No. 1.

p. 5375. But, as the parties in this case must take the succession under Andrew Simpson's settlement, they are not considered by the law as heirs-portioners, but as heirs of provision; Stair, B. 3. T. 5. § 11. Andrew Simpson having been an unlimited proprietor, the present parties, although heirs of line both to him and to his son William, cannot, by having made up their titles in that character, free themselves from the qualities which Andrew's settlement imposed on the succession. Nor does it signify, that they are not called to it *nominatim*, but by description, as the " heirs whatsoever of John Simpson. They are not the less heirs of provision on that account; of consequence, the pursuer does not come under the exception to the general rule above-mentioned.

Answered: The defender's plea is founded on an erroneous conception of the case, Cathcart against Roughhead. There, the maker of the settlement disponed his estate to his son and his issue; whom failing, to his four daughters *nominatim*, " equally among them," on whom, on the son's death, the succession accordingly devolved. It is plain, however, that they succeeded not as *heirs portioners*, but as *joint disponees*; and consequently there was no more room for the eldest claiming a *præcipuum*, than if they had been four sons or four strangers. But here, the parties succeed as the " heirs whatsoever" of John Simpson. It is left solely to the law to find out who these are. They succeed, therefore, in the strictest sense, as heirs-portioners at law; and consequently, the pursuer is entitled to every advantage which the law confers on the eldest sister.

The Lord Ordinary reported the cause on informations.

The Lords, on the ground stated for Mr. Wight, unanimously found, that the pursuer, as representing the eldest heir portioner, has an exclusive " right " to the mansion-house, office-houses, barn-yard and garden at Viewfield, as a " *præcipuum*."

Lord Ordinary, *Swinton*. Act. *Solicitor-Geueral Blair, John Clerk, W. Clerk.*
Alt. *Rolland, Davidson.* Clerk, *Menzies*

R. D. *Fac. Coll. No. 98. p. 238.*

1801. *May* 27.

ELIZABETH CRUICKSHANKS and Husband, *against* JEAN CRUICKSHANKS and Others.

No. 2.
Heirship moveables are divided equally among heirs portioners.

The five daughters of Patrick Cruickshanks succeeded to his estate of Stracathro, as heirs portioners. His brother had been appointed by him his executor.

Elizabeth, the eldest daughter, with consent of her husband, brought an action against her sisters, and their tutors, for division of the succession, in

which she claimed the mansion-house, offices, lawn, gardens, and pigeon-houses, as *præcipuum*, and also heirship-moveables.

No. 2.

The Lord Ordinary "sustained the pursuer's claim *jure præcipui*, to the "mansion-house, offices thereto belonging, the lawn around the mansion-"house, the new and old gardens, and the two pigeon-houses."

This interlocutor was acquiesced in.

His Lordship ordered informations on the claim for heirship moveables.

The pursuer

Pleaded: Heirship moveables are given to the heir to enable him to support the dignity of the family, and the duties of hospitality in the mansion-house, which devolve on the eldest heir-portioner, with more slender funds to support them than any other heir.

Heirship-moveables are indivisible, and fall naturally to be possessed by the head of the family, which the eldest heir-portioner undoubtedly is, and they belong to her exclusively upon the same principle as the mansion-house, Ersk. B. 3. T. 8. § 13, 17.

Answered: The first traces of heirship-moveables appear in the *Leges Burgorum*, c. 125; and from their beginning among burgesses, the reason of their introduction must have been rather to indemnify the heir for his being excluded from the moveables, which might be more valuable than the heritage, than the idea of supporting the dignity of family. They were extended to the heirs of barons, gentlemen, and freeholders, only by act 1474, c. 53; Mackenzie's Obs. on this act; Ersk. B. 3. T. 8. § 17.

The act of Parliament mentions "heirs" in general terms, and therefore must apply to females as well as males.

Now, heirs portioners sometimes are, and sometimes are not executors of the deceased.

In the last situation, are grand-daughters by a son predeceased, where the grandfather leaves other children. In such case, the heir-portioners collectively bear the character of heirs; as such, they are entitled to all the privileges, and the heir-ship moveables fall to be equally divided among them, as it would be quite anomalous to hold, that *proper* should be more divisible than *constructive* heritage.

There is still less reason for making any distinction among them, when (as in the present case), *ab intestato*, they are executors as well as heirs of the deceased.

Besides, as the original principle of succession suggests, that children should succeed equally to their parents, any deviation from it is to be considered as an exception from the general rule. Such is primogeniture, which arose from the feudal system, or the state of society which produced that system. Even in the more early periods of the feudal law, the fee opened equally to all the sons. This was altered by the *Leges Feudorum* only as to military fees, and as to others, an equal division remained.

No. 2.

Such still continues to be the law in some parts of England; Robinson's Law of Gavelkind, 12, 34, 78, 110, where the original rule universally prevails as to females; Black's Law of Descents, § 3. Some articles do not indeed admit of division, in which case, the eldest heir has the choice, but only on giving an equivalent; Blackstone's Commentary, Vol. 2. p. 190.

By our older law, the eldest heir-portioner gave an equivalent even for the mansion-house; and an equal division or obligation to give an equivalent for articles indivisible, remains as to heirship-moveables; Craig, Lib. 2. D. 17. § 7.; Stair, B. 3. Tit. 5. § 9.; Reg. Mag. Lib. 2. C. 27. § 4. C. 28.; Craig, Lib. 2. D. 14. § 7.; Bankt. B. 3. Tit. 5. § 84.

An opposite opinion is indeed delivered by Mr. Erskine, founded partly on the latter decisions as to the mansion-house, and partly on the decision, 16th January 1725, Executors of Lady Garnkirk, No. 7. p. 5366. But this opinion is erroneous. Exceptions from general rules are not to be extended to analogous cases, and the ultimate decision, in the case of Garnkirk, was against the exclusive right of the oldest.

The Lords, with one dissenting voice, "found, That the moveables in this "case divide equally among the heirs portioners, without any *præcipuum* to the "eldest."

Lord Ordinary, *Hermand*. Act. *C. Hay*. Alt. *D. Williamson*. Clerk, *Gordon*.

D. D. *Fac. Coll. No.* 231. *p.* 524.

1807. *May* 27. MACLAUCHLANE *against* MACLAUCHLANE.

No. 3.
The elder of heirs-portioners is entitled to the mansion-house, &c. as a *præcipuum*, though they be called to the succession as heirs whatsoever of the institute, but is not entitled to heirship-moveables.

MAJOR MACLAUCHLANE of Kilbride, in 1775, executed a general disposition of his whole property in favour of Artt Maclauchlane, his brother-consanguinean, and the heirs-male of his body; whom failing, to his own nearest heirs and assignees whatsoever. This disposition contained neither procuratory nor precept.

Artt Maclauchlane predeceased his brother the Major, who died in 1803, leaving two sisters-german, Elizabeth and Margaret, upon whom the estate of Ardchonnell, which belonged to the Major, devolved as heirs-portioners.

Elizabeth, the elder sister, claimed as a *præcipuum* the mansion-house and garden, and likewise heirship-moveables, including a valuable Gaelic manuscript, which had long been in the family. These claims being resisted by Margaret, the younger sister, an action was raised by Elizabeth, to have it found and declared, that as eldest heir-portioner she was entitled to the mansion-house, and also to heirship-moveables.

The Lord Ordinary (28th May 1805) "sustains the defences, in as far as "concerns the conclusions for heirship-moveables, assoilzies the defender there-