1799 *November* 26.

ELIZABETH BISSET *against* GEORGE and JAMES WALKER.

No. 2.
Two sisters who had purchased an heritable subject with their joint funds, and taken the rights to themselves and "the longest liver of them two, their heirs and assignees," concurred in disponing it *mortis causâ* away from their heir-at law. One of them was on death-bed. After the death of the other, who survived three years, without challenging the joint settlement, it was found not reducible *ex capite lecti*, as to the share of the predeceasing sister.

ELIZABETH and MARGARET BISSET, two sisters, purchased a house, offices, and garden, from their joint funds, and took the rights to themselves, and "the longest liver of them two, their heirs and assignees."

They afterwards, by a joint disposition *mortis causâ*, conveyed them to George and James Walker.

At this time Elizabeth was on death-bed. Margaret survived her sister about three years, and died without serving heir to her.

After Margaret's death, Elizabeth Bisset, the niece and heir-at-law of both sisters, brought a reduction of the disposition, on the general grounds of fraud, imbecility, and lesion, and also in so far as related to Elizabeth's share, as being executed on death-bed.

After a hearing in presence, on a proof, the Court (24th May 1799) repelled the whole reasons of reduction as to Margaret's half, and ordered memorials on the objections peculiar to Elizabeth's.

In a petition against this interlocutor, the pursuer argued the whole cause.

On the question of death-bed, she

Pleaded: If the expression "longest liver of them two," had not been inserted in the disposition, a conjunct fee would have been vested in the sisters, of which each would have transmitted her own share to her separate heirs; Craig, B. 2. D. 3. § 19. Bankt. B. 2. Tit. 3. § 113. Stair, B. 2. Tit. 3. § 42. The expression in question merely denotes, that the survivor was to have a total liferent. Each might have burdened or disponed of her own half during their joint lives.

The expression "their heirs," in grammatical construction, means heirs of each. And as both parties contributed equally toward the purchase, and there was no preference given to the heirs of the one above those of the other, (the criterion fixed on by lawyers for deciding cases of this kind; Stair, B. 2. Tit. 3. § 41. B. 2. Tit. 6. § 10. B. 3. Tit. 5. § 61. Bankt. V. 2. p. 337. Ersk. B. 3. Tit. 8. § 36.) both must come in equally.

Supposing the fee of the whole to have gone to the survivor, still a service was necessary to vest the feudal right in her. She could not in apparency gratuitously dispone her sister's share, and cannot by implication be held to have passed from the right of challenge vested in her, and which is now competent to the pursuer; Ersk. B. 3. Tit 8. § 99.

Answered: When a right is vested in two persons, and the longest liver of them, the survivor has not a liferent merely, but an absolute fee in the whole; 22d June 1627, Lidderdale, No. 39. p. 4247; Dict. *voce* FEAR, January 1673, Archibalds against Ogilvy, No. 61. p. 4274. So much is this the case, that, though in general, where a subject is vested in a husband and wife, the

No. 2. former is sole fiar, if the expression "longest liver" occur, the wife becomes fiar by survivancy; 6th Nov. 1747, Riddels against Scott, No. 10. p. 4203; and the case is the stronger when the subject belongs to two strangers.

Independently of the expression "their heirs," therefore, an absolute fee was vested in Margaret merely by survivancy. She came, then, to have the same right which both had formerly; and as she did not succeed as Elizabeth's heir, a service was not necessary. If the superior had raised a declarator of non-entry, he would have been told, that the fee was full in the survivor.

The meaning of the expression "their heirs," varies according to circumstances. In a case like the present, it means the heirs of the longest liver; Ersk. B. 3. Tit. 8. § 35. 22d July 1739, Fergusson against Macgeorge, No. 9. p. 4202.

Supposing Margaret to have succeeded merely as her sister's heir, as her own share is effectually conveyed, it cannot be supposed that she did not wish Elizabeth's to go the same way; and having lived three years without challenging the disposition, her homologation in apparency excludes the plea of the pursuer; Ersk. B. 3. Tit. 8. § 99, 100. Bankt. B. 3. Tit. 4. § 42. 31st July 1666, Halyburton against Halyburton, No. 52. p. 5675.

On advising the petition, with answers, the case was considered to be attended with much nicety. The right of the sisters (it was observed) may be compared to that of trustees, or of a corporation, which transmits to the survivors without a new investiture. Each had an immediate fee in a half, and an eventual one in the whole.

The term "Their heirs," means heirs of the survivor.

Even if a service had been necessary, the right of challenge on death-bed is excluded by homologation in apparency.

The Lords, by a great majority "adhered to the interlocutor reclaimed "against as to Margaret's share of the subjects in question; and likewise "found, that, by her surviving Elizabeth, the fee of the whole subjects became "vested in Margaret, and was carried to the defenders by the settlement; and "therefore assoilzied the defenders."

Lord Ordinary, *Polkemmet.* Act. *Ja. Gordon.* Alt. *D. Monypenny.* Clerk, *Gordon.*

D. D. *Fac. Coll. No.* 144. *p.* 322.

1801. *February* 3.

MRS. ELIZABETH CRAWFORD *against* THOMAS COUTTS.

No. 3. How far a disposition on death-bed ex-

THE reported decision pronounced in this case, on the 17th November 1795, No. 53. p. 14958, having been appealed from, the House of Lords (11th July