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

the Duke of Perth was dead before that day he was not attainted, because it was neither the intention of the act to attaint dead persons, nor had they used the proper words for that effect. This he showed by comparing the style of this act with the style of other acts where dead men were intended to be attainted, particularly the act attainting Oliver Cromwell, Bradshaw, &c.; in short he said there was here no subject of an attainder. Others seemed to put their opinion upon the nature of a potestative condition, which if it becomes imprestable by the act of God, as in this case, *habetur pro impleta;* and to this purpose was quoted the case of a man that becomes caution *judicio sisti,* or to produce a man in judgment, and if that man dies before the day. And it is the same case if the condition of the attainder becomes imprestable by the act of the King, as in the case of Farquharson of Monaltrie, who was attainted by this very act under the same condition, but was taken before the 12th of July, and was tried and condemned, which he could not have been if he had been already attainted by this act, because the objection would have lain, *autrefois atteint.* But Lord Tinwald doubted whether this maxim of the common law which holds a potestative condition as fulfilled that becomes by the nature of the thing imprestable, obtains in England; and Lord Easdale thought that a suspensive condition could not be added to the act any more than a resolutive condition. Here, he said, there was but one condition in the act, " if he surrendered against such a day," and no court of justice could take upon them to add another, " if he lived till that day."* He quoted the case of Lord Duffus after the 1715, to be found in Cummin's Reports, where it was found that this condition of surrendry could not be fulfilled by an equivalent. But it was observed that the question there was not about fulfilling the condition by an equivalent, but what was to be done when it could not be fulfilled any way.

N.B. The use of the mention of the 18th of April in the act was to draw back the attainder to that day, so that all deeds of the attainted persons after that day might be void, (for at that time the vesting act was not made annulling all deeds from the 1743,) not, as was unwarily said by some of the advocates, and Lords too, for the decision, to save those who fell in the Battle of Culloden; for that was supposing the rule to be that by this act men dead before the 12th of July are attainted, which made it necessary, by mentioning the 18th of April, to except those that died at Culloden. But the real reason of mentioning this day was to supply the place of an indictment at common law, which mentions a day upon which the treason is committed, to which by the common construction of law the attainder is always drawn back; and the 18th of April is here fixed on as the last day on which any treasonable act deposed to, in the proof whereon the act proceeded, could be committed, being the day on which the rebels after their defeat at Culloden dispersed at Riven of Badenoch, so that none of them by this act might be attainted before the crime was committed.

* Lord Elchies' way of laying it avoids this difficulty.