

No 23.  
ship had been damaged; the constituent never having offered the money, or demanded the vendition.

*Replied* for the charger; Mr Gibson having bought the ship by the suspender's order, the latter was properly *dominus*; for *mandatarius* may take the right to be acquired either in his own, or the constituent's name. It was not reasonable for Mr Gibson to take the original right to the ship in the suspender's name, who had not paid the price; nor was he obliged to transmit the vendition, till he got payment. However, the same was in his name only as *fiduciarius* for the suspender; consequently, any damage the ship sustained must fall upon him.

THE LORDS repelled the reason of suspension, and found the letters orderly proceeded.

*Fol. Dic. v. 2. p. 58. Forbes, p. 472.*

1716. July 28. JOHN YOUNG against COLIN FINLAY.

No 24.  
A shipmaster who had exceeded his commission, by buying goods with the proceeds of a cargo, which goods were lost, was found liable for the price of the first cargo.

JOHN YOUNG having shipped on board the Phoenix of Glasgow, Colin Finlay master, a parcel of salmon, whereof Colin grants receipt, and obliges them to deliver the goods to John Young's at Bilboa; thereafter Young gives him commission to dispose of them when he should come there, and takes his obligation, subjoined to the receipt, wherein he binds him to be comptable for the goods, sea-hazard excepted, and he receiving factor-fee: The skipper accordingly sells the salmon at Bilboa, but sent no advice to Mr Young, either at what rate they were sold, or how he should be paid of the proceeds; and having thereafter bought wines with the money, the ship coming from Bilboa, was taken up to England, and there condemned; so that these wines, bought with Mr Young's money, on his account, run the same fate with the rest of the cargo.

The question turning upon this, Whether, in the case above mentioned, the skipper was peremptorily tied down to return money for the salmon, or if, by his commission, he had the liberty, at discretion, to purchase for them such goods as were usually imported from that country, and to be comptable for these?

It was *alleged* for the defender Finlay; That the commission being general, seemed to lay no other tie upon him than what was incumbent to be done by factors in the like case; and, in that view, Young the pursuer ought to prove, that that was to center the salmon precisely into money; and then he behoved also to prove that the defender was obliged to remit the money by bills, or to carry it home in specie; if the last, then the ship having been taken without the defender's fault, and so it being indifferent what was the return he made, he was free. And, as to the first, the defender's commission was general. That it is impossible he could be made liable to do otherways than he did for himself and the rest of his employers; or, if the pursuer had inclined that his salmon should be managed in any singular manner from the rest of the cargo outward

bound, he should have taken the defender otherways obliged than he had done.

No 24.

*Answered* for Young the pursuer; That the obligation is clear, 'that the defender was to dispose on the pursuer's goods.' Now, this can noways be meant of bartering the same with other commodities; because, the constant and current practice among merchants, when any such thing is intended, is to order the neat proceeds of the outwards cargo to be reinvested, and to mention the merchandise in which the same is to be so reinvested; nothing of which was done in the present case; and therefore the above clause of the obligation must be interpreted to be disposing of the merchandise by way of sale, for ready money, which the defender might have remitted or brought home: And, tho' he did indeed get ready money for the goods; yet, he having bestowed that on other goods, the objection still recurs, viz. that this was *ultra vires mandati*; besides, that in this case the defender ought certainly to have sent the pursuer a bill of loading, or letters of advice, that such goods were shipped in return of the salmon upon the pursuer's own account: For, supposing the wines had come safely home, yet the pursuer not having any bill of loading or advice as above, he could have had no pretence to demand the wine, neither could he know what quantity, nor what number he was to call for; and the defender's obligation could have afforded him no action, not having ordered wines, or any other commodities to be brought in return from Bilboa: So that, if the defender had offered the price he received at the port, he would have justly contended that he had satisfied the terms of his commission; and therefore, now that the wines are lost, he cannot be heard to turn over the loss upon the pursuer.

'THE LORDS found, That the skipper having sold the salmon, and bought the wines for the price, without giving advice thereof to the pursuer, is liable for the prices of the salmon.'

Act. *Graham.*Alt. *McKenzie.*Clerk, *Robertson.**Fol. Dic. v. 2. p. 58. Bruce, v. 2. No 29. p. 37.*

1724. July 17.

GEORGE TAYLOR, Merchant in Amsterdam, *against* JAMES JOHNSTON,  
Merchant in Edinburgh.

MR JOHNSTON, by his letter 23d August 1718, to Mr Taylor merchant and factor at Amsterdam, directed him to buy several parcels of goods particularly expressed in the letter, 'and ordered him to deliver them to Mr Andrew Man shipmaster, to be found at Mr Adam Duncan's merchant in Rotterdam, from whence he was to sail with the goods for Scotland, and to take Mr Man's receipt for the goods,' which the letter said should be sufficient.

No 25.

A factor who had employed one to enter goods, instead of doing it himself, was found liable for them, having been seized as not properly entered.