

S E C T. III.

Privilege as Creditor.

1529. December 9.

Mr ARCHIBALD MONCRIEFF *against* LADY BALNAGOWN and M'INTOSH.

No 21.

FOUND, that a comprising for the King's blench duty ought to be preferred to all infestments anterior, by dispositions or comprising.

Kerse, MS. fol. 30.

1620. December 6. Sir HENRY WARDLAW *against* WILLIAM DICK.

FOUND, that poinding, without decret, cannot be for the King's duties, except for the same year.

No 22.

Kerse, MS. fol. 30.

1679. January 28. The LAIRD of BLAIR *against* The LADY HASLEHEAD.

THERE being a double poinding raised at the instance of the Tenants of Over-town against the Lady Haslehead and the Laird of Blair, both compeared and produced their interests; viz. the Lady's interest is her infestment upon her contract of marriage; and Blair's interest is a gift from the King, presenting Blair in place of Carsland who was forefault, who held the said lands of Haslehead, together with a retour of the quinquennial possession of the rebel, bearing, that Carsland was in possession of Over-town, as heritable possessor by a security granted by Haslehead, redeemable upon payment of 13,000 merks; and thereupon *alleged*, That he ought to be preferred to the Lady, because Carsland's right from Haslehead was prior to the Lady's liferent. It was *answered* for the Lady, in this process, That she is not obliged to dispute the priority, or posteriority of her right, being secured by two unquestionable defences; the one is, that she is possessor *bona fide et facit fructus perceptos suos*, so that having bruicked by her infestment unquarrelled, she is secure, as to what is uplifted; and though in some cases law requires not only uplifting, but consumption, that is only in moveables, which may be extant, though uplifted, as stacks of corn, or stocks of cattle; but in rents which are liquid, being either in money or victual, the uplifting presumes the consumption, seeing none can be o-

No 23.
Not competent to plead a possessory judgment against the King.

No 23.

bliged to instruct how far they expended the rents. *2do*, The Lady hath been seven years in possession, without interruption, and therefore her right cannot be questioned but by reduction, which is a several defence from the former; for if she had but uplifted the rents for one year, as *bona fide possessor, facit fructus perceptos et consumptos suos*, but when the possession extends to seven or more years, the right is thereby secured, not only as to what is past or received, but for all years to come, till the right be reduced. It was *replied* for the donatar to the *1st*, That he oppones the retour of the rebel's quinquennial possession, which, and likeways the rebel's forefaulture, were known and notour, and therefore the Lady could not be *in bona fide* to possess an estate of a forefault person in prejudice of the King; *2do*, By act of Parliament 1600, cap. 14. it is declared, That the negligence of the King's officers shall not prejudice the King, but whatsoever they have neglected or omitted, may again be repeated by way of exception or reply; and therefore a possessory judgment is not competent against the King, nor needs the King a reduction, but may by way of reply exclude the Lady's right, as a *non habente potestatem*, being granted by Haslehead, after he was denuded in favours of Carsland; and the Lady's seven year's possession, without interruption, is by the negligence of the King's officers. It was *duplicated* for the Lady liferenter, That Carsland's right was no ways notour or known to her, it being but a security for money, which she could not challenge during her husband's life, nor did she know it to be anterior to her own right. To the *second*, Albeit in forefaultures of the King's immediate vassals, which imply recognition, all subaltern rights fall of consequence; yet here Carsland not being the King's vassal, but Haslehead's, the fee of the forefault person is devolved upon the King *cum suis oneribus*, like an escheat, liferent, bastardy, or *ultimus hæres*, as if the King had bought Carsland's right; in all which cases, the King *utitur jure communi*, without any more privilege than his author, against whom the possessory judgment by seven years possession, would have been unquestionable. It was *triplicated*, That whatever might be said in the case of the King's purchase, or succession; yet this right falls to the King *jure coronæ*, not as superior, but as sovereign Prince, and therefore it becomes a part of the public patrimony of the Crown, and is secured by the foresaid statute. THE LORDS sustained the first defence, and assoilzied the Lady from what she had uplifted before the interruption; but repelled the second defence, and found that the right of this land coming to the King, *jure coronæ*, he needed not reduce, but might reply, against which no possessory judgment could exclude him. It was further *alleged* for the liferenter, That the King's privilege by the foresaid statute, is incommunicable to a donatar, who, if he should suffer the Lady to possess seven years after his right, he behoved to reduce; and albeit the concourse of the King's Advocate upon his Majesty's interest, may exclude the liferenter, as to the bygone years before the gift, yet as to the years since the gift, she must be preferred, because the donatar has no real right in his person, till he be infeft upon the presentation.

Which the LORDS sustained, for otherways the donatar needed never be infest, and so the King would loose his casualty of the superiority.

No 23.

Fol. Dic. v. 1. p. 522. Stair, v. 2. p. 682.

* * * Fountainhall reports this case :

THE LORDS sustained the pursuit at the instance of the donatar to the Laird of Carsland's forefaulture, and his assignee, upon his presentation without infestment, for the bygone feu-duties, except those that were *bona fide percepti*, albeit the donatar be not infest, in respect of the King's Advocate's concurrence; and repels the allegiance of the possessory judgment against the donatar.

Fountainhall, MS.

1724. *January.*

COMMISSIONERS of EXCISE *against* The CREDITORS of the EARL of NORTHESK.

IN a competition between the Commissioners of Excise, on behalf of the Crown, and some of the personal creditors of the Earl of Northesk, about certain bygone rents in the tenants hands, the Commissioners *insisted* for preference, because they commenced their suit before any of the other creditors obtained decree, according to statute 33d, Henry VIII. cap. 39. § 25, by which it is provided, ' That the King shall have first execution for any debt due to the Crown, against any defendant, before any other person; so always that the King's suit be taken and commenced, or process awarded for the said debt, before judgment given for the said other persons.' THE LORDS preferred the Commissioners. See APPENDIX.

No 24.

Fol. Dic. v. 1. p. 524.

1754. *July 7.*

CREDITORS of JOHN BURNET *against* JAMES MURRAY, Receiver General of the Customs.

JAMES MURRAY, Receiver General of the Customs, led an adjudication of the real estate belonging to John Burnet merchant in Aberdeen, for a debt due by him to the Crown upon duties of tobacco. Burnet's other creditors led adjudications within year and day; and *insisted*, in the ranking, for a *pari passu* preference, upon the act 1661, Charles II. parl. 1. cap. 62.

Argued for the Crown; That by the law of England, whether the common law or the statutes, the Crown, before judgment obtained, was preferable in a competition with other creditors, upon the real as well as personal estates of its

No 25.

The Crown ranked *pari passu* with other adjudging creditors, in a ranking and sale of a bankrupt's estate.