No 57. ed in giving effect to clauses of conquest, because though the subjects acquired may consist of land, still these must have been purchased with money, which, as a moveable subject, descends to executors. From some peculiar ideas too respecting burgage-tenements, it seems to be established in practice, that after conveying subjects of this sort in favour of the heirs and bairns, or heirs and children, of the marriage, the whole shall not belong to the eldest son, but shall be divided equally. But in the case of landed property, as the right of primogeniture has ever been firmly settled, so in marriage-settlements respecting it, it seems reasonable, that under the word 'heirs,' the eldest son should have a preference, even although it should be coupled with others of a more doubtful signification. Accordingly, although some decisions, chiefly of an ancient date, may be referred to, which appear to have deviated from the principles just now stated, the more recent ones, without any regard to the value of the subjects, which would afford a very uncertain rule, seem to have uniformly given a different effect to settlements of this sort, Sir James Steuart, *voce* HEIRS of PROVISION; *Id. voce* PROVISION IN FAVOUR OF BAIRNS; Bankt. b. 3. tit. 5. § 48.; 13th February 1768, Kempt *contra* Russel; 23d November 1773, Home and Scott *contra* Murdoch and Miller; 18th November 1788, Jacobina Reid *contra* Catharine, &c. Woods, *voce* SERVICE of HEIRS.

THE LORDS found, That James Fairservice, the eldest son of the marriage, was entitled to succeed to the lands in question.

Lord Reporter, *Justice-Clerk.* Act. *Cha. Brown.* Alt. *Geo. Fergusson.* Clerk, *Sinclair.*
Fol. Dic. v. 3. p. 124. *Fac. Col. No* 69. *p.* 125.

SECT. VIII.

Legacy to Poorest Friends and Relations.—Declaring a Disponee Personally Liable for a Disponer's Debts.—Conveying Moveable Goods and Gear.

No 58. The trustees named by a defunct for managing his affairs, and paying off his legacies, &c. found to have a *discretionary*

1762. *August* 3. The TRUSTEES of JOHN BROWN *against* His RELATIONS.

JOHN BROWN, fewer in Laswade, having no near relations, executed a settlement of his affairs in the form of a trust-disposition, whereby he vested his whole estate, real and personal, in certain trustees, with directions to dispose of his heritable estate, in the event of his death, in manner therein mentioned, and to make payment of a variety of legacies specially bequeathed; after which fol-

No 58.
power of distributing a legacy, left to the testator's *poorest friends and relations.*

lows a general clause, in these words: 'And the remainder of the proceeds of 'my said means and estate, after payment of the several legacies already be- 'queathed, or to be bequeathed by me at any time of my life, in manner fore- 'said, and of the payment of the expenses of executing this trust right, to be 'divided amongst my poorest friends and relations, whom I may have forgot 'herein, or in any other deed to be made by me, in relation hereto, at any time 'during my life.'

Upon John Brown's death, the trustees entered upon the management of his affairs, and paid off the special legacies and donations; but the residue which remained to be divided, in terms of the above general clause, having turned out pretty considerable, they could not agree with the relations about the manner of distributing it; some of them insisting that this money should be divided equally among all who could prove propinquity to the defunct, though in the remotest degree, and though in the most opulent circumstances; others laying claim to the whole residue as nearest of kin to the defunct; and some few pretending an exclusive right to it as the poorest relations.

In these circumstances, the trustees brought a process of multiplepoinding against the whole of the claimants, containing likewise a declaratory conclusion, for having it found and declared, That a discretionary power was lodged in the trustees of distributing this residue among such of the relations, and in such proportions as they should judge proper. In which process, compearance was made for two different sets of claimants, viz. *1mo*, The nearest of kin upon the father's side, who insisted that they alone were entitled to the whole residue, and, *2do*, A number of the relations on the mother's side, who thought it for their interest to apply for an equal division of the money among all who were in the field, and could prove any degree of propinquity. Besides these two sets of kindred, there were a number of others who had been called in the multiplepoinding, but for whom no compearance was made, most of them being extremely poor, and some of them out of the country.

Pleaded for those relations who claimed the equal division: The testator plainly intended that this residue should be divided among his relations, of whatever degree, whom he had not otherwise taken care of; and his meaning was, that it should be equally divided. The clause will not bear any other interpretation; for the word divide always means a separation into equal parts, when nothing is added to signify a contrary intention. At any rate, the clause can never import, that these trustees were vested by the testator with a discretionary power of distributing according to their pleasure; nor does it appear proper or reasonable that they should have such a power, as the legacy might be thereby entirely frustrated; for, if they are at liberty to give each relation what share they think proper, it is obvious that, supposing they should give each of them a sixpence and no more, the relations must rest satisfied, and could have no redress.

No 58. *Pleaded* for the nearest of kin: 1*mo*, The whole clause is inexplicable, and ought to be held *pro non scripto*. The words *poorest friends and relations* are unintelligible; for either the particle *and* must be taken in a conjunctive sense, in which case it is only the poorest relations, who are likewise friends, that are entitled to the residue; or it must be considered as disjunctive, in which case his poorest friends, as well as his poorest relations, must come in for a share. In either case, the division could not be made without a proof of the propinquity, friendship, and circumstances of each claimant, which would be endless and inextricable. The clause, therefore, being altogether perplexed, the rule in the civil law ought to take place, and the legacy held *pro non scripto*; the consequence of which is, that it must fall to the nearest of kin of the testator, who would have been entitled to take it *ab intestato*.

2*do*, Supposing this clause were to have effect, still the remote relations could not profit by it; for the word *relations*, in a legal sense, means only the nearest of kin; and therefore, the residue must be divided among such of the nearest of kin as the testator had not otherwise provided, by any special legacy or donation. The commentators on the civil law lay it down as a rule, that, where a testator calls in general *consanguineos suos*, or *totam agnationem suam*, those only are supposed to be called who would have succeeded *ab intestato*; *Voet. tit. de hæred. instit.* § 19. and 20. The same is the rule in the English law; as appears from Peere Williams's Reports, vol. I. p. 327. where it is mentioned as a settled point, 'That, when one devises the rent of his personal estate among his relations, without saying what relations it shall go among, all such relations as are capable of taking within the statute of distributions; else it would be uncertain; for the relation may be infinite.' And thus it was decided in chancery, in the case of a legacy left by a person among his kindred, according to their most need, 30 Car. II. 2. Chanc. Rep. p. 146.

Answered for the pursuers, to both sets of defenders: In claiming this power of distribution, the sole view of the trustees is to fulfil the will of the defunct, and do equal and impartial justice to all concerned. This power they apprehend to be vested in them by the will of the defunct, and from the nature of the thing. The whole effects are vested in them, in the first place; and they are appointed to divide the residue among the poorest friends and relations; they are therefore plainly intrusted by the defunct with this distribution. It could never be his intention, that an equal division should be made among all who could claim kindred or friendship to him, though ever so remote, and though in the most opulent circumstances; and nothing can be more rational, than to suppose, that he intended his trustees, whom he vested in the management and direction of his whole affairs after his death, should be at the trouble of making enquiry into this matter, and of determining according to circumstances the particular share that each should receive. The trustees are far from meaning, that they have thereby a power of acting arbitrarily, or of favouring any person improperly, or contrary to the intention of the defunct; the word

friends, they apprehend, in this case, to be synonimous with relations; and their design is, to make a distribution of the money among such of the relations as have been forgot by the testator, by giving some more and some less, according to the necessities of each, and the degree of relation in which they stand to the defunct. It is understood, that they must execute this trust *secundum arbitrium boni viri;* and, if they are guilty of any abuse, or any improper partiality, they will be subject to correction, by an action at the instance of those who are fraudulently disappointed. No 58.

With regard to the claim of the nearest of kin, it is plainly adverse to the intention of the testator: Nothing is more obvious, than that the defunct meant, that this residue should be distributed among his poor relations in general; and, as the intention was most laudable, there is no reason why it should not have effect. The clause is abundantly intelligible, and can be extremely well carried into execution, by supposing a discretionary power to be vested in the trustees. As to the authorities which were adduced from the civil and the English laws, to prove, that by relations in general are meant, those who succeed *ab intestato;* in the *first* place, the Court of Session gave a contrary judgment in the late case of Edward Whary's settlement, 16th July 1760*. *2dly*, Whatever may be the law where a legacy is left to relations or kindred, without any addition, which may denote what relation or kindred the testator meant, the present case is very different; for the testator has expressed himself in terms which plainly comprehend all the relations: The words of the clause, when taken together, plainly indicate an anxiety, that none of his relations, who stood in need of any assistance, should be omitted; it cannot therefore be maintained, that he meant to confine his bounty to any particular set of relations, far less to those who happened to be his heirs at law.

'THE LORDS found, that, by the trust-disposition executed by the deceased John Brown, his trustees are vested with a discretionary power to divide among the poorest friends and relations of the said John Brown, the remainder of his estate, after payment of his debts and legacies, and the expences of executing the trust, and that without distinction, whether the said relations are connected by the father's or by the mother's side, and also without distinction of degree. And they ordain the said trustees, betwixt and the 16th of November next, to give into process a condescendence of the names of the persons among whom, and the proportions according to which, they propose that the said division should be made; and remit to the Lord Ordinary to proceed accordingly.'

For the Pursuers, *Ilay Campbell et Dean of Faculty.* For the Nearest of Kin, *Dewar et Rae.* For the other Relations, *Wight.*

Fol. Dic. v. 3. p. 125. Fac. Col. No 95. p. 213.

* *Voce* IMPLIED WILL.