HEIR-PORTIONER.

1743. *February* 1. PEADIE *against* PEADIES.

No. 1.

THE eldest heir-portioner is entitled to the principal messuage or mansion-house, office-houses, garden, and orchard, without recompense. (See DICT. No. 10. p. 5367.)

1744. *November* 2. LADY HOUSTON *against* Sir GEORGE DUNBAR.

No. 2.

IF there is a messuage the eldest daughter gets it, and as a consequence thereof the share lying next that messuage; and the other heirs cast lots for their shares; and the division ought to be not according to the extent of the present rent only, but according to the real value of the grounds, quantity and quality considered.

Two feu superiorities being part of an estate descending to three heirs-portioners, the Lords found that the eldest had right to one superiority, and that both were liable to the third in a recompense for her proportion of the feu-duties, but without regard to any casualties. (See DICT. No. 9. p. 5366. and No. 11. p. 5369.)

1744. *November* 8.
CREDITORS of ROSEBERRY *against* LADY MARGARET and DOROTHEA PRIMROSES.

No. 3.

EARL ROSEBERRY disponed his whole unentailed estate, consisting of lands, houses, heritable bonds with infeftments on them, and some without infeftments, to his four younger children; but it was all general, and had no procuratory or precept; and it was at first thought of little or no value,

No. 3. because done on death-bed; wherefore first the second eldest, and afterwards the second youngest, accepted of this Earl's security for certain portions, and conveyed their interest in both the heritable and moveable estate; but the second youngest son being under age, reduced their transaction on minority, and pretty strongly qualified fraud likewise; and thereafter discovering that their father went to market after the deed, brought a declarator of *liege poustie*, and prevailed, (*vide* DEATH-BED.) Meantime, as the Earl was heir-at-law and of the investiture, he had uplifted not only some of the yearly profits, but also some of the principal sums. The two ladies afterwards took a decreet in implement, and adjudged, but adjudged only the half of the several subjects; and such of the heritable debts as had been totally uplifted by this Earl were not at all adjudged. Next the creditors adjudged and charged the superiors, but then they adjudged only the half pertaining to their debtor; and last of all, the ladies adjudged the Earl's half for payment of what he had uplifted of their half. In a count and reckoning before me betwixt these Ladies and the Earl and his creditors for clearing their several interests in the subject, the Ladies insisted to be preferred not only to the just and equal half of each of the subjects yet remaining, to which they were entitled by their father's disposition, but likewise to so much further of the remaining subjects as would make up their half of what the Earl had uplifted, and that the whole heritable succession was to be considered as *universitas*, whereof the Earl had right to the one half and they to the other; and whatever he had received out of whatever subject behoved to be imputed in satisfaction *pro tanto* of his half; and the remainder, after completing his half, behoved to pertain to them as in *a judicium familiæ erciscundæ;* but I gave it against them on two grounds, 1*st*, The point of law, for that each of the four younger children had by the father's disposition right only to one-fourth of each subject, and had the deed contained procuratory or precept, or any of the children adjudged in implement, none of the superiors could give that child infeftment in more than the one-fourth of the subject held of himself; and though the Earl, being heir of investiture, had thereby power to uplift more than his own share of any subject, whereby he became liable to the pursuers for their share, yet that did not diminish his interest by the disposition, (as having right to the shares of the two eldest,) in any other subjects; 2*dly*, Upon the account of the diligence, because the father's personal disposition conveyed only a *jus ad rem*, but the real right devolved to this Earl; the pursuers had only adjudged in implement the half of particular subjects therein named, omitting altogether those that had been uplifted, and the creditors had adjudged the other half and completed their

adjudication by a charge which was equal to an infeftment on each subject, and therefore as the pursuers could be preferred on no more than they had adjudged, so the creditors had completed their right to the other half. But I found that whatever this Earl had uplifted out of any particular subject, should be imputed to his half of that subject. The Ladies reclaimed, and the President was clear against the interlocutor on both points. He considered the whole as one *universitas* to be divided, whereof the Earl had already drawn so much; (and it would be so in executory, *vide* 16th June 1664, Murray;*) and as to the diligence, he thought that the Ladies were by their father's disposition preferable to this Earl the heir, and that his creditors' adjudications and charge could give them no more right than was in their debtor; but Arniston differed from him in both points, and argued long and well, and *inter alia*, as to the first point said, that by the law of Scotland, there is no such thing as an action *familiæ erciscundæ*; but every heir-portioner succeeds to a share of every heritable subject; and as to the other, that the *jus in re* devolved to this Earl, notwithstanding the disposition; and the creditors' charge to enter heir, and adjudications and charge against the superiors, carried that *jus in re* preferably to any personal right, whether of the last Earl or this Earl, and that a contrary judgment would overturn the foundations of our law, and our security from the records; and it carried by a very great majority to adhere. (See DICT. No. 75. p. 534. and No. 102. p. 3322. No. 4.

1750. *January* 2.

CHALMERS *against* CHALMERS, Heirs-Portioners of Gadgirth.

No. 5.

WE found that the eldest should have as a *præcipuum* without recompense, not only the house and garden, and offices adjoining to and belonging to the house, but the orchard also and avenue through it to the house, so far as the garden reached; but as there were several superiorities, we appointed a hearing in presence whether these should be divided as far as could be without splitting any one superiority; or if the whole must go to the eldest, and the younger sisters have a recompense for the feu-duties.—*N. B.* The garden and orchard were only about two acres and a half. (See DICT. p. 5369.)

(* DICT. No. 4. p. 13300.)

See NOTES.