

1758. *January 20.* ROBERTSON, COUTTS and COMPANY *against* WILLIAM BAILLIE.

(Reported by Lord KILKERRAN to the Court.)

“ ROBERTSON, COUTTS, and Company, merchants in Rotterdam, brought their action before the high Court of Admiralty, against William Baillie of Brechin, for the payment of 874 guilders, as the balance of his account current, which *inter alia* comprehended the price of sixty ankers of brandy, and three ankers of geneva, which the defender had commissioned them to ship for his account, aboard the vessel called the Three Brothers of Aberdeen, Charles Leys, master, and which had accordingly been so shipped, though the vessel upon her arrival on the coast of Scotland, hovering off Tod’s Head, having her whole cargo aboard, and among the rest the foresaid spirits, was seized by the officers of the revenue, and carried into condemnation.

“ To this article, in the account pursued for, and which is the only article to which exception was taken, it was for the defender objected, that he could not be liable for the spirits, because the pursuers had not only failed to execute the commission given them, but had directly counteracted the same, and were, therefore, answerable for any disaster befalling the goods. For understanding which, it will be necessary to state the fact.

“ Your Lordships will then know, that by the letter of commission, dated 20th August, 1750, *O. S.* the defender desires the pursuer “ to take the master’s receipt for the brandy and Geneva deliverable off the Todshead, and if he will not grant it, do not ship any for me ; advise me how soon you get his receipt, that I may have an outlook for the vessel on the coast.”

“ It would appear that Leys the master was unwilling to give a receipt, bearing the spirits to be deliverable off the Todshead, and remonstrated against it to the pursuers, as no other person concerned in his cargo had asked such a thing ; and as quite needless, as he assured them that not only the spirits, but his whole cargo, was to be delivered off Todshead to the several persons interested in the cargo ; and upon these assurances of Leys, the master and the defender took the freedom, notwithstanding the precise terms of the commission, to order the spirits to be shipped at Campvere, and of this they acquainted the defender by their letter of the 22^d September, 1750, wherein they also say, that they believed it may be eight days before he sails from Campvere ; and add, that they had wrote their friend there to get him if possible to sign a receipt for their goods, deliverable at Todshead for security’s sake, and along with this they sent to the defender a particular invoice of the casks and marks.

“ To this letter of the 22^d September, which must in the course of the post have come to hand nigh two months before the ship came, the defender made no reply which the pursuers say they considered as an acquiescence in what they had done. The first and only letter he wrote them after the receipt of it was on the 19th November, after the ship was seized, and then he tells them that the ship was seized, that he did not conceive himself concerned, and that they might employ whom they would to take care of their interest.

“ It happened that the friend to whom the pursuers had wrote to procure if possible the master’s receipt, obliging him to deliver the spirits off the Todshead, did

procure such receipt from the master upon the 30th September, but it is true that the pursuers omitted to acquaint the defender of their having got such receipt.

“ In the course of the process before the Admiral, wherein the question turned upon this point, how far the pursuers had failed in observing the terms of the commission, particularly in not giving notice to the defender of their having procured the master’s receipt, which by the commission they were enjoined to do, it was *inter alia* alleged for the pursuers, as an evidence of the defender’s acquiescence in the notice they had given him by their letter of 22^d September, as sufficient in place of all other notice, that after he had received the pursuers’ letter of 22^d September, he had given orders to some of his confidants residing upon the coast, to keep an outlook when the ship should arrive off the Todshead, and bespoke boats to be ready on a call to assist in smuggling the cargo, which accordingly they had attempted but could not accomplish, by reason of a storm which drove the ship from her anchors out to sea, and which at last, upon her attempting a second time to make the Todshead, was with her whole cargo seized by the Customhouse officers.

“ This fact the defender denied, alleging, that though he had bespoke boats, that was only done upon his giving the commission, when he was in hopes that the goods were to come in consequence of his letter of commission, and that the terms of his commission were to be observed, which cannot import any acquiescence in what the pursuers had afterwards done in direct contradiction to the terms of his letter of commission.

“ And the judge having before answer allowed a proof of the several allegations, he, on advising the debate and proof, pronounced a long interlocutor, which you have ingrossed in both informations, assoiling the defender, and by an after interlocutor, he decerned the pursuers in the expense of extracting the decret, and the process now before your Lordships is a reduction of this decret.

“ The ground on which the judgment is laid, is their having failed to give notice to the defender how soon they got the master’s receipt. Taking the commission strictly, and according to the letter, the commission was counteracted by the very shipping the goods before the receipt was got ; but on this article, the judge has done full justice to the pursuers, when, by the first words of his interlocutor :—
“ In respect the pursuers had sometime after the shipping got the receipt, he finds it proven, that the pursuers had, in terms of their commission, shipped the goods on the 21st August, and the interlocutor is solely laid on this, that they had never advised the defender of their having got such receipt, which, whether it be sufficient to support the judgment under the circumstances of the present case is the question. As to what the Judge did also find, that the pursuers had not proved their allegation, that after receipt of their letter, the defender had employed his confidants on the coast to assist in taking the goods from the ship ; the interlocutor cannot be said to be laid upon that, as it is no more than his throwing that circumstance out of the case, as not proved, though that is also to be subjected to your Lordships’ consideration.

“ First then, with respect to the point on which the judgment is laid. It is pled for the defender in support of it, that in all commissions, the factor is by law bound to follow strictly the terms of the commission in every circumstance, more especially in matters of commerce.

“ That it may be true, that where commissions are given in general, it may some-

times happen that the factor must have a liberty to judge according to circumstances, but where the commission is special, the factor must comply with the precise terms of it, as the constituent may have had reasons which may not be known to the factor, or he is answerable for the consequences ; and a stronger, or plainer instance of counteracting the terms of the commission could not be, than what occurred in the present case, where the orders were precise, admitting no dubiety ; and some decisions were appealed to, as applying to the present case.

“ That the pursuers might have given notice to the defender, when they got the master’s receipt upon the 30th September, is what cannot be denied ; but the answer the pursuers make, that their omission so to do can be of no consequence, as it was quite immaterial, after the notice they had given the defender by their letter of the 22d September, whether they gave notice of the master’s receipt or not.

“ They admitted that there might be cases in which the factor is bound precisely to observe his orders, and into the reasons of which he is not to enquire. But it was said for the pursuers that the present case was none of them, for that in this case the commission itself bears the reason, for the particular instructions given in it, *viz.* that the defender might have an outlook for the vessel upon the coast, these are the very words of the commission, and what better notice could he have got for that purpose, than the notice he got by the pursuer’s letter of the 22d September ; by which he was as much put upon the watch, as he could have been by his being afterwards acquainted that the master had granted that receipt.

“ It has been observed, that no return was made by the defender to this letter for two months, nor till after the goods were seized ; and it is a rule among merchants, that where a factor apprises his constituent of his conduct, and gives his reasons for not strictly observing the commission, if the constituent make no return, he is supposed to acquiesce. Now, the pursuers, by their letter, acquainted him that they had shipped the goods on the master’s verbal assurance, and that the ship was soon to sail : they add, it is true that they had wrote their friend to try to get the master’s receipt, but the defender must have seen it to be at least doubtful whether such receipt would be got or not, and his making no return implied an acquiescence, whether it should be got or not ; and if that is true, that *esto* the receipt had not been got, his conduct was understood to be approved of, it would be hard to make them suffer the loss for not acquainting the defender that they had got the receipt, which, for the reasons given, they thought unnecessary.

“ As to the two decisions referred to for the defender, as applicable to the present case, that of *Ogilvie and Joshua Harle & Company*, and *Selvine against Arbuthnot*, I do not find them taken notice of in the case for the pursuers, but answers were made to them in the minutes of debate, on which the case was taken to report ; and I shall shortly mention them.

“ The case of *Ogilvie and Harle* was, that *Ogilvie* had commissioned sugars from *Harle*, which he ordered him to ship if the convoy was not sailed, and if it was sailed, to wait the next convoy, and *Harle* sent them without convoy, &c. &c.

“ And the case of *Colonel Selvine and Bailie Arbuthnot* has nothing to do with the case.

“ So much for the point on which the interlocutor can only be said to be pro-

perly laid; and if the pursuers prevail, no matter whether the pursuers have or have not proven their allegiance, that after the defender had received the pursuers' letter of 22d September, and was thereby apprised of the whole circumstances of the case, he had employed his friends and confederates on the coast to keep an outlook for the ship's arrival, and that they might have boats prepared in order to receive out the goods, which, if true, was by the pursuers pled as a demonstration of his acquiescence in the pursuers' conduct, and that he had then no thought of abandoning the goods; I say, if the pursuers prevail on the first point, it is immaterial whether they have proven this or not, but as the Judge Admiral has found it not proven, this is also submitted to your Lordships' consideration.

“ And on this article, the single question is, at what time it was that the defender gave these instructions to his friends. The defender says it was just after he had given the commission on the 20th of August; and when he expected the terms of his commission were to be observed. On the other hand, the pursuers say it was after the defender must have received their letter of the 22d September; and as your Lordships have a full copy of the proof, it is needless for me to make any observations on it; only this much I cannot but say, that it appeared to me that the proof was more pregnant for the pursuers' allegation.

“ The pursuers' letter is wrote on the 22d September, N. S. which the defender must have got by the 23d, O. S. and what say the witnesses, that in the beginning of winter, and some say after harvest, others between Michaelmas and Martinmas, others a fortnight after Michaelmas.

“ And all we have in opposition to this is, that some of the witnesses say it was in harvest.

“ Another matter I cannot help taking notice of, that the defender has alleged that his orders, whenever they were given, were not peremptory, but that before his friends should do any thing, they should acquaint him, when he would give particular orders; an allegiance *felo de se*.”

[Here LORD KILKERRAN'S report ends.]*

* The following are copies of the interlocutors pronounced by the Judge Admiral, and the Lord Ordinary, respectively.

The Judge Admiral “ found it proven, that in terms of the defender's letter of commission, of date 21st August 1750, the pursuers did ship on board Charles Leys' ship, at Campvere, and did get from the said Charles Leys a receipt of date the 30th September, N. S. whereby, in terms of said letter of commission, the said Charles Leys obliges himself to deliver said spirits off the Todshead; but finds it proven that the pursuers never did advise the defender of their having got such receipt until the month of December 1750, after the ship was seized by the officers of the revenue: and finds, that in terms of said letter of commission, the pursuers were bound to have advised the defender of their having got the receipt above mentioned, which they had time enough to have done before the arrival of the ship on the coast of Scotland, which happened some time in the beginning of November, 1750: and finds that the pursuers have not proven that the defender did intend, upon the letter of advice from the pursuers, 22d September, 1750, to receive from on board Charles Leys' ship, the spirits in dispute if said ship had not been seized by the officers of the revenue, therefore assolvyies the defender, &c.”

Lord Kilkerran, in altering the interlocutor reducing the Judge Admiral's decree, pronounced the following interlocutor:—“ The Lord Ordinary having considered that at the time the goods were sent to Campvere to be shipt, the pursuers acquainted the defender thereof, and of the master's declining to give a receipt for the same in the terms of the commission, and of the reason of his refusal; but that notwithstanding he really was to observe the terms of the commission, as his whole loading was to be delivered at the Todshead; and that by the same letter they transmitted to the defender a particular invoice of the goods shipped; and that until nigh two months thereafter, and when the ship and cargo were seized, for hovering off Todshead, the defender did not signify his disapprobation; but, on the contrary, and *separatim* having considered that the proof adduc-

January 20, 1758.—The Lords reduced the decret, and pronounced, in terms of the Ordinary's interlocutor.

1758. *January 25.* HENRY GALLOWAY, Merchant in Stirling, *against* BLACK and COMPANY, Merchants in Glasgow.

November 1752.—THE pursuer consigned 39 pieces of linen, and 6 pieces of sheeting to the defenders, to be sold by them, as his factors, for his behoof.

1753. *March 21.*—Of this date the pursuer wrote to the defenders, desiring to know what was become of these goods. They wrote him in answer, (*March 26,*) that 26 pieces were sold; but without mentioning to whom, or in what manner. The pursuer afterwards wrote different letters to the defenders, inquiring after his goods. These letters were not produced, but it was proved that they had been written, and had been received by the defenders.

1754. *March 13.*—Of this date the defender Black, in answer to a positive demand from the pursuer, to be informed of the fate of the linens, wrote as follows: "That the parcel sold in December 1752, had been sold to Alexander Smith, and that he had stopped payment.—That the rest of the linens were sold; but he thinks some of the buyers will be good and some of them not."

In answer to this letter the pursuer wrote to the defenders, complaining that they did not tell him when Smith had stopped payment, how much had been bought by him, or when the price was payable; and concluding that they ought to be liable to him for Smith's debt: And further, desiring them that they would send him a particular account of the sales of the whole of his linens.

March 18, 1754.—Of this date the defender Black wrote That fifteen pieces had been sold to the said Smith, 13th December, 1752; twelve pieces to James Bruce, the 16th March, 1753; and eighteen pieces to William Mitchell and James Bruce, on the 18th August, 1753.

March 28, 1754.—Afterwards, of this date, Black informed the pursuer that Bruce had failed in his circumstances, and had involved Mitchell so much as to make him also stop payment.

It appeared that before the defender sold a part of the goods to Smith he had obtained a *supersedere* from his creditors, and that the defenders were aware of this. They ALLEGED, however, that notwithstanding this he was still in good credit.

With regard to the parcel sold to James Bruce, on 16th March, 1753, it appeared that the purchaser had granted bills for the price, payable at six and nine months, which, consequently, became due in September and December 1753.

The third parcel again sold to Bruce and Mitchell, in August 1753, were sold upon twelvemonths' credit.

ed is more pregnant for the pursuer's construction of it, that after this letter of the pursuers fell, in the course of post, to have come to the defender's hand, he employed persons to keep a look out for the ship, and how soon she appeared, to send off a boat, and which was accordingly attempted to be done when the ship appeared, though, by reason of the storm, the boat could not go to sea, than it is for the construction put upon it by the defender, reduces the decree, and finds the defender liable for the price of the goods in question," &c.