1743. *January* 20. LAURIE *against* ———.

[C. Home, No. 229.]

THE Lords sustained the claim of the executors by the President's casting vote. *Dissent. Arniston.*

This interlocutor was altered, upon a reclaiming bill, by a considerable majority. Adhered to the alteration, December 12, 1743.

1743. *February* 1. JEAN and ANNE DALLASES *against* GEORGE DALLAS.

IN a contract of marriage, the father of the bride bound himself to pay a sum of money, to the husband and wife in conjunct fee and liferent, and to the heirs whatsoever of the marriage.

The Lords unanimously found,—That the money belonged to the heir, and did not divide equally among all the children. Notwithstanding that, it was argued,—That heir-whatsomever is variously understood, according to the nature of the subject; and that here the subject was a moveable sum, and therefore, by heir-whatsomever, ought to be understood *hæres in mobilibus*, the executor: that there was a *mutatio stili* in the contract, which favoured this interpretation; for, in the clause before, the land estate was provided to the heir-male of the marriage; and, in this clause, the money is provided to the heir-whatsomever, which must be supposed to mean a different person, and not even the heir of line, but the whole children.

1743. *February* 4. PEADIE *against* PEADIE.

[Kilk., No. 2, *Heirs-Portioners;* Elch., No. 1, *ibid.;* C. Home, No. 226.]

IN this case, the Lords found that the principal messuage, though neither tower nor fortalice, belonged to the eldest heir-portioner as a *præcipuum*, without any recompense or equivalent to the rest. Here it was allowed by both parties, 1*mo*, That a tower or fortalice went to the eldest heir-portioner without any recompense, because towers and fortalices are considered as accessories of the jurisdiction, *Instrumenta Jurisdictionis*, as Craig expresses it. Besides, towers and fortalices were *inter regalia*; they belonged to the King, who had a right to use them at any time for the defence of the country, so that the private persons who dwelt in them were little more than heritable keepers of them; and as it required a considerable expense constantly to keep them in repair, for that reason they were adjudged to the eldest heir-portioner with-

out any recompense to the other sisters. *2do*, It was allowed that the principal messuage did of right belong to the eldest sister, and that she had more than an option or *jus eligendi;* the only question was, whether she was obliged to give an equivalent to the other sisters.

The *rationes decidendi* were, 1*mo*, That it was so decided, *anno* 1707, *Cowie* against *Cowie*; and in a question so arbitrary, and where there was no inherent iniquity on either side, the decisions of the Court ought to make law: for this reason, both the President and Elchies were for the decision, who otherwise would have been against it. *2do*, As it is allowed, that the principal messuage belongs of right to the eldest sister, it would require very uniform custom, or even the authority of a statute, to make her pay for what is her own; especially if it is considered, that, seeing the house belongs to her of right, she cannot oblige the others to take it off her hand, and so is under a necessity to purchase a house, perhaps at the whole value of the estate. *3tio*, It is an indivisible subject in its nature, as much as a superiority, jurisdiction, or title of honour; nor is it an answer to say, that it may be valued in money, for so may a superiority, or jurisdiction.

On the other hand, it must be allowed that there was the authority of all our law-books from the earliest times,—not only our oldest law books, such as *Regiam Majestatem*, Skene, Craig, Hope, but likewise the more modern, if rightly understood, such as Stair and M'Kenzie. There were likewise alleged decisions on that side, particularly the *2d December* 1669, *Carrubber* against *Boyd*, observed both by Stair and Gosford, though somewhat differently.

1743. *February* 10. ——— *against* DAVID MAULE.

[C. Home, No. 222.]

MR Hepburn of Keith, having put up his estate to voluntary sale and roup, did, by a letter under his hand, empower David Maule to appear at the roup, and bid to the extent of twenty seven years' purchase, and promised, in case the estate should fall to him, to relieve him, and take it off his hands.

Accordingly David Maule did appear at the roup, and was the highest bidder; after which, a creditor of Mr Hepburn the seller arrested in Mr Maule's hands, and pursued a forthcoming. Mr Maule's defence was, that he was only a trustee for Mr Hepburn, who had bound himself to relieve him, and take the estate off his hands in case he carried it, so that he was not debtor to Mr Hepburn for the price, and consequently the arrestment was inept: which the Lords sustained; although they did not all approve of the practice, and thought that it was contrary to good faith not to let the highest bidder carry off the estate.

Afterwards the arrester sought the expenses of the arrestment and forthcoming from David Maule; and the Lords were willing to have granted them,