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as executors confirmed to her.—It was *answered*, That the right of blood ought not to be diminished by forms, and the act of Parliament bears expressly, That it is against law, equity, and conscience, to exclude the nearest of kin from their share; and therefore, if any of the nearest of kin should die before they can confirm, there were no reason to exclude their children.—It was *replied*, That the nearest of kin can never suffer but by their own negligence; for they may, immediately after the defunct's death, publish edicts, and obtain confirmation, and the law never provideth for such extraordinary cases, such as the dying before confirmation can be; for seeing the nearest of kin transmit their share by naked confirmation, there is no necessity of executing the testament, as sometime the custom was, which required a very long time.

THE LORDS found, That David having died before Lady Mary's testament was confirmed, no part of her share did accresce to him, nor did belong to the Countess, as executrix; and if she should enter executrix to Lady Mary, she is excluded by her contract of marriage, 'renouncing all right she can have to 'Lady Mary's share.'—The defender further *alleged*, That the pursuers had homologated this transaction, by requiring their commissioners to call for payment of the L. 15,000 bond, which was a part of the defender's obligement by the transaction; and likewise, that the Duke's commissioners had demanded the money from the defender: 2*do*, In a pursuit against the Dutchess, at the instance of Scott of Bassenden, to denude herself of these lands in favour of him, conform to a back-bond granted by the Dutches's predecessor, a defence was proponed after minority upon Tweeddale's right to Bassenden, as belonging to the Dutchess, which was a part of the said transaction.—It was *answered*, That the calling for the money, *non relevat*, because they might, and did refuse *re integra*, before it was received; and as to the proponing upon Tweeddale's right of Bassenden, it was but of course, by a procurator, without special mandate, and was not sustained, nor did the pursuers obtain any benefit thereby.——THE LORDS repelled both these defences. *See* NEAREST of KIN.—PRESUMPTION.

*Fol. Dic. v.* 1. *p.* 148. *Stair, v.* 2. *p.* 504.

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1678. *July* 16. MURRAY *against* MURRAY.

No 9.
The heir collating his heritage, has a title to a share of the childrens part.

UMQUHILE Thomas Murray, bailie of Edinburgh, having children of two marriages, did marry all the children of the first marriage, and gave them tochers, in full satisfaction of their portions-natural, and bairns part; he did also give bonds of provision to the bairns of the second marriage, wherein the sums were all equal, bearing 'to be for their better provision:' And at last, by his testament, has appointed, 'That after payment of his debts, and bonds of provision to his bairns, that all his bairns, of the first and second marriage, should have equal share of his goods and gear;' and, in an account amongst the bairns, those of the second marriage craved their bonds of provision as debt, which

affect the whole executry, before any division; and that what were free, over and above the bonds of provision and debts, should be divided in two, the one half falling to them as bairns un-forisfamiliate, and the other half being as dead's part, by his universal legacy, should be divided equally amongst all his bairns of the first and second marriage. It was *alleged* for the bairns of the first marriage, that the bairns of the second marriage could not both have their bonds of provision, and also their bairns part, unless their father, by their bonds of provision, had declared, 'that these bonds should be but prejudice of their bairns part,' which he doth not. But, on the contrary, the bonds bear, 'To be for their better provision;' and such bonds neither bearing in satisfaction of their portion-natural, nor by and attour the same, the intent thereof has ever been sustained, that the father would secure these bairns in these provisions *in omnem eventum*, but not that he should give them their provisions and bairns part also, and thereby restrict his own power of legating, which cannot reach the bairns part; so that the children, so provided, may either hold to their bonds of provision as creditors, or may reject them, and take their share of the bairns part, if it be better; in which case, the executry will be the greater, and the wife will have the larger share, and the dead's part, disposed of by legacies, will be the larger. Likeas, by the ancient Roman law, which our customs follow, all tochers, and other donations to children, were accounted as parts of their legitim, and if they had received the same, they behoved to confer and bring it back to the heritage; and if it were resting, it behoved to be imputed a part of their legitim, and that such collations were not to the children only, to make them equal in their legitim, but to their whole succession; and therefore the Lords, in the case of the Lady Dunbeath, 18th February 1663, No. 5. p. 2367. where Dunbeath having one daughter married and tochered, but not in satisfaction of her bairns part, she was admitted to the third of the executry as her bairns part, she always collating her tocher, whereof a third accresced to the wife, and a third to the dead's part; and therefore such collations are not only to equalize the bairns part, their being no bairns in that family but one. It was *answered*, That bonds of provision to children, made and delivered in *liege poustie*, have all the effects of other debts, and come off the executry before any division, and yet do not exclude the bairns from their bairns parts of what is free, debts deducted, and in that they differ from bonds granted on death-bed, which affect only the dead's part as legacies. It is true, that when the bairns part comes to be divided, or even the dead's part, if not exhausted by legacies, that the parity of natural affection hath made both the Roman law and ours to equalize the children, so that as much must be laid by to the rest as to make them equal to the bonds of provision; but then, what is over, is equally divided amongst them all, in case some of the bairns have greater provisions than others, which takes no place here, because all the bonds of provision are equal. It is true, that if there be but one bairn, the bond of provision, or tocher thereof, must be collated or imputed, whereby the wife's part, and dead's part, would be increased,

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because in that case there are no more children to whom it might accresce; and therefore it accresces to the whole executry; but if there were more children, it would accresce to them.

THE LORDS found, that the bonds of provision to the children of the second marriage, not bearing in satisfaction of their bairns part, were to be taken off the whole executry, before the division, and that the half of the free gear, after deduction of these and other debts, did belong to the bairns of the second marriage only, and that the bairns of the first marriage were excluded by their contracts of marriage; but found that the other half, by the father's legacy, belongs to bairns of both marriages equally.

In this process the heir offered to confer his heritage, and craved a share in the bairns part, because the only reason the heir is excluded to share *in mobilibus*, is because he has the sole succession and heritable rights, which is ordinarily better than his share in the moveables; but if he will collate his heritage, he is always admitted to share in the moveables.

THE LORDS admitted the heir collating the heritage, and all to be equal sharers in the whole bairns part, with the succession of the heritage.

*Fol. Dic. v. 1. p. 149. Stair, v. 2. p. 635.*

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1678. *July* 23. MURRAY *against* MURRAY.

No 10.
The heir collating his heritage, has a title to a share of the childrens part, but is obliged to collate whatever is derived to him from his father, whether by disposition or representation.

IN the count and reckoning of the executry of Bailie Murray, decided the 16th, (*supra*) the eldest son, as heir, offered to communicate the heritage to which he should succeed, and desired to be sharer with the bairns, who *alleged*, that the heir behoved not only to communicate what he should succeed to, but a tenement disponed to him by his father, which communication ought to be in and to the whole moveable heritage, whereby the legatars would have a share, as well as the bairns. It was *answered*, That the heir had unquestionable right to come in with other children, either in case there were no heritable right, but all the succession were moveable, or in case he would communicate the heritable succession falling to him; but there was neither law nor custom for communicating what he got from his father by donation. And it was found, in the case Dutchess of Buccleugh and Earl of Tweeddale, No 8. p. 2369. that David Scot had a share of the bairns part of his father's gear, without communicating the right of a considerable estate of land which he had from his father by disposition. It was *answered*, That the cases were not alike, for David Scot was a bairn in the family, *et proprio jure* had a share in the bairns part, without communicating of what land he had got, that having done no prejudice to the bairns, nor abated any part of the moveable estate; but the only ground of the heirs being admitted to a share of the moveable estate, is, that law allows him to be in no worse condition than other children; so that, if either by succession or