No 26. such distinction or difference between the case of debts and of goods, or even lands belonging to the debtor.

ANSWER.

IT is a settled distinction in the Court of Exchequer, that an extent binds the goods of the debtor from the *teste* of the writ and the writ is always tested on the day of the *fiat*, though it issues after. But the extent binds debts due to the King's debtor from the day of the inquisition only. This distinction appears from Bunbury's Reports above mentioned, in folio 39. 269. 265. The first is grounded on Sir Gerard Fleetwood's case, in Coke's Reports, 8th part, folio 171.; the latter, by the practice of the Court of Exchequer, founded upon manifest justice; for, if the debt was to be bound from the issuing the extent, the debtor might pay the debt before the inquisition, and would be bound to pay it over again to the Crown; whereas the inquisition is (as it is presumed) notice to the debtor not to pay the debt to the King's debtor. When the debt is found by the inquisition, a writ of extent, in aid of the King's debtor, issues against the party who has the money in his hands; by virtue of which, the debt is levied, and it will be no excuse for him to say, that he paid the debt after the inquisition, for the debt is bound to answer the King's demand from the date of the inquisition; but it would be too hard upon the debtor to be charged before he can be presumed to have notice that his debt will be found for the benefit of King, and therefore the Exchequer holds, that, although the goods are bound from the *teste* of the writ, yet debts are bound only from the inquisition.

(Sic subscribitur) JOHN MADOCKS.

Lincoln's Inn, June 27. 1774.

1791. *June* 29. JAMES OGILVIE *against* THOMAS WINGATE.

No 27.
Found that a landlord's right of hypothec over his tenant's stocking, &c. could not be defeated by a decree obtained against the tenant, at the instance of the Crown, prior to the sequestration

ON 11th July 1781, James Ogilvie, a Collector of the Excise, obtained a decree from the Justices of the Peace, against one Burgess, a tenant of Thomas Wingate's, for payment of certain distillery-duties. It contained the usual authority for poinding, rouping, and selling the goods belonging to the defender.

No farther steps, however, were taken at that time; and on 30th July following, the Sheriff of the county, at Mr Wingate's instance, awarded a sequestration of the effects of Burgess, as his tenant, for the rents secured by the hypothec.

A sale of the effects was afterwards ordered on 10th August; but before the sale, an officer of Excise, acting under the authority of Mr Ogilvie, took a pro-

No 27. sued by the landlord. Reversed on appeal.

test, wherein, after narrating the judgment which had been obtained on 11th July, he 'arrested the effects under sale, and prohibited Thomas Wingate, and 'all others, from intermeddling with them until the sums due to the Crown 'were paid.'

In this manner a competition arose between Mr Ogilvie and Mr Wingate. In support of Mr Ogilvie's claim of preference, it was

Pleaded, At the union of the kingdoms in 1707, though the municipal regulations of each country were preserved entire, it was intended that the laws relating to government and revenue should be the same in both.

For this purpose it was provided, that in both parts of the united kingdom, trade should receive the same encouragements, and be liable to the same prohibitions and restrictions; that the laws respecting the customs and excise should be the same, and that the Court of Exchequer, to be established in Scotland after the model of the English one, should proceed upon the same rules, and with the same authority and effect; 6th, 18th, and 19th articles of the Union, 6th Anne, c. 26.

It was farther provided, that the recognizances and other securities taken by the Judges in the Scots Court of Exchequer, should have the full force of those taken in England, according to the true meaning of the statute of Henry VIII. and any other subsequent statute; that the Crown should enjoy the same preference in all suits and proceedings, according to the statute 33d Henry VIII. and by the usage of the Court of Exchequer in England; and 'that the bodies, 'as well as the lands and tenements, debts, credits, specialties, goods, chattels, 'and personal estates, of all debtors or accountants to the Crown, or their 'debtors in Scotland, should be liable, by extent, inquisition, and seizures, or 'by any other process, ways, or means, to the payment of said debts, duties, 'and revenues, to the Crown, in such and the same manner and form as is used 'in the Court of Exchequer in England in similar cases;' 6th Anne, c. 26. § 6.

The only distinction which was allowed to remain between the laws of the two countries, in relation to the prerogative process of the Crown, is confined to the case of *real estates* in Scotland, with regard to which the Scots law is declared to be still in force. And thus, in every question respecting *moveables*, or what in England is called *personal estate*, the rule established by the 33d of Henry VIII. and the subsequent enactments of the English Parliament before the Union, must be equally binding on both sides of the Tweed; 6th Anne, c. 26. § 7.

By the statute of Henry VIII. § 4. it is provided, 'That if any suit be com-'menced or taken, or any process be hereafter awarded for the King, for reco-'very of any of the King's debts, that the same suit and process shall be pre-'ferred before any other person or persons, and that the King shall have first 'execution against any defendants, of and for his said effects, before any other 'persons, as always that the said suit be taken and commenced, or pro-

No 27. ' cess awarded, at the suit of the King, before judgment given for the said per-
' son or persons.'

The application of these enactments is often attended with difficulty, from the use of the peculiar terms of the English law. But in such cases recourse must be had to analogy; and the same effect which in England is given to any particular right, ought to be imparted to those in Scotland which have the nearest resemblance to it; Kames's Elucidations, p. 382.

In England, the preference of the Crown can only be excluded by a complete alienation, or a voluntary security followed with possession. Hence a landlord in England, unless he has, by legal execution, appropriated the effects of his tenant for the rents due to him, is postponed to the Crown. A landlord, therefore, in Scotland, ought to be in the same situation; the exception as to real rights confirming in other instances the general rule; King *versus* Cotton, Parker's Reports, p. 112.

If we consider the origin and general nature of those remedies which the landlords of the two countries have for the recovery of their rents, the similarity is very remarkable. A distress, as in England the landlord's remedy is termed, is held to be ' in the nature of a pledge by the operation of the law,' being derived from the Roman jurisprudence; Bacon's Abridgement, *voce* Distress. The Scots landlord's right of preference is traced to the same source, and for some time seems to have gone under the same name, until after the institution of the College of Justice, when the modern term of *hypothec* was given to it; Stair, book 4. tit. 25. § 15.; Stat. 7. Rob. 1.; Blackstone, vol. 3. p. 14. l. 9. D. *De pignorat. act.*; Bankton, vol. 1. p. 383. 398.

It is true, that some of our lawyers have considered the landlord's interest in the effects of his tenant as a right of property arising from the rule, *Quod solo satum solo cedit*. But that this rule fails here in its application, is evident in the case of cattle and other stocking brought upon the lands, and in that of the *invecta et illata*, in the lease of subjects unconnected with a farm. The circumstance, too, of its being incompetent for a Scots landlord to recover the immediate produce of the farm, after the elapsing of three months from the term of payment, and the cattle and other stocking, after they have been *bona fide* delivered to a purchaser, is quite incompatible with every idea of that sort.

Indeed, the remedies given to the English landlord appear to be much more efficacious than those which our law affords. He may retain the effects of his tenant until the whole arrears are discharged; while in Scotland, with the exception of the corn, which, as long as it remains on the lands, is hypothecated for the rents of that year of which it is the produce, the landlord's right of retention is limited to the rent of one year. An English landlord, without any judicial authority, has the power of selling his tenant's effects, a liberty which our law does not permit; 8th Anne, c. 14.; Geo. II. c. 19.

Answered; The present case falls within the meaning of the exception in the statute 6th Anne, with regard to *real estates*. In vain would a creditor in Scot-

land obtain a security over the lands of his debtor, if at any time the officers of the Crown might exclude him, or, what is the same thing, the hypothecary privilege of his debtor, by which alone he is enabled to appropriate the produce of the lands for his payment. No 27.

2*dly*, Although by the union the government of both kingdoms became the same, the peculiar laws and usages of each were in general preserved entire. Any law, therefore, applicable to both countries, though intitled to the same force in each of them, must be applied according to their respective municipal institutions; and where any part of the law of the one has been imposed on the other, it must operate agreeably to the constitution of the kingdom where it is to have effect, and must take the different objects of law, as there established and defined, without changing their nature.

If the rights of the landlords in both countries were the same, though known by different names, it would no doubt follow, that if the landlords in England were excluded by the prerogative process of the Crown, as defined by the statute of 33d Henry VIII. the landlords of Scotland, in consequence of the extension of that law at the union, should in like manner be excluded. It might even be admitted, that though these rights were not entirely the same, yet if the resemblance between them was nearer than between the right of the Scots landlords, and those of a similar nature which are in England disregarded in a competition with the Crown, the conclusion would be the same. But neither of these propositions can with any justice be maintained.

The privileges of the Scots landlord are derived from the common law, which holds, that the produce of the ground, and by analogy the cattle and other stocking upon it, are his property, or at least that he has such a real right or *lien* in them as precludes the tenant from selling them till the rent is paid. And the limitations of this general rule are to be found in peculiar enactments, or in the subsequent usage, which, by following out the views of the Legislature, have reconciled this privilege to the interests of commerce, and a more improved state of society; *Reg. Maj. lib.* 4. *c.* 22.; Stat. Dav. II. c. 5. 7.; Act 1469. c. 36.; Sir George Mackenzie's Observations; 11th July 1628, Lady Ednam against the Laird, *voce* POINDING; Hepburn against Richardson, No 11. p. 6205; Kames's Law Tracts, 4. Elucidations, article 10. p. 70.; Instit. lib. 2. tit. 2. § 32.; Stair, b. 1. tit. 13. § 15. b. 4. tit. 25.; Bankt. b. 1. tit. 17.; Erskine, b. 2. tit. 6. § 56. 57.

In England again, the common law afforded to a landlord only a right of distress, or of *impounding* his tenants effects, while they remained on the farm, without preventing a voluntary sale by the tenant, or the prior diligence of his other creditors. So stood the law of England in the reign of Henry VIII. and so it continued to stand at the date of the union, so that the preference of the Crown in a question with the landlord could not admit of any doubt. By the later statutes, which, however, cannot affect the present question, although from their giving a power of recovery and of sale, the remedy by distress is rendered more efficacious than formerly, the nature of it still remains the same;

No 27. the landlord having no real lien in the effects, but merely a right of action founded on these statutes; 2 Ventris, p. 268.; Park, 122.; Jacob, *voce* Distress; Blackstone, b. 3. c. 1. § 1. vol. 3. p. 6.; Parker's Reports, p. 121.

The situation of a Scots landlord, more resembles that of the furnisher of repairs to a ship in a foreign port, to whom, by the act of the law, the ship is held to be impledged. In such a case, the prerogative of the Crown ceases, as indeed it seems to do in every case, where the competitor, before the commencement of the suit, has acquired a real interest, or, as it is called, a special property, in the effects. In a competition with a factor, a manufacturer, or a carrier, whose interest in the goods intrusted to their care is not more ample than that of a Scots landlord in the effects of his tenant, the Crown has no preference. In the same manner, it might also be observed, the assignees under an English commission of bankruptcy exclude the right of distress, as well as the prerogative process of the Crown; but in Scotland, a landlord excludes the factor named under the Scots bankrupt statutes; Parker's Reports, p. 110. 10th August 1781, Buchan *contra* Nisbet, No 72. p. 6272.

After giving one judgment in favour of the landlord, the Lord Ordinary took the case to report on informations.

The informations were followed by a hearing. Cases were also made up, and the opinions of eminent English counsel obtained, which, however, were not satisfactory.

Some of the Judges seemed to think, that the landlord's claim was strongly founded in the exception with regard to real estates. The judgment of the Court, however, which was nearly unanimous, did not seem to rest there, but on the nature of the Scots hypothec compared to the right of distress in England; all the Judges being of opinion, agreeably to the sentiments expressed by Lord Hardwick, in the case of Gordon against Park, referred to in Lord Kames's Elucidations, *loc. sup. cit.** that in the construction of such a law as that of 6th Anne, which transfers an English statute to Scotland, without applying the principle of it to the terms known in the Scots law, regard was to be had to analogy, so as to give the same effect in both countries, to those rights which are either the same, or have a very close resemblance.

Such of the Judges as disapproved of the judgment, were of opinion, that the difference between the situation of the landlords in the two kingdoms, was not so great as to justify the giving of so important a preference to the Scots landlord.

The interlocutor was in these terms,

THE LORDS find, "that the landlord's right of hypothec over the crop and stocking of his tenant, cannot be defeated by the prerogative process of the Crown, in virtue of the statute of the 33d year of the reign of Henry VIII. as extended to Scotland, by the articles of union, and the act of Parliament the 6th of Queen Anne."

* *See* No 60. p. 4728. *voce* FORFEITURE.

After advising a reclaiming petition, which was followed with answers, THE LORDS adhered to the judgment above recited. No 27.

Reporter, *Lord Henderland.* Act. *King's Counsel, Abercromby.* Alt. *Dean of Faculty, Wight, Cathcart.* Clerk, *Mitchelson.*

C. *Fol. Dic. v.* 3. *p.* 368. *Fac. Col. No* 187. *p.* 385.

*** This case was appealed.

THE HOUSE OF LORDS, 15th June 1792, "ORDERED, That the interlocutors complained of, so far as they declared generally, That the landlord's hypothec over the crop and stocking cannot be defeated by the prerogative process of the Crown, in virtue of the statute 33d Henry VIII. as extended to Scotland by the articles of union, and the act of Parliament 6th of Queen Anne, be reversed. But in respect that the King's title does not sufficiently appear in the process, it is further ordered, That the cause be remitted to the Court of Session, to inquire more particularly into the process and conduct thereof, in virtue whereof the effects in question are supposed to have been subjected to the King's title."

1793. *December* 3.

The FACTOR on the Sequestrated Estate of JOHN LESLIE, *against* JAMES TWEEDIE.

No 28.
The officers of the revenue suing for debts due to the Crown, are preferable to the landlord claiming on his hypothec over the *inuvecta et illata.*

THE factor on the sequestrated estate of John Leslie, let to Robert Bee, from Martinmas 1790 to Martinmas 1791, a brewery, which was a part of the bankrupt estate.

Robert Bee having fallen in arrear of duties to the Crown, James Tweedie, supervisor of Excise, before Martinmas 1791, obtained a warrant from the Justices of Peace, in virtue of which Bee's whole brewing and malting utensils were laid under distress for payment of the debt.

The factor on Leslie's estate having, two days prior to this event, obtained a sequestration of the same subjects, for payment of the current year's rent, presented a bill of suspension and interdict against the officers of the Crown, praying that they might be prohibited from disposing of the effects, till the landlord's hypothec should be satisfied.

The bill having been passed, Tweedie

Pleaded; By the English statute, 15th Cha. II. c. 11. Parliament 13. which extends to Scotland, in consequence of the 18th article of the union, the utensils used in a brewery are liable to all claims arising from the excise laws, in consequence of the manufacture therein conducted, even although they are not the property of the brewer; and by 28th Geo. III. c. 37. a general enactment was introduced, giving the public revenue the same right, not only over utensils,