

* * * The following particulars of the case are mentioned in the Folio Dictionary :

THE estate of Carnock having devolved on several heirs portioners, the principal mansion house was decerned by a decree arbitral, and an interlocutor of an Ordinary following thereon, to belong as a *præcipuum* to Lady Houston, the eldest heir portioner. Afterwards the Sheriff of the county appointed an inquest, who having surveyed the whole estate, divided it, by their verdict, into three parts. Lady Houston insisted, That as eldest heir portioner, she was entitled to have for her share the third that lay most contiguous to the mansion-house ; especially as the planting and offices stood upon that part. Urged for the other sisters, The preference of the shares ought to be determined by lot, especially as the third next to the mansion house was of greater value than the others ; as an evidence of which being the fact, each of the two younger sisters offered L. 500 Sterling to have that third adjudged to them. Replied, That the offer of L. 500 proceeded merely from caprice, as the several shares were found equal by the inquest ; and a considerable time having now intervened since their verdict was returned, it could not be opened again without the strongest evidence of fraud. THE LORDS approved of the division reported by the inquest, and found that Lady Houston the eldest heir portioner was entitled to that third contiguous to the mansion-house, as bounded in the said verdict, and that the other two heirs portioners must cast lots, or cavel for the remaining thirds of the lands.

Fol. Dic. v. 3. p. 263.

1743. February 2.

MARGARET PEADIE, eldest Heir Portioner of Ruchill, against GRIZEL, &c. PEADIES, the other Heirs Portioners.

THE question betwixt these parties resolved into a neat point of law, *scilicet*. Whether the mansion-house, office-houses, and gardens on the lands of Ruchill should belong to the pursuer, as the eldest heir portioner, without any consideration or recompence to be given to the other heirs on that account.

The substance of the *arguments* for the eldest was, That the brief of division concerned only such subjects as admitted of a division, and by no means such as were in their own nature indivisible ; consequently, these last did, by the feudal law, *jure præcipui et primogenituræ*, necessarily belong to the eldest heir portioner without division, and without any recompence to the other *puisne* heirs portioners ; that the want of a head in the brief to enquire into indivisible subjects, and to afford a recompence from the eldest, carried alongst with it a strong evidence, that no such thing was known in the law of Scotland at that time : That it was certain, indivisible subjects, such as superiorities, jurisdictions, towers, and fortalices, fall to the eldest without any recompence ;

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The principal dwelling-house, or messuage, &c. belongs to the eldest heir portioner, without any recompence to the other heirs portioners. See No 6, p. 5362.

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and why a manor-place, the principal messuage of the family, ought not to pass in the same manner, is not easy to discover: Nor can it make any difference, that it may admit of a value, as the pursuer knows of no patrimonial subject which will not admit of a value. Besides, it seems inconsistent that the principal messuage should be retained by the eldest, *pro dignitate primogenituræ suæ*, and at the same time she should be laid under a burden of purchasing that right for a price, whereby she would be in a worse case than any of the rest, as the expense of repairs, and rights of hospitality, would remain on her.

It may admit of a different consideration, if it is only a tenant's house, and no principal messuage, seeing such may be divided, as two tenants live frequently under the same roof; or, if that could not be done, so much more of the land might be assigned to the other heir portioner, for building another steading, and answering the expense which might be laid out upon the same. See Hawthorn against Gordon, No 5. p. 5361; Cowies against Cowie, No 6. p. 5362; Stair, lib. 3. tit. 5. § 11.

The substance of the *reasoning* for the other heirs portioners was, That they had all an equal interest in the house as well as the lands; that the house can, in no sense, come under the description of a tower or fortalice, which being considered as accessories to jurisdiction, *et separata jura* from the lands, have been thought to fall to the eldest heir, exclusive of the rest; but the one in question was lately built by the father of the contending parties for his accommodation a few months in the summer time; that anciently a strict equality was observed in all succession, whether male or female. Primogeniture, with us, has prevailed as to the first; but among females, the general rule is still observed, and which will not be presumed to be departed from further than is proved. Where a subject does not admit of division or estimation, the eldest must have it; but if it does admit of estimation, the law restores the succession to its natural equality, by giving a value to the other heirs portioners, in place of that share of the subject they were entitled to, but which, by its being indivisible, they could not literally enjoy. Of the first, are titles of honour, jurisdictions, and such superiority as do not yield a certain liquid rent to the superior; but where such rent is paid to the superior, although the superiority in that case will not divide more than any other, and although it must necessarily draw the feu-duty alongst with it to the eldest, yet she must give a recompence therefor to the rest for their shares of the feu-duty, which is a certain rent, and admits of a proper estimation. The question is, under which of these a messuage falls to be ranked? It is admitted, that it cannot be divided more than a feu-superiority; but still it remains to be asked, why, as in the one case, so also in the other, a recompence ought not to be given? a dwelling house may admit of a value with as much certainty as a feu-superiority. See *Reg. Maj. lib. 2. cap. 27. Skene de verb. sig. cap. 27. Craig lib. 2. diæg. 14. § 7. Hope's Practicks, Tit. De jure nostro de successionibus in linea recta, § 7. Carruber against Sibbald, No 2. p. 5357; Sir George Mackenzie Instit. Tit. Succession of heritable rights, § 25. Heirs portioners of Carnock, No 9. p. 5366.*

THE LORDS found, That the mansion-house, office-house, and garden, belonged to the eldest heir portioner, without any recompence to the other sisters.

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Fol. Dic. v. 3. p. 362. C. Home, No 226. p. 369.

* * * In conformity with this case was decided the competition among the Creditors of Chalmers of Gadgirth, 1750. See APPENDIX.

* * * Kilkerran reports the same case :

THE LORDS unanimously found the eldest heir portioner entitled to the mansion-house and gardens, without any recompence to be made to the other heirs portioners for the same.

Many of the LORDS declared themselves of this opinion, independent of the decision, Cowie *contra* Cowie, No 6. p. 5362. and others, did, on account of the said decision, which had now for 35 or 36 years stood unaltered, concur in the judgment now given.

Kilkerran, (HEIRS PORTIONERS.) No 2. p. 242.

1744. November 3.

LADY HOUSTON *against* SIR GEORGE DUNBAR and SIR WILLIAM NICOLSON.

THE succession of the estate of Carnock having opened to three heir-portioners, a process was brought for dividing the same among them. A small part of the lands had been feued, viz. Gartencaber and Carbrock, each possessed by a different vassal, and each paying the precise same sum of feu-duty; and the question was, In what manner these superiorities should be divided among the three heirs portioners? For Lady Houston the eldest, it was *contended*, That all indivisible subjects, such as titles of honour, jurisdictions, the principal messuage, ward and blench superiorities, belong to the eldest heir portioner by the privilege of primogeniture; that a feu superiority, being also an indivisible subject, comes under the same rule; and that, if such subjects belong to the eldest heir portioner *jure proprio*, there can be no foundation for obliging her to pay any recompence to her sisters; because a man is not bound to pay a price for his own property.

It was *answered* for the other heirs portioners, That, whatever be the rule as to subjects that are strictly indivisible, the same rule cannot obtain as to feu-duties which are divisible; that Craig, lib. 2. dig. 14. § 7. is clear that the eldest heir portioner who succeeds in a feu superiority, is bound to pay a proportion of the value to the other heirs portioners; that Stair, B. 3. T. 5. § 11. delivers the same opinion, with this addition, that, if there be any more feu-superiorities than one, they ought to be distributed among the heirs portioners.

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In a division of an estate among three heirs portioners, it was found, that two superiorities devolved to the two elder sisters, the eldest sister having the right of choice; but that the youngest was entitled to a proportional recompence from the other two.