1789. *June* 17. JAMES FAIRSERVICE *against* JAMES WHYTE.

No 57.
Destination of lands in a marriage-contract to heirs and bairns, was interpreted to belong to the eldest son only.

THE father of James Fairservice, in his marriage-articles, disponed some lands of small value belonging to him, to the heirs and bairns of the marriage. The obligation to infeft, the precept of sasine, and the assignation to the writs, as well as a clause respecting the conquest, were in favour of the children of the marriage.

Of this marriage there existed several children. James Fairservice, the eldest, after his father's death, obtained, from the superior of the lands, a charter, confirming the disposition from his father, and also containing a precept of *clare constat*, wherein, on the narrative of its being shown by authentic documents, and by the charter of confirmation, that the bearer thereof was nearest and lawful heir of the deceased, he granted warrant for infeftment, &c.

James Fairservice being infeft in virtue of this warrant, sold the lands to James White; who being charged for payment of the price, preferred a bill of suspension, in which he *contended*, That the devise being to 'heirs and bairns of the marriage,' while all the subsequent clauses were in favour of the 'children of the marriage,' the lands sold to him did not belong to James Fairservice, but to the whole issue of the marriage equally; and

Pleaded, Notwithstanding the favour which our law has shown to priority of birth, by interpreting the word 'heirs,' occurring in a settlement of land rights, as comprehending those persons, in their order, who are called to the intestate succession, yet where a testator has at the same time added other words which do not readily admit of such a construction, it has given way to a different rule. Thus, where the expression of 'heirs and bairns of a marriage' has been employed, the practice has been, not only in the case of *feuda pecuniæ* and in that of burgage tenements, but also in the settlement of land estates, to admit, without distinction, all the children of the marriage. In circumstances like the present, such an interpretation seems peculiarly proper, the whole relative clauses respecting this insignificant piece of land, which the proprietor could have no intention of perpetuating in his family, being in favour of 'the children of the marriage,' which cannot be understood to give any more right to the eldest son than to his younger brothers and sisters. And, in another clause, that respecting the conquest, it will not be disputed, that the whole children of the marriage were meant, this having been determined in many instances, Dirleton, *voce* HEIRS of PROVISION and SUBSTITUTION; Stair, b. 3. tit. 5. § 52.; Dict. *voce* PROVISIONS to HEIRS and CHILDREN; 17th February 1736, Rankine *contra* Rankines, C. Home, p. 39. *voce* SUCCESSION; 13th June 1760, Scott *contra* Scotts, No 100. p. 985.

Answered, Where, in marriage-settlements, sums of money are provided, it has been justly held, that if the destination is to the heirs and bairns of the marriage, the children will succeed *per capita*, because this would be the rule of distribution if no settlement had been made. And the same thing is observ-

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-