

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.

WALTER WORDIE, writer in Edinburgh, pursued a sale of the estate of the deceased Robert Robertson feu 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 disposed 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, disposed 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.

A subject was disposed 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.

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-

No 12.

poned for the which causes, that is, for the mutual provisions by the husband ; as was found 12th July 1671, Gairns against Sandilands, No 26. p. 4230 ; and 29th January 1639, Graham against Park and Garden, No 23. p. 4226 ; a husband being bound to lay out so much of his own money, together with the tocher, in conjunct fee and liferent to themselves, and the children in fee ; which failing, to their heirs equally, was found fiar ; and 23d January 1668, Justice against Stirling, No 25. p. 4228 ; a bond to a husband and wife, and the heirs betwixt them, which failing, to the heirs of the longest liver, was found to belong to the husband. It is not the last termination of heirs which settles the fee ; but where there are degrees of substitution, the person's heirs who succeed first, Dirleton, word Fiar. Here the intention of the parties appears ; for a bond was taken from Robert Robertson and Margaret Sampson, to pay L. 50 Sterling to John Sampson's other daughter : As he was bound to pay this sum he behoved to get the subject ; and the obligation was ineffectual as to her.

Replied, The subjects are not disposed *nomine dotis* ; and there was a further tocher of 200 merks Scots given, which was agreeable to the quality of the parties. In the case of Graham against Park, the money was given as tocher ; in that of Justice against Stirling, it was money lent by a husband during the marriage ; and in that of Garden against Sandilands there was no other tocher. Mackenzie, b. 3. t. 8. § 20. says the husband is fiar, because of the prerogative of the sex ; and he is fiar on whom the last termination falls : And Stewart, in his answers to Dirleton, word Fee, says, the last termination determines the fee, contrary to Dirleton's opinion, cited by the respondent ; which, however, applies not here, as the destination is first to the heirs of both, whom failing, to those of the wife : And it was found, 22d June 1739, Fergusson against Macgeorge, No 9. p. 4202, that a bond to a husband and wife, and the longest liver, their heirs, &c. belonged to the wife, as the longest liver. The intention of the parties cannot be gathered from the bond, as the wife is taken bound, and was believed so to be ; and it is not necessary now to argue whether it could be made effectual against her or not.

THE LORDS found the fee belonged to the wife.

Act. *J. Grant.*

Alt. *Scrymgeour.*

Fol. Dic. v. 3. p. 207. D. Falconer, v. 2. No 150. p. 174.

1759. *March 6.*

GEORGE WILSON, Mason in Edinburgh *against* JOHN FORREST and ALEXANDER MAXWELL, Merchants in Edinburgh.

No 13.

A bond was granted to a husband and wife, and

longest liver of them, in conjunct fee

IN 1754, Messrs Forrest and Maxwell granted bond for L. 900 Sterling, payable at Candlemas 1755, ' to George Wilson and Elizabeth Ramage, spouses, ' or longest liver of them two, in conjunct fee and liferent, and to the children