

March 27. 1822. Gibson then appealed to the House of Lords on the ground, 1. That the judgments were contrary to the ordinary principles which regulate cautionary obligations, by which a cautioner is entitled, upon paying the sum for which he is bound, to insist for an assignation to the debt, and to all the means of relief which are in the hands of the creditor;—2. That this right of relief is not discharged by the bond, and therefore must be held effectually to subsist; and that the right could not be affected by the circumstance of the Bank having a further claim against Thomsons and Company. To this it was answered, that the general principle was excluded by the terms of the bond,—1. Because by that deed the cautioners were bound, not for any one species or class of transactions, but for the whole conduct of Thomsons and Company in the performance of their agency;—2. Because it provides that the sum which the cautioners are to make good is a sum of loss, skaith, damage, or expense, and that the loss actually sustained exceeded £5000;—and, 3. Because full recourse for the whole loss upon the estate of the principal debtors was reserved to the Bank,—a right of which they could not avail themselves, if they were compelled to assign their claim to the cautioners. The House of Lords ‘Ordered and adjudged that the interlocutors ‘complained of be affirmed.’

Appellants' Authorities.—Rusforth, 10. Ves. 409; Baillie, 12. Ves. 435.

Respondent's Authorities.—Maxton, Jan. 17. 1777, (No. 1. Ap. Cautioner.)

J. CAMPBELL,—C. BERRY,—Solicitors.

(*Ap. Ca. No. 14.*)

No. 32. ROBERT CARGILL, Appellant.—*Greenshields—Moncreiff.*
CRAIGIE, Respondent.—*Cranstoun—Henderson.*

Sale.—A party having sold an heritable property, on condition, inter alia, that the purchaser should procure him an Ensigny in the army, and pay a debt affecting the property, and it having been afterwards ascertained that the heritable debt exceeded the sum specified, and that inhibitions had been executed; and the purchaser having refused to procure the Ensigny till the property was relieved of these incumbrances—Held (reversing the judgment of the Court of Session)—1.—That the purchaser was liable only for interest on the price of the Ensigny, and not for the pay and emoluments thence arising; and,—2.—That he was entitled to insist, before payment, that discharges of the real burdens should not only be produced, but that they should be duly recorded.

April 1. 1822. CRAIGIE, the proprietor of a house and garden in Dunkeld, agreed to dispoise them to Cargill, subject to an heritable debt of £90, on condition that Cargill should procure for him a commis-

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Lord Robertson.

sion as ensign in one of his Majesty's regiments of foot; and pay him £90. Accordingly, on the 22d of September 1807, Craigie executed a disposition in favour of Cargill, who, on the other hand, gave this letter: 'As you have of this date sold your house and garden to me, as more particularly described in the disposition thereto, I hereby become bound to put you in possession of an ensign's commission within a reasonable time from this date, or as soon as the forms of the War-Office will admit, and to pay you the sum of £90 sterling, upon your making a search of incumbrances, and satisfying me that there is no other burden upon it than a debt of £90 sterling due to Mr. James Fisher; and in the event of no other burden appearing, I pay the expense of search; if otherwise, you pay.' The disposition and letter were thereupon put into the hands of Patrick Robertson, Cargill's agent, who addressed a letter to Craigie, stating that he was to retain them for his and Cargill's 'joint behoof, until you mutually call for the same, after the transaction is completely finished.' The price for which an ensigncy could be purchased at this time was 220 guineas. On searching the record, however, it was discovered that three inhibitions had been executed against Craigie, and that the amount of the heritable debt of £90 was, by arrears of interest, increased to £114; so that the whole debt for which the property was liable was upwards of £300.

In the mean while, Cargill had got possession of the disposition from his agent, and having taken sasine, he sold the property to the Duke of Atholl, who completed his titles. Cargill, however, refused to purchase the ensigncy until the property was cleared of the inhibitions, and of the arrears of interest by which the heritable debt had been increased beyond £90. Several arrestments having been thereafter executed against him at the instance of Craigie's creditors, he raised a process of multiplepointing, and Craigie thereupon brought an action of reduction of the sale both against Cargill and the Duke of Atholl, concluding that the sales should be set aside, or that 'at least the said Robert Cargill, defender, ought and should be decerned and ordained to procure for the pursuer an ensign's commission in one of His Majesty's regiments of the line, as stipulated by the said agreement, and to make payment to the pursuer of the pay which he would have got as an ensign from the 11th day of November 1807, when the said commission should have been procured for him, and in time coming, till the same shall have been so procured.' From this action the Duke of Atholl was assoilzied; and Cargill pleaded in defence, 1. That he was not bound to purchase the commission till discharges of the inhibitions were not

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April 1. 1822. only obtained, but were duly registered, so as to clear the record of these incumbrances, and until he was relieved of the excess of the heritable debt above £90 ; and, 2. That, at all events, he was not liable for more than 220 guineas, being the price of an ensigncy at the date of the transaction, and of interest thereon ; and this the more especially, as Craigie, from various circumstances, could never have been allowed to hold such a commission. To this it was answered, 1. That regular discharges of the inhibitions had been exhibited and offered to Cargill, but that he had declined to receive them ; and, 2. That he had violated the agreement under which the disposition and letter were deposited with his agent, and obtained himself infeft in the property ; that he therefore became immediately liable for all the emoluments arising from a commission as an ensign, and that there was no such disqualification as he alleged. The Lord Ordinary, after issuing an interim decree against Cargill for £200, and appointing an investigation as to the terms of the deposit of the disposition and letter, of which Cargill alleged he was entirely ignorant, found ‘ it sufficiently instructed that the defender was acquainted with the terms and conditions on which these writings were so deposited ; and that, notwithstanding thereof, the defender not only entered into possession of the subjects, but also got from Patrick Robertson the disposition which had been so deposited with him, and that the defender thereon completed his titles, and thereafter sold the subject to the Duke of Atholl ;—that it is not alleged by the defender that the Duke of Atholl retained the whole or any part of the price, on the ground that the titles were not complete, or that incumbrances were not purged ;—that, in these circumstances, the defender was not entitled to refuse or delay implement of every part of the stipulated consideration or price of that subject which he had purchased from the pursuer, although he might have retained a sum equivalent to the debts with which the subject was affected, until these debts and the inhibitions were discharged, and the discharges recorded :—that the defender is bound to account to the pursuer for the sum at which an ensign’s commission could at that time have been procured, minus the sum of £200 already paid :—and further, that he must account to the pursuer for the pay and all the emoluments of an ensign as from Whitsunday 1808, the pursuer always being bound to pay to the defender the difference between the sum of £90 and the sum actually paid by the defender to the heritable creditor as due to him at Martinmas 1807, and to discharge all other real incumbrances affecting the subject ;’ and found the defender liable in expenses. To

this interlocutor the Court adhered, on the 18th December 1817 and 12th May 1818.* Cargill having entered an appeal, the House of Lords found, ‘ That, under the circumstances of this case, the appellant is bound only to account to the respondent for the sum of 220 guineas, the sum offered by him as the price of an ensigny, with interest on that sum from the date of the sale of the houses and lands in the proceedings mentioned, until the payment of the sum of £200 under the order of the Court, and with interest for the residue of the said sum of 220 guineas from the time of payment of the said sum of £200, subject to the deductions herein after mentioned, and the account herein after directed; and that the appellant is not bound to account to the pursuer for the pay and emoluments of an ensign for any period; and that the respondent is bound to pay to the appellant the difference between the sum of £90, and the sum actually paid by the appellant to the heritable creditor, as due to him at Martinmas 1807, together with interest on the amount of such difference; and the Lords find also, that the respondent is bound to discharge all other incumbrances affecting the subject: And it is ordered that the cause be remitted back to the Court of Session, to take the account between the parties according to the directions aforesaid, and settle the balance; and it is declared that the appellant is not bound to pay such balance, if any, as may appear to be due from him, until proper discharges of all real incumbrances on the said houses and lands shall be duly recorded; and the Lords further find, that the appellant ought not to be made liable for expenses hitherto incurred: And it is further ordered and adjudged that the several interlocutors complained of, which are inconsistent with this judgment, be reversed: And it is further ordered that the said Court of Session do proceed in the said cause as shall be just and consistent herewith.’

J. RICHARDSON,—J. CHALMER,—Solicitors.

(*Ap. Ca. No. 15.*)

* Not reported.