1817.

BRODIE, &c. *v.* BRODIE.

ELIZABETH BRODIE, Widow of William Brodie, late farmer at Amisfield Mains, in the county of Haddington, deceased; HELEN, JANET, and ELIZABETH, his three youngest daughters; and the Reverend WALTER FISHER, Minister of Cranston, the husband of the said Helen; and GEORGE BANKS, Seedsman and Ironmonger in Haddington, the husband of the said Elizabeth; for their respective interests, . . . } *Appellants;*

JOHN BRODIE, Farmer at Chesterhall, afterwards at Belhaven, the eldest son of said William Brodie, deceased, . } *Respondent.*

House of Lords, 26th March 1817.

TRUST SETTLEMENT—RESIDUE—CONSTRUCTION OF CLAUSE.—A testator by a trust-disposition, after making several special provisions, divided the whole residue among his widow, sons, and daughters, in the proportions following:—"The division "to run thus, as nine to ten, that is to say, for every ten "pounds that shall fall to the share of *each* of my sons, my "spouse, and three youngest daughters, shall be nine." The question arose upon this clause, Whether for every £10 that each of the sons took, the daughters were to draw £9 *each*, or only £9 among them as a class. The Court of Session held, that while the sons took £10 each, the widow and daughters were only entitled to £9 among them in a class. Reversed in the House of Lords, and held them entitled to £9 each, for every £10 drawn by each of the sons, according to the true construction of the trust-disposition.

The late William Brodie, farmer at Amisfield Mains, left a trust deed and settlement for the following purposes:—1st, For the payment of his debts. 2d, For the payment of an annuity of £300 to his widow, which was "ordained to "be paid from off the farm of Upper Keith, as long as "the present lease shall last. 3d, The tack of Upper Keith, "I have assigned over to my daughter Agnes and her hus-"band, and her heirs, they being bound to pay me, and my "heirs, an annuity of £600, during the lease yet to run," &c., "which annuity, after my death, shall be distributed "in the following manner, to my spouse, as already men-

" tioned, £300 yearly; the other £300 to be divided among " my family, as follows, £100 to Agnes," &c., " the two " remaining hundreds to be divided among the five others " of my family, viz., my two youngest sons, Alexander and " George, and three youngest daughters Helen, Janet, and " Bess. 4th, The farm of Amisfield Mains I leave to my " son Alexander, in case he chooses to accept of it, with " £3000 for stocking the same," &c. " But in case my son " Alexander should not choose this farm, or it should be " otherwise disposed of, and not given his discharge for his " bairns' part of gear, then the forenamed trustees shall pay " him a portion of £2500 sterling, and then come in jointly " and equal with his brothers."

Then follows this clause, that " As my eldest son John, " and my youngest son George, with my two eldest daughters " Agnes and Helen, and my youngest daughter Bess, is " already provided for, and given me their discharge for their " bairns part of gear, they shall come in for no part of " legacy until my son Alexander shall be paid his portion " of £2500 sterling, and my daughter Janet's portion of " £1200 sterling, unless they have got their portion in my " *lifetime*, and given their discharge. 7th, Besides the an- " nuity formerly mentioned to my spouse, she shall come in " for her part of legacy equal to one of her youngest " daughters, with all the table linen and napery, which shall " be entirely at her own disposal; likewise my spouse shall " have the use of the household furniture and silver plate as " long as she lives."

Then followed the clause which gave rise to the present dispute, " I hereby empower my foresaid trustees, tutors, " curators, factors, executors, to divide the *remainder* of all " money, whether in heritable bonds, or otherwise, goods or " effects, among my spouse and children afternamed, viz., " my three sons John, Alexander, and George, and my " three youngest daughters, Helen, Janet, and Bess; *the* " *division to run thus, as nine to ten;* that is to say, for *every* " *ten pounds that shall fall to the share of each of my sons,* " *my spouse and three youngest daughters shall be nine.* Be " it further understood, that after the death of my spouse, " her annuity shall be divided in the same proportion among " my six youngest children, or their heirs."

Mr Brodie, having sometime afterwards taken the farm of Burney Mains, he added a codicil to his trust deed, on 12th December 1809, declaring his son Alexander might take it,

1817.

BRODIE, &C. v. BRODIE.

or Amisfield Mains, declaring that the farm rejected by Alexander should go to the eldest brother John.

He died a short time after the execution of this codicil.

After his death, it appeared, that the whole of Mr Brodie's children, with the exception of Alexander and Janet, had received certain provisions from their father, and had granted discharges and renunciations of their legal claims.

A multiplepoinding having been brought by the trustees, two points were made in the dispute between his surviving children :—1st, Whether the clause directing the division of the *residuary fund* established a proportion of ten to nine between the sons *individually*, and the widow and daughters *individually ;* or between the sons, *individually*, and the widow and daughters *as a class ;* and 2d, Whether or not Alexander, by accepting the farm of Amisfield Mains, was excluded from any share in the residuary fund ?

May 14, 1811. The Lord Ordinary (Newton), of this date, pronounced this interlocutor : " The Lord Ordinary having considered " the foregoing claim for John Brodie, eldest son of Mr " William Brodie, tenant in Amisfield Mains, with counter " claim for Mrs Elizabeth Bogue, widow of the said William " Brodie, and for her younger children, containing answers " to the claim for John Brodie, replies for John Brodie, and " duplies for Mrs Elizabeth Bogue and her younger children ; " and having also particularly considered the trust-disposi- " tion and settlement, executed by the said William Brodie, " finds that the residuary bequest of his funds and effects, " can bear no other construction than that which he himself " has put upon it in the said clause of his trust-disposition, " viz., ' that it shall be divided among his spouse and chil- " ' dren therein named, to wit, his three sons John, Alexander, " ' and George, and his three youngest daughters, Helen, " ' Janet, and Bess. The division to run thus, as nine to ten ; " ' that is to say, for every ten pounds that shall fall to the " ' share of each of my sons, my spouse, and three daughters, " ' shall be nine.' Or in other words, that the spouse and " three daughters shall only draw amongst them £9 for every " £10 that each of the sons shall draw. And that, though " the expression of the *division running as nine to ten* may " not be strictly accurate, yet, as the testator has himself " expressly declared, what he thereby meant, no other con- " struction of it can be admitted ; but finds, that Alexander, " one of the sons, having betaken himself to the farm of " Amisfield Mains, and £3000 for stocking the same, which

" are specially settled upon him by the trust-settlement, he " cannot both claim these and a share of the residuary funds: " Ordains the trustees, the raisers of the multiplepoinding, to " give in a scheme of division of the trust funds, in terms " of Wm. Brodie's will, and of this interlocutor; and when " given in, allows all concerned to see the same, and object " thereto if they shall see cause." On representation, Lord Gillies adhered.

Various questions having been submitted to the Second Division of the Court in a reclaiming petition, which was followed by answers, the follow interlocutor was pronounced: " The Lords having resumed consideration of this petition, May 27, 1812. " and advised the same, with answers thereto, adhere to the " interlocutor complained of, in so far as it finds, that Alex- " ander Brodie, having betaken himself to the farm of Amis- " field Mains, and £3000 for stocking the same, cannot both " claim these and a share of the residuary fund;* and refuse " the desire of petition, in so far as it prays for an alteration " of that part of the interlocutor: Find that the petitioner " (John Brodie), is not barred by the deed of ratification " from insisting in his present plea; but before deciding what " is the just construction of the clause in the settlement " directing the distribution of the residuary fund, appoint " the parties to put in mutual memorials on that branch of " the cause."

These memorials having been given in, the Lords pronounced this interlocutor: " Having resumed consideration May 12, 1813. " of this petition, so far as regards the just construction of " the clause in the settlement, directing the distribution of " the residuary funds, and having advised the same, with the " answers thereto, and mutual memorials for the parties; " refuse the prayer of the petition, and adhere to the inter- " locutor of the Lord Ordinary complained of, with this " explanation, that in the distribution of the residuary funds, " the sons shall draw £10 sterling each, for every £9 drawn " by the widow and daughters among them, *as a class*."

On reclaiming petition, the Court adhered. Feb. 1, 1814.

Against these interlocutors the present appeal was brought by the appellants to the House of Lords.

Pleaded for the Appellants.—1st, The clause in dispute was framed by the testator for the express purpose of regulating the distribution of the residue *among* his wife and family, of that

---

* This part of the interlocutor was acquiesced in.

1817.

BRODIE, &C. v. BRODIE.

portion of his effects which remained after the specific appropriation of certain sums of money, or particular subjects contained in the preceding part of the deed; the testator must be presumed, therefore, to have had an individual distribution in view, and the declaration, that the division shall run as nine to ten, with its accompanying explanation, implies, that the individual distribution was to take place according to that proportion, and that the share of the wife and daughters individually, was to bear a *ratio* as nine to ten, to that of the sons taken individually. The clause is, no doubt, very loosely expressed, in which respect, it only resembles the other parts of the deed, which are equally loose in expression. But it seems utterly inadmissible to canvass the meaning of such a settlement by the strict rules of grammar. The respondent says, that the expression, "my "spouse and three daughters shall be nine," thus uniting the spouse and three daughters into a class, is not only unambiguous, but is technically descriptive of a conjunct legacy as opposed to an *individual bequest* by the Roman law, which in this particular is identified with the law of Scotland; but the various authorities appealed to by the respondent, do not bear any legal application to the present case, and do not lend even any light in clearing up the dispute, in so far as the language here used is concerned. The question between the parties is, no doubt, Whether the proportion of £9 is a disjunct proportion to be paid to each individual, or conjunct proportion to be paid to them as a body; and the respondent has certainly produced high authority for maintaining, that an individual or collective appropriation was uniformly implied by certain forms of expression in the Roman law. It is clear, however, that these expressions are either of such a nature as to exclude the possibility of any other interpretation, or, that they are technical terms, consecrated by the Roman law to that particular purpose, totally inapplicable to the practice of our law, and almost untranslatable into our language. Under the first of these clauses may be included the various expressions, "*Titio et Mœvio ædes do, lego;*" "*Titio et Mœvio fun-*" "*dum Cornelianum do, lego,*" which the respondent has proved, by various authorities, to mean conjunct legacies. It must be perfectly evident, that the disjunctive interpretation is there completely excluded by the subject of the legacy; and that, if only one house, or one farm was actually bequeathed, the legatees could not have each a house or a farm to himself. The same remark may apply to the quotation from Stair, "Where the proportion is express equal or

Stair, lib. iii., tit. viii.

" unequal; thus, let *Titius* or *Mœvius* be my heirs equally, " or let *Titius* be heir in one-half, and Mœvius and Caius in " another half; here Caius and Mœvius are conjunct in " words and matter; but they are several from Titius, both " as to words and matter." It certainly requires no quotations from commentators here to decide that *Mœvius* and Caius can only get a conjunct legacy, for the obvious arithmetical reason, that if Titius received one-half, there would remain but one other half to be divided.

But the question here regards the sense of a particular form of expression used by a testator; and it seems sufficiently obvious, that in such a discussion no assistance can be derived from the technical import of certain expressions in another language, differing completely in its idiom from that in which the testament is framed.

2. It is assumed by the respondent, that when a number or plurality of persons are appointed to receive a proportion, that proportion must necessarily be understood to be divisible *amongst them*, and not to be *exigible by each;* but the appellants conceive, that this assumption, taken as a general rule, is utterly erroneous, and that a number of persons, whether connected by copulatives, or expressed by a plural number, do not always imply a class connected collectively, with the verb to which they stand as nominatives; but must, in various cases, be construed individually as a series of substantives in the singular number. Whether this be warranted by the strict rules of grammar, or imply an ellipsis of the word " each," or some such mark of individuality, it is unnecessary to inquire. It is sufficient, that such a construction is received in ordinary language, without giving rise in general to any doubts of the meaning, which it is the intention of the persons using it to convey.

Besides, by the deed itself indications the most positive and express are set forth to show that this was an individual distribution among his whole six children, for after the clause in dispute he proceeds to say, " Be it further understood, that " after the death of my spouse, her annuity shall be divided " in the same proportion *among* my six youngest children, or " their heirs." These words express an individual distribution among the six children, and not to the daughters only as a class. By another clause in the deed, he allows £100 sterling a year to be retained by Agnes and her husband; and that £100 " shall be *their* full part of legacy, as I con- " sider they have got a good bargain of the farm of Upper

1817.

BRODIE, &C. v. BRODIE.

"Keith," expressions which, if there be any meaning in language, show that there was a very considerable difference between the value of that annuity and the portion of legacy which he understood would be drawn by her sisters.

Pleaded for the Respondents.—1. Alexander Brodie, after having declared his option to take the lease of Amisfield, with £3000 for stocking the same, has no claim to any share of the residuary fund, by the true meaning and expression of the trust-deed in question. He had not got his provision, like the others, from his father; and the option given to him was, either to take the farm and £3000, in lieu of every thing he could claim by the deed, or giving up the lease and the £3000, to take £2500 as his share of the residue. 2. The clause in the settlement as to the residue, by which the deceased, after the adjustment of all the special provisions, divides the whole among his spouse, his sons, and his three younger daughters, is in these terms: "The division to run "thus, as *nine* to *ten;* that is to say, For every *ten* pounds "that shall fall to the share of *each* of my sons, my spouse "*and* three youngest daughters shall be nine"—does, according to the natural, the grammatical, and the legal meaning of the words so employed, import that *each* of the sons shall draw a share of the said residuary fund, bearing the same proportion to a single share, to be drawn by the *widow and three younger daughters among them, as a class of joint legatees,* which the sum of *ten pounds* bears to the sum of *nine pounds.* And the testator having declared, in express words, that this is his meaning, no other construction is admissible. Had he meant that the "spouse and three younger daughters," should take individually, and not as a class, he would have used the term "each" as applicable to them, in the same manner as he has used that word when describing the sons. 3. If the clause is construed according to the natural and legal meaning of the words, the whole settlement is rational and consistent, and accords with a systematic plan, by which the testator proposed to divide his estate among his children. But if the construction proposed by the appellants were admitted, the settlement would be rendered completely irrational and absurd, reconcileable to no plan or principle whatever, and inconsistent with all the acknowledged views of the testator.

After hearing counsel,

The LORD CHANCELLOR said,

"My Lords,*

"This is an appeal, first, from an interlocutor of Lord Newton, Ordinary, of whom (as he is no more) it is not indelicate now to say, that his authority was very considerable. It regards the meaning of a clause in a trust-deed which I shall consider more at large by and bye. In the case below, Lord Newton pronounced, first, this interlocutor." (Here his Lordship read Lord Newton's first interlocutor.) "The principle here laid down by Lord Newton I admit to be unquestionable, that, when a testator himself expressly declares what his meaning is, *no other construction* can be admitted; but this still leaves behind what this meaning truly is.

"I observe, that Lord Newton's construction of the clause, was, that "the spouse and three daughters should only draw amongst "them £9 for every £10 that each of the sons should draw," which I understand to mean, that if the three sons took £30, then the spouse and three daughters would be entitled to £27 among them.

"The interlocutor, in so far as it respects Alexander's special provision, has been subsequently acquiesced in."

(His Lordship next read the interlocutors of Lord Gillies, and of the Second Division appealed from.)

"I observe, that the interlocutor of the Second Division of the 12th of May 1813, adheres to the interlocutor of the Lord Ordinary, with this explanation, that, in the distribution of the residuary funds, the sons shall draw £10 each, for every £9 drawn by the widow and daughters among them, as a class.

"If I understand this aright, though both the Lord Ordinary and the Court were agreed in the principle which ought to rule this case, yet they came to this very different conclusion, that, whereas the Lord Ordinary was of opinion that the property was to be divided as £30 is to £27, yet the Court was of opinion, that while the sons took £10 each, as individuals, the widow and three daughters come to take £9 among them, as a class.

"It is impossible for any one to show the obscurity of the clause more strongly than is done, by two Courts having come to two opinions upon it, so totally different. It is a fair question, therefore, if a third Court may not find a third meaning for the clause, as clear as the other two.

"In the printed papers, we have a good deal of acute reasoning on the advancements of money given to the different children during the father's life, and on the terms of the will of the testator's father. Even if we had this last before us, we could not look into it, unless Mr Brodie had himself referred to it in his

---

* Taken by Mr Robertson.

1817.

BRODIE, &C. *v.* BRODIE.

will. Neither could we take notice of the advancements of money to children, unless he had himself referred to this in his will.

"I conceive there can be no doubt that in the interpretation of an instrument like this, we are entitled to look at the whole will, when we have to inquire into the meaning of any part of it. My noble and learned friend (Lord Redesdale) may remember a case of this kind, in the English courts, where a testator had devised part of his real estate to A, without a word of limitation, but these were supplied from another part of the will, where he said he meant to give a similar estate in Black to A that he had given in White to B.

"In looking at this will, I find inaccuracies in many parts of it, all of them requiring construction."

(Here his Lordship read the trust-deed from the beginning, commenting upon the different clauses as he proceeded.)

"I observe that, in the commencement, he refers to his 'own 'will and instructions,' not to the will and instructions of any body else.

"In the clause disposing of the 2d £300 surplus rent from the farm of Upper Keith, the words '*my family*,' appear to be exclusive of his spouse, whereas, in other parts of the instrument, they may bear a different construction.

"The £100 a year to be retained by Agnes and her husband, as '*their full part of legacy*,' we understand from other parts of the instrument, must mean *their share of the residuary fund.* When he says, he considers that Agnes and her husband have got a good bargain of the farm of Upper Keith, even if this were doubtful, it would not let in Agnes to her share of the residue.

"When he says, 'The two remaining hundreds to be divided 'among the five others of my family, namely, my two youngest 'sons, Alexander and George, and my three youngest daughters, 'Helen, Janet, and Bess;' this clearly means, a division among them as individuals; yet there are two classes, and if we were to take the civil law authorities, without looking at intention, we should divide these hundreds between the two classes, as two to three.

In the disposition of Amisfield Mains too, you cannot go on the strict words of the instrument. Nobody can doubt that his meaning was, not to give to Alexander both Amisfield Mains and a share in the residue. When he says as to the latter alternative, 'then the foresaid trustees shall pay him a portion of '£2500, and then come in jointly and equal with his brothers,' he must have meant, that Alexander should so come in, jointly and equally with his brothers, not that the trustees should do so, though the words import this.

"Again, where he says, that Mrs Fisher's provision shall, in a certain event, return to *this family*, this may occasion a question,

what individuals he meant. When he says also, that Mrs Fisher, in another event, is to come in for no part of legacy, this must mean, a share of the residue.

"When he mentions, that his eldest son, and others of his children, were already provided for, and should come in for no part of legacy till Alexander should be paid his portion of £2500, and his *daughter Janet's* portion of £1200, it never could be contended that any inequality in their provisions could have any effect as to the residue; the other part of the clause also requires *construction*, for he could never mean that Alexander was to take both the £2500 and his sister Janet's £1200, yet so the words import.

"As to the clause itself, it was contended, that certain constructions of it tended to absurdity. I would agree that no absurdity in the principle of division ought to prevail against the meaning of clear words, yet in a doubtful case, and where the words are obscure and interpretation necessary, this absurdity of principle is one way of getting at the meaning of the words.

"If he had stopped at Bess, it might have been contended that there were three classes, his spouse *one*, his sons a *second*, and his daughters a *third*.

"In any view, Lord Newton's interpretation of the clause, is much more according to the strict words, than the interpretation of the Court. According to the former, while the sons as individuals would take £30 amongst them, the spouse and daughters would get £27 as a class. If the strict words are to be taken thus, how is it possible to construe them, by intention, to mean that, if the sons took £30, the mother and three daughters were to take £9 among them.

"I allow that in either way, the distribution might have varied by the deaths of the sons and females. But he further says, that after the death of his spouse, her annuity shall be divided in the *same proportion*, among his six youngest children, or their heirs. This clearly showed that he had an individual division in his view, as after the death of his wife, his daughters must necessarily have taken a different division, from what, in the other cases, they would do, of the residue of his estate.

"Upon the whole, I think the meaning clearly is, that while *each* of his sons was to take £10, *each* of his wife and daughters was to take £9. If he had said, my three sons shall take £30, and my spouse and three daughters shall take £9, then, I conceive, the words of the will would have bound us; but the words are very different here, and I think the meaning I put upon the clause, is the most rational, when all parts of the will are taken into view.

"But in declaring this to be the meaning of the will, we must be careful not to prejudice the contingent rights of any parties,

1817.

BRODIE, &C. *v.* BRODIE.

as to what may occur relative to the provisions to Mrs Fisher; this I mean to provide for in the words of the judgment."

LORD REDESDALE.—"It appears to me that the decision in this case is not only erroneous, but that the grounds of it are also erroneous.

"The Court seems to have excluded from the construction of the clause everything but the words of the clause itself, whereas, they ought to have looked at the whole instrument.

"When the Lord Ordinary, in the first instance, thinks that the word 'and' makes the daughters a class, why it should have this effect here, and in no other part of the instrument, I am unable to discover. If it did make a class, the judgment of the Lord Ordinary was right; the sons, if three, would share in the residue, and would thus take £30 for £27, that the females would take. But when the testator directs his trustees to *divide* the residue among his spouse and children, after named, he indicated an individual distribution.

"If he had stopped before the words, 'as nine to ten,' there would, according to the judgment, have been three classes, 1st, The wife,—2d, the sons,—and 3d, the daughters.

"These words, 'as nine to ten,' are very important, whether we adopt the view of the Lord Ordinary or of the Court. We must advert to the view of this which existed in the testator's mind.

"To exclude Alexander from a share of the residue, the Court must go against the strict words of the clause. But the testator evidently meant that Alexander should only take a share in the residue, if he did not take his special legacy.

"According to the Second Division of the Court, if all the three sons were to take, there would be a division as of £30 to £9; if only two, they would take as £20 to £9; and if only one, he would take £10 to £9; but he previously announces his purpose to make an individual division, then he says, as nine to ten; but these words are merely explanatory; his meaning in my view clearly was, that each of his sons should take £10 for every £9 that each of the females should take.

"It is perfectly clear to me, that neither the Lord Ordinary nor the Court has given the true meaning and intention of the testator. Even in this clause, I see nothing to make the daughters a class; but when you look at the whole will, this is quite clear that the strictest interpretation of the words would only give the interpretation of the Lord Ordinary. Upon the whole, therefore, I entirely concur in the judgment that has been proposed.

Journals of the House of Lords.

It was, therefore, ordered and adjudged that the several interlocutors complained of be, and the same are hereby reversed, so far as the same regard the construction of

the residuary clause in the said trust-disposition of the said William Brodie deceased, with respect to the division to be made of the residuary funds and effects of the said William Brodie, amongst his widow, his two sons, John and George, and his three daughters, Helen, Janet, and Bess, his son Alexander being excluded from a share of such residuary effects, as in the said interlocutors expressed: And find that, according to the true construction of such trust-disposition, such residuary funds and effects (subject to the question after mentioned), ought to be divided between the said widow and the said sons, John and George, and the said daughters, Helen, Janet, and Bess, in proportions following, that is to say, that, for every £10 of such residuary funds and effects which shall be drawn by each of the said sons, John and George, upon distribution of such funds and effects, the widow shall draw £9, and each of the said daughters, Helen, Janet and Bess, shall draw £9, so that when the sons shall take £10 each, the widow and daughters shall take £9 each. But this finding is to be subject, nevertheless, as to the share of the said daughter, Helen, to any question which may arise touching such share upon the true construction of such trust-disposition, with regard to the conditions expressed therein concerning the said Helen, and her husband, the appellant, Walter Fisher. And it is further ordered, that with this finding, the cause be remitted back to the Court of Session, to do therein as shall be just.

For the Appellants, *Sir Saml. Romilly, John Fullerton.*

For the Respondents, *John Leach, John Clerk, James Moncreiff, Fra. Horner.*

NOTE.—Unreported in the Court of Session.

WM. WALKER, Esq. of Coats, . . . *Appellant;*
Major JAS. WEIR of Tolcross, . . . *Respondent.*

House of Lords, 26th March 1817.

ROAD—POWER OF TRUSTEES IN SHUTTING UP ROAD—ACQUIESCENCE.—Three questions occurred in this case, 1st, Whether there was any power in the road trustees to shut up a road at Bell's Mills? 2d, Whether, supposing they had such power,