No 10.

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.

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

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half of the crop that is payable at Candlemas thereafter; and if he die after Martinmas, though before Candlemas, the executor is to have that whole crop.—It was *answered*, That though this hold in infeftments of property, or in annualrents payable at Whitsunday and Martinmas, yet this annualrent is only payable once in the year, at Candlemas.—It was *replied*, That whatever might have been pretended, if this annualrent had been constituted to be payable at two precise terms, Candlemas and Lammas; yet here it being constituted payable between Yule and Candlemas, the ordinary time of payment of farms, the division with the defunct's executor must be according to the division of farms.——The Lords found, That the executor had right to the whole year's farm, her father having died after Martinmas, albeit before Candlemas, and that the liferenter had right to no part thereof.—The relict did also insist for the half of her husband's moveables, there being no children but one, who is heir, who cannot crave a bairn's part, unless she would confer the benefit of the heritage.—It was *answered*, That the heir is excluded from a share of the bairn's part, unless the heir confer; but this confers nothing to the relict's part, who can have only a third, if there be bairns one or more; and the one bairn will be both heir and executor, and have the bairn's part without collation.——The Lords found, That the heir had the whole bairn's part, without collation, there being no more bairns, and that she was not obliged to confer to increase the relict's share.—The relict did also insist for a legacy of 6000 merks, left her by the defunct.—It was *answered*, That she cannot both claim the legacy and her third, because *debitor non præsumitur donare;* and legacies are ordinarily understood to be in satisfaction of the legatar's interest, as where the law provides the executor to a third part of the dead's part for executing the testament; yet if there be a legacy, the executor cannot claim both; and here the legacy is left without prejudice of her contract, but doth not bear 'without prejudice of her 'third;' and therefore the defunct's mind hath been to give her this legacy in place of her third.—It was *answered*, That legacies in our law is ever understood to be out of the dead's part; and albeit where the law gives a third to strangers executors, having no obligment to execute the testament, wherein legacies left to the executors are accounted in satisfaction, that is by an express provision in the statute, and cannot be drawn to this case, but the defunct must be understood to leave out of his own share 6000 merks to his relict; for if he had only intended to make up her third 6000 merks, it had been easily so exprest.

The Lords found the legacy due out of the dead's part, and no part of it out of her own third, but that she had right both to it and the legacy.

Fol. Dic. v. 1. *p.* 149. *Stair, v.* 2. *p.* 831.

*** Fountainhall reports the same case:

No 12.

A count and reckoning for her intromission as tutrix to her daughter, wherein she craves her annuity of ten chalders of victual for the crop 1673.—*Alleged*, Her husband outlived Martinmas 1673, and so it fell under her executry.—*Answered*, Candlemas is the term of payment contained in her infeftment, and he dying before that, her annuity was due.——The Lords found Candlemas was only adapted for the case of the tenants, who paid their victual then; but seeing her husband outlived Martinmas, they found no annuity due for that crop; but it would be otherways in a heritable bond, liferented by the wife, bearing payment of the annualrents at Candlemas and Lammas; because annualrents are not like victual, but are due *de die et diem*.—Then *alleged*, She must have the half of executry due to her as relict, because her daughter being heir, has no interest except she collate the heritage with her.——The Lords found the heir was not bound to collate her heritage, but only to other younger children; and that the heir had right to a legitim of her father's moveables; but if the heir had already got moveables, she would have been obliged to have collated those with the relict, as has been oft decided in other cases.—Then it was *alleged* against the relict, she could have no share of the moveables, because her husband left her a legacy of 6000 merks, which law presumes to be in satisfaction of all she can ask or claim *qua* relict.——The Lords repelled this, in so far as it may exclude her from her share of the moveable, because the legacy was out of the defunct's part, which he may dispose on at pleasure; but if the relict were claiming a part of the defunct's part, for executing the testament, the legacy, if it be more, it would exclude her; and if it be less, it would be imputed in her claim *pro tanto*. *See* Husband and Wife. *Fountainhall, MS.*

1695. *February* 19. Sinclair and Heriot *against* Sinclair and Redpath.

No 13. Found in conformity with No 6. p. 2368.

Halton reported Sinclair and Heriot *contra* Sinclair and Redpath. Two nieces of Mr Robert Sinclair, minister at Dirleton, were competing, as nearest of kin. The eldest being married in his lifetime, in her contract of marriage he obliged himself to pay 4000 merks of tocher with her; and he dying before the second was married, in the division she also craved to have the like sum allowed to her, at least that her sister should collate her 4000 merks; seeing she being co-heir *confusione tollebatur obligation.*—*Answered*, *Quoad* that I am a creditor, and must deduct it *jure præcipui* out of the whole; and you can only have the half of the rest.——The Lords found, That the 4000 merks was to be repute a debt of Mr Robert's, and as his goods divided equally, so also his debts, and consequently each of them paid the half of it; which made the eldest to have 2000 merks more than the youngest.

Fol. Dic. v. 1. *p.* 148. *Fountainhall, v.* 1. *p.* 671.