1760. *July* 22.

ANTHONY and JAMES MACHARGS, *against* GILBERT BLAIN of Blainfield.

No 110.
In a testament executed in Scotland, carrying effects situated in Antigua, a residuary legacy to brothers and sisters, or other nearest of kin, does not comprehend the nephews and nieces of the defunct, while the testator has brothers and sisters alive; though by the law of England, which takes place in Antigua, they would have been entitled to a share of the residuary funds.

JOHN BLAIN, brother of Gilbert Blain, and uncle, by the mother, to Anthony and James Machargs, resided some years as a merchant in Antigua; he afterwards settled in Glasgow; and, after a few years residence there, returned again to Antigua; where he lived about twelve years, and died.

During his stay in Scotland, he executed a latter-will, wrote with his own hand, by which he appointed his brother Gilbert his executor; to whom he bequeathed L. 100; to his sister Marjory, L. 200; and L. 100 to Anthony and James Machargs, his nephews by his deceased sister Jean Blain. When he left Scotland, he committed this will to the care of a friend.

The will contains this clause; 'And all the rest, residue, and remainder of 'my effects and estate, I leave and bequeath equally amongst my brethren and 'sisters, or other nearest of kin that shall be alive at the time of my decease.'

John Blain left a very considerable moveable estate, mostly acquired after he went last to Antigua, and situated there at the time of his death.

Anthony and James Machargs claimed right, not only to the special legacy bequeathed to them, but also to a share of the residuary legacy; to which they alleged they were entitled by the above recited clause of their uncle's will, under the description of his *other nearest of kin.* They brought an action against Gilbert Blain, the executor nominate, to account to them for their share of the said residuary legacy.

Gilbert Blain *insisted*, That the residue of the defunct's estate belonged to him and his sister Marjory, in virtue of the general residuary legacy.

Pleaded for the pursuers, The defunct generally resided in Antigua, and there his effects were situated at the time of his death. By the laws of Antigua, the right of representation in the succession to moveables *ab intestato* prevails. It is not to be presumed the defunct had in view to alter this rule; and the words of his will seem, agreeable to it, to intend a distribution of the residue of his effects amongst his brothers and sisters who should survive, and the children of those who should predecease him.

The effects are, by the law of nature and nations, under the disposal of the judge in whose jurisdiction they were situated at the time of the testator's death; it is *ex comitate* if he gives execution to the sentence of any other judge concerning them; he cannot give such execution but in conformity to the laws of his own country; every plea, therefore, arising to the pursuers from the situation of the effects, and the law of the country where they were situated, ought to be equally good here as in Antigua. In the law of England, (which takes place in Antigua,) nephews and nieces are considered as *next of kindred* to their deceased uncle, as they concur with his brothers and sisters in his succession; and it is to be presumed, that the defunct understood *nearest of kin* in that sense.

No 110.

Answered for the defender, John Blain was a Scotsman born; had passed most of his life in Scotland: was settled merchant in Glasgow when he made his will; all or most of his effects were then in Scotland; his testament was executed in the language, and according to the forms of the law of Scotland; and it cannot be imagined, that he intended any rule of succession, or any construction of the words of his will, different from that of the law of Scotland. He bequeathed the residue of his estate *to his brothers and sisters, or other nearest of kin*. The only possible construction of these words is, That his brothers and sisters, if any survived him, and failing all them, his nearest of kin, should succeed to the residue of his estate; which necessarily excludes the pursuers, who are neither brothers nor sisters, nor nearest of kin, while a brother and sister are alive.

If John Blain had died upon his voyage from Glasgow to Antigua, it cannot be doubted, that the pursuers would have been excluded from his succession; and the legal sense and construction of his testament cannot surely be varied by the accidental increase, or change of situation, of his effects. Such change might alter his succession *ab intestato*, according to the laws of the different countries where his effects happened to be situated at the time of his death; but could never alter the import of his testament; which must always be understood according to the sense of the law of the country where it was executed.

It is improper to argue from the rules of succession *ab intestato*, or presumed intention of the defunct, when his express will directs the distribution of his estate. The observations upon the law of nature and nations, and the power of the magistrate to distribute the effects of a defunct situated in his jurisdiction, according to the law of the country, are entirely misapplied to this case. If John Blain had died intestate, his effects situated in Antigua would have been distributed according to the legal course of succession there; but as he made a will, if the matter was to be judged in Antigua, it could not be determined according to the rules of succession *ab intestato*, but according to the words of the will. By the law of every country, the will of the defunct is the sovereign rule of his succession; and if any thing is doubtfully expressed in the testament, it must be explained according to the acceptation of the words in the country where, and according to whose forms, it was executed. It cannot be imagined, that the defunct used the words *nearest of kin*, not in the sense of the law of his own country, but of the law of England, of which there is no reason to believe he had the least knowledge.

'The Lords found, That after payment of the special legacies contained in the testament, the residue of the estate and effects of the defunct belonged to the defender, and his sister Marjory; and therefore assoilzied the defender.'

For the Pursuers, *J. Craigie, Ferguson.* Alt. *Miller.*

W. N. *Fol. Dic. v.* 3. *p.* 222. *Fac. Col. No* 238. *p.* 433.