APPENDIX.

PART I.

CAUTIONER.

1777. *January* 17.

JOHN MAXTON, Cashier to the Perth United Company, *against* The CREDITORS of MR. ROBERT M'INTOSH, Advocate.

No. 1.
Cautioners *ad factum præstandum*,—how far entitled to be ranked for relief upon the estate of the person for whom they were bound.

See No 61. p. 2133.

IN 1771, Anthony Fergusson, merchant in Edinburgh, was appointed agent for the Perth Banking Company, and being obliged to find security for his transactions, he granted a bond in the following terms: "We Anthony Fergusson, Dr. Hugh Reid of Lydeserf, Walter Fergusson, Writer in Edinburgh, Robert Scott Moncreiffe, of Coats, and Mr. Robert M'Intosh, Advocate, for and in name of and having full power and authority from, and taking burden upon me, for John M'Intosh, of Dalmudie, merchant in London, my Brother German—Bind and oblige us in manner following, viz. I the said Anthony Fergusson, bind and oblige me, for the whole sum that shall at any time be due or owing by me to the said Company; and we the other obligants above named, bind and oblige us, our heirs and successors respectively, for and in the sum of £1000. each, as cautioners to that extent, for the said A. Fergusson—that is to say, that the said A. Fergusson, shall faithfully account for and pay what balance shall be due by him to the said Company, or failing thereof, that we shall severally and rateably, according to the sums for which we are here respectively bound, pay to the said Company the said balance." &c. In 1772, Anthony Fergusson stopt payment, and it appeared that at the time of his failure the balance due by him to the Company was £5056. Sterling. The Perth Banking Company were accordingly ranked for that sum upon the estate of Anthony Fergusson, and received a dividend therefrom, amounting to £1287. 14*s.* 5*d.*—After which, there still remained a balance due to the bank of upwards of £4000. For this

No. 1. balance their cashier brought an action against Fergusson's cautioners, and obtained an adjudication, all exceptions *contra executionem* being reserved against the estates both of Robert M'Intosh and his brother John.

In the ranking of Robert M'Intosh's creditors, two objections were stated against the interest of the Perth Banking Company.

1*st*, That Robert had not bound himself personally, but only for his brother John, for whom he acted *factoris nomine*, and whose estate, he having made no objection to the debt, is adjudged for payment thereof.

2*dly*, That supposing Robert to have been properly bound, that each of the cautioners were creditors to Anthony Fergusson in relief of the £1000. in which they were bound, and were entitled to draw a proportional part of the whole dividend upon the total sum which had been paid to the Bank, whereas the bank had applied that dividend solely to the extinction of the balance for which they had no cautionary obligation.

This question having been reported to the Court by the Ordinary,—on the first point, the argument for the Bank was to the following effect:

Robert, besides binding his brother *factoris nomine*, himself along with the rest of the cautioners bind and oblige themselves, their heirs and executors, for payment of the money. There cannot be a doubt that Robert, by that clause, stands personally bound. There is no writing from John M'Intosh, to subject him to this debt, either antecedent or subsequent to the obligation, and although his estate was adjudged, yet there is nothing still to prevent him or his creditors from denying that he ever gave authority for the litigation, upon which the decree proceeds. Robert besides must be liable as expromissor for John.

Answered for M'Intosh: The clause founded on by the bank is fully explained by the preceding part of the obligatory clause, where Robert only acts for and in name of, and as taking burden on him for John, therefore the after clauses must be qualified by the preceding. As Robert has taken upon him the burden that John *shall be* bound, if *de facto* John is bound, by submitting to the debt, Robert has performed his part of the obligation, and has nothing further to do in the matter—and as John has acquiesced, Robert must be liberated. Such instances happen daily in the case of men of business acting for their constituents, and signing submissions or deeds of accession in their names. Such obligations are only *ad factum præstandum*, and the fact to be performed is the procuring the principal party's acquiescence in the obligation.

Argument for the Bank on the second point.

The object of the Bank by receiving the obligation founded on, was, that in case they did not recover full payment out of Fergusson's funds, they might have recourse for the deficiency against the cautioners to the extent of £4000. It could never be the view of the Bank, that in such an event, the cautioners, in place of being liable for £1000. to make up the deficiency of Mr. Fergusson's effects, should themselves draw a part of these effects towards part of the £1000. The clear meaning of the obligation, was, that whatever

No. 1.

balance should become due by Fergusson, he himself and his funds should in the first place be liable to the Bank, and that so far as these funds should be deficient, his cautioners should be liable to the extent of £4000.

Answered for M'Intosh: As the Bank had entrusted Anthony Fergusson to the extent of £1056. Sterling more than what was contained in the cautionary obligation, they are his creditors to that amount, and the cautioners and the Bank together are his creditors for £4000. But as all cautioners are entitled to relief from the person for whom they were bound, the cautioners are just as much creditors upon Fergusson's funds for their cautionary debt as the Perth Company are for the other part of the debt which is unsecured. And if the cautioners had actually paid up the £4000. to the Bank, and had therefore stood the only creditors for that sum, there cannot be a doubt they would be entitled to draw a proportion of the bankrupt's effects effeiring to the £4000, just as much as the Bank were entitled to draw their proportion effeiring to the £1056. remaining due to them. The circumstance of having paid or not paid to the principal creditor, can make no difference whatever upon the question, as the cautioners are distressed for payment, and are equally entitled, as creditors in relief, to be ranked, and to draw their share of the funds, with any other creditors whatever. Besides, as the Bank have drawn the dividend effeiring to the sum for which the cautioners were bound to them, how can that Company maintain that they have a right to apply that dividend not in payment of that sum for which it was drawn, but entirely to the extinction of another sum which the common debtor was owing to them.

The Court found, "That by granting the bond in question, Mr. Robert "M'Intosh became bound only *factorio nomine* for his brother John; and "remit to the Lord Ordinary to inquire how far this was authorized or "afterward homologated or acquiesced in by John, and consequently how "far the bond is binding upon and effectual against John; and upon the "whole of this point to hear parties, and to do as he shall see cause: Fur-"ther, as to the second objection to the interest of John Maxton, repel the "said objection *simpliciter*, and remit to the Lord Ordinary to proceed accord-"ingly."

The Court adhered to the last part of this interlocutor, after advising a reclaiming petition and answers. But upon advising a reclaiming petition for the Perth Banking Company, against the first part of the interlocutor as to the first objection, with answers for the creditors of Mr. M'Intosh, the Court, in consideration of a letter produced from Mr. Robert M'Intosh to his agent at Edinburgh, dated 10th July 1772, in which, speaking of the foresaid cautionary obligation, he says, "as far as relates to me, as one of those sureties, "by virtue of the bond to that effect, signed by me for myself, and in name "of my Brother," &c. altered their former interlocutor, and found Mr. Robert M'Intosh personally liable.

No. 1. It had been contended by the creditors that this letter did not make the least difference, as the letter had evidently been written by Mr. M'Intosh not recollecting the nature of the obligation, and he could never mean by writing this letter to engage himself more deeply than he was by the original bond; nor indeed could he do so to the prejudice of his creditors. The Court, however, seemed to think that the letter expressed what Mr. Robert M'Intosh understood was the nature of the obligation, and as his acknowledgment to that purpose would render him liable, his letter ought certainly to have the same effect.

Lord Reporter, *J. Clerk.* For M'Intosh's Creditors, *Ilay Campbell, A. Elphinstone.*
For the Bank, *W. Nairne.*

D. C.

1802. *May* 20 MILLIGAN *against* GLEN.

No 2.
A cautioner must communicate to his co-cautioner the benefit of any separate security he may have obtained from the debtor.

ROBERT MILLIGAN of Nithbank, and David Glen writer in Dumfries, jointly subscribed a bond (25th June 1781) for a cash credit for £300. Sterling, along with John Ogilvie and John Muncie: The account to be kept in the name of Muncie. Glen likewise received a joint letter from Muncie and Ogilvie, acknowledging that he was only cautioner for them. Glen, besides this, advanced to Muncie £100.

Muncie's affairs having gone into disorder, he executed a deed (12th August 1785), for David Glen's "better security and more sure payment of the aforesaid "sum of £100. Sterling penalty obliged for the same, and annualrent that may "be due thereupon, in the first place, and for his being freed and relieved of and "from payment of the aforesaid sum of £300. Sterling penalty obliged for the "same, and interest that may become due thereon, in the second place; wit ye me, "without hurt or prejudice to my personal obligation above-written, the above-"mentioned bond granted to the bank of Scotland, or to a missive letter grant-"ed by the said John Ogilvie and me, of the date of last-mentioned bond, to "the said David Glen, but in further corroboration thereof, *veluti accumulando* "*jura juribus*, to have sold and disponed that large tenement," &c. This disposition is declared redeemable upon repayment of the above sums and penalties. On 17th December 1786, the subject conveyed was sold for £511. 11s. and Glen paid £150 as his share towards extinction of the cash-account; the balance of which £87. 5s. 11d. Milligan was forced by diligence to pay. (18th February 1789).

He brought an action against Glen, as co-cautioner, for £43. 11s. 11½d. being one-half of the above loss, as well as for the expenses of diligence used against him.

Informations were ordered by Lord Stonefield (3d February 1801.)

Milligan Pleaded:

The utmost extent of Glen's obligation was not to pay one half of the bond only; for he was bound with the others, conjunctly aud severally, to pay the