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which brought the house to its present size; and he also added to the garden. This shows, that the house has not, at least in the present century, been thought too large for the estate; and, whether large or small, being the messuage or manor house belonging to the estate, it must go to the eldest heir portioner, as an indivisible subject, and without any recompense.

In fact, notwithstanding the pompous description given of this house, by reckoning small closets in the number of the rooms it contains, it is at present in a situation almost perfectly ruinous; and the longer the cause is spun out, it will grow the worse.

The late Boindlie possessed the whole house and pertinents, and thought it little enough for him, as he found himself obliged to make an addition to it for the accommodation of his family. His widow did the same; and though she found room also for her daughter and her husband, it will not follow that the house can accommodate two separate families.

As to the rent of the estate, which is likewise misrepresented, the fact is, that when set to the defender and her late husband by the liferentrix, at a very low rent, it yielded about 700 merks; and, when afterwards subset by the defender, she got from the subtenant L. 40 Sterling of rent, besides reserving to herself what was worth L. 17 Sterling more; and, when the lands were surveyed in April 1772, they appeared to contain about 540 acres of ground, valued at L. 70 Sterling *per annum*.

And, with regard to the marches, were there any room for dispute about the marches, it is obvious, that, as the question arises incidentally in the division, the same falls properly to be tried and determined there; and nothing can be more easy than to do so, when the lands are at any rate to be measured, and witnesses and assizers, &c. to go upon the ground, in order to take the necessary steps for accomplishing the division.

The COURT 'refused to advocate the cause, and remitted to the Sheriff to allow the respondent the expenses that have been incurred by the litigation before this Court.'

Act. *Hay Campbell.* Alt. *J. Ferguson, C. Hay.* Clerk, *Ross.*

Fol. Dic. v. 3. *p.* 264. *Fac. Col. No* 116. *p.* 311.

1792. *June* 12. JOHN SMITH *against* MARION WILSON, and Others.

No 16.
A person died possessed of a farm worth L. 1600, a house in town in which he resided, and five or six

JOHN WILSON, town-clerk of Glasgow, was proprietor of a farm in Dumbartonshire, worth about L. 1600. He had also a house in the town of Glasgow, where he almost constantly resided, valued at L. 1400.

Besides, Mr Wilson had a small tenement, called Muirend, consisting of five or six acres, at the distance of several miles from Glasgow, where he had erect-

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acres in the country on which he had built a small villa. Found, that, in these circumstances, the eldest heir portioner had no right to the country-house as a *præcipuum*.

ed a small kind of villa; the grounds, which were surrounded with a high wall, being converted into a garden and shrubbery, &c. and to this place he used to retire in the months of summer, for a day or two, as often as his professional engagements would allow.

Mr Wilson was also possessed of some moveable effects. At his death, he having no son, John Smith, in the right of his eldest daughter, claimed as a *præcipuum* the property at Muirend. In support of this claim, Smith

Pleaded; The right of the eldest heir portioner to the chief mansion-house or country residence of the defunct, does not depend on the relative value of it, or of the garden-grounds connected with it. Neither is it of any importance that, as in this case, the messuage is at some distance from the other parts of the landed property which belonged to the ancestor; *Reg. Mag.* 2. 27. 28.; Balfour, p. 223.; Skene, *De verb. sig. voce* ENEYA; Hope's Maj. pract. tit. *De Jure nostro de Succes. in lin. rect.*; Craig, 2. 14. 7.; Stair, 3. 5. 11.; Bankt. 3. 5. 84.; Erskine, 3. 8. 13.; 1707 and 1708, Cowies, No 6. p. 5362.; Carnock, No 9. p. 5366.; Peadies, No 10. p. 5367.; 1750, Chalmers, see note on No 10. p. 5369; Ireland *contra* Govan, No 13. p. 5373.; Forbes *contra* Forbes, No 15. p. 5378.

Answered; A *præcipuum* can be claimed only where, after the principal messuage or mansion-house has been set apart for the eldest heir portioner, there is some landed property attached to it, which may be divided among the other co-heirs. Besides, though used as a retreat for a day or two in the summer season, the house in question could not be called the principal messuage or mansion-house of the deceased, whose residence was in the town of Glasgow, where he carried on his business. The consequences of a contrary doctrine would be, to give to the eldest daughter of every petty tradesman or man of business, who may have had a country house, such a preference over her younger sisters as would be exceedingly unjust, and at the same time quite inconsistent with feudal notions; Du Cange, *voce Messuagium capitale*; Ibid. *voce Præcipuum*; Stair, 3. 5. 11.; Mackenzie, 3. 8. 25.; Bankt. 3. 5. § 5.; Erskine, 3. 8. 13.; Hawthorn, No 5. p. 5361.; Wallace, No 12. p. 5371.; June 24. 1786, Angus, *See* APPENDIX.

The Lord Ordinary found, that, in this case, the pursuer had no right to a *præcipuum*.

And, after advising a reclaiming petition, with answers,

THE LORDS unanimously adhered to the Lord Ordinary's interlocutor.

Ordinary, *Lord Justice-Clerk.* Act. *Mat. Ross.* Alt. *Craig.* Clerk, *Home.*

C. *Fol. Dic. v.* 3. *p.* 264. *Fac. Col. No* 217. *p.* 455.

Eldest heir portioner has the custody of the evidents. *See* COMMON INTEREST.

Relief among heirs portioners. *See* HEIR and EXECUTOR.

Brief of division where it ought to be directed. *See* JURISDICTION—*Sheriff-Court.*

Heirs portioners liable *in solidum*, or only *pro rata*. *See* SOLIDUM ET PRO RATA.

See COLLATION.

See APPENDIX.