

1707. February 26.

JANET COWIE eldest Heir Portioner to the deceased JOHN COWIE of Bothkenner,
against The Younger Heirs.

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A man who had a very small land interest, leaving five daughters, the eldest claimed the mansion-house. The Lords found the mansion-house (tho' scarcely fit for an heritor to live in) belonged to the eldest daughter, there being other houses for the tenants.

An orchard not having been let for rent, was found to belong to the eldest heir portioner, without any recompence to the rest.

JOHN COWIE's heritage falling to his five daughters as heirs portioners, the younger heirs raised a brieve of division for dividing the lands, house, and yards, by the Sheriff of Stirling, which was advocated by the eldest sister, for whom it was *alleged* at the discussing of the advocation, That the house and yards should belong to her as a *præcipuum*, and a distinct indivisible right.

Answered for the Younger Heirs; The dwelling-house ought to be divided equally amongst them all; because, albeit the principal manse being tower, fortalice, &c. falls to the eldest heir portioner, Stair Instit. lib. 3. tit. 5. § 11. yet this doth not hold as to ordinary country houses, which pass as pertinents of the land. And *ita est*, the house in question is such, being about two stories high, having a thatch roof, and a roundabout fireside for the conveniency of servants, and the boiling of beasts meat, &c. It was built by the parties predecessors after their acquiring of the lands, and they were only designed goodman and goodwife; and the whole estate is but a matter of five chalders of victual; so the original design of preserving a chief representative of a family, cannot take place here.

Replied for the eldest Heir; Many great heritors in old time went under the name of goodman and wife; and the principal manse or Messuagium, comprehends all ordinary dwelling-houses for accomodation of heritors, larger than farmers' ordinary country houses. For houses of late are not built by way of tower and fortalice as in old time, but for conveniency; and yet must remain indivisible rights for the accomodation of the heir and representative of the family. Now, this house was never in use to be set for rent, and is much larger than an ordinary farmer's house, being three stories high, containing about twenty-two glass windows in nine rooms, with a closs, office-houses, and a stone pend above the entry; therefore it cannot be reputed as part and pertinent of the ground it stands on. Again the reason for preferring the chief representative of a family holds without respect to the greatness or smallness thereof; and though the house in question was built by the parties predecessors after their acquiring of the lands, there was a mansion-house upon the heritage before.

THE LORDS considering that the house in question was the only house for the heritor's dwelling, and that there were several houses besides for the tenants on the ground, they found that the said principal messuage belongs to the eldest heir portioner.

1707. March 5.—In the cause aforesaid betwixt Janet Cowie and her younger sisters, mentioned February 26, it was *alleged* for these younger heirs por-

tioners, that they should get some satisfaction or equivalent from the eldest in lieu of the principal dwelling-house adjudged to her; because, *imo*, The said mansion-house being originally *prædium rusticum, fructuum colligendarum causa paratum*, built and used by the heritors for labouring their own ground before any tenants were put upon it; the subsequent building of a tenant's house, cannot alter the right and nature thereof, so as to hinder it to belong equally to the heirs portioners; for in determining the right and nature of things of this kind, *initium est inspiciendum*; and if it be adjudged to the eldest, the rest must have their proportion of the value. *2do*, By our law and custom, where the eldest heir portioner gets the principal dwelling-house, or any other indivisible right, she must pay the value for the *ipsum corpus*, *Reg. Maj. L. 2. C. 28. § 3. junct. Cap. 27. § 4.*; *Craig feud. Lib. 2. Dieg 14. § 7.*; Mackenzie's Institutions printed with notes, page 249: In the same way as the first effectual adjudger, in the division of a bankrupt's estate, would have his option of the dwelling-house or largest share, but upon payment of the superplus value. And if it were otherwise, the eldest might come to have vastly more in proportion than any one, yea, than all the rest; which neither law nor the defunct designed.

Answered for Janet Cowie the eldest heir portioner; That she, by the right of primogeniture, ought to have the house as her *præcipuum*; and if she should be obliged to give a price for it, the privilege would be ineffectual and overturned. For what heir would not rather chuse to sell a share of an old or perhaps ill contrived house, than to purchase it from five or six, and so the family would become despicable or extinct? Besides, many things that fall under division are adjudged to one of the heirs portioners for the value, for the more convenient expediting of the brieve; so that if a price were given for the mansion-house, it could not be called an exception in favours of the eldest. Again, no instance can be given in our custom, where an eldest heir portioner gave any allowance to the rest for the house; on the contrary, the eldest heir portioner of Carnock buiks the house and yards without any controversy, or compensation to the rest. And if any such compensation should now be found due by the eldest, what pleas might it create among those who have hitherto acquiesced in the common practice of the nation? As to the objections that are made against the eldest heir's pretensions, they are easily answered; for, *imo*, Though the house in question be not a tower or fortalice in the strict acceptation, which imports a *turris pinnata*, or house of strength with walls and ditches, it is such in a legal acceptation, which includes all dwelling houses that have lofting and joisting; and therefore cannot pass for a country house, designed only for the accommodation of labourers of the ground. *2do*, As to the opinion of old lawyers, who assert that satisfaction is to be made for the principal mansion-house, that is overbalanced by the opinion of our latter lawyers, supported by the constant custom of the nation in such cases, and more agreeable to the feudal

No 6. law. And among these my Lord Stair is positive, B. 3. T. 5. § 11. that the indivisible rights fall to the eldest alone, without any thing in lieu thereof to the rest.

THE LORDS found that the principal house did belong to the eldest sister, without any compensation to the rest.

1708. June 24.—IN the competition betwixt the Cowies, heirs portioners of John Cowie of Bothkenner, Janet Cowie the eldest claimed the yard, as well as the house as a *præcipuum, jure primogenitura*, without division or compensation; and *contended*, That such a claim was founded in law and the practice of the nation. For, *1mo*, The eldest daughter of Innes of Dunoon in Angus, possessed the house, yards, and parks of Dunoon; the eldest daughter of Sir Thomas Nicolson possesseth the house, yards, and a considerable park of Carnock without division, or compensation; besides many other such instances. *2do*, The right of primogeniture stands established by the judicial law of Moses, Deutr. 21. 17. and *Gudelin de jure novissimo, Lib. 2. C. 14.* observes, that *in feudis illud generale, ut jure primogenituræ, unus unave, vel totum, vel semissem, vel aliam partem præ cæteris obtineat.* It is true that some of our old lawyers, though they cannot but yield some privilege to the eldest, think some recompence ought to be given to the rest upon that account; but this opinion is without foundation in law or custom; for where law declares any thing to be mine another can have no interest therein; and it is unreasonable to oblige a person to give a recompence for what *de jure* is his own. *2do*, John Cowie the heritor did evidence his will, that the yard should go with the house; in so far as he hath inclosed the house, office-houses and closs within the same by a continued fenced hedge, and admitted no passage thereto, save one through the closs, and continually possessed the same, without setting it separately for rent, selling only so much of the fruit as he could spare. *3tio*, A house disposed carries with it the pertinents necessary for the use thereof possessed by the disposer, July 18, 1676, and December 9, 1679, *See PART and PERTINENT.* And though sometimes a greater house may have adjoined to it a lesser orchard, *et e contra, majus et minus* ought not to vary the law in this case.

Answered for the younger heirs portioners; Albeit the eldest gets the house as a thing indivisible, without an equivalent, yet the orchard, which is of its own nature divisible rendering yearly profit, though for expediency it may be adjudged to one, the rest must have their share of the price. Nor doth other heirs portioners acquiescing in that matter to the eldest, make law in prejudice of the younger heirs portioners competing here. Besides, there are contrary instances, in the case of Hamilton of Pumpherstoun,* where an equal division of yards and parks was made before the Sheriff of Linlithgow; and in the case of White of Weedins,* where the whole subject without distinction was equally divided. And our greatest lawyers, Craig, Skeen, Stair, M'Kenzie, and White-

* Examine General List of Names.

law, in his notes on him, hold that a recompence is due, where the subject is valuable, even for a superiority that has feu-duties; though it be otherwise in a barony, or *castrum* (as foreign lawyers speak) where all around the principal mansion-house, at which sasine is to be taken, is understood to be annexed thereto, so far as the same may have relation to the house, rather than to a tenantry.

THE LORDS found, that the orchard not having been set for rent, did belong to the eldest heir portioner as well as the house, without any recompence to the younger heirs.

Thereafter, July 22, 1708, THE LORDS preferred also the eldest heir to the custody of the writs, upon her granting an obligation to make the same forthcoming to all concerned, or to give transumps upon their equal charges.

Fol. Dic. v. 1. p. 364. Forbes, p. 136. 137. 253.

* * Dalrymple reports the same case :

THE five daughters of John Cowie being served heirs portioners to him in a small inheritance, the younger daughters raised a brieve of division of the lands, house, and yards, by the Sheriff of Stirling; which being advocated, the LORDS find the principal dwelling-house doth belong to the eldest. But the younger daughters *alleged*, That though the house does fall to the eldest as a subject, not properly divisible, nor yielding rent, yet the eldest ought to give satisfaction or an equivalent in lieu thereof to the younger heirs portioners, because there is a perfect equality in the succession of female heirs; and though subjects indivisible can only belong to one, yet the value thereof is always divisible, and so it was *in judicio familiae erciscundæ* by the civil law, whatever advantage any heir got by the division was made up in value to the rest; and so it is by our antient law, as appears by the *Majest. L. 2. cap. 27. § 4.* where the eldest heir of a *socoman* has the messuage, for which he shall satisfy his brethren according to the value thereof; and *Craig, L. 2. dieg. 14. § 7.* in the case of heirs portioners observes, that the eldest daughter is to satisfy the younger for the value of the messuage.

It was *answered* for the eldest; That the succession of heirs portioners is not stated nor cleared by any positive statute, but by constant and uniform custom, by which the eldest daughter always enjoys the principal messuage without any acknowledgment or compensation to the younger daughters in lieu thereof; and there is no precedent where ever the younger daughters obtained any thing upon that account, either by course of law or transaction, or did so much as lay claim to it; and it is very suitable to the feudal law, which prevails much in Scotland, that the eldest should have some privilege for keeping up the memory of the family, and by our custom they have not only the principal messuage, but dignities, superiorities, and the custody of the evidents belong to the eldest; and what is argued from the civil law has no weight in this

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case, because by that law there was no privilege to primogeniture; and what is mentioned in the majesty relates to a succession that is now quite unknown in Scotland; and what Craig asserts is not confirmed by any decision; and the same paragraph bears, that superiorities belong to the eldest without any compensation, except where there is a constant feu-duty which is divisible, and there is no reason offered why a compensation should be given for the messuage more than the superiorities; and whatever hath been the opinion of lawyers of old, yet later custom hath favoured the eldest daughter: and my Lord Stair doth very plainly affirm, that the eldest hath right to the principal messuage and all indivisible rights without any thing in lieu thereof to the rest, and differs from Craig's opinion, that the feu-duties are to be divided, because the superiority being indivisible the feu-duty is a necessary consequence thereof.

"THE LORDS found, that the eldest hath right to the messuage, without any allowance to the younger in lieu and place thereof."

Dalrymple, No 76. p. 96.

* * See the report of this case by Fountainhall, No 7. p. 2453.

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1725. January 16. EXECUTORS OF LADY GARNKIRK *against* GRAY.

IN a question among heirs portioners whether the heirship moveables go as a *præcipuum* to the eldest, or divide among all, the LORDS found the eldest sister can only draw her share. See APPENDIX.

Fol. Dic. v. I. p. 363.

No 8.

1730. December. DUNBAR of Mochrum *against* LADY HOUSTON.

WHAT falls to the eldest heir portioner as a *præcipuum* with or without recompence to the sisters debated, but not determined. See APPENDIX. (See the next case.)

Fol. Dic. v. I. p. 364.

No 9.

1742. December 18. LADY HOUSTON *against* DUNBAR.

FOUND, that the eldest of three heirs portioners was entitled to that third, within which the mansion-house lay.

Kilkerran, (HEIRS PORTIONERS.) No I. p. 242.