correct that injustice by making effectual the purchaser's will. The son of the second marriage was accordingly preferred. No 11.

Fol. Dic. v. 3. *p.* 308. *Sel. Dec. No* 134. *p.* 189.

1760. *July* 16.

JAMES WHARRIE, Vintner in Whitehaven, *against* The distant RELATIONS of EDWARD WHARRIE.

No 12.
A residuary legacy was left among the testator's relations not named in the testament. The nearest relation of the testator claimed the whole, upon this ground, That he was not named as a legatee, and that it could not be the testator's intention that the residue should be divided among all his relations in the remotest degree who were not named. The claim was repelled.

EDWARD WHARRIE of Guildford, in the county of Surrey, having resided for many years at Dumfries, executed a testament, by which he appointed William Lightbody of Liverpool his sole executor. He directed him to pay all his debts and a number of legacies, among which there is one in the following words: 'To the three children of James Wharrie, vintner in Whitehaven, or survivors of them, share and share alike, the sum of L. 750 Sterling.'

After the legacies is the following clause: 'All which legacies being paid, I 'appoint and ordain my said executor to remit the surplus of my money to 'Andrew Binnie, in the parish of Graitney, and William Johnston in Langriggs, to be by them divided equally amongst my relations not herein named; 'and I appoint the legacies to be paid, and the surplus to be remitted, within 'year and day after my decease.'

After Wharrie's death, a competition ensued betwixt James Wharrie, vintner in Whitehaven, to whose children the L. 750 had been left, and some more distant relations of the defunct, for about L. 300, which remained after paying the legacies; and for determining the preference of the parties, a multiplepoinding was raised in the name of Lightbody, the executor, and of Binnie and Johnston, the trustees above-mentioned.

Pleaded for the more distant Relations, That by the very words of the testament, it can never be understood that James Wharrie, or any other person whatever, should be entitled to claim the whole of the money in question. The surplus is thereby directed to be divided equally among the defunct's relations not named in the testament. It is impossible, therefore, that though James Wharrie were the nearest relation, he could pretend an exclusive right to this money.

2do, It is clear, that by the words of the testament, he is cut out from any share in the surplus. It is thereby specially provided, that no person named in the testament could be entitled to any share. But James Wharrie is expressly named, and a considerable sum left to his children. Besides, as he was expressly under the testator's view, and as nothing is left to him, it is evident that the testator did not mean that he should be entitled to claim any thing farther than the L. 750 left to his children.

No 12.

Pleaded for Wharrie; Notwithstanding the clause in the deed, it cannot be pretended, that the surplus falls to be divided amongst the relations of the testator to the remotest degree. The fair meaning and construction of this clause is, that after the legacies are paid, the residue is to be divided among such as would have succeeded to the defunct *ab intestato*, provided they are not named in the will. If, therefore, there is any one person who would have excluded all the rest *ab intestato*, he is entitled, in like manner, to take the surplus in preference to more remote relations. James Wharrie is undoubtedly the defunct's nearest relation not named in the will, and consequently is entitled to exclude all the rest.

2*do*, It could never be the meaning of the testator, that no person whose name is contained in the testament, should have any title to this surplus. The obvious meaning is, that no person who is honoured, or receives any thing by the testament, could have any title. Wharrie certainly has got nothing by the will, and therefore must be entitled to a share of the surplus. Suppose he had been a witness to the deed, and consequently his name therein mentioned, it cannot be pleaded, that he would have been thereby excluded. The cases are perfectly parallel.

'THE LORDS having considered the clause in the testament, whereby the residue of the defunct's effects, after payment of his debts, the large legacy to James Wharrie's children, and other legacies therein mentioned, was to be remitted to the trustees in Scotland, to be by them immediately divided among his relations not therein named, found, That James Wharrie is not entitled, as nearest of kin, to claim the said residue to the exclusion of the testator's other relations not named in the said testament, among whom the trustees shall divide the same; and therefore repel the claim of James Wharrie in Whitehaven, as being contrary to the purview of the testament.'

For Wharrie, *Macqueen.* For Lightbody, *Hew Dalrymple.* Clerk, *Forbes.*

P. M. *Fol. Dic. v.* 3. *p.* 309. *Fac. Col. No* 236. *p.* 430.

1763. *August* 10.

CREDITORS of ANGUS M'ALISTER of Loup, *against* His Wife, JEAN M'DONALD.

No 13.
A woman assigned to her relation, a married woman, a bond of L.100, secluding the husband's *jus mariti*. She afterwards as-

ANGUS M'ALISTER of Loup, having denied his marriage with Jean M'Donald, she brought a declarator of marriage against him.

While this suit was in dependence, Margaret Drummond, a relation to Jean M'Donald, on the 29th January 1760, assigned to Jean a bond for L. 100, due by three tradesmen in Edinburgh, 'secluding her husband's *jus mariti*, and all 'manner of right of administration, or other interest he could pretend 'thereto.'