

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.

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opinion, Messrs Donald, &c. have acquiesced, by having produced no opinion to the contrary; therefore prefer Brown, Yule, and Company," &c.

Nota.—The opinion alluded to was that of Mr Maddox, an eminent English counsel; and, though some of the Judges expressed their notion of the merits to be rather in favour of the opposite side, yet, as being an English opinion in a matter of English law, it was agreed to follow the same, and to lay the judgment upon that special ground.

Clerk, *Tait*.

Fac. Col. No 138. p. 365.

. The OPINION of ENGLISH COUNSEL, referred to in the above case.

QUESTIONS, with Mr MADDOX'S ANSWERS, for BROWN, YULE, and COMPANY, against DUNLOP'S TRUSTEES, constituted by a voluntary Trust granted by DUNLOP, a Bankrupt, and acceded to by Two-thirds of his Creditors.

POINTS and QUESTIONS upon which the Opinion of Counsel is desired.

1mo, Does the Crown's privilege or right to recover payment out its debtor's effects, in preference to, or before any private creditor, operate *retro*, before the time application is made to the Court of Exchequer for a writ of extent, or before the *teste* of such a writ?

2do, Is this privilege universal; so that, whether the debtor resides in England or Scotland, and has effects in any other part of the kingdom, or in America, as well as in the country where he resides, does the Crown's privileges tend over the whole?

3tio, If it does extend, from what period does it take place? or, How is it rendered effectual? Must not writs of extent be sued out in the proper Revenue Courts of each country? If such a writ is first taken out from the Exchequer of England, can it have any effect in Scotland or America? or, Will the production of such a writ, before the Courts of America, be a ground for such Courts giving their writs of extent a retrospect to the same period that is mentioned in the said English writ for the commencement of the enquiry, in order to extend the debtor's estate or effects?

4to, Writs of extent are directed to the Sheriffs of particular counties. Has such a writ any effect beyond such counties, when also subject to the jurisdiction of the Court? or, If it happens that effects are discovered in another county, must a new writ of extent be taken out against them; and, in such case, will that new writ bear a retrospect beyond the *teste* of the writ, or date of the motion made for obtaining it; or, Will it be carried back to the *teste*, or time mentioned in writs already taken out for other counties?

5to, Writs of extent appoint the Sheriff to take inquisition of what effects the debtor had upon a certain day, or has had since that time, and to report the same into Court against a certain future day. Suppose no inquisition is actually made before that day, can it afterwards be done upon the same writ? or, Can a new writ be at any time after taken out, to attach such effects as might have been extended under the old writ, or had belonged to the debtor between the *teste* of it and the *teste* of the new writ?

6to, In the case of commissions of bankrupt against bankrupts, who are also debtors to the Crown, can the assignees obtain any preference upon the debtor's effects, by means either of the bankrupt laws or acts, or of their getting possession of the debtor's effects before the *teste* of a writ of extent, or after the time is expired within which the inquisition upon the writ of extent should be reported into Court, or through the circumstance of no writ of extent being sued out for the county where the effects lie, or no inquisition being made upon it by the Sheriff, if actually sued out?

7mo, Where a person happens to be bail or surety for another, in a debt to the Crown, is such bailman entitled to obtain the Crown's aid, by writ of extent for recovering payment out of the proper debtor's effects? or, Can such writ be refused, if applied for by the bailman?

8vo, If, after a writ of extent is issued on the application of the bailman, but without being executed by inquisition, &c. the debt is actually paid to the Crown, out of the proper debtor's effects, which lay in another country, Can the bailman, or the assignees of the bankrupt, for behoof of certain creditors, with concurrence of the bailman, afterwards take any benefit from that writ, so as to cover, as in right of the Crown, an equivalent part of the debtor's effects that might have been extended and seized for the Crown's payment, but which, *de facto*, was not so done, and thereby prevent and hinder other creditors from taking such effects in legal execution for their payment?

9no, If the bailman in such a debt after a writ of extent is taken out, but not executed within the time mentioned in the writ, shall pay the debt to the Crown out of his, the bailman's, own money, and so obtain a discharge or acquittance of the debt; or get the bonds and securities for the same cancelled or voided, Can such bailman afterwards use the said writ of extent, or avail himself of the Crown's right, so as to obtain a preferable title to operate his payment and relief out of such effects of the debtor as might have been extended under the writ for the Crown's payment? And can he do so, notwithstanding that, when he himself paid and extinguished the debt that had been due to the Crown; he did not obtain or apply for any assignment of the Crown's debt; or of its right to recover payment out of the principal debtor's effects; but made such payment simply upon a discharge or acquittance from the Crown, in the same manner as if the principal debtor himself had paid the debt?

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10mo, In the case last mentioned, Would not the principal debtor's assignees, under a commission of bankruptcy, have a right preferable to that of the bailman, to take and divide among the whole creditors such effects of the bankrupt, or principal debtor, as might have been extended or seized by the Crown or bailman, before the Crown's debt was actually paid and extinguished, but which were not so extended? And would not the bailman, in such a case, be obliged to content himself with his rateable share of these, and the other effects of the bankrupt, in proportion to the debt which he had so paid to the Crown, in the same manner as if the Crown had never been creditor, or otherwise concerned in the debt?

If the opinion upon the above points and questions can, in all or any of the articles, be supported by authorities or precedents to be found in printed books or reports, it will be of great use to have such authorities mentioned or referred to, as applicable to the different points respectively.

A N S W E R S.

1st, The extent of the Crown binds the goods of the debtor from the *teste* of the writ, whether it be or be not delivered to the Sheriff before the private creditor's execution comes, if the execution comes into the Sheriff's hands after the *teste* of the extent, and the *teste* of the extent is of the same date with the Barons *fiat* for the writ, which must be founded on an affidavit.

2d, This privilege of the Crown is by the law of England; and, therefore, must subsist in other parts of the King's dominions, where the law of England prevails.

3d, If writs of extent are taken out in other countries within the King's dominions, and extents also issue in England against the same person, the several writs have no relation to each other.

4th, If the debtor has effects in different counties in England, different extents may be taken out upon one and the same *fiat*, and bear *teste* alike, though they are not all sued out at the same time.

5th, If the inquisition cannot be taken by the day named in the writ, an *alias* extent may issue upon motion, the goods remaining bound from the *teste* of the first writ.

6th, If the assignee under a commission of bankruptcy can get the actual possession of the bankrupt's effects before the *teste* of an extent, the sheriff cannot execute the extent upon the goods in the hands of the assignee, the property being in the assignee; but from the *teste* of the writ of extent, the goods are bound to answer the King's debt, and he shall be preferred before the commission of bankruptcy.

7th, If the bail apply to the Court, offering to pay, and do pay the Crown-debt, the Court will order that the bail stand in the place of the Crown, and

have the benefit of the prerogative-process; or the bail may, upon affidavit of the debt due to the Crown from the principal, have an immediate extent against the principal; and may have also an extent in aid for finding out and enforcing the payment of debts due to the principal.

8th, If the Crown-debt be paid out of the effects of the principal debtor in another country, the like value of his effects cannot be covered by an extent in the country where he resides to the prejudice of his other creditors; but if the debt be paid with the effects of another person, that other person may have the benefit of the Crown-process against the estate of the debtor.

9th, An order of the Court of Exchequer must be obtained, that the party paying shall stand in the place of the Crown, and have the benefit of the Crown-process.

10th, If the bail sue out an immediate extent against the principal, and, before the same is executed, pay, out of his own estate, the debt to the Crown, and have an order to stand in the place of the Crown, and to have the benefit of the Crown-process; in that case, he may levy upon the goods of the bankrupt in the hands the assignees, provided his extent bear *teste* prior to the assignment made to the assignees by the commissioners; but, if subsequent, he may come in as a creditor under the commission.

The books referable to upon these questions are Bunbury's Reports in the Exchequer. *The King v. Cotton*, 2 Vesey, 288.

JOHN MADOCKS.

Lincoln's Inn, 8th March 1773.

CASE, on questions arising upon a Writ of Extent, in a cause in the Court of Session in Scotland, *Brown and Co. against Dunlop's Trustees.*

FROM an opinion given some time ago by Mr Madocks, it is understood, that a writ of extent, issued from Exchequer, for recovering a debt due to the Crown, binds the goods of the debtor in his possession, or belonging to him, from the *teste* of the writ, which is of the same date with the *barons fiat* for issuing the writ.

Advice is further desired,

imo, Whether the extent also binds from the *teste* debts which were due, or owing to the Crown's debtor; or if such debts are only bound to the Crown, from the day on which the sheriff takes his inquisition, in virtue of the extent, and finds that such debts are due to the Crown's debtor?

The reason of putting this question is, that a case is observed in Bunbury's Reports, p. 265. *Rex v. Green*, May 1729; which it is hoped will be looked into before answering the above query.

2do, If debts are not bound from the *teste* of the extent, but only *a die captionis inquisitionis*; what is understood to be the reason or ground in law for

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 pointing, rousing, 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-