these words of the deed : ' With full power to my said daughter, and her fore- No 66.
' saids, for their respective interests above mentioned, after my decease to up-
' lift, &c.' It is here supposed, that his daughter had one interest, and her heirs another, at the time of his death.

THE COURT found, ' That the fee of the bond in question is vested in Mrs
' Graham the mother.'

Lord Ordinary, *Kaimes.* Act. *Wight.* Alt. *M'Laurin.* Clerk, *Campbell.*

*** This cause was appealed.

THE HOUSE OF LORDS, 17th March 1780, ' ordered and adjudged that the ap-
' peal be dismissed, and the interlocutor complained of affirmed.'

Fol. Dic. v. 3. p. 210. Fac. Col. No 78. p. 151.

1781. *March* 1.

BARBARA CUTHBERTSON *against* ISAAC THOMSON and JEAN YOUNG.

No 67.
Disposition to a daughter in liferent, and to her children procreated or to be procreated in fee, conveys the fee to the daughter, and not to the children.

ON the 16th January 1724, Peter Cassils executed a disposition of a house in Edinburgh, ' To and in favour of Anne Cassils, his daughter, in liferent, during
' all the days of her lifetime, with the burden always of the aliment and edu-
' cation of the children of the marriage betwixt her and John Cuthbertson,
' during their respective pupillarities, and to the children procreated, or to be
' procreated of the said marriage, equally and proportionably amongst them, in
' fee ; and failing any of them by decease, to the others surviving.'

The children of the marriage between Anne Cassils and John Cuthbertson were three ; Peter, Anne, and Barbara. Peter died in the year 1755, leaving several children. Anne died in 1762, and left an only son Isaac Thomson. Their mother, the liferentrix, survived them both, and died in 1778.

Some years after the death of Peter Cuthbertson, his eldest son William was charged to enter heir to him, at the instance of William Polson, a creditor, who obtained an adjudication, comprehending, among other subjects, Peter's fee of the third part of the house above mentioned. Polson afterwards got a charter from the Magistrates of Edinburgh, upon which he was infeft. He then purchased a voluntary conveyance from William Cuthbertson, of those subjects which he had adjudged, containing a renunciation of all right of redemption or reversion competent to the said William. And, a short time before his death, he settled upon his spouse Jean Young the liferent of the house in question.

Upon the death of Anne Cassils the liferentrix, Barbara Cuthbertson, her only surviving child, made up titles by a service, as heir of provision to her grandfather ; and, in that character, claimed right to the whole of the subject. Jean Young, Mr Polson's widow, claimed a third of the rent, in virtue of the rights above mentioned, derived from Peter Cuthbertson, and his son William.

No 67. And the tenants having called them to dispute their interests in a multiplepoinding, appearance was made for Isaac Thomson, who also claimed a third, in right of his mother Anne Cuthbertson.

The question, therefore, came to be, at what period the destination of the fee by Peter Cassils took effect; whether at his death, or at the death of his daughter, the liferentrix? In the one case, the three grandchildren, Anne, Peter, and Barbara, having each of them right to a third, Anne's share descended to her son Isaac Thomson; and Peter's was carried by Polson's adjudication, and the subsequent conveyance he obtained from William Cuthbertson. In the other case, Barbara, as only surviving child, had right to the whole.

Pleaded for Barbara Cuthbertson; It is a rule of law, that the fee of no subject can be *in pendente*. Upon this principal, whenever lands are disponed to a person in liferent, and to his children in fee, the parent is presumed to be the fiar; and nothing is understood to be vested in the children but a *spes successionis*, which may be disappointed; Lillie *contra* Riddel, No 56. p. 4267. Douglas *contra* Ainslie, No 58. p. 4269. In the present case, therefore, it was impossible that Peter and Anne Cuthbertsons could transmit any right whatever in the subject; for there being nothing in the conception of the deed that limited their mother's right of fee, or rendered it *fiduciary*, she might have sold the whole, or she might have disponed it gratuitously.

But, supposing that the fee could have been in the children of Anne Cassils, it is plain, from the words of the disposition, that the granter did not mean to call them to the succession as 'conditional institutes,' but as 'proper substitutes;' so that Barbara alone surviving the liferentrix, must have succeeded, in preference to the representatives of her brother and sister; Stair, 13th July 1681, Christie *contra* Christie, *voce* LEGITIM. She is not, however, under any necessity of carrying the argument so far; because the fee never having been in Peter and Anne Cuthbertsons, but in their mother who survived them, it fell to their sister Barbara, in the same way as if they had never existed.

At any rate, as Peter Cuthbertson died without making up any titles in his person, Mrs Polson, in virtue of her husband's adjudication, has no right to compete for the rents of the subject.

Answered for Young and Thomson; The cases Lillie *contra* Riddel, and Douglas *contra* Ainslie, related to a fee granted not to children already existing, but to children *nascituri*, where, to preserve the rule of law, that a fee cannot be *in pendente*, a constructive fee was presumed to be in the father. But here, there is no room for any such presumption. The children of Anne Cassils and John Cuthbertson were all of them actually existing at the date of their grandfather's settlement; and the fee could no more be said to be *in pendente*, by being bestowed upon them directly, than by being presumptively vested in the person of the liferentrix. Accordingly, in all such cases, the fee is held to be in the children existing; Fraser *contra* Brown and Gordon, No 53. p. 4259.

No 67.

And, in the latter case, the fee was found to belong to children not existing till afterwards, in preference to the creditors of their father the liferenter; 25th February 1773, Grays *contra* Wood, No 14. p. 4210.

But, supposing the fee, by a strong perversion of the destination, to have been in the mother, though provided to the liferent only, and the children, to whom the fee was expressly disponed, to have had no right, except by succession to her, yet this hypothesis would not avail Barbara Cuthbertson; because it is not to her, but to her nephew William, that the succession in that case must fall.

Neither is the second branch of her argument better founded: For it would be a most singular construction of the settlement, to suppose that Peter Cassils, providing the fee expressly to his grand-children, meant only to create a liferent to each of them, untransmissible by any manner of way, or for the most onerous cause, except by the last liver, in whom the whole fee was to center. The clause in question imports no more than a '*constitutional institution*' of the grand-children to one another, which did not take effect, because the condition did not exist. All the three survived the granter; and so Peter and Anne transmitted their respective shares to their representatives.

But, even considering it in the light of a 'proper substitution,' the condition *si sine liberis decesserit*, was clearly implied; and Barbara's right, as survivor, became limited by the existence of children of her brother and sister; 21st November 1738, Magistrates of Montrose *contra* Robertson, *voce* IMPLIED CONDITION. And this doctrine is so far supported by the case of Christies in July 1681, observed by Stair, that, as soon as the effect of the implied condition was properly stated, the Court appointed it to be heard in presence.

As to the right of Jean Young, it stands both upon her husband's adjudication, and upon the voluntary conveyance of William Cuthbertson; though the first alone would have been sufficient; 14th December 1710, Smith *contra* Smith, *voce* FIAR, ABSOLUTE LIMITED. Whereas Barbara's service as heir of provision to her grand-father could carry nothing, he being entirely divested of the subject by his own disposition; Erskine, B. 3. tit. 8. § 75.

Replied for Barbara Cuthbertson; The condition *si sine liberis* is not applicable to the present case. Among the Romans, from whom we derive it, it took place only in settlements made by persons who had no lawful issue existing at the time; and was founded on the natural presumption, that the granter would have preferred his own issue to strangers; Erskine, B. 3. tit. 8. § 46. Where, therefore, all the substitutes stand nearer related to the granter, than those to whom it is now said to be transmitted; and, where he has expressly substituted one grand-child to another; there is no room for applying the condition *si sine liberis*, or for presuming that he did not mean to prefer his surviving grand-children to his great-grand-children.

With regard to the titles, Peter Cassils was never divested of the subject during his life; for, though he disponed it to his daughter Anne and her children,

No 67. he, at the same time, reserved his own liferent, and also a power and faculty to alter. He died, therefore, in the full right of the subject, and being the person last infeft, Barbara's service, as heir of provision to him, was perfectly proper and regular.

Observed on the Bench; The conception of the deed being to children 'to be procreated,' the fee was clearly vested in their mother, the liferentrix; and no more than a *spes successionis*, contingent on the number of the children, was conveyed to them; and, as the substitution necessarily implied the condition *si sine liberis*, those who had died before the liferentrix, transmitted their right to their children. The Court thought the charge to William Cuthbertson ought to have been as heir to his grand-mother; and it was doubted, whether even his voluntary conveyance carried more than the mails and duties during his life. But, as he did not object, the judgment was,

'Find, That the fee of the subject in question was in Anne Cassils; and that, after her death, the same descended to her daughter, Barbara, and to her grand-son, William Cuthbertson, in right of his father Peter, and to Isaac Thomson in right of his mother, Anne Cuthbertson, equally.'

Barbara reclaimed; but her petition was refused without answers.

Lord Ordinary, *Alva.* Act. *H. Erskine.* Alt. *Nairne.* Clerk, *Tait.*

L. *Fol. Dic. v.* 3. *p.* 210. *Fac. Col. No* 42. *p.* 76.

SECT. VIII.

Provisions to Daughters, to return if they die without Children.

1724. *July* 23.

Mr James Baillie, Writer to the Signet, and Inglis, *against* Nathaniel Gordon of Carleton.

No 68.
A man granted a bond to his daughter payable at the first term after his decease, with annualrent from that time, with this proviso, that if she died without children, the

John Gordon of Overbar, with advice and consent of his spouse, granted a bond of provision to his youngest daughter, Janet, for 2500 merks, payable at the first term of Whitsunday or Martinmas after his decease, with annualrent thereafter, and the bond contained the following clause: 'And for eviting all 'controversies that may arise, in case of the said Janet her dying before she be 'married, or in case of marriage, decease without having children, or having 'children, they decease without lawful succession, or she survive them, the 'the said spouses bind and oblige them, *&c.* to make payment of the said sum,