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of the public registers would be no security if such infeftments were good, because it would be impossible to know the extent of such burdens from the records. The security here granted being therefore indefinite, can have no effect whatever as a preference. 2d. The distinction taken between burdening landed property, with an indefinite security, and conveying in security an heritable bond, which already burdens a land estate with a *definite* sum, is a mere piece of ingenious refinement. An heritable bond is heritable property, and, in the true sense of the term, an heritable subject; so that argument on this part of the case comes to nothing; and the appeal therefore falls to be dismissed.

After hearing counsel, it was
Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *R. Blair, W. Grant.*
For Respondent, *Rob. Dundas, Jas. Boswell.*

[M. 2136.]

WM. KEITH, Accomptant in Edinburgh, Trustee on Sir Robert Maxwell's estate, } *Appellant;*
SIR WM. FORBES, Bart., JAS. HUNTER & Co. *Respondents.*

House of Lords, 11th June 1794.

RANKING—CAUTIONER—RELIEF—CORREI DEBENDI.—Three parties became bound, conjunctly and severally, in a personal bond for the sum of £10,000, borrowed for the use of one of them: the other two being mere sureties, and having bonds of relief granted. The principal became bankrupt, and nothing could be derived from his estate. One of the sureties also became insolvent, and the other being obliged to pay the whole debt. Held that the latter was entitled to rank on his co-surety's estate for the whole debt paid by him, to the effect of recovering the one half due by him. Reversed in the House of Lords, and held that he was only entitled to rank for the one half of the debt, each of them having been indebted as principal for a moiety thereof; and as surety for the other moiety.

Sir Robert Maxwell of Orchardtown, Bart., Patrick Heron of Heron, Esq., and Robert Maxwell of Cargen, Esq.,

had occasion to borrow money upon personal bond, to the extent of £10,000. Sir Robert Maxwell and Mr. Heron were mere securities for Robert Maxwell of Cargen in this transaction; but were taken bound, conjunctly and severally, as principal obligants, the latter granting bonds of relief to them. Mr. Maxwell of Cargen became bankrupt: his estate paid nothing over paying preferable creditors secured thereon. Sir Robert Maxwell's affairs also became insolvent, and he executed a trust deed to the appellant Keith, for behoof of his creditors. The credit and stability of Mr. Heron was also shaken, but his friends, the respondents, Sir William Forbes & Co., interposed on his behalf, came forward, and paid for him the debt, they getting an assignation to the same from the creditors. The sum paid was £6479. 12s. 8d,

The estate of Sir Robert Maxwell was sold by Mr. Keith, his trustee, for behoof of the creditors, and Sir Wm. Forbes & Co. ranked on the funds of this estate for the whole debt, to the effect of recovering one half of the amount payable by Sir Robert Maxwell as a co-surety. Mr. Keith refused to rank for the whole, but only for the half; and thereupon action was brought against him. It was maintained by the trustee, Mr. Keith, that Sir Wm. Forbes & Co. were no better than trustees for Mr. Heron, and that Mr. Heron being, together with Sir Robert Maxwell, merely sureties for Mr. Maxwell of Cargen, each could only have relief against the other to the extent of one half of the debt, which either might pay as surety for Mr. Maxwell,—that all therefore that was due from Sir Robert to Mr. Heron, was one half of the original debt, in respect of his paying the whole, the other half having been extinguished by Mr. Heron, the other co-obligant, for his own account, and for which he has no relief against him, and no right even to rank upon it to the effect of entitling him to recover full payment of his debt. For the pursuers (respondents) it was maintained; —that they came in the right of creditors, and were entitled to all the privileges of such. That they were by law entitled to come against either of the co-obligants bound conjunctly and severally, or either of their estates, and to exact payment of the full debt. And if all or any of the obligants become bankrupt, they may insist to be ranked in solidum upon any of their bankrupt estates, or upon all of them, under condition always of not drawing more than full payment of their debt. Accordingly, though law concedes this

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right to a creditor, yet it does not overlook the interests of co-obligants, or affect the relief *inter se,* because, although one co-obligant pay the whole debt, and in virtue of his assignation from the creditors, rank for the whole on the estate of his co-obligants, yet this is only to the effect of recovering from him the one half of that debt which he ought to have paid. Therefore it follows in the present case, that Mr. Heron having paid Sir Robert Maxwell's one half of that debt, as well as his own, is entitled to rank on the whole debt, to the effect of recovering that one half. If such would have been the right of the original creditors in these bonds, so must it be the right of the respondents, their assignee. Or if such was the right of Mr. Heron, as one of the *correi debendi,* supposing Sir Wm. Forbes & Co. mere trustees for him, so ought it to be to the respondents—that once the creditor is satisfied, the next object of the law is to adjust the rights of the co-obligants themselves, so that payment of the debt may be made to fall equally on both; and that a creditor cannot, by an arbitrary use of his diligence, be allowed to prevent this equal division of the debt among them.

Feb. 8, 1792. On report to the Court, the Lords, of this date, found "the defender, William Keith, as trustee for Sir Robert "Maxwell's creditors, is bound to rank Patrick Heron and "Sir Wm. Forbes and Co., as trustees for him, upon Sir "Robert Maxwell's funds, for the whole sums due upon "those debts, in which Mr. Heron and Sir Robert Maxwell "were jointly bound along with Maxwell of Cargen; but "under this condition, that, in consequence of their being "so ranked, they shall not draw more than one half of said "debts, and decern."* On reclaiming petition the Court

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* Opinions of Judges :—

Lord President Campbell.—"This is a question of relief among co-cautioners, where one of them is solvent and another bankrupt, and the former having paid upon an assignment from the original creditors.

"It is maintained that Mr Heron's personal demand can only be for one-half against his co-cautioner, Sir Robert Maxwell's estate; and if by Sir Robert's insolvency he should not recover twenty shillings in the pound, there is no help for it. He must take his chance with the other creditors, as there is no legal ground upon which, by enlarging his debt in the ranking, he can indirectly obtain a preference over them. In the case of Tilloch's creditors, June 1776, Sess. Papers, Vol. 31, No. 85, the reverse proposition

adhered, and remitted to "the Lord Ordinary to hear par- "ties further upon any specialties in the situation of the "debts claimed on, and to do therein as to his Lordship "shall seem just."

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—Of the sum paid by Mr.

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was maintained, *e.g.* that the creditor should not be allowed to rank for the full debt upon the estate of the insolvent obligation, but should first take his payment from the solvent person, leaving him to claim against the estate of the bankrupt co-obligant; but the Court thought that the creditor might do either the one or the other as he pleased.

"But, in the present case, it may make a difference, that the estate of Sir Robert Maxwell was disponed for his whole debts, which may be said to be equal to an attachment for the whole, at least as the creditors were entitled to claim for the whole upon the estate so disponed—and this right belonging to them, is assigned by them to Heron, who is fairly entitled to avail himself of it.

"Suppose both estates bankrupt, they would be put into a very unequal situation, if one is to be ranked upon the whole and the other for the half. On the other hand, I doubt if the trust-deed made any particular lien."

LORD JUSTICE CLERK.—"Heron paying the whole debt, could only have adjudged, or done diligence against Sir Robert Maxwell for the one-half. But the case is different here. Sir Robert conveyed his estate for *whole* debts, including this, therefore the estate is pledged for the *whole*. Mr. Heron is entitled to use that pledge for operating his relief to the full extent of one-half. It is not merely a personal claim. When Heron got assignation from his creditors, he got it not only to the extent of his own personal claim, but to the whole extent, to the effect of relieving him of the half. The case of Sommervell, 3d December 1751, in Falconer, was different. He could not adjudge for the *whole*, when *one-half* was paid."

LORD SWINTON.—"I think he can only claim for *one-half*."

LORD ESKGROVE.—"I am of Lord Justice-Clerk's opinion."

LORD PRESIDENT CAMPBELL, on further advising, said,—"The interlocutor seems to be right. The trust having been accepted of and acquiesced in by all parties, the estate of Cargen became thereby applicable to the payment of this whole debt, as well as other debts; and Mr. Heron, when afterwards called on to pay it, was entitled to an assignation to this security, whole and entire, to the effect of relieving himself of one-half."

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Heron to Cargen's creditors, one half was the debt of Mr. Heron himself; for the other half he was a creditor to Sir Robert Maxwell, and to that amount only is he entitled to rank on Sir Robert's estate: And no principle of law or justice can authorize him to extend his claim beyond the amount of his debt. This is so obviously founded on reason and justice, as to be generally recognized in principle, and sanctioned by the invariable practice of accountants. It is no doubt true, that co-cautioners being mutually bound in relief to one another, the debt must be equally borne by all; but this holds only as to the *obligation to pay*, and not to all cases of *actual payment*. The one paying is not entitled, in all events, to full payment, because, as in this instance, consistently with the rights of other creditors, such full payment cannot take place where there is an insolvency, and no funds to pay creditors in full out of Sir Robert Maxwell's estate, and where to do so would be giving him a preference to all the co-cautioner's other creditors. It is equally clear that Mr. Heron, by paying and getting an assignation to the whole debt from the creditors, does not stand in right of those creditors to the full amount of that debt, but only to the extent of one half—the other half being discharged and extinguished as a debt due by himself. The difficulty arises from confounding the present case with that of a creditor having two obligants bound to him, and one of them being bankrupt, he claims first upon his estate, ranking for the full debt, and then upon the other. The case of Speirs and other creditors of Dunlop *v.* Thomas Dunlop and others, trustees of Carlyle and Co., has no analogy to the present case. That was a case of supposed double ranking, but in fact a ranking on two different grounds of debt; 1st. The partnership of Carlyle and Co. ranking for the debt due to them as a company by Dunlop, one of its members; and, 2d. The creditors of Carlyle and Co. ranking for the share of the debt for which Dunlop, as a partner, was liable.

May 1777.
Ante, vol. ii. p. 437.

Pleaded for the Respondents.—The relief among *correi debendi* abstractly from the circumstances of the loan or valuable consideration, arises either from each being equally bound to the obligee or creditor; or from a mutual contract implied by the law between them, by which each is bound for the whole debt. This is the nature of their relation to the creditor. As between themselves, if one is called on to

pay the whole, he has relief against his co-surety for the share he has been compelled to pay for him as co-cautioner, and is entitled to demand an assignation to the whole debt, in order to operate his relief, and to make good his co-surety's half. The *correus* who thus pays can only effectuate his relief by suing as in full right of the debt. In the present case, every principle of equity supports this view of the law; because, in ranking, he ought not to be pnt in a worse situation than if he were suing under an assignation to the whole debt. He ought therefore to be entitled to rank for the whole debt, to the effect of recovering the one half paid for Sir Robert Maxwell.

After hearing counsel, it was

Ordered and adjudged that the interlocutor of the 8th Feb. 1792, complained of in the appeal be affirmed, with the following variations, viz. after the word (for) insert (half), and after (the) leave out (whole), and after (Cargen) leave out to the end of the said interlocutor, and insert (each of them having been indebted as principal for a moiety thereof, and as surety for the other moiety).—And the cause was ordered to be remitted back to the Court of Session to proceed accordingly. And it is farther ordered and adjudged, that the interlocutor of the 23d of Feb. 1792, also complained of, so far as the same is repugnant to the interlocutors of the 8th Feb. 1792, varied as aforesaid, be *reversed.*

For Appellant, *W. Grant, W. Adam.*

For Respondents, *Sir J. Scott, J. Anstruther, Allan Maconochie, Wm. Tait.*