Act 41, *anno* 1661, could not give authority to stop up one of two roads leading to the same place, though the one they stopt up was a very bad road, and though it was allowed that they might have turned them both about 200 yards; and they were so near one another, that, without exceeding the legal distance, they might have been laid alongside one of another.

N. B. The Lords, at least some of them, particularly my Lord Elchies, gave it as their opinion that the road could not be turned off one heritor's ground upon another's; because that other might turn it again, and so on, till it might be diverted from its first course never so far.

The Lords were much divided.

1749. *July* 4. Mr Francis Charteris *against* The Officers of State.

[Elch. No. 22; *Tutor, &c.*; C. Home, No. 88.]

Mr Francis Charteris claimed L.10,000 sterling of the forfeiture of his brother, Lord Elcho, upon this ground, that the foresaid sum was left to him by his grandfather, Colonel Charteris, upon this condition, that Lord Wemyss, the claimant's father, should not intermeddle in the education of the claimant, who was the Colonel's heir. In the same deed the Colonel appoints four guardians who were to have the direction of the claimant's education, three of whom were to make a *quorum*, and his wife, who was one of them, to be a *sine qua non*; and then is subjoined the clause, "prohibiting Lord Wemyss to claim any voice or power in directing the place of residence, travelling, or circumstances of the education of the claimant, or that he or any body else should any way interpose to hinder the same, under the penalty of the forfeiture of the ten thousand pounds left to Lord Elcho for the support of Lord Wemyss's family, and likewise of L.41,000 sterling more left to my Lord's other children." Notwithstanding of which prohibition the claimant averred that Lord Wemyss had intermeddled in his education, and therefore the irritancy was incurred, and the L.10,000, which had been paid by the claimant's tutors to the family of Wemyss during his minority must be repeated, the condition of the grant having failed; and a proof being allowed, before answer, both as to my Lord Wemyss's intermeddling and as to the acceptance of the nominees, it came this day to be advised; and the Lords, after a full hearing of the case, which lasted three days, by a majority of votes decided that the claim was not well founded.

It was admitted by all the Lords that spoke in this question, except the Lord President, that this irritancy might be declared, even after the forfeiture, against the crown, who would be considered in no better case than my Lord Elcho would be in if he had not been forfeited; and many cases were cited where it had been decided that such irritancies in entails could be declared after the forfeiture, particularly in the case of *Cassie of Kirkhouse*, *Grierson of Leck*, and *Harry Maule*, all which had happened upon occasion of the Rebellion 1715; and in some of them it was so decided in the last resort. The case likewise of

my Lord Sutherland was quoted, to whom it was found competent to bring a declarator of recognition after forfeiture, though my Lord was afterwards found not entitled to insist in it, because he had not claimed as the law directed. That, by our law's being made the same with the English law in matters of treason, the security provided to creditors after the Revolution is noways altered; and the rule of the English law is the same with our Revolution law, viz. that a man can only forfeit what he has after deduction of his debts, and that no man can forfeit by his crime what he cannot alienate by voluntary deed. *2do*, It was agreed by all the Lords, that the condition here adjected to the grant was not only a lawful condition, but a reasonable condition, intended for the preservation of Colonel Charteris's family and representation, by hindering Lord Wemyss to intermeddle with the education of his heir, and breeding him up in principles which might be the ruin of him and his fortune. This he could do no otherwise but by restraining my Lord under a penalty; for though he might have tutors for the estate which he gave the claimant, yet he could not take from my Lord Wemyss the care and direction of the person of his son, which the laws of God and man had intrusted him with, otherwise than by engaging him voluntarily to renounce it rather than to forfeit so much money to his family. *3tio*, It was admitted that it made very little difference in this case whether the condition was suspensive or resolutive; for though it had been suspensive only, as the money was paid during the claimant's minority, and as he has revoked, it is the same thing as if the money had not been paid yet. *4to*, It seemed to be the mind of by far the greatest part of the Lords, that it was proved in this case that Lord Wemyss had intermeddled indirectly and behind the curtain, (for he knew well his danger in meddling directly,) in the education of the claimant, by recommending governors to him, and hindering him from taking those that were recommended to him by the Earl of Ilay, one of the nominees. *5to*, It likewise seemed to be the opinion of the generality of the Lords, that the foresaid Earl of Ilay had accepted of the nomination, by proceeding so far as to petition the Court of Chancery to take upon it the guardianship of the claimant, which was the proper step to be taken as the claimant did not seem disposed to follow the counsel of the nominees, and the Chancellor, in his delivery on the petition, recommended it to the Masters in Chancery to have particular regard to the advice of the Earl of Ilay in every thing relating to the education of the claimant;—So that there only remained two questions to be determined,—*1mo*, Whether the condition of the grant had any connexion with or dependance upon the nomination of the guardians; that is, in other words, whether Lord Wemyss was prohibited to intermeddle, suppose none of the nominees had accepted or acted; and Lord Easdale was of opinion that he was, and that there was more reason for prohibiting him in that case, when the claimant was not under the control of the nominees, than in the other, when he was; but the majority of the Lords were of opinion that the condition of Lord Wemyss's intermeddling in the education was necessarily connected with the nomination of the guardians, and that the words above-mentioned, by which Lord Wemyss was prohibited to claim "any voice or power as to the place of residence, &c. of the claimant, or to interpose to hinder the same," necessarily supposed that he was under the management of somebody; besides the absurdity of leaving the young man to the wide world without any direction at all. And, *2do*, Whether or not my Lord Ilay

only accepting and acting, was sufficient to make the condition take place and the irritancy be incurred; with respect to which my Lord Elchies was of opinion, that rather than the nomination should fall to the ground, a court of justice might have found that Lord Ilay alone, though but one of the quorum, had a right to act: and so it had been frequently found in this Court, in the case of nomination of tutors, (though it had been several times decided otherwise,) but that, he said, was a favourable case, as thereby the will of the defunct was supported, who was presumed to incline that the administration should rather go to one of the nominees than to the administrators of law; more especially would this hold in the present case, where the legal guardian was expressly excluded; but the question here, he said, was concerning a penal irritancy, which is unfavourable, and cannot be extended by interpretation, so that Lord Ilay's acting alone cannot be understood to be sufficient to make the irritancy in this case be incurred; and this was the opinion of the majority of the Lords.

1749. *July* 20. DRUMMOND of LOGIE *against* OFFICERS OF STATE.

[Elch. No. 7, *Forfeiture;* C. Home, No. 87.]

THE question here was, Whether James Drummond, commonly called Duke of Perth, was attainted by the late act of attainder, he having died before the 12th of July, the day fixed by that act for the persons attainted rendering themselves to justice? The words of the act are,—"That James Drummond and the other persons there named, if they shall not render themselves to justice on or before the 12th of July, shall be attainted from and after the 18th of April;" and the Lords found that he was not attainted. The whole question was, Whether the condition of the attainder was suspensive or resolutive? for the Lords seemed to be all of opinion that if the condition had been only resolutive, and if the Duke of Perth had been attainted at the time he died, no court of common law could have given relief by adding another resolutive condition to the act, viz, "if he died before the 12th of July." The only remedy in that case would have been to apply to the Parliament, who, *ex æquitate*, might have given redress. But the Court was of opinion that the condition in this case was suspensive, both by the conception of the words, which clearly imply that the attainder does not take place till the condition exists, and from the genius of the English law, which does not condemn a man without hearing him or giving him an opportunity of being heard, and from this consideration, that if the Duke of Perth had rendered himself to justice before the 12th of July he could not have been said to have been one moment attainted. Add to this, that the attainder plainly proceeds upon three grounds:—1*mo*, The evidence given before the Parliament; 2*do*, The persons' flying from justice; 3*tio*, Their contumacy in not appearing to their trial within the time limited; without all which concurring, there can be no attainder by this act. This therefore being laid down that the condition was suspensive, and consequently that the attainder did not take place till the 12th of July, Lord Elchies argued, that as