Friday, March 3.

FIRST DIVISION.

THE SCOTTISH PROVIDENT INSTITUTION *v.* FERRIER'S TRUSTEES AND ANOTHER.

Cautioner — Back Letter — Change of Obligation — Giving Time—Liberation. The debtor in a bond was taken bound, along with cautioners, to repay the sum borrowed at a certain term. Thereafter the creditor, without communicating with the cautioners, granted a back letter to the principal debtor, agreeing that, under certain conditions, the bond should not be called up till six years after the term mentioned therein. *Held* that the creditor had effected a material alteration in the relative rights of parties, and had thereby liberated the cautioners.

On the 8th April 1857 Mr W. F. Ireland, banker in St Andrews, granted a bond for £1000 to the Scottish Provident Institution, in which Professors Ferrier and Fischer were bound as cautioners. The obligation was to repay at Whitsunday 1857, and the bond also contained an assignation to a policy of assurance on Mr Ireland's life. On the following day the Scottish Provident Institution, through their manager, granted a back letter to Mr Ireland, to the effect that, "although the bond bears that the principal sum is to be repaid at Whitsunday 1857, it is understood and agreed that the loan is to remain for six years from that term, provided the interest and the premiums of assurance on the policy are regularly paid, and the security shall remain in all respects as satisfactory as at present." From the letters produced in process, it appears that, although the back letter was granted in terms of previous arrangements with Mr Ireland, the cautioners were not made aware either of these arrangements or of the existence of the back letter.

Professor Ferrier died in 1864. In June 1868 Mr Ireland's estates were sequestrated, and the Scottish Provident Institution, having ranked for their debt on his estate, now sued Professor Fischer and the trustees of the late Professor Ferrier for the balance.

The defenders pleaded, that by granting the back letter to the principal debtor, the pursuers had entered into a new and different contract with him, and so liberated the cautioners.

The Lord Ordinary (MURE) assoilzied the defenders.

The pursuers reclaimed.

The SOLICITOR-GENERAL and ASHER, for them, argued—That the back letter made no material alteration in the rights of parties; that by it the creditors in no way tied their hands, but merely stated that they did not anticipate calling up the bond for six years, and that, consequently, there was nothing to prevent the cautioners paying the debt and operating their relief against the principal debtor.

MILLAR, Q.C., and BLAIR, for Ferrier's trustees, and J. C. SMITH, for Professor Fischer, were not called on.

At advising—

The LORD PRESIDENT—I am of opinion that the Lord Ordinary is right. The back letter was certainly meant to have some obligatory effect. The argument of the pursuers would deprive it of all meaning. It would leave it entirely to the discretion of the creditors to call up the bond or not. I cannot give this construction to a back letter, which the creditors acknowledge as something inconsistent with the bond, and which is to be the rule between parties in opposition to, and notwithstanding the bond. I consider that by the back letter the creditors are debarred from claiming payment within six years unless they can assign some distinct reason. It is obvious that the cautioners are thus deprived of a privilege which they might otherwise have obtained between 1857 and the expiry of the six years. They could by the bond pay the debt at any time within that period, take an assignation, and go against the principal debtor. But they would be using the rights of the cedent, and would be bound by all obligations pleadable against the cedent, and, consequently, would have been met by this latent back letter. This seems to be conclusive.

LORD ARDMILLAN—I concur. Three matters of fact are proved. *First*, Whatever was done by the back letter was done by way of agreement between the creditors and Mr Ireland. *Second*, This was done without consent of the cautioners. *Third*, The condition of the cautioners was varied, and varied to their prejudice. It is clear that if they had paid the debt and taken an assignation they could not have sued Mr Ireland unless the creditors could, and the creditors would have been met by the agreement contained in the back letter.

LORD KINLOCH concurred.

LORD DEAS absent.

The Court adhered.

Agents for Pursuers—Morton, Whitehead, & Greig, W.S.

Agent for Ferrier's Trustees—Hunter, Blair, & Cowan, W.S.

Agent for Professor Fischer—Thomas Spalding, W.S.

Friday, March 3.

ALEXANDER AND OTHERS *v.* STOBO AND MILLER.

Superior and Vassal—Co-Vassal—Servitude—Altius non tollendi — Jus quæsitum tertio. Where a proprietor, who had laid out his lands on a feuing plan, disposed of three lots to a builder, two upon one side of a street and the third upon the other, the first by feu-disposition to be held *a me vel de me*, the two remaining ones by feu-contract, to be held *de me* only, prohibiting sub-infeudation; and where the builder had split these lots into building stances, and disposed of them to different parties, to be held of himself where the state of his title admitted it, and from him of his superior where it did not; where, moreover, the superior had inserted in both his grants to the builder valid feudal restrictions *inter alia* against building houses more than four square storeys in height, and, at the same time, had bound himself to insert similar restrictions in all future conveyances of the property, so far as fronting the said streets; and where the builder had similarly bound all his disponees, either directly or by reference.—*Held*, 1 (*diss.* Lord Deas), That those holding the stances of one lot, as subfeuars under the builder, as well as those holding stances in one of the other lots, as