[Fac. Coll. Vol. xvii., p. 462.]

PETER ARNOT, Merchant in Leith, agent for Redfern and Nettleship, Merchants in London, . . . } *Appellant;*

PATRICK STEWART, Merchant in Perth, *Respondent.*

House of Lords, 21st March 1817.

SALE—DELIVERY—RISK.—Molasses were ordered by the respondent, merchant in Perth, from the appellant's constituents, merchants in London, which order was received on the 21st February, and the goods were sent to the shipping wharf on the 24th; but no notice and no invoice were sent until the 27th, and this invoice bore that the goods were sent by the "Defiance," whereas, they were sent by the "Kinloch," which sailed on the 25th February, and was captured at sea. Held the buyer not liable for the price, as the invoice led him to believe that the risk was only to commence on the 27th. Affirmed on the ground that had the buyer insured, he could not have recovered under this representation.

The respondent ordered from Messrs Redfern and Nettleship, Merchants in London, the appellant's constituents, ten puncheons of molasses, to be forwarded to him at Perth. This order was received on the 21st of February. The goods were shipped on the 24th of February; but they did not despatch notice or send invoice until the 27th February. The invoice bore that the molasses were sent per the "Defiance," but the goods were sent to Dundee by the "Kinloch." The "Kinloch" sailed from London on the 25th February; and before the respondent was informed of this, she was seventeen days at sea, which precluded the possibility of obtaining insurance on the goods with her, for the voyage was usually completed in seven days; sometimes shorter. It turned out that she had been captured by a French privateer; and the respondent, had he insured the goods per the "Defiance," could not have recovered, from radical defect in the essentials of the policy.

The appellant's constituents insisted that the loss fell on the purchaser, "as the moment the goods are delivered to "the wharfinger, they cease to be ours, nor can we have "any interest in them."

Action having been brought for the price, the respondent stated in defence, that he was free from all liability, in consequence of the appellant's constituents having failed to give due notice of the shipment, and, also, in consequence of acting

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erroneously in stating the goods had been shipped by the "Defiance," whereas they were sent by a different vessel.

The Judge-Admiral, before whom the action was brought, pronounced this interlocutor:—"Having resumed considera-" tion of the petition for the pursuer, with defences in the " cause, &c.; in respect that the pursuer's constituents noti-" fied to the defender that they had sent to Miller's Wharf " the goods libelled for the 'Defiance,' and did not say they " were actually put on board that vessel, and that it is proved " the goods were sent, and that the 'Defiance' was then first " in commission for sailing: Finds that the pursuers are " nowise liable for the goods having been put on board the " 'Kinloch;' repels the defences, decerns in terms of the " libel, and finds expenses due, subject to modification."*

June 7, 1811.

On reclaiming petition prepared by counsel, the Judge-Admiral adhered, issuing the note below.†

* Note by Judge-Admiral:—

"Nothing is more common than goods being sent by a smack " from London, different from what one is led to suppose they " were to be sent by, and sometimes in two or three smacks, " and on that account, insurance is made on the goods per " smack or smacks. The pursuers were to blame in delaying " to notify till the 27th of February, the molasses having been " sent to the wharf on the 24th. But the cause does not turn " upon this, because if they had given due notice, it would have " made no difference."

† Judge-Admiral's Note:—

"Redfern and Nettleship, by order of Patrick Stewart of " Perth, sent on the 21st of February 1810, goods to Miller's " Wharf, London, for him, to be sent by one of the smacks. " The smack then lying ready for sailing was the 'Defiance;' " but the shipping company shifted her and substituted the 'Kin-" loch' in her place, on board which Mr Stewart's goods were " sent. Redfern did not give notice of the goods being at the " wharf till 27th February, and in the letter, said that the goods " were for the 'Defiance,' but did not say when they had been sent " for the vessel. The 'Kinloch' sailed with the goods on the 25th " February, and was taken, but the 'Defiance' arrived safe. In " an action for payment, Stewart pleaded that he was not liable, " because the goods had not been sent per the 'Defiance,' and " delay had occurred in giving notice.

"I have already observed that it was negligent and unmercantile " to delay till the 27th, giving the petitioner notice of goods having " been sent to the wharf for the 'Defiance' on the 21st, or even on " the 23d of February; and had any loss been occasioned by such

The judgment was brought under the review of the Court of Session by advocation. A proof was allowed and reported. And the Lord Ordinary (Bannatyne) having heard parties on the import of the proof, repelled the reasons of advocation, and remitted the cause *simpliciter*. On representation, the Lord Ordinary adhered, issuing the following note.* June 11, 1812.

" delay, I would have made the constituents of the pursuer liable " for it, *ex. gr.* Had the 'Defiance' sailed in the meantime with " the goods, and had been lost or captured before notice had been " given of their being aboard, the judge would have held the pur- " suers as the underwriters. But no evil whatever arose from the " delay, nor from the misrepresentation said to be communicated " by the letter of the 27th, which, by not mentioning when the " goods had been sent to the wharf, left it to be inferred that they " had only been sent that day; for, had Redfern and Nettleship " given notice of the day they sent the goods to the wharf; had " they mentioned in their letter of the 27th, that the goods had " been sent there on the 21st or 23d, it would not have made any " difference; still the notice would have been that the goods were " at the wharf for the 'Defiance,' and if insurance had been made, " it could not have covered goods aboard the 'Kinloch.' But the " loss arises from the goods having been not aboard the 'Defiance,' " but aboard the 'Kinloch,' which was taken. The judge, there- " fore, cannot make the pursuers suffer for a negligence that did " no harm. The only point in this case is, since the pursuers did " not write till the 27th, were they bound to have inquired at the " wharf whether the goods had been despatched or not? If they " had done this, they might have discovered that the goods had " been sent by the 'Kinloch;' but the judge apprehends that they " were not bound to make this inquiry, that in practice they did " all that was incumbent on them in sending the goods to the " wharf; *vide* Heseltines *v.* Arrol and Co., 15th January 1802; Fac. Coll. et M. p. 10,111. " Elton, Hammond and Co., *v.* Porteous and Dewar, 13th December Fac. Coll. Vol. " 1808, that they were entitled to trust to their being sent by the xv., p. 48. " 'Defiance,' and to run all risks for not having communicated the " goods being at the wharf. For these reasons the judge refused " the petition, and decerned for payment of the goods."

* Note by Lord Ordinary:—

" From the proof led, and the productions now made in this " case, it appears, in point of fact, 1st, That the goods in question, " which the Judge-Admiral, by a note subjoined to his judg- " ment, supposed to have been sent to the wharf by the persons " who made the furnishings on the 21st, were sent no earlier " than the 24th February. 2d, That at the time of their being " sent, it was the intention of the agent for the Dundee Shipping

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The respondent brought this interlocutor under the review of the Inner House (Second Division), by reclaiming petition.

" Company to have sent them by the smack 'Defiance,' though " by a subsequent change of arrangement they were sent by " the 'Kinloch.' 3d, That the advice given Mr Stewart as to " the despatch of his goods by Messrs Redfern and Co., was, by a " letter of Tuesday 27th, accompanied by an invoice, a note sub- " joined to which, stated the goods as sent to Miller's Wharf, 'for " 'smack "Defiance" of Dundee,' and the first which, when the " goods were sent, it had been in view to despatch. 4th, While it " is admitted that no post leaves London on Sunday, and it appears " that the manifest of the smack 'Kinloch,' in which the goods in " question were, in fact, shipped, and which sailed on Sunday the " 25th, was only despatched on Monday the 26th, and could not " reach Dundee earlier than the 1st of March; that the letter of " advice and accompanying invoice were, as above stated, des- " patched on Tuesday the 27th, and must have been received by " the respondent on the 2d March.

" Under these circumstances, the ground of imputing undue " delay to Messrs Redfern and Co., as to the time of sending advice, " which the Judge-Admiral supposed to have been from the 21st " to the 27th February, is materially narrowed, from its being now " established, that the persons employed to furnish them had not " sent the goods to the wharf earlier than Saturday the 24th, so " that Monday the 26th would seem to be the earliest day on " which Redfern and Co. could have sent advice.

" Still, had it appeared to the Lord Ordinary, that the omission " to insure was a necessary consequence of that delay, however " short, he might have probably followed out the intention said to " have been at one time expressed by Lord Gillies, of calling for a " report of merchants as to whether it was or was not to be con- " sidered such an undue delay, as was in practice understood to " throw the risk of any loss imputable to it, on the agent or other " person bound to give advice. But concurring with the Judge- " Admiral in opinion, that, as the representer had sufficient time " to have effected insurance on the goods after receipt of the invoice " and letter of advice on 2d March, and, in fact, several insurances " were effected on goods shipped by the 'Kinloch' after that date, " while, by making such insurance on goods by smack or smacks " the usual and accustomed way, even when the advice, as in this " case, names a particular smack, as that by which they are in " view to be sent, the circumstances of their coming to be shipped " in the 'Kinloch' in the place of the 'Defiance,' would not have " prevented the representer recovering under it. That the loss " which has here occurred, by the goods being shipped in the 'Kin-

On advising which, the Court pronounced this interlocutor: —"Alter the interlocutor reclaimed against, advocate the "cause, assoilzie the petitioner, and decern: Find the peti- "tioner entitled to his expenses, allow an account thereof to "be given in, and remit to the auditor to tax the same, and "to report."* On further reclaiming petition, the Court adhered.

Jan. 26, 1813.

Nov. 25, 1813.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1. The constituents of the appellant having sold goods, and made delivery of them in due form, are entitled to obtain payment of the price.

2. The defence of the respondent, considered in a general point of view, is a complaint that, by a delay in notifying the shipment of the goods, he lost his opportunity of effecting insurance. It is answered, that in a case in which it is admitted that the vessels often accomplish their voyages in as short a time as the post conveys letters by land, a party meaning to effect an insurance ought not to wait the arrival of the letter of advice. By doing so, he demonstrates that he never had any serious intention to effect insurance. The complaint about insurance, therefore, is a groundless pretext, to which no attention is due.

3. The delay to send off advice of shipment of goods from Saturday to Tuesday thereafter, cannot in reason or justice have the effect to produce a forfeiture of the right to obtain payment of the price. To say that the delay may prevent insurance from being effected, amounts to an admission that the remark already made is correct, that a Scottish purchaser intending to effect insurance on goods commissioned from London, ought not to wait for the arrival of a letter advising that the shipment has been made.

"loch,' and that vessel being captured on the 2d March, cannot be "considered as the necessary consequence of the advice being sent "on the 27th in place of the 26th, under which view he did not "feel the calling for such a report to be necessary or proper."

* Opinions of the judges:—

"The Court altered the judgment on these grounds, 1st, That the invoice misled the buyer to believe that the risk was not commenced till the 27th, and that an insurance on that information would have been ineffectual, and 2d, That although no insurance was here made and avoided, the buyer was entitled to use his discretion upon just information."

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4. It is ascertained, that in practice, a London merchant is not bound to warrant that goods intrusted to a shipping company, shall be transmitted to Scotland by a particular vessel belonging to that company. Although the merchant intimates, that the goods are meant to be conveyed by one vessel, yet, if the company put them on board another, he is not held to be culpable on that account; and merchants must adapt, to such accidents, the form in which they effect insurances. If a merchant, sending goods on Saturday, do not forfeit his right to the price by a delay to send advice of the shipment till Tuesday thereafter; and if the London merchants are not bound to watch over the operations of shipping companies, it follows, that the constituents of the appellant did nothing improper, when they prefixed to their letter of Tuesday 27th February 1810, the true date on which it was written, and did not attempt to find out, and intimate the particular time and manner in which the shipping company had transmitted the goods in question.

Pleaded for the Respondent.—1. *Periculum rei venditæ, necdum traditæ, est venditoris*, if there has been any negligence on his part, in consequence of which the vendee is not enabled to take suitable precautions against loss. The vender is guilty of negligence if he does not notify, in due time, that the goods sold have been shipped, and are exposed to the perils of the sea. Now, Messrs Redfern and Nettleship, the appellant's constituents, did not give due notice; for though the molasses were shipped on the 24th February, they did not despatch notice till the 27th February, so that no notice was given for a period, during which the voyage from London to Dundee is sometimes completed, and a great part of it is always performed. By Redfern and Nettleship's negligence, the goods were in risk during all that period, while the respondent was not enabled to guard against loss.

2. If the vender gives false information to the vendee, by which any precautions taken by the latter against loss will be rendered ineffectual, the peril lies on the vender and not on the vendee. But Redfern and Nettleship gave false information to the respondent on two points, either of which would have been fatal to any insurance which might have been effected by him; *First*, The invoice was falsely dated on the 27th of February, instead of the 24th of February, when the goods were actually shipped; and an underwriter insuring on the representation, that the goods had not been furnished, and, therefore, could not have been put

in hazard, till on or after the 27th of February, would have been liberated, on its appearing, that the hazard had commenced three days before. *Secondly*, Redfern and Nettleship stated, that the goods had been shipped on board of the "Defiance," which was an armed vessel, whereas they were shipped in the "Kinloch," which was unarmed; and any insurance proceeding on this false information, must have been void. Then information, too, in this particular, was altogether without excuse, because they were not entitled, without previous inquiry, to specify the "Defiance" as the ship by which the goods were to be carried. If they had inquired, they *must* have learned, that the "Kinloch" was to be the ship; one of the two alternatives, therefore, of necessity, follows, either, that they did not inquire, in which case, they ought not to have mentioned the "Defiance," or if they did inquire, they gave false and erroneous information.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said—

"My Lords,

"Being of opinion, that, if the respondent had insured upon this representation, he could not have recovered from the underwriter, I propose to your Lordships to affirm the judgment."

It was ordered and adjudged, that the interlocutors complained of, be, and the same are hereby, affirmed. And it is further ordered, that the appellant do pay, or cause to be paid to the said respondent, the sum of £50, for his costs, in respect of said appeal. Journals of the House of Lords.

For the Appellant, *Isaac Espinasse, C. Abbott.*

For the Respondent, *John Greenshields, Fra. Horner.*

Lieut.-General SIMON FRAZER, sole surviving acting Trustee under the settlements made by the Hon. Lieut.-General Simon Frazer, late of Lovat, now deceased, } *Appellant.*

ALEXANDER MACDONELL of Glengary, *Respondent.*

House of Lords, 28th March 1817.

JUDICIAL SALE—CONSIGNATION—ADJUDICATION—CALCULATION OF INTEREST.—The appellant's author was the purchaser at a judicial sale of the estate of Abertarff, and the appellant objected to pay or consign the balance of the price, until the debts still affecting the estate sold were discharged. The Court of Session