1685. *November.* Laurence Ord *against* Innesses.

No 40.
A father was obliged to pay 1000 merks to his daughter, who was married, and the children to be procreated of her body; whom failing, to her nearest heirs. The Lords found, that the fee of the whole 1000 merks belonged to the mother, the children not being procreated at the time.

A father being obliged to pay 1000 merks to his daughter, who was married, and the bairns to be procreated of her body; which failing, to her nearest heirs; the question arose, if the bairns to be begotten were to be considered as conditional co-creditors for the half of the sum, or if only as substitute to their mother, in the case of their existence.

It was *alleged* for the first part of the question, That obligations might be granted to children to be born, which in effect are conditional, and purified by their birth; for the brocard, that a fee or obligement, cannot be *in pendente*, is not to be taken *judaice*; and it is but a notion in law, that the rights and obligements of a defunct are in *hæreditate jacente*, till the heir enter.

The Lords found, That the fee of the whole 1000 merks belonged to the mother, the bairns not being procreated at the time; for that the fee could not be *in pendente*. But if there had been children now competing, it is like they would have had right to the half as institute. But this decision seems not to be very consequential to the analogy of law; Castlehill's Pratt. tit. Bonds, No 164.

Fol. Dic. v. 1. *p.* 301. *Harcarse*, (Bonds.) *No* 203. *p.* 46.

1778. *July* 28. Anne Turnbull *against* George Turnbull and Others.

No 41.
Import of a legacy to the parent in liferent, and children in fee.

George Turnbull executed a settlement of his whole effects on his nephew George Turnbull, by which the nephew was burdened with a provision 'of 2000 'merks to Janet Turnbull his niece, in liferent, and to her children in fee.'

Janet had several children, all of whom outlived the testator, but pre-deceased herself. After her death, this legacy was claimed by different parties. It was *insisted*, 1*mo*, for the heir, That the legacy had fallen by the death of Janet and her children; 2*do*, For Davidson, Janet's second husband, That it belonged to him, *jure mariti*; 3*tio*, For Anne Turnbull, That she had the right to succeed to this legacy, as nearest of kin to Janet, her sister-german; 4*to*, For the children of Davidson by a former marriage, That it belonged to them as nearest in kin to Janet's children, their brothers and sisters by half blood.

In this competition, the Lord Ordinary pronounced the following interlocutor: 'In respect the persons in whose favour the legacy in question was conceived, outlived the testator, and the term of payment thereof, finds, That the same has not fallen, but is now exigible from the testator's representatives: Prefers the children of Davidson, as representatives of his children by Janet Turnbull, to the said legacy, and annualrent due thereon.'

Pleaded for Anne Turnbull, in a reclaiming petition; The provision to the children of Janet was a provision *liberis nascituris*, as well as to her children then existing. But, as the fee of the subject could not remain *in pendente*, Janet was, in the construction of law, fiar; and the eventual fee provided to the children imported nothing more than a *spes successionis*, or substitution, to take effect after their mother's death; Children of Frog *contra* his Creditors, 25th November 1735, No 55. p. 4262.; Lillie *contra* Riddell, 1741, No 56. p. 4267.; If the fee was in Janet, the petitioner, as her nearest of kin, must be entitled to take up the succession. No 41.

THE COURT refused the petition, without answers. *See* LEGACY.

Act. *Blair.* Alt. *G. Wallace.*

Fol. Dic. v. 3. *p.* 213. *Fac. Col. No* 38. *p.* 66.

SECT. II.

Both parent and children named fiars.

1665. *December* 12. MR JOHN PEARSON *against* MARTIN and his SONS.

No 42.
A clause in these terms, 'Payable to the husband and wife in conjunct-fee and liferent, and to the heirs of the marriage in fee,' makes the husband fiar, and the heirs only substitutes.

MR JOHN PEARSON, by his contract with Eupham Martin, did conceive the clause of his tocher in these terms, that it should be payable to him and her, the longest liver of them two, in conjunct-fee and liferent, and to the heirs of the marriage in fee; which failing, to return to the wife's heirs. By a second contract betwixt the husband and his wife, it was agreed that that clause should be altered; and that, failing the heirs of the marriage, it should return to the man's heirs, who thereupon pursue declarator of right by virtue of the second contract. The defender being absent,

THE LORDS advised the cause, wherein the difficulty appeared to be, that the tocher was provided to the bairns in fee, so that the husband and wife could not alter the succession, being both liferenters, because that the clause bears to them in liferent, and to the bairns in fee; yet the Lords sustained the declarator, seeing the husband and wife were named conjunct-fiars, so that either of them behoved to be fiar, and the adjection of 'and liferent,' could only be understood of the persons that were liferenters, and albeit it was exprest to be the bairns in fee, yet that could be but of a substitution, seeing there were no bairns then existent.

Fol. Dic. v. 1. *p.* 301. *Stair, v.* 1. *p.* 325.