

## No 20.

A pardon for high treason never having passed the seals, falls by the death of the sovereign who granted it, and any rights acquired by the forfeiting person during subsistence of his pardon will escheat to the Crown.

1755. December 2. CREDITORS OF STRUAN *against* His Majesty's ADVOCATE.

IN the year 1689, Alexander Robertson of Strowan was, by a sentence of the Parliament of Scotland, forfeited for high treason. In 1703 he got a pardon from Queen Anne, restoring him to his estate, and to the bygone rents. He again joined in the rebellion 1715. But before that period, living openly in possession of his estate, he acquired several adjudications affecting the same, which were conveyed to a trustee for his behoof. The pardon granted by Queen Anne as aforesaid to Strowan never having been expedited through the seals, it fell by the Queen's death, and the estate remained forfeited to the Crown. By an act, 25th of his present Majesty, the estate was annexed unalienably to the Crown; and, by a clause in a subsequent statute, provision is made for making payment and satisfaction to all such lawful creditors whose claims shall be ascertained in this Court.

In pursuance of this clause, the creditors whose debts were contracted betwixt the date of the pardon and the rebellion 1715, presented their claims to the Court of Session, *insisting* upon two different grounds for obtaining their payment: *imo*, That they lent their money to Strowan, who had a pardon from the Queen, and a right to his estate; and therefore, that they are entitled, in equity at least, to be ranked as creditors upon the estate. *2do*, As to the adjudications purchased by Strowan while he was a good subject, these, at any rate, must be considered as a fund for payment of the creditors; for, however it may be as to a purchase made by a forfeiting person, which must go to the Crown by escheat because of his incapacity to hold; the same rule does not apply to a purchase made by a forfeiting person who is pardoned and is capable to hold.

To the *first* ground the *answer* was obvious, That the right which Strowan had to his estate by the pardon was conditional. If the pardon should not be revoked, and should pass the seals in the Queen's lifetime, Strowan's right was completed. It was a grant upon a suspensive condition, which never having existed, the deed never can have any effect. The other ground is more nice. Queen Anne's pardon, which never was revoked by her, was undoubtedly effectual during her life, though it never past the seals; this solemnity being necessary for no other end but to bar revocation by the granter, or by any succeeding sovereign. This pardon did accordingly entitle Strowan to pursue or defend, and particularly to levy the rents of his estate; and it would have been a good defence to him in the Justiciary Court, or elsewhere, had he been apprehended as a traitor in order to suffer death. For the same reason, this pardon entitied Strowan to enter into bargains, and in particular to purchase adjudications upon his estate. These became his own property by the purchase. Had he again disposed of the same, the dispositive must in all events have been secure, even after the pardon fell by the death of Queen Anne. The only dif-

fealty is, whether they did not accrue to the Crown by escheat, as remaining with Strowan after he had lost the benefit of the pardon by the Queen's death. These adjudications not being in Strowan's person in the 1689, when he was convicted of high treason, could not fall under his forfeiture. Neither did they fall to the Crown by his purchase; he being at that time entitled, by the pardon, to acquire for his own behoof. But then, after Queen Anne's death, he was reduced again to the same circumstances he was in before obtaining the pardon. He was no longer a free subject, nor entitled to any privileges of a free subject. In particular, he was not capable to hold or enjoy any estate, real or personal, within Scotland. And if he could not hold the adjudications in question, the plain consequence is, that they must accrue to the Crown as escheat.

“ The creditors accordingly were found to have no claim to the estate, nor to the adjudications affecting the same.”

*Sel. Dec. No 94. p. 127.*

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

IN the 1689, Alexander Robertson of Strowan engaged in rebellion, and in the 1690 was, by a sentence of the Parliament of Scotland, convicted and forfeited in absence.

In the year 1703, Queen Anne granted him a pardon, together with a gift his estate, and of all the rents and debts which he had forfeited; the remission and gift were taken out at the Secretary's office, but never passed the seals.

Strowan, in consequence of this incomplete pardon, lived in the open and undisturbed possession of the estate which had belonged to him, was admitted to sue and to defend before the Court of Session and the House of Peers; and *that*, although the objection that he had no *persona standi* was moved.

During the period from the 1703 to the 1715, he contracted various debts. In the 1715, Strowan again entered into rebellion, and was attainted by act of Parliament, notwithstanding of his former forfeiture.

In the 1723, King George I. made a gift of the estate of Strowan to Margaret Robertson, sister of Strowan; which gift was declared revocable at pleasure. She conveyed it to trustees redeemable by Strowan for 1000 merks whenever he should be pardoned.

In the 1732, Strowan obtained a pardon, which passed the seals. He returned to the possession of his estate, but used no order of redemption against the trustees. He contracted new debts. In the 1740, the estate which had belonged to him, was, at the suit of his creditors, sequestrated by the Court of Session.

Between the 1703 and the 1715, Strowan also acquired right, in the name of a trustee, to certain adjudications against this estate. The trustee conveyed them to an assignee, who, in the 1717, obtained a decree of the Court of Ses-

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Strowan having, in the 1745, engaged again in rebellion, the grant in favour of Margaret Robertson was revoked by his Majesty. The estate which belonged to the King by the forfeiture in the 1690, was, by act of Parliament passed in the 1752, annexed to the Crown; but an act passed in the 1753, allowed all creditors having any lawful claims on this estate, to enter them within a time limited; and ordained such claims to be judged of in the same manner as the claims affecting the other estates forfeited by the rebellion of the proprietors in the 1745.

They who had become creditors to Strowan during the two periods above-mentioned, viz. from the 1703 to the 1715, and from the 1732 to the 1745, entered their claims.

It was *objected* for his Majesty's Advocate, that the whole estates of Strowan were forfeited by act of Parliament in the 1690; that the remission and gift granted to Strowan in the 1703, could not prevent the effect of this forfeiture; for that they, having never passed the seals, were revocable by Queen Anne, and by her demise became of no avail against the succeeding prince.

*Pleaded* for the Creditors, *imo*, Although the pardon was revocable by Queen Anne, and fell by her demise; yet this ought not to affect the creditors who had contracted *bona fide* with Strowan, while he remained in possession of the estate, and acted in all respects as if no sentence of forfeiture had passed. The Crown could have no action against the tenants of the estate for rent paid to Strowan, nor against his debtors for debts contracted before the forfeiture, and paid to him after his pardon. Any person who had purchased the woods on the estate from Strowan, might, notwithstanding the lapse of the pardon, demand delivery; and the same equity may be urged in support of the claim made by the creditors who contracted with Strowan in the course of daily transactions. This *bona fides* ought more particularly to be supported in the case of forfeitures, where creditors are *in damno vitando*, but the Crown is *in acquirendo* by the delict of the debtor.

*2do*, The Claimants have also a valid title to the adjudications purchased by Strowan, who was enabled to purchase them by the money which they lent him. Strowan was, by the pardon granted by Queen Anne, rendered capable of holding the adjudications at the time of the purchase; had he at that time assigned them, his assignee would have been preferred to the Crown; so also ought the creditors who lent their money *bona fide* to him.

*3tio*, The claim of the second class of creditors ought to be sustained, for that they were reasonably induced to trust Strowan at a time during which adjudications were allowed to pass against the estate, as belonging to Strowan.

*Pleaded* for his Majesty's Advocate; *imo*, No pretence of *bona fides* can be urged in this case; for that the creditors are presumed to have known of the forfeiture; and if they knew of the gift and remission, they must also have

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.

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2do, 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.

3tio, 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.

LADY SOPHIA ERSKINE acquired right to several adjudications affecting the estate of Pitsligo. Her intention was to dispoise 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 dispoise 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 purchase, 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 personally to redeem the same by payment of a rose noble upon any Whitsunday or Martinmas after his said capacity and hability, upon 40 days premoni-

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A personal power of redemption does not fall under forfeiture.

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