

1770. June 15.

Captain JOHN DUNNING *against* WILLIAM CARMICHAEL, late Writer in Edinburgh.

No 7.

Mandatory found not liable to account for the interest of his constituent's money lying in his hands, while in the course of making payments for him in the management of his affairs.

THE defender had, for several years, been employed as the pursuer's agent ; had become jointly bound with him in a bond for the price of a subject he had purchased ; and had been in the course of receiving and paying away different sums of money on his constituent's account. No settlement of accounts had taken place for a period of 17 years ; and the pursuer having then brought an action against the defender for that purpose, wherein he charged periodical interest upon the sums the defender at different periods had in his hands, this was objected to ; and the LORD ORDINARY, on the 15th December 1759, pronounced the following interlocutor : " Finds, That while the defender was in the course of making payment for the pursuer out of the money in his hands, which therefore he was obliged to have always ready, he is not liable for any interest : Further finds, that the defender is not bound to pay interest for the balance that remained in his hands after the several payments made for the pursuer, while the bond to Alexander Dunning, in which the suspender was conjunctly bound with the pursuer, was not delivered up, as it does not appear that the delay of delivering it up was owing to the defender ; but as it is acknowledged that this bond was delivered up on the 21st June last, finds interest due from that time." Thereafter the following interlocutor was pronounced : " Finds, That while the defender was entitled to retain the pursuer's money in his hands, he was not obliged to lend it out at interest ; because if he had done so, it must have been at his own risk ; so that it is not necessary to enquire whether he did put it out to interest or not."

The pursuer reclaimed, and *contended*, That the defender, as his mandatory, was liable in the same diligence in the management of the affairs entrusted to him as he would have bestowed upon his own ; and, as he would not have allowed his own money to lie as a dead stock in his hands, so neither would he that of the pursuer ; and as he must have drawn interest upon the pursuer's funds, he was liable to account for it. The reason was stronger here, as the defender's employment was not gratuitous, being amply rewarded ; and in support of this argument, the following authorities were referred to, L. 10. § 3. Digest. Mandati vel contra ; Voet. lib. 17. t. 1. § 9. ; L. 13. 21. Cod. Mandati vel contra ; Lord Stair, b. 1. t. 12. § 10. ; 1701, Creditors of Carden *contra* Robertson, No. 52. p. 515. ; Wallace *contra* Cunningham, No. 100. p. 558.

The defender rested his defence upon the reasons assigned in the Lord Ordinary's interlocutors, and quoted the following authorities : 20th July 1716, Barklay *contra* Caruthers, No. 99. p. 555. ; July 1730, Creditors of Thomson

contra Monto, No. 74. p. 534.; 23d January 1747, Earl of Roseberry *contra* No 7.
 Primroses, No. 75. p. 534.
 THE LORDS, June 15. 1770, adhered.

Lord Ordinary, *Monboddo*.

For Dunning, *Boswell*.
 For Carmichael, *Maclaurin*.

R. H.

Fac. Col. No 33. p. 91.

1771. December 10.

JAMES BURNETT of Monboddo, one of the Senators of the College of Justice, *against* JAMES CLARK, Farrier in Edinburgh.

THE pursuer having employed the defender to attend a horse that was diseased, gave him a positive injunction that he should give the horse no medicine of any kind but nitre. The defender accordingly gave the horse nitre; but, in order to take off the sharp taste of the medicine, and to make him swallow it more readily, mixed it up in a draught with a small quantity of treacle.

The horse appeared to be in a very bad state when the medicine was given him; and having died the next day, the pursuer brought an action against the defender for his price or value.

The pursuer rested his action upon the grounds, *imo*, That the horse had died in consequence of the defender's improper management; and, *2do*, In respect that he had exceeded the *fines mandati*, the pursuer having ordered the defender to administer nothing but nitre, whereas he had given him some other draught along with it.

In support of the *first* ground of action, the pursuer referred to the following authorities: L. 9. § 5. D. Locat. Conduct. L. 8. § 1. D. ad Leg. Aquil. L. 7. § *ult.* L. 8. in princip. ad Leg. Aquil. Voet. lib. 9. tit. 2. § 23. Stat. 1477, c. 78. 'Of shoeing of Horse in the quick be Smiths.' In support of the *second* ground, that a mandatar was answerable for every deviation from the terms of his mandate, he referred to Lord Stair, b. 1. t. 12. § 9. Bankton, b. 1. t. 18. § 13. Erskine, b. 3. t. 3. § 37. 12th Dec. 1758, Countess of Glasgow *contra* Thermes, *voce* PERICULUM; 18th June 1730, Selwyne *contra* Arbuthnot, *IBIDEM*.

The defender *answered*,

That the pursuer's doctrine, as to mandate, did not apply to the present question. He could not be considered as a mandatar receiving a commission *tanquam quilibet*, but as a person of skill employed and trusted in the way of his profession. A deviation from orders, no doubt, rendered an ordinary mandatar responsible; but, with regard to a person of professional skill, he was only liable where *imperitia artis* was not only apparent, but proved to have been the efficient and certain cause of the loss that had been sustained. Inst. § 7. de Leg. Aquil. L. 9. Pr. et § 1. D. ad Leg. Aquil.

No 8.

A farrier found not liable for the price or value of a horse who died while under his charge, although he did not treat him precisely as directed.