No 19.

Answered; It has been established in Scotland, as well as in other countries in which the feudal system prevails, that where there are two or more in the same degree of propinquity to a person deceased, the landed property, or those effects which are held to be of an analogous nature, descend in succession to men in preference to women; and to the eldest among the males in exclusion of the younger male relations. In order, likewise, that this privilege may not, in any instance, prove hurtful to the person in whose favour it was introduced, it has been farther established, that he may renounce the exclusive character of heir, and, betaking himself to the common one of nearest in kin, receive an equal proportion of the whole funds. But for entitling any person to the benefit of this alternative, it is not enough that he is called to the succession as heir. He must also, on renouncing this succession, be in such a situation as enables him to claim, as executor, or nearest in kin, to a share of the moveable effects which belonged to the ancestor. This is laid down by all our lawyers, Mr Erskine alone excepted, who rather delivers what he says in the way of doubt than as his fixed opinion. The decision observed by Lord Fountainhall does not support the contrary argument. The question which occurs, was indeed agitated; but, as on the opening of the succession, the heir, who was also one of the nearest in kin, had been required to collate, it was most justly found, that whether such a privilege existed or not, his son, afterwards succeeding, could not lay claim to it; Balfour's Practics, *voce* HEIRS AND SUCCESSORS, p. 233.; Stair, b. 3. tit. 8 § 26. 43.; Bankton, b. 2. tit. 3. § 28. 16th July 1678, Murray, No 9. p. 2372.

THE LORDS, 'unanimously assoilzied the defenders, and found the pursuer liable in expenses.'

Reporter, *Lord Henderland.* Act. *Geo. Ferguson.* Alt. *Lord Advocate.* Clerk, *Orme.*

C. *Fol. Dic. v.* 3 *p.* 134. *Fac. Col. No* 7. *p.* 12.

1794. *December* 3.

MRS RAE CRAWFURD *against* SIR JOHN STEWART and MRS STIRLING.

No 20.

An heir of entail who is one of the nearest in kin, and not the heir *alioqui successurus*, is entitled to a share of the moveable succession without collating.

FRANCIS STEWART CRAWFURD died intestate and a batchelor.

Sir John Stewart, his only brother, was his heir at law, and his two sisters, Mrs Rae Crawfurd and Mrs Stirling, his executors.

The property of Mr Crawfurd at his death, consisted, *1mo*, Of some heritage of little value descendible to the heir of line; *2do*, Of Milton, an estate of considerable value which he held under a strict entail, and to which his eldest sister Mrs Rae Crawfurd succeeded as nearest substitute; *3tio*, Of arrears of rent and other moveables, worth above L. 1200 Sterling.

Sir John Stewart having found it for his interest to collate, he and his youngest sister, Mrs Stirling, claimed the whole unentailed succession, to the exclusion of Mrs Rae Crawfurd, unless she would collate the estate of Milton, while she

on the other hand, contended, that this was rendered impracticable by the entail, but that she was nevertheless entitled to a share of the moveable succession, as one of the nearest in kin. No 20.

In order to try the question, a multiplepoinding was brought, in name of the tenants and others, who held moveable funds belonging to Mr Crawfurd, in their hands; and, in support of the claim of Mrs Rae Crawfurd, it was

Pleaded; 1*mo*, The law of collation applies only to the heir of line, and not to heirs of entail, or of provision; Balfour's Practics, p. 233.; Stair, b. 3. tit. 8. § 48.; Dirleton, *voce* HEIRS OF TAILZIE; Macdowall, vol. 2. p. 385.; Erskine, b. 3. tit. 9. § 3.; 19th November 1720, Riccarts against Riccarts, No 15. p. 2378. Indeed, if the latter were bound to collate, a double collation would frequently take place; a thing never supposed by our lawyers, who speak of the privilege of the heir in this case, thereby meaning the heir of line, in contradistinction to successors by tailzie and provision, who, in comparison with him, are considered as strangers; Craig, *lib.* 2. *dieg.* 17. § 19.; Dirleton, *voce* HEIRS OF TAILZIE; Stair, b. 3. tit. 5. § 8.

Collation is a privilege competent to the heir at law, whereby the general rule excluding him from the whole intestate moveable succession, is limited, and himself admitted to a share, upon his collating the heritage and heirship moveables. As, however, it is only to a share of the moveable intestate succession to which he is admitted, there is no reason why he should contribute the heritage he takes by deed. To be admitted to the legal succession of one kind, it is enough that he renounces the legal succession of another.

2*do*, The limitations in the entail render it impossible for Mrs Rae Crawfurd to collate; and it would be repugnant to the idea of collation that she should on that account be excluded, as it always supposes an option in the heir to use his privilege or not, as he shall think best. Such exclusion would also be attended with obvious injustice, wherever the entailed property was of small value, in proportion to the moveable succession.

Answered; In all cases where the law either grants any privilege to heirs, or imposes any obligation on them, heirs of provision, if not specially excepted, are understood to be precisely *in pari casu* with the heir of line. As to collation in particular, there is no reason why the former should be more favoured than the latter; for although a person may chuse to regulate his succession by settlements, it does not follow, that he means in other respects to dispense with the reciprocal obligations thence arising in the ordinary course of law between heir and executor; Macdowall, b. 3. tit. 8. § 100.; 15th November 1787, Balfour and others against Scott, No 18. p. 2379.

2*do*, If it be impossible for an heir of entail to collate, it must be equally impossible for him to take any share of the moveables; for no person can claim a privilege, without fulfilling the condition on which it is granted. But it is a mistake to suppose, that heirs, under the strictest entail, cannot collate; they may

No 20. at least collate the rents and profits of the estate during their lives, and even the estimated value of the fee.

THE LORD ORDINARY, 'in respect that Mrs Rae Crawfurd was not heir of line, but only heir of provision in a particular estate, which she takes under a deed of entail, found that she is entitled to take a share of the executry alongst with her brother and sister, without collating the tailzied estate.'

On advising a reclaiming petition and answers, it was

Observed on the Bench, Mrs Rae Crawfurd is a stranger to her brother's heritable succession, being neither his heir at law, nor taking any thing under any deed of his, and therefore the law of collation cannot in any shape apply to her; she succeeds to the estate of Milton under a strict entail, executed by their common ancestor, and not as representing her deceased brother, who himself was only an heir of entail: And it is no reason for excluding her from a share of his moveables, that she takes an estate to which, in consequence of the destination of the tailzie, he was a prior substitute to her.

The COURT, with only one dissenting voice, 'adhered.'

Lord Ordinary, *Justice Clerk*. For Mrs Rae Crawfurd, *M. Ross*. Alt. *C. Hope*. Clerk, *Home*.
R. D. *Fol. Dic. v.* 3. *p.* 134. *Fac. Col. No* 138. *p.* 314.

See Ranken against Ranken, C. Home, p. 39. *voce* SUCCESSION.

See APPENDIX.