

out any recompense to the other sisters. *2do*, It was allowed that the principal message did of right belong to the eldest sister, and that she had more than an option or *jus eligendi*; the only question was, whether she was obliged to give an equivalent to the other sisters.

The *rationes decidendi* were, *1mo*, That it was so decided, *anno 1707*, *Cowie* against *Cowie*; and in a question so arbitrary, and where there was no inherent iniquity on either side, the decisions of the Court ought to make law: for this reason, both the President and Elchies were for the decision, who otherwise would have been against it. *2do*, As it is allowed, that the principal message belongs of right to the eldest sister, it would require very uniform custom, or even the authority of a statute, to make her pay for what is her own; especially if it is considered, that, seeing the house belongs to her of right, she cannot oblige the others to take it off her hand, and so is under a necessity to purchase a house, perhaps at the whole value of the estate. *3tio*, It is an indivisible subject in its nature, as much as a superiority, jurisdiction, or title of honour; nor is it an answer to say, that it may be valued in money, for so may a superiority, or jurisdiction.

On the other hand, it must be allowed that there was the authority of all our law-books from the earliest times,—not only our oldest law books, such as *Regiam Majestatem*, Skene, Craig, Hope, but likewise the more modern, if rightly understood, such as Stair and M'Kenzie. There were likewise alleged decisions on that side, particularly the *2d December 1669*, *Carrubber* against *Boyd*, observed both by Stair and Gosford, though somewhat differently.

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1743. *February 10.* ——— against DAVID MAULE.

[C. Home, No. 222.]

MR Hepburn of Keith, having put up his estate to voluntary sale and roup, did, by a letter under his hand, empower David Maule to appear at the roup, and bid to the extent of twenty seven years' purchase, and promised, in case the estate should fall to him, to relieve him, and take it off his hands.

Accordingly David Maule did appear at the roup, and was the highest bidder; after which, a creditor of Mr Hepburn the seller arrested in Mr Maule's hands, and pursued a forthcoming. Mr Maule's defence was, that he was only a trustee for Mr Hepburn, who had bound himself to relieve him, and take the estate off his hands in case he carried it, so that he was not debtor to Mr Hepburn for the price, and consequently the arrestment was inept: which the Lords sustained; although they did not all approve of the practice, and thought that it was contrary to good faith not to let the highest bidder carry off the estate.

Afterwards the arrester sought the expenses of the arrestment and forthcoming from David Maule; and the Lords were willing to have granted them,

but it appeared that he knew, before the arrestment, that Mr Maule was only a *Trustee*.

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1743. *June 21.*

RANKIN *against* MORGAN.

THE Lords found, that a proprietor of a mill could not hold a multure court upon lands that were within the thirle but did not belong to him; and therefore reduced the decret for abstracted multures *in totum*, and would not so much as turn it into a libel. The *ratio decidendi* was the common principle of law, *Extra territorium jus dicenti impune non paretur*; and some of their Lordships carried it so far as to say, that an astriction to a mill gave no jurisdiction at all over another man's tenants, who, for that reason, they did not think would be obliged to answer to a court held upon the proprietor of the mill's own lands.

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1743. *June* . CRAFTSMEN of CANONGATE *against* HERITORS.

THE burgh of the Canongate (which is a burgh of barony, holding of the town of Edinburgh,) has been in use, time out of mind, to pay part of the cess of the town of Edinburgh, notwithstanding they have not the benefit of the act of communication of trade, and are not entitled to any of the privileges of the town of Edinburgh. The origin of this custom is not known, but this was not the controversy here. Of this proportion of the cess of Edinburgh, the craftsmen and mechanics of the Canongate had been in use to pay a share with the heritors of houses; this they thought a great hardship, considering that they had no privileges of trade, and therefore they brought a declarator of immunity, wherein they concluded against the heritors that they should be liable for the whole cess. But the Lords, in respect of the constant custom, time out of mind, presumed there had been some ancient contract or agreement betwixt the heritors and mechanics, and therefore assoilyed the defenders. Actores, James Balfour, Alexander Lockhart.

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1743. *June* . THEODORE EDGAR *against* JAMES MAXWELL.

THIS was a question about making up titles to a tenement within burgh. The fact was this: In the 1595, the Magistrates and Town Council of Lochmaben grant a charter of the mill and mill-lands of Lochmaben to William Johnston, "*tenendas et habendas, de domino nostro rege, et de balivis et consulibus dicti nostri burgi, in libero burgagio, feudifirma et hæreditate in perpetuum*;" and the red-dendo bears L.40 Scots annually to the town. In the year 1656, John John-