1785.

CAMPBELL
v.
WELSH, &c.

her own knowledge. 2. Because the proof allowed of the *veritas convicii*, most properly limited to the special articles in the appellant's condescendence, and the latitude taken of ten weeks prior and ten weeks posterior to the days she has, after the fullest time for inquiry, fixed upon as the date of the criminal acts alleged, surely does not afford room for complaint on the part of the appellant. And the whole strain of these articles being inserted simply to afford colourable pretext for the other charges, and seemingly inserted, not from actual information, but from common report, idle tales, and frivolous circumstances, it was quite proper in the Court not to admit them to proof. 3. It is certainly necessary and proper that the respondent should be apprised of the witnesses by whose evidence it is proposed to establish so heavy a charge against her. The limitation to the persons named as witnesses in the condescendence is just, and agreeable to the constant practice of the Court. Proofs at large are never allowed, and in support of general pleas or defences. It will indeed be evident that the appellant did not limit herself in the condescendence, but mentioned every person she imagined could aid her, or know any thing of the respondent, when she made out a list of no less than 158 persons; and she has not yet assigned a reason for wishing to add to that list. 4. But if she has any further evidence to lead, it will be quite competent for her, under the reservation in the interlocutor, to move the Court to allow proof of other articles.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors complained of be affirmed.

For the Appellants, *T. Erskine, Alex. Wight.*

For the Respondent, *Ilay Campbell, Wm. Adam.*

WM. CAMPBELL, Esq. of Shawfield, . *Appellant;*

JOHN WELSH, Esq., and Others, Creditors of the York Buildings Company, . } *Respondents.*

House of Lords, 11th May 1785.

BANKRUPTCY—RANKING OF CREDITORS—LANDLORD AND TENANT—RETENTION OF RENT.—A tenant had a lease of the estate

of Kilsyth for 99 years, at a rent of £500 per annum. The tenant afterwards became creditor of the landlord to a large amount, £7282 of his debt being heritably secured over the estate on bond, which bore an express clause entitling the tenant to retain the tack duty. The other debts were secured by adjudication; and he contended, on the bankruptcy of the landlord, that he was entitled to retain the rent, in the first place, to pay the interest of his whole debts, and then to extinguish the principal. Held in the Court of Session, that he was entitled to retain the rents for the payment of the interest and principal of the £7282 heritable bond, but not for the other debts. Reversed in the House of Lords; and held that the tenant was entitled to retain and impute the rents, in the first place to pay the interest, and in the second place, the principal of the whole debts due to the appellant as are preferable to the debts due to such creditors.

The York Buildings Company, who had acquired all the forfeited estates in Scotland, granted to the appellant's grandfather, David Campbell, Esq. of Shawfield, a lease of the estate of Kilsyth for 99 years, for a tack duty of £500 per annum.

Soon thereafter David Campbell became a creditor of the York Buildings Company in several sums of money advanced by him to them, amounting in all to a sum of £10,000. In particular, £7282 of this sum was secured by heritable bond, of this date, over the estate of Kilsyth. The bond having 1728.
this clause, " that he and his foresaids shall be allowed, and
" are hereby allowed, to retain the said tack duty in their own
" hands from Whitsunday 1732, or in all time coming, during
" the not payment, in payment, *pro tanto* of the sums of money,
" principal, annual rents, and necessary expenses." Besides this heritable bond, Mr. Campbell was obliged, as security for the Company, to pay a bank debt of £1500, accumulated with interest to £1900, on which he raised adjudication in the following year. He had also to interpose to pay a debt 1729.
against the Company, due to Lady Bute, on which adjudication was led in 1735, whereupon he obtained assignation to that adjudication. He likewise acquired right from John Sommerville to an adjudication which had been taken by him against the Company in November 1733, for the sum of £552.

The Company never paid any part of these debts, principal or interest, to Mr. Campbell or his representatives. On the other hand, they had been paid no rent for the lease of the estate of Kilsyth, but had allowed Campbell to retain

1785.

CAMPBELL
v.
WELSH, &c.

the whole. In the meantime, the Company became bankrupt, and having reference to the manner in which the appellant was to account to the Company's creditors for these rents, the question was, Whether the appellant had a right, as he contended, to set off against this demand for rents, the whole debts acquired by and due to his grandfather, with interest; or whether, as was contended by the creditors, he should account for these rents as a fund to be divided among the Company creditors, after allowing for the preferable heritable bond?

The Company being engaged in extensive schemes, found occasion for large supplies of money; and having obtained an Act of Parliament, impowering them to sell and grant annuities or rent charges by way of lottery, they issued transferable annuity bonds to the amount of £10,403. 11s. upon the security of their estates, and, to render such security effectual, they granted a disposition in Oct. 1727 in favour of trustees for said annuitants. This was the first real security granted over their estates.

Upon the disposition to the estates, of date October 1727, the annuity creditors were only infeft 14th March 1729, so that the infeftment was subsequent to that of Mr. Campbell.

In 1737, the annuity creditors brought an action to set aside the above lease, which was afterwards dropped; and it was alleged, in this and other proceedings in the Court among the creditors, that Mr. Campbell did not claim a preference beyond his bond debt, and did not seek a right to retain the rents except for it.

Of the same date, 1728, with the heritable bond of £7282, the Company granted to Sir John Meres, an heritable bond over their *whole estates*, including Kilsyth, for a debt due to him upon which he was infeft, but subsequent to Mr. Campbell's infeftment.

The Company, having occasion to borrow more money, granted in 1731 a trust disposition, conveying their whole estates to trustees, in security of £100,000, for behoof of their creditors; and infeftment followed thereon on various dates, from 4th November 1732 to January 1735. These were called the trustees for the bond creditors.

The Duke of Norfolk adjudged the whole estates in Scot-
1732. land on 10th November 1732, for payment of an arrear of tack duty of £2025, on a security of a yearly tack duty of £3600 per annum.

Nov. 10, 1732. The Duke of Norfolk's adjudication was thus first led, but

the appellant's first adjudication and it were completed by charter and sasine on the *same date*, viz. 19th January 1734. The appellant's *third* adjudication, viz. of Sommerville's debt, acquired by Campbell, was led on 7th November 1733; and there were no other adjudications within a year and a day of the Duke of Norfolk's, which was the leading adjudication. Several adjudications, however, were led during the year 1734, and of course prior to the appellant's second adjudication, consisting of Lady Bute's debt of £1848, which was not taken until Feb. 1735.

1733. Nov. 7, 1733.

1734.

Feb. 1735.

Mr. Campbell's claims against the Company thus exceeded £10,000, and, consequently, the annual interest due him was above £500, being the yearly rent paid by him. The appellant therefore claimed right to retain the tack duty or rent of £500 per annum, in the first place, towards extinction of the interest of this whole debt, and, in the next place, towards extinction of the principal sums.

It thus appeared, with regard to Mr. Campbell's bank debt, on which adjudication was only obtained in 1773, that the following creditors were preferable, 1st, The Trustees for the Annuitants; 2d, Sir John Meres; 3d, The Duke of Norfolk and Partners; and 4th, The Trustees for the Bond Creditors. It was also alleged, that certain other creditors were likewise preferable, in consequence of their adjudications, inhibitions, and other diligence, viz. Bertram of Nisbet, whose inhibition was recorded 18th August 1721; Rowland Ainsworth, by inhibition, recorded 2 February 1727. And there were four creditors whose adjudications were within a year and a day of Shawfield's first adjudication, and entitled to come in *pari passu* with him.

Before the present question was raised, Sir John Mere's debt was paid; so was the Duke of Norfolk's debt. The trust-deed creditors were also paid; and the annuity creditors were otherwise provided for. The question lay therefore between the appellant and what were called the postponed creditors of the Company.

It seemed admitted by the creditors, that the heritable bond for £7282 was a preferable debt; but in regard to the three adjudication debts, they contended that these were not preferable, and therefore he was bound to apply the rents exclusively to that bond debt, to the extinction of interest and principal, leaving the principal and interest of his other debts to stand over.

The Court pronounced this interlocutor, "Find, That in

1785.

CAMPBELL
v.
WELSH, &c.
Dec. 7, 1780.

" the present case, Walter Campbell of Shawfield, is bound " to impute his tack duties termly to the payment of the " interest on the heritable bond for £7282, 5s. 9d. sterling; " and to impute termly any excess of tack duties to the pay- " ment of the principal sum in the said heritable bond; and " after the extinction and payment of the heritable bond, " find, That the tack duties are a fund *in medio* to be divided " among the creditors of the York Building's Company, " according to their respective preferences, and remit to the " Lord Ordinary to proceed accordingly." On reclaiming

Feb. 4, 1785.

petition the Court adhered.

Against this interlocutor the present appeal was brought, in so far as it did not allow him also to retain the rents or tack duty, against the other debt of £3000 secured preferably, in so far as the present postponed creditors were concerned.

Pleaded for the Appellant.—It seems admitted that this is a question between the postponed creditors of the Company, (that is, creditors not equal in time or rank with the appellant,) and the appellant, and there is no pretence that postponed creditors can maintain any plea against the appellant, that it could not be competent for the Company itself to maintain. Thus then, for the engagements which Campbell came under for the Company,—which he soon thereafter had to pay for the Company, and upon which he was secured by adjudication, as well as for the £7284 heritable bond, he is entitled to retain his rents, and to set them off against the interest of the *whole* debts due to him. There was no covenant in the lease to pay interest for the rents after the periodical terms of payment, and the process which the law permitted to found a demand of interest, was never followed. The appellant might therefore maintain, that he is entitled to charge against the Company the whole debts in his person, with interest, and to give allowance only for the rents, without interest, at the commencement of this action. But as the rents were not demanded, or were allowed to remain in his hands, he admits that they must in equity be stated against him annually, if applied to the whole debts, but, upon the principles of law and justice, he submits, that the respondents cannot be heard to insist that the rents shall be applied to one debt, so as gradually to extinguish it, principal and interest, while the other debts remain entire, and the growing interest on them is dead stock, when all the debts are precisely on the same footing as between the ap-

pellant and respondents, who are creditors postponed to him. The interest on his whole debts therefore, must compensate with the rents; and if there is a surplus over, that surplus must go to extinguish the principal of the debts least secured. The respondents say no; because there is an exception to the general rule, arising from the circumstances of this case, viz. 1st, Mr. Campbell, as to the bond debt, agreed that the rents were to be applied periodically to extinguish principal and interest on that debt. 2. That he did actually apply the rents in this manner, and consequently the mortgaged debt was discharged, and cannot now be reared up. But it is a mistake to say both that Mr. Campbell agreed to apply the rents first to principal and interest of the heritable bond; and that he did so apply them, for there was no such agreement, and, of course, no such application. And it does not follow, from the clause in the bond, that the appellant is prevented from retaining the rents for the whole debts *in general.* This was the understanding of the parties at the time, and proved by the circumstances of the Company, and had Mr. Campbell understood otherwise, he would not certainly have allowed the adjudication debts to lie over so long, but would have secured them at once. He is therefore entitled to retain for these as well as for the heritable bond of £7284.

Pleaded for the Respondents.—The mode of accounting for the rents of Kilsyth, as fixed by the Court below, is not only just, but agreeable to the understanding and covenant of the parties. It has been proved, that the appellant's ancestor agreed with Sir John Meres and the Company, to take an assignment of a preferable debt, for the purpose of being let in to the possession of the rents of the estate. That Sir John Meres, to accommodate him, was induced to give up the hold he had of this estate. That Shawfield could otherwise have had no title to the possession. That he succeeded likewise in getting the Company's corroborative or collateral security, giving special power to retain the rents, to be applied towards extinction of principal and interest of this debt. That Shawfield had no other debts in his person at the time. That the retention, therefore, could apply solely to this debt, and he was bound to apply the whole rents accordingly. That the other creditors so understood the matter, and, for 30 years, allowed him to apply the rents accordingly. And in a former suit, it was not only admitted, but settled, that the retention applied to the heritable bond

1785.

CAMPBELL
v.
WELSH, &c.

debt solely. The appellant cannot therefore now be allowed to claim retention on other debts subsequently in his person. His title of possession of these rents was, the heritable bond alone, and he cannot ascribe that possession afterwards to a different title; and now, after the extinction of the heritable bond and interest, claim retention on the other debts acquired, which were not ranked on the same footing. He was bound therefore by special paction, to apply these rents, in the first place, to the extinction of principal and interest on the heritable bond.

After hearing counsel,

LORD CHANCELLOR THURLOW :—

" MY LORDS,

" This is an appeal from certain interlocutors of the Court of Session, (stated the interlocutors of 7th December 1780 and 4th February 1785). And the appellant's complaint is, that these interlocutors have laid down an improper rule of accounting.

" To avoid the mentioning fractions of sums and circumstances, which have no influence on the question, I shall suppose the following case :—A person possessed of an estate under lease to a tenant for £500 rent, owes, 1st, to the tenant A. £2000; 2d, to B., a stranger, £2000; 3d, to the said A., the tenant, another £2000; and that these debts are, by the diligence of the respective creditors, preferable in the above order. The tenant A. is entitled to retain his rent, and apply it to payment of his first debt £2000 and interest. In something less than five years the debt will be discharged. The stranger B. is then entitled to have the rents paid over to him, his debt then amounting, with interest, to £2500. It will take more than five years of the rents to discharge this debt. When it is fully paid, the tenant comes again to hold the rents. The tenant says to the landlord, ' It is true, in competition with the stranger B., I could only found upon my first debt, and in accounting that way it was exhausted, but in competition with you, I will state myself as creditor for both my debts, and I will impute the rents first to pay the interest of both, before encroaching upon the principal of either. The landlord says, you did in fact hold only for your first debt,—it is paid, and you are now to go upon your second. The question is, What ought to be the rule?

" In the cases, a great deal is said with respect to the creditors who were preferable or *pari passu* with Shawfield; but it is unnecessary, because it is confessed in the minute, and was at the bar, that the postponed creditors are the only parties. 2d, No doubt the counsel for respondents does not admit this, and it shall be guarded. But at present, the appellant may be stated as preferable to all the other creditors not paid. And the question is, Mr. Campbell being allowed

to possess or retain the rents, can he impute them to all his debts, or must he impute them in payment only to the heritable debt?

"There arises two questions—

"1. What is the general rule of law?

"2. Whether there was any agreement, or were any circumstances to take this case out of the general rule?

"On the 1st,—It is plain that Shawfield, as tenant, was not obliged to pay any rent to the Company, while he was creditor of the Company. The rents were just equivalent to pay the interest of those debts, and consequently were sunk, and he is creditor still for his principal.

"On the 2d,—First as to circumstances. It is contended that the annuitants were preferable to Shawfield's adjudications; and in a process in which they were the parties, it was said that Shawfield stood first only for his heritable debt, and that the annuitants were next entitled to the rent when that debt was paid. It is of no consequence in the present case, what was said in that process, because it only went to rule in competition with creditors entitled to a priority.

"In the proceedings on the bill of suspension 1761, the heritable debt was declared *extinguished*, that expression is not to be understood literally or generally, but *secundum subjectam materiam*. It was a question with the annuitants,—they are out of the field or paid,—and notwithstanding that decree, Mr. Campbell continued to retain, as against the Company and its postponed creditors. Can a concession of the party, or a declaration of the Court in that cause, operate in favour of persons who were not parties? It was declared in the process of reduction, that they could not, by finding the annuitants only entitled to plead the *res judicata*.

"No case and no principle of law has been stated to show that the postponed creditors, claiming under the Company, can have a right to plead against Shawfield, what the Company itself could not plead. On the contrary, and in competition with them as in a question with the Company, Shawfield is entitled, in point of law, to bring all his debts to set off against the rents.

"The clause in the heritable bond was an unnecessary one. It professed only to do what the law would have done without declaration. The respondents want to make it an obligation upon Shawfield, to apply the rents to payment of the heritable debt singly or preferably. Consequently, to let all his other debts lie over with interest unpaid. It is impossible to imply an obligation in this way; it would have required other and more express words than are here to make out such an obligation.

"No consent of Shawfield's, to impute in the way the respondents contend, is to be found in the proceedings. On the contrary, he claimed, and was allowed to retain, for other debts than the heritable bond.

1785.

M'INNES v. MORE.

"I therefore move to reverse the interlocutors, and declare that Shawfield is entitled to retain the tack duty, and impute the same; 1st, In payment of the interest of all his debts; and then, in payment of the principal thereof in competition with creditors not preferable to any of the said debts."

It was ordered and adjudged that the interlocutors of 7th December 1780, and 4th February 1785 complained of in the appeal, be reversed. And it is further ordered and adjudged that the appellant, in account with the York Buildings Co. and their postponed creditors, has a liberty to retain and impute the tack duty of £500, in the first place to pay the interest, and, in the second place, the principal of all such debts due to the appellant as are preferable to the debts due to such creditors.

For Appellant, *Ilay Campbell, W. Grant.*
For Respondents, *Ar. Macdonald, Alex. Wight.*

NOTE.—Unreported in Court of Session.

JANET M'INNES, Widow of CAPTAIN FAIRBAIRN, late of the Sixty-second Regiment, - - - - } *Appellant;*

ALEX. MORE, - - - - *Respondent.*

House of Lords, 23d May 1785.

CONSTITUTION OF MARRIAGE—Held, that though a party joins issue, and goes to proof and final judgment, on one fact of her condescendence, that she is not foreclosed, on failure in making out the issue, from going to further proof of the other facts and circumstances of her condescendence. So held in a declarator of marriage.

The particulars of this case are reported, *ante* p. 598, Vol. II.

The appellant, in attempting to make out her marriage, grounded her case, both in the libel and subsequent condescendence given in for her, on a written acknowledgment, which she alleged was sufficient proof to establish a valid marriage between them; and the House of Lords having reversed the judgments of the Court of Session, which found such acknowledgment sufficient, and ordered that the Court of Session do remit to the Commissaries to find that such written acknowledgment was not sufficient proof of any