1749. *November* 22. LORD BOYD *against* KING'S ADVOCATE.

No 11.
A lease was taken to husband and wife, 'and the survivor of them, and their heirs and executors.' It was found that the wife, as survivor, came to have full right to the lease, and to transmit it to her heirs.

THE York-buildings Company, in the year 1743, granted a lease for twice nineteen years of the estate of Linlithgow, to William Earl of Kilmarnock, and Anne Countess of Kilmarnock his wife, and the survivor of them, and the heirs, executors, and administrators of the survivor. The Earl suffered death for his accession to the rebellion 1745, and the estate of Linlithgow was surveyed by the Exchequer, as what he was interested in by the lease. After the death of the Countess, who survived her husband, a claim was brought by Lord Boyd her son, setting forth, that the Countess by her survivance, was entitled to this tack, and that the right descended to the claimant as her representative. It was *answered* in behalf of the Crown, That the husband was fiar of the lease, and the wife only liferenter in case of her survivance; that it was attachable by the husband's creditors, and therefore was forfeited to the Crown by the husband's attainder.

In the pleading, the point chiefly insisted on by the King's Advocate was, that property cannot be *in pendente;* that either the husband or wife must have been proprietor the moment the lease was executed; and, if it was in the husband, it could not go from him to his wife merely by her survivance. When the cause was advised, Elchies *observed*, that the maxim against a fee being *in pendente*, is not applicable to this case, in respect that a lease, though made real by statute against singular successors, is but a personal contract, conveying no property to the lessee, but only a right of possessing for a rent certain; and that for this reason, there is nothing in law to bar a tack to be granted to two conjunctly, neither of whom has the power of disposal without consent of the other. He added, that this was a different case from a bond where one must have a power of taking payment, because the debtor must always have a power to pay.

'Found the right to the lease was in the Countess of Kilmarnock the survivor, and therefore sustained the claim.'

The distinction made by Elchies is no doubt just, but it was unnecessary. A land estate may be disponed to two conjunctly, and to the longest liver, and to the heirs of the longest liver. Here the intention is plain, that the property should be in the two during their joint lives; and that the survivor should have the sole property. Is there any thing in the nature of property to prevent such a settlement from taking effect? I cannot see that there is. A common property is well known in law, and a fee is not *in pendente* when it rests upon two, more than upon one. The English are well acquainted with this sort of right, which they term a joint tenancy, and which they distinguish from a right of copartnery where the subject is also possessed in common, but the interest of each of the partners descends to his heirs, and not to the survivor. In a word, by such a settlement as that in question, each party has right to the whole, *sed*

No 11. *concursu partes faciunt;* and therefore the survivor takes the whole in his or her own right, not as succeeding to those who predecease.

Fol. Dic. v. 3. p. 207. Rem. Dec. v. 2. No 113. p. 227.

*** D. Falconer reports the same case:

ALEXANDER HAMILTON of Dechmond and Alexander Glen of Longcroft held the late Earl of Linlithgow's estate, by lease from the York Buildings Company, for twenty-nine years, commencing at Whitsunday 1721, in trust for Lady Anne Livingston, who having entered into marriage with the Earl of Kilmarnock, the Company, 14th March 1738, let it to the Earl, his heirs, executors, and assignees, for thirty years, to commence from Whitsunday 1750; and, 30th September 1743, on the narrative that the Countess and trustees had resigned their lease, for a new one to be granted to the Earl and her, and that he had resigned the said lease granted to him, therefore they let the premises to the Earl and Countess, and the survivor of them, and the heirs executors, &c. of the survivor, for thirty-eight years, to commence from Whitsunday 1742.

On the Earl of Kilmarnock's attainder, the subject of the lease was surveyed, and a claim entered upon it by the Lord Boyd, as heir to the Countess, who survived her husband, and thereby came to have right to the lease, and transmit it to her heirs.

Answered, A right to a husband and wife resolves into a liferent in the wife's person, and the fee is in the husband; and though the destination of succession may carry the subject to the wife's heirs, if she survive her husband, yet they must take it as heirs of provision to him; and thus both the Countess and her son could only have claimed as heirs to the Earl, and consequently are cut out by his forfeiture.

2do, The greatest part of the term of this current lease fell under the lease granted to the Earl himself, and could only be granted in pursuance of his resignation; so that if any right thereby, other than a liferent or hope of succession, was conveyed to the Countess, it falls to be considered as a conveyance to her by her husband, and is void by the act 20th of the King; whereby all conveyances and assurances, of any lands, tenements, rents, hereditaments, or real estate whatsoever, made at any time after the 24th of June 1742, by any person who has been attainted, unto or for his own use, or unto or for the use of his wife or any of his children, and also all assurances or conveyances whatsoever, made at any time since the said 24th of June 1742 by any such person, are declared to be fraudulent; excepting such as have been made for just and onerous causes and these otherwise instructed than by the writings themselves.

Replied, The Earl and Countess were joint tenants in the lease, and the survivor came to have the sole right. There is no necessity of interpreting the wife's right to resolve into a liferent, from the received maxim, that property

cannot be pendent; since there was here no right of property, but a right to hold the possession of an estate for rent, without any power of disposal. No 11.

2do, The right is not such as the conveyance thereof falls under the statute mentioned, not being comprehended under any of the expressions used therein; if it were, there is no conveyance thereof by the Earl to his Lady, but only a lease from the Company, which they could not have been obliged to grant, on his resignation, as a superior can; and if they had refused, matters would have rested where they were, the resignations would have been ineffectual, and the estates continued to have been held under the lease to the trustees for the Countess, which was still current.

THE LORDS found, that the lease or tack being granted by the York Buildings Company to the late Earl and Countess of Kilmarnock, and to the survivor of them, and the heirs and executors of the survivor of them, the said Countess having survived the late Earl her husband, the right to the said lease, by the conception thereof remained with the said Countess, and her heirs as such; and found that the said lease did not fall under the penult clause of the vesting act of the 20th year of his present Majesty; therefore sustained the claim.

Act. *Lockhart & Ferguson.* Alt. *Advocatus, &c.*

D. Falconer, v. 2. No 99. p. 114.

1750. *July* 18. WALTER WORDIE *against* MARGARET SAMPSON.

No 12.
A subject was disponed by a father in his daughter's post-nuptial contract of marriage, to her children in fee; whom failing, to her heirs. The creditors of the husband having pursued a sale of this property, the Lords found, that the fee belonged to the wife.

WALTER WORDIE, writer in Edinburgh, pursued a sale of the estate of the deceased Robert Robertson feuer in Bruntston, wherein appeared Margaret Sampson his relict, and claimed, as belonging to her, and therefore to be struck out of the sale, a tenement of land in the Cowgate, and the tack of a shop set by the Town of Edinburgh; for that, by her post-nuptial contract of marriage, Robert Robertson the husband's father, had disponed certain subjects to them in conjunct fee and liferent, and to the children of the marriage in fee; which failing, to the heirs of the said Robert Robertson younger; as also the said Robert Robertson bound himself to provide the conquest to themselves in conjunct fee and liferent, and children in fee; which failing, to be equally divided betwixt their heirs; for which causes, John Sampson wright in Musselburgh, her father, disponed the said house and tack to the spouses in conjunct fee and liferent, and the children in fee; which failing, to her heirs: And *alleged*, the fee behoved to be understood to belong to her, as the subjects came by her, and were destined to her heirs.

Answered, The fee belonged to the husband, as the subjects were given *nomine dotis*; for though the expression is not used, they are so really, being dis-