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port the defender's intromission; and the reason is, because bankrupts mentioned in that act of Parliament, are disabled from doing any deed for conveying their means heritable or moveable, that the same may lie open to be affected by the diligence of creditors; and that act doth give a more full and ample security to the creditors than the act 1621 did; for, in the said former act, there was no notoriety of bankrupt, and oft-times no insolvency required, as in the case of diligence, although that diligence did not specifically affect the subject disponed; yet the user of the diligence had interest to reduce posterior voluntary deeds without so much as proving insolvency; therefore those deeds did subsist as to all other effects. 2*do*, Whereas it is *alleged*, That if Man had disponed to all equally and proportionally, none could have quarrelled; and that the pursuer is only prejudged in as far as he is omitted: It is *answered*, That is not the case, and the pursuer is not obliged to debate what would have been the effect of such a disposition; whether in law he might have repudiate it, and affected the subject with his diligence; but it is sufficient for him to allege, that in this case there is a preference, and therefore the law hath annulled the deed. 3*tio*, As to the practiques, the last has no contingency with this case; and in it there were several specialities, as, that the pursuer was the defender's own son quarrelling a disposition, made by his grandfather by the mother, in favour of his father, on deathbed; which disposition, if the mother had been preferred to the fee, would have afforded a courtesy; and the mother having survived five years, the Lords did only reduce the disposition as to the fee. The other practique does more approach the case; but it was determined without debate, having only occurred to the Lords at advising; and was also founded upon the former law; which, because of the new devices of bankrupts, has been amplified and extended by the act 1696.

'The Lords found Wales's disposition null, and that it could not be a ground to compete with the pursuer's diligence in whole or in part.' *See* No 113. p. 1006. and No 168. p. 1083.

Fol. Dic. v. 1. *p.* 84. *Dalrymple, No* 51. *p.* 65.

1706. *February* 8.

WILLIAM HAMILTON of Wishaw *against* The CREDITORS of CLELAND.

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A disposition by a bankrupt to some of his creditors, was found null *ab initio* upon the act 1696; and was not sustained, as a

In the ranking of the Creditors of Cleland, William Hamilton of Wishaw craved preference for the sum of L. 721 : 1 : 9 Sterling, and the annualrents on it resting by Cleland, as collector of supply for the shire of Lanark, to the commissaries of the army, and assigned by them to him, upon these grounds: 1*mo*, The collector's estate was really affected, and liable to quartering, at the instance of the Fisk, for his intromissions with the supply, a public privileged debt, as well as the estates of heritors are liable for their several proportions: For the King's

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customs were found preferable to other creditors, June 10. 1631, Peebles against Scot, Durie, p. 589.*; and the supply is no less privileged. And, although the commissioners of the shire, in obedience to the act of Parliament, name the collector, he, as well as these his constituents, is directly liable to the Fisk and its general receivers. So the estates of Lords of Erection, Sheriffs, Bailies of Regality, their Deputes and Clerks, were always found liable, and quartered upon for the whole taxation imposed upon their Erections or Jurisdictions, however small their property was; and as collectors had relief from vassals, tacksmen of teinds, and others, conform to their particular proportions. Several acts of Parliament, and Convention of Estates, appoint quartering, and other real diligence, against the Collector, for his intromissions; particularly the *Act of Convention* 1678, ordains quartering upon his estate till he gave up a list of deficients; consequently here where there are no deficients, the quartering must continue till he pay his intromissions. And the act 3. Par. 3. Cha. II. provides, That the Collector, retaining in his own hands any part of the supply longer than a month after his receipt thereof, shall be liable in ten for each hundred pound, and to quartering or other diligence beside. *2do*, As the Fisk had real and preferable diligence against the Collector's estate, the like is competent to Wishaw, who is come in place of the Fisk, by a discharge and assignation from the General Receivers, upon payment made to them. For the real privilege and quality must accompany the debt wherever it goes; which is kept up against Cleland, notwithstanding the discharge, whereby Wishaw as cautioner, and the commissioners of the shire are liberate. And if the privilege were personal to the Fisk, and not communicable to assignees, the commissioners who are but assignees themselves, could not have it: Now if it can go to one assignee, why not further to others by translation? Yea, by the known custom of the treasury and exchequer, a sheriff or any person upon making his *æque*, and getting discharge; his relief for what is paid continues *debitum fundi*, as effectual to him as if he had received an assignation at the fitting of the *æque*. And the privilege or real quality of a debt hath been often found transmitted by assignation; Anderson and Provan against Town of Edinburgh, Stair, v. 1. p. 260. *voce* TACK; Rae *contra* Heritors of Clackmannan, Stair, v. 1. p. 303. *voce* PUBLIC BURDEN. And justly, seeing law gives the privilege to the debt, and not to the persons. *3tio*, Wishaw is preferred by a disposition to him from Cleland, for payment and relief of his debts and cautionries: Which disposition is still valid as to the said public debt, albeit reduced upon the late act anent bankrupts, in so far as concerns his debts and cautionries. For the disposition as to the said public debt is no voluntary preference of one creditor to another, but in effect a declaring of that preference formerly given by law. *4to*, Wishaw ought at least to be preferred to the rents and duties that were in the hands of the tenants or factor, at the time of pronouncing the interlocutor, February 7. 1705, whereby the voluntary disposition granted by Cleland was reduced, and the omitted creditors admitted to a share of the estate. In regard the disposition was a good title to hinder repetition as to bygone rents preceding the reduction,

* *Voce* PRIVILEGED DEBT.

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which were *bona fide percepti* by Wifhaw; and fince the public's poffeffion by a party of dragoons, and the poffeffion of the factor put in upon Wifhaw's application muft be underftood to be his poffeffion, fo long as his title ftood unreduced; Wifhaw deferved this much; at leaft from the creditors, whofe *negotium gessit*, in keeping the lands from being laid wafte, by removing the quartering party upon the faith of his right by the difpofition.

Alleged for the other Creditors: The claufe in the acts, about quartering upon the Collector, infers no more a real burden upon his eftate, than lands purchafed from brewers are burdened in the perfon of the fingular fucceffors, with the refts of excife due by the difponers to the public, as a *debitum fundi:* For a brewer is fubject to quartering for the excife, but his heritage is not really affected therewith; nor is the cefs a real burden upon the land-rent beyond each heritor's valuation. And therefore the particular quota of cefs impofed on the fhire of Lanark can only affect the Collector's eftate in that fhire, according to the proportion of his valuation as an ordinary heritor. And the other executions of quartering againft him are only perfonal diligence. For the acts not being exprefs as to the Collector's lands, muft be ftrictly interpreted, according to the rule, *in dubio contra Fiscum est respondendum*; efpecially where the Fifk is fufficiently fecured by a real burden upon the whole lands in the fhire for their refpective proportions, the perfonal obligement of the Collector and his cautioners, and fummary execution againft them. If the lands of Collectors be liable, thofe of Tackfmen, Commiffaries of the army, &c. muft run the fame fate; and their fingular fucceffors fmart by the bargain. Yea, thefe might be made liable at their author's pleafure by the cunning or malicious abftracting of difcharges. The faith of our records would fignify little to purchafers, who behoved to be at the endlefs trouble of expifcating, if any of their authors were Collectors or Tackfmen, and how their accounts were cleared. As to the allegeance, That the cuftoms of imported goods have been found real: That is only as to the fubject bought, which correfponds only to Cleland's quota as heritor. But then again, whatever may be as to the petty burdens of moveables of fmall value, which may be difappointed by clandeftine abftractions, that is not to be extended to the ruining the fecurity of heritable rights. 2*do*, What Wifhaw might have obtained if the Fifk had not got payment upon any other terms is not the queftion, but only whether by payment fimply made to the Fifk the privilege is extinct? Which muft be allowed, for thefe reafons; Payment, by whomfoever made, extinguifheth the obligement; fo as in the Roman law, a particular conftitution was found neceffary to introduce the *Beneficium cedendarum actionum*. Far lefs can the creditor's privilege pafs to the cautioner, making payment fimply, without fecuring himfelf by a real relief. Thus an heritor's hypothec for an year's rent, after he difcharged the tenants, is not competent to an apprifer without infeftment or poffeffion, againft merchants who bought the farm for the price, July 29. 1675, E. Panmure *contra* Collifon, Stair, v. 2. p. 362. *voce* RIGHT in SECURITY. And the fhire, which was principally bound to the public, being difcharged upon Wifhaw's paying

No 227. *eorum nomine*, the privilege of the debt is extinct, though itself may subsist as a private personal debt, *quoad* those bound in relief to the payer. *3tio*, The disposition being made by a notour bankrupt, and so absolutely null by the act of Parliament 1696, doth not alter the case. For it was found, Man against Reid, No 226. p. 1183. That the receiver of such a disposition of moveables could not by virtue thereof come in *pari passu* with other creditors doing diligence posterior to the disposition and possession thereon, which was found to operate nothing. *4to*, Wishaw can have no pretence to the rents preceding the falling of his disposition; because that was a legal nothing: A disposition by a bankrupt in the terms of the new statute being simply void and null *ab initio*, that it could not subsist as a security. Nor is the dragoon's or factor's possession to be esteemed Wishaw's possession; for quartering is military compulsion, and no title of possession of the rents of lands. The party quartered cannot uplift a sixpence of the rent, or poind so much as a hen-chicken for payment of the cess: All they can do is to uplift for their own locality at the established rate of so much *per diem*. Besides, the party could not quarter after the debt was extinguished by Wishaw's taking a discharge from the public; and there was a year's interruption betwixt the quartering and the factor's possession. As to the factor's possession, it was alike to all creditors; for the factory bears expressly to be granted for the behoof of such as should be preferred in the ranking: And Wishaw, being cautioner for his son-in-law, can have no consideration for his relieving the lands of quartering; because, *qui proprium negotium gessit non repetit*. Nor can an adjudger get from a co-adjudger within year and day the expence of changing the holding from simple to Taxward, February 20. 1683.* *5to*, Any action competent to the Commissaries for the cess against the Collector was prescribed, by the elapsing of three years since the same fell due before the assignation in favour of Wishaw.

Answered for Wishaw, The triennial prescription is only in favour of heritors, and cannot be stretched to exeem Collectors who are liable by law, and by bond and caution given to the public. *2do*, The prescription was interrupted by Cleland's disposition, and decreets against him.

Replied for the other creditors, Though the personal obligement of Collectors and their cautioners may endure till the long prescription, the *privilegiata obligatio et condictio ex lege* expires after three years. *2do*, The disposition could be no interruption of the three years prescription, because the act 1701, allows only of interruption by horning and denunciation.

The Lords found the disposition granted by Cleland to Wishaw, and other persons therein named, null *ab initio*, both as to the preference thereby given for the sum due by Cleland, as Collector of the shire to the Commissaries of the army, and as to the other debts therein contained. And therefore found, That Wishaw and the other creditors in that disposition, had no right thereby to the bygone rents of the estate preceding the interlocutor, February 7. 1705. *See* Privileged Debt. *See* Prescription. *Fol. Dic. v.* 1. *p.* 84. *Forbes*, *p.* 94.

* The case alluded to is No 21. p. 249.