

- No. 14. *tente (inter alios) me* for reasons mentioned, MS. 8vo. \* I indeed thought the settlement void by the act Geo. I., commonly called the Clan Act, and so thought Kilkerran, but the majority thought otherwise, and the point was not determined.

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1750. November 30. ATTAINDER of the ESTATE of PERTH.

- No 15. THE judgment, No. 7, touching the estate of Perth, being acquiesced in by Lord Advocate, the estate was surveyed as forfeited by the attainder of the second brother, commonly called Lord John Drummond, who survived the 12th July 1746; and was again claimed by the said Thomas Drummond of Logie, under a destination by James to him in trust for certain persons, and which was said to be delivered to the deceased Mr James Graham, the ordinary lawyer of the family, by whose advice and direction it was drawn. Mr Drummond objected to the survey of the estate, that it was not forfeited by Lord John's attainder, because he not having surrendered before the 12th July, he stood attainted from the 18th April, and James having died only May 11th, John was then incapable of succeeding to him; for that by the law of England, though a person attainted of treason may take by purchase, but cannot hold, whereby such purchases become forfeited, yet by that law a forfeiting person cannot either take or hold by descent or succession; and therefore estates devolving by succession do not forfeit to the Crown, but become escheat to the overlord or superior *ob defectum hæredis*. The President was of opinion that such was the law of England as to estates held of subject-superiors, but not estates held of the Crown; but the authorities quoted made no insinuation of any such distinction; and most of us, and the President, also thought that the condition of John's attainder being suspensive till 12th July, he was till that day capable of succeeding, and of both taking and holding by descent, and that he might after May 11th, have been served and entered as *legitimus et propinquior hæres* to his brother; and that his not surrendering, though it made his attainder operate *retro* to forfeit to the Crown whatever belonged to him on the 18th April or afterwards, yet would not void his service or the succession devolved to him, but would forfeit it to the Crown; and that the same reason that prevented his brother's being attainted by his death on the 11th May, made John capable of succeeding to him on the 11th May; and therefore we found the estate forfeited by his attainder. The principal objection to the claimant's disposition (besides some others that were not decided) was, that it was not delivered. The claimant ac-

\* See NOTES.

knowledged on oath, that for a long time after James's death, he had never seen it, and it was at last recovered out of Mr Graham's repositories; but the claimant offered to prove by witnesses that it was sent to Mr Graham, with orders to take infestment and registrate it; but could not condescend more specially at what time, nor by whom these orders were sent, or whether it was by writing or by word that the message was sent; and therefore as this was a disposition of the granter's whole estate, reserving to himself only a small annuity of L.200 sterling, notwithstanding of which he retained full possession for three years till his death, and was thereafter recovered from the successors of his ordinary lawyer, who appears to have advised it; therefore we found the proof of delivery not sufficient; and as he would condescend no further, refused him a proof before answer; but some carried the point much further, and thought that no proof by witnesses was competent; and others thought, though there were sufficient proof of delivery, it would not avail; and therefore we dismissed the claim. Affirmed unanimously in Parliament, 30th March 1751, after taking the opinion of the Judges on the first point, which was unanimous.

No. 15.

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1750. *December 12.*      **ATTAINDER of the ESTATE of PERTH.**

No. 16.

A THIRD claim was entered on this estate of Perth by James Lundin of Lundin, the grandson of Earl of Melfort, as nearest protestant heir-male to James Drummond, and whose blood was saved from being corrupted by his grandfather's forfeiture, by a clause in the act attainting him, saving the blood of his first marriage with the heirress of Lundin; and the claim was founded on the act 1700; but we found that he could not be heir to James Drummond of Perth, because of the attainder of James Lord Drummond, the father of the said James Drummond, whereby that bridge was broken, as Chief Justice Hales expresses it. *2do*, We thought that the succession is not by the act 1700 established in the protestant heir, without either a service, or some other legal act, to ascertain, that the nearest heirs professed popery, and the protestant heir's own title; that till then the right of apparenency remains with the popish heir, who may possess and contract debts and be charged to enter heir, yea, and may be served and infest if no body oppose, and therefore may forfeit; and the succession having on the 11th May 1746 devolved to John, we thought the estate became forfeited by his attainder, and therefore dismissed the claim.