

there, and therefore he brought the said crowns away with him, and did bestow his labour, trouble, and diligence upon them, as he did with his own, and in the meantime, the ship that he was into was stricken into Portsmouth in England, by storm of weather, and there into the road in a stormy night the cables and the ship driven upon shore suffered *naufragium*, so that the crowns with the rest of the defender's gear, which was in a coffer, perished, *et sic mandatarius ille non tenebatur prestare casum fortuitum, prout in L. 26. D. Mandati, verba textus in § 6. non omnia quæ impensurus non fuit, mandatori imputabit; veluti quod spoliatus sit a latronibus aut naufragio res amiserit; et in L. 13. C. Mandati.* To this was answered, that the defender ought not to have transported the said crowns forth of B., because the pursuer offered him to prove, that there were sundry Scots merchants, who being in B. at that present time, offered to take the said crowns *omni periculo*, and to give so much advantage upon the frank, and pay the same to the pursuer; and so it appeared, that in so far as the defender refused the same *non eam fidem et diligentiam adhibuit in negotio quam diligens paterfamilias adhibuisset, et in L. 3. D. Mandati, causa mandantis melior fieri potest, nunquam deterior*, and so the defender in so far as he did not give forth the crowns to the utility and profit of the pursuer, was *in lata culpa*. To which it was answered, that the defender in no manner of way ought to have given forth the crowns to the said pursuer's profit, *quia fuit ultra fines mandati*, and the pursuer might have found fault with that, as well as with the other *et de jure in L. Si procuratorem, § Dolo D. procurator tenetur tantum de lata culpa quando quis curat alienas res ita ut proprias, arg. L. 32. D. Depositi, ut in presente casu*, the defender used the crowns and the pursuer's gear, in all respects as his own, and alike to the peril and danger, and so by this dealing, it was clear and manifest, *quod non fuit in lata culpa, quia nulla fuit suspicio fraudis aut doli, quia æquiparantur fraus. dolus et lata culpa.* THE LORDS, after long reasoning, found by interlocutor, that the exception should be admitted, the defenders proving that the ship suffered *naufragium*, and that his own gear that was therein perished.

Fol. Dic. v. 2. p. 57. Colvil, MS. p. 372.

1675. June 4.

HAY against GRAY.

A MERCHANT having given a commission to a skipper, to carry a parcel of salmon to Bourdeaux, and upon the sale of the same there, to bring home wines and prunes; pursued the said skipper for the said salmon and profit thereof, and referred the libel to the skipper's oath; and the defender having qualified his oath on these terms, viz. that being upon his voyage to France, he was forced to go into Holland by storm of weather, so that he could not go to Bourdeaux, and that he was forced to sell the salmon in Holland, and with

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No 19.

A shipmaster who sold goods for a merchant, and bought others for him of a different kind from those ordered, was found liable; the goods ha-

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 ving been
 taken by an
 enemy at sea,
 on the pas-
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the price of the same did buy a parcel of cards and other goods mentioned in his oath, for the pursuer's use ; and having embarked the same to be transported to Scotland, and in the *interim* war having arisen, the ship and goods were taken by the Dutch ; and that he had done for the pursuer as for himself, and as other merchants had done for themselves ; which oath being advised, it was debated amongst the LORDS, whether the defender should be assoilzied, in respect of the oath and qualification foresaid ; and it was found, that albeit the defender might be excused upon the account foresaid, for not going to Bourdeaux and fulfilling his commission *in terminis*, yet as to the buying of the parcel of cards with the product of the salmon, and the embarking of the same for the pursuer's use, for which he had no order, he was to be considered as *negotiorum gestor*, and upon his own hazard, and could not prejudge the pursuer by disposing of his money, unless he were able to say, *gessit utiliter* both *consilio et eventu* ; specially seeing he might have secured his money in factors hands, or transmitted the same by bills of exchange, without employing, or far less hazarding the same without order.

Clerk, Hay.

Fol. Dic. v. 2. p. 58. Dirleton, No 259. p. 105.

* * * Gosford reports this case.

IN an action at Hays instance against Gray, for making payment of the price of ten barrels of salmon in trust by him, to the said Gray as skipper, to be carried in his ship to Bourdeaux, with an express commission, that he should sell the same, and with the price thereof bring home wine to Leith, which was referred to his oath ; he having deponed, that he had received aboard the said quantity of salmon, with many other commodities of greater value from other merchants, and that he made sail to go for Bourdeaux, but by stress of weather was driven into Holland, after which time the war being declared betwixt the King and Holland, he did sell the said barrels of salmon, as other merchants did theirs, and with the price thereof, did buy a parcel of lint and hemp, which he did put in another ship going for Scotland, which was seized upon, and declared a lawful prize ;—the parties' advocates being heard at the advising of a cause, it was *alleged* for the pursuer, That the skipper ought to be decerned for the value of the salmon, because he had transgressed his commission, which was to buy wine and vinegar, and albeit he was forced by storm to go into Holland, yet the war being declared, he was *in mala fide* to buy commodities there to send to Scotland, seeing he might have remitted the money received, by bills of exchange, without any danger, It was *answered*, That he could not be liable as having received a commission, because it was impossible he could execute the same ; neither could he be decerned as having brought the foresaid commodities into Holland to be sent to Scotland, because that part of his loading of salmon being but inconsiderable,

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'

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A mandatary trusting to another, does not in doing so without orders, comply exactly with his mandate, and must be liable for the consequences.