heir of line; and if Sir James had foreseen the case as it now stands, that the second daughter would succeed to the bulk of his estate, worth L. 10,000 yearly, and married to another family not of his name, and that his eldest daughter, or her daughter, should, by this order of discussion, be excluded from all benefit of his succession, it could not be presumed he would have so ordered, but rather that his younger daughter should have paid his debt out of the tailzied estate, being but a small burden out of such an estate, and so she should have the remainder of the tailzied estate, and the equal half of the untailzied estate, free of burden, and that the pursuer his oye by his eldest daughter with the Earl of Glencairn, should have the half of his untailzied estate free of burden also. No 6.

The Lords found the Lady Cardross as heir of tailzie to Sir William her brother, to be liable to pay all the debts in the foresaid clause in the disposition by her father to her brother simply, without the benefit of the order of discussion, and without affecting or exhausting the untailzied heritable estate. *See* Tailzie.

Fol. Dic. v. 1. p. 154. Stair, v. 2. p. 787.

1707. *March* 5. Cowie *against* Cowies.

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In the end of this case, it is decided in conformity with the above, that the eldest heir-portioner is entitled to the custody of the writs. The case chiefly relates to the eldest daughter's right to the mansion-house and garden, and is referred to *voce* Heir-Portioner.

John Cowie, portioner of Bothkennar, leaving behind him five daughters, and an heritage about five chalders of victual, the four sisters take out of the chancery a brief of division, directed to the Sheriff of Stirling; which being advocated to the Lords, the eldest daughter claimed the mansion house, yard, and orchard, *jure præcipui et ratione primogenituræ*; for though law had introduced an equality among female heirs-portioners, as the Roman law did amongst all children whatsomever, whether sons or daughters; yet our lawyers had given that prerogative to the eldest daughter, to have the mansion-house, without division. *Alleged* for the younger sisters, the said maxim held in towers and fortalices, and large houses on baronies; but this was only a mean country-house, on a small interest of five chalders of victual, little differing from a tenant's sit-house, and the law speaking of *turres pinnatæ* could never mean such thatched buildings as this. *Answered*, This house was built for the accommodation of the heritor, and not for the labourers of the ground, there being other tenants houses there to serve the use of agriculture, *et ad rem prædii rustici pertinentes*; and is three stories high, and has above twenty glass windows; and such buildings *cum contignationibus* are ever reputed for the use of the heritors; now since the use of building houses with barrikin walls and fosses about them (as in the time of the old feuds) is generally ceased. The Lords found, this being the principal thessuage on the ground, and there being other houses for the tenants, therefore this ought to belong to the eldest daughter and heir portioner. But on this arose a second question more difficult, whether she ought not to give some satisfaction or equivalent to the rest of the heirs-portioners in

No 7. lieu thereof, and for that effect both it and the yard should be appretiate and valued? It was *contended* for the younger sisters, that they being founded on the rule of equality, though for conveniency their elder sister got the house, yet it was *cum onere;* and so all our lawyers, both ancient and late, had determined, as appears by *Regiam Majestatem, lib.* 2. *cap.* 27. No 4. *cap.* 28. No 3. that the messuage of a Sockman goes to the eldest, who must satify the rest according to its value; and Craig, *feud. L.* 2. *D.* 14. says, *principale messuagium ad primogenitam pertinet, pro quo tamen cæteris sororibus satisfaciet;* and Stair, lib. 3. tit. 4. seems to incline to this opinion; and so does Sir George Mackenzie, and my Lord Whitelaw's notes on him, p. 249. that though indivisible rights go to the eldest, yet it is with the burden of some compensation therefor; and so Voet, in his Commentary *ad digest.* in his digressions *de feudis*, No 84. lays down some rules for this; and Vinnius, *quest. select. tit.* 1. *cap.* 35. treating about dividing the heritage among brethren *judicio familiæ erciscundæ* tells, where a whole house is adjudged to one, because it cannot be commodiously divided, it must be valued, and he whose share preponders is condemned in a sum to be given to the rest, to preserve an entire equality. *Answered*, This would make it no favour at all to the eldest, if she got the house, but withal behoved to pay in its price to the rest; for in sundry small baronies it is known the house is near to the value of the property of the lands; and it is confessed on all hands, that there is no compensation given for honours, jurisdictions, and superiorities, which, as *jura indivisibilia et regalia*, go to the eldest; and there is no exception from this but only in the case of feu-duties, which can be easily divided; and though this has occurred an hundred times in Scotland, yet it cannot be shewn wherever the youngest sisters either craved or got any thing for the eldest sister's possessing the mansion-house; and particularly among the heirs-portioners of Nicolson of Camock, it was not so much as dreamed of to be demanded; and though some of our lawyers have differed, yet they can adduce no decision to fortify their opinion.——THE LORDS found no compensation due. Then remained the third question anent the yard, whether it, as a consequence and pendicle, followed the house. Some thought if it could afford any considerable rent, it might be valued and divided; but this was not decided at this time. My Lord Chancellor, on the occasion of this process, said, he thought it the interest of the nation, that an act of Parliament were made, taking away the succession of female heirs-portioners, and that the eldest sister have it without division, and only with portions to the younger sisters.

1708. *June* 10.——The eldest daughter contending to have the yard and orchard as a necessary pendicle of the house, which was found to belong to her; and it being *alleged*, that this was beyond the common yards belonging to country houses, and consisted of sundry acres, set with near a hundred fruit trees, and inclosed either with stake and rice, or a quickset hedge, and paying a considerable rent yearly; and the heritage being but small, to give her the orchard

No 7.

was to break all the rules of equality introduced by law amongst sisters heirs-portioners, and to give her near the half of the heritage, to the prejudice of her four sisters; and what if such a little feuar should inclose and plant a great part of his land, for the more improvement, there is neither law nor reason that the eldest should claim all that to herself.——The Lords, before answer, allowed a conjunct probation, both as to the value and extent of this orchard; which coming to be advised this day, it appeared that there was included in this orchard two roods and 35 falls of ground, and it being in Stirling carse, where yards afford much profit, it would some years yield 250 merks for the fruit, and something also for the grass, and other years 100 merks only, and that it lay contiguous to the house, and environed the same on two sides.——The Lords found, that this yard behoved to follow the house, and to belong to the eldest daughter *jure primogenituræ*; but being of a value far above what such a house or small heritage required, (which needed only a garden of pot-herbs for the kitchen), they found that the other sisters ought to get a recompense and satisfaction for their share and proportion therein; and for liquidating the value, the Lords would not take in either the highest or the lowest rent, seeing fruit is a most casual uncertain rent of any others; they fixed its yearly rent at L. 5 Sterling, and put the price of ten years purchase upon the orchard at that rent, which extended to L. 50 Sterling, and modified L. 12 Scots yearly for a gardener's house, *inde* L. 72 Scots in all, and ordained the eldest sister to pay in this yearly to her younger sisters, deducting her own share and proportion out of the whole.

1708. *June* 24.——In the cause, mentioned 10th current, between Cowies heirs-portioners, the eldest having reclaimed by bill, that it was a contradiction *in adjecto* to find she had right to the orchard, as a consequent of the mansion-house by her primogeniture, and yet with the other hand to take it from her, by burdening it with a recompense to the younger sisters; and that the case concerned the whole heirs-portioners in Scotland; and it was never hitherto controverted, but the eldest got the yard as well as the house, as her plain due and prerogative; and the same reason entitling her to the house, by the same foundation of law, the yard goes as a necessary concomitant, and was so found in the case of Innes of Dunoon *. *Answered*, That this being a mean heritage of five chalders of victual, *quid juris* if he had inclosed the whole into a fruit orchard? and, by the same rule, the elder sister might claim parks and inclosures adjacent to the house, which was never pretended; but only *jura indivisibilia*, as jurisdictions and superiorities; and recompenses were sustained both in Pumpherston's case*, and that of Wadding's *; and both Craig and Stair incline to that opinion; and seeing fruit orchards pay vicarage-teind, they are certainly *inter prædia rustica*, and so cannot follow the house, especially seeing a nineteen years tack is offered of this yard, at 200 merks *per annum*.——The Lords, by a scrimp plurality, altered the former interlocutor, and found the whole orchard belonged to the eldest sister, without any recompense to be given by her to the rest.

* *See* Heir Portioner.

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1708. *July* 21.——Janet Cowie, the eldest heir-portioner of Bothkennar, mentioned 24th June 1708, desiring the LORDS (by a bill given in) to appoint one of their number, or the Sheriff of Stirling, to divide the land betwixt the three sisters and her; and seeing the LORDS had given her the mansion-house and orchard, it was consequential, that the lands lying most contiguous and ewest should be adjudged to her, but so, that if their quality were better than the rest, consideration should be had thereof, and for that effect the ground should be visited and perambulate, and witnesses examined on the rent, value, quantity, and quality of the land, conform to the words of the law, § 4. 5. *Instit. de offic. judic. L.* 21. *D. com. divid.* Some of the LORDS started, that there was no law nor act of Parliament empowering the Lords to divide among co-heirs, who possessed all *pro indiviso*. Others thought, that though the dividing of commonties and runrig lands had special acts about them, yet heirs-portioners needed not, seeing there was an ancient brieve in use amongst us for that effect, called the brieve of division, by which each heir-portioner got their share.—— THE LORDS demurred as to their power. The petitioner had another desire, that she, as the eldest sister, might have the custody and keeping of the writs and evidents of the lands, on her obligement to make them forthcoming to the rest, or to give them transumpts when they needed them, as has been oft decided, and particularly, 17th July 1638, Denham *contra* Denham, No 1. p. 2447. This part the LORDS thought reasonable.

Fol. Dic. v. 1. *p.* 154. *Fountainhall, v.* 2. *p.* 355. 441. 444. & 456.

No 8.

In a dispute, who should have the keeping of common evidents, the Lords appointed bonds to be registered, and extracts to be taken by each party at his own expense; and as to dispositions, charters, and such like, appointed inventories to be taken, and an obligation

1711. *December* 25. GEORGE STEVENSON *against* DR PITCAIRN.

SIR ARCHIBALD STEVENSON, doctor of medicine, being doubtful of his son George's management, and he having offended him, by marrying without his consent, he makes a tailzie of his houses and bonds, whereby he constitutes his son only liferenter, and his bairns fiars, and failing thereof, substitutes Dr Pitcairn, and his children by his daughter Elisabeth, and gives the custody of the writs to the Doctor, to be delivered at the sight of Mr John Buchanan and others. The debtors shunning to pay the annualrents to George, he pursues the Doctor for exhibition and delivery, who *alleged*, No delivery, for you may give them up for a small thing to the debtors, in prejudice of me, the substitute; but I am willing to concur with you in the discharge, and if any refuse keeping the money any longer, I shall make the bond forthcoming on the re-employing the money, and securing it in the terms of the tailzie. *Answered*, The writs are absolutely mine, in so far as I have the liferent, and my bairns the fee, to whom I am administrator of the law; and they being five in number, you, the substi-