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.

1798. *April.*

Common-wealth *v.* Banks.

Common-wealth *v.* North & Co.

all, was not official, but the same as if given by any other individual, and no excuse for their not pursuing the law. The cases, therefore, are wholly dissimilar as to the ground of relief. Upon the whole, the court adjudge that there is error in the judgments aforesaid: Therefore it is considered, that the same be reversed and annulled, and that the appellees respectively pay the costs of the prosecution of the appeals aforesaid here; and this court proceeding to give such judgment as the said district court ought to have given, It is further considered that the several appeals of the appellees from the decisions of the auditor of public accounts rejecting the claims of the appellees be dismissed."

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EPPES *v.* TUCKER.

In March 1779, A. borrowed of B. six hogsheads of tobacco, to be shipped on board A.'s own vessel to a foreign port, and there invested in goods: In September, after the arrival of the goods, A., with a view to pay the loan, left six tobacco notes, exceeding the loan, with B., who lay sick: In April, A. wrote to B. that C. would receive any tobacco or money he might send: B. sent the whole six notes; which C. delivered to A., who expressed surprize: This did not rescind the loan, and entitle B. to keep the goods.

If, in order to avoid capture by the enemy, the master, before he reaches the port of destination, strands the vessel; which is thereby lost, but the cargo saved, the cargo shall not contribute to repair the loss of the ship; but the owner of the ship is entitled to freight and salvage.

Eppes exhibited his bill in the high court of chancery, against *Tucker*, stating, That *Tucker*, being owner of the schooner *Despatch*, lying in Appomattox river, adjacent to the shore of Prince George county in Virginia, it was agreed, between him and the plaintiff, that the latter should ship six hogsheads of tobacco, on board the schooner, to be transported to some port in Europe: One half of which said tobacco to be retained, by the defendant, for freight and risque; and the other half to be expended by the master

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of the schooner in the purchase of merchandize, for the plaintiff, according to an invoice furnished by him. That the schooner arrived, safely, at Surinam in South America, with the tobacco on board; which the master expended in goods. That the schooner afterwards sailed with the merchandize on board; and arrived in Virginia, where the plaintiff demanded of the defendant a moiety of the goods according to the agreement aforesaid; but had not been able to obtain it; and therefore the bill prayed for an account, and general relief.

The answer admitted, That, in March 1779, during the war between Great Britain and this country, the defendant lent the plaintiff (who had none of his own) six hogsheads of tobacco, to be shipped on board the schooner; and the same were laded accordingly. That the schooner commenced her voyage, but put into Surinam to avoid the danger from enemy vessels; where the tobacco was sold, and goods purchased with the proceeds: One half for the benefit of the plaintiff, and the other for the defendant and the other owners and adventurers. That, in July 1779, the schooner sailed, from Surinam, for Virginia; and, on the 17th of August following, fell in with two British cruisers, of superior force, on the coast of North Carolina, near Curratuck; and it being judged, by the master, mariners and passengers, that it would be impossible to avoid being captured, if the voyage was continued, but that, if the schooner was run on shore, the cargo, or the greater part of it, might be saved, they determined to do so, and did actually run her on shore accordingly, with the sole view of preserving the cargo: where they landed the cannon and ammunition, from on board the schooner, and defended her against the enemy, thereby saving the cargo. That, fearing the schooner would go to pieces, the master afterwards hired assistance, from the people of the country, and, with their aid, brought the cargo on shore, great part of which, with some materials of the schooner, were thus finally preserved. Of all which, the master, mate and one of the passengers made due pro-

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test, according to custom. That the defendant communicated intelligence of these events to the plaintiff and the other proprietors of the cargo, and proposed to take the plaintiff's share of the loss, or if that was refused, to pay him an equivalent for his risque on the outward voyage, although the plaintiff had not paid the defendant for the tobacco lent. That the plaintiff afterwards, to wit, in September, deposited notes for six hogsheads of tobacco with the defendant, who lay sick: which amounting to more than the quantity lent, the plaintiff, in April following, requested the difference, when the defendant, not having any transfer notes, proposed to return the deposit, which the plaintiff acceded to; and therefore still owes the tobacco lent. That the defendant had the goods appraised and sold; and is ready to account with the plaintiff and other proprietors of the goods, allowing contribution for the loss of the vessel, salvage for the goods, freight and other customary charges.

The exhibits filed in the cause, were, 1. The protest made by the master and others. 2. A schedule of the goods saved from the schooner. 3. An account of the charges; and a statement by the defendant of the average loss. 4. The plaintiff's letter, in April 1780, to the defendant, apprizing him, that the bearer, colonel *Byrd*, would receive any tobacco or money he might send on the plaintiff's account; and the defendant's letter at the bottom of it, sending all the notes deposited in September; with the plaintiff's receipt to colonel *Byrd* for them. 5. A list of the goods purchased in Surinam.

The deposition of colonel *Byrd* proves that he delivered the plaintiff's letter to the defendant, and received some tobacco notes from him; which he, afterwards, delivered to the plaintiff; who expressed surprize at the return of all the notes, as he expected to receive less than 1000lbs. of tobacco.

The deposition of the passenger who joined in the protest, fully sustains the answer of the defendant, as to the chase by the British cruisers; the danger of being taken;

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the advice of the mariners and himself the only passenger, to run the vessel on shore to avoid the capture, and save the cargo; the defence with the cannon and ammunition, after they were landed, against the enemy, and their final repulsion; the ultimate wreck of the schooner, and preservation of the goods.

The court of chancery adjourned the case, by consent of the parties, to the court of appeals.

The cause was first heard before the judges of the high court of chancery, general court, and court of admiralty, under the first constitution of the court.

It was argued for the plaintiff, That he was entitled to a moiety of the proceeds of the six hogsheads of tobacco lent by the defendant; and that the return of the notes, left with the defendant in September, did not alter the case; for the return was without his solicitation, as his letter could only be understood, as requesting the surplus. That the defendant was not entitled to contribution; for that only applies to *jettison* of the goods, and not to the destruction of the vessel. That the Rhodian law, as collected in the Imperial Code, which adopts it, is only, that, if goods are thrown overboard in order to lighten a vessel, the loss incurred for the sake of all, shall be made good by the contribution of all, 1 *Dom. Civ. L.* 319; and the laws of *Oleron* are agreeable to it, *art.* 8. That these laws, under our act of assembly for constituting the court of admiralty, are statutes, in effect, to the court upon the subject, as it declares that that tribunal shall be governed "by the laws of *Oleron*, and the *Rhodian*, and *Imperial* laws, so far as they have been heretofore observed in the English courts of admiralty." *Ch. Rev.* 104. But neither of those laws provides for the case of the destruction of the ship to save the goods, even if that were the sole motive; and, as it is a matter of positive law, the rule cannot be carried further than the law itself prescribes. But it was not the sole motive in the present case; for the object was the chance of

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saving the ship and crew and the defendant's own goods on board, at the time; and it would be dangerous, as a general rule, to put it in the power of the master and crew to take such a step in the absence of the freighters, whose interests might be sacrificed, when the owners of the ship might, without the knowledge of the freighters, be secured to the full value, and receive contribution besides. Accordingly, no English case has decided, that contribution shall be made by the freighters in cases of that kind. If the ship had merely received a wound from the stranding, which let in the water and ruined the goods, but the vessel had, afterwards, been got off, and saved, the freighters could not have claimed contribution, as the goods had not contributed to save the vessel; and the obligation must be reciprocal, or it does not exist at all. Thus if the ship be lost in a storm, and part of the goods be afterwards recovered, the freighters are not bound to contribute. 1 *Dom.* 320. The saving of the goods, in the present case, did not occasion the loss of the ship; for she would have been lost without; and therefore it is an attempt to make a merit of necessity, in order to get something for nothing. Freight is not due in strictness, as the ship did not reach her port of destination: Nor is salvage due under the circumstances.

For the defendant, it was argued, that the plaintiff, by accepting the return of the tobacco notes, without apprizing the defendant of his objection, had rescinded the contract for the loan; and therefore, was not entitled to the goods. But if that were not so, the defendant had a clear right to contribution; for the vessel was destroyed to save the cargo; and therefore, it was as reasonable that contribution should be made for the loss in this, as in the case of *jettison*, where the casting away of the goods saves the vessel: for the rule ought to be reciprocal: and so it was understood to be in the case of *Wright* v. *Sheppard*, Show. Cas. Parl. 18: which was decided expressly on the ground, that the safety of the silks had not occasioned the loss of the oils. For

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both sides, in effect, admitted, that if the loss of the oils had saved the silks, or the saving of the silks had occasioned the loss of the oils, there must have been contribution in that case. And, if a mast be cut down, or other damage voluntarily done by the master to the ship in the course of the voyage, with intent to save the vessel and cargo, the freighters must contribute. 1 *Dom.* 320. *Molloy*, 249. Which necessarily fixes the principle, that injury, whether partial or total, done to the ship for the general benefit, shall be repaired by general contribution. That the act of assembly made no difference; for that means, not the text merely, but the practice under, and the inferences drawn from, the adopted codes and decisions; and from the rules of general equity arising out of the laws of nature and nations; which latter reference was clearly in favour of the defendant, as almost all modern nations proceed upon that principle. That the sea law directs, that the master, in all cases of extremity, shall do what is most for the benefit of the concerned; and as what was done, in this case, was done, with an honest intent to serve all parties, all who had an interest ought to contribute. That the voyage was, under all the circumstances, to be considered to have been completed, as the goods came to a place of safety within the plaintiff's own country; which, in time of such a war, was sufficient; and the most that could fairly be expected. That there could be no doubt with respect to the salvage; for the expense was necessarily incurred; and, without it, the goods must all have been lost.

Cur. adv. vult.

In conference, chancellor *Wythe*, thought that the case was completely within the rule of contribution, as the vessel was destroyed to save the cargo; and, therefore, that it stood upon the same principle, as when goods are thrown overboard in stress of weather; or in danger, or just fear of enemies, in order to save the ship and the rest of the cargo: in which case, it is universally admitted, that that

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which is saved, including the ship, shall contribute to repair that which is lost. So, in this case, where the ship was stranded in order to save the cargo, and had that effect, it was equally just, that the cargo should contribute to repair the loss of the ship.

But chancellor *Blair* thought otherwise; for the ship was run on shore, in order to save the property of the owner; and not to preserve the cargo of the freighters, which is always the avowed and single object, in the case of *jettison*. That all chance of escape was taken from the proprietors of the goods, with a view mainly to benefit the owner of the vessel; which might, in the estimation of the master and crew, by the intervention of shallow waters, or other impediments to the heavier vessels of the enemy, have, possibly, eluded the danger. And although the goods, belonging to the freighters, were ultimately saved, yet that was the consequence, and not the principal intent, at the time of running the ship on shore. Nor had any case been produced to shew, that the owner of the ship could, under such circumstances, claim contribution. And, although there was no proof of any actual fraud in the conduct of the master and crew, nor reason to suspect it, yet the court should be guided by safe principles, and not lay down a rule which would, hereafter, be liable to abuse.

The judges, however, came to no resolution at the time; but the cause was held under advisement until several terms afterwards; when another argument was directed; but never took place before the court as then constituted; for, in consequence of the new system, the court of appeals was reduced to five judges only; and, in June 1790, the cause was reheard before *Pendleton*, president, *Carrington*, *Fleming* and *Mercer*, judges; who made the following decree:

"The court having maturely considered the transcript of the record, the exhibits produced and read, and the arguments of the counsel on both sides, are of opinion, That the defendant ought to be accountable for the merchandize

saved from the wreck of the brigantine *Despatch*, according to the sales thereof, and with each proprietor in proportion to the amount of his interest in the cargo; and that each such proprietor ought to be charged with full freight for the goods saved, and a reasonable salvage; but be exempt from average contribution for any loss or damage to the vessel or her rigging, or for goods lost or damaged; the proprietors of which vessel and goods must abide their respective fates, and take what is saved from the wreck."

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Memorandum.—What passed at the conference, was related to the reporter by chancellors *Wythe* and *Blair*.

DOUGLASS *v.* ROAN.

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Ship's stores and seamen's common stock, are not subject to entry at the custom house; and the omission to enter them will not render the vessel liable to forfeiture, although that and other circumstances created probable cause of seizure.

The proceeds of the sales of a ship condemned as forfeited, by the court of admiralty, are liable to the seamen's wages, in lieu of the ship.

Christopher Roan, as well on behalf of himself as of the commonwealth, filed, in May 1786, a libel, in the court of admiralty, against the brigantine *Tortola*, a British vessel, *Hugh Douglass*, master, for a breach of the then revenue laws of the state, charging that the ship and cargo, belonging to a foreigner, arrived at Hampton, about the 17th of April, 1786; and that the master made a false entry of part of the cargo, by concealing three hogsheads of porter, two boxes and one cask of shoes, one box of merchandize, and forty-two barrels of herrings and barley: whereby the vessel and that part of the cargo which was not entered, became liable to forfeiture.