of the executry of "her uncle, David Scott of Scotstarvet in Scotland, with-"out collating her heritable estate, to which she succeeds "as heir: Finds the succession to the said David Scott, his "personal estate in England, falls to be regulated by the "law of England; and therefore, in so far as respects it, "assoilzies the defender from the process of declarator, and

June 17, 1788. "decerns." On reclaiming petition, by both appellants and

June 17, 1788. respondents, the Court adhered.

Against these interlocutors the appellants brought an appeal, in so far as the interlocutor found that the personal estate in England was to be regulated by the law of England, and Henrietta Scott brought a cross appeal, in so far as they found her *not* entitled to a share of the executry in *Scotland* without collating.

Pleaded for the Appellants.—1. The right to the whole personal estate, as well that in England as in Scotland, ought to be regulated by the law of Scotland. The deceased inherited and possessed a family estate there; held a government office there; was born and brought up there all his life, and, at the time of his death, this family estate and government office were still possessed by him; and though he had been for eleven years previously residing in London

and had died there, yet Scotland was the place of his domicile. It can make no difference in this, that the personal estate was administered to in England, for that was resorted to only to make up a title for recovery, leaving the rights of parties uninjured, and to be regulated by the law of Scotland, where he had his domicile. 2. But even if this personal estate was to be regulated according to the law of England, still, when she comes to claim the heritable estate in Scotland, this can only be done under the usual conditions and obligations imposed by that law, one of which is, that if she takes the heritable estate, she is not entitled to claim the personal; and if she takes the personal, she is bound to collate the heritable, which doctrine of collation being a question applicable to heritable succession, ought to be regulated by the law of Scotland. 3. As to the cross appeal. There can be no doubt as to the executry in Scotland. One cannot take real estate as heir, and also claim a share in the personal estate without collating. And it makes no difference in this, whether those who succeed are collaterals, because collation applies equally to them as to descendants. Nor that she does not succeed *ab intestato*, because, in point of fact, she does take *ab intestato* to the late Mr. Scott her uncle; and it is only to her grandfather that she succeeds by special destination. In either case, she must collate. In the latter, because, besides taking by special destination, she is also *alioque successura*.

Pleaded for the Respondents.—1. It is a settled rule in the law of Scotland that the *lex rei sitae* is the rule which governs succession in personal estate. The personal estate belonging to David Scott consisted of navy bills and government securities, and was situated in England and payable in London, where he had his domicile for many years prior to his death, and where he died. Both the *lex rei sitae* and *lex domicilii* concur in fixing the law of England as the rule of succession, and where, therefore, the Scots law of collation can have no place. 2. It is erroneous to hold the question as one regarding heritable estate in Scotland, to which alone the Scotch law can be applied. Collation is a doctrine not applicable to heritable estate, but alone applies to personal succession. It is not an obligation which burdens the heir's estate; but only a privilege, which he may or may not avail himself just as he chooses. 3. And as to the cross appeal the respondent prefers, she contends that the rule of collation extends only to heirs *ab intestato*, who

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are *alioqui successuri*, not to *haeredes facti*, or of entail, who take *provisione hominis*, or by special deed or will of a predecessor, not *provisione legis*, or by the mere act of law. A man can have but one heir at law, otherwise called heir general, or heir of line; (excepting the case of heirs portioners), but he may have an indefinite number of heirs of entail. But the law of collation is a law of legal succession, and applies only to the heir at law; and all the writers on the law of Scotland seem to lay it clearly down, that it is only the heir at law who succeeds *ab intestato*, that can be obliged to collate. Balfour, p. 233; Stair, b. 3, § 48; M'Kenzie, b. 3, tit. 9, § 11; Bankton, vol. 2, p. 285; in the present case, the respondent does not succeed to any part of Scotstarvet estate as heir *ab intestato* to *her uncle;* nor was she *alioque successura* to him; because she takes as heir of entail and provision to her grandfather under the settlement 1743, which disinherits both her and her sisters as heirs portioners, and compels her to hold this estate under various restrictions and irritancies. And further, she was not *alioque successura* to the late Scotstarvet, because it was always possible that he could have had children of his own. She is not heir at law but of entail, not *alioque successura* as heir at law, and therefore it is not incumbent on her to collate such estate.

After hearing counsel, it was

Ordered and adjudged that the said original appeal be dismissed this House; and it is hereby further ordered and adjudged that the said interlocutors of the 16th November 1787 and 17th June 1788 complained of by the said Henrietta Scott in the said cross appeal, be, and the same are hereby reversed; and it is hereby declared that the said Henrietta Scott is entitled to claim her distributive share in the whole personal estate of her said uncle, David Scott of Scotstarvet in Scotland, without collating his heritable estate, to which she succeeded as heir, in so much as she claimed the said share of the said personal estate by the law of England, where the said David had his domicile at the time of his death.

For Appellants, *W. Grant, Wm. Tait.*

For Respondents, *R. Dundas, Sir J. Scott, J. Anstruther, John Anstruther, J. A. Park, W. Dundas.*