May 5, 1826. cluded; but the present action is founded on an assignation which is not consented to by the landlord, and the conclusion is to have it declared that the appellant is the 'only person en-'titled to the possession of the same,' a conclusion to which it is impossible to give effect consistently with the rights of the landlord. Again, as to the co-tenants, they are not liberated by this assignation from their obligations to the landlord, and it was only granted to the appellant on the condition that he should regularly pay these rents. But he has not done so; and the offer which he has made is insufficient, because he does not offer to pay the arrears of rent, but only to pay those which shall be ascertained to be due.

The House of Lords ordered and adjudged that the interlocutors be affirmed, with £50 costs.

DUTHIE—J. CAMPBELL, Solicitors.

No. 14. GEORGE ROBINSON, W. S. Appellant.—*Shadwell—Robertson.*
EDGARS and LYON, Respondents.—*Adam—Keay.*

Bill of Exchange—Novation.—Circumstances under which, in a question with the payees of a promissory note, it was held (affirming the judgment of the Court of Session) that one of the two granters, who alleged he was merely a cautioner, was not released.

May 11, 1826.
2d DIVISION.
Lord Pitmilly.

ROBERT AINSLEY, W. S. along with the appellant, accepted a bill for £235, in favour of a person named Mason, dated 10th November 1815, payable three months after date. When the bill was about to fall due, Ainslie, foreseeing his inability to take it up, wrote, on 9th January 1816, to Mr Edgar, who was his cousin, and a partner of the respondents, Edgars and Lyon, merchants in Glasgow, saying, 'The purpose of my writing you, is 'to mention, that, like other lairds, having a little debt, a sum 'of between two and three hundred pounds, for which my friend 'and late partner, Mr George Robinson of Clermiston, is bound 'along with me, is called up, and payable about the 8th or 10th 'of next month. The quarter from whence I expected to have 'got cash to have paid this sum, I have been disappointed in here, 'and it has just occurred to me, that probably you or Mr James 'might, from your floating capital, oblige me, by letting us have

'that sum on our obligation, which might either be a bond, or, 'if wanted sooner, the temporary document of a bill might be 'adopted, signed by Mr Robinson and me jointly. Mention 'this to your brother, and give him the inclosed. Try to let me 'have this if you can, and you will much favour, &c.'—This accommodation, in consequence of Mason agreeing to renew the bill, was not at this time required. Afterwards, however, the renewed bill being on the point of falling due, Ainslie made another application to Edgar, who wrote to him on the 2d of May 1816, in these terms:—'When I had the pleasure of seeing 'you here, two days ago, you mentioned that you might, by and 'by, require the accommodation about which you wrote me some 'time ago. If you do not require it before the middle of next 'month, we can then, without difficulty, discount your bill; 'but if you require the money before that time, the matter may 'be better managed, by your discounting our bill at three 'months, (which we will send you now, or at any time,) as Ed-'gars and Lyon themselves stand in need of all the discounts 'they can look for from the banks during the present month. 'When our bill to you falls due, you can either remit us the 'money to retire it, or, by discounting your bill at that time, we 'can continue the accommodation for three months longer. I 'think it better to write you early, to arrange this matter, as I 'am anxious not to disappoint you at the time you want the 'money. Be so good as write me on receipt of this; and if it 'will answer you, we will, on receipt of your letter, send you 'our bill, at three months' date, for the sum you mentioned.' On the 8th of the same month, Ainslie replied, 'I am extremely 'obliged by your friendship in that letter, and willingly accept 'of your kind offer. You will remember that when the idea of 'your accommodating me first was mentioned, the plan was, 'that I should send you Mr Robinson's note and mine, which 'you then proposed discounting, and sending the money. Ac-'cordingly, Mr Robinson being in London, with the view of 'carrying that scheme into effect, I sent him for signature, a 'promissory-note (in conjunction with me) to your firm, and it 'has been returned accepted, or rather signed by him. I now 'inclose it for you, and trust that you may find it convenient 'still to carry into effect that original plan of discounting that 'note, and remitting me its contents, as the cash is wanted by 'me on Saturday first. I hope you can manage matters so as 'to discount it to-morrow, Thursday, or Friday, and make 'the remittance on Friday.' To this Edgar sent an answer that certain difficulties existed, from the rules at the banks, in

May 11, 1826. getting the note discounted, and he stated, that 'It occurred to 'me as the only way in which the matter could, just at present, 'be managed, was to draw on you at one month's date, which 'Edgars and Lyon accordingly did this day for £236, 7s.; and 'I now inclose bank-notes for the proceeds, being £235 sterling. By the time the draft on you falls due, we will be able 'to discount your bill, as by the middle of next month, we, ourselves, will be easier. In the meantime I return it to you, 'and will be ready to discount either it or your own bill within 'three months, so as to remit you the proceeds in time to pay 'our draft on you, which of course you will accept when it is 'presented. When you send your bill for discount, it would 'answer better if made payable in Edinburgh than Glasgow, as 'the banks prefer Edinburgh to Glasgow bills.'

The proceeds of the draft thus sent by Edgar were applied in payment of the bill by Robinson and Ainslie to Mason. This draft fell due on the 10th-13th June, and to provide for it, Ainslie, on the 9th, re-transmitted to Edgar, the promissory-note by Ainslie and Robinson, payable in Glasgow to Edgar and Lyon. This bill Edgar discounted, and forwarded the proceeds to Edinburgh, and Ainslie took up the one month's draft.

The promissory-note of Robinson and Ainslie was payable on the 5th August, and Anslie wrote to Edgar on the 1st:—'The 'bill per Mr George Robinson and me, which you were so good 'as discount for me (£235), payable at your office, I observe is 'due on 2d-5th August current. As from your correspondence 'then, it did not seem of consequence to you when it was payable, I have been counting on your allowing it to remain over 'for a little while, cash being in the market very scarce at present, which has prevented me from being conveniently in cash 'at this time to take it up. This, I trust, it may be convenient 'for you to do, and you will oblige me much if you will do so. 'This you will receive upon 2d (to-morrow), and your writing 'me in course that you can manage the matter in this way for 'me, I shall take kind.'

Edgar immediately answered, that it would not then suit to advance the money for the bill; but stated that 'we now draw 'upon you for the amount of your bill, including the discount 'on the last and present bills, and the stamp, and will thank 'you to return the enclosed draft in course of post, which may 'prevent our being put in actual advance, provided we can get it 'on Monday forenoon. That it may be the more convenient for 'you, we have drawn the inclosed at some days more than three 'months, and it will not fall due till Martinmas. We will take-

'care of the bill on Monday, but trust to receiving the inclosed 'to refund us on Tuesday.'

Ainslie accepted this draft, and on the 4th of August returned it to Edgar, saying,—'I have this day yours of 3d current, and 'now return you the bill you have drawn on me for £240, 7s. 'accepted payable 11th-14th of November. I am extremely 'obliged by your at present thus managing the matter. I do 'not wish you to return me the bill you already have, accepted 'by both Mr Robinson and me. Let it remain in your hands 'for the present, and until we settle the debt afterwards; you 'may therefore take it up not on a discharge of it, but per indor- 'sation. I'll see you ere long at Glasgow; and in the meantime 'you can write me a few lines mentioning your having received 'this bill; but that you, in the meantime, retain also the other 'bill till the debt is paid.'

Edgar discounted the acceptance, and with the proceeds retired the promissory-note of Robinson and Ainslie, and took it up in the way suggested. He then wrote to Ainslie:—'I was yes- 'terday favoured with your letter of the 4th current, covering 'your acceptance to Edgars and Lyon, due 11th-14th Novem- 'ber, for £240, 7s. We have taken care of your and Mr Ro- 'binson's bill for £235, due yesterday, and will hold it till we 'have the pleasure of seeing you here.'

When Ainslie's acceptance fell due, he again wrote to Edgar on the 19th October 1816. 'As Martinmas returns, we begin 'to think of our obligations, and your and my bill for my ac- 'commodation has not failed to recur. But as the principal 'way that lairds have of discharging debts is by contracting 'corresponding loans, and as I have not succeeded in laying my 'hands on a similar sum, so I must beg the favour to continue 'matters as they are for a little longer. I hope you will find 'no inconvenience in so managing the matter for me; and I 'write you thus early about it on that account.' Mr Edgar, on the 25th, wrote in answer,—'We will endeavour to arrange 'matters in the same way as formerly, by discounting your bill 'in the Royal Bank, and remitting you the proceeds; and now 'enclose a draft on you, 4th October, at four months' date, '£240, which I will thank you to accept, and return to me so 'as to be here about the 1st or 2d of next month; and I will 'take care to get it discounted, so as to be in time for the bill 'you have to pay on the 11th-14th November, and will either 'pay you the money when you are here, or remit it to you in 'Edinburgh.' Ainslie accordingly accepted and returned the four months' draft for £240, which being discounted by Edgar,

May 11, 1826. the proceeds were remitted to Edinburgh, and with these proceeds Ainslie retired his acceptance.

Again, on the 10th May 1817, Ainslie wrote to Edgar from Edinburgh:—'To prevent mistakes about this, I have to mention, that the purpose of your remitting this money is to retire my acceptance to you for payment for £243, 6s., payable at the Royal Bank here; and which was one of a series of bills, by which, one after another, we raised money, so as to have a fund to replace that originally employed in retiring a bill, in which Mr G. Robinson had joined me, to James Mason in Berwickshire, per £235, 12s., dated 10th November 1815.'

This kind of traffic continued until 1818; and shortly afterwards, Ainslie became so embarrassed as to oblige him to place his affairs in the hands of a trustee; and of this he gave intimation to Edgar.

Being unable to obtain payment, Edgars and Lyon raised an action against Ainslie and Robinson for payment of their promissory-note for £235. Ainslie made no appearance, but Robinson gave in defences; and the Lord Ordinary, after some procedure, decerned in terms of the libel, and afterwards found expenses due. Robinson having presented a petition against this judgment, which was appointed to be answered, the Court, on the 26th of May 1824, adhered.

Lord Craigie.—The interlocutor is quite right. The promissory-note by Ainslie and Robinson was granted with the view to retire a joint obligation, in which Robinson was as effectually bound as Ainslie was. There was no giving of time, in the proper sense of the word, or which can afford any defence to Robinson.

Lord Glenlee.—The promissory-note was transmitted by Ainslie to Edgars and Lyon on the 4th of August 1816, on returning the draft which had been made upon him, so as to raise money for payment of the original debt, and he desired them to keep the promissory-note till the debt was paid. Matters appear afterwards to assume somewhat of a complicated character, but if they remained on the same footing as at first, I am at a loss to see how the obligation of Robinson has been taken away. I rather think that they did so, and that Edgars and Lyon have just made an advance in liquidation of the original debt for which Robinson was bound. In security of their relief for this advance they received the promissory-note, and they are entitled to avail themselves of it.

Lord Justice-Clerk.—There are no legal grounds for disturbing the interlocutor. There has been no giving of time in reference

to the acceptor, which in such a case as this is not relevant. If Robinson had been able to show that the promissory-note which he had granted had been extinguished, the case would have been very different, but he has not done so.

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Lord Robertson.—The answers are quite satisfactory. Robinson was jointly bound with Ainslie for a debt of £235. A promissory-note was then granted, with the view of raising money for both; and this was put into the hands of Edgars and Lyon. But even if Robinson had not been liable for the original debt, this would not have affected a bona fide holder of the promissory-note. There is no evidence that it was ever retired.

Robinson again reclaimed, but the Court, on advising his petition with answers, adhered on the 8th of February 1825, 'reserving to the petitioner his claim of deduction for and in 'respect of any dividend received by the respondents from Mr 'Ainslie's estate and effects.'*

Lord Glenlee.—It will be observed, that Ainslie desired Edgar and Lyon to take up the promissory-note 'per indorsation.' This is no doubt somewhat ambiguous, as perhaps Ainslie might have wished to have had it indorsed to himself. The language of Edgars and Lyon is also equally ambiguous, for they say to Ainslie that 'we will hold it till we see you.' If, however, the note was taken up by indorsation to Edgars and Lyon themselves, which I take to be the fact, the case is different from what it would have been if it had been taken up and indorsed to Ainslie, as that would have extinguished the bill. There is, however, no allegation to that effect, and I am afraid we must adhere.

Lord Robertson.—The note was put into the hands of Edgars and Lyon as a security, and no arrangement between Robinson and Ainslie could affect them. A difficulty, however, arises from their having returned the note to Ainslie, and it may be doubted whether Ainslie had any authority to retransmit the note to them. That, however, is a question properly between Ainslie and Robinson.

Lord Pitmilly.—My opinion remains the same as when I pronounced the judgment complained of. I agree with Lord Robinson that Edgars and Lyon have nothing to do with any question between Ainslie and Robinson. The latter trusted Ainslie with the note, in order to retire one for which they were jointly bound, and he must suffer the consequences. Edgars and Lyon are bona fide holders. There is no room for the plea of novation.

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* See 3 Shaw and Dunlop, No. 355.

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Lord Alloway.—I am of the same opinion. The note was sent by Ainslie to Edgars and Lyon expressly for the purpose of being held in security of the advance which they might make for the liquidation of the original debt. The subsequent transactions which took place were merely expedients to prevent Edgars and Lyon being in actual advance. The note was, in point of fact, never paid by Ainslie or Robinson, and there has been no novation.

Robinson appealed; and he having died, the appeal was revived in the name of his son, William Rose Robinson, Esq.

Appellant.—The respondents gave no value for the promissory-note. It was transmitted to them to be discounted that the proceeds might go to extinguish the bill due to Mason. This mode of raising the money was not adopted by the respondents, who preferred discounting a bill drawn on Ainslie alone, and with the proceeds of which the bill to Mason was extinguished, so that the promissory-note now became inoperative, and the appellant released. It was a breach of trust in the respondents to discount the promissory-note after the purpose of its being granted had been satisfied. On its retransmission, the respondents gave no value for it. It was discounted by the bank, and was retired and extinguished by funds supplied for that purpose by Ainslie, the proper debtor, and its obligatory force then expired. The respondents could not hold the promissory-note as a security for future contractions by Ainslie, especially for the sum finally due them. If it could be considered as a security for anything, it could only be for the first draft on Ainslie. But that draft had been paid, and consequently the security lapsed. It was plain to the respondents that the appellant was a mere surety, lending his name for the accommodation of the proper debtor. It is evident from the correspondence that the appellant was dropped out of the transaction altogether. The obligation had fallen by novation, and the respondents lost their right of action against the appellant, by having given time to Ainslie, without the appellant's consent.

Respondents.—Edgars and Lyon are onerous holders of, and gave full value for the promissory-note; and if that be disputed, the onus probandi lies on the appellant. They have no concern with the conduct of Ainslie to the appellant. The parties appear as principal obligants on the note, and it is jus tertii to the respondents, whether the appellant was or was not a mere surety. They cannot be affected by alleged latent objections, or

be accountable for the application of the proceeds of the note. In point of fact, these proceeds went to extinguish a debt due by the appellant and Ainslie. The respondents held the note in their possession as a valid and subsisting debt against the co-obligants. The appellant has mistaken the law of recourse, even if the doctrine were, as it is not, applicable; he is not a drawer or indorser, but a joint acceptor of a bill in their favour. Novation is not to be presumed; and there was neither novation nor release. The note was not paid by funds supplied by Ainslie, but by the respondents out of their own pocket.

The House of Lords ordered and adjudged that the interlocutors complained of be affirmed, but without costs.

Lord Gifford.—My Lords, in this case the principal question undoubtedly is that which has been argued at your Lordships' bar by the Counsel, namely, In what situation Mr Robinson, the appellant, stood with respect to this bill between him and the respondents, Messrs Edgars and Lyon? If, as between himself and Edgars and Lyon he was a co-principal with Ainslie, then I apprehend little doubt can be entertained of the correctness of the judgment which has been pronounced below, because then he was a principal debtor. The question therefore is, whether there is anything in this case to prevent their recovering against Robinson? Now, my Lords, with respect to the situation in which Robinson stood, there is no doubt that he had, in connexion with Mr Ainslie, become liable at least to a Mr Mason for a sum of £235. It is contended on the part of the appellant, that at this time Mr Robinson was only a surety for the debt of Ainslie, but it is quite clear that they were both jointly liable on the security given by them to Mr Mason.

My Lords, that debt not having been paid, but the bill given to Mr Mason being nearly due, Mr Ainslie considered how money was to be raised in order to discharge that debt to Mason, to which, whether Robinson was a principal or a surety, he was jointly liable, at all events, and they had recourse to this contrivance:—A joint promissory-note was drawn by Robinson and Ainslie, payable, as I understand, upon the face of it, to Messrs Edgars and Lyon. Ainslie, in whose hands this note was, then wrote a letter of the 9th of January 1816, to Mr Edgar, in which he states this: 'The purpose of my writing you is to mention, that, like 'other lairds, having a little debt, a sum of between £200 and £300, for 'which my friend and late partner, Mr George Robinson of Clermiston, 'is bound along with me, is called up, and payable about the 8th or 10th 'of next month. The quarter from whence I expected to have got cash 'to pay this sum, I have been disappointed in here, and it has just occurred 'to me, that probably you or Mr James might, from your floating capi'tal, oblige me, by letting us have that sum on our obligation, which might 'either be a bond, or, if wanted sooner, the temporary document of a bill 'might be adopted, signed by Mr Robinson and me jointly.'

May 11, 1826. My Lords, after that, a note was drawn, dated the 10th of February 1816, payable in three months, for £235, 12s. That note was transmitted by Mr Ainslie to Edgar, in order to have it discounted, for the purpose of raising money to discharge the debt due to Mason. Mr Edgar thought that the better way of raising the money would be, (there being a difficulty in discounting this promissory-note,) that Messrs Edgars and Lyon should draw a bill of exchange on Mr Ainslie, that bill to be accepted by Ainslie, and discounted, and the money applied to the payment of the debt of Mason. In that way the money was raised, and the debt due to Mason paid. The promissory-note by the appellants to Mason was returned in the first instance, by Messrs Edgars and Lyon, they stating that they could not discount it; but it was afterwards returned again to them, and in their hands it remained. The money raised upon the first bill of exchange not having been advanced by them when that bill became nearly due, it was renewed by another bill, and so it went on by several renewals till November 1818, when, Mr Ainslie falling into difficulties, they could no longer raise the money in this way, and Edgars and Lyon were finally obliged to raise the money to retire the bill which had been accepted by Ainslie.

During the whole of this transaction, my Lords, I must confess,(though I do not say that the case is without difficulty as to the relation in which Robinson stood, but considering the situation in which he stood upon this promissory-note, as between him and Ainslie on the one hand, and Messrs Edgars and Lyon on the other,) I cannot say that there has been any mistake. It has been argued, that if Robinson was a mere security to Mason, he ought also to be considered a security to Edgars and Lyon; but if he was a mere security, having been jointly liable upon that note, the money having been advanced to Ainslie to relieve him from the joint liability they had incurred to Mason, it appears to me that Messrs Edgars and Lyon were not bound to consider whether Robinson was a security to Mason or not. They were desired to raise a sum of money to relieve this joint responsibility; and whether Robinson stood in relation to that person as a principal, or a security, does not appear to me to be material. The contract, it is stated, proceeded on the foundation that he was a surety to Mason; but it appears to me that it is difficult to say that that was the precise situation in which he stood. It is true, there are some of these letters in which he uses the terms 'that you will accommodate me;' but then in the same letter he talks of 'accommodation to us,' as if it were an accommodation to them jointly.

Looking, therefore, to the whole of this case, and particularly to the correspondence, which I had done carefully previous to the argument, and have attended to as it proceeded, I am not able to say, that the Court of Session have arrived at a wrong decision upon the facts of this case.

Then, my Lords, it is said, that if they were jointly liable, this debt has been paid, and that the promissory-note of Mr Robinson must be considered as discharged as between him and Messrs Edgars and Lyon. I agree that if he had been a mere surety, it would be extremely difficult

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to say, that time having been given without his knowledge (for time had been given, so far as appears, without his knowledge), he was not discharged by that; but if he was a co-principal as between him and Edgars and Lyon, and he and Ainslie both liable as principals, whatever delay there might be in suing either the one or the other, I apprehend one cannot be discharged without both being discharged. If, therefore, they were both principals, as I apprehend they both were, the money not being advanced till the last bill of exchange was paid by Edgars and Lyon, then the debt for which they had a right to enforce their demand against Robinson and Ainslie, still continued as against both. I apprehend it is quite clear that the appellant was not discharged by the frequent renewals of those bills of exchange which had taken place.

Upon the whole, therefore, though I do not think the case perfectly free from difficulty, I cannot say that the conclusion at which the Court of Session have arrived, is wrong; but being of that opinion, I must confess, I do not think this is a case in which the appellant should be visited with costs. I think there was a sufficient ground for his desiring to have your Lordships' judgment upon the case; and therefore, my Lords, thinking there was room for doubt, and a fair question for discussion, I shall not advise your Lordships to give any costs on this case, but simply to affirm the judgment of the Court of Session.

Appellants' Authorities.—2 Barn. and Ald. 210—Chitty, 291.
Respondents' Authorities—1 Bell, 341.—2 Barn. and Ald. Rep. 210.—3 Ersk. 4. 29. —Rutherford, Feb. 25, 1785.—(7069)—Douglas. Heron, and Co. July, 24, 1785—(7070)—Chitty (1818, edit.) p. 125.

A. MUNDELL—J. CAMPBELL, Solicitors.

No. 15.

Lieut.-Colonel JOHN GORDON of Cluny, Appellant.—*Shadwell —Buchanan.*

JAMES ROBERTSON and others, Respondents.—*Adam Keay.*

Tack—Clause.—Held (reversing the judgment of the Court of Session), that a clause in articles and conditions relative to a lease regulating the management of a farm, bearing, that 'the whole fodder to be used upon the ground, and none sold or carried 'away at any time, hay only excepted; and all the dung to be laid on the farm the 'last year of the lease,' created an effectual prohibition against the tenant disposing or carrying off the farm any part of the straw of the way-going crop.

May 19, 1826.

2d DIVISION.
Lord Cringletie.

MR ROBERTSON and others were tenants on the estate and barony of Slains, belonging to Colonel Gordon. No regular lease was granted to any of them, but they possessed in virtue of missives, which referred to certain articles and conditions relative to the whole estate, containing mutual obligations on both