

[18th June 1839.]

(Writ of Error from the Court of Exchequer, Scotland.)

THOMAS SPEARS (representing Robert Spears deceased), (No. 18.)
 THOMAS SPEARS, and WILLIAM MITCHELL (represent-
 ing George Douglas Mitchell deceased), Plaintiffs in
 Err or. [Dr. Lushington.—Miller.]

Sir JOHN ARCHIBALD MURRAY, Her Majesty's Advocate
 General of Scotland, on behalf of Her Majesty,
 Defendant in Error.

[Attorney General (Campbell)—Lord Advocate (Murray)—
 Kaye.]

Extent—Assignment in Security.—Two partners of a trading firm executed a trust conveyance of part of their shares in the partnership stock to certain co-obligants in bonds of credit at the bank; under the conditions, first, that before any sale or transfer of the said stock should take place, the trustees should be bound to give three months intimation of their intention to the assignors, and secondly, that the trustees should be bound to apply the proceeds of the stock in paying whatever should be due on the bonds of credit at the time of the sale of the stock. The assignors intimated said assignment, by having the stock transferred in the books of their firm to the names of the assignees. A writ of extent was afterwards issued against the assignors as crown debtors, at which time the value of the stock so assigned was 960*l.* 4*s.* 8*d.*, and the debt due on the bonds of credit was 1,200*l.* Upon scire facias by the Crown against the trust assignees, Held (reversing on error the judgment of the Court of Exchequer in Scotland), That the assignees

had, by virtue of the intimated assignation, a special property in said stock, available against the Crown seizing the stock under an extent against the assignors for a debt due to the Crown.

Baron of
Exchequer,
Sir P. Murray,
Bart.

GEORGE M'LAGAN and Frederick M'Lagan carried on in partnership, under the firm of George M'Lagan & Co., the business of distillers in Scotland. They were also partners in another distillery company, under the firm of Spears, Mitchell, & Co.

A balance was struck on the company books of Spears, Mitchell, & Co. on the 1st of September 1813, when the amount of stock then at the credit of Frederick and George M'Lagan respectively, in the concern of Spears, Mitchell, & Company, was 1,529*l.* 13*s.* 10 $\frac{3}{4}$ *d.*

On the 7th of April 1814 the M'Lagans executed a trust assignation, setting forth "that for certain good
" causes and considerations it is proper and expedient
" that we should grant the trust right underwritten;" and therefore they assigned, conveyed, and made over to and in favour of certain other partners in the firm of Spears & Co., "but in trust always for behoof of
" us and our heirs and successors, and under the
" conditions and provisions herein-after specified, a
" part of our stock belonging to us in the concern
" of Spears & Co., to the extent of 1,200*l.* sterling
" each, together with the whole interests, dividends,
" profits, &c. that shall arise upon the said share of
" the stock of the said company of Spears & Co., to
" the extent foresaid, from and after the date hereof,
" turning and transferring the whole right of the
" premises from us, our heirs, executors, and suc-
" cessors, to and in favour of the said R., T., and

‘ H. Spears, and assignees, whom we hereby sur-
 “ rogate and substitute in our full right and place
 “ of the premises,” with full power to them to
 sell and dispose of the whole or any part of the said
 shares of the capital stock of the company of Spears
 & Co., to the extent foresaid, with all right compe-
 tent, to the assignors, but under the conditions,
 “ (1.) that before any sale or transfer of such stock
 “ shall take place the trustees shall be bound to give
 “ three months intimation of their intention so to
 “ do to the M‘Lagans: (2.) declaring always, that
 “ the trustees shall be bound to apply the proceeds
 “ of the stock so conveyed in paying and dis-
 “ charging whatever sums shall be due at the time of
 “ the sale of the said stock on two bonds of credit
 “ for 1,000*l.* sterling each, granted and subscribed by
 “ the said Robert, Thomas, and Henry Spears, and
 “ David Millie, binding themselves along with us the
 “ said F. & G. M‘Lagan, one thereof to the Bank of
 “ Scotland, and the other to the Falkirk Banking
 “ Company, to be operated upon by the said company
 “ of George M‘Lagan & Co.: (3.) during the sub-
 “ sistence of the trust to pay the profits to the
 “ M‘Lagans.”

On the 11th and 12th of April 1814 the M‘Lagans wrote to the managing partner of Spears & Co., desiring him to “ transfer 1,200*l.* of their stock in the
 “ concern of Spears, Mitchell, & Co. to Robert, Henry,
 “ and Thomas Spears, jointly to be held by them in
 “ terms of trust deed.”

On the 16th of May an entry was made in each of the accounts in company of the M‘Lagans in the books of Spears, Mitchell, & Co. thus:— “ 1814, 10th May.

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“ To Robert, Henry, and Thomas Spears joint account.
“ fo. 23. 1,200l. ;” and a joint account was opened in
the books of Spears & Co. in the names of Robert,
Henry, and Thomas Spears, in which account were the
following entries : — “ 1814, 10th May. By Frederick
“ M'Lagan's account in company, fo. 5. 1,200l. —
“ 1814, 10th May. By George M'Lagan's account in
“ company, fo. 6. 1,200l.

On the 27th March 1816 a writ of extent issued
against G. & F. M'Lagan, for excise duties due to the
Crown.

By an inquisition under that extent it was found that
the firm of Spears & Co. were indebted in the sum of
509l. 15s. 9d. to G. & F. M'Lagan, in respect of their
share in the company funds of Spears & Co., which was
seized by the sheriff, and claimed by Messrs. Spears.
At the trial in the Court of Exchequer it was agreed
that the M'Lagans interest in the company funds of
Spears & Co. at the time of taking the inquisition was
960l. 4s. 8d., instead of 509l. 15s. 9d. On the 2d of June
1832 a writ of scire facias was brought by the Advocate
General of Scotland on behalf of the Crown, in the
Court of Exchequer, to recover this sum. To this writ
Messrs. Spears pleaded, that they were not at the time of
the teste of the writ of extent, nor at the time of taking
the inquisition under the extent, indebted to the
M'Lagans in the said sum, and issue was joined. The
case came on to be tried before the Court of Exchequer
in Scotland, on the 23d May 1834, when the jury
returned a special verdict, setting out the foregoing
facts ; the question thereby raised being whether the
Crown was entitled to the 960l. 4s. 8d. as a debt due
from Spears, Mitchell, & Co. to the M'Lagans, the

Crown debtors, or whether Messrs. Spears were not in full right of that sum, by virtue of their assignation of 7th April 1814, duly intimated.

This special verdict was argued on the 27th June 1834, when Baron Sir P. Murray directed judgment to be entered for the Crown.

Spears and others brought a writ of error.

Plaintiffs in error.—The stock was duly assigned by the M'Lagans, who were divested of all right in the same. The assignation was expressly granted to secure those now represented by the plaintiffs in error against the consequences to which they might be subjected by their having become bound as obligants in two bonds of credit granted by them for the use and benefit of the assignors; and according to the law of Scotland an assignation in trust or in security, followed by intimation, is equally available as an absolute assignation for the purpose for which it may have been granted; and such assignation, from and after the intimation thereof, completely divests the assignors of the property or subject conveyed, and transfers the full right thereof to the assignees. The assignation was not only intimated, but the amount of stock assigned was set apart and transferred and appropriated to the assignees in a separate account entered in their names in the books of the company, part of whose stock held by the assignors was conveyed to those represented by the plaintiffs in error, by such assignation, so that the stock ceased to be the property of the M'Lagans, or attachable for their debts, until the claims of the assignees thereupon were fully satisfied. The Crown upon an extent in aid is entitled only to the rights of the Crown debtor in so far

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Judgment in
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as available against his debtor, and here, after assignation intimated, the assignors have no right against the assignees.

Defendant in error.—The trust assignation of the 7th of April 1814, set out in this special verdict, and upon which the decision of this question depends, was, under the circumstances of this case, inoperative. For one of its conditions was, that no sale or transfer by the trustees of the subjects assigned could take place till three months notice had been given by the trustees to the assignors. At the time when the extent issued no such notice had been given, so that the trustees then had no power to sell, and might never have acquired that power, as the assignors might have discharged their liability to the banks out of their private funds, or have made some other arrangement, without allowing the trustees to resort to their property in the house of Spears & Co.

Ld. Chancellor's
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LORD CHANCELLOR.—My Lords, in this case Frederick and George M'Lagan, the Crown debtors, carried on the business of distillers, in partnership together, under the firm of M'Lagan & Co., and they were also partners in the firm of Spears, Mitchell, & Co.

By a balance struck in the books of Spears & Co. in September 1813, the amount of stock to the credit of Frederick and George M'Lagan was 1,529*l.* On 7th April 1814, Frederick and George M'Lagan by deed assigned to the other partners in the firm of Spears & Co., part of the stock belonging to them in the firm of Spears, Mitchell, & Co. to the extent of 1,200*l.*, with all the dividends and profits which

should arise therefrom, to the extent aforesaid, upon trust, first, to give three months notice before selling; second, to apply the proceeds in discharge of what should at the time be due upon two bonds, in which Messrs. Spears, partners in the firm of Spears & Co., had joined the M'Lagans as securities for advances made to them by two banks; thirdly, during the subsistence of the trust to pay the profits to the M'Lagans.

On the 11th April the M'Lagans wrote to Spears & Co., desiring that 1,200*l.* of their stock in the firm of Spears, Mitchell, & Co. might be transferred to the account of Messrs. Spears, their co-obligors, which was done, and which was dated on the 10th May 1814. On the 27th March 1816 the writ of extent issued, at which time the share or stock of the M'Lagans in the house of Spears, Mitchell, & Co. was 960*l.*, and at the same time the debt due from the M'Lagans to the banks exceeded the 1,200*l.* These facts were found by the special verdict; and the question upon the writ of error was, whether the Crown was entitled to the 960*l.* as a debt due from Spears, Mitchell, & Co. to the M'Lagans, the Crown debtors, or whether the Spears, the co-obligors, were entitled to that sum under the deed of the 7th April 1814.

The learned baron, Sir Patrick Murray, was of opinion that the Crown was entitled, not upon the ground of any invalidity, under the law of Scotland, of the assignation in trust, but because it was not an absolute but only a conditional assignation, which had not been rendered absolute before the teste of the extent, by notice and actual sale under the provisions of the deed.

I cannot concur in this opinion; the deed was an

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assignment of what was due from the firm of Spears, Mitchell, & Co. to the M'Lagans, or of their interest in the stock of that firm. Due intimation was given, and no question is made as to this having been a valid assignation of the property in question according to the law of Scotland. The 1,200*l.* was actually transferred into the names of the assignees in the books of the firm.

The M'Lagans, therefore, could not have compelled payment of the amount of their share of the stock in that firm without satisfying the terms of the trust of the deed. They had ceased to be creditors for or owners of the full amount of their share in such stock, and had become creditors for or owners of so much only of such stock as might remain after satisfying the trusts of the deed, and that by a valid assignation according to the law of Scotland, two years before the issuing of the extent.

Could the Crown, claiming title to receive what was due to or was the property of the M'Lagans, be entitled to more than they could themselves have demanded? Could the Crown, so claiming, be entitled to seize what had two years before become the property of the plaintiff under the deed, to the extent of their lien thereon? If such were the law it would be most unjust, and it would make it impossible to deal with any one liable to become debtor to the Crown for any assignment of property upon trust, or subject to conditions or otherwise than for an absolute interest. The authorities show that such is not the rule of law as applicable to extents.

In *West on Extents*, page 116, the rule, as extracted from the authorities quoted, is thus stated: "Goods,

“ pawned or pledged before the teste of an extent
 “ cannot be taken, because the pawnee or bailee has a
 “ special property in them. Nor for the same reason
 “ goods demised or lent to another for a term certain
 “ during the term. But it seems that goods pawned
 “ before the teste of the extent may be taken as against
 “ the pawnee, on satisfaction of the pledge, or taken
 “ and sold subject to the pawnee’s right.” In the
 King v. Sanderson, (reported in Wightwick, page 53,) the Chief Baron says, the preference of the Crown can only operate upon what the partner himself had.

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In the King v. Lee, (reported in 6 Price, page 369,) the goods of the Crown debtor were in the hands of a factor, who had paid bills accepted upon the credit of the goods before the issuing of the extent, and had accepted other bills not due at the time of issuing the extent, judgment was given for the factor, the Chief Baron (Richards), in delivering the judgment of the Court, saying: “ The Crown debtor himself could not
 “ have compelled the factors to give up the goods to him
 “ without first paying them what was due. Therefore we
 “ think that the Crown could not compel the factors to
 “ give up their lien without paying them what money
 “ they had advanced on the faith of the consignment to
 “ their principal.” The rule upon this subject must be the same in Scotland as in this country; indeed the learned Baron so considers it. The case of Redfearn v. Somervail, in 1 Dow. page 50, shows the title, according to the law of Scotland, of the assignee under an intimated assignation; and the authorities referred to show that the Crown can only claim that which its debtor was entitled to.

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I therefore move your Lordships to give judgment for the plaintiffs in error.

The House of Lords ordered and adjudged, That the judgment given in the said Court of Exchequer in Scotland for the defendant in error be and the same is hereby reversed.

ALEXANDER MUNDELL.—BOWYER, Solicitors.