

common by the husband and wife at the time of her decease, without respect to the moveable heirship, which they alleged could not be considered till after the death of the husband, the LORDS found, notwithstanding, that the moveable heirship ought to be set aside before division; and that, as to moveable heirship, there was no communion betwixt husband and wife.

Gosford, MS. No 56. p. 20.

No 32.

1680. November 12. STEVENSONS against PAUL.

STEVENSONS, as creditors to umquhile ——— Cruickshank, having arrested the heirship moveables drawn by Sir John Paul his heir, pursue to make furthcoming. It was *alleged* for Cruickshank's relict, That, by her contract of marriage produced, 'the half of all her husband's estate, heritable and moveable, ' was to belong to her, if there were no children,' and therefore she had right to the half of the moveable heirship; and as to the other half, it was extant *ipsa corpora* entire, and she could be decerned in no more but to deliver the same, which the arrester could not crave till the price were liquidated.—THE LORDS sustained the defence for the one half, and decerned for the other, and ordained the Magistrates of Aberdeen to roup the same, and take an instrument upon the roup, and deliver the money to the pursuer. It was then further *alleged*, That seeing the relict had the one half of all, there behoved to be an alteration of what fell under heirship; for instance, if there were a dozen of silver spoons, the heir would get them all; but now coming to half a dozen, the heir would get but one, because the defunct had no more himself but the half, and the relict had right to the other half. It was *answered*, That the drawing of heirship was ever of the whole moveables, before any division; and albeit the relict by law has right to a half, or third, which must be as strong as any right by provision in a contract, yet it was never pretended that she should draw her share of moveables first, and that the heirship should only be drawn out of the remainder, as solely belonging to the defunct.

THE LORDS found the heirship was to be drawn, and separated from the moveables, before any division by law or paction, and that the relict might claim the half both of the heritage and heirship moveables, as heir of provision to her husband; but if there were a dozen of silver spoons, for instance, the whole would fall in the heirship, and not one spoon only, as if there were but six, because of the wife's right to the half.

Stair, v. 2. p. 795.

No 33.
Heirship
moveables are
to be drawn
off the whole
head before
the relict's
share. See
No 32. *supra*.