

No 16.

of Session were in use either to name the salaries in their factories, or expressly to reserve it till count and reckoning; so that, after it was universally understood that a salary was annexed to such office, there was no necessity of mentioning it in the commission.

Neither can the specialty, on which the defender lays so great stress, avail him, namely, that one of the former factors got a salary; seeing that was in consequence of an express paction. And it might as well be argued, that an allowance for board was due by a major, though without paction; because, perhaps he had paid board to the house where he was maintained immediately before. But, when the fact is set forth, the argument turns strongly the other way; seeing there were two factors interjected betwixt George Aitkman and the defender, neither of whom had any salary.

THE LORDS refused to allow this article, in regard it did not appear that there was a paction for any salary or reward offered to be proven.

*C. Home, No 19. p. 42.*

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1738. February 17.

JOHN RANKIN, Merchant in Ayr, *against* ROBERT MOLLISON, Collector of Excise there.

No 17.

One who contracts *factorio nomine*, is presumed to bind his constituent only, unless the contrary be expressed; and therefore is not personally liable to implement, but only to furnish a sufficient commission so as to bind his constituent.

MR ARBUTHNOT in Peterhead having wrote to Mollison, with respect to some meal he had to dispose of, Mollison, in consequence thereof, entered into a bargain with Rankin anent the purchase of the meal, and wrote a letter to him, wherein he says, That he had a commission from Mr Arbuthnot to dispose of a certain quantity of meal for his account; and then adds, 'And I do agree with you, in his name, that betwixt, &c. he shall provide you 800 bolls good and sufficient oat-meal, &c. to be delivered either at Portsoy or Peterhead, in the option of the said Mr Arbuthnot, who is to have his orders ready at Portsoy, if the ship calls for them.' In consequence of which bargain, Rankin sent a ship for the meal; and, upon its not being delivered, he brought a process against Mollison, founded upon the above letter, for the damage he sustained by the not delivery.

The defence *pleaded* for Mollison was: That, by the whole tenor of the letter, it was plain, he did not intend to subject himself to any personal demand at the pursuer's instance, as he declares therein, That he acted by commission from Mr Arbuthnot, disposes of the meal for his account, and the place of delivery to be at his option; wherefore, as there are no obligatory words upon the defender through the whole of it, the natural construction must be, that Mollison intended only to bind his constituent, and not himself. *See* Huber. tit. *Exerc. act.* § 6. Voet. *De Inst.* § 6. Sand. *Decis.* book 3. tit. 7. def. 1. The import of which authorities amounts to this, that the obligation of the party con-

tracting, is to be regulated by the character under which he acts ; and that a factor, or person acting by commission, is understood to bind his constituent only, and not himself.

No 17.

*Answered* for the pursuer ; Though the letter bears the defender had a commission, yet the same was not shown to him at or before the bargain ; he relied solely on Mollison, and cannot be supposed to have acted on the faith of a commission not seen, which, now it is produced, is indefinite as to quantity, price, and date. *2do*, Supposing the defender had acted *procuratorio nomine*, yet that could not free him, because, as such, he was bound as well as his constituent, See *L. 13. ff. § 25. De act. empt. L. 1. § 17. De exer. act.* *3tio*, The letter or commission from Mr Arbuthnot to the defender does not give him a power to conclude a bargain with any person, and therefore he cannot give a third party a legal action against his constituent, though, from his commission, the Court may find the defender has an implied relief.

THE LORDS found the defender was not personally liable, but only to furnish the pursuer with a commission.

*Fol. Dic. v. 1. p. 288. C. Home, No 87. p. 141.*

1738. July 20.

FORD against CRICHTON.

FOUND that a factor officiously acquiring debts of his constituent, to which the constituent has but the shadow of an objection, must in the mean time account, and not stave off his constituent till his objections to such debts be determined.

No 18.

*Fol. Dic. v. 3. p. 202. Kilkerran, (FACTOR.) No 1. p. 181.*

1739. June 6.

AINSLIE and FACTOR against ARBUTHNOT.

FOUND that a factor having taken bills in his own name from his constituent's debtor, without any notice given to his constituent or any posting by the factor in his books, whereby it might appear that the said bills were in his name for his constituent's behoof, the loss happening by the after bankruptcy of said debtor, falls upon the factor and not upon the constituent.

No 19.

A factor taking bills in his own name from his constituent's debtor, the loss falls upon the factor.

This was afterwards altered, July 13. 1739, not upon the general point, but upon the *species facti* ; it being thought to appear from a book called a bill-book, that there was evidence of such posting as the former interlocutor had supposed necessary ; but this last judgment was reversed upon an appeal, the House of Peers having no regard to a bill-book as not *nomen juris*.

*Fol. Dic. v. 3. p. 202. Kilkerran, (FACTOR.) No 2. p. 182.*