

obliged to pay the cloth, and doth only act in name of his master, and therefore the merchant ought to have called for the account from his master within three years, which he has not done till many years, long after his master's death. It was *replied*, That the ticket must oblige him, at least, *docere de mandato*, for his doing in name of his master could not oblige his master, so that if he be not so obliged, the merchant loses his debt, and nobody is obliged. It was *answered*, That he who acts with any mandatar, should know his commission, and if he does not know it, it is upon his own hazard; but if the mandatar act, not in his own name but his masters, he does not oblige himself; and if servants who receive in their master's name should be thus obliged to shew their warrant, it would be of very evil consequence, seeing their receipt can be proved by witnesses within three years, and their warrant would not be so probable.

THE LORDS found, That *post tantum tempus*, the defender was not obliged to instruct his warrant, but the same was presumed to have been known to the merchant, unless it be proved by the defender's oath, that he acted without a warrant, or that he did not apply the cloth to his master's use.

*Fol. Dic. v. 2. p. 158. Stair, v. 1. p. 309.*

1755. July 23. SIR ANDREW MITCHELL *against* MARY GAINER.

MARY GAINER being pursued upon a surgeon's account, for furnishings to her family at London, and the same being referred to her oath, she, *inter alia*, deponed, "That she made no doubt, from the state of John Leitch, her servant, his health, medicines might have been got for him from the shop libelled."

*Pleaded* for her; A master is not liable for medicines furnished to his servant in this manner.

"THE LORDS found, That the articles of the furnishings to John Leitch, the servant, are presumed to be furnished with the defender's consent and knowledge; and therefore found her liable for the same."

Act. *Wedderburn.*

Alt. *J. Dalrymple.*

*J. D.*

*Fol. Dic. v. 4. p. 127. Fac. Col. No 160. p. 241.*

1786. June 21. JOHN SPOTTISWOOD *against* HUGO ARNOT.

THE practice of slaughtering cattle in the places within the town of Edinburgh hitherto used for that purpose, had been long complained of. Many meetings were held by the proprietors of houses in the New Town, in order to obtain relief, at which Mr Arnot attended.

No 271.  
liable personally, and being pursued long after, was not obliged to instruct his warrant.

No 272.  
A master found liable for medicines furnished to a servant with his knowledge.

No 273.  
Mandate presumed. Where one has attended meetings of parties con-

No 273.

cerned in a common interest, unless he explicitly express dissent, his future acquiescence is presumed.

At first it was proposed to obtain subscriptions for carrying through an act of Parliament, by which a sufficient compensation should be provided to the butchers, to be levied by an assessment on the inhabitants; and Mr Arnot, besides contributing a small sum, was extremely active in advancing this scheme.

Afterward it was, in general, resolved to employ Mr Spottiswood, a solicitor in London, to bring forward an act of Parliament for the above-mentioned purpose. Mr Arnot was not present at the meeting in which this was agreed on, nor at any after one; but no other evidence could be adduced to show, that he dissented or disapproved of it. A law was accordingly obtained for removing the butchers, under condition of indemnification within a limited time; which, however, were not fulfilled, the statute not having authorised any method of raising the necessary sums. In this manner, the advantage of the whole proceedings was altogether lost.

Mr Spottiswood then brought his action for the monies disbursed by him, and for a suitable reward of his own services, against the persons who had attended the meetings, and, among others, Mr Arnot; who

*Pleaded*; There are only two grounds in law on which a person can be made liable for the expense of managing or conducting any particular piece of business. The *first* and more ordinary one is, his having employed the agent who managed it, in which case, he is liable *actione mandati*. The *second* is, his having derived a benefit from such management, when he is liable, *actione negotiorum gestorum*.

The present claim, however, cannot be thought to arise *ex negotiis gestis*; because, from an essential error in the conduct of the business, its utility has been entirely frustrated. On the footing too, of a special mandate, it is equally destitute of foundation. Instead of authorising, or even approving the abortive measures which were adopted, the defender was active in forwarding one of a nature totally different; and which, while it would have insured a successful conclusion to the undertaking, would have exposed individuals to no other expense than they chose to incur, or was suitable to their peculiar circumstances.

*Answered*; When men unite together in order to concert an undertaking of common utility, their resolutions must be held to be binding on every one who does not expressly declare his dissent; Scott *contra* Dewar, 5th July 1782.\*

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\* The nature of this case, which has not been reported, was this: Mr Dewar of Vogrie had for some time taken an active part in procuring a law, which was then in agitation, for the emancipation of the colliers in Scotland. He had been preses of many meetings held for this purpose, but had afterwards given notice to Mr Walter Scott, writer to the signet, who had the charge of bringing forward the act of Parliament, that he meant no longer to give it his concurrence. In an action brought by Mr Scott for the expenses incurred by him, the Lords found Mr Dewar liable in that part of the sums claimed which had been disbursed prior to the notification. See APPENDIX.

The persons, therefore, employed in effectuating their designs, are understood to receive an authority from each of those who have at any time concurred in the proceedings; nor can it be allowed to an individual, under pretence merely of his absence at a particular period, to shake himself loose, on an unsuccessful termination of the enterprise, from his obligation. For, in those cases, *Qui tacet, consentire videtur*; and *Qui vult quod antecedit, non debet nolle quod consequitur*; 20th July 1725, Campbell *contra* Creditors of the Equivalent, No 3. p. 9276.

No 273.

The Court considered Mr Arnot's acquiescence to be equivalent to a mandate; and therefore repelled the defences.

Reporter, Lord Swinton. Act. Elphinston. Alt. Dean of Faculty. Clerk, Sinclair.  
 C. Fol. Dic. v. 4. p. 128. Fac. Col. No 275. p. 423.

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SECT. III.

*Qui tacet consentire videtur.*

1662. June 24. HAY against HUME of Blackburn.

ROBERT HAY, tailor, pursues Hume of Blackburn, as representing his father upon all the passive titles, to pay a debt of his father's. The defender *alleged*, Absolvitor, because there was nothing produced to instruct the debt, but an extract out of the register, bearing the bond to have been registered by his father's consent; whereas it is notour and acknowledged by the summons, that his father was dead long before the date of the registration. The pursuer *answered*, The extract is sufficient to instruct the verity of the bond, being in a public register of the session; albeit the defunct was dead the time of the registration, which might have been the creditors' mistake, and cannot prejudice them, seeing *vita præsuntur*, especially now, when through the loss of the registers, principal writs cannot be gotten. The defender opposed his defence, and the decisions of the LORDS, lately, in the like case, concerning the Earl of Errol, because nothing can instruct against any man, but either a writ subscribed by him, or the sentence of a judge upon citation or consent, and this is neither.

THE LORDS refused the extract simply, but ordained the pursuer to condescend upon adminicles for instructing thereof, either by writ or witnesses, who saw the bond, &c.

No 274.

Extract of a bond registered, found not to instruct or prove against those who consented not.