SCOTLAND.

COURT OF SESSION.

SAMUEL STIRLING, and others, accepting and acting Trustees of *John Mackenzie*, deceased - - - } *Appellants*;

ROBERT FORRESTER, Treasurer to the Governor and Company of the Bank of *Scotland* - - - - } *Respondent.*

THE Bank of Scotland having discounted bills to the amount of 8,000 *l.* which were dishonoured, the acceptors becoming bankrupts, agree with the drawers to retain the dishonoured bills, and receive the dividends which might become payable from the bankrupt estates; and, as additional security, to take four promissory notes, indorsed by four sureties, for 2,000 *l.* each, to guarantee the unsatisfied bills, or any balance upon them which might remain unpaid, to the extent of 2,000 *l.* each. This agreement having been carried into effect; when the notes were nearly due, upon the application of the original debtors for delay of payment, the Bank of Scotland gave up one of the promissory notes, and accepted a new one from the surety who had indorsed it; renewed notes were also given by two other of the sureties, aud with the fourth surety, a treaty was carried on, respecting a renewal, pending which he died. The dishonoured bills had also been delivered over by the Bank to the original debtors, upon the treaty for the renewal of the notes.

Held, (reversing *pro tanto* the judgment of the Court below,) that the fourth surety and his estate, by the legal effect of the transaction, was discharged as to three-fourths, and liable only as to one fourth, of the balance due upon the dishonoured bills, after giving credit for all monies

1821.

STIRLING and others *v.* FORRESTER.

received or receivable from any of the parties upon the bills, or their estates; and that, on payment of such fourth part of such balance, the Bank were responsible to the estate of the fourth surety for all future dividends upon the dishonoured bills.

A COMPANY conducting business at Dunfermline, under the firm of James and George Spence, employed Mr. Paterson, banker in Edinburgh, as their money-broker and banker, lodging in his hands the bills which by the usage of their trade they obtained from their customers at long dates. In return, Paterson and his agents in London, Robertson, and Stein, and Tod and Company, accepted bills drawn by Messrs. Spence, which were discounted with Mr. Hunt, the agent for the Bank of Scotland at Dunfermline. Mr. Hunt, and his cautioners in the bond granted, in consideration of his official trust, were liable to the Bank for these discounted bills, and all consequent loss.

In the autumn of 1810, Mr. Paterson and his agents failed, leaving unretired with the Bank of Scotland acceptances of bills drawn by Messrs. Spencē to the extent of 8,200*l.* Being liable for these acceptances, Messrs. Spence proposed that the Bank should retain the acceptances by Mr. Paterson and his agents, and draw the dividends which might be due from the bankrupt estates; and for additional security, that four gentlemen should guarantee the unsatisfied bills, or *any balance* upon them that might remain unpaid, to the extent of 2,000*l.* each. This proposal was accepted by the directors of the Bank; and accordingly Mr. Mackenzie, the Appellants constituent, indorsed to Mr.

1821.

STIRLING and others v. FORRESTER.

Hunt a promissory note for 2,000*l.* at eighteen months, granted by Messrs. Spence, and bearing date December 1st. 1810. Similar notes of the same date and currency were indorsed to Mr. Hunt, one by Mr. John Spence, another by Mr. Beatson, and a third by Mr. Haig. All these notes were then indorsed by Mr. Hunt to Mr. Forrester, treasurer of the Bank of Scotland, the Respondent; and the unsatisfied bills were also placed in his hands.

The form of the obligation was a promissory note by James and George Spence to Mr. Mackenzie, dated 1st December 1810, and payable eighteen months after date, indorsed by Mr. Mackenzie to Mr. Hunt, and by Mr. Hunt to the Respondent, as treasurer of the Bank.

When the promissory notes thus obtained became nearly due, Messrs Spence again applied to the directors of the Bank for further delay of payment, requesting at the same time that their note indorsed by Mr. John Spence might be given up.

In answer to this application, by a letter from the accountant of the Bank, dated the 27th of April 1812, after stating the balance due on the discounted bills, and the manner in which the payment of that balance was collaterally secured, Messrs. Spence are informed that the directors agree to the liquidation of the balance by a bill or note from Messrs. Spence, jointly and severally with Messrs. Beatson, Haig, Mackenzie, and Hunt, payable three months after date. By another letter of the same date, Messrs. Spence are informed that "the directors have ordered their new promissory

1821.

STIRLING and others v. FORRESTER.

" note, indorsed to them by Mr. John Spence, for " a balance of 1,997*l.* 4*s.* 2*d.* due on the bills " specified in the letter, and according to an ac- " count therein stated, to be discounted, and applied " in payment of the balance on the dishonoured " bills before specified, being that part of the dis- " honoured bills which had been accepted by Ro- " bertson and Stein, which were inclosed in the let- " ter, and directed to be given up (unconditionally), " together with the original note for 2,000*l.* in- " dorsed to them by Mr. John Spence, as guaran- " tee."

Some time after this transaction, but at what time does not appear, the bills were again restored to the Bank; and in the accounts exhibited by the Bank, which were made up to the 5th of October 1813, credit is given for the dividends received upon them.

The directors had taken a renewed promissory note, indorsed by Mr. John Spence, surgeon, Royal Navy, dated 27th April 1812, at three months, for 1,997*l.* 4*s.* 2*d.* in lieu of the original note for 2,000*l.*; and according to the proposal made by Messrs. Spence, they expected to receive other three notes, each indorsed by one of the three gentlemen whose original notes were to fall due on the 4th June 1812.

On the 8th of May 1812, Mr. Mackenzie wrote to Mr. G. Spence a letter, in which, after noticing that the bill for 2,000*l.* which he had accepted was about to fall due, and that a dividend would be paid out of Paterson's estate, he says, " in that case I " trust the Bank will not object to renew the bill."

On the 11th May 1812, Mr. George Spence

wrote to Mr. Mackenzie, informing him of the new arrangement made with the Bank, that a new note for the whole amount would be forwarded for his indorsement, and if any dividend should be received on the dishonoured bills, it would be placed by the Bank to the credit of the new bills given for their security.

Mr. Mackenzie being unwell when he received this letter, his daughter, Miss Mackenzie, wrote a letter, dated the 13th May 1812, to his agent Mr. Pearson, desiring him to inform Mr. Spence that her father would accept the 2,000*l.* bill when sent.

In answer to this letter, Mr. Pearson, on the 14th May 1812, wrote to Miss Mackenzie, to inform her that he should mention to Mr. Spence what she stated as to the 2,000*l.* bill.

On the 15th May 1812, Messrs. Spence wrote to Mr. Mackenzie as follows: "I now enclose for "your indorsation our note to you for 2,000*l.*, at "three months, from 3d June 1812, which please "indorse above Mr. Charles Hunt's name. As this "bill is to lie with the Bank of Scotland, and to be "applied for our account and behoof solely, we "hereby oblige ourselves to free and relieve you of "the same, when due, and also oblige ourselves to "give you any satisfactory line necessary. We "omitted to mention above, that this bill is to re-"tire ours for the same amount, indorsed by you, "due the 1st-4th June 1812, and that upon lodg-"ing this bill with the Bank of Scotland they give "up the other one, which we will return you."

Mr. Mackenzie died on the 21st of May without having indorsed the new promissory note.

1821.

STIRLING and others *v.* FORRESTER.

On the 2d of June 1812, Messrs. Spence wrote a letter to the Bank, enclosing their new promissory notes, informing them that Mr. Mackenzie had died before he could fulfil his promise of indorsement, and suggesting, that as Mr. Mackenzie had intended and engaged to indorse the note, it would be the same security to the Bank to let the old note lie over for three months. But the directors would not agree to accept of the new note without the indorsement; and Mr. Mackenzie's original note when it fell due was protested "at the instance of Robert "Forrester, Esq. treasurer to, and for behoof of, "the Bank of Scotland, the holder, against James "and George Spence, manufacturers in Dunferm-"line, the grantors, John Mackenzie, Esq. indorser, "and Charles Hunt, late agent for the Bank of "Scotland at Dunfermline, also indorser."

This protest was intimated to Mr. Mackenzie's representatives, by an official letter from the Bank; and was also duly recorded in the books of session.

On the 24th May 1813 the directors demanded from Mr. Mackenzie's representatives payment of the sum contained in the promissory note which he had indorsed, which being refused, an action was brought by the Respondent in the name and on the behalf of the Bank of Scotland.

The case having come before Lord Alloway, as Ordinary, his Lordship, after hearing counsel, granted a diligence for recovering writings; and appointed the Appellants to state in a condescendence the grounds of their defence. Such a condescendence having been lodged, and followed by answers, and the documents upon which both parties founded having

ing been produced, the Lord Ordinary pronounced the following interlocutor: "The Lord Ordinary "having considered the condescendence for the De- "fenders, answers thereto for the Pursuer, produc- "tions and whole process, finds, that this action "proceeds on a bill granted to the late Mr. Mac- "kenzie by Messrs. Spence, and discounted by Mr. "Hunt, as the agent for the Bank of Scotland at "Dunfermline: Finds, that this bill was indorsed "by Mr. Mackenzie, together with other three bills, "by Mr. Haig, by Mr. Beatson, and Mr. John "Spence, for 2,000 *l.* each, in order to operate to "the Bank of Scotland as a security for a sum ex- "ceeding 8,000 *l.*, in which Messrs. Spence then "stood indebted to the Bank, arising from the re- "turned bills of David Paterson, Robertson and "Stein, and Tod and Company, which Messrs. "Spence had negotiated with the Bank: Finds, that "when the bills indorsed by Mr. Mackenzie and the "three other gentlemen became due, although Mr. "Mackenzie was not a joint obligant for the 8,000 *l.*, "and could only be liable upon his separate obliga- "tion for the 2,000 *l.*, yet, as it appears from Mr. "Sandy's letter that the Bank were well acquainted "with the nature of the transaction, and that these "four obligants had merely interposed their security "for Messrs. Spence to the amount of 2,000 *l.* each, "in relief of 8,000 *l.* due by the Spences to the "Bank, so the Bank could only have proceeded "against them by giving them a proportionable and "equitable relief of the debts which they had been "able to reeover from the original obligants: Finds, "that, although it is alleged that the Bank had given

1825.

STIRLING and others v. FORRESTER.

" up to Messrs. Spence the bills which they held of
" Robertson and Stein, which formed part of the
" 8,000 *l.*, yet this was done merely for the purpose
" of drawing the dividend from Robertson and Stein;
" and, this being done, these bills were again restored
" to the Bank; and credit is given in the accounts
" exhibited by the Bank for the dividends so drawn:
" Finds, that when the four bills for 2,000 *l.* each
" became due, Messrs. Spence had applied to their
" friends and to the Bank for a renewal of the same
" for three months; and *that it is instructed by*
" *Miss Mackenzie's letter, written by her father's*
" *order, that he had also agreed to renew his obli-*
" *gation for three months*; and Mr. Haig, Mr.
" Beatson, and Mr. John Spence, having also con-
" sented to a renewal of their obligation, new bills
" upon their part were discounted; but Mr. Mac-
" kenzie having died after the bill had been sent to
" him to be signed, his bill was not renewed, but
" the former bill was protested, and duly intimated
" to the representatives: Finds, that in these cir-
" cumstances the renewal of the other three bills,
" and Mr. Mackenzie *having previously assented to*
" *a renewal*, cannot entitle his representatives to be
" relieved of the payment of his bill: Finds, that the
" intimation to his representatives of the dishonour
" of the bill upon which Mr. Mackenzie stood bound,
" put in their power to have brought the matter to
" a close, and to have insisted that the Bank should
" immediately close the account, and receive their
" proportion of the loss corresponding to Mr. Mac-
" kenzie's obligation of 2,000 *l.*, but so as not to ex-
" ceed that sum: Finds, that nothing has been stated

"upon the part of the Defenders to show that the "Bank had attempted to give any of the obligants "the least preference over the rest; and as it is not "disputed that the balance due to the Bank still "greatly exceeds the sum of 2,000*l.* contained in "the promissory note indorsed by Mr. Mackenzie, "after giving credit for all the sums which they have "been enabled to recover from the other obligants, "decerns against the Defenders as Mr. Mackenzie's "representatives, for payment of the sum contained "in the said promissory-note, with interest thereon "since the same became due."

Upon this judgment, the Respondent gave in a representation, in which he prayed the Lord Ordinary to alter the interlocutor, in so far as it connected Mr. Mackenzie's note with the other three promissory-notes, and either at once to decern generally against the Appellants; whereupon the Lord Ordinary superseded advising this representation, until the representation, and additional representation upon the part of Mr. Mackenzie's representatives, came to be advised. And on advising the same, with the representation for the Appellants, he refused the representation, and adhered to the interlocutor complained of.

Two other representations on the part of the Appellants were followed by similar decisions.

Both parties reclaimed by petition to the First Division of the Court; and the petition of the Appellants was disposed of by this interlocutor: "The "Lords having heard this petition, they refuse the "desire of it, and adhere to the interlocutor reclaimed "against;" and, of the same date, their Lordships

1821.

STIRLING and others *v.* FORRESTER.

pronounced as follows, on the petition of the Respondents: "The Lords having resumed considera- "tion of this petition, they refuse it as unneces- "sary."

The parties again offered petitions against these interlocutors, when the following judgment was pronounced on both: "The Lords having heard this "petition, they refuse the desire of it, and adhere "to the interlocutor reclaimed against."

The cause having afterwards come to be heard before the Lord Ordinary, on the point of expences, the question was remitted to the auditor, with the instruction; that, in taxing the amount, he shall strike out the expence of the representations and petition for the Bank; and, finally, judgment was pronounced, approving the auditor's report, and assessing the expences to the sum of 80 *l.* 14 *s.* 11 *d.* for which, and the dues of extracts, decerns.

Against the interlocutors of 24th November 1815, 17th May, 11th June, 4th July, 28th November, and 10th December 1816, and of 22d January 1817, the Appellants entered their appeal. The Respondent also, on his part, took the necessary measures for keeping open the interlocutors, in so far as they tended in any degree to limit the foundation of his argument. A cross-appeal was entered for that purpose.

For the Appellants, the *Attorney-General*, and *Mr. C. Warren.*

Arg. 23 & 28 Feb.

The original proposal, as appears by the letters of Messrs. Spence to the Bank, was to procure security

to the amount of 8,000*l.**; but this was only to be in aid of the dividends on the returned bills. Each surety was liable till the 8,000*l.* was paid; but his responsibility was limited to 2,000*l.* and was liable to be further limited by payments on the doubtful notes. It was considered as one joint transaction of suretyship, and so the claim was made for the Respondents, as appears by their accounts, in which the expences as to one are charged against all the sureties †; and the Bank had no right to relieve one of the sureties without the privity of the others. The returned bills were given up absolutely, not for the pretended purpose of obtaining the dividends ‡. By giving up those bills to the principal debtors, and taking a new security from one of the sureties, the other sureties were discharged; for then, by that transaction, part of their remedies were lost, and their relative situation was altered.

In any cross-action against J. Spence for contribution, the other sureties could not have had the same remedy; by accepting a new security from J. Spence, they discharged him from the old security. The letter written by Mackenzie's daughter, in answer to the proposal by the Bank, could not bind him, especially as he was not informed of the circumstances. If one of several co-sureties pays more than his share of the debt secured, he has a right of contribution against the others, *Deering* v. *Lord Winchelsea* §. By discharging the obligation

* See the letters in the appendix to the Appellant's printed case, pp. 13 & 14.

† See the appendix to the Appellant's printed case, the last item of the account.

‡ Letters, 23 & 27 April 1812. Appx. to A. P. C.

§ 2 Bos. & Pul. 270.

1821.

STIRLING and others v. FORRESTER.

of the debtor, the creditor discharges the surety; so by any transaction with the co-sureties. The situation of the surety was altered by giving up the bills of Robertson and Stein, and he was thereby discharged.

If the creditor has no right to alter the situation of the surety as to the whole debt, the principle applies equally to the case of a part. The acceptances of Robertson and Stein might have been one of the inducements to the contract. By indorsing the new note, John Spence was discharged from the original debt, and consequently from the obligation to contribute. At law it has been doubted whether an *assumpsit* is raised against a surety; and, at the most, the aliquot part only can be recovered. *Cowel* v. *Edwards* *. But in equity the surety may recover, from a solvent co-surety, the full proportion, according to events.

Independently of all other objections, the delay in prosecuting the remedies against the principal debtors, was sufficient to discharge the sureties.

For the Respondents, *Mr. Wetherell,* and *Mr. W. Adam.*

The note given by Mr. Mackenzie was distinct and unconnected with the other notes; and by granting indulgence to the other obligants, the Bank did not weaken their right of recourse against Mr. Mackenzie, or his representatives.

The proposal, stated in the correspondence, that each obligant should be bound for the whole sum,

* 2 Bos. & Pul. 268. See the Dict. of Buller, J. in *Toussaint* v. *Martinnant*, 2 T. R. 105; and of Lord Kenyon, in *Exall* v. *Partridge*, 8 T. R. 310.

was rejected, and the notes were accordingly taken in a separate form. A bill or a promissory-note is considered as money; and the doctrine of law as to cautioners is not applicable to the case. Ersk. B. 3. tit. 2, s. 31. *Sharp* v. *Harvey*, 24 June 1808. *Macdougal* v. *Foyer*, 13 February 1810.

The bills due by Robertson and Stein were put into the hands of Messrs. Spence, merely in order to enable them to draw, for the Bank's behoof, the dividends due upon them from the bankrupt estate of Robertson and Stein. Messrs. Spence accordingly drew these dividends, which were paid over to the Bank, and were placed to the credit of Messrs. Spence's debt; and, upon this object being effected, the bills were returned, and have ever since remained in the possession of the Bank. The account exhibited by the Bank shows that credit was given for these dividends. The Lord Ordinary was satisfied, that the Respondent's statement on this point was correct, and found accordingly.

The note for 2,000 *l.* which was indorsed by Mr. John Spence, was not a surrender, but a renewal.

The transaction with regard to John Spence's note was not essentially different from what was done with regard to the other notes, and the whole complaint of the Appellants resolves merely into this:—that the Bank, instead of doing diligence upon these notes, when they fell due, took renewals of them, and, by thus giving indulgence, injured or weakened Mr. Mackenzie's right of relief.

The cautioner is not free, because the creditor allows the principal debtor reasonable indulgence, and abstains from following out immediate diligence:

1821.

STIRLING and others v. FORRESTER.

Erskine * lays it down, "That the cautioner continues bound, though the creditor should set the "debtor at liberty after he was apprehended by the "messenger, but before his actual imprisonment; "for, as no creditor can be compelled by a cautioner to use diligence against the debtor, neither "can he be compelled by him to consummate an "incomplete diligence." Nor is it of any consequence, that, during the delay so granted, one or more of the co-obligants may have become insolvent. The very object of taking a cautionary obligation is, to secure the creditor against insolvency; and, if the obligation does not fall in consequence of delay being granted, the circumstance of insolvency afterwards happening cannot at all weaken its effects. This is implied in the passage quoted from Erskine †; and Lord Bankton still more directly, after declaring that the creditor is not entitled to discharge any of the obligants, immediately adds, "His suffering the principal debtor to become insolvent "will not prejudice him, because the others jointly "bound ought to have secured their own relief; so "that the same objection of negligence that they "make against him, lies against themselves."

By the renewal of these notes, the Bank neither discharged any of the joint obligants, nor surrendered any other collateral security which could have been available to the Appellants, nor weakened their right of relief.

And whatever might have been the effect of these renewals under other circumstances, the consent of

* B. iii. tit. 3, s. 66. † B. i. tit. 23, s. 44.

Mr. Mackenzie must be held to bar all challenge at the instance of his representatives.

If the Appellants had not been willing that the renewals of the notes should take place, it was in their power to have guarded against the consequences of that measure. Upon the intimation of the dishonour of the bill, upon which Mr. Mackenzie stood bound, his representatives might have insisted, that the Bank should immediately close the account, and receive their proportion of the loss, corresponding to Mr. Mackenzie's note for 2,000*l.*, but so as not to exceed that sum.

In the course of the argument the following observations were made:—

The Lord Chancellor:—If this were the case of an entire debt, there is no doubt that giving time would discharge the surety. It is clear that, in the circumstances stated, J. Spence could not have been called on for contribution. The transaction with the Bank effected an absolute discharge. It is a new and important question. Suppose the guarantee had been confined to the 2,000*l.*; was it not discharged by the transaction with J. Spence? Is it not discharged to the amount which J. Spence would have been liable to contribute? If the giving up of the bills does not effect a discharge of the sureties, then the amount of the dividend upon them is to be received for the sureties. But is a surety to be put in the situation of being driven into the account of a bankrupt estate, and the question what it may or may not pay? In another point of view, the bills of Robertson and Stein,

1821.

STIRLING and others v. FORRESTER.

provable under the bankruptcy, were considered as part of the original security. The sureties had a right to stand as *cestui que* trust of the proof. The sureties might thus have received more than they could in any other way. The case* before Lord Kenyon is material. Formerly it was thought that the remedy was only in equity †; but in that case it was held, that if one in the nature of surety paid a debt, he might bring an action against the parties liable for the debt. Until I became acquainted with that case, I thought the remedy must be in equity.

Lord Redesdale :—In the account, credit is given for part of the debt from Robertson and Stein; the Respondents give up the old note, take a new security for a different one from John Spence, and, as part of the transaction, give up to him the bills from Robertson and Stein, and the benefit of the dividends.

The principle established in the case of *Deering* v. *Lord Winchelsea* is universal, that the right and duty of contribution is founded in doctrines of equity; it does not depend upon contract. If several persons are indebted, and one makes the payment, the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. The cases of average in equity rest upon the same principle. It would be against equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment. He is bound, seldom by contract, but always in conscience, as far as he is able, to put

* 8 T. R. 310. See the note in Selwyn's at N. P. vol. i. p. 75.
† See *Toussaint* v. *Martinnant*, 2 T. R. 105.

the party paying the debt upon the same footing with those who are equally bound. That was the principle of decision in *Deering* v. *Lord Winchelsea*; and in that case there was no evidence of contract, as in this. So in the case of land descending to coparceners, subject to a debt; if the creditor proceeds against one of the coparceners the others must contribute. If the creditor discharges one of the coparceners, he cannotproceed for the whole debt against the others; at the most they are only bound to pay their proportions.

The Lord Chancellor:—This is a question as to transactions between a creditor and a principal debtor and sureties; and, as to the effect of this transaction, upon the liability of co-sureties. The judgment of the Court below cannot stand in all its parts. It will be necessary, in moving judgment here, to state clearly the doctrines on which we proceed. In the mean time the agents must give answers to the following inquiries: 1. What became of the bills drawn by George Spence, and accepted by Paterson? Whether the bills have been proved against the estates of the several parties, and whether any and what dividends have been received? 2. In what state the bills stand, and who is entitled to a dividend, if made? The result of these inquiries may assist those who have to advise the House upon the judgment. The case is extremely important, as it regards the doctrines of equity upon the liability of co-sureties. 19 March.

The Lord Chancellor:—In this case, it appears that the firm of James and George Spence em- 13 June.

1821.

STIRLING and others v. FORRESTER.

ployed Mr. Paterson as their money broker and banker. It is represented that the transaction was carried on by their lodging bills in his hands, and, in return, drawing bills on him and his agents in London; which, being accepted by them, were discounted with the agent for the Bank of Scotland. Paterson and his agents having failed, leaving the bills, drawn by Messrs. Spence to a large amount, unsatisfied in the hands of the Bank of Scotland. Upon this event, it was agreed that a security should be taken from four sureties, to guarantee to the Bank the payment of any balance upon the unsatisfied bills, which, after receipt of the dividends from the bankrupt estates, might remain unpaid, to the amount of 2,000*l.* each. Four promissory-notes for 2,000*l.* were accordingly made by Messrs. Spence, and indorsed to the treasurer of the Bank, in whose hands the unsatisfied bills were also placed for the purpose of receiving the dividends.

It is represented in the printed case, on the part of the Appellants, that although the securities are in form separate, it was in fact one individual transaction. This is a very important part of the question. If the securities were in effect separate, then each surety had nothing to do but with his own; but if it was one transaction of joint suretyship, then, when there has been a dealing with any of them, the others have a right to look to that dealing as affecting them. When the notes were nearly due, it appears that by an arrangement between Messrs. Spence and the Bank, other notes, granted by Messrs. Spence, and indorsed by the sureties, were to be substituted, payable three months after date; and the original note, with the indorsement of one

of the sureties (Mr. J. Spence), was to be, and was, in fact, given up before this transaction was completed. Mr. Mackenzie died without having assented to the renewal of the notes, as the Appellants allege. The Respondents contradict that allegation; but I think it appears from the evidence that a treaty was pending, which was not carried into actual agreement.

Under these circumstances, the Bank refused to delay their remedy upon the old note for three months, or to accept of the new note without the indorsement of Mr. Mackenzie; and when the original note fell due, it was protested, and an action was brought upon it against the representatives of Mr. Mackenzie. By the first interlocutor in this action, it is found that the Bank could not have proceeded against the sureties without giving them a proportionable and equitable relief of the debts which they had been able to recover from the original obligants; that the bills of Robertson and Stein had been given up merely for the purpose of drawing the dividend, which, being received, were credited in the account, and the bills returned to the Bank; that Mr. Mackenzie having assented to a renewal, his representatives were not entitled to be relieved from the payment of the original bill; that after the intimation of the dishonour they might have brought the account to a close, and paid their proportion of the loss; that there was no proof that the Bank had given a preference to any of the obligants; and as the balance due to the Bank, after giving credit for the monies recovered from the other obligants, exceeded 2,000*l.* that the Pursuer was entitled to recover.

1821.

STIRLING and others v. FORRESTER.

On the part of the Appellants it is contended, in contradiction to the finding of this interlocutor, that the bills of Robertson and Stein were given up, not merely for the purpose alleged, but actually and irrevocably, and that the situation of the sureties by that act was altered, and the obligation of Mackenzie thereby released.

The four promissory-notes may be considered as one transaction of suretyship. They are separate in form; but the effect in equity, as to the obligation of the parties, was such, that the creditors were bound to act as if all the notes formed one transaction of suretyship. The ground of complaint against the interlocutor was fully argued at the bar, and is stated in the cases. It will be necessary, in considering the merits of the appeal, to attend particularly to the matter of the correspondence. An application having been made to the Bank by Messrs. Spence for delay of payment, and the delivery of their note indorsed by Mr. John Spence, by a letter of the 27th of April 1812, Messrs. Spence are informed that the Bank will accept, for the balance stated to be due, a new bill from them, jointly and severally with the former sureties. By another letter of the same date, it appears that the bills of Robertson and Stein are directed to be given up, together with the original note for 2,000*l.* indorsed by Mr. John Spence. In consequence of these transactions it is insisted by the Appellants, that the four indorsers of the notes are to be considered as co-sureties, and ought to have in equity all the relief usually given in favour of sureties when the creditor deals with the principal debtor. Their situation is not to be made worse than if no such

transaction had taken place. By the Appellants it is contended, that this transaction put an end to the whole demand upon Mackenzie's representatives. The Respondents contend, that at all events the effect was only partial. If the transaction did not put an end to the whole demand, it is necessary to consider what was the effect of the transaction with regard to Mackenzie's representatives; and so far only to relieve them. Under all the circumstances of this case, the latter is the true principle of decision; we cannot go the whole length of the doctrine for which the Appellants contend *.

Lord Redesdale:—This is a case of very great importance, as applicable to all questions where one or more persons make themselves debtors for others as sureties. The cross-appeal was waived; it quarrelled with the principle on which the judgment of the Lord Ordinary proceeded: but that principle was perfectly correct. The interlocutor finds, that "when the bills became due, although Mr. Mac-"kenzie was not a joint obligant for the 8,000*l.* and "could only be liable upon his separate obligation "for the 2,000*l.*; yet as the Bank were well ac-"quainted with the nature of the transaction, that "the four obligants had interposed their security "for Messrs. Spence to the amount of 2,000*l.* each, "in relief of 8,000*l.* due by the Spences to the "Bank; so the Bank could only proceed against "them by giving a proportionable and equitable "relief of the debts which they had been able to "recover from the original obligants." That doc-

* The Lord Chancellor here read the minutes of the proposed order of the House.

1821.

STIRLING and others v. FORRESTER.

trine is correct; and that finding should have governed all the subsequent decisions of the Lord Ordinary.

At the bar it was contended, that the rights and obligations of co-sureties are founded upon a supposed contract between them; and that in this transaction they entered into the obligation without communication with each other. The question depends upon equity, not upon contract; and in this case a contract is to be implied. The decision in *Deering* v. *Lord Winchelsea* * proceeded on a principle of law which must exist in all countries, that where several persons are debtors, all shall be equal. The doctrine is illustrated in that case by the practice in questions of Average, &c. where there is no express contract, but equity distributes the loss equally. On the prisage of wines, it is immaterial whose wines are taken; all must contribute equally: so it is where goods are thrown overboard for the safety of the ship; the owners of the goods saved by that act must contribute proportionally to the loss. The duty of contribution extends to all persons who are within the scope of the equitable obligation.

The next question is, whether the subsequent findings of the Lord Ordinary are founded in fact; the first is, "that the bills of Robertson and Stein "were given up to the Bank merely for the purpose "of drawing the dividends." That is somewhat disputable; and the fact rather different from what is stated in the finding. It is there found that "Mr. Mackenzie had assented to a renewal of the "note." That seems not to be the case, for he died without giving a final consent to the renewal.

* 1 Cox, 318; 2 Bos. & Pul. 270.

1821.

STIRLING and others v. FORESTER.

Under the circumstances of the case the effect of the transaction seems to be, that the Bank, by their conduct, took upon themselves the situation and obligation of the other sureties with respect to Mackenzie; and therefore the Bank can only demand one fourth of the sum secured from his representatives, because Mackenzie was originally liable to no more.

The Bank having given time, without obtaining the final consent of Mackenzie, made an arrangement with the other sureties as to three fourths of the debt. The first part of the finding of the Lord Ordinary is right and just in principle: the latter part is wrong in point of fact.

Die Merc. 13 June 1821.

Find, that the Governor and Company of the Bank of Scotland, having accepted the promissory-note of James and George Spence to John Spence, and indorsed by him and Charles Hunt, in substitution for the balance due on the bills in the proceedings mentioned, drawn by James and George Spence on, and accepted by, Robertson and Stein, are not entitled to make any demand against the estate of James Mackenzie, deceased, upon the indorsement of the said John Mackenzie on the promissory-note of James and George Spence, dated the 1st of December 1810, in the proceedings mentioned, in respect of the said bills drawn by James and George Spence on, and accepted by, Robertson and Stein: further find, that, under the circumstances of this case, the said Governor and Company are entitled to demand against the estate of the said John Mackenzie, on the said promissory-note of the 1st of December 1810, one-fourth part only of the balance which shall appear to be due to the said Governor and

1821.

STIRLING and others v. FORESTER.

Company from the said James and George Spence, in respect of the several bills drawn by the said James and George Spence on, and accepted by, D. Paterson, Todd and Company, in the proceedings mentioned, after giving credit for all the sums of money received by the said Governor and Company, or which might have been received by them, from all or any of the parties to such bills respectively, or their respective estates, towards discharge of the debt due to the said Governor and Company upon such bills: and it is therefore ordered and adjudged, that the several interlocutors complained of in the said original appeal, so far as they are inconsistent with these findings, be, and the same are hereby reversed: further ordered, that the cause be remitted back to the Court of Session in Scotland, to ascertain the balance due from the estate of the said John Mackenzie to the said Governor and Company according to such findings: and the Lords further find, that upon payment of such fourth part of such balance, the said Governor and Company are bound to answer to the estate of the said John Mackenzie one-fourth part of any future dividends, which, after the adjustment of the said account between the said Governor and Company and the estate of the said John Mackenzie, according to the findings aforesaid, may become payable to the said Governor and Company from the several parties to the said bills, drawn by James and George Spence on, and accepted by, D. Paterson and Todd and Company, in respect of such bills respectively: and it is further ordered and adjudged, that the said cross-appeal be dismissed this House, and that the said interlocutors, so far as they are therein complained of, be affirmed *.

* See *Rees* v. *Berrington*, 2 V. J. 540; *Nisbet* v. *Smith*, 2 B. C. C. 579; the observations of Eldon, C. in *ex parte* Gifford, 6 Ves. 807; and see *Orme* v. *Young*, Holt's N. P. C. 84. *Dunn* v. *Shee*, *Id.* 399, and *Quære*.