

could not prohibit, specially they being sitting in Parliament in the time; and therefore, in that case, his silence cannot import a consent.

THE LORDS sustained the libel, and repelled the defence, but would not suffer the price of the watch to be proven by the pursuer's oath, but *prout de jure*. See OATH IN LITEM.

Fol. Dic. v. 1. p. 378. Stair, v. 1. p. 119.

No 11.

1663. January 8.

NICOL against HOPE.

No 12.

In a perambulation of marches, it was *alleged* by the defender, That he had built a park dike on a part of the ground challenged by the pursuer, *sciente et astante domino*. *Answered*, Such a slender presumption of consent is not relevant to take away property, neither was it incumbent upon the pursuer to dissent, seeing he knew that what was built upon his ground would become his own.—THE LORDS repelled the defence, but they thought the taciturnity might operate this much, that the builder might remove the materials of his wall, or give to the pursuer the price of the land cut off from him by the park dike.

Fol. Dic. v. 1. p. 378. Stair.

* * * See the case No 49. p. 2200.

1779. November 17.

THOMAS LOMBE against THOMAS SCOTT.

ON the 10th of March 1776, Thomas Scott, merchant in Kelso, commissioned from Thomas Lombe at Rotterdam twenty hogsheads of lintseed for sowing, to be shipped on board the first vessel from Rotterdam to Leith, Berwick, or any of the interjacent ports; mentioning at the same time, that if the lintseed could not be landed before the 11th of April, he did not incline to make any purchase of that kind.

This commission reached Mr Lombe on the 23d of March. At that time there were no ships at Rotterdam destined to the ports specified by Mr Scott, Mr Lombe, however, shipped the lintseed on board a vessel for Newcastle, from whence it might be forwarded speedily, and at a small additional expense, to any of them.

On the 6th of April Mr Scott received Mr Lombe's letter, acquainting him with these particulars, but returned no answer till the 25th; when, upon being informed by Mr Lombe's correspondent at Newcastle, that the goods had arrived, he signified his disapprobation of Mr Lombe's proceedings, and declared his resolution to take no concern in the disposal of the articles sent.

No 13.
Silence of a merchant, to whom goods have been sent contrarily to the commission given by him, imports his homologation of the sender's proceedings.

No 13.

Mr Lombe pursued Mr Scott for the price of the lintseed, with commission, &c.

Pleaded for the defender; In the contract of mandate, any deviation from the precise terms of the commission must acquit the mandant of his obligation; l. 5. D. *Mandati*. In this instance a deviation of the most important kind occurred, by which the goods were sent to a port where the defender had neither correspondents nor customers, and where, of course, the object of the commission could not in any proper manner be attained.

Had the pursuer complied with the mandant's injunctions, his claim might have been supported, although by some misfortune the goods had not arrived within the limited time; but as the loss here could not have existed but from his transgressing the limits prescribed to him, he alone ought to suffer by it.

Answered; The decision of this case must depend, not on the nature of the contract of mandate, as known in the Roman law, but on the general practice and understanding of merchants in transactions of this sort.

When a merchant studying the interests of his correspondent, transmits goods to him without orders, or contrarily to the precise tenor of his commission, the risk attending this falls upon the sender. If, however, he gives immediate information of his proceedings, it is the duty of the correspondent immediately to notify his dissatisfaction, should the adventure be disagreeable to him. His silence on such an occasion is construed into an approbation of the measures adopted by the sender, which no after contingency will entitle him to retract. A contrary idea would be attended with fatal consequences to trade, by relaxing that punctuality of correspondence which is so necessary among merchants.

THE LORDS repelled the defences.

Lord Ordinary, *Gardenston*.

Act. Hay.

Alt. Swinton, Nairne.

C.

Fol. Dic. v. 3. p. 274.

Fac. Col. No 90. p. 175.

SECT. IV.

Of facts inferring knowledge of, and consent to the right challenged.

Effect of consent where the right is not known. Effect of legal steps passing of course. Effect of minority. Effect of payment.

1592. December 4.

SCHAW against HIS TENANTS.

No 14.

ANE fiar, albeit he be witness to ane tack of certain years set by the liferenter, he is not thereby obliged to acknowledge it after his liferenter's decease;