BOWMAN FLEMING, Appellant.—*Robertson—Connel.* No. 24.

JOHN THOMSON, Agent for Royal Bank of Scotland, Respondent.—*Keay—Jno. Campbell.*

Cautioner.—A creditor having obtained, in security of a loan of money, a disposition to heritable property, containing an obligation to infeft only a me, on which sasine was taken; and having got also bills by cautioners in corroboration of, but without prejudice to the heritable security; and it being stipulated that the creditor should convey the property to the cautioners, in the event of their being obliged to pay the debt; and the creditor having neglected to get a confirmation of the sasine, whereby the property was carried off by another party,—Held (reversing the judgment of the Court of Session) that one of the cautioners, who was sued for payment of his bill, was by this neglect discharged.

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1ST DIVISION. Lord Eldin.

THE affairs of William Harley and Co. manufacturers in Glasgow (of which William Harley was the sole partner), having become embarrassed, an agreement was entered into with their creditors, by which they bound themselves to pay a composition of 8s. 9d. per pound, by four different instalments, at 6, 12, 18, and 30 months; and in security thereof, Harley conveyed his estates, real and personal, to Messrs Cook and Cuthel, as trustees, for behoof of the creditors.

When the second instalment fell due, it became necessary to negotiate a loan; and the branch of the Royal Bank of Scotland, at Glasgow, agreed to advance £7990, in consideration of a conveyance by Harley and his trustees, of his heritable property in security; and bills at twelve months date by other parties, as guarantees each for a limited amount, among whom was Bowman Fleming for £500, to the extent in all of £6500, and Harley granting his own acceptance for the balance, being £1490. A conveyance to Thomson, as cashier for the Bank, was accordingly executed in April 1817, ex facie absolute and irredeemable; but it was qualified by a back bond, in which it was stated, 'that it was a condition on which the foresaid 'sum of money was agreed to be advanced by the said Bank, 'that bills to the extent of £6500 Sterling of the foresaid sums, 'should at the time be deposited with the Bank, to be held as 'corroborative securities of the sum advanced as aforesaid, the 'one without prejudice of the other, with full power to operate 'on the personal obligations created by the said bills, by horning, caption, adjudication, or otherwise, without hurt or prejudice of the heritable security created by the said disposition; 'and the following bills have accordingly been granted and delivered to me as cashier aforesaid, all of which are dated the '23d day of April current, payable twelve months after date,

May 23, 1826. 'accepted respectively by the said William Harley, and drawn 'and indorsed by the following persons,'—(Here followed the names of the parties, including Bowman Fleming), 'amounting 'the said bills to £6500 sterling; and the said William Harley 'also delivered to me his own bill or promissory-note for £1490 'Sterling, payable 12 months after date, making in whole the 'said sum of £7990 Sterling; which said bills I oblige myself 'and my foresaids to renew to and in favour of the drawers and 'acceptors thereof, and of such other persons as may, with my 'approbation, be substituted in their place, until the term of 'Whitsunday 1822, under the usual discount. And considering 'that, although by the foresaid disposition, the lands, buildings, 'and other erections, conveyed as aforesaid, are absolutely and 'irredeemably disponed to me and my foresaids, as above express-'ed; yet the truth is, that the same, as well as the bills above 'enumerated, were granted, and are to be held by me and my 'foresaids, in security to the said Bank (and to the said respec-'tive drawers of the said bills, or such of them as shall become 'under advance in consequence thereof, according to the several 'rights and interests of the said Bank and them; but which 'right and interest of the said drawers and indorsers shall never 'stand in competition with the interest of the said Bank) of the 'repayment of the foresaid sum of £7990 sterling, with interest 'and other sums after specified. Therefore, I do hereby acknow-'ledge and declare, that I and my foresaids do and shall hold 'the foresaid several subjects, and also the foresaid bills, in se-'curity only as aforesaid, of the repayment of the foresaid sum 'of £7990 sterling, and of all interest, expense of repairs, 'insurance against loss by fire, and any other expenses I or my 'foresaids may disburse in the premises, in the event of the 'same not being done by the said William Harley, or his fore-'saids, expenses and damages, which may be incurred by the 'said Royal Bank, or by the drawers of the said bills, or any of 'them; and I the said John Thomson bind and oblige myself 'and my foresaids, upon the sum of £7990 being paid, and the 'granters of the said bills being relieved thereof as aforesaid, 'with all interest, damage, and expenses that may arise thereon, 'in the event of the same being done prior to the sale after-'mentioned, to grant, execute, and deliver all writs necessary 'for divesting me and my foresaids of, and investing the draw-'ers of the said bills, or such of them as may be in advance 'with the said several subjects; or in the event of their being 'wholly relieved, then to convey the same in favour of the said 'William Harley, and his heirs and successors, or to the said

'trustees for his creditors, in the most ample and formal man- May 23, 1826.
'ner, but at their own expense. But it is expressly provided
'and declared, that in case the whole or any part of the said
'sums, principal, interest, and expenses, shall remain unpaid,
'either to the said Bank, or any of the drawers of the said bills,
'at the term of Whitsunday 1822, the clause or power of re-
'demption and obligation on me to convey as above written, shall
'ipso facto become void and null; and in the same event, I and
'my foresaids shall then hold the same subjects absolutely and
'irredeemably, and have full power and authority without far-
'ther delay, and without the consent of the granters of the said
'disposition, or the drawers of the said bills, or their heirs or
'successors, and without any process of law whatever, to sell
'and dispose of the foresaid subjects, or any parts or lots there-
'of, which I or my foresaids may think proper absolutely and
'irredeemably, by public roup, in Glasgow, &c. and apply the
'proceeds, after deducting the expenses of the sale, in payment
'of the foresaid sum of £7990 Sterling, or such part thereof as
'may be due at the time, with the interest thereof, and other
'sums before mentioned, either to the said Bank, or to any of
'the drawers of the said bills, according to the sums they shall
'be respectively in advance at the time; and, lastly, account for,
'and pay the remainder, if any be due, to the drawers of the
'said bills, or any of them who may be in advance as aforesaid;
'and to the said William Harley or his foresaids, or to the said
'trustees for his creditors, according to their respective rights
'and interests; declaring, that in the event of the drawers of the
'said bills, or any of them, being actually in advance previous
'to a sale taking place as aforesaid, such persons so in advance
'shall have a right to be consulted in the letting and selling of
'the property, but not to impede or obstruct the same.' It
was also provided, that 'in the event of the said William
'Harley being made bankrupt, or of his sickness or death, or
'ceasing to attend to the management of the establishment car-
'ried on in the premises; or in the event of the death, bankrupt-
'cy, or other contingency, rendering any one or more of the
'drawers of the said bills unable to pay the amount for which
'he shall be bound; and of no other obligant being immediately
'substituted by the said William Harley in place of such drawer
'or drawers, it shall be in the power of me, or of my said suc-
'cessors in office, or our assignees, with consent of the drawers
'of the bills, if the property be sold in lots, to bring the said
'subjects to sale, as above mentioned, at any period three months
'after either of the above events may take place, and to apply

May 23, 1826. 'the proceeds thereof in manner above expressed, anything 'herein contained to the contrary notwithstanding.'

The subjects which were so conveyed to the Bank were held feu of Mr Campbell of Blytheswood, under an express prohibition against sub-infeudation, and a declaration that no disposition should be granted, under the penalty of irritancy, except on condition of being held directly of him. Accordingly, in the disposition granted to the Bank, there was no warrant for a base infeftment, the obligation to infeft being only a me. On this precept, sasine was taken by the Bank in April 1817; but no confirmation was obtained from Mr Campbell, the superior.

The bill which had been drawn by Fleming was renewed in terms of the agreement in 1818, 1819, and 1820; but in 1821, he and another of the bill obligants having suspended payments, and no new drawers being substituted by Harley in their place, the Bank obtained a deed from all the bill obligants, authorising an immediate sale, in such lots as Thomson should deem expedient. In this deed, it was narrated, that Thomson had, in virtue of the disposition of April 1817, been 'duly infeft in the 'said respective heritages.'

About the same time the Bank used diligence upon the last renewed bill, due in April 1821, by horning and caption, against Fleming, who thereupon made a partial payment of £300. In 1822, Harley's affairs having again become embarrassed, a sequestration of his estate and effects was awarded under the bankrupt statute. In the meanwhile, the Bank had applied to the superior for a confirmation; but it was not obtained in consequence of a dispute relative to the arrears of feu-duty. The trustee under the sequestration, however, proceeded to charge the superior to enter him; and a charter of adjudication having been executed in his favour, he was found preferable to the Bank in an action, which was brought to decide the question.

An agreement was then entered into between the Bank and Cook and Cuthel (the two trustees, who had conveyed the property), by which the Bank consented to withdraw all opposition to the competing right of the trustee on the sequestrated estate; and the trustees bound themselves to account to the Bank for the amount of the proceeds which should be realised by the judicial trustee out of the estate, to the extent of the claims which the Bank had under the bills. The judicial trustee was then infeft, in virtue of the charter of adjudication; and the Bank having charged Fleming to pay the balance of his bill, he brought a suspension on the ground, 1st, that as he was a cautioner, and the subjects had been conveyed to the Bank both for his

and their security and relief; and as they had neglected to make them effectual by delaying to obtain a confirmation, they had lost recourse on him; and 2d, that the charge was premature, as the Bank was bound to renew the bill till April 1822, whereas the charge was on the bill which fell due in April 1821. In answer to this, Thomson, on behalf of the Bank, besides denying the validity of these pleas, offered to put Fleming in the same situation in which he would have stood, if the security over the lands and others had been effectually completed previous to the charter of adjudication granted in favour of the judicial trustee, or at least to put him in an equally good situation. The Lord Ordinary appointed Thomson to give in a condescendence of the facts by which he considered he was entitled to charge the suspender before Whitsunday 1822, and to annex a minute stating more explicitly the nature of this offer. He accordingly did so; and explained that as he would have been bound, in terms of the back-bond (had the heritable security been effectual), after receiving full payment of the sums of money, principal, interest, expenses, and damages of every kind, to convey the heritable property, if unsold, to Fleming and the other bill obligants, in proportion to their advances; and if sold, to divide any balance of the price among them in the same proportion; and as the heritable security was not now effectual, he was willing to account to Fleming for the price of the subjects under the above deductions, as the same should be ascertained by any sale to be made by the trustee. May 23, 1826

Thereafter, the Lord Ordinary, on advising memorials, found the letters orderly proceeded, and decerned with expenses; and the Court, on the 24th November 1825, adhered; but remitted to the Lord Ordinary to hear parties on any other points of the cause.*

Lord Hermand.—The interlocutor is quite right. There were here two securities—the one without prejudice of the other. But because the one has not proved available to the Bank, can it possibly be maintained that they were to lose the benefit of the other? Certainly not. As to the plea, that the Bank were bound to renew the bill, the suspender had become insolvent, and therefore a renewal was out of the question.

Lord Balgray.—It is impossible to get the better of the terms of the deed. The lands and the bills were to be corroborative

* See 4 Shaw and Dunlop, No. 178.

May 23, 1826. securities, without prejudice to each other. The heritable security was given to the Bank tantum et tale, as it was held by Harley and his trustees. It was the duty of those giving the security, to see that it was complete; and the obligants cannot get free, because the Bank has been deprived of that security.

Lord Craigie.—I am of the same opinion.

Lord President.—It is true, that all the parties thought the heritable property would be sufficient to pay the debt; but then there is a stipulation that it should not prejudice the claim of the Bank against the obligants in the bill. The circumstance of its being lost cannot avail them.

Lord Gillies concurred.

Fleming appealed.

Appellant.—It was in the character of cautioner for Harley, that the appellant put his name on the bill charged on. He did so in reliance of ultimate relief from Harley's property, conveyed to the respondent not merely for the security of the Bank, but for the security of the appellant and the other bill obligants. This is not the ordinary case of a creditor having both personal and heritable security for payment of his debt; but the respondent became expressly bound to convert that security to the cautioners' use, in case they should be called on by the Bank. It was his duty to have made the security effectual; and having by his neglect destroyed the security on which the appellant relied, he has cancelled the cautionary obligation. Even on general principles, the respondent was responsible for his gross negligence. He was not entitled to neglect the cautioners' interests. The difficulty from the dispute about arrears, is a mere shadow. Besides, the respondent, by the agreement with the two trustees of Harley, has incapacitated himself from performing his obligation to the appellant, and excluded him from any benefit even under that management. The appellant was entitled to have exercised his discretion as to the defect in the security, but he was not consulted as to that transaction. The offer to put him in statu quo, is quite irrelevant. There is no principle more completely established, than that cautionary obligations are strictissimi juris, and must be literally fulfilled; but in point of fact, this is now impracticable. The provisions favourable to the cautioners in the back bond have flown off. But even if the appellant were not liberated from his enagement, the respondent was not authorised under the stipulation to which all parties had agreed, to enforce payment prior to Whitsunday 1822; and the charge is therefore incompetent.

Respondent.—In lending the money to Harley and his trustees, the respondent was entitled to require the best security. Accordingly, he took heritable and personal security; and all parties agreed that these securities were to be independent of, but at the same time corroborative of, each other. If one proves bad, that cannot affect the other. The respondent is in the ordinary situation of a creditor holding two securities, and of course having power to make his debt good out of either of them. It was no part of the respondent's duty to see that the conveyance of Harley's heritage was unimpeachable. The respondent has done nothing to impair or alter it. It is still in as complete shape as when it came into the respondent's hands. It was not confirmed by the superior, owing to a dispute with Harley as to the amount of the arrears of feu-duties. Besides, the respondent would have challenged the Lord Ordinary's interlocutor, preferring the trustee in Harley's sequestration, had not Harley's two trustees offered the terms contained in their agreement. He had no right or interest to demand more. The respondent came under no obligation to obtain indefeasible heritable security to relieve the cautioners. That was their own duty; and they, under their hands, in the deed of May 1821, admit that the respondent was 'duly infeft.' But the respondent has offered, and is willing, to place the appellant precisely in the situation in which he would have stood, had the heritable security from the first been effectual, and to account on that principle. The bills were to be renewed, only if the drawers and indorsers remained solvent; and accordingly, the appellant paid three-fifths of his bill, on that understanding. May 23, 1826.

The House of Lords ordered and adjudged, that the interlocutors complained of be reversed; and that the letters be suspended simpliciter.

LORD GIFFORD.—My Lords, this is an appeal against several interlocutors of the Court of Session, pronounced in a proceeding before them, arising out of the circumstances which I will endeavour shortly to state to your Lordships. It appears, that a person of the name of Harley, at Glasgow, having become embarrassed in the year 1816, offered a composition of 8s. 9d. in the pound on his whole debts, which was unanimously accepted of. It was agreed that the composition should be paid by four different instalments, for which Harley and Co. should grant their bills, payable at six, twelve, eighteen, and thirty months; and that, in security of the two first instalments, Harley and Co. should convey their whole heritable and moveable property to certain persons, as trustees for their creditors, and find good personal security for payment of the third. This

May 23, 1826. agreement was carried into effect. Harley and Co. granted their bills for the stipulated composition; and, on the 19th of June 1816, Mr Harley executed a general conveyance of the whole heritable property, in which the trustees were infeft; and they took possession of the moveable property by an instrument of possession. However, my Lords, when the second instalment became due, the trustees found it was impossible for them to discharge the bills which had been granted for it; and, in consequence of that, an application was made by Mr Harley and his trustees to the Branch of the Royal Bank at Glasgow, for a loan of £7990 for five years, on the security of Mr Harley's heritable property. It was also agreed, that Mr Harley should grant promissory-notes in the manner to be afterwards mentioned.

I should have stated to your Lordships, that the Bank being doubtful with respect to the extent of the security, and whether they were not bound to have security in the shape of bills or promissory-notes, it was agreed, that, in addition to the security of Mr Harley's heritable property, he should grant promissory-notes to those gentlemen who came forward to befriend him to the extent of £6500; which notes were to be indorsed by the granters to the Bank. Harley's own bill was to be granted for £1490; which made up the whole sum of the loan agreed to be made by the Bank. As I have stated to your Lordships, promissory-notes were to be drawn by him, and indorsed by persons as his securities to the Bank.

Your Lordships perceive, therefore, that the Bank were to have a double security; they were to have the security of the heritable property which Mr Harley possessed, and the security to the extent of £6500 by those promissory-notes, to be indorsed by friends of Mr Harley to the Bank. In consequence of this, a disposition was made by Mr Harley to Mr Thomson, who represented the Branch Bank at Glasgow. At the same time, Mr Thomson granted what is called in these proceedings a back-bond, an instrument to which it is material to call your Lordships' attention, because that instrument contains recitals respecting the nature of the transaction between the Bank and Mr Harley, and the nature of the engagment entered into by those different sureties for Mr Harley. It begins by reciting the disposition which had been made by Mr Harley to Mr Thomson of his heritable property. It then goes on to recite—

'And considering that it was a condition on which the foresaid sum of 'money was to be agreed to be advanced by the Bank, that bills to the 'amount of £6500 Sterling of the foresaid sums should at the same 'time be deposited with the Bank, to be held as corroborative securities 'of the sum advanced, as aforesaid, the one without prejudice of the 'other, with full power to operate on the foresaid obligations created by 'the bills, by horning, caption, adjudication, or otherwise, without hurt 'or prejudice to the heritable security created by the said disposition;'

then it states the number of bills which had been granted by the different sureties; which said bills Mr Thomson obliged himself to renew in favour of the drawers and acceptors thereof, and of such persons as might, with his approbation, be substituted in their place, until the term of Whitsunday 1822, under the usual discount.

May 23, 1826.

It then goes on to state—'And considering, that although by the fore-'said disposition, the lands, buildings, and other erections, conveyed as 'aforesaid, are absolutely and irredeemably disponed to me and my fore-'saids, as above expressed, yet the truth is, that the same, as well as the 'bills above enumerated, were granted, and are to be held by me and my 'foresaids, in security to the Bank (and to the respective drawers of the 'bills, or such of them as shall be come under advance in consequence 'thereof, according to the several rights and interests of the Bank and 'them, but which right and interest of the drawers and indorsers shall 'never stand in competition with the interest of the Bank) of the repay-'ment of the sum of £7990 Sterling, with interest, and other sums after 'specified; therefore I do hereby acknowledge, that I hold the several 'subjects, and also the foresaid bills, in security only, as aforesaid, of the 'repayment of the sum of £7990 Sterling, and of all interest, expenses 'of repairs, insurance against loss by fire, and any other expenses I or my 'foresaids may disburse in the premises, in the event of the same not 'being done by William Harley, or his foresaids, expenses and damages 'which may be incurred by the Royal Bank; and I bind and oblige my-'self, upon the sum of £7990 Sterling being paid, and the granters of 'the bills being relieved thereof, with all interest, damages, and expenses 'that may arise thereon, to grant, execute, and deliver all writs necessary 'for divesting me and my foresaids of, and investing the drawers of the 'bills, or such of them as may be in advance with the several subjects; 'or in the event of their being wholly relieved, then to convey the same 'in favour of Harley;' that is to say, that if the drawers and indorsers of those notes should, under the circumstances, be obliged to pay the whole, or any part of the amount of the notes they had given, then the Bank was to invest those persons with the heritable subjects which had been conveyed to the Bank; but in case they were wholly exonerated and relieved from their obligation, Mr Thomson, on behalf of the Bank, was to convey this property to Harley and his trustees. And then this follows: 'Provided and declared, that in case the whole, or any part of the sums, 'principal, interest, and expenses, shall remain unpaid, either to the 'Bank, or any of the drawers of the bills, at the term of Whitsunday '1822, the clause, or power of redemption, and obligations on me to con-'vey, as above written, shall ipso facto become void and null; and in the 'same event, I and my foresaids shall then hold the said subjects abso-'lutely and irredeemably, and have full power and authority, without 'further delay, and without the consent of the granters of the disposition, 'or the drawers of the bills, or their heirs or successors, and without any 'process or order of law whatever, to sell and dispose of the foresaid sub-'jects, or any parts or lots thereof, which I or my foresaids may think 'proper, absolutely and irredeemably, by public roup in Glasgow, for 'what prices the same shall bring; and to receive and discharge the price, 'and grant all writs necessary for conveying the premises to the purcha-'sers, heritably and irredeemably, in the most ample and valid manner; 'and to apply the price, and interim rents, if any be recovered, in the first

May 23, 1826. 'place, in payment of the expenses of the sale, and next in paying the 'sum of £7990 Sterling, or such part thereof as may be due at the time, 'with the interest thereof, and other sums before mentioned, either to the 'Bank, or to any of the drawers of the bills, according to the sums they 'shall be respectively in advance at the time; and lastly, account for and 'pay the remainder, if any be due, to the drawers of the bills, or any of 'them who may be in advance, and to Harley and his foresaids, or the 'trustees for his creditors, according to their respective rights and inte- 'rests; declaring, that in event of the drawers of the bills, or any of 'them, being actually in advance previous to the sale, they shall have a 'right to be consulted in the letting and selling of the property, but not 'to impede or obstruct the same;' and then it is farther provided and declared, 'that the purchasers of the subjects shall have no right to retain 'the prices thereof, but shall be obliged to pay the same to me or my 'foresaids.' Then it was declared, that Mr Thomson, or the Bank, should not be obliged to do diligence for the rents of the subjects, nor be liable for the same, or any part thereof unoccupied, nor for arrears, but should only be liable for their own intromissions; and that although he or the Bank should enter into the possession thereof, by levying the rents, or otherwise, they should not be obliged to continue such possession, but might relinquish and resume the same as often as they might think fit.

Then it goes on—'And in respect it is not intended that the whole of 'the debt now contracted to the Royal Bank should remain undischarged 'during the whole period of five years, as above expressed, but that such 'a reduction should annually or termly be made from such arrangements 'as the drawers of the bills should think eligible to adopt respecting the 'premises, it is hereby declared, that they shall have right to enter into 'possession of, and receive and discharge the rents, and adopt such rules 'and management of the property, with consent of me or my foresaids, 'as they shall think expedient; and in the event of the said William Har- 'ley being made bankrupt, or of his sickness or death, or ceasing to attend 'to the management of the establishment carried on in the premises, 'or in the event of death, bankruptcy, or other contingency, rendering 'any one or more of the drawers of the bills unable to pay the amount 'for which he shall be bound, and of no other obligant being immediately 'substituted by Harley in the place of such drawer or drawers, it shall 'be in the power of me, or of my successors in office, or our assignees, 'with the consent of the drawers of the bills, if the property be sold in 'lots, to bring the subjects to sale, as above mentioned, at any period, 'three months after either of the above events may take place, and to 'apply the proceeds thereof in manner above expressed.'

My Lords, after these notes had been given, and the heritable property conveyed, and this back-bond executed, it appears, that in the year 1821 there was an instrument executed by the different persons who were liable upon these promissory-notes to the Bank, to which it may be necessary for me to call your Lordships' attention. That instrument recites the disposition made by Harley to the Bank; and that by virtue of

that disposition, Mr Thomson was at that time duly infeft in the re- May 22, 1826.
spective heritages. Your Lordships will by and by perceive, that that recital is not unimportant. Then it goes on to state, 'that it was a con-
'dition on which the foresaid sum of money was agreed to be advanced
'by the Bank, that bills to the extent of £6500 Sterling should at the
'same time be deposited with the Bank, to be held as corroborative secu-
'rities of the sum advanced.'

It then states the bills which had been given; and further, in regard that though, as to the disposition, the heritages are absolutely and irredeemably conveyed to him, as above narrated, yet the fact being, that the same, as well as the bills, were granted and to be held by him in security, as therein mentioned, of the foresaid sum of £7990 Sterling, with interest and consequents, therefore he thereby acknowledged and declared, that he should hold the same accordingly; and then he obliged himself to divest himself of the subjects, and convey the same to Harley, or to the drawers of the bills, or to such of them as might be in advance for any part of the sum; but expressly declaring, that in case the whole, or any part of the sums, principal, interest, and consequents, should remain unpaid at Whitsunday 1822, then the obligation and power of redemption should cease. And then it goes on further to recite the conditions of the back-bond, and to state, that the sums contained in the bills drawn by John Smith, John Fleming, William Dunn, George Brown, James Hill, and William Penny, amounting together to the sum of £2200 Sterling of principal, with the whole interests and consequents thereof, have been paid to the Bank; and that, in consequence of the death of John Sinclair, and of the failure of Dawson and Mitchell, bills or promissory-notes were received by Thomson from Archibald Cuthill and Robert Moffat, in lieu of those which had been granted by Sinclair and Dawson and Mitchell; that there remains due to the Bank the sum of £5790 of principal, together with interest from a date which is not filled up; that Thomas Edgar having suspended his payments in the month of June 1820, a requisition was made by Thomson to Harley, on the 22d day of the said month, to procure another drawer, in terms of the provision to that effect, above narrated, in his place, but which has not hitherto been complied with. Then it recites, that in these circumstances Thomson was entitled to sell the subjects without consent of the sureties; but as they were all of opinion, that it would be for the interest of all parties that the subjects should be sold in such lots as Thomson might think proper, and the prices applied in manner after mentioned, therefore anything to the contrary in the back-bond notwithstanding, and without prejudice to the bills held by the Bank, or to any diligence, personal or real, competent to follow thereon, they agreed that Thomson should sell and dispose of the heritable subjects by public roup in Glasgow, at such prices as he might think just and reasonable. It then directs, that the proceeds shall, in the first place, be applied in payment of the expenses of the sale, and of the whole expenses incurred in granting a disposition and other writs to the purchaser, and the other expenses which may be incurred in the premises; and next in payment of the said sum of £5790

May 23, 1826. sterling, or such part thereof as may remain owing to the Bank, with interest on the same; thirdly, in payment to the drawers of the bills who may be put in advance of the sums for which they are respectively bound, or any part thereof, rateably and proportionally; and, lastly, that Thomson should pay the residue of the prices and proceeds, if any be, to the trustees in right of William Harley, declaring, that any right or conveyance of the subjects to be granted by Thomson, in virtue of the powers committed to him, should be equally valid and effectual, as if the same had been granted by Harley, or with his consent, or that of the other subscribers thereto, or by the trustees.

After this, the Bank instituted proceedings against the appellant, Mr Fleming, who had been one of the sureties, for the sum remaining due upon his promissory-note, he having paid a proportion of it. Mr Fleming objected to the proceeding, on the ground that it was instituted before the expiration of the time at which, according to the original agreement, the parties were at liberty to renew their notes. Your Lordships will recollect, that although they gave notes payable at the end of twelve months after date, it was a stipulation in the original contract, that they were to be at liberty to renew them from time to time until the term of Whitsunday 1822. In consequence of this, my Lords, an action of suspension was raised by Mr Fleming, the present appellant, contending that the action had been brought too soon, that he ought to be permitted to renew those notes; and he also contended, on grounds I shall presently state to your Lordships, that the Bank had lost their remedy against him, in consequence of their not having completed the conveyance of the heritable property of Mr Harley. The case came on before the Lord Ordinary, who pronounced this interlocutor on the 28th day of February 1823. (Here his Lordship read the interlocutor, ordaining Thomson to state his offer as to putting Fleming in the same situation as if the security had been duly completed.)

My Lords, in consequence, a condescendence was put in, and an interlocutor was afterwards pronounced by the Lord Ordinary, who determined against the appellaut, and found expenses due; and to this judgment he adhered.

This interlocutor was afterwards brought under the review of the Court of Session, who in the course of last year, 1825, affirmed the interlocutor of the Lord Ordinary; but remitted to the Lord Ordinary to hear parties on any other point in the cause.

I ought to have stated, in the order of time, to your Lordships, that after this conveyance by Mr Harley to the Bank, or Mr Thomson on behalf of the Bank, in the year 1822 Mr Harley became a bankrupt—his affairs became deranged irretrievably—a sequestration followed—and it was then discovered that the Bank, or Mr Thomson representing the Bank, had neglected to complete the conveyance which had been made to the Bank of the heritable property of Mr Harley. My Lords, it appears that this property had belonged to a Mr Campbell of Blythswood, who was the superior, as it is called in Scotland; and it appears that, by the disposition which had been granted by Mr Harley in favour of the respondent,

Mr Thomson, there was no warrant for any base infeftment; and that Mr Campbell of Blythswood inserted a condition in all his feu-rights, that his feuars should not grant subaltern rights, to be holden of themselves. It therefore was expressly stated in the disposition, that the lands were to be held only of and under Blythswood, Mr Harley's superior; and it was declared, that no base infeftment was permissible, although the disposition contained both procuratory and precept; but the precept was inserted solely for the purpose of enabling the Bank to make up their title by confirmation, if they should think that mode most convenient. May 23, 1826.

It appears, my Lords, that the respondent took infeftment upon the precept; but that infeftment was a nullity until it was confirmed by the superior, and gave Mr Thomson no title whatever in the lands. He suffered the title so to remain till the bankruptcy of Mr Harley, which happened in the year 1822. Upon Mr Harley's sequestration, it appears that an application had been made by the trustee of Mr Harley, to complete his title to this property; and proceedings were about to be, and I believe some proceedings were had between the trustee and the respondent, with respect to which of them was entitled to the preference to complete their title to these lands; and it was finally determined in favour of the trustee under the sequestrated estate; the consequence of which was, that Mr Thomson, representing the Bank, and the Bank, were deprived of the security they had over this heritable property. After the sequestration, however, an arrangement was entered into between the Bank and the former trustees of Mr Harley, to which Mr Fleming and the other sureties were no parties, by which it was arranged, that notwithstanding the trustee had, as I have stated to your Lordships, obtained a right to this property, yet it was considered equitable that the proceeds of the property should be applied to the benefit of the Bank; and an arrangement was entered into between Mr Thomson and the trustees, reciting, that the title to this property had not been completed by the superior, and reciting the competition which had ensued between Mr Thomson and the trustee on Mr Harley's estate; and then the agreement proceeds in this way—'And whereas the said James Cook and 'Archibald Cuthill, who are considerable creditors upon the estate of the 'said William Harley, being desirous to avoid further proceedings at law, 'in order that the estate may be more speedily winded up, and being 'satisfied of the equitable right which the said John Thomson has to 'the subjects conveyed to him by the foresaid disposition, have agreed 'to the following arrangement:' therefore Thomson consents and agrees to withdraw all further opposition, upon his part, to the claim made by the trustee on the sequestrated estate of Harley, to the property conveyed to him in security, as aforesaid; to assign, in favour of Cuthill and Cook, all claims and demands which he or the Bank had against Harley and his sequestrated estate, with the whole vouchers thereof, with the exception of the bill for £500, granted by Harley to Fleming, and indorsed to Thomson, being the bill charged on; and of another bill for £200, granted by Harley in favour of William Kilpatrick, also indorsed to Thomson. On the other hand, Cook and Cuthill bind

May 23, 1826. themselves to pay Thomson the amount of the net proceeds of the subjects contained in the disposition, granted by Harley in favour of the Bank, so soon as the subjects shall be sold by the trustee upon the sequestrated estate, and the prices divided among Harley's creditors.

Now, my Lords, one question which was discussed at your Lordships' Bar was this, whether, looking at the arrangement which was made by these gentlemen who were sureties for Mr Harley, it was not clear that they entered into that arrangement upon the faith that this heritable property had been duly conveyed by Mr Harley to Mr Thomson for the behoof of the Bank. This, your Lordships cannot but perceive, might have been a very considerable ingredient in the consideration upon which these gentlemen became securities,—for this reason, that your Lordships perceive throughout the whole of the arrangement stated in the backbond, this property was not only to be a security to the Bank for the advances they had made, but, if the sureties were to be called upon for the whole, or any part of the sums for which they had given security by promissory-notes, the property was to remain as a security to reimburse them those advances. Now, your Lordships perceive, that the property was conveyed to Mr Thomson. Mr Thomson knew, therefore, that it was incumbent upon him—at least he must be taken to have known that it was incumbent upon him, to have confirmed that security, by obtaining a charter from Mr Campbell of Blythswood; and in the subsequent arrangement of 1817, in which the sureties conferred a power upon the Bank of selling by lots, it was recited, that Thomson had taken infeftment on the precept, but had not obtained, or ever applied for, confirmation of his disposition and sasine. Now, Mr Thomson says, It is true that I did not apply for confirmation of the disposition and sasine, but it was incumbent on Mr Harley, or you the sureties, who were interested in seeing that Mr Harley did his duty, to have had this completed. It was therefore your duty to take care that this part of Mr Harley's duty was done. He said also, When I came, in the year 1822, to ask for this charter of confirmation, I found there was a considerable arrear of feu-duty, and Mr Campbell of Blythswood refused to grant this charter of confirmation without being paid the arrears of feu-duty. I was not called upon to pay those arrears, because I was not bound to make the advance; and it appeared, that even at the time the heritable property was conveyed, in 1817, there was an arrear of feu-duty; and it was not incumbent on me at that period to have paid that feu-duty. To this the sureties replied, You should have given us notice of this in 1817; and if you had given us notice in 1817, that it was necessary to complete the heritable security in the first place, we should have had time to consider whether we would not proceed against Mr Harley, unless Mr Harley paid up this feu-duty; or we might have considered it advantageous to us to assist you in the payment of it; but we say it was your duty to obtain that charter of confirmation, and by your having failed to do so, we have lost the benefit of that security, in the faith of which we have subscribed these promissory-notes.

It appears to me, my Lords, that when this matter came before the

Lord Ordinary originally, he appears to have been struck with the equity of this defence; for your Lordships will perceive, that he directed the respondent to give in a special condescendence, framed in terms of the act of sederunt, of the facts and circumstances by which he considered the Bank entitled to charge the appellant for payment of his bill previous to the term of Whitsunday 1822, and to annex to his condescendence a minute, stating the offer then made at the Bar;—for it appears an offer was made at the Bar, to put the appellant in the same situation as if the security over the feus held of Mr Campbell of Blythswood had been effectually completed, previous to the charter of adjudication granted by Blythswood in favour of the trustee on Mr Harley's sequestrated estate. My Lords, in consequence of this permission, the respondent, Mr Thomson, put in a condescendence; and, with respect to the first part of the interlocutor, he stated the reasons why he conceived himself entitled to proceed against Mr Fleming, the appellant, previous to the year 1822; but with respect to the other part of the interlocutor, he admitted that the security had been found to be ineffectual, but said, that the appellant was not thereby put in a worse condition, 'for 'the charger has offered, and now again judicially offers, to put him in the 'very same situation in which he would have stood, if the security over 'the feus held of Mr Campbell had been effectually completed previous 'to the charter of adjudication granted in favour of the trustee on Mr 'Harley's sequestrated estate, or at least to put him in an equally good 'situation; that is to say, had the heritable security been effectual, the 'charger would have been bound, (in terms of the above-mentioned back-'bond,) after receiving full payment of the sums of money, principal, in-'terest, expenses, and damages of every kind due to him, to convey the 'said heritable security, if unsold, to the suspender and the other bill-'obligants, in proportion to their several advances; and if sold, to divide 'any balance (after payment to him as aforesaid) among them, in the 'same proportion; and although the same heritable security is not now 'effectual, the charger agrees to account in the same manner to the sus-'pender for the price of the said security subject, as the same shall be 'ascertained by any sale or sales to be made by the trustee.' In answer to this, Fleming says, 'that it was irrelevant to offer to put him in an 'equally good situation with that in which he would have stood, had the 'security on which he relied not been destroyed; and that, in point of 'fact, it was impossible to put him in the same, or an equally good situa-'tion.'

May 23, 1826.

My Lords, this condescendence and the answer coming before the Lord Ordinary, his Lordship, feeling the question to involve points of law of importance, ordered the case to be stated in memorials. That was done, and his Lordship, as I have already stated, found the letters orderly proceeded; and the Court of Session adhered, but remitted to the Lord Ordinary to hear parties on any other points in the cause. My Lords, it is extremely difficult to know what the Court of Session meant, in remitting to the Lord Ordinary to hear parties on any other points in

May 23, 1826. the cause. The Lord Ordinary's interlocutor found the letters orderly proceeded, and decerned; and therefore it was a final adjudication of the cause. But, laying this aside, it appeared to be admitted in the discussion at the Bar, that if it was incumbent on the Bank to make good that heritable security, by obtaining confirmation of the charter, the offer made at the Bar could not avail them, for it was impossible for them to put the sureties in the same situation as they would have been under the original arrangement; for if the sureties had been called upon to pay their money, the Bank would have been compellable, as they state in this offer, to have conveyed the property to the suspender, and the other co-obligants, in proportion to their several advances, and they would have a right to dispose of this property; but all they say is—admitting we have no title to this heritable property, we have made an agreement with the trustee on the sequestrated estate, that he shall account to us for the price for which this property sells, and we will account to you for whatever we receive. My Lords, that arrangement was made with the Bank without any concurrence of the sureties, and that is not an unimportant circumstance; because, if it was incumbent on the respondent originally to have taken the title in the manner I have stated, I apprehend, at all events, the sureties were entitled to be consulted in the arrangement to be made with the trustee upon this subject. However, they were not consulted. But really the main question in the cause is this, Whether or not the completion of the title to the heritable property by the agent of the Bank, was not a material part of the agreement entered into with these sureties. If it was, Was it not incumbent upon the Bank to have completed their title; or if there was any difficulty in their completing that title, by there being an arrear of feu-duties, Was it not incumbent upon them to give notice to the sureties, when they made this arrangement with the trustee, that the sureties might exercise their discretion, whether they would advance those feu-duties, or would insist, as the appellant does now insist, that he will have nothing to do with it, because he conceives it was the duty of the Bank to complete their title to this property?

My Lords, upon the best consideration I have been able to give this case, I think that the sureties entered into this engagement on the faith of this heritable property having been conveyed to the Bank; that it was incumbent on the Bank to obtain a conveyance of this property; and that, by not doing so, they have placed the sureties in a situation in which they never intended to have been placed, and in which they never would have been placed but for the negligence of the Bank;—that that being so, the offer which they made at the time the case was before the Lord Ordinary, could not do away with the effect of their former omission, for this reason, that the offer could not place the sureties in the situation in which they had a right to be placed under the original agreement; that they are entitled to have the property under their control, for the repayment of themselves if they were called upon; that that cannot be, and that they are not bound to take into their consideration, whether Mr Thomson subsequently made an arrangement with the trustee to secure that property for the

Bank, the property being to be sold now by the trustee under this sequestrated estate. May 23, 1826.

My Lords, I think very considerable doubts might also have been entertained upon the question, whether the Bank were entitled to sue the surety before the time for renewing those bills; but it is unnecessary to enter into that; for considering, as I do, that the surety has been discharged by the conduct of the Bank, by their negligence in not obtaining the charter of confirmation, and not giving notice to them when the transaction came to their knowledge, I think, for these reasons, the interlocutors of the Court of Session cannot be supported, but that they must be reversed. I would therefore propose to your Lordships to reverse this judgment, giving, therefore, the appellant the benefit of that defence he made in the Court below, and which he was, I apprehend, justified in making.

Appellant's Authorities.—2 Ersk. 3. 20.—2. 7. 15.—Thomson, Jan. 29, 1822, as reversed in 1824.—Paisley, Jan. 13, 1779. (8228.)—University of Glasgow, Nov. 18, 1790. (2104, and Bell's Cases, 134.)—M'Lagan and Co., Nov. 19, 1813. (F. C.)

RICHARDSON and CONNELL—SPOTTISWOODE and ROBERTSON, *Solicitors.*

GOVERNORS OF HERIOT'S HOSPITAL, Appellants.—*Keay*—*Robertson.* No. 25.

T. COCKBURN, J. C. MAXWELL, and OTHERS, Respondents.

Superior and Vassal—Servitude.—Held ex parte (reversing the judgment of the Court of Session) that a vassal in an urban tenement is not entitled to retain his feu-duties, on the allegation that the superior has bestowed on him a servitude altius non tollendi over houses on the opposite side of the street, which had been violated—the vassal having been found to have right to enforce that servitude by having the houses reduced in height.

IN 1806, the Magistrates of the city of Edinburgh, Messrs Winton and others, and the Governors of Heriot's Hospital, proprietors of ground in the northern part of the New Town of Edinburgh, entered into a contract for laying it out in streets, rows, crescents, &c. agreeably to a ground plan, which each, in regard to their respective properties, became bound to adopt. Among other stipulations, it was agreed, that in no case should the houses in certain streets, and among others, India Street, exceed in height 46 feet, from the level of the street to the top of the front wall. May 23, 1826. 1ST DIVISION. Lord Meadowbank.

In 1807, the lots in India Street (being the property of Her-