

1739. July 25. POTTER and his Factor *against* ROBERTSON.

No 5.
A factor for a foreigner pursuing, and losing the cause, was found to be *qua* such personally liable in expenses.

A FACTOR for a foreigner pursuing and losing the cause, found, upon report, to be, *qua* such, personally liable to the defender in the expense of process.—Elchies reporter.

N. B. The like judgment had been given, Pringle and Porteous *contra* Mr David Kennedy, No 4. p. 4643; where not only the factor, but also the agent in the process, was found with him conjunctly and severally liable in the expense of process to the defender; the factor, who was the agent's constituent, was in that case also a foreigner.

Several of the Lords were of opinion, notwithstanding these decisions, that where a foreigner pursues, the defender ought to insist *initio litis*, that caution should be found, without which the foreigner will not be allowed to insist in the process, as was found Feb. 14. 1627, Pyrmon *against* Ramsay's Executors, *voce* WRIT; but that if the defender neglect this, a factor or agent should not be found liable, merely because they undertake a kind office for a stranger.

Kilkerran, (FOREIGNER.) No 1. p. 212.

1761. July 31.

ROGER O'HAGGEN, and WILLIAM ALEXANDER, his Attorney, *against* HUGH BOYD.

No 6.
The Attorney for a foreigner liable in costs of suit for his constituent.

ROGER O'HAGGEN, an Irishman, brought an action before the Court of Session *against* Hugh Boyd, and constituted William Alexander merchant his attorney, or factor, as without an attorney he could not have been heard in his action.

He lost his suit, and was found liable in expenses; in which last part of the decerniture, his attorney was comprehended. Immediately after, Roger O'Haggen became insolvent.

William Alexander his attorney petitioned *against* that part of the judgment which found himself personally liable for costs of suit, merely because he lent his name and acted as attorney for O'Haggen. He *contended*, That he could not be liable personally, unless the defender had insisted, *in initio litis*, to have caution found for expenses, in case they were awarded.

Answered for Hugh Boyd; When a foreigner brings a suit here, he must give a mandate to an attorney, and the action goes on in the name of both, for this very reason, that it is impossible to get the expenses off the foreigner, whereas the native of this country is at hand; and accordingly the Court is in use to give expenses *against* the factor, when they are given *against* the constituent;