

seals being put on in presence of friends, ought not to have been removed, and the warrant to inventory did import that the writs might be secured till they were inventoried. But however, it was the defender's part to have procured a warrant to inventory, and to have introritted only at the sight of a Judge. 5to, As to the indiscreet sealing of the doors of the rooms, the fact is denied. But supposing it, the Lady might either have obtained the seals to be removed by the warrant of a Judge, or at least in presence of famous witnesses, and obtained new seals to be put upon the writs.

' THE LORDS found the Lady's intromission with the writs *per aversionem*, without any inventory, relevant to infer a presumption that the debts due to the defunct did exceed the debts due by him to the value of the sum in the Lady's bond, or that the same were so accepted by her; and repelled the allegiance founded upon her oath in the exhibition.'

*Fol. Dic. v. 1. p. 208. Dalrymple, No 113. p. 157.*

1724. January 23.

ROBERT BUNTYNE of Ardoch and MR THOMAS FLEMING against WALTER BLAIR and COMPANY.

By charter-party in August 1721, Buntyne and Fleming let out their ship, the Cathcart, to Blair and Company, for a voyage from Clyde to Maryland; where after her arrival in Choptank river, she was to lie for the space of 90 days for taking in the merchant's cargo of tobacco; and the merchant's freighters were, by the same charter-party, bound to pay 30s. of demurrage, for each day the said vessel and company were detained through the said freighters, or their supercargo, or their factor's default, longer than the lie-days agreed upon.

The ship arrived in the said river the 4th February 1722, whereby her lie-days expired the 4th of May; at which time the cargo not being fully provided, the master unmoored the ship as a signal of her readiness, and he acquainted the supercargo that he was ready to sail, and that he was going to Annapolis to take a protest against him in the hands of the only notary public in the province. The protest was accordingly taken, yet notwithstanding the ship was detained, waiting for the loading till the 22d of August.

The owners of the ship brought an action for demurrage, conform to their charter-party, before the Judge-Admiral, and obtained a decret; which being suspended, it was *pleaded* for the defenders,

That in the greatest part of maritime affairs, where damages, or any other considerable consequence was to arise from the acting or omission of either party, the law had required that instruments should be taken at the time, to the end that witnesses might more particularly remember what past; as was found 14th February 1678, Calderwood *contra* Angus\*, and in a late case, the

No 9.

No 10.  
Demurrage found due, though the master of a vessel went 60 miles for a notary, there being none nearer, notwithstanding of the usual form of taking protest at the mast.

\* *Vide* PROOF.

No 10.

Owners of the Katharine of Whitehaven *contra* the Freighters; so that demurrage could not be due till a protest was used; and, therefore, in anno 1716, Mason *contra* Hamilton, a protest clandestinely taken was not sustained, *voce* FRAUD. The protest taken at Annapolis, above 60 miles from the place where the supercargo was, could be of no effect; for it should have been either taken against the supercargo personally, or at least publicly at the mast of the ship.

It was *answered* for the pursuers, That though often protests were requisite, yet where the lie-days were fixed by the charter-party, in that case *dies interpellat pro homine*; and the supercargo, who came along with the ship, could not but know the day of the arrival, and consequently when the lie-days expired; demurrage was therefore due without a protest, especially when, as in this case, it was moderate, and did not exceed the true expense and tear and wear upon the ship; and the protest produced was a sufficient declaration of the master's *animus* in staying, that it was on account of the freighters, and is a presumptive evidence of the ship's being in readiness? as was found in the cases of Whiteside of Whitehaven, anno 1718, and Stenhouse in the year 1722\*. As to the decisions cited for the defenders, that of Calderwood's was against them; for, in that case, there were no lie-days fixed by the charter-party; so that the *dies* could not interpel, which made a protest necessary. And in the case of Hamilton and Mason, there was fraud in the skipper; for he being obliged to have his ship ready at a certain day to receive the cargo, took a latent protest without acquainting the master, who was upon the place, and with whom he daily conversed, and yet made no mention of the protest, but allowed him to put his cargo aboard at leisure, and received it without complaint.

' THE LORDS found demurrage due.'

Reporter, *Lord Newhall. Act. Ja. Graham. Alt. Dun. Forbes. Clerk, Dalrymple or Murray. Fol. Dic. v. 3. p. 168. Edgar, p. 5.*

1760. November 18.

MARJORY STEVEN, Relict of WILLIAM JOHNSTON Maltster in Aberdeen, *against* JOHN ROBERTSON Merchant there.

No 11.

No action of damages found to lie against the seller of victual for non-implementation, where the price was referred to the seller, and the buyer himself having died

IN November 1756, William Johnston maltster in Aberdeen, and Provost Robertson, entered into a verbal agreement; whereby the Provost sold his farm-bear of Pitmillan, for crop 1756, to Johnston, deliverable as soon as the same could be got ready by the tenants, the price to be fixed by the seller.

In pursuance of this agreement, 30 bolls were delivered before Christmas; but Johnston dying soon after, the Provost sold the remainder of his bear to others, at L. 10 Scots per boll, the same price charged for 30 bolls that were delivered; having previously let Johnston's widow know, who made a demand

\* See MUTUAL CONTRACT.