

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

No 10.

*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.

No 11.

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.

No 11.

' FOUND, That the eldest heir portioner is entitled to one of the superiorities and the feu-duties arising therefrom, and that she is entitled to make her election. Found, That the second heir portioner is entitled to the other superiority and the feu-duties arising therefrom. And found, That the third heir portioner is entitled to a recompence from the other two heirs portioners, for her proportion of the feu-duties.'

The case being of no great importance to the parties, was reported upon a short minute, where the point was but slightly handled. In examining whether this judgment be well founded, it will be proper to take under consideration the case of heirs portioners in a vassalage, which may possibly afford some argument from analogy. It is a rule laid down by Glanvil, *lib. 7. cap. 3.* as well as in the *Reg. Maj. lib. 2. cap. 29.* that even in ward-holding the land is to be equally divided among the heirs portioners of the vassal, notwithstanding that the superior is only entitled to the service of one military vassal for the land. But then the matter is thus adjusted; that the husband of the eldest heir portioner is he only who is bound to do homage for the land; which of them is bound to perform service to the superior in war, or whether they must club for a soldier, is not said.

I think the same rule must obtain with regard to heirs portioners who succeed to a superiority; for this good reason, that lands held by any man, though, with regard to vassals, it be considered as a superiority, yet, with regard to the holder's superior, it is considered as a vassalage. And what clears this point is the form of making up titles to the land, which is the same in superiority and in vassalage. A right of superiority is never mentioned as such in any charter or retour; the land is mentioned, and the expression is the same whether it be a superiority or a property. From this very consideration it is evident, that heirs-portioners have an equal right to the land *pro indiviso*, and must make up titles accordingly, whether the land belonged to their ancestors in property or in superiority. The eldest, by the tenor of the retour, has no better right than the youngest.

Dignities, offices, and such like feudal holdings, which have no relation to land, stand upon a different footing. These are in their nature indivisible, and, as they can be held but by one person, the eldest comes first in view. Whether her sisters be entitled to any recompence is not a clear point; but what incline me to think that they are not entitled, are the following considerations: By the law of England, originally the same with ours, the eldest daughter has no claim to a peerage by succession; it being the privilege of the Crown to bestow the peerage upon any one of the daughters. And if in our practice this privilege of the Crown have given way to the privilege of primogeniture, a claim for recompence, which was not known originally, would not readily arise upon the innovation; especially as dignities, offices, and others of the like nature, are not capable of an estimation in money.

With regard to ward, relief, marriage, non-entry, and all casualties that not only belong to the superiority of land, but admit of a regular estimation in money, there can be no reason why the younger sisters, who have an equal interest in the land, should be deprived of their proportion. And as to the principal message, though, as an indivisible subject, it goes to the eldest, yet, as a subject which can bear an estimation in money, it is settled that the younger sisters are entitled to a recompence, Glanvil, *lib. 7. cap. 3. Reg. Maj. lib. 2. cap. 27. § 4. cap. 28. § 3.*

It is very true, that as on one hand the superior is not entitled to homage and military service from each of the heirs portioners in the property, but only from the eldest, so, on the other hand, the vassal is not bound to do homage or perform military service to each of the heirs portioners in the superiority, but only to the eldest; nor is the heir of the vassal bound to demand infeftment from each of those heirs portioners, but only from the eldest. But though the eldest is thus preferred to indivisible rights, without a recompence, where the subjects admit not a pecuniary estimation; it will not follow, that she must also be preferred without a recompence to pecuniary casualties, which not only admit an estimation, but which, in fact, can be divided among the heirs portioners. Taking the matter in this light, the interlocutor is undoubtedly well founded. While the heirs portioners in the superiority possess *pro indiviso*, there is the same reason for distributing the feu-duties among them, that there is for distributing the rents. And when they chuse to bring a process of division, there is the same reason for parcelling out among them the feu-superiorities, that there is for parcelling out the property of lands. And if there be not so many superiorities as there are heirs portioners, the privilege of age entitles the elder sisters to make a choice, upon giving a recompence to the others.

*Fol. Dic. v. 3. p. 263. Rem. Dec. v. 2. No 57. p. 85.*

1758. *January 20.*

JEAN WALLACE, and JOHN BUCHANAN Writer in Glasgow, her Husband,  
*against* JANET WALLACE, and THOMAS BUCHANAN of Kirkhouse,  
her Husband.

ALEXANDER WALLACE sheriff-clerk of Renfrew, died possessed of moveables to the extent of L. 3000 Sterling, and heritage to the value of about L. 1000 Sterling. He left two daughters, Jean and Janet Wallaces; and as he made no settlement, his estate fell to be divided between them.

Alexander Wallace's heritable estate consisted of 70 acres of ground yielding about 200 merks, situated at the distance of two or three miles from Paisley; of a house and offices, which he built for his own residence, on half an acre

No 12.  
A dwelling-house, &c. built within a burgh of barony discontinuous to the rest of the heritor's landed estate, falls not to his eldest heir portioner as a *præcipuum*.