No 68. these words of the narrative of the bond: 'And for better advancement to a 'fortune suitable to her degree and quality,' &c. and *contended*, That the granter having it in his eye to provide his daughter in a good marriage, it was impossible he could propose to attain his end by so small a provision as the annualrents; and therefore must be supposed to have designed her the fee of the principal sum.

It was *replied* for the defender; That the dispute was mistaken, for the deed in question was not to be regulated by the ordinary cases of substitutions, or of returns in bonds, because here the father evidently intended, that neither the daughter nor her husband should have the disposal of the principal sum, but only of the annualrents; for, after the obligement to pay, he says, 'Whilk 'sum so to be liferented by the spouses foresaid,' &c. which words are so strong, that it is impossible they can bear another interpretation, than that the spouses were not to be heirs, but liferenters. 2*do*, As to the arguments from the onerosity and rationality of the deed, and the circumstances brought to show, that the father intended that the daughter should be fiar, it was replied, that these might be of use, if the intention was to be drawn from rules in law, but could be of no avail, where the design appeared to be so clear from the writ. It might indeed seem odd, that after the show the father had made of doing for his daughter, he should have given her only 125 merks yearly, but he intended to give no more, and thought that securing the fee to the children was great enough encouragement to a match.

The Lords found, That the wife was not a simple liferentrix, but that she was a qualified fiar.

The cause was afterwards reported upon the effect of the quality, and the Lords found 'that she could not assign,' because the event of her having a husband was in the father's view, and was provided against.

Reporter, *Lord Dun.* Act. *Alex. Menzies.* Alt. *Ja. Boswell.* Clerk, *Murray.*
Fol. Dic. v. 3. *p.* 212. *Edgar, p.* 101.

No 69. In a competition between the wife's next of kin, and her second husband, claiming, as her assignee, part of the tocher contracted with her first husband, which, in the event

1775. *March* 2.

Andrew Jamieson, *against* Nearest of Kin of Rachael Wilson.

In the contract of marriage between Rachael Wilson and her former husband, David Russel, she was provided in a liferent annuity of 500 merks; and, on the other part, her father, Walter Wilson, did assign to the said David Russel the sum of 5000 merks Scots, which Rachael accepted of in full satisfaction of bairns part of gear, &c.

By the said contract it is mutually agreed, 'That in case the marriage dis-'solves within year and day, without a living child procreated betwixt them,

No 69.
of there being no child of that marriage living at her death, was conditioned to return to her 'nearest heirs 'and execu-'tors,' the Lords preferred the husband.

'then the provisions above written shall return to either party, their nearest 'heirs or executors: And, in case there be no child alive at the time of the 'said Rachael Wilson her death, then there shall 1000 merks of her tocher re-'turn to her nearest heirs and executors.'

This marriage dissolved without children by the death of David Russel the husband; and Rachael Wilson, the widow, having intermarried with Andrew Jamieson; in a postnuptial contract of marriage between them, dated December 10. 1754, the said Rachael Wilson, on her part, for the onerous considerations therein mentioned, assigned to her husband the foresaid sum of 1000 merks Scots, with annualrent, &c. and the said former contract of marriage itself, in so far as concerned the said sums.

Rachael Wilson having died, and Jamieson, the husband, failing in his circumstances, he conveyed the 1000 merks above mentioned, with all his other estate, real and personal, in favour of a trustee for his creditors.

In consequence of this conveyance, the trustee claimed from the heirs of David Russel this sum of 1000 merks; and the same being likewise claimed by the executors and nearest in kin of Rachael Wilson, as having right thereto in virtue of her first contract of marriage, a multiplepoinding was raised by the heirs of David Russel, in which the LORD ORDINARY gave a judgment, 'preferring Jamieson, the husband, to the wife's next of kin;' who reclaimed, and

Pleaded; That Rachael Wilson was neither entitled in law nor equity to grant this assignation. It will not be disputed, that the father of Rachael Wilson, who was undoubted proprietor of the whole 5000 merks of tocher, before her contract of marriage with Russel, had it in his power to dispose of this money under such conditions as could be agreed upon betwixt him and the other contracting parties; as it appeared to him, therefore, a reasonable thing, that, in the event of his daughter dying without children, 1000 merks of her tocher should revert to her own nearest relations, he was careful that it should be so expressly provided by the above clause of return in favour of her 'nearest 'heirs and executors.'

In the *next* place, that Rachael Wilson never had any property in the sum in question is extremely obvious. Prior to her marriage with David Russel, the absolute property of this money was in her father: Posterior to that marriage, the liferent thereof remained with her father; but the fee was in Russel her husband. The right could never be in Rachael, because the condition on which the sum was to return, being her death without children, it could not be purified during her life. Upon the death of Russel, both the liferent and fee of this sum devolved upon his heir, burdened with the return thereof, at the death of Rachael Wilson, to her nearest heirs and executors; so that, at no period whatever, had Rachael either the liferent or the fee of this money. It does not occur, therefore, upon what principle she could assume the power of disposing of this sum, and of taking the fee from those in whom it was vested by the foresaid clause of return, which was, in effect, equivalent to a disposition in their favour.

No 69.

Answered, 1mo, By the conception of the contract, in general, and even of the clause of return, in particular, Rachael Wilson acquired right to this 1000 merks during her own lifetime, and thereby became entitled to dispose of the same. By the words of the contract itself, the fee of the 1000 merks must have been vested in Rachael Wilson, upon this ground, that, where a sum of money is taken to a person's heirs and executors, such sum will undoubtedly belong to the person himself, and be at his disposal, unless it shall evidently appear that the designation of *heirs* and *executors*, was intended to demonstrate and point out certain individuals intended to be favoured. The right to the 1000 merks must have been in somebody, after the dissolution of the marriage between Rachael Wilson and her husband, by his death. It could not be in the husband's heirs, who had not right thereto by the contract. It could not be in the executors of Rachael, because, till her death, no such persons did exist. It must, therefore, have immediately vested in her own person, and have become by her assignable at will. It is therefore evident, that, in the eye of law, a right granted to the heirs and executors of any person, is virtually granted to the person himself; and of consequence, that the 1000 merks in question were as much provided to return to Rachael Wilson, as if she herself had been expressly mentioned in the clause of return.

The condition of return, which, it is urged, was incapable of being purified during the life of Rachael Wilson, was clearly purified the moment it became certain that there were to be no children of her body of that marriage alive at the time of her death: Now, this was equally certain a few months after David Russel her husband's death, as it was at the time when her death actually happened. In the eye of law, therefore, the condition was completely purged, and Rachael became entitled to receive and dispose of the 1000 merks from and after the death of her husband.

The intention of the contracting parties appears clearly to have been this, that, in case the marriage should dissolve within year and day, the provisions should return to either party, their heirs and executors; that, in case it should subsist longer, and afterwards dissolve without children, by the death of the wife, in that event, the surviving husband should pay back 1000 merks of the tocher to her heirs and executors; and, in case of its dissolving by the death of the husband, then the 1000 merks should return to Rachael herself, her heirs and executors. That such must have been the meaning of parties, will not admit of a doubt, although, from inattention, they have only expressly provided for the event of the wife's death before the husband, and of consequence, have confined the conditional return to her *heirs* and *executors*, on supposition of her pre-decease. And, as the intention of parties is clear, the Court will be inclined *ex æquitate* to supply any defect in the words themselves, and will not permit the executors of Rachael Wilson to take advantage of a doubtful, or defective clause in a contract, in which they had no farther concern than a mere *spes successionis*, from their being pointed out as the successors of Rachael Wilson in

the 1000 merks, in case of her dying before her husband; but which was at an end by her living after him, and thereby acquiring right in her own person to the said sum. No 69.

But, 3*tio*, Supposing the contract to be strictly interpreted, and the right to the 1000 merks to be confined to the *heirs* and *executors* of Rachael Wilson: By executors are to be understood not merely executors at law, but any executor or executors which Rachael Wilson should regularly and legally appoint; and, it is apprehended, that the pursuer, Andrew Jamieson, though nominally an assignee, is virtually the executor of Rachael Wilson, with regard to the sum contained in the clause of return, and is entitled, as such, to confirm himself executor-creditor, and thereby to draw the 1000 merks in question.

'THE COURT adhered to the Lord Ordinary's interlocutor.

Act. *H. Erskine.* Alt. *M'Cormick.* Clerk, *Ross.*

Fol. Dic. v. 3. *p.* 212. *Fac. Col. No* 167. *p.* 62.

DIVISION III.

Whether a fee can be *in pendente.*

1766. *January* 14. CAMPBELL of Ederline *against* ISABEL M'NEIL.

No 70.
The fee of lands taken to a father in liferent, thereafter to his son in liferent, and his heirs-male, whom failing, the father's heirs in fee, found to be in the father, and after his death, in the son.

NEIL CAMPBELL of Dunstaffnage, in the contract of marriage of Angus Campbell, his son, became bound 'to provide his lands and estate of Dunstaff-'nage in favour of himself in liferent, and after his decease to and in favour of 'the said Angus Campbell, his son, in liferent; and the fee of the same, af-'ter both their deceases, to the heirs-male of the said Angus Campbell his 'body, of that or any subsequent marriage; which failing, to the said Neil his 'heirs-male, according to the rules of succession, established by his rights and 'infeftments thereof.'

In an action for reducing certain provisions, granted by Neil Campbell, as contrary to the terms of this contract, brought in name of a trustee for Angus, it was admitted, that, had the estate been taken to the father in liferent, and to the son in fee, the father must have been held to be divested of the fee, in terms of the decisions quoted in the Dictionary, *voce* FIAR; but it was contend-