REPORTS

OF

CASES

ARGUED AND DECIDED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

VOLUME IV.

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NOTE BY THE EDITOR.

There is no printed report of the decisions of the first court of appeals, and of those which have been omitted by reporters from that period to the death of Mr. *Pendleton*, although such a work is obviously wanted; and it is to supply that defect, that the present volume is published: which consists of two parts: the first includes all the important cases determined from the commencement of the first court, to its final dissolution in the year 1789; the second contains the unreported cases in the new court of appeals, from that period to the death of judge *Pendleton* in 1803, besides two cases in the general court, and court of admiralty.

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N. B. Mr. *Washington's* account of this case is very short, and affords little information; but the above report, extracted from Mr. *Marshall's* notes, shews it to have been a very important decision, particularly as to the statutes of discount and replevin.

It is remarkable, that although the county court, in fact, gave no judgment upon the verdict, the district court affirmed it, with the ten per cent. damages; and that the court of appeals did the same thing. Which probably arose from oversight, as it does not appear to have been mentioned by the counsel, on either side.

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LOVE *v.* ROSS, SHORE & Co.

A. the owner of a brig chartered her to R. & Co., to carry a cargo of tobacco from Virginia to Curracoa or Eustatia; from thence to Hispaniola; and back to Virginia; the freight to be half the tobacco shipped in Virginia, payable at the port of delivery in the West Indies; and £1000 paper money on the vessel's arrival in this country. The stipulated freight, in the charter party, was all the freight that A. was entitled to; and he had no right to any further freight for bringing back the return cargo.

In cases of that kind, performance of the voyage is the consideration for the freight.

And if A. breaks the charter party, he cannot come into equity to enforce it against R. & Co.

Love filed a bill, in the high court of chancery, against *Ross, Shore & Co.*, stating, that, upon the 5th of August, 1779, articles of affreightment of the plaintiff's brigantine, the *General Scott*, were entered into between the plaintiff and the defendants in writing, thereto annexed. That independent of those articles, it was further stipulated, by parole, that *John M'George*, the agent of the defendants, should sell the plaintiff's cargo and do the other business of the vessel in St. Eustatia, free from commission, provided she arrived at that port, and load her for Hispaniola, as far

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as it was necessary and adviseable for the joint interest of the defendants and the plaintiff, and as far as it could be done, on freight, for the plaintiff's interest. That it was also promised that Mr. *Douglass*, another agent of the defendants, should be in Hispaniola, and transact the plaintiff's business there, in selling the cargo, and purchasing a return cargo for Virginia, free of commission, provided he was not taken, by the enemy, on his way thither. That the plaintiff entertained great hopes of profit from the voyage; and therefore agreed to order the vessel to Hispaniola, and to give up the freight of one half of her *hold*, from Hispaniola to Virginia, in consideration of such important services: which was all the plaintiff was to receive for the freight of half the *hold*, from St. Eustatia to Hispaniola, except £ 830 paper money, worth only 1276 *libs* of tobacco, although it would have cost the plaintiff 360,000 *libs* of tobacco to have insured the vessel from the former to the latter place. That after the brigantine was loaded and nearly ready for sea, the defendants refused to give the instructions to *M'George* and *Douglass;* but the plaintiff, still hoping they would comply, sent the vessel down the river; yet, hearing nothing from the defendants, he was obliged to relinquish the scheme, and sell the freight of that half of the vessel, which had been retained for himself, to *Braxton*, at less than a moiety of the profit he would have made by the voyage, if the defendants had complied. That the defendants brought suit and obtained judgment against the plaintiff in Henrico court, upon an account in which the plaintiff is charged with 1025½ gallons of Taffia rum, although he had, in fact, but 982 gallons. The bill therefore prays, that the judgment may be enjoined; the error as to the Taffia rum may be corrected; the defendants made to account with the plaintiff for the freight of one half of the said vessel from Hispaniola to Virginia; and that the plaintiff may have general relief.

The answer admits the written articles of affreightment; and avers that they contain the whole agreement between the parties. That the defendants laded the brig with tobacco,

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agreeably to the articles of affreightment, and directed *M'George* to assist the captain with his advice: That the defendants fully performed the said articles of affreightment, without delay, although the plaintiff was constantly disputing about them, to the injury of the defendants: That the vessel was not got ready for sea, until near four months after the stipulated time. Denies the verbal stipulations set forth in the bill, respecting the services of *M'George* and *Douglass;* or that those services were meant as a consideration for the freight of the vessel from Hispaniola to Virginia: Believes, that the plaintiff's sale of half the freight of the vessel to *Braxton*, arose from the plaintiff's want of funds to pay disbursements, and purchase a return cargo: That the suit in Henrico was long depending, and defended by the complainant with his utmost power.

Upon the coming in of the answer, the chancellor dissolved the injunction, except as to £20. 16. There was a general replication, afterwards, filed to the answer; and commissions awarded to take depositions.

W. Hay, a subpartner of the defendants, (but examined by consent,) states, that the suit in the county court had been long depending, and was defended by counsel for the plaintiff: That the defendant's account for the Taffia rum was correct: That the plaintiff's counsel insisted, on the trial, that the £830, (being the £1000 in the charter party, proportioned,) for the return freight, was not enough for the services performed; and that the articles of affreightment were laid before the jury.

Irving—Proves that *M'George* was a merchant of character. That insurance from St. Eustatia to Virginia was from 25 to 33⅓ per cent. That the plaintiff sold the brigantine, *General Scott*, on her return from Hispaniola, for upwards of 360,000 *libs* tobacco. That *Braxton's* cargo of coffee cost 9 sous, except 832 *libs* at 6 sous. That *Braxton* agreed to ship 80 hhds. of Taffia, and 4000 *libs* coffee; and to give the plaintiff one half of the same, for the freight home. That the brigantine would probably have held 140 to 160,000 *libs* of coffee.

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Cowper—That in spring 1780, freight to St. Eustatia and the neighbouring islands, was half the cargo shipped; the return freight to James river on rum and sugar, 20 per cent.; and, on dry goods, 10 per cent.

Perkins—That the brigantine left Ozborne's, on her way to sea, upon the 9th of December, 1779.

Douglass—That he, in 1779 and 1780, did business for the defendants, in Curracoa: and that no proposition was ever made to him to go to Hispaniola.

Nicolson—That *Ross, Shore & Co.* made many charters of affreightment, which were more advantageous than that with the plaintiff, they having the liberty of one half the *hold* freight free back, without a premium, except salt.

There were sundry other depositions taken; but they did not vary the case materially.

The exhibits were, 1. A letter from *Campbell*, the master of the brigantine, dated the 11th of April, 1780, at Aux Cayes, which says that he shall sail to-morrow for Virginia, loaded with coffee, taffia, sugar and molasses. 2. A letter of the 7th of August, 1779, from the plaintiff to *J. Hay*, one of the partners of *Ross, Shore & Co.*, which says Mr. *Ross* had promised that he might have £ 1000 for that defendant's part of the return freight, and wishes him to advance some as directed in the letter. 3. A letter from the defendants to *M'George*, dated 1st December, 1779, saying that they send a copy of the charter party; and have promised his *good offices* to captain *Campbell*, the master of the brig, which he depends upon; finding fault with *Love's* delays, &c.; and advising him to be upon his guard. 4. A letter, from *David Ross*, to *Love*, dated the 3d January, 1780, which says, that the articles of affreightment are explicit; and that there is no room to dispute about any thing contained in them; complains that the vessel has not proceeded to sea; and protests for all damages the defendants may sustain in consequence of it. This letter is in answer to the following letter, that is to say: 5. A letter from the plaintiff to *Ross*, in which he states his own ideas relative to the ar-

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ticles of affreightment; and of the services to be performed in lieu of return freight. 6. A letter from the plaintiff to *David Ross*, dated the 9th of December, 1779, complaining of the want of liberality in *John Hay's* construction of the articles of affreightment. 7. The articles of affreightment, signed by the parties, in the following words: "Articles of agreement between *Alexander Love*, sole owner of the brigantine *General Scott*, now at Ozborne's, and *Ross, Shore & company*. That the said brigantine shall be ready compleated and fitted for sea by the 20th September next, with four carriage guns, four swivels, with ammunition for the same, and sufficiently manned and victualled. That the said company will load the said brigantine with a cargo of upland tobacco for the island of Curracoa, or St. Eustatia, as the said company shall direct, and pay, for freight, one half of the said cargo at the port of delivery, where the utmost despatch shall be given in receiving the tobacco. The said company are to pay half the craftage on board, and half the duties here and in the West Indies. On the arrival of the said brigantine at St. Eustatia or Curracoa the company's factor, in conjunction with the captain, may determine whether to send a small cargo of goods, or send cash, to Hispaniola, (to purchase her return cargo on joint account, or separate account, as they may agree,) which is to consist of such articles as the said factor and captain shall think best for the interest of the concerned, allowing to the brigantine the usual freight on the goods carried to Hispaniola from Statia or Curracoa; but nothing to be allowed for money. The said companies agent in Statia or Curracoa, where she may happen to arrive, shall be directed to render the captain every good office in advising him for the best. That in case it shall so happen that the said captain is either disabled for want of money, or chooses to decline shipping one half of her return cargo, the said company may, if they please, fill her up, and for all that is over and above their one half of her burthen, they shall pay the said *Alexander*, as freight for the said surplus, at the rate of 10 per cent. on

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the sales here, or a tenth part of the goods here. The surplus part of the cargo to be distinguished by a separate bill of lading signed in Hispaniola. The said company will pay half the port charges in Hispaniola, and the cargo shall be chargeable with no more commissions than is usually paid there. Should the brigantine be loaded fully back on the joint account of the said *Alexander* and the said company, the cargo to be delivered, in like manner, on its arrival here; and the said company moreover agree, that on delivery of the said brigantine's cargo here, or any safe port to the north or south, they will pay the said *Alexander*, one thousand pounds continental money, provided the brig is of the burthen of 140 hogsheads of tobacco, and so in proportion for a greater or less burthen. In witness whereof we have hereunto set our hands and seals this fifth day of August, 1779." 8th. A copy of an account between *Richards & Coleman* and the plaintiff. 9th. An account between the plaintiff and *Duncan Campbell*, the master of the brig. 10th. An award between *Richards & Coleman* and the plaintiff. 11th. A copy of an account between the plaintiff and the defendants. 12th. A copy of an account between the plaintiff and *M'George*. 13th. A copy of the defendants' judgment, in Henrico county court, against the plaintiff, for £211. 14. 10. and costs.

The high court of chancery dismissed the bill, upon a hearing, with costs; and *Love* appealed to the court of appeals.

Counsel for the appellant. The contract was not performed by the defendants; for they refused to furnish the plaintiff with the stipulated instructions to *M'George* and *Douglass;* which threw the appellant into despair, and obliged him to sell his moiety of the adventure to *Braxton;* who made great profit, by the purchase; which would have been gained by *Love*, had he retained, as he would have done under other circumstances, the share to himself.

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This was the more inexcusable, as the services to be rendered by those agents, were the sole motive for agreeing to accept less than full freight for the return voyage; for the £ 1000 paper currency was no compensation at all, as the risk from Eustatia to Hispaniola, was as great or greater, than that to Virginia, so that a double risk was encountered for that paltry sum, when the plaintiff, for the outward voyage alone, was to receive half the cargo shipped: which proves, that, either there was an omission in the charter party, or that those services were to compensate for the risk: The bill alledges the latter, and every presumption is with it; for the charter party stipulated that they should be rendered, and rendered without commission, too, as none is required; which was considered, on both sides, as a reasonable reward; and therefore ought to have been faithfully afforded: But when, instead of that, the refusal of the defendants to furnish the instructions, gave reason to conclude that they would not be given at all, it was cause of just alarm, as the appellant was likely to be left without an agent in the West Indies, to conduct his business there; and that drove him to the necessity of sacrificing his interest in the adventure, in order to avoid the danger of greater loss. That the contemplation of those services was the great motive to the acceptance of such inconsiderable freight for the return voyage, is clear upon the face of the transaction; for no man, in his senses, would have accepted it, without some other equivalent satisfaction: and this internal evidence of the fact is as strong, as if it had been expressed in terms in the charter party. Therefore an issue ought to be directed, to ascertain the damage which the plaintiff has sustained, in consequence of the misconduct of the defendants; whose actual instructions afterwards to *M'George* were an aggravation of their delinquency, as they indicate that good faith was not intended; for they admonish him to be upon his guard against the plaintiff; which must, necessarily, have operated to his disadvantage. The testimony proves that the plaintiff was charged, by the defendants, with more Taffia rum than he

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received, and therefore the difference ought to be corrected: for the pretence that it was an adversary trial of the cause in the county court, will not prevent relief against actual error; and, much less, will what was said about the charter party at that trial: But it is unnecessary to remark upon either of those circumstances, as *W. Hay* is the only witness who says any thing concerning them, and he is interested.

The appellees' counsel contended, that the contract had been fully and honourably performed by the defendants; who had shipped the cargo on board in due time, and given *M'George* the instructions stipulated for in the charter party; of which they sent him a copy; and if they put him upon his guard against the plaintiff, it was no more than was proper, as they referred to his disputing about the terms of the charter party, and delaying to send out the vessel, as manifesting that caution would be necessary. That all the stipulations, between the parties, were contained in the charter party; which could not be abridged, or added to, by parol testimony, if any such there had been, although there was none. *Bac. Ab. tit. Evidence*, (G.) Besides the alledged parol stipulations are all denied by the answer, and are not supported by a single fact, or witness. That the conduct of the appellant was entirely reprehensible; for the vessel was detained near four months, while he was raising unfounded disputes about the charter party, to the great loss of the appellees, whose funds were thereby suspended, and their property exposed to greater danger of capture by the enemy, after the coast, which was then clear of privateers, should be again infested with hostile cruisers. That the pretended necessity for the sale to *Braxton*, did not exist; for, in truth, it arose from inability in the appellant to procure adequate funds for paying disbursements about the vessel, and perfecting his objects in the adventure. But had it been otherwise, his course was, either to have stuck to his interest in the adventure, and relied upon his claim to damages for a breach of contract by the appellees; or to sell,

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as he did: But, in the latter event, he gave up all claim to relief for the breach; especially, as there is no proof, that he did not get full value from *Braxton*, not only for his real, but even for his imaginary, expectations of profit. That the claim for services from *M'George* and *Douglass*, was delusive; for they extended to advice only, and not to active operations, requiring commissions; which it is impossible to believe the defendants would have stipulated for, as the agents would certainly have demanded them; and they must have been paid, either by the plaintiff or the defendants; yet neither is pretended. But the language of the charter party is decisive; for it is confined, in terms, to the rendering "the captain every good office, in *advising him*, for the best:" and nothing further could be claimed. Such services, however, could not have been so important, as to have been received as compensation, for freight of the return voyage, if, in fact, there had been a return voyage, upon which freight could have been demanded. But the truth is, that the whole argument as to a return voyage is misconceived, and founded in error: for there was, in fact, but one voyage, as the same vessel, by the terms of the charter party, was to take out the home cargo, and bring back the proceeds changed into a cargo from abroad: so that the freight mentioned in the charter party, was for the whole voyage *out* and *in;* and not for the outward voyage only, which was not to terminate in the West Indies; but was to continue unbroken, until the safe return of the vessel to Virginia; and, if she had been lost, the freight *outwards* and *inwards*, would have been gone. 1 *Brownl.* 21. It follows, that there was no return voyage upon which freight could have been demanded; and consequently, that there neither was, nor could have been, any freight to surrender, in consideration of the services. That there was no hardship in all this, as *Nicolson* proves, that so far from its being oppressive, the appellees frequently chartered upon more advantageous terms, having one half of the *hold* of the vessel freight free, on the voyage back to this country. That

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the verdict in the county court, with respect to the Taffia rum was probably right; but, if not, the error was corrected by the chancellor.

Cur. adv. vult.

LYONS, Judge, delivered the resolution of the court as follows:

This is a suit founded on a charter party, made on the 5th of August, 1779, between the appellant and the appellees, for the charter of the brig *General Scott*, belonging to the appellant, on a voyage from Ozborne's to the West Indies, and back to this country.

The charter party stipulates, 1. That the brig shall be compleated and fitted for sea by the 20th of September, then next following. 2. That the appellees shall load her with tobacco, to be carried to the island of Curracoa, or St. Eustatia, as the appellees might direct, and pay, *for freight*, one half of the cargo at the port of delivery. 3. That the appellees will pay half the craftage on board, and half the duties here, and in the West Indies. 4. That, on the arrival of the brig at St. Eustatia, or Curracoa, the appellees' factor, in conjunction with the captain of the vessel, shall determine whether to send a small cargo of goods, or cash, to Hispaniola, to purchase a return cargo on joint account, or separate account, as they may agree; which is to consist of such articles, as the said factor and captain shall think best for the concerned, allowing the brig the usual freight on the goods carried, from Eustatia or Curracoa, to Hispaniola; but nothing for money. 5. That the appellees' agent in Eustatia or Curracoa, where the vessel may arrive, shall be directed to render the captain "every good office, *in advising him for the best.*" 6. That, if the captain, from choice or want of funds, should decline shipping one half of the return cargo for the appellant, the appellees may, if they please, fill her up; and, for all that is over and above *their one half* of her burthen, shall pay freight for such surplus, (to be distinguished by a separate bill of

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lading signed in Hispaniola,) at the rate of 10 per cent. on the sales, or a tenth part of the goods here. 7. That the appellees shall pay half the port charges in Hispaniola, and the cargo be charged with no more commissions than is usually paid there; and should the brig be loaded fully back on joint account, the cargo to be delivered here, in like manner, upon joint account. 8. That, on delivery of the brig's cargo here, or in any safe port, to the north or south, in the United States, the appellees shall pay the appellant £ 1000, continental money, provided the brig was of the burthen of 140 hogsheads of tobacco; or, in that proportion, for a greater or less burthen.

The appellees, agreeably to the charter party, loaded the brig with tobacco in due time, and wrote to *M'George*, enclosing him a copy of the charter party, and apprizing him that they had promised the appellant, his (*M'George's*) good offices in *advising* the captain, as mentioned in the charter party. But the brig was not got ready nor sailed, before the 9th of December, 1779.

In the mean time, the appellant sold his moiety of the adventure to *Braxton;* and the vessel proceeded to Eustatia, where she delivered the cargo; thence went to Hispaniola; took in a load of West India produce; and arrived safe, with it, in Virginia, where it was delivered to the owners.

A controversy, having arisen between the appellant and the appellees, relative to a difference in account respecting some Taffia rum, which the appellant alledged was overcharged, the appellees sued him in the county court of Henrico, and recovered the whole amount claimed.

Upon which the appellant filed a bill of injunction in the high court of chancery, to be relieved as to the overcharge for the Taffia, and stating his claims upon the charter party; which he said had been violated by the appellees, who had not given, as he alledged, the directions stipulated for to *M'George* and *Douglass*, when required by him; in consequence of which, he had been obliged to sell to *Braxton*

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at a loss, and prays that the damage may be ascertained by a jury. The appellees, by their answer, insist upon the letter of the charter party; deny that there were any other stipulations, than those contained in it; and say that they have fully performed the latter.

The court of chancery at first dissolved the injunction except as to the excess alledged for the Taffia, but, upon the hearing, dismissed the bill with costs; and *Love* has appealed to this court.

The appellant sets up two claims:

1. Compensation for damages sustained, in consequence of the sale to *Braxton*.

2. Deduction, from the verdict in Henrico court, on account of a supposed overcharge for Taffia rum.

In support of the first, it is alledged, that the appellant was entitled to the active services of *M'George* and *Douglass* in the West Indies, in consideration of his having relinquished his right to further freight upon the return cargo; and that the failure of the appellees to furnish instructions for that purpose, obliged him to sell to *Braxton* at a sacrifice, which produced a loss, that should be compensated for.

The claim, to the services, was endeavoured to be maintained, 1. By the assertion, that there were verbal stipulations, to that effect, superadded to the charter party. 2. By internal evidence to be derived from the charter party.

The just remark, to the first assertion, is, that there is no proof of the verbal stipulations; for the answer of the appellees denies, that there were any such; and it stands uncontradicted by any fact, or witness, in the cause: which destroys the appellant's pretensions, upon that score.

The second assertion is equally unfounded. For it is not true, that the charter party contains internal evidence of a right to such services, from *M'George* and *Douglass*, as it only stipulates for their good offices in *advising* the captain, and not for their agency on behalf of the appellant. For the captain was to be his agent; and was to conduct every thing relating to his interest. *M'George* and *Doug-*

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lass to do nothing more than give *advice:* which it does not appear was ever refused.

But the whole argument, for the appellant, upon his supposed right to freight for the return voyage, and the relinquishment of it, being the consideration for the ulterior services of *M'George* and *Douglass*, is misconceived and without foundation. For it was all one voyage, that is to say, a voyage from Virginia to Curracoa or St. Eustatia; from thence to Hispaniola; and, from Hispaniola, back to Virginia, or some northern or southern port in the United States: and the only freight, which the appellees were to pay, was the half of the outward cargo, and the £1000 continental money (both which were received, the first in Eustatia, and the other by the Henrico verdict), unless the captain declined to purchase a return cargo, and the appellees filled up the residue of the vessel; in which case, they were to pay freight, in the words of the charter party, for "all above, *their one half.*" Which, necessarily, implies, that they were not to pay any thing more, for their own half *outward*, or *inward*. The same observation applies to the passage from Curracoa or Eustatia to Hispaniola; for, in that case too, additional freight was to be paid by the terms of the articles of affreightment: So that, in every instance, where it was intended, it is expressly provided for in the charter party, thereby affording an irresistible inference, that it was to be paid in no other case. For had it been otherwise, it would have been declared, and not left to such obvious implication, from the excepted cases.

It was said, however, that *Love* would have acted absurdly in suffering his vessel to go to Hispaniola, out of her way, at additional risk, and bring back the return cargo, without any, or very little freight; and if he submitted to it, it must have proceeded from hardship and oppression, on the part of the appellees. On which it is to be remarked, in the first place, that the increase of distance, and the additional risk, if there was any, were compensated for in the stipulated freight. But suppose it were otherwise, how

would that alter the case? For still the existing contract was actually made: and whether wisely, or unwisely, is of no consequence to the decision; for it is the business of the court to decide what the contract is, and not to speculate upon the prudence, or imprudence, of the parties in the transaction. Much less have we to do with the hardship of the contract, if there had, in fact, been any. For it is not the appellees, who come into a court of equity to enforce a hard bargain, which the court might or might not have decreed, according to circumstances; but it is the appellant, who comes to complain of the hardship, and to ask relief, as far as it suits himself, but to insist upon the contract in other respects, with an alteration of the terms of it, to the great disadvantage of the appellees. A solecism which a court of equity will never tolerate; for if the appellant might have resisted the whole contract, upon the ground of hardship, in a suit against himself, why may not the appellees resist the alteration upon the same ground? But there was, in fact, no hardship in the case; for *Nicolson* proves that there was nothing oppressive in the articles; and that the appellees had chartered several other vessels upon more advantageous terms.

The result is, that the whole foundation of the claim fails; and the claim, itself, falls with the foundation.

But were it otherwise, it is not proved, that there was any loss sustained, by the sale to *Braxton*. For the appellant sold all his advantages in the adventure; which included every benefit to arise from it; and it is not shewn that the price was inadequate.

There is another view of the subject, however, which deserves consideration. How can the appellant come into a court of equity, to complain of a breach, by the adversary party, of a contract, which he has violated himself? For, by the terms of the charter party, the brig was to be ready for sea, on the 20th of September; but she did not, in fact, depart, until the 9th of December, almost three months afterwards, and then, probably, with increased danger of

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capture. It is plain, under these circumstances, that the appellant could not have recovered, even at law, upon a breach of the charter party by the appellees, if there had been one, as he could not have averred performance on his own part. For it is not a case of mutual independent covenants, upon which either party may sue, without shewing performance by himself; but performance, on one side, is the consideration for performance, on the other; so that neither could the appellees have supported an action against the appellant, for not sailing at the appointed time, without shewing that the tobacco had been shipped; nor could the appellant have sustained a suit at law against the appellees, for a breach, if there had been one, as to the services of *M'George* and *Douglass*, without shewing that the vessel had sailed at the prescribed period.

But if this be so at law, the case is much stronger in equity. For he who comes into a court of equity, to ask relief, must be able to shew that he has done it himself.

The claim for the supposed overcharge for the Taffia rum, was properly disallowed by the chancellor at the final hearing of the cause; and, upon the whole, the court discovers no error in the decree: which is unanimously affirmed.