LORD CULLEN—I concur.

LORD JOHNSTON, who did not hear the argument, delivered no opinion.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for the Pursuer—The Solicitor-General (Morison, K.C.)—Moncrieff, K.C. —Carmont. Agents—Campbell & Smith, S.S.C.

Counsel for the Defenders—The Dean of Faculty (Clyde, K.C.)—Watson, K.C.—Wark. Agents—Hope, Todd, & Kirk, W.S.

Wednesday, February 2.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

CALLANDER *v.* HARVEY AND OTHERS.

Succession — Heirs-Portioners — Præcipuum — Principles of Determination — Indivisibility—Amenity.

In an action by the eldest of several heirs-portioners against the others and their representatives for determination of the extent of the *præcipuum*, *held* that the mansion-house fell under the *præcipuum*, solely as a result of its indivisible character, and that it carried with it such subjects as were necessary adjuncts of it, but not such subjects as were merely necessary to secure its amenity.

Mrs Alice Louisa Craigie Halkett or Callander, residing at Cramond House, Cramond, Midlothian, wife of George Frederick William Callander, Esquire, of Ardkinglas, Argyllshire, *pursuer*, brought an action in the Court of Session against Mrs Elizabeth Diana Craigie Halkett or Harvey, residing at 10 West Eaton Place, London, wife of Colonel G. S. A. Harvey, Cairo, Egypt, and others, *defenders*, to have it found and declared "that the pursuer, as eldest heir-portioner of the deceased Duncan Craigie Halkett, has the sole and exclusive right *jure præcipui* to those portions of the lands and estates of Cramond and Harthill after described, consisting of the mansion-house of Cramond, together with the offices, lawns, gardens, lodges, avenues, and policies pertaining thereto, all as delineated and coloured red on the Ordnance Survey map herewith produced, or to such portions thereof as shall be determined in the course of the process to follow hereon, and to the rents, maills, and feuduties thereof from and since 31st March 1912, and in all time thereafter, and is entitled to have the custody of the writs and title-deeds of the said lands and estates, which said lands and estates are described in the title-deeds thereof as follows, *videlicet*—[*Then followed a description of the lands*]. . . ."

The pursuer pleaded—"The pursuer as the eldest heir-portioner being entitled to the mansion-house and pertinents specified in the summons, decree should be pronounced in terms of the conclusions of the summons."

The defenders pleaded—"(3) The pursuer having no right *jure præcipui* to the subjects claimed, other than the mansion-house, gardens, and offices occupied along therewith, the defenders are entitled to absolvitor with regard to the remainder of the subjects claimed."

The *facts* of the case appear from the opinion of the Lord Ordinary (ORMIDALE), who on 17th July 1914, after a proof, pronounced this interlocutor:—"Finds and declares that the pursuer as eldest heir-portioner of the deceased Duncan Craigie Halkett has the sole and exclusive right *jure præcipui* to those portions of the lands and estates of Cramond and Harthill described in the summons, consisting of the mansion-house of Cramond and those portions of the lands and estates of Cramond, coloured pink on the plan, together with the poultry run, the south avenue, and the lodge at the south end of said avenue, and to the rents, maills, and duties of said subjects from and since 31st March 1912 and in all time thereafter; and decerns: Finds the defenders entitled to expenses to the extent of three-fourths of the taxed amount thereof," &c.

Opinion.—"This is an action at the instance of Mrs Craigie Halkett or Callander, residing at Cramond House, to have it found and declared that she as eldest heir-portioner of the deceased Duncan Craigie Halkett, has right *jure præcipui* to certain portions of the lands and estates of Cramond and Harthill, all as delineated on a map produced, 'or to such portions thereof as shall be determined in the course of the process to follow hereon.'

"The pursuer's father died on 31st March 1912. By disposition, dated in June 1879, he had disponed to himself in liferent and to his surviving son Duncan, and his heirs and assignees whomsoever, in fee, the lands and estates in question. Duncan having died in March 1889 without issue was succeeded in the fee of the lands by his seven surviving sisters as heirs-portioners. Of these Miss Constance sold her one-seventh share to her father in 1907. Miss Mabel died in June 1912 intestate, her right in the lands devolving upon her sisters equally. Three of the sisters and the executors of the father have lodged defences to the action.

"The subjects claimed by the pursuer are delineated on the plan. They extend to about 103 acres, and include the mansion-house of Cramond, the gardens, stables, and offices, and two avenues, about 86 acres of grass land, and 7 acres of woodland.

"The defenders admit that the pursuer is entitled to the mansion-house, together with the gardens and offices occupied along therewith, and they offer without prejudice to concede the pursuer's right to ground extending to 10 acres, including the site of the mansion-house, gardens, stables, and certain offices adjacent to the house, with the avenue leading to the house from the

road on the west, between Edinburgh and Cramond village. The subjects so tendered are coloured pink on the plan.

"It is not disputed that Cramond House falls with the *præcipuum*. It is not only the principal house on the estate of Cramond; it is the only mansion-house on the whole estates falling to the heirs-portioners, viz., Cramond, Southfield, and Harthill.

"Reading the abstract—which is admitted for the purposes of this action to be correct—along with the plans, it appears that Cramond has 235 acres, with a rental of £1248, 19s. 8d. Southfield, which is separated from Cramond by the estate of Barnton, has 219 acres with a rental of £710. Harthill has 2539 acres, with a rental, including mineral rents and wayleaves, of £5100. The acreage of the whole estate is 3000 and the gross rental about £7100. The values put upon the several estates for the purposes of the Finance Act were Cramond £27,861, Southfield £15,000, and Harthill £57,357, or nearly £100,000 in all.

"The estates are therefore of considerable value and extent. It is the fact that at the moment they are heavily burdened, but this does not affect in any way the present question.

"Another estate, called Lauriston, marches with Cramond on the east and south-east. It came into the possession of the Cramond family about 1856. It is held under an entail, and the pursuer is the heir of entail presently in possession of it. It had a mansion-house called Lauriston Castle, which did not fall under the entail and was sold in 1859. The estate has 190 acres. Its rental is £685, 13s. 4d., and its value is £13,796. The present case is in no way concerned with the Lauriston estate, although reference was made to it in the course of the proof.

"Cramond and Southfield, speaking generally, are the oldest of the family possessions, the original estate of Cramond having been acquired by Mr James Inglis in 1622. Harthill was acquired at least as long ago as 1687, when it was created a barony by charter in favour of Sir James Inglis of Cramond. In 1795 the whole estates were entailed by Sir John Inglis, and have since that date been held under the same title and possession. They were disentailed in 1879, and they then passed under the disposition, already referred to, by Colonel Halkett to himself in liferent and to his son and his heirs whomsoever in fee.

"James Inglis, a grandson of the original laird of Cramond, was made a baronet in 1687. Sir James had a son John, who was Barrack-Master for Scotland. Sir John made great improvements on the estate. He had an only daughter, who married Lord Torphichen. On her father's death Lady Torphichen came into the estates, and possessed them until her death in 1849. Upon her death Charles Craigie Halkett or Halkett Inglis succeeded as heir under a collateral line, and in 1877 he was succeeded by the father of the present heirs-portioners.

"The mansion-house of Cramond was originally of a much less imposing and pretentious character than at present, and apparently it fronted towards the north. The house took its present form about 1795, when Sir John Inglis made an addition, which now constitutes the front of the house, looking towards the east. This portion embraces all the public rooms, the older portion providing the bedrooms and other accommodation.

"Originally there was only one avenue or approach to the house, that namely which is tendered by the defenders, but shortly after 1806 what undoubtedly became the main avenue was laid out by Lady Torphichen. It enters from the Edinburgh road on the south and is about 800 yards in length.

"I refer to Mr Watson's evidence for an account of the Tower of Cramond. It was at no time occupied as a residence by the Inglis family, and has from time immemorial been a ruin. It is situated at the distance of a few yards from the mansion-house.

"From time to time the mansion-house was let with varying extents of ground. Lady Torphichen herself, living at Calder house while her husband was alive, let it to Sir William Forbes in 1800 and to Alexander Brodie of Barnhill in 1802. In 1854 it was let to Mr Tod and his wife, in 1868 to Mr Hughes, in 1885 to Count Bobrinski, and in 1886 with renewals down to 1904 to Mr J. Edward Hope, W.S.

"Such is the general history of the family and the family estates, and in relating it I have, I think, stated nothing about which there is really any controversy.

"The pursuer's claim is set out in Cond. 4 under reference to the Ordnance Survey map on which the subjects claimed are coloured red. 'The portions of the estate thus claimed by the pursuer consist of (1) the mansion-house, stabling, byres, &c., and offices, a double lodge, two other lodges, and a gardener's house, all of which are essential to the proper occupation of the mansion-house; (2) gardens, lawns, avenues, and policy ground, including two grass parks on either side of the avenue, which are lawns or policy ground and are planted and laid out as part of the amenity of the mansion-house. All these are necessary and incidental to the proper occupation of the mansion-house.'

"All these, it is also said, are necessary to enable the pursuer to enjoy the undisturbed possession of the mansion-house. 'The division of any of said subjects would render it impossible for the pursuer to reside in said mansion-house.'

"The extent of the whole subjects, as already stated, is 103 acres, and the total value of them is £11,950. The value of the mansion-house itself is £2300, and with stables, offices, cottages, gardens, &c., *being* substantially the subjects tendered by the defenders, about £4500.

"The pursuer's claim rests on the view that the subjects other than the mansion-house have been set apart and dedicated to the mansion so as with it to form a distinct and indivisible unit; that their user has

been from time immemorial so identified with the occupation of the mansion-house that life in the mansion-house would without their being associated with it be impossible; that the value of the mansion-house as a residence would without them be in effect destroyed.

"The facts and circumstances which are said to justify this view are these. The continued existence of the house and grounds for upwards of a century substantially as they are now. The ornamentation with trees of the area claimed, and especially that part of it in the vicinity of the house, the beech avenue in the Lawn Park being a particularly striking feature. The erection of a policy wall at great cost round the greater part of the area. The withdrawal at considerable sacrifice of rent from ordinary tillage and the laying down in permanent grass of the East and West Bridges Parks, extending to upwards of 60 acres, and the planting of these parks with ornamental timber. The clearing out of the ancient feus up by the Cow Park and the putting back of the wall so to include the ground formerly occupied by them. The laying out of walks and paths within the enclosed area. The restriction of the use of the larger parks to grazing by cattle and sheep, and of the parks closer to the house to pasturing by sheep. The use made of the parks for purposes of recreation.

In my opinion it is quite unnecessary to examine closely the evidence on which these statements are founded. It may be a question whether the variation in the rents when the East and West Bridges Parks were laid down in grass was just so great a sacrifice as is maintained. There may be questions as to the particular dates when various bits of planting were done, and as to the existence and endurance of some of the alleged walks, *e.g.*, the walk along by the policy wall on the west and south sides of the area claimed. It may also be contended with some force that the evidence of the use of the ground or any part of it for golf, tennis, hockey, or tobogganing is not very convincing. But taking a broad view there is no doubt that the intention and the result of the treatment of the ground in question, taken as a whole, was the creation of a series of well-timbered parks laid out in many parts of them with great skill and taste, with the effect of at once greatly enhancing the privacy and beauty of Cramond House and its comfortable occupation as a residence, and of marking off the area claimed as a portion of the estate entirely different in character from the remainder. No part of it is associated with any farm. It has been kept in a sense in the proprietor's own hands.

But taking this to be so, it seems to me to be impossible to predicate of the subjects claimed other than the mansion-house that they were either so dedicated and set apart for use with the mansion, or that they were in fact so used by the owner or tenant for the time of the mansion, as to bring them, taken all together, within the category of the pertinents or pendicles or necessary adjuncts of a mansion-house, which by the custom of this country are held to be incapable of separation from it, and therefore to pass to the eldest heir-portioner *ex jure præcipui*.

"The law of this subject, as stated by the text-writers and as illustrated by the decided cases, is in its application and scope of a restricted and inelastic nature, and it is not surprising that it should be so. The *præcipuum* is a privilege, and a very valuable privilege, accorded to the eldest daughter. It constitutes an exception to the general rule of equal division among heirs-portioners. It is founded on the theory that the subject of it is indivisible.

"Stair, iii, 5, 11, states that 'though heirs-portioners succeed equally, yet rights indivisible fall to the eldest alone without anything in lieu thereof to the rest, as (1) the dignity of Lord, Earl, &c., (2) the principal mansion, being tower, fortalice, &c., which doth not extend to houses in burghs nor to ordinary country houses, the former being divisible, the latter fall under division as pertinents of the land whereupon they stand and are not *separata jura* or distinct rights.' This is readily understandable in the case of a title or dignity. It is not just so easy to appreciate the application of the term indivisible in its absolute sense in the case of the mansion-house, at anyrate without recompense being made to the other heirs-portioners.

"Apparently the view taken, if one may judge as much perhaps from the arguments adduced in the reported cases as from anything decided, was that the mansion-house passed to the eldest daughter *jure primogenituræ* with the view of preserving a chief representative of a family, *e.g.*, *Cowie*, 1707, M. 5362. Bankton's view, however, is that a recompense ought to be made for the messuage and gardens, these importing a constant patrimonial interest as much as a feu-duty, another subject claimed to be indivisible. Erskine, iii, 8, 13, says—'The principal mansion-house of the lands is accounted an indivisible right; but because that subject admitted of valuation our old law directed that the younger sisters should be recompensed out of the deceased's other estate to the amount of the value. But by our later customs the older is entitled to it even without recompense to the other sisters;' and he cites the cases of *Cowie*, 1707, M. 5362, and *Peadie*, 1743, M. 5367, which establish that proposition. After stating the general rule to be equal division among heirs-portioners it is to be noted that Erskine thus describes the *præcipuum*—'Yet the eldest daughter enjoys this privilege from necessity that rights which are indivisible *ex sua natura* fall to her alone, *e.g.*, titles of dignity.'

"The law therefore is that the mansion-house—and it need not be a tower or fortalice—goes to the eldest heir-portioner without recompense to the other sisters. The extension of the right beyond the actual mansion-house is not however readily to be presumed, and in none of the decided cases therefore does more appear to have been given to the eldest daughter than what was

on a reasonable construction, both of the fact and the term, held to be a pertinent of the mansion-house, *e.g.*, offices, yards, gardens, or orchards.

"*Cowie's*, case, M. 5362, shows that the mansion-house need not be a tower or fortalice but a building of a very humble description if occupied as the estate residence. In it also the law was applied to an orchard, but with great difficulty. On June 10th the Lords held that the orchard did not pass to the eldest daughter without making recompense; on June 24th the Lords by a 'scrimp plurality' varied that interlocutor and held that it did, ultimately giving effect to the argument apparently that although sometimes a greater house may have adjoined to it a lesser orchard, *et e contra majus et minus*, ought not to vary the law of the case. But the orchard in question only extended to 2 roods 35 falls. It was 'environed by the house' on two sides, and it had not been set for rent. In *Wight*, 1798, M. *sub voce* Heir Apportioner, App. No. 1, a case whose chief concern was with the terms of a destination, the *præcipuum* claimed and allowed included mansion-house, office-houses, barnyard, and garden. In *Cruickshanks*, 1801, *loc. cit.* App. No. 2, an interlocutor of the Lord Ordinary sustaining a claim *jure præcipui* to the mansion-house, the new and old gardens, the lawn around the mansion-house, and two pigeon-houses was acquiesced in. In *Maclauchlane*, 1807, *loc. cit.*, App. No. 3, an interlocutor finding the eldest heir-portioner entitled to the mansion-house with the garden, yard, and office-houses was sustained.

"In *Inglis*, 1781, Hume 762, it was held that after the lands had been laid off into three lots of equal value, the first must belong to the eldest daughter 'as it lies round the house and gardens' which belonged to her as a *præcipuum*.

"In *Dinniston*, 1830, 8 Sh. 935, it was held proved that a tower and dwelling-house with an orchard attached to them formed a proper subject of *præcipuum*.

"In *Earl of Dundonald* v. *Dykes*, 1836, 14 S. 737, there was no decision by the Court as to the extent of the *præcipuum*, though an award by the arbiter seems to have gone a little further than the decisions to which I have just referred.

"Now in none of these cases can I find the slightest approach to a claim so extensive as that made by the pursuer. And it appears to me that her claim differs in quality as it does in quantity from the illustrations I have referred to. It in no sense justifies the epithet of pertinent or pendicle or something attached to the house. The parks claimed greatly exceed in value the mansion-house. They have been in constant use to be let, and they are not themselves *ex sua natura* indivisible. They are obviously susceptible of division in the sense that they can very easily be valued. I quite admit that speaking generally they form in every way a most desirable adjunct to the mansion-house, and I have no doubt that the value of the mansion-house without them would be greatly depreciated as a selling or letting subject, but that does not appear to me to have been at any time the test applied in questions of *præcipuum*.

"Accordingly I reject the pursuer's claim as stated on record.

"But at the hearing counsel for the pursuer maintained that if she were not entitled to the whole of the 103 acres, she was still entitled to a great deal more than the defenders were prepared to concede, and he tabled two alternatives. It is to be regretted that those alternatives were not formulated on record, but I did not understand the defenders to take any objection on that ground to their being considered, and the conclusions of the summons are so stated as to enable me, if otherwise so advised, to give effect to them.

"The first alternative claim submitted . . . would cover undoubtedly a well-timbered portion of ground, including the two roundels shown on plan. It embraces a portion of ground which is directly in view of the house. Any interference with it, especially by buildings, would certainly prejudice the prospect from the house. But the line suggested is entirely arbitrary, and there is nothing in the use of the land claimed . . . to differentiate it from the larger area embraced in the principal claim. Amenity, and amenity alone, is the foundation of this alternative claim, and this it seems to me, apart from any special treatment of the area by the bygone owners of the house in connection with the house, is no ground at all for holding the land to pass with the mansion-house as part of the *præcipuum*.

"Much more may be said in support of the second alternative of the minor claims, so far at least as it is confined to what are known as the Lawn Park and the Cow Park, which are coloured yellow on the plan. The line of the old sunk fence marked out by Mr Drysdale I do not accept. There is no history of the old sunk fence, and nothing to show that it was used to separate off the subjects on the north side of it for some special use in connection with the mansion-house either as recreation ground or anything else. If it did at any time serve such a purpose it has long ceased to do so.

"But taking the Lawn Park and the Cow Park with the strip of wood on the west side of the Cow Park as substantially instructing the second of the alternative claims the situation is to some extent different. To begin with, the names Cow Park and Lawn Park suggest a possible very intimate relation with the use of the mansion-house, and they are names which have for a very considerable time been appropriated to the ground in question. No doubt in 1815 the extent of the Cow Park was much greater than it now is. It embraced the larger portion of what is now the Lawn Park. The Lawn Park did *not* then exist *eo nomine*. So much of it as was not Cow Park appears to have been known as policy—a name which is itself suggestive of restricted use, and of use in direct connection with the mansion-house. Then throughout these parks various paths appear to have been laid out. The exact

date at which this was done is not very clearly established, but they are of considerable age. But they have, with one exception, been greatly neglected. Even Davy's Walk has become a tangle of weeds. The Folly Walk, which to my mind is proved to be a most attractive walk, has had some attention bestowed on it down to the present date, and while I think that Folly Wood, to which the walk leads, as a subject by itself could not be held to be covered by the *præcipuum*, I should, if the ground through which it passes had been exclusively and entirely devoted to use as a pleasure ground by the family at Cramond, have been strongly inclined to hold that the path, so far as leading down to the sea, was a fair subject to include as a pertinent of the house.

"We also find in the Lawn Park, Cramond Tower close to the north end of the mansion-house. And there is also the very striking avenue of fine old beech trees running from west to east through the centre of the Lawn Park directly in line with the front of the mansion-house.

"But while there is much to be said in support of the contention that these parks, and especially the Lawn Park, are essential for the reasonable and comfortable use of the mansion-house, that again, looking to the history of the subject, is from the point of view of amenity alone. If the Lawn Park were feued out the amenity of Cramond House is gone. I am quite clear about that. The house would cease to be the Cramond House that has come down to the present owner. But to my mind, in questions of *præcipuum*, in extending the eldest daughter's right beyond the actual mansion-house, the law has always had regard only to the practical utility of the pertinents thrown in, holding them to be necessary from that point of view to the proper enjoyment of the house as a dwelling-house —offices, gardens, yards, and orchards. In *Cruickshank's* case it is true the lawn was held to fall under the *præcipuum*, but it was 'the lawn around the mansion-house,' a subject probably of very restricted extent. There is nothing in the report to suggest the contrary. 'Lawn' is, no doubt, a word which may be used to describe a very considerable portion of ground, but only, I think, if the context supplies a glossary. In the case of *Anderson* v. *Dickie*, 1914, 51 S.L.R. 614, 52 S.L.R. 563, it was held to mean a stretch of grass land between or among trees. The lawn there in question, Lord Dundas said, was obviously something quite different, in extent at least, from anything which according to ordinary social usage and parlance is familiarly known as a lawn. It seems to me at any rate that being a word of varying signification one is not entitled to say that because in the case of A a lawn was included in the *præcipuum* therefore the lawn must also be included in the case of B. It is necessary to know precisely what is the nature and extent of the particular subject, and to what use it has been put. Now if there had been any evidence to show that the Lawn Park here had been devoted entirely to use as a pleasure ground, and had been so used solely and constantly by the occupiers of the house for walking and recreation, it might, notwithstanding its extent, upwards of nineteen acres, have been treated as a necessary adjunct of the mansion-house like a garden or an orchard. But that has not been its history. In the lease to Sir William Forbes there is let the lawn in which the house stands; that was not, however, the Lawn Park; and while in the lease to the Tods it is let as 'the lawn around the house,' the very words used in *Cruickshank's* case, it was reserved to the proprietor, not let with the house, though his use of it was restricted to pasturing sheep. Then in the lease to Mr Hughes it is referred to as the lawn of Cramond and is let for a separate and specific rent. In Mr Hope's lease it becomes 'the park to seaward of the house known as the Lawn Park.' When the mansion-house was not let the Lawn Park was let to an ordinary grazing tenant.

"All this, it seems to me, negatives completely the theory of the user or occupancy of the Lawn Park as a necessary adjunct as a matter of practical utility and business of the mansion-house.

"The Cow Park has been in no different position, and even when occupied by a member of the family rent has been exacted.

"The Tower has, as I have already said, at no time been occupied along with Cramond House as a residence. It was for a short period used as a place for making gas, with pipes leading from it to the house. If it had been in such use at the date of the last owner's death it might have passed to the eldest heir-portioner as an office, but on no other ground. It had, however, ceased to be so used, and served no other practical purpose in connection with the occupation of the mansion-house.

"I come to the conclusion that there is no ground for holding that these parks or the Tower fall under the *præcipuum*.

"The avenue is in an entirely different position. It may be that the house would be well enough served by the west approach, which I cannot help thinking is quite a good approach—an approach which might with a little care and attention be made quite picturesque and attractive. But quite clearly the south avenue has been for 100 years the main avenue of Cramond House, and that being so it appears to me that it falls to be treated as gardens and offices are treated, viz., as a subject necessary for the proper and reasonable use of the mansion-house, which ought not to be separated from it. The fact that it constitutes the sole entry to one of the Bridges Parks does not appear to me to really derogate from its use as the main approach to the house.

"There is one topic to which I have not yet referred, viz., the close proximity of the Lawn Park to the front of the mansion-house. It approaches at one point to within 25 feet of it, and at no point recedes from it to a greater distance than 70 feet. It appears to me that there was great force in the contention that the pursuer should not be placed in the position of having to run

the risk of the ground passing into the hands of a hostile owner, and of her own house front being practically built up, and I should have been willing to consider still another alternative giving the pursuer some measure of protection against this risk if such had been tabled and if there had been any principle or ground on which to base it other than amenity. No such alternative was suggested. At the same time it has to be kept in view—and this contrary to the pursuer's contention I regard as a most pertinent and relevant consideration—that the eldest daughter has the right of first choice on the subjects being divided, and so far as I can judge there should be ample land available in this way round about the mansion to enable the eldest heir-portioner, if so advised, to acquire the necessary safeguard and protection.

"In the view that I take of the law applicable to the pursuer's claim I am prepared to hold that the subjects tendered by the defenders, plus the poultry run and the south avenue and the lodge at the south end of it, fall to the pursuer *ex jure præcipui*.

"No objection was stated by the defenders to the declaratory conclusion of the summons, except to the part which deals with the portions of the lands and estates.

"I shall therefore find and declare that the pursuer, as eldest heir-portioner of the deceased Duncan Craigie Halkett, has the sole and exclusive right *jure præcipui* to the mansion-house of Cramond, together with those portions of the lands and estates of Cramond and Harthill coloured pink on the plan, and with the poultry run, the south avenue, and the lodge at the south end of said avenue, and *quoad ultra* in terms of the declaratory conclusions. . . ."

The pursuer reclaimed, and argued—The principles of the law were to be discovered from the following authorities—Stair, Inst. iii, 5, 11, and More's Notes (*ibid.*) at p. cccxxix; Ersk. Inst. iii, 8, 13; Ersk. Prin. 21st ed., iii, 8, 5; Bankton, iii, 5, 84; M'Laren, Wills and Succession, vol. i, 85; Shand, Practice, ii, 607; Rankine, Landownership, 4th ed. 596; *Halbert* v. *Bogie*, 1857, 19 D. 762; *Cowie* v. *Cowie*, 1707, M. 5362 and M. 2453; *Peadie* v. *Peadie*, 1743, M. 5367; *Ireland* v. *Govan*, 1765, M. 5373; *Forbes* v. *Forbes*, 1774, M. 5378; *Wight* v. *Inglis*, 1798, M. *voce* Heirs-Portioners, App. part i, No. 1; *Cruickshanks* v. *Cruickshanks*, 1801, M. *voce* Heirs-Portioners, App. part i, No. 2; *Maclauchlane* v. *Maclauchlane*, M. *voce* Heirs-Portioners, App. part i, No. 3; *Inglis* v. *Inglis*, 1781, Hume 762; *Dinniston* v. *Welsh*, 1830, 8 S. 935; *Dundonald* v. *Dykes*, 1836, 14 S. 737. In the present case the principles contained in the antiquated authorities had to be applied to modern conditions. It was clear from the institutional writers and cases cited that indivisible subjects fell under the *præcipuum*. On this ground the mansion-house and tower or fortalice fell under the *præcipuum*. It was matter of admission that the mansion-house in this case fell under the *præcipuum*. But the principle of indivisibility was not a complete explanation, for the *præcipuum* did not include "ordinary country houses," which were just as indivisible as the mansion-house. A *præcipuum* could only be claimed where the mansion-house was pretentious—*Halbert* v. *Bogie* (*cit.*); Stair Inst. (*cit.*)—and was given with a view to maintaining the dignity of the family. In that case the true theory was that when the house was a family mansion it was not *pars soli* like country houses, but the principal subject which carried with it certain accessories. In discovering what these accessories were, consideration must be given to the fact that the denial of compensation to the other heirs was based on the law of primogeniture—*Cowie* v. *Cowie* (*cit.*). The eldest heir's right was assimilated to the normal case of the succession of the eldest son, and was therefore *in dubio* to be favourably construed in favour of the eldest heir-portioner. Further, while indivisibility was the main criterion in discovering the subjects falling under the *præcipuum*, this criterion had suffered a progressive development, so that in the main indivisible subject what was reasonable and necessary for its comfortable occupation and use as a dignified family mansion had come to be included, *e.g.*, in *Dundonald* v. *Dykes* (*cit.*) offices, court, gardens, spots and gushets of ground were included; in *Dinniston* v. *Welsh* (*cit.*) an orchard of five acres; in *Cruickshanks* v. *Cruickshanks* (*cit.*) a lawn which at that date meant an open space amongst trees covered with rough grass—*Anderson* v. *Dickie*, 1914 S.C. 706, 51 S.L.R. 614, 1915 S.C. (H.L.) 79, 52 S.L.R. 563. That was the character of part of the subjects claimed by the pursuer, and in particular of the Lawn Park. What was reasonable and necessary for the comfortable occupation and use of the family mansion was to some extent indicated by the manner in which the subjects had been used—Ersk. Prin. (*cit.*); M'Laren, Wills and Succession (*cit.*). Further, it must necessarily include what was necessary for the amenity of the mansion-house, for loss of amenity meant loss of its character of mansion-house. It was irrelevant to contend that amenity could be amply secured by the right of first choice belonging to the eldest heir-portioner as regards the division of the subjects, for if so the *præcipuum* need never have covered more than the actual stone and lime of the mansion-house.

Argued for the respondents—The Lord Ordinary was right. The value of the subjects claimed as accessories of the mansion-house exceeded it in value. The mansion-house originally fell to the eldest heir-portioner upon compensation to the others, and later without compensation—Craig, Jus Feudale, ii, 14, 7; Balfour, Practicks, p. 223; Regiam Majestatem, ii, 28—but, apart from that change, the law as to *præcipuum* was unchanged. The mansion-house, tower, and fortalice were within the *præcipuum* solely because they were indivisible, and physically incapable of falling under the general rule of equality of division—Stair, Inst. (*cit.*); Ersk., Inst. (*cit.*). Blench superiorities went to the eldest heir-

portioner on the same principle, just as titles of dignity. The *præcipuum* was thus an exception to the ordinary rule of equal division, of the nature of a privilege to be construed strictly against the claimant in any case, and in particular in this case in view of the age and meagre character of the reports of the cases. Maintenance of the dignity of the family was not an element to be considered, for were that the test heirship moveables would have fallen under the *præcipuum*, which they did not—*Cruickshanks* v. *Cruickshanks* (*cit.*). Further, dignity of the family could not be secured when the eldest heir-portioner could alienate her *præcipuum* to a third party at any moment. In *Halbert* v. *Bogie* considerations of dignity could not be appealed to, for the claimant was a disponee of the eldest heir-portioner, not one of the family, and the sole ground of the decision was indivisibility. That recompense was obligatory in the early law was also contrary to the idea that dignity was a consideration, for if prior to *Cowie's* case (*cit.*) compensation was given to the younger heirs-portioners they had no interest in what the eldest got, but in that case and thereafter they had, and yet that decision and the later decisions were all based on the principle of indivisibility. The subjects given with the mansion-house were always in a unity of possession with it and adjuncts inseparable from it. In *Cowie's* case (*cit.*) these adjuncts were given by a bare majority. In *Dundonald's* case (*cit.*) the award was obviously a maximum. *Cruickshanks'* case (*cit.*) was really a decision as to heirship moveables. There was nothing to show the extent of the lawn, its character, or the use made of it, and in any case it was stated to be around the mansion-house. The amenity of the mansion-house was an irrelevant consideration, for that was adequately secured by right of first choice of the other subjects in the eldest heir-portioner—*Lady Houston* v. *Dunbar*, 1742, M. 5366, 5367; *M'Neight* v. *Lockhart*, 1843, 6 D. 128. In this case even if Cramond alone was the subject of division this right would adequately secure the amenity of the mansion-house. The curtilage of the house as distinguished from the policies was what fell under the *præcipuum*—*Josh* v. *Josh*, [1858], 5 C.B. (N.S.) 454. The question of indivisibility turned largely on the use the subjects had been put to. Long-continued use as an adjunct of the mansion-house might result in the subject so used becoming by dedication a necessary adjunct of the house, but that was not the case here, for the Cow Park and the Lawn Park were continually separately let from the mansion-house. They were also separately valued. In no case had a cow park been included in the *præcipuum*, yet in almost all the cases cow parks must have existed. The use of the subjects for sport referred to in the evidence was casual, unauthorised, and irrelevant.

LORD PRESIDENT — The question submitted for our consideration in this case is the just ambit of the *præcipuum* conferred upon the eldest of a family of heirs-portioners according to the law of Scotland. The concrete topic of controversy is the pursuer's claim to embrace within her *præcipuum* two grazing parks. As the region which we have been traversing in this case has been unfamiliar to most of us—certainly to me since very early days—it was right that counsel on both sides of the Bar should have offered as they did a full and careful argument displaying great research. The further that argument advanced the more convinced I became that the conclusion reached by the Lord Ordinary was sound, and that the reasoning expressed in his very full and able opinion was unassailable. The truth is that when one comes to realise that the principle which lies at the root of the *præcipuum* is indivisibility all becomes plain, and in particular the justice, if not the generosity, of the award of the Lord Ordinary becomes very apparent, because his Lordship has given to the eldest heir-portioner here not only the mansion and the offices and the ground occupied by them both, and the gardens, but also a poultry run and a long avenue, half-a-mile or more in length, with the lodge at the end of it.

Now that seems to me all that the *præcipuum*, according to the old law of Scotland, ever did and could be held to embrace, and confirms an impression I have that we find the last word stated on the subject in Lord M'Laren's work on Wills and Succession, where after explaining the principle he says (vol. i, p. 86)—"The mansion-house or principal messuage of a landed estate, with the offices and ground occupied in connection with it, belong to the eldest heir-portioner as a *præcipuum*—the garden, avenue, and orchard of the mansion, if not let, being included." And when we turn to the two parks which the pursuer here claims we find that neither is necessary for the occupation of the mansion-house—that both have been for all time apparently regarded as separate and distinct subjects. In the earliest lease of the mansion-house to which our attention was drawn the Lawn Park and the Cow Park are not included at all. In a subsequent lease they are included, but a separate rent is mentioned, and in a third lease they are not included, but a right is given to the lessee of the mansion-house to include them in his lease, if he so pleases, upon certain conditions which are prescribed.

The conclusion one would reach from an examination of the leases is much reinforced by an examination of the valuation roll, and really when one comes to consider the list which is given in of the various properties claimed by the pursuer and tendered by the defenders, and when one finds that the Cow Park is let to a tenant, Miss Halkett, at £6 and the Lawn Park is let to another tenant, Thomas Lawrie, for £25, it appears to me that the question at issue is at an end. These are two separate and quite distinct subjects which have been so treated for all time, and ought, I think, to be so treated by us when we are invited, as we are here, to consider the ambit of the *præcipuum* of the pursuer.

The sole ground upon which it was sought

to have the grazing parks included was that they were necessary to secure the amenity of the mansion-house. That is undeniable, but is, I think, wholly irrelevant in a question of this kind, and I am at a loss to understand the reason why by the law of Scotland the eldest heir-portioner has undoubtedly the choice of the lot lying nearest to the mansion-house, unless it be to secure the amenity of the family mansion which she has to occupy. It is not without importance in the present case to keep in view that when the time comes for choosing these lots it will be apparently quite within the pursuer's power, if she exercises her right, to secure an acreage greater in extent than is embraced by the Cow Park and the Lawn Park by, as I judge, nearly a dozen acres.

No separate argument was offered to us with regard to the park numbered 4 on the plan, and the conclusion we reach with regard to the two parks I have mentioned necessarily embraces No. 4.

On the question of expenses I think the Lord Ordinary has exercised a very sound discretion, and I am not disposed to disturb his judgment.

LORD MACKENZIE—I agree in the conclusion your Lordship has reached. The pursuer in this action claims that she is entitled to the benefit of *præcipuum*, and it is not disputed that the conditions attaching to that right by the law of Scotland are satisfied in the present case. There is no question that Cramond House is a mansion. It is not a villa. It is not a country house in the sense in which that is used in the text-writers, occupied simply for the purpose of cultivation of the land. The succession opened in 1889 *ab intestato*, and the estate is divisible amongst the heirs-portioners, of whom the pursuer is the eldest.

The pursuer came into Court claiming not only the mansion to which *jure præcipui* she has an undoubted right, but also 103 acres of land—the area embraced within the policy walls. That claim has been negatived by the Lord Ordinary, and is no longer insisted in. The defenders conceded ten acres or thereby, including the site of the mansion-house, gardens, stables, and offices adjacent to the house. The Lord Ordinary has substantially given effect to the concession of these subjects, with the addition of the south avenue and the lodge. The claim which the pursuer now insists in is 25 acres which lie to the east and to the north of Cramond House.

I think it is right to state at the outset what the *præcipuum* is not. It is not that extent of ground adjacent to the mansion-house which is necessary for its amenity. The contrary proposition cannot be supported by reference to any of the text-writers or any of the cases that have been decided. From the earliest case to which we were referred, *Cowie* v. *Cowie*, 1707, M. 2553 and 5362, down to the last, *M'Neight* v. *Lockhart*, 1843, 6 D. 138, which I think was some fifty or sixty years ago, there is no trace of the doctrine that it is amenity which has to be considered. I think that justice was hardly done to the expert witnesses who were examined on behalf of the pursuer. The true problem was not presented to them. Mr Davidson, an eminent land valuer, addressed himself to the topic of what was necessary for the amenity of the mansion-house, and gave evidence in regard to the extent of adjacent ground which in his opinion was necessary. But that is not the true question in the case. The question is, what are the necessary adjuncts of the mansion-house? That is different from the question, what would be required if amenity were to be kept in view?

Although we are called upon in this case to pronounce only upon the extent of the *præcipuum*, it is, I think, quite permissible to advert to what has been established by two cases, one in 1742, the case of *Houston*, 1742, M. 5366, 5367, and the other in 1781, the case of *Inglis*, 1781, Hume 762, viz., that the eldest heir-portioner, who takes as her *præcipuum* the mansion-house and what is necessarily adjunct to the mansion-house, is entitled when a division takes place between her and her sisters to select that portion of the ground which forms the lot surrounding the mansion-house, and therefore she will be enabled to a certain extent —I do not say to what extent, because that depends upon the way in which the lots are laid out, but to a certain extent—to secure that some additional land is obtained lying in the vicinity of the mansion-house.

The essential feature upon which the principle of the *præcipuum* rests is that the mansion-house is indivisible. It must go to one person, and it goes to the eldest heir-portioner. There was apparently at one time in the law of Scotland a principle recognised that this could be carried into effect consistently with the principles of equity only if provision were made for compensation being made by the eldest to the other heirs-portioners. Speaking for myself, I think there is a great deal to be said for that as a sound legal principle, but the contrary has been decided. The eldest heir-portioner takes the *præcipuum* without indemnifying her sisters; but the fact that the law starts with the idea that the estate is to be divided equally makes the doctrine of the *præcipuum* an exception to that rule, and if it is an exception, then I think it must be strictly construed, and certainly must not be extended beyond what may be regarded as necessarily the adjuncts of the mansion-house. The case in 1707—the case of *Cowie*—was the case which really gave the doctrine of compensation its quietus, although, if I remember aright, the matter was stirred again somewhere about the middle of the eighteenth century, in 1768, when finally, I think, the idea of compensation was laid to rest.

We have not got any very large selection of cases to afford us a really trustworthy guide, because, as I followed the references to the various cases which were cited, I do not think I do the properties under discussion in these cases any injustice when I say that they appeared to be inconsiderable estates. I say that because where we are able to gather the extent of ground which went with the house, I do not think there

was any instance in the books in which the extent of ground ran to what is conceded in the present case, ten acres. We were referred to one case, the case of *Dundonald*, 1836, 14 S. 737, where the reference was to gushets of ground and spots of land, which do not suggest that the idea of the *præcipuum* received there a very extensive application. And in regard to the case of *Cruickshank*, 1801, M. *voce* Heirs-Portioners, App. part i, No. 2, which was just at the beginning of the nineteenth century, we have the first introduction of the term "lawn," but no indication of what the extent of the lawn was in that case.

It has always been regarded as of prime importance to see what the nature of the occupation has been. If you find that the subjects which are claimed as forming part of *præcipuum* have not been occupied along with the mansion-house, but have been let separately to outside tenants, then that is a circumstance which goes far to decide that they are not to be reckoned as necessarily adjunct to the mansion-house. Applying that test here, we find that the Cow Park and the Lawn Park, which are the subjects claimed in the present case, have been treated in that way. They have been let to separate tenants, and therefore it cannot be said that they were for the personal use of those who were living in the mansion-house.

I take this case as presenting to us only the alternatives of the 10 or 11 acres, or of 25 acres in addition to the 10 or 11 acres, because I am unable to find in the pleadings or in the proof, or to any satisfactory effect in the plans, materials for cutting and carving upon the 25 acres. But I desire to guard myself by saying this, that if the pursuer had formulated and proved a case for a moderate addition of ground to the east, I will not say that she might not have succeeded in getting slightly more than the 25 feet which lie immediately to the east of the front door. But no such case has been made and no such case has been proved. When one says that the *præcipuum* includes what is necessary as an adjunct to the house, each case must be decided upon its own merits. If in the future the Court have to deal with a subject of a different size and character, it may be necessary — having regard to its requirements, and having regard to the nature of the occupation of the ground surrounding the house—to give more than 10 acres. There is no hard and fast rule. All that we decide is that in the present case the Lord Ordinary has come to a just conclusion.

LORD SKERRINGTON—In the view which I take of this case it raises no question of law but one of fact. It is common ground that the pursuer as eldest heir-portioner is entitled to the mansion-house as her *præcipuum*, and that her right is not confined to the bare fabric and site of the house. The decisions show that as part of the house and along with it there may be included the offices, the barnyard, the gardens, and even an orchard of 5 acres. The only principle which I can deduce from these decisions is this—that the eldest heir-portioner may claim as part of the mansion-house any ground in its vicinity which it would be unreasonable to regard as a separate and independent tenement, having in view the character of the ground, its situation, and the manner in which it has been occupied in the past. Applying that test, it seems to me that the Lord Ordinary has done complete justice to the pursuer when he awarded her certain buildings and about 10 acres of land in the vicinity of the house. But it seems to me equally clear that the additional ground which she claims has in point of fact been treated as something separate from and independent of the mansion-house, and that it ought to be so regarded as regards the present question.

LORD CULLEN—I concur in the result at which your Lordships have arrived.

The ratio of the rule of law to which the pursuer appeals is the indivisibility of the subject forming the *præcipuum*. According to the decisions the indivisible unit comprises not only the fabric of the mansion-house but such things beyond it as, in the words of one of the cases, are pertinents necessary to the use of it, and that according to a reasonable view of necessity and a due sense of proportion applied to the circumstances of each particular case.

The extensive claim here advanced by the pursuer, both as originally tabled and as now restricted, seems to me clearly to travel beyond the limits of the rule. It is based on wide considerations of the amenity of the mansion-house as a desirable residence, and the ratio of it comes, I think, to this, that no part of the land in the vicinity of the mansion-house should be included in the equal division among the heirs-portioners if to do so would imperil the amenity of the mansion-house by placing such land, in whole or part, outwith the pursuer's control. This is a new view. It is neither exemplified nor suggested in any previous case, and it appears to me to be in no way justified by the principle on which the *præcipuum* rests. So far as the pursuer may be unable to advance her interests in the matter of amenity through her preferable right of choice among the lots, any endangerment of the amenity of the mansion-house arising from the division of the lands is, I think, an inevitable incident of the conditions of the succession which make such a division necessary.

Viewing the matter from the legitimate standpoint of indivisibility in the sense above mentioned, I think that the Lord Ordinary's view does adequate justice to the pursuer's right of *præcipuum*.

LORD JOHNSTON, who had not heard the case, delivered no opinion.

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