lent, due by the defunct, albeit he was not obliged to infeft the creditor for these sums; yet, seeing the creditor might, for the same sums, have apprised the lands if he had not been infeft, therefore the heir had no lesion by the disposition, and so it could not be reduced. No 6.

THE LORDS found, albeit this infeftment was reduced, as to the fee, yet that it did subsist as to the husband's liferent, in respect that there was thereby no lesion to the heir; because it is presumed, that the husband would have infeft his wife, and so enjoyed the courtesy, if this infeftment had not been. *See* DEATH-BED, No 16. p. 3196. *Stair, v. 2, p. 109.*

1713. *July* 23.

JOHN EDGAR, Chirurgeon-apothecary in Haddington, and CHRISTIAN BROWN, his Spouse, *against* WILLIAM SINCLAIR, of the Parish of St Martin's in London.

No 7.
One having, for love and favour to his daughter, and other onerous causes, assigned to her and her husband, their heirs and executors, a certain sum owing to him by a third party, the Lords found that the husband had right to the fee, and the wife to the liferent of the whole.

THE deceased William Brown, chirurgeon-apothecary in Haddington, having, for the love and favour he bore to Christian Brown, his daughter, and for certain other onerous causes, assigned to her and Francis Sinclair, then her husband, and their heirs and executors, 700 merks Scots, owing to him by Alexander Miller of Gourlybank, there arose, after Francis Sinclair's decease, who died abroad, a competition for the sum aforesaid, betwixt William Sinclair who produced a probate of the defunct's will out of the prerogative court of Canterbury, naming him his executor and administrator, and John Edgar, present husband to Christian Brown.

William Sinclair *pleaded*, That Francis Sinclair, the husband, being conjoined with Catharine Brown, his wife, in the assignation to this moveable sum, he, *tanquam persona dignior*, was sole fiar, June 9. 1667, Johnston *contra* Cunningham, No 5. p. 4199.; January 23. 1668, Justice *contra* Stirling, No 25. p. 4228.; January 29. 1639, Graham *contra* Park, No 23. p. 4226. And Christian has right only to the annualrent of the half of the sum; because not provided to the man and his wife, and the longest liver, but only to her and him, February 18. 1637, Mungal *contra* Steel, *voce* HUSBAND and WIFE.

Answered for John Edgar; Though usually transmissions to husband and wife infer a preference in favours of the husband, yet that suffers many exceptions, not only in matters of heritage, but even in the transmission of moveable sums, where the design of the granter to make the wife fiar, appears from pregnant presumptions; as in this case, where the right flows from the wife's father, upon a narrative of love and favour to his daughter, the wife is first named, and the husband only in a manner, follows *pro interesse*. Upon which ground the wife hath a just claim to the fee of the whole; at least she ought to be preferred to the fee of the half, as a common conjunct fiar, the conveyance not being to them in the usual style of conjunct-fee and liferent, which useth to be interpreted in the husband's favours; but the assignation is made to Christian Brown and Francis Sinclair her husband simply, as when a subject

No 7. is conveyed to several strangers jointly, in which case, the common rule of law takes place, *ubi duobus conjunctim disponitur, concursu faciunt partes.* Now, this holds more in the case of moveables, which by their nature more easily receive division than lands, and is consonant to the decision, February 2. 1632, Bartilmo *contra* Hassington, No 20. p. 4222.

The Lords found, That the husband hath right to the fee of the whole, and the wife to the liferent of the whole.

Fol. Dic. v. 1. p. 297. Forbes, p. 708.

1727. *June.* Edgar *against* Edgar.

No 8.

A wife, during her marriage, having succeeded to some tenements and lands, did gratuitously dispone them to herself and husband in conjunct-fee, and to the heirs and bairns of the marriage, which failing, to the husband's other heirs and assignees whatsoever. Notwithstanding this was a disposition without any onerous cause, the Lords found the fee in the husband. *See* Appendix.

Fol. Dic. v. 1. p. 298.

1739. *June* 22. Fergusson *against* M'George.

No 9.

A bond bore the sum of 1000 merks, to be received from the husband and wife, obliging the debtor 'to repay the same to the husband and wife, and 'longest liver of them two, their heirs, executors, or assignees.' The marriage having dissolved by the predecease of the husband without children, the question occurred betwixt the relict and the husband's children of another marriage, which of them was fiar? *Pleaded* for the Children, That the husband was undoubtedly fiar, and in *dubio* the fiar's heirs must be understood to be called. *Answered*, 1*mo*, *Esto* the husband had been fiar, the wife succeeded upon her survivance, and then her heirs are understood to be called, as being the heirs of the fiar. 2*do*, The meaning of the clause is the same as if the bond had borne, 'and to the heirs of the longest liver.' The Lords preferred the relict, and found that the bond belonged to her as longest liver. *See* Appendix.

Fol. Dic. v. 1. p. 298.

*** Kilkerran reports the same case:

Where a bond bore the sum to have been received from husband and wife, and was taken to the man and his wife, and the longest liver of them two, 'their heirs, executors, and assignees,' the marriage dissolving by the predecease of the husband without children, the sum was found 'to belong absolute-'ly to the wife as longest liver;' several of the Lords dissenting, who were of opinion, that it resolved into a liferent only to the wife, agreeable to the ex-