No 9.

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.

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

disposition, he be as well as they, that ground ceaseth; and, therefore, he must communicate both, if he crave a share in the moveable estate; for it is ordinary for fathers, in their sons' contract of marriage, to infeft them in their whole heritable estate, whereby there remained no heritable succession, and yet they were never admitted to partake of the moveables, but were excluded as heirs *per perceptionem hæreditatis*; and there is no reason that an inconsiderable remnant of an heritage should, by communication thereof, admit heirs to the moveables, when perhaps the far greater part were enjoyed by them, by their father's disposition. No 10.

The Lords admitted the heir to a share with the other bairns, providing that he communicate all that he had of the heritable estate, by disposition or succession, by being infeft as heir, and disponing to the children an equal share with himself of the said heritable estate, with the burden of an equal share of the heritable debt. But the Lords did not determine, whether the communication should be only to the bairns part, or also to the dead's part, but were clear that he was not to communicate to the relict's part, seeing there were other bairns in the family, and the relict would neither have benefit nor loss by any thing the husband, nor any, could do, as to her share.

Fol. Dic. v. 1. p. 149. Stair, v. 2. p. 640.

1680. *July* 21. James Brown *against* His Mother and Tutors.

No 11.

By contract of marriage, the lands being provided to the heir by the first clause, and the conquest to the bairns in a subsequent clause; The Lords found the heir had a share in the conquest, (though it was most part executry) without collation, because he was also a bairn.

Fol. Dic. v. 1. p. 148. Fountainhall, MS.

1681. *January* 12. Trotter *against* Rochead.

No 12.
There being only one child, who was both heir and executor, he was found to have the whole children's part, without collating the heritage with the relict.

In an action of count and reckoning between Catharine Trotter, Lady Craigleith, and Rochead, Lady Prestongrange, younger, her daughter; the auditor reported the points following; *Imprimis*, The Lady Craigleith, by her contract of marriage, is provided to —— chalders of victual yearly, out of the lands of Craigleith, to be uplifted yearly between Yule and Candlemas; and her husband having died after Martinmas, but before Candlemas, she claims that year's annuity.—It was *alleged* for the heir her daughter, That she being both heir and executor, the whole year in which her father died belongs to her, as executrix, according to the known custom between executors and liferenters or heirs, wherein the legal terms of Whitsunday and Martinmas are only respected as the rule for division; so that if the defunct die after Whitsunday, his executor hath the