

' THE LORDS find, That Clochombie is entitled to apply said heritable security for relief and payment of the first and last of these debts, (viz. the debt to the bank, and balance advanced by Colonel Campbell,) and in so far is not bound to communicate it, or any part of it, to the petitioner. But as to the debt originally due to Mr Lockhart, find, he must communicate said heritable security to the petitioner, to the effect that any loss on that debt may be borne by him and the petitioner proportionally, but not to compete with the respondent as to the other two debts.'

Act. Hay Campbell.

Act. Rolland.

Clerk, Tait.

Fac. Col. No 182. p. 102.

No 60.

1777. January 17. MAXTON against CREDITORS OF M'INTOSH.

ANTHONY FERGUSON being appointed agent for the Perth Banking Company, granted a bond, along with certain others, as his cautioners, narrating, that the said Anthony Ferguson bound himself for the whole sum that should at any time be due by him to the said Company; and they, the other obligants, bound themselves and heirs for the sum of L. 1000 each, as cautioners to that extent for the said Anthony Ferguson. Among these co-obligants, was Mr Robert M'Intosh, who became bound in the following terms: ' Mr Robert M'Intosh, advocate, for, and in name of, and having full power and authority from, and taking burden on me, for John M'Intosh, my brother.' Anthony Ferguson having stopt payment, it appeared that the balance due by him to the Company was L. 5056 Sterling, and they drew a dividend from his estate, amounting to L. 1287 Sterling. Thereafter the bank pursued the cautioners; and, *inter alia*, adjudged the estates both of Robert and John M'Intosh.

In the ranking of Robert M'Intosh's creditors, two *objections* were stated to the Bank's interest: 1st, That Robert was not bound personally, but only for his brother, *factorio nomine*: 2dly, That supposing Robert personally bound, each of the cautioners were creditors to Anthony Ferguson, in relief of the L. 1000 for which they were bound, and were entitled to draw a proportional part of the whole dividend on the total sum 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.

On the *first* objection the Court at first found Mr Robert M'Intosh liable only *factorio nomine* for his brother; but afterwards, in consideration of a letter produced from Robert M'Intosh to his agent, in which, speaking of this debt, he says, ' so far as relates to me, as surety in virtue of the bond to that effect, signed ' by me for myself, and in name of my brother,' they altered and found him personally liable.

THE COURT repelled the *second* objection to the Bank's interest in the ranking.

Fol. Dic. v. 3. p. 117.

No 61.

Several parties were cautioners to a certain extent each, for a person's intromissions as agent for a bank. The bank were found not bound to communicate to the cautioners any part of a dividend recovered out of the agent's bankrupt estate; but were allowed to employ the whole towards extinction of a balance, not secured by the cautionary obligation.