

HEIR PORTIONER.

1523. February 26.

ELIZABETH FENTON *against* The HERITRIX of Dirleton.

No 1.

GIF ony fre tenant or vassal haldand landis of diverse and sindrie sisteris, or utherwayis airis-female, as thair superiouris, he aucht and sould be enterit thairto be the eldest air-female allenarlie, and the releif quhilk he payis the time of his entrie sould be equallie dividit amang all and hail the superiouris, and on na wayis sould pertene to the eldest aire alane.

Fol. Dic. v. 1. p. 363. Balfour, (RELIEF.) No 5. p. 256.

1669. December 2. CARRUBER, (Monteith of) *against* SIBBALD, (Boyd.)

No 2.

CARRUBER and Mr David Sibbald having married two sisters, who were heirs portioners to Mr Robert Boyd, there was a decret of division raised and put to the knowldege of an inquest, who did ordain the eldest sister to have the principal house and messuage of the whole lands; and did ordain the second sister to have the mill and mill-lands, with the multures, as being in worth equivalent to the lands of this division. There being a reduction intented upon this ground, that the whole lands and mills being divisibile of their own nature, they should have been equally divided, especially they being *tenementa diversa*; and, as to the house, if it could have been conveniently divided, it ought to have been done, it was *answered*, That the messuage did belong to the eldest sister *jure primogeniturae*; and the mill being divisibile of its own nature, and worth the whole lands, there was a necessity to make the division, as was found by the inquest.

A message ought to be divided among heirs portioners, if it may be justly done, otherwise it falls to the eldest, who must satisfy the rest for their proportions.

THE LORDS did sustain the reduction, and ordained a new commission for dividing the house and messuage if it might be conveniently done; otherwise, that it might be valued, and the youngest sister have satisfaction for the half;

Tho' a mill cannot be possessed by two persons, yet the Lords divided the rents between two heirs portioners.

No 2. and for the lands and mill, they found them both divisible in their own nature; and therefore, that they should be both equally divided, seeing the mill may be set by both in tack, whereof the tack-duty may be divided, and that it is ordinary that several parties, by infeftments or other rights, having interest in a third or fourth, or fifth part of mills, albeit they must be bruiked *pro indiviso*, yet their rents and multures may be divided according to the distinct rights of several parties; likeas, if there were nothing left to two heirs portioners but a mill, it would not hinder; but by a brieve of division, both parties might have their just half of the multures and lands allocated to them.

Fol. Dic. v. 1. p. 363. & 364. Gosford, MS. No 207. & 208. p. 83.

* * * Stair reports the same case :

UMQUHILE Mr Robert Boyd of Kips, dying infeft in the lands of Kips and Gourmyre, and in a mill; and, having left two daughters heirs portioners, the younger having married Monteith of Carruber being dead, her son and heir raised a brieve of division against the eldest sister, whereupon division was made in this manner, viz. the rent of the mill being rated at L. 100 the chalders, being more than the rent of the land, the whole land was set on the one part, and the mill on the other; and, because the mansion-house belonged to the eldest sister, the land was adjudged to her, and the mill adjudged to the other, and the surplus of the rent of the mill allowed in satisfaction of the youngest sister's interest in the house. Carruber raises reduction of this division upon these reasons: *First*, That the lands ought to have been divided in two shares, and the house likewise; having convenient rooms and lodgings for both families, in which they have dwelt these twenty years, and not to have adjudged the mill only to him, stating the victual, being only meal, at L. 100 the chalders, far above the just value; and stating the mill-rent equivalent to the land-rent, which is subject to many more contingencies and expenses in upholding the mill, and difficulties in recovering the rent; and, in the common estimation, is not accounted equivalent to land-rent; so that he is enormly lesed, and offered 1000 merks to Margaret, the eldest daughter, to exchange shares, albeit the rent of either share be but about three chalders of victual. The defender *answered*, That the reasons of reduction were no way relevant, because all divisions ought to proceed, as is most convenient for either party, and where least is left undivided; and the division itself cannot have a precise rule, but is *in arbitrio* of the inquest, who were knowing gentlemen of the neighbourhood, and upon oath; so that unless the lesion were *ultra dimidium justı valoris* it cannot be recalled, seeing an inquest has the irrecoverable determination of life and death, which is of far greater moment than this; and this division proceeded upon Carruber's own process, and the inquest was called by himself; and, albeit it be true, that if the division could have been made, by giving both a share of the lands and a share of the mills, if there had been

more mills it might have been more equal; but here, if the land had been divided, the mill behoved to have remained for ever common, and so the division not be complete; likeas, the mill lies at a distance from the land and near to Carruber's own land, and is not a casual rent arising from free multures, but has the whole barony of Torphichen astricted by infestment; and the defender is willing to give 2,500 merks for each chalder of the mill-rent, which is the ordinary rate of land-rent; and the reason why there was no cavel or lot, was because the eldest sister falling the mansion-house by law, she behoved to have the land therewith.

THE LORDS sustained the reasons, and ordained a new commission for a new division. Here the Lords would not consider the points severally, whether the mansion-house ought to have been adjudged to the eldest sister, and a recompense to the second; or, whether such a house, being no tower nor fortalice, but which would be comprehended as a pertinent of the land, gave no preference, so that lots ought to have been cast upon the division; or whether the house could be divided *per contignationes*; or whether the mill, though it had been truly rated, could have been put to answer the whole land; or that the land behoved to have been divided and the mill remain common; but only generally, the LORDS gave a new commission for a new division.

Stair, v. I. p. 654.

1670. February 1.

MR WILLIAM DUNDAS and His SPOUSE *against* MAJOR BIGGAR.

In mutual compts and reckonings betwixt William Dundas, who had married a daughter of the Laird of Wolmet's, of his second marriage, and Major Biggar, who had married the eldest daughter of the first marriage, there being a question anent the method of accounting, upon this ground, that there being a tack of the coal of Wolmet set to the seven daughters, (whereof there were three of the first marriage, and four of the second); for their provisions, the rent of which coal, by the space of three years, was intromitted with by Dankeith, and thereafter, the rent was intromitted with by Moristoun by the space of eight years, against whom decreets were recovered, wherein allowance was given to Dankeith for alimending his wife's four daughters; and, in the decreet against Moristoun, allowance was given for the three daughters of the first marriage; Mr William Dundas craved, that he might have part of the whole sums contained in Moristoun's decreet, without any defalcation, seeing there was none given for the entertainment of his wife; because, that a tack made to the whole daughters of the coal, whereof there were diverse intromitters, who were distinct debtors, he, in law, might crave his full proportion of every particular debt for which he did insist; and whensoever Major Biggar should

No 2.

No 3.

Heirs portioners ought to share alike in good and bad debts, and cannot be forced to divide.