duty, she must pay a recompence for it to the younger sisters; but there is no necessity for the mansion-house and gardens falling to the eldest sister without a recompence. They are neither *sua natura*, nor *ex lege*, indivisible, and may easily be valued; and, therefore, they ought to be divided among the heirs portioners; or, if they shall be considered as falling to the eldest sister, there is surely no reason why she should not pay a recompence for them to the other heirs portioners, in order to preserve that equality among them which is the principle by which the female succession is regulated. See Reg. Mag. l. 2. c. 27. § 3. and c. 28. § 1, 2, 3, and 4; Balfour's Pract. p. 223; Skene, *voce* ENEYA; Craig, l. 2. dieg. 14. § 7; and the case Carruber *contra* Sibbald, No 2. p. 5357; and Hathorn *contra* Gordon, No 5. p. 5361. No 13.

Answered; The mansion-house may, with great propriety, be reckoned among the subjects that do not admit of a division, as it would be impossible to divide a small house among a number of heirs portioners? neither does it properly admit of a valuation, as it would be next to impossible to get any two valuators to agree in a value to be put upon houses; and, therefore, the law has justly considered the principal messuage as a subject indivisible, and incapable of being valued, and which therefore falls to the eldest sister. And, though some of our oldest writers, and more ancient decisions, lay it down that a recompence is due, yet our later writers are of a contrary opinion, supported by an uniform train of decisions from the beginning of this century, where, as often as the case occurred, the Court found the eldest heir-female entitled to the principal messuage, without any recompence. See Stair, lib. 3. t. 5. § 11; Erskine, lib. 3. t. 8. § 13; and Feb. 26th 1707, Cowies, No 6. p. 5362; Carnock, No 9. p. 5366; Peadies, No 10. p. 5367; and 1750, Gadgirth, see note on No 10. p. 5369.

'THE LORDS found the eldest sister entitled to the principal messuage as a *præcipuum*, without any recompence.'

Act. *Lockhart*. Alt. *Henry Dundas*.

C. B. *Fol. Dic. v. 3. p. 262. Fac. Col. No 17. p. 227.*

1773. *February* 16.

JAMES CATHCART of Carbiston, one of the Heirs portioners of Inverleith, *against* JAMES ROCHEID, the other Heir portioner of that Estate. No 14.

There is a distinction between heirs portioners *ab intestato*, and heirs portioners provisional, with respect to the

IN 1691, Sir James Rocheid of Inverleith executed a deed of settlement, disponing the estate of Inverleith, and others, to his son James, and the heirs whatsoever of his body, whom failing, to Magdalen, Janet, Mary, and Elizabeth, his four daughters, equally among them, and the heirs whatsoever of their bodies; but qualified with this condition and proviso, that it shall not be in the

No 14. *præcipuum*; which, in the case of the latter, was found not claimable in right of the eldest of four daughters, who had been, failing a son, *nominatim* called to the succession, by a settlement equally among them.

power of James, the son, to contract debts, or otherwise burden the lands disponed, or to alienate the same, or do any other deed whereby they may be adjudged, or otherwise evicted in prejudice of his four daughters; with liberty, however, to James, the son, to make suitable provisions for a wife and younger children, and to charge the estate with debt to a certain extent. And these provisions are guarded with irritant and resolutive clauses. The entail was completed by infeftment, and recorded.

On Sir James's death, James, the son, took the estate on the footing of this entail; and, having died in 1737, without issue, the succession devolved on Mary and Elizabeth, two of Sir James's four daughters then living, and the eldest sons of Magdalen and Janet, deceased, who made up their titles by special service, as heirs of provision.

From the death of the last mentioned Sir James Rocheid, in 1737, the estate of Inverleith had been held *pro indiviso*, till James Rocheid, the descendant of Mary, the third daughter, having succeeded to her fourth share, and having right to the fourths of the other two sisters, Janet and Elizabeth, lately insisted in a brief of division, before the Sheriff of Edinburgh, against James Cathcart, who, as being grandson to Magdalen, the eldest daughter of Sir James Rocheid, and standing in her right as to one fourth part of the lands of Inverleith, contended, that he was entitled to have the mansion-house, offices, and garden of Inverleith, allotted to him as a *præcipuum*; and the Sheriff having over-ruled his claim, the cause was removed by bill of advocation; which was passed of consent.

Pleaded by the claimant; As it is a fixed principle in the law of Scotland, that the eldest heir portioner takes, as a *præcipuum*, all subjects which are in their nature indivisible, which is the case of the messuage and its appurtenances, the question resolves into this abstract point, Whether the same principle ought not to obtain, where the same persons are both heirs of line and heirs of provision?

That such would be the rule in succession, *ab intestato*, is established by the uniform opinion of the later writers upon the law of Scotland, and by a train of decisions conformable thereto; and, therefore, it lies upon the other party to show upon what principle the distinction between heirs-general and heirs of provision can be supported. The *ratio legis* is the same in both, viz. the indivisibility of the subject, which, in the nature of things, cannot admit of being split, and, therefore, *ex necessitate*, must be decreed to one or other of the heirs portioners; and, *cæteris paribus*, the law does so far acknowledge a secondary right of primogeniture among heirs portioners, and in respect thereof, throws the indivisible subjects into the portion of the eldest, without any recompence to the other heirs portioners; *et ubi eadem est ratio, idem debet esse jus.*

No 14.

It is manifest, from the tenor of it, that Sir James's only view, in executing this setlement in the form of an entail, was to tie up the hands of his son, that he might not dissipate the estate; the prohibitive, irritant, and resolutive clauses, went no farther than the son; and, upon his death, the estate became a fee-simple in favour of those very persons who would have taken, in the course of legal succession, his four daughters, failing issue of his son's body; so that the destination of succession in their favour had nothing farther in view, than to continue the line of natural succession. Under these circumstances, it is impossible to imagine that Sir James could intend to establish a different rule among his own daughters, than would have obtained, had the estate devolved to them in the course of legal succession.

Answered; In some later cases, the Court has, no doubt, found, that the eldest heir portioner is entitled to the principal messuage, without being liable in any equivalent. But, whether these decisions are well or ill founded in law, is immaterial; because it is clear that they apply singly to the case of succession devolving, *ab intestato*, upon heirs portioners.

In strict propriety, the expression, 'heirs portioners,' applies only where a *hæreditas* is split into portions, not by a deed of the party disponing a subject to two or three females equally among them, but by the operation of law; Stair, b. 3. tit. 5. § 11. In the present case, therefore, the four daughters of Sir James Rocheid did not take, as heirs portioners, in the legal sense of the word, but as joint disponees, to whom the estate was conveyed, in the event their elder brother should die without leaving heirs of his body; and the *hæreditas* comes to be divided among them, not in consequence of any act of the law, which would constitute them heirs portioners, but by the express terms of Sir James Rocheid's settlement; which declares, that, in the above event, they should succeed, and the lands and barony of Inverleith be divided equally among them.

As the right of primogeniture, giving the whole of a land-estate to the eldest son, in preference to his brothers, and giving a *præcipuum* to the eldest heir portioner, in case of a female succession, is, like all other rules of succession, *ab intestato*, derived from the presumed will of the deceased, it must unavoidably cease where a person has not left his will to be gathered from presumption, but has disposed of his estate in his own lifetime, in the clearest and most unambiguous terms. Where an express deed is founded upon, the favour of promigeniture, and the presumptions of law, are at an end; and the only question is, with regard to the meaning and import of that deed.

The mode of expression, 'which failing, to Magdalen, Janet, Mary, and 'Elizabeth Rocheids, my daughters, equally among them,' importing as clearly as words can, that the four daughters were to have each an equal interest in the subjects thereby conveyed, without any preference of the

No 14. one to the other, either expressed or implied, is repeated in all the other clauses of the deed. When Mr Cathcart, therefore, as representing Magdalen, one of the four daughters, insists, that the mansion-house, &c. of Inverleith shall be adjudged to him, without being liable for any equivalent to one who stands in right of the other three daughters, is it possible to deny that he is maintaining a plea directly in face of that very deed under which alone he can claim?

'THE LORDS find, that, in this case, the claimant, James Cathcart, as in the right of the eldest daughter, is not entitled to a *præcipuum*, as in the case of heirs portioners; and remit the cause to the Sheriff to proceed accordingly; reserving to the parties to be heard before him, to whom, in the division, the mansion-house, offices, garden, and planting about the same, shall belong, he paying a recompense.'

Reporter, *Coalston.* Act. *Dean of Faculty.* Alt. *Crosbie, Blair.* Clerk, *Tait.*
Fol. Dic. v. 3. *p.* 263. *Fac. Col. No* 58. *p.* 143.

1774. *June* 24. GEORGE FORBES *against* ELIZABETH FORBES.

No 15.
The eldest heir portioner was found entitled to the mansion-house and garden, as *præcipuum*, without any recompense, though it was alleged the house was divisible and actually inhabited by two families, and was out of all proportion in value to the yearly rent of the lands.

THE succession to the estate of Boindlie, in Aberdeenshire, devolved upon two sisters, as heirs portioners to their father Captain John Forbes.

George Forbes acquired right from the eldest to her share; and having taken out a brief of division directed to the Sheriffs, when the brief came before him, various objections were stated, on the part of Elizabeth Forbes, the other heir portioner, in particular respecting the *præcipuum*; and, 2*dly*, that the marches of the lands were not distinct, and that these ought first to be settled.

The Sheriff repelled the objections to the division of the lands; and, 2*dly*, found, 'That George Forbes, as deriving right from Jean Forbes, eldest daughter, and one of the heirs-portioners served to the deceased Captain John Forbes of Boindlie, is entitled to have the lands of Boindlie, &c. divided betwixt him and Elizabeth Forbes, the other heir portioner: That the petitioner George Forbes has right to the legal *præcipuum*, being the mansion-house and garden thereto belonging, without recompense to the respondent; but superseded determining the particular quantity of ground allotted to the garden, until a survey and mensuration of the whole lands under division be made out and reported.' And, by the same deliverance, warrant was granted for summoning an inquest, and for citing witnesses; and the Sheriff afterwards named a surveyor for making the survey.

Elizabeth Forbes and her husband presented a bill of advocation, complaining of these proceedings.