

1736. February 17. Lady ORBISTON against CHARLES HAMILTON.

No 16.

No salaries
due to a fac-
tor without
paction.

IN the process of count and reckoning betwixt these parties, Mr Hamilton craved allowance of L. 330 Scots, for acting three years as Lady Orbiston's factor, by uplifting the jointure payable to her out of the estate of Orbiston.

It was acknowledged there was no express bargain betwixt the Lady and him, when he obtained the factory, anent what reward he was to have for his trouble; however, he *contended*, that some suitable gratification was due to him for his pains, especially considering she had been in use to allow former factors, particularly George Aitkman, the same salary that was then demanded; and, when the defender undertook that business, it was understood he was to be upon the same footing with him.

It was acknowledged, That, in general, the nature of a mandate is gratuitous; notwithstanding of which, the law says, *Sin remunerandi gratia, honor intervenerit, erit mandati actio*; therefore, there was no necessity to make a new bargain, as he came in place of others to whom a salary was given, and of consequence was entitled to the like reward: And that, in executing all commissions whatever, a salary or gratification is implied; *e. g.* merchants have their commissions; the Lords factors have 5 per cent. of all their intromissions, without any previous paction; and lawyers agree, that *negotiorum gestores* are not only entitled to their expenses, but to a remuneration; therefore, it would be hard to deny him as a factor, what he would have been entitled to as a *negotiorum gestor*.

Answered for Lady Orbiston: That, in the year 1723, the defender proposed to her to take a lease of the parks of Orbiston which she liferented, during which he offered to uplift her jointure from the tenants, without any mention of fee or reward; in consequence whereof, she set the parks to him, giving him at the same time a power to raise her jointure, which amounted to about L. 100 Sterling yearly; and while he acted as factor, she allowed him the use of all her kaim, fowl, drags and carriages, worth about L. 5 Sterling yearly; so that he had nigh 5 per cent. of the subject of his intromission (without including the use of Orbiston house) for his trouble, which she thought a sufficient recompence without a salary. And, as no agreement had been made for one, she *pleaded*, That the defender had no title to any, as was found in the process betwixt the Duke of Montrose and Graham of Kilmannan. Neither does the text quoted from the civil law concern the present question; as the case there put is of an honorary which is given or promised, for which, says Ulpian, *Erit actio mandati*, even though it might be thought inconsistent with the nature of a gratuitous contract. The case of merchants who have commission-money without paction, does not apply, as they live by their business; nor is there any similitude betwixt factors appointed by judges, and those named by private persons; more especially, as Lord Stair observes, that the Lords

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of Session were in use either to name the salaries in their factories, or expressly to reserve it till count and reckoning; so that, after it was universally understood that a salary was annexed to such office, there was no necessity of mentioning it in the commission.

Neither can the specialty, on which the defender lays so great stress, avail him, namely, that one of the former factors got a salary; seeing that was in consequence of an express paction. And it might as well be argued, that an allowance for board was due by a major, though without paction; because, perhaps he had paid board to the house where he was maintained immediately before. But, when the fact is set forth, the argument turns strongly the other way; seeing there were two factors interjected betwixt George Aitkman and the defender, neither of whom had any salary.

THE LORDS refused to allow this article, in regard it did not appear that there was a paction for any salary or reward offered to be proven.

C. Home, No 19. p. 42.

1738. February 17.

JOHN RANKIN, Merchant in Ayr, *against* ROBERT MOLLISON, Collector of Excise there.

No 17.

One who contracts *factorio nomine*, is presumed to bind his constituent only, unless the contrary be expressed; and therefore is not personally liable to implement, but only to furnish a sufficient commission so as to bind his constituent.

MR ARBUTHNOT in Peterhead having wrote to Mollison, with respect to some meal he had to dispose of, Mollison, in consequence thereof, entered into a bargain with Rankin anent the purchase of the meal, and wrote a letter to him, wherein he says, That he had a commission from Mr Arbuthnot to dispose of a certain quantity of meal for his account; and then adds, 'And I do agree with you, in his name, that betwixt, &c. he shall provide you 800 bolls good and sufficient oat-meal, &c. to be delivered either at Portsoy or Peterhead, in the option of the said Mr Arbuthnot, who is to have his orders ready at Portsoy, if the ship calls for them.' In consequence of which bargain, Rankin sent a ship for the meal; and, upon its not being delivered, he brought a process against Mollison, founded upon the above letter, for the damage he sustained by the not delivery.

The defence *pleaded* for Mollison was: That, by the whole tenor of the letter, it was plain, he did not intend to subject himself to any personal demand at the pursuer's instance, as he declares therein, That he acted by commission from Mr Arbuthnot, disposes of the meal for his account, and the place of delivery to be at his option; wherefore, as there are no obligatory words upon the defender through the whole of it, the natural construction must be, that Mollison intended only to bind his constituent, and not himself. *See* Huber. tit. *Exerc. act.* § 6. Voet. *De Inst.* § 6. Sand. Decis. book 3. tit. 7. def. 1. The import of which authorities amounts to this, that the obligation of the party con-