

S E C T. VI.

Ex Rhodia de jactu.—Damage sustained by a ship in defence against a privateer.

* * * See, as connected with the subject of this section, the cases, No 20, No 22, and No 24, in Section 4th.

1763. November 30.

DAVID LANDALE, Shipmaster in Leven, *against* WILLIAM THOMSON and Others, Merchants in Aberdeen.

No 37.

Where a ship is damaged by being run on shore in order to save the cargo and lives of the men, the owners of the cargo must pay their proportion of the loss.

IN October 1760, the ship the Old Briton, commanded by the pursuer, sailed from London for Aberdeen, with a valuable cargo.

At a small distance from the destined port, they met with a violent storm which drove them upon the coast, near some breakers, which they did not see a possibility of avoiding; upon which, the master and mariners came to the resolution to run the ship ashore, as the only chance they had to save their lives and the ship and cargo. This accordingly they did, and ran the ship ashore on the sands of Belhelvy, by which the cargo was saved, but the ship was greatly damaged.

Some time after this, Landale brought a process against Thomson and others, owners of the cargo, before the High Court of Admiralty, setting forth, That the ship had been run ashore for the purpose of saving the lives of the men, the ship, and the cargo; that the damage arising from so doing amounted to £.335; and concluding, that the defenders should pay their several shares of the said sum, in proportion to their respective interests in the cargo.

The Judge found the owners of the cargo obliged to contribute their respective proportions towards repairing the damage.

This decree having come before the Court of Session, by suspension, the LORDS, upon the 15th of July 1763, pronounced this interlocutor: "In respect it does not appear, that, in this case, the master did expose the ship for the safety of the cargo more than he must have done had there been no cargo on board, assoilzie the defenders, and decern."

Pleaded in a reclaiming petition for the pursuer; Where several parties have their interests embarked on one bottom, so that they must, in all probability, be saved or lost together, nothing can be more consonant to reason, than that partial losses should affect them all equally; and, *a fortiori*, that, when the property of one of the concerned, as in the present case, is sacrificed for the preservation of the rest, those who reap the benefit should repair a proportion of the loss.

This principle has been early adopted by commercial nations, and was the foundation of the *lex Rhodia de jactu*, which contained many more heads than are now to be found in the *Digest*, as is explained by Vinnius, in his notes upon the Commentary of *Peckius ad rem nauticam*, p. 206.

And as, in reason and justice, the contribution claimed is due, so authorities both ancient and modern are explicit on this point.

Thus, the 31st article of the fragment of the Rhodian laws bears, "Si mercator navem oneraverit, et navi quid acciderit, omnia quæ salva supersunt in contributionem utrinque veniant." Again, Vinnius, after observing, that, if the ship's mast is cut, or any other of her tackle destroyed for the common safety, average is due, adds, "Idemque juris est, si voluntate vectorum, aut alias ex consilio majoris partis, navem in littus impigit." And Voet gives the same rule in the case of a ship's being run ashore, ad leg. Rhod. § 5.

The same principles are laid down by the maritime laws of France, established by edict in 1681, § 32.; by Postlethwayte in his Dictionary of Commerce, title CONTRIBUTION; by Malynes in his *Lex Mercatoria*, p. 110.; by Molloy *De jure Mar.* b. 2. c. 6. § 15.; and by Magens, in his *Essay on Insurances*, Vol. I p. 57.

Besides these authorities from books, a certificate, signed by twenty-seven of the most reputable merchants in London, shows what is the constant practice there. It certifies, 'That, when a master of a ship is, of necessity, for the preservation of the ship, her cargo, and the lives of the men on board, obliged to run his ship ashore, or do any other act for the benefit or preservation of the whole, it is the constant and invariable custom, that the ship, cargo, and freight, sustain and pay, in equal proportions, the expense and damage incurred by such act.'

From all which, it clearly appears, that gross average is always understood to be due when a ship is run ashore.

With regard to the reason given in the interlocutor, that the pursuer did not expose the ship more than he must have done, if there had been no cargo aboard, it may be observed, *1mo*, That the unavoidable consequence of a ship's being run ashore, loaded with goods, is, that she must sustain more damage than if she were in ballast; *2do*, When a storm happens, it is often necessary to cut the mast of a ship in ballast, as well as of a loaded vessel; yet it is indisputable, that, when that is done on a loaded ship, contribution is due from the cargo. Numberless instances of the same kind might be given; and, were the *ratio* of the interlocutor to be sustained, no claim of average could ever be sought on account of damage done to the ship.

Answered for the defenders; It is established by natural justice, that, wherever one person voluntarily subjects himself either to loss or danger, for the benefit of another, he who suffered such damage should have a claim for indemnification against the person upon whose account he had run this risk. Such was the equitable meaning of the *Lex Rhodia*; but the interpretation of

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that law can go no further, without manifest injustice: For, how can one person have a claim upon another, who run no risk, suffered no damage, and who has subjected himself to no disadvantage upon his account, as in the present case? Where nothing is given up, surely nothing can be demanded; and, if Mr Landale, by following the only course which he could possibly take for the preservation of his crew and vessel, happened at the same time, by the bye, to contribute in some measure to the safety of the cargo, the defenders were so far lucky, that the conduct which was necessary for the pursuer was also convenient for them; but they cannot conceive that they can possibly be bound to any pecuniary contribution, as he did not give up one *jota* of his own interest, nor suffer the smallest detriment upon their account. What he did, was merely the effect of necessity, and he must have done it for his own preservation, whether he had had a cargo aboard or not; he actually did this, and no more; consequently he is entitled to no retribution; *vide* Voet ad L. Rhod. § 5. Vinæius in his Commentary upon Peckius ad L. Rhodiam.

It may be also observed, that, in every case where the ship suffered the damage, by the *Lex Rhodia*, the claim of contribution was always allowed with more difficulty, than where any part of the cargo itself had been lost; because the ship was considered as more particularly bound to run every risk to carry the goods safe to the destined port; L. 6. in fine de L. Rhod. D. et l. 2. § 1. *cod. in medio*. Sea Laws of France, 1681, l. 1. tit. 8. § 14.; and Magens, vol. 1. p. 53. and 67.

“THE LORDS found it sufficiently instructed, That the ship the *Old Briton* of *Leven* was, upon the 27th of October 1760, run on shore, and stranded upon the sands of *Belhelvy*, by the master and mariners, *dedita opera*, and of set purpose, for the preservation of the men's lives, ship, and cargo; and therefore find, That the loss and damage occasioned by the ship's being run on shore must be sustained and paid by the owners of the ship, cargo, and freight, in proportion to the respective values of each; and find the defenders liable to contribute their shares of the said loss and damage, according to the values of the goods that each of them had on board.”

Act. *Lockhart, Rac.*Alt. *Ferguson & J. Ferguson, jun.*

J. M.

Fol. Dic. v. 4. p. 217. Fac. Col. No 123. p. 289.

1785. July 27.

JOHN ROBERTSON against ROBERT BROWN.

No 38.

Damage sustained by a ship in a defence against a privateer, not made up by a general contribution.

A VESSEL employed in the carrying trade between London and Sealock, was attacked by a privateer; from which, after a smart action, she had the good fortune to escape. She, however, suffered considerable damage both in her hull and rigging.

The question therefore occurred, Whether the loss was a partial one, that is, to be borne by the owners of the ship alone; or if it was general, and fell