

1794.

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| <p>FALLIJEFF, &c. v. ELPHINSTONE, &c.</p> | <p>MAJOR MICHAEL FALLIJEFF of St. Petersburg, Merchant, Owner of the Vorst Potomskin of St. Petersburg, and SIR WM. FORBES, Bart., his Attorney,</p> | } | <i>Appellants;</i> |
| <p>The Honourable WM. ELPHINSTONE, Owner, and JOHN GARDNER, late Master of the Paisley of Carron, a private Ship of War,</p> | | } | <i>Respondents.</i> |

House of Lords, 12th March 1794.

(House of Lords, 14th August 1784.)*

CAPTURE — ILLEGAL PRIZE — DEMURRAGE AND DAMAGE.—Held, where the vessel belonged to a neutral, but was bound for Cadiz with a cargo of hemp to that port, at the time Spain was at war with Great Britain, and was captured by an English privateer, and taken into Leith, and detained there for some considerable time, without proceeding to have her condemned as lawful prize, or the papers, master, and crew of the vessel examined, that the capture was illegal. And in respect that it was so declared in the Court of Admiralty; Held the owner liable in demurrage and damages from the date of the capture to the day in which the vessel was freely given up, and made fit to proceed on her voyage.—Vide note below, First Appeal. Disputes having arisen as to the precise items of the damage and the demurrage, Held that demurrage was due at the rate of 10s. per ton per month of the vessel's tonnage: That a premium of insurance for £5337, the sum for which the cargo had been insured: That the ship's repairs for damage sustained since capture, and also for damage sustained after she set out on her voyage, by running on the coast of Ireland, &c. were due.

For the report of the first part of this case, see Note below,* which ended in an appeal to your Lordships on 14th August 1784.

* The privateer, called the Paisley of Carron, commanded by John Gardiner, and belonging to the respondent, Mr Elphinstone, captured in the month of January 1781, the Vorst Potomskin, with a cargo of hemp for the use of the Spaniards, then at war with Great Britain.

It was stated by the respondents, that on examining the ship's papers, and conversing with the master and crew, there seemed to

In consequence of the remit back to the Court of Session, in that appeal, the parties proceeded to investigate the amount of demurrage and damages. The appellants gave in a condescendence of the damages, and afterwards an addi-

1794.

FALLIJEFF, &c.
v.
ELPHINSTONE.
&c.

be no doubt that the cargo was Spanish property, and a lawful prize. The ship was bound for Cadiz; the Russian master and crew, who had navigated her from St. Petersburg, had been changed at Elsinore, and a Danish Captain and crew put in to navigate her from that place to Cadiz. She had double clearances on board, had no Elsinore pass, without which no vessel whatever comes out of the Baltic—her bills of lading bore date St. Petersburg, July 1780, six months antecedent to her capture, and yet she was captured within ten days' sail of that port. On being boarded, the captain admitted the cargo was enemy's property, and a good prize. In short, the circumstances of suspicion were so strong as to warrant the taking her to the nearest British port, it being impossible at that season of the year to examine the cargo at sea.

On the other hand, it was stated, that the ship's papers, which showed clearly the property, and that there was no contraband article on board, were immediately delivered to the captors, but none of the privateer's people could read them; and, without the least examination of the cargo, they carried the vessel first to Methel, and then to Leith in the Firth of Forth, after detaining her at Methel for nineteen days. The ship's papers were carried off by the respondent, Mr. Elphinstone, but were not brought into any Court of Admiralty, neither were the master or crew examined, or any one step taken by the captor, which, by the law of prize, and his Majesty's positive instructions to privateers, were required. In short, nothing was done to have the vessel adjudged as prize. They soon thereafter discovered that the seizure was illegal, and then made offer of the papers, and to let the vessel go on her voyage.

But, in the meantime, both the vessel and cargo had sustained damage, and the vessel could not proceed to sea without repairs. While the appellant, Fallijeff, had written to Sir William Forbes to attend to his interest, and to make a claim for damages, demurrage, and other charges. An action was brought in the Court of Admiralty for these, accordingly, as well as for the loss in replacing the insurance, which was assured for £5834. After this action was brought into Court, the repairs of the ship being completed, and the cargo reloaded, the appellant applied to the Judge-Admiral to declare the ship and cargo were neutral property, not subject to any claim on the part of the pretended captors, and that the vessel might proceed on her voyage. No answer was given unto this applica-

1794. tional condescendence. By the first, they claimed under
 the former judgment appealed, the sum of £3070. 11s. 7d.;
 and by the second £3120. 3s. 5d. The whole vouchers were
 not lodged in process till 18th January 1785.

May 8, 1782. tion, and the Judge-Admiral pronounced an interlocutor in terms as
 craved, and the vessel accordingly proceeded on her voyage.

In the meantime, the action for damages, stipulated at £3000,
 proceeded. In defence, it was stated, that the defenders could be
 liable in no damages, owing to the suspicious circumstances attend-
 ing the ship and cargo, and the conduct of the master and crew
 affording just and probable grounds for suspecting that the cargo was
 lawful prize. A joint proof was allowed and taken, and, upon con-
 sidering which, with the memorials for both parties, and proof led,
 in which it was proved, that the captain of the vessel captured had
 said on boarding her, that the vessel was neutral property; but that the
 cargo might be lawful prize, the Judge-Admiral, of this date, absolv-
 ed the respondents from all the appellant's demands; and on re-
 claiming petition, adhered. A reduction of this decree was brought
 before the Court of Session. But the Lord Ordinary and the Court
 affirmed the judgment of the Judge-Admiral.

Feb. 23, 1783. Against these interlocutors an appeal was taken to the House of
 Lords.

July 11, — After hearing counsel, it was
 Ordered and adjudged, "That notwithstanding the cause of seizure
 afforded by the demeanour and express declaration of the pursuer,
 the master of the vessel in question, that the cargo was good prize,
 but that the vessel was not so; yet, in respect that, in the said
 Court of Admiralty, it was, among other things, on the 8th day
 of May 1781, at the instance of the pursuers, declared and adjudged
 in this cause, That the said ship and cargo are neutral property,
 and free of all claims made against the same by the defenders;
 which order was not reclaimed against; and also, in respect that the
 defenders took upon them to detain the said ship and cargo, claiming
 the same, or one of them, as prize, without proceeding in any manner to
 obtain condemnation thereof, or bringing or sending any part of the
 company of the said ship before the judge of the Admiralty Court,
 to be sworn and examined upon such interrogatories as might tend
 to the discovery of the truth concerning the interest and property
 of such ship and cargo; or bringing or delivering to such judge
 all the papers, documents, and writings delivered up, or found on
 board the said ship; it is further declared, That the defenders are
 liable and responsible to the pursuers respectively, and according to
 their rights, for the demurrage of the said ship; and also for such
 damages as the said ship and cargo may have sustained by reason
 of the detention thereof from the day of capture, to the said 8th

In the former branch of the case, the respondents had stated, that when the vessel captured was brought into Leith Roads, they had given notice to the captain that he might proceed on his voyage. This notice was given by a notary public, under the form of an instrument of protest, on 14th February 1781; and was renewed next day in same manner. At the same time, the respondent Mr. Elphinstone, offered to give security for any damages which might be awarded against him; but that the captain refused to proceed on his voyage, on the pretence that the vessel had sustained some damage. The vessel did not sail from Leith till the end of October.

1794.
 FALLIJEFF, & C.
 v.
 ELPHINSTONE,
 & C.

It was, on the appellants' part, stated that the vessel had received considerable injury, and could not proceed to sea without a thorough repair, which rendered necessary the unloading the cargo, and loading the vessel again. That she had proceeded on her voyage as soon as the repair was effected; and having been cast ashore on the coast of Ireland in proceeding on that voyage, they were entitled to the damage sustained both before leaving Leith as well as that sustained after it. The claim for damage under the first head, that is, before leaving Leith, the respondents contended, that it could only be for damage which the appellants could instruct the vessel sustained subsequent to the capture of the vessel. From the proof led, no such damage was established, although it was attempted to be proved, as had all along been asserted, that she had sustained damage in getting her keel hurt in going into the port of Methel.

As, according to the judgment of the House of Lords, it was of importance to have it fixed at what date the vessel

day of May 1781, on which day, it appears, by the minute of the pursuers preferred to the said Court of Admiralty on the 3d day of May 1781, the said ship was ready to depart, unless the defenders can instruct that the said ship and cargo had been before that time freely, absolutely, and unconditionally, delivered up to the pursuers, or so tendered; and in that case, to such time as the said ship and cargo might have been made ready to depart, after such surrender or tender thereof. And it is therefore ordered and adjudged, That the said several interlocutors complained of in the said appeal be, and the same are hereby reversed, so far as the defenders are thereby absolved. And it is further ordered, that the said cause be remitted back to the Court of Session in Scotland to proceed accordingly."

1794.
 FALLIJEFF, &c.
 v.
 ELPHINSTONE,
 &c.
 Mar. 3, 1787.

was freely and unconditionally delivered up to the pursuers, in order to fix the quantum of demurrage; the parties judicially agreed that Sir Wm. Forbes' declaration that he considered the vessel delivered up, if not prior, at least on the 26th Feb. 1781, as equivalent to an oath. Upon which the Lord Ordinary found: "That there is sufficient evidence that the ship was freely, absolutely, and unconditionally relinquished and delivered up by Captain Elphinstone to Sir Wm. Forbes upon the 26th Feb. 1781; but that Captain Elphinstone is liable in demurrage, and other charges occasioned by the capture, till the ship was fit to go to sea, which was upon the 13th day of March said year."

Aug. 10, 1786.
 Feb. 9, 1787.

The Lord Ordinary, on representation, reported the cause to the whole Lords, who found "That the vessel was freely, absolutely and unconditionally delivered by the defender, upon the 16th Feb. 1781, but that the defender is liable in demurrage on account of capture from the 18th day of January, the day on which the capture was made, to the 30th day of March, both in the year 1781: Also find the pursuers entitled to the expenses incurred in the unloading the cargo, and to the premium of insurance on the £1000 for which, it is alleged, that insurance could not be procured: Find the pursuers entitled to interest on the price of the cargo, from the said 18th January to the 30th day of March 1781, and likewise to the Town dues, light money, harbour dues, pilotage claimed, so far as the same can be properly instructed: And, lastly, find the pursuers entitled to expenses, &c. and remit to the Lord Ordinary to ascertain the quantum of demurrage, expense of unloading and reloading the cargo, the above articles for town dues, and to hear parties thereon, and in particular, whether articles 16th, 17th, and 19th of the condescence, No. 2 of the exhibits, ought to be considered part of the expense. Sustains the objections to the claim of expense for reparation done to the vessel and for other damages done to the goods, and to all other articles of the condescence other than those above mentioned."

Mar. 3, 1787.

The respondent reclaimed against this interlocutor, insisting that he could not be liable for a premium on that part of the cargo which had not been insured, and that there was not sufficient evidence of the value on board. The Lords remitted to the Lord Ordinary to hear parties as to the quantum of the cargo insured, but *quoad ultra* adhered.

The Lord Ordinary ordered a condescendence of the articles claimed under the interlocutor; and, upon considering which, with the answers thereto, he pronounced this interlocutor: “ Sustains the objection made to the first article of the condescendence to the extent of £18. 18s. 11d., for men’s clothes, and £7. as paid to Russian sailors, which two sums being deducted from £90. 13s. 7d., the amount of article first of the condescendence, leaves a balance of £64. 14s. 8d. due for the expense of unloading and reloading the vessel, for which sums finds the defender liable. With regard to article *second*, the demurrage, the Lord Ordinary *in hoc statu* makes avizandum therewith. Sustains the *third* article of the condescendence, extending to £318. 12s., being the premium of insurance of £4000 commission at one half per cent., and one-fourth per cent. paid for guaranteeing the underwriters. With regard to the *fourth* article, being the premium claimed for the £1000 said to have been short insured, sustains the objection to the extent of £220 sterling, the value of the goods sold at Leith; and also of £533, as the amount of the damage which the pursuer himself has stated is sustained by the cargo; but finds that the policies of insurance to which the defender appeals as evidence that an average of six and one half per cent. upon the goods was received from the underwriters, affords no evidence whatever upon the subject, and therefore repels the objection, in so far as founded upon that particular. As to article *fifth*, finds the pursuer entitled to interest upon what shall in the issue appear to be the value of the cargo from 18th January 1781 to 30th March thereafter. Sustains the *sixth* article of the condescendence. Finds the defender liable in such a proportion of the *seventh* article of the condescendence, being town dues, light money, &c. amounting to £18, as shall be found to correspond to the period from the said 18th Jan. to the 30th March 1781. Finds that articles *tenth*, *twelfth*, and *thirteenth*, are repelled by final interlocutor of Court. Sustains the objection to the expenses of the appeal, being article eleventh, and assoilzie the defender therefrom, in respect the judgment of the House of Lords gives no costs, and that it finds the defender liable only for demurrage and for such damages as the ship and the cargo may have sustained by reason of the detention thereof. Finds the defender liable in article 14th, being the expense of process in the Court of Admiralty and Court of Session, and decerns. And as

1794.

FALLIJEFF, & C.
v.
ELPHINSTONE,
& C.
Mar. 11, 1788.

1794. " to the remaining articles of the condescence, being

 FALLIJEFF, & C. " articles eight and nine, appoints the pursuer to specify
 v. " in writing, by way of minute, the trouble for which these
 ELPHINSTONE, " articles are severally charged." Of the same date, " the
 & C. " Lord Ordinary remitted to shipmasters both at Leith and
 " at the port of London, to report from the invoices, bills of
 " lading, or other evidence to be laid before them, the
 " tonnage of the said ship Vorst Potomskin, with power to
 " examine such persons as may have seen and inspected said
 " vessel, the better to enable them to make their report."

Both appellants and respondents represented, the former
 in so far as he was not found entitled to the premium of
 insurance on the full sum of £1000; the latter, in so far as
 it allowed for any premium at all, and also, in so far as it
 gave £64. 14s. 8d. as the expense of unloading and reloading
 the vessel, and the expense of process. The Lord Ordinary
 refused the prayer of the respondents' representation; and
 in the representation for the appellants, sustained the objec-
 tion " to the premium for £1000 short insured to the ex-
 " tent of £220, as the value of the goods sold at Leith,
 Aug. 9, 1788. " and £533 as loss sustained upon the cargo, in respect
 " these particulars are now properly explained from the pur-
 " suers' original condescence; *Quoad ultra adhere.*"

Thereafter the Lord Ordinary, on representation, recall-
 ed " the interlocutor represented against, and of new
 " sustains the objections made to the first article of the
 " condescence, to the extent of £18. 18s. 11d. for
 Mar. 11, 1789 " men's clothes, and £7 as paid to Russian sailors, which
 " two sums being deducted from £90. 13s. 7d. the amount
 " of article *first* of the condescence, leaves a balance
 " of £64. 14s. 8d. due for the expense of unloading and re-
 " loading the vessel, for which sum finds the defender liable.
 " With respect to article *second*, finds that the ship Vorst
 " Potomskin is to be held of 200 tons burden; and finds
 " the defender liable in damages from 18th Jan. to 30th
 " March 1781, inclusive of both days, at the rate of ten
 " shillings per ton. Sustains the *third* article of the conde-
 " scence, extending to £318. 12s., being the premium of
 " insurance for £4000 commission at one half per cent., and
 " one-fourth per cent. paid for guaranteeing the underwrit-
 " ers. Sustains article fourth, being the premium of insur-
 " ance for £1000 with commission. As to article *fifth*, finds
 " the pursuer entitled to interest upon what shall, in the
 " issue, appear to be the value of the cargo from 18th Jan.
 " to 30th March 1781 inclusive. Sustains the *sixth* article

1794.

“ of the condescence. With respect to the 7th article,
 “ finds the defender liable for the light money, and in such
 “ a proportion of the town dues, harbour dues, &c. as shall
 “ be found to correspond to the period from said 18th Jan.
 “ to 30th March 1781. Finds the defender also liable in
 “ such part of article eighth and article ninth as corresponds
 “ to the foresaid period from said 18th January to 30th
 “ March. Finds that the articles tenth, twelfth, and
 “ thirteenth are repelled by the final interlocutor of the
 “ Court. Sustains the objection to article eleventh, and as-
 “ soilzies the defender therefrom, in respect the judgment
 “ of the House of Lords does not give costs, and that it
 “ finds the defender liable only liable for demurrage, and
 “ for such damages as the said ship and cargo may sustain
 “ by reason of the detention thereof. Finds the defender
 “ liable in article fourteenth, being the expenses of process
 “ in the Court of Admiralty and Court of Session, so far as
 “ the same are reasonably charged, the amount thereof to
 “ be afterwards ascertained when the particular accounts
 “ come to be advised. Finds interest due upon the several
 “ sums above decerned for other than the expenses of pro-
 “ cess, from the date of the citation in the Admiralty Court,
 “ until payment, and decerns.”

FALLIJEFF, &C.
 v.
 ELPHINSTONE,
 &C.

Both parties applied to the Court for an alteration of the
 above interlocutor, in so far as adverse to them, and the
 Court found “ that the ship Vorst Potomskin is to be held
 “ of 217½ tons burden, and that the defender is liable in
 “ demurrage at that burden, from 18th Jan. to 30th March
 “ 1781, inclusive of both days, at the rate of ten shillings
 “ per ton per month : Modify the article of agency charged
 “ for Sir Wm. Forbes and Co. to £60 sterling, but allow the
 “ article of £30 charged as paid to Mr. Muldrup, and finds
 “ the defender liable in such part of the said articles as cor-
 “ responds to the aforesaid period, from the said 18th Jan.
 “ to 30th March 1781 : and remit to the Lord Ordinary to
 “ proceed accordingly; and also to hear parties procurators
 “ further with respect to the premium on the £1000 said to
 “ be short insured, and to do as he shall see cause; and,
 “ with these variations, adhere to the interlocutor of the
 “ Lord Ordinary reclaimed against.”

Nov. 18, 1789.

The cause having returned once more to the Lord Ord-
 nary, his Lordship, after hearing parties, pronounced this
 interlocutor:—“ Finds the defender liable to the pursuer
 “ in the sum of £261 sterling of demurrage, at the rate of
 “ 10s. per ton per month from the 18th Jan. to the 30th

Mar. 8, 1790.

1794.

FALLIJEFF, &c.
v.
ELPHINSTONE,
&c.

“ March 1781, of the ship Vorst Potomskin, which is to be
 “ held of 217½ tons burden; sustains the pursuer’s claim
 “ for £55. 12s. of premium, with commission on the £1000
 “ short-insured, and finds the defender also liable to the
 “ payment of the same. Finds the defender further liable
 “ in £52. 12s. 9d. sterling of interest from the above men-
 “ tioned period of detention upon £5337. 10s., as the value
 “ of the cargo on board the ship. And with regard to the
 “ town dues, light money, harbour dues, and the sums for
 “ agency to Sir Wm. Forbes and Co. and the Danish Consul,
 “ included in the 7th, 8th and 9th articles, as in the afore-
 “ said state, amounting together as now restricted by the
 “ interlocutor of Court, to the sum of £108, for the whole
 “ period from 18th Jan. to 30th March 1781, and decerns
 “ accordingly; and further decerns against the defender for
 “ the sums for which he is found liable by interlocutor of
 “ 11th March 1789—namely, £64. 14s. 8d., being the ex-
 “ pense of unloading and reloading the vessel; £318. 12s.,
 “ the premium of insurance; and £6. 9s. 2d. sterling, the
 “ shoremaster’s dues, and of interest of the whole sums a-
 “ bove mentioned, from citation until payment. Modifies
 “ the accounts of expenses in the Admiralty to £82 ster-
 “ ling: modifies the expenses in this Court previous to the
 “ appeal to the House of Lords, to the sum of £63 sterling,
 “ and modifies the expenses, since the cause was remitted,
 “ to £140 sterling, agent fee included, and decerns for the
 “ same and dues of extract.”

The appellant appealed to the House of Lords against the interlocutors of the Lords of Session of the 9th Feb. 1787 and 18th Nov. 1789, and against the several interlocutors of the Lords Ordinary of the 20th July 1787, 11th March, 25th June, 18th July, 9th Aug. and 25th Nov. 1788, and 14th Feb. and 11th March 1789, and 8th of March 1790, in so far as the several sums claimed by the original action, and stated in the condescendences put in by him, are not decreed to be paid to him, or are in any way modified or restricted. And the respondents have entered a cross appeal in so far as they are thereby subjected to the appellants’ claims.

After hearing counsel, it was

Ordered and adjudged that the respondents do pay to the appellants the sum of £890. 8s. 7d., being the amount of the different sums mentioned in the report of the register of the Court of Admiralty as due for demurrage and damage. And it is further ordered and ad-

judged, that the parts of the interlocutors complained of, by which the respondents are decreed to pay to the appellants the sums of £82, £63, and £140, together with the expense of extracting the decree, be affirmed; and that the said interlocutors be in all other respects reversed.

1794.

LOWTHIAN
v.
MAXWELL, &c

For the Appellants, *Sir J. Scott, William Adam.*

For the Respondents, *W. Scott, J. Anstruther.*

NOTE.—The result of this interlocutor was to sustain the claims made for demurrage at 10s. per ton, and also part of the claims made for damages, such as the premium of insurance on £1000 short insured, and also for that insured; the sums for unloading and reloading the vessel; the amount of repairs for the vessel, and the harbour and other dues.

[M. 16853.]

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| Mrs. AGLIONBY or LOWTHIAN, Widow of RICH- | } | <i>Appellant;</i> |
| ARD LOWTHIAN, Esq., - - - | | |
| JOHN MAXWELL and Another, trustees of | } | <i>Respondents.</i> |
| GEORGE ROSS, - - - | | |

House of Lords, 11th June 1794.

SETTLEMENTS—EXECUTION OF SETTLEMENTS BY NOTARIES—SOLEMNITIES REQUISITE—INCOMPETENT WITNESS.—A deed of settlement and other relative deeds, were executed by a person blind, and partly deaf, by the aid of notaries. The deeds, before being signed, were not read over to him, so as to make him understand, or to be heard; nor were they read over to him in the presence of the witnesses, nor was any mention made in the notaries' docquet, that they were so read. Held, the deeds of settlement void and ineffectual in law. Also, held that the agent for the appellant in this cause, and who had also been agent for her deceased husband, was an incompetent witness for her.

This was a reduction brought of certain deeds of settlement, executed by Richard Lowthian in favour of his wife, settling his whole heritable and moveable estate in Scotland, worth £70,000, on her and her heirs and assigns. He