

was saved. THE LORDS found the freight due, deducting as much thereof, as the merchant should instruct he was damnified by the landing of the ship in the place where she broke, and tried the damage, by comparing the price of the loading as it was sold in the place it was cast in, with the prices it would have given in Aberdeen, which was the port to which they designed.

No 44.

*Fol. Dic. v. 2. p. 59. Fountainhall, MS.*

1732. February 12.

LUTWIDGE against GRAY.

By charter party, a shipmaster having become bound to transport a loading of tobacco from Virginia to Port Glasgow, and the merchant to pay a certain freight per tun; the ship in her return was wrecked on the coast of Ireland, but most of the cargo was saved and got upon shore, some of it much damnified. So soon as the freighter got notice of this disaster, he sent an agent to Ireland, who, upon paying salvage, got the goods delivered to him; some of them he shipped for Bristol, in order to be abandoned to the insurers, the remainder he carried straight to Glasgow. In a process for the freight, the LORDS found, That the contract of affreightment was dissolved by the total loss of the ship, albeit some of the shipwrecked goods were saved out of the shipwreck; and that the freighters indorsing the bill of lading to the insurers did not subject the freighters to any freight for the goods recovered by the insurers; but found the merchant liable for the freight *pro rata itineris* of such of the goods as were brought to Glasgow, notwithstanding that part of the tobacco was found damnified and burnt there. See APPENDIX.

No 45.

*Fol. Dic. v. 2. p. 46.*

1802. January 15. HESLITINES against ARROL and COMPANY.

In the month of January 1800, Arrol and Company, grocers in Edinburgh, gave an order for three chests of tea to the agent of Messrs Edward and Thomas Heseltine, wholesale tea-dealers in London. They accordingly sent to the wharf at London the tea, as commissioned to be shipped for Arrol and Company by the Berwick Shipping Company, who employ a number of packets in the trade between London and Leith.

They were informed, that the goods would be put on board the Kelso Packet; Robert Moir, master. Accordingly, the invoice was made out in these terms, and a letter of advice to this effect was dispatched, (6th February 1800,) to the defenders. Upon sending, however, again to the wharf in the evening, they learned from the wharfinger, that the tea would be sent by the Union Packet. They therefore altered the invoice, and deleted the name of the vessel, "Kelso,

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Goods shipped upon commission by a London merchant are at the risk of the consignee, altho' there be a mistake in the invoice.

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Robert Moir, master," and inserted " the Union, John Paterson ;" by which vessel they understood the goods were to be sent.

After all, however, from some accident, the tea was shipped on board of the Kelso instead of the Union, and, in the course of the voyage to Leith, the vessel was stranded ; two boxes of the tea were lost, and, upon the 14th of March, one box was delivered in a damaged state to the defenders. They received the tea ; but, at the same time, protested, that Heseltines should be liable in every damage that might have been sustained by not dispatching the tea according to the advice given, and that they should only be responsible for the value of the box of damaged tea which had arrived. They immediately transmitted a copy of this protest to the pursuers.

Heseltines and Company, upon this, brought an action against Arrol and Company, for payment of the full value of the tea which had been shipped, with interest from the time at which the price should have been paid.

The LORD ORDINARY reported the cause, and the pursuers

*Pleaded,* By delivery of the goods at the wharf, and obtaining an invoice, the commission is understood to be executed ; for the duty of the London merchant is merely to deposit his goods safely in the hands of the wharfinger, who becomes responsible for any subsequent damage, from whatever cause it may have arisen. The pursuers are nowise responsible for the conduct of the wharfinger ; it does not, however, in this case, appear, that he is at all liable. It is impossible, from the nature of the thing, to calculate precisely the quantity of goods which each vessel is able to take, so as to determine previously by what particular ship any parcel may be dispatched. The universal practice in the trade, therefore, is, to insure " on ship or ships." The pursuers had, on former occasions, given notification of this in the course of their dealings with the defenders ; and it is the mode of insurance adopted universally by the traders from London to Leith. *2do,* The defenders are not able to show, that any damage has arisen from the improper designation of the vessel ; because not having executed any insurance upon it, they cannot pretend that the underwriters availed themselves of the mistake.

*Answered,* A merchant must do his duty before he can transfer his risk to a consignee ; and in mercantile dealings, where goods are shipped, and an invoice or bill of lading duly transmitted, the risk is transferred to the purchaser. The pursuers have not discharged themselves of this risk ; for they sent the goods by a wrong vessel, and gave a false intimation ; 24th July 1754, Hoog against Kennedy and Maclean, No 31. p. 10096. This is the established practice among merchants ; and there is no reason by which the carrying trade between London and Leith should form an exception. The intimation which was said to have been given, to insure " on ship or ships," was entirely special, and referred to the particular commission then to be executed. *2do,* It is *ius tertii* in the pursuers to plead, that no insurance was effected ; for a merchant

who stands his own insurer is entitled to every argument competent to an underwriter.

THE LORDS found the defenders liable, with expenses.

*Observed* from the Bench, There is a great difference in questions between merchants themselves and between the merchant and the underwriter. It is therefore very material that no insurance was effected in this case. The general nature and practice of the carrying trade between London and Leith seems to be in favour of the pursuers.

Lord Ordinary, Polkemmet,

Act. Erskine, Cathcart.

Agent, Jo. Young.

Alt. Lord Advocate Hope, Boyle.

Agent, J. Phillips, W. S.

J.

Fac. Col. No 15. p. 30.

1802. July 9.

TAYLOR and COMPANY *against* HOGG.

HERCULES TAYLOR and Company, merchants in Montrose, freighted the ship Agnes, belonging to Alexander Hogg, to load coals in Scotland, to be delivered at Gottenburgh. The vessel was to be there loaded with iron and deals, and to return with these commodities to Montrose. The freight was to be L. 60, with two-thirds of port charges, and the agreement was completed by missives mutually subscribed by the parties. It was farther arranged verbally, that Hogg should receive from Taylor and Company, or their correspondent, such money as he might have occasion for, to account of the voyage.

Accordingly, Hogg sailed from Scotland with the coals, which were duly delivered at Gottenburgh. He there loaded his vessel with iron and deals, but during the course of his voyage homeward, was captured by the enemy. At the port in Scotland where he took the coals on board, he received one guinea to account of the loading, and he received L. 30 at Gottenburgh to account of the voyage.

Taylor and Company brought an action before the Admiral for repetition of the sums which had been advanced, and the Judge-Admiral assoilzied the defender (May 19th 1797). This decree was brought before the Court by reduction, and the pursuers

*Pleaded*; The voyage to Gottenburgh and back again was understood by the parties to be one voyage. The loss is total. No freight therefore is due; Malynes, p. 98, 100; Molloy, b. 2. ch. 4. § 7; Bankton, b. 1. tit. 18. § 22; Erskine, b. 3. tit. 3. § 17. It makes no difference, that coals were carried out; the value of such a cargo is in this case so trifling, that it may be considered little else than ballast. The object of the voyage was to bring iron and deals from Gottenburgh. Since no freight could be due till the whole voyage out and home was completed, the master *in petitorio* could not have claimed it; and the

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No 47.

When a ship is taken on the homeward voyage, freight is not due.