No 11.

With regard to ward, relief, marriage, non-entry, and all causualties that not only belong to the superiority of land, but admit of a regular estimation in money, there can be no reason why the younger sisters, who have an equal interest in the land, should be deprived of their proportion. And as to the principal messuage, though, as an indivisible subject, it goes to the eldest, yet, as a subject which can bear an estimation in money, it is settled that the younger sisters are entitled to a recompence, Glanvil, *lib.* 7. *cap.* 3. *Reg. Maj. lib.* 2. *cap.* 27. § 4. *cap.* 28. § 3.

It is very true, that as on one hand the superior is not entitled to homage and military service from each of the heirs portioners in the property, but only from the eldest, so, on the other hand, the vassal is not bound to do homage or perform military service to each of the heirs portioners in the superiority, but only to the eldest; nor is the heir of the vassal bound to demand infeftment from each of those heirs portioners, but only from the eldest. But though the eldest is thus preferred to indivisible rights, without a recompence, where the subjects admit not a pecuniary estimation; it will not follow, that she must also be preferred without a recompence to pecuniary casualties, which not only admit an estimation, but which, in fact, can be divided among the heirs portioners. Taking the matter in this light, the interlocutor is undoubtedly well founded. While the heirs portioners in the superiority possess *pro indiviso*, there is the same reason for distributing the feu-duties among them, that there is for distributing the rents. And when they chuse to bring a process of division, there is the same reason for parcelling out among them the feu-superiorities, that there is for parcelling out the property of lands. And if there be not so many superiorities as there are heirs portioners, the privilege of age entitles the elder sisters to make a choice, upon giving a recompence to the others.

*Fol. Dic. v.* 3. *p.* 263. *Rem. Dec. v.* 2. *No* 57. *p.* 85.

---

1758. *January* 20.

JEAN WALLACE, and JOHN BUCHANAN Writer in Glasgow, her Husband, *against* JANET WALLACE, and THOMAS BUCHANAN of Kirkhouse, her Husband.

No 12.
A dwelling-house, &c. built within a burgh of barony discontiguous to the rest of the heritor's landed estate, falls not to his eldest heir portioner as a *præcipuum*.

ALEXANDER WALLACE sheriff-clerk of Renfrew, died possessed of moveables to the extent of L. 3000 Sterling, and heritage to the value of about L. 1000 Sterling. He left two daughters, Jean and Janet Wallaces; and as he made no settlement, his estate fell to be divided between them.

Alexander Wallace's heritable estate consisted of 70 acres of ground yielding about 200 merks, situated at the distance of two or three miles from Paisley; of a house and offices, which he built for his own residence, on half an acre

No 12. of ground purchased by him at the west end of the town of Paisley, and held feu of the burgh; and of six or seven acres of land, lying near half a mile distant from his house, which he purchased, and inclosed, after building the house, and sometime let to a tenant, but afterwards took into his own possession.

Jean, the eldest daughter, brought a process against her sister Janet, for having the house, offices, and garden, at Paisley, as the messuage or mansion-house of the defunct, declared to belong to her as a *præcipuum*, in respect of her primogeniture, without being liable to give a recompence to her sister.

*Pleaded* for the pursuer, By the custom of this country, female heirs succeed equally in lands, and heritable subjects that admit of division; but such subjects and rights as are indivisible, devolve, according to the law of primogeniture, upon the eldest heir portioner. In judging what subjects are divisible or not, the nature of the subject, and not the value or estimation of it, is considered. The brief of division only concerns such subjects as of their own nature can admit of a partition, and does not apply to indivisible subjects, or direct them to be valued or sold, and the price divided. Nor does the law distinguish between mansion-houses used by heritors of lands for their own proper residence, but built in the form of an ordinary dwelling-house, and such houses built like a tower or fortalice. Of whatever form the house is, it falls to the eldest heir portioner, together with the offices and garden. So it was found, 26th February and 5th March 1707, and 24th June 1708, Cowie *contra* Cowie, No 6. p. 5362; and in the competition among the heirs portioners of James Peaddie merchant in Glasgow, No 10. p. 5367; and no recompence was allowed. The house in question was entirely possessed by the defunct, and built for the accommodation of his single family; and therefore ought to belong to the pursuer.

*Answered* for the defender, By our ancient law, the eldest daughter was entitled to the messuage, or principal mansion-house upon the estate of her father; but under this quality, *ita quod in aliis rebus satisfaciet aliis sororibus ad valentiam*; *Reg. Maj. L.* 2. *C.* 27. § 4. *C.* 28. § 3.; *Craig, lib.* 2. *dieg.* 14. § 7. It is true, that a few later decisions have found the eldest daughter entitled to the messuage, without recompence; but the point cannot yet be held as so established; and, at any rate, these decisions will not be extended still further, contrary to the common law of succession among heirs portioners, which distributes equally every subject, capable by its nature either of division or of valuation. The brief of division is an executorial of the law, which confers the succession of the defunct's heritable estate upon his daughters *per capita*; and therefore must be understood to direct the Sheriff, and the assize called by him, not indeed to divide every field, farm, house, or mill, but to make the several allotments, according to the just value of the several subjects which compose the heritage. Titles of honour and jurisdictions are incorporeal rights, which, from their own nature, and that of the grant of them, cannot be vested in more

No 12.

than one person at the same time; and therefore fall to the eldest. A single superiority too goes the same way, in respect to the vassal's interest, which forbids a division; but, then, being properly a right of lands, a recompence is due; and if there are more superiorities, they are distributed among the sisters.

Thus it is plain, that every indivisible subject does not fall to the eldest without recompence.—But, at any rate, it is sufficient to exclude this pursuer's claim to the house in question, that it is not a mansion-house standing on the defunct's land estate, which lies at a considerable distance from it, but a house built within the town of Paisley, contiguous on one side to other houses in the town, and held feu of the burgh; so it is merely an urban tenement, which was intended for the defunct's residence when attending his business as clerk to the Sheriff-courts held there. It therefore falls under the division, according to the opinion of Craig, Stair, and other authors.

*Replied* for the pursuer, The house may be truly said to be situated in the country, as there are none of the houses of the burgh that lie without it, or separate it from the adjacent fields; and it cannot come under the description of borough-houses mentioned by Lord Stair, which are ordinarily set *per contignationes*, and built for the accommodation of several families. Most of the fields for two miles round hold of this burgh of barony; but that could never hinder an heritor from building a proper mansion-house upon his own grounds; and although this house and garden are not contiguous to the other lands of the defunct, yet that circumstance ought not to make any variation in the case, as a part of his lands were so near as to afford him the conveniency he wanted for keeping his horses and cattle,

The Court seemed to be of opinion, that this house was not properly a messuage or mansion-house, in respect of its situation.

'THE LORDS sustained the defence, assoilzied the defender, and decerned.'

Act. *Ferguson.* Alt. *Miller.* Clerk, *Kirkpatrick.*

*D. R.* *Fol. Dic. v. 3. p. 262.* *Fac. Col. No 90. p. 161.*

---

1765. *November 14.* ROBERT IRELAND *against* ALEXANDER GOVAN.

No 13.
Found in conformity with Peadie against Peadies, No 10. p. 5367, that the principal messuage belongs to the eldest heir portioner without recompence to the other heirs.

THE lands of Mains of Eastwood, containing about 150 acres, and worth about L. 35 Sterling *per annum*, having fallen to four heirs portioners, Alexander Govan, as in the right of the eldest sister, brought an action, for dividing the lands, against Robert Ireland, as in the right of the other three sisters.

It was *argued* for the younger sisters, on the first point, *1mo*, There are here no *termini habiles* for the principal messuage going to the eldest sister as a *præcipuum*; because the mansion-house is neither a tower nor fortalice, which alone, as carrying along with them an idea of honour, are considered as indivisible, and, therefore, fall to the eldest sister as a *præcipuum*. See Craig, lib.