

out any further act on his part, had the effect of a contract; but it is unnecessary for us to decide this. We must reverse the decision of the learned Judge; and, as there may be a defence to the suit on other grounds, we must remand it for re-trial: and the costs of this appeal will be costs in the suit.

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*Decree reversed and suit remanded.*

Attorney for the plaintiffs: *C. Tyabji.*

Attorneys for the defendants: *Hearn, Cleveland, and Peile.*

*Appeal No. 115.*

*In re The Indian Companies' Act, 1866.*

March 13.

THE SECRETARY OF STATE IN COUNCIL OF

INDIA ..... *Appellant.*

THE BOMBAY LANDING AND SHIPPING COM-

PANY (LIMITED) ..... *Respondents.*

*Crown Debts—Judgment Debts due to the Crown—Precedence in Execution—Judgment Debts due to the Secretary of State in Council for India—Indian Companies' Act—Stay of Execution—Cession of Bassein to the Portuguese.*

A judgment debt due to the Crown is in Bombay entitled to the same precedence in execution as a like judgment debt in England, if there be no special legislative provision affecting that right in the particular case.

Under similar circumstances a judgment debt due to the Secretary of State in Council for India is in Bombay entitled to the like precedence, and the reason is that such debt is vested in the Crown, and when realised falls into the State Treasury.

The nature of the cause of action in respect of which the judgment was recovered does not affect the right of the Crown or of the Secretary of State in Council for India to priority.

As the Crown is not, either expressly or by implication, bound by the Indian Companies' Act (X. of 1866), and as an order made under that Act for the winding up of a company does not work any alteration of property, such an order does not enable the Court to stay the execution of a judgment debt due to the Crown, or to the Secretary of State in Council for India.

The cession of Bassein and its dependencies (including Bombay and Salsette) by Sultán Bahádur of Gujarát to the Portuguese, and the treaty made thereupon, mentioned.



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It is a principle recognised by the laws of many countries that claims of the Crown or State are entitled to precedence, *e. g.*, the Hindú, Roman, and French Codes, the laws of Spain, the United States of America, Scotland, and England.

**T**HIS was an appeal from an order made by Arnould, J., in the First Division Court, on the 29th of July 1867.

The appeal was argued before COUCH, C.J., and WESTROPP, J., on the 7th, 20th, and 21st of December 1867.

The facts of the case fully appear in the judgment of the Court.

*The Advocate General (The Honorable L. H. Bayley)*, for the appellant, cited Stat. 21 & 22 Vict., c. 106; 22 & 23 Vict., c. 41; 53 Geo. III., c. 155, s. 111; 24 & 25 Vict., c. 67, s. 24; 11 & 12 Vict., c. 21, s. 62; *Giles v. Grover* (a); *Laing v. Ingham* (b); *Wildes v. The Attorney General of Trinidad* (c); *Viscount Canterbury v. The Attorney General* (d); Stat. 3 & 4 Wm. IV., c. 85, s. 43; *The Mayor of Lyons v. The East India Company* (e); *The Advocate General v. Richmond* (f); *The Advocate General v. Ranee Surnomoye Dossee* (g); *Khanoo Raoot Kulvekur v. Dhunbajee Kan* (h); 4 Bac. Ab., Prerogative, E. 5; *R. v. Wright* (i); Com. Dig., Parliament, R.; *The Attorney General v. Donaldson* (j); *Baron de Bode's Case* (k); *Mersey Docks Case* (l); and L. R. 2 Q. B., 493, and 11 Jur. N. S., per Cockburn, C.J., p. 465.

*Green*, on the same side, cited Code Napoléon, Art. 2098; *The Collector of Masulipatam v. Cavalry Vencata Narrainapah* (m); *Gunga Rupa v. Bapoo Gungadhur, coram Sausse, C. J.*, (escheat); *The Secretary of State v. Kamachee Boye Sahaba* (n); 2 Wms. on Exors. 893; *Otway v. Ramsay* (o); *Prideaux on Judgments* 173; *Parker R.* 101; *Grove v. Aldridge* (p);

- (a) 1 Cl. & F., 72, 143, 197, 212, 213, 215; S. C. 9 Bing. 128.  
 (b) 3 Moo. P. C. 26. (c) Ibid 200. (d) 1 Phillips 306.  
 (e) 1 Moo. Ind. App. 175. (f) Perry's Or. Ca. 566.  
 (g) 9 Moo. Ind. App. 387. (h) 2 Borr. 301.  
 (i) 1 Ad. and E. 436 Crompton's Argument.  
 (j) 7 M. & W. 422, and 10 ibid 117.  
 (k) 13 Q. B. 364, per *Wilde, C.J.*, 378. (l) 11 Jur. N. S. 746, 747.  
 (m) 8 Moo. Ind. App. 500, 529. (n) 7 Moo. Ind. App. 476.  
 (o) 4 B. & C. 414, 416 n., per *Lord Hardwicke*. (p) 9 Bing. 428.



*The Attorney General v. Walmsley* (q) ; 1 Kent's Comm. 262, 263 (et ib., *Fisher v. Blight*) ; Stat. 33 Hen. VIII., c. 39.

*Dunbar*, for the respondents, cited *The Attorney General v. Dakin* (r) ; Com. Dig. Administration C. ; 2 Wms. on Exors. 894 ; Act X. of 1866.

*The Advocate General*, in reply, cited Parker R. 95, 99, 101, 260, 262, 263 ; *Sir William Herbert's Case* (s) ; West on Extents, p. 2 ; 3 Bac. Ab., Exors. and Admors., L. 2 ; *Naoroji Berámji v. Rogers* (t).

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*Cur. adv. vult.*

WESTROPP, J. :—In Suit No. 631 of 1867 at the Original Civil Jurisdiction side of this Court, the Secretary of State in Council of India, on the 17th of May 1867, filed his plaint against the Bombay Landing and Shipping Company, Limited, to recover moneys due to the plaintiff for work done by the Government artisans at the Government Dockyard (lately the property of the East India Company) for the defendants and for materials, that is to say, Government stores, supplied by the plaintiff to the defendants.

On the 6th of May 1867, at a meeting of the shareholders of the defendants' company, a resolution was passed to wind up the company voluntarily, and it was confirmed at another meeting on the 14th of June 1867. On the 29th of June a petition was presented to the court, praying that the winding up should be continued under the supervision of the court.

On the 9th of July 1867, the Secretary of State recovered, in the Third Division Court, before Sir Charles Sargent, a judgment in the action, No. 631 of 1867, against the Bombay Landing and Shipping Company, for Rs. 1,568-0-10 and costs, and interest from the 11th of March 1867 until payment ; but Sir Joseph Arnould, having been informed that a petition to wind up the company under the supervision of the court was pending, stayed the execution of the

(q) 12 M. and W. 179.

(r) L. R. 2. Exch. 290 (W. N. No. 27 for 1868, p. 192).

(s) 2 Rep. 12 b.

(t) 4 Bom. H. C. Rep., O. C. J. 1.



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judgment, notwithstanding the opposition of the Advocate General on behalf of the plaintiff.

On the 29th of July 1867, an order on the petition was made, by Sir Joseph Arnould, directing that the company should be wound up under the supervision of the court, and at the same time cause shown by the Advocate General against the Judge's order *nisi* of the 20th of July, that the stay of the suit should be continued until further order, was disallowed, and the order to stay was made absolute. On the same 29th of July, an application to him by the Advocate General, that the winding up of the company should be without prejudice to the payment in full of the debt, interest, and costs given by the decree of the 9th of July 1867, and that such payment should be made in priority to the claims of all other creditors of the company, was refused.

By consent of the learned counsel on both sides, it was arranged that, notwithstanding any peculiarity in the form of the application, and proceedings before Sir Joseph Arnould, the questions to be argued before him should be: whether the judgment recovered by the Secretary of State was entitled to precedence over the claims of the ordinary creditors, who sought the benefit of the winding-up order; and, accordingly, whether the execution of that judgment was rightly stayed.

Upon that understanding the matter was argued before Sir Joseph Arnould. Against his orders then made, the present appeal was brought, and the case has been argued before us on the same basis.

A preliminary question here is, whether, assuming, *1st*, that the nature of the causes of action in respect of which the judgment has been obtained, presents no difficulty; and, *2ndly*, that the Secretary of State in Council is, in suits brought by him, entitled, under ordinary circumstances, to the benefit of the prerogative of the Crown as to precedence; the Indian Companies' Act, X. of 1866, does not, in such a case as the present, reduce him to the same position as that of common creditors.



On that point we have not felt any doubt. The Crown is not, either expressly, or, as we think, by implication, bound by the Indian Companies' Act (X. of 1866). That Act has not worked any alteration of ownership in the property, against which the Advocate General, on behalf of the Secretary of State, seeks execution. The ownership still remains in the Bombay Landing and Shipping Company, and, that being so, the doctrine which prevailed in *Giles v. Grover* (*u*) applies. The cases of *The Attorney General v. Capel* (*v*), and *The King v. Crump* and *Hanbury* (*w*), there cited (*x*), *Audley v. Halsey* (*y*), and *Rex v. Pixley* (*z*), show that before assignment the Bankruptcy Acts did not bind the Crown. In *The King v. Cotton* (*a*), Chief Baron *Parker* says that the reason given by Sir Bartholomew *Shower* in his reports, namely, "that the property was not altered, is the true reason," and adds: "Nothing bars the King, but the assignment, and that bars him, because it has altered the property in the goods."

It not appearing that the right (if any) of the Crown to precedence is, either expressly or by implication, taken away by the Indian Companies' Act, or any other special legislative provision which has been brought to our notice, affecting a case so circumstanced as the present case, we proceed to consider the second question, which is, whether the nature of the causes of action, in respect of which the judgment has been obtained, affects the right of the Crown.

Chief Baron *Comyn* (Digest, Title Debt, G 1) says—

"So every person, who by any means is chargeable to the King, shall be debtor to the King; for it shall be taken *extensivè*: as where he is answerable to the King for debt, damage, duty, rent, arrear, &c." (*b*). Sir Edward *West*, the first Chief Justice of the Supreme Court of Bombay, in his *Treatise on Extents*, p. 25, says: "Wherever there is such a

(*u*) 9 Bing. 123, 253, 266, 267, 272; 1 Cl. & F. 72.

(*v*) 2 Shower 481. (*w*) See Parker R. 126. (*x*) 9 Bing. 253, 272.

(*y*) Sir Wm. Jones 202, and see Parker R. 127.

(*z*) Bunbury 202. (*a*) Parker R. 112, 127, 128.

(*b*) Godbolt 293.

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debt due to the Crown as that an action of debt, or *indebitatus assumpsit*, might be maintained against the debtor, were it due to a subject, such debt may, it is apprehended, be found under the inquisition, for the purpose of issuing a *scire facias*, or immediate extent for it."

A very careful examination of the English authorities has not enabled us to discover any instances in the case of an extent in chief against the King's debtor, or in that of an extent in chief in the second degree, *i.e.*, by the Crown against the debtor of the King's debtor, in which a distinction has been taken with regard to the nature of the debt due to the King; though by the Civil Law the preference given to the State, so far at least as it is secured by the *jus pignoris* (tacit or implied mortgage) appears to be subjected to restrictions (*vide infra*, p. 34, note [n]).

In the case of an extent in aid, in order to prevent abuse of the process of the Crown, a distinction has been taken where the King's debtor who sued out the extent in aid, was neither the officer of, nor an accounting party to, the Crown. In *The King in aid of Hughes v. Wilton (c)*, an extent in aid, obtained under such circumstances, was set aside, *quia improvidè emanavit*. But the Secretary of State in Council is not in the same position as a King's debtor, and an execution at his suit cannot be regarded as an extent in aid. We think that the nature of the causes of action for which the judgment was obtained in this case, cannot of itself affect the right (if any) of precedence.

The third and remaining question has occasioned to us the chief difficulty. That question is, whether the Secretary of State in Council for India is entitled, in respect of payment of debts, to the same precedence as the Crown would be in England? In considering that question, we have not overlooked certain English statutes (9 Anne, c. 10, s. 30; 14 & 15 Vict., c. 42, s. 31; 28 & 29 Vict., c. 124, ss. 3 and 4), and Act XXXII. of 1860, ss. 185 and 188, of the Government of India, which, it may be asserted, tend to show that, with



out express legislation to that effect, neither the Secretary of State in Council, nor any party other than [Her Majesty herself, or her Law Officers, can be entitled to precedence, or be in a better position with regard to execution than any ordinary subject or body corporate. The object of the Stat. 9 Anne, c. 10, s. 30, appeared to be to render postage debts, not exceeding £5, recoverable in a summary manner, as small tithes were, before Justices of the Peace. That section further provided that "such debt or sum of money shall be preferable in payment by the person owing the same, or from whose estate the same is or shall be due, before any debt of any sort to any private person whomsoever." Those debts are in the same section described as "due and owing to the Receiver General of the said" (Post Office) "revenues for Her Majesty's use." The mode of recovery of small tithes was fixed by a prior statute, 7 & 8 Wm. III., c. 6, which did not confer upon small tithes any preference over other claims; and as the statute of Anne applied the mode of recovery appointed for small tithes to postage claims not exceeding £5, it, no doubt, was considered prudent *expressly* to reserve to such postage claims a priority of payment. The Stat. 14 & 15 Vict., s. 42, related to the separation of the direction of Her Majesty's Works and Public Buildings from the management of Her Majesty's Woods, Forests, and Land revenues. The 29th, 30th, and 31st sections related to us is by or against the Commissioners or the Attorney General. The 31st section contained the following proviso: "Provided that nothing in this Act contained shall extend or be taken to prejudice or affect the prerogative or rights of Her Majesty, or the right, power, or duty of Her Majesty's Attorney General, to sue or defend, or other rights, powers, or duties of such Attorney General, in regard to any contract, or any action, suit, or proceeding, whether such contract, or such action, suit, or proceeding, shall affect or concern the department of Her Majesty's Woods, Forests, and Land Revenues, or the department of the Commissioners of Her Majesty's Works and Public Buildings." That seems to us to have been inserted by way of precaution, and to be declaratory, rather than to lay down any new rule. The

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observations which we shall make on the statute next to be mentioned will, in a great measure, apply to this proviso also.

The Stat. 28 & 29 Vict., c. 124, consisting of twelve sections, is supplementary to Stat. 27 & 28 Vict., c. 57, which related to the purchase and management of lands for the public service by the Commissioners of Admiralty. The first section of Stat. 28 & 29 Vict., c. 124, gave them a name by which they might be styled in actions, and suits, or other proceedings, and provided that such actions &c. should not be affected by any change among the Commissioners, and that they should be liable to pay, and entitled to receive costs.

The 3rd section is: "Nothing in this Act, or in the Admiralty Lands and Works Act, 1864, shall take away or abridge, in any action or suit, the legal rights, privileges, and prerogatives of Her Majesty, her heirs and successors, but in all actions and suits instituted by or against the Commissioners of the Admiralty, and in all proceedings and matters connected therewith, the Commissioners of the Admiralty may exercise and enjoy all such rights, privileges, and prerogatives as are for the time being exercised and enjoyed, in any action or suit in any Court of Law or Equity, by Her Majesty, her heirs or successors, as if the Crown were actually a party to such action or suit." The 4th section is: "Notwithstanding anything in this Act, or in The Admiralty Lands and Works Act, 1864, it shall be lawful for Her Majesty, her heirs and successors, to proceed by information in the Court of Exchequer, or by any other Crown process, legal or equitable, in any case in which it would have been competent for Her Majesty, her heirs or successors, so to proceed if no provisions respecting procedure had been inserted in this Act, or in The Admiralty Lands and Works Act, 1864."

The reservation of prerogative privileges to the Commissioners in their litigation, and the reservation of the Crown's right to proceed in the Exchequer, no doubt, afford an argument in support of the legal necessity for such provisions;



but such an argument is never, when it stands alone, a very strong one, and does not relieve us from the duty of inquiring into the state of the law previous to such enactments. Legislation of that kind is often merely declaratory, and resorted to *pro majori cautelâ*, and for the purpose of clearly notifying to the public what the law is. We should, moreover, observe that the provision in the 1st section as to costs has an opposite tendency to that of the 3rd and 4th sections, as indicating that, were the Legislature to have remained silent, the Admiralty would neither pay nor receive costs, and would be in the same position as the Crown was before the passing of Stat. 18 & 19 Vict., c. 90. So far as the general rule still stands, independently of that statute, it is that the Crown neither pays nor receives costs: 4 Stephen Comm., 4th Ed., p. 72.

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What has been said with respect to those statutes is in great part applicable to the provision in Secs. 185 and 188 of Act XXXII. of 1860. A clear declaration of the priority of income tax over private claims may have been considered especially necessary for the Mofussil, where the extent to which English law should be applied is much less clearly defined than in the Presidency towns (*d*). There are, moreover, certain special provisions, which are variations from the English law, as to the priority of the claim of the Crown, introduced into both of those sections.

In considering the position of the Secretary of State in Council with regard to the revenue, after mentioning the acquisition of Bombay by the Portuguese, it will be necessary to refer to the Treaty, under which Bombay was acquired by the British, and also to some of the charters and statutes relating to India, and to notice how, in several instances, those charters and statutes have dealt with the revenue or particular items of it, the mode of levying it,

(*d*) *The Mayor of Lyons v. The East India Company*, 1 Moo. Ind. App. 175; *Varden Seth Sam v. Luchputty Royjee Lallah*, 9 *ibid.* 303; *Dâdâ Honâji v. Bâbaji Jagushet*, 2 Bom. H. C. Rep., A.C.J. 38; *Webbe v. Lester*, *ibid.* 55; and see *Bentinck v. Willink*, 2 Hare 1.



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what powers were conferred upon the Company, and what reserved to the Crown.

Bombay, sometimes called by the Portuguese the Island of Bombaim, and sometimes the Island of Mahim (*e*), was at, and for some time previously to, the death of Ahmed Shah (*f*), and thence until its cession to the Portuguese by Sultán Bahádur, part of the kingdom of Gujarát (*g*). Bombay was then deemed to be of small importance as compared with Bassein (Baçaim), of which it at that time was, and still continued to be, a dependency, until ceded to the British Crown (*h*). In A.D. 1534, Sultán Bahádur, who ruled Gujarát, and to whom Portuguese writers occasionally give the title as well of King of Cambay as King of Gujarát, being hard pressed by the Portuguese on one side and the Emperor Humáyun on the other, made peace with the former, and formally ceded Bassein and its dependencies to the King of Portugal. The treaty of cession was concluded in December 1534, between the Ambassador of Sultán Bahádur, on the one side, and Nuno da Cunha, Governor of Goa, on the other (*i*). Our much esteemed friend the Reverend Dr. Wilson, the very learned Orientalist and scholar, has kindly directed our attention to, and procured for us, the work of De Couto, which contains a copy of that Treaty. The following is a translation of the first Article, taken from the copy given by De Couto :—“That the Sultán Bahádur gave and made over from henceforth and for ever to the King of Portugal, the city of Baçaim, *with all its territories*, continental as well as *islands* and seas, *with all* the jurisdiction and sovereignty thereof, with all its revenues and royalty rights, in the same manner as he, the Sultán Bahádur, King of Gujarát, and his Captains and Thánádars, had and possessed them hitherto; and that from henceforth all the right which he had to or

(*e*) 4 Bom. H. C. Rep., O. C. J. p. 83, Patent of Mazagon.

(*f*) He reigned from A.D. 1412 to A.D. 1443.

(*g*) 2 Erskine's Lives of Báber and Humáyun, p. 20.

(*h*) 4 Bom. H. C. Rep., O. C. J. p. 83, Patent of Mazagon.

(*i*) Asia de João de Barros, 4 Decade, Part I., Liv. iv., Cap. xxvii., pp. 527, 530, *et seq.*, Lisbon Ed. 1777; Asia de Diogo de Couto, 4 Decade, Part II., Liv. ix., Cap. ii., pp. 314, 316, *et seq.*, Lisbon Ed. 1778.



upon the said territories, islands, and seas so transferred and made over to the King of Portugal, ceased, and he requested him to send his officers to take immediate possession of the same."\*

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The island of Salsette (*j*) was, as well as Bombay, a dependency of Bassein. Both, accordingly, passed, under the Treaty of 1534, to, and were taken possession of by, the Portuguese. In 1532, two years previously to that treaty, the Portuguese had made a descent upon the coast, and overrun Bassein, Bombay, Tháná, and other places (*k*).

By Article XI. of the Treaty of the 23rd of June 1661, entered into on the marriage of Charles II., the Port and Island of Bombay were, by Alfonsus, King of Portugal, with the assent of his Council, and of the Regent Louisa, ceded to the Crown of England in perpetuity, "with all the rights, profits, territories, and appurtenances whatsoever thereunto belonging, and, together with the income and revenue, the direct, full, and absolute dominion and sovereignty of the said Port, Island, and premises, with all their royalties, freely, fully, entirely, and absolutely."

The Portuguese law was mainly founded on the Civil Law, which (with certain exceptions and restrictions) gave to a debt, due to the State, precedence over other debts. In his

\* "Que El Rey Soltão Badur dava e doava a El Rey de Portugal daquelle dia para todo sempre a Cidade de Baçaim com todas as suas terras, assim firmes, como Ilhas, e mares, com toda sua jurisdição, mero e misto imperio, com todas suas rendas, e direitos Reaes, assim, e da maneira que elle Soltão Badur, Rey do Guzarate ate então, as possuira, e possuiram seus Capitaes, e Tanadares. E que dalli por diante desistia de todo o direito, que nas ditas terras, Ilhas, e mares tinha: e que traspassava, e applicava a El Rey de Portugal; e que havia por bem, que logo por seus officiaes mandasse tomar posse de todo o sobredito." De Couto, *ubi supra*, p. 316. De Barros would appear to give an abridgment, rather than a copy, of the same Treaty. The Treaty contained several Articles beside that above extracted from De Couto, but they are not relevant to the present question. As to the death of Bahádur Sháh, see Elphinstone's Hist. Ind., 6th Ed., Appx., p. 678.

(*j*) De Couto, General Index, p. 319.

(*k*) 1 Grant Duff, Hist. Mahrattas, p. 56, Bombay reprint, 1863.



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Sententiæ Receptæ (l) the doctrine is expressed by Julius Paulus with characteristic brevity : *Privilegium fisci est inter omnes creditores primum locum tenere*. In the earlier days of the Empire, *fiscus* was the private treasury of the Emperor, and was distinct from *ærarium*, the public treasury ; but in later times, and long before Julius Paulus wrote, the distinction had ceased (although noticed by him under the terms *jus populi* and *jus fisci*), and the term *ærarium* had become merged in that of *fiscus* (m). The preference due to the State as a creditor is again very clearly asserted in the propositions *Respublica creditrix omnibus chirographariis creditoribus præfertur* : Dig., Lib. XLII., Tit. v., pl. xxxviii. ; and *Fiscus semper habet jus pignoris* (n) : Dig., Lib. XLIX., Tit. xv., pl. xlvi.

Such right to priority of payment of debts as the Crown of Portugal may have possessed in Bombay, must, by the Treaty, have passed to the Crown of England.

The introduction of the laws of England into this island has so recently been discussed by us in this court, in the case of *Naoroji Berámji v. Rogers* (o), as to render it unnecessary to recur to that topic. We must, however, refer briefly to such charters and statutes as bear upon Crown debts, or debts due to the East India Company.

Charles II., in making over, by the Charter of 1668, the Port and Island of Bombay to the London Company of

(l) Lib. V., Tit. XII., pl. 10 (Cumin C. L. 753). *Vide etiam* Codicis Lib. IV., 46, 1 ; Domat by Cushing, pl. 1758 ; Mackeldei Syst., pl. 319, *et ibid.*, Pars Specialis, Lib. II., App. IV., *de creditoribus concursus*, pl. 20, 24, ed. Lipsiæ, 1847.

(m) Mackeld. Syst., pl. 144 ; Smith, Dict. Antiq., Tit. *Fiscus*, by Mr. Geo. Long, quoting Savigny ; *et vide* Sm. Gr. and Rom. Biog., Vol. III., p. 155 ; Cumin C. L. 76. Compare *Advocate-General v. Amerchund*, 1 Knapp P. C. C. 329 n., and *The Secretary of State, &c. v. Kamackee Boye Sahaba*, 7 Moo. Ind. App. 476.

(n) This *jus pignoris*, or *hypotheca tacita*, as, in cases of lien implied by law, it has with stricter accuracy been denominated (Saunders Inst., p. 216, 2nd Ed.), was not, it would seem, conferred by the Civil Law upon every kind of debt due to the Emperor or State. For exceptions see Domat by Cushing, pl. 1758 n. (a) ; Mackeld., Lib. II., Appx. IV., pl. 26.

(o) 4 Bom. H. C. Rep., O.C.J. 1.



Merchants trading to the East, did so "with all the rights, profits, &c., all and singular royalties, revenues, rents, customs, &c. privileges, franchises, &c., whatsoever within the said premises, or to them or any of them belonging, or in any wise appertaining, in as large and ample a manner" as the Crown of England enjoyed them by virtue of the treaty with the Crown of Portugal, and not further or otherwise, "saying and always reserving to" the Crown of England "the faith and allegiance" to it "due and belonging," and its "Royal Power and sovereignty of and over" its "subjects and inhabitants there." The same Charter empowered the Company, for the better government of the Island, to make laws, and, amongst other means of enforcing them, to impose reasonable fines and amerciaments. The earlier Charters granted to the Company, namely, 43 Eliz. (31st December 1601), 7 Jac. I. (31st May 1609), and 13 Car. II. (3rd April 1661), while respectively authorising the Company to make laws for the regulation of their officers, servants, mariners, &c., and to impose reasonable fines and amerciaments for the enforcement of such laws, further added: "and the same fines and amerciaments shall and may levy, take, and have to the use of the said Governor and Company and their successors, without the impediment of Us, our heirs or successors, and without any account therefor to Us, our heirs or successors, to be rendered or made." The Charter of 1668 expressly confirmed all jurisdictions, powers, liberties, privileges, benefits, and advantages conferred on the Company by the Charter 13 Car. II. (3rd April 1661.)

Infringements of the monopoly of trading to the East, conferred upon the Company, were punishable by forfeiture of the goods, merchandise, and things brought, and of the ship bringing them into England, or any of the dominions thereof, half of such forfeiture to go to the Crown, and the other half to the Company (Charters 43 Eliz., 7 Jac. I., 13 Car. II., 35 Car. II.)

The Charter 5 Wm. & Mary (7th October 1693) granted to the London Company full power to sue for all *debts* then

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due, or thereafter to become due, to them, and to "recover the same, either in the name of Us" (King William and Queen Mary), "our heirs or successors, or in the name of the said Company, or otherwise as Law or Equity shall require or admit of, and to retain the same to their own use and benefit." It also charged the property of the Company with debts, due by them.

Upon the English Company trading to the East Indies, which, under the authority of Stat. 9 & 10 Wm. III., c. 44, was established and incorporated by Charter 10 Wm. III. (10th September 1698), power was, by that Charter, conferred to sue and be sued in their corporate name in Courts of Record, or any other place whatsoever.

The same Charter empowered that Company to make by-laws for the good governance of their trade, factors, agents, officers, and others concerned, and to inflict reasonable penalties, &c., mulcts, fines, or amerciaments, for breaches thereof, which should be recovered "to the only use and behoof" of the Company, "without any account or other matter or thing to be therefore rendered" to the Crown.

It also reserved to the Crown "the sovereign right, power, and dominion" over all the forts, places, and plantations of the Company.

The Indenture Tripartite of the 22nd of July 1702, between Queen Anne and the two Companies (by which, and by Godolphin's Award of the 29th of September 1708, those Companies were amalgamated) created and incorporated the United Company of Merchants trading to the East, and empowered it by that name to "sue and be sued, grant, take, possess, and enjoy, do, perform, and execute, and have, all capacities, powers, privileges, benefits, possessions, and advantages whatsoever," in the same manner as the English Company. It contained a reservation of "the sovereign right, power, and dominion" of the Crown over "all forts, places, plantations, and settlements" of the United Company. Clauses of reservation similar to this occur in many statutes relating to India—for instance, 19 Geo. III., c. 61, s. 6; 20 Geo. III., c. 65, s. 6; 53 Geo. III., c. 155, s. 95.



The Port and Island of Bombay, "and all *revenues*, rents, customs, incomes, and profits" arising therefrom, "and all *prerogatives, royalties, privileges*, franchises, preëminences, and hereditaments whatsoever," of the old Company, were, together with other possessions of that Company in the East Indies, and, in accordance with provisions in the Indenture Tripartite, transferred by the Indenture Quinquartite of the same date to the new Company.

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In pursuance of Godolphin's Award, the *debts* due to the old Company were by that Company assigned to the Crown, which, by Charter 8 Anne (22nd April 1709), regranted them to the new Company, and empowered it to sue for and recover them either in its own name, or in that of the Crown, and for that purpose granted to that Company "the aid and assistance" of the Court of Exchequer, and of the "officers and ministers of the said Court, and of the process thereof."

On the 7th of May in the same year, a surrender made by the old Company of its Charters to the Crown was accepted. That surrender could not extinguish or affect the rights previously acquired by the new Company from the old Company. The Charter 1 Geo. II. (17th November 1727), by way of supplement to the Charter (13 Geo. I., 24th September 1726) which first established the Mayors' Courts at Madras, Fort William, and Bombay, granted all fines, amerciaments, forfeitures, penalties, and sums of money imposed, or to be imposed, by those courts, to the United Company of Merchants trading to the East Indies, with power to "have, hold, receive, *levy, sue for, recover, and enjoy the same to the said United Company &c. and their successors, in as large and ample a manner, to all intents and purposes, as We, our heirs or successors, may, might, or could have, hold, receive, levy, sue for, recover, and enjoy the same*, if these presents had not been made, without any account, or other matter or thing, to be rendered or paid for the same." It empowered the Company to proceed for the recovery of them by action of debt in the Mayors' Courts, "or by such other suits, actions, ways, or means as may be lawfully had and prose-



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cuted in those Courts, in their corporate name, or by any other lawful ways or means, either *in the name of Us, our heirs or successors*, or of the said United Company of Merchants trading to the East Indies, or their successors, and to collect, take, seize, and levy the said fines, amerciements, &c. by the proper officers, &c. of the said United Company, &c., to the only proper use and behoof of them and their successors, without any writ, warrant, or other process out of the Exchequer of Us, our heirs or successors, or any other Court or Courts of Us, our heirs and successors, whatsoever and whensoever, to be had and obtained in that behalf, any usage or custom to the contrary thereof in any wise notwithstanding." It also directed the Mayors' Courts to pay over all such fines &c. to the Company, and declared that such payment should be as valid as if made into the Exchequer.

The second Charter of the Mayors' Courts, (26 Geo. II., 8th January 1753) repeated *verbatim* the above provisions as to fines &c. contained in the supplemental Charter of 1727.

The Charter (14 Geo. III., A. D. 1774) of the Supreme Court at Calcutta expressly reserved all amerciements, fines, ransoms, and forfeitures set or imposed by that court *to the Crown* (*vide In re Gholam Quadir* [p]). It empowered the court, however, to make reasonable satisfaction to prosecutors out of such fines.

To the United Company (which subsequently, by Stat. 3 & 4 Wm. IV., c. 85, s. 111, was styled the East India Company) the Stat. 3 Geo. II., c. 14, ss. 7, 10, and the Stats. 17 Geo. II., c. 17, s. 12, and 33 Geo. III., c. 52, s. 72, continue (*inter alia*) "the rights, remedies, methods of suit, and all penalties and forfeitures, &c." to which it or the English Company was entitled, by Acts of Parliament or Charters.

The Stat. 33 Geo. III. c. 52, s. 62 \* enacted that presents received by servants of the Crown or of the Com-

(p) 1 Taylor and Bell R. 304.

\* See also Stats. 13 Geo. III., c. 63 ss. 23, 24; 3 & 4 Wm. IV., c. 85, s. 76.



pany should be forfeited *to the Crown*, or (Sec. 36), at the discretion of the Court trying the offender, restored to the donors.

In almost the same words as those used in the Charters of the Mayors' Courts, the Charters of the Recorders' Courts at Madras and Bombay (38 Geo. III., 28th February 1798), and the Charters of the Supreme Courts at Madras (41 Geo. III., 26th December 1800) and Bombay (4 Geo. IV., 8th December 1823) contained grants of fines &c., imposed or to be imposed by those courts, *to the Company*, with power to levy, sue for, and recover the same, in as ample a manner as the Crown could, and either in the name of the Company or that of the Crown. These Charters further provided that the respective courts might make reasonable satisfaction to prosecutors of informations or indictments out of any fines imposed on persons convicted on such proceedings; and further that it should be lawful for those courts "to award and issue such process against the persons liable to the payment" of any fines, amerciaments, &c., "in order to the recovery of the same, in aid or for the use of the said Company; or otherwise, according to the circumstances, to discharge or mitigate the same, as our Court of Exchequer in England, or the Chancellor and Barons thereof, may or lawfully can do upon estreats of the Green Wax in England."

Then followed a power to those courts to award a share of any fine to a prosecutor for his expenses.

The Stat. 53 Geo. III. (1813), c. 155, s. 98, empowered the respective local governments, with the sanction of the Court of Directors and Board of Control, to impose "duties of customs and other taxes" to be levied within the towns of Calcutta and Madras, the Town and Island of Bombay and Prince of Wales's Island, and upon all persons, British-born or foreigners, resident in any country or place within the authority of those governments, respectively, and upon all goods, &c. and property whatsoever, being in any such country or place. Sec. 99 authorised those governments to

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make laws and regulations respecting such duties or taxes, and to impose fines, penalties, and forfeitures for the nonpayment of such duties or customs, or for the breach of such laws and regulations. The Supreme Courts at Fort William and Madras, the Recorder's Court at Bombay, and the Court of Judicature at Prince of Wales's Island, and all other courts within the British territories in India, were respectively directed to take notice of these laws and regulations, without being specially pleaded, and it was declared "lawful for all persons whomsoever to prefer, prosecute, and maintain in the same Supreme Court and Recorder's Court, and Court of Judicature at Prince of Wales's Island respectively, all manner of indictments, informations, and suits whatsoever for enforcing such laws and regulations, or for any matter or thing whatsoever arising out of the same; any Act, Charter, usage, or other thing to the contrary notwithstanding." (The Stat. 54 Geo. III., c. 105, declared as valid as if imposed under the Stat. 53 Geo. III., c. 155, all similar duties and customs imposed by the Governor General in Council, and Governors in Council, and all laws, &c., fines, &c., for the enforcement of those duties and customs.)

Sec. 100 of the Stat. 53 Geo. III., c. 155, authorised the Advocate General or other principal Law Officer of the Company, at the several Presidencies and at Prince of Wales's Island, "to exhibit in the Supreme Courts at Fort William and Madras, Recorder's Court at Bombay, and Court of Judicature at Prince of Wales's Island, as occasion shall require, against any person or persons whomsoever subject to the jurisdiction of the said several courts respectively, any information or informations for any breach or breaches of the revenue laws or regulations of any of the said Governments, or for any fine, &c., penalty, &c., forfeiture, &c., *debt or debts*, or sum of money or sums of money, committed, incurred, or due by any such person or persons in respect of any suit, law, or regulation, and such proceedings shall be had and taken upon every such information as may lawfully be had or taken in case of an information filed by His Majesty's Attorney General in the *Court of Exchequer* in England for



any offence committed against the revenue laws of England, or for any fine, penalty, forfeiture, *debt*, or sum of money due in respect thereof, so far as the circumstances of the case, and the course and practice of proceeding in the said courts respectively, will admit; and all fines, penalties, forfeitures, *debts*, and sums of money, recovered or levied under or by virtue of any such information, so to be exhibited as aforesaid, shall belong to the said United Company, and the same, or the proceeds thereof, shall be carried in their books of account to the credit of the territorial revenues of the said Company."

In applying the provision in the Charter of the Recorder's Court, created in 1798, and in the Charter of the Supreme Court, created in 1823, that those courts "should not have or exercise any jurisdiction, in any matter concerning the revenue *under the management of the Governor and Council*, either within or beyond the limits of the Town and Island of Bombay," &c., it would have been proper to consider how far that provision was controlled by the Stat. 53 Geo. III., c. 155 (r), and also by the provisions in those same Charters relating to the recovery of fines, amerciaments, &c., to which reference has already been made, and by Reg. XIX. of 1827, Sec. 5, which empowered the Advocate General to sue for certain forfeitures (s).

The 111th section of the same statute (53 Geo. III., c. 155) is as follows:—

"And whereas doubts have arisen whether the Advocate General, or other Principal Law Officer of the said Company, at any of the said Company's Presidencies, is by law authorised to exhibit to the respective Courts of Judicature at any of the said Presidencies, for and on behalf of His Majesty, informations in the nature of actions at law, or bills in equity, for or in respect of any *cause or causes of action, debts, dues, demands, accounts, reckonings, sum or sums*

(r) Secs. 98, 99, 100, above mentioned.

(s) Quit-rent payable in Bombay to the Company has been held to be revenue under the management of the Governor and Council, and, therefore, within the prohibitory clause in the Charter of the Supreme Court: *Spooher v. Juddow*, 4 Moo. Ind App. 353.—[Ed.]

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of money, stores, goods, chattels, or any other matter, cause, or thing whatsoever, which may have arisen or accrued, or which may arise or accrue to His Majesty; for remedy thereof, be it further enacted, that it shall and may be lawful to and for the Advocate General, or other principal Law Officer of the said Company for the time being, at each of the said Company's Presidencies respectively, for and on behalf of His Majesty, his heirs and successors, to exhibit to the respective Supreme Courts of Judicature at the said Company's Presidencies of Fort William and Madras, or to the Recorder's Court at Bombay, or the Court of Judicature at Prince of Wales's Island, any information or informations in the nature of an action or actions at law, or of a bill or bills in equity, as occasion shall require, against any person or persons residing within, or being amenable to, the jurisdiction of the said courts respectively, for or in respect of any cause or causes of action, debts, dues, demands, accounts, reckonings, sum or sums of money, stores, goods, chattels, or any other matter, cause, or thing whatsoever, as fully and effectually to all intents and purposes, as His Majesty's Attorney General for the time being is by law authorised to exhibit any such information or informations in any of His Majesty's Courts of Law or Equity in this realm; and that thereupon, such proceedings shall be had; as far as the circumstances of the case, and the course and practice of the said Courts of Judicature at the said several Presidencies will admit, as are had upon any such informations exhibited by His Majesty's Attorney General in any of His Majesty's Courts of Law or Equity in this realm (t).

That section, it will be perceived, is of very great importance as to the remedies of the Crown for debts due to it, and for its other rights or claims.

(t) *The Attorney General v. Brodie*, 4 Moo. Ind. App. 190; *The Advocate General v. Amerchund*, 1 Knapp P. C. C. 329 n; *The Advocate General v. Richmond*, Perry's Or. Ca. 566; *The Advocate General v. Damother*, *ibid.* 526; *The Wardens of Nossa Senhora v. Bishop Hartmann*, *ibid.* 433; *The Advocate General v. Raneé Surnomoye Dossee*, 9 Moo. Ind. App. 387; *The Advocate General v. Visvanath Atmaram*, Supreme Court, Bombay, June 12, 1855, are cases illustrative of the application of this section.—[ED.]



The Charter of the Supreme Court (*u*), in that part of it relating to Civil causes, and after providing for suits against the Company, contained this passage :—“ And the said Company may also sue in the said Supreme Court of Judicature at Bombay, in the same manner and to the same effect as any other persons within the jurisdiction thereof can or may do ; and, if judgment shall be given against the said Company, the said Court of Judicature may order reasonable costs to be paid by them to the defendant.” The Recorder’s Court Charter contained a similar provision.

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The 8th section of the Indian Insolvent Debtors’ Act of 1828 (Stat. 9 Geo. IV.), c. 73, provided “ that *no debt due to our Sovereign Lord the King*, nor any fine, penalty, or forfeiture whatsoever, nor any recognizance whereby a debt is acknowledged to the King, or forfeiture, nor any estreat, shall be deemed or taken to be such a debt or debts as to entitle any person or persons to petition as is before mentioned, nor shall any person be entitled to receive any dividend for the same under this Act, nor shall any such fines, penalties, forfeitures, recognisances, *debts*, or estreats be in any way discharged or affected by any thing done under this Act, otherwise than they might and would have been discharged or affected if this Act had not been passed.” The 62nd section of the Indian Insolvent Debtors’ Act of 1848 ((Stat. 11 & 12 Vict., c. 21) is in precisely the same terms.

The Stat. 3 & 4 Wm. IV., c. 85, s. 1, enacted that, with the exception of St. Helena, all of the territories of the Company, including the Port and Island of Bombay, and all their “ lands, hereditaments, revenues, rents, and profits,” &c., “ chattels, moneys, debts, and real and personal estate whatever ” (subject to the debts and liabilities affecting the same) (*v*), “ and the benefit of all contracts,” &c., and “ all rights to fines, penalties, and forfeitures, and other emoluments whatsoever,” should remain and be vested in the Company “ in trust for His Majesty, his heirs and successors,

(*u*) Para. XL., 2 Morley Dig. 663.

(*v*) See Secs. 10, 17.



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for the service of the Government of India, discharged of all claims of the Company to any profit or advantage therefrom to their own use, except the dividend on their capital stock." That arrangement was continued (*w*) by the Stat. 16 & 17 Vict., c. 95. By the 7th section, all fines and penalties, incurred by the sentence of any Court of Justice within those territories and forfeitures, escheats, and lapses of real and personal estate for want of an heir or successor, and *bona vacantia*, were declared to belong to the East India Company in trust for Her Majesty for the service of the Government of India, with certain powers of the Governor General in Council over the same, which it is unnecessary now to state.

The Stat. 21 & 22 Vict., c. 106 (1858), which (Sec. 1) terminated the rule of the Company, by Sec. 2 enacted that "India shall be governed by and in the name of Her Majesty, and all rights, which might have been exercised by the said Company, if this Act had not been passed, shall and may be exercised by and in the name of Her Majesty as rights incidental to the Government of India, and all the territorial and *other revenues of or arising in India*, and all tributes and other payments in respect of any territories which would have been receivable by or in the name of the said Company if this Act had not been passed, *shall be received for and in the name of Her Majesty*, and shall be applied and disposed of for the purposes of the Government of India alone, subject to the provisions of this Act."

The 39th section enacted that "all lands, &c., moneys, &c., and other real and personal estate" of the Company, "subject to the debts and liabilities affecting the same," and "the benefit of all contracts, &c., and all rights to fines, penalties, and forfeitures, and all other emoluments, which the said Company shall be seised or possessed of, or entitled to," at the time of the commencement of that Act, "except the capital stock of the said Company and the dividend thereon, should become vested in Her Majesty, to be applied and disposed of, subject to the provisions of that Act, for the purposes of the Government of India.

(*w*) Sec. 1



The same Act (*x*) conferred upon the Secretary of State in Council for India the general control over the expenditure of its revenues. It directed certain accounts to be opened in his name (*y*), empowered him to borrow (*z*), and to "sue and be sued, as well in India as in England, by the name of the Secretary of State in Council as a body corporate," and gave the same suits, remedies, &c. against him as might have been had against the Company, and enacted that the property and effects by that Act "vested in Her Majesty for the purposes of the Government of India, or acquired for the said purposes, shall be subject and liable to the same payments and executions as they would, while vested in the said Company, have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company" (*a*). The 66th section rendered contracts, &c. of the Company enforceable against the Secretary of State in Council.

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The 68th section is important: it provided that neither the Secretary of State, nor any member of the Council, shall be personally liable in respect of any such contract &c. of the Company, or in respect of any contract entered into under the authority of this Act, or other liability of the Secretary of State in Council in their official capacity; but all such liabilities, and all costs and damages in respect thereof, shall be satisfied and paid out of the revenues of India.

We are acquainted with the decision of the Supreme Court at Calcutta in *The Peninsular and Oriental Steam Navigation Company v. The Secretary of State*,\* upon a case sent up in 1861 from the Calcutta Court of Small Causes. The Supreme Court there held that an action lay against the Secretary of State in Council of India, in respect of damages sustained by the plaintiffs in consequence of the negligence of the workmen employed by Government in one of its dockyards. The Court was of opinion that the East India Company would have been liable to such an action, and that

(*x*) Sec. 41.      (*y*) Secs. 43, 44, 45.      (*z*) Sec. 49.  
 (*a*) Sec. 65.      \* Appendix A.



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the words "liabilities incurred" in the Stat. 21 & 22 Vict., c. 106, ss. 42 and 65, are applicable as well to liability arising out of a wrongful act (b), as to liability under a contract, and that, therefore, the action would lie against the Secretary of State in Council of India, and the damages would be payable out of the revenues of India. That decision, however, does not seem to us to affect the question in the present case.

The Stat. 22 & 23 Vict., c. 41 (1859), *inter alia*, authorised the Governor General in Council and the Local Governments of Bombay, Madras, and the North-Western Provinces, in the name of the Secretary of State in Council, to sell real and personal estate in India vested in Her Majesty under the Stat. 21 & 22 Vict., c. 106, and to purchase land, &c. and other property, and to enter into any contracts whatsoever, for the purposes of that Act, and enacted that all property so acquired shall vest in Her Majesty for the service of the Government of India. It declared that neither the Secretary of State nor any member of the Council shall be personally liable in respect to such sales, purchases, or contracts, and that all liabilities, costs, and damages in respect thereof shall be satisfied and paid out of the revenues of India. Lastly, it declared that "all actions, suits, and proceedings in respect of any of the matters aforesaid shall and may be carried on, prosecuted, or defended in the name of the Secretary of State for India in Council."

The statutes and charters, which have been referred to, show that the right of the Crown to proceed in the Records' and Supreme Courts in India as in the Exchequer, or as nearly thereto as may be, has been recognised, and that in many cases the same privilege has been granted to the Company.

We next proceed to consider whether in England, if a judgment be recovered in the name and at the suit of a subject, but the Crown be entitled to the actual benefit of it, the

(b) *Vide Dhakji Dadaji v. The E. I. Company*, Perry's Or. Ca. 343.



Crown can successfully maintain a right to have that judgment satisfied in priority to the claims of ordinary creditors.

It is deserving of remark, that there are several cases in which it has been laid down, that although the Crown be the nominal party to whom a recognisance has been acknowledged, yet, if the recognisance be really for the benefit of a subject, and not for that of the Crown, such recognisance is not entitled to prerogative privileges. In *ex parte Usher (c)*, which was the case of a recognisance by a guardian in the matter of a minor, Lord *Manners* said: "It certainly does not appear to me to be a debt due to the Crown, nor such as to warrant a Baron of the Exchequer to grant a fiat for the purpose of an extent issuing; for it is not a public debt, in which case alone the Crown process issues. *And I think that the form of the security does not alter the nature of the debt in this respect.*" The same principle was acted upon by Sir *M. O'Loghlen*, M. R. in Ireland, in *Keily v. Murphy (d)*, which was the case of the recognisance of a tenant under the Court of Chancery. He declined to allow costs in addition to the sum secured by the judgment, as the debt was not, in his opinion, one really due to the Crown. The Master of the Rolls mentioned several cases, both in England and Ireland, which supported his view. He acted on the same principle subsequently in *Creed v. Creed (e)*. In *Reg. v. Bayley (f)*, where Sir *E. Sugden* held that one of the Irish Limitation Acts, 8 Geo. I., c. 4, does not bar the remedy on a Receiver's recognisance, he mentions, but does not dispute the authority of, those cases.

The question asked in those cases was not, "In whose name is the debt standing on record"? but "Does the debt, when recovered, fall into the coffers of the State?" We shall presently again advert to those cases.

There can be little doubt that the rule of the Roman Law,

(c) 1 Ball & Beatty 199; *Re Dalton*, 2 Molloy 442, is to the same effect.

(d) S. & Sc. 479.

(e) 4 Ir. Eq. R. 299.

(f) 1 Drury & War. 213 S. C., 4 Ir. Eq. 142.

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already referred to, has been the parent of the maxim of English law: *Quando jus domini regis et subditi concurrunt, jus regis præferri debet* (g).

Parker, C. B., in *Rex v. Curtis* (h), says: "By the Common law the King has a prerogative of preference in payment to all his subjects, and to be first satisfied; the reason of it is given in *Sir William Herbert's Case* (i): *Quia thesaurus regis est pacis vinculum et bellorum nervi*. This preference which the King had by the Common law was the foundation of Magna Charta, c. 18, which was only declaratory of the Common law. And that this was the King's prerogative by the Common law, and that process issued out of this court (Exchequer) to enforce it, appears by Madox's History of the Exchequer from fol. 662 to fol. 667."

In his *Commentary on Littleton* (j), Lord Coke puts it thus: "The King, by his prerogative, regularly is to be preferred, in payment of his duty or debt, before any subject, although the King's debt or duty be the latter; and the reason hereof is: for that *thesaurus regis est fundamentum belli et firmamentum pacis*." The principle seems to be *de tur digniori*, and is more or less recognised by the laws of many countries as applicable to the claims of the Sovereign or the State; e. g., France (k), Spain (l), America (m), and Scotland (n).

That principle is no novelty in India. At an early date we find it promulgated by Hindú jurists. Yājñavalkya says: "A debtor shall be forced to pay his creditors in the order in which the debts were contracted, after first dis-

(g) Broom 66, 3rd Ed.

(h) Parker R. 95, 100.

(i) 2 Rep. 12 b.; et vide 2 Inst. 18, 19; Com. Dig., Tit. Debt, G 8; Tit. Execution, B 3.

(j) 131 b.

(k) Code Civil, Art. 2098; *Ibid.*, note 1, 17th Ed. by Tripiet, p. 275.

(l) *Institutes of the Civil Law of Spain* by Del Rio and Rodriguez, 6th ed., translated by Johnston, London, 1825, Bk. II., Tit. VII., p. 157; Tit. XI., pp. 194, 197; Bk. III., Tit. XI., p. 351. The dwelling-houses, arms, and horses of knights (caballeros) and noblemen (hijosdalgo) are exempt from seizure, except for Crown debts: *Ibid.*, p. 356.

(m) 1 Kent Comm. 262-269; 2 *Ibid.* 552, 558, 10th ed.

(n) 1 Bell Comm. 620, 621, 6th ed.



charging those of a priest or the King." Kátyáyana says: "If there be many debts at once, that which was first contracted shall be first paid, after those of a King or of a priest learned in the Veda" (o). The term "King" is by the commentator Jaganátha Tercapanchána, extended to the whole military (Cshatriya) class, to which class, he seems to think, a Bráhmaṇ would, as *dignior*, be preferred in the payment of debts (p). Hindú Law regards land revenue as the paramount charge on the land, and if the subject do not pay it, the King may grant the land to another (q). Muhammadan sovereigns were not prone to waive or abandon such royal prerogative as they found existing in India. The British rulers of India have recognised the precedence of the State. In the Mofussil of this Presidency, and in the Island of Bombay, land revenue, by express legislation, is declared to be prior to any other claim on the land: Bombay Reg. IV. of 1827, Sec. LXIX., Cl. 2; Reg. XVII. of 1827, Sec. v., Cl. 3 (qualified by Sec. 13), and Sec. 12; Reg. XIX. of 1827, Secs. 3 and 4 (that Regulation was confirmed by Act VII. of 1836). The purchaser at a sale for arrears of revenue in Bengal acquires the land free of all incumbrances created since the settlement of revenue with the defaulting tenant: Act I. of 1845, Sec. 26 (r). Where lands in the Bengal Mofussil, after seizure by the Sheriff under an ordinary execution, were sold by the Collector for arrears of Government revenue, the surplus proceeds only were held liable to satisfy the debt due to the execution creditor: *Khisticoomar Moitre v. Issenchunder*

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(o) Vyavahára Mayúkha, Ch. V., s. iv., pl. 9. The rule *Nullum tempus occurrit regi* is also to be found in the Hindú Law; *ibid.*, Ch. II., s. II., p. 7.

(p) 1 Dig. trans. Colebrook, Bk. I., ch. i., pl. cclxxviii., cclxxix.

(q) *Ibid.*, Bk. II., ch. II., plac. xii. comm. *et seq.* See, as to revenue, Manu, trans. Sir W. Jones, Ch. VII., pl. 130—132; Ch. X., pl. 118; Elph. Hist. Ind., 4th Ed., pp. 72, 73; and his Report on the Territories conquered from the Peishwa, pp. 17, 27, Bombay reprint in 1838; 1 Grant Duff Hist. Mahrattas, pp. 26, 27, 326, 407; *ibid.*, Vol. II., p. 170; 1 Mill Hist. Ind., Bk. II., ch. v., pp. 224, 225, 5th Ed. As to land revenue (pension and tax) in the Island of Bombay, see 4 Bom. H. C. Rep., O.C.J. pp. 1, 39, 40, *et seq.*, 82—86; Morley Dig. Vol. I., p. 559, Tit. Revenue, pl. 2.

(r) And see Bengal Regs. I. and XIV. and XLIV. of 1793; II. of 1793, Sec. 37; Reg. XLVII. of 1803, Sec. 5; Reg. V. of 1812.



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*Moostofee (s)*. In his judgment in that case, *Peel*, C.J., says : "Now the prior right of the Government did not abrogate wholly that of the Sheriff and creditor. It took precedence in like manner, as the concurrent claim of the Crown under its process defeats or postpones the execution of the subject whilst it is incomplete, that is, till completed by sale;" and again (*t*): "the surplus in the hands of the Collectors was still subject (the claims of the Government being satisfied) to the still existing and unsurrendered rights of the creditor, there having been no abandonment of the execution." Act XII. of 1850, Secs. 4 and 5, gave the same remedy against defaulting public accountants throughout India, as exists for the recovery of land revenue,—a remedy closely akin to an immediate extent.

In England the right of the Crown to precedence does not arise out of any peculiar quality in the writ of extent. The reasoning of Lord Coke and Chief Baron Parker, it has been seen, rests on a broader foundation, namely, that the destination of the debt, when recovered, is the State treasury. Accordingly, we find that the Crown enjoys the same preference in the administration of assets: 2 Wms. on Exors., 4th Ed., 850 to 852; 3 Bac. Ab., Tit. Exors. and Admors., L 2; 2 Inst. 32.

It would seem reasonable that the converse of the rule in *Ex parte Usher (u)*, and the cases of that class already cited, should prevail, and, consequently, that if the debt, though nominally due to a subject, really belong to the Queen, and, therefore, be destined to fall into the public treasury, that debt should be entitled to prerogative privilege. We asked for authority on that point, but none was cited. Nevertheless the books are not destitute of examples.

Admitting the general rule, that execution ought to be sued out by him who is party to or privy to the record, and that a *scire facias* does not lie upon a judgment, when there wants privy (Com. Dig., Tit. Execution, E, and Tit. Pleader 3, L 7), we proceed to refer to *Beverley's Case* first:

(s) 3 Taylor & Bell 99, 100 (1853). (t) *Ibid.* 101. (u) *Ubi supra.*



In Michaelmas 29 Eliz., Thomas Beverley (*v*) recovered in *quare impedit*, and before he had execution he was outlawed; whereupon the Queen brought her writ of *scire facias*, in virtue of the outlawry, for execution of the judgment. Walmesley, Serjeant, argued strongly that the writ could not lie, because, amongst other reasons, there was no privity in the Queen to sue out execution. *Sed tota curia contra eum*, and they said that the Queen in the case aforesaid had sufficient privity to sue execution, because the *chose*, which had been in the plaintiff, Beverley, was then vested in the Queen. To the same effect is Bac. Ab., Title Scire Facias, B; Title Outlawry, D 3 (4).

In Noone's case (*w*) an action of debt was brought in London against one as an executor, and, on plea of *plene administravit*, judgment was given for the plaintiff, who assigned the same to the Queen, whereupon a *scire facias* issued out of the Exchequer against the defendant into the county Dorset. The Sheriff returned *nulla bona*, &c., which *scire facias* was upon a *constat* of goods in another county. It was agreed by all the Barons that the debt was well assigned to the Queen, and also that the *scire facias* might issue forth of another court than where the record of the judgment remained. Citing that case, *Comyn*, C. B. (Dig., Tit. Pleader 3, L 3, *Scire facias upon judgment*), says: "If a debt, after recovery in B, is assigned to the King, a *scire facias* may issue out of the Exchequer."

At page 11, pl. xxviii. of Savile, the right of the Queen to proceed on a debt assigned to her is thus recognised:—"If J. S. be indebted to J. D., who is in debt to the Queen, and make over the bond of J. S. to the Queen, process shall be awarded to inquire what goods and chattels J. S. had at the time of the assignment, and not at the time of the making of the bond."

(*v*) Sir F. Moore, p. 241, pl. 378. Beverley's outlawry was afterwards reversed: *Ibid.*, p. 249, pl. 421; but that does not affect the law as laid down in this case.

(*w*) 2 Leonard 67, Trin. 31 Eliz.; Com. Dig., Tit. Assignment D; and see *York v. Allen*, Savile, p. 133, pl. cex. Pasch. 36 Eliz. in the Exchequer.

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In *Beaumont's Case* (x) it was held by the Exchequer that the Queen might have a *scire facias* upon a bond conditioned for the performance of covenants, which bond was assigned to her by the obligee, *who was her debtor*. The cases of *Breadman v. Coles* (y), and *The Attorney General v. Poultney* (z), show the validity of such assignments, notwithstanding the Stat. 7 Jac. I., c. 15.

In the course of his able judgment in *Cawthorne v. Campbell* (a), Eyre, C.B., says: "We held, upon very solemn argument, not a great while ago, that the King's moiety recovered in, I believe, a popular action, as soon as it was fixed and vested by judgment, became a regular debt to the Crown, and was within the Act of Harry the Eighth, which entitles the Crown to be preferred in its execution as for a debt; so that the Crown's interest in the subject is very distinctly marked and affirmed."

That case mentioned by Eyre, C.B., is the strongest of all of the decisions which we have been able to discover in favour of the Secretary of State. The action was a *qui tam* popular action brought by an informer. By him the judgment was obtained. There was not any assignment to the Crown, and the mere fact that the Crown was beneficially entitled to the moiety of the penalty recovered by the judgment, was held to give precedence in its execution to the Crown.

Those cases, such as *Cawthorne v. Campbell* (b), *The Attorney General v. Hallett* (c), *The Attorney General v. Kingston* (d), *Adams v. Fremantle* (e), *Lamb v. Gunman* (f), in which the Court of Exchequer has removed from other courts into the Exchequer, suits or proceedings in which the profit of the Crown came in question, show that the Exchequer sets no importance upon the question whether the Crown was actually a party to the suit or other proceeding, and considers only whether the Crown is interested.

(x) 2 Leonard 55, Trin. 29 Eliz. (y) Hobart 253.

(z) Hardress 403.

(a) 1 Anst., p. 221.

(b) 1 Anst., p. 205.

(c) 15 M. & W. 97.

(d) 8 M. & W. 263.

(e) 2 Exch. 453.

(f) Parker 143.



On the same principle, that court, in *Ex parte Durrand (g)*, held that it might entertain an application to control the conduct of the Commissioners for auditing public accounts, with respect to a contract entered into by Durrand with the Lords of the Treasury.

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The test adopted by Lord *Manners* in *Ex parte Usher (h)*, we think, affords a safe guide in the present case, which is the converse of that case. The question with him was, does the money go into the State Treasury? That principle does not seem to be in conflict with any of the authorities, but appears to have been acted upon in several of them, especially in the instance mentioned by *Eyre, C.B.*, in *Cawthorne v. Campbell*. The Secretary of State (who is very much in the same position as the public officer of a joint stock company, through whom the company may sue and be sued, but is himself uninterested), we have seen, takes by the statutes no beneficial interest whatsoever in the money to arise from the judgment. It is indeed an item of casual revenue only, but, for that, just as much as for an article of regular revenue, *Eyre, C.B.*, held, in *Cawthorne v. Campbell*, that the King was entitled to assert his prerogative to have the case moved into and determined in the Exchequer.

The East India Company, at all events down to the passing of the Act 3 & 4 Wm. IV., c. 85, were beneficially interested in the revenues of India, and, even after the passing of that statute, and down to the close of their career as a governing power, in 1858, continued so interested to the extent of the dividends on their capital stock; yet we have shown that, with respect to many items of their revenue, they were entitled to the same advantages of suit as the Crown. The Secretary of State in Council has no interest whatever in the revenue of India. Whatever rights the Crown had to any portion of Indian revenue before 1858, it still has. Further, Sec. 2 of the statute of that year (21 & 22 Vict., c. 106)

(g) 3 Anst. 743.

(h) *Ubi suprâ*. And see the observations of Lord Campbell in *Spooner v. Juddow*, 4 Moo. Ind. App. 379, as to quit-rent going into the Treasury of the East India Company.



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vested in the Crown all the territorial and other revenues of or arising in India, and directed that all of those revenues should be received not only for, but in the name of, Her Majesty.

The judgment debt in this case seems to us to fall within the words "other revenues of or arising in India;" and in receiving the same the Secretary of State must, in obedience to that enactment, do so both for and in the name of Her Majesty. Were we to hold that this judgment debt is not a debt due to the Crown, we could only do so upon grounds highly technical, and upon no satisfactory principle whatsoever, and, as we think, in contravention of the Imperial Statute of 1858. The outlawry or assignment of a judgment creditor will, we have seen, so vest the judgment debt in the Crown as to entitle it to priority of execution. We cannot attribute a less effect to the statute. The property in this debt is, under that statute, vested in the Queen. The Secretary of State in Council cannot, to use the most carefully measured language, be regarded as having even so much of property in that debt as the informer, who was the plaintiff in the *qui tam* action mentioned by *Eyre*, C.B., had vested in him in the King's moiety of the penalty, the subject of that action. The Secretary of State in Council has merely a power or capacity to sue and be sued, but has no property in this or any other item, casual or regular, of the revenue of India.

For these reasons, we feel bound to decide, although in this particular instance with some reluctance, in favour of the priority of the Crown as represented by the Secretary of State in Council for India. In consequence of the opposite opinion arrived at by the eminent and learned Judge, from whose decision this appeal has been brought, we have thought it our duty thus fully to give the grounds of our judgment.

We reverse the orders of the learned Judge so far as they affect the claim of the appellant, and we direct that the judgment debt, in Suit No. 631 of 1867, be paid, out of the



assets of the Bombay Landing and Shipping Company, Limited, before any distribution is made amongst the other creditors of the company. We give no costs of this appeal.

Attorney for the appellants: *R. V. Hearn* (Government Solicitor).

Attorneys for the respondent: *Acland Prentis, & Bishop*.

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*In re* MANCHARJI HIRJI READYMONEY.

Jan. 31.

*Insolvent—Detaining Creditor—Imprisonment—Execution—Indian  
 Insolvent Debtors' Act.*

Where, under Sec. 51 of the Insolvent Debtors' Act (11 and 12 Vict., c. 21), it has been adjudged that an insolvent shall be forthwith discharged from all his debts, &c. except as to certain specified debts, and as to these that he shall be discharged so soon as he shall have been in custody, *at the suit* of the person or persons who shall be creditor or creditors for the same respectively, for such period as the Court shall direct.

Such an order of adjudication does not in itself operate as an order for the imprisonment of the insolvent, but the detaining creditor, if he wishes to arrest or detain the insolvent for such period, must (if he have not already done so) place himself in a position to issue execution against the insolvent.

MANCHARJI HIRJI READYMONEY was brought up in the custody of the Marshal of the County Gaol, under a writ of *habeas corpus* dated the 30th of January 1868.

*The Clerk of the Crown (J. Marriott)* read a warrant, dated the 30th of November 1867, under which the prisoner had been imprisoned in the County Gaol on the criminal side for two calendar months, for an offence under Sec. 50 of the Insolvent Debtors' Act.

He also read an order of the same date made by Tucker, J., sitting as Commissioner in Insolvency, whereby he directed that the said Mancharji Hirji Readymoney should be discharged forthwith as to all the debts and liabilities mentioned in his schedule, save as to the debt due to H. and A. Berens; and as to that debt, that he should be discharged so soon as he should have been in custody for six calendar months in the County Gaol, on the Civil Side, at the suit of