

1750. June 26. CLAIM of JOHN HAY *against* OFFICERS OF STATE.

[Elch. No. 9, *Fiar.*]

JOHN HAY of Lysterig in his contract of marriage bound himself to provide a sum of money, (by settling it upon lands or other good security,) to himself and spouse in liferent, and to the heirs of the marriage in fee. In a question concerning his forfeiture, the Lords found, That the fee was in him, though the obligation was never executed, and consequently the children were not heirs but creditors, and though by far the greatest part of the money came by the wife.

*N.B.* This point was hardly pleaded by the bar, but the President said he thought it was the strongest point in the cause; and it appears to me that it might have been pleaded upon one or other of these footings:—*1mo*, That by the plain sense of the words, the father has only a liferent, and that the fee is given by a subtlety of our law, viz. that a fee cannot be *in pendente*, which, though it may be admitted in favour of creditors, ought not to be admitted *pro fisco*; *2do*, That if a fee must be somewhere, rather than go against the express words of the deed, it were better to suppose a fiduciary fee in the father for behoof of the children; and, *3tio*, The maxim cannot here take place, because there is here no fee at all established, but only an obligation to give a fee to children, which obligation we can suppose not to exist till the children are born, and then they are creditors upon the obligation, and can pursue for implement of it; and why may they not here claim as any other creditors?

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1750. June 30. CLAIM, STEWART of ARDSHIEL *against* THE OFFICERS OF STATE.

[Kilk. No. 8, *Tailyie.*]

THIS claim was founded upon the claimant's father's contract of marriage, by which the lands of Ardsheel were provided to the husband and the heirs-male of the marriage, and thereafter follows this clause:—"And it is hereby expressly provided, condescended, and agreed upon betwixt the said parties, that albeit it should happen the said Charles Stewart at any time to be convicted or attainted of high treason or any other crime, whereby he might come to forfeit or lose the lands foresaid, hereby provided in fee to his heirs-male, in manner above written, yet they shall not be thereby prejudged, but succeed to the fee of the said lands immediately after such conviction or attainder, in the same manner as if the said Charles Stewart had been naturally dead; upon which express condition and qualification these presents are entered into, and the said Charles Stewart bound and obliged, as he hereby obliges him and his foresaids, to