

1742. December 20. HEIRS-PORCIONERS of the ESTATE of GARNOCK.

[Kilk., No. 1, *Heirs-Portioners.*]

LADY HOUSTON, Sir William Nicolson, and Sir George Dunbar, having right, as heirs-portioners, each to a third of the estate of Garnock, brought an action for division before the Court of Session. The Lords remitted to the Sheriff of the county, to call an inquest of fifteen men and settle the division by them, and after that to report to the Lords. Accordingly, an inquest was called, of ten gentlemen and five farmers in the neighbourhood, who, after a year's labour, divided the estate into three parts as equal as possible; which division was reported to the Lords. The first question was, Whether the eldest heir-portioner, Lady Houston, having had the house and parks adjudged to her by way of *præ-cipuum*, should not have the third lying nearest the house? or whether the division should not be made by lot and cavel, which is the rule laid down in some of our ancient law books?

The Lords found,—That the eldest heir-portioner had no right of election, and that she had no peculiar exclusive right to the third lying nearest the principal messuage, the method of division anciently among heirs-portioners having been by runrig; but that, in equity and common sense, and by the rule laid down in the Act 23, Sess. 5, Par. 1st, Will.—which directs that, in division of runrig, principal regard should be had to the mansion-houses, that the division may be commodious to them; the Lady Houston ought to have that third allotted to her that lay nearest the mansion-house.

In this case, the other two parties offered the Lady either to take the third lying nearest the house, and give her either of the other two, with £500 to boot, or to let her have it, provided she gave them that sum. But this offer the Lords considered only as a bite and device to get £500 from Lady Houston, because they knew very well she could not part with the third they wanted, without giving up her house, upon which she had laid out a great deal of money.

*2do*, It was OBJECTED to the division,—That the third nearest the house was £60 sterling more in rent actually paid at present than either of the other two thirds. And it was argued, That the real rent ought to be the rule in this division, as well as in other divisions,—such as divisions of valuations, old extents, schoolmasters' salaries, &c. To which it was ANSWERED,—That the real rent was a very fallacious rule to follow in such divisions, because some rents may be more racked than others, some grounds more improveable and more abounding with the materials of improvement than others.

The Lords sustained the division, notwithstanding the inequality objected to it, and found, That they could have no better evidence than that of fifteen men in the neighbourhood, who declared, upon their great oath, that the three parts were equal.