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,