

FACTOR.

1777. March 4. MAXTON *against* CREDITORS of Mr ROBERT M'INTOSH.

IN the ranking of the Creditors of Mr Robert M'Intosh, (see Cautioner,) and on the bond of cautionry there mentioned, for Anthony Ferguson, another point occurred.

In granting said bond, Mr Robert M'Intosh granted it "for and in name of, and having full power and authority from, and taking burden upon me for John M'Intosh of Dalmenzie, merchant in London, my brother-german;" and the obligatory clause bore, that the other three cautioners, and he, the said Robert M'Intosh, for, in name of, and as taking full burden upon him for the said John M'Intosh, his brother, bound and obliged them in manner following, *viz.* "I, the said Anthony Ferguson, bind and oblige me, &c. for the whole sum that shall at any time be due and owing by me to the said company; and we, the other obligants above named, bind and oblige us, our heirs, executors, and successors, respectively, for and in the sum of L. 1000 each, as cautioners to that extent for the said Anthony Ferguson," &c.

It was disputed, whether, from the above clauses, Mr Robert M'Intosh was bound only *factorio nomine* for his brother John, or had bound himself personally?

The majority of the Lords were of the first opinion, and found so, (21st January 1777.) But then, as it did not appear whether Mr Robert had authority from John to do so, or whether John had afterwards homologated or acquiesced in it, the Lords remitted to the Ordinary to inquire into these facts, and to proceed further in the cause and do as he should see just.

The Lords held the decision mentioned in the Dict. Vol. I. p. 288, *voce* Factor, 17th February 1738, *Rankin*, to be well founded; whereby it was found, that one who contracts *factorio nomine*, is presumed to bind his constituent, 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. But, in this case, they seemed further to hold, that, if Mr Robert M'Intosh could not produce authority sufficient to bind his brother John, he would be bound himself personally. Lord Gardenston thought there was no need of further expiscation in this matter; for that the expression, "taking burden for his brother," bound Mr Robert in every event.

In a reclaiming petition, a letter was produced and founded on, from Mr Robert M'Intosh, whereby his sense of the transaction appeared, *viz.* that he understood himself bound personally, as well as *factorio nomine* for his brother. It was a letter agreeing to a trust-right granted by Anthony Ferguson in favour of his creditors. The Lords, upon this, and advising reclaiming petition and answers, altered their interlocutor, and found him bound, not only *factorio nomine* for his brother, but also personally, (4th March 1777.)