

## CAUTIONER.

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1777. *March 4.* BANK of PERTH *against* CREDITORS of Mr ROBERT M'INTOSH,  
as one of the Cautioners for Anthony Ferguson.

THE Bank of Perth, having resolved to employ Anthony Ferguson as their agent at Edinburgh, took from him, and four other gentlemen, a bond of caution. By this bond, Anthony Ferguson became bound for the whole sum that should at any time be due by him to said Company; and the other gentlemen, respectively for, and in the sum of £1000 sterling each, as cautioners for him to that extent, for whatever sum he might at any time receive of the Bank's in his hands: that is to say, "That he, the said Anthony Ferguson, 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 hereby respectively bound, pay to the said Company the said balance."

In 1772 Anthony Ferguson stopt payment; in debt to the Bank in the sum of £5056; and, on the 15th of September 1773, the Company received a dividend of his effects, amounting to £1287. After which, they pursued the cautioners for the balance, at the rate of £1000 each.

The cautioners pleaded, That the dividend received by the Bank out of Anthony Ferguson's effects, behoved to be communicated to them proportionally with the Bank;—and if this was done, each of the cautioners behoved to answer for the remainder, always not exceeding £1000 each.

The case was attended with some difficulty at first view; but, upon an attentive consideration, it appeared, that the cautioners had come under two obligations,—an indefinite one, that Ferguson should account;—and a definite one, that, on his failing to do so, each of them should be liable only in the sum of £1000. Now, the first obligation was not taken away by the second; and therefore, although, in a common case, there might have been some ground for the plea of the cautioners, yet, in this case, they were barred by their own deed, and could not ask it.

This case occurred in the ranking of Robert M'Intosh's Creditors, who, as was alleged, either personally or *factorio nomine* for his brother John, was one of the four cautioners; and the point was pleaded in objection to an interest produced for the Bank of Perth, who had adjudged for the whole £1000, effecting to Mr M'Intosh's obligation, without allowing the dividend. "The Lords repelled the objection," (21st January 1777.)

They thought the cautioners bound that Ferguson should account indefinitely,—and that a taxation of this, to £1000 each, no doubt freed them from paying *ultra*; but did not entitle them to any share of Ferguson's effects, until the Bank was totally paid.

The case was reckoned of importance, in point of precedent, many bonds of caution in the public offices, Banks, &c. being conceived in that form.

This day, (4th March 1777,) upon advising a reclaiming petition and answers, the Lords adhered. They thought the cautioners barred from competing with the Bank, *personali objectione*, in terms of their bond.

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1773. July . BRITISH LINEN COMPANY *against* NISBET, &c.

EBENEZER Hill having been appointed cashier to the British Linen Company ; Nisbet, and Others, became cautioners for him *de fidei*, " That he should obey the Directors of the Company, and produce to Mr Goldie, the manager, every week, or daily if required, distinct states of the cash under his charge,—and that he should account for all sums which he should receive, and pay all damage by him occasioned, under the penalty of L.100 sterling, attour performance. That an account from the Company's general cash-book should constitute the charge, and that no suspension thereof should pass but on consignment only. In all this, the cautioners became bound, conjunctly and severally ; but it was declared that they should be no further liable by the bond than to the extent of L.500."

This, of giving in a state of the cash weekly or daily, if required, had been enjoined by several resolutions and minutes of the Company, concerning the duty and office of cashier ; and it was alleged by the cautioners, that, at the time when they granted the bond for Mr Hill, this was one of the arguments used by Mr Goldie, to convince them that Mr Hill's cash was to be examined so often, there could be no great risk in their being thus bound for him ; and it was added, in the papers, that this examination of the cash in the hands of their cashier or treasurer, weekly, was the practice in all the established Banks.

Hill embezzled the cash of the Bank, and thereupon the cautioners were charged for their L.500. They suspended ; and pleaded, *inter alia*, in defence, the non-observance of this regulation, concerning the state of the cash ; which they said was a regulation calculated for their safety, in which therefore they had an interest,—and upon the faith of the observance whereof they had signed the bond ; and they quoted a decision marked by Fount. 30th November 1697, *Sir James Dick against Nisbet and his Cautioners*, which, as they alleged, gave a sanction to this doctrine.

It was answered,—That the clause in the bond, and in the resolutions of the company referred to, were calculated purely for the security of the Company. That the cautioners had no claim upon it ; and as to this being agreed upon, and made use of as an inducement for them to engage in the bond,—this was totally denied. And, in corroboration of this, a decision was quoted, later than that of Sir James Dick, *viz.* 18th June 1706, *Sir George Hamilton against Sir James Calder*, where a defence of this kind, pleaded for cautioners, was repelled. There were other points pleaded ; but, upon the whole, " The Lords repelled the reasons of suspension, and found the letters orderly proceeded," (2d February 1773.

The cautioners reclaimed, praying the Lords to suspend the letters, or, at