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

1799) remitted the cause for further hearing to the Court of Session. The Lords adhered to the former judgment.

Act. *R. Craigie et alii.* Alt. *Solicitor-General Blair et alii.*

R. D. *Fac. Coll. No.* 216. *p.* 492.

*** On a second appeal, the House of Lords pronounced the judgment which is subjoined to No. 53. p. 14958, *voce* SUCCESSION.

No. 3. cludes the heir-at-law, where the granter, while in *liege poustie*, has executed a former settlement in favour of a stranger, containing reserved powers to alter on death-bed.

No. 4. In ascertaining whether the granter of a deed challenged on the head of death-bed, has lived sixty days, the day of its date is excluded, but the day of the granter's death is held to be completed, if he has survived any portion of it.

1801. *February* 3.

STEPHEN MITCHELL *against* MARGARET WATSON.

HUGH MITCHELL executed a disposition of part of his heritable property in favour of Margaret Watson, on the 23d May 1799.

He died on the 22d July following.

Stephen Mitchell, his heir-at-law, averred, that at the date of the disposition, Hugh had contracted the disease of which he died, and never afterwards went to kirk or market. He further averred, that Hugh executed the deed about two o'clock afternoon of the 23d May, and that he died about one o'clock of the 22d July.

On these facts he instituted an action of reduction of the deed on the head of death-bed, and

Pleaded; It is settled by the case 10th December 1793, Ogilvie against Mercer, No. 114. p. 3336. that in ascertaining whether the granter of the deed has survived its execution for sixty days, the day of its date is not to be counted. Now, according to this mode of reckoning, Hugh Mitchell survived only fifty-nine days, and a part of the sixtieth; and as the heir is the *persona prædilecta*, the defender cannot take the advantage of the maxim, *Dies inceptus pro completo habetur*; for that maxim has place only *in favorabilibus*.

Besides, the operation of the maxim is precluded by the act 1694, C. 4. which expressly requires, that "the person live for the space of threescore days."

The Lord Ordinary "assoilzied the defender," and his Lordship added the following note to his judgment.

"The above interlocutor is founded on the admission, that the deceased died "at one o'clock afternoon on the sixtieth day after executing the deed under "reduction, not reckoning the day of its date, so that I apprehend there is of "course room for the rule, *Dies inceptus pro completo habetur*."

On advising a reclaiming petition against the Lord Ordinary's judgment, it was

Observed on the Bench: The interlocutor is fully supported by the principles of the judgment in the case of Ogilvie against Mercer, in the House of