

acquittance thereof. And he has ever since grounded his title in several suits upon that decree, according to his preference therein and has also received several sums of money thereupon; and now because in the event he gets not full payment, it is hard he should require the same to be reversed, which would occasion a new suit among the creditors, after it has been so long acquiesced in, nor is there any error in the date; for though these titles were produced after the 7th of February, and determined accordingly, yet that could be no ground to reverse the decree, because there was thereby no alteration made therein, and they are only thereby ordered to be added to the other creditors who had right by adjudications, and all posterior to the appellant, and they were included in the decree of ranking before the Court allowed the appellant to extract the same. Thus, none of the creditors were thereby any ways prejudiced, and the date is regulated by an express order of the Court.

Judgment,  
7 May  
1714.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutor, and orders, therein complained of be affirmed.*

For Appellant, *Rob. Raymond. Thos. Lutwyche.*  
For Respondent, *P. King. John Pratt.*

John Cheisly the heir put in no answer to the appeal.

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Case 23. Michael Russell of London, Merchant, - *Appellant;*  
John Cochran of Waterside Esq; - - *Respondent.*

12th May 1714.

*Presumption.*—A bond is granted for a partnership debt to an individual creditor by one partner; the same partner afterwards executes an assignment of the partnership funds to the creditors in general, bearing to be in full payment and satisfaction of the partnership debts; this was recited in a power of attorney granted by the creditors; though the assignment was not executed by the other partner, it extinguished the bond to the individual creditor.

THE respondent, and James Home, Merchant in London, deceased, being co partners in trade, bought and purchased several quantities of goods from Michael Russell the appellant's father deceased; and became debtors to him in several sums of money.

After the dissolution of the said co-partnership, the respondent on the 21st of December 1689, executed a bond to the appellant's father, reciting that there was due to him by the respondent and the said James Home a sum of 695*l.* 13*s.* 5*d.* sterling, and it being most reasonable that the appellant's father should be fully and completely paid, without being put to any charge in prosecuting for the same, or any further trouble than to lend his name for recovering the same out of the partnership estate, therefore  
the

the respondent obliged himself to procure payment to the said Michael Russell, his heirs, or assigns, (they always lending their name as above,) of the said sum of 695*l.* 13*s.* 5*d.* out of the partnership estate, or in default thereof, to pay the same out of the respondent's own proper estate before the 8th of the said month.

The bond was not paid when it fell due; but Home being thrown into prison, various letters were written by the appellant's father to the respondent on the subject of a proposal which Home had made to the partnership creditors of assigning the whole partnership funds to them, in satisfaction of their debts. The parties in the present appeal are not agreed upon the precise import of these letters; but the scope of them was to persuade the respondent to join in executing such assignment: and Home having declined to grant such assignment first, the appellant's father wrote the respondent, that he might execute it.

The respondent accordingly executed a deed, dated the 25th of January 1692-3, whereby, after reciting the several debts due to the appellant's father, and the said other creditors, the respondent did assign to him and them in full payment and satisfaction of their said respective debts, all the debts, money, goods and effects, belonging to the co-partnership. This assignment was transmitted by the respondent to one Ellis, a Merchant, in London, who shewed the same to the creditors. The appellant's father afterwards wrote to the respondent, that he had seen the assignment, and desired the respondent to send an account of the co-partnership estate, where it was, and how to be recovered.

The appellant's father, and the other creditors on the 20th of February 1693-4, executed a faculty or letter of attorney, which recited the said assignment made by the respondent, and did for the more effectual recovery of the debts and effects thereby assigned, constitute one George Watson, Merchant, in Edinburgh, their attorney, or factor, with full power to receive, sue, and give discharges for the same. An action was accordingly brought by Watson before the Court of Session to recover the partnership effects and sundry steps taken therein. Home, the respondents' partner, died without executing the said assignment.

The appellant's father lived near twenty years after these transactions, but took no step against the respondent upon the said bond. After his death the appellant brought an action, as his administrator against the respondent before the Court of Session upon the said bond for payment of the said sum of 695*l.* 13*s.* 5*d.* with interest. The respondent pleaded for defence, that the said disposition or assignment executed by him to the creditors, bearing to be in full satisfaction of their respective debts, and which was accepted of by the appellant's father, was an innovation of the bond and equivalent to a discharge thereof.

The Court on the 24th of July 1712, "found that the disposition granted by the respondent to the appellant's said father and others, dated the 21st of January 1692-3 posterior to the bond granted by the respondent to the appellant's said father the 21st of December 1689, bearing expressly to be in

“ full satisfaction to them, and each of them, of their respective  
 “ debts contracted by James Home, each of them for their re-  
 “ spective parts, the said disposition extinguished the said bond,  
 “ granted by the respondent to the appellant’s said father.”

The appellant reclaimed, and after answers for the respondent, the Court on the 24th of June 1713, “ adhered to their former  
 “ interlocutor and further found it instructed, that the disposition  
 “ was accepted of by the appellant’s said father.”

Entered,  
 19 March  
 1713-14.

The appeal was brought from “ an interlocutory sentence, or  
 “ decree of the Lords of Council and Session of the 24th of July  
 “ 1712, and the affirmance thereof, the 24th June 1713.”

*Heads of the Appellant’s Argument.*

The bond having been duly executed, cannot be voided by pre-  
 sumptions; and nothing but presumptions can be pretended in  
 this case, for the assignment does not bear to be in satisfaction of  
 the bond; and had it been so intended, no doubt the bond would  
 have been mentioned in the assignment, and the same delivered up  
 and discharged. An assignment by the respondent alone, without  
 the other co-partner, carried no right to the creditors, and this  
 was all they got, for Home never signed it. On the contrary, he  
 made an assignment of all the funds and effects to one Thomas  
 Man without mentioning the other creditors, and attachments  
 were laid upon the co-partnership effects, by Home and his  
 creditors, so that nothing could be recovered upon that assignment.

Supposing this deed had been in satisfaction of the bond,  
 (which is still denied) yet the same never having been de-  
 livered to the creditors can never militate against them. The  
 assignment was sent up by the respondent to Patrick Ellis,  
 this is acknowledged both by the respondent and Ellis upon  
 oath, but there is no proof of its being delivered; Ellis swears he  
 believes it was, but cannot be positive, on the contrary there is  
 this strong presumption that it was not delivered, that when the  
 appellant commenced his action, the respondent having pleaded  
 this assignment in bar to it, he procured the said assignment to be  
 delivered up by Ellis, so that it must have continued in Ellis’s  
 hands. Nor is it of moment, that the creditors granted a factory  
 in pursuance of that assignment, since that was done only to assist  
 the respondent in recovering the co-partnership effects, in opposi-  
 tion to the assignment granted by the other co-partner. This  
 was done at the respondent’s desire, when the assignment was  
 not in their hands and they knew not the nature of it. And  
 whatever argument this might be against the *other* creditors, it  
 can never militate against the appellant’s father, who only lent  
 his name to this suit, as he was expressly obliged by the bond.

*Heads of the Respondent’s Argument.*

Besides the recital of the assignment, and the factory there-  
 upon granted to Watson, the respondent set out certain letters  
 written in 1692, by the appellant’s father to him, to obtain from  
 him the assignment in question: in these he mentioned that they  
 had

had told Home, the other partner, that the respondent was willing to assign to the said creditors what share of the said effects was in his hands, and persuaded the respondent to a compliance with what had been proposed in order to a *full end*, which would be acceptable both to Home and the creditors; and telling the respondent, that he (the appellant's father) *was a friend to peace though to his loss*, and that though the creditors should not be *thereby paid their full debts*, yet there would be an *amicable end*, which would *bring ease to his mind, though it might be loss of money to him*. And Home having refused to make such assignment first,

8 December  
1692.

the appellant's father did, by letter, desire the respondent to comply also in assigning first, and to send up such assignment on his part, quickly to put an end *to that concern*.  
The respondent accordingly executed the assignment, and by order of the creditors sent it to Mr. Ellis; by Ellis it was given to the creditors who read and approved the same, and delivered it back to him to keep for their use, as appeared by a letter written by the appellant's father to the respondent, and by Ellis's evidence in the cause. After the assignment had been sent to Ellis in London, the appellant's father also wrote to the respondent, *for perfecting the business*, to send up to Mr. Ellis an account of what money the respondent had received and paid with several obligations or conditional discharges which the respondent had taken of other creditors for the money which he had paid them, saying that he (the appellant's father) and the other creditors would then give discharges to both the respondent and Home. And this account and conditional discharges were so accordingly sent up.

9 February  
1692-3.

Nor did the appellant's father, during his life, or any of the said other creditors, (who all of them well knew their agreement and intention, that the respondent should be discharged on his granting the said assignment) ever demand any thing of the respondent on account of the said bond, or the said other debts. The appellant, nevertheless after his father's death, finding the said bond among his waste papers, brought an action thereupon against the respondent, when by the deaths of the said Home, and the appellant's father and others, and the great length of time since the said matters had been transacted, the respondent's defence was rendered more difficult. The appellant first denied, that there had been any such assignment made to or accepted by his said father, and upon his requiring it, the respondent produced upon oath, all the letters which he had received from the appellant's father relative to the same. And Mr. Ellis produced the assignment itself to the Court of Session, and deponed that it came to him under the respondent's cover, and that it had been by him delivered to the said creditors, and was by them left in his hands for their use.

After hearing counsel, *It is ordered and adjudged that the petition and appeal be dismissed, and that the interlocutory sentence or decree therein complained of be affirmed.*

Judgment,  
12 May  
1714.

For Appellant, Rob. Raymond. P. King.  
For Respondent, Tho. Lutwyche. Sam. Mead.