No 10.

'The Lords found, That the pursuers are not the heirs intended by the 'deed 1721; and, therefore, that there is no action upon that deed to oblige 'the defender to denude of the estate of Inverey in their favours.'

Sel. Dec. No 102. *p.* 142.

1757. *December* 13.

ALEXANDER ABERDEIN *against* ROBERT ABERDEIN.

No 11.
A disposition of an estate was written by the disponee's agent, and transmitted by the disponee to the disponer for his signature. Before it was returned, the disponee died. Although the disponee had thus never completed the disposition by acceptance, it was found sufficient to exclude the heir at law.

Provost Aberdein inclining to have a country seat near the town of Aberdeen, and finding that Farquharson of Invercauld was willing to sell the lands of Crabston, within three miles of that town, the parties exchanged missive letters, agreeing that the lands should be disponed to the Provost in liferent, and to any of his children he should please in fee, and that the price should be L. 3900 Sterling. In prosecution of this agreement, the writings of the estate were delivered to a writer, who, by the Provost's order, made out a scroll of the disposition to be granted by Invercauld to the Provost in liferent, and to Alexander, the only son of his second marriage in fee; and the scroll being revised by the Provost, was upon the 12th June 1756, extended and dispatched to Invercauld at his country-seat, inclosed in the following letter, subscribed by the Provost: 'This will come along with the amended disposition, and upon 'its being delivered to me duly signed, I am to put the bond for the price in 'the hand of your doer.' Invercauld not being at home, the packet was delivered to his Lady. As soon as he returned home, which was on the 21st of the said month of June, he subscribed the disposition, and sent it with a trusty hand to Aberdeen, to be delivered to the Provost. But the Provost being taken suddenly ill, died on the 25th June, a few hours before the express arrived at Aberdeen; by which means it came that the disposition was not delivered to him, nor the bond for the price granted by him.

This unforeseen accident gave rise to a question betwixt Robert, the Provost's eldest son and heir, and the said Alexander, son of the second marriage. For Robert, it was pleaded, that to complete the said disposition and to make it an effectual settlement of the land of Crabston, the Provost's acceptance was requisite; that this act not having been interposed, the disposition remained an undelivered evident, no less ineffectual than if it had wanted the subscription of the granter; and that laying aside this incompleted deed, the Provost's claim to the lands of Crabston, resting upon the mutual missives, must descend to his heir at law, seeing none of his children is named in these missives.

It was admitted for Alexander, the son of the second marriage, that the foregoing conclusion was indeed founded on the strict principles of the common law. But it was contended that the common law, in bestowing the estate of Crabston contrary to the express will of the purchaser, is so far unjust; and therefore, that it is the duty of the Court of Session, as a court of equity, to

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 survi-'vors 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 Lang-'riggs, 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 multiple-poinding 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.