emption when the tax was first imposed no longer applies. The license duty then was £50; now, it is scarcely so many shillings. In the circumstances, it would be unjust to hold that the legislature meant to tax one class of retailers and exempt another. The principle, therefore, ought to hold, that wherever the exemption of the previous acts is not renewed by the later, they ought to be considered as virtually repealed.

After hearing counsel, it was

Ordered that the judgment in the Court of Exchequer in Scotland be *reversed*, and that judgment be given for the defender in the original action.

For Appellants, *Henry Erskine*, *Allan Maconochie*, *Wm. Dundas.*

For Respondents, *Arch. Macdonald*, *R. Dundas*, *Sir J. Scott.*

[M. 7884.]

JAMES OGILVIE, Collector of Excise . *Appellant;*
THOMAS WINGATE, . . . *Respondent.*

House of Lords, 13th June 1792.

LANDLORD'S HYPOTHEC — CROWN'S PREFERENCE — WHETHER CROWN HAS PREFERENCE OVER LANDLORD'S HYPOTHEC?—Held, in the Court of Session, the landlord preferable to the crown. Reversed in the House of Lords, and case remitted to inquire more particularly into the crown's title, and process whereby the effects in question were supposed to be subjected to the king's title.

James Burgess possessed a farm belonging to the respondent situated in Fife. He also carried on the business of a distiller and maltster; and being in arrear with his distillery and malt duties, the appellant, collector of excise, obtained judgment against him for the duties due to the crown.

Thereupon the respondent, his landlord, sequestrated for the current rent of crop 1781, and warrant to sell was issued, when George Luke, excise officer, in virtue of the above judgment for the malt duties, attached the same subjects, and warned the landlord not to sell, as such was

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illegal, after the proceedings of the crown. The landlord proceeded with the sale; and action was then brought before the sheriff by the appellant, for the value of the corns thus sold. The sheriff gave judgment in favour of the respondent. In advocation, the case was reported to the
July 2, 1790. Court, who pronounced this interlocutor: "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 33 Henry VIII. "as extended to Scotland by the articles of Union, and the "act of parliament the 6th of Queen Anne; therefore advo- "cate the cause and sustain the defences pled for Thomas "Wingate, assoilzie him from the conclusion of the libel
Feb. 1. 1791. "and decern."* On reclaiming petition the Court adhered.

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* Opinions of Judges.

LORD HENDERLAND.—"This is a case of nicety. In the case of Campbell of Stirling, it was found that the goods being in the hand of a third party for payment of a debt, that this was good against a writ of extent and arrestment of these goods on behalf of the crown. Vide p. 24 of Information for Wingate."

LORD SWINTON.—"The sense of the country for the last 80 years past, has been against the king's claim of preference. But the question is, whether the stock and crop are to be held as *tenant's effects?* They are the proprietor's, redeemable by the tenant on payment of his rent. The words real estate in the act mean not only heritable but moveable, in which there is a *jus in re.*"

LORD MONBODDO.—"I think the landlord has not a property, but a hypothec only; and the question having relation to the second sequestration only, I think the crown is preferable."

LORD DREGHORN.—"Even supposing them to stand in *pari casu*, and were both equal in execution of diligence, still the king would be preferable; but the Court did not mean to take the right belonging to another, and therefore that right would remain good, e. g. a ship on which there is a bond of bottomry *transit cum suo onere.*"

LORD ESKGROVE.—"The landlord's right is *a jus in re.* I do not go upon the words of the act of parliament; as I rather think it meant land estate. But the question is, What subjects is the crown to take in preference? In my opinion, it is the subjects which any common creditor would take. N. B. In England, if distrained by landlord, no common creditor can take, but the crown can. The crown can only take the debtor's right, in the same way that it was *ab ante* vested in another."

LORD GARDENSTONE.—"I think the crown preferable to all who

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—By the treaty of Union, England and Scotland were placed on a perfect equality, are *in cursu diligentiæ*. The crown could not recover from a *bona fide* purchaser though the landlord can. The landlord's right is a completed right from the beginning, and the crown cannot take away any vested right by the mere force of its diligence or writ of extent, e. g. an assignation in security, duly intimated. But suppose the goods consigned, and a debt owing the assignee, the latter's right of retention cannot be defeated by the writ of the crown."

THE LORD JUSTICE-CLERK.—" I think the rights of real creditors remain the same as before, and the right of the landlord is a real one. The salvo in the statute is only of real estates. An estate in England may consist of an interest in any subject, but the crown will not for the debt of A. distrain the effects of B. The landlord has a stronger right in Scotland than in England. Suppose an *estate mortgaged*, can the crown defeat the mortgage? Suppose money is deposited in the hands of a banker and money advanced, can it defeat the banker's right of retention? I think not."

LORD HAILES.—" Referred to the state of Scotland at the time of Union."

LORD JUSTICE-CLERK.—" It is difficult for us to say what is the law of England on the subject. But let us compare this with other rights where the crown is postponed. I am clear as to the mortgage, because it is a real right vested in another, and not the estate of the debtor. The same rule as to actual pledge. Hypothec is a *tacit pledge*. It is a real right; and gives a right to detain and bring back even against purchasers. The case mentioned of a ship, stands on the act of law, not on the convention of parties; for the act of the party could not alter the law of the land. Traditionibus non dominium (nudis pactis?) transferuntur rerum dominia."

LORD SWINTON.—" King's preference a new idea. Never thought of before."

LORD DREGHORN.—" Of same opinion. The landlord has an effectual security, which is next to payment. See the close of Mr. Wood's opinion. In the case of the landlord, it is a contract of pledge implied by the law. It is also founded on the principle of retention—the tenant's possession being that of the landlord."

LORD DUNSINNAN.—" Of the same opinion."

LORD ESKGROVE.—" Of same opinion. The act 6 of Queen Anne seems only declaratory of what was already settled by the treaty of Union itself. The *salvo* as to *real* estate is thrown in not as an exception, but in order to save existing rights, which were not meant to be touched. This exception ought to have a liberal construction.

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in matters of revenue; and consequently, in every case where the crown is preferable in matters of debt to the subject in England, it ought also to be preferred to the subject in Scotland. "By the 6th article of the treaty of The sense of the country, and king's council, ever since the Union, has been on the side of the landlords' right in Scotland. Landlords' rights in England has varied from time to time; and the best part of it is, the landlord's right has been preferred since the Union."

LORD HAILES.—"The nearest thing to a right of pledge is the landlord's right of hypothec, and therefore I am for preferring him as a pledgee. The claim of the crown, however, is not new. The history of the Union not well understood; and we are liable not to take into view the miserable state of the Scots tenantry at that time. They were in a general state of bankruptcy, and the only security for a landlord was the tacit hypothec; and even this would not have been given up without opposition."

LORD HENDERLAND.—"I think the landlord is entitled to his preference against the crown."

LORD PRESIDENT.—"I am of the contrary opinion, and for preferring the king's writ of extent.

"The question is, whether the landlord's right of hypothec, or the king's debt upon a writ of extent is preferable, the goods being *in medio?*

"This is not left to the law of Scotland alone, for by the act 6 Anne we must have recourse to the law of England in all questions regarding the king's preference. There is nothing extraordinary in this. It is the same in Treason law.

"Care was taken to make an exception of real estate, as the great security of our records, &c. depended upon the adherence to our own feudal establishment. But personal estate was not thought of equal consequence.

"The present question regards the effects of a tenant which are in their nature moveable or personal estate, viz. horses and cattle; and the same question would apply to *invecta et illata* in an urban tenement. They are said to be hypothecated for landlord's rent, i. e. the landlord has certain legal remedies for recovering his rent out of them of a more beneficial nature to him, than those of any common creditor.

"A superior also has such remedies for his feu duties, and even a real creditor infeft, by poinding the ground. But how far these remedies operate in competition with the crown, is the question.

"1. Take a view of the law of England, then of Scotland, as to the landlord's remedy. The two laws are somewhat different, but not more than was to be expected from the two countries being independent, having different legislatures, and different jurisdictions

" Union it is provided, that they shall be under the same " prohibitions, restrictions, and regulations of trade, and " liable to the same customs and duties on import and ex- " ports, &c." By the 19th article it was provided, " that

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and forms. Suppose the origin to have been the same, and that they set out from the same point, they would naturally diverge.

" Rent charge in England and in Scotland was originally the same. See Kames' Law Tracts, vol. i. 241 ; and at present their mortgage and our personal bond have the same object, though the forms are different.

" The administration of personal estate assumed by the clergy in both countries, had the same source, and conducted in nearly the same manner. It is still nearly akin in both, attended with some variations in form and practice. I doubt if this variation be such as would affect any question arising upon the king's preference.

" In England, so early as *magna charta*, upon the death of the king's debtor, the king had a right to have his debt first paid, 9 Hilery 3, cap. 18. It is presumed this is still the law of England, and if so, we are bound by the act 6 of Queen Anne to receive it here.

" What preference the king had with us before the Union is not clearly ascertained. Probably he stood upon the same footing with the Roman fisk.

" Certain debts are held to be privileged. See Instructions to Commissaries, Acts of Sederunt 1666; and among these, duties of lands for a year.—Funeral expenses, and physician's fees are omitted, yet these have always been held preferable, and in the first rank; see Kilkerran, p. 138, 29 June 1742, Cowan *v.* Barr, *Creditor funeralium*, (funerarius?) found preferable to landlord for rent. No mention is made of the king. But if the king be preferable to other creditors chirographari, such as furnishers to burial, &c., he must *a fortiori* by that decision, be preferable to the landlord, who is truly a creditor by special contract only, though with us said to be *hypothecarius*.

" The landlord's situation in England is fully described in the English opinions produced and authorities referred to. He can by a summary proceeding at his own hand, distrain for the whole arrears. This is called distress; and by act 2 Wm. and Mary, c. 5, extended to power of apprising and selling at sight of sheriff or constable, and extended to corns reaped.

" As the law therefore stood at the Union, the landlord's powers in England were very ample and effectual as to arrears, and when goods were impounded, they were in custody of the law, from which they could not be taken by any common creditor.

" The author of Bacon's Abridgment says that this was a *hypothecation*. Voce *Distress*, vol. 2, p. 105; and vide preamble of said act Wm. and Mary, where it is said that goods are detained as *pledges*.

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" there be a court of Exchequer in Scotland for deciding " questions concerning revenues, customs, and excise there, " having the same power as in England." By 6th Anne, it was declared that debts to be paid to Her Majesty in Scot-

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" What stronger lien could there be, when, by common law, they might there be detained for ever till the rent was paid, and by statute might be sold, if not redeemed, like a pledge, yet the king's prerogative prevailed.

" By act 8 Queen Anne, c. 14, a *tacit hypothce*, in the proper sense, was created for a year's rent, so that the law of England now stands very nearly on the same footing with ours; yet this makes no difference as to the king's right.

" By the common law, property must be actually changed to exclude the king; there must at least be a *special property* vested, such as a pawn or pledge delivered, or a ship mortgaged. See case in Par. Ker's Reports, p. 112, King *v.* Cotton, where the question with the landlord is fully discussed.

" A *tacit hypothec* or lien, which is no other than a *preference* or privilege given by law, will not answer the purpose, no special property being thereby vested, as by the covenant of parties, and actual delivery of the subject.

" As to the law of Scotland, what we now call hypothec, seems anciently to have been precisely a distress, and nothing more. See Kames' Law Tracts, vol. i. p. 240, &c. and Information for the pursuer, p. 22.

" Afterwards we chose the Roman law word *hypothec;* but the substance is the same.

" I am clear that the property of goods on the ground, and corns, reaped or unreaped, is in the tenant. They are the fruit of his industry; and Mr. Wood's idea as to the corns being the property of the landlord, is not well founded; but it was an implied condition in the Roman Emphyteusis, and in all feudal grants, that if the heritable tenant failed in payment of the reserved rent or feu duty to the landlord, there should be a power of re-entry, and of seizing upon the subject itself, as well as every thing upon it. This was the case if the Roman tenant was three years in arrear. This right fell to the ground. Same with us if vassal was two years in arrear. But the aid of the law was necessary to give it effect.

" It was also understood, that if the right of the vassal was not irritated, the superior had a remedy by a species of *real* action, called *poinding the ground*, i. e. the goods on the ground. He remains infeft in the lands, and has a supereminent right to the rents, which he makes effectual in this manner. Perhaps the lands are in the natural possession of the vassal. There are no *rents* therefore, but only *fruits*, which he lays hold of, as preferable by his infeftment,

land were to be of the same force and effect as such obligations in England, by virtue of the royal prerogative, and that such debts, suits, and prosecutions, were to be preferred, in virtue of the said 33 Henry VIII., " and shall have and en-

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and excludes any arrester or common poinder. This was extended in practice even to other goods on the ground, not that they are hypothecated in the proper sense of the word, but that the superior re-enters by the aid of the law, and takes what he can find.

" It was extended also to the case of a liferenter, or other real creditor infeft.

" Suppose a competition between the king and a poinder of the ground, by the act of Queen Anne the latter, so far as his infeftment goes, is preferable upon the *lands* and rents, and consequently on the *fruits*, if in the natural possession of the proprietor. But what preference could he claim upon the *moveable goods*, such as cattle, &c., in which he is not infeft, and upon which there does not even seem to be any such idea as a hypothec?

" As to the case of landlord and tenant; 1. Both fruits and stocking are the tenant's property. 2. They are in his possession till the master applies to the judge Ordinary, or perhaps his own baron Bailie, to sequestrate them, which is another word for *impounding* them. But this is no more than putting them in the custody of the law, founded on the same kind of antecedent right that a landlord in England has, which is a right to distrain and to recover, &c., with which no common debtor can interfere, though the goods are *in medio,* but with which the king can interfere, because his right is supereminent. It was decided long ago that the king was preferable to all common creditors. See Dict. *voce* King. The only puzzle here is, that the landlord is said to be *creditor hypothecarius.* But this term, when applied to the personal property of the debtor, and in possession of the debtor, means, in common sense, no more than that he is a privileged or preferable creditor, which the king also is, and the short question is, which of these two ought to prevail?

" If there be any doubt upon the construction of the law, or upon the resemblance between the rights of the landlord in England and Scotland, we must have recourse to analogy, and to that construction which will bring the two as nearly together as possible, and in this point of view, the reasoning from the case of Gordon of Park is very strong.

Vide ante, vol. i. p. 558, et 562.

" If these goods could be said to be a real estate in the tenant, the act of Queen Anne would determine the point. But they are clearly a moveable estate in the tenant. As to the case of a ship hypothecated for repairs, it is not a tacit pledge or hypothec, but an actual pledge by contract of parties, and delivery made by some symbolical form. It is an awkward circumstance that we should take to our-

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"joy such and the same prerogatives, as well in the plead-
"ings, as in the lands, tenements, debts, credits, and spe-
"cialties, goods, chatels, and personal estate;" provided
"that no debt or duty shall affect or subject any real estate

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selves in Scotland, a right against the king, which the landlords in England have not. The only pretence for it is, that we consider the landlord's hypothec in Scotland to be of the nature of a real right, and therefore similar to a *special property* in England, though the landlord's remedy in England is not so. This, however, is judging more upon the apparent effect of the right, than upon the true nature of it. In the case of steelbow leases, where the landlord delivers over so many head of cattle to the tenant, taking him bound to redeliver the same, or an equal number and of equal value, at the expiry of the lease, the landlord is understood to have a special property in the *universitas gregis*, by which no creditor of a tenant would be entitled to interfere. But, in common leases, where the tenant provides his own cattle, and stocks the farm himself, all that can be said is, that the landlord is a preferable creditor for payment of his rent, and so is also the king for debts due to him. Had we not adopted the words hypothec, which conveys the idea of a regal right, the question would have been attended with less difficulty.

"It has been shown, that corns and cattle upon the ground are not real estate in the tenant, and as little are they a real estate in the landlord; and therefore the words of the act of Queen Anne do not in any sense reach the case.

"Real estate, in the sense of the statute, probably means heritable estate, though even an heritable right, e. g. a disposition to lands does not, in a strict legal sense, become real till it is completed by infeftment; and, in general, the idea of the legislature was, that our feudal rights in Scotland, and the modes of conveying and granting securities upon them, should not be disturbed, and this alone was the question at issue in the case of Burnet against Murray, 17th July 1754, about the effect of adjudications upon a land estate for the king's debt and a common debt.

Vide ante, vol. i. p. 594.

"But a mere moveable subject, such as a cow or a horse, never passed in the language of our law by the name of *real* estate. It is neither heritable or real, but *moveable*, though, at the same time, the property of it is a *jus in re*, or real right, and produces a real action for recovery, similar to the *rei vindicatio* of the civil law, and the action of detenue or trover in the English law. There are likewise real rights and real actions of an inferior nature to those arising out of property, such as in the case of pledge; but a moveable thing pledged, never was spoken of in the law of Scotland as a real estate." See Erskine.

Vide President Campbell's Session Papers, vol. lxi.

"in Scotland." These being the explicit provisions of the act in regard to the debts of the crown being placed on precisely the same footing as in England, a sequestration by the landlord, or the landlord's hypothec in Scotland, can be in no better situation than the distress warrant in England. There is no specific difference between the landlord's distress warrant in England, which cannot compete with the crown's debt, and the landlord's hypothec; and therefore the latter cannot be preferable to the crown in Scotland. Certain debts, termed privileged debts in the law of Scotland, such as physician's fees, servants wages, &c., are all preferable to the landlord's hypothec. But, in a question with the crown, these privileged debts have no preference. To give, therefore, the landlord a preference over the crown debts, as is done in this instance, is placing his hypothec in a better position than ever before it enjoyed, and making his right be preferable even to privileged creditors. Nor is it any answer to this to say, that substantially the landlord's hypothec is a real right of property in the thing, and therefore not attachable by the crown for a debt due by the tenant, because, in point of fact and law, the right is no more than a pledge in the hands of the tenant.

Pleaded for the Respondent.—By the law of Scotland, the landlord has an absolute real right of property in the crop upon his ground, until the year's rent for which it is the crop be paid, which, as it could not be defeated by the tenant selling the crop, so could not be defeated by his debtor, the crown. By the law of England, a pledge, or even the hypothec on a ship for foreign affairs, defeats the crown's right of preference; but the landlord's hypothec in Scotland is equal, if not paramount, to a pledge in England, and therefore the landlord's hypothec ought not to be defeated by the right of preference secured to the crown by the act Henry VIII. There is no analogy between the distress warrant for rent in England and the landlord's hypothec in Scotland. The former proceeds on the footing of the effects being the tenant's *ab initio*, but the latter is founded on a real right in the crop—a property already belonging to the landlord, and of which he cannot be deprived. It is a real estate; and the act 6 Anne founded on, expressly exempts real estate in Scotland from the operation of the crown's preference. The present is the very first attempt ever made in Scotland to deprive the landlord of

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his hypothec, by an alleged preference over it on the part of the crown.

After hearing counsel, it was

Ordered and adjudged that the said interlocutors complained of in the said appeal, in so far as they declare generally "That the landlord's 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 33d Henry VIII., as extended to Scotland by the articles of Union, and the act of parliament, the 6th Queen Anne," be, and the same are hereby *reversed;* but in respect that the king's title does not sufficiently appear in the process, it is further ordered, That the said cause be remitted back to the Court of Session in Scotland to inquire more particularly into the process, and the conduct thereof, whereby the effects in question are supposed to have been subjected to the king's title.

For Appellant, *A. Macdonald, R. Dundas, Sir J. Scott, W. Dundas.*

For Respondent, *T. Erskine, Henry Erskine, Alex. Wight, D. Cathcart.*

NOTE.—Professor Bell says:—"It is believed that no argument was delivered at pronouncing this judgment of reversal;" but the eminent judge who then presided in the House of Lords made very full and minute inquiry into the condition of landlords, and the nature of their rights in the two countries; and although, perhaps, a distinction might have been found between them, it was held, that the great and governing principles which regulated the decision of Gordon of Park, on the effect of the treason laws in England, as extended to this country, ought to dictate the decision in such case; and that, taking the analogy of the landlord's right in both countries, the point was to be so decided, as to give the landlords in Scotland no superiority over those of England."—Com. vol. ii. p. 55.