

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 obligation, cannot be *in pendente*, is not to be taken *judaice*; and it is but a notion in law, that the rights and obligations of a defunct are in *hereditate 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 life, 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 life, 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*, *imo*, for the heir, That the legacy had fallen by the death of Janet and her children; *2do*, For Davidson, Janet's second husband, That it belonged to him, *jure mariti*; *3tio*, For Anne Turnbull, That she had the right to succeed to this legacy, as nearest of kin to Janet, her sister-german; *4to*, 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.'