whereas the present defender is heir, while the pursuers are exclusively the executors. No 18.

THE LORDS found, That the 'defender Miss Scott was not entitled to claim any part of the executry of her uncle David Scott of Scotstarvet in Scotland, without collating his heritable estate, to which she succeeds as heir.'

See SUCCESSION—FOREIGN.

Reporter, *Lord Justice-Clerk.* Act. *Dean of Faculty, Rolland, Blair.*
Alt. *Lord Advocate, Solicitor-General, Maclaurin, Ross, Honyman, J. Anstruther, junior.*
Clerk, *Robertson.*

S. *Fol. Dic. v. 3. p. 134. Fac. Col. No 1. p. 1.*

*** This cause was appealed.—1793. *March* 11.—The House of Lords 'ORDERED and ADJUDGED, That the original appeal be dismissed, *i. e.* at the suit of Hay Balfour and others, and that the interlocutor complained of by the cross-appeal for Henrietta Scott be reversed; and it is declared, that the said Henrietta Scott is entitled to claim her distributive share in the whole personal estate of her uncle David Scott, to which he succeeded as heir by the law of England, where he had his domicil at the time of his death.'

1787. *November* 28.

JAMES DREW M'CAW *against* MARY and ANNE M'CAWS.

No 19.
An heir cannot insist for collation, if he be not at the same time one of the nearest in kin.

AFTER the death of David M'Caw, his heritage, consisting of a small house, descended to James Drew M'Caw, his nephew by a brother deceased; while his executry, or moveable estate, which was of much greater value, devolved to Mary and Anne M'Caws, his sisters and nearest in kin.

James Drew M'Caw, the heir, insisted in an action for having it found, that he was entitled, upon collating the heritage, to draw a rateable proportion of the whole effects which had belonged to the deceased. In support of this action, he

Pleaded, The right of collation is inseparable from the character of heir. Whenever the person on whom, as the *persona predilecta*, our law has conferred the right of succeeding to the heritage, finds it more advantageous to claim a share of the moveable effects, he is at liberty to do so. This is the opinion of Mr Erskine; and it seems to have met with the approbation of the Court, in a case collected by Lord Fountainhall; although there, on account of specialties, the right of the heir was held to be barred. Other lawyers of eminence, it is true, have adopted a different sentiment. But this apparent inconsistency may be easily removed, by confining the doctrine last stated to another case of collation, occurring between children laying claim to the legitim, which stands on a footing altogether different from that of which we are now speaking; the legitim being due to descendants, and those in the first degree only, and the right to collate, as applicable to it, suffering a corresponding limitation; Erskine, b. 3. tit. 9. § 3.; Fountainhall, v. 1. p. 825. 16th February 1698, Dick of Grange *contra* Dicks, *voce* SUCCESSION.

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