verarity was sufficiently known to the public, to render the appellant inexcusable, if he did not inquire into it. The fact that he had left sufficient grain to satisfy this arrear of rent, never having been relevantly averred, so as to go to proof, was rightly disregarded. 1796. JAMIESON, &c. v. LAURIE.

After hearing counsel, it was
Ordered and adjudged, that the interlocutors complained of be affirmed, with £100 costs.

For Appellant, *J. Anstruther, W. Adam.*
For Respondent, *Sir J. Scott, R. Dundas.*

JOHN JAMIESON & Co. Merchants, Leith, *Appellants;*
JOHN LAURIE, Shipowner, . . . *Respondent.*

House of Lords, 10th November 1796.

DEMURRAGE OR DAMAGE.—A claim was made by the owner of a vessel, against the freighters thereof, for demurrage, on account of the detention of the vessel beyond the time stipulated. Held, that the claim of demurrage ceases on the day of her sailing from her loading port; and though the vessel was obliged to put back after being two days at sea, and finally, frozen in for the winter, that this was a *casus fortuitus*, falling on the owners and not on the freighters of the vessel, and for which the latter could not be held liable, reversing the judgment of the Court of Session.

A hundred tons of Siberian tallow were purchased by the appellants from Atkins E. Regail & Co. of St. Petersburgh, who, in answering their communication, stated:—"We shall expect shipping for it next August." In the month of July, the appellant chartered the respondent's vessel, the "Bell of Leith," Captain Anderson, to proceed to St. Petersburgh for the tallow, with written instructions to the captain to deliver the enclosed letter to Atkins E. Regail & Co., who were immediately to ship the tallow, and give him what deals and battens they have to fill up the ship. Also a provisional order for forty tons of iron, "If they can

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"ship it in time." If he could not get any other cargo, he was "directly to load without it; Observe, you must be "clear, and sail before 1st September, N. S., as the pre-"miums of insurance advance greatly after that date." The ship proceeded on her voyage, and arrived at her port of destination on 22d July; but the cargo of tallow, which is brought from Siberia to the sea ports, by floating it down the rivers, in consequence of the great drought of that season, had not arrived at Cronstadt, and the cargo was not ready for delivery until the beginning of October. A protest was taken by the captain for all charges, damage, and detention that may arise in consequence. At their desire, the ship was detained for her cargo. The tallow arrived at Cronstadt on the 12th October. It was all shipped, and the vessel cleared out and ready for sea on the 16th October. She then sailed for Leith, but after a few days at sea, she returned to port, in consequence of having met contrary winds; after which, the frost setting in, she was frozen up for the winter, and was detained until the month of May of the following year; in consequence of all which, the appellants suffered great loss on the cargo, besides being liable to the owners of the ship "Bell" for demurrage for the whole period she was detained at Cronstadt, at the rate of £3 per day.

The respondent, as owner of the vessel "Bell," made a claim against the appellants for demurrage and damages, and raised action, first before the Court of Session.

In defence, it was stated:—1st, That the shipmaster being bound by his instructions to wait no longer for the cargo than the 1st September, was bound to have set off on his homeward voyage, if the cargo was *not* ready by that time, after taking protest. 2d, That if he thought proper to wait longer, he could only claim demurrage, in the same way that any other shipmaster was entitled to do, and was not entitled to claim demurrage after the ship received its cargo: it being an established rule of mercantile law, that the claim of demurrage ceases the moment the vessel gets her cargo on board, and is cleared for sea.

Dec. 11, 1792. A proof was gone into, to show that this latter was the universal understanding among shipmerchants.

The Lord Ordinary, (Lord Justice Clerk), after various interlocutors, pronounced this interlocutor:—"In respect "of the depositions of sundry merchants and shipmasters, "who gave it as their opinion, that the demurrage of a ship

" ceases on the day of her sailing from the port of her loading,
" and that if a ship should thereafter be put back by contrary
" winds, and detained by the frost setting in, the same is con-
" sidered as a *casus fortuitus*, that must affect the owners, and
" that no opinions to the contrary appear from the proof: alter
" the former interlocutor, and finds that the charger is not
" entitled to demurrage after the 29th October 1787; and
" appoint parties to be ready to debate on the extent of the
" damage or demurrage, claimable upon the suspenders on
" account of the detention, prior to that period." But, on reclaiming petition against this interlocutor to the Court,
" the Lords found:—" That the opinion of merchants, Jan. 16, 1794.
" founded on by the respondent, does not apply to this cause:
" Find, that by the original bargain of affreightment, the ship
" ought to have been loaded and ready for sailing on or
" about the 1st of September: Find, that it was by de-
" sire of Atkins E. Regail & Co. that the ship was detained
" beyond that time: Find, that it was not owing to any
" fault of the master, but to contrary winds, and the frost
" setting in, that the ship did not make out her voyage, and
" that if the ship had sailed by the 1st of September, or
" soon thereafter, it is presumable the disasters by which
" she was detained through the winter would not have
" happened; and that, therefore, any damage, thence
" arising, must fall upon suspenders: And, therefore, upon
" the whole, find the letters orderly proceeded, and de-
" cern." *

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* Opinions of Judges:

LORD PRESIDENT CAMPBELL.—" This is a question about demurrage. The first interlocutors are strongly founded on reason. The last interlocutor is entirely founded on the *ex parte* opinions of merchants, produced by the defender, which do not go to the precise case in hand, but to the general case of a ship sailing upon her voyage, without any known or actual cause of impediment existing at the time. But if, in consequence of the detention before sailing, the ship has been put into a situation that makes any attempt to sail ineffectual and abortive, it would be against all reason and justice that the person, owner of the vessel, should suffer the loss thence arising, and that the party who occasioned it should be free. It is no matter whether we call it damage or demurrage. It is a loss arising by breach of contract, negligence, or other fault, imputable to the freighter. The ship is entitled to its hire, as much as the men to their wages, and the contract, whether in writing or not, or

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Against this last interlocutor the present appeal was brought.

Pleaded for the Appellants.—By the letter of affreightment, which was the contract between the appellants and respondent, the captain had express instructions not to wait longer, and he was not bound to wait longer for the cargo from the foreign merchants than 1st September, N.S. He was ordered to "observe, that he must be clear, and sail be-"fore that day," and if he could not get the cargo of tallow, he had express instructions and liberty to load his ship with other goods, and to execute orders for other merchants; but these instructions expressly mentioned, that "the ship must not be detained for them." The captain was sensible of this himself, because, in his protest taken on the spot, he declares "that *his lie days by his letter of af-*"*freightment were expired.*" After this he was bound to return home, or he might have advertised the ship as a general ship, ready to take on board goods for freight. But, in place of this, he thought proper to remain; and, having done so, he can only claim demurrage according to the universal rule and custom of merchants—namely, up to the day that the vessel receives her cargo, and is cleared for sea; after this, no claim lies, as the moment the vessel receives her cargo and sails, all claim to demurrage is at an end, and any accident happening thereafter, which may detain her, must, as a *casus fortuitus*, be borne by the shipowners. Here the "Bell" sailed with her cargo on the 16th October, and though she was some days thereafter obliged to return

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whether by the month, or for an entire voyage, is entitled to a liberal construction, or rather, to be favourably interpreted for the owners, so far as regards this article of hire. Molloy, B. 2, c. 4, §. 12. The distinctions made in the answers are too subtile, and not to be found in any law book, nor do they apply to all circumstances.

"The ship in question attempted to sail, but could not. The master did every thing in his power, but in vain. The sailing was not effectually begun till the month of May, and it is then only that the claim of damage ceases. I am therefore for altering."

LORD JUSTICE CLERK.—"Of same opinion."

LORD ESKGROVE.—"Of same opinion."

LORD DREGHORN.—"Of same opinion."

LORD CRAIG.—"Of same opinion. It is not properly demurrage, but damage."

Vide President Campbell's Session Papers, vol. lxxii.

to port from contrary winds, yet no demurrage lies for the consequence of that return; for that would be to hold the appellants liable for the contrary winds, and the frost setting in. And the usage and practice of merchants, and the evidence produced, that this claim ceases when the vessel is loaded for sea, is decisive of the present question.

Pleaded for the Respondent.—By the original bargain of affreightment, the ship ought to have been loaded and ready for sailing by the 1st of September; and, having to wait for her cargo, it not being ready when she arrived, she would have proceeded without it; after her lay days had expired, had she not been detained by the desire of Atkins, E. Regail & Co. for the cargo. And as when she did receive that cargo, and proceeded to sea, it was no fault of the master, but because of contrary winds, and the frost setting in, that she did not make out her voyage, and as this would not have happened had her cargo been ready at the time stipulated, because, had she sailed on 1st September, it is presumable that no such disasters would have happened, the damage must therefore fall on the appellants.

LORD CHANCELLOR LOUGHBOURGH said,

"My LORDS,

"The appellants in this case were sued to make good a claim of demurrage, stated to have been incurred by the detention of a ship belonging to the respondent, *freighted by the appellants* to bring a cargo of tallow home from the Baltic, the ship having been detained during the winter of 1787, by the severity of the weather, and the setting in of the frost.

"I am not able to concur with the judgment and opinion given in this question by the Court of Session, though the judges were unanimous. One of the judges, indeed, at one period, pronounced an interlocutor in favour of the appellants; but he afterwards coincided in opinion with the other judges, when the final interlocutor was pronounced. Lord Justice Clerk (MacQueen.)

"The circumstances of the present case are as follow:—The appellants, in 1787, were informed by Messrs. Atkins and Son of London, that their partners, Messrs. Atkins, Regail & Co. of St. Petersburgh, had made a purchase of a quantity of tallow, deliverable in August, which they conceived might suit the appellants; they state the prices, and intimated that if the terms were agreed to, they must be paid in cash, to answer the drafts of the partners in St. Petersburgh. Upon the prospect of that adventure, the appellants agreed to take 150 tons of this tallow, at the prices mentioned, and to put Messrs. Atkins & Son in cash, to answer the drafts of their correspondents. Advice

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was also sent to the partners at St. Petersburgh, by the appellants, and in a letter from Atkins, Regail & Co., which was the last on the agreement for the purchase, it appears that they are content with the price, and they state, 'We shall expect shipping for it in 'August next.'

"The appellants, having full reliance that the tallow would be ready for delivery accordingly, and having supplied the house in London with money in advance, they proceeded to freight a ship belonging to the respondent, for the purpose of bringing home their purchase. The tallow was their principal object in sending to the Baltic, though it did not complete the lading; and the shipmaster was provisionally allowed to bring home also forty tons of iron, and fifty or sixty tons of goods; and, if wanted, he might also ship a quantity of deals and battens for the appellants. About these last, however, from the terms in which they are mentioned, it is very plain that the appellants were indifferent; and that the order was given with no view but that the cargo should be complete, and for none of the articles was the vessel to be detained a single day. To the tallow was the shipmaster's attention particularly directed. No charter party was entered into between the freighters and the shipmaster, nor is there written evidence of the specified terms of agreement between them. It does not appear what freight was agreed to be paid, but this matter was settled by the parties, and did not enter into the dispute between them.

"But though there was no charter party, there were still written documents of this agreement. The master was furnished with a letter of instructions, from which the views of parties appear. This letter informs him that he was addressed to Atkins & Co. of St. Petersburgh, that they would ship with him 100 tons of tallow, that he has a provisional order for forty tons of iron, *if it could be shipped in time;* and that he was permitted to take general goods to the amount of forty or fifty tons, *but the ship was* not *to be detained* for them, and this letter contained this direction :—'Observe, you must 'get cleared, and sail before the 1st of September, new style,' and the reason for this is given,—'As the premiums of insurance ad-'vance greatly after that date.'—'About this we write particularly 'to Messrs. Atkins, Regail & Co., and we hope they will attend to 'it.'

"The letter to be delivered to Atkins, Regail & Co. was in the same terms, and it repeats and enforces the injunction, which is imperative,—'As our insurance advances greatly on the 1st of Sep-'tember, and again on the 18th ditto, new style, you must have him 'cleared by that time.'

"The ship accordingly proceeded on her voyage, and arrived in St. Petersburgh in the end of July, but the tallow, which was the principal object, had not arrived there from Siberia, and Atkin & Co. when complained to of this, returned an answer, which came very ill from them,—that the ship had been dispatched too soon. The ship,

therefore, was obliged to remain, as there was no cargo but the tallow, which, at that period of the voyage, she could proceed with homeward.

"The month of August wearing out apace, and no appearance of the tallow, the shipmaster appears to have been in doubt what course to take, but takes a formal protest against Atkins, Regail & Co., for not having loaded him according to his instructions,—a very regular and prudent step on his part,—and continues to wait.

"I apprehend the master had conceived himself bound not to come away without the tallow, but no power could have hindered him from doing so. And Atkins and Regail, who were the correspondents, and not the agents of the freighters, would, in the case of his coming away, have been liable to the appellants, for non-performance of contract and damages. Though the agreement of the respondent was to this extent, that the shipmaster was the servant of the freighters, and acting for those who were liable to the owner for the consequences.

"The master, who appears to have been very active, complains very sensibly to the owner of the want of a charter party: 'No 'man,' says he, 'ought ever to come here without a charter party; 'if he does, he is a fool.' The idea, I believe, had occurred of general freight being due to the owner, to which, in my apprehension, he was entitled. Freight must have been paid to him, and the freighters would have had remedy against the shipper for breach of contract, according to the terms of that contract. But, the ship being freighted for a given space, the shipmaster was not bound to remain longer, but might have come away, and the owner have had his remedy against the shipper. Unfortunately, however, he stays, and waits for the tallow; and here I must remark, that he was not lucky enough to get any writing from Atkins, Regail & Co. ordering his stay, or to show that any attempt was made by them to prevent his going. But what could they have done? They had no authority over the captain, and the owner would have had his remedy. They, indeed, the captain depones, insisted upon his staying for the tallow, and he submits to their opinion. There was no new contract entered into, but Atkins and Regail must have either been bound to the owner for the detention, or the shipmaster must have acted wrong.

"The captain waits,—the tallow at last arrives, and the captain having used all expedition, receives the cargo on board, and sets sail. About forty other vessels sailed at the same time; of these thirteen make out the voyage, but some twenty or more, among which the respondent's vessel is one, put back, and that without any fault being imputable to the shipmaster, and the frost setting in, he is prevented from leaving the Baltic; he winters at Cronstadt, and does not get home till June in the following year.

"Upon these facts the action in the present case was founded,

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and in it the respondent insisted against the appellants, in the first place, for freight; but this part of the claim was afterwards adjusted, as I have already mentioned, between the parties; and, 2d, for demurrage, or damages for detention of the ship at Cronstadt. When this question came first to be decided by the Judge of the Admiralty Court, he mentioned as the ground of his decree, which was in favour of the respondent, that the extraordinary detention of the vessel at Cronstadt, which ultimately occasioned her detention there, arose by the fault of Atkins, Regail & Co., for whom the appellants were answerable, and in this manner the cause was ultimately determined by the Court of Session. It probably was owing to the detention of the tallow that the ship was detained, and for this Atkins and Regail were answerable in damages.

"That damage was liable to be paid to the owners for the detention of the vessel, was never doubted in this case to be matter of law; but the answer made by the freighter is also well known law, namely, that after the commencement of the voyage, no claim for damages could be made. This question has, in the present case, been much agitated, and distinctly argued at the bar, and it was agreed on both sides, that there was no claim for damages after commencement of the voyage.

"But it was said for the respondent, that the proceedings in the Court below, and interlocutors pronounced in favour of the respondent, might be supposed to be for damages on account of the detention. But I cannot distinguish between the damages suggested, and demurrage in this case. The term demurrage is generally applied to the sum liquidated between a freighter and owner, antecedently settled in a charter party. The ship is to be loaded by such a day, and days for demurrage are appointed, and the sum specified to be paid for those days, without regard to the actual damage; but if there is no agreement betwixt the parties, the sum paid for detention is exactly in the same proportion as where it is liquidated betwixt themselves as to freight.

"I have such respect for the interlocutor of the Lord Ordinary, of the 11th December 1792, which was afterwards departed from, as to think that, in matter of law, it was well founded; and as this is a question of very general importance, I shall in few words state my ideas upon it.

"The law of demurrage for detention is reasonable, as I know it to be general law, and there are no circumstances to take this case out of the general rule. This general rule too was fully proved to be the understanding of merchants in the proof taken in the cause. There are two modes of freighting a ship,—1st, Where a ship is hired at so much per month, and where hired for time, no damages are incurred for detention. 2d, Where a ship is hired for a certain sum to complete a voyage; and this is the more common practice, and the mode of the voyage in question.

"Charter parties vary with regard to the sum payable, according to the extent or risk of the voyage, and by these, the consideration to be given by the freighter must be governed. But there is also a material consideration, namely, when the homeward voyage is to commence; for voyages are much shorter and safer at one season of the year than at another, and there is a consequent difference in the rate of insurance. Thus, in the West India trade, there are different rates of insurance paid for different periods. The first is about the 25th of July, or 1st August, when the rate of insurance is smaller; and the next sometime in September, when it is higher; this is of course, because, by setting off at the first period, the voyage will be made out more early in the season, and later if commenced at the second period.

"So, in the Baltic trade, the early voyage must be commenced by the 1st of September, after that the insurance rises at two several times or periods. In the present case, the respondent's ship was freighted for the first period, the voyage to be commenced at low insurance on 1st September, when the freighter had assurance, and the shipmaster had assurance that the cargo would be ready. If a charter party had been made in this case, and the ship had been detained after the running days, then demurrage would have been due to the owner.

"By the first of September, the cargo then was to have been loaded, and demurrage has been distinctly claimed from that date till the commencement of the second voyage. But I am by no means clear, that demurrage in this case was due after the first of September. The captain, proceeding in this case to load the ship, must be considered in a question between the owner and freighter, as the servant of the owner; and, in all questions between the owner and shipper, he must be considered as the servant of the freighter. As the cargo was not ready in time, he was to judge, from the documents and means of knowledge in his power, of the degree of peril in the voyage, and he might have refused to take it if he thought proper.

"The captain might think it right to wait for the tallow; but he might also think demurrage a good thing in determining his option, especially as there were forty other captains who seemed to have judged it proper to act as he did. After he gets the tallow, it appears he was very active, and did every thing in his power to get away. As he agreed, however, to take the cargo, and sailed, it cannot be considered in any other view than as a prolongation of the one term appointed for sailing; and, by sailing, when he did, on the 29th October, it must be considered that he undertook to perform it on the same risk as if it had been commenced on 1st September. A contrary rule would, in my opinion, be totally hostile and destructive to commerce, if the freighters were to be liable for any misfor-

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tune that might happen to the vessel which had sailed after such a prolongation, as in this case. If the ship should have been lost, or detained, after sailing on 29th October, in my opinion, no other action would lie against the freighters than if she had been lost or detained after sailing on 1st September. Aitkins and Regail were to blame for the delay in the cargo; but the captain, who, as to them, was the agents of the freighters, took the cargo at last, and agreed to sail.

"If the ship had sailed on the 1st September, it is probable that she might have made out the voyage; but the freighters cannot be considered to be the insurer of the safety or endurance of the voyage; of these, the owner himself must form his judgment, and act accordingly.

"If, in law, detention shall entitle the owner to demurrage, after commencement of the voyage, for the length of it, or any loss sustained by the owner, the detention for one day must have the same effect as a detention for two months. And, in this case, where there was a precise contract, if the master had sailed sooner than he did, but after the 1st September, and the ship had been detained, the same consequences, by this way of reasoning, would follow upon the freighters. But were the law so, it would be impossible for the merchant to know at what risk he was undertaking to freight the ship, and trade could not be carried on with safety.

"Here the ship was freighted at low insurance, to sail at the early period, and not being then loaded, the master acted right in taking the protest which he did. There was no order to control his stay, although the ship might not even have been bound by such order. But as Atkin & Co. were not the agents of the freighters, but adverse contracting parties, Jamieson & Co. would not have been bound by their acts, but the owner might have had damages against them.

"The captain, however, rashly agrees to wait. I do not mean to impute any blame to him—it was a mistaken idea of his orders. But this conduct has been most unfortunate for the freighters; if he had come away in September, the appellants, who, it was agreed on all sides, were totally free from blame, would have sustained no loss. But, by the captain's acting as he did, very considerable loss has arisen to the freighters by the detention of their tallow, and a fall in the price of that article, by which they are sufferers to the amount of near £1200, as seems admitted by the respondent.

"In the course of the argument, it was taken for granted by the respondent, that the appellants would be entitled to recover from Atkins and Regail the damages that had been occasioned by their bad conduct. But this was impossible, after the captain received the cargo on board, and agreed to sail.

"I have, therefore, to propose to your Lordships, that the whole interlocutors complained of by the appellants may be reversed, and

the parties will then return to the Court of Session and settle the quantum of demurrage, in terms of the interlocutor of the Lord Ordinary of 11th December 1792.

"It is necessary for me to state, however, respecting that interlocutor, that though it is perfectly correct in finding that the demurrage ceases on the day of sailing, and the detention was a *casus fortuitus*, which must fall upon the owners, yet his Lordship was mistaken in resting this judgment upon the opinions of the merchants examined in this cause, and not, as it ought to have been, on the foundation of general law."

After hearing counsel, it was

Ordered and adjudged that the several interlocutors complained in the appeal be *reversed*. And it is further ordered and adjudged, that the interlocutor of the Lord Ordinary, of the 11th December 1792, be affirmed: And it is farther ordered, that the cause be remitted back to the Court of Session in Scotland to proceed according to the said interlocutor of the 11th December 1792.

For Appellants, *J. Adair. Wm. Adam.*

For Respondent, *Sir J. Scott, R. Dundas, Geo. Ferguson.*

CHARLES FERGUSON, JOHN FORDYCE, WM. GEMMELL, and DUNCAN DAVIDSON, Esqs. of London, Trustees of the late Andrew Grant, Esq. of Granada, . . } *Appellants;*

DOUGLAS, HERON & Co., and their Factor, *Respondents.*

House of Lords, 11th November 1796.

SEXENNIAL PRESCRIPTION—INTERRUPTION—FOREIGN ADMINISTRATORS.—FORUM.—(1.) Held, in counting the six years of the sexennial prescription, that the *terminus a quo* in reckoning the period, is from the last day of grace after the bill falls due. (2.) Also held, in the special circumstances of this case, that English administrators residing in England, acting under an English will, proved in the Prerogative Court of Canterbury, in reference to an estate in Granada, and beyond the jurisdiction of the Court of Session, were not liable to be called to account in the Supreme Court of Scotland, reversing the judgment of the Court of Session; but opinion expressed, that the Court of Session were quite competent to judge in a case where either the persons of the executors, or the effects of the deceased, are within their jurisdiction, no matter where the