EWART, ET AL., ... *Appellants.*
LATTA, ... *Respondent.*

1865.
May 4th and 5th.

Principal and Surety.—A surety is not entitled, in Scotland or in England, to have an assignment of the principal security, unless he pays the debt in full.

Bankruptcy.—Payment of a dividend in bankruptcy is not payment of the debt except as against the debtor himself, and confers no right on the bankrupt or his assignee to call upon the creditor to surrender any collateral securities.

Proof is Payment.—Import of this phrase as used in bankruptcy.

THE Appellant, a London merchant, having advanced 1,000*l.* to Mounsey (*a*) and McAlpine, both carrying on business in partnership as solicitors in Carlisle, they granted to him a promissory note in the terms following :—

> Carlisle, April 21, 1856.—We jointly and severally promise to pay to John Ewart, Esq., or order 1,000*l.* sterling, by half-yearly instalments of 100*l.*, interest at 5 per cent. per annum for value received; as witness our hands.—G. MOUNSEY, D. MCALPIN.

As a further security to the Appellant two policies of insurance were deposited with him, with a memorandum as follows :—

> MEMORANDUM.—That we, George Mounsey and Daniel McAlpine, have deposited with John Ewart a certain policy of assurance on the life of the said George Mounsey, numbered 86,066, and a certain policy on the life of the said Daniel McAlpine, numbered 86,030, under the common seal of the Eagle Life Insurance Company, as a collateral security for the payment of the sum of 1,000*l.* and interest due from us, dated the 21st April instant; as witness our hands this 21st day of April 1856.—GEORGE MOUNSEY, D. MCALPINE.

The partnership of Mounsey and McAlpine was dissolved in 1860. McAlpine undertook collection of the debts, and, in a correspondence with the Appellant, admitted liability on the bill; but, being unable to pay,

(*a*) Mounsey was the Appellant's brother-in-law,

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he granted, along with his father-in-law, Alex. Christie, wine merchant in Edinburgh, a further security to the Appellant, in the form of the following note:—

Two years after date we jointly and severally promise to pay John Ewart, Esq., or order, 1,000*l.* with interest thereon in the meantime yearly at the rate of 5 per cent.; value received.

31st March 1860. D. McALPIN, ALEX. CHRISTIE.

Christie's estate was sequestrated in 1862, and the Respondent was appointed trustee in the bankruptcy. The Appellant claimed to be ranked as debtor for 1,000*l.* and interest, and in his affidavit under the Statute stated the first promissory note as a collateral security, and Mounsey and McAlpine as co-obligants. The trustee declined to rank this claim unless the Appellant should assign to him the securities, and his right of action against Mounsey and McAlpine, on the ground that the bankrupt was only in fact a surety for these parties, and that he was therefore entitled, on making payment, though in part only, to reimbursement by them.

The *Lord Ordinary*, on appeal, recalled this order of the trustee, holding that "the equitable claim upon a creditor to grant an assignation in favour of a cautioner who pays the debt, only exists when the cautioner pays the whole debt," and that "a ranking" on a bankrupt estate, which, as regards a creditor, is only payment of part of the debt, cannot entitle the trustee to demand an assignation as if there had been full payment. The Inner House, however, differed from the *Lord Ordinary*, and made an order that procedure should be stayed to allow the Appellant to take steps to obtain payment from Mounsey, as the principal debtor. On the Appellant declining to take any such steps, the Inner House pronounced the following judgment.

"Find that in the circumstances of this case the Appellant is "not entitled to payment of the consigned dividend correspond-

" ing to the debt for which he has been ranked on the bankrupt " estate, or any subsequent dividends, until he shall execute and " deliver an assignation in favour of the trustee on that estate, " for behoof of the creditors thereon, of the said debt, and of the " securities held by the Appellant for the same, including the " earlier promissory note and policies of insurance in dispute, to " the effect of enabling the said trustee to recover from the prin- " cipal debtors, George Mounsey and Daniel McAlpine, and their " respective estates, the amount of the said dividends and inte- " rest, in so far as the said trustee may be otherwise legally " entitled to recover the same; but qualified always the said " assignation with this express provision and declaration that the " same shall not be used or be capable of being used in competi- " tion with the Appellant in any steps taken or to be taken by " him for the due and timeous recovery of the full balance of his " said debt, interest, and expenses, or otherwise in prejudice of " the Appellant, as a creditor preferable in all respects to the said " trustee for payment of the said balance, interest, and expenses."

From this judgment the present Appeal was presented to the House.

Mr. *Rolt*, Mr. *Boyd Kinnear*, and Mr. *Mounsey* for the Appellants, argued that there was nothing in the Scottish bankrupt Statute justifying the conditions imposed by the trustee on the Appellant. For the purposes of voting in the bankruptcy the Appellant was required to set a value on any collateral obligations he might hold, and to deduct them from his debt, but this was not the case in regard to drawing dividends, as to which a clear distinction was made by the Act, and the benefit of all securities, except such as were over the estate of the bankrupt himself, was reserved to the creditor until he had obtained from one source or other full payment. The question then was, whether there was anything in the common law to support the principle laid down by the Court of Session. No case could, however, be cited to support it. In a case where, as in this, the surety is bound as full debtor, there was no right of discussion (*a*),

(*a*) Ersk. iii. 3, 61; 1 Bell's Com. 347.

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and in any case such right is abolished by 19 & 20 Vict. c. 60. s. 8, unless it is distinctly expressed. The text writers laid down the principle that no partial payment entitled a surety to demand an assignment of collateral securities (*a*). The Appellant, on receiving full payment, has always been ready to grant the assignation required, but he is not bound to grant it without full payment. There is no pretence for saying that because bankruptcy has intervened, and he cannot obtain full payment, the partial payment is to be accounted as if it were in full. The trustee on the bankrupt's estate can have no better right than the bankrupt, if solvent, would have had himself.

The *Attorney General.*(*b*) and Mr. *Anderson* for the Respondents insisted that partial payment by dividend in a bankruptcy was to be taken in such a question as full payment, being all that in the circumstances could be paid. There were cases in which the principle of assigning securities on a partial payment had been recognized (*c*).

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The LORD CHANCELLOR (*d*):

My Lords, the rules which are applicable by the law of Scotland, and which prevail equally under 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

(*a*) Ersk. iii. 5, § 11; 2 Bell's Com. 534.

(*b*) Sir Roundell Palmer.

(*c*) Lowe *v.* Greig, 3 S.D. 543; Inglis *v.* Renny, 4 S.D. 113; Crantoun *v.* Macdowal, M. 2552; Dunlop *v.* Spiers, M. 1383; Sligo *v.* Menzies, 2 D. 1478.

(*d*) Lord Westbury.

called in Scotland the right to discuss. So also, under certain circumstances, 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 as 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 the liability. He has, further, 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.

But the sole question, in this case, is whether a debtor who is still in a state of indebtedness has any right to call upon the creditor to make any conveyance of his security or his remedies against other persons. 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, until he has fulfilled his own contract, he has no right to dictate any terms, to prescribe any duty, or to make any demand upon his creditor. 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 the 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, that

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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 satisfied the measure of his obligation.

In order that there may be no misapprehension upon the matter, I will refer to the case of *Lowe* and *Greig*, which is the only one that might be supposed to interfere with that position. In that case there was a heritable security; the cautioner was bound, not for the principal debt, but for the payment of the interest; 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 thereupon entitled 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. The case of *Lowe* v. *Greig*, therefore, does not at all interfere with the proposition, that if there be a personal contract in which two 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.

That doctrine, my Lords, I find 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, my Lords, the two Interlocutors which have been pronounced by the Court of Session in this case have proceeded on a species of equitable view of this case that is quite inconsistent with the principle to which I have adverted. The first Interlocutor, by which the Interlocutor of the *Lord Ordinary* was recalled, went on the reasoning that the trustee under the sequestration, that is, the representative of the bankrupt Christie, who had not paid the debt, was nevertheless entitled to call upon the principal creditor to act finally, that is to say, to require the principal creditor to sue the principal debtor.

My Lords, 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 it, he claims, in respect of

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the payment of that fragment, a right which is conceded only, and I apprehend rightly conceded only, to the surety when he has discharged his obligation in full.

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 had, 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.

My Lords, upon these grounds I submit to your Lordships that the Interlocutor of the *Lord Ordinary* is right, and 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 Chancellor's opinion.

Lord KINGSDOWN: My Lords, I also agree.

Interlocutors reversed; Interlocutor of the Lord Ordinary affirmed, with expenses in the Court below.

GREY & MOUNSEY—W. ROBERTSON.