

No 13.

Mr Lombe pursued Mr Scott for the price of the lintseed, with commission, &c.

Pleaded for the defender; In the contract of mandate, any deviation from the precise terms of the commission must acquit the mandant of his obligation; l. 5. D. *Mandati*. In this instance a deviation of the most important kind occurred, by which the goods were sent to a port where the defender had neither correspondents nor customers, and where, of course, the object of the commission could not in any proper manner be attained.

Had the pursuer complied with the mandant's injunctions, his claim might have been supported, although by some misfortune the goods had not arrived within the limited time; but as the loss here could not have existed but from his transgressing the limits prescribed to him, he alone ought to suffer by it.

Answered; The decision of this case must depend, not on the nature of the contract of mandate, as known in the Roman law, but on the general practice and understanding of merchants in transactions of this sort.

When a merchant studying the interests of his correspondent, transmits goods to him without orders, or contrarily to the precise tenor of his commission, the risk attending this falls upon the sender. If, however, he gives immediate information of his proceedings, it is the duty of the correspondent immediately to notify his dissatisfaction, should the adventure be disagreeable to him. His silence on such an occasion is construed into an approbation of the measures adopted by the sender, which no after contingency will entitle him to retract. A contrary idea would be attended with fatal consequences to trade, by relaxing that punctuality of correspondence which is so necessary among merchants.

THE LORDS repelled the defences.

Lord Ordinary, *Gardenston*.

Act. Hay.

Alt. Swinton, Nairne.

C.

Fol. Dic. v. 3. p. 274.

Fac. Col. No 90. p. 175.

SECT. IV.

Of facts inferring knowledge of, and consent to the right challenged.

Effect of consent where the right is not known. Effect of legal steps passing of course. Effect of minority. Effect of payment.

1592. December 4.

SCHAW against HIS TENANTS.

No 14.

ANE fiar, albeit he be witness to ane tack of certain years set by the liferenter, he is not thereby obliged to acknowledge it after his liferenter's decease;

and having transacted with the lady tercer, may remove the tenants from the hail, albeit the lady tercer might not have removed them from the third.

Fol. Dic. v. 1. p. 378. Haddington, MS. No 43.

No 14.

1613. June 8. Mr ALEXANDER POWRIE against JOHNSTON.

Mr ALEXANDER POWRIE, as parson of Dalton, pursued Johnston for spuilzie, or wronguous intromission of his teinds. The defender *excepted*, That he had tacks set to him of the teinds controverted, by the Bishop of Glasgow, for terms to run. It was *replied*, That the tack set by the Bishop was null, because he was not titular of that benefice of Dalton, but only patron, and so had no power to set tacks. It was *duplied*, That this pursuer could not impugn the tack, because he had in effect ratified it, he being inserted witness in it, and having subscribed it. To this was *answered*, That his subscription as witness was only a testimony of the truth of the tack, and could not infer his consent to the tenor thereof. Which answer the LORDS found relevant; and, in respect thereof, repelled the allegiance.

Fol. Dic. v. 1. p. 378. Haddington, MS. No 2539.

No 15.

Subscribing as witness to a tack was found only to be reputed a testimony of the truth of the subscription, but not to hinder the witness to impugn the tack he signed.

1625. July 19. WALWOOD against TAYLOR and the E. of DUNFERMLINE.

In a suspension, Walwood, in Dunfermline, against Taylor and the Earl of Dunfermline, suspending a decret obtained by Walwood against the said Taylor, for removing from a coal; in the which suspension, the right of the coal being disputed betwixt Walwood and the Earl of Dunfermline, the LORDS found, that albeit Walwood was witness to a tack of that coal, set by the E. of Dunfermline to Taylor, against whom Walwood had obtained a decret of removing from the said coal, yet his being witness to that tack did not prejudice him of his right to the coal, nor yet of his decret obtained after that tack against Taylor; but that, notwithstanding of his subscribing as witness to the tack set by the Earl of Dunfermline to Taylor, he might thereafter seek, and pursue, and obtain decret of removing against Taylor, upon his right to the coal, and that he needed never to have warned the Earl of Dunfermline, setter of the tack, nor his heirs, in that process of removing, because Taylor was tenant of that coal to him divers years before that tack, set by the Earl of Dunfermline. Nam quando aliquis subscribit tanquam testis, non videtur se obligare, L. Titia, § Lucius; D. de legat. 2do, Ratio videtur quia subscribere possum ut testis, licet non vidi quæ subscripsi, quo casu non obligor, Socin. Reg.

477.

No 16.

In a competition between two persons for the property of a coal, one of them, who had obtained decret of removing against the tacksman, subscribed as witness to a tack let to the same tacksman by the other competitor. Found that this did not prejudice the subscriber in his right.

This sentence was adhered to, though the tack contained a clause in favour of the subscriber.