

1749. November 23. LORD BOYD *against* The OFFICERS of STATE.

[*Rem. Dec. No. 113.*]

THE late Lord Kilmarnock, father to the claimant, obtained a tack of the estate of Callender from the York Building Company, for the space of thirty years, to him and lady, and the survivor of them two, and the heir of such survivor. The Lord Kilmarnock was attainted and beheaded, and his lady survived him; she is now dead, and Lord Boyd as heir to her claims this tack. It was objected, that by the words above-mentioned, the father was *fiar*, the lady only *liferenter*, and her heirs only heirs of provision to the father; because it had been often decided that a fee could not be *in pendente*, but must be in somebody; that in this case it was in the father, as had been often decided in the case of such like destinations.

Lord Elchies answered, that the maxim that a fee could not be *in pendente*, would not apply in this case, where there was no fee nor right of property, not so much as a *feodum pecuniæ* or right to a bond, but only a right of possession and reaping the fruits of the ground; that the husband had the exercise of this right *durante matrimonio*, but he could not dispose of it without the consent of his wife any more than she could without his consent; that the power of alienation, to whom it belonged, whether to the man or the wife, as also to whose heirs it went, was only determined by the event, by which in this case the lady, being the survivor, is determined to have the power of alienation and transmission to her heirs. And upon these principles the case was determined; though many thought the distinction betwixt a right of property and a right of tack very subtle, and that the decision would have stood better upon this foot, That the man and wife had, during their lives, both a right to the tack, each *pro solido*, and *partes faciebant concursu*, and upon the death of one of them the survivor had the whole *jure non decrescendi*.—This is agreeable to the civil law, and to some decisions of the Court. Vide *November 21st, 1740*, and *June 23d, 1739, Ferguson against* ———. Besides, in this case it was probable that the tack was granted by the York Building Company on account of the lady, who represented the forfeited family to whom these lands belonged.

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1749. December 1. EWAN M'PHERSON *against* The LORD ADVOCATE.

[*Elch. No. 11, Forfeiture.*]

THE question here was, Whether this claimant, Ewan M'Pherson, was properly attainted under the name of Ewan M'Pherson of Clunie, his father being alive, in fee and possession of the estate of Clunie? And the Lords found he was, *dissent. tantum Easdale*. It was admitted in this case by the advocate, *1mo*, That the addition of *Clunie* related to the lands and estate, by the custom of Scotland, and not to the place of abode, according to the custom of England. *2do*, That though no addition was necessary in an act of attainer,