SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

ARNOT—*Appellant.*
STEWART—*Respondent.*

Mar: 17, 1817.

MISREPRESENTATION.—INSURANCE.

A. a merchant in London, having an order in 1810 from B. a merchant in Perth, for goods to be shipped from London for Dundee, sends the goods to the wharf on Saturday 24th Feb. the vessel then taking in goods for Dundee, being the K. (unarmed) which had been substituted by the Shipping Company for the D. (armed), the Company announcing on the 23d and 24th Feb. to all who inquired that the K. and not the D. was to sail on the 25th (Sundays and Thursdays being the regular sailing days). A. dispatches the invoice on 27th Feb. dated on that day, with advice that the goods had been sent by the D. not naming the 24th as the day when the goods were sent to the wharf, and leaving it to be inferred from the date of the invoice that the furnishing was made on the 27th, and that the sea risk did not commence till the 1st of March. The K. sails with the goods on the 25th Feb. and is captured on 2d March by a privateer. Action brought by A. against B. for the price of the goods, and held below that he could not recover. The Judgment affirmed above; the Lord Chancellor being of opinion that if B. had insured upon the representation sent him, he could not have recovered from the underwriter. (*Vid.* Fac. Coll. 25th Nov. 1813.)

Order.

THE Respondent ordered from Redfern and Co., London, by their agent the Appellant, ten puncheons of molasses to be shipped from London for Dundee. The order reached London on the 21st Feb. 1810; and Messrs. Redfern and Co. caused the molasses to

be sent to Miller's wharf on Saturday, the 24th Feb. to be shipped for Dundee. The vessel whose regular turn it was to sail on the next day was one called the *Defiance*. But on Friday, the 23d February, the Shipping Company, as appeared from the evidence of the clerk, had resolved to substitute a vessel called the *Kinloch*, and that was the vessel announced on the 23d and 24th, for sailing on the 25th, and which did sail on that day with the goods in question, the 25th being Sunday, a day on which the mail does not go from London. On Tuesday the 27th Feb. the invoice with advice was sent from London, dated on that day, and having at the end these words "To Miller's wharf, for the Defiance, "p. Dundee." The notice, instead of reaching the Respondent on the evening of the 27th, as it would have done if it had been dispatched on the 24th, did not reach him till the evening of the 2d March. On the 10th March he sent a letter to Edinburgh, directing his brokers to insure, &c. per Defiance from London to Dundee, stating that the invoice was dated the 27th Feb. and that he would not allow more than the usual premium; and received for answer that it could not be done at the usual premium, as the day on which the vessel sailed had not been mentioned. The Kinloch was captured on the 2d March by a French privateer.

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Feb. 24, goods sent to wharf.

Advice not sent till Feb. 27.

Order for insurance.

Goods captured.

The Respondent having refused to pay for the molasses, the Appellant, as agent for Redfern and Co. brought an action for the price in the Court of Admiralty in Scotland, and obtained judgment for the amount; but the cause having been brought by advocation before the Court of Session, that

Action for the price.

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Interlocutor Jan. 22, 1813, for the Defender.

Court ultimately gave judgment against the claim and in favour of the Respondent, and Arnot appealed.

The points chiefly insisted upon for the Appellant were, that his constituents having delivered the goods at the wharf had nothing further to do with the transaction; that the delay in sending the notice had no effect with respect to insurance, since Stewart, although he had notice on the 2d March, did not attempt to insure till the 10th; and that as these vessels often accomplish the voyage in as short a time as the post conveys letters by land, a person intending to insure ought not to wait the arrival of a letter of advice; and that as to the name of the ship, Redfern and Co. were not bound to watch the operations of the Shipping Company, or to warrant that goods entrusted to a shipping company should be conveyed in any particular ship belonging to that company, even although they intimated that it was meant to send the goods by a particular vessel; and that merchants ought to adapt, as they usually did, the form of the insurance to such accidents as the substitution of one ship instead of another, by insuring "per ship or ships;" and the cases of *Heseltine v. Arrol,* Fac. Coll. Jan. 15, 1802—and *Elton v. Porteous,* Fac. Coll. Dec. 13, 1808—were cited.

For the Respondent it was contended that the notice sent to him was not such as to enable him to make a valid insurance, that from the date of the invoice he was led to believe that the goods were sent to the wharf only on Tuesday, the 27th Feb. and that, as Thursdays and Sundays are the days

on which the vessel sails from the wharf; the sea risk had not commenced till Thursday, the 2d March. If that had been the case, there was no improper delay in not insuring till the 10th, as the vessels are not considered as out of time in eight days, though they often perform the voyage sooner; that supposing an insurance had been effected, the Appellant could not have recovered from the underwriter (and it made no difference when a merchant was his own insurer) for two reasons: 1st, Because the representation must have been that the risk did not commence at soonest till the 27th February, whereas it had in fact commenced on the 25th. 2d, Because the representation must have been that the goods were sent by the Defiance, an armed vessel, whereas they were in fact sent by the Kinloch, an unarmed vessel. That Redfern and Co. having specified a particular ship, were answerable that the goods should be sent by that ship, or at least that at the time when the goods were sent to the wharf the ship specified was that in which the Company then intended to ship them: and that if they had inquired on the 24th Feb. they would have learned that it was intended to send the goods, not by the Defiance, but by the Kinloch; and the case of *Andrew v. Ross*, 6th Dec. 1810, was cited.

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Mr. Leach and *Mr. Harrison* for the Appellant; *Sir S. Romilly* and *Mr. Adam* for the Respondent.

Lord Eldon, (C.) Being of opinion that if the Respondent had insured upon this representation

Judgment. Mar. 17, 1817.

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he could not have recovered from the underwriter, I propose to your Lordships to affirm the judgment.

Judgment AFFIRMED.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SHEPPARD—*Appellant.*
WATHERSTON and others—*Respondents.*

March 7, 24, 1817.

GRASS FARM.—RENT, &c.

CONTRACT for purchase of lands, 100 acres arable, 700 acres pasture; the purchaser's entry to commence at Whitsunday, 1807, and that he is to have right "to *the* "*crop and year* 1807," and disposition, assigning "*the* "*rent for crop and year* 1807." The farm at the time of the sale in possession of a tenant at a rent payable one half at Candlemas, the other half at Lammas, in each year. Held that the seller, not the purchaser, was entitled to the rent payable by the tenant at these two terms in 1807. N. B. The purchaser obtained possession of the grass and houses at Whitsunday, 1807, and of the arable land after the separation of the crop from the ground in that year.

ON the 31st Dec. 1806, the Appellant purchased the lands of Kirktonhill from the Respondent, Elizabeth Watherston and her husband for 7000*l.* of which 2000*l.* was to be paid at Whitsunday, 1807, and 5000*l.* in five years thereafter, but bearing interest from Whitsunday, 1807. In the con-