on a right of fee. Following the case of *Miller*, I think that there is a repugnancy between these limitations and the right of fee, and that the rights of the fiar must prevail.

Mrs Macleod being fiar was, in my opinion, entitled to sell her interest under the settlement, and there could be no possible benefit in keeping up the trust against the buyer. It is, I think, a well-settled principle that the Court will allow a legatee to do directly what may be done indirectly.

LORD TRAYNER—I have no difficulty in arriving at the conclusion that the shares of residue destined under the testamentary writing before us to Mrs Wight and Mrs Macleod vested in them *a morte testatoris*. But then the testatrix has directed her trustees to hold these shares of residue in their own hands "for the benefit and alimentary use" of the beneficiaries named, and to pay them the capital and interest, or only the interest, at such time and in such manner and proportion as to them (the trustees) shall seem proper and expedient. The testatrix has made her intention quite plain that the benefit conferred by her on Mrs Wight and Mrs Macleod should not be paid over to them, but should be so secured to them during their respective lives that no act or deed of theirs should deprive them of it. It may be that the testatrix has not effectually secured the shares of residue in question against the creditors of the beneficiaries, a point on which I give no opinion, but in judging of a claim made by a beneficiary under a testamentary writing, I am not disposed to dissever the right itself from the condition annexed to the right by the giver of it, nor concede to the beneficiary something which the testator has in express terms forbidden or refused. It is maintained, on the authority of the case of *Miller's Trustees*, that the conditions referred to are ineffectual, and cannot be enforced. I am bound to follow the decision in that case if applicable, whatever my own opinion may be. But I think the present case falls within the exception to the rule given effect to in that case—an exception stated by the Lord President in these words—"When there are trust purposes to be secured which cannot be secured without the retention of the vested estate or interest of the beneficiary in the hands of the trustees, the rule cannot be applied, and the right of the beneficiary must be subordinated to the will of the testator." These words, in my opinion, express the law applicable here.

Mrs Wight being dead, and the will of the testatrix having been fulfilled in regard to Mrs Wight's share, I think her representatives are now entitled to payment, and accordingly I would answer the first question in the affirmative. But I think Mrs Macleod is not entitled to claim payment of her share of the residue, and I would therefore answer the third question in the negative.

The LORD JUSTICE-CLERK concurred with Lord Rutherfurd Clark.

LORD YOUNG was absent.

The Court answered the first and third questions in the affirmative, and found it unnecessary to answer the second question.

Counsel for the First and Second Parties—Strachan—Sandeman. Agents—Mack & Grant, S.S.C.

Counsel for the Third Party—W. Thomson. Agents—Hamilton, Kinnear, & Beatson, W.S.

Wednesday, November 29.

SECOND DIVISION.

[Sheriff of Aberdeen.

ALLAN, BUCKLEY ALLAN, & MILNE *v.* PATTISON.

Cautioner — Discharge of Cautioner by Change on Obligation—Trust-Deed for Creditors Substituted for Composition Arrangement without Cautioner's Consent.

Under a composition arrangement a cautioner guaranteed to a certain extent the due payment of the last instalment of the composition. The first instalment was not paid, and the creditors obtained from the debtor a trust-deed conveying to them his whole estate. No intimation was sent to the cautioner, but after the execution of the trust-deed a meeting of the creditors was called by circular, a copy of which was sent to the cautioner without objection by him. The debtor's estate was realised, and the amount guaranteed was claimed from the cautioner.

Held that the creditors, by taking from the bankrupt the trust-deed without the cautioner's consent, liberated him from the conclusions of the summons.

The affairs of James Chalmers M'Kay, printer, Aberdeen, became embarrassed in the beginning of 1891, and upon 12th February he granted a trust-deed in favour of William James Middleton and John Thomson, Aberdeen, as trustees for behoof of his just and lawful creditors as at the date thereof. After several meetings of creditors they agreed to supersede this trust-deed, and to accept a composition of 7s. 6d. per pound, payable by instalments of 2s. 6d., 2s., and 3s. at four, eight, and twelve months respectively, with security for the last instalment, which amounted in all to about £250. James Y. Pattison, Aberdeen, became one of the sureties for this instalment to the extent of £100, and granted a holograph letter of guarantee, dated 21st February 1891, to Messrs Allan, Buckley Allan, & Milne, advocates, Aberdeen, who acted for the creditors. On the composition contract being concluded M'Kay was reinvested in his estate. The debtor was unable to pay the first instal-

ment of the said composition, and on the 20th June 1891 a trust-deed was taken from him in favour of William James Middleton, and Hugh Macdonald, solicitor, Aberdeen, as trustees for behoof of his creditors, without any intimation to Pattison. Notice of this was at once sent to all the creditors, and a meeting called for the 24th June. A copy of this circular was sent to the cautioners, including Pattison. The creditors of James Chalmers M'Kay agreed to his estate being realised under this trust-deed, and no objection was made to this by the defender. The said estates were realised, and the dividend thereon was under 2s. 6d. per pound.

Allan, Buckley Allan, & Milne now sued Pattison for £100, the sum contained in his letter of guarantee.

The pursuers pleaded—"(1) The debtor M'Kay having failed to make payment of the last instalment of his composition, the pursuers, on behalf sf the creditors, are entitled to call upon the defender to make payment thereof to the extent of his guarantee. (2) The defender having guaranteed payment of the said last instalment to the extent mentioned, he is bound, on the failure of the debtor to pay, to implement his guarantee. (3) The said James Chalmers M'Kay having, on his failure to pay the first instalment of the composition, become insolvent, his creditors were entitled to take a trust-deed from him, and under it to realise the estate. (4) The creditors of the said James Chalmers M'Kay not having by their actings or otherwise relieved the defender of his cautionary obligation, they are entitled to insist on implement thereof."

The defender pleaded—"(4) The creditors of the said James Chalmers M'Kay having under the circumstances above set forth abandoned any competent claim against the said alleged cautioners, are now barred from insisting in this action. (6) The said James Chalmers M'Kay having failed to pay the first instalment of the alleged composition, and the pursuers, or those whom they represented, having in consequence thereof departed from the said composition arrangement, and entered upon the possession of the said estate under the trust-deed, and that without having consulted the defender, as above narrated, and the defender having thereby suffered prejudice, at least to the extent of the said alleged obligation, the pursuers, or those whom they represent, are barred from insisting in this action, and the defender is entitled to be assoilzied, with expenses. (7) The alleged guarantee sued on having been granted on the condition-precedent that the first two instalments of the said composition should be paid, and the same having not been purified, and the composition arrangement having been abandoned and departed from, the defender is entitled to absolvitor, with expenses."

Upon 3rd April 1893 the Sheriff-Substitute (BROWN) pronounced an interlocutor finding the facts above stated, and proceeding:— . . . "Finds in law that the estate of the said James Chalmers M'Kay having been realised with the knowledge of, and without objection on the part of the defender, he is now barred from objecting thereto or pleading it as a ground of release from his obligation. Therefore repels the defences: Decerns against the defender as concluded for: Finds the defenders entitled to expenses," &c.

Upon appeal the Sheriff (GUTHRIE SMITH) pronounced this interlocutor:—"Affirms the findings in fact in said interlocutor: *Quoad ultra* recals the same: Finds in law that the creditors by taking from the bankrupt the trust-deed of 20th June 1891, without the defender's consent, liberated him from his obligation: Therefore assoilzies the defender from the conclusions of the summons, &c.

"*Note.*—This case seems to me to be governed by the case of *Scott* v. *Campbell*, 12 S. 447, mentioned by the Sheriff-Substitute in the note to his interlocutor. The offer of composition by the bankrupt, the interposition of the defender as one of the securities to a limited extent for payment of the last instalment, and the acceptance by the creditors of the composition so guaranteed, put an end to the prior trust-deed, and amounted to a contract between the cautioner and the creditors which could not be altered or varied without the cautioner's consent. This is the effect of the judgment in *Scott* v. *Campbell*. Nor is it relevant to inquire whether the new agreement with the bankrupt, by which he granted a second trust-deed, altered the cautioner's position for the worse, because when a man undertakes a cautionary obligation on a certain footing it is for him to judge whether or not he will remain liable notwithstanding the change; when therefore the bankrupt failed to pay any of the instalments of the composition which he had promised to pay, the creditors might have called on the cautioner to make good the deficiency to the extent of his obligation, and in that event he would have had recourse against the estate left in the hands of the bankrupt for his own indemnification, but they were clearly not entitled to deprive him of that remedy by taking from him the second trust-deed, without discharging the surety, unless he had expressly agreed to continue bound. It is this want of consent on the defender's part which seems to be fatal; and I cannot agree with the Sheriff-Substitute that standing by and doing nothing was as good as consent, and bars him from now urging the plea. This view of the Sheriff-Substitute is opposed to the opinions expressed in *Polak* v. *Everett*, L.R., 1 Q.B. Div. 669, an English case no doubt, but there is really no difference on such a purely equitable question as this between the practice of the English and Scottish Courts. Wherever a man has knowledge of a transaction, and from the usage of trade or otherwise there is a duty to speak, he may be precluded by his silence from afterwards objecting. 'But to say' (says Lord Blackburn) 'that a person who, being a surety, becomes aware that the creditor is going

to give time, or do something else, which if done without his consent may discharge him, is bound to warn the creditor against it, is a thing for which no authority has been cited.' The defender therefore seems entitled to judgment."

The pursuers appealed, and argued—The trust-deed of 20th June 1891 did not discharge the defender. Its effect was equivalent to sequestration against the debtor, and it was settled law that the granter of a guarantee was not relieved of the obligation he had voluntarily undertaken by sequestration proceedings—*Freeland*, June 11, 1823, 2 S. 389; *Muir* v. *Scott*, December 2, 1825, 4 S. 252; *Thomson* v. *Craig & Latta*, June 12, 1863, 1 Macph. 913. The case of *Scott* v. *Campbell* had no application, because in this case the cautioner had not taken particular precautions to see that his liabilities were not increased by the actings of the debtor.

The respondent argued—The cautioner was discharged. Anything which materially changed the position of affairs freed the cautioner if it was done without his consent, and it was not necessary to show that what was done would prejudice the cautioner. By this trust-deed, however, the security upon which the cautioner relied, viz., the debtor's estate, was taken away, and as time was thus given to the debtor, the composition arrangement was abolished, and along with it the defender's cautionary obligation—*Forsyth* v. *Wishart*, February 8, 1859, 21 D. 449; *Johnstone* v. *Duthie*, March 15, 1892, 19 R. 624.

At advising—

LORD JUSTICE-CLERK—In the beginning of 1891 the affairs of Mr M'Kay became embarrassed, and on 12th February of the same year he granted a trust-deed to certain persons as trustees for behoof of his creditors. A composition arrangement was afterwards agreed to, and Mr Pattison, the defender, became security for payment of £100 as the last instalment of the composition arrangement. Mr M'Kay failed to pay the first instalment of the composition, and thereafter he entered into a second trust-deed in June 1891. This trust-deed was granted without any communication to the defender, and a meeting of the creditors was held, when for the first time information of the trust-deed was sent to him.

The question in the case is, whether the second trust-deed, being entered into by M'Kay and his creditors without the consent of the cautioner, has or has not the effect of relieving the defender from his obligation to pay the £100 he had become security for.

Now, this second trust-deed was a voluntary arrangement made by the creditors of M'Kay, and it is said by the defender that it has superseded the former arrangement and has freed him. The Sheriff-Substitute found that the defender was liable; the Sheriff reversed that finding, and held that the taking of the trust-deed without the defender's consent liberated him from his obligations, and I have come to the conclusion that the Sheriff is right,

Had the intervention taken the form, not of a voluntary trust-deed, but that of proceedings in exercise of right by creditors, such as the diligence of sequestration, that would make quite a different case. Sequestration would not free the cautioner from his obligation, because sequestration is a diligence according to law. But the position of this case is quite different. The defender undertook to become surety for this £100 upon certain conditions, and if these are not carried out, then he is not bound to submit to other conditions to which he was not a party.

It was said for the pursuers that the defender was barred from claiming to be relieved from the obligation because he did not object to the second trust-deed when it was entered into, but I do not see that a cautioner is bound in such circumstances to interfere. It is for the persons who are making the new arrangement to take care of themselves, but a cautioner cannot lose his right to relief in consequence of innovation because he did not inform the innovators that if they went on with their arrangement he would hold himself freed from his obligation.

LORD YOUNG—I have not found this case free from difficulty, and the most I can say is, that I do not see sufficient grounds to interfere with the judgment of the Sheriff.

LORD TRAYNER—The material facts requiring attention in the decision of this case are not in dispute, and are to be found set forth in the joint-minute of admissions lodged in process. Shortly stated, the facts are as follows—In February 1891 James Chalmers M'Kay having become embarrassed, granted a trust-deed for behoof of his creditors, but after the granting of the trust-deed negotiations were set on foot for the purpose of carrying through a composition arrangement between M'Kay and his creditors whereby the trust-deed would be superseded. That composition arrangement was effected, and under it M'Kay offered and his creditors accepted a composition of 7s. 6d. per pound, payable by instalments at four, eight, and twelve months respectively from the month of February 1891. The defender guaranteed the due payment of the last instalment to a certain extent. The first instalment was due in the month of June, and was not paid by the debtor, and very shortly thereafter (in the same month) M'Kay's creditors required him to grant, and he did grant, a trust-deed in their favour whereby he conveyed to trustees there named his whole estate for his creditors' behoof. Under that deed the insolvent's whole estate has been realised by the trustees. The question of law is, whether the actings of M'Kay's creditors subsequent to the date of the guarantee, have released the defender from his obligation. The Sheriff, differing from the Sheriff-Substitute, has answered this question in the affirmative, and has

assoilzied the defender. I am of opinion that the Sheriff is right, and for the reasons which he has stated, to which I have very little to add.

The condition of the agreement or contract under which the defender became cautioner was, that the debtor was to remain vested with his whole estate with a liability to pay the instalments under the composition arrangement as they became due. That bargain was one which the debtor and his creditors were not entitled to depart from if the cautioner was to remain liable. But in four months after making that bargain the creditors and the debtor entered into a new contract, whereby the debtor was at once divested of his whole estate, and such a bargain did, or reasonably might deprive the cautioner of a right of relief against the debtor's estate which he was entitled to rely upon having when he granted his cautionary obligation. The appellant argued that the taking of the trust-deed did the cautioner no prejudice, which he would not have suffered if the creditor, instead of taking a trust-deed, had applied for sequestration of the debtor's estate after his failure to pay the first instalment; and that taking out sequestration would not have liberated the cautioner. The cases of *Freeland* and *Muir* were cited in support of this argument. The law laid down in these cases was not questioned, but I think these cases do not aid the pursuers' contention.

In the cases cited, the rule laid down was that creditors who do diligence for recovery of a first instalment under a composition arrangement do not thereby liberate the cautioner for a second or third instalment. Sequestration is just a kind of diligence, and may be resorted to by a creditor like diligence of any other kind. It would be out of the question to say that creditors to whom a first instalment is due are not to be allowed to use the means which the law provides for recovery of what is due to them except on condition of giving up a cautionary obligation for something which is not yet due. Creditors may undoubtedly resort to such means without any such consequence following. But if creditors, instead of using such means, enter into a new bargain with the debtor for obtaining, not money payment of the instalment due, but payment of their whole debt, so far as the debtor's whole estate when realised will yield payment, then they cannot hold a cautioner like the defender liable on his limited cautionary obligation—an obligation granted on a condition which left the debtor vested in his whole estate. In short, the creditors by voluntary arrangement with their debtor, having without the cautioner's consent essentially altered the conditions under which the cautioner alone consented to be bound, cannot enforce that cautioner's obligation. I think the case of *Scott*, referred to by the Sheriff, is quite in point, and am of opinion that this appeal should be dismissed.

LORD RUTHERFURD CLARK was absent at the hearing of the cause.

The Court pronounced this interlocutor:—

"Find in fact in terms of the findings in fact in the interlocutor of the Sheriff-Substitute of the county of Aberdeen dated 3rd April 1893: Find in law in terms of the findings in law in the interlocutor of the Sheriff of the county of Aberdeen dated 23rd May 1893: Dismiss the appeal, and of new assoilzie the defender from the conclusions of the summons, and decern," &c.

Counsel for Appellants—M'Kechnie—W. Campbell. Agents — Duncan Smith & M'Laren, S.S.C.

Counsel for Respondent—Salvesen—W. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Thursday, November 30.

SECOND DIVISION.

MACKENZIE *v.* THE STEAMSHIP "TREGENNA" COMPANY, LIMITED.

Reparation — Personal Injury — Seaman Injured by Defective Ladder — Fellow Workman.

A seaman on board a vessel was injured by a fall from a wooden ladder which broke under him while he was climbing from the hold to the deck. The defect in the ladder might have been observed by inspection, and the captain was in fault for failing to have it repaired. The owners supplied the captain with all that he desired for the use of the vessel. There were two fixed iron ladders from the hold to the deck.

In an action by the seaman against the owners of the vessel, *held* that the defenders were not liable for the accident, which had occurred by the fault of the captain.

William Mackenzie, seaman, sued The Steamship "Tregenna" Company, Limited, Leith, for £250 sterling as damages for personal injury sustained by him on board the "Tregenna."

The pursuer averred that he had been engaged by Captain Smith, master of the "Tregenna." He signed articles, and joined the vessel upon 12th November. He was sent down to work in the main-hold along with the second mate, the boatswain, and two other seamen. "A wooden ladder was at the time in position between the deck and the hold, and was being used for going down and coming up by the crew, and by carpenters working in the hold. The pursuer and the other persons above named descended by the said ladder. At the dinner hour his party stopped work and proceeded to go on deck. The pursuer was ascending by the said ladder, and had nearly reached the hatch-combings, and was about to place his hands on the combings, when one side of the ladder suddenly broke, and he was precipitated to the bottom of the hold, a