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the legal *præcipuum*, being the mansion-house and garden thereto belonging, without recompense to the respondent; but superseded determining the particular quantity of ground allotted to the garden, until a survey and mensuration of the whole lands under division be made out and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.

In point of fact, she set forth, that, above 200 years ago, a younger son of the family of Pitsligo acquired the farm of Boindlie, on the coast of Aberdeenshire. The rent of that piece of land, till lately, was only 200 merks, and has been lately raised to about L. 26 Sterling: That, as this was their first acquisition, the family took their title from that farm; but they afterwards acquired an estate in Cromar, at about fifty miles distance, of above seventeen times the value of the lands of Boindlie: That, about the year 1660, when they were in possession of this large estate, the then Forbes of Boindlie built a house for his residence; and, as he was then tutor and nearest agnate to the family of Pitsligo, his prospect of succession to that estate was not very remote. As Boindlie lay nearer the sea coast, and within two miles of Pitsligo, he chose, it seems, to place his house on this detached little farm rather than on his principal estate. A house was built in proportion to the fortune of the family: By various accidents, however, they were obliged to dispose of all the rest of their estate except Boindlie, which remained alone to them with this building, which the rents were hardly sufficient to keep in repair. No 15.

And, with regard to the *first* point, Whether any *præcipuum* at all be due in the present case? it was *pleaded*, It is true the Court have found, in some decisions of late, that the eldest sister is entitled to the mansion-house and garden, as a *præcipuum*, without any recompense; but, at the same time, that the Court has departed from what might be reckoned the old law, with regard to a recompense being due, as laid down by the books of the Majesty, Craig, and the older decisions, which Lord Bankton also gives as his opinion: The Court have in no case given the mansion-house and gardens to the eldest sister, except where it could be properly considered as a *præcipuum* according to the old feudal laws.

There were only two reasons for giving these subjects to the eldest sister, viz. that they were considered as indivisible; and that she, as being at the head of the family, had the rites of hospitality to maintain. None of these reasons, however, occur in the present case. The house not only is divisible, but in fact has been absolutely divided for many years. The one side was possessed by the old Lady Boindlie, and the other side by Elizabeth Forbes's husband, who had a lease of the lands. And if there be any person who is to keep up the rites of hospitality, that burden will certainly fall upon Elizabeth, to whom part of the estate belongs, and not upon her sister, who has abandoned it, nor the pursuer who is a stranger.

But, 2*dly*, In all cases where the Court have given the mansion-house as a *præcipuum*, there has always been a proportion between the house and the estate. The house has always been such as might have been built by a proprietor of the estate to which it belonged. The present case is perfectly different. The house and gardens in dispute must have cost, at the time they were built, above L. 400. The rent of the present lands of Boindlie was then only 200 merks, and the value of it, at fifteen years purchase, the ordinary price then, would

No 15. have been only 3000 merks, or half the value of the house which was built for an estate above seventeen times that rent. Were no distinction to be made between the case, where a mansion-house is proportioned to the estate, and where the disproportion is so great as in the present question, it must render the succession of heirs portioners often exceedingly unequal, and lead to consequences which could not be intended by law. And in a case something similar to the present, Wallace *contra* Wallace, No 12. p. 5371., the Court sustained the defence, that a house, that was discontiguous to the rest of the landed estate, did not fall to the eldest sister as a *præcipuum*.

In the *second* place, were it to be supposed the Court should find a *præcipuum* due to the pursuer without a recompense, he can have no pretence to any more than the garden corresponding to the old garden of the family.

Lastly, With regard to the great encroachments made by the pursuer, it is evident that the division cannot proceed until they be properly settled.

Answered; By the interlocutor in question, the general point is indeed determined, that the eldest heir portioner is entitled to a *præcipuum*; but, as to every thing else, the interlocutor is quite innocent, having neither determined the extent of the *præcipuum*, so far at least as respects the garden, nor ascertained the precise boundaries of the lands, as neither of these could with propriety be done till after the survey was taken; and then, and no sooner, was the Sheriff to determine upon them. Hence this obstinate litigation, which the other party have thought proper to carry on with respect to points not yet decided, and which they would not allow the Sheriff to determine when he was *in cursu* of doing it, is premature, and highly improper.

As to the general point, that the eldest heir portioner is entitled to the house and garden as a *præcipuum*, Lord Stair lays down this to be the law of Scotland, b. 3. t. 5. § 11. And it has been found, by repeated decisions, that under the mansion-house must also be included the garden and orchard, as pendicles thereof, Cowie, No 6. p. 5362.; Peadie, No 10. p. 5367.; Chalmers of Gadgirth, in 1750, see note in p. 5369.; Ireland *contra* Govan, No 13. p. 5373. The case of Wallace *contra* Wallace, in 1758, referred to on the other side, respected a dwelling-house within burgh.

Neither is the present case attended with any specialties which can have the effect to withdraw it from the common rule. The pursuer knows very little of the history of the family of Boindlie, nor does he think it of much consequence to the present question to trace that history for centuries back. The house of Boindlie, however, could not well have been built for the accommodation of an estate in Cromar, at the distance of forty miles; and, to judge from appearances, it must have been built at a much earlier period than that mentioned by the other party, at least, that part of it which was not built by the late Captain Forbes of Boindlie, who, finding the old house insufficient for him, though he did not possess a fur of land other than Boindlie itself, made two additions to it,

No 15.

which brought the house to its present size; and he also added to the garden. This shows, that the house has not, at least in the present century, been thought too large for the estate; and, whether large or small, being the messuage or manor house belonging to the estate, it must go to the eldest heir portioner, as an indivisible subject, and without any recompense.

In fact, notwithstanding the pompous description given of this house, by reckoning small closets in the number of the rooms it contains, it is at present in a situation almost perfectly ruinous; and the longer the cause is spun out, it will grow the worse.

The late Boindlie possessed the whole house and pertinents, and thought it little enough for him, as he found himself obliged to make an addition to it for the accommodation of his family. His widow did the same; and though she found room also for her daughter and her husband, it will not follow that the house can accommodate two separate families.

As to the rent of the estate, which is likewise misrepresented, the fact is, that when set to the defender and her late husband by the liferentrix, at a very low rent, it yielded about 700 merks; and, when afterwards subset by the defender, she got from the subtenant L. 40 Sterling of rent, besides reserving to herself what was worth L. 17 Sterling more; and, when the lands were surveyed in April 1772, they appeared to contain about 540 acres of ground, valued at L. 70 Sterling *per annum*.

And, with regard to the marches, were there any room for dispute about the marches, it is obvious, that, as the question arises incidentally in the division, the same falls properly to be tried and determined there; and nothing can be more easy than to do so, when the lands are at any rate to be measured, and witnesses and assizers, &c. to go upon the ground, in order to take the necessary steps for accomplishing the division.

The COURT 'refused to advocate the cause, and remitted to the Sheriff to allow the respondent the expenses that have been incurred by the litigation before this Court.'

Act. *Hay Campbell.* Alt. *J. Ferguson, C. Hay.* Clerk, *Ross.*

Fol. Dic. v. 3. *p.* 264. *Fac. Col. No* 116. *p.* 311.

1792. *June* 12. JOHN SMITH *against* MARION WILSON, and Others.

No 16.
A person died possessed of a farm worth L. 1600, a house in town in which he resided, and five or six

JOHN WILSON, town-clerk of Glasgow, was proprietor of a farm in Dumbartonshire, worth about L. 1600. He had also a house in the town of Glasgow, where he almost constantly resided, valued at L. 1400.

Besides, Mr Wilson had a small tenement, called Muirend, consisting of five or six acres, at the distance of several miles from Glasgow, where he had erect-