

No 2. 1675. January 26. A. against B.

UPON a bill, the LORDS found, that parties having a joint and equal interest in lands and tenements, both as to the right itself being disposed to them jointly, and as to the respective proportion and parts of the said tenements, the principal writs should be kept by such as offered caution to the other portioners; and that transumps should be given to the other persons concerned, upon the common charges of them all.

Fol. Dic. v. 1. p. 154. Dirleton, No 227. p. 107.

No 3. 1677. February 29. A. against B.

An eldest brother preferred to the custody of the writs, though the estate was in Holland, where all the children succeed equally, and another brother had purchased in all the other children's parts.

AN exhibition being pursued at the instance of an heir of conquest; and it being *alleged* by the heir of line, that some of the lands, whereof the writs were craved to be exhibited, were in Holland; and that, by the custom there, the eldest brother did not succeed as heir of conquest, but all the brothers and sisters equally, so that the writs ought not to be delivered to the pursuer, who had only an interest as to the fifth part, whereas the defender had four parts, having acquired three from his brothers and sisters, and having one himself; and he having the far greater interest in the land and writs, ought to have the keeping of the same, being liable to make them furthcoming to the pursuer.

THE LORDS notwithstanding preferred the elder brother to the keeping of the writs.

In that same cause, it was *alleged*, that, as to the lands in Scotland, the defunct's right was only by a comprising, which was personal, and whereupon no infestment had followed; and which belonged to the heir of line, as tacks and reversions: THE LORDS, nevertheless, found, that the heir of conquest has right to the same, conform to a late decision. See HERITABLE and MOVEABLE.

Fol. Dic. v. 1. p. 154. Dirleton, No 451. p. 219.

No 4. 1680. December 21. A. against B.

A process of removing, at the instance of one adjudger, cannot proceed without concurrence of the rest, unless the pursuer offer a more sol-

ONE ——— pursues removing against the tenants of ——— lands, apprised by him. Compearance is made for ———, who *alleged*, that he had apprised the same lands since 1652, and before this apprising, and so had equal right coming in *pari passu* with him, and therefore he could not remove the tenants without his consent. It was *replied*, *imo*, That the pursuer's interest was very great, and the other parties but small, and therefore he could not hinder the removing.

THE LORDS found, That the removing could not proceed without consent of both parties, unless the pursuer offered a more solvent tenant, or a greater rent, in which case the interest of any other person, *in re communi*, could not, without fraud, hinder the common advantage of all concerned *.

Fol. Dic. v. 1. p. 154. Stair, v. 2. p. 823.

1681. November. HALLIDAY against BRUCE of Kennet.

IN an action of removing, there being compearance for several other adjudgers, who were within year and day of Halliday, it was *alleged*, that his interest being but L. 1000, he could not remove the tenants and possessors to the prejudice of other adjudgers. THE LORDS found, That Halliday could not remove the tenants, except he found caution for the mails and duties to the rest of the comprisers, so far as concerned their interest.

Fol. Dic. v. 1. p. 154. Pres. Falconer, No 5. p. 2.

1686. July 23. LADY MARGARET CUNNINGHAM against THE LADY CARDROSS.

LADY MARGARET CUNNINGHAM, the only daughter of ——— Stuart, who was one of the two daughters of Stuart of Kirkhill, and sisters to Sir William Stuart his son, pursues the Lady Cardross, the other daughter of Sir James, and sister to Sir William, for exhibition and delivery of the whole writs and evidents of the estate of Sir James and Sir William, both heritable and moveable, to the said Margaret Cunningham, as heir portioner served and reboured to Sir James and Sir William, and as representing the eldest heir portioner, thereby having the prerogative of the custody of the writs. The Lady Cardross compearing, produced several writs, and *alleged*, that she was not obliged to deliver any of these writs to the pursuer, she having equal interest, and being in possession of the writs. THE LORDS repelled the defence, and found that the eldest heir-portioner ought to have the custody of the writs, and to give transumps to the defender as younger heir-portioner, upon the equal expenses of both. It was further *alleged* for the Lady Cardross, Absolvitor from the delivery of the evidents of Kirkhill and Strabrock, because she produceth a disposition granted by Sir James Stuart her father in favours of Sir William her brother, and the heirs of his body; which failing, to the heir-male of his eldest daughter; which failing, to the younger daughter, the Lady Cardross, &c.; upon which disposition Sir William was infeft, and in respect there were no heirs of his body, nor heirs-male of his eldest siter's, therefore the Lady Cardross is infeft as heir of tailzie to him, and so excludes Lady Margaret Cunningham from any interest in these writs. It was *answered* for Lady Margaret, That if the Lady Cardross accept-

* See This case, *vide* LITIGIOUS, as observed by Lord Fountainhall, MS. He names the parties Forbes of Savock against James Buchan.

No 4:
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which case
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the common
advantage of
all concerned.

No 5.

No 6.
The eldest
heir portion-
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custody of the
writs, and
must give
transumps to
a younger
sister, upon
the equal ex-
penses of
both.