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DEMURRAGE.

In commercial affairs time is an element both of importance and of pecuniary value. The maritime law seeks to enforce promptitude in the performance of the various obligations arising out of the hiring of ships.

The vessel is required to make the voyage in as short a time as may be found consistent with reason and safety, and compensation may be had for the various acts of commission or omission which tend to delay the loading or discharge. The unprofitable detention of a ship whilst thus engaged may result from the negligence of the master, from the neglect of the freighter or consignee, or from causes beyond the control of the parties; the fact that delay is being paid for often makes the master remiss, whilst the merchant, for divers reasons, not unfrequently fails to perform his duty of speeding the vessel, and thus inflicts a corresponding loss upon the ship-owner. It might naturally be imagined that causes of this character would lead to frequent differences, but it might also well be supposed at this late day, that the reciprocal rights, duties and obligations of ship-owners, shippers and consignees would be so well settled that adjudications thereon would rarely be called for. Such, however, does not seem to be the case; on both sides of the Atlantic suits for the recovery of demurrage continue to furnish a most fruitful source of litigation.

The term *demurrage* was formerly supposed to include all claims in the nature of delay or detention which were capable of being ascertained and paid for, either at a rate agreed on, or by an

amount calculable at so much per ton, or by damages to be subsequently estimated and arrived at. Modern English cases have, however, dealt with demurrage on a different footing, by drawing a hard and fast line between cases originating in the breach of an express contract and actions for damages for detention in the nature of demurrage, resulting from the breach of the contract implied by law.

This, however, is not the case in America. In our courts every improper detention of a vessel, whether arising in consequence of the time lost in making the necessary repairs occasioned by a collision, or by reason of the breach of a contract, express or implied, liquidated or unliquidated, as capable of being ascertained and paid for, may so be recovered by action brought *eo nomine*, the claim is considered in its commercial aspect, free from technicalities or mere points of form, as an extended freight or reward to the vessel for the earnings she is improperly compelled to lose: *The Apollon*, 9 Wheat. 378; *Williamson* v. *Barrett*, 13 How. 101; *Sprague* v. *West*, Abb. Ad. Rep. 548.

The contract of hiring usually contains a demurrage clause, or a provision reciting the dispatch or number of days agreed upon in advance as the measure of time to be consumed, and also the terms upon which delay, if occurring, is to be compensated for. If no such provision be contained in the charter-party or bill of lading, the law will imply a contract to perform the requisite duty with reasonable promptitude or within a reasonable time.

To enforce his claim, the injured party, if he has not parted with his lien may, in general, proceed *in rem* or *in personam* at his election. The former remedy is, however, for obvious reasons in general the more efficacious. Ships may be employed by their owners, or they may be let to others; their cargoes may be made up of merchandise belonging to their owners or to strangers; there may be one shipper and one consignee, one shipper and several consignees, or several shippers and several consignees. When the vessel is not chartered, if there be any stipulation for demurrage, it will be found in the bill of lading, and such is usually the case in the American coasting trade, which is carried on exclusively in our own bottoms, and generally in vessels of moderate carrying capacity. "General ships," ordinarily, as well as vessels "going foreign," are usually under charter, and, in such an event, if there be more than one bill of lading the terms and conditions of car-

riage, loading and delivery may in the case of each individual shipper or consignee be different. If, therefore, the vessel be chartered, recourse should generally be had to both the charter-party and bill or bills of lading in determining questions of demurrage.

As between the parties to the contract the rule is that when the time is expressly ascertained and limited by its terms the merchant will be liable if the thing be not done within the stipulated time, unless the detention be occasioned by the default of the shipowner or his servant; and this on the ground that if the delay be occasioned by the wrongful acts of others, there exists a remedy against them, but the circumstance that there was no fault or omission on his part is no defence, because he has by his contract stipulated that it *should* be done, and *he* is therefore responsible for all the various vicissitudes which may prevent him from accomplishing that which he has undertaken, and accordingly it has been held that delays in loading or in unloading a vessel beyond her running days, if occasioned by frost or by prohibition of a foreign government, or by custom-house regulation, or by an unlawful seizure, or by the crowded state of the docks, or by the state of the weather, or by the default of the shippers, or by a casualty, cause or accident other than the default of the shipowner or his servant, are misfortunes which must fall upon the freighter: *Barret* v. *Dutton*, 4 Camp. 333; *Barker* v. *Hodgson*, 3 M. & S. 267; *Hill* v. *Idle*, 4 Camp. 327; *Bessy* v. *Evans*, Id. 131; *Randall* v. *Lynch*, 2 Id. 352; *Fenwick* v. *Schmaltz*, L. R., 3 C. P. 313; *Jones* v. *Adamson*, 1 Exch. Div. 60; *Leer* v. *Yates*, 3 Taunt. 387; *Straker* v. *Kidd*, 3 Q. B. Div. 223; *Porteus* v. *Watney*, Id. 534. Apparent hardship is, in such cases, no mitigation, and it has been held that where a general ship has been delayed by the fault of one of the consignees, demurrage may be recovered against the other consignees for the whole of the delay, although it be occasioned by no fault of theirs: *Leer* v. *Yates*, *supra*; *This* v. *Byers*, 1 Q. B. Div. 244; *Straker* v. *Kidd*, *supra*; *Porteus* v. *Watney*, *supra*. The liability of the parties may, of course, be changed or controlled by special terms in the charter or bill of lading: *Oglesby* v. *The Yglesias*, 27 L. J. Q. B. 356; *Peterson* v. *Lotinger*, 20 Law Times 267.

A provision in a charter-party exempting the charterer from liability for detention "unless by default of the charterer," exempts him only from delay by reason of causes which are beyond his

control, and which act directly to retard the undertaking. If, therefore, the delay be caused by bad weather, or by the act of the municipal authorities, no liability exists as against him: *The Mary E. Tabor*, 1 Benedict 105; *Towle* v. *Kettell*, 5 Cush. 18. But he will be held to a strict performance of his contract notwithstanding this provision, unless the default be occasioned by a direct vismajor, or something like it: *Thatcher* v. *Boston Gaslight Co.*, 2 Lowell 361; *Davis* v. *Pendergast*, 16 Blatchf. 565. The burthen of proving the default is in such cases on the shipowner or his servant: *Towle* v. *Cushing*, *supra*.

Instead of contracting that the work shall be performed in a certain number of days, words of technical meaning are sometimes instead inserted. The word "direct" in a charter-party means that the vessel shall take a direct course from the port of departure to the port of destination, without deviation or unreasonable delay: *The Onrust*, 6 Blatchf. 533. "Running days" mean every day that ship could run: *Cochran* v. *Retberg*, 3 Esp. 121. "Working days" exclude Sundays and legal holidays. If the word "days" simply is used, running days are meant, unless there be some special usage to the contrary: *Brown* v. *Johnson*, 10 M. & W. 331; *Nieman* v. *Moss*, 29 L. J. Q. B. 206; *Commercial Steamship Co.* v. *Boulton*, L. R., 10 Q. B. 346. "Rainy days" mean only those days on which the rain-fall is such as to interfere with the execution of the work with safety and convenience: *Balfour* v. *Wilkins*, 5 Sawyer 429.

"Dispatch" means without delay, it does not mean with due diligence, nor does it refer to any usages, customs or rules of the port. The charterer who stipulates for dispatch in discharging takes all the risk of being able to effect such a discharge, and if he is obliged from any cause to detain the ship he must pay the demurrage, and this stipulation places upon the consignee the duty of taking the cargo as rapidly as the vessel could have delivered it, and also of obtaining a place of discharge for the vessel without delay. For failure in either regard he will be liable: *Sleeper* v. *Ping*, 17 Blatchf. 36. A covenant to load with "usual dispatch" excludes every delay on the part of the shipper beyond the ordinary time for bringing the cargo to the place of landing and loading: *Kaeron* v. *Pearson*, 7 H. & N. 386. "Quick dispatch in discharging" excludes all delays save the time employed in unloading and delivering the cargo, unless they be occasioned by natural causes

beyond the control of the contracting party: *Davis* v. *Wallace*, 3 Clifford 123. "Customary dispatch" includes usages of the port, such as working hours, the order in which vessels must come to the wharf, and the observance of holidays, but it does not include any delay which is purely voluntary on the part of the merchant, although such delay be usual in his trade: *Lindsay* v. *Cusimano*, 10 Fed. Rep. 303; 12 Id. 503.

An agreement for "dispatch in discharging" or for "quick dispatch" supersedes any custom of the port: *Thatcher* v. *Boston Gaslight Co.*, *supra*; *Keen* v. *Audenried*, 5 Benedict 535; *Davis* v. *Wallace*, *supra*; *Sleeper* v. *Puig*, *supra*.

When there is no special contract the usage of the port in respect to the reception and delivery of the cargo is frequently a matter of material consideration, but usage cannot prevail over or nullify the express provisions of the contract: *Bliven* v. *New England Screw Co.*, 23 How. 431. Proof of usage is admitted either to interpret the meaning of the language of the contract, or to ascertain its nature and effect in the absence of express stipulation when the meaning is equivocal and obscure. But proof of usage is not admissible to contradict express stipulations or to vary the language employed by the parties when the meaning is expressed in plain and unambiguous terms: *The Reeside*, 2 Sumn. 569.

When the bill of lading contains a stipulation for demurrage, either expressly or by reference to the charter-party, the acceptance of the goods has been held to be evidence of an agreement by the consignee to pay demurrage as well as freight: *Jesson* v. *Solly*, 4 Taunt. 52. But where no express contract exists, courts of common law have generally held that the consignee or his assignee is not liable for demurrage, even after the receipt of the goods: *Gage* v. *Morse*, 12 Allen 410; *Young* v. *Moeller*, 5 E. & B. 755. The reason being that as the consignee is not a party to the contract, the bill of lading, he is only liable upon the contract to pay freight, and is therefore not bound to accept the cargo at any particular time, and incurs no responsibility by reason of delay; that the contract implied from acceptance extends no further than the conditions upon which delivery is made to depend by the bill of lading. As a result, the consignee remained exempt from an action at law for his own neglect, and the master being obliged, in order to obtain his freight to deliver his cargo, became thus deprived of his lien or

right of action thereon for the demurrage, and was remanded to a foreign jurisdiction in which to sue the shipper. In England, Parliament came to his relief, and it was provided by statute that the consignee or assignee who receives the cargo is entitled to all the rights and subjected to all the liabilities of the contracting party: *Smurthwaite* v. *Wilkins*, 11 C. B. (N. S.) 842.

In America an equally beneficial result has been obtained by the refusal of the Admiralty Court to follow the common-law decisions. And it has accordingly been held that when the consignee is the freighter or the owner of a cargo he is liable in damages for any detention in loading or unloading occasioned by his own conduct, although the bill of lading contained no express contract therefor: *Sprague* v. *West*, Abbott's Admiralty Rep. 548; *Railroad Co.* v. *Northam*, 2 Benedict 1; *Robbins* v. *Welsh*, 9 Phila. R. 409.

The delivery of the bill of lading is a delivery of the cargo, and creates a privity between the parties: *The Schooner Mary Ann Guest*, Olcott's Rep. 498; *Griffith* v. *Ingledew*, 6 S. & R. 429; *Conard* v. *Ins. Co.*, 1 Peters 446.

If there be no express contract to pay demurrage, there can be no recovery unless the detention be occasioned by the delinquency of the consignee: *The Glover*, 1 Brown's Admiralty Rep. 166; *Wordin* v. *Bemis*, 32 Conn. 268.

It not infrequently happens that the bills of lading contain words or phrases which give notice of the existence of the charter-party without definitely stating therein the provisions in regard to demurrage, and it thus occurs that a shipper of goods may be so fixed with liabilities of which he is nowise apprised save by such notice, he not being a party to chartering the vessel, and having, perhaps, no other acquaintance with its terms or conditions. A sense of the hardship springing from this doctrine of constructive notice when pushed to its extreme limits, doubtless influenced some of the earlier decisions, but the general tenor of those of later date is to charge a shipper with the terms of the charter-party, if, by reasonable imputation, he may be supposed to have had notice of them, subject, however, to the rule that when it is intended to charge a consignee or endorsee of a bill of lading with any other obligation than the payment of freight, plain words should be used: *Chappel* v. *Comfort*, 31 L. J., C. P. 58; *Grey* v. *Carr*, L. R., 6 Q. B. 522; *Russell* v. *Niemann*, 33 L. J., C. P. 358;

Young v. *Moeller*, 5 E. & B. 755; *Gage* v. *Morse*, 94 Mass. 401. If the words of incorporation in the bill of lading are "paying for said goods as per charter-party," no liability subsists for demurrage, but *aliter* if the clause of incorporation be "freight and other conditions as per charter-party:" *Smith* v. *Sieveking*, 4 E. & B. 945; *Wegener* v. *Smith*, 24 L. J., C. P. 25. But even though the bill of lading contain no reference to the charter-party whatever, it may, notwithstanding, operate in connection with that document to charge the shipper or charterer's own agent: *Foster* v. *Colby*, 3 H. & N. 705. When delay happens without fault on either side, neither party having undertaken by contract, express or implied, that there should be no delay, the loss must remain where it falls: *Ford* v. *Cotesworth*, L. R., 4 Q. B. 127; *Cargo ex Argos*, L. R., 5 P. C. 134.

In the absence of an express contract for demurrage, there is an implied contract on the part of the consignee, if he receives the goods, that he will use reasonable diligence in effecting their discharge, and he will be liable in such an event for detention occurring by reason of his own negligence, notwithstanding the fact that the vessel has been employed by the shipper: *Crawford* v. *Mellor*, 1 Fed. Rep. 638. And it would seem that a consignee of goods, when notified by the carrier of his readiness to deliver them, should either refuse to receive them or use reasonable diligence to effect their discharge: *Fulton* v. *Blake*, 5 Bissell 371. But in the absence of any provision for demurrage, the only obligation in respect to discharge which rests upon the consignee, is that of proper or customary diligence, and when a delay occurs, no liability can be imposed upon him without showing negligence on his part: *Henley* v. *The Ice Co.*, 14 Blatch. 522. And it would seem that he is not, in such a case, responsible for the delay which ensues in consequence of the vessel's being obliged to await her turn, if such be the customary method of discharge, unless there be proof of negligence on his part: *Henley* v. *The Ice Co.*, *supra*; *Cross* v. *Beard*, 26 N. Y. 85; *The Glover*, 1 Brown's Ad. R. 166; *Wordin* v. *Bemis*, 32 Conn. 268. If the bill of lading or charter-party require "dispatch" in discharging, the master can claim precedence, notwithstanding the fact that there exists a custom to the contrary: *Keen* v. *Audenried*, 5 Benedict 535.

To earn demurrage a vessel must not only arrive but be ready to deliver her cargo: *Aylward* v. *Smith*, 2 Lowell 195.

The period from which the lay days begin to run depend on various circumstances connected with the port, and upon the form of contract. The test being whether or not the ship has arrived at the usual or agreed place of discharge: *Tapscott* v. *Balfour*, L. R., 8 C. P. 46; *Ashcroft* v. *The Orchard Co.*, L. R., 9 Q. B. 540; *Ship Co.* v. *Dempsey*, 1 C. P. Div. 654; *This* v. *Byers*, 1 Q. B. Div. 244; *Davies* v. *Mc Veagh*, 4 Ex. Div. 265; *Postlethwait* v. *Feeedland*, Id. 155; *Wright* v. *New Zealand Shipping Co.*, Id. 165.

The general rule is that in the absence of contract or custom to the contrary the days are reckoned from the arrival of the ship at the usual place of discharge, and not at the port, and this is true even though for the purposes of facilitating navigation a portion of the cargo may have been discharged at the entrance of the port: *Brierton* v. *Captain*, 7 Bing. 559; *Kill* v. *Anderson*, 10 M. & W. 498; *Rowe* v. *Smith*, 10 Bos. 268.

As soon as the period arrives at which the owner of the cargo is bound to accept part delivery, the voyage as to him, is at an end. If by the usages of the port a part of the cargo has been discharged in two different places within the port, both places taken together constitute the usual place of discharge, and lay days begin to run from the time of the ship's arrival at the port: *McIntosh* v. *Sinclair*, 11 Irish Rep., C. L. 456.

But if part of the cargo be discharged at one wharf and part at another and no objection be made thereto at the time it will be assumed, in the absence of proof to the contrary, that it was done in accordance with custom, and the charterers will not be chargeable for the time thus consumed: *The Cargo of the Mary E. Tabor*, 1 Benedict 105; 268 *Logs of Cedar*, 2 Lowell 378.

If the usual place of discharge be at a dock, the general rule is the days would begin to run from the period of the vessel's arrival at the dock, and not from the time of coming to her berth: *Brown* v. *Johnson*, 10 M. & W. 331. This, however, may be modified by proof that in the case of vessels engaged in particular trade, lay days begin to run from the time of mooring: *Steamship Co.* v. *Dempsey*, L. R., 1 C. P. Div. 654.

When no wharf is named in the contract, or in the absence of a custom to the contrary, the master of a general ship may go to a suitable wharf and notify the consignees, who are then bound to take their goods from the wharf: *Cope* v. *Cordova*, 1 Lowell 103; *The Tangier*, 21 Law Rep. 8.

A discharge of goods upon the wharf, giving reasonable notice to the consignee, constitutes a delivery: *The Eddy*, 5 Wallace 481. But if there has not been a delivery to the consignee or shipper personally, the substituted delivery must be justified: *Gatliff* v. *Bourne*, 4 Bing. N. C. 314; *Humphreys* v. *Reed*, 6 Whart. 435; *Hemphill* v. *Chenie*, 6 W. & S. 62.

A formal notice to the consignee of the readiness of the vessel to receive her cargo is not necessary if they knew that she was ready. That they did know it may be inferred from circumstances, so far, at least, as to throw upon them the burthen of proof: 268 *Logs of Cedar*, 2 Lowell 378.

It seems that the consignee of goods under a bill of lading, if he is the only person having goods on board of the ship, or all the consignees, if they are unanimous, have the right to direct the master to unload at any usual and convenient wharf within the limits of the port, or, in the case of a general ship, the master may lawfully proceed to any such wharf without consulting the shippers. The question is one of custom rather than of law: *E. H. Fitler*, 1 Lowell 114. When there are two or more wharves equally convenient to the carrier, he is bound to deliver at the wharf which is most convenient to the shipper: *The Boston*, 1 Lowell 164. The wharf selected must be safe and unencumbered. The naming of a wharf by the consignee is a warranty that a berth can be had there: *Thatcher* v. *Boston Gas Light Co.*, 2 Lowell 361. Delays within the port for a considerable time owing to a want of sufficient water at the place of delivery, do not require the freighter to receive the cargo at another place or change the general rule in regard to period at which lay days begin, and this is true although the contract stipulates that the ship was to go only so near the place as she could safely get: *Aylward* v. *Smith*, 2 Lowell, *supra*; *Parker* v. *Winlow*, 7 Ellis & B. 902; *Bastifeel* v. *Lloyd*, 1 Hurls. & C. 388. When the amount of demurrage has been agreed upon or stipulated for in advance, the quantum of damages will, in general, be regulated in accordance with its terms, but when this is not the case, the measure of damages is to be determined by the amount of freight earned under the contract, subject to a deduction of the expense to which the shipowner has been subjected: *Smith* v. *McGuire*, 27 L. J. Ex. 465.

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