No 72.

But this point cannot be said to have received a direct decision, in respect of a distinction, which in this case occurred, to be made between such casualties as are essential to the feu, and such as are only introduced by statute; that whatever difficulty there might be as to the first, there could be no good reason assigned why the last might not be renounced; and such is this casualty of the feu's reverting to the superior *ob non solutum canonem*, as it had its rise from the act 246th, (250) Parliament 1597, before which statute it was not known in our practice without paction: And even when introduced by that statute, it is only declared to have the same effect, sicklike as if a clause irritant were specially engrossed in the infeftment of feu-farm; and as before the statute, such clause in the charter might have been renounced by the superior, *cum unicuique liceat juri pro se introducto renuntiare*; so the statute does, in that respect, make no difference, as it is a statute solely in favour of the superior, and to which, therefore, the rule does not apply, that *pactis privatorum non derogatur juri communi*; and which cannot be better illustrated than from the case of the statute 1685, concerning tailzies, which provides that irritant clauses, not inserted in the precepts of sasine, and procuratories of resignation, should not be effectual against creditors and purchasers; and which, therefore, as being in favour of the whole nation, cannot be dispensed with by any clause in the tailzie; but were there a clause in a tailzie, that the heir's not inserting the irritancies, &c. should not infer an irritancy of the heir's right, it would be effectual, though the creditors would be safe.

THE LORDS found the clause effectual against the singular successor.

Kilkerran, (PERSONAL AND REAL.) *No* 7. *p.* 391.

*** D. Falconer's report of this case is No 9. p. 4180. *voce* FEU.

1750. *November* 21. FRASERS *against* The KING'S ADVOCATE.

No 73.
An estate was disponed to an apparent heir, reserving powers to contract debt, and dispose of the rents. No infeftment taken. The estate was found to be still forfeitable in the person of the father.

SIMON, Lord Fraser of Lovat, tailzied his said estate to Simon his eldest son, and the heirs-male of his body; which failing, to Alexander and Archibald, his second and third sons, with other substitutions; reserving the liferent of certain lands; and also reserving 'the full power and liberty of administration 'and intromission over the whole estate during his life; and to contract debt, 'and grant security therefor, real and personal; and to grant feu-rights and 'wadset-rights of the same, and tacks, long or short; and to make such 'appointments concerning the rents, falling due even after his death, for 'the payment of his debts, as he should think fit; and to be sole tutor and 'curator to the heirs of tailzie, during his life, in the means and estate belonging to them, in virtue thereof, without being liable to account for his intromissions, or to find caution, or give up inventory; and with power to ap-

No 73.

'point stewarts or factors, who should be accountable to him only during his 'life, and be discharged by him only.'

The Lord Lovat and Simon his son were both attainted of high treason, and my Lord executed; and Alexander and Archibald his sons claimed the estate, as falling to them successively after the death of their elder brother the fiar, in virtue of the said tailzie.

Answered; Notwithstanding the tailzie, on which no infeftment ever followed, the Lord Lovat continued fiar of the estate; and by the conception thereof, he had the full powers of a proprietor over it; and, therefore, it was forfeitable for his crime.

Pleaded for the claimants; The powers reserved by Lord Lovat are in no respect equal to a property of the estate: The circumstances of his affairs, he being involved in debts, made it impossible to extricate himself, without large powers over the estate; and to that purpose solely these are calculated: And he was undoubtedly obliged to apply his intromissions, and the debts by him contracted, to the debts upon the estate, to which also he reserved power of applying the rents, to fall due after his death: He might feu, and grant wadsets, but at a reasonable avail, and for an adequate price, and set tacks for a competent rent. This is a consequence of an accountable administration; and there is no provision that he should not be accountable for his intromissions; this is confined to his office of tutory and curatory over the heirs of tailzie when minors; and he might have named other curators, with the same powers; but the exercise of the powers reserved to him on their majority, are expressly for the payment of his debts; or supposing he might, for onerous causes, have so exercised them, as to have alienated the estate, yet he could not by gratuitous deeds, or fictitious contractions, have disappointed the heirs of tailzie.

2dly, Whatever powers he might have over the estate, it was not in him an estate of inheritance, and powers and conditions confined to a person are not forfeitable, and cannot be exercised by the Crown in his name, especially after his decease; and thus the act 33d Henry VIII. forfeiting conditions has always been constructed. The Duke of Norfolk settled his estate to the use of himself for life, and afterwards to the use of the Earl of Arundel his eldest son, with this provision, 'That if he should be minded to alter or revoke the said 'uses, and should signify his mind in writing, under his proper hand and seal 'subscribed by three witnessess, that then the uses should be revoked.' The Duke was attainted; and, Eliz. it was adjudged, 'That this proviso 'or condition was not given to the Crown by the act 33d Hen. VIII., because 'the performance of the same was inseparably annexed to his person,' Coke's Reports, Part 7. N. 13. Sir William Skelly made a feoftment, *anno* 23d Eliz. to the use of himself for life, with remainders in tail; provided that if he, during his life, should tender a ring or a pair of gloves to any of the feofees, or their heirs; *ipso Gulielmo tunc declarante et expressante*, that the tender was to the intent to avoid the deed, that then the uses should be void, and the feofee

No 73. should stand seized to the use of Sir William and his heirs. Sir William was attainted, and the Queen authorised Sir John Fortescue to tender a ring; but it was judged 2d Car. I. Harding *versus* Walter, Latch, p. 25. 69. and 102. that the power of revoking the uses by this tender, was not forfeited to the Queen. Simon Main having right for a term of years to the rectory of Hadingham, assigned it in 1643, in trust for himself for life, and afterwards for uses, provided, 'That if he were minded to change the uses, or otherwise dispose of the premisses, then he should have power so to do, by writing, or by 'his last will and testament;' he was attainted as one of the regicides, but it was adjudged both by the Court of Common Pleas, and in the King's Bench, 23d Car. II. that the donee to this rectory had no title. There were two points agreed, *first*, That this was a personal condition, and not given to the King; *2dly*, That if it were given, yet the same expiring by the death of Main, could not be performed after his death by the King, Hales, H. P. C. vol. 1. f. 246. Modern Reports, Part 1. f. 16, and 18. Wheeler *versus* Smith. On this occasion Moreton said, if it be objected that Main had, by this proviso, *jus disponendi*, I answer, it is true he had a power, if he had been minded so to do; but it was not his mind and will; and Hales, that the proviso did not create a trust, but *potestatem disponendi*, which is not a trust. Sir Francis Englefield conveyed his estate to the use of himself for life, with remainder; proviso, that if he, by himself, or by any other during his natural life, did deliver or offer to the person in remainder a gold ring, to the intent to make void all the uses, then all the uses should be void. Sir Francis was outlawed, 18th Eliz. for high treason, and the attainder confirmed by Parliament 28th Eliz. It was ruled in the Court of Exchequer, that the Queen might, in the lifetime of Sir Francis, tender the ring; Coke's Reports, Part 7. N. 12. 33, and 34th Eliz. and a special act was made, 35th Eliz. to confirm the forfeiture. Francis Engelfield the heir in remainder, had been advised to sue for a writ of error; his counsel not being satisfied in the case, when he was prevented by this act; but the case has been always reckoned strict; and yet here was something special in the proviso, that the tender might be made by him or any other; and then it was only held it could be done during his life; and Hales, H. P. C. vol. 2. f. 245. says, if Sir Francis had died before the Queen had made the tender, then the condition had been determined; and it was found by the court of delegates, after the Rebellion in 1715, 18th March 1720, and 23d November 1722, that powers to charge debt upon an estate did not forfeit, in the cases of Perth and Nithsdale; and a bond revocable, as by husband to wife, not being revoked, was sustained to the Countess of Panmuir.

Pleaded for the Advocate, Lord Lovat was noways limited in the exercise of his powers to any purposes, nor accountable for his intromissions; and it is only the power of applying rents to grow due after his decease, that is restrained to payment of his debts; which debts however, might have been contracted any how after this disposition, so that he was real proprietor; the powers in him

characterised his right to be a fee; whereupon the estate would have been adjudgeable for his debt; and the nominal fee given to his son, to be of no more consequence than that it would save a service upon his death. As there had no infeftment past on the tailzie, these were powers which he had over his own estate, and were only to resolve into faculties over that of another, by expeding the infeftment; if it had been expede, my Lord's interest was such, that it ought to be considered only as an infeftment in trust for his use; and uses are forfeited by 33d Hen. VIII. by the English law, as delivered by Lord Hales; the King is, in some cases, entitled to a condition of re-entry, belonging to the party, viz. not to the land itself, but to the benefit of the condition; which might reduce the land into the possession of the party attainted, and now to the benefit of the King. And Littleton, Coke Inst. 1. f. 201, saith, 'That an 'estate is called upon condition, because that the estate of the feofee is de-'feasible; as if a man infeofs another in fee-simple, reserving a certain rent 'on condition if the rent be behind, that then it shall be lawful to the feoffer 'to enter into such lands and tenements; and them in his former estate to 'have and hold, and the feofee quite ouste thereof.' A feu-right by the law of Scotland, is precisely an estate on this condition, and other such there are, as wadsets. Hales explains, by a distinction, what conditions the King has the benefit of by forfeiture, viz. If the condition be such, as that the substance of the performance thereof is not bound up strictly to the person attainted; the conditions on which the several estates were defeasible in the cases cited by the claimants, were strictly bound up to the persons attainted; the estates were once put out of the original proprietor; who had it in his power to recal them, by performance of the condition; as in the Duke of Norkfolk's case, by a writing under hand and seal, subscribed by three witnesses; in that of Sir William Shelly, by his tender of the ring, *ipso Gulielmo sic declarante*, &c. in that of Simon Main by his declaration of his mind and will, in manner required; and in Sir Francis Engelfield's, though the condition was to be performed during his life, yet it was found not to be bound up in his person. Lovat's settlement was similar to none of these; the estate was not, after being out of him, to be recalled by performance of a condition, but he reserved in him the powers over it. No 73.

Replied, The claimants are not in a worse case, that there was no infeftment expede on the tailzie; they have a personal right to the estate, and such was found sufficient to found a claim, in the case of Stewart of Grantully, on a minute of sale of part of the estate of Southesk; for though the Earl might afterwards have effectually disponed it; yet the King could only take benefit of what the Earl could have fairly and lawfully done. The heir of tailzie was entitled to have completed in him such a right to the estate as the tailzie would have conferred; and if that would have taken the estate out of Lord Lovat, so as not to have been forfeited by him, they are now well founded in their claim. The powers reserved could only be exercised by my Lord, and were

No 73. as personal as the conditions in the alleged cases; and particularly this settlement is precisely the same with that made by Simon Main, who putting the estate out of him, reserved *potestatem disponendi*. If the estate might have been adjudged for his debt, it proceeded from the contractions being an exercise of the power, which might afterwards have been made effectual by diligence.

Duplied, So long as there was no infeftment, the estate remained in Lord Lovat, and came to the Crown by his forfeiture, and was rightly surveyed; and the claimants could only pretend as creditors to take it again from the Crown; this was a personal, or, as an English lawyer would express it, an equitable right; but, on the other hand, there was in Lord Lovat an equitable right of disposing of the estate at his pleasure, which rendered it ineffectual; and there was no equity that the claimants should now take from the Crown an estate forfeited by the Lord Lovat, over which the disponees never had any effectual right.

"THE LORDS found the feudal and real right to the estate being in the person of Simon Lord Lovat, and he vassal to the Crown therein, at the time of his treason and attainder, and that notwithstanding of the personal right made to Simon Fraser his son, full power was reserved to Simon the father, to charge the estate with debts at pleasure, to alienate the same, by granting feu-rights and wadsets of the whole or part thereof, as he thought fit, and to apply the same to what uses he thought proper during his life, without being accountable; that the infeftment of property did remain in him for all these ends and purposes; and that the real and substantial estate of fee and inheritance, did continue and subsist in the said Simon Lord Lovat; and therefore was forfeitable for his treason, and was by his attainder forfeitable accordingly; and therefore dismist the claim."

Act. *R. Craigie, Ferguson* et alii. Alt. *The King's Counsel.* Clerk, *Forbes.*

D. Falconer, v. 2, No 166. p. 192.

1750. *December* 21.

No 74. The annuitants of the York-Buildings Company had right to annuities to the extent of a certain sum, and security, by infeftment for a smaller sum. Whether as the sum

The DUKE of NORFOLK *against* The ANNUITANTS of the YORK-BUILDINGS COMPANY.

IT is enacted 6*to* Geo. I. for enabling such corporations as should purchase estates forfeited by the Rebellion in 1715, to grant annuities forth thereof, 'That it should be lawful for bodies politic and corporate, as had purchased or 'should purchase any part of the said estates, to grant or settle rent-changes 'or annuities forth thereof:' And it is enacted, 7*mo* Geo. I. to enable the York Buildings Company, who had purchased several of these estates, to sell annuities by way of lottery, 'That it should be lawful to the said Company to grant