

APPENDIX.

PART I.

HEIR PORTIONER.

1798. December 12. DAVID WIGHT *against* WILLIAM INGLIS.

ANDREW SIMPSON executed a settlement, by which he disposed his lands of Viewfield to the persons therein mentioned; whom failing, to John Simpson, his nephew, and his heirs and assignees whatsoever.

In consequence of the failure of prior substitutes soon after Andrew's death, William got himself served heir in general to him, and was afterward infeft in that character upon a precept of *clare constat* from the superior. On his death, without children, the succession opened to the representatives of John Simpson. These were the sons of two sisters; David Wight, the son of the eldest, and William Inglis, the son of the youngest; and their mothers being also heirs portioners of line of Andrew and William Simpson, their sons got themselves served heirs to the latter in that character, and were infeft in virtue of precepts of *clare constat* from the superior.

David Wight afterward brought an action against William Inglis, for having it, *inter alia*, found, that as the son of the eldest sister, he had "the sole and exclusive right to the mansion-house, office-houses, barn-yard, and garden of Viewfield, as a *præcipuum*."

In defence, Mr. Inglis

Pleaded: The general rule of law is, that heirs portioners have an equal interest in the succession. From necessity, an exception has been introduced with regard to dignities and rights of superiority, which, exclusive of the emolument arising from them, as being indivisible, go to the eldest. And the exception has been also extended to the mansion-house. These deviations, however, take place only where the heirs portioners succeed *ab intestato*; 16th February 1773, Cathcart against Roughhead, No. 14.

No. I.

The eldest of heirs portioners is entitled to the mansion-house, &c. as a *præcipuum*, altho' they should be called to the succession under the last substitution of a destination, as the "heirs whatsoever" of the immediately preceding substitute.

No. 1. p. 5375. But, as the parties in this case must take the succession under Andrew Simpson's settlement, they are not considered by the law as heirs-portioners, but as heirs of provision; Stair, B. 3. T. 5. § 11. Andrew Simpson having been an unlimited proprietor, the present parties, although heirs of line both to him and to his son William, cannot, by having made up their titles in that character, free themselves from the qualities which Andrew's settlement imposed on the succession. Nor does it signify, that they are not called to it *nominatim*, but by description, as the "heirs whatsoever of John Simpson." They are not the less heirs of provision on that account; of consequence, the pursuer does not come under the exception to the general rule above-mentioned.

Answered: The defender's plea is founded on an erroneous conception of the case, Cathcart against Roughhead. There, the maker of the settlement disposed his estate to his son and his issue; whom failing, to his four daughters *nominatim*, "equally among them," on whom, on the son's death, the succession accordingly devolved. It is plain, however, that they succeeded not as *heirs portioners*, but as *joint disponees*; and consequently there was no more room for the eldest claiming a *præcipuum*, than if they had been four sons or four strangers. But here, the parties succeed as the "heirs whatsoever" of John Simpson. It is left solely to the law to find out who these are. They succeed, therefore, in the strictest sense, as heirs-portioners at law; and consequently, the pursuer is entitled to every advantage which the law confers on the eldest sister.

The Lord Ordinary reported the cause on informations.

The Lords, on the ground stated for Mr. Wight, unanimously found, that the pursuer, as representing the eldest heir portioner, has an exclusive "right to the mansion-house, office-houses, barn-yard and garden at Viewfield, as a *præcipuum*."

Lord Ordinary, *Swinton*.

Act. Solicitor-General Blair, John Clerk, W. Clerk.

Alt. Rolland, Davidson.

Clerk, Menzies

R. D.

Fac. Coll. No. 98. p. 238.

1801. May 27.

ELIZABETH CRUICKSHANKS and Husband, *against* JEAN CRUICKSHANKS and Others.

No. 2.

Heirship moveables are divided equally among heirs portioners.

The five daughters of Patrick Cruickshanks succeeded to his estate of Strathro, as heirs portioners. His brother had been appointed by him his executor.

Elizabeth, the eldest daughter, with consent of her husband, brought an action against her sisters, and their tutors, for division of the succession, in