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upon, with liberty to receive such new allegations and evidence as the occasion may require.

It was therefore ordered and adjudged, that the cause be remitted back to the Court of Session in Scotland, to hear parties further thereupon, with liberty to receive such new allegations and evidence as the occasion may require.

For the Appellants, *Alex. Wight; Wm. Adam.*

For the Respondents, *Ilay Campbell, R. Dundas.*

THE GOVERNOR and COMPANY of the BANK	}	<i>Appellants;</i>
of ENGLAND, - - -		
WILLIAM PULTENEY, Esq. - - -		<i>Respondent.</i>

House of Lords, 14th December 1787.

HERITABLE SECURITY—RANKING—INDEFINITE PAYMENTS—ASSIGNATION.—A creditor held an heritable security for repayment of his advances, to the extent of £12000. He also held an adjudication debt against the same debtors, for a bank debt paid by him for them, which was not included in the heritable bond. On the bankruptcy of the debtors, and ranking and sale of their estate, Held, that he was entitled to impute indefinite payments made to him to his least secured debt, so as to make the heritable bond cover the whole debts due to him within the amount of that security; and, therefore, that he was preferable, both for the balance due on the bond debt, as well as for the adjudication debt. In this last debt, another party was bound as co-surety. Held, that on payment, he was not bound to grant the creditors an assignation to his claim.

Robert and William Alexander, late merchants in Edinburgh, having become bankrupt, an action was commenced in the Court of Session, for the purpose of ranking their creditors upon the price of their estates, which were brought to judicial sale.

Among the creditors appeared the respondent, who claimed, in virtue of an heritable security, a preference on the estate of Cluny, situated in the county of Fife, for a debt of £12,000, or, at least, for the balance remaining due by the bankrupts.

The debt was contracted in the year 1769, by Mr. Pulteney accepting bills drawn upon him by the bankrupts for the following sums:—

21st Dec. 1769.—£1500, payable to J. Campbell, Esq. of the Royal Bank of Scotland, six months after date.

21st Dec. 1769.—£1500, payable to the said John Campbell, nine months after date.

29th Dec. 1769.—£1500, payable to the said J. Campbell, six months after date.

29th Dec. 1769.—£1500, payable to the said J. Campbell, nine months after date.

30th Dec. 1769.—£6000, payable to the bankrupts themselves, and endorsed by them to James Spence, Treasurer of the Bank of Scotland, six months after date.

In security of these bills, amounting in whole to £12000, the bankrupts granted an heritable bond, which specially recited the bills above mentioned, and then followed this personal obligation, “ And whereas the said Wm. Pulteney, “ Esq., at adhibiting his acceptance to the said five bills, had “ no value in his hands belonging to us thē said Robert and “ William Alexander, or belonging to the Company now “ carried on by us, under the firm of William Alexander and “ Sons ; but did the same at our desire, and for our use, upon “ condition of our granting him the security underwritten. “ Therefore wit ye us, the said Robert and William Alexan- “ der, to be bound, as we hereby bind and oblige ourselves, “ our heirs and executors, to content and pay to the said “ William Pulteney, Esq., his heirs and assignees, the fore- “ said sum of £12000, in the months and at the terms after- “ mentioned, viz. the sum of £1500 upon the said 21st day “ of June next, to the end that he may apply the same for “ retiring the bill first above narrated. Item, the sum of “ £1500, upon the said 21st September next, to the end “ that he may apply the same for retiring the second bill “ above narrated.” And so on, thus enumerating the whole bills.

The bankrupts, by the said heritable bond, having bound themselves to infest and seize Mr. Pulteney in the estate of Cluny in security and payment; he was infest, and the infestment duly recorded.

Jan. 20, 1770.

The repondent likewise produced in the ranking an adjudication for payment and relief of certain other debts in which he stood concerned with Messrs. Alexander, one of these a debt of £3009, due to the Royal Bank of Scotland, for which the respondent had become bound as security in 1772.

The appellants had an heritable security granted to them over the estates of Cluny, for a debt due to them, of date subsequent to the above bond, granted to Mr. Pulteney, and

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were thus interested in seeing that no more was ranked for on that estate than was due on the respondent's bond.

The claim lodged for the respondent claimed the balance due on the heritable bond debt, amounting to £6000, all the other bills under the heritable bond having been paid.

To these claims, so far as the respondent's heritable bond was concerned, the appellants and other creditors objected, stating, that the bond had been granted for the respondent's relief of five acceptances, therein particularly mentioned, so in a settlement of accounts, which took place between him and Messrs. Alexander, in April 1775, it was admitted, that these five acceptances had been retired by Messrs. Alexander, and three of them, including the one for £6000, had been delivered up by the respondent for cancellation. And, therefore, that the heritable security was extinguished, the debt being paid. The respondent answered, That although the five bills were nominally retired by Messrs. Alexander, yet they had been truly and substantially paid by his, the respondent's money, or by his granting new acceptances, which came in the place of the original ones; and, in particular, he endeavoured to show, from written evidence produced, that this was the case with respect to the acceptance of £6000.

July 18, 1780. The Lord Ordinary found sufficient evidence that the bill for £6000 sterling, was afterwards retired and paid by Mr. Pulteney, and therefore found that the bond and infertment are still in his person a subsisting security for relief and repayment of the contents of the said bill, at least, to the extent of the balance truly due, by Mr. Alexander to him, upon a fair accounting. This case was appealed to your Lordships, but affirmed.

The respondent then urged that his adjudication debt for £3009 was also entitled to be included under the heritable bond, so as to give it a preference over sums due to other creditors.

To this it was objected, that although the respondent might have a good claim to be relieved of the £3009, for which he stood bound, yet, as this claim had no connection with his heritable security, and did not exist till some years after the date of that security, he could only be ranked thereon as a common personal creditor.

July 14, 1783. The Lord Ordinary, of this date, found, " That Mr. Pulteney is entitled to be ranked for payment of the sums due by Messrs. Alexander to the Royal Bank, for so far as he has paid the same, and for relief thereof, so far as still

“ unpaid, and shall not be drawn by the Royal Bank as cre-
 “ ditors, producing an interest in this ranking, and finds,
 “ that the heritable bond will extend to his claim, for pay-
 “ ment and relief of this engagement to the Royal Bank ;
 “ and that to the extent of the £6000 already sustained by
 “ the Court, and interest, without prejudice to Mr. Pulteney,
 “ to show that the bills for the remaining £6000 contained
 “ in the heritable bond were retired by him or his effects.”

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In a representation, it was stated, that in the debt to the bank, a Mr. Aitchison was interested as a co-obligant, and the question was urged, how far the respondent was not, at least, bound to grant an assignation to the postponed creditors.

The Lord Ordinary, (4th Dec. 1784), “ In respect Mr. Pulteney is claiming to be ranked on the funds of the principal debtor, finds, that he is not obliged to grant any conveyance to the creditors at drawing his payment.”

In a reclaiming petition, it was contended, that Mr. Pulteney could not apply the sums paid him towards special debts, namely, the bills, so as to make the heritable bond available for more than was due by it, but was bound to apply those payments to the special debts for which they were paid. The respondent answered, That he was entitled to apply any money he had received from Messrs. Alexander, in the course of their various transactions, to that debt which was least secured ; and to keep up his heritable security to the amount of the balance due to him. That this had been settled by the former judgment ; and, finally, That he was not bound to grant any assignation to the appellants for whatever sum may be recovered on that bank debt, out of his co-obligant’s estate, who was only a co-cautioner and surety.

The Lords adhered to the interlocutor of the Lord Ordinary reclaimed against. Mar. 4, 1785.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—The debt due to the Royal Bank of Scotland, originally constituted by a bond for £5000, by Messrs. Alexander and John Aitchison, and for which, the respondent and Alexander John Alexander of Grenada, gave a corroborative security in July 1772, has no connection whatever with the bills, for relief whereof the heritable bond was given. It was not even brought to the credit of the respondent, in the account fitted between them in April 1775, he cannot therefore extend his heritable bond, so as to make it cover that debt, but must rank for it as a personal creditor.

Supposing the respondent entitled to hold the debt in

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question, as covered by the heritable security, he ought to be ordained to assign his claim against Mr. Aitchison's representatives, who are quite able to pay, and ready to meet the demand, so as the other creditors may derive the benefit of this claim.

The respondent founds on the rule of law, that every creditor is entitled to apply indefinite payments in extinction or relief of the debt least secured. But, admitting the rule of law, still it will not avail him in the present question, because, in cases of bankruptcy, matters must be taken as they stood at the time of the bankruptcy; and, in this case, it will be admitted by the respondent, that at *that time* he had not made any payment to the Royal Bank, on account of this debt of the Alexanders. He was indeed bound for the debt, but he could not become creditor to Messrs. Alexander, until he was compelled to pay it. The debt, therefore, did not exist at the time when the supposed indefinite payments were made by Messrs. Alexander to the respondent, and, of course, these payments could not be applied to that debt. Because the payments to the respondent were all made prior to the account fitted in April 1775, and must therefore be applied to the debts stated as due to the respondent on that account. By that account there is a balance struck of £4012. 11s. 7d. due to the respondent, which, by a subsequent account, likewise fitted and signed, but bearing no date, is extended to £5425. 2s. 6½d., subject, however, to contingent deductions. These accounts conclusively show, that the payments cannot and were not taken and deemed as indefinite payments.

Pleaded for the Respondent.—1. Whether the respondent shall be entitled to include in his account the debt due to the bank, the whole of which is now paid, is already determined by your Lordships, by the affirmance on appeal, of the interlocutor first above mentioned (18 July 1780). It is evident that where the question was, Whether the heritable bond should stand as a security to the respondent for the balance of his account, it was open to the appellants to have argued, as they do now. They might have objected individually to the articles of which the debit side of that account was composed. They might have said this article was posterior to the heritable bond—was not in the view of the parties at the execution of it—had no connection with it—and if it was open to them at that time so to argue, it cannot be open to them now. In fact, they did so argue it in that way as the pleadings in the former case show. In his answers to the ob-

jections given in he says, p. 24, "The next article is the debt for
 " £3009. 3s. 1d. which Mr. Pulteney is bound to pay to the
 " Royal Bank, and it is said, as the bank has claimed for this
 " debt and will be ranked for it, Mr. Pulteney, the cautioner,
 " ought not also to be ranked. In answer to this, he admits
 " that the debt cannot be ranked so as to draw twice in the
 " ranking, but as he is liable to the bank, he apprehends he
 " is clearly entitled to be relieved, and must be ranked ac-
 " cordingly; and so far as he is obliged to pay he will be
 " entitled to compensate what is due to him with part of
 " the sum advanced for him by Messrs. Alexander, without
 " encroaching upon his heritable security. The creditors
 " say that this is in effect stretching his heritable security so
 " as to cover the bank debt. But with submission it is a
 " mistake to view the matter in that light; for he is only
 " using the privilege which by law is competent to every
 " creditor in the like circumstances, of applying any indefi-
 " nite payment made in extinction or relief of the debt least
 " secured." Thus showing that the point was actually in
 issue in the former suit, which ended by the judgment of
 your Lordships. It therefore follows, that if the appellants
 are at liberty to object to the articles on the debit side of
 the account, on the single ground, that they are not the bills
 mentioned in the heritable bond, and have no connection
 with them, then your Lordships' affirmance of the interlocu-
 tor of 14th July 1780 in the former appeal, may be in sub-
 stance reversed. For if every article except that bill be
 struck out, and the indefinite payments thereby necessarily
 applied to that bill, then the heritable bond will stand as a
 security for the balance on that bill only, and not for the ba-
 lance truly due on a fair stating of the accounts, which would
 be a plain subversion of the interlocutor affirmed by your
 Lordships.

Upon the second question, Whether the respondent be
 bound to assign his right of indemnity against the repre-
 sentatives of Mr. Aitchison, it is unnecessary to argue much?
 It is sufficient to say, that Mr. Aitchison was a mere cau-
 tioner with himself in the debt due to the Royal Bank only,
 but in no manner connected with the other course of tran-
 sactions had with Messrs. Alexander, for which they granted
 him the heritable bond. Had Mr. Aitchison paid the whole
 debt due to the respondent, the creditor, perhaps it would
 have been equitable that he should assign him all the secu-
 rities against the estate of Mr. Alexander, the principal
 debtor, but there is no equity which will give to Mr. Alex-
 ander, or to his general creditors, the benefit of the respon-

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dent's right of indemnity against the surety of the principal debtor.

After hearing counsel, it was

Declared that the appellants not having pursued the appeal against the interlocutors of 18th July 1780 on the 19th June 1782, the day appointed for hearing the said appeal, and the said interlocutor having been thereupon affirmed, and thereby become absolute and final, the appellants are precluded from the ground of objection now insisted on by them. And it is therefore ordered and adjudged that the interlocutors be affirmed.

For Appellants, *A. Pigott, Alex. Wight.*

For Respondent, *Ilay Campbell, Wm. Alexander.*

[Mor. 4525.]

REBECCA DELVALLE, FRANCIS ROPER HEAD, Esq. and Others, Creditors of the Govern- nor and Company for Raising the Thames Water in York Buildings, -	} <i>Appellants ;</i>
THE GOVERNOR & COMPANY of Under- takers for Raising the Thames Water in York Buildings, - - -	
	} <i>Respondents.</i>

House of Lords, 12th March 1788.

PRESCRIPTION—FOREIGN.—Circumstances in which held, that certain bonds due to creditors in England, by an English Company, ranked on an estate in Scotland belonging to *that Company*, had incurred the negative prescription of forty years. Reversed in House of Lords.

The appellants, creditors of the York Buildings Company, were those class of creditors called the annuity creditors, the company having been empowered by act of Parliament to raise money on their estates by granting bonds of annuity.

The following is a copy of one of the bonds:—

“ 13. No. 77. £100.

“ The Governor and Company of Undertakers for raising
“ the Thames Water in York Buildings do hereby oblige
“ themselves and their successors to pay unto Mr. Thomas
“ Yorbury, his executors, administrators, or assigns, £100,
“ with interest at the rate of £4 per cent. per an., on the
“ 12 day of April 1732; for true payment whereof they