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.'

Five months after, while the suit betwixt Mr M'Alister and his wife was still in dependence, Mrs Drummond executed a general settlement in favour of Mr Maxwell of Kirkconnel, and assigned to him all her bonds, and particularly this one; in lieu thereof, she, however, obliged him to pay L.100 to Mrs M'Alister, but forgot to seclude her husband's *jus mariti*.

Mrs M'Alister succeeded in her declarator of marriage, after which her husband's Creditors arrested the sum due by Kirkconnel to Mrs M'Alister, as *in bonis* of her husband.

Objected for Mrs M'Alister, The same reasons which induced Mrs Drummond to seclude Mr M'Alister's *jus mariti* at the date of her first deed, subsisted for secluding it at the date of the second. By the second deed, her intention was only to alter the security, but not to alter the object of her benefaction. She changed the debtor, and gave a more sponsible one, a landed gentleman; but she did not mean to change the creditor, or to put Mr M'Alister in place of his wife, whom he was at that very time renouncing.

'THE LORDS preferred Mr M'Alister's creditors.'

For Creditors, *Lockhart*. For Mrs M'Alister, *Jo. Dalrymple*.

J. M. *Fol. Dic. v. 3. p. 309. Fac. Col. No 119. p. 279.*

No 13.
signed to her heir all her bonds, particularly the above-mentioned one, in lieu of which she obliged her heir to pay to the former assignee L. 100, but forgot to exclude the *jus mariti*. Though it was pleaded that the granter's intention was evident from the first deed, and that the reasons for excluding the husband still subsisted, the *jus mariti* was found not excluded.

1764. *January* 26. COUNTESS of CROMARTY *against* The CROWN.

No 14.
A person settled on his wife a jointure, and in case of no children, a greater. Being attainted, his wife was found entitled to the larger jointure, because, though he had children, they could not succeed to him.

THE estate of Cromarty standing entailed in favour of heirs-male, the Earl in his contract of marriage, *anno* 1724, 'became bound, in case of children of 'the marriage who shall succeed to, and enjoy the estate, to infeft his lady in 'a liferent locality of 40 chalders victual; and in case there be no children of 'the marriage who shall succeed to and enjoy the estate, he became bound to 'make the said locality 50 chalders.' To which there is added the following clause: 'That if, at the dissolution of the marriage, there be children who 'shall succeed to, and enjoy the estate, but who shall afterwards decease dur-'ing the life of his said spouse, she, from that period, shall be entitled to 50 'chalders, as if the said children had not existed.'

The Earl of Cromarty being forfeited in the year 1745, having issue both male and female, a claim was entered by his lady for her jointure of 50 chalders, to take place after her husband's death. *Objected* by his Majesty's Advocate, That she is entitled to 40 chalders only, there being sons of the marriage, who, but for the forfeiture, would succeed to the estate. *Answered*, That taking the words of the contract strictly, according to common law, the claim must be restricted to 40 chalders, because it cannot be said literally that there are no children of the marriage who can succeed to, and enjoy the estate. But here the forfeiture is plainly a *casus incogitatus*, about which the parties interposed no will; and equity dictates, that the lady ought not to suffer by this over-