known that they were incomplete. But further, although *bona fides* might afford a defence in an action of repetition at the instance of the Crown against him who had paid rent or money to Strowan, yet *bona fides* cannot be the foundation of an active title in the Claimants, against an estate which did not belong to Strowan their debtor. No 20.

2*do*, The adjudications became the property of the Crown upon their being acquired by Strowan, at least the Crown acquired right to every thing belonging to Strowan, as soon as by the demise of Queen Anne his pardon fell. The creditors ought to have known this; and if they lent their money for the purchase of the adjudications, they must be presumed to have lent it on this hazard, and on the personal security of Strowan.

3*tio*, The second class of creditors must also be presumed to have known that the grant to Margaret Robertson was revocable at pleasure by his Majesty.

" THE LORDS found, That the estate of Strowan having been forfeited by a decree of the Parliament of Scotland, in the year 1690, the creditors, contractors with Alexander Robertson of Strowan posterior thereto, have no claim upon the said estate."

Reporter, *Milton.* Act. *Wedderburn, J. Craigie, Ferguson.* Alt. *King's Council.* Clerk, *Home.*

N. B. The Claimants represented, That some equitable relief might possibly be obtained for them; at their desire, " THE LORDS remitted to the Lord Ordinary to ascertain the extent of their several claims, agreeable to the vouchers and documents produced."

Fac. Col. No 172. *p.* 254.

1756. *March* 5. JOHN FORBES, Esq; *against* His MAJESTY'S ADVOCATE.

No 21.
A personal power of redemption does not fall under forfeiture.

This decision was reversed on appeal, but on a different ground.

LADY SOPHIA ERSKINE acquired right to several adjudications affecting the estate of Pitsligo. Her intention was to dispone the same to her son the Lord Pitsligo; but as he had been unhappily engaged in the rebellion 1715, and, though not forfeited, was liable to be prosecuted for treason within the three years, she came to a resolution, *anno* 1716, to dispone the same to her grandson, the Master of Pitsligo, at that time under age; and the disposition contains the following provision: ' That whensoever it shall happen Alexander Lord ' Pitsligo my son to be in a condition, capacity, and hability, lawfully to pur- ' chase, acquire, and redeem the saids adjudications in his own person, from the ' said John Master of Pitsligo and his foresaids, it shall be lawful to him per- ' sonally to redeem the same by payment of a rose noble upon any Whitsun- ' day or Martinmas after his said capacity and hability, upon 40 days premoni-

No 21. ' tion; and, in case of refusal, the said rose noble to be configned in the hands ' of any of the Bailies of Fraserburgh.'

Alexander Lord Pitsligo having again rebelled, *anno* 1745, was attainted and his estate forfeited to the Crown. The Master entered his claim upon the said adjudications. The objection made to this claim was drawn from the statute 33d Henry VIII. cap. 20. enacting, ' That if any person shall be attainted of ' high treason by the course of the common law or statutes of this realm, every ' such attainder shall be of as good strength and effect as if done by authority ' of Parliament; and that the King shall have as much benefit and advantage ' by such attainder, as well of uses, rights, entries, conditions, as possessions, ' reversions, remainders, and all other things, as if done and declared by au- ' thority of Parliament.' By the authority of this statute, it was *pleaded*, That the right of redemption given to Lord Pitsligo in the disposition of these adjudications to his son, is, in the sense of the English law, a condition which is carried to the Crown by forfeiture; and consequently, that it is in the power of the Crown, now in the right of Lord Pitsligo, to redeem these adjudications upon payment of a rose noble.

To this objection, two *answers* were made, *1mo*, That a personal privilege of redemption is not a condition in the sense of the law of England. A condition is described in the English law, ' A quality annexed to a real estate, by virtue ' of which it may be defeated, enlarged, or created, upon an uncertain event.' And it is held as a general rule, ' That conditions can only be reserved to the ' feoffer, donor, or leasor, their heirs; and not to any stranger.' New Abridgement of the Law, v. 1. p. 400. And if faculties reserved in deeds to any person other than the granter, are not conditions in the sense of the English law, they come not under this statute: They are only rights of action competent to the forfeiting person, which fall not under forfeiture. *2do*, *Esto* the present faculty were a condition, yet it is personal to Lord Pitsligo, descends not to heirs, far less to the Crown by forfeiture. Thus, in the famous case of the Duke of Norfolk, *anno* 18th Elizabeth, he conveyed his lands to the use of himself for life, and afterwards to the use of Philip, Earl of Arundel, his eldest son, in tail, with diverse remainders over, under a proviso, ' That if he should be ' minded to alter and revoke the said uses, and should signify his mind in writ- ' ing, under his proper hand and seal, subscribed by three witnesses, then the ' uses should be revoked.' The Duke being some years after attainted of high treason, it was adjudged, That this proviso or condition was not transmitted to the Crown by any of the statutes made in relation to forfeiture; and upon this ground all the possessions of the Duke of Norfolk were saved and rescued from the effect of the forfeiture. This judgment is referred to by Lord Chief Justice Coke, in his Reports, Part 7. No 13.

I find no reply to the first answer. But to the second, it was *replied*, That there is a distinction betwixt personal faculties, where the power of redemption can only be exercised by the man himself personally, such as making a writing

under his proper hand and seal, as in the Duke of Norfolk's case; and where the power of redemption may be exercised by others, as tendering a gold ring or consigning a rose noble, which is the present case; that, in such a case, the Crown, as in right of the forfeiting person, may use the order of redemption. In support of this distinction, the case of Englefield was appealed to, which is as follows: Sir Francis Englefield conveyed his lands for the use of himself for life, the remainder to his nephew, and the heirs-male of his body, with a proviso, 'That if Sir Francis, by himself, or any other during his life, shall deliver or offer to his nephew a ring of gold, to the intent to make void the uses, 'then the uses shall cease.' Sir Francis was attainted for treason. It was ruled, 'That the Queen in the lifetime of Sir Francis may, by commission, &c. tender 'the ring, and make void the uses; for it was not personally annexed to him, 'but might be performed by the Queen.' No 21.

To this it was *duplied*, That this is a distinction without a difference. Whatever is purely personal, can neither go to heirs nor assignees; and to say, as in Englefield's case, that the Queen could tender the gold ring, is in effect saying that a right purely personal, may, contrary to the very constitution of the right, be assigned; for if it cannot be conveyed by will, far less by forfeiture. And accordingly Sir Edward Coke concludes his report of this case in the following words: 'But the counsel of Francis Englefield were not satisfied with the 'judgment, for they conceived that the condition was so inseparably annexed 'to his person, that the same was not given to the Queen by the act 33d Henry 'VIII.; and their advice was to bring a writ of error. But, at the next Parliament, a special act was made to establish the forfeiture to the Queen.'

Such were the pleadings on both sides. But the Court took up the case upon a simpler and more obvious ground. They observed, that the faculty is not only personal, but conditional; and that Lord Pitsligo's title to redeem is limited to his being in a capacity to hold these adjudications, after using the order of redemption. Hence it follows, that if Lord Pitsligo should obtain a pardon remitting the punishment only, not the forfeiture, he would not in that condition be entitled to redeem: It would be a good defence to the Master, that the faculty of redemption was not given to Lord Pitsligo, but upon condition that he himself personally should have the benefit of these adjudications; and therefore that since he could not hold, he could not redeem. In this view, Englefield's case, supposing it well founded in the law of England, does not apply. *Esto* it were law that the King, by forfeiture, may in right of the forfeiting person, use an order of redemption, though conceived personally; it will not follow that the King, in the right of a forfeiting person, can use an order, which the forfeiting person himself has no right to use.

'The claim was accordingly sustained.' (Reversed on appeal.)

Sel. Dec. No 105. *p.* 148.

No 21.

*** This case is reported in the Faculty Collection :

Alexander late Lord Pitsligo was attainted for his accession to the rebellion 1745; his estate was surveyed by the Barons of Exchequer as forfeited to the Crown.

John Forbes, the late Lord's eldest son, entered a claim upon the estate for a certain sum of money due to him by two adjudications of the estate of Pitsligo, obtained in 1690 and 1695; to which adjudications the claimant's grandmother, Lady Sophia Erskine, when Lady Dowager of Pitsligo, came to have right; and in 1716 and 1717 disponed them to the claimant, who was then an infant of two or three years old.

The conveyances of the adjudications by Lady Pitsligo to the claimant contain the following clause: 'That how soon and whensoever it shall happen 'Alexander, Lord Pitsligo, my son, to be in a condition, capacity, and a-'bility, lawfully to purchase, acquire, and redeem a right to the said ad-'judication, in his own person from the said John, Master of Pitsligo and 'his foresaids, it shall be lawful and leisom to him, personally, to purchase and 'redeem the right of the hail premises from his said son, and his foresaids, 'upon payment of a rose noble, upon any Whitsunday or Martinmas after his 'said capacity and ability, upon 40 days premonition,' &c.

The reason of Lady Pitsligo's conveying the adjudications to her grandson, under the provision above-mentioned, was, that her son Alexander Lord Pitsligo had been concerned in the rebellion 1715, and though not attainted, yet, at the date of the conveyances, was liable to be prosecuted and attainted, as the three years from the commission of the treason had not then run.

The claimant admitted, that he had never heard of these adjudications, nor the conveyances thereof in his favour, until the year 1748, when a gentleman told him, that they had been sent to him from the house of Pitsligo after the rebellion 1745.

His Majesty's Advocate *objected* against the claim, *First*, That so soon as Alexander Lord Pitsligo, by the lapse of three years from the rebellion 1715, came to be in a capacity and ability to acquire the adjudications, there remained no more with his son the claimant than a nominal fee, defeasable by Lord Pitsligo at pleasure, and that the real and substantial right was in Lord Pitsligo; and therefore was forfeited by his attainder, in the same way as when a father dispones his estate to his son, reserving his own liferent and a power to burden or alter, &c. such nominal fee in the son does not protect the estate from being forfeited by the father's rebellion, as was found in the case of Lovat, 21st November 1750, *voce* Personal and Real; and that the objection was strengthened in the present case from the adjudications and conveyances not being delivered to the claimant, but to his father.

2*dly*, That supposing the conveyances of the adjudications to the claimant to be valid and unexceptionable, yet the condition or power of redemption for a

Rose Noble, conceived in favour of Lord Pitsligo, was forfeited and belonged to the Crown by his attainder; for by statute 33d Hen. VIII. cap. 20, it is enacted, 'That if any person shall be attainted of high treason, by the course of 'the common law, or statutes of this realm, every such attainder shall be of as 'good strength and effect as if it had been done by authority of Parliament; 'and that the King shall have as much benefit and advantage by such attain-'der, as well of uses, rights, entries, conditions, as possessions, reversions, re-'mainders, and all other things, as if it had been done by authority of Parlia-'ment.' That although in some cases, decided in the Courts in England, it had been found, that some conditions did not forfeit; yet it was only in cases where the conditions were conceived absolutely personal to the party, so as not to be performable by any other. But Hales, vol. i. p. 244. observes, 'If the 'condition be such, that the substance of the performance thereof is not bound 'up strictly to the person attainted, then such a condition is given to the 'Crown;' for which he cites Englefield's case. That the present condition or right of reversion was not by the law of Scotland personal, but was descendible to Lord Pitsligo's heirs, had they been different from the fiar; was assignable by Lord Pitsligo, and might have been affected by his creditors by adjudication; and therefore went to the Crown by forfeiture. No 21.

3*dly*, It was *objected*; That supposing the claim for the sums contained in the adjudications to be good, yet no annualrent could be due thereon, since the adjudications in the person of the claimant; because, as he had been alimented and educated by his father, who was the debtor in these adjudications, and much more bestowed upon him than the annualrent of these sums, the aliment behoved to be considered as payment of the annualrents; for *debitor non præsumitur donare*.

4*thly*, It was *objected*; That at any rate the claimant could only demand the principal sums in the adjudications, and the interest of such principal sums, but not the accumulated sums and interest upon them; because these accumulations were penal, and all penalties are disallowed by the vesting act.

It was *answered* for the claimant to the *first* objection; That the conveyances of the adjudications by the Lady Dowager of Pitsligo were intended to vest a real fee in the claimant, and the heirs of tailzie substituted to him; and if her son the late Lord Pitsligo had died without exercising the faculty of redemption, it appears evident, that the claimant could have infeft himself upon the adjudications conveyed to him, and brought every action competent upon them against the estate of Pitsligo, without representing his father; and therefore there is no colour to compare these conveyances to the case of the tailzie of Lovat; for in that case the estate was originally vested in Lord Lovat the attainted person, and the claim was founded upon the tailzie executed by him a short time before the rebellion, with a view to elude the forfeiture; which tailzie reserved such general powers, as left him at liberty to do what he would with the estate; and therefore the tailzie was constructed to be an elusory

No 21. deed, intended to avoid the forfeiture, without denuding the granter, who was the forfeiting person.

But, in the present case, the adjudications never were in the person of the late Lord Pitsligo; they belonged to his mother, who might have made them over to any person she pleased. She gave them to the claimant under a proviso, which, if it can now take place, may have effect; but if it cannot, the claimant's right is simple and absolute; and whatever may be said against deeds granted by a man to secure against a future forfeiture, that may be inflicted for his own crime; it is undoubtedly most lawful and allowable for a party who apprehends such danger, with respect to a presumptive heir, to secure his estate against it; and any powers reserved in favour of such heir will fall to be amply interpreted.

And with respect to the delivery of the deeds, there is no reason to suspect that they were ever delivered to the late Lord Pitsligo, who was out of the country at the time when they were executed; but it is not material to whom they were delivered; because their being out of the granter's hands was a sufficient delivery, and the claimant was entitled to insist for exhibition of them from any person in whose custody they were.

To the *second* objection, it was *answered;* That the question falls to be determined by the law of England, which has always been careful not to extend forfeitures beyond the plain meaning of the statutes enacted for that purpose; it was not extended to *estates taill*, although excepted by no statute, until an express act was made for that purpose, anno 26, Hen. VIII. Nor was it extended to rights held in trust for the forfeiting person, until another statute was made for that purpose in the 33d year of the same reign. And, even as the law now stands, rights of action to lands and tenements, writs of error, competent to heirs in remainder, and many other beneficial rights which might belong to the forfeiting person, do not fall under the forfeiture, as appears from the English law-books, particularly Lord Coke's Institutes, part 3. fol. 19, and his Reports, part 3. No 2. Sir Francis More's Reports, p. 25. and 125.

The statute referred to by the respondent for comprehending such faculties as those conceived in favour of the claimant's father, is the foresaid act 33d Hen. VIII. cap. 20, by which it is contended, that all conditions provided in favour of the attainted person fall under the forfeiture.

But, *first*, The faculty conceived in favour of the claimant's father falls not under the description of a condition by the law of England, which is described to be 'a quality annexed to a real estate, by virtue of which it may be defeated, enlarged, or created upon an uncertain event.' And it is laid down as a general rule, 'That conditions can only be reserved to the feofer, donor, or leasor, and their heirs, and not to any stranger.' New Abridgment of the Law, vol. i. tit. Conditions, p. 400, where reference is made to several authorities for proving that rule.

No 21.

But, in the *next* place, Even where such faculties are reserved to the granter, and therefore properly held to be conditions; yet it is an established rule in the law of England, That where they are personally conceived in favour of the person afterwards attainted, they will not transmit to the Crown by his forfeiture; this was found in the case of the Duke of Norfolk, who, anno 18th Eliz. conveyed his lands to the use of himself for life, his eldest son in taill, with divers remainders over, and under a proviso, 'that if he should be minded to alter 'and revoke the said uses, and should signify his mind in writing, under his 'proper hand and seal, subscribed by three witnesses, that then the uses should 'be revoked.' This judgment is referred to by Lord Coke in his Reports, part 7. No 13.

The like judgment was given in the case of Harden *versus* Warren, anno 21 Car. I. reported by Latch, p. 25, 69, and 102. Sir William Shelly had made a feofment to the use of himself for life, remainder to his first, second, or other sons in taill, provided, that if Sir William during his life tender a ring or a pair of gloves to any of the feoffees or their heirs, *ipso Gulielmo tunc declarante et expressante*, that the tender was to the intent to avoid the deed, that then the the uses should be void, and the feoffee should stand seised to the use of Sir William and his heirs. Sir William was afterwards attainted for high treason; and it was adjudged, both by the Court of Exchequer and Court of Common Pleas, that the power of revoking the uses was not transmitted to the Crown by the forfeiture.

And the like judgment was given in the case Smith *versus* Wheeler, adjudged first by the Court of Common Pleas, and thereafter in the Court of King's Bench, 23d Car. II. observed by Sir Matthew Hale, vol. i. p. 246. And accordingly Sir Matthew Hale, vol. i. p. 245, lays down this general rule, as proved by the above three precedents which he there recites, viz. That if the condition be appropriated and applied to the person of the party attainted, then such condition is not given to the Crown.

And if, in the above-mentioned cases, the faculties conceived in favour of the forfeiting person did not transmit to the Crown, much less can they in the present case; for that in the above cases the faculties were created by the forfeiting persons themselves; but, in the present case, they were created by a third party, who was guilty of no crime, and had full power over the estate transmitted by the conveyance in favour of the claimant. And even although the faculty were construed to be a condition, yet it could not possibly fall to the Crown; because it is a condition which is not given to the party when he falls under an incapacity.

The judgment mentioned by the respondent to have been given in the case of Englefield was never approved of. Lord Coke, who mentions it in his Reports, Part 7. No 12. observes, that the counsel of Englefield were not satisfied with the judgment, and advised to bring a writ of error; but the next session of Parliament, *anno* 35. Eliz. passed an act establishing the forfeiture in favour

No 21. of the Queen; and, when the like question occurred in the cases of Harden and Smith, the judgment in Englefield's case was not regarded, but the precedent in the case of the Duke of Norfolk followed, as more agreeable to the law of England.

It is needless to inquire, whether the faculty conceived in favour of the late Lord Pitsligo, could, by the law of Scotland, have been assigned by him, or transmitted to his heirs, or affected by his creditors; for it is the law of England which must determine what rights are forfeitable. It has been found, that rights conceived in the most strict and unalienable form that the law of Scotland can devise, are liable to forfeiture, because they were so by the law of England; and, *e converso*, it must be equally certain, that rights of action, and many others which, by the law of Scotland, may be transmitted to assignees either voluntary or legal, are, notwithstanding thereof, not subject to forfeiture, because not so by the law of England; for, by that law, there is no occasion, in the case of forfeitures, to inquire how far the rights are transmissible to heirs, assignees, or creditors, but only to consider how far the forfeiture is enacted by statute, as it can go no further than statutes have carried it, or the constructions put upon them in former precedents. At the same time it may justly be doubted, if the faculty conceived in favour of the late Lord Pitsligo could have been assigned by him, or transmitted to his heirs or creditors; because the faculty was conceived personally in favour of himself only; and it is certain, that reversions do not go to heirs and assignees, unless it be so expressed.

To the *third* objection against the annualrents which were claimed upon the principal sums contained in these adjudications, it was *answered*, That the aliment furnished to the claimant could not compensate or extinguish the annualrents; because the brocard, that *debitor non præsumitur donare*, cannot apply to the case where the person who furnished the aliment was under a natural obligation to aliment the other party, as was found in February 1731, in the case of Lord Kimmergham's Daughter against his Creditors, *voce* PRESUMPTION, where her claim for the annualrents of L. 8000 Scots, which had been assigned to her by a relation, and affected her father's estate, was not extinguished or lessened by the aliment which her father had furnished to her.

To the *last* objection, it was *answered;* That the accumulation of the annualrent due at the date of the adjudications into a principal sum, so as to bear annualrent thereafter, was not penal, but was most equitable; because, seeing the creditor did not make payment of these annualrents, it was reasonable that they should be considered as a principal sum, so as to bear annualrent from the date of the adjudication, as was found in the case of Sir Lewis M'Kenzie claimant upon the estate of Cromarty, No 19. p. 220.

"THE LORDS repelled the objections founded upon the clauses contained in the conveyances of the adjudications granted by the Lady Dowager of Pitsligo, in favour of her grand-son the claimant, in respect it was not alleged, or offer-

ed to be proved, that the late Lord Pitsligo executed these personal faculties; and found, That there could be no deduction from the sums in the adjudication, on account of the aliment furnished to the claimant by his father; and sustained the claim for the principal sum and interest of the bonds accumulated into one sum without penalties, at the date of the respective adjudications, and for the interest of the sums so accumulated." No 21.

Reporter, *Kames.* Act. *Ferguson.* Alt. *King's Counsel.*

B. *Fac. Col. No* 197. *p.* 291.

*** This case was appealed;

The House of Lords "ORDERED, That the interlocutor complained of, 9th March 1756, be reversed, and the respondent's claim dismissed." *See* APPENDIX.

SECT. III.

With what burdens forfeiture is affected.

1541. *March* 15. HELEN DOUGLAS *against* The King's ADVOCATE.

No 22.
Where a superior of land was forfeited, found that the vassal's lady's terce would still be safe to her, it having fallen to her before the forfeiture; tho' she was kept from possession till after the forfeiture, by another lady, who had the great terce, and died not till the superior was forfeited.

HELEN DOUGLAS, relict of umquhil Bartilmo Livingston, asked the Sheriff of N. to enter her to her right terce of certain lands of the barony of Livingston, of the terce of the quhilk hail barony, be the decease of her said husband, she was served of the said terce be the breives of the King's chappell, and kenned thereto be the Sheriff, that for the time was upon 22 years syne, albeit she as yet was not entered thereto, because there was ane Lady of the great terce yet ay livand while Juley last, wha, be vertue of the great terce brookit these lands that this Helen desired to be entered to. This land was halden of Sir James Hamilton; and, be his forfalture, the King's Advocate alleged all to have come in the King's hands. THE LORDS decerned that the said Helen ought to be entered to her terce foresaid, and that the same could not be forfalt in this case, because it fell long before the said superior's forfalture; albeit, be reason of the Lady of the great terce foresaid, the said Helen had never been yet entered reallie in possession thereof.

Fol. Dic. v. 1. *p.* 314. *Sinclair, MS. p.* 18.