

No. 7. 1749, July 18. CLAIM, THOMAS DRUMMOND of Logie.

THE Lords pretty unanimously found that James Drummond, commonly called Duke of Perth, having died 11th May 1746, long before the time allowed for his surrendering himself, he was not attainted by the act of Parliament nor his estate thereby forfeited to the Crown, and therefore leave it to the claimant to follow out his right to that estate in the ordinary course of law. Easdale was against the judgment, Kilkerran was *non liquet*, and Leven thought the Court not competent to judge of the question. All the rest voted for it. The President for some time doubted of our jurisdiction, but his doubts were removed. He spoke first, and was clear both on the question of the jurisdiction and also on the principal question. The reasons of my opinion were chiefly two: I thought the condition, if he do not surrender, &c. was clearly suspensive and not resolute, for that such as did surrender it could not be said that they ever were for one moment attainted of high treason, whereas had it been only resolute, then notwithstanding the surrender they truly stood attainted from 18th April till the date of their surrender; and if it was suspensive, then James Drummond was a free liege at the time of his death, and his estate devolved to his heirs or disponees, and the act could no more be constructed to attain him after his death no more than if he had been dead before the act or before 18th April, or before that Session of Parliament; and though I did not dispute the Parliament's power to attain traitors after their death, as they did in the case of Cromwell and others, yet it is not done as an attainder *per verba de presenti*, but that they shall be adjudged and taken to be attainted of high treason as if they had been attainted during their lives, and the difference in the enacting words as to persons dead and persons alive but fled, in the act 30th Anne 12th Cap. 2d, is remarkable; and therefore I cannot think, that if any of this last class had afterwards been proved to be then dead, that they would have been thereby attainted; and as this act attainted a person supposed to be in being, and there was no such person in being as James Drummond on the 12th July 1746, till which time this attainder was suspended, therefore he was not thereby attainted. 2dly, That the Courts of law must judge of the meaning as well as the words of all acts of Parliament, and this as well as others, and must judge of them according to the known rules of law, and as it is a known rule of law that when potestative conditions are rendered absolutely impossible by the act of God without any act or fault of the person, such conditions *habentur pro impletis*, therefore the surrender being rendered impossible by James Drummond's death, we must hold it as performed.

No. 8. 1749, June 20, July 25. LORD BOYD'S CASE.

THE Earl of Kilmarnock in 1732 vested the fee of his estate in his son Lord Boyd, under certain reserved powers to be exercised with consent of some friends, whereon Lord Boyd was that year duly infeft, and has lately sold the estate to the Earl of Glencairn. The Exchequer having since surveyed that estate, Lord Boyd, by the name of James Boyd of Kilmarnock and Callender, entered a claim to the estate, and the answer was on the Clan Act, (which in the question anent superiors and vassals, we found was not expired, but subsisted till the act 21st of the King's repealing that part of the clause,) that all dispositions and conveyances by persons who should be attainted of the treasons