

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;

Pringle *contra* Kennedy, No 4. p. 4643; 25th July 1739, Horn *contra* Robertson.

No 6.

'THE LORDS found Mr Alexander liable in costs of suit, conjunctly with his constituent.'

Act. *M. Laurin.*Alt. *Dalrymple.*Clerk, *Gibson.*

J. M.

Fol. Dic. v. 3. p. 232. Fac. Col. No 57. p. 139.

* * In the same manner were decided the cases of Irvine against Wannock and Malcolm, June 1765, and Hope against Orr, 8th February 1780. See APPENDIX.

1792. December 19. AMELIA LEIGH *against* JAMES ROSE.

AMELIA LEIGH having prevailed in an action of declarator of marriage, before the Commissary Court, against Robert Sinclair, was found entitled to expenses. As Mr Sinclair was out of the kingdom, she insisted that Mr Rose, who had defended in the action, in virtue of a power of attorney from him, should be found personally liable for them; and so the Commissaries found.

Mr Rose having brought an advocacy of this judgment,

Pleaded, Although the factor for a foreigner, *pursuing* in this country, has been found personally liable in expenses, it is not equitable that this rule should be applied to the attorney of a foreign defender. A foreigner not being amenable to the courts of this country, it is reasonable, if he pursue in a groundless action, that he should find a person on the spot who shall be answerable for the costs. But before an action is commenced against a defender, either his person or his effects ought to be found in this country, in order to constitute an effectual jurisdiction over him. And in consequence of its being established in this manner, if the pursuer is found entitled to costs, it necessarily follows, that either the defender's person or his property must be liable to diligence at his instance, in order to render his claim for them effectual. There is not therefore the same occasion for subjecting his attorney personally; and without an absolute necessity, the law will never deviate so far from ordinary principles, as to make a factor liable for his constituent's debt. Besides, it is voluntary in a pursuer, but necessary for a defender, to come into court. It would therefore be inconsistent to force his attendance under a penal certification, and at the same time insist on his finding caution for the expenses incurred by the pursuer, which might in many cases preclude his appearance.

Answered, The steps which an attorney for a foreigner, whether pursuer or defender, takes in a process, are considered as the attorney's own proper acts and deeds, and therefore he must be personally liable for their consequences.

THE LORD ORDINARY remitted to the Commissaries, 'with this instruction, to assoilzie James Rose from expenses.'

No 7.
An attorney defending in an action for a person abroad, is not liable personally for the expenses awarded against his constituent.