vant case stated, and if no relevant case was stated by the Procurator-Fiscal in the complaint, it is not for us to answer questions of law arising under a complaint which is so stated that no conviction should have followed on it.

The complaint is that the respondent committed a contravention of the Roads and Bridges (Scotland) Act) 1878, section 123 and section 101 of Schedule C appended thereto. Now, the relevancy of that complaint depends on the terms of the clause of the Act libelled, and if that clause said that any person doing the things mentioned in it would be liable to the penalties specified, then this would be a relevant complaint. But unfortunately this is not at all what is laid down in the clause, which bears that "if the surveyor of any turnpike road, or any contractor or other person employed on such road" shall do certain things, then such person shall be liable to certain penalties. Now, I find here no averment that the respondent Robert Cooper was a contractor employed on such road. For the appellant it was argued that because he was designed as contractor in the complaint, that was sufficient. Now, that he was named and designed as contractor tells us no more about him than that the prosecutor chose so to identify him for the purposes of citation, and does not amount to an averment that he was a contractor on these roads in the sense of the statute. Therefore I am clearly of opinion that the complaint is irrelevant and should not have been sent to trial, and that we must refuse the appeal on that ground, and decline to answer the questions put to us.

LORD RUTHERFURD CLARK and LORD KYLLACHY concurred.

The Court dismissed the appeal.

Counsel for the Appellant — Guthrie. Agent—John Cameron, S.S.C.

Counsel for the Respondent—W. Campbell. Agents—Macfarlane & Richardson, S.S.C.

Tuesday, October 31.

(Before the Lord Justice-Clerk, Lord Rutherfurd Clark, and Lord Kyllachy.)

FRASER, APPELLANT.

Justiciary Cases—Bail—Forgery — Successive Charges.

Thomas James Fraser, a corn-factor in Glasgow, was committed on a charge of forging three bills for sums amounting to about £1000. On his applying for liberation on bail, the Procurator-Fiscal stated that he was investigating a further charge against Fraser of forging bills to the amount of about £3000. The Sheriff-Substitute (Birnie) refused the application *in hoc statu*, and Lord Kincairney adhered on appeal. On the second set of charges being formulated, Fraser renewed his application for bail, and the Sheriff fixed the amount at £2500. Fraser appealed to the High Court of Justiciary, on the ground that as his estates had been sequestrated the amount was prohibitive, and that his estates would probably yield sufficient to pay his creditors in full even if the bills current were included as debts, and that bills to the amount of £1000 were not current, having been taken up as they fell due or never discounted. He suggested £500.

The Court *refused* to interfere with the discretion of the Sheriff, and indicated that if the Crown had brought a counter-appeal they would have been prepared to hold that in the circumstances bail should be refused.

Counsel for the Appellant—Guy. Agents—Wylie, Robertson, & Rankin, W.S.

Counsel for the Respondent—Adv.-Dep. Reid. Agent—Crown Agent.

COURT OF SESSION.

Tuesday, November 7.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

NORTH ALBION PROPERTY INVESTMENT COMPANY, LIMITED *v.* WILSON AND MACBEAN.

Right in Security—Personal Obligation in Bond and Disposition in Security—Right of Debtor on Paying Amount Due under Bond to Demand Assignation to Bond.

The granter of a bond and disposition in security who has sold the security subjects after granting the bond and disposition is entitled, when called upon by the creditor to pay the debt in full under his personal obligation, to demand from the creditor an assignation to the bond, and if the creditor has disabled himself from granting an assignation to the bond in its entirety the debtor is freed from his obligation.

MacBean having granted a bond and disposition in security for the sum of £3000 to Bankier's trustees, subsequently sold the security subjects under burden of the bond. The purchaser applied to Bankier's trustees to restrict the bond in order to enable him to sell part of the security subjects. Bankier's trustees consented without receiving any consideration, and the bond was restricted accordingly. Thereafter Bankier's trustees assigned the bond so restricted to an investment company which had previously obtained a postponed bond over the part of the security subjects still covered by the original bond granted by MacBean.

In an action by the Investment Company against MacBean for payment of

the full amount due under the bond granted by him, the Court *assoilzied* MacBean, *holding* that the Investment Company, as a condition of receiving payment, were bound to assign the bond to MacBean, and that as it could no longer be assigned in its entirety, MacBean was freed from his obligation.

By bond and disposition in security, dated 13th and recorded in the General Register of Sasines 21st May 1874, Hugh MacBean granted him to have borrowed the sum of £3000 from the trustees of William Bankier, which sum he bound himself to repay at Martinmas 1874, and in security of repayment he disponed to the said trustees a piece of ground in Glasgow extending to 870 square yards.

In November 1874 MacBean sold the security subjects to George Jeffrey in consideration of the payment of a sum of £1400, and of the said George Jeffrey freeing and relieving him, as by acceptance of said disposition he bound and obliged himself to free and relieve him, of the above bond and disposition in security, which bond and disposition in security, and whole obligations contained therein, it was agreed should transmit against Jeffrey, and his heirs and successors whomsoever.

Jeffrey sold the lands in 1876, and after various transmissions they were acquired in 1877 by George Eadie. At this date the lands were still subject to the bond for £3000, which had never been called up, and they were further burdened with two postponed bonds for £800 and £550 for sums borrowed by successive proprietors after they had ceased to belong to MacBean.

Immediately after acquiring the subjects, Eadie borrowed £3000 from the North Albion Investment Company, Limited, for which he granted a bond dated 5th and recorded 6th June 1877, and in security he disponed to the company a piece of ground extending to 552 square yards, being part of the subjects disponed by the bond and disposition in security granted by MacBean to Bankier's trustees.

In the same year Eadie applied to Bankier's trustees to release part of the subjects which they held in security under the bond granted by MacBean. The trustees consented to grant this release without receiving any consideration, and in October 1877 they granted a deed of restriction declaring 325 square yards of the 870 disponed to them in security by MacBean to be redeemed and disburdened of the security constituted by the bond and disposition granted by MacBean.

In 1880 the North Albion Property Investment Company paid Bankier's trustees a sum of £3000 for their rights under the bond and disposition in security granted by MacBean, and the trustees assigned and disponed to the company the bond and the subjects thereby disponed in security, but excepting the portion released by the deed of restriction.

In 1892 the North Albion Company sued John Wilson, *curator bonis* to Hugh MacBean, and Hugh MacBean for the principal sum of £3000 due under the bond granted by MacBean to Bankier's trustees, and also for a large amount of interest.

The pursuers pleaded, *inter alia*—"(3) The pursuers' right to enforce the personal obligation undertaken by the defender Hugh MacBean in the said bond and disposition in security granted by him is not prejudiced by the renunciation by Mr Bankier's trustees of part of the security subjects contained in said bond and disposition in security. (4) The pursuers are not bound, on payment only of the amount due under the bond of 1874, to grant an assignation of the security-subjects contained in the said bond, in respect that the said subjects are also held by the pursuers in security of another debt, and that the pursuers would be prejudiced by the keeping up of the security created by the said bond of 1874, or at least have an interest to object to that security being maintained. (5) *Separatim*—In any view, the pursuers are entitled to recover payment of the sum sued for, under deduction of a sum equivalent to the value of the part of the security-subjects released as aforesaid."

The pursuers did not aver, and the defenders denied, that the application made by Eadie for a release of part of the subjects held in security under the bond granted by MacBean, or granting of the deed of restriction by Bankier's trustees, had ever been brought to MacBean's knowledge.

The defenders pleaded—"(2) The authors of the pursuers, as creditors in said bond, having, without the knowledge or consent of Mr MacBean, altered the contract between him and them, he was thereby freed of liability for the said bond. (3) The defenders ought to be assoilzied, in respect that the pursuers are not in a position to assign to the defenders the said bond, together with the subjects disponed by Mr MacBean in real security of the payment thereof, in exchange for payment of the sum contained in the bond."

On 8th February 1893 the Lord Ordinary (WELLWOOD) sustained the defences, and assoilzied the defenders from the conclusions of the summons.

"*Opinion.*—This case raises some interesting and novel questions.

"I. The leading question which was argued is, whether the granter of a bond and disposition in security who has sold the security-subjects after granting the bond and disposition is entitled, when called upon by the creditor to pay the debt in full under his personal obligation, to demand from the creditor an assignation to the bond? Owing to various transmissions the narrative in the record is somewhat complicated, but, stated shortly, the essential facts of the case are as follows.

"A borrows £3000 from B, and grants a bond and disposition in security in the usual terms, the security-subjects extending to 800 square yards of ground. A then sells the security-subjects to C under burden of the bond, the sum in the bond being treated as part of the purchase price. C afterwards applies to B to restrict the bond in order to enable C to sell 300 square

yards free of the bond. B agrees to do so without receiving any consideration, and the bond is accordingly restricted to 500 square yards. B thereafter assigns the bond so restricted to D, who had previously obtained a postponed bond over the 500 square yards still covered by the original bond by A.

"The heritable subjects having depreciated in value, D demands from A, the granter of the first bond, full payment of the debt. A declines to pay, on the ground that D as a condition of receiving payment is bound to assign to him the bond which he granted to B, and that as it can no longer be assigned in its entirety A is freed from his obligation.

"I do not profess to give a complete statement of the facts or figures, but it is sufficient to show how the questions arise. D represents the present pursuers, and A the defender Hugh MacBean.

"The position maintained by the pursuers is this, that under the original bond and disposition in security the creditor had two separate and distinct remedies—one the personal obligation of the debtor, the other the heritable security; that he might use the one or the other just as he found convenient; and that if the debtor sold the security-subjects the creditor might, if he chose, discharge the bond in whole or in part, and thus free the lands, while at the same time the personal obligation of the debtor remained intact.

"The defender, on the other hand, maintains that an assignation of the bond—a reconveyance of the security—is the counterpart of payment, and that if the creditor has disabled himself from reconveying, the original debtor is liberated.

"Before I proceed to consider the legal aspect of the case, I propose to inquire what would be the practical result to the parties of sustaining the one contention or the other.

"To deal first with the defender's view. So long as the security-subjects remain in the hands of the debtor the question cannot arise. If the debt is paid up the security is discharged.

"The difficulty arises when the debtor sells the security subjects. So long as the bond remains undischarged, the subjects are to that extent diminished in value; the seller cannot obtain full value for the subjects. He accordingly conveys the subjects under burden of the bond, receives so much less money, and for greater security takes the purchaser bound to relieve him of the debt, and to agree that the debt shall transmit against him. All this appears on the face of the recorded deed. The result of this is, that although the debtor remains liable if called upon by the creditor to pay, he has not only the personal obligation of the purchaser but also the value of the heritable subjects between him and ultimate loss.

"On the other hand, the creditor has not merely the original debtor's personal obligation and the security of the heritable subjects unimpaired, but also the personal obligation of the purchaser for which he had not bargained.

"That is the result from the defender's point of view.

"Again, according to the pursuer's argument the result would be that the original debtor would be entirely deprived of the benefit of the security subjects, and might in certain events be compelled to pay the debt twice over. As I have pointed out, the price which a seller receives who sells property under a bond is diminished by the sum covered by the bond; and if he is afterwards called upon to pay the debt in full, and the purchaser is bankrupt, and he is deprived of all relief from the sale of the security subjects, he will simply have paid the debt twice over. That is what the pursuer's counsel maintains to be the law.

"This statement of the case shows, I think, that the result contended for by the pursuers would be productive of great hardship to the original granter of the bond, while the creditor would suffer no prejudice if the defender's contention were sustained. It remains to be considered whether the defence is warranted by the law of Scotland.

"I think it may be taken that there is no express decision or authority in the law of Scotland directly in point. On the other hand, certain English cases have been quoted in which it is maintained the point was expressly decided in favour of the defender's view. I shall afterwards consider these cases in detail.

"To deal first with the law of Scotland. In the absence of express decision or authority the question must be decided upon principle. I think it is to be solved by considering the nature of the contract between the original debtor and the creditor. The security which the debtor grants and the creditor accepts is really a pledge for payment of the debt; and the law of the contract of pledge—viz., that the pledgee must apply and use the pledge only for the purposes for which it is given—rules the present case. It is not necessary to refer in detail to the history of redeemable securities; but if it is attended to it will be seen that a wadset, of which the modern heritable security is a development, is simply a pledge of land in security of debt, the lands pledged having to be reconveyed and restored to the debtor on payment of the debt. Now, the creditor's obligation under the contract of pledge is to restore the subject of the pledge on the payment of the debt. The right of property remains with the pledger, subject to the burden, and the creditor has no right of use during his possession of the pledge. The subject of the pledge cannot be sold without the order of a judge; the seller cannot sell at his own hand—Bell's Prin., secs. 206, 207.

"It will be seen that these limitations of the pledgee's powers in regard to the subjects of pledge find their counterpart in some at least of the rules applicable to the use which the holder of heritable security is entitled to make of his right. If the creditor demands payment of his debt while the security subjects remain in the original debtor's possession and the debt is

paid, the security as an accessory obligation is discharged, or at the request of the debtor it is assigned to a third party. If payment is not made, and the creditor sells under his bond and recovers full payment, the personal obligation is discharged, and the creditor accounts for the surplus, if any. So far there is no difficulty; the creditor can only use and deal with his security as a pledge.

"If, again, the debtor sells the security subjects under burden of the bond, the bond which the creditor holds still remains a security for payment of the original debtor's debt. The debtor remains bound; the creditor who is not a party and cannot be prejudiced by the transmission does not accept the purchaser in his room—although the purchaser also may be bound if by his title the obligation transmits against him; and I do not see why the creditor's rights in regard to the use of the security should be enlarged by the fact that the debtor has transferred the estate to another. Practically the position is the same as if originally the debtor had assigned in security a bond over another person's land, in which case the creditor could not, I take it, have discharged the bond without liberating his debtor.

"If when the lands are in the possession of the purchaser the creditor proceeds to sell under his bond and recovers full payment of his debt, I do not understand it to be maintained that the original debtor is not thereby liberated. The pursuer's counsel, however, carried his argument so far as to maintain that the creditor was entitled, if he chose, to discharge his bond altogether with or without consideration, without regard to the interests of the original debtor. If this were so, the creditor might transact with the purchaser or with postponed bondholders for the discharge of the bond; discharge it for something less than the sum in the bond, and still claim full payment, not merely the balance, from the original debtor. If the creditor could discharge the bond without consideration, he could also transact for its discharge. I see no distinction between those proceedings, and either in my opinion would be a violation of the condition under which the creditor obtained the security.

"It may be that when the creditor proceeds to sell, it is not necessary that he should give notice or premonition to the original debtor. But neither is he under any obligation to give notice or premonition to postponed bondholders, and yet he is bound to account to them and all interested for the price realised, and to carry through the sale with a just regard to the interests of all concerned. It would be strange if the one person to have no voice in the matter were the original obligant, who is still liable for payment of the full debt.

"I do not think that the authorities quoted for the pursuers conflict with the view that the sale of the subjects under the bond does not affect the rights of parties in the security. The case chiefly relied on is *The University of Glasgow* v. *Yuill's Trustee*, 9 R. 643. In that case two points were decided. First, that where it is agreed *in gremio* of the conveyance the personal obligation in a bond and disposition in security shall transmit against a purchaser of the heritable subjects, the effect of such transmission is that it operates as if the purchaser had granted a bond of corroboration without any discharge of the personal obligation of the original debtor. The creditor, who is no party to the transaction, and who cannot be prejudiced by it, nevertheless gets an additional obligant, but the original debtor is not discharged.

"The second and more important point decided was one which turned upon the law of bankruptcy and the Bankruptcy Statutes. Yuill in 1876 granted a bond and disposition in security in favour of the University of Glasgow for £9000. Thereafter in 1877 the security subjects were acquired by David Horne, under burden *inter alia* of the University's bond for £9000, and in the conveyance to him it was agreed that the personal obligation should transmit against him in terms of the Conveyancing (Scotland) Act 1874.

"Yuill thereafter became insolvent, and his estates were sequestrated and a trustee appointed. The University of Glasgow claimed to be ranked on the bankrupt estate for the full amount of the debt and interest, and the question was whether they were or were not bound, under the 65th section of the Bankruptcy (Scotland) Act 1856, to deduct in claiming the value of their heritable security? The trustee in Yuill's sequestration rejected that claim, in respect that they had not, for the purpose of ranking, valued and deducted the security subjects, and had not exhausted or discussed the said property and David Horne the disponee. The University appealed to the Sheriff, who recalled the trustee's deliverance, and ordained him to admit them to a ranking in terms of their claim, and his judgment was affirmed by the First Division of the Court. The Lord President Inglis's opinion is valuable as containing an exposition of the rights of a secured creditor in common law when his debtor became insolvent. He states the following rules of ranking as well settled—'First, a creditor who holds personal or real securities other than that of the bankrupt and his estate, is entitled so to use his various securities as to make them all available to the fullest extent so as to operate payment in full, but no more. Second, if co-obligants, whether as joint-debtors or as principal and cautioners bound to the creditor, are all bankrupt, he is entitled to rank on the estate of each for the full amount of his debt, so as to operate full payment out of the combined rankings. Third, if a creditor has, in addition to the personal obligation of his debtor, a security over some subject not belonging to his debtor, he is entitled to realise the full value of his security, and supposing that does not satisfy his claim, to rank on his debtor's estate for the full amount of his debt. And fourth, it is important to observe that it makes no difference

though the real security is over a part of the insolvent debtor's estate. He may exhaust that security, and rank, not for the balance, but for the full amount of his debt, on the remainder of the insolvent's estate *pari passu* with the unsecured creditors, so as to operate full payment of his debt.'

"It will be observed that the right of a creditor who holds a security, whether over the estate of his debtor or that of a third party, is simply to operate payment in full of his debt, from both sources. In order to secure this, he is entitled to rank upon the bankrupt estate, without deduction, for the full amount of his debt. To this extent he has an advantage over unsecured creditors; but at most he will only obtain a dividend upon his debt, and the remainder he may, if he can, recover out of his security. But he is only entitled to use those two remedies to the effect of getting full payment of his debt. This is well expressed in the passage from Bell's Commentaries which the Lord President quotes—'Bell's Commentaries, 7th edition, p. 419—It is of some consequence to determine what shall be the effect in bankruptcy of a creditor secured over a particular estate drawing, or being entitled to draw, a large part of his debt out of that estate, preferably to the personal creditors, when he comes to demand payment of what remains still due. It is the right of a creditor by the common law of Scotland to demand payment of his whole debt under the obligation of his debtor, and this right does not bar him from claiming the full benefit of any pledge or security which he may hold, provided from both sources he does not derive more than full payment of his debt.'

"The only question remaining was to what extent the common law had been altered by statute. That depended upon the terms of the 65th section of the Bankruptcy Act 1856, under which a creditor who holds a security over any part of the estate of the bankrupt is bound, in order to be ranked to draw a dividend, to deduct the value of his security from his debt and specify the balance. The question to be decided was whether Yuill, having conveyed away the security subjects, the bond which he had granted when he was owner of the subjects or the estate over which the security was constituted could be held to be part of the bankrupt's estate within the meaning of the statute. The question is one of considerable nicety, because if the creditor in a heritable security is bound while the debtor remains solvent to count and reckon with the debtor for the heritable security, the security or right to demand an accounting for its value is in a sense part of the debtor's estate; and there is room for argument that its character is not altered by the debtor's bankruptcy. But the Court took a strict view of the matter. They were dealing with a question in bankruptcy where the creditor was unable to obtain full payment under the debtor's personal obligation; and they were construing a statute which to a certain extent restricted the creditor's rights at common law. The view which they took was that the property referred to in the statute depended upon true ownership; and that as the security subjects, if liberated from the security, would not have been part of the bankrupt's estate available for distribution among his creditors, the value of the heritable security did not fall to be deducted by the creditor in his claim. I do not, however, find in the opinions of the Judges any countenance for the view either that the creditor could operate more than full payment out of the ranking and the security together; and certainly I find no authority for the contention that a security-holder dealing with a solvent debtor is entitled to recover full payment from him and refuse him the benefit of the security which was given for the sole purpose of securing payment of the debt.

"It was also pleaded for the pursuers that where a creditor has two obligants bound as full debtors, he may discharge one without losing his recourse against the other. This does not in my opinion touch the present case, which I think turns upon the nature of the transaction between one of the principal obligants and the creditor. It is to be remembered that we are here dealing with a question between the parties to the original transaction, or, what is the same thing, between one party to the original transaction and the assignee of the other.

"Therefore if the case has to be determined on principle according to the law of Scotland, I am prepared, although not without hesitation, to sustain the defender's contention upon this point.

"I am confirmed in this view by the English decisions quoted for the defender; in particular, the leading case, *Palmer* v. *Hendrie*, 27 Beavan 349, and 28 Beavan 341, and the recent case, *Kinnaird* v. *Trollope*, L.R., 39 Ch. Div. 636. No doubt, the law of England upon this subject must be received with caution, but I do not think that these decisions proceed on any technicalities of English law, but upon broad principles of equity which are equally applicable to a kindred question in Scotch law.

"In certain respects a mortgage differs from a heritable bond, but the differences are more in form than in substance. Under a mortgage the legal estate or fee passes to the mortgagee, and the purchaser is left with only an equity of redemption. But he is usually left in possession of the lands, and he has power to grant further mortgages over the equity of redemption or to assign it absolutely. Thus in substance he is practically in the same position as the owner of lands who has granted a heritable security. Again, the mortgage, although in form a conveyance of the fee, is really nothing more or less than a security. On payment of the debt the mortgagee is bound to reconvey the lands, and if he sells them to pay his debt, he must account to the mortgagor. If he forecloses in default of payment, it seems that he is entitled to retain the lands, even although

they are of greater value than the debt, but if after foreclosing he finds that the lands are not sufficient in value to cover the debt, he cannot sue the mortgagor for the balance on the covenant or personal obligation, except on condition of reopening the foreclosure and reviving the equity of redemption.

"I understand that the following points are established by the decisions—1. If the mortgagor has assigned the equity of redemption absolutely, he is still entitled to a conveyance of the legal estate if sued on the covenant, and if the mortgagee has parted with the whole or part of the legal estate, he is thereby disabled from suing the mortgagor on the covenant. 2. If after the mortgagor has assigned the equity of redemption, the mortgagee obtains from the assignee a second mortgage, he is still bound, if he sues on the covenant, to convey the legal estate to the mortgagor on payment of the debt for which the first mortgage was granted, subject to such equity of redemption as may be subsisting in the assignee or any other person, and he is not entitled as a condition of such conveyance to demand payment from the mortgagor of the sum covered by the second mortgage.

"In the case of *Palmer* v. *Hendrie* the facts were these—Palmer, the plaintiff, in 1847 mortgaged some leasehold property to Hendrie for £800, and he covenanted in the usual terms to pay the mortgage money. After part of it had been paid off, Palmer agreed to transfer the equity of redemption to Overton & Hughes, who were solicitors. Accordingly, by an indenture dated in February 1850, Palmer assigned the property to them subject to the mortgage, and Overton & Hughes covenanted to pay the mortgage and to indemnify the plaintiff therefrom. After this Hendrie executed certain deeds by which he and Overton & Hughes granted under-leases of part of the property at peppercorn rents, and by these transactions considerable sums by way of premium were received and retained by Hughes. Overton's interest in the mortgaged property was transferred to Hughes, who in 1858 absconded, and was declared bankrupt.

"In January 1859 the executors of Hendrie commenced an action at law against Palmer upon his covenant to recover £300 alleged to be due on the mortgage. Palmer then filed a bill against the executors, submitting that in equity he had been relieved from all liability upon the covenant for payment of the mortgage money contained in the deed of 1847.

"The opinion of the Master of the Rolls, Sir John Romilly, on a motion for an injunction in the action, so fully explains the law of England in regard to the rights of mortgagor and mortgagee in such circumstances, that I now quote it at some length. He says (p. 351)—'I am of opinion that there can be no question as to the relative rights and obligations of a mortgagor and mortgagee. A mortgagee may pursue all his remedies at once; he may bring actions of covenant and ejectment, and at the same time proceed to foreclose the mortgage. If he forecloses it and afterwards sues on the covenant, he thereby opens the foreclosure, but if he sues on the covenant and does not get fully paid, he may still go on and foreclose the mortgage. But after he has once been paid in full under the covenant, he cannot touch the estate, and is precluded from all proceedings afterwards. These, then, are the relative duties and reciprocal obligations between mortgagor and mortgagee. The mortgagee has a right to make use of all his remedies against the mortgagor for obtaining payment of his money, but as soon as the mortgage money has been fully paid, he is bound to deliver over the mortgaged estate to the mortgagor. The question is, whether when the mortgagee has made it impossible to restore the property mortgaged, he can proceed against the mortgagor to recover the amount of the mortgage money. He can, undoubtedly, at law sue upon the covenant, and consequently the executors of Hendrie are at law entitled to recover from the plaintiff the unpaid mortgage money; but the mortgagees must perform their reciprocal obligations; they are bound on payment to restore the property to the mortgagor, and if it appear from the state of the transaction that by the act of the mortgagee, unauthorised by the mortgagor, it has become impossible to restore the estate on payment of all that is due, I am of opinion that this Court will interfere and prevent the mortgagee suing the mortgagor at law. Suppose a mortgagee has conveyed away the property without receiving any consideration for it, can he afterwards sue the covenantor, who on his part is unable to redeem the property, there being none left to redeem: What is there in this case to take away the plaintiff's right to redeem the property, or his right to compel the defendants to restore it on being paid? I see nothing in the case to do it.'

"He then deals with the argument for the defendant to the effect that the plaintiff (the mortgagor) by conveyance of the equity of redemption was precluded from calling for a conveyance of the legal estate, having ceased to have any interest whatever in the mortgaged property. On this subject he says (p. 352)—'It is argued that by the conveyance of the equity of redemption, the plaintiff is precluded under any circumstances from calling for a conveyance of the estate. But it is to be observed that the transferees became liable to pay the mortgage money, and that they covenanted to indemnify the plaintiff therefrom. Hendrie was no party to the deed, and his executors insist that it was not binding on them, and that they have a right to sue the plaintiff on the covenant in the mortgage deed. But he has since admitted the transaction and granted leases of the property at nominal rents, and has either received the purchase money for the leases or has allowed Overton & Hughes to do so. I think his executors cannot now repudiate the transfer and avail themselves of it for the

purpose of saying, on the one hand, that it relieves them from their obligation to restore the estate, and on the other that they can still sue for the mortgage money.'

"The proceedings on the hearing are reported in 28 Beavan 341. The Master of the Rolls adhered to his former opinion, and the only passage in the opinion then delivered that I need quote is the following. He says (p. 343)—'If a man mortgages property, and afterwards sells the equity of redemption to a third person, who then sells the property with the concurrence of the mortgagee, such mortgagee cannot, if he has allowed the purchaser of the equity of redemption to receive the purchase money, sue the original mortgagor for the amount of the money which he has thus allowed to be paid to the purchaser of the equity of redemption. That is one of the first principles of equity.'

"The result was that defendants were perpetually restrained from all proceedings at law in respect of the mortgage debt and interest.

"The case of *Palmer* v. *Hendrie* was followed in 1888 by the case of *Kinnaird* v. *Trollope*, L.R., 39 Ch. Div. 636. The facts of the case closely resemble those of the present, as will appear in the following passage in the rubric—'In 1870 the defendants mortgaged property to the plaintiffs to secure £12,000 and interest, and entered into the usual covenants for payment of principal and interest. In 1872 the defendants, for value, absolutely assigned their equity of redemption to A B, and he covenanted to indemnify them against the £12,000 and interest. In 1875 A B further charged the property to the plaintiff to secure £8000 and interest, covenanting that it should not be redeemable except upon payment of the £8000 as well as the £12,000. A B afterwards became insolvent, and the property having depreciated in value, the plaintiffs brought an action against the defendants, on the covenant contained in the mortgage of 1870, to recover the £12,000 and interest.' The defendants were willing to pay the £12,000 and interest, but upon condition that the plaintiffs assigned to them the mortgage of 1870 as security for the £12,000 in priority to the plaintiffs' charge for £8000 created by the indenture of 1875.

"It will be seen that in *Kinnaird* v. *Trollope* the mortgagee had not parted with any part of the legal estate, but he had obtained from the assignee of the equity of redemption a further charge on the property, and he maintained that he was not bound to convey or assign the legal estate to the mortgagor except on payment not only of the sum covered by the first mortgage, but also the sum lent to the assignee of the equity of redemption. The decision in *Kinnaird* v. *Trollope* is chiefly of importance as bearing upon the second point in the present case; but the decision of Justice Stirling proceeds upon a thorough examination of the previous authorities, including *Palmer* v. *Hendrie*, and the principles thereby established or recognised. The following part of his opinion bears on this point. He says (pp. 645, 646)—'Then does it make any difference if after the assignment of the equity of redemption, the assignee mortgages either to the original mortgagee or to some other person? I think not. Such a mortgage creates in the new mortgagee a fresh interest in the equity of redemption; but it does not in my opinion impose any additional burden or liability on the mortgagor. On this part of the case *Palmer* v. *Hendrie* again throws some light. It was there held that the mortgagor on paying off the mortgage debt is entitled to have the property restored to him unaffected by any acts of the mortgagee unauthorised by the mortgagor. The necessary authority might be derived either (as in the case of *Rudge* v. *Richens*) from the powers conferred by the mortgage deed, or from the direct concurrence of the mortgagor, or possibly otherwise; but it was held in *Palmer* v. *Hendrie* that the mere concurrence of the assignee of the equity of redemption in acts which were not within the powers conferred by the mortgage was insufficient. It was argued in the present case that by absolutely assigning the equity of redemption the mortgagor authorised the assignee to deal with it as his own property, and consequently to raise money on it. If this argument be well founded, I have difficulty in seeing why the dealings which formed the subject of decision in *Palmer* v. *Hendrie* should not have been held to be authorised by the mortgagor. Such authority as was conferred by the assignment did not, in my judgment, extend to raising money on behalf of the mortgagor, or to making his right of redemption more burdensome to him than it would otherwise have been. The assignee could only raise money on his own behalf, and could not by so doing impose (as against the mortgagor) an additional burden on the mortgaged property.'

"The result was that the plaintiffs (mortgagees) were held entitled to judgment for £12,000 as the sum in the first mortgage, with interest, but only upon terms that they reconveyed the property to the defendants, subject to such equity of redemption as might be subsisting in any person or persons other than the defendants themselves.

"It seems to me that, *mutatis mutandis*, these decisions are directly in point. In both cases the mortgagor was completely divested of his estate in the lands. He had parted with the legal estate to the mortgagee, and with the equity of redemption to the assignee. And yet it was held that he could not be called upon to pay under the covenant or personal obligation which still subsisted in favour of the mortgagee except on condition of having the legal estate reconveyed to him, subject to the equity of redemption with which he had parted.

"In parting with the equity of redemption the mortgagor did what in Scotland would be equivalent to selling the lands under burden of the bond. What he was entitled to receive back from the mortgagee on payment of the sum in the first bond was in point of form the legal estate sub-

ject to the assignee's equity of redemption; but in substance that is equivalent to an assignation of a heritable security.

"It therefore seems to me that after making all allowance for certain peculiarities in the law of England applicable to mortgages, the decisions to which I have referred are directly in point. The principle which underlies them is that a mortgage is a pledge; and that it is a term or condition of the bargain between mortgagor and mortgagee—which is unaffected by subsequent transmission of the equitable estate by the mortgagor, or transactions between the mortgagee and the assignee of the equity of redemption—that the mortgagor shall not be called upon to pay under his covenant or personal obligation except on condition of the mortgaged property being reconveyed to him, subject to other existing equity of redemption.

"II. The pursuers' second answer to the defence is that they are not bound to assign the security, because they would be prejudiced by doing so, in respect that they hold a postponed bond over the security-subjects which are now not of sufficient value to meet both bonds. There can be no doubt of the pursuers' interest to refuse to grant an assignation, but in the circumstances it does not, in my opinion, constitute a legal excuse. As assignees of the original creditor the pursuers are open to all defences and exceptions which could have been pleaded against the former. If I am right in the views which I have expressed as to the debtor's right to insist that the heritable security granted by him shall be in one way or another applied in extinction or relief of his personal obligation, he has no need to appeal to the equitable right which a person who pays a debt in full has to demand an assignation to the debt, and any security which may be held by the creditor.

"In such a case the person who pays the debt has had, strictly speaking, no previous right or interest in the security, and may not even have known of its existence. But the creditor is bound to grant an assignation if he has no good reason for refusing. The right to demand it, however, is founded in equity, and therefore if the creditor can qualify any substantial prejudice which will, or even may possibly ensue, he will be entitled to refuse. Upon this ground the case of *Guthrie* v. *Smith & Maconochie*, 8 R. 106, proceeded.

"In the present case the defenders' claim for an assignation is founded not on equity, but on implied contract. If the creditor's rights in the security were limited, as I hold them to have been, he could not, by advancing money to the purchaser of the lands and taking a postponed bond over the security-subjects, free himself from his obligation to apply the first bond to the purpose for which it was granted. On this subject I think the remarks of Justice Stirling in *Kinnaird* v. *Trollope*, which I have quoted, are closely in point. He says—'The assignee could only raise money on his own behalf, and could not by so doing impose as against the mortgagor an additional burden on the mortgaged property.'

"Applying those words to the case in hand, the creditor and the purchaser of the security-subjects could not, without the consent or knowledge of the granter of the first bond, arrange that any additional burden should be placed upon the security-subjects to the effect of prejudicing the original debtor's rights in the bond which he had granted. Of course the purchaser was entitled to grant, and the creditor to take, a postponed bond over the subjects on the ordinary footing of its ranking after the first bond; but what the pursuers now seek to do is to appeal to the fact of the creditor having, without the original debtor's consent or knowledge, acquired a postponed bond over the security-subjects as a reason for refusing an assignation to the first bond, and after obtaining full payment from the debtor, to apply the whole proceeds of the heritable subjects in part payment of the two bonds which they hold over them.

"No separate argument was addressed to me in support of the pursuers' fifth plea-in-law, which is to the effect that in any view they are entitled to recover payment of the sum sued for, under deduction of a sum equivalent to the value of the part of the security-subjects released as aforesaid.

"It was not contended that if as a condition of receiving payment from the defenders the pursuers are bound to assign the bond, and were in a position to do so, there would be any conveyancing difficulty in the way of assigning it to or for behoof of the defenders.

"On the whole matter, I think that the defence is well founded, and that the defenders must be assoilzied."

The pursuers reclaimed, and argued—A creditor in a bond and disposition in security could in no case be asked to give more than a simple discharge if he could show that to give more would prejudice his interest—Erskine, iii. 2, 11; Bell's Prin. sec. 557; Opinions in *Fleming* v. *Burgess*, June 12, 1867, 5 Macph. 856; *Guthrie* v. *Smith*, November 19, 1880, 8 R. 107. The fact that the debtor had parted with his property after he had granted the bond burdening it did not affect the creditor in the bond, and the debtor could not on that account require more from the creditor than if he had not sold it. The original debtor's right of relief, if he had stipulated for it, was not discharged—*Carrick, &c.* v. *Rodger, Watt, & Paul*, December 3, 1881, 9 R. 242; Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), section 47. By parting with his estate he had restricted his right to one of relief. The discharge of a bond did not operate a reconveyance; its object was to prevent a fraudulent assignation by the creditor after payment. The creditor in a bond and disposition in security was entitled both to sue the debtor on his personal obligation, and also to use his remedy against the lands—*M'Whirter* v. *M'Culloch's Trustees*, July 9, 1887, 14 R. 918; *M'Nab* v.

Clarke, March 16, 1889, 16 R. 610, and the difference in the laws of the two countries made the English cases inapplicable. The English cases referred to, depending as they did on technicalities of English law, were not applicable. Nor were they all in the defenders' favour, for where there were first and postponed mortgagees the mortgagor could not demand that the first mortgagee should assign his debt and convey the property to a nominee of his own without the consent of the puisne mortgagee—*Teevan* v. *Smith*, L.R., 20 Ch. Div. 724. Unless the defender were to be treated as in the position of a cautioner, the decision of the Lord Ordinary was wrong—*Liddesdale, &c.* v. *Keith*, May 17, 1893, Scots Law Times. If the Court did not accept the argument above submitted, the pursuers desired opportunity to assign the subjects as they now stood, and their value was practically unimpaired.

Argued for the defenders—The debtor in a bond and disposition in security bound himself personally to pay the debt, and further granted a conveyance of heritable subjects in security of the personal obligation. The conveyance was redeemable by payment of the debt, and on payment being made the debtor was entitled to be retrocessed in the security-subjects. The fact that in the usual case discharge operated retrocession was an accident. In all obligations of the kind—wadset, bond and disposition in security, or *ex facie* absolute disposition—there was an equity on the creditor to retrocess the debtor in the security-subjects on payment of the debt. If the creditor could not reinvest the debtor, he lost his right to demand payment from him. This principle had been applied in the case of a cautionary obligation—*Sligo* v. *Menzies*, July 18, 1840, 2 D. 1478—and the authority of that case applied to other cases of reciprocal obligations. It disposed of the pursuers' argument that the creditor in a bond was not bound to assign the security-subjects on receiving payment if it would prejudice him to do so. Erskine's dictum only applied where payment was made by one who was not the proper debtor. In *Fleming* v. *Burgess* the doctrine contended for was recognised, and *Guthrie* v. *Smith* was a case of superior and vassal, and so belonged to quite a different category from the present. If the restriction of the right in security had not been effected without defenders' knowledge and consent the case might have been different. *Liddesdale's* case did not apply, for there the creditor had not disabled himself from restoring the security subjects entire. The principle contended for had been recognised in England—*Palmer* v. *Hendrie*, 27 Beavan 349, and 28 Beavan, 341; *Kinnaird* v. *Trollope*, L.R., 39 Ch. Div. 636. The English cases were applicable—*National Bank of Scotland* v. *Union Bank*, December 18, 1885, 113 R. 380, and December 10, 1886, 14 R. (H. of L.) 1. The case of *Teevan* merely exemplified the principle recognised in *Love* v. *Storie* that a proprietor who has conveyed his property in security of a debt has conveyed his whole right and interest in it, and that he cannot afterwards put anyone in a preferable position to the holder of the bond in respect of any right in the property—*Love* v. *Storie*, November 6, 1863, 2 Macph. 22. The defenders' security having been prejudiced, he was not bound to submit to an inquiry as to whether the subjects still covered by the bond were sufficient security. No inquiry had been allowed in *Kinnaird's* case as to the prejudice affected by the peppercorn leases.

At advising—

LORD KINNEAR—The Lord Ordinary has observed that the question in this case is one of novelty. But it depends upon clear and familiar principles, and I cannot say that their application to the circumstances of the case appears to me to involve any serious difficulty.

In May 1874 the defender Hugh MacBean borrowed £3000 from Bankier's trustees, and executed in their favour a bond and disposition in security in ordinary form, obliging himself to repay the loan, and disponing to the lenders a piece of ground in Glasgow, extending to 870 square yards, in security of the personal obligation.

In November 1874 the borrower MacBean sold the subjects under burden of the bond to George Jeffrey for £4400, £1400 being paid in money, and the purchaser undertaking to pay the balance of £3000 by relieving the seller of his bond in favour of Bankier's trustees. In addition to this obligation of relief the disponee agreed that the obligations contained in the bond should transmit against him and his heirs and successors, and that agreement appears *in gremio* of the conveyance in terms of the 47th section of the Conveyancing Act 1874. There can be no question as to the import or legal effect of this transaction. The seller did not insist upon the price being fully paid up in order that his liability under the bond might be discharged, but relied upon the lands being sufficient to meet his creditor's claims. His personal obligation was therefore allowed to remain in force, but the debt was still secured upon the lands, and assuming the security to be sufficient he effectually protected himself against his disponee not merely by taking him bound in relief, but also by requiring him to undertake a direct liability to the creditor enforceable by diligence or otherwise in the same manner as against himself as the original granter of the bond. The lands were sold by Jeffrey, and after passing through various hands they were acquired in March 1877 by George Eadie. At that date they were still subject to the bond for £3000, which had never been called up, and they were further burdened with two postponed bonds for £800 and £550 for loans contracted by successive proprietors after they had ceased to belong to the defender. But nothing had been done to prejudice the security held by Bankier's trustees, or to alter in any way the mutual rights and liabilities of the creditor and debtor under their bond. Each new proprietor in turn

had become bound to pay the debt, and so to relieve his predecessor. But the personal liability of the defender was still undischarged.

But the position of parties was materially altered by a subsequent transaction. Immediately after acquiring the property Eadie borrowed £3000 from the pursuers, and disponed in security a portion of the ground included in the defender's bond and disposition in favour of Bankier's trustees. The new bond was of course postponed to the first, and therefore the pursuers could take no benefit from their security until Bankier's trustees were fully paid. But, presumably for the purpose of improving their position, and at all events with that result, Eadie in October 1877 obtained from the trustees a deed of restriction whereby, without any consideration having been paid to them, they released a portion of the land, extending to 325 square yards, from the security constituted by their bond, and declared it to be redeemed and disburdened thereof.

In 1880 the pursuers purchased the right of Bankier's trustees for the sum of £3000 —the full amount of their loan—and obtained from them an assignation and disposition of their bond and security excepting the portion which they had released. The pursuers, as assignees of the original bondholders, now sue the defenders for payment of the sum contained in the bond. But they are not in a position to reinvest him in that part of the security-subjects which their authors have released, and they decline to reinvest him in the part which is still covered by their security. They maintain that their right to enforce his personal obligation is in no way prejudiced by the release, and that they are not bound to grant an assignation of the bond, because the subjects still affected by it are held by them in security of another debt so as to give them an interest to insist that it shall be discharged of the debt they are now seeking to enforce.

I am of opinion with the Lord Ordinary that the pursuers' position is untenable. The rights of debtor and creditor under the bond in question are in all material respects identical with those of pledger and pledgee. The bond and disposition in security constitutes a real contract by which the debtor conveys to his creditor a heritable subject, to be held by him in security of the debt, and to be redelivered on payment or satisfaction. It is quite true, as the pursuers' counsel maintained, that the creditor is entitled to the benefit of all his remedies so as to obtain full payment. He may enforce the personal obligation against the debtor without losing his real right over the subject of the security if his debtor does not pay in full. But his obligation under the contract is to restore the land on payment of the debt, and he cannot demand payment on any other condition. These are concurrent obligations, and if the creditor has disabled himself from performing his part of the contract by making away with the impignorated lands he cannot enforce the counter-obligation against his debtor. The pursuers are in no better position than their authors by whom the subjects impignorated were conveyed without consideration to Eadie, and indeed they claim to take benefit from the renunciation in Eadie's favour as enlarging their security as creditors under his bond. Their contention therefore is that when lands have been conveyed in security of a loan, the lender may convey them without consideration to a third party, and may still enforce payment of the loan from the borrower without giving back the lands.

It was argued in support of this claim that the creditor in a heritable security is under no obligation to convey but only to discharge the debt; that if the borrower has retained the property the discharge will operate a reconveyance to him; that if he has sold the property the discharge must of necessity operate in favour of his disponee, but that that is not the fault of the creditor but the legal consequence of his own act. The conveyance, it is said, carries with it an assignation of the right to redeem, and entitles the creditor to transact with the assignee. But the debtor is not only divested of his right to redeem, he is absolutely divested of the property affected by the security. The discharge or renunciation therefore, which is the only instrument which a security-holder whose right is determined is under obligation to grant, cannot operate in favour of the debtor, but only in favour of the disponee, to whom he has chosen to convey the lands. It follows that he cannot re-acquire the right which he possessed when he executed the bond and disposition in security, nor can he acquire any new right in the lands except by an assignation of his creditor's right. But a creditor is under no legal obligation to assign to his debtor. The debtor's interest to obtain an assignation arises from a contract with which the creditor has no concern, and the right to demand it is admitted on a principle of equity only, and may be excluded by a counter equity in the creditor. But the pursuers hold the subjects in security for a separate debt and cannot be required to grant an assignation which may prejudice that security.

This reasoning appears to me to be fallacious from beginning to end. A heritable security may in general be extinguished by a discharge declaring the lands to be redeemed and disburdened, not because the creditor is not bound by his contract to reconvey, but because a formal disposition or resignation is unnecessary to operate a reconveyance. Before the present statutory forms were introduced it was settled law, as a consequence of the rule, that the feudal infeftment is merely accessory to the personal obligation, that the infeftment on a bond and disposition in security might be extinguished by a registered renunciation. But the creditor's obligation is not to be measured by the forms of conveyancing but by the substance of his contract. And neither the common law nor the Acts of 1845 and 1868 relieve him of his obligation

to redeliver the land which he holds only in security of a debt, when the debt is paid in full. So long as the debtor retains the property that obligation will be effectually performed by executing a discharge in the usual form. But the obligation is not to disburden the lands, in whose hands soever they may be, but to redeliver them to the debtor when he is called upon to pay. And if the lands have been sold under burden of the debt, so that a mere discharge will not operate in the debtor's favour, he is entitled to demand an assignation and disposition, not upon any principle of equity, but because that is the appropriate instrument for giving effect to the creditor's obligation to give back the subjects which have been impledged to him when his debt is paid. It is true that the defenders' right has been assigned, and if it had been assigned absolutely the pursuers and their authors would have been entitled to transact with the assignee. But it was obvious on the face of the titles that the assignation of the right to redeem was conditional on the disponees making payment of the debt and so discharging the defenders' obligation as well as disencumbering the lands. There is no difference in this respect between the position of the ultimate purchaser Eadie, with whom the pursuer transacted, and that of the immediate purchaser from the defender. The conveyance in his favour was under burden of the security, and by accepting it he bound himself to pay the debt, and so to relieve his immediate authors of their obligation to relieve the defender of all liability. He had no right therefore in the subject of the security, and could acquire none which should be good against the defender, except by paying the debt or otherwise procuring a discharge of the defenders' liability under the bond. It is true that the redeemable right created by a bond and disposition in security is a mere burden in the fee, and therefore that a discharge of the security or the debt must necessarily disencumber the lands for the apparent benefit of the proprietor for the time being. But so long as it remains undischarged the redeemable right in security is held and may be transmitted as a separate and distinct estate; and whether the creditor who holds it has a right to transfer it to the actual proprietor of the feudal fee depends not upon the form of his title but upon his personal obligations by his contract with the debtor from whom he acquired. If he may dispose of it gratuitously to the prejudice of his debtor, it would seem to follow that he might sell it for a price, and I can see no ground of distinction in this respect between a discharge in favour of the feudal proprietor, and an assignation in favour of a third party. The only difference is that the proprietor in this case had undertaken a personal liability for payment of the debt, and was entitled upon such payment to disencumber his estate. The creditor might therefore accept him as debtor in place of the defender if he thought fit, and this is what he has done in effect. I do not think it material whether Bankier's trustees should be held to have accepted Eadie as their debtor, and renounced by implication their claim against the defender, or to have exonerated the defender from liability by disabling themselves from performing their counter obligation. In either view they could not transfer their right in security to the defenders' prejudice and still enforce payment from him under his bond. The English decisions to which we were referred afford valuable and interesting illustrations of a principle which is common to the laws of both countries. But the principle is not in controversy. No one disputes that a pledgee must give back the pledge when the debt is paid by the pledgor. The only question raised by the pursuers' argument is whether that general rule is not excluded in the case of a bond and disposition in security by technical rules of Scotch conveyancing. For the reasons already given, I am of opinion that that question must be answered in the negative.

LORD M'LAREN—The history of the case and the bearing of the facts upon the question at issue are so fully explained in the opinion which has been delivered, that it is not necessary that I should do more than briefly indicate the reasons which lead me to concur in the judgment proposed.

When a proprietor of lands and heritages grants a bond for borrowed money, and dispones his lands in security of his obligation to repay, he has two rights as against his creditor. First, he is entitled on payment of the principal sum and interest to be retrocessed, or to have the burden on the lands removed, which according to our practice is accomplished by means of a discharge of the bond noted in the register of sasines. Secondly, in case of default in payment, and the consequent sale of the lands under the power of sale contained in the bond, he (the debtor) is entitled to have the price of the entire subject applied by the creditor in redemption of the debt, so that he shall not be liable to be distressed for payment of any larger sum than the balance remaining due after the surplus proceeds of the sale shall have been so applied. So long as the debtor retains the property of the lands, no question can arise, because the creditor's right is a redeemable right, becoming irredeemable only in virtue of a sale under the power, and the creditor cannot without the debtor's consent give away any part of the security or dispose of it by a private sale so as to give a good title to the disponee. But the debtor, after granting a bond and disposition in security, retains the power of selling and disposing of the subject under the burden of the bond because he is the proprietor, and when this is done, as in the case before us, the creditor may have two debtors—the purchaser, who is bound as a debtor in virtue of his agreement with the seller, and the original debtor, who continues to be bound in terms of his obligation until the creditor obtains payment or grants a release.

The sale of the subject under burden of the bond makes this difference in the relations of the original debtor to his creditor, that the original debtor is not and cannot be reinvested in the estate which he has sold as a consequence of payment in terms of his bond; he is only entitled to an assignation of the bond to the effect that he may take the place of the creditor in the obligation, while the purchaser holds the estate as before under the burden of the debt. This is merely a variation of the mode in which the right of the original debtor is explicated; the substance of the transaction is the same, for in either case the redeemable right to the lands is restored to the debtor when he repays the borrowed money and interest. Again, if the subject of the security comes to be sold under the powers of the bond, the original debtor may require his creditor to apply the proceeds of sale towards the payment of the debt, and he is only liable to the extent of the deficiency of the fund for payment after such application is duly made. So much I think is clear and indeed cannot seriously be disputed. The heritable creditor cannot by agreement with the purchaser discharge the real security and at the same time require the original debtor to make full payment in terms of his personal obligation. Such a proceeding appears to me to be contrary to the most elementary notions of justice, as it is inconsistent with the contract of pledge and with the general law of rights in security. But if the creditor is unable to release the entire subject from the burden affecting it consistently with the retention of a right of action against his original debtor, neither can he release a part of the subject so as to defeat or lessen the right of his debtor to obtain an assignation of the security-subjects in exchange for payment of the debt. If only a part of the lands be released the breach of contract is less in degree, but it is perfectly clear that the release is a breach of contract; and in my apprehension the only question is, whether such a breach of contract has the effect of disabling the creditor altogether from suing on his bond, or whether the effect is that the value of the subject released is to be ascertained and its amount imputed along with the proceeds of the sale of the remaining estate towards the extinction of that debt. This question indeed was not argued to us, and I only notice it in passing because it seems to me to be the true alternative, indeed the only alternative which deserves serious discussion.

My opinion is, that by releasing a part of the subject, however small, the creditor is disabled from suing the original debtor on his personal obligation. The creditor's obligation to restore the subject upon the borrowed money and interest being repaid is an obligation arising out of the contract of pledge whereby the lands are disponed in security heritably and redeemably. This obligation to restore is one and indivisible, and it is the counterpart of the debtor's obligation to repay, which is also indivisible. As the debtor while he retains the property has not the right in making a partial payment to demand a restriction of the security—I mean release of a part of the heritable subjects—so neither has the heritable creditor the right to grant a partial release to a purchaser, nor indeed to operate upon the subject of security in any way except by a sale in terms of the power. I can find no principle for converting the legal obligation of the heritable creditor to account for the proceeds of a sale into an equitable obligation to account on the principle of a valuation. If the principle of estimation of value were admitted in a case where only a part of the subject was released; it must also be applicable to the case of a release of the entire subject, and thus the right of the debtor to a retrocession would be converted without his consent into a right of a different nature, and one which it may safely be assumed he never would have agreed to accept when he granted the heritable security.

Now, in the present case it is admitted that the pursuer is not in a position to tender an assignation of the entire subject of the security, nor is he able to offer an assignation of the subject which he has released in exchange for so much of the debt as is not covered by the proceeds of sale of the remanent estate; and it follows, in my opinion, that the defender is entitled to be assoilzied from the action as laid. This will not in the meantime extinguish the bond or deprive the creditor of his recourse in case he shall be able to buy back the released subject before any steps are taken by the defender to have his liability as debtor in the bond determined. It may be an obligant in such circumstances has the right to bring an action against his creditor tendering payment of the unpaid portion of the debt, and concluding for an assignation of the impledged subjects, or alternatively that he should be declared free from his obligation. Whether such an action could be successfully maintained it is not necessary now to consider, because the question cannot arise under an action at the creditor's instance. In the present action we only decide that the pursuer is not entitled to enforce the bond against the defender, because he does not offer and is unable to offer fulfilment of his counter obligation to restore or assign the subject of the security.

LORD ADAM and the LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuers—H. Johnston—Ure—Wilson. Agents—Davidson & Syme, W.S.

Counsel for the Defenders — Graham Murray, Q.C.—Younger. Agents—J. & J. Ross, W.S.