the 1000 merks, in case of her dying before her husband; but which was at an end by her living after him, and thereby acquiring right in her own person to the said sum.

No 69.

But, *3tio*, Supposing the contract to be strictly interpreted, and the right to the 1000 merks to be confined to the *heirs* and *executors* of Rachael Wilson: By executors are to be understood not merely executors at law, but any executor or executors which Rachael Wilson should regularly and legally appoint; and, it is apprehended, that the pursuer, Andrew Jamieson, though nominally an assignee, is virtually the executor of Rachael Wilson, with regard to the sum contained in the clause of return, and is entitled, as such, to confirm himself executor-creditor, and thereby to draw the 1000 merks in question.

'The Court adhered to the Lord Ordinary's interlocutor.'

Act. *H. Erskine.* Alt. *M'Cormick.* Clerk, *Ross.*

Fol. Dic. v. 3. *p.* 212. *Fac. Col. No* 167. *p.* 62.

DIVISION III.

Whether a fee can be *in pendente*.

1766. *January* 14. Campbell of Ederline *against* Isabel M'Neil.

No 70.
The fee of lands taken to a father in liferent, thereafter to his son in liferent, and his heirs-male, whom failing, the father's heirs in fee, found to be in the father, and after his death, in the son.

Neil Campbell of Dunstaffnage, in the contract of marriage of Angus Campbell, his son, became bound 'to provide his lands and estate of Dunstaffnage in favour of himself in liferent, and after his decease to and in favour of the said Angus Campbell, his son, in liferent; and the fee of the same, after both their deceases, to the heirs-male of the said Angus Campbell his body, of that or any subsequent marriage; which failing, to the said Neil his heirs-male, according to the rules of succession, established by his rights and infeftments thereof.'

In an action for reducing certain provisions, granted by Neil Campbell, as contrary to the terms of this contract, brought in name of a trustee for Angus, it was admitted, that, had the estate been taken to the father in liferent, and to the son in fee, the father must have been held to be divested of the fee, in terms of the decisions quoted in the Dictionary, *voce* Fiar; but it was contend-

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,