

ress, or an action for implement upon a contract of marriage before the term. Is there not *par ratio* for granting adjudication in security in this case, as for granting arrestment upon a bond before the term of payment, till it be loosed upon caution?

No 57.

THE LORDS, upon report of the Lord Cullen, were clear, that decret of adjudication should be granted, in respect the defender was *vergens ad inopiam*; unless within a certain time he find sufficient caution to the pursuer.

Forbes, p. 523.

. Fountainhall's report of this case is No 57 p. 8149., *voce* LEGAL DILIGENCE.

1714. July 2.

Mr GEORGE ROME, Writer in Dumfries, *against* WILLIAM GRAHAM, SON to the deceased William Graham of Ingliston.

IN a reduction and declarator at the instance of Mr George Rome against William Graham, the LORDS found, that inhibition used upon a provision in a contract of marriage, made by the husband in favour of the children of the said marriage before they were born, did not denude the father of the fee, or incapacitate him to traffic or contract lawful debts with extraneous persons, but only hindered him to do any fraudulent or gratuitous deed, in prejudice of the children of the said marriage.

No 58.

*Forbes, MS. p. 75.*1724. January 24. LYON *against* CREDITORS of Easter Ogle.

A MAN, in his contract of marriage, bound himself to pay a certain sum to the daughters to be procreated, payable at their marriages, if in his life, or, in case of his predecease, upon their attaining the age of 18. The father falling into bad circumstances, a daughter, with concurrence of the friends, at whose instance execution was to pass, led an adjudication against the father's estate within year and day of his other creditors adjudgers; who, in a competition, *pleaded*, That provisions in a contract of marriage were of the nature of succession, and must yield to lawful debts; and likewise, that an adjudication upon an obligation, the term of payment of which was not come, could not compete with their bonds, to which the law allowed *paratam executionem*. THE

No 59.

No 59. LORDS found the daughter's adjudication preferable *pari passu* with the other creditors.

Rem. Dec. Edgar.

* * * This case is No 58. p. 8150, *voce* LEGAL DILIGENCE.

1724. July 22.

WILLIAM DOUGLAS *against* ROBERT DOUGLAS and EDWARD DRUMMOND,
Portioners of Inveresk.

No 60.

The effect of an obligation in a contract of marriage, conceived in favour of children *nascituri*, and prestable within a limited time.

ROBERT DOUGLAS, by contract of marriage with Helen Gourlay, became bound "to infeft himself in certain lands and tenements about Inveresk, and that betwixt and a precise day, about a year after the marriage; and being so infeft, immediately thereafter to resign for new infeftment to his future spouse in life-rent, and the heirs of the marriage in fee; which failing, his own nearest lawful heirs and assignees whatsoever; with reservation of his own life-rent." Inhibition being raised upon this contract, William Douglas, a son of the marriage, insisted in an action against the father, to denude; and in that process Edward Drummond having compeared, and produced a disposition for onerous causes, did contend, That the father, by the conception of the contract of marriage, was agreeable to the intention of the marriage-articles still to remain fiar; and consequently, could alienate for onerous causes. It was *pleaded* accordingly, That nothing is better established in our law by decisions, than that a fee in favours of children to be procreated of the marriage does resolve only in a substitution: So it was found in the case of Muir of Anniston, (see No 45. p. 4252.) where a bond being disposed to a husband and wife in life-rent, and to the children in fee, the father was found to be fiar, and the children only substitutes. And in the case of Thomsons *contra* Lawsons, 4th February 1681, No 51. p. 4258., where certain tenements were made over to a husband and wife in a contract of marriage in life-rent, and to the heirs of the marriage, &c. the Lords found, "that by the conception of the disposition, notwithstanding of a life-rent mentioned to the husband, yet he was really fiar." To which may be added the authority of Sir James Stewart, in his Answers to Dirleton's Doubts, Tit. FEE: And the reason of this is plainly, that the fee cannot be *in pendente*, cannot hang in the air; therefore must be in the father, since it cannot be in the children before they are born. Now, besides this argument from the necessity of the thing, it will be easy to make it appear, that such was the design of the parties that the father should be fiar. In the *first* place, The obligation is in favours of heirs; which necessarily imports a succession; and though in some special cases they are to be understood *designative*, here the substitution to those heirs of the marriage demonstrates, that nothing but a succession was intended.