

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.

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,