

only be to give distinct interests in the same debt to both creditor and surety."

If the doctrine announced in the case referred to, be applicable to this, it puts an end to this part of the controversy, because Mr. Swann has paid but a very small portion of the debt; and if he is, upon the principles of equity, entitled to an assignment *pro tanto* of the mortgage, we have the very anomaly which the Court of Appeals said they would not countenance.

It is said, however, that the case of *Hollingsworth vs. Floyd* was a case at law, and that we are in equity unfettered by those technical rules which sometimes are too stubborn to yield to considerations of justice and right. But though *Hollingsworth vs. Floyd* was a case at law, it came before the Court upon a motion to quash an execution; and it is believed to be well settled, that upon such motions, the Courts exercise a *quasi* equitable jurisdiction, and feel themselves less restrained by technical rules, than when exerting their ordinary powers. At all events, it is, I think, impossible to read the opinion of the Court, in that cause, and not come to the conclusion, that neither at law nor in equity, could a surety call for an assignment from the creditor, or be clothed, by mere operation of law and upon principles of equity, with the rights of an assignee, unless he had paid the *entire debt*, and, of course, had wholly satisfied the claim of the creditor.

The doctrine of *Lidderdale vs. Robinson*, 2 *Brock. Rep.*, 160, is in perfect harmony with that which prevails in this State. It certainly does not carry it any further, unless it may be supposed to be carried further by the determination, that the same rule applied as between co-sureties. So far as the law of principal and surety is concerned, and the rights of the latter to be substituted to every equitable intent and purpose in the place of the creditor whose debts he has discharged, the principles of the case of *Lidderdale vs. Robinson* are precisely those which obtain in our Courts.

But another objection, and, as it appears to me, one of great force, is made to this right of substitution, claimed for Mr.