WM. HENDERSON, Trustee on the Sequestrated Estates of Francis Garbett and Co., late Merchants at Carron Wharf, and of Charles Gascoigne, one of the Partners of that Company, as an individual, } *Appellant;*

RICHARD CARR GLYNN, THOMAS and SAVILLE HALLIFAX, Bankers, Representatives of the late Messrs Glynn and Hallifax, Bankers in London, and CHARLES SELKRIG, Trustee for the Creditors of Messrs Adam and Thomas Fairholme, } *Respondents.*

House of Lord, 27th June 1816.

RELIEF—ASSIGNATION—BANKRUPTCY OF COMPANY.—(1) Held, that a co-obligant, insisting on an assignation from the creditors, holding a separate security over his co-obligant's separate estate, in order to operate relief against that estate, for sums drawn out of his estate, more than out of it, was not entitled to demand an assignation in the circumstances of this case. (2) It having been disputed whether the individual estate of a partner in a bankrupt company, had been included in the sequestration of the company, held that after a silence of thirty years, it was impossible to hold that the sequestration extended to his individual estate.

By the preceding appeal it has been seen that Messrs Glynn and Hallifax were large creditors of Francis Garbett and Co., as well as of Charles Gascoigne, as an individual to the extent of £24,000, as at 1st January 1774; and that they were preferably secured as creditors on the Carron stock held by Francis Garbett, as an individual, which was assigned to them in security. The debts due by the Company amounted to £86,163, 3s. 4d., by Charles Gascoigne, as an individual, including Fairholme's trustees, £43,284, 6s. 2d.

The whole creditors ranked on Charles Gascoigne's individual estate, and drew dividends from it; and the appellant insisted that he was entitled to relief against Francis Garbett's individual estate, in other words, relief from the Carron stock in question, to the extent of what he alleged was paid more than his proportional share in the joint obligation. In the multiplepoinding raised by the Carron Company, Messrs Glynn and Hallifax were preferred, and decree of preference obtained. Although they had received a power to sell the

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stock, yet for almost twenty years they delayed to do so. In the interval, the value of the stock had risen immensely, so as, after paying their debt, to leave a reversion over.

A question had been made, but never determined, whether Francis Garbett's *individual* estate had been included under the sequestration, a question which came to be of importance now that there was a prospect of a reversion, arising from the value of his individual stock. In these circumstances the appellant presented a petition to the Court, praying that they would resume consideration of this question, and to find that the sequestration did include Francis Garbett's separate estate. The respondent, Mr Selkrig, the trustee for the creditors of Messrs Fairholme, who had taken out a confirmation *qua* creditor of the deceased Francis Garbett, so as to affect this stock in payment of his constituents' debt, appeared and opposed this application, having it in view to rank and claim whatever reversion there might be, for his constituents' debt. The Second Division of the Court held that after so long a silence on the part of the creditors, it was impossible to hold, that the sequestration could extend to Francis Garbett's estate.

It appeared that, all this time, Messrs Glynn and Hallifax had continued to draw the dividends arising on this Carron stock. They had also drawn dividends from the estate of Charles Gascoigne, and even for debts properly due out of the estate of Francis Garbett; and, failing in the above application, the appellant then proposed to the representatives of Messrs Glynn and Hallifax, that since they had failed to make use of their separate security, to the extent they ought to have done, and had ranked for their full debt on Mr Gascoigne's estate, and had drawn dividends from both his and the Company estate, they should grant to the appellant an assignation (assignment) to their security, to enable him to make effectual the relief to the extent of one-half the dividends drawn by them, which, in the circumstances of the case, he was entitled to claim from the estate of Francis Garbett. And he stated, that it was not necessary to show that Charles Gascoigne had paid more than the half of the joint debts, it was enough, if it appeared, that what had been paid from his estate, on the ground of his being cautioner for Francis Garbett, exceeded what had been paid from Francis Garbett's estate, each being liable *in solidum*, each was to be considered as principal debtor as to his own half, and *cautioner* for his co-obligant in the other half. And, therefore, even supposing the in-

dividual estate of that gentleman did not fall under the sequestration, yet he was entitled to demand an assignation from the representatives of Messrs Glynn and Hallifax, for whose debt, as due by Francis Garbett and Co., Francis Garbett's estate was as directly bound, as that of Charles Gascoigne, each being principal debtor for one-half of that debt, and cautioner for the other, in the other half; and the appellant, in his argument, founded very much on the case of Sir Robert Maxwell *v* Heron, as applicable to the present. *Vide ante*, vol. iii., p. 350.

The Court, after several interlocutors, pronounced this interlocutor:—"Upon the first prayer of the petition respect- Dec. 10, 1811.
"ing the amount of the balance of debts remaining due to
"the representatives of Messrs Glynn and Hallifax, they
"remit to the Lord Ordinary to do as he shall see cause;
"and, *quoad ultra*, in respect it was long ago decided that
"in the bond granted to the trustee for the Messrs Fair-
"holme, Charles Gascoigne was the principal debtor, and
"Francis Garbett, in effect a cautioner only, Find that the
"petitioner, Mr Henderson, as standing in the right of
"Charles Gascoigne, the principal debtor, is not entitled to
"require an assignation from the representatives of Glynn
"and Hallifax of the Carron Company stock belonging to
"Francis Garbett, the cautioner, to the prejudice of Mr
"Selkrig, trustee for the creditors of Messrs Fairholme, to
"whom both the principal debtor and cautioner stand jointly
"and severally bound as full debtors. Therefore, refuse the
"second prayer of this petition; and in so far adhere to
"the interlocutor of the Lord Ordinary reclaimed against."*
On reclaiming petition the Court adhered. Jan. 21, 1812.

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* Opinion of the judges:—

Mr Selkrig's Right to oppose.

LORD SUCCOTH.—"I do not at present understand whether it is necessary here to decide the question, with regard to the validity of Mr Selkrig's confirmation as executor-creditor, and the arrestments used by him, of the Carron stock, or rather the renewing of the arrestments, which had been laid upon this stock by his predecessor in office, Mr Grant, in 1773.

"This is a question of some difficulty, which was formerly discussed at great length, and seems to have been before the Second Division of the Court; but it is said that the Court did not give their decision, as it was not necessary to decide it, the Court being clear that the creditors, after having for thirty years relinquished

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Against these interlocutors the present appeal was brought to the House of Lords.

their claim for sequestrating the estate of Francis Garbett, as an individual, could not now revive it.

"It is said, that unless Mr Selkrig had a right to attach the stock by his arrestments, he has no interest to object to the assignment claimed by Mr Henderson. If so, and that question be open, I doubt if Mr Selkrig could attach this stock by arrestments after his predecessor had agreed, for a valuable consideration, to give up the arrestments in 1773. It is said he did not get the full consideration, as the interest stipulated was not regularly paid, but he got £2500 down. He got twenty-seven shares of Mr Gascoigne's Carron stock, which, but for the agreement, must have been shared with the other creditors; and he continued to act under the agreement, although the interest was not paid, and never objected to it on this head."

Question of Relief.

"The state of the fact is distinctly explained in the papers set forth, that whether we take the debt due to Glynn and Hallifax *alone*, or the whole joint debts on which Charles Gascoigne and Francis Garbett were co-obligants, into view, that in neither case has so much been paid out of the private estate of Charles Gascoigne, as has been paid out of the private estate of Francis Garbett, and what is more material, that *in none of the different views given by the accountant, has Charles Gascoigne's estate paid one-half of the joint debts* due by those two co-cautioners. Therefore, on the principles adopted in the case of Macdowal in 1798, the claim of relief set up by Mr Henderson, as trustee for Charles Gascoigne, is not well founded. Unless *one* of *two* co-cautioners has paid *more* than *half* of the debt for which they are both bound, upon what principle can he claim relief against the other co-cautioner? The original creditor may, no doubt, claim *in solidum* against both; and in this case he has done so; and if he had drawn more than the half from the *one*, he might be obliged to *assign* his debt to the *other*, that he might operate his relief.

Cranston *v.* M'Dowal, May 22, 1798, Fac. Coll. *et* Mor. p. 2552.

"The decision in the case of Macdowal was not inconsistent with that of the House of Lords in the case of Heron *v.* Maxwell, for the questions were substantially different.

Vide ante, vol. iii., p. 350.

"Mr Selkrig also founded a separate argument upon the alleged fact that Charles Gascoigne was the principal debtor, and Francis Garbett only cautioner in the debt, in which case, he maintains that, even although the estate of Charles Gascoigne had paid more than his *half* of the debts, still Mr Henderson could not be entitled to relief from the estate of Francis Garbett, until he *had relieved* Francis Garbett of his cautionary obligation to Fairholme's credi-

Pleaded for the Appellant.—The ratio assigned in the interlocutor of the Court of the 5th December 1811, for holding the appellant to be barred from demanding an assignment, cannot justly have any such effect. The appellant, as trustee on Mr Gascoigne's estate, is not limited to such pleas, as Mr Gascoigne might himself have maintained, had he been solvent. He is trustee for the whole of Mr Gascoigne's creditors, and as such, is entitled to make every claim for their behoof, which they might have done individually. But if the whole creditors have, in consequence of the mode in which the joint debts have ranked on Mr Gascoigne's estate, right of relief against that of Francis Garbett, and a title to make this effectual, to a certain extent, by obtaining an assignment to the preferable security on the Carron stock, they cannot be prevented from doing so, because a single creditor has attempted to carry off the reversion of this fund, by a diligence to which the assignment must naturally be preferable. This single creditor cannot, from the mere circumstance of his being so, or having Francis Garbett bound as cautioner, have any right of preference over the Company creditors, as those to whom Charles Gascoigne and Francis Garbett were bound as co-principals. Neither can he have any preference even to the individual creditors of Mr Gascoigne, for the claim of relief at their instance, is founded on the payments made from Mr Gascoigne's estate, towards debts which belong primarily to Francis Garbett. They have a right, therefore, to come upon the estate of the latter, although he might not have been originally bound to them, no less than his proper creditors, and if the assignment is such, as from its nature, must give them a right to the reversion of the Carron stock, which is preferable to that arising from Mr Selkrig's confirmation, they are entitled to the benefit of it. There can be no doubt, however, that the assignment must give a preference to the confirmation. It proceeds on the footing, that Messrs Glynn and Hallifax ought in justice to have taken a larger proportion of their debt from the Carron stock, and it produces the same effect as if they had done so, by substituting Mr Gas-

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tors. But there is no sufficient evidence of the fact on which this plea is founded.

"In the original bond granted to Fairholme's trustee, Francis Garbett was no less *principal debtor* than Charles Gascoigne."—*Vide Campbell's Collection of Session Papers, vol.* 145.

The other judges went on the grounds stated in the interlocutor.

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coigne's creditors, or the appellant, as their trustee, in place of Messrs Glynn and Hallifax, and by giving him the benefit of their right of pledge, which is indisputably preferable to every other claim upon Francis Garbett's Carron stock, and in particular to the confirmation of Mr Selkrig, which, by its nature could only affect the balance, if there were any remaining, after satisfying the claim of Glynn and Hallifax, or the appellant as their assignee, upon the preferable security held by them over that stock.

2d, The appellant is not barred from demanding the assignment by the contract betwixt Mr Grant and Mr Gascoigne, which was subsequently confirmed by the appellant's predecessor, Mr Anderson. For the stipulation as to the regular payment was originally null, and was also passed from and given up, and a mode of distribution of the sequestrated estates adopted, and sanctioned by Mr Selkirg himself, which was quite inconsistent with it. At any rate, Mr Selkrig has no interest to oppose the assignment on this ground; for, if successful in his action on the contract, he will recover his full payment from the appellant, in so far as the funds in his hands, including the reversion of the Carron stock, may be sufficient for this purpose.

3d, The estate of Charles Gascoigne, having been ranked upon, for the whole debts for which he and Francis Garbett were jointly bound, while the estate of the latter has not been brought under distribution, nor ranked upon by any of the creditors, there arises to the former, a right of relief against the latter, to the extent of one-half of the dividends paid on the joint debts. And in these circumstances, the appellant is entitled to insist that the respondents, the representatives of Messrs Glynn and Hallifax, shall either draw their payment, as far as possible from Francis Garbett's estate, by exhausting their separate security, or grant him an assignment to it, to the extent of the dividends they have drawn from Mr Gascoigne's estate, that he may operate his relief from the reversion. There is no room for a counter-claim of relief in consequence of the sum drawn by Messrs Glynn and Hallifax, from Francis Garbett's Carron stock, seeing that they have ranked on Mr Gascoigne's estate for their full debt; and were such a counter-claim even to be admitted, there will still be a large balance of surplus payments from Mr Gascoigne's funds, and the appellant will, at least, be entitled to an assignment to the effect of recovering from the Carron stock, the one-half of this excess. The connection between Francis

Garbett and Charles Gascoigne as partners, and between the debts, as company debts, it is submitted, fortifies this plea. For one out of perhaps fifty company debts, Francis Garbett gives a security upon his Carron stock. The remaining forty-nine debts, to four or five times the amount, in each of which Francis Garbett is the proper and principal debtor for one-half, are suffered to come upon Charles Gascoigne and his individual estate alone, Francis Garbett's individual estate paying no part. In such a case, surely, it is just and equitable, that the creditor, holding the security upon Francis Garbett's stock for the single debt, should draw his whole payment from the fund over which his security extends, when so many other Company debts come upon Charles Gascoigne's individual estate.

Pleaded for the Respondents Sir Richard Carr Glynn, and Thomas and Saville Hallifax.—The respondents have neither interest nor inclination to interfere in the question of reciprocal relief between the appellant on the one hand, and the respondent, Charles Selkrig, on the other; but they have an interest to insist that they shall not be decerned to assign in favour of either of these two parties, or restrained in ranking and drawing dividends on their respective estates, until the debt due to them shall be paid. The respondents hold three securities for their debt; 1st, Their personal claim against the estate of Francis Garbett and Co. 2dly, A similar claim against the estate of Charles Gascoigne; and lastly, The real security of the Carron stock of Francis Garbett. And they humbly conceive that they are not bound to transfer any one of these securities to any party, or to suffer their interest in any one of them to be diminished, or in any way weakened or embarrassed, until their debt shall be paid.

The appellant is pleased to say, that if the respondents will assign their Carron stock to him, he will sell it, and pay their debt with the first of the price which he receives; in other words, he undertakes to hold the stock as trustee for their behoof, in the first place. He cannot claim the property as long as any part of the debt due to the respondents remains unpaid; but he insists that he shall have the administration of it. Now, the respondents humbly conceive, that they have just as good a right to the administration as to the property itself. No party asserts, or can pretend to have any interest in this Carron stock, until the debt due to the respondents shall be paid. The right of property, redeemable no doubt, is vested in them. It did not belong to any

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of the estates over which the respondent is trustee, while the owners were solvent, and it does not belong to the appellant now. In the same manner the right of administration did not belong to any of his authors, and it does not belong to him now. The respondents have no desire to retain this property for an instant after their debt shall be paid, nor have they any inclination to act capriciously between the appellant and the other respondent, Mr Selkrig. On the contrary, they have waited now more than forty years for the payment of this money; they will be most happy to receive it, and to execute an assignation in favour of either party whom the law shall prefer; but until the money shall be paid, they do not hold themselves bound to assign in favour of either the one or the other.

Pleaded for the Respondent, Mr Selkrig.—The dividends corresponding to the debt due to Glynn and Hallifax, made from Charles Gascoigne's estate, at and prior to 10th January 1803, added to what Glynn and Hallifax have already received, and will still receive from the proceeds of Francis Garbett's Carron stock, do fully pay, and of course extinguish, the debt due to Glynn and Hallifax; and after that debt is so paid and extinguished, there remains a surplus of proceeds of the said Carron stock. But the debt to Glynn and Hallifax being thus extinguished, they can have no right or interest in, or power or control over the surplus of Francis Garbett's stock; and it is therefore altogether incompetent for them to assign any right over such surplus to any other party, so as to affect the respondent's preference lawfully acquired. The balance of debt due to Glynn and Hallifax at Lammas 1810, was £10,694, 13s. $9\frac{1}{12}$d. The value of the Carron stock as now estimated, is £19,800, so that there is a surplus of £9694, 13s. 9d. over. It seems to be self evident that Glynn and Hallifax, after the balance of their debt is thus provided for, and of course the whole debt due to them fully paid up and extinguished, have nothing at all to do with this surplus, and that any attempt by them to assign it would be to assign what does not and cannot possibly belong to them. The respondent, by his confirmation, is preferable over this stock to every other creditor, excepting Glynn and Hallifax; and, consequently, the moment that their debt is extinguished by payment, the respondent's preference attaches and secures the whole surplus as his property, to the effect of being applied for payment of his debt. If the appellant can make any good demand upon the respondent, as in the legal possession of that surplus stock, it may be competent to him to

insist in such a demand, the merits of which will remain to be considered. But, in the meantime, Glynn and Hallifax have no power to grant any assignment of a subject which does not belong to them; but by the extinction of their debt, falls under the legal dominion and control of the respondent.

2d, Neither the appellant, as the trustee of Charles Gascoigne, nor the creditors of Charles Gascoigne, have given any consideration to Glynn and Hallifax for the assignment which the appellant requires them to grant. Indeed, so far from having given any consideration, the appellant and his constituents have not paid nearly the share of the debt due to Glynn and Hallifax, which properly falls upon the estate of Charles Gascoigne. Charles Gascoigne and Francis Garbett are joint and several obligants in the debt to Glynn and Hallifax; they are bound *singuli in solidum* to the creditors; but, in the accounting between themselves, they are precisely on an equal footing, each being liable for one-half of the debt. Charles Gascoigne is no more cautioner for Francis Garbett, than Francis Garbett is cautioner for Charles Gascoigne. Each is principal debtor for one-half; and when either obligant *has paid his own half*, he is creditor in relief for whatever sums he may be obliged to pay on account of the other half of the debt, in which he is cautioner, and the other obligant principal debtor. But while his own half of the debt is unpaid, all his payments only go to extinguish his own debt, and he can be held to have paid nothing as cautioner for the other.

Now, the fact is ascertained, that the estate of Charles Gascoigne has paid, on account of the debt of Glynn and Hallifax no more than £13,832, 15s. 2d., while the estate of Francis Garbett has paid, and will pay on account of the same debt, £59,067, 10s. 4d., being more than four times as much as the estate of Charles Gascoigne has paid. From this it is evident, that the estate of Charles Gascoigne, instead of having paid that half of the debt in which he is principal debtor, has not paid much above *one-third* of such half. It consequently appears to be quite impossible to maintain, that the appellant or his constituents, have given any consideration whatever to Glynn and Hallifax for the assignment which they now demand; on the contrary, they have not paid to Glynn and Hallifax nearly that part of the debt for which they were themselves liable as principal debtors, and they have obliged Glynn and Hallifax to take payment of the greater part of that proportion from the estate of Francis Garbett, which, in regard to the appellant, was only liable for it as a cautioner.

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In these circumstances, the appellant professes to maintain, that the estate of Charles Gascoigne has given a sufficient consideration for the assignment. *In the first place*, he states, that, in point of fact, Glynn and Hallifax have been ranked for the full amount of their debt on the estate of Charles Gascoigne, and have hitherto drawn dividends corresponding to the full debt. The half of such dividends he is pleased to consider as paid on Charles Gascoigne's half of the debt, and the other half of them he considers as paid on Francis Garbett's half of it. To the extent of one half of the dividends, therefore, paid from Charles Gascoigne's estate, the appellant contends that he is entitled to be relieved out of the estate of Francis Garbett; and, therefore, that to this extent he has given a sufficient consideration for the assignment required by him. In this part of the case, the appellant relied principally on the supposed application of the case of the creditors of Maxwell *v.* Heron, 8th February 1792, decided in the House of Lords 11th June 1794. It is believed that a little consideration will show, that that case is very far indeed from giving any aid to the plea of the appellant, because the case is essentially different.

After hearing counsel,

It was ordered, that the interlocutors of the 15th November 1808, and 7th February and 11th March 1809, complained of in the said appeal be, and the same are hereby affirmed.* And it is further ordered and adjudged that the interlocutor of 5th December 1811 be varied, by leaving out the words, "in respect it was long ago decided, that in the bond granted to the trustees for the Messrs Fairholme, Charles Gascoigne was the principal debtor, and Francis Garbett, in effect, a cautioner only;" and by inserting instead thereof, the words "under the circumstances of this case;" and that the said interlocutor be further varied by leaving out the words, "the cautioner, to the prejudice of Mr Selkrig, the trustee for the creditors of Messrs Fairholme, to whom both the

* These interlocutors of the Lord Ordinary had repelled "the demand of the trustee to obtain an assignation to Francis Garbett's share of the Carron stock held in security of their debts, in respect the debts in security of which they were so held were the proper debts of Francis Garbett and Co., and not of Francis Garbett personally."

principal debtor, and cautioner stand jointly and severally bound as full debtors therefor." And with these variations, it is ordered and adjudged, that the said interlocutors of 5th December 1811, and 21st January 1812, be, and the same are, hereby affirmed, with £147 costs, to be paid to the respondents, Messrs Glynn and Hallifax.

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For the Appellant, *Sir Saml. Romilly, Mat. Ross, Alex. Irving.*

For the Respondents, *Messrs Glynn and Hallifax, John M'Farlane, W. G. Adam.*

For the Respondent, *Mr Selkrig, Wm. Adam, John Leach, John Clerk, Jas. Moncreiff.*

NOTE.—Unreported in the Court of Session.

[Dow., vol iii., p. 233.]

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BAYNE v. WALKER.

WM. BAYNE, Esq. of Newmill, . . . *Appellant;*
JOHN WALKER, Tenant in Newmill, . . *Respondent.*

House of Lords, 3d July 1815.*

LANDLORD AND TENANT—DESTRUCTION OF SUBJECT LET, BY FIRE —CULPA.—In the Court of Session it was held where the farm-house of the tenant was burned down by accidental fire, that the landlord was liable to rebuild the house. Reversed in the House of Lords.

The appellant is proprietor or landlord, and the respondent tenant, of the farm of Newmill, in the county of Fife.

At a time when the respondent's wife was confined to bed of severe indisposition, the farm-house was, unfortunately, burned to the ground, without any blame attachable to the respondent; and the present action was raised by him, first, before the sheriff, and afterwards insisted on before the Court of Session, insisting that the farm-house should be re-built by the appellant, or that the respondent should be empowered to re-build it himself, and to retain the rents until the expense should be paid.

In defence, the appellant stated that a landlord was not

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* Omitted at its proper date.