

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

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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.

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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

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

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debtors. See Coke, 1. Inst. 30. B. 130. A & B, and 131. A & B; the reason given is, *quia thesaurus Regis est fundamentum belli et firmamentum pacis*. See also the act 33d Henry VIII, cap. 39. § 2. & 25. where this is enacted in express words. That, by the 6th article of the Treaty of Union, it is 'provided, ' That all parts of the United Kingdom shall be liable to the same duties on ' import and export.' And, by the 18th article, ' That the laws, concerning ' regulation of trade, custom, and such excises to which Scotland is to be liable, shall be the same in Scotland as in England.' And, by the 19th article, ' That there be a Court of Exchequer in Scotland for deciding questions ' concerning the revenues of Customs and Excises there, having the same ' power and authority, in such cases, as the Court of Exchequer in England.' That, by the act 6th, Ann, cap. 26. for establishing the Court of Exchequer in Scotland, it is enacted, ' That all obligations for debts to the Crown shall ' have the same force and effect as in the Court of Exchequer in England, according to the true intent and meaning of 33d Henry VIII. cap. 39. or any ' other law, &c.; or by virtue of the prerogative royal; and that her Majesty ' be preferred in all suits in the said Court of Exchequer in Scotland, according to the said statute 33d Henry VIII. and according to the practice of the ' Court of Exchequer in England; and as well the bodies as the lands and tenement-debts, credits, and specialities, goods, chattles, and personal estate ' of all debtors, or accountants to the Crown, or their debtors in Scotland, shall ' be subject and liable, by extent, inquisition, and seizures, or by any other ' process, ways, or means, to the payment of such debts, duties, or revenues ' to the Crown; and in such and the same manner and form, to all intents ' and purposes, as in the Court of Exchequer in England.' Hence, it is evident, that in Scotland the Crown must be preferable to all other creditors, as well in the debtor's real as his personal estate, without any respect to priority of diligence. Nor does it alter the case, that, in the act last mentioned, there is a proviso, ' That no debts to the Crown shall affect or subject any real estate ' in Scotland further, or otherwise, or in any other manner or form, than such ' real estate may, and ought to be, subject and liable by the laws of Scotland.' For that this proviso means no more but that a personal obligation granted to his Majesty for the duties of customs and Excise, does not in terms of the 33d Henry VIII. create a real lien upon the debtor's real estates in Scotland, for this were to make them liable further; nor are they liable to be attached by extent, or other English forms of diligence, for this were to make them liable otherwise than in the law of Scotland; but yet, as soon as the real estate is affected, at the Crown's instance, according to the forms of the law of Scotland, then the prerogative of the Crown ought to take place, and give the same preference in Scotland as it does in England.

Answered for the Creditors, imo, That, by the law of Scotland, before the Union, the King was entitled to no preference upon real land estates, for revenue debts, but according to his diligence; ' That, by the treaty of Union, all

‘ the laws in Scotland, not inconsistent with any of the particular articles, are saved and preserved.’

That the preference given to the Crown over the estates belonging to its debtors was only given by the said act, 6th Annæ, cap. 26. when pleaded before the Court by that act established, the Court of Exchequer; that, supposing the case were even before the Court of Exchequer, the preference, in the act above mentioned, never could affect a real estate. For, *2do*, This was carefully provided for by the proviso above mentioned; where it is declared, not only that such debts shall not affect the real estates further, or otherwise, and in no other manner nor form, than by the laws of Scotland; ‘ but also that the laws of Scotland shall, in all such cases, hold place and be observed.’ Neither does the statute leave the matter to rest even there; for, in another clause, it expressly provides, ‘ That the validity or invalidity, and preference of the title of the Crown to any honours, manors, lands, tenements, or hereditaments, or to casualties belonging to the Crown, shall continue to be tried and decided in the Court of Session, as was used, and, of right, ought to have been, by the law and practice of Scotland, at the time of the Union, and not otherwise.’ This puts an end to all question; and it is well it does so; for, were the Crown’s plea good, the whole faith and security of our records would be at an end; the whole security of entails would be also at an end; for, by the 33d Henry VIII. § 26 and 27. a simple personal obligation to the King, charges land to whomsoever it comes, whether by descent or purchase. Even entails are subjected, in like manner, to the Crown’s debts. See Wood’s Inst. book I. cap. 2. p. 20.

‘ THE LORDS found, that, before the Union, the King, by the laws of Scotland, was entitled to no preference, for revenue debts, upon the real land estates of his subjects, but only according to his diligence; and found, that, by the act 6th Annæ, the laws of Scotland are saved, and declared to hold place and be observed; and therefore found his Majesty preferable only *pari passu* with the adjudgers, within year and day of his adjudication; and prefer him and them, *pari passu*, accordingly.’

Act. Lockhart, And. Pringle. Alt. Advocatus, R. Craigie. Clerk, Gibson.

Fol. Dic. v. 3. p. 368. Fac. Col. No 112. p. 166.

* * * This case was appealed :

THE HOUSE OF LORDS ‘ Ordered that the interlocutor complained of be affirmed.

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* * * Lord Kames reports the same case.

1754. *July 18.*—In the year 1746, John Burnet, merchant in Aberdeen, became bound in a bond to the King for the duty of tobaccos imported, the balance remaining due after partial payments being L. 1500. For the recovery of this balance, an adjudication was obtained, November 1760, at the suit of his Majesty's Advocate, upon which the receiver-general was infest. Upon this title, he brought a ranking and sale of Burnet's real estate, in which compearance being made for Burnet's other creditors, who had obtained adjudications within year and day of that now mentioned, these creditors craved to be ranked *pari passu* with the general-receiver.

It was *answered* in behalf of his Majesty, that by the privilege and prerogative of the Crown, settled and established by law, the King's interest is preferable, and his competitors are not entitled to come in *pari passu* with him. That this is the prerogative of the Crown was endeavoured to be made out by the act *6to Annæ cap. 26.* establishing the Scots Exchequer, enacting, "That all suits and prosecutions upon any obligation, recognizance and specialty for any revenues, debts, or duties, due or payable to the Crown within Scotland, shall be in the said Court of Exchequer; and her Majesty, her heirs, and successors, shall be preferred according to the statute 33d of Henry VIII., and according to the usage, course, and practice of the Court of Exchequer in England; and shall have and enjoy the said prerogatives, as well in and about pleadings, as in other matters and things as by any of the laws of England, or Court of Exchequer in England, have been, are, or ought to be allowed." Again, "As well the bodies, as the lands and tenements, debts, credits, and specialties, goods, chattels, and personal estate of all debtors or accountants to the Crown, or their debtors in Scotland, shall be subject and liable by extent, inquisition, and seizure, or by any other process, ways, or means, to the payment of such debts, duties, or revenues, to the Crown; and in such and in the same manner and form, to all intents and purposes, as hath been, or is used in the Court of Exchequer in England in like cases." Whence it was inferred, that as the King's debt by the said statute Henry VIII., and by the practice of the English Exchequer, is preferable to private debts upon land, as well as upon moveables, the same preference must obtain in Scotland; especially that by the 18th article of the Treaty of Union, it is declared, That the laws concerning the regulation of trade, customs, and such excises to which Scotland is, by virtue of this treaty, to be liable, shall be the same in Scotland, from and after the Union, as in England."

In answer to this pleading, another clause in the same statute for establishing an Exchequer in Scotland was urged: "Provided nevertheless, that no debt or duty from any of the debtors or accountants to the Crown of Scotland, shall affect or subject any real estate in Scotland of any such debtors or

accountants, to the payment or satisfaction of any such debt or duty, further or otherwise, or in any other manner or form, than such real estate may and ought to be subject and liable thereto by the laws of Scotland; which shall in all such cases, and for all such purposes, hold place and be observed, any thing in this act contained to the contrary notwithstanding." To this, the King's Advocate had no other answer but by wresting the sense to confine it to the form of the execution, which he allowed must be by adjudication; but contended, that this clause did not subject the King to any of the rules of preference among creditors established by the law of Scotland. And he urged, *2do*, That by the law of Scotland before the Union, the King's debt was privileged; and, in competition with private debts, had a preference both upon the land and moveables of the debtor.

"THE LORDS found that before the Union of the kingdoms of England and Scotland, the King by the laws of Scotland, was entitled to no preference for revenue debts upon the real estates of his subjects, but only according to his diligence. And that by the act *6to Annæ*, the laws of Scotland are saved, and declared to hold place and be observed. And therefore that his Majesty is preferable only *pari passu* with the creditors whose adjudications are within year and day of his adjudication."

As this is a question of great importance with regard to the laws and rights of Scotland, I took pains to examine it thoroughly. By the act 33d, Henry VIII. two privileges are granted to the Crown. One is, that the King's processes shall have the preference; that is, shall be privileged and take place before private processes. Another is, that the King shall have the first execution, provided his action is commenced before judgment is recovered by others.

By the act *6to Annæ*, cap. 26. establishing an Exchequer in Scotland, it is provided, "That the King shall have preference in all suits and proceedings in the Court of Exchequer, according to the said statute, 33d Henry VIII." Now, this is only adopting the privilege first mentioned, that of giving a preference to the King's suits. Not a word of the privilege of first execution; and where the question is of a privilege so extraordinary, the clause in Queen Anne's statute is not to be extended. *2do*, Supposing both privileges to be comprehended, yet the clause is express, confining the privilege to proceedings in Exchequer. The clause does not comprehend the Court of Session, nor any court save the Exchequer. Therefore, upon this plan; the King may have the first execution of moveables, where the writ of execution issues from Exchequer, in competition with any other writ issued from Exchequer in favour of a private party. But supposing a writ of execution against moveables upon a debt due to the King, is directed to the Sheriff; and another writ directed to the same Sheriff by the Court of Session, upon a debt due to a private party, the privilege does not even obtain in this case. But, *3tio*, It is not the law of England, that moveables taken in execution by a private party,

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and sold for his payment, may be taken in execution from the purchaser for payment of a debt of the first proprietor to the Crown. By an English execution against moveables by a *feri facias*, the goods are sold, and the price returned to the court whence the warrant issued. No posterior execution, even for the King's debt, can deprive the purchaser of his property. Nor can such execution affect the price, even where it is in the hands of the Exchequer; because its warrant is directed against the debtor's moveables, not moveables that are sold and belong no longer to the debtor. Nor can it reach the price of these moveables, which is given to a creditor by authority of the court. Far less will this execution reach the price of the debtor's moveables returned to the court of Common Pleas, in pursuance of a warrant of execution issued from that court. For the same reason, if land be taken in execution by a writ of *eligit* at the instance of a private party, the same land cannot be taken from the private party by an attachment for payment of the King's debt. Hence it is, that considering our appraisings in their original form, when lands were adjudged to a creditor commensurate with his debt, the King, supposing the law of England to be the rule, had no privilege to deprive the creditor of his property, and to take the same land again in execution.

But however proper to examine this matter to the bottom, neither of the privileges bestowed upon the Crown by the statute of Henry VIII., supposing both of them to be extended to Scotland, seem applicable to the present case. The question of the King's preference in execution does not here occur. The writs of execution in favour of the King, and of his competitors, are all of them completed by adjudication. If the King, therefore, has any privilege here, it must be, that having the first execution by adjudication, no private party, adjudging after him can be preferred *pari passu*. But there is nothing in the law of England, nor in the British statute, establishing the Scotch Exchequer, that regulates this case. It must be regulated by the law of Scotland, and consequently by the act 1661, which regards all debts, without exception of debts due to the Crown. And that this statute must be the rule, will be evident from the following consideration. Supposing the King's adjudication to be the latest in date, will he not, however, be entitled to a *pari passu* preference? Undoubtedly. And if so, it follows, that if the act 1661 apply in favour of the King, to bring him in *pari passu* with others, it must equally apply to others, to bring them in *pari passu* with him.

According to this view of the case, the competing creditors have no occasion for the Exchequer act, saving the laws of Scotland, with regard to real estates attached for payment of Crown debts; though it undoubtedly saves the law of Scotland in its full extent with regard to the rules of competition as well as the forms of execution. Further, the creditors must carry their point, even supposing the statute were to be construed in the limited sense given it in behalf of the Crown. For if the King cannot reach his debtor's land otherwise than by an adjudication, it is evident, that neither of

his prerogatives established by the statute of Henry VIII. can apply to the competition betwixt him and other adjudgers; and therefore that this competition must be governed by our statute 1661.

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The President was the single judge who gave his opinion for the Crown. He said, that the King of England has a privilege of being preferred to other creditors in all competitions; and that by the 18th article of the Treaty of Union, the King's privileges are extended to Scotland, as far as concerns the duties of customs and excise. It was *answered*, That the King has no such privilege, even in England, nor can the case readily occur in England, the nature of their rights admitting not of such competitions. And that the article of the Treaty of Union mentioned, has no such meaning.

The judgment, in this case, was, upon an appeal, affirmed in the House of Peers, 24th February 1755. It is generally admitted, that, with respect to moveables, the King is entitled to be preferred before all other creditors; and all our writers on law agree in this proposition. But I cannot discover upon what ground. I observe first, that the privilege of the first execution established by the statute of Henry VIII. is not extended to Scotland. In the next place, supposing it were, it could not have the same effect in Scotland as in England. All English writs of execution are directed to the Sheriff; and though the King's writ should be the last that is put in the Sheriff's hand, he must execute it first. In Scotland, we proceed in a different manner. The King's writs, indeed, from Exchequer, are directed to the Sheriff; but writs of execution from the Court of Session, letters of poinding, arrestment, &c. are directed to messengers, as sheriffs in that part. Betwixt them and the real Sheriff, their being no correspondence, each of them proceeds to execute separately; and there are no means provided for obliging the messenger to stay his execution till the Sheriff has first performed his duty. There is no provision made in the law of England, nor in the Exchequer act, for this case. And if the messenger has first completed his execution, it is clear, that the Sheriff has no power to take the goods from the creditor, in execution of the King's writ.

Sel. Dec. No 66. p. 86.

1774. November 17.

BROWN, YULE & COMPANY, against ANDREW DONALD and Others.

In a competition between the above-named parties, the decision of which depended upon the question 'A quo tempore are nomina debitorum bound, in virtue of a writ of extent?' The Court pronounced the judgment following:

"In respect that, from the opinion produced by Brown, Yule, and Company, it appears to be the law of England, that debts due to the King's debtors are bound by a writ of extent from the day of inquisition only; in which

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The Court found agreeably to the law of England that debts due to the King's debtors are bound by a writ of extent from the day of inquisition.