SECT. II.

Succession of Moveables AB INTESTATO.

1626. *July* 4. HALIDAY *against* HALIDAYS.

No. 19.

In an action against executors, alleged, The pursuers, executors to their father, can have no right to a deal or portion of their goodsirs, to whom the defenders are executors, because the pursuer's father died before. De action. Hæred. 5. Replied, The goodsir was obliged by the pursuer's father's contract of marriage, that their father, the time of the goodsir's decease, their own father, should have a deal and portion of his goods; and so the pursuers being the father's executors, and representing him, and on life, the time of the obliged goodsir's decease, have right to a portion and deal of his goods. Admits the reply.

Clerk, *Durie.*

Fol. Dic. v. 2. *p.* 398. *Nscolson MS. No.* 185. *p.* 132.

1663. *February* 13. WALTER RIDDELL *against* ———.

No. 20.

Walter Riddell, as executor dative confirmed to one Liddell in the Canongate, pursues his debtors to pay. Compears a donatar, as *ultimus hæres* and craves preference. The pursuer answered, *first*, His gift was not declared; 2*dly*, He offered to prove the defunct had an agnate, viz. an uncle, or an uncle's son; which the Lords found relevant to be proven by witnesses.

Stair, v. 1. *p.* 179.

1729. *July* 5. GEMMIL *against* GEMMILS.

No. 21.

The subject of competition was the executry of Janet Gemmil, wherein her nephews and nieces, children of her full sister, were preferred to her sister consanguinean, upon this medium, that they were descendants by the whole blood, whereas their competitor was only related to the defunct by the half blood; and it was argued, That amongst persons of equal degree, since the whole blood excludes the half-blood, it follows that all the descendants of the whole blood do exclude the half-blood; for the difference of a degree never enters into the consideration, where there is a separate ground for devolving the succession; just as a great grand-child is preferred in the succession of his predecessor to the brother or father, though nearer of kin to the defunct; and all this not by right of repre-

No. 21. sentation, which takes no place in moveables, but because the descendant line excludes the collateral and ascendant *in infinitum*, and so does the full blood the half-blood. See APPENDIX.

Fol. Dic. v. 2. p. 398.

1747. *November* 6. RIDDELLS *against* SCOTT of HARDEN.

No. 22.
A bond granted to a husband and wife in conjunct fee and life-rent, providing that the husband should have power to dispose of part of the sum and the wife of the remainder, the heirs of the wife who survived the husband were found preferable to his creditors for that part of the sum which was stipulated to be at her disposal.

Walter Scott of Harden granted bond, bearing him to have "received from John Nisbet of Nisbet-field, writer to the signet, and Agnes Riddell his spouse, the sum of 1200 merks; which sum, with the annual rents thereof, he bound and obliged himself to pay to the said Mr John Nisbet and Agnes Riddell spouses, and longest liver of them two, in conjunct fee and life-rent, their heirs, &c. declaring nevertheless that, notwithstanding the conception of the fee of the said principal sum, yet it should be still leisom and lawful to the said Mr John Nisbet and his spouse to dispose thereof as follows, viz. the sum of 500 merks at the disposal of Mr John Nisbet, and the other 700 merks at the disposal of the said Agnes Riddell, and that by a writ under their hands; but that it should be nowise lawful to the said Mr John Nisbet to assign, uplift, or discharge the premisses, without the advice and consent of the said Agnes Riddell had and obtained thereto."

Christian and Jean Riddells, executors of Agnes Riddell, the surviving spouse, pursued Walter Scott, who succeeded the granter of the bond in the estate of Harden; and their title being questioned, the Lord Ordinary, 13th December, 1743, "In respect it was not denied that the wife survived the husband, and that it was not alleged the husband disposed of any part of the sums in the bond, found that the wife was fiar thereof."

The defender pleaded compensation upon two debts of the husband's acquired after his decease; whereupon the Lord Ordinary, July 5. 1745, "Found that from the tenor of the bond, Mr. John Nisbet had the power of disposing upon 500 merks of the principal sum, and that the defender having paid the like sum of 500 merks to a creditor of the said Mr. Nisbet's, behoved to have deduction and allowance out of the debt pursued for of the said 500 merks; and repelled the other grounds of extinction founded on by the defender, (to wit, the other debt which he had paid) and found the defender liable for the other 700 merks."

The argument in the reclaiming bill against this interlocutor, and the answers thereto, run wholly on the question, whether the husband or wife was fiar? For if he was, though burdened with a faculty to her of disposing of 700 merks, yet as she had not exercised that faculty, the sum was subject to his debts, and became affectable on the expiration of the life-rent: Whereas if she was fiar, it was otherwise; and it was pleaded she was found so by a standing interlocutor, and though this were opened, she could not miss still to be found so, at least to the extent of 700 merks.