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WILLOCK, &c. *v.* OUCHTERLONY.

[Mor. 5539.]

ROBERT WILLOCK of Cornhill, London, Bookseller; and PATRICK and JOHN STRATON of Montrose, Merchants, ... } *Appellants;*

JOHN OUCHTERLONY of Montrose, Esq., . *Respondent.*

Et e contra.

House of Lords, 30th March 1772.

ARREARS OF INTEREST—ADJUDICATIONS—HERITABLE BOND—HERITABLE OR MOVEABLE.—(1.) An heritable bond was granted for a large amount—after which decret of adjudication was obtained thereon, for principal and arrears of interest. Part (£5500) of the principal sum contained in the heritable bond; was conveyed, without any mention of the adjudication, to Alexander Ouchterlony, and by him to his brother George in liferent, and to his nephew John in fee. The latter's heir, on the death, first of Alexander and then of George, claimed not only the fee of £5500, but also the arrears of interest due thereon, amounting to £4296. Held that the arrears were heritable, and went to the heir and not to the executors of the will of George: Reversed on appeal, and the executors by the will entitled to the arrears. (2d.) The other part of the heritable debt (£4517. 15s.), and certain annuity bonds, were conveyed by George to his trustees by a trust deed, reserving power to alter; and a will made in virtue of this reserved power, Held that these were sufficiently conveyed so as to go to his executors, and beyond the claim of his heir at law.

John Ouchterlony, merchant in Montrose, and Alexander and George Ouchterlony, merchants in London, were brothers-german; and they had one sister, who was the mother of the appellant, Robert Willock. Neither Alexander nor George left any issue; but John, the eldest brother, left issue, Robert his eldest son, and John his second; and also two daughters, Margaret, who is the wife of Patrick Straton, and Margery, unmarried. Robert died, leaving five children, three sons and two daughters, whereof John Ouchterlony, the respondent, is the eldest son. John, the younger brother of Robert, died without issue.

Thus the respondent John Ouchterlony became heir at law not only of his father and grandfather, but also of Alexander and George Ouchterlony his grand-uncles, and of John his uncle. Under this character he was claiming almost the whole residue of his grandfather George's estate. And the present question occurred between him and the appellants, who are the trustees and executors of the grand-uncle, who held the estate for the purpose of distribution among a number of nephews and nieces.

The Duke of Norfolk and partners, lessees under Sir Alex. Murray, of his mines in the county of Argyle, granted a sublease of those mines to the York Buildings Co. for the term of twenty-five years, at a tack duty of £3600. For better security of the regular payment of the rent, the Duke and his partners were infeft in the York Build-

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ings Co. estates in Scotland; and the Company likewise granted personal annuity bonds to the several partners for their respective proportions of the said rent transferable by indorsement; and to four of these bonds, for £25 each, the said Alexander Ouchterlony, the respondent's grand uncle, acquired right by indorsation from the Duke of Norfolk, Sir Robert Sutton, and Sir Alex. Murray, the original grantees. Three of these bonds were the absolute property and separate estate of Alexander Ouchterlony, the fourth was indorsed to him in security of a debt due by Sir Alexander Murray.

The York Buildings Company having failed to pay their rent, the Duke of Norfolk and partners sued out adjudications against the Company's estates, for securing payment of these arrears, and upon all of these adjudications, charter was obtained, and infeftment passed thereon.

Nov. 12, 1737. Of this date, Charles Murray, heir of Sir Alexander Murray, to whom Sir Alexander had conveyed his estates, granted an heritable bond over his lands to George Ouchterlony, for the sum of £10,017. 15s. with an annual rent for the same of £500. 17s. 9d. or such an annual rent, less or more, as should at the time correspond to the said principal sum. This heritable bond contained an assignation to such share of the mines and minerals as remained in and belonged to the said Charles Murray at the time of granting the said heritable bond, and were not let or disposed of formerly by him. A decree of adjudication of the estates so mortgaged was obtained in the name of George, for the principal sum, penalty, and interest, contained in the said heritable bond, extending at the date of the decree to the sum of £12,371. 15s.

George Ouchterlony by disposition, wherein he recited the afore-

Aug. 17, 1742. said heritable bond granted to him by the said Charles Murray, and seisin thereupon taken, but did not mention the aforesaid decree of adjudication, sold and disponed to John Arbuthnot a yearly annual rent of £275. as part of the said yearly annual rent of £500. 17s. 9d., or such an annual rent less or more as should correspond to the principal sum of £5500. therein after assigned, being part of the said sum of £10,017. 15s. for which the heritable bond above mentioned was granted. And thereby assigned to him the heritable bond to the extent of £5500, together with the heritable bond itself in all its pro-

Aug. 3, 1753. visions, articles, heads, and clauses. John Arbuthnot conveyed this right, so acquired by him, to Alexander Ouchterlony, but without any mention being made of the decree of adjudication above set

Oct. 17, 1753. forth. Of this date, Alexander conveyed to George Ouchterlony, his brother in liferent, and to John Ouchterlony his nephew in fee, the foresaid annualrent of £275, and principal sum of £5500, with the interest thereof from and after the day of his decease, with this proviso, that George should pay the interest of all his debts due by him, without recourse against his nephew. But this disposition he reserved power to alter. Accordingly Alexander, executed a last will

and testament, in the following terms, " As to my estates, goods and " chatels, my will is, that after payment of all my debts, as also le- " gacies which I shall herein, or by a codicil, mention to be paid to " sundry persons, the residue, whether personal or real, may go to " the sole use and benefit of my brother, George Ouchterlony, and " in remainder to John Ouchterlony, my nephew, on condition, how- " ever, that the said John, my nephew, does pay, or cause to be " paid to my said brother, whatever interest he may receive at any " time on an heritable bond, for the principal sum of £5500 on the " estate of Charles Murray of Stanope, Esq., which I disponed to my " said nephew John Ouchterlony." " I likewise more particularly " mention the bonds or general sums due from the York Buildings " Company, for the payment of rent on a lease to the said Company, " of mines in Argyleshire let to them by the late Duke of Norfolk, " Sir Robert Sutton, and others, together with the accumulated in- " terest due thereon by infeftment and adjudications on their estates " in Scotland, amounting to the sum of £100 yearly rent for my " share, contained in separate bonds assigned to me by the Duke of " Norfolk, Sir Robert Sutton, and Sir Alexander Murray ; and this " I mean to be in as much force as if the said bonds were made over, " disponed, or assigned to the said George my brother, in the forms " of the law of Scotland, and as the said bonds are made over to me " as above specified."

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April 5, 1754.

Alexander died of this date. His nephew also died unmarried and intestate.

April 1758. Feb. 1762.

By the death of Alexander and John Ouchterlony, the right to the debt on the estate of Stanope stood thus. There remained with George, in virtue of his original heritable bond right, the sum of £4517. 15s., being part of the principal sum contained in the heritable bond, with a proportional part of the interest and penalty, and the whole benefit of the accumulations contained in the aforesaid decree of adjudication, of which he had never conveyed any part. George had also right, by his brother Alexander's deed of disposition of 17th October 1753, and last will and testament of 5th April 1754, to the liferent and annual interest of the sum of £5500, being the residue of the principal sum contained in the said heritable bond, inclusive of arrears due at his brother's death. And the respondent, the grand nephew, as heir at law of his uncle, the said John Ouchterlony, the nephew of Alexander and George, had right to the fee of the said sum.

George had right also to the annuity bonds by the will of his brother Alexander. But a doubt having arisen whether the right to these funds could, by the law of Scotland, be effectually conveyed by will, being secured by infeftment and adjudication, the respondent agreed to grant a conveyance of the same to George Ouchterlony, Oct. 8, 1760. which was done accordingly.

Thus stood the right and interest of George Ouchterlony in these

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two debts, when he executed a disposition and assignation, whereby he conveyed to the appellants, Robert Willock, Patrick and John Straton, and the respondent John Ouchterlony, *that share of the debt or heritable bond* over the estate of Stanope, which belonged to him, being £4517. 15s. of the principal sum contained therein. He also "assigned, transferred and disponed to and in favour of the said trus-"tees, all mines and minerals and metals already discovered, or which "should thereafter happen to be discovered, in the whole lands and "others above mentioned. As also all lead ore and other ore what-"soever, and particularly his share of the tack duty due by the York "Buildings Company, and bonds issued by them therefore. In "trust for the purposes therein mentioned."

Mar. 5, 1762. Farther, of this date, George Ouchterlony executed his last will, whereby he bequeathed many special legacies and annuities to friends and relations. Amongst others, he left the bequest of £50 to the respondent, in the following terms: "Whereas my grand nephew, "John Ouchterlony is handsomely provided for, as being the ne-"phew and heir at law of my late nephew, John Ouchterlony of "London, merchant, deceased (alluding to the respondent's succes-"sion to the fee of the aforesaid partial sum of £5500), I therefore "give to him, &c." He disposed of the residue of his estate as follows: "All the rest and residue of my estate, ready money, plate, "linen, stock in business, and all bonds, bills, notes, mortgages, and "leases, government and other securities for money, and all the in-"terest, rents and profits that shall be due thereon at the time of my "decease, and all other my estate and effects of whatever nature or "kind soever and wheresoever, which I shall die seized, possessed "of, or entitled to, I give, devise, and bequeath the same unto and "amongst all and every of my nephews and nieces, grand nephews "and grand nieces equally, to be divided betwixt them share and "share alike." Robert Willock, Patrick Straton, and the respond-dent, were the executors of this will.

George Ouchterlony died two years thereafter, 1764. The will was proved in the prerogative court of Canterbury by the appellants Robert Willock and Patrick Straton. The respondent not only accepted of his legacy of £50 under the will, but also drew a dividend of £300, as one of the residuary legatees, under the description of grand nephew. He likewise acquiesced in and approved of the trust deed of Feb. 1762, and acted under it in the character of trustee, by accepting a factory along with his co-trustees, appointing a person in Edinburgh to uplift the debts and funds in Scotland.

It was stated by the appellants, that the transaction by which the respondent conveyed, by his disposition of 8th October 1760, the annuity bonds to George Ouchterlony, was unknown to them, whereby the respondent was enabled to recover payment of these, amounting to £2279. 0s. 11d.

In a ranking and sale of Sir Alexander and Charles Murray's

estates of Stanope, both of these debts were ranked as follows; viz. the respondent for £5500, and for the annual rents bygone then in arrear, and in time coming. And the appellants, as trustees, for £4517. 15s. as the remaining part of the said total principal sum, and the annual rents thereof then past due, and to become due. Neither party agreeing in this ranking of their claims, it was agreed that they should both consent to give the purchaser a conveyance, reserving all questions as between themselves. 1772. WILLOCK, &c. v. OUCHTERLONY.

Accordingly the respondent received £5500 of principal, and £4552. 19s. 2d. of interest due thereon. The appellants received £4517. 15s. and £3426. 14s. 10d. of interest.

The appellants having discovered the disposition of 8th October 1760, were advised that they had right to £1709. 5s. 8d., as the proportion of £2279. 0s. 11d., corresponding to the three bonds above alluded to. And also to the whole interest of £4552. 19s. 2d. due on the principal sum of £5500, at the death of George Ouchterlony.

On the other hand, the respondent claimed the other share of the heritable bond, namely, the £4517. 15s. of principal, and the £3420. of interest, on the ground that it was not properly conveyed, and belonged to him as heir at law. Mutual actions against each other having been brought and conjoined.

The Lords, on the report of the Lord Justice Clerk, pronounced this interlocutor:—" 1. Sustained the defence proponed for " John Ouchterlony against payment of the sum of £4296, as the " balance of the interest of the principal sum of £5500 sterling, " which was resting owing at the time of George Ouchterlony's " death, and assoilzied the said John Ouchterlony from that branch " of the libel, at the instance of the trustees of George Ouchterlony " against him. 2. Repel the defence proponed for the said John " Ouchterlony against payment of the sum of £1709. 5s. 8d. uplifted by the said John Ouchterlony; find that the said sum does " fall under the trust right libelled on, executed by the said George " Ouchterlony in favour of the said Robert Willock and his other " trustees; find the said John Ouchterlony liable in payment of the " said sum to the trustees, and interest thereof from the 11th of " August 1764, when he received the same. 3. Sustain the defence proponed by the said Robert Willock and the other trustees " against payment of the sum of £4517. 15s. sterling, and annual " rents thereof, claimed by the libel at John Ouchterlony's instance " against the said trustees; found the said sum was carried by, and " vested in the trustees by the trust disposition executed by George " Ouchterlony in their favour, and the said George Ouchterlony's " latter will and testament relative to the said trust right; and assoilzied the said Robert Willock and the other trustees of George " Ouchterlony from the process brought at John Ouchterlony's instance against them for payment of this sum; and decerned." Dec. 14, 1769.

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On reclaiming, the Court adhered.

Against these two interlocutors the appellants appealed, in so far as the Lords of Session thereby sustain the defence stated by the respondent, against payment of the sum of £4296, as the interest due on the principal sum of £5500. And the respondent brought a cross appeal, in regard to the other debts, namely, the £4517. 15s., part of the heritable bond debt, and the debt due on the annuity bond.

Pleaded for the Appellants.—1st. Original appeal. Although by the form of the decree, an adjudication may perhaps be considered in law as a conveyance of land under reversion, in payment of the debt, yet, in the sense and understanding of mankind, it is only a security for the debt, and therefore they are led most naturally to believe that the *arrears* of *interest* due for this, like the arrears of interest due for every other debt secured upon a real estate, and like the arrears of *rent* due for a real estate itself, are personal assets, and go to the executor. Heritable bonds are commonly in the form of a conveyance of lands under reversion, and consequently, on the death of the creditor, or mortgagee, this right to the lands goes to his heir, as clearly as if it were *adjudged*. But when the debt comes to be paid off, and the lands redeemed, the heir must renounce his right, upon being paid the principal sum and interest since his succession ; for such *interest* as was due to the mortgagee at the time of his death, is personal assets, and payable to the executor. And no substantial reason can be given why arrears of rent due for lands, arrears of feu-duties, and arrears of interest due for a debt voluntarily secured by a conveyance and sasine of lands, should all go to the *executor*, and that the heir at law should, in this case, in defeasance of the will and intention of the defunct, be entitled to carry off so large an arrear of interest, merely because his predecessor had found it necessary for securing the debt to adjudge the debtor's estate.

2d. It is admitted that George Ouchterlony had a right to the whole interest due for the £5500 down to the day of his death, and might that very day have received it, in virtue of Alexander's conveyance to him in *liferent ;* and if he had so received it, there is no doubt it would now belong to the appellants, his executors, as personal assets, for the uses of his will, and which therefore ought not to be defeated by the accident of the testator's not being able to operate payment in his lifetime. 3d. Besides, Alexander Ouchterlony, in his conveyance to his brother George in liferent, and to his nephew John in fee, reserved power to alter the same at any time of his life, *et etiam in articulo mortis ;* and by his last will, made subsequent to the foresaid conveyance, he not only gave the *residue* of his estate, real and personal, to George, but *particularly* provided that John should pay over to George whatever interest he should at any time receive for said partial principal sum of £5500. Now, this proviso in the will having a relation to the foresaid con-

veyance, must be considered as part of it, and as John must have taken the fee, subject to this proviso, so the respondent, as his heir at law, must take subject to that proviso also. 4. But the adjudication was only a collateral security, and was not conveyed to John Arbuthnot, nor consequently by him to Alexander Ouchterlony; and the recitals, the assignments of, and obligations to make furthcoming the title-deeds and evidences in these conveyances, go no further than the heritable bond and sasine, and the adjudication is not mentioned from beginning to end. 5. The principal sum of £5500 was an estate for life in George from the death of Alexander; and the appellants, as the personal representatives of George, have right to the interest thereof, which accrued due during that period. 6. By homologation, the respondent is further barred from challenging the will of his grand uncle.

On the cross appeal. By the trust deed in favour of the appellants, without the will executed in reference thereto, by virtue of powers reserved, the debt in question was effectually conveyed.

Pleaded for the Respondent.—The appellants admit the respondent's title to the principal sum of £5500, but, as executors of the will of George Ouchterlony, they claim the arrear of interest due thereon at the time of his death, as part of his personal estate. The respondent contends, that by the law of Scotland, the nature of the security itself, and the uniform judgments of the Court, the *interest* arising upon *adjudications* has always been considered as real estate descendable to the heir, and undevisable by testament. Whatever therefore might be the intentions of George Ouchterlony, with regard to this interest, it was not in his power to transmit it by will. It was equally heritable, by reason of the adjudication, with the principal sum upon which it arose, and of course must descend to the heir at law, and not to the executors; by the former of whom the adjudication alone could be renounced in favour of the debtor, had he redeemed it himself, or be assigned to the purchaser of his estate; and therefore the will, though it had expressly mentioned this interest, would have been altogether unavailable to the appellants. Neither can the appellants maintain their claim to this sum, as trustees named by George Ouchterlony in his trust-disposition of 27th February 1768, for this sum is not, through the whole of that deed, expressed or implied; and besides, the respondent, by his cross action, contends and maintains that the disposition itself is void and ineffectual, and therefore this interest must fall and belong to the respondent, as heir in the course of legal succession. On the cross appeal. The appellants have no right to retain the £4517. 15s. interest and costs received by them out of the heritable debt on Charles Murray's estate of Stanope, which always remained with George Ouchterlony. This sum was real estate, being heritably secured by infeftments and adjudications; it was therefore impossible to transmit it by will; and without calling in the will, the trust disposition upon which the appellants found, can have no operation whatever. But, supposing it

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effectual, along with the will, to give the appellants the £4517. 15s., yet they have no right to demand repayment of the sum recovered from the York Buildings Company, because, under a fair construction of the trust disposition, neither these annuity bonds, nor the diligence used upon them, were conveyed, nor meant to be conveyed, to the appellants.

After hearing counsel, it was

Ordered and adjudged that the money received by George Ouchterlony, on account of interest upon Charles Murray's bond to him on the lands of Stanope, ought to be imputed in discharge of the interest, according to the order of time when the same became due, and after satisfaction of all the interest which incurred before Martinmas 1742, the said George ought to be considered as debtor to Alexander, assignee of John Arbuthnot, for a proportional part of the money so received by George corresponding to the interest of £5500. And it is further declared, that whatever money has been paid to the respondent, as and for the interest of the said sum of £5500, from Martinmas 1742 to the death of Alexander, ought to be considered as part of the personal estate of Alexander; and what has been paid to and received by the respondent for interest accrued due upon the said £5500, from the death of Alexander to the death of George, ought to be considered as part of the personal estate of the said George. And it is ordered and adjudged that the interlocutors, so far as they are complained of by the original appeal be reversed. And it is farther ordered, that the cause be remitted back to the Court of Session to proceed therein according to the declarations herein before made. And it is farther ordered, that the interlocutors, so far as they are complained of by the cross appeal be, and the same are hereby affirmed.

For Appellants, *Ja. Montgomery, J. Dunning.*
For Respondent, *Alex. Wedderburn, Alex. Wight.*

[Mor. 15,200.]

JAMES SCOTT of Comieston, Esq., . . . *Appellant;*
GEORGE STRATON, ... *Respondent.*

House of Lords, 13th May 1772.

LEASE IN PERPETUITY—SINGULAR SUCCESSOR—HOMOLOGATION—IRRITANCY.—A lease was granted to a party, and his heirs and assignees, for nineteen years after the death of a party; and after the expiry of these nineteen years, for a second nineteen years, and after the expiry of the second nineteen years, for the space of other nineteen years, and so forth from nineteen years to nineteen years, so long as the said party and his heirs and successors shall desire to possess. The lease had no definite ish, and the