

No 7.

1708. July 21.—Janet Cowie, the eldest heir-portioner of Bothkennar, mentioned 24th June 1708, desiring the LORDS (by a bill given in) to appoint one of their number, or the Sheriff of Stirling, to divide the land betwixt the three sisters and her; and seeing the LORDS had given her the mansion-house and orchard, it was consequential, that the lands lying most contiguous and ewest should be adjudged to her, but so, that if their quality were better than the rest, consideration should be had thereof, and for that effect the ground should be visited and perambulate, and witnesses examined on the rent, value, quantity, and quality of the land, conform to the words of the law, § 4. 5. *Instit. de offic. judic. L. 21. D. com. divid.* Some of the LORDS started, that there was no law nor act of Parliament empowering the Lords to divide among co-heirs, who possessed all *pro indiviso*. Others thought, that though the dividing of commonties and runrig lands had special acts about them, yet heirs-portioners needed not, seeing there was an ancient brieve in use amongst us for that effect, called the brieve of division, by which each heir-portioner got their share.—THE LORDS demurred as to their power: The petitioner had another desire, that she, as the eldest sister, might have the custody and keeping of the writs and evidents of the lands, on her obligation to make them forthcoming to the rest, or to give them transumptis when they needed them, as has been oft decided, and particularly, 17th July 1638, Denham *contra* Denham, No 1. p. 2447. This part the LORDS thought reasonable.

*Fol. Dic. v. 1. p. 154. Fountainball, v. 2. p. 355. 441. 444. & 456.*

No 8.

1711. December 25. GEORGE STEVENSON *against* DR PITCAIRN.

In a dispute, who should have the keeping of common evidents, the Lords appointed bonds to be registered, and extracts to be taken by each party at his own expense; and as to dispositions, charters, and such like, appointed inventories to be taken, and an obligation

SIR ARCHIBALD STEVENSON, doctor of medicine, being doubtful of his son George's management, and he having offended him, by marrying without his consent, he makes a tailzie of his houses and bonds, whereby he constitutes his son only liferenter, and his bairns fiars, and failing thereof, substitutes Dr Pitcairn, and his children by his daughter Elisabeth, and gives the custody of the writs to the Doctor, to be delivered at the sight of Mr John Buchanan and others. The debtors shunning to pay the annualrents to George, he pursues the Doctor for exhibition and delivery, who *alleged*, No delivery, for you may give them up for a small thing to the debtors, in prejudice of me, the substitute; but I am willing to concur with you in the discharge, and if any refuse keeping the money any longer, I shall make the bond forthcoming on the re-employing the money, and securing it in the terms of the tailzie. *Answered*, The writs are absolutely mine, in so far as I have the liferent, and my bairns the fee, to whom I am administrator of the law; and they being five in number, you, the substi-

tute come but in *sexto loco* ; and is it either sense or reason that you shall lock up my writs in your cabinet, and straiten my own and my family's aliment? Which were to render my father's design, in giving us the liferent and fee, wholly useless ; and if I were so foolishly mad as to gift-away my childrens' means, yet there is no fear debtors would comply, seeing you have served an inhibition against me.—THE LORDS found an easy remedy to salve both their interests ; for they ordained the bonds to be given in to the register, and either party to take out extracts on their own charges ; and as to the dispositions, charters, and other writs, they appointed them to be inventoried, and an obligation in the tail of it to be given by the Doctor, to George his brother-in-law, to make them forthcoming, when he has any necessary occasion for the same. Where parties are cast into a communion by law, as heirs-portioners, the eldest has the custody of the writs under an inventory and obligation *ut supra*. In conventional societies, he that has the greatest interest claims the custody of the papers, common to the whole. See 17th July 1638, Denholms, No 1. p. 2447. ; where the LORDS, ordaining the eldest sister to give transumps to the younger, though one of them bought in all the other shares, yet found the primogeniture gave the preference in keeping the principal original writs ; but ordained the transumps to be taken on equal expense. Where parties agree, there is a fourth way of accommodating their differences, by accepting notorial attested doubles collated under two notars hands ; and which is sometimes, for the more solemnity and verification, attested upon oath, and sometimes it is done without it.

*Fol. Dic. v. 1. p. 154. Fountainhall, v. 2. p. 693.*

See COMMONTY.—COMMUNITY.

See APPENDIX.

No 8.

to be granted by the party having the chief interest, and the custody, to make them forthcoming when necessary.