

REPORTS
OF
C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA :
WITH SELECT CASES,
RELATING CHIEFLY TO POINTS OF PRACTICE,
DECIDED BY
THE SUPERIOR COURT OF CHANCERY
FOR
THE RICHMOND DISTRICT.

VOLUME II.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

FLATBUSH, (N. Y.)

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1809.

DISTRICT OF VIRGINIA, TO WIT :

BE IT REMEMBERED, That on the twenty-first day of March, in the thirty-third year of the Independence of the United States of America, WILLIAM W. HENING and WILLIAM MUNFORD, of the said district, have deposited in this office the title of a book, the right whereof they claim as authors, in the words following, to wit :

“ Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia :
“ with Select Cases, relating chiefly to Points of Practice, decided by the Superior Court of
“ Chancery for the Richmond District. Volume II. By William W. Hening and Wil-
“ liam Munford.”

IN CONFORMITY to the act of the Congress of the United States, entitled, “ An act for
“ the encouragement of learning, by securing the copies of maps, charts, and books, to the
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an act, entitled, “ An act, supplementary to an act, entitled, an act for the encouragement
“ of learning, by securing the copies of maps, charts and books, to the authors and proprie-
“ tors of such copies, during the times therein mentioned, and extending the benefits thereof
“ to the arts of designing, engraving and etching historical, and other prints.”

(L. S.)

WILLIAM MARSHALL,
Clerk of the District of Virginia.

CASES
 ARGUED AND DETERMINED
 IN
 THE SUPREME COURT OF APPEALS
 OF
 VIRGINIA.

At the Term commencing in April, 1808.

IN THE THIRTY-SECOND YEAR OF THE COMMONWEALTH.

JUDGES, PETER LYONS, (1) Esquire, *President*.
 WILLIAM FLEMING, Esquire.
 SPENCER ROANE, Esquire.
 ST. GEORGE TUCKER, Esquire.

ATTORNEY-GENERAL,
 PHILIP NORBORNE NICHOLAS, Esquire,

The Commonwealth *against* Colquhouns and
 others.

THIS case was twice argued, at great length, (in *November*, 1806, and *June*, 1807,) on the important question, whether the Commonwealth could be compelled to make good the loss of tobacco which had been received, inspect-

(1) Judge LYONS was absent the whole of this term, having been prevented from attending by indisposition.

house, but not delivered by the inspectors on application to the persons holding the notes; notwithstanding the same was unlawfully converted to their own use by the inspectors, or is otherwise missing and not accounted for, and the inspectors are insolvent.

The Commonwealth cannot be compelled to make good the loss of tobacco received, inspected, and passed at a public warehouse.

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ed and passed at a public warehouse; but was not delivered by the inspectors, on application, to the persons holding the notes, the same having either been unlawfully converted to their own use by the inspectors, or otherwise missing and not accounted for; and the inspectors being insolvent.

It appeared that, in the year 1796, *Colquhouns* and others, being proprietors of certain tobacco-notes, to the amount of *one hundred and thirty-six hogsheads*, acquired, in the ordinary course of their dealings, for a valuable consideration, applied to the inspectors at *Barksdale's* warehouse, by whom the notes were issued for the tobacco expressed therein; and that the said inspectors not only failed to deliver the tobacco, but publicly acknowledged that it was not in the warehouse.(1) Upon this subject, evi-

(1) It is proper to mention, that *Erasmus Gill*, one of the inspectors, by his letter to the Court of *Dinwiddie* County, dated the 12th of *November*, 1796, (a copy of which is inserted in the record,) declared that no fault ought to be attributed to Col. *George Pegram*, the other inspector; that the deficiency in the tobacco was to be attributed "to no other cause but his own credulity for delivering tobacco on *lists*, without notes, on the *honour of men* who called *themselves gentlemen*; and that those very notes had been transferred to others after receiving the tobacco from the warehouse." In the deposition of *Robert Colquhoun*, one of the witnesses examined before the justices, a circumstance is stated, which, in some degree, corroborates this allegation of *Gill*. The deponent said, that three hogsheads of tobacco were shipped by *Robert* and *Walter Colquhouns*, from *Barksdale's* warehouse, on the 14th day of *September*, 1796; and that the deponent, on examining the books of *John M'Rae, senior*, saw an entry therein, from which it appeared that the said *M'Rae* had, on the 17th of the same month, purchased three hogsheads of tobacco corresponding with the three, which had been shipped, in *numbers, tares and netts*; that the deponent did not deliver, with his own hands, the notes for the said three hogsheads of tobacco, to either of the inspectors, but sent them, together with three dollars for tax, by a black man named *Plenty*, who commonly delivered notes to the inspectors for the deponent and others. The deposition of *John M'Rae, senior*, proved, however, that he received from the warehouse three hogsheads of tobacco, for the same three notes, which he had purchased; and a


dence was taken before two justices of the peace, in the manner prescribed by the 36th section of the act reducing into one the several acts of Assembly for the inspection of tobacco,^(a) and laid before the governor and council, who removed the inspectors from office, considering the loss to have been occasioned by their *misconduct*, though in *what manner* did not precisely appear.

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 (a) Rev. Code,
 1 vol. p. 266.

Several of the persons injured brought actions on the case, under a clause in the same section above mentioned, in the County Court of *Dinwiddie*, against the inspectors, obtained judgments, and sued out executions, which were returned "no effects." They then applied to the auditor of public accounts, and demanded from him a warrant on the treasury for the value of the tobacco, which he refused to grant: whereupon they filed a bill, (stating the said circumstances,) in the late High Court of Chancery, against the Auditor, Attorney-General, and Treasurer, praying for such relief as equity might direct. To this bill the defendants put in an answer and *demurrer*; the former of which neither admitted nor denied the allegations of the plaintiffs, but required legal evidence to support them: and the latter absolutely denied the responsibility of the Commonwealth to make good the loss.

The late Chancellor was of opinion, that the Commonwealth compelling its citizens to deposit their tobacco in its warehouses, under the care of its own officers, and receiving a *reward* for the custody thereof, could be considered only in the light of a *bailee*, or warehouse-keeper, for *hire*, and, as such, is responsible for the misconduct of its agents. He therefore decreed, that the Auditor should

number of witnesses mentioned similar circumstances, shewing that *Gill*, the principal acting inspector, (*Pegram* being prevented from attending at the warehouse from his bad state of health,) in many instances delivered tobacco according to lists, *sent with the notes*, and afterwards delivered other tobacco, (of course not corresponding in numbers, &c.) to other persons who afterwards bought the notes.

APRIL, 1808. *“ deliver to the plaintiffs respectively, warrants upon the*

 The Commonwealth *“ treasury for the values of the tobaccos which belonged*
 v. *“ to them,” &c. “ to ascertain which values, that issues be*
 Colquhouns *“ joined between the parties, and tried before the District*
 and others. *“ Court in Richmond; and that the verdicts be certified to*

“ the Court of Chancery.” From which decree the Attorney-General, on behalf of the Commonwealth, took an appeal.

The *Attorney-General*, in support of the appeal. This case depends altogether on the construction of the laws regulating the inspection of tobacco, and relative to public warehouses for the reception of that article. It must be admitted, that the Legislature has a right to pass laws of this sort. All improved countries must resort to such laws to perfect their manufactures or products. In this state, they have been extended to a variety of articles, viz. fish, hemp, meal, lumber, flour, tar, &c. as well as tobacco; and this right of the Legislature has been recognized by the constitution of the *United States*. It was exercised at a very early period, by our Assembly; particularly as to the article of *tobacco*, the staple of the country; and great pains have been taken in perfecting the laws on this subject. To these laws the people have assented, and they are therefore obligatory upon them, especially upon the tobacco-makers, for whose benefit they were made. We must look then into the laws enacted on this subject, to judge of the liability of the Commonwealth; because those laws certainly could extend or restrain that liability as the public good might require; and more information will be derived from *them* than from any treatise on *bailments*, even that for which the world is indebted to the perspicuous mind and eloquent pen of Sir *William Jones*.

When we look into those laws, we shall find they form a connected *whole*—a *system*. The duties of the inspectors are defined, their salaries, their privileges, their incapacities, and the restrictions upon them; the penalties they

are liable to, and in what cases; where the public shall be liable, &c. Let us refer more in detail to these provisions:

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Here the *Attorney-General* referred to the "act reducing into one the several acts of Assembly for the inspection of tobacco," (a) to shew the great pains taken by the Legislature relative to the appointment of inspectors, to select proper characters, and to guard against their misconduct. By the 14th section, (b) every inspector is required to give bond with good security in the penalty of *four thousand dollars, with condition for the faithful performance of his duty according to the act.* It is true that this bond is payable to the *Governor* and his successors, is directed to be recorded in the County, and transmitted by the Clerk of the Court to the Treasurer: but these circumstances do not confine the right of suing on the bond to the *Commonwealth only.* Its being recorded in the County is for the benefit of persons injured by the misconduct of the inspectors; and any such person has a right to put it in suit for his own benefit; for, according to the mode prescribed in the *Revised Code*, (c) a judgment obtained on a bond, with collateral condition, shall remain as a security for any breaches which may happen, until the penalty be exhausted; and it cannot be doubted that the Governor's name may be used for the benefit of the individual. But if the law were defective on this point, it would only shew that application ought to be made to the Legislature *to extend the remedy*; it by no means follows that the *public* is liable.

(a) *Rev. Code*,
1 vol. c. 135.
sects. 11. 16.
19. 23. 29 &
30.
(b) *Ibid.* p.
257.

(c) 1 vol. p.
111. c. 76,
sect. 21.

It may be objected, that the penalty of the bond is too small. This may possibly shew that the law wants amendment, but proves nothing more.

The claimants in this case proceed upon a supposed misconduct of the inspectors, who, they say, have embezzled their tobacco, and could not deliver it when demanded. I call upon gentlemen to shew in what part of the law the public is made liable for such misconduct; a law so careful

APRIL, 1808. to state the cases in which liability shall attach, and to provide for every contingency.

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(a) Rev. Code,
1 vol p. 261.
(b) Ibid. p.
266, 267.

In the 20th section, (a) a remedy is given against the *inspectors*, for double the value of the tobacco refused to be delivered. By the 36th, (b) they may be removed from office, and are made liable to the action of the party grieved for all damages arising from any neglect of duty. Under this section, the claimants have proceeded to obtain the removal of the inspectors, and to get judgments against them; thereby shewing their own sense of the law.

In their bill, however, they state that the inspectors are *insolvent*. How does this give them a claim upon the Commonwealth? Is there any correspondent provision in the law?

(c) Ibid. p.
267.

The 37th section (c) is conclusive, according to the maxim, "*expressio unius est exclusio alterius*"; for that section provides, that when a warehouse is destroyed by *fire*, the loss shall be made good by the General Assembly; "and in case of such accident, no inspector shall be sued or molested for or by reason of any receipts by them given, or for any tobacco burnt in any of the said warehouses, but shall be altogether acquitted and discharged of and from the payment of the tobacco mentioned in such receipts; any thing in the said act before contained to the contrary, notwithstanding." Of course it follows, that in every other case, except that of *fire*, the *inspectors*, and not the *public*, are to be responsible.

(d) Ibid. p.
265.

The 31st section (d) shews the caution of the Legislature in guarding against any constructive liability of the public

(e) P. 271.

for a deficiency of the inspector's *salaries*; and sect. 51st (e) is of the same character.

Upon the whole, it seems very clear that it was not the intention of the Legislature to make the public liable, except for *fire*; and the liability cannot be extended further; 1st. Because the state has the power to pass an obligatory law upon this subject, by which every citizen is bound; and, 2dly. Because every man who has sent his tobacco to

a public warehouse, has done it under the faith of the law, MARCH, 1808.
as existing, and of no other.

Let us now proceed to examine the grounds of the Chancellor's decree, and the reasoning on which it is founded, or by which it may be attempted to be supported.

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The application of general theories or principles, under all circumstances, and to all subjects, is a fruitful source of error in politics, philosophy, and law. Nothing can be more dissimilar than the nature of the contract resulting from bailment, and the construction of the laws regulating a public institution. In the one case, parties meet on equal terms; one party puts into the hands of another, property for certain purposes, and the law raises a contract. In the other, the Legislature prescribes a rule. According to *Jones on Bailments*, (a) most cases of that sort are of implied contracts, where the law determines how far the party is liable. In the case of the warehouse, there is no room for implication; the law gives the rule.

(a) P. 1 & 117.

But, even in cases of *bailments*, if there was an express undertaking to a certain extent only, the bailee would be liable no farther. Suppose a farmer agrees to receive horses to graze, but not to be liable for escapes; he certainly would not be liable for escapes. So in this case, should I admit it to be one of *bailment*, I should nevertheless contend that, as there is an express undertaking that the public is to be liable in one case, it is not to be liable in any other case.

But it is said, that the Commonwealth receives a reward. If she did, it ought not to affect the case. But, in fact, she does not receive a reward. The constitution of the *United States* authorises her laying a duty on exports, to execute her inspection-laws; and what she receives is no more than enough to do this, to provide for the contingency of fire, and to support the warehouses. It appears from sections 4 and 5. (b) that where the rents of warehouses in certain cases are directed to be paid to the Treasurer, it is

(b) P. 254 & 255.

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merely to indemnify the public for buildings or repairs: in other cases, the rents uniformly go to the *proprietors*, and not to the *public*.

The Chancellor says, too, that the Commonwealth *compels* her citizens to deposit their tobacco in the warehouse. But the law does not compel any man to make tobacco, nor is he obliged to send it to a public warehouse when made. It is true he cannot *export* it without doing so; but this law is made for his own benefit. So the law compels a man to go to law for redress of injuries, and even lays a tax on the writ; yet the Commonwealth is not to pay for every wrong done by a sheriff, clerk, or coroner. If the public is liable in this case, it opens a door for fraud between the holders of tobacco and the inspectors, and establishes a principle by which the public is to make good all losses arising from the acts of public officers.

The doctrine of *bailment* seems out of the question. The case is more analogous to the doctrine of *insurance*. Here there was an insurance against *fire*, and nothing else; and the principle is certain that an insurer is liable no farther than the *express* contract in the policy. It is immaterial whether the Legislature used words of exclusion, or whether it enumerated in what cases it should be liable.

(a) See 4 The construction is the same in either case.(a)

Bac. Abr.

(Gwil. edit.)

641. and La-

rabre v. Wil-

son, Doug.

284.

(b) Jones, p.

1.

George K. Taylor, for the appellees. If the idea of sovereignty be excluded, this is a complete case of bailment. The terms of the definition(b) apply exactly to this case. I will therefore examine the case, 1st. On the doctrine in such cases generally; 2dly. Whether the Commonwealth's being a party makes any difference in reason or in law.

1. Every bailee for reward is liable for the want of ordinary care.(c) In this case, the state demands and receives a reward of one dollar on every hogshead, and the same reason applies. In every instance the bailee is amenable for the negligence or fraud of his servants, because *he* selects and reposes confidence in them, and not the *stranger*,

(c) Jones, 37,
58.

who acts only with, and on the faith of, the *master*. Now, if these doctrines be true in case of *voluntary* bailments, how much stronger must they be in *this*, where the bailment is *constrained*? For the planter is compelled, if he will not use his tobacco on his own farm, to bring it to a public warehouse, and there to leave it under the care of persons whom he does not select, who serve for the small salary of 100*l.* each, and of whose conduct and morals he is utterly ignorant. Should he, after leaving his tobacco, understand that the inspectors are among the worst of men, yet in their custody it must remain, till exported. He receives only a piece of paper in lieu of it, with a special promise that it shall be re-delivered for exportation.

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This then is as strong a case of bailment as can be put; and on principle, the public is liable. I do not object to the tobacco-law. It is politic and expedient. But the Commonwealth is bound by the obligations which it imposes upon her. Such, from the law, appears to be the sentiment of the public: for provision is made for the planter's indemnification in case of *fire*; though that is a case where the bailee for reward would not be liable; neither could the *inspectors*, since a loss by fire is not occasioned by *gross*, nor by *ordinary* negligence. The public indemnifies the holder then, on this principle, that he is *obliged* to deposit and leave his tobacco. But, if they will indemnify where there is *no kind of blame* imputable, would it not be monstrous if they were not to do so where there is *great blame* imputable to their own agents?

It is said, however, that remedies are given to the injured persons against the inspectors. True: and where these remedies are sufficient to produce absolute satisfaction, there is no redress against the public; at least no one would think of asserting it. The giving the remedy at all is an acknowledgment that the aggrieved individual ought to have redress: but, where that experiment is tried and proves ineffectual, is the principle conceded by the Legislature satisfied by a *dehesive* recovery against the agents of

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the public? Why would the Legislature give double damages against the inspectors, if not to induce persons injured to sue *them* instead of the public?

It is objected, that the inspectors gave bond and security. But the answer is, that that bond is given only for the benefit of the *public*, to secure its *taxes*; not for the benefit of *individuals*. For, in no instance, can any individual take advantage of such bond, except where that right is expressly given him by law; as in the cases of *sheriffs'*, *clerks'*, and *executors'* bonds, &c. Now, here, there is not only no such provision, but, *e contra*, there is a particular remedy given on the bond to the *Treasurer officially* for non-payment of duties. Again, the *penalty* of the bond proves it to be only for duties; for each inspector is bound only in four thousand dollars, a sum vastly inadequate as a security for the large quantities of tobacco intrusted to their care; but fully sufficient to answer for the duties.

It is said, that the public is not liable for the acts of sheriffs, clerks, and other functionaries. But these officers are appointed for the benefit of *individuals*, not of the *public*: Here the *inspectors* are appointed for the benefit of the *public*. From the agency of the *former*, the *public* receives no reward; but, *here*, it does receive a reward. And, above all, in those cases the bond is given for the benefit of *any person injured*; which is not the case of inspectors' bonds.

The great object of the Commonwealth is to preserve the credit of tobacco-notes; for the individual, being unable to remove his tobacco, is compelled to receive the note as its substitute. This note he sells. With this note he pays his tobacco-debts; and these notes are specifically recoverable by action of debt. They are made, in fact, a circulating medium, and pass from one to another without assignment. If sold, or paid away in satisfaction of a debt, nobody imagines, in case the tobacco mentioned in them is not delivered by the inspectors on application, that resort can be had to the *seller* or *payer*. So far, indeed, is the

idea carried, (that the *holder* of the note is entitled to the tobacco *at all events*,) that by the 41st section,(a) where the real owner loses the note, he gives bond, on receiving a new one, to make good the value to any person who shall exhibit the original; and this private injury is submitted to for purposes of public policy. Now, to make them as current as bank-notes—to compel the receipt of them instead of the tobacco itself—to subject the owner, if careless in keeping them, to the total loss of the fruits of his labour—and yet to say, that, for a fraud committed by its agents, the public will not be liable, manifests so great an inconsistency as ought not to be imputed to the Legislature.


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(a) P. 267.

2. Does its being a case of the Commonwealth make any difference?

For the exercise of those powers which are necessary to its *sovereignty*, the State is not and ought not to be liable; because, in such instances, individual inconvenience and injury must yield to public benefit. But there is, on principle, a difference between a case of that sort, and one founded on *contract*, either express or implied; and, in support of that principle, remedy is given, in every instance, where a person considers himself as having a just claim against the public. Now here, the custody of the tobacco by the agency of inspectors is not an *absolutely necessary* act. The State may consider it an *expedient* one: but not being *absolutely necessary*, the State assumes the custody, receives a reward, and issues a note, *printed by herself*,(1) though *signed by her agents*, promising to deliver it. The promise of the agents made by her directions is therefore her own promise. The case, then, is that of *contract*, and the tobacco is recoverable; for wherever the Commonwealth binds herself by contract, her Courts can enforce it.

(1) It is the duty of the public printer to supply the inspectors with blanks. See *Rev. Code*, 1 vol. p. 382. c. 238. sect. 2.

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In every other instance of loss to individuals from the agents of the State, reparation is made by the State; for example, in the case of *impressments*. The same reason applies here; because restraint is imposed on the free agency of the citizen in both instances.

The constitution of the *United States* prohibits the imposition of duties on exports, except for the support of the inspection laws. Now, there is a large surplus in the tobacco fund; for the amount of the duties far overgoes all losses by fire and other expenses. The state then either holds the surplus as trustee for sufferers of this description, or she violates the Constitution, and is amenable to the general government for the surplus.

Wickham, on the same side. The case is a new and important one; but to be decided on principles long known and established. In this case the tobacco was not lost by fire, inundation, or depredation of the enemy, but by gross fraud in the officers of government. If, in all those instances, the Legislature thought it their duty to compensate individuals, why not in the present instance?

There are two species of acts of sovereignty; 1. Such as are absolute and independent of *contract*; such as the appointment of officers of government, &c.; and 2dly. Those in which the State enters into *contracts*; viz. acts for the establishment of canals, banks, &c.; and, in the last mentioned cases, it subjects itself to obligations, as much as individuals do by *their contracts*. In this case, the State undertakes to establish public warehouses, appoints agents, and receives not only a tax for support of the institution, but a compensation to indemnify against losses. I grant this is not received as *revenue*: for if it was, it would be clearly unconstitutional.

It is objected, that the State has provided for the case of *fire* only, and not for other cases. To this I answer, that it was unnecessary to mention other cases, because, in every instance, except that of fire, the liability of the State rests on general principles.

All that the Court wanted was jurisdiction. This is given by a law since the revolution. The case of the *Commonwealth v. Beaumarchais*(a) puts that question for ever at rest. Since the law appointing auditors of public accounts, the Legislature has been cautious in meddling with claims against the State; but, in every question of difficulty, has left it to the judiciary; and every member of the Assembly, as a man of honour, has felt himself bound to appropriate the money, when the Judges have decided against the Commonwealth.

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(a) 3 Cull,
122.

Our whole system of laws proves that the Legislature always considered tobacco-notes as representing the specific tobacco itself, and that, whenever the tobacco cannot be had from the warehouse, the Commonwealth is bound to compensate for it. Tobacco-notes (and not the tobacco itself) are made a *tender* by the *Revised Code*;(b) and even *transfer* tobacco is made a tender, in the *same County, or the next adjacent*. Now, unless the notes represent so much tobacco which the State is pledged for, the debtor may pay off his creditor with *nothing*. Suppose an execution for tobacco is satisfied by the delivery of *notes*; can the person receiving it, if he finds he cannot get the tobacco itself, resort back to the payer, unless he can prove that the payer had applied for the tobacco, and discovered it was lost, *before* the payment? But how can that be done in this case? Now the State receives a compensation adequate to all these losses.

(b) 1 vol p.
260. sect. 20.

An objection is raised to making the State liable for the misconduct of its officers: but the same thing frequently happened during the war. There were then a number of commissaries, quarter-masters, &c. Suppose they embezzled property after giving receipts, was not the state liable? It is said, the suit ought to be brought against the inspectors. True it is, the action lies against them for the *penalty*: but, considering this as a case of bailment, it is like the case of goods lost in a ship, for which either the *owner* or his *agent* is liable. The person injured may sue either, but can have only one satisfaction.

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Hay, on the same side, noted the difference between tobacco and every other commodity; observing that other commodities were not (like tobacco) taken out of the possession of the owners. If the tobacco was not as good as it ought to be, it was directed to be burnt; and though inspected and passed, might be sold, if not taken away in twelve months. If this was a case in a foreign country, and the government did not consider itself responsible for the fraud of its agents under such circumstances, we should think it the most ignorant part of *Africa*.

The doctrine we contend for is recognized in the inspection law: else, why did the Commonwealth make itself responsible in case of fire? It required no great foresight to know that fire might happen: it was therefore provided for. But a fraud of this sort, a flood, or an enemy, were not thought of: they were therefore omitted. Yet when a quantity of tobacco was carried away by a flood in the year 1771, and when another quantity was destroyed by the enemy during the last war, the Assembly passed laws to

(a) See the make it good.(a)

acts of 1771,
c. 1. and of
May Sess.
1782, c. 10.

(b) 4 vol. p.
381.

In a similar case, in the *L. U. S.* (b) the Congress, authorising a deposit of teas, in certain cases, thought it necessary expressly to provide that it should be at the risk of the importer, to prevent the *United States* from being liable, though the deposit in such cases is *voluntary*.

Whether the Commonwealth, in this case, is a *bailee* for reward or not, is unimportant; because a *bailee* without reward, is responsible for fraud. But, in fact, the Commonwealth receives a large profit.

As to suing on the inspector's bond, such a suit cannot be maintained. The Legislature never contemplated such a fraud (the inspectors being annually appointed) as that of their failing to deliver tobacco, and therefore required security for the *public money* only. The double penalty was given to prevent *neglects* of duty, but not *frauds*. This is manifest from the words of the Act of Assembly, sect. 14.

for, if the bond had been intended for every individual, it would have remained in the County; instead of which it is to be transmitted to the Treasurer. Its being recorded in the County, is merely to prevent the inconvenience which might arise from the loss of the original on its way to the Treasurer. The penalty of four thousand dollars was never intended to cover property to the value of four hundred thousand. In the case of bonds given by the collectors for the *United States*, the penalties are in some degree adequate to the public monies going through their hands. The language of this law too is, "If the inspectors shall fail to *pay*, &c. the *Treasurer* shall move against them," &c. which seems to limit the right of recovery to the *Treasurer only*.

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Wherever official bonds have been intended to be put in suit for the benefit of an individual, the Legislature has expressly said so; but in this instance it is silent.

It is contended, however, that any person injured may, *ex debito justitiæ*, put in suit a bond taken for the performance of *public duties*. I question whether this was law in *England*, until the case of *The Archbishop of Canterbury v. House, Cowp.* 140. cited in 1 *Esp.* 199. see also 3 *Atk.* 248. but *Salk.* 315. is *contra*. At any rate, in this country, the Legislature have not recognized the idea; but have gone upon the principle that a special provision is necessary.

The honour of the country, and sound policy, require that the tobacco-notes should freely circulate, and that the tobacco should be forthcoming. The State cannot stand on a higher ground than an individual. Our position is, that where government takes a man's property, and is paid for keeping it, it ought to keep it safely, or pay for it. We shew the *general* rule: if the State is entitled to any discrimination in its favour, such privilege ought to be shewn. But no reason can be given for it. There is no instance in any government of a State's claiming a *right* to take private property without compensation; not even in the reign

APRIL, 1808. of *Robespierre*. But, here, the case is as strong as possible; for *Virginia* has positively declared, that any person may sue the Commonwealth, either in law or equity.(a)

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(a) *Rev. Code*,
1 vol. p. 140.
sect. 6.

Randolph, in reply, in addition to the arguments urged before by the *Attorney-General*, said, that the principle involved in this case was of vast importance. No human foresight could reach the consequences which might flow from it, since many other claims of a similar nature might be produced by the decision, if it should be against the Commonwealth. These consequences ought not to intimidate the Judges, but to make them cautious, and induce them to give their profound and energetic attention to the subject.

The comparison to *bailments* arises from a disposition to apply general maxims to cases not analogous. The *compulsion* on the planter to deposit his tobacco in the warehouse, is as much a ground of *defence* on our part, as of *attack* on theirs. It proves that this is an act of the State's *sovereign authority*. From that circumstance I conclude, that the compelling act, being an act of *sovereignty*, excludes the responsibility of the State, wherever it is silent as to such responsibility. Now it is *silent* as to responsibility on *this* occasion.

This law is not unjust, because it derives its force from the *assent* of the governed. In a *pure democracy*, this assent is *expressly* and *personally* given; in a pure aristocracy, mixed monarchy, or representative government, *impliedly*. The inspectors, therefore, are, in fact, the agents of every individual, because they all assented by their representatives to the appointment of those officers. Every individual is consequently liable for their default.

The difference between a *law* and a *compact* is clearly stated in 2 *Ruth. Inst.* 216. from which it is evident, that in this case there was no *compact* on the part of the State, but only a *positive law* for general purposes.

Another consideration, which proves that there is no APRIL, 1808.
compact in this instance, is, that the Legislature may re- 
peal this law, whenever it thinks proper ; but it will not be The Commonwealth
said, that it can repeal its own contracts. v.

In the cases of *Beaumarchais* and of *Pauley* against the Colquhouns and others.
Commonwealth, there were positive contracts with the
Executive ; and, in the case of *impressments*, there is an
express provision in the law.

For a century and a half, inspection laws have existed in
this country : yet no such experiment was ever made be-
fore ; and no such proceeding was ever heard of in *Great-*
Britain, or under any other government. The very idea
of sovereign authority is inconsistent with it. And shall
we convert the sovereign State of *Virginia* into a petty
bailee or common carrier ? The consequence would be, if
general principles were carried so far as to make the Com-
monwealth liable, in this case, that, by parity of reasoning,
the government might be compelled, if it laid an *embargo*,
to make good all damages resulting from it.

He strongly pressed the principle of the sovereign power
of the State, putting it in various points of view ; and in-
sisted, that even if the State was *morally* bound to make
good this loss, the *Courts* could not compel it to do so,
unless it had bound itself by a contract, or by its own law ;
for the law concerning the Auditor(a) only gave a *remedy* (a) Rev. Code,
against the State to enforce a *right*, but did not create a 1 vol. p. 140.
right where not otherwise existing.

He concluded with saying, that the only remedy for the
claimants, if they could expect any, was to apply to the Le-
gislation ; and the examples put by Mr. *Hay*, of destruc-
tion by a flood or by an enemy shewed the necessity of
such application.

Curia advisare vult.

APRIL, 1808. *Saturday, April 16.* The Judges delivered their opinions.

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Judge TUCKER. *Colquhoun* and others brought a suit in the H. C. C. against the Auditor for the value of certain tobacco purchased by them, the notes for which they had; but on application for the tobacco it was not delivered, having been embezzled, as was alleged, by one of the inspectors, both of whom were insolvent. Upon a demurrer to the bill the Chancellor decreed that the Commonwealth was liable for the tobacco thus embezzled. The Auditor appealed.

On the part of the Commonwealth it is contended,

1. That according to the true interpretation of the tobacco-laws the Commonwealth is not liable for the misconduct of the inspectors, in case of insolvency.
2. That she cannot be made liable in any case where she is not expressly made liable by those laws.

On the part of the appellees it is contended,

That the Commonwealth is liable for the misconduct of the inspectors in the same manner that any common bailee of goods is, or may be liable for the misconduct of his agents and servants.

The laws for the inspection of tobacco made at several periods in this country, have had for their object the improvement of that staple commodity, and the benefit and security of all that make, or deal in it. The planter is secured from participating in the loss, which might otherwise be sustained by the whole community, in consequence of the fraudulent, or slovenly conduct of unprincipled men, who might wish to put off mere trash for a valuable commodity; the merchant on the other hand is equally secured against these frauds; and purchases with confidence on the evidence of the tobacco-note, that the commodity is sound and merchantable. Laws made with a view to these objects must be compulsory, must be penal in order to be beneficial. Numerous are the penalties which they

impose upon the planter, the inspector, the masters of vessels and of crafts attempting to violate, or evade the regulations they prescribe : all of them ultimately tending to the security of the merchant. From the year 1730, to the present time, the same system, with occasional amendments, appears to have been invariably pursued ; and the remedy given against the inspectors for not delivering tobacco, according to the notes, has from that period to the present, been precisely the same. In the year 1732, an act passed, (probably occasioned by some recent event) for indemnifying inspectors against their notes, in cases where the warehouses might be burnt, and in 1748, the Assembly engaged to make good all losses arising from such accidents. In 1769, the title of an act occurs ^(a) to appoint commissioners to state and settle damages done by the late storm, in several warehouses : and in 1771 ^(b) one for the relief of the sufferers by the loss of tobacco damaged, or burnt in several warehouses. In *May*, 1782, an act passed to ascertain the losses and injuries sustained from the depredations of the enemy within this Commonwealth, ^(c) one of the objects of which I believe (for I have not the act itself to refer to) was, to recompense those who sustained losses by tobacco burnt in the warehouses.

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^(a) Ed. 1785,
p. 16.

^(b) Ib. p. 20.

^(c) Ib. 158.

Notwithstanding the special acts made at different times, we find no *general* provision in any subsequent law, to recompense the sufferers on future occasions of the like kind, the Legislature seeming to reserve them to be acted upon by their own body, occasionally. The case of embezzlement no doubt appeared to them to be sufficiently provided against by the high penalty of double the value, imposed by the 21st sect. of the act 1792, c. 135. on any inspector who should *fail* or *refuse* to deliver any hogshead of tobacco, when demanded for exportation. The remedy was probably commensurate to any offence which the Legislature could imagine might happen, within the space of a year, or perhaps a few months, weeks, or days ; since the warehouses were always to be open for the application for

APRIL, 1808. and delivery of tobacco. And a single instance of failure
 The Commonwealth or refusal would lead to general alarm, and instant detec-
 v. tion; in which case the law had provided a summary meth-
 Colquhouns od of removing the delinquent inspector from his office.
 and others. The extreme case of an extensive speculation, and total in-
 solvency on the part of both the inspectors, was probably
 not foreseen, and certainly not provided for by the Legis-
 lature. I am, therefore, upon this point, most clearly of
 opinion, that there is nothing in the tobacco law *itself*
 which entitles the appellees to redress against the State for
 the loss they have sustained; there being a specific remedy
 provided by that law, for this very case, which, although
 it may happen, in the present instance, to be inadequate, is
 the *only* remedy which the *law* gives. This brings me to
 the second point:

Whether the state can be made liable, in any case in
 which the Legislature have not expressly declared she shall
 be liable?

It was strongly urged by the appellees' counsel that the
 act declaring that a petition to the H. C. C. or District
 Court of *Richmond*, shall be allowed to all persons entitled
 to demand against the Commonwealth any right, in law or
 equity ;(a) placed the Commonwealth in those Courts, up-
 on the same footing, precisely, as any other defendant.
 This is certainly true, I conceive, as to the remedy in all
 cases *within* the provisions of the laws, or constitution of the
 State ; but ought not to be interpreted in such a manner
 as to go beyond the limits which the laws and constitution
 prescribe. Neither a Court of Law, nor a Court of Equi-
 ty can carry a statutory remedy further than the statute al-
 lows, nor supply a *casus omissus* in any statute. And if the
 remedy given by a statute against *A.* be inadequate, or hap-
 pen to fail, I know of no rule of law by which *B.* can be
 held liable, unless the statute expressly declares that he
 shall be so, if *A.* be unable to make satisfaction. But it is
 argued that there is a *moral obligation* upon the State to in-
 demnify all persons against the misconduct of the inspect-

(a) *L. V.*
 1794, c. 85.
 sect. 5.

ors, as well as an express one, contained in the act, to indemnify those who may be sufferers in case of fire : and that this Court has power to decree the performance of that moral obligation. This doctrine, I apprehend, is contended for upon too broad a ground ; there are numerous moral obligations which a State may contract towards its own citizens, which it will not be pretended that this Court is competent to decree the performance of. Allegiance and protection, for example, are reciprocal duties, and create a moral obligation upon the State, either to afford protection to the citizen, or to indemnify him, as far as the nature of the case will admit, for his losses : the house of a citizen is burnt, his slaves and his crops carried off by enemies, and himself maimed for life, in a conflict with them. The State was bound to have protected him against all enemies : Can this Court remunerate him for the loss of his house, his slaves, his crops, or his limbs ? Certainly not, unless there be some statute made for that express purpose, nor, even in that case, beyond the measure of compensation which the statute allows. The mere establishment of a tribunal to which all persons entitled to demand against the Commonwealth any right either at law or equity, may resort, does not authorise that tribunal to overstep the bounds of legal right, or of such equitable rights as are within the *reason*, though not within the *words* of the law upon which legal rights are founded : moral rights, beyond these limits, must be referred to the Legislature.

The undertaking on the part of the State to insure all persons against the misconduct of inspectors has been inferred from a variety of circumstances : The negotiability of tobacco-notes ; their being receivable in taxes, and in discharge of executions. All these are circumstances growing out of the relative state of commerce, at the time those laws were made, but do not, I conceive, impose any obligation upon the State ; they were all in fact, calculated for the benefit of the merchant in their final operation. His remittances were to be made in that article, and every faci-

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lity to enable him to do so, was provided by law. His debt-
or might pay him fifty, a hundred, or five hundred pounds
of tobacco—instead of receiving the specific tobacco in these
small parcels, an inspector's note was offered him; and
when he had as many of those small notes, as would enable
him to fill a hogshead with the tobacco itself, the inspector
for a moderate premium was bound to collect it from the
various parcels in his care, and have it packed, and in due
order for exportation. I can discover no moral obligation
upon the State, arising from these circumstances.

But the warehouses are said to belong to the State; this
is a mistake; they belong to private persons, who receive
either a stated rent per annum; or storage at the rate of 25
cents per hogshead, for one year, and five cents per month
afterwards, to be paid by the *shipper*: If the owner of the
ground where the warehouse is proposed to be established,
refuses to build one, in that case, indeed, the warehouse
is to be built at the expense of the public: but that was not
the case in this instance, and it is believed there are few or
none where it has been done. The inspectors are considered
also as the special agents of the State, acting for its benefit,
and emolument; and from hence the State is considered in
the light of an ordinary bailee of goods, and as responsible
for the fraudulent conduct of those agents.

Upon the most mature consideration, I cannot distinguish
the inspectors of tobacco from other public officers. If a sheriff
take goods, slaves or chattels in execution, is the State liable
for his peculation, although (as has happened in some counties)
the sheriff and his securities should all prove insolvent, or run
out of the State? no one will pretend it. If the clerk of a Court
loses a will, a deed, or a record, and by negligence has his office
burnt and destroyed, is the State liable for his misconduct? This
is not pretended. Why then is the State liable for the misconduct
of an inspector? Because, say the counsel for the appellants,
the State draws a revenue from the tobacco. However that fact
may be, it does not constitute any part of the

record in this case, and it would be equally indecorous, and against the rule of proceeding in an appellate Court to travel out of the record in quest of reason for holding the State responsible ; on the contrary we are bound to presume the reverse ; for since the constitution of the *United States* prohibits any State from imposing any duty on exports, except what may be absolutely necessary for executing its inspection laws, without the consent of Congress, we are bound to presume (in this case) that the State has not been guilty of an infringement of that article of the federal constitution. And although there may be an excess in the hands of the State at present, a single fire might transfer the balance to the other side. Such an excess (if it exists) may furnish the appellees with a reasonable ground to apply to the Legislature for their indemnification : but as the fact does not appear upon this record ; it has nothing to do with the present question.

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By the 37th sect. of the tobacco-law, if any of the warehouses therein mentioned shall happen to be burnt, the loss sustained thereby shall be made good, and repaid, to the several persons injured, by the *General Assembly*. This clause is in the nature of a compact on the part of the State, and this Court, in such a case, might be authorised to decree a specific performance of it, under the act which allows a petition to the High Court of Chancery. But what if it should appear that the tobacco burnt had been permitted to remain twelve months in the warehouse after the date of the receipt. The owner or proprietor of it must bear the loss and not be paid for it by the public. Here the terms of the compact are changed, according to the circumstances of the case—nor could a Court of Equity vary the obligation which the State has contracted voluntarily, in the smallest respect. Neither can it extend the obligation to any other case of accident but that of fire ; that being the only one provided for by the law.

Upon the whole of this case, I think the State is not liable ; and therefore, that the decree ought to be reversed, and the appellees' bill dismissed.

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p. 420.

Judge ROANE. The principal object of the acts regulating the inspection of tobacco, is, to preserve the purity of that staple. This is evident, as well from a general review of them, as from the second section of the act of 1654 ; (a) an act, the principal provisions of which are kept up in the modern laws upon this subject, almost *verbatim* ; although, for the sake of brevity, the declaration in that section is omitted in the act of 1792, on this subject.

That section declares, that “ for the more effectual preventing the exportation of *trash*, bad, unsound, and un-
“ merchantable tobacco,” all tobacco which shall be exported, shall be first inspected according to the directions of the act. This important purpose is not the less the great object of the policy of the act, because, as incidental thereto, and depending thereupon, another beneficial purpose is effectuated thereby—namely, that the receipts for the tobacco during its continuance in the several warehouses, are made to answer some of the purposes of cash. This latter, however, is certainly an *incidental* consequence, and is no where declared to be the primary object of the act. Notwithstanding this latter provision also, in relation to the currency and qualities of tobacco-notes, during their existence and circulation, it is clearly the object of the act, that the tobacco should remain but a *short* time in the several warehouses. This is evident from the provision, (b)

(b) *Rev. Code*,
vol. 1. c. 135.
sect. 4 & 5.
p. 254.

that the County Courts are to provide, from time to time, warehouses having sufficient room to contain *two-thirds*, only, of the tobacco which will be *annually* brought there, which at an average is only equal to a deposit of eight months’ continuance ; from the provision that tobacco of more than twelve months’ continuance in the warehouse

(c) P. 267.
sect. 37.

(d) P. 263.
sect. 28.

shall not be paid for by the public, if *burnt*, (c) and from the regulation respecting the sale of *old* tobacco. (d) Add to this, that it could not have been rationally expected that *that* commodity would have generally remained long on hand, without yielding interest or profit, which at the epoch of the

Enaction of our first inspection laws, formed almost the only article of export from this country. It is also a fact well known, that the tobaccos are generally prepared and carried to the inspection during the winter or spring seasons, and are usually exported from this country in the spring or summer. I mention these things to shew, that neither the Legislature nor the people contemplated a long continuance of the tobaccos in the public warehouses; a circumstance which will have its due weight in forming a just construction upon this subject.

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This was not only not contemplated, but even if it were, it is better for the planters and those claiming under them, (admitting the irresponsibility of the government in the case in question, and laying no stress, at present, upon the great convenience and accommodation resulting to them, from the creation and currency of tobacco-notes,) that their tobaccos should remain in *secure* warehouses and under the care of officers of great integrity and responsibility, than in any private hands whatsoever. Be this matter, however, as it may, the planters are under no obligation to carry their tobaccos to be inspected, *until* it is intended to be exported; neither they nor those who claim under them are compellable to retain it there a moment after it is inspected, but may immediately cause it to be exported; (at the same time it is to be remarked, that it would have entirely defeated the object of the inspection laws to permit the planters, after inspection, to take away their tobaccos, for any other purpose than that of exportation;) and they may choose, throughout the whole State, that warehouse which appears to them the most *secure*, and those inspectors whom they deem the most upright and worthy of confidence. It will presently be seen that the Legislature has been very vigilant to insure the existence of the one and the other.

The primary object of the inspection acts being, as I have supposed, at all times the preservation of the purity of the staple, it perhaps *never* was intended to derive a revenue from the system: at any rate, it never was intend-


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ed that the *State* should receive any *reward* for *keeping* in its warehouses a commodity which, (I have already endeavored to shew) it was wished and expected should be taken therefrom as soon as possible ; and accordingly a review of the inspection system will shew, that the taxes and duties imposed upon the inspection of tobacco are only equal to, as they are intended, to defray the necessary expenses of the institution. But however this might formerly have been, there exists no doubt upon the subject at this day ; the constitution of the *United States*, art. 1. sect. 10. having declared that “ no State shall, without the consent “ of Congress, lay any imposts or duties on imports or *export* “ ports, except what may be absolutely necessary for *execu-* “ *ting* its *inspection laws*,” and that all such laws shall be subject to the revision and controul of the Congress. As our *present* inspection laws passed since the adoption of this constitution, we cannot construe the duties imposed on the inspection of tobacco to be a *reward* to the State, for the *safe keeping* of the article, without imputing to the Legislature the wantonness of imposing a tax on our people which it is immediately compellable to pay over to the general government. The State of *Virginia*, therefore, receives no reward for *keeping* the tobaccos of the people, and in truth wishes them to be kept on hand no longer, than the convenience of the citizens and interests of commerce should be found to require.

In the establishment of the inspection system, however, it was found necessary that certain officers should be appointed who do receive a *reward* for *this* among other services. That *reward* is found to exist in the *salaries*, paid to the several *inspectors*, and in consideration of which the doctrine of bailment will (as to them) undoubtedly attach. As to the Commonwealth, however, no reward or salary is received by it for the services in question, and the taxes paid upon the inspection of tobacco (however they furnish a salary to the individual inspectors) can only be considered as “ duties absolutely necessary for the execution of the

"inspection laws." In this view therefore the doctrine of bailment would not, as to the Commonwealth, naturally attach.

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Although the salaries of the inspectors are paid by the Commonwealth, it is not doubted but that they enure to the benefit of every person aggrieved by their breach of duty, so far as the principles of law or the positive provisions of the act, will go to charge them. It is admitted on all hands, (and accordingly the appellees have tried their remedy at law,) that those principles and provisions will go to charge the inspectors, in the case of an embezzlement : But the question here is, whether the Commonwealth be also liable in the case which has happened.

On general principles, if it was not contemplated nor expected, that the tobacco would remain *long* in the warehouses, there is the less reason for adopting a construction making the State liable, than if (as was argued) it was the principal object of the act to procure a permanent and compulsory deposit of this commodity for the purpose of creating a circulating currency : In other words, a system whose principal object was the *safe keeping* of articles for hire, ought naturally to yield a better security for their safe return, than one where the deposit is for another purpose, and where the custody of the article is merely transitory and incidental. It is now to be seen whether the particular provisions in and constructions arising out of the act in question, support or overrule this principle in the case before us ; no position being more clear than that "*modus et conventio vincunt legem.*"

By the act of 1792(a) *four* persons are to be *annually* (a) *Rev. Code,*
 nominated by the County Courts as inspectors at each ware- *vol. 1. c. 135.*
 house, out of whom the executive are to select *two*, and *sect. 11. p. 256.*
each inspector shall annually *renew* his bond. The short duration of these appointments, the circumspection used in selecting the officers, and the great respectability of the County Courts, as well as of the executive, (which Courts are also intimately acquainted with the characters of the in-

- APRIL, 1808. individuals recommended,) give a sufficient assurance **that** men of character and integrity will generally be appointed. Various checks are also provided against misconduct on the part of the inspectors. By the 36th section of the same act, (a) two justices are empowered to hear complaints, against inspectors, and take depositions and send them on to the executive touching any *breach of duty*, who may instantly *remove* such inspectors, and they are moreover declared to be liable to the action of the party grieved for *all loss arising from their failure or neglect of duty*. A similar provision is made by an act of 1796, (b) whereby commissioners are required to visit the warehouses once in six months, and (*inter alia*) see that the inspectors in all things *diligently discharge their duty*. By the act of 1792 (c) the inspectors are annually to lay before the several County Courts the quantity of tobacco inspected, and the *condition of the warehouses*, and the Courts are required to cause *adequate repairs* to be made if they are not satisfied that the warehouses are *properly secured*. These provisions (and perhaps others might be found) have for their direct object, the sufficiency of the warehouses, and the continuance of the integrity of the inspectors: they are such as the justice and policy of the government would equally provide, in furtherance of the great object of the system, in the idea that the several inspectors were alone liable, as under a contrary supposition. The inspectors also take an oath (d) diligently to view all tobacco, &c. not to pass unsound tobacco, &c. nor to refuse any that is sound and merchantable, &c. and in all things well and faithfully to discharge the duty of inspector, *according to the directions of this act*. They are also *each* of them to give an *annual* bond in the penalty of 4,000 dollars payable to the governor and his successors, with condition for the true and faithful performance of his duty according to the directions of this act, (e) The form of the receipt for the tobacco, signed by the inspectors, is, that it shall be "delivered *by us* for exportation when demanded," (f) and they are declared
- (a) P. 266.
- (b) Ib. p. 365.
- (c) Sect. 5. p. 254.
- (d) P. 257. sect. 14.
- (e) Ibid.
- (f) Ib. sect. 14.

liable to a penalty of double the value of any tobacco refused to be delivered to the owner presenting the note and demanding it for the purpose of exportation.(a)

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The inspectors' bonds, of which there are two given with good security, annually, at each warehouse, I presume enure to the benefit of persons whose tobaccos are embezzled. I consider that this is the case because the condition thereof, as well as the oath, is to perform their duty according to the directions of the act, one of which directions is, to deliver out all tobacco when demanded for exportation. A person whose tobacco is embezzled and refused to be delivered when demanded for exportation, is a person injured within the meaning of the act, and has, *ex debito justiciæ*, a right to put the bond in suit. The case of the *Archbishop of Canterbury v. House*,(b) recognized and approved by this Court in the case of *Braxton v. Winslow*,(c) seems to establish this principle in an analogous case. The omission in the act of 1792, of a positive declaration (which is unnecessary under the decisions just mentioned) that the bond may be put in suit by any party injured, &c. (as is the case in relation to some other public bonds,) and the provision in the 14th section, p. 257. that the bond after being recorded in the county shall be transmitted to the treasurer, who shall move against every inspector failing to discharge the same, seems insufficient to oust individuals of the benefit of suing on the bond, who bring themselves entirely within the meaning of its condition, and are consequently entitled, *ex debito justiciæ* to bring suit thereupon. It is not a natural construction that a bond whose condition is, expressly, commensurate with all the duties prescribed by the act, should be held to extend to one duty only; that of paying into the treasury the money due to the Commonwealth; the words just mentioned "failing to discharge the same" can be satisfied without producing this effect, under the principle *referendo singula singulis*.

(a) P. 261.
sect. 21.

(b) Cowp.140.

(c) 1Wash.31.

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If the *two* bonds annually given by the inspectors at each warehouse, enure to the benefit of individuals in cases like the present, it would seem that the penalties thereof would *generally* be sufficient to cover the defalcations arising within the respective years. But even if it be otherwise, it is probable that the liability to pay *double the value* of tobaccoes embezzled, to the extent of the inspectors' whole fortunes, would (under the great caution used too to procure *upright* inspectors and *secure* warehouses) afford a sufficient guarantee to the owners of tobacco; perhaps a much better than could generally be found in the hands of other individuals. When we add to these considerations not only the option the planters have as to particular inspectors and warehouses, but also that the inspection system undoubtedly enhances the price of the commodity, the benefits resulting to the owners of tobacco are sufficiently great even under the construction contended for on the part of the Commonwealth.

It is true that the act in question while it is *profuse* in declaring the liability of the inspectors in cases like the present, does not declare, *totidem verbis*, the exemption of the Commonwealth from responsibility. This would have been supererogation, in consequence of the general considerations before mentioned, and particularly from the non-existence of a reward on the part of the Commonwealth, without which the doctrines of bailment do not regularly attach. The sense of the Legislature, however, on this subject may be sufficiently collected from the act. In the 37th sect. of the act of 1792, p. 267. it is provided that if any warehouse herein mentioned shall happen to be *burnt*, the loss thereby sustained shall be *made good* by the *General Assembly*, and in case of such *accident* no inspector shall be sued or molested for or by reason of any receipts by them given for the tobacco so burnt, but shall be altogether acquitted or discharged of and from the payment of the tobacco mentioned in such receipts, *any thing herein before contained to the contrary notwithstanding*. Under the

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and others.

principle, that *expressio unius est exclusio alterius*, this is equivalent to a declaration on the part of the Legislature that in *other cases* the Commonwealth shall not be held responsible. It is said too that the loss shall be made good by the "General Assembly," thereby indicating that even in that case a recourse shall not be had against the officers of the Commonwealth in the ordinary way, but whensoever such loss shall happen the faith of the Commonwealth is pledged that the Legislature shall make it good by a particular act to be passed for that purpose.

Thus it seems to be the true construction of the act, that in case of this "accident," (and also, in that mentioned in the argument, of the loss produced by a great fresh, and perhaps in some others,) which no care, integrity nor prudence on the part of the inspectors could possibly have averted, the Commonwealth should be bound to indemnify the owners; leaving them at the same time to be recompensed by the inspectors for all losses of a contrary character, to be made good by them in consideration of the reward paid to them for their services.

I am therefore of opinion that the decree should be reversed, and the bill dismissed.

Judge FLEMING. It is sound policy in every commercial country to take care that their several articles of exportation be of a good, sound, merchantable quality; and under this impression, our Legislature have from time to time judged it expedient to pass laws for the inspection not only of tobacco, but of bread, flour, meal, fish; pork, beef, hemp, tar, pitch, turpentine, and even lumber: and tobacco being the principal staple of our country, the greater part of which is annually exported to foreign markets, it was a great object of our Legislature that its quality should be equal, if not superior to that carried to market from other countries; that it might command a better price: hence the act commonly called the "*tobacco-law*," which has been varied from time to time, as circumstances seem-

APRIL, 1868. ed to require, is more diffuse, and embraces a greater variety of objects than any other act on the subject of inspection ; by the first clause of which it is enacted " that no tobacco shall be shipped or exported, but in hogsheads or casks of a particular description, carried to some public warehouse, and there inspected by men specially appointed for that purpose." This law, with occasional variations, has, on the experience of near a century, been found very beneficial, as well to the cultivators of tobacco, as to the community at large, for whose general emolument it was originally instituted ; but not for the purpose of raising a revenue, as was contended in the argument, by the counsel for the appellees ; though, from the present judicious regulations, it may bring a small sum annually into the treasury.

It is not contended but the Legislature had a constitutional right to pass the law : that being admitted, it follows of course that they had a right to do it under such regulations and modifications as to them, from time to time, seemed expedient, and most likely to be beneficial to the community at large : but it by no means, as I conceive, placed the Commonwealth in the state or condition of a common bailee, and made it responsible for all the losses that might be sustained by the owners of tobacco in the several warehouses.

By the 37th sect. of the act of 1792 (as was done in many of the former acts) it is provided that where a warehouse shall happen to be burnt, the loss sustained thereby shall be made good by the General Assembly, and the inspectors indemnified : but further the Legislature did not go—reserving to themselves the discretion of making compensation for all other losses, or not, according to circumstances, by special provision ; as was done, I believe for the losses sustained by the great fresh, in the year 1771, and on several other special occasions.

(a) Act of 1792, sect. 14. The law requires(a) that every person appointed an inspector of tobacco shall, before entering upon the duties of his office, give bond with good security, in the penalty of

4,000 dollars, for the faithful performance of his duty ; which the Legislature, no doubt, thought a sufficient sum to cover the delinquency and malfeazance of any one inspector ; though in this singular instance, it seems, they were mistaken.

APRIL, 1808,
The Commonwealth
v.
Colquhoun
and others.

It seems a hard case on the appellees, but they must seek relief from another quarter.

The decree was reversed, and the bill dismissed *with costs*.(1)

Anderson and Starke *against* Fox and others.

ON an appeal from a decree of the late High Court of Chancery, dismissing a bill exhibited by the appellants against the appellees.

Nelson Anderson, one of the complainants, was surety for *Richard Anderson*, in a bond to *Alexander Baine* for 1,889*l.* 12*s.* 0*d.* in paper money, which, being reduced by the scale, amounted to 157*l.* 9*s.* 4*d.* bearing interest from

If an executor sells the slaves of his testator, when there are no debts to render such sale necessary, and buys them himself, the sale may be set aside, at the instance of any person interested.

(1) The *Commonwealth*, when the decision is *in its favour*, recovers costs ; though it does not *pay costs*, when *cast in a suit*.

having sold certain slaves which were specifically bequeathed by his testatrix ; having become the purchaser himself ; and, afterwards, recovered damages in an action of *trespass* against the sheriff for seizing and selling them as the property of the *specific legatee*, in whose possession they were found ; a Court of Equity will require an account of his administration, to ascertain whether the sale, at which he was himself the purchaser, was necessary for the payment of debts, or not ; and (even if the sale and purchase by himself be justified by the result of the investigation) will grant a new trial of the issue in the action of *trespass* ; (though no motion to that effect was made *at law* ;) in case the damages were *excessive*, and produced by erroneous impressions on the minds of the jury ; and where the damages are *evidently excessive*, the testimony of the *jurors* will be received to declare the motives which induced them to give such damages. In such case, the damages ought not to be *vindictive*, but only for the *value* of the slaves, with a reasonable allowance for *hire*.

Quere, how far an *ex parte* settlement of his administration account by an executor, with commissioners appointed, on his own motion, by the Court in which the will was proved, is valid ?

☞ In this case, a doubt was suggested, whether, an executor could legally purchase the property of his testator sold by himself *though the sale were public, and necessary for the payment of debts* ; but it appears, from the decree, that such sale and purchase (the sale being necessary for the payment of debts,) would be confirmed if no fraud were proved.