

In this situation, before the condition exists, the property of the subject disposed is indeed not *in pendente*, because it is in the disponer; but as to the disponee, the fee or property is undoubtedly *in pendente*. If the condition exist, the property is transferred to the disponee; if it never exist, the property remains with the disponer. That a fee cannot be *in pendente*, applies more especially to land-rights; for the superior must have a vassal. But there is nothing in law to bar a vassal from disposing his property under a condition. He, in the *interim*, continues vassal; and when the condition exists, the disponee becomes vassal. Now, disposing to children *nascituri*, is similar to disposing under a condition; the legal effects of both are the same. And, in the present case, Isobel's disposition to herself in life-rent, and to her children *nascituri* in fee, is the same with disposing to her children *nascituri*, reserving her own life-rent. Janet, therefore, was by this deed made a conditional institute, and her institution was purified by Isobel's death without issue.

The argument, that Isobel was imposed upon, and intended to take the fee to herself, might operate in a reduction of the settlement upon the head of imposition; but, taking the deed as it stands, the words are not susceptible of a double meaning.

Sel. Dec. No. 117. p. 167.

1770. *March 1.* FOUKE *against* DUNCANS.

A man, by his will, bequeathed to his two nephews, David and Patrick, the one half of his personal estate, to be disposed of between them in manner following, viz. two thirds to David, and one third to Patrick. The legacies were to be paid at the death of the testator's wife; and it was declared, that if either of the legatees should die before the term of payment, without male issue, then his share was to go to the survivor and his male issue. Both legatees survived the testator; but predeceased the term of payment. David predeceased Patrick, without issue; and Patrick also died without issue, but left a will in favour of his wife. Here the question occurred, Whether this devise was to be considered as a substitution, or only a conditional institution? or, in other words, whether, on David's decease, his share of the legacy vested in Patrick, in virtue of the destination in their uncle's testament, so as to make the whole legacy descend to the representatives of Patrick, exclusive of David's next of kin? The Lords found, That the substitution in favour of Patrick did take place, and therefore preferred his representatives to the whole legacy bequeathed to David and Patrick.

* * * This case is No. 38. p. 8092. *voce* LEGACY.