construction of the contract, and that that, therefore, was the only question that could properly be raised in this form of summons.

I therefore humbly move your Lordships to affirm the order of the Court below, and to dismiss the appeal with costs.

LORD CRANWORTH.—My Lords, I entirely concur with the noble and learned Lord on the woolsack. The only argument that at all raised a doubt in my mind was that of the learned counsel, Sir Hugh Cairns, with respect to the clause, in which there is a stipulation which establishes a title to pass toll free along the railway. His argument upon that was, that *expressio unius est exclusio alterius;* but looking at it a little more narrowly, I think your Lordships will come to the conclusion, that that is merely an inartistic and clumsy way of saying that they shall pay the £25 a year for each year the railway shall be used, but not that they are to pass toll free in such a way, that they shall not be liable to pay the £25 a year for each year the railway shall be so used. But even if that interpretation were not put upon it, it is quite impossible so to narrow the rights of a landlord as to suppose, that he would grant by implication in that way, that which, if he had intended to grant it, he might have granted in direct and indisputable terms. With regard to the suggestion, that on this record a narrower interpretation might be assumed, I think that is entirely a mistake. There is no allegation whatever of an exceptional use of the railway. The pursuer says, you have granted something which you had no right to grant; I am entitled to damages: and I will shew you, that I have incurred damage, for the Messrs. Henderson are using the railway, and in that way they are profiting by me. But there is no suggestion, that if the grant was right, there was an exceptional use made of it.

LORD KINGSDOWN.—My Lords, I entirely agree both with the conclusions at which my two noble and learned friends have arrived, and with the arguments on which they are founded. I confess, that when I heard the commencement of the argument, I scarcely thought it would have proceeded further.

Interlocutors affirmed, with costs.

Appellants' Agents, Burn, Wilson, and Burn, W.S.; Grahames and Wardlaw, Westminster. —*Respondents' Agents*, Horne and Rose, W.S., Melville and Lindsay, W.S.; Maitland and Graham, Westminster.

MAY 5, 1865.

JOHN EWART and Mandatory, *Appellants*, *v.* JAMES LATTA (Christie's Trustee), *Respondent.*

Principal and Cautioner—Bankruptcy of Cautioner—Assignation of Securities—*C., as cautioner of M., joined M. in a joint and several promissory note to E. for £1000. C. became bankrupt, and E. proved on C.'s estate for the whole debt, and claimed payment of the dividend of 7s. 6d. then payable.*

HELD (reversing judgment), *That the trustee on the sequestrated estate of C. could not insist, before payment of the dividend to E., upon an assignation of the security held by E., for a creditor is not bound to assign his securities, except on full payment by the cautioner.*[1]

This was an appeal from a judgment of the First Division.

In 1856, the appellant, Mr. Ewart, advanced a sum of £1000 to Messrs. Mounsey and M'Alpin, solicitors, Carlisle, for which he took their joint and several promissory note, which expressed, that the money was to be repaid in half yearly instalments of £100, with interest at five per cent., and they gave a further security each of a policy of insurance on his own life, that of Mr. Mounsey being for £1000, and that of M'Alpin for £500, of which they paid the premiums. The half yearly instalments were not regularly paid, and the firm was dissolved. In 1860, Mr. Ewart requested additional security from Mr. M'Alpin, who had taken the greater number of clients, and was to recover the debts of the firm. On pressure, Mr. M'Alpin procured his father in law, Mr. Alexander Christie, wine merchant, George Street, Edinburgh, to join him in a new promissory note as follows:—"Two years after date we jointly and severally promise to pay John Ewart, Esq., or order, £1000, with interest thereon in the mean time yearly at the rate of 5 per

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[1] See previous report 1 Macph. 965; 35 Sc. Jur. 539. S. C. 4 Macq. Ap. 983: 3 Macph. H. L. 36: 37 Sc. Jur. 419.

cent. value received. Dated 31st March 1860. (Signed) D. M'Alpin. Alex. Christie." This note was granted to Mr. Ewart on the alleged agreement, that it should be held as an additional security for the former note made by Mounsey and M'Alpin.

In 1862 Mr. Christie was made bankrupt, and Mr. Latta was elected trustee on the estate. Mr. Ewart gave in an affidavit and claim for the whole sum of £1000 and interest, alleging, that he held the first note as security, and also the two policies of insurance, and that he held bound for the debt Messrs. Christie, Mounsey, and M'Alpin. Mr. Latta, as trustee, was of opinion that, as the note made by Christie was merely in security of the first note by Mounsey and M'Alpin, and Christie was their cautioner, and as Mr. Mounsey was reputed solvent, and had not been discussed, Mr. Ewart was bound, before drawing a dividend, to execute an assignation in favour of Mr. Latta as trustee of the securities held by him, including the earlier promissory note, to the effect of enabling the trustee to recover the dividend from the other obligants. Mr. Mounsey was the brother in law of Mr. Ewart, and was solvent, and able to pay the whole debt; and it was considered by the trustee that Mr. Ewart wished to shield Mr. Mounsey from payment. The trustee claimed an assignation, not so as to give him a preferable title to Mr. Ewart, or so as to compete with him, but a title merely to recover the amount from the other obligants so far as he could. The dividend from Mr. Christie's estate was 7*s.* 6*d.* in the pound. Mr. M'Alpin had also been made a bankrupt in England about the same time, and his estate was said to be likely to yield 12*s.* 6*d.* in the pound.

Mr. Ewart having declined to make the assignation claimed by Mr. Latta, appealed to the Lord Ordinary (Barcaple), who held, that Mr. Latta was not entitled to insist on the assignation before paying the dividend to Mr. Ewart, for, as Mr. Ewart had not been paid his debt in full, but merely a composition which was not equivalent to full payment, he was not bound to part with his securities, and that the only way in which Mr. Latta could be entitled to the assignation would be by paying all the debt. On reclaiming to the First Division, the Court recalled Lord Barcaple's interlocutor, and held, that Mr. Ewart was bound to make the assignation claimed, but without prejudice to his right, and so that the assignation should not be used in competition with Mr. Ewart in any steps to be taken for the due recovery of the debt, Mr. Ewart being a preferable creditor.

Mr. Ewart now appealed from that judgment.

The appellant, Ewart, in his *printed case*, contended, that the interlocutor of the First Division was wrong, for the following reasons:—1. The respondent is not entitled to require the appellant, as a condition of drawing his dividend from the bankrupt Christie's estate, to assign the debt due to him or securities held by him therefor; and there is no good ground for withholding payment of the said dividend, or attaching any condition thereto. 2. The grounds alleged in support of the contention, that the appellant is not entitled to draw any dividend until he shall execute and deliver an assignation in favour of the respondent, are insufficient and are not proved.

The respondent, in his *printed case*, contended, that the interlocutor of the First Division was right, for the following reasons:—1. The obligation of Christie being that of a mere cautioner for a debt originally contracted by Mounsey and M'Alpin, and still due, he is entitled to be relieved both by Mounsey and M'Alpin, as principal obligants, and to receive an assignation to the securities granted for the original debt at the time when it was contracted. 2. As the appellant has demanded payment of the dividend payable from Christie's estate on the debt in question, and as he has delayed and has judicially declined to take proceedings against Mounsey, and this without assigning any reason for such delay or declinature, the respondent was and is entitled to withhold payment of the dividend unless and until an assignation, as described in the judgment of the Court, shall be granted in his favour by the appellant.

Rolt Q.C., *Kinnear*, and *Mounsey*, for the appellants.—The respondent, being a trustee on a bankrupt estate, has no better or higher right than the bankrupt himself would have had, unless the Bankrupt Act gives a better right, and it gives none. There is nothing in the Act making it compulsory on a creditor to assign his securities against a third party; at most it is only the securities over the bankrupt estate that are ordered to be assigned. Here the surety being bound as full debtor, the surety had no right to insist on the appellant going first against the principal debtor—Ersk. iii. 3, 61; 1 Bell's Com. 347. Even in the case of cautioners not bound as full debtors, the rule now is, that there is no right of discussion—19 and 20 Vict. c. 60, § 8. Besides, the rule, that a cautioner can demand assignation of the collateral security, only applies where there has been payment of the whole debt—Ersk. iii. 3, 68; iii. 5, 11; M. 1386. Here there has been no such payment; and it has always been held to be a further qualification of the obligation to assign, that the surety is not prejudiced. There is no authority for holding, that for the present purpose bankruptcy is equivalent to payment.

The general rule is, that no such condition as is here insisted upon can be imposed on a creditor receiving part payment, and it lies on those alleging, that the present case is an exception to the general rule to prove it.

The *Attorney General* (Palmer), and *Anderson*, Q.C., for the respondent.—The respondent does

not rely on the right of discussion, but on this, that the right of relief of a surety arises necessarily out of the act of payment. The surety here has done all that it was in his power to do, and the Court has taken care, that no prejudice shall accrue to the creditor. The assignation, as it was ordered, cannot prejudice the appellants. In *Lowe* v. *Greig*, 3 S. 543, it was held, that a surety on each payment of interest was entitled to an assignation to the real security.

[LORD CHANCELLOR.—That was a case of a heritable security. Have you a case of a personal security?]

In *Inglis* v. *Rennie*, 4 S. 114, the security was also real, and so it seems was the case of *Cranshaw* v. *Macdowall*, M. 2552, but nothing turns on that. There was also a case of *Dunlop* v. *Spears*, M. 1383; 14,610, and M. Ap. Society, No. 2.

[LORD CHANCELLOR.—That was a case of contribution between partners, not of suretiship by contract.]

The principle is exactly the same, for both are cases of contribution. A surety in such a case is not bound to rely on his common law rights—*Erskine* v. *Manderson*, M. 1386. The practice to call for such an assignation on payment by a surety of part of the debt, is shewn by the form in 1 Jur. Styles, 317. It is not enough to answer the application for an assignation, that it would be apparently against the creditors' interest—*Sligo* v. *Menzies*, 2 D. 1478. It is said, the rule of calling for assignation applies only where there has been full payment by the surety, but since the bankrupt has paid all he can pay, he must be taken to have paid the debt in full. It is not a voluntary tender. The creditor takes what he can get in respect of the whole debt. The dividend represents the whole debt for the purpose of the present case.

Rolt replied.

LORD CHANCELLOR WESTBURY.—My Lords, I think it will be found, that the principles of law which are applicable to the decision of this case are in themselves very clear and well understood. They may, in point of fact, be involved in some obscurity by the citation of former cases, probably in some respects inaccurately reported, or by the mind being led away from the consideration of the rules of law applicable to the case to be decided, into an endeavour to solve or to explain the enigma which frequently arises, whether those cases cited were rightly decided, and whether they are applicable to the case before us. But if the case is resolvable into simple, well established, and clear principles, those principles do not require to be further illustrated by the citation of other cases, because they are in themselves so clear and easily understood, that any explanation would serve to bring them into obscurity, rather than to throw upon them additional light.

The rules which are applicable by the law of Scotland, as well as those which prevail by the law of England as between principal and surety, are few and very intelligible. The surety has a right in certain cases, where the nature of his obligation as surety is perfectly clear upon the face of the instrument, to call upon the creditor to resort first to the principal debtor for payment of the demand. That is called in Scotland the right to discuss. The surety has also this right under certain circumstances; that when he has paid the debt and satisfied his obligation, he is entitled to stand in the shoes of the creditor, and has all the rights of the creditor against the principal debtor. That is called the right to relief. The surety has another right by the law of Scotland: he has the right of division, which I apprehend to be this, that where there are several sureties, he has a right to have attributed to himself only a proportionate amount of his liability. He has also the right of contribution, which arises after he has made payment, that is, a title to demand from co-sureties a contribution to the joint liability which he himself has entirely discharged.

Now, the circumstances of the *present case* are of this nature, that in the year 1856 two solicitors, who were partners, of the name of M'Alpin and Mounsey, gave the present appellant, Mr. Ewart, a promissory note for £1000. The debt was not paid: there appears to have been—at least I infer it—a dissolution of partnership, and, in the year 1860, Mr. M'Alpin, one of the principal debtors, together with a gentleman of the name of Christie, whose trustee is the present respondent, joined in giving another promissory note to Mr. Ewart, the creditor, in respect of the same debt of £1000, which was secured by the first note. Mr. Christie therefore was a party to the second contract, but was no party personally and directly to the first contract. But inasmuch as the first and the second contracts were both contracts in respect of the same debt, Mr. Christie becoming surety for Mr. M'Alpin in the second note was also in truth a surety for Mounsey in the first note. And Christie and Mounsey therefore stood in the relations of principal debtor and surety, just in the same manner in which M'Alpin and Christie would stand in the relation of principal debtor and surety. But, by a peculiarity of the law of Scotland, inasmuch as Christie and Mounsey are jointly and severally bound in the contract contained in the promissory note, there would not arise as between Christie and M'Alpin, or as between Christie and Ewart, that right to discuss, that is, to call upon the creditors to have recourse to the principal debtor, which I have mentioned. The case therefore comes to be considered with regard to the right of relief.

It appears that Mr. Christie subsequently became bankrupt as well as Mr. M'Alpin, and that under that bankruptcy Mr. Ewart, the holder of the notes, has become entitled to dividends from

Christie's estate to the amount of 7*s.* 6*d.* in the pound. Upon those dividends being declared, but before they were paid over to Mr. Ewart, the trustee on Christie's estate raised this claim, that he was entitled to receive from Mr. Ewart, the creditor, an assignation of Mr. Ewart's rights and remedies and securities as against the principal debtor, to the amount of the dividends which have been declared, and were to be paid over. That became the subject of a note of appeal from the decision of the trustee to the Lord Ordinary. And I think the question was decided by the Lord Ordinary on very plain and intelligible principles. It is quite clear, that, as between the bankrupt Christie and the bankrupt Christie's trustee and Ewart, the amount of liability of the bankrupt to Ewart has not been discharged. Christie and Christie's estate are still indebted to Ewart: and the question is, whether a debtor, no matter in what capacity he became a debtor, who has not paid the amount of his obligation—who has not discharged his contract, but is still in a state of indebtedness to the creditor, has any right to call upon the creditor to make any disposition of his security or his remedies against other persons, or in any manner to interfere with the conduct or action of the creditor.

The Lord Ordinary was of opinion, that there was no such right. And in common reason, and according to natural justice, this appears to be quite obvious, and a very reasonable conclusion, that, until the debtor has discharged himself of his liability, has fulfilled his own contract, he has no right to dictate any terms, to prescribe any duty, or to make any demand upon his creditors. The creditor must be left in full possession of the whole of the remedies which the original contract gave him, and he must be left unfettered and at liberty to exhaust those remedies, and he cannot be required to put any limitation upon his course of legal action given to him by his contract by any person who is still his debtor, except upon the terms of that debt being completely satisfied.

That this is the law of Scotland, I apprehend is quite clear, from what has appeared in the course of the argument. Although the greatest industry has been exerted, and the greatest amount of learning and familiarity with the law and decisions of the Courts in Scotland has been applied, yet no case has been cited in which any right of interference with the creditor has been conceded to a surety, until the surety had fully paid the measure of his obligation.

I will state, in order that there may be no misapprehension upon the matter, the case of *Lowe* v. *Greig*, which is the only one that might be supposed to interfere with that position. In the case of *Lowe* v. *Greig* there was a heritable security; the cautioner was bound for the principal debt; and the interest accruing, due *de anno in annum*, or from half year to half year, became the debt which the surety was called upon from time to time to pay. It was held, that when the cautioner paid the full amount of interest that had become due, he, having thereby discharged to the full extent the money that could be then claimed against him, was entitled then to the benefit of that real security to the extent of that payment. And quite rightly, for although he was bound, no doubt, to answer the subsequent interest, when and as that interest became due, yet when he made the payment of the whole amount of interest that was due, he was no longer indebted to the principal creditor at all. And, inasmuch as it was a payment in part discharge of the debt secured upon the land, he was entitled to the benefit of that security. That does not at all interfere with the proposition, that if there be a personal contract in which two persons are bound, and one is in reality surety for the other, and the contract is broken and a sum of money thereby becomes due, the surety party to the contract is not entitled to prescribe to the creditor claiming under the contract any obligation in dealing with that contract for the benefit of the surety, unless the surety has paid the amount due upon that contract.

I find that laid down in a variety of passages, that have been cited from learned authors on the law of Scotland, and particularly Professor Bell and also Mr. Erskine. And the same principle prevails also in the law of England, that if a debt be due from A and B, and B be the surety, B has no right in respect of that debt, as against the creditor, unless he undertakes to pay, and actually does discharge it. Now the two interlocutors which have been pronounced by the Court of Session in this case have involved a species of equitable view of this case, that is quite inconsistent with that principle. The first interlocutor, by which the interlocutor of the Lord Ordinary was recalled, proceeded upon this principle, that the trustee under the sequestration, that is, the representative of the bankrupt Christie, who had not paid the debt, was still entitled to call upon the principal creditor to act finally, that is to say, to require the principal creditor to sue the principal debtor.

I apprehend, that that is quite a misapprehension of the principle of equity which entitles the surety to call upon the creditor to discuss the principal debtor. Unquestionably the surety had no such right except he undertook to pay the debt. But the trustee under the sequestration came to the Court of Session, and intimated, that he could not pay the debt. And not offering to pay the debt, and having paid only a part of the debt, he claims, in respect of the payment of that fragment of the debt, a right which is conceded, and, I apprehend, rightly conceded, only to the surety when he has discharged his obligation in full.

The Court of Session appear to have founded themselves upon the refusal of the appellant to abide by that interlocutor as to some extent entitling them to require from the appellant an

assignation of his rights and remedies as a condition of entitling him to receive even a dividend. So that the interlocutor of the Court of Session is not put upon any equity arising in the trustee after the payment of the dividend, but the right of the trustee is put as high as this, that the dividend shall be withheld from the creditor until he has made an assignation of the whole of his remedies to the extent of the money received.

Now some difficulty has been suggested at the bar with respect to understanding correctly what is the extent and full effect of this assignation, which, although it would seem at first sight to involve the transfer of the whole of the securities, is coupled with and limited by so many provisos and so many declarations, that it is somewhat difficult to ascertain what is its true effect. I think, however, it seems to be admitted, or if not admitted, it seems to be the true effect of this instrument, that if the appellant executed that assignation, any action that might afterwards be brought upon unpaid promissory notes must be an action at law by the trustee as the assignee of those instruments, because the instruments purport to be assigned ; and although it is declared that the assignment shall operate only to the extent of the money paid out of the surety's estate, yet in reality the assignment might operate to the extent of transferring the right of action, though the benefit resulting from the right so transferred would be limited in the manner I have mentioned, so far as the assignee, that is, the trustee, could avail himself of it. Now, on what possible ground could the creditor be called upon to part with a promissory note, and to part with his right to sue upon the promissory note, and to have it transferred to another person, who has discharged only a portion of his debt to the estate? That appears to me, as it appeared to the Lord Ordinary, to be so much at variance with the principles which are applicable to dealings of this description, and to the relations of principal debtor and surety to the creditor, that I cannot for a moment think, that your Lordships will concur in that view, but, that you will consider, that, in accordance with the known principles of law, and with the obvious good sense of the matter, we should adhere to that rule, which certainly prevails in England, and which is universally expressed both in the cases and in the text writers to which we have been referred on the law of Scotland, and which I will read now from the language of one of them, namely, Professor Bell's Commentaries, (vol. ii. p. 531) :—"Bankruptcy does not necessarily limit the right of the creditor who holds a collateral obligation from a third party, since the general body of the creditors takes the estate exactly as it stands in their debtor, and cannot insist for an assignment in relief against a co-obligant while any part of the debt remains unextinguished."

The question was put more than once at the bar, If Mr. Christie had remained solvent, could he have demanded this assignation upon paying 7*s.* 6*d.* on the amount of the debt?—And it was admitted, and it could not be denied, that Mr. Christie could have had no such right. Now, the universal principle is, that a trustee or assignee in bankruptcy stands in the place of the bankrupt, and can have no better right than the bankrupt himself would have, with the exception only of that right which is given on general policy to trustees or assignees. On what possible ground, therefore, can the trustee claim that which the bankrupt could not have claimed? It was only attempted to be supported by the use of a species of maxim, the abuse of which has been perpetually pointed out, namely, that proof is payment. Proof against a bankrupt's estate is payment in this sense, that the party making proof could not afterwards have a personal remedy against the bankrupt. But proof is not payment for the purpose of entitling the bankrupt or the assignee or the trustee of the bankrupt to call upon the creditor to denude himself of his securities in order to enable the bankrupt's trustees to make a claim in his name and right against a third person.

Upon these grounds I submit to your Lordships, that the interlocutor of the Lord Ordinary is right, and that the principles upon which it was founded are quite sound, and that it would be quite at variance with the established rule upon this subject, if we admitted that view of the matter, which appears to have been taken by the Lords of the Inner House. I shall therefore humbly move your Lordships, that the interlocutors appealed from be reversed, and that the interlocutor of the Lord Ordinary be affirmed, with expenses.

LORD CRANWORTH.—My Lords, I have nothing to add except to express my entire concurrence in the view which the LORD CHANCELLOR has taken of this case.

LORD KINGSDOWN.—My Lords, I also agree.

Interlocutors reversed, and interlocutor of the Lord Ordinary affirmed, with expenses.

Appellants' Agents, Mackenzie and Kermack, W.S. ; Gray and Mounsey, Staple Inn, London. —*Respondent's Agents*, J. and J. Gardiner, S.S.C. ; W. Robertson, Westminster.