

No. 2.

Such still continues to be the law in some parts of England; Robinson's Law of Gavelkind, 12, 34, 78, 110, where the original rule universally prevails as to females; Black's Law of Descents, § 3. Some articles do not indeed admit of division, in which case, the eldest heir has the choice, but only on giving an equivalent; Blackstone's Commentary, Vol. 2. p. 190.

By our older law, the eldest heir-portioner gave an equivalent even for the mansion-house; and an equal division or obligation to give an equivalent for articles indivisible, remains as to heirship-moveables; Craig, Lib. 2. D. 17. § 7.; Stair, B. 3. Tit. 5. § 9.; Reg. Mag. Lib. 2. C. 27. § 4. C. 28.; Craig, Lib. 2. D. 14. § 7.; Bankt. B. 3. Tit. 5. § 84.

An opposite opinion is indeed delivered by Mr. Erskine, founded partly on the latter decisions as to the mansion-house, and partly on the decision, 16th January 1725, Executors of Lady Garnkirk, No. 7. p. 5366. But this opinion is erroneous. Exceptions from general rules are not to be extended to analogous cases, and the ultimate decision, in the case of Garnkirk, was against the exclusive right of the oldest.

The Lords, with one dissenting voice, "found, That the moveables in this case divide equally among the heirs portioners, without any *præcipuum* to the eldest."

Lord Ordinary, *Hermand.* Act. *C. Hay.* Alt. *D. Williamson.* Clerk, *Gordon.*

*D. D.*

*Fœc. Coll. No. 231. p. 524.*

1807. *May 27.* MACLAUHLANE *against* MACLAUHLANE.

No. 3.

The elder of heirs-portioners is entitled to the mansion-house, &c. as a *præcipuum*, though they be called to the succession as heirs whatsoever of the institute, but is not entitled to heirship-moveables.

MAJOR MACLAUHLANE of Kilbride, in 1775, executed a general disposition of his whole property in favour of Artt Maclauchlane, his brother-consanguinean, and the heirs-male of his body; whom failing, to his own nearest heirs and assignees whatsoever. This disposition contained neither procuratory nor precept.

Artt Maclauchlane predeceased his brother the Major, who died in 1803, leaving two sisters-german, Elizabeth and Margaret, upon whom the estate of Ardchonnell, which belonged to the Major, devolved as heirs-portioners.

Elizabeth, the elder sister, claimed as a *præcipuum* the mansion-house and garden, and likewise heirship-moveables, including a valuable Gaelic manuscript, which had long been in the family. These claims being resisted by Margaret, the younger sister, an action was raised by Elizabeth, to have it found and declared, that as eldest heir-portioner she was entitled to the mansion-house, and also to heirship-moveables.

The Lord Ordinary (28th May 1805) "sustains the defences, in as far as concerns the conclusions for heirship-moveables, assoilzies the defender there-

“ from ; also sustains the defences as to the conclusion, that the Gaelic manuscript shall be found to belong in property to the pursuer exclusively, and “ without recompense ; but finds the pursuer entitled to the sole custody “ thereof, for behoof of herself and the defender, and decerns accordingly : “ Repels the defences, in as far as concerns the conclusion for having the pursuer entitled to a *præcipuum* ; and finds, that the mansion-house, with the “ garden, yard, and office-houses thereto appertaining, must be set apart to “ the pursuer as her exclusive property, without recompense ; and decerns.”

Mutual petitions were presented against his interlocutor. The younger sister

Pleaded : The mansion-house and offices can be claimed as a *præcipuum* by an elder heir-portioner, only when the heirs succeed *ab intestato* to their ancestor, and not when they are called to the succession in virtue of a special destination ; Ersk. B. 3. Tit. 8. § 74. Cathcart against Rocheid, 2d February 1773, No. 14. p. 5375. By the settlement executed by Major Maclauchlane in 1775, his sisters were called to the succession as heirs of provision after his brother-consanguinean ; and though they happen likewise to be his heirs of line, they must be considered as heirs of provision, and might be compelled, by any one having an interest, to make up their titles to their brother in that character ; Maccallum against Campbell, 21st February 1793, No. 88. p. 16135 ; for the predecease of the first institute, without male issue, cannot have the effect of vacating the whole destination.

Answered : It is only as heirs-at-law that the sisters of Major Maclauchlane are entitled to claim the succession to this estate, which is not destined to them *nominatim*, but only as the nearest heirs of the disponent. They can claim in no other character than as heirs-portioners of their brother ; and if they take it up in that character, they must be affected by every peculiarity which attaches to that description of heirs, one of which is, that the eldest sister shall enjoy the mansion-house, garden and offices, as a *præcipuum*, over and above her share of the estate ; Wight against Inglis, 12th December 1798, No. 1. *supra*.

The Court, upon advising the petition, with answers, adhered to the interlocutor of the Lord Ordinary.

The elder sister likewise reclaimed against that part of the Lord Ordinary's judgment, by which her claim to heirship-moveables was set aside ; but her petition upon this point was refused without answers.

Lord Ordinary, *Glenlee*.

Act. *Boyle*.

Agent, *W. Patrick, W. S.*

Alt. *L' Amy*.

Agents, *Buchan & Drysdale, W. S.*

Clerk, *Buchanan*.

J.

*Fac. Coll. No. 280. p. 633.*