

[M. App. Jurisdiction, No. 7.]

1800.

The Right Hon. JOHN EARL OF GALLOWAY, }
and JOHN GORDON, Esq., - - - } *Appellants;*

The Lords COMMISSIONERS of his Majesty's }
Treasury, and His Majesty's Advocate, } *Respondents.*

EARL OF
GALLOWAY, &c.
v.
COMMISSIONERS
OF HIS
MAJESTY'S
TREASURY, &c.

House of Lords, 15th July 1800.

JURISDICTION—*LIS ALIBI PENDENS*—CAUTIONARY OBLIGATION.—

Two cautioners became bound in a bond to the crown, for the Receiver General of Land Tax, &c., for the time being. Thereafter the additional duty was imposed upon this office, of receiving the Court of Session money, which increased materially the pecuniary responsibility of the Receiver's office. He died largely indebted to the crown. An action was raised in the Court of Session of constitution, with the view of leading an adjudication against the deceased's land estate, pending an action in the Court of Exchequer for the same sum. The cautioners objected to the competency of this action, both because the Court of Exchequer was the proper jurisdiction, and also because, in that Court, an action was already pending for payment. They further contended that their bond could not cover the money deficiencies of the Court of Session—the duties of this department having been conferred on him after the date of their bond, and without their consent. Held that there was no *lis alibi pendens* here, and that the Court of Session had jurisdiction, to the effect of giving a decree of constitution, for the purpose of raising adjudication against the land estate in Scotland; but, in the House of Lords, the case was remitted, to consider to what extent the cautioners were liable for the Court of Session money under their bond.

Admiral Keith Stewart was Receiver General of the land tax, &c. in Scotland; and having, on his death, been indebted to the crown in a large balance, the present action of constitution was raised against his son, as his representative, along with the admiral's cautioners, chiefly with the view of making a decree of constitution the foundation of raising an adjudication, and proceeding against Admiral Keith Stewart's land estate in Scotland. The bond or instrument which he had signed along with his cautioners was executed by Scotsmen, and in Scotland; and after the date of the bond, additional duties of collection had been conferred upon him, increasing materially the pecuniary responsibility of his office, viz. the Court of Session money.

The cautioners did not deny liability for any deficiencies falling under the proper duties of Receiver General at the

1800. time they granted the bond. And the present question, accordingly, had reference only to the additional duty subsequently imposed, and which increased materially the pecuniary responsibilities of the office.
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- In defence, it was stated, 1st. That action did not lie for a debt due to the crown, in the Court of Session, but only by a suit in the Court of Exchequer, which had exclusive jurisdiction conferred on it, in terms of the act 6 Anne, c. 26. 2d. That action for the same debt was actually depending, at the suit of the king, in the Court of Exchequer, against the same defenders; and, 3d. For the cautioners, That the obligation undertaken by them did not apply to, and was not intended to cover the money deficiencies in question,—viz. the Court of Session money—the care and receipt of that department having been committed to him after the date of their bond.
- June 9, 1799. The Lord Ordinary pronounced this interlocutor, finding, “ that by the law of Scotland, and also by the act 6th of Queen Anne, c. 26, this Court is alone competent to the trial of any question concerning, or any claim brought against the heritable estate of a debtor to the crown, and in respect the pursuers’ counsel have limited the conclusions of their action to a *decree of constitution*, in order to found an adjudication of their debtor’s heritable estate, and that the defenders have not shown that they have yet paid or accounted for the sums claimed by the pursuers, decerns against them conjunctly and severally for the sums, principal and interest, as libelled, reserving all exceptions *contra executionem*; and as despatch is said to be the object of the pursuers, as delay is alleged to be the object of the defenders, and as the Lord Ordinary has bestowed all the attention in his power, dispenses with any further representation, and allows the defenders to apply to the whole Lords.” A representation was notwithstanding given in, whereupon the Lord Ordinary adhered to his former interlocutor. On reclaiming petition to the whole Court, the Lord Ordinary’s interlocutor was adhered to.
- July 11, 1799.
- Nov. 12, 1799.

Against these interlocutors the present appeal was brought by the cautioners of Admiral Keith Stewart only.

Pleaded for the Appellants.—The appellants’ obligation, which is the sole foundation of a demand on them, neither in terms nor in spirit comprehends or extends to the Court of Session money, which came into the hands of Mr. Stewart (if

it ever did, for there is no evidence of the fact) long after his appointment to be Receiver General, and after the date of the obligation by him and his sureties, not in the usual course of office, but in pursuance of a special act of parliament, directing that this money should be paid to the Receiver General of His Majesty's land rents, to be by him remitted to the Exchequer in England. The condition of the obligation is, that Mr. Stewart shall, out of the land rent and casualties received by him, and out of such monies as shall be impressed or directed to be paid into his hands by the Barons of Exchequer in Scotland, or by warrants under the royal sign manual or otherwise, pay all such sums as the said Barons shall direct. Such is the whole contents of the instrument that relates to the receipt and payment of the money for which Mr. Stewart and his sureties became engaged by the tenor of that obligation; and at once shows that it can have no relation to the money in question. Nor do the general words "that the said Keith Stewart shall well and truly exercise the office during the time he shall continue in the same; and that he shall annually account to the Barons of the Court of Exchequer for all monies received on their account," comprehend the sums in question, because this would be extending the sureties' obligation further than is warranted by a fair construction of their bond. The cautioners' bond could have only reference to the duties of Receiver General as exercised by this officer at the date thereof. None else were in contemplation, and no additional duty afterwards conferred, increasing materially the pecuniary responsibility of the office, can be embraced under their obligation, unless the consent of the sureties was obtained thereto. The general clause above alluded to, is followed by a particular enumeration of the matters intended to be covered by their obligation; and it being the rule of law, that such general clause, followed by an enumeration of particulars, is always qualified by these particulars, and cannot be extended beyond them; and as law allows cautionary obligations to be strictly interpreted, it follows, that the additional duty afterwards conferred on this office, with its accompanying increased pecuniary responsibility, cannot be held in law to fall under the obligation come under by the cautioners. That obligation only reached the matters specially enumerated, and that this was the sense in which their obligation was viewed by the officers of state themselves, was clearly shown by their demanding fresh

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bonds and sureties whenever the branch of revenue was committed to his collection and control. But, 2d. Supposing the cautioners liable for the money in question, under their bond, yet, according to the true nature and just construction of that bond, the present suit was competent only in the Exchequer Court. This is clearly established by the act 6 Anne, c. 26, § 7 of which enacts, that all suits for any “revenue, rents, duties, accounts, profits, or other things accruing to the Queen’s Majesty within Scotland, or which shall any wise concern or relate thereto; or any officers, ministers, or accountants of,” “shall be in the said Court of Exchequer in Scotland;” and even if this statute were not positive and express, which it undoubtedly is, still the nature of the case shows, that the obligee in such an instrument can only be sued in the Court of Exchequer. 3d. Supposing it to be perfectly competent for the crown to bring the action before either court, yet it is against all law and justice to bring a suit in both courts against the same parties, and at the same time.

Pleaded for the Respondents.—1st. The necessity of the present suit before the Court of Session, while another is pending before the Court of Exchequer, and the apparent objections to such a course, and to the competency of the jurisdiction, at once disappear, when due consideration is had to the explanation set forth in the summons,—namely, that the object by it was, to obtain decree in order to ground an adjudication, and to proceed against the heritable estate of the debtor. And this appears more necessary, when it is expressly provided by the 6 Anne, c. 26, quoted by the appellants, that “no debt or duty from any of the debtors or accomptants of the crown in Scotland, shall affect or subject any real estate in Scotland of any such debt or accountant”—“and that the law of Scotland shall, in all such cases, and for such purposes, hold place and be observed.” The present action being brought for the purpose of attaching, by adjudication, the real estate of the appellants, the objection to the competency of the Court of Session is obviously ill founded. It has been so found in many cases, particularly in a much stronger case than the present, *Creditors of Burnet v. Murray*, 17th July 1754, where the Court, without obliging the officers of the crown, as the respondents have, for the sake of more accuracy, done in this case, to apply for and obtain a previous decree of constitution, adjudged the estate of the crown debtor at

Vide ante Vol. I., p. 594.
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once, upon the simple production of the bond executed by the crown debtor in the English form. And the same was the case of His Majesty's Advocate and the Receiver General of the Customs *v.* Foggo (1752) by decree of adjudication and action of mails and duties. But, 2d. In regard to the objection of *lis alibi pendens*, in respect to the writs of *scire facias* depending in Exchequer, it is sufficient to say, that this is entirely founded in a complete misapprehension of the rule of law, which is inapplicable to the present case. When two courts have each a jurisdiction in the same matter, justice will not admit of a party vexatiously to prosecute two actions of the self same kind, and to the same effect in each: he must choose one and abandon the other. But, in the present case, the actions depending in the two courts are in their nature entirely different. They relate to different subjects, and have different purposes in view. Unless the crown prosecuted *simul et semel* in both, its remedy would not be complete; and, by succeeding in both actions, it is only in the end placed in the same situation it would have been in by a proper suit maintained in the Court of Exchequer in England; or, as if the question had occurred before the Union, by the proper action before the Court of Session. The treaty of Union, and the act 6 Queen Anne, compel the crown, in recovering its debts, to divide its suits between the Court of Session and Exchequer. When personal estates and effects are the objects of the suit, it is in the Court of Exchequer where satisfaction can alone be had. But when the real estate is to be attached, the crown must, like any other private creditor, adjudge the estate, inhibit, or bring the estate to judicial sale in the Court of Session. In such case, there is no room for the plea *lis alibi pendens*. The *scire facias* in the Exchequer Court is the beginning of a diligence against the moveable estate of the debtor. If there is none such, it does not and cannot foreclose the crown from proceeding against the heritable estate in the manner which alone the law permits proceedings against such estate, in order to acquire that preference which is the aim of both suits. The object therefore of the one suit is different from the other. They are different in their nature and effect, and both together form one entire remedy. 3d. It is a plain misconstruction of the bond and obligation of the sureties, to contend that these sureties only became sureties for the office of Receiver General, as at the date of their obligation, at which time he had no concern with the Court of Session

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