

1802. *July 6.*ROBERTSON *against* JARDINE.

By statute 33d Henry VIII. c. 39. § 74. it is enacted, ' That if any suit be commenced or taken, or any process be hereafter awarded for the King, for the recovery of any of the King's debts, that then the said suit and process shall be preferred before the suit of any person or persons: And that our Sovereign Lord, his heirs, and successors, shall have first execution against any defendant or defendants of and for his said debt, before any other person or persons, so always that the King's said suit be taken and commenced, or process awarded for the said debt, at the suit of our Sovereign Lord the King, his heirs or successors, before judgment given for the said other person or persons.' This act was extended to Scotland by the articles of Union, and 6th Anne, c. 26.

John Gibb and Janet Walker his mother, tenants on the estate of Grange, having fallen considerably in arrear for the rent of crop 1799, an application was made by the landlord to the Sheriff of Stirlingshire, praying for a sequestration of their effects in common form, and for a warrant to sell the same, to discharge the arrears of rent. The Sheriff (16th February 1801) granted warrant of sequestration; in consequence of which, their whole effects were laid under sequestration on the 20th day of February 1801. This proceeding was reported to the Sheriff-court (27th February 1801), when the Sheriff granted warrant to sell as much of the sequestered effects, by public roup, after due advertisement, as would pay the bygone rent, with the expense of sale.

In consequence of the discovery of a still used by Gibb, an information in the name of Mr Robertson, the Collector of Excise in the district, to the Justices of the Peace of the county of Stirling, was exhibited against him on the 3d of March, and he, upon citation, appeared that same day before the Justices, at a meeting held by them at Falkirk, being fifteen days posterior to the Sheriff's interlocutor granting warrant to sequester, and four days after granting warrant to roup, but before the day appointed for the roup itself. At this meeting, the Justices pronounced a decree, finding Gibb and his mother jointly and severally liable in a fine of L. 150 Sterling. The proper officers of Excise, accompanied by a messenger at arms, proceeded (10th March 1801) to recover the penalties awarded, by attaching the goods and chattels of the delinquents in the usual manner; but they were prevented from carrying the attachment into execution, upon the 11th day of March 1801, (the day appointed for the roup under the Sheriff's warrant, but the sequestered effects remaining unsold) by the intimation of a sist pronounced upon a bill of suspension, which had been presented by the landlord on the 10th.

The question with regard to the preference of the Crown or landlord in these circumstances, was reported from the Bill-chamber on memorials, when Henry Jardine, writer to the signet, factor for the landlord,

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The prerogative process of the Crown preferable to the landlord's hypothec, as long as the tenant's effects remain unsold, tho' after sequestration and a warrant to sell.

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*Pleaded* ; It is not disputed, that, in consequence of the reversal of Ogilvie against Wingate, No 27. p. 7884, the Crown's right under the prerogative process, in terms of 33d Henry VIII. § 74. is preferable to that of the landlord, in virtue of his hypothec. But the present competition betwixt the landlord and the Crown must be determined in a different manner, as there the competition arose betwixt the prerogative process and the naked hypothec of the landlord, before any judgment or interlocutor by the Sheriff; whereas, in the present case, the landlord competes with the Crown, after a judgment obtained from the Sheriff; for the interlocutors of the 16th and 27th of February 1801, sequestrating the tenant's stocking, and granting warrant for sale, are of the nature of a judgment in favour of the landlord; and being prior to the decree of the Justices of 3d March 1801, imposing the penalty above-mentioned, in virtue of which the attachment of the Crown proceeded, a preference is thereby created to the landlord over the Crown, in terms of the statute of the 33d Henry VIII. § 74. declaring, that the King's process shall have first execution, or be preferred before the suit of any other person or persons, provided always, that such process be taken and commenced before the judgment given for the said other person or persons. In England, the tenant's goods are impounded by the landlord's authority merely, without the intervention of any judge, Blackst. Com. b. 3. c. 1. § 5.; b. 2. c. 3. § 10. Though they are of the nature of a pledge, yet no lien is imposed upon them till the judgment of a judge intervene; King against Cotton, Parker's Reports, p. 112.; 4. Termly Reports, 402. and 2. Blackst. Hilary, Geo. III. 1251. 1294.; till then it is simply a distress. The clause in the statute of Henry VIII. applies in general to any judgment or final sentence that is adapted to any species of action raised on the part of the subject, and is not limited to a judgment of any particular kind or form. Now, the warrant for sale granted by the Sheriff, following upon the landlord's sequestration, is the concluding step of the process; because, according to the general practice, when a sale has taken place under the authority of the Sheriff, for the rent due to the landlord, no further application is necessary; the clerk of the roup is in use immediately to pay over the proceeds of the sale, in so far as these may be requisite for payment of the hypothec rent, and the expenses. The warrant of sale, therefore, is a virtual adjudication by a judge of the proceeds of the sale to the landlord; and is such a judgment under the intent and meaning of the statute, as creates a preference in favour of the landlord, sufficient to exclude the King's process.

*Answered* ; The warrant of the Sheriff appointing a sale to take place on a particular day, cannot be converted into an actual sale and transfer of a tenant's effects in favour of the landlord; it is only an interlocutory order or decree pronounced by the competent court in favour of a subject; and, although previous to the suit of the Crown, it can in no shape constitute or create a preference to the former over the prerogative process of the latter. On the contrary, by the term judgment, under the statute of Henry VIII. is truly meant an exe-

cution, whereby the property of the King's debtor is actually taken out of him and vested in another, until which period his property is liable to the King's execution or distress, even though such goods and chattels are *in custodia legis*, by some antecedent act of a subject creditor. And hence, a judgment, according to a fair interpretation of the statute of Henry VIII. comprehends an execution, whereby the property of the goods is altered, and transferred from the debtor into the person of the subject-creditor, whose preference operated, and took effect, in consequence of his judgment or execution being prior to the test or date of the Crown's writ or process; King against Aldersey; and Stracy against Hulse, in Douglas, p. 395.; King against Cotton. The landlord's right of hypothec in the present instance, or the proceedings by sequestration held before the Sheriff for rendering the same effectual, did not go the length of altering or transferring the property of the sequestered goods and effects of the tenant, so as to bar the prerogative process of the Crown. This appears by attending to the detail of the proceedings carried on before the Sheriff for rendering the landlord's right of hypothec effectual; for the proceedings before that Court are not at an end by the warrant to sell; but after the sale has been made by the clerk, and when the whole produce of it has been recovered by him, another application must be made by the landlord, narrating the proceedings, and praying the judge to direct the clerk to make payment to him of such sums of money as would extinguish the arrears of rent falling under the hypothec, together with the expenses incurred in carrying the process of sequestration into effect; and the desire of this petition being granted by the Sheriff, the landlord becomes entitled in this manner to receive payment of the arrears of rent incurred, but not sooner. Sequestration does not take the goods out of the tenant's hands; Dickson against Watson, 6th February 1779, No 270. p. 1246.; it may be defeated before sale by payment of the arrears, and the landlord's creditors may arrest it in the tenant's hands. The superior too may defeat it by a claim for the feu-duties, and an heritable creditor of the landlord may carry it off by a decree of mails and duties. In short, till actual sale, the tenant is not divested of the property, and, till then, there is no such judgment as can defeat the Crown's right.

The Court, before deciding the question, recommended to the parties to take the opinion of English counsel, for an explanation of the meaning of the term judgment, and ordered an inquiry into the practice of the Sheriff-courts in questions of sequestration.

It appeared to be the law of England, that as long as the property in the goods remains in the King's debtor, the extent will prevail over the process and execution at the suit of the subject; and that this is the case till the delivery of the writ of *feri facias* to the Sheriff, so that the extent, if tested, even after signing the judgment, but before delivery of the writ of execution, will be preferable.

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The reports from the different Sheriff-clerks were almost unanimous in not considering the procedure relative to sequestration closed with the warrant to sell, which contains an order for the auctioneer to lodge the proceeds of the sale, with a report of the proceedings, in the hands of the clerk of court ; but that, after this has been done, the landlord must make up a statement of the debt due to him, and of the proceeds of the roup, with the expense of sale and sequestration, and the court then authorises the clerk to pay the sum consigned to the landlord in extinction of the debt, and the balance, if there be any, to the tenant.

Counsel were also heard in presence.

The Court, with one dissentient voice, (6th July 1802), “ preferred the Crown,” as both the warrant to sequester, and the warrant to sell, were only ministerial acts, interlocutory sentences, and not final so as to authorise an execution ; which is the sort of judgment the statute requires, and which first divests the property out of the King’s debtor ; although it was pleaded, that the distress in England, and the landlord’s hypothec were different, in as much as the landlord, in virtue of his distress, had no previous connection with the tenant’s goods, which could be attached by him only in the same way as by any other creditor ; but that the hypothec is a tacit pledge for the rent, and the warrant to sell might, without impropriety, be considered as analogous to the writ of *feri facias* delivered to the Sheriff, so as to close the business at that period.

Lord Ordinary, *Meadowbank*.

For the Crown, *Crown Lawyers*.

Agent, *R. Dundas, W. S.*

*W. S.*

For the Landlord, *H. Erskine, Robertson, Rae, Sir P. Murray.*

Agent, *H. Jardine, W. S.*

Clerk, *Pringle.*

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*Fac. Col. No 53. p. 108*

*See APPENDIX.*