

he disposed thereof, and of the goods he bought with the price as he did with his own, and as others entrusted with the rest of his loading did with theirs. THE LORDS did find the skipper liable for the price, deducting so much for the exchange as it would then have given, if he had remitted the money, upon that reason, that the war being declared, he ought not to have bought goods in Holland, nor sent them to Scotland by sea under so great a hazard; which seems hard, seeing by the impossibility to execute the commission, he was in the case of *negotiorum gestor*, and disposed with that parcel as he did with his own, and as other merchants did who had a greater quantity, and run a greater hazard; and if he had remitted the money by bills, there might have arisen a great hazard, as well as by sending the goods by sea.

Gosford, MS. No 754. p. 468.

No 19.

1687. July 8. ANDREW ALEXANDER against SIR JAMES CALDER.

ANDREW ALEXANDER, late factor at Rochelle, against Sir James Calder of Muirton, for payment of a bill of exchange:—THE LORDS found Andrew had exceeded *finis mandati* in not selling the salmon at Rochelle, but sending them to Bilboa in Spain, in hopes of a better market, though it proved contrary, and therefore assoilzied from exchange and re-exchange; but ordained him to be heard anent the annualrent of it.

Fol. Dic. v. 2. p. 58. Fountainhall, v. 1. p. 464.

No 20.

1696. November 12. M'NEIL, ROWAN, &c. against GEORGE DAWLING.

IN the concluded cause, M'Neil, Rowan, and other merchants in Glasgow, against George Dawling skipper in Greenock, for compt, reckoning, and payment of the value of a cargo of herrings they trusted him with to Stockholm in Sweden; his defence was, he consigned them to Alexander Pittillo, a factor there; and with their produce bought from him dales, iron, and tar; and after his ship was loaded, he breaking, and being debtor to the King of Sweden for public dues, the government there seized on his ship, and *manu forti* took away the goods as Pittillo's.—*Answered, 1mo*, You being not only skipper, but having a special factory and commission, you could not consign them to another factor; but the very nature of your trust and mandate obliged you to sell for ready money; at least, to have enquired whom you trusted, and exacted caution; and if you did not, it is on your own peril, and not your constituents; *2do*, Pittillo's condition was at that time suspect, and he shortly after broke, and so you was *in mala fide*.—THE LORDS, as to the first point, found a *mandatarius* trusting another did not exactly obey the terms of his mandate, but followed the faith of that other on his peril, and was liable for the event, tho'

No 21.
A mandatary trusting to another, does not in doing so without orders, comply exactly with his mandate, and must be liable for the consequences.

No 21. there was neither *dolus* nor *lata culpa* chargeable on the *mandatarius*; but any negligence and omission, (not having exactly followed his mandate,) lay at his door, even as if an advocate should delegate another to manage for him, he must be answerable, because in such cases *industria personæ* is elected. And there was ground of suspicion against the factor; and it was not proved that he had trusted his own part of the cargo to him, as he had alleged; and there is no less diligence required in a mandatary's executing his commission than he uses to exhibit in his own affairs. Law impedes him not to substitute, but if he do, he must take his hazard of the event, and not throw it over on his constituents. But the LORDS would not have required this exact diligence of him *quæ* skipper, had he not also been supercargo, with a special commission and trust, because he had been oft there, and had the Swedish language.

Fol. Dic. v. 2. p. 58. Fountainball, v. 1. p. 733.

1707. March 7.

LORD INVERURY *against* JAMES GORDON, Merchant in Edinburgh.

No 22.

A merchant who sold wine, was desired by the buyer to purchase a cask to put it in, to be carried by sea. The cask having been insufficient, the merchant was found liable to restore the price.

INVERURY having bought 18 gallons of Florence wine from Gordon, and he telling he had no less than a butt, he desired him to get him a cask and hogshead to draw it off, to be shipped on board a vessel then lying at Leith, and shortly to sail to the north. Accordingly he went to a couper, and got him a cask, which he looked on as sufficient, and put the wine into it, and shipped it; but the ship being retarded with contrary winds, ere it came to Inverury, it was found the wine had syped out, and so was all lost and spilt. My Lord pursues Mr Gordon for the damage, he having furnished him with a leaky insufficient cask, though he had trusted the care of it to him.—*Alleged*, He can never be liable, for all his concern was to deliver him the wine; but to provide him a cask to put it in was a mere act of kindness and friendship done at my Lord's desire, to serve him *tanquam quilibet*; likeas it stood twenty-four hours before it was boated, and not the least appearance of any defect, and was shipped, and so received by the skipper in good condition; but a storm having risen, they were driven into the Wemyss harbour, and, by the agitation of the ship, it might have got a dash, so that either the couper, furnisher, or the skipper may be answerable; but it is impossible to reach Mr Gordon, who only bestowed his pains; and so it was *locatio operæ tanquam proxeneta*, and no more.—THE LORDS, before answer, allowed a conjunct probation as to Bailie Gordon's undertaking the trust of furnishing a cask, and what trial was taken of it before the wine was put into it; and if the loss was casual and accidental, or by any latent defect and insufficiency in the cask; and the LORDS coming to advise the testimonies of the witnesses adduced *hinc inde*, Mr Gordon *alleged*, That no more diligence could be required of him than what he had done; for he being desired to look at a cask, he did so, and saw no visible fault in it; and by the