

No 3.

insist upon his intromission for aliment from Dankeith, he should then allow to him what was defalked for aliment. It was *alleged* for Major Biggar, That the whole sisters having a common and conjunct right to the rent of one individual coal, for the intromission whereof, decreets were gotten by his diligence, both against Moristoun and Dankeith, the method of the account and reckoning ought to be, that the whole defalcations allowed in both the decreets should be first taken off the total of the whole intromissions; and, that as to the remainder, the whole sisters should have alike right for their proportions, and share alike in the benefit and loss of the debtors against whom decreets were gotten. THE LORDS found, That the method of computing should be as to the whole; and the defalcations for aliment taken off the total; and, if any debtor was irresponsal, they all should share alike in the loss.

Fol. Dic. v. 1. p. 364. Gosford, MS. No 243. p. 99.

1672. January 13.

THE MASTER OF SALTON *against* LORD SALTON and ARTHUR FORBES.

No 4.

In an adjudication of an estate belonging to heirs portioners, the Lords sustained process, although one of the heirs, who had renounced, was not cited; but found the adjudication would reach no farther than to the portion of the heir cited.

Afterwards, it being discovered that a third heir, who had not renounced, was not called, the process was dismissed.

THE Master of Salton as assignee to a debt due by the late Lord Salton, having pursued his father thereupon, and he having renounced to be heir, insists now for adjudication; compareance is made for Arthur Forbes, who has a disposition from the Lord Salton, who *alleged*, that all parties having interest were not called, because the Lord Salton is but one of two heirs portioners of the late Lord Salton, and the other is not called. It was *answered*, That the other heir portioner had renounced. It was *replied*, That the renunciation being voluntary, and not upon a process, could be no ground of an adjudication; and the said Arthur Forbes having right by disposition, had good interest to allege that there was no lawful contradictor representing the defunct called, because all the heirs portioners jointly do represent.

THE LORDS repelled the defence, and found process; for they thought that a creditor might adjudge against an heir portioner alone *pro rata*, but that the adjudication would reach no further than the portion of that heir portioner called, and so reserved that allegiance to Arthur Forbes against the adjudication, when it should compete with his right, and sustained the adjudication *periculo petentis*.

Stair, v. 2. p. 45.

* * * Gosford reports the same case :

THE Master of Salton, as assignee to a bond granted by the deceased Lord Salton, did intent action against the now Lord Salton, his father, for payment,

upon a charge to enter heir to the last Lord Salton; wherein compearance was made for Arthur Forbes, as having right by adjudication to the estate of Salton, for whom it was *alleged*, That all parties having interest were not called, viz. ——— Lindsay, who was apparent heir portioner with the Lord Salton, defender, they being both descended of two sisters. It was *answered*, That there was no necessity to call her, because she had already subscribed a renunciation to be heir. It was *replied*, That the effect of this action being to adjudge the estate of Salton from the apparent heirs portioners, she ought to have been called, that decret might have been gotten against her as well as the Lord Salton; without which, the voluntary renunciation can be no ground of adjudging the whole estate. THE LORDS did repell the allegiance *hoc loco*, and found that the pursuer might insist against one of the heirs portioners, as he pleased; but reserved to Arthur Forbes to be heard upon that allegiance in any real action against the estate, why the adjudication to be obtained could give no right nor interest, but, to that part of the estate which did belong to my Lord Salton, who was cited; which decision is against former practiques, and may occasion an irregular procedure.

But thereafter, it being *alleged* for Arthur Forbes, That all parties having interest were not called, viz. a third heir portioner who had granted no renunciation; and if they were cited, they might propone a defence to elide the debt, it was *replied*, That the pursuer declared he insisted only against his father, who was apparent heir and cited, and ——— Lindsay, who had renounced, and that their two parts of the estate might be adjudged. THE LORDS did find the allegiance relevant, and found no process, until all heirs portioners who had not renounced, should be cited, as being requisite by custom and practise.

Gosford, MS. p. 229.

1696. November 12.

HAWTHORN against GORDON.

IN the action Margaret Hawthorn against Gordon of Cairnfield, her eldest sister's husband, for a portion of the value of the dwelling-house, in the lands whereof her sister and she were co-heiresses, *alleged*, That in the division among co-heirs, the manor-place *tanquam indivisibile quid* appertained solely to the eldest daughter, as a prerogative of primogeniture. *Answered*, That held only in towers and fortalices, such as Craig calls *turres pinnatæ*, and where the interest was considerable; but here it was proven the property did not exceed 200 merks yearly, and it was but such a house as a tenant might dwell in; and though it held of the King, and the manor-place was excepted in the wife's liferent sasine, yet this could not make it any more than an ordinary country-house. THE LORDS found it had no privilege, but was divisible between the two heirs portioners.

No 5.

An ordinary country house, (no tower or fortalice,) was found divisible among the heirs portioners of a small estate.

Fol. Dic. v. 1. p. 364. Fountainball, v. 1. p. 733.