

*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.

No 8. There had been no *imperitia* or improper treatment in the present instance; the draught was innocent and salutary. The addition of treacle, instead of being a deviation, was even necessary, in order to fulfil the pursuer's directions as to the administering of nitre; and as the horse had been *moribundus* when the medicine was given, there was not even a presumption that it had been the cause of his death.

The Judges were of opinion, That the defender had not gone *ultra fines mandati*, but that the mode followed was necessary to fulfil the orders given. Neither did their Lordships think that the abstract principle of responsibility, in the event of a deviation from the mandate, would, in the present instance, have applied; it having been observed from the Bench, That where a person in a profession of skill, adopted measures that were even *extra fines*, he would not, provided these measures were innocent and proper, be liable for the consequences.

The Sheriff of Edinburgh had found the defender liable for a certain sum as the price of the horse; but the Court altered that judgment, assoilzied the defender, and found the pursuer liable in expenses.

Lord Ordinary, *Coalston*.  
Clerk, *Campbell*.

For Lord Monboddo, *J. Boswell, et alii*.  
For Clark, *J. Maclaurin, et alii*.

R. H.

*Fac. Col. No. 118. p. 347.*

1776. December 10.

NASMITH, Petitioner.

No 9.

A WRITER or agent before the Court of Session, prosecuting for payment of his account of business, is not bound to produce his client's mandate, empowering him to manage a particular piece of business.—See APPENDIX.

*Fol. Dic. v. 3. p. 398.*

1779. January 13.

PAISLEY against RATTRAY.

No 10.

RATTRAY wrote a letter of credit, in favour of Nisbet, to Paisley, authorising him to furnish Nisbet with goods to the amount of L. 10, and take his bill for the same; which, if not paid by Nisbet, he would see retired. Paisley furnished the goods, but demanded no bill from Nisbet, on whose bankruptcy Paisley pursued Rattray for the sum in the letter of credit.—THE LORDS found, That in respect the mandatary had not observed the terms of the mandate in taking a bill for the money from Nisbet, no action lay against Rattray the mandant.

*Fol. Dic. v. 1. p. 398. Fac. Coll.*

\* \* This case is No. 7. p. 8223. *voce* LETTER OF CREDIT.