No 70. ed, that, as only a right of liferent was provided to the son, so, lest the fee should be *in pendente*, it of necessity subsisted in the father.

'THE LORDS found, that the fee was in the father, and, after his death, in the son.'

Reporter, *Pitfour.* Act. *Ro. Campbell.* Alt. *Montgomery.*

G. F. *Fac. Col. No* 28. *p.* 246.

1766. *July* 18. WATSON *against* JOHNSTON.

No 71.
The fee of a subject proceeding from the wife, taken to the spouses in conjunct fee and liferent, and the heirs of the marriage in fee, found to be in the husband.

THE question was, Whether the husband or wife was fiar of the price of a tenement of houses, which had been disponed to the wife, redeemable by her brother for a sum specified, and by her disponed, by postnuptial-contract, 'to 'her husband, and herself in conjunct fee and liferent, and to the heirs of the 'marriage in fee.'

It seems to have been admitted upon both sides, that the price, as a *surrogatum* to the subjects, was to be considered in the same light, as if the subjects themselves had been *in medio*. And various decisions were referred to for determining whether the fee was in the husband or in the wife, all of which are reported, Dict. *voce* FIAR.

'THE LORDS found, that the fee was in the husband.'

For Watson, *W. Wallace.* Alt. *Rolland.*

G. F. *Fac. Col. No* 41. *p.* 268.

1786. *June* 29. JEAN MURE *against* ADAM MURE.

No 72.
Clause bequeathing a legacy 'to a 'mother and 'her children, begotten or to be begotten,' vests the former with the absolute fee.

A TESTATOR bequeathed a legacy in these terms: 'I give and bequeath unto 'my niece, Marion Smart, now the wife of Robert Mure, for the benefit of her 'and her children, begotten or to be begotten of her body, L. 300.'

Marion Smart survived the testator, and had two children, Adam and Jean. To the former she conveyed the legacy by her last settlement; upon which the latter alleging that the fee had never been in the mother, but in herself and her brother, sued him for payment of one half of the sum.

Pleaded for the defender; As a fee cannot be *in pendente*, that of the legacy in question, provided to a mother, and her children yet unborn, must of necessity have been in the mother, while the children could only have a *spes successionis*. 7th July 1761, Douglas *contra* Ainslie, No 58. p. 2694.

Answered; A fiduciary fee may here be supposed to have been in the mother, for behoof of her children; Dirleton, *voce* FEE. Or rather the children,

being in existence before the death of the testator, were themselves at that period vested with the right. For in testamentary deeds *tempus mortis inspiciendum;* and therefore the case was the same as if they had been born prior to the date of the legacy. No 72.

Replied; Such a fiduciary fee is never to be understood to take place, without the clearest evidence. And as to the children being considered as *nati*, and not *nascituri*, that is a circumstance of no moment. Begg *contra* Nicolson, No 44. p. 4251.; Lamington *contra* Moor, No 45. p. 4252.; Porterfield *contra* Graham, No 66. p. 4277.; Cuthbertson *contra* Thomson, No 67. p. 4279.

The cause was reported by the Lord Ordinary; when

The Lords sustained the defence.

Reporter, *Lord Gardenston.* Act. *Rolland.* Alt. *G. Fergusson.* Clerk, *Home.*

S. *Fol. Dic. v. 3. p. 211. Fac. Col. No 283. p. 435.*

1794. *July 9.*

John Newlands and his Tutor *ad litem*, *against* The Creditors of John Newlands.

No 73.
Where heritable subjects are disponed to a father 'in liferent, 'for his life-'rent-use allenarly, and 'to his children *nascituris* in fee,' the fee found not to be attachable for the debts of the father.

Alexander Newlands, on the 10th June 1771, disponed certain heritable subjects to Lieutenant John Newlands, 'during all the days of his lifetime, *for* 'his liferent-use allenarly, and to the heirs lawfully to be procreated of his body, 'in fee;' whom failing, to his nearest lawful heirs whatsoever.

Alexander Newlands having, before the execution of this deed, contracted the disease of which he died on the 17th July 1771, it was reducible on the head of death-bed. Having however left no heirs, the disponee, who was his natural son, obtained from the Barons of Exchequer a gift of *ultimus hæres* of the subjects contained in it.

The gift was granted precisely in the same terms with the disposition, viz. 'Joanni Newlands durant. omnibus suæ vitæ diebus, *pro ejus vitali reddítu so-*'*lummodo*, et hæredibus legitime ex ejus corpore procreand. in feodo; quibus 'deficien. propinquioribus legitimis hæredibus dict. demortui Alexandri New-'lands quibuscunque.'

Lieutenant Newlands afterwards became insolvent, and a process of ranking and sale of his heritable property having been brought, which included the subjects contained in this gift, John Newlands, his eldest son, presented a petion, stating, That his father, under the titles before mentioned, was merely a liferenter, or held only a fiduciary fee for his behoof, and therefore praying the Court, 'to ordain the whole of the said heritable subjects to be struck out of 'the sale of the subjects belonging to Lieutenant Newlands, in so far as con-'cerns the fee of the said subjects.'