No 5.

right to their father's gear; and albeit this was considered by the Lords, yet it could not be effectual to give the bairns any right thereto, so long as the father lived; and albeit also the chargers alleged, that seeing the father is living, the bairns could not have right, and that the husband is truly reputed in law to be *dominus omnium bonorum*, as the party alleged, therefore, with the mere reason, and in law, should his wife have the half of all which he had the time of his decease; which allegeance was repelled, and the wife's part resricted to a third, as said is.

Act. *Ja. Gibson.* Alt. ———. Clerk, *Gibson.*

Fol. Dic. v. 1. *p.* 543. *Durie, p.* 728.

No 6.

1737. *November* 10. Justice *against* His Father's Disponees.

A man who had only one son who succeeded to him in his land estate, and no other children, made a disposition of his moveables *mortis causa* to certain trustees for the behoof of his grand-children, which, after his death, being quarrelled by his son, as in prejudice of his legitim, the Lords "found the pursuer entitled to a legitim, and reduced the disposition in so far as it was prejudicial thereto."

The heir is no less entitled to a legitim than the other children, though, if he insist on it, he must collate; and if he was not *de jure* entitled to it, he could no more claim a share of the moveables upon collating, than the younger children can claim the heritage upon collating. It is also *triti juris*, that though there be but one child who is heir, and a relict, the testament is tripartite as well as where there are more children; but if the heir were not *de jure* entitled to a legitim, it should be only bipartite. But why then should not he have been obliged to collate the heritage with the disponees? For this reason, that the right to demand collation is a privilege personal and peculiar to the executor at law, and to no other.

Fol. Dic. v. 1. *p.* 543. *Kilkerran, No* 1. *p.* 332.

No 7.

1747. *February* 25. Marshall *against* Finlays.

Questioned, where a man left two children, one his heir, what should be the division of the moveables. *Urged*, That legitim is the portion allotted by law to younger children otherwise unprovided, to which the heir can have no claim. *Answered*, the heirs being provided, is no bar to his claim of legitim, for the younger children, as well as he, have their legal succession, viz. the deads part in the moveables; and the legitim is a separate portion, which the

law gives to the children *proprio jure.* THE LORDS found the heir entitled to a legitim.

No 7.

Fol. Dic. v. 3. p. 381. D. Falconer. Rem. Dec. Kilkerran.

*** See Kilkerran's report of this case, No 7. p. 3948, *voce* EXECUTRY, and Lord Kames, and Falconer's, No 132. p. 5928, *voce* HUSBAND and WIFE.

1749. *February* 22. MARTIN *against* AGNEW.

No 8.
Legitim not due to the heir without collating, where all the other children have accepted provisions in satisfaction.

ANDREW AGNEW, late of Scheuchan, died widower, leaving two sons, Robert the eldest, now of Scheuchan, and James; and Robert having confirmed executor dative *qua* nearest of kin, and intromitted with the whole moveables, a process was brought against him at the instance of Gilbert Martin, as assignee by James the younger son, to account for his intromissions.

It was *pleaded* for Robert, That James had in his father's lifetime accepted of a provision in satisfaction of his legitim and bairn's part of gear, and that therefore his claim was to be restricted to the dead's part; and that he could have no part of the legitim, which, by his forisfamiliation, did wholly belong to the defender.

But it being *answered* for the pursuer, That the defender being heir, could have no claim to any part of the executry, unless he would collate; the Ordinary "repelled the defence, in respect of the answer;" and the LORDS once and again "adhered," notwithstanding the reply for the defender, that collation can only be sought from the heir by those who have a right in the subject which the heir claims, as where he claims to concur in the dead's part with the nearest of kin, or in the legitim with the other children who have title to a legitim; but where the children have renounced their legitim, they can no more require the heir, claiming his legitim, to collate, than the relict, or the executors, or legataries named by the defunct, can do. The reason is all the same, that they have no interest in the legitim, the subject which the heir claims.

It was admitted on all hands to be an established point, that where the heir is the only child, he is entitled to the legitim in a question with the relict, or with the disponees, to whom the father may have conveyed his moveables, as in Justice's case, No 6. p. 8166. And the LORDS, who differed from the judgment here given, could see no reason why the heir should not have the same title to it, where all the other children had renounced; as children who have renounced their legitim, are, with respect to the legitim, to be considered as not in being. And further, where there is a relict and no heritage, and all the children have renounced their legitim or bairn's part of gear, the division is bipartite between the relict and dead's part; and so it must be, because there is no person in being entitled to a legitim. But as