No 12.

than one person at the same time; and therefore fall to the eldest. A single superiority too goes the same way, in respect to the vassal's interest, which forbids a division; but, then, being properly a right of lands, a recompence is due; and if there are more superiorities, they are distributed among the sisters.

Thus it is plain, that every indivisible subject does not fall to the eldest without recompence.—But, at any rate, it is sufficient to exclude this pursuer's claim to the house in question, that it is not a mansion-house standing on the defunct's land estate, which lies at a considerable distance from it, but a house built within the town of Paisley, contiguous on one side to other houses in the town, and held feu of the burgh; so it is merely an urban tenement, which was intended for the defunct's residence when attending his business as clerk to the Sheriff-courts held there. It therefore falls under the division, according to the opinion of Craig, Stair, and other authors.

Replied for the pursuer, The house may be truly said to be situated in the country, as there are none of the houses of the burgh that lie without it, or separate it from the adjacent fields; and it cannot come under the description of borough-houses mentioned by Lord Stair, which are ordinarily set *per contignationes*, and built for the accommodation of several families. Most of the fields for two miles round hold of this burgh of barony; but that could never hinder an heritor from building a proper mansion-house upon his own grounds; and although this house and garden are not contiguous to the other lands of the defunct, yet that circumstance ought not to make any variation in the case, as a part of his lands were so near as to afford him the conveniency he wanted for keeping his horses and cattle,

The Court seemed to be of opinion, that this house was not properly a messuage or mansion-house, in respect of its situation.

'THE LORDS sustained the defence, assoilzied the defender, and decerned.'

Act. *Ferguson.* Alt. *Miller.* Clerk, *Kirkpatrick.*

D. R. *Fol. Dic. v. 3. p. 262.* *Fac. Col. No 90. p. 161.*

1765. *November 14.* ROBERT IRELAND *against* ALEXANDER GOVAN.

No 13.
Found in conformity with Peadie against Peadies, No 10. p. 5367, that the principal messuage belongs to the eldest heir portioner without recompence to the other heirs.

THE lands of Mains of Eastwood, containing about 150 acres, and worth about L. 35 Sterling *per annum*, having fallen to four heirs portioners, Alexander Govan, as in the right of the eldest sister, brought an action, for dividing the lands, against Robert Ireland, as in the right of the other three sisters.

It was *argued* for the younger sisters, on the first point, *1mo*, There are here no *termini habiles* for the principal messuage going to the eldest sister as a *præcipuum*; because the mansion-house is neither a tower nor fortalice, which alone, as carrying along with them an idea of honour, are considered as indivisible, and, therefore, fall to the eldest sister as a *præcipuum*. See Craig, lib.

No 13. 2. dieg. 8. § 3; Stair, lib. 3. tit. 5. § 11; and M'Kenzie's Institute, lib. 3. tit. 8. § 25.

2*do*, Even though ordinary mansion-houses should fall to the eldest as a *præcipuum*, the estate ought to be such as to entitle it to a capital messuage, and able to afford the expense of keeping it in repair; otherwise what was intended as a mark of honour, will be a mark of dishonour to the family, which it is highly probable, would be the case in the present instance, where the estate is so very small, that the share of the eldest sister is at present set for L. 28 Scots *per annum*.

And, 3*tio*, The house ought to be actually subsisting, and not bare walls without a roof, as in the present case.

To the *first*, it was *answered*; That the distinction here between houses built in the form of towers and fortalices, and such as are not built in that form, is not supported by any of the authorities quoted, except M'Kenzie, who, from a misapprehension of Lord Stair, confines the right of the eldest sister to houses built in that form; whereas, it is evident, that Lord Stair, under the *et cætera* at the place referred to, comprehends all houses, in whatever form they are built; as do the other writers on our law. See Skene, de verb. signif. *voce* ENEYA; Craig, l. ii. dieg. 14. § 7; Balf. Practicks, p. 223; Lord Bankton, l. iii. tit. 5. § 84; and Erskine, l. iii. tit. 8. § 13.

To the *second*; None of our law-books or decisions make any distinction, whether the estate be large or small; it is sufficient if it has been the inheritance of the family; and, in the case of Cowies, No 6. p. 5362. the Court found the eldest heir portioner entitled to the principal messuage as a *præcipuum*, though the estate was even smaller than here.

And, to the *third*; The ruinous condition of the house ought to be no reason for making it an exception from the general rule, as the decay is in a great measure owing to the antiquity of it, and as it was the ordinary residence of the family, while they lived on the estate.

Pleaded for the younger sisters, on the *second* point, If a recompence is due? A perfect equality, the most rational and equitable rule of succession, was formerly followed in this, as in most other countries, till, by the feudal customs, it was altered in the male succession, and the eldest son preferred to the younger: But, though this change took place as to males, yet the old rule of succession remained among females, who are all equally called to the succession, without any preference to the elder sister over the younger, except in such rights as do not admit of a division, or such as are by law considered as indivisible; those the law gives to the eldest heir portioner, without any recompence; for these she pays a recompence: Thus, titles of honour and dignity fall to the eldest sister without any recompence; because, *sua natura*, they do not admit of a division or of a valuation; a single right of superiority falls also to the eldest sister, as being indivisible, *ex lege*; but, if it yields a yearly profit as a feu-

duty, she must pay a recompence for it to the younger sisters; but there is no necessity for the mansion-house and gardens falling to the eldest sister without a recompence. They are neither *sua natura*, nor *ex lege*, indivisible, and may easily be valued; and, therefore, they ought to be divided among the heirs portioners; or, if they shall be considered as falling to the eldest sister, there is surely no reason why she should not pay a recompence for them to the other heirs portioners, in order to preserve that equality among them which is the principle by which the female succession is regulated. See Reg. Mag. l. 2. c. 27. § 3. and c. 28. § 1, 2, 3, and 4; Balfour's Pract. p. 223; Skene, *voce* ENEYA; Craig, l. 2. dieg. 14. § 7; and the case Carruber *contra* Sibbald, No 2. p. 5357; and Hathorn *contra* Gordon, No 5. p. 5361. No 13.

Answered; The mansion-house may, with great propriety, be reckoned among the subjects that do not admit of a division, as it would be impossible to divide a small house among a number of heirs portioners? neither does it properly admit of a valuation, as it would be next to impossible to get any two valuators to agree in a value to be put upon houses; and, therefore, the law has justly considered the principal messuage as a subject indivisible, and incapable of being valued, and which therefore falls to the eldest sister. And, though some of our oldest writers, and more ancient decisions, lay it down that a recompence is due, yet our later writers are of a contrary opinion, supported by an uniform train of decisions from the beginning of this century, where, as often as the case occurred, the Court found the eldest heir-female entitled to the principal messuage, without any recompence. See Stair, lib. 3. t. 5. § 11; Erskine, lib. 3. t. 8. § 13; and Feb. 26th 1707, Cowies, No 6. p. 5362; Carnock, No 9. p. 5366; Peadies, No 10. p. 5367; and 1750, Gadgirth, see note on No 10. p. 5369.

'THE LORDS found the eldest sister entitled to the principal messuage as a *præcipuum*, without any recompence.'

Act. *Lockhart*. Alt. *Henry Dundas*.

C. B. *Fol. Dic. v. 3. p. 262. Fac. Col. No 17. p. 227.*

1773. *February* 16.

JAMES CATHCART of Carbiston, one of the Heirs portioners of Inverleith, *against* JAMES ROCHEID, the other Heir portioner of that Estate. No 14.

There is a distinction between heirs portioners *ab intestato*, and heirs portioners provisional, with respect to the

IN 1691, Sir James Rocheid of Inverleith executed a deed of settlement, disponing the estate of Inverleith, and others, to his son James, and the heirs whatsoever of his body, whom failing, to Magdalen, Janet, Mary, and Elizabeth, his four daughters, equally among them, and the heirs whatsoever of their bodies; but qualified with this condition and proviso, that it shall not be in the