No 3. him of his moveable estate; Forbes, 27th January 1708, Lady Harden *contra* Scot, No 1. p. 3809.

'The Lords, notwithstanding, remitted the cause to the Commissaries, with this instruction, to prefer the disponee.'

And the reasons for this judgment are as follow: The next in kin is preferred to creditors and legatees in the office of executry, because the next in kin has generally the greatest interest. But as there are few general rules without an exception, here is an exception founded on the common principles of law. It is a principle, that no person is allowed to bring an action, or make a claim, whatever right he may have, unless he can show an interest. A contract betwixt two apprisers, that neither should alien under the pain of forfeiture, was not sustained to produce an action of forfeiture upon alienation; because the pursuer could qualify no damage by the alienation, and, therefore, had no interest to raise the process, Durie, 11th February 1630, Carr *contra* Limpetlaw, No 4. p. 95. For the same reason, the next in kin who cannot figure to herself any advantage by the office, ought not to be admitted; especially in competition with the disponee, who has a well-founded interest to be admitted to the management of effects, which, after payment of the debts, are wholly to be applied to his use; 2*do*, If the next in kin be preferred, the whole moveables must be converted into money; which seems to be both unnessary and unreasonable, when perhaps there is not a shilling of debt; 3*tio*, The case of Lady Harden *contra* Scot, instead of being an authority for the next in kin, affords an argument for the disponee. In that case, the next in kin was also heir to the land estate, who urged, that he had an interest *qua* heir to have the debts paid: And next, that the bulk of the executry consisted in arrears due by his tenants; and that he had an interest to deal with them tenderly, which could only be in his power if he himself were made executor. These considerations favour the disponee, who had right to the real estate as well as personal.

Sel. Dec. No 74. *p.* 98.

1762. *August* 6. Alexander Earl of Home *against* Lady Jane Home.

No 4.
A bond of provision granted by a brother to a sister, and bearing to be in full satisfaction to her of all claim of executry, found in the hands of the brother's doer after his death, does not ex-

Upon the 7th of May 1757, William, late Earl of Home, granted a bond of provision to his sister Lady Jane, whereby, upon the narrative of his being inclined to make a reasonable settlement upon her in the event of her surviving him, he bound himself and his heirs, &c. to pay her an yearly annuity of L. 80 Sterling during her remaining unmarried; and, in the event of her marriage, the sum of L. 1000 Sterling at the first term thereafter.

The bond contained the following clause: 'And it is hereby expressly provided and declared, That the above-written provisions, in favour of the said 'Lady Jean Home, shall be in full satisfaction to her of all claim of executry, 'or whatever else she can ask, claim, or demand by my decease, except what

'further I shall think fit to give or bequeath to her of my own good will; under 'which condition, these presents are granted by me, and to be accepted of by 'her, and no otherwise; reserving always to me full power and liberty, at any 'time in my life, even on death-bed, to revoke or alter these presents, in whole 'or in part, at my pleasure; and declaring, that these presents shall have the 'full force and effect of a delivered evident, albeit the same shall be found in 'my own custody undelivered at the time of my decease; whereanent I here-'by expressly dispense.'

No 4. clude the sister from being confirmed executrix *qua* nearest of kin.

The bond was deposited in the hands of Earl William's doer, and never made its appearance till after his Lordship's death.

Upon that event, Lady Jane took out an edict, upon which she was decerned executrix to her brother; and applied to the Commissaries for an order to inventory and appretiate the furniture in the mansion-house of the family.

The present Earl appeared for his interest, and *insisted*, That his sister being excluded from all claim to the executry by the bond of provision granted to her, he alone was entitled to the administration of the effects which belonged to himself.

The Commissaries found, That Lady Jane was not excluded from the office, and allowed her to expede her testament.

The Earl presented a bill of advocation; and, upon the 17th of June 1762, the Lord Egefield Ordinary, after advising with the Lords, refused the bill, reserving to both parties to insist upon their point of right to the executry-subject, as accords.

The Earl preferred a reclaiming petition, in which he *insisted*, That the office of administration must always go to the person who is to have the ultimate benefit arising from the succession coming out to a good avail, or the loss arising from the shortcoming; and that both by the Roman law, and by a course of decisions for upwards of four score years past, bonds granted by a person to his nearest in kin have always been found sufficient to exclude them, 27th January 1680, Sandilands *contra* Sandilands, *voce* PROVISION to HEIRS and CHILDREN; 1731, Campbell *contra* M'Leod, *see* APPENDIX; 1748, Campbell *contra* Campbell, *voce* SUBSTITUTE and CONDITIONAL INSTITUTE.

Answered for Lady Jane; *1mo*, Although the Earl had exheredated her in the most express terms, by declaring, that she must accept of the bond in place of any claim she could have to the succession, such act of exheredation, without her acceptance, could have had no effect, and she must still have remained heir to her brother *in mobilibus*. By the Roman law, the institution of an heir was the foundation of every testament or latter-will, without which it could not subsist. A testament with them was good, though it contained nothing but a nomination of an heir in three words, as *Titius heres esto*; but if, instead of such nomination, it contained only an exheredation, as *Titius exheres esto*, it would have been altogether ineffectual. In like manner, supposing a testator to have left a sum of money to Titius, under the express condition, that he should be

No 4. debarred from claiming any right to the succession; yet, if he named no other person to be his heir, he would still die intestate; and Titius, if his heir at law, would, notwithstanding such prohibition, succeed to him. Further, though Titius had actually accepted of the sum of money, and thereby had become virtually bound not to claim the succession, or though he had bound himself in the most express terms, such obligation would by the Roman law signify nothing; because, by that law, every paction *de hæreditate viventis* was reprobated, so that it could not impede the course either of the legal or testamentary succession. It is true indeed, that, by the practice of this country, any man may, for a valuable consideration, renounce the hope of a succession, even by accepting a bond under such a condition; but then the acceptance of the bond is absolutely necessary. The rule, that there can be no exheredation without an institution or nomination, still remains; and not one example is to be found of any nearest of kin being excluded from the succession, without either a testament naming another executor, and universal legatar, or a bargain whereby such nearest of kin, either expressly or implicitly renounced his right. None of the decisions referred to point that way; all of them proceed either upon an acceptance of a provision, or upon an express renunciation.

2*do*, The late Earl has not in this case excluded his sister absolutely from her right of succession, but only conditionally, in case of her accepting of the bond; so that an option was allowed her to betake herself either to the one or to the other; it being impossible to assign any reason why her acceptance should have been at all mentioned, if it had been the Earl's intention that she should be absolutely cut off from the succession without any choice.

Replied for the Earl; 1*mo*, The will of the defunct is the fundamental rule for determining all questions of succession, especially to moveables, the free disposal whereof has met with every indulgence; and, though the Roman law has been adopted in general, with relation to the succession of moveables, yet this, as well as other nations, has repudiated many of its subtilties and distinctions, which are found not to be adapted to the policy of modern times. In particular, it is not necessary to institute another heir, in order to exheredate or exclude one who might otherways succeed to a share of the defunct's effects *ab intestato*. Thus, where two or more stand in the same degree of relation to the defunct, and he executes a deed, declaring his express intention, that one of them shall have no part of his effects at his death; or, if he grant a provision to him in satisfaction of all share of such succession, there can be no more doubt of his intention, that the share of such party should accresce to the other relations, who he saw would succeed *ab intestato*, than if he had expressly made the same over to them; and consequently the same effect must be given to his intention in the one case as in the other. In such a case, the party excluded is put in the same situation as if he never had existed, so that the succession accresces of course to the other next in kin. The kinsman, to whom the benefit thus accrues, has no occasion for any other title than what stood in him *jure*

sanguinis, and which is only enlarged by the act and deed of the defunct, excluding a person who, by the course of the same succession, would otherwise have been entitled to a share with him. Had there been here no sister, the petitioner, though heir to his brother in his land-estate, would likewise have been his sole executor *qua* next in kin; and, as the case stands, were he not heir, he would unquestionably come in equally with Lady Jane: Now, as they are both *in pari gradu*, and the defunct has declared his intention and purpose to exclude the lady, by giving her a provision in full, matters are thereby brought to the same situation as if the lady had not been living at her brother's death; in which case, the petitioner became unquestionably entitled to both the heritable and moveable estate as heir, and next of kin. In short, if in this case Lady Jane were preferred to the whole executry in lieu of her special provision, the law of Scotland would suffer a material alteration, and, instead of effect being given to the late Earl's will and declared intention, his succession would be carried in a direct contrary channel. No 4.

To the *second*; The words of the bond obviously import a mandate or command, and not an option or election given to the obligee. The words, *and to be accepted*, import the same thing as *shall be accepted*, according to the expression used in the former part of the clause, that the provision shall be in full satisfaction. The exception of what further he should think fit to give or bequeath was superfluous; but still it shows he meant that she should have nothing *ab intestato* beyond that provision, but only by special gift or legacy. And the words in the preamble, declaring the Earl's intention 'to make a reasonable settlement upon her in the event of her surviving him,' further demonstrate, that the contents of the bond were to be taken as a reasonable settlement, and no more. In short there is no ambiguity whatever; the words are clear and positive, that the provisions shall be taken in full; and, were there even ambiguity in them, yet, if the sense and meaning is clear, the exheredation must be effectual, according to the rule of the Emperor Justinian, elegantly expressed in *L.* 3. *cod. De lib. præt.*

'THE LORDS found Lady Jane not excluded by the bond of provision; and refused the Earl's petition.'

For the Earl, *Rae*, *Ferguson*. For Lady Jane, *Burnet*. Clerk to the bills.

Fol. Dic. v. 3. *p.* 190. *Fac. Col. No* 96. *p.* 216.