

Such are the facts upon which the first count is based. I do not think that they are relevant to be admitted to probation.

The obligation of a lessor of urban property, apart from special stipulation, is to provide a reasonably heritable and tenantable subject, and one which is wind and water tight, and to keep it in that condition. But if it ceases to be so, it is the tenant's duty to bring the fact to his notice, and unless the tenant does so no liability attaches. The lessor does not guarantee the premises. There is this further limitation on the lessor's liability, that if there is a patent defect in the premises the lessee cannot complain (*Webster v. Brown*, 19 R. 765). Now, on the *species facti* alleged, there was a sufficient means of carrying off surface water from the roof, but after it reached the ground its means of escape was tampered with by careless work done by the plumbers employed by the lessor at a date anterior to the current lease. The defect was as apparent to the lessee as to the lessor, as the lessee happened to be already in possession when the work was done. But as it was below the surface and was immediately covered up, it was, without blame to either, not noticed by either. In a question between neighbouring proprietors it may be a sufficient defence to an owner that he has employed a competent tradesman to do a proper and necessary piece of work, for his liability depends not on *dominium* solely, but on *dominium* and *cupla* combined. But between lessor and lessee I do not think that this defence would hold good. If then the defective work of the plumber employed by the defenders was the proximate cause of the alleged flooding, I should be prepared to hold that a relevant case of liability had been put on record. But it is clear on the statement that there would have been no injurious result but for the proximity of the gas pipe crossing the branch drain and entering the workshop through an underground hole in the workshop wall. This was the true proximate cause of the alleged flooding, and it appears to me to be, in the first place, too remote from the subject of wind and water tight to ground liability in damages. And, in the second place, though the defect, if it can be called a defect, occasioned by it was a defect latent from the outside, it was patent from the inside of the workshop, and any risk to be apprehended from it was as much within the cognisance of the lessee as of the lessor, and the former made no complaint but took and occupied the premises as they were.

On the first count, therefore, there is no relevant case stated, and the action falls to be dismissed.

The second count is that, owing to the defective condition of a waste pipe in the subjects 30 Stockwell Street, second above mentioned, of which the defender had notice, a burst took place within one of the floors let to the pursuer, and that damage to his property ensued. I agree with your Lordships in thinking that this

part of the case cannot be disposed of on the record without a proof, but I think that that proof should be before answer, reserving the question of relevancy.

LORD KINNEAR gave no opinion not having heard the case.

LORD M'LAREN was absent.

The Court recalled the interlocutors of the Sheriff and Sheriff-Substitute, dated 5th August and 23rd March 1909 respectively, dismissed the crave of the initial writ in so far as it asked decree for £39, 5s. mentioned therein; *quoad ultra* directed the Sheriff-Substitute to allow a proof before answer of the facts set forth in Condescendences 4, 5, and 6: and remitted to the Sheriff-Substitute to proceed as accords.

Counsel for Pursuer (Appellant)—Clyde, K.C.—MacRobert. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for Defenders (Respondents)—Morison, K.C.—Lippe. Agents—Balfour & Manson, S.S.C.

Saturday, February 5.

BILL CHAMBER.

[Lord Cullen.

THE LORD ADVOCATE (FOR THE POSTMASTER-GENERAL) *v.* GALBRAITH (WALKER'S TRUSTEE).

Bankruptcy—Sequestration—Preferential Claim—Debt Due to Crown—Telephone Dues—Payable to Postmaster-General—Prerogative Right of Crown to Preferential Ranking—Act 33 Henry VIII, cap. 39, sec. 74—Act 6 Anne, cap. 26, sec. 7.

In a sequestration the Postmaster-General claimed a preferential ranking in respect of certain telephone charges due by the bankrupt to the Crown. The trustee on the sequestrated estate rejected the claim for preferential ranking, but admitted the debt to an ordinary ranking. *Held* (*per* Lord Cullen), sustaining an appeal for the Postmaster-General, that the Crown was entitled to a preferential ranking.

The Act 33 Henry VIII, cap. 39, section 74, enacts—"And it is also enacted by the authority aforesaid, 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 same suit and process shall be preferred before the suit of any person or persons; (2) And that our said Sovereign Lord, his heirs and successors, shall have first execution against any defendant or defendants, of and for his said debts, 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 said Sovereign

Lord the King, his heirs or successors, before judgment given for the said other person or persons."

The Act 6 Anne, cap. 26, section 7, enacts—"And it is further hereby enacted and declared by the authority aforesaid that the said barons of the Court of Exchequer in Scotland, or any one or more of them, either in Court or out of Court, shall have full power and authority to take all manner of recognisances and securities for debts, and that all obligations, recognisances, specialties, and other securities for any the revenues, rents, debts, duties, accounts, profits or other things accruing, or which shall or may become due or accrue to the Queen's Majesty, her heirs or successors, within Scotland, or which shall in any wise concern or relate thereto, or any the officers, ministers, or accountants thereof or for the same, or which shall be taken in or by order of the said Court of Exchequer in Scotland, or upon any other account for the use or benefit of the Crown, or for securing any the revenues, debts, or duties of the Crown, shall be taken in the name of the Queen's Majesty, her heirs and successors, and to be paid to the Queen's Majesty, her heirs and successors, with other proper words, and with and under such conditions as shall be suitable to the matter for which they shall be taken, and shall have the full force and effect of any obligations, recognisances, and specialties which have been or may be taken or acknowledged in the Court of Exchequer in England, according to the purport, true intent, and meaning of the statute in that behalf made in England in the three and thirtieth year of the reign of King Henry the Eighth, or any other law or statute, or any practice, custom, or usage in the Court of Exchequer in England, or by virtue of the royal prerogative; and that all suits and prosecutions upon any the said obligations, recognisances and specialties, or for any revenues, debts, or duties any ways due or payable to the Queen's Majesty, her heirs and successors within Scotland shall be in the said Court of Exchequer in Scotland, and Her Majesty, her heirs and successors within Scotland shall be preferred and have preference in all suits and proceedings in the said Court of Exchequer in Scotland, according to the said statute of the three and thirtieth year of King Henry the Eighth, and according to the uses, course, and practice of the Court of Exchequer in England, and shall have and enjoy such and the same prerogatives as well in and about pleadings and in all other matters and things as by any the laws in England or course of Exchequer in England have been, are, or ought to be allowed, and as well the bodies as the lands and tenements, debts, credits, and specialties, goods, chattels, and personal estate of all debtors or accountants to the Crown, or their debtors in Scotland, shall be subject and liable, and shall and may be made subject and liable by extent, inquisition, and seizures, or by any other process, ways, or means, to the payment of such debts, duties, or revenues to the Crown, and

in such and the same manner and form to all intents and purposes as hath been or is used in the Court of Exchequer in England in like cases."

In March 1909 the estates of Mrs Agnes Walker, trading under the name of James Walker, cabinet-maker, Glasgow, were sequestrated, and William Brodie Galbraith, C.A., Glasgow, was appointed trustee thereon.

On 1st April 1909 His Majesty's Postmaster-General lodged with the trustee a claim for £7, 5s., being the annual rent of a telephone used by the bankrupt, which fell due on 28th March 1909, demanding at the same time a preferential ranking on the estate for the same, on the ground that the telephone rent was a debt due to the Crown.

On 23rd July 1909 the trustee issued the following deliverance:—"The trustee rejects the claim to a preferable ranking, but admits it to an ordinary ranking."

Against this deliverance a note of appeal was presented in the Bill Chamber for His Majesty's Advocate, acting under the Crown Suits (Scotland) Act 1857, on behalf of the Postmaster-General and the Post Office.

The appellant pleaded—"The said sum of £7, 5s., being a debt due to the Crown, is payable in full before other creditors are paid, and the appellant is entitled to preferential ranking therefor in said sequestration."

The respondent pleaded, *inter alia*—" (3) The appellant not being entitled to a preferential ranking either by statute or at common law the appeal should be dismissed. (4) The debt which the appellant seeks to recover not being a Crown debt but due to the Sovereign only as coming in room and place of a subject, the rules and preferences applicable to the recovery of Crown and Revenue debts cannot be pleaded by the appellant."

The arguments of parties and the authorities relied on sufficiently appear from the opinion *infra* of the Lord Ordinary.

LORD CULLEN.—The Postmaster-General is a creditor entitled to rank on the sequestrated estate of Mrs Agnes Walker, a trader in Glasgow, for a debt of £7, 5s., being the amount of certain telephone dues incurred by the bankrupt. The question raised in the appeal is whether he is entitled to be ranked preferably to the ordinary creditors. The trustee has admitted the claim to an ordinary ranking only.

The appellant's plea-in-law is as follows:—"The said sum of £7, 5s. being a debt due to the Crown is payable in full before other creditors are paid, and the appellant is entitled to preferential ranking therefor in said sequestration."

The respondent's fourth plea is to the effect that the debt in question is not a Crown debt, but this plea was not maintained at the hearing.

No diligence has been used by the appellant, and so far he is *in pari casu* with the ordinary creditors. His claim for a pre-

ferential ranking is based on the assertion of a general prerogative right which gives a preference in favour of the Crown in all cases "where the Crown's and the subject's rights concur and so come into competition."

In the fourth article of his condescendence the appellant states—"The prerogative of the Crown in respect of preferential payment of its debts rests upon Statute 33 Henry VIII, cap. 39, which statute was extended to Scotland by 6 Anne cap. 26." At the hearing, however, the appellant asserted a prerogative right in the Crown independent of the statute of Henry VIII.

The part of that statute which is brought into question is section 74. The first portion of the section appears to be limited to giving the King preference in Court for the hearing and disposal of suits for the recovery of Crown debts. The second portion runs thus—"And that our said Sovereign Lord, his heirs and successors, shall have first execution against any defendant or defendants, of and for his said debts, 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 said Sovereign Lord the King, his heirs or successors, before judgment given for the said other person or persons."

This latter portion of the section is applicable to the case of execution for Crown debts, and it gives the Crown the right to "first execution," subject to the condition that the King's suit shall have been taken and commenced "before judgment given" for any other person. The parties are not at issue as to what is, on the authorities, the effect of this enactment. The effect of it may be stated generally to be that the Crown's execution has preference if the Crown process has begun before the debtor has been divested of the property against which it is directed.

As already stated, there have been no steps by way of diligence taken by the Crown in the present case, and if the appellant's claim were rested solely on the 74th section of the statute of Henry VIII it would seem to fail. The appellant's case, however, as presented in argument was rested on the view (1) that apart from the statute of Henry VIII the Crown has by the common law of England a prerogative right to prevail for payment of Crown debts over other creditors of the debtor wherever the claim of the Crown and the claims of such other creditors concur and come into competition; (2) that the statute of Henry VIII does not create the prerogative right, but defines it in the case of competing executions; and (3) that this prerogative right prevails in Scotland by virtue of the Statute 6 Anne, cap. 26.

There is not much authority in the law of Scotland on the subject. Such as there is relates to the application of the statute of Henry VIII (*Ogilvie v. Wingate*, June 29, 1791, M. 7884; *Robertson v. Jardine*, July 6, 1802, M. 7891; *Burnet's Creditors v. Murray*, July 7, 1754, M. 7873; Bell's Com. II, p. 40 *et seq.*; *Tipper v. The King*, May

22, 1830, 8 S. 785; *The Advocate-General v. Magistrates of Inverness*, January 29, 1856, 18 D. 366, *per* Lord Mackenzie). From the statement of the law in Bell's Commentaries the view taken, so far, would seem to have been that the right to first execution defined in the Statute of Henry VIII represented the whole prerogative rights of the Crown in competition with other creditors.

The first question to be considered, accordingly, is whether by the common law of England the Crown has the general prerogative right claimed by the appellant. If so, the next question is whether under the provision of the Statute 6 Anne, cap. 26, this right extends to Scotland.

As regards the first of these questions, it appears to me that the authorities founded on by the appellant verify his contention that by the common law of England the Crown has the general prerogative right which he asserts. The rule will be found stated by Coke in *Quick's case*, 5 Coke's Rep. 229. In the leading case of *Rex v. Wells* (1807, 16 East. 278), it is enunciated by Macdonald, C.B., as follows: "I take it to be an incontrovertible rule of law that where the king's and the subject's title concur, the king's shall be preferred."

This rule has been recognised as operative in the case of company liquidations in England (*in re Henley & Co.*, 1878, 9 Ch. Div. 469). In bankruptcies the modern English Bankruptcy Statutes have displaced it to some extent by enacting that certain specified Crown debts shall alone have preference. As regards other Crown debts the Crown's right depends on priority in execution under the statute of Henry VIII (*in re Bonham*, 1879, 10 Ch. Div. 595). In Ireland, where there are not the same limitations of the Crown's rights as under the English Bankruptcy Acts, the prerogative right of the Crown to preference over ordinary creditors in distributions under bankruptcy has been affirmed (*in re Galvin*, Irish Rep. Ch. Div. 1897, vol. i, p. 520; *in re Niblock*, Irish Rep. 1907, vol. ii, p. 559). Finally, there is the case of *New South Wales Taxation Commissioners v. Palmer* ([1907] A.C. 179). In this case it was held that in the administration of a bankrupt's estate in New South Wales the Crown was entitled to preferential payment over all other creditors. The Bankruptcy Act of New South Wales neither enacted a preference to the Crown nor excluded its inherent rights, and the claim for preference was rested on a general prerogative right in the Crown to preferential payment in competition with other creditors. The claim was rejected by the Colonial Court on the ground that the vesting of the assets in the official assignee for the general body of creditors without execution taken at the instance of the Crown excluded the preference. The Crown's claim was affirmed by the Privy Council. In delivering the judgment of their Lordships, Lord Macnaghten cited the statement of the law made by Macdonald, C.B., in *Rex v. Wells*, and said that apart from special legislation the rule was of universal application. Lord Macnaghten

also cited and endorsed the statement of the law by James, L.J., in the case of *in re Henley*—“Whenever the right of the Crown and the right of a subject with respect to the payment of a debt of equal degree come into competition, the Crown’s right prevails.”

Such being the rule of the common law of England, the question remains whether that rule does not prevail in Scotland. It has always been allowed, and it is common ground in the present case, that the statute of Queen Anne extends to Scotland the provisions of the statute of Henry VIII. The contention of the appellant is that it does more, and extends to Scotland all the prerogative rights of the Crown in regard to the recovery of its revenue. The statute of Queen Anne provides for the institution of a Court of Exchequer in Scotland in pursuance of the Act of Union. The section of the statute chiefly in question is section 7. This section is expressed with reference to the new Court of Exchequer established in Scotland by the statute. Section 6 of the statute enacted that all matters touching the Crown revenue and the remedies and means for recovering the same should be within the jurisdiction and authority of the Court of Exchequer in Scotland, and they were thereby annexed to the said Court. By the common law of England the sovereign had the right of removing into the Court of Exchequer any suit or proceeding relating to the Crown revenue (*Chitty on Prerogatives of the Crown*, p. 244).

On a consideration of the Act of Queen Anne I am unable to adopt the view that the extension to Scotland of the Royal prerogative thereby made is limited in its scope to the statute of Henry VIII. The first part of the section enacts that all obligations, &c., taken for Crown debts shall have the full force and effect of obligations, &c., taken or acknowledged in the Court of Exchequer in England, according to the purport, true intent, and meaning of the statute in that behalf made in England in the three and thirtieth year of the reign of King Henry the Eighth, or any other law or statute, or any practice, custom, or usage in the Court of Exchequer in England, or by virtue of the royal prerogative. The section proceeds to enact that all suits or prosecutions for debts to the Crown within Scotland shall be in the Court of Exchequer in Scotland, and that the Crown shall be preferred and have preference in all such suits and proceedings in that Court according to the said statute of Henry VIII and according to the uses, course and practice of the Court of Exchequer in England, “and shall have and enjoy such and the same prerogatives as well in and about pleadings and in all other matters and things as by any the laws in England or course of Exchequer in England have been, are, or ought to be allowed”; and it concludes by enacting that the bodies and property of debtors to the Crown shall be “subject and liable by extent, inquisition, and seizures, or by any other process, ways, or means, to the pay-

ment of such debts, duties, or revenue to the Crown, and in such and the same manner and form to all intents and purposes as hath been or is used in the Court of Exchequer in England in like cases.”

It is, as I have said, common ground that the statute by this section extends to Scotland the prerogative of first execution in proceedings for the recovery of Crown debts defined by the statute of King Henry VIII. The amplitude of the terms used in the section appears to me to reach beyond this, and to be such as to have the effect of extending to Scotland the royal prerogatives generally according to the law of England in relation to all proceedings for the recovery of Crown revenue. If this is so, there prevails in Scotland the wide prerogative right which gives “a preference in favour of the Crown in all cases and touching all rights of what kind soever where the Crown’s and the subject’s rights concur and so come into competition” (*Rex v. Wells*, 16 East. 278, and *New South Wales Taxation Commissioners v. Palmer* [1907] A.C. 179, at pp. 185-6).

The debtor here has been divested of her estate, and it stands transferred to the trustee in her sequestration. The trustee, however, holds for the creditors according to their just rights and preferences. There is nothing in the Bankruptcy Acts to make this transference to the trustee operate to cut down the Crown’s right of preference, and it follows that in making the rankings he is bound to give effect to it.

I am accordingly of opinion that the appeal falls to be sustained.

The Court sustained the appeal.

Counsel for the Appellant—Sol.-Gen. Dewar, K.C.—Pitman. Agent—John S. Pitman, W.S., Solicitor to the Post Office.

Counsel for the Respondent—Sandeman, K.C.—Black. Agents—Patrick & James, S.S.C.

HOUSE OF LORDS.

Thursday, April 7.

(Before the Lord Chancellor (Loreburn), the Earl of Halsbury, Lord Atkinson, Lord Collins, and Lord Shaw.)

EARL OF LAUDERDALE

v. SCRYMGEOUR-WEDDERBURN.

(*Ante*, July 18, 1908, 45 S.L.R. 949, and 1908 S.C. 1237.)

Heritable Office—Hereditary Standard Bearer of Scotland—Nature of Office—Transferability—Prescription—Adjudication.

The office of Hereditary Standard Bearer of Scotland is held *jure sanguinis*, and cannot therefore be bought, sold, or adjudged. If the blood fails the grant is spent and the office becomes extinct.

The pursuer in an action of declarator