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.

Compearance was also made for the executors of the husband, and the same arguments used for them as for the defender; but it is needless to insert them, because the Lords did not think it necessary to determine the question: For whether she were fiar, or *nominatim* substitute, she came to have right to the subject by survivancy, and he could not, either by discharge or assignation, or contracting debt, disappoint her of that right, further than his power of disposing extended. No. 22.

The Lords found, that in competition between the heirs of the husband and the heirs of the wife, who was the longest liver, the heirs of the wife were preferable; and adhered to the Lord Ordinary's interlocutor, repelling the grounds of compensation further than to the extent of 500 merks.

Act. *W. Grant.* Alt. *A. Pringle.* For Nisbet's heirs, *Ferguson.* Clerk, *Forbes.*

D. Falconer, v. 1. *No.* 206. *p.* 285.

*** Kilkerran's report of this case is No. 10. p. 4203. *voce* FIAR.

SECT. III.

Succession A TESTATO.

1662. *July* 22.

MARGARET ANDERSON and JOHN ELPHINSTON *against* MARY WAUCHOP.

No. 23.
A clause obliging a party, and his heir-male and successors, on this narrative, that his heir-male had the benefit of his estate, and the heirs-female were excluded, was found to burden the heir *primo loco*, and that he must be discussed before his executors could be liable.

Margaret Anderson, and John Elphinston, as heir to ——— Anderson, who were the two daughters of umquhile Mr. David Anderson of Hills, pursue Mary Wauchop, his relict and executrix, to fulfil an article of his contract of marriage, bearing, "That if there were no heirs-male of the marriage, he bound and obliged him, and his heirs-male and successors whatsomever, to pay to the daughters of the marriage 3000 merks;" and craved, that the executrix, as representing their father, might pay the same. The defender alleged, Absolvitor, because it is clear, by the clauses of the contract, that the father did not bind himself simply, or himself and his heirs, but that he bound only himself and his heirs-male; which is the more clear that the narrative of the clause bears, "because his estate is provided to his heirs-male." The pursuer answered, He opponed the clause, by which he did not oblige his heirs-male, but himself and his heirs-male; and so, in obliging himself, he hath obliged all that represent him; and he might have been pursued in his own life-time, if his daughters had come to the age appointed by the provision; *2dly*, He has not only obliged himself and his heirs-male, but his successors whatsomever, and therefore his executors.