Pitfour. The decision in *Falconer, 29th January* 1751, where the contrary was found, is rightly reported by the Collector; but that was the first judgment. The Court altered on a review.

Gardenston. The cases quoted in the petition are in point.

Monboddo. I am glad to hear that it is held to be law, that the objection of undue negotiation is good in a question between the original creditor and the drawer. I do not see the difference between that case and this: every draught is an assignation,—every assignation supposes that *debitum subest*.

President. I lay the case upon the nature of bills, that an indorsee may take the benefit of the objection arising from an undue negotiation, though the drawers cannot.

On the 2d February 1773, the Lords found no recourse due, and therefore suspended the letters; altering Lord Monboddo's interlocutor.

Act. G. B. Hepburn. *Alt.* W. M'Kenzie.

1773. *February* 16. James Cathcart of Carbiestoun *against* James Rocheid of Inverleith.

HEIRS-PORTIONERS.

There is a distinction between heirs-portioners *ab intestato*, and heirs-portioners provisional, with respect to the *præcipuum*; which, in the case of the latter, is not claimable in right of the eldest of four daughters, who were, failing a son, *nominatim* called to the succession equally amongst them.

[*Fac. Coll. VI.* 143; *Dictionary*, 5,375.]

Auchinleck. There is all the difference imaginable between an heir and a disponee. That here they happen to be the same persons, makes no difference: they do not claim as heirs: they must take as disponees.

Monboddo. The distinction between disponee and heir is as ancient as any in the feudal law. But here the daughters take not as disponees, but as heirs, and make up a title as heirs by service. If they had been strangers, still the eldest heir-portioner would have had a right to the *præcipuum*. The eldest daughter of Sir James the younger would have had a right to a *præcipuum*, so also the daughters of Sir James the elder.

Hailes. It is hard for judges to determine impartially upon a point of law, when, from private knowledge, they are apprised of the sentiments of the parties; which set aside the point of law altogether. The young gentlemen here know nothing of what happened before their own day. The truth is, that there are new buildings at Inverleith made by Colonel Cathcart and Mrs Rochied, exceeding the value of the old capital messuage and its appurtenances. It is impossible to suppose that Colonel Cathcart paid any more than one-fourth of the

expense of those buildings. Mrs Rocheid could never mean to pay three-fourths of the expense, in order to enlarge or create the Colonel's *præcipuum.*

Kaimes. I cannot enter into the distinction between heirs-portioners by disposition or by right of blood. It would be difficult to make any plain man understand it; but I doubt whether the eldest heir-portioner should at any time have the capital messuage without making recompense.

President. It is too late to go into that question. The case of *Peadie* is in point. It was solemnly determined in 1743. The rule there established was followed in the case of *Gowan* against *Ireland.*

Alva. The right of *præcipuum* is not so much from the nature of the heir as from the nature of the subject.

Gardenston. In the case of proper heirs-portioners, the eldest is entitled to a *præcipuum* without retribution. The question is, Ought the same rule to be applied here, where to the rights of heirs-portioners is superadded a destination? Heirs-portioners succeed equally from the presumed will of the predecessor, yet the eldest has a *præcipuum* without recompense. So ought they to do here by the will of the testator.

Pitfour. The general strain of our old law was to give a recompense. Towers and fortalices were excepted: other houses were of inconsiderable value. But when houses came to be of more value, sometimes exceeding the value of the estate, the Court began to perceive that, to give a recompense, would be to oblige the eldest heir-portioner either to quit the house or to quit the estate. Whenever a *pretium affectionis* comes in, there must be arbitrary questions and doubtful decisions. Of late there has been an acquiescence of the nation in the case of *Peadie,* &c., as judged by this Court. As the title here is made by service, I cannot see the distinction between heirs and disponees.

Justice-Clerk. When a man makes no settlement, the courts of law suppose he meant to make his estates go in the course of common law, *i. e.* that the capital messuage should go to the eldest heir-portioner without recompense; but when a man gives his estate equally, courts of law must suppose that the words are to be understood according to the intention of the donor; *i. e.* that no heir shall have more than another.

President. Suppose that a man has five daughters, and leaves out the youngest in his settlement; or, that he has four daughters, and leaves out the eldest, will a *præcipuum* be due? It is dangerous to step out of the road, and to argue from the analogy of a general rule, which is admitted in itself to be arbitrary. The service is nothing. The distinction is between *hæredes legitimi* and *hæredes destinatione.*

Gardenston. Here the will of the man is just the will of the law.

Coalston. When a man, by a deed *inter vivos,* dispones his estate to two or more persons, the whole will be divided equally among them. In the case of heirs-portioners, practice has introduced an exception. This is necessary; because there are some subjects which cannot be easily divided; some incapable of division. Our ancient lawyers supposed that there was a recompense due when the subject admitted of division; yet it has been otherwise decided in this country, and it is of importance that decisions in an arbitrary matter should be preserved uniform. But I would not extend the decisions by analogy: a dis-

position to four daughters ought not to be viewed in a different light from a disposition to four sons or to four strangers. Here the daughters are not disponees, but substitutes. The counsel for Mr Rocheid incautiously admits that, if James Rocheid, younger, had had daughters, the eldest would have had a right to *præcipuum.* I cannot see this : it seems fatal to the plea on Mr Rocheid's part.

Kennet. The difficulty here arises from the accident of the same persons being both substitutes, and having the right of blood. If Sir James Elder had called his daughters as heirs whatsoever, a recompense would have been due ; bnt they are called *nominatim.* If James Rocheid, elder, had had afterwards a fifth daughter born to him, she would have been excluded from the succession. This points out a material difference between the right of the four daughters by blood and by destination.

On the 16th February 1773, the Lords found that, in this *case,* no *præcipuum* is due, as in the case of heirs-portioners *ab intestato ;* reserving to parties to be heard to whom the capital messuage shall be adjudged to belong.

Act. H. Dundas. *Alt.* A. Lockhart.

Reporter, Coalston.

Diss. Kaimes, Pitfour, Gardenston, Alva, Monboddo. Mr Cathcart reclaimed : his petition was appointed to be answered. He afterwards adjusted matters with Mr Rocheid.

1772. *November* 17. Alexander, Duke of Gordon, *against* James, Earl of Fife.

SUPERIOR AND VASSAL.

[*Dictionary,* 15,096.]

Hailes. The docquet subjoined to the charter, 1686, is null by the statute 1681. It mentions not the name and designation of the writer : the names and designation of the witnesses are not inserted in the body of the writ : but, independent of this, the docquet seems misunderstood by the pursuer. "Upon the condition above expressed," does not mean that David Stewart was to hold for ever of the lord of erection. *Tenend. in feudifirma et hæreditate in perpetuum,* is a constant clause in feu-farm charters, and means that the superior had alienated to the vassal as in property, and without reversion. This is not a condition by which the vassal agrees to hold. There is no occasion for a man interposing his assent to hold a perpetual property instead of a casual. The only meaning of the condition above expressed must be, that the vassal was willing to perform