had been appealed, had it not been that the Counsel in England, that were advised, were of opinion, that the settlement was void by the Clan Act.

No. 15. 1750, Nov. 30. ATTAINDER of the ESTATE of PERTH.

IN this case, we found by a considerable majority, that the estate of Perth might forfeit by the attainder of John Drummond, commonly called Lord John, though his elder brother James died 11th May 1746, and his attainder, if he did not surrender on or before 12th July, was by the act drawn back to 18th April; *2do*, That there was no sufficient evidence that the trust-disposition by James to the claimant in 1743 was a delivered evident, and refused to allow him a further proof before answer;—and therefore, *3tio*, disallowed and dismissed the claim.—*Vide* (*supra*) the decision 18th July 1749, where the question was touching the attainder of James, in which decision the Crown acquiesced. What gave occasion to the first point, was a subtility in the law of England pleaded for the claimant, that if a succession devolves of lands after the attainder of the nearest heir, he is incapable of succeeding, and cannot even take by succession, but the lands become escheat *ob defectum hæredis*, and fall to the King if he is superior, if not to the subject superior, and here the succession devolved after the 18th April, from which time he is declared attainted;—and as only the English treason laws and forfeitures for treason are extended to Scotland, but not escheats *ob defectum hæredis*, the estate is not forfeited; and as to that, both the President and I thought, that if the estate is not forfeited by the treason, there was no law in Scotland that would give it as escheat to the Crown; and he admitted, that in estates held of subject-superiors in England the law was such, but doubted if the law of England was such in estates held of the Crown;—but as I knew nothing of that law but by authorities quoted, I saw no foundation for that distinction; and it seems by that law an attainted person can take by purchase, but cannot hold, and therefore it forfeits to the Crown; but he can neither hold, nor even take by descent, and therefore it does not forfeit, but becomes escheat to the superior *ob defectum hæredis*. But what removed my difficulty here was, that the condition of the attainder was suspensive, and on the very same principles that we found James not attainted because he died May 7th, though he did not surrender before 12th July, upon the same Lord John was on May 11th and indeed to 12th July capable both to take by succession, and to hold, and might even have been served heir and infeft; therefore though on his not surrendering before 12th July, the attainder was drawn back to or near to the grand act of treason committed at the battle of Culloden, so as to void all intermediate acts of his, yet that did not avoid the succession devolved to him May 7th. As to the delivery, as Mr Graham was ordinary lawyer of the family, and advised and corrected this very deed, I thought his possession was his client the granter's possession, especially that the deed was intended immediately to denude the granter of both property and possession, having reserved only a small annuity of L.200,—and yet he retained possession three years till his death, and the trustee owned he never saw it before giving in this claim; but then the claimant offered to prove that it was sent to Mr Graham, with orders to take infeftment and registrate it, which I thought would be relevant if there were satisfying evidence of it;—but I wanted a more special condescendence, since the papers were only sent him with these instructions, Whether it was only a

verbal message, or if there was any missive letter or other writing? *2do*, By whom and at what time these instructions were sent? But Mr Craigie said they could make no more special condescendence;—and that general condescendence I thought too vague in a matter of importance. Others carried the matter further, and thought no proof of delivery competent by witnesses. But the President carried it still further, and thought that though there were a clear proof of delivery, and though it would have excluded the forfeiting person himself, yet being but a personal deed, and not good against purchasers, therefore it would not be good against the forfeiture. He admitted that a man whose next heir was attainted, might lawfully and laudably put his estate by him; but if he did so by a personal deed only, and remaining in his own custody, with a clause dispensing with not-delivery, he asked if I thought that would be good against the Crown, and I owned that I thought it would. However, this question anent refusing a proof before answer, carried only by his casting vote. The objection of fraud was also argued, and my opinion was, that as James died *ad fidem et pacem Regis*, he could dispose of his estates as he pleased, and his deeds were not challengeable for any supposed intention of fraud to disappoint his own attainder, since he never was attainted, and it was no fraud but lawful to disappoint the forfeiture of his estate by his brother's attainder in case of his own death. But the President and others thought the whole contrivance fraudulent to disappoint the forfeiture, by either of them being attainted, and that therefore it fell under the act 13th Eliz. C. 5,—but this point was not decided. After the two first points had been voted, the third question was put, Whether to sustain or dismiss the claim? and several were for sustaining, which to me looked odd.

No. 16. 1750, Dec. 12. ATTAINDER of the ESTATE of PERTH.

THIS claim was founded on the act 1700 against Popery, and he (Lundin) claimed as nearest Protestant heir to James Drummond of Perth, the person last infeft, who died 11th May 1746, before the days limited for his surrender; and in the debate, he also insisted on the point overuled 30th ult. in Logie Almond's claim, that John Drummond never having surrendered, he was declared attainted from 18th April 1746, therefore his brother James having died after that day, when John was incapable to succeed to him, though he died before the 12th July, the day limited by the commission of the said act for his surrender, the estate could not forfeit by John Drummond's attainder, but only escheated *ob defectum hæredis*, and *2do*, that by the said act 1700, John Drummond being a professed Papist, was incapable of succeeding as heir. In the course of the debate, I moved a difficulty, Whether the claimant could be heir to John Drummond, because though by an express *proviso* in Earl Melfort's attainder by the Parliament of Scotland in 1695, the claimant, and his other issue by Sophia Lundin, his first wife, were saved from any corruption of blood, yet the father of James Drummond, the person last infeft, viz. James, commonly called Lord Drummond, having been attainted by act of Parliament 1st Geo. I. his blood was corrupted, and as the claimant was connected only by him to the person last infeft, the bridge was broken, as Hale expresses it? To which the claimant's Counsel made no other answer, but that he claimed as Protestant heir-male, and that by the law of England, an heir-tail's blood was not corrupted, but supposed entailed. But as this