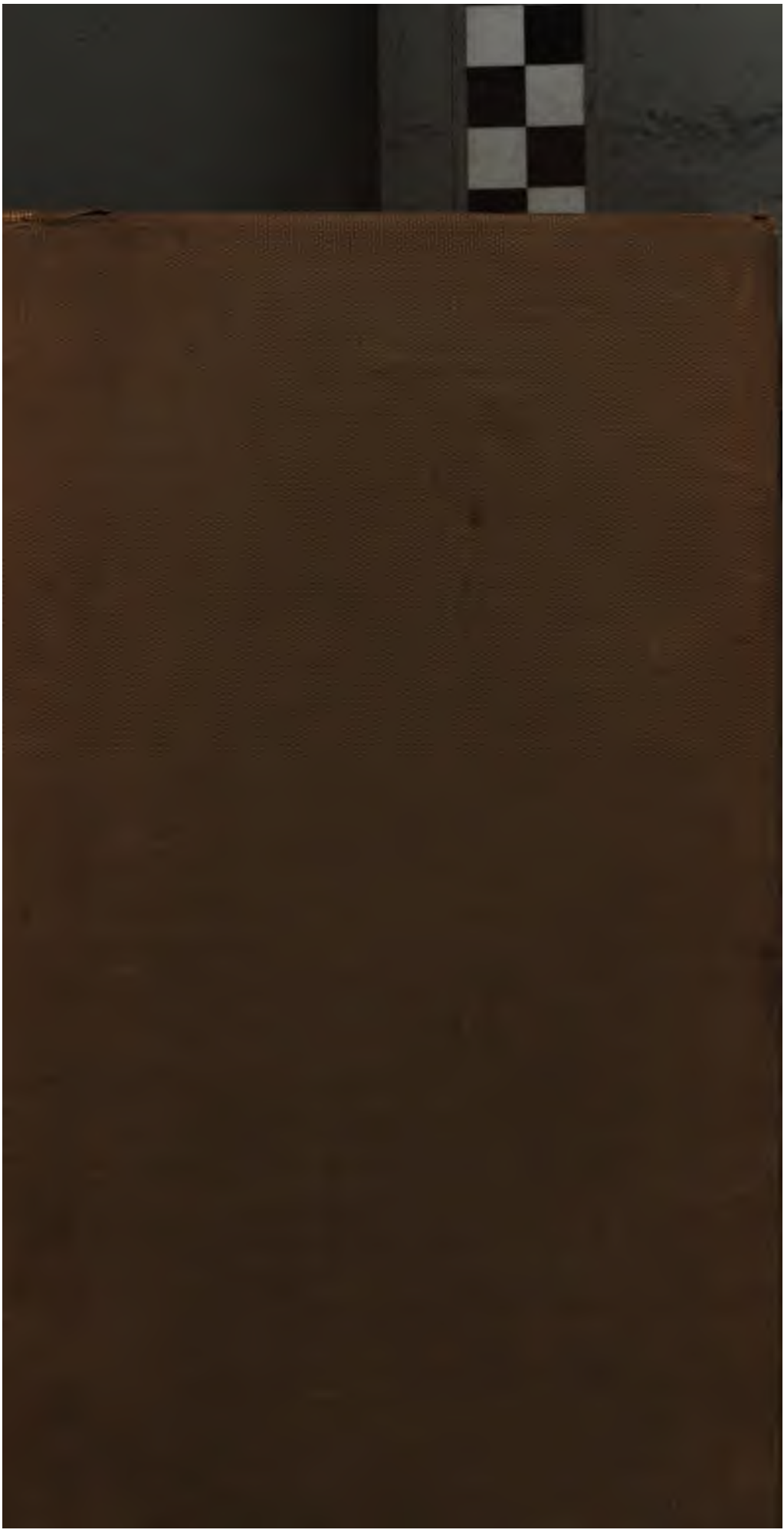

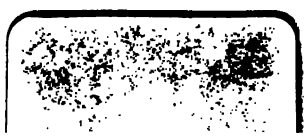

NEW-YORK TERM REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THAT STATE.

BY GEORGE CAINES,

COUNSELLOR AT LAW AND REPORTER TO THE STATE.

VOL. I.

NEW-YORK:

PRINTED FOR ISAAC RILEY & CO. NO. 1, CITY-HOTEL.

1804.

District of New-York, } ss. BE IT REMEMBERED, That on the fourteenth day of November, in the twenty-ninth year of the Independence of the United States of America, GEORGE CAINES, of the said District, hath deposited in this Office, the Title of a Book, the right whereof he claims as author, in the words following, to wit:

"New-York Term Reports of Cases argued and determined in the Supreme Court of that State. By GEORGE CAINES, *Counsellor at Law, and Reporter to the State.* Vol. I."

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 Authors and Proprietors of "such Copies, during the times therein mentioned."

EDWARD DUNSCOMB,
Clerk of the District of New-York.

November 14, 1804.

PREFACE.

IN a juriſprudence where the judgments of the paſt are to regulate thoſe of future times;—where that which has been, is to form the rule of that which is to be,—the utility and importance of tranſmitting, to thoſe who are yet to come, the deciſions of our days, to be acknowledged, need only be named. The inconveniences reſulting from the want of a connected ſyſtem of judicial reports, have been experienced and lamented by every member of that profeſſion for whoſe uſe the following ſheets are peculiarly deſigned. The determinations of the court have been with difficulty extended beyond the circle of thoſe immediately concerned in the ſuits in which they were pronounced; points adjudged have been often forgotten, and inſtances might be adduced where thoſe ſolemnly eſtabliſhed, have, even by the bench, been treated as new. If this can happen to thoſe before whom every ſubject of debate is neceſſarily agitated and determined, what muſt be the ſtate of the lawyer, whoſe ſole information ariſes from his own practice, or the hearſay of others? Formed on books, the doctrines of which have

in many reſpects been wiſely overruled, he muſt have frequently counſelled without advice, and acted without a guide. To alleviate theſe embarraſſments, and diſſeminate that which it concerns all to know, the following Reports have been undertaken. Their continuance will be regular by quarter-annually publiſhing in each vacation the deciſions of the laſt preceding term.

The reporter would ill deſerve the favours he has received, did he not in the fulleſt manner avow their extent. Their Honors on the bench, with a kindneſs and warmth of encouragement, for which far more is felt than it is poſſible to expreſs, have unreſervedly given their written opinions, and the whole bar has frankly and generouſly afforded their caſes and every other communication, that was wiſhed or deſired. To theſe aids the clerk of the court has added an unlimited recurrence to the papers and pleadings his office contains.

From this enumeration of aſſiſtances it will appear, that the reporter's exertions have been reduced to little more than arranging the materials received, and giving, in a ſummary manner, the arguments adduced. In ſtating theſe it has been neceſſary to condenſe; to ſhorten but not to deviate from the path, counſel have been pleaſed to elect. So little has this

been done, that in ſome inſtances, it has been thought right to tread in their ſteps, and the very words have been adhered to, becauſe they have been conſidered as mirrors reflecting the caſe, without which it would often be impoſſible to behold it in the light repreſented to the bench. To omit altogether what the advocate has urged, and ſpecify his points alone, has more than once been ſuggeſted; but believing the reaſonings of the barriſter to form the link which connects the caſe with the deciſion, it was thought impoſſible, without in ſome degree preſerving the language of the pleader, to do juſtice to either. Notwithſtanding every endeavour to render this, it muſt be confeſſed that it has not always been accompliſhed; and the eloquent in the law will often have to regret the inadequacy of their reporter. For this their forgiveneſs is entreated: the fault is not in the man, but the nature of the thing. Where is the original that in the copy has not loſt fire and colour? With this apology the reporter takes his leave of a bar to whom he is in every ſenſe of the word, truly obliged.

GEORGE CAINES.

NEW-YORK, *February*, 1804.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF NEW-YORK,

In MAY TERM, in the TWENTY-SEVENTH YEAR of our INDEPENDENCE.

Bogert and Lewis, Executors of Bogert, againſt Hildreth, Sheriff of Montgomery.

NEW-YORK, May 1803.

In an action for an eſcape from priſon in one county, that the judgment on which the ſuit againſt the priſoner was founded is of record in another county, is not ſuch a ſubſtratum as makes the action local where the judgment is recorded. Query, if the county where an eſcape happens be not the proper county for the venue?

THIS was an action for an eſcape from execution. The venue was laid in the city of New-York. The defendant at a former term, on an affidavit ſtating the cauſe of action (if any) to have ariſen in the county of Montgomery, and adding that the defendant's witneſſes, who were numerous, reſided in that county, moved to change the venue from New-York to Montgomery. It was then contended, that this action was ſo far local that the plaintiff was bound to lay the venue in the county where the priſoner had eſcaped: but the court was of opinion, that the ſuit was tranſitory; that the plaintiffs had a right to lay the venue where they pleaſed in the firſt inſtance, and the defendant enjoyed the common privilege of changing it on the uſual affidavit. On that a rule was made that the venue ſhould be changed from the city of New-York to Montgomery, unleſs the plaintiffs, within twenty days, ſhould ſtipulate to give, on the trial, material evidence ariſing in the city of New-York. The plaintiffs did ſtipulate accordingly, and tranſmitted a notice of it to the

NEW-YORK, May 1803.

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defendant's attorney by mail to Johnſtown in Montgomery county; four days after which, and before, according to the courſe of the mail, the defendant could have received the notice, he pleaded in bar freſh purſuit and recaption before action brought.

Riggs now moved that the plaintiff be diſcharged from his ſtipulation, on the grounds, firſt, that the ſubſtratum of the action being the judgment againſt M'Donald, which was filed in New-York, the cauſe of action aroſe there;* and, ſecondly, that the defendant, having pleaded before he received notice of the ſtipulation, had waived the rule for changing the venue.

* See Mellor v. Barber, 3 D. & E. 387. Pinkney v. Collins, 1 D. & E. 571. Cliſſold v. Cliſſold, ibid. 647. Talmaſh v. Penner, 3 Boſ. & Pul. 12.

Per curiam. This is a motion to vacate a rule entered the laſt term, "for changing the venue to Montgomery, unleſs "the plaintiffs would undertake to give evidence material to "the iſſue ariſing in the city and county of New-York." It is now ſaid, that the court committed an error in changing the venue; becauſe, there being matter of law and matter in pais, material to the iſſue, in different counties, the plaintiff might elect to lay his action in either; and that, in ſuch caſes, it cannot be changed, unleſs for urgent or particular reaſons. This rule when well underſtood is a ſalutary one, but it does not apply to this caſe: it means, that when official acts are done by the defendants in ſeveral counties, ſome of which are matters of record, and others of fact, there the plaintiff has his election. Thus in the caſe of Griffith v. Walker, 1 Wil. 336, which was an action againſt the ſheriffs of Radnorſhire for a falſe return to a ſcire facias, the venue of which was laid in Herefordſhire, it was alleged, on demurrer, that the action ought to have been laid in Radnor, becauſe whatever acts the ſheriff does officially muſt be done in his own county, or at leaſt the law ſuppoſes them done there: but the court ſaid, the ſheriff may indorſe his writ any where; and, as it is alleged that he did this in Herefordſhire, the plaintiff has his election to lay his action where he can prove the *fact done*. Here the return was matter of record, but it is not on that account merely that this election is given, but becauſe the ſheriff was the party *who made that return, which was the giſt of the ſuit*. If this return had afterwards been filed (as was no doubt the caſe) in the office of the Court of King's Bench, it would not have juſtified the laying of the venue in that

county. In the caſe before us it is ſaid, that the judgment roll againſt the party who eſcaped is filed in an office kept in the city and county of New-York, and therefore the venue cannot be changed. This judgment was no act of the ſheriff's, and therefore not like the caſe of a return made by him in a particular county. Nor is it the ground of this action, which is, emphatically, the eſcape from the jail of Montgomery. A principal reaſon for permitting a plaintiff to retain the venue where he has laid it, ariſes from the circumſtance of his having material witneſſes there. This rule ſhould not be abuſed by too much refinement. If the recovery againſt the party who has eſcaped muſt be given in evidence on the trial, it may be done by exemplification, which is the proper way; and this may be carried without expenſe to Montgomery. Bulwer's caſe, in 7 Co. 1, only determines, and that on demurrer, that an action for maliciouſly outlawing the plaintiff might be laid in the county where the capias utlagatum was executed; and not neceſſarily in Middleſex, where the wrong was commenced by iſſuing the capias ad ſatisfaciendum. This decides nothing; for although the plaintiff may, in many caſes, in the firſt inſtance chooſe his venue,* it does not follow that the defendant ſhall not change it, or that the court would not, in that very caſe, have changed it on the common affidavit. The caſe of Cameron v. Gray, in 6 T. R. 363, is ſubſequent to the Revolution, nor can the facts be all diſcloſed. Lord Kenyon would hardly have ſaid, (and yet ſuch is the effect of that deciſion) that all actions for infractions of patent rights are local, and muſt be tried at Weſtminſter, ſolely becauſe the patent, which is its ſubſtratum, iſſued there. If this be his meaning, we are at liberty, conſidering the date of this caſe, to differ from his Lordſhip; and it appears to me, with due deference, that the county in which the right of the patentee was invaded was the proper theatre of trial; for there, and not elſewhere, the cauſe of action aroſe. So in an action for an eſcape, unleſs particularly circumſtanced, many reaſons occur why a trial ſhould be had in the county from which the priſoner fled. A ſheriff ought not lightly to be called out of his county: the witneſſes alſo muſt, generally ſpeaking, be there; nor ſhould a public officer be ſubject to the oppreſſion and expenſe of attending with his witneſſes at a diſtance. Yet we are now called on, not only to ſanction

* See 1 Lev. 1
286, Mayor
Berwick v. F
art, 2 Bla
1069.

NEW-YORK, May 1803.
Bogert & anoth. v. Hildreth.

this practice in one case, but to render it universal and permanent; or, in other words, to declare, that every sheriff, however distant he may reside, shall answer in Albany or New-York for escapes, for no other reason than because the judgment or writ on which the person was arrested is to be found in one of those counties. It is astonishing that actions of this kind have ever been regarded as transitory: this, however, without any decision on the point, appears to be the case. Why they should be local, has already been suggested. Much vexation must be the consequence if we decide (which will be the effect of a vacatur) this rule, that in no case shall a sheriff have a trial of this kind in his own county, because a judgment, which can be proved without the personal attendance of any one, has been rendered elsewhere. Actions of this nature are within the reason of the "act for the more easy pleading in certain suits rendering local certain suits against sheriffs and other public officers;" and it would be a good rule, in which I* should heartily concur, to make all actions of this kind triable in the county to which the officer belongs, unless strong circumstances rendered it improper. Upon the whole, we are well satisfied with our decision the last term. It was full as favourable to the plaintiff as he had any reason to expect, and ought not to be disturbed.

* Livingston J. who delivered the opinion of the court.

Radcliff J.† concurred, observing, however, that according to the English practice he took the rule to be, that where evidence material to the plaintiff's action arises in different counties, the plaintiff has a right to elect the county in which to lay his venue, and to keep it there; that the rule is the same, whether the evidence consist of matters in pais in each county, or of record in one and in pais in another. Pursuing that practice, the plaintiffs would be entitled to retain the venue in New-York. But he thought this a question in which we had a right to prescribe a rule for ourselves. Applications to change the venue must in general rest in the direction of the court, and be regulated by the circumstances of the case.

† His Honour referred to the following authorities: 7 Co. 1. Bulwer's case, Cro. Eliz. 574. Wil. 336. Plow. 37. b. Styl. 107. 2 Bl. Rep. 240. 2 D. & E. 238. Ibid. 275. 6 D. & E. 363.

Townsend against New-York Insurance Company.

MOTION for a commission to examine. This cause had been once deferred for want of testimony, to acquire which a

commiſſion had iſſued. The defendants afterwards, but previous to the laſt circuit, gave notice to the plaintiff that he ſhould, on affidavits, (the copies of which he annexed) move for a commiſſion to examine witneſſes, and ſpecified the names of the commiſſioners. At the time of ſerving this notice, the defendants offered to ſtipulate not to delay the cauſe. The plaintiff *did* not aſſent to join in the commiſſion, and in a few days *gave* the regular notice for trial. At the circuit an application was made to poſtpone the cauſe, on the uſual affidavit of the want of that teſtimony, to obtain which the commiſſion noticed was to be ſued out. The plaintiff's counſel objecting, he had till the next day to produce an affidavit of a former delay. Not doing this, the cauſe ſtood over of courſe.

If notice of applying for a commiſſion ſpecify names of commiſſioners, and the party ſerved do not then object, he is concluded. Query whether coſts ſhould not follow on applications for time?

Hoffman now moved for the commiſſion.

Hamilton objected to its being directed to the commiſſioners named.

By the court. The commiſſioners having been named in the notice of the motion, and the plaintiff having neither joined *nor* objected, is now concluded.

Hamilton then argued againſt the application, becauſe it was uncertain how long it would tie up the cauſe, and the defendants had not entered into any ſtipulation.

By the court. It is unneceſſary, for they take the commiſſion *at* their peril: let it iſſue.

Hamilton hoped that it would be on paying the coſts of the circuit.

The court ordered them, and ſeemed to think, that in all caſes of delay, coſts ſhould follow.

Clarkſon againſt Gifford.

HARRISON moved, on the uſual affidavit, to change the venue.

In covenant of ſeiſin, the venue may be changed to where the lands lie.

Evertſon. This action is founded on a ſpecialty: in ſuits of this ſort, the court does not change the venue.

Harriſon in reply. The action is on a covenant of ſeiſin, affecting, or, as the technical phraſe is, ſavouring, of the realty.

Motion granted.

NEW-YORK, May 1803.

Griſwold & an. v. Stoughton.

Griſwold and another againſt Stoughton.

If a default be regularly entered, and no excuſe ſhewn how it was incurred, tho' the ſubſequent proceedings be ſet aſide for irregularity, the default will ſtand, and plaintiff may perfect his judgment. See Rule 8th of April 1796. Cole. Ca. Prac. 5.

ASSUMPSIT on a promiſſory note. The plaintiffs had proceeded under the act of the Legiſlature, and had entered the demand of a plea in the clerk's office, without ſerving it on the defendant, who lives in the city of New-York. Judgment by default having been obtained,

Pendleton moved to ſet it aſide on an affidavit ſtating that no rules had been entered, either for interlocutory judgment, or for the clerk to report damages on the note, offering at the ſame time to pay coſts, and put in ſpecial bail.

Riggs contra. The proceedings are regular to the default: the affidavit ſtates no excuſe for that; and though the ſubſequent ſteps are not according to ſtrict practice, the defendant, being in default, and that default regularly entered, is not entitled to favour. The utmoſt, therefore, the court will do, is to vacate the proceedings from the default.

Per curiam. As the default is not accounted for by the affidavit, it is unimpeached, and therefore muſt ſtand: but as the ſubſequent proceedings are irregular, they muſt be ſet aſide, with the uſual liberty, however, for the plaintiffs to perfect their judgment this term, if they can.

Manhattan Company againſt Herbert.

Trial by record to be on notice. See Knap v. Mead, Cole. Ca. Prac. 122.

HOPKINS moved for a rule to bring on a trial by record.

By the court. Trials by record are to be brought on by notice, in the ſame manner as caſes for argument.

Livingſton againſt Delafield.

After ſtipulation, the court will on ſpecial circumſtances allow a ſecond excuſe, and not grant judgment as in caſe of nonſuit.

THIS cauſe had been put off on the uſual affidavit of abſence of a witneſs, in expectation of whoſe return the plaintiff had ſtipulated to try peremptorily: on his not doing ſo, the defendant had, on a former day, moved for judgment, as in caſe of nonſuit, for not proceeding to trial; but not ſucceeding, and the cauſe not having been brought on according to the ſecond ſtipulation, the motion was now repeated. On the part of the plaintiff, an affidavit was read, ſtating that the wit-

neſs was a ſeafaring man, and had never been within the ſtate of New-York ſince the ſuit commenced, and that the ſtipulation to try was in expectation of his return.

Per curiam. The witneſs having been conſtantly out of the ſtate ever ſince the ſuit was commenced, and being a ſeafaring man, ſome *indulgence* is due from his way of life. The defendant *therefore* can take nothing by his motion.

Bedle & ux. againſt Willett.

BY the court. The notice of a motion to refer muſt contain the names of the referees. The court never nominates them. But the making the motion is not confined to the firſt day of term: notice may be given afterwards, on ſhewing a reaſonable cauſe for the omiſſion.

Practice on referring a cauſe. See the Act, 1 Rev. Laws N. Y. 347, 8.

Edmund Seaman againſt John Davenport and others, tenants in poſſeſſion.

IN partition, after ſervice of the petition and notice, Hopkins moved for a rule to appear and anſwer. The court at *firſt thought* this a rule of courſe; but on the counſel's obſerving, that *proof of* ſervice was by the act required to be made to the ſatisfaction of the court, and that the manner of the ſervice would, according to the act, vary in particular caſes, the court ſeemed to coincide, but ſaid that the rule muſt be drawn up as the party ſhould be adviſed.

Practice in partition.

John B. Church againſt the United Inſurance Company.

THE plaintiff had obtained, in laſt January term, an order of court for the verdict recovered in this cauſe to ſtand, and judgment to be given accordingly, unleſs the defendant ſhould, fourteen days before the next "*ſittings*" in New-York, give notice to the plaintiff that a commiſſion iſſued in the ſuit had been returned, in which caſe there ſhould be a new trial, and the plaintiff at liberty to amend, &c. The clerk had drawn up the rule before the next "*circuit*." The plaintiff had given

Miſpriſion of clerk in drawing up a rule amended on application, and the plaintiff noticing to the adverſe party the error, may have the ſame benefit as if the rule had been right.

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immediate notice of the miſtake to the defendant's attorney, and that he ſhould be prepared to try the cauſe at the ſittings. The defendant not having noticed the return of the commiſſion,

Hamilton moved, that the rule be amended to "ſittings," and be made abſolute for judgment. Ordered accordingly.

James Everitt, Surrogate of Orange County, ads. The People of the State of New-York, ex. rel. Charles Beach.

Peremptory mandamus ſet aſide on motion, if unfairly iſſued.

HOFFMAN moved to enter a vacatur on a rule for a peremptory mandamus, and ſet aſide the mandamus which had been iſſued on the following facts:

A rule was obtained in July term 1802, that defendant ſhew cauſe, by October term, why a mandamus ſhould not iſſue, compelling him to proceed in a cauſe then depending before him, concerning the will of Thomas Beach.

A return was made to this rule, which, from the defendant's counſel being unavoidably detained on his way to Albany, was not filed until the third day of the October term.

On the firſt day of October term, Charles Beach attended, and obtained a rule for the mandamus: and on the third day, on filing the return, that rule was vacated.

Notice of the vacatur was given to the perſon who had acted in behalf of Beach, and obtained the firſt rule; but Beach had previouſly left Albany, and the mandamus iſſued.

At the laſt term Mr. Colden was charged with the buſineſs, to make the proper application to the court, and to oppoſe a peremptory mandamus. On Mr. Colden's way to Albany, he met Mr. Morton, the attorney for Beach, when it was agreed, that all further proceedings ſhould be ſtayed until the preſent term. Mr. Colden therefore did not further attend to the cauſe.

The relator Beach attended at Albany the cloſe of the term, employed other counſel, and obtained a rule for a peremptory mandamus, which has been iſſued. Motion granted.

Seaman and others againſt Drake.

NEW-YORK, May 1803.

Seaman & al. v. Drake.

A MOTION had been made laſt term on the part of the defendant's bail to vacate the judgment and all ſubſequent proceedings. The facts of the caſe were theſe:

In April *term* 1800, final judgment had been regularly entered, *and a* capias ad ſatisfaciendum againſt the body had iſſued. *In* July term following, the writ was returned cepi *corpus* in cuſtodiam; on which the defendant applied to ſet *aſide* the judgment and execution on an affidavit of merits, and that his attorney, who reſided two hundred miles back, did not know of the alteration in the rules of practice, by which the defendant was to plead in twenty days, and not as before, in the next term. The judgment was accordingly ſet aſide on payment of coſts, and a ſtipulation to plead in twenty days. No plea being given, in October term 1801 judgment was confirmed. The roll had been carried in, coſts taxed, judgment docketed, and the roll marked as filed, but the clerk had omitted to ſign it. A capias ad ſatisfaciendum was iſſued, directed to the ſheriff of New-York, and returned not found. In January term 1802, another capias, but not a teſtatum, was directed to the ſheriff of Ulſter, on which nothing was done. In April term 1802, a capias ad reſpondendum was iſſued againſt the *bail* on their recognizance. In July term 1802, another. In September 1802, another. In October term 1802, another. In January term 1803, returned taken. The application firſt mentioned was then made on three grounds: Firſt, That the proceedings were irregular, the roll not having been ſigned by the clerk purſuant to the law of 24th March 1801, ch. 75, ſ. 7. Secondly, that there was no teſtatum capias iſſued to the ſheriff of Ulſter. Thirdly, that the principal had been diſcharged under the inſolvent law.

If the principal be diſcharged under the inſolvent law or bankrupt act, and his bail afterwards be fixed, they may notwithſtanding have an exoneretur entered on payment of coſts.

Per curiam. On the firſt point, we conſider the omiſſion of the clerk's ſignature as an error of our officer. This ought not to prejudice the plaintiff, defendant, or any other perſon. The judgment was docketed as the ſtatute requires,* and therefore the world has the due and legal notice of its exiſtence. On theſe principles, we, the laſt term, ordered an amendment nunc pro tunc, and the ſame muſt be done now, by ordering the ſignature of the clerk to be added in the ſame

* 31ſt March 1801, ch. 105. ſ. 3.

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manner. On the other two points we will, as the counſel requeſt it, hear them at a future day.

Hopkins now moved for leave to enter an exoneretur on the bail piece, and produced the diſcharge of the principal under the inſolvent law of the ſtate. By this it appeared, that the defendant's eſtate had been aſſigned by order of the court of common pleas of the county on the 25th of September 1801, and the defendant diſcharged by the ſame court on that day.

Colden contra. The bail are too late in their application for relief. Proceſs againſt the bail was returned cepi corpus on the firſt day of January term laſt. They were therefore in eight days after abſolutely fixed.

Per curiam. On Friday, in the ſecond week of the laſt term, a motion was made to ſet aſide the ca. ſa. iſſued in this cauſe on two grounds: 1. Becauſe it ought to have been a *teſtatum* writ, it having iſſued into a county different from that in which the venue was laid. 2. Becauſe the roll was not ſigned by the clerk, and the record was therefore incomplete, and the judgment irregular.

The ſecond objection we conſidered as a mere clerical omiſſion, and it was diſpoſed of at once by permitting the clerk to add his ſignature to the roll nunc pro tunc. The conſideration of the firſt objection, on account of the preſſure of buſineſs was poſtponed till the preſent term; and it being evident that the object of the motion was the relief of the bail, the proceedings againſt them were in the mean time directed to ſtay.

Another motion is now made for a rule that an exoneretur be entered on the bail piece, founded on the irregularity of the ca. ſa. as above ſtated, and alſo on the further fact that the principal was inſolvent, and was diſcharged under the inſolvent act on the 25th September 1801. The ca. ſa. was returned *non eſt* in July term laſt, and the action againſt the bail is ſtill pending.

It is now objected, that the bail ought not to be permitted to avail themſelves of the defendant's diſcharge, becauſe it was not a ground on which the motion depended at the laſt term. But this cannot be a good reaſon to charge the bail if they are otherwiſe entitled to relief.

July term 1808. In the caſe of Van Alſtyne ads. Brinkerhoff, we permitted

an exoneretur to be entered on an application from bail under similar circumſtances. In that caſe the principal was alſo diſcharged under the inſolvent act before the bail were fixed in law. The ſuit however proceeded againſt the bail, and the eight days after the return of the capias againſt them had expired before they made their application for relief. We decided, that as they were entitled to have the exoneretur entered *before* they were fixed, and had barely omitted to have it *done*, they had not forfeited that right while the action was pending againſt them, and that the only conſequence was that they ſubjected themſelves to the payment of coſts.

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The facts in this caſe in ſupport of the motion made this term are ſimilar, and we think the former deciſion was equitable and proper in favour of bail, and ought to govern the preſent. It is therefore unneceſſary to give an opinion on the firſt objection made on the former motion.

Let the exoneretur be entered on the payment of coſts.*

* In the courſe of the argument a caſe of Riddles v. Mitchell, manucaptor of Cuyler, was alluded to. The counſel engaged in that cauſe has favoured me with a ſtatement of the facts, which were as follows:

Riddles v. Mitchell.

THE original action was brought in the mayor's court of the city of New-York, and judgment obtained therein. The defendant brought a writ of error returnable to this court. Pending the writ of error, the defendant in the *original ſuit* was diſcharged under the inſolvent law. Errors not being duly aſſigned, *the defendant* nonproſſed the writ, iſſued a ca. ſa. in this court, and upon a return of a non eſt inventus, brought an action of debt againſt the bail on their recognizance in the original ſuit. After declaration, plea, and demurrer, the defendant applied to the court to ſtay proceedings. It was contended on the part of the preſent plaintiff, that the defendant came too late with this application, having pleaded to the action. But the court, on the authority of the caſe in Carthew,† ordered the proceedings ſtayed.

† Dolſin v. King, 515. But the caſe ſeems by no means analogous. A ſurrender had been actually made before the return of the latitat on which the bail had been arreſted.

Abraham S. Hallet againſt Daniel Cotton.

THIS cauſe was tried at the ſittings after January term laſt, when the jury found a verdict for the plaintiff for 866 dollars 20 cents. The defendant obtained a judge's order for a ſtay of further proceedings, until the next term, for the purpoſe of then moving for a new trial.

On moving for a new trial, the court will not order the amount of the verdict, or ſum admitted due to be brought in, though the bail have become inſolvent, and obtained their certificates under the Bankrupt-law.

Hawes now moved, on the part of the plaintiff, for an order, that the defendant bring into court the ſum found by the jury, with coſts of ſuit; and that in default thereof, the or-

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der to ſtay proceedings, be diſcharged. This application was founded on an affidavit ſtating, "That ſince this cauſe has been at iſſue, the ſpecial bail has been declared bankrupt and diſcharged under the bankrupt law of the United States. That, on the trial of this cauſe, a balance was admitted by the defendant's counſel to be due to the plaintiff of about 500 dollars. That, at the ſittings in November laſt, on the application of the defendant this cauſe was put off for that court, on the condition of payment of coſts: but that thoſe coſts, although repeatedly demanded, were not yet paid." A further affirmation of the plaintiff was read, ſtating "That from the circumſtances of the defendant he was in danger of loſing his ſaid debt, unleſs the money was brought into court, or the rule to ſtay proceedings diſcharged: but it was acknowledged a copy had not been ſerved.

For the plaintiff it was ſaid, that a motion for a new trial was an application to the equitable diſcretion of the court, to relieve from what in the opinion of the party, was an erroneous or oppreſſive verdict. That it was a maxim of law, founded on principles of equal juſtice, "that he who ſeeks equity, ſhould do equity." From the affidavit it appeared, that the defendant had admitted on the trial that the plaintiff was entitled to recover about 500 dollars, which ſum entitled him alſo to full coſts. Before, therefore, the court would ſuffer the defendant to be heard on a motion for a new trial, they would require him to do what he acknowledged to be juſt. The bankruptcy, and diſcharge of the bail, and the circumſtances of the defendant, were additional reaſons for requiring the defendant to bring the money into court, to abide the event of the ſuit. That, from the great number of caſes now before the court, it was not in the leaſt probable, that the caſe to be made in this cauſe, could come on in its order, and a deciſion be had thereon, in a ſhorter time than 6 or 9 months: by which time, the defendant, from his preſent circumſtances, would doubtleſs be a bankrupt, or, as his bail were already bankrupt, he might abſcond. Under ſuch circumſtances, *delay* was equally prejudicial as a *denial of juſtice*. It alſo appeared that the defendant was now in contempt, and liable to an attachment for non-payment of coſts incurred on putting off the trial of this cauſe, at a former ſitting. That it was a ſtanding rule of the mayor's court of the city of New-York,

that, "upon every motion for a new trial, the defendant ſhould, within eight days, bring into court the ſum recovered by the verdict, with coſts; and that in default thereof, the plaintiff have leave to proceed." That, although this court might not be diſpoſed to go the length to eſtabliſh ſuch a rule, *in all caſes*, it was believed the peculiar circumſtances of this cauſe were ſuch, that they would not heſitate to make the order *now* requeſted; or at leaſt, for ſuch ſum as was admitted to be due, with coſts.

Bogert ſaid the object of the motion was perfectly new and unprecedented.

Per curiam. The practice of the mayor's court, in obliging the amount of the verdict to be brought into court on a motion for a new trial, has never been adopted here. The inſolvency of the bail* is certainly not a ſufficient ground to induce us to make ſuch an order; and a copy of the affirmation, reſpecting the defendant's circumſtances, has never been ſerved on him: of that, therefore, we can take no notice.† But *let it be* underſtood, we do not mean to ſay, that had it been otherwiſe we would have granted the motion.

Rule refuſed.

* See Gilleſpie ads. Plaiſter & M'Comb, as t inſolvency in caſes of ſecurity for coſt. Cole Ca. Prac. 119.

† Card ads Fitzroy & ors Cole. Ca. Prac. 63. whenever a ſpecial motion i to be made o an affidavit, a copy muſt b ſerved. See alſ Grove againſt Campbell, ibid 114, that ſupplementary affidavits to rebut thoſe in anſwer cannot be receiv ed.

James W. Gilbert againſt James C. Brazier.

Party on whom a fine is levied not liable to th coſts of levy.

PER curiam. The queſtion is, whether the ſheriff is entitled to fees on levying a fine. The ſtatute directing the mode of making the levy, declares it ſhall be done without fee or reward. The fee-bill gives a fee; but does not ſay by whom it ſhall be paid. We all know how it has been: the fee has been charged by the ſheriff, in his accounts. This, we think, is the regular practice; for it cannot be demanded from the perſon who has had to pay the fine.

L. & N. Vandyck againſt Van Beuren & Voſburg.

Liberty to turn a caſe into a ſpecial verdict ſtays execution.

PER curiam. Wherever a caſe is made, with liberty to turn it into a ſpecial verdict, execution muſt ſtay of courſe, till the next term after the deciſion is given, that, if either party be diſſatisfied, there may be time to make up the ſpecial verdict.

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Heyl v. Burling.

Chriſtian Heyl againſt Samuel Burling.

TROVER, to recover the value of two logs of mahogany, tried at the New-York ſittings in June 1802, before Mr. Juſtice Radcliff.

On a caſe reſerved, the following facts appeared:

That the plaintiff bought of one Bonſall, mate of a veſſel, three logs of mahogany, for one hundred dollars—that they were laying on a wharf, and part of the conſideration money paid. That Mr. Roget, herein after named, was preſent, and a converſation paſſed between him and the mate and the plaintiff; but what it was, was not known.

A mate of a veſſel having a right to a certain quantity out of a cargo, by way of privilege cannot, after a ſale of the whole cargo by the conſignee, pick out any ſpecific parts, and ſell them. A right of privilege in a cargo, does not give ſuch an intereſt as will enable the purchaſer of it to maintain trover, if the conſignee has not aſſented to the ſelection of thoſe parts which are taken in ſatisfaction; for, in trover, property and poſſeſſion muſt be ſhewn. A releaſe, executed to a witneſs, after his having depoſed, does not make him competent.

Charles Smith, on part of the plaintiff, teſtified, that he was preſent at the purchaſe. The logs were pointed out, and agreed for in the preſence of the captain of the veſſel, and immediately marked by the plaintiff. This was on Saturday. On Monday following, *Heyl*, in the preſence of the captain and of the mate, took poſſeſſion of the logs, and removed them to a ſaw-yard, from whence they were taken, and afterwards left by witneſs, for Heyl, at White-Hall. That the captain, at the time of their removal, ſent a perſon to ſee that they were thoſe which had been ſold, and had the proper marks. This perſon examined and took the numbers of the logs. Two of the logs being afterwards miſſing, the witneſs went in company with *Heyl*, to the defendant's yard, where he ſaw the logs. *Heyl* claimed them as his, and demanded of the defendant to deliver them to him; which the defendant refuſed. That, during the time the logs were on the wharf, and before their removal, Roget, the perſon, to whom it afterwards appeared in teſtimony, the whole cargo of mahogany was conſigned, gave conſent to Heyl to take away the logs, and made no objection to the ſale by the mate. The witneſs mentioned, that when he was firſt examined, he ſaid the plaintiff had agreed to buy the logs of mahogany at the rate of one ſhilling and ſix pence per foot, but that it was afterwards agreed between the plaintiff and mate, that the plaintiff ſhould pay the groſs ſum of one hundred dollars, and that the ſubſequent agreement was in order to get rid of the trouble of having the mahogany meaſured; as the logs were not then meaſured.

Smith, after Jeremiah Marſhall had given his teſtimony, ſaid, that the logs purchaſed by the plaintiff had, at the time of the purchaſe, been meaſured; as he ſaw the meaſurer's marks upon them.

Jeremiah Marſhall, for the defendant, teſtified, that he is a public meaſurer of timber: that he was employed by Roget, to meaſure a cargo of mahogany conſigned to the ſaid Roget, as the witneſs underſtood from Roget—the captain and mate of the veſſel: That, after the firſt day's work was done, the mate of the veſſel pointed out a log of mahogany, which came from on board the ſaid veſſel, (and which had been meaſured, marked and numbered, as No. 21, of the ſaid cargo,) as being one of three logs, which belonged to him; that the witneſs, on the next day, before they began to diſcharge any of the mahogany, requeſted the mate to mention when they came to the other logs which belonged to him, in order that they might be put into a different bill; upon which the mate ſaid, that he did not own any three particular logs; but that he had a *right* to make choice of three; that the witneſs might meaſure the whole together, as he had been directed, and that he, the mate, would ſettle with Roget for the intereſt he had therein: in conſequence, the account of the meaſurement of the whole of the mahogany was kept in one bill, and *delivered* to Roget, who paid for the meaſuring.

Iſaac Roget, the conſignee, was then offered as a witneſs: he was objected to by the plaintiff's counſel, as incompetent; but the judge admitted him, on being releaſed by the defendant. The point of his admiſſibility was ſaved by plaintiff.

Roget's teſtimony was, that he never authorized the mate to ſell any of the cargo; and that the whole conſignment was ſold by him to the defendant, before the taking away of the logs: That he never gave any authority to the plaintiff to take away the mahogany: That he never had any knowledge of the claim of the mate to any three particular logs, until after the defendant had purchaſed the whole of the reſt of the cargo, and until after the plaintiff had taken the three logs from the reſt of the cargo, which lay all together on the wharf.

The plaintiff's counſel offered to prove other declarations and admiſſions of the captain, as well before as after the ſale of mahogany by the mate to plaintiff, that ſuch ſale was by

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his, the captain's knowledge and conſent; inſiſting he ſtood in the relation of agent for the conſignee; but the teſtimony was rejected. This alſo was ſaved by the plaintiff's counſel.

The defendant read a depoſition of a clerk in the counting-houſe of Roget, ſtating, that he was on the wharf at the foot of Rector-ſtreet, when the plaintiff and ſeveral other perſons were removing three logs of mahogany, No. 21, 50 and 52, which the witneſs forbade, informing them Roget had ſold the logs to the defendant; that, witneſs knew the whole cargo compriſing the three logs above mentioned, were conſigned to Roget, who has accounted for the ſame to the conſignor; and that the whole were ſold to, and paid for by the defendant.

The plaintiff then offered to give in evidence a depoſition, duly taken, made by the mate, to prove plaintiff's intereſt in the logs, and Roget's conſent to the ſelling the logs in queſtion to the plaintiff, and which was inſiſted upon as proper teſtimony, there being no evidence of the mate having warranted the logs to the plaintiff, as his property: but the Judge was of opinion that ſuch teſtimony was inadmiſſible, unleſs the mate was releaſed by plaintiff; which opinion was ſaved by the plaintiff's counſel.

The plaintiff then produced a releaſe; and the witneſs to its execution being called upon to prove it, teſtified, that he was preſent at the time the depoſition was taken, and on his return to his office, being an attorney, and acting in behalf of the attorney for the plaintiff, fearful leſt an objection might be taken to the intereſt of the witneſs, he drew a releaſe, and the ſame was executed by the plaintiff, and delivered to the mate in his office, who left it with witneſs, for the purpoſe of being uſed on the trial. That this was done in the courſe of half an hour after the depoſition was taken; and before the plaintiff, witneſs and mate had ſeparated, after they had left the place of examination. That the defendant's attorney croſs-examined the mate, and ſuch croſs-examination was in writing, at the end of the mate's teſtimony, as proven on part of the plaintiff; and a conſent was ſubſcribed to ſuch examination by defendant's attorney, as follows:

"We, the ſubſcribers, attornies for the plaintiff and defendant reſpectively, do conſent, that the above depoſition be

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read in evidence upon the trial of this cauſe; ſaving and reſerving the exceptions to the admiſſibility of the teſtimony."

Under theſe circumſtances, the counſel for plaintiff moved, that the depoſition ought to be read in evidence; but it was rejected. This point was alſo reſerved by plaintiff.

The judge charged, that it was abſolutely neceſſary* the plaintiff *ſhould* ſhew an acquieſcence on the part of Roget, to the *ſale* by the mate; and that the conſent of the captain, or *his* acts, and that of the mate, were not binding without ſuch *acquieſcence*.

The jury found a verdict for defendant.

The plaintiff now moved to ſet aſide the verdict for miſdirection in the judge, both in his charge, and rejection of proper teſtimony; and for a new trial to be granted.

Woods. A releaſe to Bonſall, the mate and vender of the plaintiff was totally unneceſſary: the court ought not to have aſked it, as he was competent, being equally liable, howſoever the cauſe was determined: firſt, to Roget the conſignee, and alſo *to the* plaintiff, as purchaſer. Peake, Law of Evid. 113.† And peculiarly ſo, as Bonſall had ſold without any warranty; and therefore, had never aſſerted any intereſt in himſelf.‡ Peake 118. "If a vendor of an eſtate covenant for the title, "or warrant the premiſes, he cannot be a witneſs to ſupport "the *title of* the vendee, in an action againſt him by a third "perſon for the premiſes. 2 Roll. Abr. 685. But a vendor, "who does not covenant for the title, or enter into any war-"ranty, is a good witneſs. Buſby v. Greenſlate, 1 Stra. "445."§ But if the court ſhould be of opinion a releaſe was neceſſary, ſuch a releaſe was given and offered. The circumſtance of its being after the examination, is immaterial, from the peculiar facts ſtated in the caſe. If Roget, the conſignee, was competent, being releaſed by the defendant, Bonſall, the vendor, was as much ſo, on a releaſe from the plaintiff. Beſides, the declarations and admiſſions of the captain were full evidence for the plaintiff. He was the agent of the conſignee; and, as in that capacity he conſented to the ſale to the plaintiff, it bound Roget, and confirmed the ſale by Bonſall: the

* His Honour's real charge was, as the reporter is from high authority informed, by no means of the very poſitive kind ſtated by the caſe; but qualified with reaſonings on the nature of the action, the circumſtances of the caſe, &c. and after ſtating the evidence given, and pointing out to the jury how the law was, according as the teſtimony ſhould be believed, his Honour left to them to determine on its weight.

† It is ſuppoſed Evans v. Williams, is the caſe alluded to. 7 D. & E. 481, n. (c.)

‡ The old caſes make a diſtinction between ſales of chattels in poſſeſſion and out of poſſeſſion. That in the firſt inſtance, an expreſs warranty is not neceſſary; in the ſecond, it is. Medina v. Stoughton, 1 Salk. 372. But this has been denied to be law. Paſley v. Freeman, 3 D. & E. 57, 58. See 1 Lex Mer. Am. 372.

§ The reaſon of theſe determinations is, that with reſpect to purchaſes of lands, the maxim of "caveat emptor" applies: in thoſe of chattel intereſts, it does not. Money had and received, will not lie to recover back the conſideration paid for an aſſignment of a mortgage, which turns out to be a forgery, if bona fide transferred, and the aſſignor has not covenanted for the goodneſs of the title. Bree v. Holbeck, Doug. 655.

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rejecting, therefore, theſe declarations and admiſſions, was contrary to law. From the facts it appears, the plaintiff had peaceable poſſeſſion under a good title; and at all events, his poſſeſſion alone was enough to prevent the defendant from taking the logs out of that poſſeſſion; for it was as much continued while the logs lay at White-Hall, as if in the plaintiff's yard; having been left there by him.

But ſee 2 Ch. Ca. 19, and Hardinge v. Nelthorpe, Ne's. Ch. Rep. 118.

Boyd for the defendant. There is not an equal liability in Bonſall. He is not liable to the defendant; for there is no privity between them. The defendant purchaſed of Roget, and Roget is liable to him, not the mate;* for he is liable only to the purchaſer, the plaintiff; and therefore liable to only one of the parties in the cauſe. Therefore, admitting the principle of equal liability, (which he did) it did not apply; as to the releaſe being given after the depoſition offered, the teſtimony was properly rejected. The reaſon why a releaſe is neceſſary, is to do away the effect of the influence of intereſt; but if it be given after the teſtimony, the intereſt has already had its effect. The declarations and admiſſions of the captain could not be received; for he is not the agent of the conſignee, and his agency terminates on delivery; which had here taken place, and a ſale been made to the defendant. He denied, therefore the poſſeſſion of the plaintiff; as it had been transferred by the conſignee to Burling; and as to the warranty, in ſales of chattels it was not neceſſary.

* The principle is, that the liability muſt be immediate, to the parties in the ſuit, and not a remote, circuitous liability. Ball v. Boſtwick, 1 Stra. 575.

Radcliff J. I underſtood the mate's claim to be founded on his office, as a privilege annexed.

Woods in reply, inſiſted on his firſt poſitions.

Per curiam. The facts of this caſe ariſe merely from the depoſitions of witneſſes ſubmitted to the court. From theſe it appears, that the plaintiff purchaſed of one Bonſall, the mate of a veſſel, three logs of mahogany; that at this time, the captain and conſignee were preſent, as is ſtated by the witneſſes of the plaintiff. On the caſe, as preſented to us, there is ſome degree of contradiction in the teſtimony, which, as it was laid before the jury, they, no doubt, duly eſtimated. In this action, property and poſſeſſion muſt be ſhewn. The only evidence of this property and poſſeſſion is from the teſtimony of Mackworth and Smith. They ſtate, that the price contracted for between Bonſall and the plaintiff, was one hundred dollars; and Smith, as a reaſon for a groſs ſum being

agreed upon, adds, "that it was to ſave the trouble of having the mahogany meaſured." Marſhall, the public meaſurer, depoſes, that he did meaſure the whole cargo, and that the mate ſold them after they were ſo meaſured. That, at the mate's requeſt, the charge of meaſuring was debited to Roget, the conſignee, who paid for it; and that the mate himſelf acknowledged he did not own any three particular logs, but that he had a right to make choice of three, and would ſettle for it with Roget. After this teſtimony is delivered, Smith recollects that the mahogany had been meaſured, and that he ſaw the meaſurer's marks on the logs; though before that, he aſſigns its non-meaſurement as a ſpecific reaſon for a groſs price of one hundred dollars being agreed as the purchaſe money. After this, a releaſe being produced from Burling, the defendant, Roget, the conſignee, was admitted very properly as a witneſs, and he is followed by his clerk. Under theſe circumſtances, it muſt be taken for granted, that the jury weighed Smith's credibility; and if ſo, there could be no doubt that there was neither property nor poſſeſſion in the plaintiff. It is urged as a reaſon for a new trial, that the judge's charge precluded certain teſtimony; or at leaſt, prevented the jury from weighing it: for, the judge charged that it was neceſſary to ſhew an acquieſcence in Roget. But it muſt be preſumed to have been underſtood by the jury, that Roget's acquieſcence was neceſſary for Heyl to ſhew property in himſelf; and, on this point, we think, that the mate, Bonſall, muſt have ſhewn property, as the conſignment was to Roget entirely. The teſtimony of Smith was very properly diſcredited, and the verdict ought to ſtand. The releaſe of Bonſall, being after his examination, and when the intereſt he had, muſt have had its full influence and operation on his teſtimony, came too late, and could not be received.

Jackſon on the demiſe of John Jauncey, againſt Martinus Cooper and James Styles.

In ejectment against ſeveral defendants, they ſever in their pleadings and enter into

THIS was an action of ejectment, in which the defendants **ſevered** in their appearances, and entered into ſeparate conſent **rules.** The plaintiff, on motion, obtained leave to amend by **altering** the name of the leſſor of the plaintiff from John to

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ſeparate conſent rules, the notices and pleadings muſt be entitled againſt all, as at the commencement, but each party muſt be ſerved with a ſeparate notice, &c.

William Jauncey; but the notices on which the motion was founded were entitled as above, againſt both defendants.

Benſon now moved to ſet aſide the proceedings for irregularity, contending, that as the defendants had ſevered, the original ſuit became divided into two diſtinct cauſes. That therefore there ſhould have been two ſeparate notices, each entitled againſt one defendant, and ſerved on the different attornies of the defendants. For there was not then any ſuit in exiſtence ſuch as that in which the notices purported to be given.

Hopkins contra for the plaintiff, inſiſted the notice was perfectly regular, and likened it to the caſe of a ſuit againſt two, where one is outlawed, yet the proceedings are entitled againſt both.

Per curiam. The objection taken againſt the notices and rules is, that as the defendants appeared by diſtinct attornies, and entered into ſeparate conſent rules, theſe circumſtances required ſeparate and diſtinct proceedings, and ought to have been entered and entitled as ſeparate; that is, that the notices ſhould have been ſeparate, addreſſed to each party, and the rules entered accordingly. The notice given to Van Schaick, attorney for Cooper, is entitled againſt two: and it is on that notice the application is made. The court are of opinion that this is the regular way in which the notice ſhould be entitled, though each party ſhould be ſerved. It does not follow, that appearing ſeparately, and entering into ſeparate conſent rules, juſtifies or requires a different practice: for pleading ſeparately does not make ſeparate ſuits. The notice muſt be as the cauſe was originally entitled, and a copy ſerved on all the attornies: for otherwiſe it would imply a diſtinct iſſue in each ſuit.

Motion refuſed with coſts to the plaintiff.

Bell and others againſt Rhinelander.

Partition.

IN partition only the notice and affidavit of ſervice is read, not the petition.

Jackſon ex dem. Nicholas Low and ors. againſt James Reynolds.

ON an affidavit ſtating the death of one of the leſſors of

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the plaintiff, from belief, information, diligent ſearch and enquiry,

Riggs, on the behalf of the defendant, moved to ſtrike out of the declaration one count wholly, and in all the others the name of Drake.

Howel contra. The application now comes too late, being after entering into the conſent rule: at all events the affidavit ſhould ſtate that the fact was unknown at that time. In addition to this he mentioned, that from the counter affidavit which he held, it appeared the defendant had heretofore conſented to give up poſſeſſion, having failed to try according to ſtipulation.

Per curiam. The motion muſt be granted. It has been before decided, that a defendant may thus come in and move, on the death of a party before the commencement of the ſuit. As to the objection that the application is out of ſeaſon, the anſwer is, that it is never out of ſeaſon when on the ground of an original irregularity in the plaintiff himſelf.* Therefore the *not coming* in earlier cannot be urged. The affidavit furniſhes ſuch evidence of the facts as are prima facie ſufficient; and if not true ought to have been denied by the plaintiff, eſpecially as it is in his power: for the attorney of the leſſor may, nay certainly muſt, know if his client is alive.

Howell hoped the coſts would not be allowed.

Per curiam. It does not neceſſarily follow that the attorney of the plaintiff muſt know of the death of one of the leſſors. He may have examined into the title on behalf of one perſon acting for others equally intereſted, and ſeeing a number of names neceſſary to be made parties, he may think them all in exiſtence, and the affidavit of the defendant be the firſt notice of the death of any one entitled. The coſts ought to be paid if the fact was known ſooner: and the application for the object of this motion ought to be made as ſoon as the right to apply was diſcovered. The court, however, reſerved the conſideration of coſts till the next day, when they denied them, ſaying the plaintiff was irregular from the beginning; and though he might not have been in fault, there is no reaſon for allowing him coſts, when it is to have his proceedings rectified, that the defendant comes before the court.

If the plaintiff in ejectment count upon demiſes by perſons who are dead, the defendant, after entering into the conſent rule, may apply to have their names ſtruck out of the declaration, and that without coſts, the neceſſity of the application ariſing from the plaintiff.

* See Ditz ads. Butler & others. Cole. Ca. Prac. 102.

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Sheffield againſt Watſon.

A miſtake by an attorney, of a rule of practice may prevent judgment as in caſe of nonſuit for not going to trial, but will not excuſe coſts.

HOPKINS for the defendant moved for judgment as in caſe of nonſuit for not going to trial.

Woods contra. The cauſe was called on, but as there were other cauſes on the day calendar, one of which actually occupied the court the whole day, the plaintiff's attorney not being quite ready, thought he ſhould be entitled to bring it on the next day, the day calendar not being gone through; but found he was put down to the bottom of the calendar for the circuit. This therefore is a plain miſtake of the rules of practice, which ought not to injure the plaintiff.

Hopkins. The plaintiff clearly was not ready; therefore equally in fault, whether the rule was as he imagined, or not.

Radcliff J. Acting under that belief, he did not prepare himſelf.

Hopkins hoped the plaintiff would be ordered to ſtipulate and pay coſts.

Per curiam. The excuſe is certainly not ſufficient to exonerate from coſts. If admitted in one caſe, it muſt be in all; and however the good faith of the plaintiff's conduct, and our belief of it, may deny the judgment moved for, to refuſe coſts would do away the effect of the rule. The plaintiff muſt ſtipulate.

Fallmer againſt Steele and another.

On producing certified copy of original writ, declaration amended.

HOPKINS moved to amend a count in the declaration, in conformity to the original writ, (a certified copy of which he produced) by ſtriking out the words "town of Herkemer," and inſerting the "town of German Flatts." Ordered.

Maria Remſen, adminiſtratrix, againſt Joſhua Iſaacs.

On a non-enumerated motion for irregularity, merits cannot be entered into, but on merits irregularity may be ſhewn.

MULLIGAN moved to ſet aſide a report of referees for irregularity and on merits.

Woods contra. In King v. Hughes it was determined, that if a motion be made as non-enumerated for irregularity, the

ground of merits muſt be abandoned, though on the merits the irregularity may be inſiſted on.

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Per curiam. The rule is according to the deciſion cited. The application muſt be for irregularity *only* to bring it on as a non-enumerated motion. If merits are united, it becomes enumerated.

Hun and others againſt Bowne.

Amending of caſe made.

COLDEN for the plaintiffs moved for leave to amend the caſe made by the defendant. From the affidavit of the attorney for the plaintiffs, it appeared, that the defendant's attorney had agreed to give the plaintiff's attorney till the 21ſt January laſt, to ſettle his amendments before a Judge at Albany, the cauſe having been tried in New-York: that by ſome accident the amendments propoſed by the plaintiffs to the caſe made on the part of the defendant, had not come to the hands of the counſel who was employed to attend to the buſineſs there, *until* the 22d January: and further, that the caſe made by the defendant did not ſet forth the merits of the cauſe as they appeared on the trial.

Hoffman amicus. In Duff v. Van Zandt, on a ſuggeſtion that *the* caſe made did not contain a true ſtatement of facts, the court *granted* a new trial after argument and deciſion.

Boyd contra ſtated ſome circumſtances of ſtrict and unaccommodating conduct in the plaintiff's attorney, which had occurred previous to the agreement mentioned in the affidavit read by Colden, and ſome declarations of the plaintiff's attorney, that he would hold the defendant to ſtrict practice.

Per curiam. We cannot travel back farther than the agreement ſtated. It appears that the defendant had given the plaintiff a time, which from accident he could not keep: the amendments were ſent with due ſpeed, and ſo that they might have arrived at Albany in ſeaſon if nothing had happened to prevent it. We cannot let the plaintiff ſuffer by circumſtances which he could not controul. The verdict is in the hands of the plaintiff, and the defendant cannot be injured by a ſhort delay.

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Anonymous.

Cases for argument must be noticed.

Anonymous.

BY the court. All cauſes intended for argument muſt be duly noticed before term to the clerk, that he may enter them on the calendar. If not ſo noticed, they muſt go to the foot of the calendar, without regard to the date of their iſſues.

John Halſey againſt James and Samuel Watſon.

Court will not grant a new trial, where the evidence has been on both ſides. In applications for new trials, on account of a ſubſequent diſcovery of material teſtimony, what that teſtimony is, muſt be ſtated, that the court may judge of its materiality.

THIS was a motion for a new trial, on an affidavit of a diſcovery of new and material evidence. The points and ſubſtance are ſo well and accurately condenſed in the deciſion of the court, that it is unneceſſary to do more than ſtate the judgment.

Per curiam. This is a motion for a new trial, and comes before us on the ground of a diſcovery of material teſtimony ſince the trial of the cauſe. To ſee this, and judge whether it be material or not, it will be neceſſary to ſtate the former teſtimony and nature of the ſuit.

It is aſſumpſit by Halſey the plaintiff, againſt James and Samuel Watſon, the defendants, as owners of the ſhip Cheſapeake, founded on a neglect in not taking on board ſome tobacco, according to contract. The witneſs, Heyer, who appears to have acted as agent for the plaintiff, ſtates what the contract was, and the time at which it was to be on board. This agreement appears to have been made on a Friday. The witneſs enquired of the defendant James Watſon, when the tobacco ſhould be ſent down to the veſſel. The anſwer was, Send it down as quick as poſſible: in conſequence of which, it was ſent the very next day. From three witneſſes it is ſhewn, that the principal part of the tobacco was on the dock by eleven o'clock in the forenoon, and that the whole was ready to be put on board by three. Theſe facts, then, are eſtabliſhed by three witneſſes. The captain ſwears that, after 4 or 6 hogſheads had been brought, he requeſted the carmen not to bring any more, as there were appearances of a ſtorm. This the principal carman has, in effect, denied; for he ſays, he was deſired by thoſe on board the ſhip, or the captain, to bear a hand; and that he got all the tobacco down by dinner time. Here the

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teſtimony is contradictory. We are to judge then, if the material evidence, as it is termed, that has been diſcovered ſince the trial, be really teſtimony of materiality. There is one perſon who ſwears, as to the directions given by the captain. The court are of opinion, that this is not material, ſo as to warrant granting a new trial. This in two points of view: The teſtimony goes only to impeach the credit of what has been ſworn, and not to eſtabliſh any new fact. It is merely contradicting former evidence. In that point of view it is not material: nor can it be ſo in another, unleſs the defendants can go further. The direction not to bring down the tobacco, was to a carman. This is not ſufficient; as Watſon directed it to be ſent as ſoon as poſſible. It ought to have been to the owner of the tobacco: or to have ſhewn, that the requeſt was brought home to the knowledge of the plaintiff: that it was made to a carman, is not ſufficient. The defendant's affidavit ſtates two other witneſſes who are material; but does not ſay to what facts they would teſtify: we cannot therefore judge whether they are material or not. Blackmer, it is ſtated, will teſtify, that the tobacco was not marked till Monday. This will only go to impeach the credit of the teſtimony; for, three witneſſes ſwear to the fact of the marking being before one o'clock on Saturday. The captain himſelf does not pretend that the reaſon for not taking it on board, was the hogſheads not being marked, but only that he had not time. He does not pretend it was not ready to be taken on board. New trial refuſed.

Ephraim Hart againſt David Hoſack.

ASSUMPSIT for money lent and advanced, for money had and received; plea, non aſſumpſit and payment, with notice of ſet-off. The plaintiff proved, and gave in evidence the following promiſſory note:

An accountable receipt given for a note borrowed, ſhould be taken up when the note is ſettled. A child of fourteen years, put with a phyſician on trial, to ſee how he would like the profeſſion, cannot make an election to become a ſtudent,

"Sixty days after date, I promiſe to pay Dr. David Hoſack, or order, three hundred and ſeventy-five dollars, value rec'd. N. York, 6th February, 1800. Eph'm. Hart."

The plaintiff alſo proved, that he paid this note when it was due; and in addition proved, and gave in evidence the following accountable receipt:

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"I promiſe to ACCOUNT with Eph'm. Hart for his note payable to me for three hundred and ſeventy-five dollars, dated this day, at ſixty days. N. York, 6th February, 1800. David Hofack." From the facts of a caſe reſerved, it appeared, that the defendant is a doctor, and alleged that the note was intended as an apprentice-fee for taking the plaintiff's ſon. In ſupport of this defence, the defendant called witneſſes, who teſtified that the plaintiff's ſon came to the defendant the latter part of the year one thouſand ſeven hundred and ninety-nine, and continued with him till the ſpring of one thouſand eight hundred; that, the ſon was conſidered in the defendant's ſhop as a ſtudent: that the witneſs underſtood from the ſon, that he was to be ſome time on trial; but the witneſs did not hear him ſay how long: that, the defendant's uſual apprentice-fee is three hundred and ſeventy-five dollars; and the witneſs paid this fee to the defendant, when the witneſs commenced his ſtudies: that, the witneſs has heard the ſon ſay he was to pay the defendant a fee of three hundred and ſeventy-five dollars: that the ſon had a ticket for the hoſpital, which was obtained for him by the defendant, and is only granted to regular ſtudents, and it would have coſt five dollars to any other perſon: that the ſon had free admiſſion to the defendant's library, and uſed his books: that ſeveral phyſicians ſay it is not uſual to return an apprentice-fee, and the witneſs knew one inſtance in which a return of the fee was refuſed: that one of the witneſſes gave the defendant only one hundred and fifty dollars as a fee, owing to particular circumſtances: that, the ſon, after being about three months with the defendant, ſaid he had been upon trial, but that he was now a regular ſtudent: that the ſon was a boy of about fourteen years of age: that, the defendant's uſual term of apprenticeſhip is three years; but there is no particular period fixed by agreement.

Elias Noah, on the part of the plaintiff, depoſed, that he was very intimate in the plaintiff's family: that, the defendant, by letter, which the witneſs ſaw and read, informed the plaintiff he had occaſion for money, and applied to the plaintiff to borrow his note. Upon this, the plaintiff made and delivered to the defendant the note above mentioned, and the defendant ſigned and delivered the receipt above mentioned: the witneſs always conſidered the tranſaction as a loan by the

ſo as to charge the parent with an apprentice-fee. In New-York, no fixed rate of fees for taking apprentices in the medical line.

plaintiff to the defendant, and nothing elſe: that the witneſs ſeveral times met with the defendant in the plaintiff's family: that the defendant was very ſolicitous to have the plaintiff's ſon come and ſtudy phyſic with him: that the defendant uſed much perſuaſion for this purpoſe, both with the plaintiff and with his ſon: that, finally the plaintiff and his ſon conſented that the ſon ſhould ſtudy phyſic with the defendant: that it was expreſsly agreed between the plaintiff and the defendant, that the plaintiff's ſon, if he went to ſtudy phyſic with the defendant, ſhould have a right to quit the defendant whenever the plaintiff's ſon *pleaſed* to do ſo; that the ſon, after this agreement, went to ſtudy phyſic with the defendant: that the ſon attended the defendant's ſhop but irregularly: that the ſon, after being ſome months with the defendant, adopted an opinion, that he could not, from the acquaintance he had formed in New-York, purſue his ſtudies as cloſely as he ought to; and thereupon he left the defendant, and went to Europe: that, *the witneſs always underſtood that the ſon was merely on trial* with the defendant.

The Judge charged, that this caſe did not depend on any general cuſtom of the faculty, or of this defendant, in relation to the fee in queſtion; but on the particular agreement; that the defendant had, no doubt, a right to fix what price he thought proper for his ſtudents; but, whatever might be his eſtabliſhed fee, he was bound by any agreement he had made; that, on this ſubject, little dependence ought to be placed on the declarations of the plaintiff's ſon, who was no more than fourteen years of age; particularly, as he muſt be conſidered as under the controul of his father. Neither ought much ſtreſs, in his opinion, be laid upon the circumſtance of the defendant's procuring the ſon a ticket for the hoſpital; as his father, or the defendant might have thought it proper to procure the ſon a ticket, although he was merely on trial with the defendant: that if the jury believed that the ſon had gone to ſtudy with the defendant on trial; that the time for trial had elapſed; and that afterwards, the plaintiff and his ſon had elected, that the ſon ſhould continue and ſerve his apprenticeſhip with the defendant; then it would be their duty to find a verdict for the defendant; but if they believed, that the ſon was with the defendant on trial, and that, by virtue of an agreement between the plaintiff and

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defendant, the ſon was entitled to leave the defendant whenever the ſon diſliked to remain with the defendant; then it would be their duty to find a verdict for the plaintiff; deducting, however, from the damages a reaſonable allowance for the time the ſon was with the defendant.

The jury found a verdict for the defendant.

On the above facts, it was now moved, on the part of the plaintiff, to ſet it aſide, as contrary to evidence.

Troup for the plaintiff. The action was to recover money lent: the defence, that it was given as an apprentice-fee. The queſtion then is, whether from the evidence, it was a loan or a payment. That it was the former, is manifeſt from the evidence of Noah, who ſaw the defendant's letter, aſking to borrow money. If the money was a payment, it was ſingular a requeſt ſhould be made to have it lent. It is not uſual for creditors to borrow their debts due, and give accountable receipts for the amount. The agreement on which the plaintiff's ſon went, is expreſsly proved; he was to leave the defendant when he pleaſed; and the receipt was therefore worded as an accountable one; becauſe, if the ſon did not continue to complete his ſtudies, only a proportionable ſum was to be paid. The plaintiff did not contend the three hundred and ſeventy-five dollars were to be recovered without deduction; but that the defendant was not entitled to the whole, againſt his agreement and his receipt. No argument could be drawn from the election of the ſon, had it been clearly eſtabliſhed: he was only fourteen years of age, and could not elect without the concurrence, and under the controul of his father. As to the defendant's witneſſes, their teſtimony went to facts perfectly immaterial: the ground of the ſuit was the agreement; by that, no time was ſpecified for electing to leave the defendant: whenever the election was made, and the plaintiff's ſon did leave the defendant, he was, upon his receipt, to account; and, for ſo much of the uſual time of ſtudying under the tuition of the defendant as was unexpired, a deduction was to be made: thus, and thus only, the contract in evidence, and the receipt could be conſiſtently explained.

Pendleton for the defendant. The application can ſucceed only on two grounds; either that the verdict is againſt the weight of evidence, or againſt a rule of law ariſing out of the

facts. To decide on the firſt, the court muſt aſſume the office of jurors, and this they never do, where there is evidence on both ſides, unleſs it is by much the ſtrongeſt on one ſide. The jury here have decided on the credibility of the witneſſes; the court will not interfere with their province in that reſpect, to give another opportunity to weigh the credit of the ſame witneſſes. This was never done, but when the teſtimony was by *foreign* witneſſes, and taken abroad: then the court *would do* it to procure evidence of their credibility, becauſe the jury muſt be ignorant of it; therefore, knowing only the credit of their own countrymen, they could not weigh it with that of foreigners, reſiding abroad.* The note for three hundred and ſeventy-five dollars, made by the plaintiff when his ſon was upon trial, was the reaſon of the accountable receipt. It was not an engagement to repay a loan, but to be accountable on a contingency, whether the ſon would be a ſtudent or not; there was no preciſe time for this: the ſon was on trial; when he choſe to be a ſtudent, the trial terminated, the account was complied with, and there was to be no return; for the bill was fairly due. The dates of the tranſactions prove this; and afterwards the ſon is found to be a ſtudent, by having a certificate gratis, which none but ſtudents could obtain without paying five dollars. The court muſt ſuppoſe him a ſtudent, or that the defendant had been guilty of a fraud, by ſigning a falſe certificate. Noah ſays the ſon was to determine whether he would be a ſtudent or not, and the other witneſſes ſay the ſon did elect to become one. Noah ſwears poſitively to a fact he could not poſitively know, the deſtruction or loſs of the letter, in which the defendant applied to the plaintiff, to borrow money: and it is very ſingular he ſhould apply to borrow the very ſum due him for a fee, and that the application ſhould be to the very man whoſe ſon was a ſtudent with him, in preference to all others. The reaſon why the receipt was an accountable one, was not becauſe no time was fixed for the plaintiff's ſon to make an election, but becauſe the defendant was not to be accountable after the trial had.

* The reſearches of the reporter do not afford an authority for this diſtinction.

Hoffman, on the ſame ſide. The conſtruction, mentioned by the counſel aſſociated with me, is that which the jury put on the bill and receipt. A pro rata accountability, for one or two years, when it might pleaſe the ſon of the plaintiff to

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leave the defendant, was abſurd, in the caſe of either a ſtudent of law or phyſic. If, however, the inference from the facts was doubtful, the jury had drawn a concluſion which, according to legal principles, muſt be deciſive.

Harriſon in reply. The plaintiff is contending for his fair and juſt rights: if injuſtice has been done, this court will interpoſe, and grant a new trial. It is admitted, that there was a period when the whole fee was not due; that is in evidence: there is no proof that at the end of four or five months the defendant could erect himſelf into a judge, and think himſelf entitled to the ſame fee as if the plaintiff's ſon had ſtaid with him four or five years. The principle inſiſted on by the plaintiff is one that is found in every volume of law. Chancery is full of deciſions of apportionment of apprentice fees, which depend entirely on the quantum of ſervices mutually rendered.* This is the conſtant rule of acting, unleſs ſome cuſtom or uſage of trade to the contrary, be eſtabliſhed. Of this there is no kind of evidence: the defendant cannot make and ſet up one for himſelf. On this point, the defendant's witneſſes ſpeak only as to hearſay, and give one ſolitary inſtance of a cuſtom, as it has been called. The uſage then, is out of the queſtion; and the queſtion depends on the agreement; of this, Noah's teſtimony is concluſive: it is alſo uncontradicted; and from his ſituation, connected with his acquaintance in the family, it is highly probable he knew all the circumſtances of the contract better than any one elſe; nor could any one but Noah prove the loſs of the letter, aſking a loan of money. He had ſeen and read the letter; and is it to be ſuppoſed the plaintiff would not have produced the letter, if he had been able? As he was not, and could not prove the loſs himſelf, Noah only could do it; who, like all other third perſons in ſimilar ſituations, ſwears to his firm belief. A belief warranted by reaſon, and the queſtion I have juſt aſked. The agreement on which the ſon was taken, and the note given, is the only evidence that can affect the cauſe. The defendant's witneſſes neither do, nor can ſpeak to this. The certificate, uſe of the defendant's books, &c. are nothing to the purpoſe. We find the defendant acting with peculiar ſolicitude to get the plaintiff's ſon as a ſtudent; and the extraordinary liberality of the defendant's agreement, might not, if taken as the reſult of his anxious entreaty, be

* Newton v. Rouſe, 1 Vern. 100 guineas, part of an apprentice-fee was ordered to be repaid, the maſter having died within 3 weeks after ſigning the articles, though they expreſsly mentioned £60 only ſhould be returned, if the maſter died within a year. But ſee Hale v. Webb, 2 Bro. Ch. Rep. 80, where Lord Kenyon, then maſter of the Rolls, ſaid, the deciſion above had carried the juriſdiction as far as could be.

thought ſo abſurd as has been argued. The ſon was not obliged to elect when the note was due: no proof of the contrary; if it was ſo, and then the fee was payable and the note accounted for, how comes it that the defendant never calls upon the plaintiff for the accountable receipt, but leaves it to be produced and made uſe of againſt him? Had the fee been abſolutely *due*, at the end of ſixty days, the receipt ought to have been *demanded*; and, as the plaintiff took up his bill, the *defendant* ſhould have taken up his receipt. The defence of Doctor Hoſack is to demand wages for labour not *done*; is contrary to every principle of natural juſtice, and therefore, the court will grant a new trial.

Per curiam. The plaintiff, on the trial of this cauſe, gave in evidence a promiſſory note of his own to the defendant. Elias Noah proves that this note was borrowed of the plaintiff by the defendant, on giving a receipt, promiſing to be accountable to him for it. The defence ſet up is, that the note was a fee to the defendant for taking the plaintiff's ſon as an *apprentice*. A motion has been made to ſet aſide the verdict, as againſt evidence, and obtain a new trial. This, the court are of opinion, ought to be granted.

The receipt given by the defendant, which was never taken up or called for, and the teſtimony of Noah, both agree in *proving* the money to have been advanced upon *loan;* this teſtimony remains in full force, notwithſtanding any thing that was proven on the part of the defendant. What is related of the ſon, that he was to be ſome time on trial, is in confirmation of the agreement ſtated by the plaintiff's witneſs. The only circumſtance of any weight on the part of the defendant, is the further confeſſion of the ſon that he was to pay three hundred and ſeventy-five dollars, and that he had been ſome time on trial, and was then a regular ſtudent. But this confeſſion by the ſon, without the knowledge or authority of the plaintiff, ought not to conclude him. The fact too, that the ſon ſoon after left the defendant, and went to Europe, proves that the reſervation in the original agreement had not been waived. In ſhort, the evidence does not warrant a verdict for the defendant; and a new trial muſt be awarded, on payment of coſts.

Lewis C. J. If the plaintiff is ſatisfied that a proportion ſhould be paid, might not a new trial be ſaved?

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Troup. There is a verdict for the defendant.

Kent. J. Is there no objection to allow for five months, at the rate of the ſum uſually paid for three years?

Troup. None in the world, ſir, if we can get rid of the verdict.

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Two hands including the maſter, are not a ſufficient crew for a veſſel of 35 or 40 tons, from New-York to Edenton in N. Carolina, and the court will decide on the inſufficiency.

An adjuſtment made on a full diſcloſure of all circumſtances is concluſive, tho' ſome may be ſuſpicious.

Adjuſtment not to be opened except for fraud, or a miſtake from facts not known.

THIS was an action on a policy of inſurance dated the fourth day of April, ſeventeen hundred and ninety-five, on the ſchooner Induſtry, from New-York to Edenton in North Carolina, valued at five hundred pounds: the defendant's ſubſcription was two hundred and fifty dollars. On the ſixteenth day of April, ſeventeen hundred and ninety-five, the defendant and the other underwriters adjuſted a loſs at ſixty per cent. It was on this adjuſtment the action was brought. The cauſe was tried before his honour Mr. Juſtice Lewis on the the third day of July, eighteen hundred and one. The plaintiff produced the adjuſtment, and there reſted his caſe.

The defendant inſiſted on fraud. To prove it he produced the depoſition of Jonathan Stratton, which ſtated, that in March, ſeventeen hundred and ninety-five, he ſailed from the port of New-York in the Induſtry: that there were no other perſons but Joſeph Dow the maſter and himſelf on board: that Dow ſaid the ſchooner was going to South Bay on Long-Iſland, for which place the deponent was ſhipped: that the ſchooner had no cargo or ballaſt on board, but had proviſions uſual to go from New-York to South Bay: that the ſchooner got aground on the beach on the Jerſey ſhore: that in a day or two after the accident, the captain left the ſchooner and went to New-York, and returned to this deponent about a week after, and informed the deponent he had been to New-York; that the ſchooner to go to North Carolina ought to have had four hands including the maſter; thinks the ſchooner was about forty tons burden; that he never was at North Carolina, and does not particularly know the navigation, but has an idea of the neceſſity of four hands.

The plaintiff then read the depoſition of Joſeph Dow, which ſtated, that about the twenty-fifth day of March, ſeventeen hundred and ninety-five, he ſailed from the port of New-York in the Induſtry, as maſter, on a voyage from thence to Eden-

ton in North Carolina: that Jonathan Stratton was the only mariner on board together with this deponent: that another hand was engaged to go, but that he fell ſick, and left the veſſel before ſhe ſailed: that he was not in New-York until he came with the ſaid Jonathan Stratton after the ſaid veſſel had grounded, nor did he ever inform Jonathan that he had been in New-York while he was ſo abſent from the veſſel as aforeſaid: that there was no cargo on board, but the witneſs had between five and ſix hundred dollars, ſome in ſpecie and ſome in bank notes, for the purpoſe of purchaſing naval ſtores: that the money was not inſured: that the ſchooner was about thirty-five tons.

The plaintiff alſo read a proteſt made before John Keeſe, Eſq. a notary public, in which the ſaid Stratton had joined, which was as follows:

Before me perſonally came and appeared Joſeph Dow, late maſter, and Jonathan Stratton, late mariner, of the pettiauger Induſtry, who being duly ſworn depoſe as follows: That they ſailed in and with the ſaid pettiauger from Coney Iſland the twenty-ſixth day of March laſt, in ballaſt, bound to Edenton in North Carolina, with a light breeze from the weſtward: that about one o'clock in the afternoon of the ſame day, the wind hauled round to the north, and from that to the north eaſt, and then to the eaſt, and then began to blow ſo hard, that they were forced to take ſingle reefs in the ſails, and take in the jib, and ſoon after to double reef the ſails: at four o'clock the wind blew ſo violent that it ſplit the foreſail ſo much that they could not ſet it: they then ſet the jib, and made the beſt of their way for Sandy-Hook, and on the twenty-ſeventh got round the Hook, and then the ſails were ſo much frozen that they could not handle them; that they were obliged to let go their largeſt anchor, but a very heavy ſea running, and the veſſel pitching bowſprit under, ſhe parted: that they then endeavoured to claw off ſhore, but the gale continuing very ſevere, and the main-maſt ſprung, and the veſſel *very leaky*, they were under the neceſſity of running the veſſel on ſhore on a ſandy beach, in order to ſave her, and for the preſervation of their lives: that they uſed every [illegible] in their power to get the veſſel off, but without [illegible] effect.

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The jury found for the plaintiff.

Hoffman for the defendant. This is a motion to ſet aſide the verdict for the plaintiff, and grant a new trial. The facts ſtated are ſufficient to bear down any erroneous concluſion which has been made. The adjuſtment, on which the action is founded, was manifeſtly obtained by fraud, and the teſtimony could never induce a contrary opinion. The verdict is not only thus againſt evidence, but againſt law; for there was not a ſufficient crew on leaving New-York. Neither this circumſtance, nor any other, was communicated to the inſurers; the veſſel was aground in South Bay on the 26th of March, and on the 4th of April there was no information of it in New-York. This is enough to excite ſuſpicion. From the depoſition of Stratton it appears the captain went to New-York, and the policy is effected on the 4th of April, when the veſſel is laying aground. If he had tried to procure aſſiſtance, that ſhould have been proved by thoſe he applied to. From the time of her getting on ſhore, notice of her ſituation might have been ſent to New-York by land in twenty-four hours; by ſea in leſs. This was like the caſe of Fitzherbert v. Mather, 1 D. & E. 12. The agent of the plaintiff had ſent orders for inſurance by the poſt, but was informed of the loſs of the veſſel before the poſt went out, and did not contradict them: it was held to vacate the policy, becauſe a concealment of a fact that might have been made known. So here the captain was to this purpoſe the agent of the underwriter. The veſſel too had no ballaſt on board when ſhe left New-York: the policy was at and from, and it was impoſſible to take it in at Coney Iſland, in the courſe of the night, ſo as to ſail by day-break next morning, with only one hand and a yawl. At all events the going there was a deviation, as no uſage is found to warrant it. The want of a bill of lading for the ſeven or eight hundred dollars ſtated by the captain to have been aboard muſt be taken as a ſupplementary circumſtance to impeach his credibility, eſpecially as he is contradicted in eſſential points by Stratton. But on the teſtimony of both, the inſufficiency of the crew appears; for two hands could not be adequate to the working a veſſel of forty tons, as ſhe is ſtated by one, or even thirty-five, as by the other. That on the incompetency of the crew the court had

a right to determine in the ſame manner as on the point of ſeaworthineſs.*

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Jones contra. This motion is made on two grounds:— fraud, and the want of a crew. The court will obſerve, that the action is brought after an adjuſtment, and therefore will demand very ſtrong reaſons for ſetting aſide the verdict. It is remarkable, that every circumſtance now relied on might have been *availed* of at the trial, and was in the full knowledge *of* the underwriter, when he made the adjuſtment: for by the proteſt ſubmitted to the defendant, on the facts ſet *forth* in which he made his adjuſtment, it appears every fact, (date of ſailing) &c. was told him. This proteſt was made on the 15th of April, and the adjuſtment on the 17th, with no other proof of loſs ſubmitted than the proteſt itſelf. In this Stratton joined; and from the ſize of the veſſel the defendant muſt have known it was her whole crew. Every thing therefore was taken into conſideration before the adjuſtment, and it was made, it being thought there were not any grounds to warrant a refuſal to pay. The captain denies going to New-York when he firſt landed: this was a point of, who ſhould be believed, the maſter or Stratton: the jury have decided. No one ever ſaw him in New-York. There is no evidence of communication between the captain and plaintiff, who reſided at Iſlip, forty miles from New-York. On his arrival at New-York he *heard of* a very ſevere gale of wind: it was a few days after his veſſel ſailed, and therefore he inſured her. Fitzherbert v. Mather does not apply. There the agent was employed for the expreſs purpoſe of making an inſurance, and though a captain be an owner's agent, he is not an agent to inſure. In the caſe cited the agent had ordered the inſurance, he therefore was the perſon to communicate. The crew was ſufficient; the veſſel was only one of the South Bay craft, the captain ſays of thirty-five, not forty tons.

Lewis C. J. Both may be right: one may ſpeak of carpenter's meaſurement, the other that of the Cuſtom-Houſe.

Jones. Not being ſeaworthy for want of crew is a matter of fact for a jury: and on that they have determined, their verdict therefore not to be diſturbed.

Lewis C. J. Does it appear how the veſſel was rigged? Had ſhe a bowſprit?

Jones. Yes, ſhe had. The want of crew was inſiſted on

* This poſition muſt, it is with deference preſumed, be taken with ſome qualification. Whether it ſhall be within the province of the bench or the jury, depends, it is conceived, on its nature: if it be technical only, it appertains to the bench; if actual and matter of fact, to the jury. On the accuracy of this diſtinction the reader can decide by recurring to the caſe of Munro v. Vandam, Parke 221, note, and that of Farmer v. Legg, 7 D. & E. 186, both cited 1 Lex. Mer. Amer. 309, 311. But in a caſe where the only circumſtance was, that the veſſel went down at once without any apparent cauſe, the Supreme Court decided that ſhe was unſeaworthy upon a caſe reſerved.

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at the trial, and the verdict ſhews the jury's opinion. Dow had gone to North Carolina on the very voyage inſured in a veſſel larger than this with only three hands including himſelf; this was only a pettiauger. As to the policy's being at and from, it is a miſtake, the words are from New-York, but granted they were otherwiſe, Coney Iſland is part of the port of New-York.

Hoffman in reply inſiſted on the words at and from; that under them the veſſel ſhould be fit for ſea when ſhe firſt weighs anchor in proſecution of her voyage; that was done at her leaving the pier in New-York and had ſhe been loſt going to Coney Iſland it would have been within the policy. The jury's deciſion on the ſufficiency of a crew is not concluſive. Suppoſe they had determined one hand only to be enough, the court would have ſet aſide the verdict. If the captain was in New-York, the communication between him and the plaintiff muſt be inferred. For this, Stewart againſt Dunlop in the Houſe of Lords, Park 209, is an authority.

Per curiam. This is a claim for a total loſs after having exhibited the uſual proofs, and on theſe an adjuſtment was made. It is upon this that the action is brought, to which ſeveral grounds of defence are taken: Firſt, that the adjuſtment was fraudulent; ſecondly, that the veſſel had not any ballaſt on board when ſhe ſailed from the place at which the policy attached, and therefore was not ſufficiently equipped; thirdly, that ſhe had not a ſufficient crew. We ſhall lay wholly out of view the two firſt grounds: it appears that previous to the adjuſtment all the facts now relied on were communicated to the underwriters. The proteſt ſtates, the time of ſailing from Coney Iſland in ballaſt, the gale of wind, &c. All theſe circumſtances and their dates appear from the proteſt to have been fully made known, and therefore all charge of fraud is at an end, becauſe the adjuſtment was made by the underwriters with their eyes open. An adjuſtment cannot be opened except on the ground either of fraud or miſtake from facts not known. On the third point we think there is ſufficient reaſon to order a new trial. It now appears that the veſſel was a ſchooner of thirty-five or forty tons burthen, with three ſails, and departed on a voyage from hence to Edenton in North Carolina with only two hands, the captain included. The veſſel was therefore in our opinion not

equipped for the voyage, and on this ground we think there ought to be a new trial: one hand and the captain were not a ſufficient crew.

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The People againſt Thomas Youngs.

THE *defendant* had been convicted of grand larceny, before the *court* of General Seſſions, at Albany in February laſt, and was brought up to receive ſentence of impriſonment for life *under* the act of 21ſt March 1801, c. 58, ſ. 4, as being his ſecond offence. The indictment on which he was now convicted did not ſet forth the record of the former conviction: but inſtead of it a ſuggeſtion, in the nature of a counterplea, had been entered againſt the priſoner in the following words: "And Ambroſe Spencer, who proſecutes for the people of the "State of New-York in this behalf, having heard Thomas "Youngs who ſtands convicted at a Court of General Seſ-"ſions of the Peace holden at Albany in and for the County "of Albany on the ſeventeenth day of February laſt paſt, of "felonioufly and with force and arms ſtealing, taking and "conveying away at the city of Albany in the county of Al-"bany on the ſixteenth day of February laſt paſt, one cotton, "&c. (ſpecifying the articles and their value) of the goods and "chattels of *Edward* Griſwold, being aſked by the court now "here what he had to ſay for himſelf why judgment ſhould "not be paſſed againſt him agreeable to law, ſaith that the "ſaid Thomas Youngs ought to receive the ſentence and "judgment of the court now here to be impriſoned in the "State Priſon for life, and there to be kept at hard labour, "becauſe he ſays that the ſaid Thomas Youngs, by the name "of Thomas Young heretofore, and before the ſaid felony "was committed in manner and form aforeſaid, to wit, at a "Supreme Court of Judicature, held at the City Hall of Al-"bany, in and for the State of New-York, on Saturday, the "twenty-eighth day of April, in the year of our Lord 1798, "before John Lanſing, Eſq. Chief Juſtice of the ſaid Supreme "Court of Judicature, Morgan Lewis, Eghbert Benſon, and "James Kent, Eſquires, puiſne Juſtices of the ſaid Supreme "Court of Judicature, was convicted on his plea of guilty to "an indictment for grand larceny, of the goods and chattels

The firſt ſection of the act "regulating certain proceedings in criminal caſes" does not extend to collateral iſſues. On ſuch, if the priſoner ſtand mute, the court will enter a plea for him. On collateral iſſues no peremptory challenge. General Seſſions has no juriſdiction on indictments for a ſecond offence in committing grand larceny. Indictments for ſecond offences, where the puniſhment is increaſed, muſt ſet forth the record of the former conviction. Priſoner tried at G. Seſſions for grand larceny and brought up here, on ſuggeſtion of its being ſecond offence, this court will give no other judgment than the court below might have pronounced.

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" of one John Wright, and thereupon it was conſidered and " adjudged by the ſaid court laſt mentioned, that the ſaid " Thomas Young be confined in the State Priſon in the city " and county of New-York, at hard labour for two years, " and this, he the ſaid Ambroſe Spencer, is ready to verify " and prove by the record thereof; and the ſaid Ambroſe " Spencer further ſaith, that he the ſaid Thomas Youngs, " who now ſtands convicted at the ſaid Court of General " Seſſions of the peace, holden at Albany, in and for the " county of Albany aforeſaid, in manner and form aforeſaid, " is the ſame perſon who was ſo convicted at the ſaid Supreme " Court of Judicature, holden at the City Hall of Albany, in " and for the State of New-York, in manner and form afore- " ſaid, and is not any other or different perſon. Wherefore, " ſince the ſaid Thomas Young hath already been duly con- " victed of the crime of grand larceny, committed ſince the " ſaid firſt conviction, the ſaid Ambroſe Spencer for the peo- " ple of the State of New-York, prays the judgment of the " court here, that the ſaid Thomas Youngs may receive " judgment to be impriſoned in the State-Priſon in the city " of New-York, at hard labour, or in ſolitude, or both, for " life."

Spencer, Attorney General, prayed that the priſoner might be put to plead his identity, and, in caſe of his denying that he was the ſame perſon, that a jury might be ſummoned inſtanter, to try the fact. This he contended was the right mode of proceeding, and for that he cited the King v. Scott & or. 1 Leach 445.

Court. Thomas Youngs, you hear what is alleged againſt you. Do you wiſh to have counſel?

Priſoner. If you pleaſe, Sir.

Hoffman and Colden being aſſigned him, requeſted a little time to prepare themſelves: the queſtion being new it was granted. On the priſoner's being brought up the next day, by advice of his counſel he ſtood mute. They inſiſting that as the puniſhment of peine forte was expreſsly aboliſhed, and the firſt ſection of the law of 21ſt March, 1801, ch. 60, applied only to caſes of arraignment, the preſent was a caſus omiſſus in which the court had no power.

After ſome conſultation on the bench, the court ordered the following plea to be entered:

"That he is not the perſon alleged by the Attorney Gen- "eral in his plea to have been formerly convicted of grand "larceny,"

Reſerving to the priſoner a right to object to the mode of proceeding and take advantage of any irregularity that might appear. His counſel then ſtated they meant to contend that the proceedings not ſetting forth the record of the former conviction were erroneous, and the court would not pronounce the judgment prayed for.

Spencer, Attorney General. The identity of perſon and former conviction are circumſtances collateral to the offence itſelf: they do not conſtitute a part of the crime, and therefore may be pleaded and replied to ore tenus, and a venire awarded returnable inſtanter, in the nature of an inqueſt of office. This is the conſtant practice in caſes where it is doubtful whether a criminal be a lunatic or not; ſo, by analogy, the ſame mode ſhould now be adopted, eſpecially as it is a matter in which the court may exerciſe its diſcretion. 1 Hawk. 4. b. 1. c. 1. ſ. 4. n. (5.) Foſt 50, 51. In Great-Britain, when a priſoner is to be ouſted of his clergy, the ſuggeſtion of his former offence is by way of counterplea, and the indictment never takes notice of the previous conviction. 4 Hawk. 254. b. 2. c. 33. ſ. 19. n. The only mode of trying whether he has *before had his* clergy is by the certificate preſcribed under the 3 and 4 W. and M. c. 9. ſ. 7. The King v. Scott & or. 1 Leach, 445. If the ſection cited from the ſtatute of W. and M. be compared with the 2d ſection of our State Law of 14th of April, 1801, ch. 146. 1 Rev. Laws N. Y. 462, 3. the certificate ordered by our proviſions will be found perfectly analagous to that required by the 3 and 4 W. and M. The firſt offence is grand larceny, puniſhed in a certain manner: the ſecond offence is the ſame, with a greater puniſhment. In England the ſecond conviction is not availed of in the indictment, but when the priſoner claims the benefit of his clergy, it is counterpleaded. This makes a perfect analogy. His identity may be tried by a jury of his country, with the aid of counſel and the right to challenge, at which time he may controvert his former conviction and indictment. Therefore, on principle, it is not neceſſary to connect the firſt with the ſecond offence, as the repetition is no part of the [illegible]ne, but collateral and only incidental to his guilt. All

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facts that do not enter into the crime, but are mere circumſtances, are to be inquired of in this way. The books of precedent are ſilent as to the practice inſiſted on, and that is an argument for the preſent mode: the form of the counterplea is warranted by Dogharty.

Colden for the priſoner. There is no analogy between the preſent caſe and thoſe which have been cited. It is not denied that to ouſt of clergy the mode is by counterplea. The preſent ſuggeſtion cannot be ſpoken of as being of the nature of counterpleas; theſe are ſo called becauſe counter to what is pleaded, or claimed by the priſoner after his conviction, when he demands the benefit of his clergy. To the plea which the priſoner has put in, to do away the force of the ſentence, the Attorney General interpoſes his counterplea; but he cannot, after trial, ſuggeſt any new matter. If the crime was as is ſtated in the counterplea, or ſuggeſtion, the court below had no juriſdiction of the offence. Juſtices of the Seſſions are ouſted of that both by the common law and expreſs words of our State act of the 21ſt March 1801, ſec. 1. Rev. Laws N. Y. vol. 1. 302. That ſtatute, after giving the juſtices a right to inquire of all offences, &c. and going on to confer on them a right to hear offences of grand larceny, has the following proviſo: "Provided always, "that it ſhall not be lawful for any of the ſaid courts to hear "and determine any indictment of, or for any treaſon, miſ"priſion of treaſon, murder or other felony or crime, which "is or ſhall be puniſhable with death, or with impriſonment "in the State-Priſon for life, but ſhall cauſe the indictments "for the ſame to be delivered to the next Supreme Court, "or court of oyer and terminer or gaol delivery, to be held "in ſuch city or county, there to be determined according to "law." The queſtion then is, is this a crime puniſhable with impriſonment for life or not? Is *not this* apparent on the record? If ſo, it is concluſive as to the juriſdiction. The court will recollect that the law referred to was paſſed with a direct view of reſtraining the juſtices in ſeſſions from exerciſing any authority where the puniſhment was ſo ſevere. The Legiſlature viewed them as a ſubordinate tribunal and therefore delegated inferior powers according to the confidence entertained. The practice on the preſent occaſion is not ſuch as has been formerly uſed: the mode heretofore adopted has been to make the firſt offence a

charge in the indictment for the ſecond, and as this has been the line of conduct in this country, it may be conſidered as a cotemporaneous expoſition of our law. It is aſſerted that, though this method might be taken, it is only matter of form: it is a matter of form however which gives a juriſdiction the Legiſlature has taken away. It is form in one point of view, in another not. This kind of alteration in criminal proceedings is not allowable. It is neceſſary that the previous offence ſhould be made a ſubſtantive charge in the indictment for a ſecond, where the puniſhment is augmented by the repetition, becauſe the repetition is the crime. Reaſon tells us, the ſecond offence muſt be after a conviction for the firſt, for it is on a preſumption of the firſt puniſhment's not having induced a reformation, that the ſecond is increaſed. 1 Hawk. 306. b. 1. c. 40. ſ. 4. 1 Hale P. C. 685. 1 Leon. 195, Fleming's caſe. 3 Dyer 323, Taverner's caſe. The diſtinction between clergyable caſes and the preſent is this: whether clergy has been allowed or not is not traverſable, but here the nature of the crime is changed by a ſuperadded fact, the party therefore muſt have an opportunity to traverſe. The time at which the ſecond offence was committed is of the eſſence of the crime. The counterplea is no evidence that the ſubſequent felony was after the 16th February, nor is any iſſue tendered of that fact. It ought to have been formally offered.

Hoffman on the ſame ſide. The neceſſity of ſuch an iſſue will be more evident on recurring to ſ. 4 of the law declaring what crimes are puniſhable with death or impriſonment for life:* the ſecond conviction muſt be after ſuch firſt conviction; if it be a queſtion then whether the ſecond offence was committed after the firſt conviction it is a fact not inquirable here, but by a jury. Before them, for an offence ſubjecting to the puniſhment now aſked, the priſoner is entitled to a peremptory challenge of twenty;† this right by the preſent mode is taken away: for on a collateral iſſue it cannot be exerciſed. Ratcliff's caſe Foſ. 42. Dogharty is a precedent in point, and in the very one adduced by Mr. Attorney, the former conviction is ſet forth.

* 21ſt March 1801. c. 58. 1 Rev. Laws, N. Y. 254.

† 21ſt March 1801. c. 60. ſ. 9. 1 Rev. Laws, N. Y. 261.

Spencer, Attorney General, inſiſted on his former arguments and that this was properly a counterplea; becauſe, when the priſoner is aſked what he has to ſay why more than

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fourteen years impriſonment ſhould not be awarded, he muſt allege the conviction to be on his firſt offence: this is his plea; then the ſuggeſtion read is the counterplea. The practice relied on has not antiquity enough to eſtabliſh it, and the diſtinction between taking away clergy, and augmenting the puniſhment, amounts to the ſame thing, for they both vary the ſentence. The idea under which the proceedings have been carried on is, that the trial might be below, and the judgment here.

Per curiam. The priſoner was convicted at a court of *General Seſſions* of the peace, held in and for the city and county of Albany, of a grand larceny. The record of his conviction is removed into this court, on which a ſuggeſtion is entered that he had heretofore been convicted of a ſimilar offence. On this the public proſecutor has moved for judgment of commitment to the State-Priſon for life, according to the act in ſuch caſe made and provided, or that the priſoner take iſſue on ſuch ſuggeſtion. The court doubting of the regularity of this mode of proceeding aſſigned counſel. The point has been ably argued and they are now to give their judgment.

From the authorities and precedents that have been laid before us, there can be little doubt, that in England, when a priſoner prays his benefit of clergy, and the queſtion is, whether it hath not been on another occaſion extended to him, this is the mode (under the appellation of a counterplea) that is generally purſued. In caſes however where the firſt offence forms an ingredient in the ſecond, and becomes a part of it, ſuch firſt offence is invariably ſet forth in the indictment for the ſecond.

A ſimilitude is ſaid to exiſt between the prayer of clergy in England, and a denial of a former conviction with us, and that therefore the ſame mode of proceeding is equally correct in the one caſe as in the other. But on ſtrict examination, there will be found to exiſt no analogy between them, and that we cannot adopt the ſame mode of proceeding without depriving the priſoner of an important privilege ſecured to him by ſtatute.

It is true that much inconvenience may and probably will ariſe from this deciſion. Few convictions for ſecond offences will be likely to take place; but the remedy lies not within

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our reach. By a ſtatute of this State every perſon who ſhall be indicted for an offence, the puniſhment whereof ſhall be, on conviction, confinement for life in the State-Priſon, is entitled, when put on his trial, peremptorily to challenge twenty of his jurors. The form of proceeding now contended for would effectually deprive the priſoner of this right. It is no anſwer to this objection to ſay, his right of challenge may on the trial of this collateral queſtion be extended to him, even ſhould it be proper to allow it him on ſuch occaſions. He is entitled to it when tried for the principal felony, and had he not been deprived of it, might have been acquitted. Another objection, and a ſtrong one, ariſes from the circumſtance of his conviction having taken place before a court of ſeſſions. The ſtatute declaring the powers of juſtices of ſeſſions expreſsly prohibits them from trying indictments where the puniſhment on conviction is confinement for life. Had it appeared then from the indictment that he was to be put upon his trial for a ſecond offence, a plea to the juriſdiction would have tied up the hands of ſuch court and have carried his cauſe for trial to a tribunal that could have extended to him all his rights.

We are of opinion this court can give no other judgment in the caſe than ſuch as the ſeſſions might have done, which exceeds not the puniſhment of fourteen years confinement.

N. B. The priſoner was ſentenced to five years.

Edward Shepherd Smith and John Stanley againſt Jordan Wright and Iſaac Wright.

For goods ſhipped on deck and ejected there is no contribution; nor is the owner of the veſſel liable as a carrier.

THIS was an action againſt the owners of a ſhip, to recover the value of goods ſhipped on deck, and ejected. The cauſe was tried on the eighth day of April one thouſand eight hundred and two. It was admitted, that the defendants were owners of the ſhip Charlotte. That the plaintiffs were owners of twelve Bales of cotton, laden on deck, to be carried from New-York to Liverpool: that, the defendants were to pay one half of the freight which was paid for goods carried in the hold; and, that the cotton, in a ſtorm, was

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thrown into the ſea, for the preſervation of the ſhip, and the reſidue of the cargo, which arrived in ſafety.

Several eminent brokers, underwriters, and merchants were examined in this cauſe, and they all uniformly teſtified, that goods on deck, if loſt, are paid for by the underwriters on thoſe goods, without contribution from the aſſurers of the veſſel or other parts of the cargo. That, there was no inſtance of an average or contribution allowed, when a loſs happened in this way: that, they never knew of any ſuch caſe occurring between an owner of goods on deck and the owner of the veſſel. Goods on deck always pay a higher premium, even in ſummer double, in winter, about 7 to 3, and leſs freight than goods under deck: the freight is leſs by one half, or two-thirds, or thereabouts; but always leſs. That, they never before heard of a demand of this kind made againſt the owner of the veſſel by the ſhipper of goods: that, the freight of goods on deck is leſs than when below, becauſe they are not conſidered as at the riſk of the owner of the veſſel. One merchant ſaid, he once owned goods on deck, which were loſt by jettiſon; and being uninſured, he claimed nothing from the owner of the veſſel or the other part of the cargo. He conceived it to be the general underſtanding, that, for goods ejected from the deck, no contribution is to be made by the owner of the veſſel or of the other goods.

The counſel for the plaintiff gave their conſent, that if, ſubſequent to the trial, any inſtances of uſage could be aſcertained by affidavit, they ſhould be added to the caſe.

A verdict was found, by conſent of parties, for the plaintiffs, for one thouſand dollars, ſubject to the opinion of the Supreme Court, on the law, and on the admiſſibility of the preceding teſtimony. If the court gave judgment for the plaintiffs, and there ſhould be any controverſy, as to the real ſum due, it was to be referred to indifferent perſons to liquidate the ſame.

Per curiam. The plaintiffs ſhipped on half freight, on the deck of the defendants' veſſel, twelve bales of cotton for Liverpool; which, for the preſervation of ſhip and cargo, were, in a ſtorm, thrown overboard; and the queſtion is, Are they entitled to general average? It is conceded, that they are not: that, the ſhippers of goods under hatches, and the inſurers on ſhip and cargo, are not liable to contribution

on account of their preſumed ignorance of any part of cargo being placed in ſo perilous a ſituation. But it is inſiſted, there is not the ſame ground of exemption for the ſhip-owners, becauſe ſuch fact is to be preſumed within their knowledge; and they are benefited by the extra freight. If this reaſoning be correct, its effect would be to make the ſhip-owners inſurers of *all* goods laden on deck, without premium, and at half freight; which certainly would be the height of injuſtice.

It is ſufficient for our purpoſe, that the uſage has been *againſt* the allowance of average to goods placed on the deck of a veſſel. This is proved to be the caſe, from the teſtimony of ſeveral inſurance-brokers and merchants, of long ſtanding among us; ſome of whom carry it back as far as thirty years; a period however, too ſhort, it is ſaid, to eſtabliſh an uſage. The true teſt of a commercial uſage is, its having exiſted a ſufficient length of time to have become generally known, and to warrant a preſumption, that contracts are made *in reference* to it. This appears to be the caſe in the preſent inſtance. We are therefore, of opinion, that judgment be for defendants.

Stephanus Miller againſt Reuben Drake.

The ſtatute of frauds does not require the agreement to make a conveyance of lands to be ſet forth in the declaration. A contract for the benefit of a third perſon, will ſupport an action by him with whom the contract is made. An averment of "being ready "prepared, and "offering to execute a conveyance, &c. according," but that defendant did not "attend, and has "refuſed," is a ſufficient offer to perform, by the plaintiff

ERROR on a certiorari from the ten pound court.

It appeared, from the juſtices return, that the plaintiff had agreed with the defendant to attend at a certain place, to receive a conveyance of ſome land from the defendant and his wife, to one Rhoam. The proceedings below were by the preſent defendant, to recover damages, for the now plaintiff's non-attendance, according to his engagement. The declaration ſtated, that the "defendant did, together with his wife, "attend at the place appointed, ready prepared and offering "to execute to the ſaid Jacob Rhoam a conveyance, &c. ac-"cording to the aforeſaid agreement." There was alſo a count for work and labour done with the defendant's waggon and horſes.

Per curiam. The errors aſſigned, and relied upon by the plaintiff, are theſe:

1ſt. That the action before the juſtice was founded on an agreement for the ſale of lands, and it does not appear that

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there was any note in writing, of that agreement; which was therefore void, by the ſtatute of frauds.

2d. That the promiſe by Miller, was for the benefit of one Rhoam, a third perſon; and therefore, without conſideration as to him; and for that reaſon, alſo void.

3d. That there was no performance of the contract on the part of Drake; it not being alleged that he offered a deed executed, or ready to be executed.

The firſt exception is clearly not well taken. Although the ſtatute of frauds requires a note in writing, to ſupport a contract reſpecting the ſale of lands, it is not neceſſary the writing ſhould be ſet forth in the declaration; and it is ſufficient if it appear in evidence. The ſtatute has not altered the form of pleading, which remains as it was at the common law.

Caſe v. Barber, 1 Raym. 450. Bull. 279.

2. The ſecond exception, we think, is equally untenable. The action was founded on mutual promiſes; and the one promiſe was the conſideration of the other. It was not neceſſary that the act promiſed to be done by Drake, ſhould appear to be immediately beneficial to Miller, in order to ſupport the obligation of his promiſe. It was ſufficient that its performance would be detrimental to Drake, or deprive him of a right which he before poſſeſſed. An injury to one party, or a benefit to another, is ſufficient conſideration for a promiſe. By the agreement in this inſtance, Drake was to convey to another* his title to certain lands, in conſideration of which, the promiſe on the part of Miller, was made; and that conſideration was ſufficient.

* Qy. If ſuch other might not have maintained an action. Dalton v. Poole, 1 Vent. 318. Marchington v. Vernon, 1 Boſ. & Pull. 101. n.(c.) See alſo Comb. 219. 8 Mod. 117. Martin v. Hinde, Cowp. 487.

3. With reſpect to the third exception, we hold the offer to perform is ſufficiently averred in the declaration. It is averred that Drake and his wife attended at the time and place appointed, "*ready prepared and offering to execute*" the conveyance "*according to the ſaid agreement;*" and that Miller did not attend; and that he has refuſed to accept the ſame, and to perform the agreement on his part.† This averment was ſubſtantially ſufficient, and the manner in which the tender or offer to convey was made, was matter of evidence on which the juſtice has decided, and which cannot appear on the record.

† See 1 Dex Mer. Amer. 372, 3. the caſes there cited.

We are therefore, of opinion, that none of the exceptions are well taken.

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J. Weaver v. E. Bentley.

If a perſon bind himſelf under hand and ſeal to do a certain act for a certain conſideration, and he fail, aſſumpſit will lie to recover back the conſideration paid.

James Weaver againſt Elijah Bentley.

THIS was an action of aſſumpſit to recover back the conſideration paid on an agreement under ſeal in the following words—" November the 26th, 1796. Know all men by " theſe preſents, that I, Elijah Bentley, do bind myſelf to pro- " cure for James Weaver, Lot No. 67, joining Ballcock's on " the weſt, which lot I am now in poſſeſſion of, which I " promiſe to procure ſo far as this, on theſe conditions, that " is, a leaſe to be either three years rent free, then to pay the " intereſt of one hundred and ſixty pounds yearly, for the " term of ten years, then with paying one hundred and ſixty " pounds, to have a deed for the ſame lot, containing one " hundred acres, which leaſe I promiſe to deliver by the firſt " day of June next, and then if not called for, whenever called " for. The condition of this obligation is ſuch, that if I do not " deliver the ſaid leaſe, the two ſixty pound notes, which are " dated November the 26th, 1796, which I have againſt James " Weaver, ſhall be of none effect. As witneſs my hand and " ſeal.

" ELIJAH BENTLEY. (L. S.)"

The cauſe was tried before Mr. Juſtice Thompſon, at the circuit court for the county of Herkimer. The plaintiff produced in evidence the agreement and affidavits of various payments by the plaintiff. The counſel for the defendant objected to the plaintiff's right of recovering in this form of action; inſiſting that the agreement was under ſeal, and imported a covenant, and therefore aſſumpſit would not lie. His honour, after hearing counſel, directed a verdict to be taken for the plaintiff, ſubject to the opinion of the court on the point relied on by the defendant. His honour the C. J. and all the Judges but Livingſton J. concurred in the following determination.

Per curiam. The defendant covenanted to procure for the plaintiff within a given time, or on demand thereafter, a leaſe for certain lands, three years free of rent, then to pay the intereſt of £.160 annually, for ten years, in lieu of rent, and at the expiration of that period, to have a conveyance of the ſame on payment of the principal ſum, in default whereof, two

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notes of ſixty pounds each, given by the plaintiff to the defendant, were to be void. The plaintiff made certain payments in money and farm ſtock to the defendant, who failed to perform his covenant and the plaintiff thereupon brought aſſumpſit; and the queſtion now is, whether the action will lie or the plaintiff be compelled to reſort to his covenant.

This caſe is ſo looſely drawn that it ſcarcely affords ſufficient ground for a deciſion. It is not ſtated for what the notes, money or ſtock were given; preſuming them to have been the conſideration of the covenant, the queſtion then will be whether the defendant having failed to perform on his part, the plaintiff may diſaffirm the contract and reſort to his aſſumpſit to recover back what he had paid. We are of opinion he had his election either to proceed on the covenant and recover damages for the breach, or to diſaffirm the contract, and bring aſſumpſit to recover back what he had paid on a conſideration which had failed. Judgment therefore muſt be for the plaintiff.

Livingſton J. Two queſtions were ſubmitted to us in this caſe.

1. Do the terms of the contract import a covenant?

2. Can the plaintiff waive covenant, and bring aſſumpſit to recover the conſideration paid for the land?

In anſwer to the firſt it is only neceſſary to ſtate, that the defendant "binds himſelf" under ſeal to procure for plaintiff a certain lot of land, and "promiſes" to deliver the leaſe by a certain day. The words "bind and promiſe" create a covenant as ſtrong as any which could have been uſed.

It follows then that an action of covenant will lie on the inſtrument on Bentley's non-performance, to recover back all that has been paid. When that is the caſe the party muſt rely on the ſecurity he has taken, there being no neceſſity for the law to imply a promiſe different from the one contained in the terms of the contract. Promiſes in law exiſt only where there is no expreſs ſtipulation between the parties—thus in 2 Term. Rep. 100,* where a ſurety had taken a bond of indemnity from his principal he was not permitted to reſort to an action of aſſumpſit for the money he had paid. This is a ſtronger caſe, for if the preſent ſuit be maintainable for the money paid in conſequence of this covenant, I ſee nothing to prevent the plaintiff from bringing an action on the inſtrument

* Touſſaint v. Martinant.

itſelf, for *other* damages which may have been ſuſtained by the defendant's non-performance, and thus ſubjecting him to two ſuits for a compenſation which might have been obtained in one—for theſe reaſons I think it more ſafe to adhere to the rule which confines a man to the ſecurity he has taken, than to depart from it, merely becauſe the merits may be with the plaintiff. The caſe of D'Utricht v. Melchor, 1 Dall. 428. cannot be law. In my opinion there ſhould be judgment for the defendant.

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William Muir and William Boyd againſt The United Inſurance Company of the City of New-York.

THIS was an action of aſſumpſit on a policy of inſurance, effected in the name of Archibald Gracie, on the cargo of the ſhip Dauphin, valued at eighty-ſeven thouſand one hundred and ſixty dollars, on a voyage from Surinam to London.

A veſſel captured, recaptured, and carried into a port of the country to which bound, and in the way to that of her deſtination; information of all theſe circumſtances being received at the ſame time, the aſſured cannot abandon. If, in ſuch a caſe, ſhe and her cargo be ſold at auction, the charges of ſale fall on the aſſured.

Qy. If newſpaper information be ſuch on which an abandonment can be made?

The cauſe was tried before Mr. Juſtice Radcliff, at the June ſittings in New-York, 1802, when the jury found a verdict for the plaintiffs, ſubject to the opinion of the court on the following caſe, in which were admitted,

Firſt, The defendants' ſubſcription, the ſailing of the veſſel on the voyage inſured on the ſecond of October 1799, and the plaintiffs' intereſt.

Secondly, That on the firſt of December 1799, in the proſecution of the ſaid voyage, the ſhip, with her cargo, was captured by a French privateer, called the Bellona, of Bourdeaux, when the whole of the crew, except the captain, mate, carpenter and boy were taken on board the privateer, together with her papers; and a prize-maſter, and thirteen men were put on board, with directions to carry her to Bourdeaux.

Thirdly, That on the fourteenth day of December 1799, the ſhip was recaptured by two Engliſh frigates, the French prize-maſter and men taken from on board of her, and an Engliſh prize-maſter and ten men put on board, with directions to carry her to Plymouth, in England, where ſhe arrived on the 12th of January, 1800, and was libelled by the re-

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captors for ſalvage, and a claim interpoſed by the captain, on behalf of the plaintiffs.

Fourthly, That on the ſecond of April 1800, information was received from a London newſpaper, of the capture, recapture and arrival of the ſhip at Plymouth; and that on the third of the ſame April, the abandonment was made.

Fifthly, That the cargo, while in poſſeſſion of the captors and recaptors, as well by reaſon of tempeſtuous weather, as from neglect and inattention, in not pumping the veſſel, ſuſtained conſiderable damage. That the veſſel, at different times, had eighteen inches of water in her hold, and that the water pumped up was frequently thick with coffee and ſugar; that one of the bales of cotton took fire by accident, and a part thereof was thrown overboard: that the cargo was plundered by the French.

Sixthly, That the captain of the veſſel, ſhortly after his arrival at Plymouth, wrote to Cadcleugh, Boyd & Co. of London, the conſignees of the ſhip and cargo, requeſting them to come down to Plymouth, or to ſend ſome perſon to aid him, or to inſtruct him what meaſures would be moſt prudent for him to purſue. That, in conſequence of this letter, Mr. Boyd himſelf went down to Plymouth about ten days after the arrival of the veſſel at that place, and immediately entered into a negociation with the agents of the recaptors for the liberation of veſſel and cargo; it being aſcertained, that the cargo would ſell in London, the place of its deſtination, at a much better price than at Plymouth.

Seventhly, That the veſſel and cargo were appraiſed at Plymouth; the former at £973 Sterling, and the latter at £11,697 : 15 : 1 Sterling. That Mr. Boyd offered to pay one eighth of the appraiſed value both of veſſel and cargo, in lieu of ſalvage, provided the agent of the recaptors would aſſent to deduct a reaſonable allowance for the damage and injury the cargo had ſuſtained while in poſſeſſion of the captors and recaptors: that, to avoid the expence of unlading the cargo to aſcertain ſuch damage, it was agreed between Mr. Boyd and the agent of the recaptors, to leave the quantum of damage and injury to the captain of the veſſel and the prize-maſter. They, after taking into conſideration the quantities both of ſugar and coffee, that had been pumped up, and the other injuries the cargo had ſuſtained, (without landing the

cargo in order to examine it accurately) were of opinion, that the cargo had ſuſtained damage to twelve and a half per cent or one eighth of its value; but this eſtimate was founded on conjecture only. On this ſubject, the captain, in his depoſition taken by conſent of parties before the trial, depoſed in the words following, to wit:

"That, *to* avoid the expence of unlading the cargo, to aſcertain *ſuch* damage, it was thereupon agreed to leave the quantum of ſuch damage and injury to this deponent and the prize-maſter; who, after taking into conſideration the quantity both of ſugar and coffee that had been pumped up, did concur in opinion, that the cargo had ſuſtained damage to one eighth of its value, or to twelve and a half per cent, which the deponent *verily believed* to be the caſe."

Eighthly, That after deducting twelve and a half per cent from the appraiſed value of the cargo, for the damage and injury as above eſtimated, the conſignees of the veſſel and cargo paid to the recaptors, for ſalvage and other incidental expences, £1953:11:3 Sterling.

Ninthly, That the conſignees refitted the veſſel at Plymouth, to enable her to carry her cargo to London, being the place of its deſtination; and, that the refitting and diſburſements, together with proviſions for the crew, pilotage and other charges, amounted to £944:7:7 Sterling, the appraiſed value at Plymouth being £891:10:0 Sterling.

Tenthly, That the conſignees of the veſſel and cargo, in London, wrote to the ſaid Archibald Gracie, a letter, dated 7th February 1801, announcing the preceding facts; and that, as they could not conſult the underwriters, that they had inſured from Plymouth to London £2000 at 3 G. per cent, to return 15s. for convoy to Portſmouth, and 15s. more from thence to the Downs. They deſired this to be communicated to the underwriters, and that, as ſoon as ſhe ſhould get round, and her cargo examined, whether ſound or damaged, it ſhould be ſold for their account.

Eleventhly, That the veſſel was unavoidably detained at Plymouth till towards the laſt of March, and did not arrive at London until the firſt day of April 1800; and ſhortly after, both veſſel and cargo were ſold at public auction, on account of the underwriters.

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Twelfthly, That, in conſequence of ſelling the cargo at auction, it was ſubjected to the following charges, viz.

Advertiſing for public ſale,	£	16: 9:1
Auction duty		596: 1:8
Brokerage to vendue maſter,		159:12:3
	£	772:3:0

The reaſon aſſigned by the conſignees to the captain, for ſelling at auction was, that the veſſel and cargo had been abandoned to the underwriters, and that they were ſold on their account.

Thirteenthly, That the captain depoſed, had the cargo been ſold at Plymouth for payment of ſalvage, it would not have brought, by 30 per cent, as much as it did in London.

Fourteenthly, That the ſeveral items charged by the conſignees, viz. auction duties, advertiſing, commiſſions, &c. &c. were proved to be regular and cuſtomary charges.

Fifteenthly, That by the act of Congreſs of the ſecond of March 1799, ſection 7, it is enacted, viz. "That, for the "ſhips or goods belonging to the citizens of the United States, "or to the citizens or ſubjects of any nation in amity with the "United States, if retaken from the enemy within twenty-"four hours, the owners are to allow one eighth of the whole "value for ſalvage; if after twenty-four hours, and under "forty-eight, one fifth thereof; and if above that, and under "ninety-ſix hours, one third part thereof; and if above that, "one half thereof; all of which is to be paid without any de-"duction whatſoever, agreeable to the articles herein before "mentioned."

Sixteenthly, That the Supreme Court of the United States have determined that the ſubjects of France were to be conſidered as enemies within the act of Congreſs, above in part recited.

Seventeenthly, That the rule adopted in the court of admiralty in Great-Britain, as to the quantum of ſalvage, is eſtabliſhed on principles of reciprocity, and regulated by the laws of that country, to which the recaptured property belongs. But Sir William Scott, the 7th of December 1798, in pronouncing ſentence in the caſe of the Santa Cruz, declared it to be the practice of the Court of Admiralty in England, to

reſtore, on its own rule, American property, without enquiring into the practice of America. The rule eſtabliſhed in the Engliſh Court of Admiralty, with reſpect to the recapture of Britiſh veſſels, is as follows:

If recaptured by one of his majeſty's ſhips of war, one eighth; and if retaken by the joint operation of one or more of his majeſty's ſhips, the Judge of the Court of Admiralty, or other court having cognizance thereof, ſhall order ſuch ſalvage, and in ſuch proportions to be paid to the recaptors by the owners, as he ſhall, under the circumſtances of the caſe, deem fit and reaſonable.

Stat. 33, Geo. 3. Ch. 66, ſ. 12. 2 Marſhall, 472,3.

By conſent of the counſel in the above cauſe, it was agreed, that the jury ſhould render their verdict, ſubject to the opinion of the court on a caſe to be ſtated, and if the court ſhould be of opinion that the plaintiffs were entitled to recover a total loſs, then that judgment ſhould be entered in their favour for the twenty-five thouſand five hundred and eighty-one dollars. But if the court ſhould be of opinion, that the plaintiffs were entitled to recover only the amount paid for ſalvage, the auction duties, together with the expences incident to the ſales at auction, and alſo the damage loſs and injury the cargo ſuſtained while in the hands of the captors and recaptors, then they find a verdict for the plaintiffs for the ſum of nine thouſand five hundred and ſixty-one dollars and twenty-four cents. But if the court ſhould be of opinion, that the damage ſuſtained by the cargo has not been properly aſcertained, or that the charges attending the ſale at auction in London were not properly incurred: then, and in ſuch caſe, a proportionate deduction to be made for the benefit of the defendants.

Per curiam. The queſtion ariſing from theſe facts is, as to the extent of the plaintiff's right to recover.

This, we think, is not a caſe of a total loſs. The news of the capture, recapture and arrival at Plymouth, all come together; and the only pretence of a total loſs exiſting when the abandonment was made, is founded on the claim of ſalvage. The amount of this could not be aſcertained with certainty, from any information poſſeſſed by the aſſured, at the time of the abandonment. Although by the act of Congreſs of 2d of March 1799, ſ. 7. the ſalvage of veſſels and goods recaptured from the enemy, after having been in their poſſeſſion ninety-

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fix hours, is eſtabliſhed at one half their value; and the rule adopted in the Engliſh Admiralty, as to ſalvage, is founded on principles of reciprocity, and regulated by the laws of that country, to which the recaptured property belonged, yet Sir William Scott declared, on the 7th of December 1798, that it was the practice of the Engliſh Admiralty to reſtore American property on the rule of the Engliſh Admiralty, *without enquiring into* the practice of America. The Engliſh rule of ſalvage is one eighth, if recaptured by a ſingle ſhip; and if by the joint operation of two or more, the ſalvage is left to be ſettled by the admiralty, according as it ſhall judge fit and reaſonable. Under the circumſtances, then, of this caſe, the rule of ſalvage would not be conſidered as going beyond one eighth. There was not, at leaſt any definitive or certain ground for eſtimating it higher. And as *matter of fact*, we find that the ſalvage was at the time, liquidated and ſettled between the conſignee and recaptors, at one eighth. The information received by the inſured, upon which the abandonment was made, was a mere newſpaper account; and if information in any caſe, derived through ſuch a channel, would be ſufficiently authentic to warrant an abandonment, we think, in the preſent inſtance, it was too imperfect, to afford ſufficient data to the inſured, to calculate his actual loſs. We are of opinion, therefore, that the plaintiff is not entitled to recover as for a total loſs; nor, that the charges attending the auction, can be conſidered as a loſs, within the policy, to be borne by the underwriters. It was a voluntary act of the conſignee; done, probably, in conſequence of information of the abandonment; and made, therefore, at the peril of the owner. Had the ſale at auction been to aſcertain the injury the cargo had received, and limited to ſuch parts as were damaged, it would have been a reaſonable charge; but that appears not to have been the object or effect of the auction. The damage had been previouſly liquidated by the captain and prize-maſter; and if thoſe damages, together with the ſalvage paid, be allowed againſt the defendants, it is all the caſe will warrant.

We are therefore of opinion, judgment ought to be for the plaintiffs, for the ſalvage and damages only.

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F. Huguet v. J. Hallet.

Francis Huguet, aſſignee of the ſheriff, againſt James Hallet.

Entering into an agreement in the nature of a rule to ſtay proceedings on a bail bond, and, after notice of bail, declaring in the original action, is a waiver of a right to a plea in the bail bond ſuit; if the plaintiff proceed on the bail bond, he will be entitled to coſts only up to the time of the notice of ſpecial bail, and on payment of thoſe, all ſubſequent proceedings will be ſet aſide.

THIS was a motion in an action on a bail bond to ſet aſide the proceedings and execution ſued out. It appeared, that ſoon after the *bail* bond was proſecuted, the attornies for both parties had entered into an agreement, in the nature of a rule, *to* ſtay proceedings in the bail bond ſuit on the uſual terms. That the defendant had accordingly filed ſpecial bail in *the* original ſuit, and had given the regular notice, but had not paid the coſts of this ſuit, as by the terms of the rule he was bound to do. The plaintiff, on ſpecial bail being entered, went on in the original ſuit, and in July one thouſand eight hundred and two, obtained final judgment, on which execution was iſſued, and thereupon ſatisfaction obtained. After this the plaintiff went on with this ſuit, entered a default, and in January laſt obtained final judgment, and iſſued an execution, on which the ſheriff, by direction of the plaintiff's attorney, levied the coſts only, but ſtill had them in his hands. The defendant in the laſt vacation obtained an order of his honour Judge Radcliff to ſtay all proceedings.

The application now was, that the ſheriff reſtore to the defendant ſo much of the money in his hands as exceeds the coſts which were due on the bail bond ſuit when the rule to ſtay proceedings was entered into.

The counſel for the defendant produced an affidavit, by which it appeared, that the attorney for the plaintiff had frequently given the attorney for the defendant verbal notice that he was proceeding with the bail bond ſuit. But it did not appear that any bill of coſts had been preſented, or any demand of a bill of coſts made on the one ſide, or of the coſts on the other.

Colden for the defendant contended, that ſpecial bail being filed under the rule, with an intent to ſtay the proceedings on the bail bond, the plaintiff could not accept it or avail himſelf of it, unleſs it was to have that operation.

That the plaintiff would not proceed with both ſuits: at moſt he had but an option to proceed with either, but having elected to purſue the original ſuit, he thereby precluded himſelf from going on with the other.

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That after the defendant had filed ſpecial bail the plaintiff might have gone on with his original ſuit, and the court would probably have compelled him, by attachment, to pay the coſts in that on the bail bond, up to that time.

That there was no precedent for this double proceeding, which was a ſtrong evidence that it could not be right.

Stuyveſant contra. It was the duty of the defendant to have paid the coſts on the bail bond, when he gave notice of ſpecial bail. The plaintiff had no other poſſible remedy for his coſts than the mode he has adopted, and as the defendant's irregular conduct has compelled the plaintiff to proceed, the whole coſts are due from the defendant, and are nothing more than the reſult of his own irregularity and obſtinacy.

Per curiam. This is a motion to ſet aſide proceedings on the bail bond on the facts ſtated by the affidavit. The ſuit was commenced in January 1802, returnable in April. Afterwards, in May, the action on the bail bond was brought. Shortly after, the plaintiff's attorney received notice of bail in the original action and then delivered a declaration. He went on to judgment, and proceeded on the bail bond to recover coſts. The plaintiff's attorney ſtates that he called on the attorney of the defendant, and requeſted him to pay the coſts on the bail bond, which he did not do, though no regular bail had been put in. On this, proceedings were continued in the bail bond ſuit to judgment, on which an execution has iſſued for the coſts. The application is to ſet aſide the proceedings and execution in the bail bond ſuit. It is eſtabliſhed, with reſpect to tendering coſts on a rule to ſtay proceedings on the bail bond, that it is the defendant's duty, when the rule is obtained, to plead and tender coſts.* There was no rule to ſtay proceedings: but an equivocal agreement in the place of that rule, and ſhould receive the ſame conſtruction. It was the duty of the attorney of the defendant to plead and pay coſts. This would have been ordered had he not proceeded in the original ſuit: but when he did that, it was a waiver of his proceedings on the bail bond, and a waiver of the right to a plea from the oppoſite ſide. The proceedings muſt be ſet aſide on payment of coſts up to the time when ſpecial bail was entered and notice of that bail given.†

* Cannon manucaptor ads. Catchcart. Cole. Cas. Prac. 80. exoneretur ordered on payment of coſts; no demand or bill preſented. Plaintiff went on. Per curiam. The coſts ſhould have been paid without waiting a demand or bill. The relief now to be, on paying of coſts ordered, thoſe of ſubſequent proceedings, and reſiſting this application.

† See Grove ads. Campbell. Cole. Cas. Prac. 115.

Potter againſt Briggs.

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Potter v. Briggs.

THIS was an application to the court for an order on the heretofore ſheriff, Lanſing, to amend a return according to the real truth of the caſe. The facts were, that the defendant had been arreſted and duly committed to jail, but was one of many others who had broken out of priſon, in the year 1798. The ſheriff had been ruled, and had returned the due execution of the writ, a delivery of the defendant's body over to one of his deputies, and a reſcue, but omitted totally the commitment to priſon.

After a lapſe of five years the court will not order a former ſheriff to amend his return, according to the truth of the caſe, by ſtating that the defendant had eſcaped from priſon, if it was at a time when many others forcibly broke out.

Troup, on an affidavit ſtating the preceding circumſtances, inſiſted on the court's being under a moral obligation to order a return according to the truth of the caſe. That by the falſe one made, the ſheriff avoided that liability for the full amount of the debt from which nothing but an enlargement by public enemies of the State could exonerate him. It was a device to get rid of his legal reſponſibility; to leave the plaintiff only to his action for a falſe return, in which he could recover no more than his damage actually ſuſtained, and in which the defendant's inſolvency might be urged againſt a recovery of any thing.

Harriſon contra obſerved, that Troup had ſtated the very reaſon why his motion ſhould not be granted; that of the plaintiff's *having it* in his power to obtain a compenſation in an action for a falſe return, to the full amount of what he really had ſuffered. The proceeding now was, to get from the ſheriff a debt, of which not one ſhilling could ever have been obtained from the defendant. That the eſcape was at a time, full in the recollection of the court, when a number of the debtors broke out of the city jail. Several had been indicted and ſentenced to the State-Priſon. The application too was very ſtale: the *ſecond* ſheriff was now in office ſince the eſcape, and five years had elapſed in ſilence. Perhaps the court might have ſome doubt how far it could in this manner interpoſe.

Troup, in reply, inſiſted on his former poſitions.

Per curiam. The plaintiff is not without remedy; he has his action on the return. We do not ſay that in no caſe ſhall a return againſt truth be amended, but in this, under all its circumſtances, we think the plaintiff muſt be left to ſuch redreſs as the law will give him without our interference.

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John M'Vickar and Co. againſt Gideon Alden.

Whilſt a public proſecutor is attending the duties of his office, his cauſes, though called on, are not put at the foot of the calendar; but if after the court of oyer and terminer is adjourned, younger iſſues be tried, he will loſe his preference and be liable to non-ſuit for not proceeding to trial, in the ſame manner as other perſons.

THIS was a motion for judgment as in caſe of nonſuit for not proceeding to trial according to ſtipulation.

Riker, diſtrict attorney, oppoſed the motion on an affidavit ſtating that he was employed for the plaintiff, and had been prevented in conſequence of his official duty as public proſecutor, from attending the court when the cauſe was called on, and had not afterwards been able to bring it to trial.

Boyd for the defendant. The public proſecutor was only counſel: it is true the attorney is his brother acting with him; but the caſe is a hard one. The defendant was a captain of a ſhip in which the plaintiff had ſhipped ſeveral bales of cotton, all of which had been delivered according to the bill of lading; but one, not worth more than ſixty dollars, had been damaged, and he had been held to bail for the whole ſhipment, to the amount of two thouſand, had been obliged to depoſit property to obtain ſpecial bail, kept here many months, and had loſt, by the detention, more than the ſum for which he was arreſted.

Radcliff and Livingſton, Juſtices. To public officers in the city of New-York, where the different courts are held at the ſame time, indulgence has always been ſhewn. Their cauſes have been called on, but not put down to the foot of the calendar if engaged in official duty. They did not loſe their preference of other cauſes, when the public officers attended. An official ſituation would otherwiſe ſubject them to peculiar hardſhips in this city, though in other parts of the ſtate the ſame inconveniences do not exiſt. Radcliff J. wiſhed to know whether, after the adjournment of the court of oyer and terminer, any cauſes, younger than the one in queſtion, had been tried.

Thompſon J. There has been a lach in the plaintiffs: the ſtipulation ſhews this is the ſecond. The plaintiff ought to have employed other counſel, for the defendant ſhould not be prejudiced: being concerned as public proſecutor ought not to cauſe any injuſtice to the defendant: he ought to have the effect of his motion.

Riker for the plaintiffs, offered to conſent to common bail.

Livingſton J. As the plaintiffs have conſented to common

bail though not impoſed, Judge Radcliff and myſelf think the motion muſt be refuſed. The plaintiff, however, will ſtipulate and pay the coſts of the laſt circuit.

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On its being ſuggeſted that younger cauſes had been tried at the circuit, after the court of oyer and terminer had riſen, the court deferred pronouncing judgment till the calendar ſhould be examined and that fact aſcertained. By a certificate, from the clerk of the court, it appeared that the preſent ſuit had been called and paſſed, and the affidavit of the defendant's attorney ſtated, that younger iſſues had been determined. On theſe grounds the court ordered judgment as in caſe of nonſuit, ſaying the certificate of the clerk was equivalent to an affidavit, and it muſt be intended the cauſe had been regularly paſſed.

W. P. Van Neſs againſt George Gardiner.

THE laſt proclamation of a fine had been omitted, it ought regularly to have been made laſt term; the application now was, to have it made nunc pro tunc and indorſed as of the laſt term.

Laſt proclamation of a fine made nunc pro tunc.

Per curiam. We ſee no objection to it at preſent. *

Rule accordingly.

* Query tamen.

Ex parte Manning.

THIS was an application on a petition, to which the court gave the following anſwer.

A public proſecution muſt be at the expence of the proſecutor, unleſs on diſcloſure of his circumſtances to the court, they find him an object of public charity.

Per curiam. The court is called on to allow againſt the county of Albany, an account for expences incurred by a proſecutor in carrying on a public proſecution. The application is made under the fifteenth ſection of the act † "regulating certain proceedings in criminal caſes." This clauſe, taken in connexion with the one that follows, we conſider as limiting the diſcretion of the court to thoſe perſons who are objects of public charity, and as never intended to apply to thoſe who can bear the expence of diſcharging their duty by a public proſecution. The next clauſe limits the diſcretion of the court to twenty-five dollars: and this, according to the 15th ſection, only on conſideration of the circumſtances of the proſecutor: the words are *his* circumſtances: therefore, till they

† 21ſt March 1801. See 1 Rev. Laws N Y.

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are diſcloſed, the court has not any diſcretion to allow compenſation. However hard it may be to individuals to attend a ſuit, and to compel a witneſs to leave his home, that is a ſubject in which the legiſlature muſt interfere. We can give no other conſideration to this than what the interpretation of the act allows. There are charges here for ſums paid to witneſſes, and the act ſtates that no witneſs is to receive a compenſation, unleſs poor.

Mr. Attorney General. Allowances, ſimilar to that prayed for, have been made at oyer and terminer.

Livingſton J. When preſiding in that court I have refuſed them, and decided according to the opinion of the court now delivered,

Ebenezer Jenks and others againſt Richard S. Hallet and Walter Bowne.

A veſſel driven by diſtreſs into a French port, where a part of her cargo is taken by the officers of the government, and ſhe prevented from taking away her original lading, may without incurring the penalties of the acts forbidding all intercourſe with the dependencies of France, purchaſe and load with the produce of the country. A paſſport granted by any particular government to protect againſt its own cruiſers, is not a ſailing under the protection of the flag of that government, ſo

THIS was an action on a policy of inſurance: a ſpecial verdict was found containing the following facts.

That on the twenty-ſeventh day of April in 1799, the defendants, for a premium of twenty-five per cent. inſured for the plaintiffs *againſt all riſks*, one thouſand dollars upon twenty-five thouſand pounds weight of coffee, valued at twenty cents per pound, on board the ſloop Nancy, from Hiſpaniola to St. Thomas. That in the margin of the policy was inſerted a clauſe in the following words, "warranted the property of the plaintiffs, all Americans," but that the words *all Americans*, were added after the policy was ſubſcribed; that the ſloop Nancy was built at Rhode-Iſland, and belonged to citizens of the United States, reſident in Rhode-Iſland, as well when ſhe left that ſtate as at the time of her capture, and, being chartered by the plaintiffs, ſailed from New-Port in Rhode-Iſland, on the twelfth day of December, in the year 1798, on her firſt voyage to the Havannah; that in the courſe of the ſaid voyage ſhe was compelled, being in diſtreſs, to put into Cape-François in the iſland of Hiſpaniola, a country in the poſſeſſion of France, where ſhe arrived on the fifth day of January 1799; that the captain and ſupercargo of the ſloop were part owners of the cargo, and are two of the plain-

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as to ſtamp a national character on the veſſel. On a ſpecial verdict the court cannot intend any thing which is not found.

tiffs in this ſuit; that having ſo put into Cape-François, the cargo was landed to repair the veſſel; that the public officers acting under the French government there, took from them nearly all the proviſions on board the ſloop, and the captain and ſupercargo were permitted to ſell and did ſell the remainder to different perſons there; that the captain and ſupercargo made a contract with the public officers, by which, they were to be paid for the proviſions in thirty days, but the payment was not made; that with the proceeds of the remaining parts of the cargo they purchaſed the whole of the cargo which was on board at the time of the capture, and alſo ſeventeen hogſheads of ſugar, which they ſent home to New-York, on freight. That the ſaid officers forbade the ſaid maſter and ſupercargo of the ſloop from taking on board the cargo landed from the ſaid veſſel, or from conveying from the ſaid iſland any ſpecie, by reaſon whereof they were compelled to take the produce of that country in payment; that the ſloop, with thirty thouſand weight of coffee on board, twenty-five thouſand pounds weight of which was intended to be inſured by the preſent policy, ſailed from Cape-François, on the twenty-third day of February, in the year laſt aforeſaid, on the voyage mentioned in the policy of inſurance, having on board the uſual documents of an American veſſel; that the ſloop, in the courſe of her ſaid voyage, was captured by a Britiſh frigate and carried into the iſland of Tortola, and veſſel and cargo libelled, as well for being the property of the enemies of Great-Britain, as for being the property of American citizens trading contrary to the laws of the United States; that, at the time of the capture of the ſloop, the following paper was found on board; "Liberty, Safe Conduct, Equa- "lity——At the Cape, 11th Thermidor, ſixth year of the "French Republic, one and indiviſible. The General of the "diviſion and private agent of the Executive Directory at St. "Domingo, requeſts the officers of the French navy and pri- "vateers of the Republic, to let paſs freely the American "veſſel called the maſter "property of Mr. E. Born Jenks, merchant at Providence, "ſtate of Rhode-Iſland, in the United States, arrived from "the ſaid place to the Cape-François for trade and buſineſs. "The Citizen French Conſul, in the place where the ſaid

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" veſſel ſhall be fitted out, is invited to fill with her name, " and the captain's, the blank left on theſe preſents; in at- " teſtation of which he will pleaſe to ſet his hand hereupon.

(Signed) J. HEELOUVILLE.

(Signed) GAUTHIER, the General Secretary of the Agency."

which paper was received on board the ſloop at Cape-François, and was on board when ſhe left that place; that the property inſured by the policy aforeſaid was claimed by the ſaid Zebedee Hunt, and was condemned by a ſentence of the ſaid court of Vice-Admiralty, in the following words: " that " the ſaid ſloop Nancy, and cargo on board, claimed by the " ſaid Zebedee Hunt, as by the proceedings will ſhew to be " enemies property. And as ſuch, or otherwiſe, liable to " confiſcation, and condemned the ſame as good and lawful " prize to the captors." That the plaintiffs are Americans and were owners of the property inſured, and that the ſame was duly abandoned to the underwriters.

Hamilton and Pendleton for the defendants. The plaintiffs are not entitled to recover. Firſt, becauſe the warranty is not true. Secondly, becauſe the voyage inſured was illegal.

On the firſt point. The ſentence ſtates that it is enemy's property: and even if not, the privilege of neutrality was forfeited, by the part owner's accepting a paſſport from another country, and ſailing under the protection of that flag. In the caſe of the Vigilantia, 1 Rob. Ad. Rep. 13, 14, 15, Sir William Scott expreſsly lays it down, that a veſſel, ſailing with the paſs of a foreign country, ſhall be deemed of that country whoſe paſs ſhe carries. It cannot be contended that the paper alluded to was a clearance. That according to 1 Valin, 282 contains " the name of the maſter, and of the " veſſel, its tonnage and cargo, the port of departure and " deſtination." Here blanks are left, and the paper bears date before the arrival of the veſſel, ſhewing it was made out for her, on a preconcerted plan of trade and buſineſs.

On the ſecond point. It is only neceſſary to look at the dates of the act of Congreſs and the tranſactions. The firſt act was paſſed in June 1798, to take effect on the firſt of July following; the ſecond, on the 9th of February 1799, to be in force on the 3d of March following: both theſe acts require a bond to be given, not to enter French ports for trade and

traffic, nor to trade there though driven in by ſtreſs of weather. The Nancy ſailed the 12th of December 1798; put into the Cape, January 1799: ſailed on the 23d of February following, and on the 23d of April next the policy was effected: under the acts of Congreſs therefore the ſelling her cargo was illegal, as even in caſes of putting into French ports from diſtreſs, traffic is forbidden.

Hoffman and Bogert for the plaintiffs. The jury have expreſsly found the warranty to be true, and the inconcluſiveneſs of foreign ſentences is ſettled in the caſes of * Vandenheuvel v. Church, and the ſame againſt the United Inſurance Company of New-York. This therefore is a complete anſwer to the firſt objection. But as the ſentence is ambiguous,† and aſſigns as a cauſe of condemnation, that which the Law of Nations does not warrant, it is doubtful whether in England it would not be examinable. 1 Marſh on Inſ. 291. 294. Bernardi v. Motteux, Doug. 554. The paper talked of as a paſs, was merely a clearance and paſſport to ſecure againſt ſeizure by French veſſels: nor can the citation from Valin be ſuppoſed to be the obligatory form on all people, according to the poſitive rule of the Law of Nations. The ſecond objection is of as little force as the firſt. The policy was ſubſcribed by the defendants with a full knowledge of the *facts and law*. Though againſt a ſtatute prohibiting certain voyages ſuch a circumſtance could not prevail, it was expected the underwriters would not have made it a ground of defence. The diſtreſs however and force, which are ſtated in the ſpecial verdict, do away every obſtacle to a recovery from the pretended illegality of the voyage. The caſe of Richardſon and others in the Diſtrict Court of New-York, affirmed upon an appeal to the Circuit Court of the United States, was ſtronger than the preſent, and is on this head a full expoſition of the act of Congreſs. There a veſſel bound to a neutral country, was captured, carried into a French port together with the cargo, condemned and ſold; the owner voluntarily purchaſed at that place another veſſel, loaded her with ſugar and came to New-York; ſhe was ſeized and libelled under this very act; the Judge of the Diſtrict Court acquitted both veſſel and cargo as not within the ſpirit of the ſtatute. This decision, from its confirmation in the Circuit Court, is now the Law of the Union.

* 1 Lex. Mer. Amer. 337. 341

† See Vaſe v. Ball. 1 Lex. Mer. Amer. 333.

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Per Curiam. It will be obſerved that this is the caſe of a ſpecial verdict, and the court can intend nothing but what is found by the jury. This remark is an anſwer to much of the reaſoning on both ſides, and narrows the grounds of diſcuſſion to the following points:

1ſt. Whether the veſſel and cargo, although literally American according to the implied warranty in the policy, had forfeited the privilege of that character, by accepting the protection of a paſſport from one of the belligerent nations?

2d. Whether the purchaſe of the cargo in a French port was within the prohibition of the act of Congreſs of the 13th June 1798, and an illegal trade.

As to the firſt, it appears that the Nancy ſailed with the uſual documents of an American veſſel, and was in every reſpect entitled to be conſidered as ſuch, unleſs the French paſſport which ſhe received at St. Domingo would deprive her of that privilege. The general rule by which to determine the national character of a veſſel is the domicil of the owner. In the preſent caſe the owners reſided in the ſtate of Rhode-Iſland—We admit the exception to this rule where the veſſel navigates under the flag or aſſumed character of a country to which ſhe does not belong—but the inſtance before us we apprehend is not the caſe of a veſſel ſailing under that protection, or, as it is termed by Sir William Scott, under the paſs of a different nation; her papers were all American except the one in queſtion; ſhe was in fact American, if we believe the verdict, and ſhe profeſſed no other than the American character. The additional paper which ſhe received on board at the Cape, according to its import, was not inconſiſtent with that character; on the contrary ſhe was therein ſtated to be the property of Mr. Jenks, merchant at Providence, ſtate of Rhode-Iſland; that paper, accompanied with the other documents ſhe poſſeſſed, could not be evidence of her being French property, or employed as a French veſſel: ſhe had come from a French port, and was deſtined to a Dutch Iſland, both of which were lawful; and it was natural, and we believe is uſual in ſuch caſes, for veſſels to ſeek for protection, and guard themſelves againſt the cruiſers of the power whoſe ports they have viſited. This paper, unſupported by other evidence of belligerent property or employment, could be received in that light only. Connected with the fact that all

intercourſe had been prohibited by our government at that period with the French nation, we think it afforded a reaſonable ground of ſuſpicion that ſhe was employed in the ſervice of the French and perhaps the riſk was thereby enhanced, but ſo far as that fact was material, the prohibition was known to the underwriters before they ſubſcribed the policy, and they muſt have *eſtimated* the increaſed danger, if any, that reſulted from it. *Of* itſelf, we think, it would afford an additional ſecurity againſt one of the belligerent parties, (the French) and could *not* alone be a cauſe of capture, or ſufficient to authorize a *detention* by any other belligerent. In practice, we believe it is cuſtomary for veſſels to endeavour to protect themſelves, by papers of this deſcription from the public agents of every nation from which they can be obtained, and they have been conſidered as affording ſecurity, inſtead of endangering their neutrality.

In determining the ſecond queſtion it is again neceſſary to recur to the facts found by the verdict. From them it appears that the veſſel was compelled to put into the Cape in diſtreſs; that when there the cargo was landed for the purpoſe of repairing her; that nearly all the proviſions were taken by the French government which prohibited relading any part of the cargo, and permitted to barter what was left for the produce of the iſland only, and to diſpoſe of it in no other way; *if this be true* they had no alternative but to comply with the terms preſcribed, or ſacrifice the whole of their property. Their acts were acts of neceſſity and coercion, and the law of Congreſs which ſuſpended the commercial intercourſe with France and her dependencies, cannot reaſonably be conſtrued to apply to a caſe of this deſcription; its object was to prevent an intentional, or *voluntary* traffic, and not to compel a ſacrifice of property or inflict a penalty in caſes of diſtreſs or neceſſity. That would be a conſtruction exceſſively ſevere, and contrary to the ſpirit and intent of the act. On this point we underſtand a ſimilar deciſion has been made in the Diſtrict Court of this ſtate, which on appeal, was affirmed by Judge Patterſon in the Circuit Court of the United States. We are therefore of opinion, on both points, that the plaintiffs are entitled to recover.

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A. M'Gregor againſt C. Loveland. The ſame againſt John B. Arnet. The ſame againſt the ſame.

If after ſuit brought the ſum be reduced by a partial payment below 250 dollars, and a cognovit be taken for ſuch reſidue, Supreme Court coſts cannot be claimed.

THIS was a queſtion of practice ſubmitted to the deciſion of the court on the following ſtatement:

The above ſuits were brought on notes exceeding two hundred and fifty dollars each; afterwards a ſum of money was paid, and ſecurity given by Loveland the indorſer, by which the amount was reduced below 250 dollars: cognovits were then given for the reſidue by each defendant. It was underſtood at the time, by the defendant's attorney, that the judgments ſhould carry Supreme Court coſts. Query. May not the clerk tax them accordingly?

Per curiam. No: the plaintiff ſhould have taken his cognovit and entered his judgment for a ſum above 250 dollars, to entitle to Supreme Court coſts; they cannot otherwiſe be allowed.

The following queſtion was alſo ſubmitted:

Practice as to coſts or a conſolidation rule.

Several ſuits are conſolidated by rule on a policy of aſſurance; if the leading ſuit ſhould recover more than 250 dollars, and the other ſuits leſs, will the party be entitled, by virtue of the conſolidation rule, to Supreme Court coſts on the ſuits that are under 250 dollars?

Per curiam. We think not.

James and Samuel Watſon againſt Frederick Depeyſter & Co.

If a ſuit be compromiſed between the parties, without the knowledge of the attornies, and nothing ſaid about coſts, each party pays his own.

THIS, and three other ſuits were commenced, againſt the above defendants and ſeveral others, on a policy of inſurance on the brig Defiance, and a conſolidation rule ſigned and entered. About a year afterwards the defendants, in the above ſuit, compromiſed with the plaintiffs who cancelled the policy as to them; of this the defendants' attorney had no information nor was there any rule to diſcontinue, or other rule entered, and the other ſuits proceeded. The principal cauſe

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went on to trial, and the jury found a verdict for the defendant, which was acquieſced in. The defendants' attorney thereupon entered rules for judgment as in caſe of nonſuit in all the cauſes, purſuant to the conſolidation rule, and the coſts were taxed and judgment rolls ready to be ſigned. It was now ſubmitted to the court on theſe facts, to decide whether the rules for judgment, and the judgment for coſts as in caſe of nonſuit, were regular or not; or, whether they ought to be ſet aſide. N. B. At the time of compromiſe nothing was ſaid about coſts.

Hoffman, as amicus curiæ, informed the bench, that in Wallace v. Lockwell it had been decided, that if a party compromiſed without knowledge of his attorney and the plaintiff went on, each paid his own coſts.

Per curiam. In every ſuit each party is ſuppoſed to advance as his ſuit proceeds. If each has paid coſts and then they compromiſe, the ſuit is ſettled; for the tranſaction imports no further proceeding is to be had; nothing more than a ſimple diſcontinuance to enter on record, and nothing being ſaid about coſts each muſt pay his own. The parties ought to have informed their attornies there was a compromiſe.

Hudſon againſt Henry.

Notice of motion for judgment as in caſe of nonſuit, ſent by the mail is not good notice; though ſuch a notice might ſave a default. * See Cole and ano. ads. Stafford. Cole. Ca. Prac. 107. Berbe ads. Paddock ibid. 135.

MR. *Henry* moved for judgment of nonſuit againſt the plaintiff for not proceeding to trial. Notice of the motion had been ſent to the adverſe attorney by the mail.

Per curiam. This notice is inſufficient. A letter may miſcarry—or the attorney may be abſent when the mail arrives, or not immediately inquire for letters, though an affidavit of a plea ſent by the mail might ſave a default. Let the defendant take nothing by his motion.*

Manhattan Company againſt Smith in cuſtody.

To an application for a ſuperſedeas for not having been charged on execution within 3 months after judgment, it is a good anſwer

THIS caſe was brought up from the Mayor's Court. The application was to prevent the diſcharge of the defendant on account of the plaintiffs' not proceeding to execution in due time according to the act for the relief of debtors with reſpect to the impriſonment of perſons; the counſel for the plaintiff relied on Brantingham's caſe, Cole. Cas. Prac. 42. The

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court, without hearing any argument for the defendant, ſaid the authority cited was concluſive.

Livingſton J. acquieſced becauſe it had been ſo decided, but confeſſed he did not believe the legiſlature intended the conſtruction put upon the act by the court, ſhould ever be given to it. The rigour of the practice was in his opinion enough to condemn it, for he thought the neglect in the plaintiff ought to accrue to the advantage of the priſoner.

that the defendant has ſince been charged.

Steele and ux. at the ſuit of Tennent. Steele, and Fuller, his bail, at the ſuit of Tennent, aſſignee of the ſheriff of Waſhington.

Attorney on being retained for a defendant ſhould examine ſtate of proceedings; though it is but fair practice for plaintiff's attorney to diſcloſe them: for want of doing ſo in a ſuit againſt bail, after a default entered execution of writ of inquiry and interlocutory judgment in original ſuit ſet aſide on terms.

THE original ſuit was treſpaſs quare clausum fregit, in which Steele and his wife had been held to bail under the ſtatute;* after the return of the writ the plaintiff obtained an aſſignment of the bail bond on which he iſſued the uſual proceſs, filed his declaration on the firſt of October 1802, and entered a default the eleventh of November; on the 17th the partner of the plaintiff's attorney received, when in his office, notice of the retainer of an attorney on behalf of the defendants in the bail bond ſuit, but no information was then given of any default having been entered. In January following final judgment was ſigned. On the eighth of March 1803, the attorney for the defendants in the bail bond ſuit was ſerved with a notice of executing a writ of inquiry † in the original ſuit; a declaration alſo in the ſame ſuit was then delivered, which the plaintiff's attorney ſwore was merely to apprize the defendant of the nature of the demand; but the attorney of the defendant ſwore it was ſerved abſolutely not on any condition, and that he did not know of the entry of the default in the bail bond ſuit or that any declaration had been filed; that acting under that impreſſion he did not attend the execution of the writ of inquiry or apply to the court laſt term. On theſe facts the defendant now moved that the default and interlocutory judgment in the original action and all the proceedings in the bail bond ſuit be ſet aſide and the defendants in the original cauſe let in to plead.

* 31ſt March 1801. c. 102. ſ. 3.

† Under ſ. 16 of ch. 90. of 31ſt March 1801. Query however if this ought not to be on application to the court by motion.

Per curiam. The court are of opinion the defendant's attorney was in default. He ought to have ſeen that the proceed-

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ings in the ſuit on the bail bond were regular. He ſhould have called after the default and tendered coſts. We do not ſay that the not diſcloſing the entry of the default in the ſuit againſt the bail amounts to a ſurpriſe, but it would have been rather more candid to have mentioned that circumſtance. Let the judgment on the bail bond ſtand as ſecurity and the coſts on that remain alſo. The default and ſubſequent proceedings in the original ſuit to be ſet aſide on payment of the coſts of entering the judgment under the ſtatute, and executing the writ of inquiry. The defendant to plead inſtanter to the declaration filed, take ſhort notice of trial, and pay the coſts of this application.

Livingſton J. I think the coſts on the bail bond ought to be paid.

William Lowry againſt Andrew Lawrence.

ON demurrer. The memorandum was of another term.

Be it remembered, that heretofore, to wit, on the third Tueſday of July in July term, in the year of our Lord one thouſand, eight hundred and one, &c. came William Lowry, and brought into the ſaid court then there, his certain bill, *&c.*

The ſuing out the writ is the commencement of the ſuit, and cauſe of action muſt be antecedent; if it appear otherwiſe on the face of the pleadings it is fatal on ſpecial demurrer.

The declaration was on a Bill of Exchange made in 1797, preſented for acceptance on the firſt of October 1801, and refuſed, of which notice to the defendant, who, on the 11th of October, promiſed.

To this the defendant demurred, and ſhewed for cauſe, that although the ſaid declaration is entitled of the term of July, in the year of our Lord one thouſand, eight hundred and one, yet the ſaid ſeveral promiſes and undertakings in the ſaid declaration mentioned, are therein ſtated to have been made on the eleventh day of October, in the year laſt aforeſaid, which is ſubſequent to the time of the exhibiting the *declaration* of the ſaid William againſt the ſaid Andrew, and for that it appears by the ſaid declaration that the pretended cauſes of action therein ſpecified had not, nor had either of them accrued to the ſaid William at the time of the exhibiting his *ſaid bill* in manner aforeſaid. The defendant inſiſted that, by the practice of this court, the ſuing out the writ was the

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commencement of the action; and if ſo, the declara ſhewed on the face of it, no cauſe of action when the ſuit commenced.

Ogden for the plaintiff. It is contended on the par the plaintiff that nothing appears on this record to warra judgment for the defendant.

2 Burr. 950. Johnſon & al. v. Smith. See Lord Mansfield's opinion 961. Cowper 454. Foſter v. Bonner.

By the courſe of the court the *filing* of the bill is the c mencement of the action in a legal ſenſe.

The latitat is conſidered only as proceſs.

The action is not deemed to be commenced until the b filed, though the real time of ſuing out the latitat is allo to be ſhewn, where it becomes material; as to prevent running of the ſtatute of limitations, &c. If ſuch a nece exiſted in this caſe the actual time of ſuing out the final ceſs might have been ſhewn by plea. But where it does exiſt the fiction of law will be preſerved, and eſpeciall when it is in furtherance of juſtice. On this occaſion, true queſtion therefore is, when, in a legal or technical ſe was this action commenced? This can only be aſcerta by ſhewing the time of *filing the bill*. The time of fi the bill may be examined into to ſhew the time of comn cing the action. It ought to have been ſhewn by pleadin this caſe. Not being ſhewn the court are at liberty to ſume that it was after the cauſe of action accrued. The tion of the declaration is matter of fiction and not conclu upon either party. If it be concluſive, all actions by bil privilege; actions againſt attornies of the court; act againſt abſent or abſconding debtors, giving ſecurity to ap to any declaration which may be filed by the petitioning c itor, would be defeated in all caſes in which the cauſe of tion accrued, during the vacation in which the declaratio filed. Becauſe in all theſe caſes the declaration is entitle the preceding term, and muſt neceſſarily be ſtated in memorandum to have been brought into court of that te This doctrine involves no hardſhip upon the defendant; cauſe, if in the firſt inſtance proceſs be iſſued before the c of action accrued, a Judge will diſcharge on common b So if the bill be filed before cauſe of action accrued, the tual time of filing it may be ſhewn and pleaded in abatem or in bar. In this caſe, it does not neceſſarily follow, t the cauſe of action did not accrue before the commencem

1 Comyn's Digeſt 103. Mod. Caſes 33.

of the action, and the time of that commencement not being ſhewn, the court are at liberty, and ought to preſume it to have accrued afterwards.

In addition to this general reaſoning on this ſubject, it may be obſerved that, in this inſtance, the real cauſe of action is ſtated to have accrued in 1797; being the date of the bill of exchange and long prior to the iſſuing of proceſs. It is the aſſumption, founded on that undertaking, which is ſtated to have been made in October 1801; and the time of the promiſe being wholly immaterial, the court will, in this circumſtance, ſee an additional motive for adopting the principle contended for by the plaintiff.

Per curiam. This caſe comes before the court on demurrer. It was an action of aſſumpſit, and the declaration captioned of July term 1801. The time laid in the declaration, at which the cauſe of action aroſe, is on the 11th day of October 1801. To this there is a ſpecial demurrer, alleging for cauſe, that the action appears from the declaration to have been commenced before cauſe of action aroſe. It is, we take it, well ſettled that if the plaintiff *at the commencement* of his ſuit had no cauſe of action a ſubſequent right would not maintain his action. And it has been ſettled in this court, in the caſe of Carpenter v. Butterfield, that as to every material purpoſe, the iſſuing the writ was the commencement of the ſuit—*ſo that* a note purchaſed by the defendant after that time could not be ſet off againſt the plaintiff's demand.*

The declaration muſt be captioned of the term when the writ is returned ſerved. This point is ſettled in the caſe of Smith v. Muller, and it is there alſo determined that the plaintiff cannot recover any demand after the term when the writ is returnable, though before the declaration is *actually filed.* Juſtice Buller there ſays, according to the antient practice the declaration was actually delivered the ſame term the writ was returned, and it was only in caſe of the plaintiff that the time of actual delivery was enlarged, but ſtill it muſt be conſidered as delivered *nunc pro tunc.*

Upon the principles of theſe authorities therefore, it muſt appear from the face of the declaration in this cauſe, and the court muſt neceſſarily intend the facts, that the writ was returned in July term 1801, and of courſe the action, both in fact, and technically ſpeaking, commenced previous to that

* See Crygier v. Long, Cole. Ca. Prac. 103. that if defendant put in bail, and plead in chief, he cannot, after verdict, take advantage of the writ's being ſued out before cauſe of action aroſe. If the arreſt be before debt due, application ought to be to a judge or the court without putting in bail.

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time. But the plaintiff alleges his cauſe of action to have ariſen on the 11th of October thereafter. We think therefore it appears upon the face of the record, that the action was commenced, before the right of action accrued. The time of actually filing the declaration cannot, as contended by the plaintiff's counſel, be conſidered the commencement of the ſuit: if therefore the defendant, by plea, had put the fact in iſſue, it would have been an immaterial fact; all the material facts appear by the plaintiff's own ſhowing. In the caſe of Ward v. Honeywood, the judgment was reverſed on writ of error, on the ground that it appeared on the face of the record, that there was no cauſe of action when the ſuit was commenced—if this would be error after judgment, advantage may certainly be taken of it by demurrer.

Doug. 61. that caſe was on marſhalſee proceſs, where the proceedings are by *plaint*; and in an inferior court the *plaint* is as an *original*. Savage v. Knight, 1 Leon. 302. See the obſervation of Aſhhurſt J. in Doug. 62.

We are therefore of opinion that judgment ought to be for the defendant.

Livingſton J. In England it is ſettled, that the filing of a bill or declaration is to be regarded for every eſſential purpoſe as the commencement of a ſuit, Vid. Cowp. 454—but in Carpenter and Butterfield, decided by this court, a different rule was adopted. The iſſuing of a writ was there conſidered as the beginning of an action, ſo much ſo that the defendant was not permitted to ſet off againſt the plaintiff's demand, a note which he had obtained for valuable conſideration between the ſealing of the proceſs and the arreſt. This rule, to operate fairly, muſt be mutual—if an action begins by iſſuing a writ ſo as to deprive the defendant of a ſet-off in the caſe mentioned, neither ought the plaintiffs to recover a demand not *then* due. *My* judgment therefore in favour of the defendant is not founded on Britiſh authorities, but entirely on a former deciſion of our own.

M'Neill's caſe.

The court will not pronounce judgment on a priſoner convicted at oyer & terminer of a conſpiracy, if the record of his conviction be not before them, but will admit to bail.

THE priſoner had, together with two other perſons, been convicted of a conſpiracy at the laſt oyer and terminer for the city and county of New-York, but had not ſurrendered to his bail in time to receive ſentence: he afterwards came in, and was now brought up, on his own petition, to have judgment pronounced; the public proſecutor appeared, but the record of

the conviction not being made up and brought into court, the bench ſaid they had nothing before them on which to proceed; and therefore admitted him to bail.

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Anonymous.

THE notice of motion in this cauſe was ſerved on a perſon in the houſe of the attorney, and where he kept his office: but held not ſufficient, as it ought to have been on a clerk in the office.*

Service.

* Swartwout ads. Gelſton, Cole. Ca. Prac. 77. "The ſervice muſt be on ſome "perſon in the office and belonging there; if nobody is there, it muſt be upon ſome "one in the houſe where the attorney reſides or the office is kept; and if nobody "is there, it may be left in the office."

Moyle againſt Gillingham.

NOTICE may be ſerved, on an agent in town, on the firſt day of term, to ſhew cauſe on the next day for non-enumerated motions; but then, it muſt be accompanied with a ſufficient excuſe for not having been for the firſt day. If the excuſe be received, the adverſe party will have till next term to ſend into the country to his principal, for counter affidavits.

Service of notices on agents for non-enumerated motions.

Abraham L. Brain againſt Rodelicks & Shivers.

IN this cauſe it was neceſſary to examine a witneſs in the Havannah; and, as that port was open only to certain privileged veſſels, in April 1802 a rule for a commiſſion was granted before iſſue joined, to prevent loſing an opportunity of tranſmiſſion which then preſented itſelf. No return having been made, the cauſe was noticed for trial for the laſt ſittings in March 1803, when the defendant's attorney, ſeeing ſome witneſſes in the court, whoſe abſence, he feared, might delay the cauſe after the return of the commiſſion, appeared and examined them; ſtating however, the circumſtances of his caſe, and that he begged to be conſidered as acting without prejudice to his future rights. He now moved to ſet aſide the

Commiſſion to examine may be before iſſue joined. A rule for commiſſion ſuſpends the trial till the rule be vacated: but if the defendant appear at the trial, and examine witneſſes, it will be a waiver of the rule to vacate.

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verdict, with costs; the plaintiff having proceeded to trial without vacating the rule for the commission.

Per curiam. When a rule for a commission has been obtained, it suspends the cause till, on application to the court, a vacatur be ordered and entered. But if the defendant appear and examine witnesses, it is a waiver of his commission, and the vacatur is unnecessary. The motion must be refused.

Codwise, Ludlow & Co. against John Hacker.

When there are cross causes, and the plaintiff in each has obtained a verdict, if material facts be omitted in a case made by a defendant, and the papers from whence they may be inserted, be in the hands of the plaintiff, the court will not order judgment to be entered, because cases have not been delivered, and tho' the case has been noticed, but will give leave to amend and perfect.

THE plaintiffs, in the sittings of June 1802 at New-York, as owners of a ship of which the defendant was captain, had, in action against him for deviating from his orders, obtained a verdict, subject to the opinion of the court on a case to be made; and he, in a cross suit, had recovered against them a larger sum, subject to deductions, in case the opinion of the court should be against him as to certain items, charged and allowed by the jury.

A case was made on the part of the defendant to which the plaintiff proposed amendments, which were adopted; the cause was then noticed for argument for the next October term, and also for January term following, in Albany. But it was then recollected, that some material facts had been omitted, without which the case could not present the only important question in the cause. This was mentioned to the plaintiff's attorney, who would not say whether he would consent to the amendments or not. The papers from whence they were to be drawn, and the case perfected, were in the hands of the plaintiff's attorney in New-York; so that the case could not be completed in Albany. No application was made to a judge to correct the amendments. Nor had cases been delivered.

Hopkins now moved to set aside the original order to stay proceedings that a case might be made, and for leave to enter up judgment.

Riker resisted the application, because the case was imperfect, and the papers from whence only it could be completed, were in the hands of the plaintiff.

Per curiam. We must deny the motion; because, in the first place, there were cross verdicts to nearly the same

amounts. Secondly, the caſes were never perfected, and it did not appear to be excluſively the fault of either. Thirdly, the plaintiff's attorney not having denied the omiſſion of certain material facts, the court would preſume they had appeared on the trial, and ought to be a part of the caſe. Let the caſe be perfected within 30 days.

Hopkins prayed coſts, inſiſting he had been regular.

Per curiam. We conſider that the plaintiff was irregular, in not anſwering when applied to, whether he would receive amendments or not.

N. B. It was ſaid by the court, that where a defendant, after verdict, makes a caſe and notices for argument, if he does not appear at the time when called, judgment ſhall go: but when the plaintiff notices a caſe made on the part of the defendant, and the plaintiff is not ready, it ſhall go down.

Practice as to noticing caſes.

P. Kemble, ſurvivor of Governeur and Kemble, againſt Walter Bowne.

Tried before Judge Livingſton, 9th of April 1802.

ASSUMPSIT on a policy of inſurance, not valued, dated the 3d September 1800, on the ſhip Helen, "At and from Point-Petre, Guadaloupe, to St. Thomas's, beginning the adventure at and from Guadaloupe and to continue till her arrival at St. Thomas's, and there ſafely moored." At a premium $17\frac{1}{2}$ per cent. The declaration contained an averment that the inſurance was made for Charles Gobert.

The defendant received no information from the broker, except that the ſhip was at Guadaloupe the 28th of July.

The Helen was a prize ſhip, and purchaſed for Charles Gobert, 20th November 1799, at Point-Petre, for 6450 dollars and 48 cents, including commiſſions on the purchaſe.

A prior inſurance had been made on the ſame veſſel and voyage at St. Thomas's, for 6400 dollars, at a premium of 30 per cent. (Gobert being there) which after paying commiſſions and premium, left 4349 dollars and 35 cents received by Gobert, which it was agreed was to be conſidered as a prior inſurance.

The amount inſured on the policy was 7500 dollars, and for that ſum the preſent action was inſtituted.

In a policy on a veſſel in a diſtant port from whence ſhe is to ſail, and ſtated to be there on a certain day, "at and from" mean the day on which ſhe is mentioned to be there, and the policy takes effect from thence. It is not neceſſary to diſcloſe how long a veſſel has lain in port antecedent to the policy. The two per cent deducted on a total loſs is, in caſe of diſaſter, a part of the premium.

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It appeared from the teſtimony of the captain who took charge of the Helen on the 20th Nov. 1799, and continued to command her till the 6th February 1800, that in that time he expended in repairing and other neceſſaries, 1335 dollars and 86 cents, including an item for wages in taking care of the ſhip, to a period after he reſigned the command; his knowledge of the payment he ſaid was derived from the information of the perſons employed in that duty: that the Helen was American built, copper bottomed, and would have been worth in New-York, with an American regiſter, 25,000 dollars; during the time he remained on board there were occaſionally ſugars and cotton put on board her, and taken out again to load other veſſels at that place, belonging to Mr. Gobert. From the evidence of the ſucceſſor of the firſt captain it appeared, that, being at Guadaloupe in July 1800, he received orders from Gobert's agent at St. Thomas's, to take poſſeſſion of the Helen, man, victual her, and ſend her to him there. That according to an account of one Brocha, Gobert's agent, "the purchaſe money, unrigging and tarring, ſafe "mooring and guarding the ſhip, while at Guadaloupe, "amounted to 7000 dollars. The witneſs paid Brocha 3000 "dollars, part of the purchaſe money, and Brocha told him "Gobert paid him 4000 dollars." Some expenditures were made upon the ſhip before the witneſs took poſſeſſion of her as before ſtated, to the amount of which he could not ſay. But the bill of diſburſements for the ſhip, paid by him for repairs and neceſſaries to get her diſpatched on the voyage from Point-Petre to St. Thomas's, came to 4461 dollars and 87 cents, amounting in the whole to 7461 dollars and 87 cents. The ſhip ſailed from St. Thomas's ſome time in September: the witneſs was a paſſenger; on the voyage ſhe was captured, carried into Antigua and condemned as prize; a claim had been interpoſed, in the proſecution of which, £.317:11:8½ was expended, of which the proportion to be paid by the ſhip was admitted to be about 500 dollars. The witneſs received poſſeſſion in July. That the repairs and outfits and the expences thereof done to her afterwards were particularly enumerated in the accounts rendered.

Mr. Ferrers, an eſtabliſhed Inſurance Broker, ſaid it was uſual in eſtimating the value of the ſhip to allow wages ad-

vanced to the captain and crew: commonly a month's pay as part of the outfit of a veſſel, alſo proviſions for the voyage, and all other charges for things requiſite and proper to prepare her for the voyage inſured. That no expenditures whatever previous to the commencement of the voyage are charges againſt the inſurers on freight. That ſome of the items in the accounts, in his opinion and according to his practice, *required* vouchers, or it could not be known whether they were proper or not. That in ſettling loſſes in ſuch caſes, vouchers were required by him. It was admitted that nine *livres* make one dollar.

The Judge expreſſed to the jury, as the inclination of his opinion, that the policy could not be conſidered as attaching from the firſt purchaſe of the ſhip by Gobert at Guadaloupe, but from the time ſome act was done towards equipping for the voyage. Whether however this was the caſe or not, and even to ſuppoſe it to have attached at the time of ſuch firſt purchaſe, that it was not neceſſary to diſcloſe to the underwriters the length of time the veſſel had remained at Guadaloupe, nor that ſhe had been uſed as a ſtore-ſhip at that place. He was of opinion that the account of the firſt witneſs ought to be laid out of the queſtion; yet however, independently of that, there appeared to be intereſt to the amount inſured in this policy, beyond the prior inſurance.

The *jury found* for the plaintiff, a total loſs, without going from the bar or examining the accounts.

The application was to ſet aſide the verdict as being contrary to law and evidence.

Pendleton for the defendant, made two points: Firſt, that the policy was void for concealment; ſecondly, that, allowing it to be otherwiſe, the verdict could not ſtand, being againſt evidence in finding a total loſs when only a partial injury had been ſuſtained. On the firſt point he obſerved, that a contract muſt be taken as it is worded, where there is no ambiguity, or it is no contract at all. In policies of aſſurance "at and from" a place, means firſt arrival at that place. Park 38,* and the caſe cited by Lord Hardwicke in Motteux v. London Aſſ. Com. 1 Atk. 48. It is true that the conſtruction is not univerſally the ſame. In France it is interpreted to be from the time of ſailing. 2 Emer. 14. But in England it is regulated by ſpecial contract. 1 Marſh 173. Bird v. Appleton, 1

* Leigh v. Mather.

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Marſh 60. That "at and from" mean from the firſt arrival is obvious from the words themſelves, and the two firſt cited authorities. If not ſo, when did the riſk commence? The Judge's opinion would make a new contract. It would be from beginning to equip for this voyage. But how is this to be aſcertained. The accounts of expenditure are without dates: they can ſhew nothing, and this very circumſtance is enough to throw aſide any other interpretation than the one contended for; becauſe if the commencement of the riſk be not mentioned, the policy is void. 1 Marſh 182. If this be ſo, then there was a material concealment in not diſcloſing the veſſel's having lain nine months at Guadaloupe, and uſed during that time as a ſtore-ſhip, or the ſtay was a deviation. On the point of concealment, it is ſettled that every fact not diſcloſed, which would increaſe the riſk, is material and vacates the policy. 1 Marſh 354. The difference of premium is deciſive on the importance of communicating her ſtay. At St. Thomas's it was 30 per cent; here $17\frac{1}{2}$. To prove that concealing the length of ſtay would vacate the policy, he relied on Hodgſon v. Richardſon, 1 Black .463, the ſtay would deteriorate the veſſel and increaſe the hazard. It was therefore a material fact to be diſcloſed, and if ſo, whether the loſs was occaſioned by the fact concealed or not, was perfectly immaterial. Fillis v. Bruton, Park. 183. Seaman v. Fonnereau, 2 Str. 1183. But allowing the verdict not to be void the plaintiffs are not entitled to a total loſs, the amount inſured was - - - - - - dollars 7500
the firſt coſt of the veſſel was, including the commiſſions and neceſſary diſburſements, but throwing out the month's wages and charges previous to the policy - - - dollars 5683
ſo that the whole cannot be due.

Hamilton contra. In this caſe the ſituation and circumſtances of the veſſel antecedent to the orders for inſurance were perfectly immaterial, and therefore needed not to have been diſcloſed. The only effect which the Helen's ſtay at Guadaloupe could have had, would have been to render her leſs fit for the voyage inſured. That ſhe was completely adequate to its performance, was a warranty implied in this as in every other policy. It is a ſettled principle, that whatever is warranted againſt, whether it be in expreſs terms or by implication, need not be diſcloſed, and the reaſon is obvious, becauſe it is

a riſk the aſſured takes on himſelf. Though the conſtruction given to the words "at and from" could not be totally denied, it could not be univerſally acceded to. The interpretation relied on was applicable to only thoſe caſes of inſurance where a veſſel was inſured at and from a port *to which ſhe was going*: but when the terms in queſtion were uſed in reference to a veſſel *in* a diſtant port, *from whence* the voyage inſured was *to* have its inception, the expreſſion could mean only *from* the time ſome act was done towards equipping for the voyage intended; at the utmoſt it could not relate back farther than to the orders for inſurance. But as the voyage might, even after the orders given, be in fact deſerted, it would perhaps be the ſafeſt interpretation to ſay the policy ſhould never attach but on ſome overt act indicatory of carrying it into execution. On the other point, the accounts and the teſtimony on which they were founded were before the court, and carried their propriety or impropriety on their face.

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Per curiam. Two queſtions are made in this cauſe.

I. Was every proper information given to the underwriter?

II. Were the charges proper and ſufficiently proved?

On the firſt no doubt was entertained at the trial nor is any now. It was not neceſſary to diſcloſe how long the Helen had been at Guadaloupe, nor that ſhe was a prize ſhip. The firſt could be material only in caſe her being there antecedent to the inſurance had enhanced the riſk, and the latter in caſe of a warranty or repreſentation which negatived her being a ſhip of that deſcription. It is of no importance how long ſhe had been at Guadaloupe unleſs the policy attached from the moment of her arrival there, although it might have been ſeveral years before it was effected. The conſtruction contended for would be unnatural. In a caſe like this, when a veſſel has been long in port previous to an inſurance, the riſk does not commence till ſome act be done towards equipping her for the voyage, or on the day on which ſhe is ſtated, as here, to have been in ſafety in the port from which ſhe was to ſail—this was the 28th of July 1800. If ſhe had been loſt or injured before that day, the underwriters would not have been liable. When ſhe is ſtated to have been at Guadaloupe on a certain day, it muſt mean that ſhe was there in ſafety, and that no preceding accident was to be made good by the aſſurers—it cannot therefore be material

* The rule in England is, that when the words "at and from"

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are in a policy effected on a veſſel then and before in port, the riſk begins from the ſubſcribing: when on a veſſel expected to arrive at a certain place but at which ſhe has not arrived, the riſk commences on the firſt arrival. Neither of theſe principles it is evident would govern here.

where ſhe was prior to that day, for the parties by agreeme have aſcertained that the riſk ſhall commence on the 28 July 1800.

The other queſtion relates to the value of the veſſel. forming this valuation, there were added to the firſt co ſundry charges, on the propriety of which we are now to c termine. On the trial one account was rejected, and we fi think thoſe charges improper, becauſe they accrued prior the 6th of February 1800, five months before the policy tached; but principally becauſe they are, with hardly a exception, of ſuch natures as to have been occaſioned ſol by her ſtay at Guadaloupe, and ſuch as gave no permane value to the veſſel. They conſiſt (except one anchor) of pr viſions, which muſt have been conſumed while the veſſel v uſed as a ſtore-ſhip, and of wages and other diſburſemen which became neceſſary by ſuch ſtay, and ought not to ſw the computation when we are aſcertaining her worth.

To the other account it is objected that the items are neith proper nor well proved. As to the proof, Davis, the fi witneſs ſays, " The bill of diſburſements for the ſhip *paid* " him for repairs and neceſſaries to get the ſhip diſpatched " the voyage from Point-Petre to St. Thomas's, amount " to 4461 dollars, as per account (A) annexed." There nothing of hearſay in this—he paid the money himſelf, a ſtates on what account. What he heard, related only to t purchaſe money, not to what was paid for repairs—it is tr there is no date to this account, but it is a fair deductio from the depoſition of Davis, that all theſe expences were curred after he took poſſeſſion of her, which was in Ju 1800: for he expreſsly ſtates, that he cannot ſay what e penditures took place *before the veſſel came to his han* The propriety of many of theſe charges againſt an und writer on the veſſel is alſo denied. If theſe be deduct there will ſtill remain a ſum large enough to entitle the pla tiff to retain his verdict. It is admitted that in eſtimati the value of a veſſel, it is uſual to allow a month's pay a vanced to the captain and crew, proviſions for the voya and all other charges for articles neceſſary to prepare her it. The counſel will be furniſhed with an eſtimate of t court according to this opinion, in which the deduction m be regarded as liberal as they reſpect the underwriters.

Upon the whole, we are ſatisfied that the firſt coſt of the veſſel, and the expences of ſuch repairs and outfits as are properly chargeable againſt the underwriters on her, are fully equal to the ſums covered by the two policies, and that therefore a new trial ought not to be granted.

N. B. By a ſtatement which was read as forming a part of the opinion of the court, the value of the Helen was thus eſtimated.

	Livres.	Dollars.
The Helen coſt - - -		6450:48
There was received on a prior policy		4349:35
This leaves of her firſt coſt for this policy		2101:13
To this muſt be added the following items of the account A:		
The hire of ſundry hands for rigging and ballaſting, &c. - -	7020	
Old cordage - - - - -	360	
Do. 630. an anchor 540. - -	1170	
* Plank 81. carpenters 540. - -	1421	
Beef and pork 864. cable 2070	2934	
Cordage bought at vendue - -	1440	
Caulking the long-boat - -	180	
Bill for plank - - - - -	74	
Blackſmith's bill 474. Caulker's 756.	1230	
Two bills for crockery for cabin 540 and 198. - - - - -	738	
Paid for a boat - - - - -	576	
† A top-gallant-ſail and ſome others	2142	
Two ſpars 387. cooper 270. - -	657	
Ship chandler - - - - -	2994	
Carpenter's bill, water, &c. - -	594	
Wages to captain, &c. advanced - -	3672	
	27,202	
Commiſſions at 5 per cent. - -	1361	
	28,563	
9 livres = to one dollar		3173:00

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	Dollars.
Add alſo premium of inſurance on ſecond policy for dollars 7500. - - -	1312:50
Commiſſions on do. at 5 per cent. - -	65:62
Expences of reclaiming her after capture - -	200:00
	6852:25
A miſtake in adding the items marked †	44:00
Intereſt as uſual on this ſum after deducting 2 per cent. - - -	137:93
	6758:32

The two per cent, which by contract of the parties are to be deducted in caſe of loſs, we regard as part of the conſideration for the inſurance, or as ſo much additional premium in the event of a diſaſter. To add it therefore to the valuation would be a violation of this agreement. The paſſages referred to in Weſket only ſhew how an inſurance ought to be made to be completely covered, not that two per cent. of the value ſhall not be retained where it is ſo ſtipulated. He admits this was formerly the practice in England, but policies there do not now contain this clauſe: on the whole, we think two per cent. muſt be deducted from the preceding valuation and intereſt calculated on the balance, to wit, on the ſum of dollars 6758:32.

Miſtake of dollars 88:88 in the item marked * makes the true ſum dollars 6669:44.

James Jackſon ex dem. Nathaniel Potter and others againſt Solomon Hubbard.

Under the act of the 8th Jan. 1794 for regiſtering deeds of military lands, &c. a prior deed not depoſited in the clerk's office is void againſt a ſubſequent purchaſe for a bona fide conſideration whoſe deed is depoſited.

EJECTMENT to recover Lot No. 49, Tully, in the county of Onondago. The facts were as follow:

Iſaac Hubble the patentee, on 30th of September 1783, duly conveyed the premiſes to Joſeph Brown and John M'Auly, who, on the 22d February 1786, duly conveyed the ſame to Hugh Walſh. The firſt deed was never depoſited in the Clerk's office, but was on the 8th of June 1791, recorded in the Secretary's office, and on the 29th of April 1797, in the Clerk's office at Onondago. The laſt deed was alſo recorded in the Secretary's office on the 8th of June 1791, and on the

7th September 1794, depoſited in the clerk's office according to law. Hugh Walſh, in due form conveyed the premiſes to Charles P. Rogers, and Charles P. Rogers to Nathaniel Potter, which laſt mentioned two deeds were recorded in the clerk's office of Onondago. Iſaac Hubble, on the firſt of October 1788, duly executed a power of attorney to Jonathan Danforth and Ezekiel Tiffany, empowering them, jointly and ſeverally, to convey the ſaid premiſes to Eliſha Crane and Moſes Budeno. Tiffany, on the 14th of Auguſt 1795 conveyed the ſaid premiſes to Crane and Budeno, and the deed was recorded in the clerk's office of Onondago. Budeno, on the ſame day laſt mentioned, conveyed one undivided moiety of the premiſes to Sebaſtian Viſcher, which conveyance was recorded in like manner. Crane, on the firſt of October in the year laſt mentioned, conveyed his moiety of the premiſes to George Allen. Viſcher, on the 4th of June 1796, alſo conveyed his moiety to the ſaid George Allen, who, on the 25th of June in the ſame year laſt mentioned, conveyed the whole premiſes in queſtion to the defendant and one David Ruſſell, which four laſt mentioned conveyances were recorded in the clerk's office aforeſaid. The defendant has been in poſſeſſion of the premiſes ever ſince his purchaſe and ſtill continues in the poſſeſſion thereof. Upon the preceding caſe the following queſtion is ſubmitted for the opinion of the Supreme Court—to wit, whether the plaintiff is entitled to recover, ſeeing that the deed from the patentee to Brown and M'Auly, under which he claims, has not been depoſited in the clerk's office according to law?

Per curiam. Both parties are fair purchaſers of a military lot of land. The deed under which the leſſor of the plaintiff claims is prior in date, and was on record in the ſecretary's office previous to the paſſing of the act requiring all ſuch deeds by a certain day to be depoſited with the clerk of the county of Albany, and declaring ſuch as ſhould not be depoſited void as to ſubſequent purchaſers, for valuable conſideration, who ſhould ſo depoſit their deeds. The defendant's deed was ſo depoſited. The deed from the firſt purchaſer to the leſſor of the plaintiff, together with the power of attorney under which it was executed, was alſo duly depoſited agreeable to the act; and the queſtion which the parties have ſtated is, whether ſuch recording in the ſecretary's office is to

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be conſidered as notice, and thus ſatisfying the principal object of the act. We think it does not. It was not the deſign of the legiſlature to direct a mere regiſtry of ſuch deeds for the purpoſe of enabling the purchaſers to examine a fair deduction of title. But the object of the act declared to be, is, the prevention of frauds by facilitating the means of diſcovering forgeries. Now the examination of a mere record could not conduce to this end. Nothing ſhort of an inſpection of the original would in many caſes anſwer the purpoſe; particularly where the forgery conſiſted in antedating the deed, and this ſpecies of forgery, we may infer from the act, which particularly alludes to it, was probably the moſt frequent.

We are of opinion that judgment be for the defendants.

L. and H. Vandyck againſt Van Beuren & Voſburg.

Where a conveyance might have been claimed, and poſſeſſion has gone with the right to claim, a deed will, after fifty years, be preſumed. A ſole poſſeſſion under claim of right for forty years by one tenant in common amounts to an ouſter. The word "deſire" in a will raiſes a truſt, where the objects of that deſire are ſpecified.

THIS was an action of treſpaſs *quare clauſum fregit*, for entering and cutting wood in five ſeveral lots in De Bruyn's patent in the county of Columbia. The plea was, not guilty, with notice that the defendants were tenants in common of the *loci in quibus*, and were ſeized in fee of a ninth part thereof. The cauſe had been firſt tried before his honour the Chief Juſtice, at a Circuit Court in Columbia County, on the 25th June 1800. The facts were briefly theſe:

Stephanus Van Alen, by his will of the 17th May 1740, deviſed inter alia as follows: "Item. I give and bequeath "unto my ſons Cornelius, Jacobus, and Ephraim, all my land "or ſhare that I have in the patent called the Bruyn's patent, "lying within the bounds of Kinderhook patent, with all the "privileges, hereditaments, and appurtenances thereunto "belonging, or in any wife appertaining, unto them my ſaid "ſons Cornelius, &c. and to their heirs and aſſigns forever, "each one equal third part thereof, the whole into three "equal parts to be divided, with a proviſo and reſtriction "that they my ſaid ſons Cornelius, &c. do pay, or cauſe to "be paid therefor unto my daughters Hyletje, Elbertje, Jan-"nettje, Chriſtina, my grand daughter Maria,* and their

* She was the daughter of the teſtator's eldeſt ſon Lawrence.

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States, and after the death of her huſband made the conveyance relied on. The admiſſion of this conveyance was reſiſted by the plaintiffs' counſel on three grounds:

1ſt. That the plaintiffs had given ſufficient evidence of abſolute, excluſive poſſeſſion of the premiſes pretended to be conveyed to the defendants. 2dly. That this poſſeſſion amounted to an actual ouſter, even upon the ſuppoſition that a tenancy in common was created by the ſaid Will. 3dly. That ſuppoſing Maria Herkemer could be conſidered as a tenant in common, yet ſhe had only a right of entry which is not aſſignable, and this being the caſe it contravened the ſtatute made to prevent maintenance.

The objections were overruled. No evidence was given of the payment of the ſum of £.12:10:0 to any of the daughters or to Maria. The Judge charged the law to be in favour of the defendants, in conſequence of which a verdict was given for them.

On a motion for a new trial in April term 1801, it was ſo ordered; and the cauſe being heard before his honour Mr. Juſtice Radcliff, on the 6th of October 1801, a verdict was, on his honour's charge, rendered for the plaintiffs.

A motion was made to ſet aſide this alſo; the facts were ſubſtantially the ſame as in the former cauſe, and the additional circumſtances are noticed in the deciſion of the court, but the reporter has to regret his inability to give the arguments at the hearing, as it took place before the commencement of the preſent ſeries.

Per curiam. On the trial it was proved by the plaintiffs that they did then, and for about twenty years preceding had lived on De Bruyn's patent; that they had a houſe and orchard and 28 acres adjoining the ſame, as early as 20 years preceding, and that they held other parcels of land; that the patent was divided in 1793, and the plaintiffs then took actual poſſeſſion of the *loci in quibus*, which were uncleared wood lots, and that the defendants had cut wood in ſome of them; that in 1796, the plaintiffs had leaſed parts of the lots contained in the declaration; that the plaintiffs claimed the whole of their lands in De Bruyn's patent, under the will of Stephanus Van Alen; that their mother was Hyletje, a daughter of Stephanus Van Alen; that in 1751 or in 1752, ſhe lived where the plaintiffs now do on the patent, and the

plaintiffs then lived with her; that the land near the houſe was then cleared; that Hyletje died in 1767, and other parcels were cleared by that time, or at leaſt by 1772; that one piece was cleared in 1761, and then in poſſeſſion of the plaintiffs; that Stephen Van Alen, the teſtator, had a ſon Cornelius, who had a ſon Stephen, who had a ſon Cornelius, each of whom was the eldeſt ſon in ſucceſſion.

On the part of the defendants, the will of Stephanus Van Alen was produced, bearing date 17th of May 1740. It was proved that the teſtator left three ſons, and that two of them died above fifty years ago without iſſue; that Maria was the daughter of Lawrence, the eldeſt ſon of Stephanus, and who died in the life time of his father; that Maria married, at the age of 20, one Herkemer, and in 1776 or 1777 went to Canada to her huſband; that her huſband died in 1795, and that ever ſince ſhe reſided in Canada. The defendants then offered a deed to them from Maria Herkemer, dated January 8, 1800, but this was overruled: that the defendants further proved, that in 1799, the ſon of Maria Herkemer offered the premiſes for ſale to the plaintiffs for £.100; that the plaintiffs offered a price but no bargain was concluded; that, a few days after, one of the plaintiffs admitted that Maria Herkemer was heir to one ninth of his land—the deed was then offered again and rejected—the defendants further proved, that in 1751 or 1752, on a diviſion of part of De Bruyn's patent, and which was after the death of Stephanus, his eldeſt ſon Cornelius acted as agent for the ſhare of Stephanus, and claimed, beſides his own ſhare under his father's will, one third of the two ſhares of his two brothers who were dead; that Henry Van Dyck claimed a ninth part of the patent, and that Hyletje and the plaintiffs after her claimed the whole ſhare of Stephanus; that about that time Cornelius took poſſeſſion of part, and paid four-ninths of the coſts of an ejectment ſuit in defending the land, and that the plaintiffs paid five-ninths of the coſts; that on the diviſion of the patent in 1793, the ſhare of Stephanus was deſignated as laid out for his repreſentatives. It was further proved that the plaintiffs had offered £.100 for Maria Herkemer's ſhare, and one of the plaintiffs ſaid Maria had a right to money and not land by the will: that at another time (about 4 years ago) one of the plaintiffs confeſſed he meant to buy a part of the premiſes of

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Mrs. Herkemer: that Cornelius Van Alen, the ſon of Stephen who was the ſon of Cornelius, had for many years uninterruptedly cut wood in ſeveral of the lots mentioned in the narration, and that, as well before as ſince the diviſion in 1793, and that he, for ſeveral years paſt, had in poſſeſſion, and ſtill has two pieces of land in the land allotted to the ſhare of Stephanus Van Alen: the deed of Mrs. Herkemer was again offered and refuſed, and a verdict taken for the plaintiffs.

It appears, by the will of Stephanus Van Alen* referred to in the caſe, that he gave to his "three ſons, to wit, Cornelius, Jacobus, and Ephraim, and their heirs, *all his lands or ſhare in the De Bruyn's patent*, each an equal third part, with a proviſo or reſtriction that they ſhould pay to his daughters Hyletje, Elbertje, Jannetje and Chriſtina and to his grand-daughter *Maria* (daughter of his deceaſed ſon Lawrence) each £.12:10:0 in ſix equal payments: and that if any of the ſaid children, or the grandchild ſhould die under age or without iſſue, the portion of ſuch child or grandchild to be divided equally among the ſurvivors: the teſtator further *deſired* his ſaid three ſons, that in caſe any of his ſaid daughters ſhould be inclined to purchaſe of them the land in De Bruyn's patent for a living for herſelf and family, that then they let ſuch of his daughters have it at the ſame price they had it for."

This controverſy, upon a ſtatement of facts ſubſtantially the ſame with that in the preſent caſe, was formerly brought into view before this court and received a deciſion in April term 1801. It came before the court upon a motion for a new trial for miſdirection of the Judge who had charged the jury that the law was with the defendants, and who had admitted the deed of Maria Herkemer. A new trial was awarded by the court, and it is in conſequence of ſuch new trial that the preſent application is made.

In the former caſe it appeared that the plaintiffs claimed the *loci in quibus* as ſons of Hyletje, the eldeſt daughter of Stephanus Van Alen: that the defendants claimed under the recent deed of the widow Herkemer, and that her right aroſe under the will, ſhe having ſurvived the two ſons of the teſta-

* He claimed one ninth of the patent, amounting to 900 acres, chiefly pine land.

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tor, both of whom had died without iſſue 55 years before the trial, when her right accrued, and that ſhe claimed an undivided ſixth part of two third parts of the teſtator's intereſt in the patent.

The court then decided,

1. That a deed from Cornelius to his ſiſter Hyletje might be *preſumed* from her entry fifty years before and uninterrupted poſſeſſion in her children ſince, *according to the nature and ſituation of the land*; and that this preſumption was the more readily to be made ſince ſhe had a *right* by the will *to claim a deed* and had intimated her wiſh accordingly.

3 Durnf. 155. 159.

2. That if this was not ſo, yet that the deed of the widow Herkemer was *void*, for ſhe being out of poſſeſſion and no demand or claim by her huſband or her for forty-two years after ſhe came of age, the jury ought to have been directed to *preſume an ouſter*, and that if ouſted, ſhe could not convey. The caſe in 1 Leon. 166,* was referred to as proving that a feme covert, whilſt feme covert might be diſſeized, ſo as to render her deed before re-entry, maintenance. The firſt enquiry that naturally ariſes in this caſe, is, whether there be any change in the facts ſufficient to change the concluſions of law that were drawn in the former caſe?

Cowp. 217. * Slyright & Page's caſe.

1. With reſpect to the preſumption that Hyletje received a deed from her brother Cornelius, the ſame facts are here to warrant it.

It appears that by the will of her father, an election was given to any of the daughters to purchaſe the premiſes and a truſt was raiſed in the will for that purpoſe; that Hyletje entered upon the premiſes with her children as early as 1751 or 1752, and after her father's death, and claimed the whole ſhare of Stephanus; that ſhe continued in poſſeſſion till her death in 1767, and that her ſons have remained in poſſeſſion of the *loci in quibus* down to the preſent day, and have alſo claimed the whole ſhare of the teſtator; that this entry and poſſeſſion of Hyletje muſt have been with the knowledge and aſſent of the other children, and have paſſed under their eye, for it appears that on the diviſion of the patent in 1751 or 1752, Cornelius, the ſon of the teſtator, was preſent and claimed the whole of his father's ſhare, and took poſſeſſion of part; that this poſſeſſion muſt ſoon thereafter have been abandoned, ſince we find within the ſame year Hyletje in poſ-

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ſeſſion, and this claim muſt ſoon thereafter have ceaſed, ſince we hear no more of it, and the claim of Hyletje remained ſanctioned by poſſeſſion; that the poſſeſſion was ſuch as the ſubject was ſuſceptible of, it being underſtood that a large part of the premiſes was uncleared pine land, and from all theſe circumſtances there ariſes a ſtrong and unſhaken preſumption of *right*. A deed is juſtly, if not *neceſſarily* to be *preſumed*, and conſiderations of public convenience and ſound policy will, under ſuch circumſtances of ancient and continued poſſeſſion by colour and claim of right, require the preſumption. We are therefore clearly of opinion that the deciſion in the former caſe applies and governs the preſent one on the firſt point, and that the verdict is right and ought to ſtand, whatever may be our opinion as to the legal operation of the deed of Mrs. Herkemer. But,

2. We think that we are alſo bound by the former deciſion to conſider the deed of Mrs. Herkemer as void, and that the ſame facts are ſtated in this caſe to lead to the ſame reſult. Her right, under the will, and upon the death of her two brothers, had accrued upwards of fifty years before the trial. Concurrently with the commencement of her right, Hyletje had entered under a claim to the whole ſhare of her father, and under a right to elect and demand a deed for the ſame. This entry and enjoyment of the premiſes muſt have been *adverſe* to the claim of her niece, and her poſſeſſion continued down in her and her ſons, had every appearance of an excluſive and independent poſſeſſion. One ſtrong mark of excluſive ownerſhip was the extenſion of the clearings from time to time, and this in purſuance of a claim to the whole ſhare of the teſtator made by Hyletje and her ſons. It does not appear that from the time of the commencement of the right of Mrs. Herkemer down to the date of her deed in 1800, a period of about fifty years, that ſhe ever aſſerted her right, or received or claimed any ſhare in the profits of the premiſes, and that an adverſe claim of poſſeſſion was conſtantly before her. Theſe facts undoubtedly amount to an ouſter, and when the court in the former deciſion ſaid that the jury ought to have been *directed to preſume an ouſter*, the deciſion undoubtedly was, that *the law* raiſed this preſumption, and that the jury were not at liberty to reſiſt it; that it was a preſumption of law ariſing from facts, and if ſo, it would not be the exer-

eſe of ſound diſcretion—it would be an idle and uſeleſs act, to remand this cauſe back to another jury, in order that the deed might be admitted, and then that the jury might under the direction of the court, preſume an ouſter, ſince we perceive that the facts *require* that preſumption—ſince the law raiſes and draws that preſumption from facts of which there is no controverſy and *no other preſumption* can be warranted. The deed was illegal evidence when it appeared that the grantor's right at the time of the execution of the deed, conſiſted in a right of action merely. The confeſſions of the plaintiffs made within a few years paſt, acknowledging the right of Maria by offers to purchaſe, whether made for the ſake of peace or from a conviction of her right, are not inconſiſtent with the fact of the ouſter; for, admitting her claim to have been turned into a naked right, theſe confeſſions might equally have been made. They do not therefore weaken the concluſion drawn, or reſulting from the antecedent facts.

Our opinion accordingly is, that the defendants take nothing by their motion.

The reporter has been favoured with a minute of the reaſons on which his honour Mr. J. Radcliff founded his concurrence with the opinion of the court, and though the reſult is the ſame, it is conceived the profeſſion will be thankful for its inſertion.

"The material facts and circumſtances appearing on the ſecond trial of this cauſe are *in my opinion* eſſentially the ſame with thoſe on the former trial, and the reſult therefore ought to be the ſame.—On that occaſion we decided,

"1ſt. That from the long and uninterrupted poſſeſſion of Hyletje, the ſiſter of Cornelius Van Alen, and her *right to claim a deed* under the will of Stephanus Van Alen, ſuch deed might be *preſumed* under the circumſtances of the caſe. 3 T. Rep. 1, 7, 9.

"2d. That the deed from the widow Herkemer was *void*, ſhe being actually out of poſſeſſion at the time it was made and for a great length of time before, and the jury ought therefore to be directed to *preſume and ouſter*, and if ouſted ſhe could not lawfully convey. Cowp. 217.

"3d. That although a feme covert ſhe might be *diſſeiſed* ſo as to render her deed maintenance, and 1 Leon. 166 was cited to that effect. The ſaving in the ſtatute of limitations alſo implies that *feme coverts* and *infants* may be *diſſeiſed*. 1 Leon. 166

"On theſe grounds a new trial was awarded, and I think nothing new has appeared to change the merits on theſe points. The teſtimony of Mr. Gardinier and P. Van Neſs, which has been principally relied upon by the defendants, whether conſidered as evidence of negociations for a compromiſe or otherwiſe, does not tend to diſprove the fact of poſſeſſion in the plaintiffs, or to deſtroy the preſumption of an ouſter of the widow Herkemer. Theſe witneſſes teſtified to overtures between the parties or to verbal declarations of the plaintiffs merely, and did not prove the exiſtence of any fact, relative to the poſſeſſion, materially different from what appeared on the former trial.

"The deed of Mrs. Herkemer, therefore, I continue to think, was properly excluded."

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William Henderſon and others againſt William Brown.

If a houſe be liable to be aſſeſſed, treſpaſs will not lie againſt an inferior officer for executing a warrant of diſtreſs though the aſſeſſment be erroneous.

TRESPASS for breaking and entering the plaintiff's cloſe, called the New Theatre, and taking and carrying away three hundred and twenty-five pieces of ſilver coin, of the value of one dollar each. Plea not guilty, with an agreement that any of the following facts, ſtated in the caſe reſerved for the opinion of the court, might be given in evidence with the ſame advantage as if they had been ſpecially pleaded.

The defendant was duly appointed a collector of the direct tax for the diſtrict in which the locus in quo is ſituated, under an act of Congreſs, * entitled "An act to lay and collect a direct tax within the United States." He was alſo duly† furniſhed with a liſt in which the locus in quo was deſignated as the dwelling-houſe of John Hodgkinſon, and as ſuch was taxed at three hundred and twenty-five dollars, for non-payment whereof he entered and took the ſilver coin in queſtion.

* July 14, 1798, Con. 5, ſeſſ. 1. ch. 92. ſ. 4.
† ſ. 2. 5. 6.

The theatre and appurtenances on which the tax was laid and levied as aforeſaid, were not the dwellings of any one, but merely buildings for the exhibition of dramatic performances, though the theatre itſelf was inſerted in the liſt of dwelling-houſes by the aſſeſſors in the valuation made under the act of Congreſs,‡ entitled "An act for the valuation of lands and dwelling-houſes and the enumeration of ſlaves within the United States," and no appeal ‖ was made from the aſſeſſment.

‡ 9th July, 1798, Con. 5. ſeſſ. 1. ch. 87. ſ. 8. 9.

‖ Sec. 18.

Had the theatre and property been inſerted in the land liſt, the tax upon it would have been leſs than the one with which it was now charged. The defendant had not any authority to enter and make the diſtreſs, except ſuch as he derived under the tax laid upon it as a dwelling-houſe.

If the court ſhould, on this ſtatement, be of opinion that ſuch authority was ſufficient to juſtify the entering and taking of the diſtreſs, a verdict was to be entered for the defendant, otherwiſe for the plaintiff, with intereſt from the time of the diſtreſs made: the form of action or of pleading not to prejudice the determination of the queſtion on either ſide.

Hopkins for the plaintiff. The act of the 9th of July, 1798, ſpecifies the kinds of property which are the ſubjects

of valuation, and the manner of making the liſts. Dwelling-houſes, with the out-houſes appurtenant, and the lots on which the ſame are erected, not exceeding two acres in any caſe, are to be inſerted in one liſt. All lands, &c. except thoſe on which dwelling-houſes are erected, are to be valued, inſerted in another liſt, and valued with a reference to all buildings thereon. A theatre is not in its nature a dwelling-houſe. The caſe negatives the fact of its being the dwelling-houſe of any perſon whomſoever. It ought therefore to have been included in the liſt of lands with the buildings thereon. The manner in which the direct tax is to be levied by the act of the 14th of July, 1798,* makes this very material to the citizen. Houſes and ſlaves are taxed at ſpecific ſums: upon land is aſſeſſed only the reſiduary ſum neceſſary to complete the amount directed to be levied in each ſtate. Had the theatre, which as a houſe is taxed at three hundred and twenty-five dollars, been placed on its proper liſt it would not have been aſſeſſed to one fourth of the amount. Here therefore is a wrong for which the law muſt afford ſome remedy. 1 H. Black. 68.† 4 D. & E. 2 & 4.‡ 8 D. & E. 468 ‖ ſhew that in ſimilar caſes the remedy, in the Engliſh courts, is eſtabliſhed to be againſt the collector who diſtrains for the tax, and that treſpaſs is the proper form of action. The mode of redreſs by appeal given by the act of the 9th of July, 1798,§ is not applicable to the preſent caſe for many reaſons. 1ſt. The principal aſſeſſor can only correct inequalities in reference to other valuations: he cannot remove property from one liſt to the other. 2d. The houſe or land might be very properly valued, though placed on the wrong liſt; in this caſe there would be a grievance, though nothing for the principal aſſeſſor to redreſs, becauſe there would be no error in the valuation. 3d. The time of appealing to the principal aſſeſſor is before the tax could by law be apportioned upon houſes and lands. Therefore altho' the circumſtance of the theatre's being placed on the wrong liſt might be the ground of a ſerious injury to the party, yet he could not at the time of the appeal, know it would ſo operate: nor could the principal aſſeſſor take that circumſtance into conſideration or be appriſed of it at the period of pronouncing judgment on the appeal.

* Sec. 2.

† Harriſon v. Bulcock & ſix others.
‡ William v. Pritchard. Eddington v. Borman.
‖ Perchard v. Heywood.
§ Sec. 18. 19. 20.

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Hamilton contra.* Three queſtions preſent themſelves for the conſideration of the court. 1ſt. Whether this court will enter into any examination of the acts of the mere miniſterial officers of the general government, acting under their revenue laws? 2d. Whether the judgment of the aſſeſſor is at all examinable here? Whether a warrant upon the face of it regular, is not a complete juſtification to the defendant? On the firſt point he ſaid he ſhould not himſelf much inſiſt, but as the idea had been entertained by gentlemen of ſome conſideration, he thought it his duty not to paſs it over in ſilence. On the other points he obſerved that policy and juſtice require that mere miniſterial officers ſhould not be either compellable, or even permitted to queſtion the legality of the proceedings of thoſe under whom they act. With regard to officers of courts the rule certainly is, that the writ is a juſtification unleſs the want of juriſdiction, or a manifeſt abuſe of that juriſdiction appear upon the face of it. The inclination of the courts has been to narrow the liabilities of all mere executive officers. In caſes like the preſent the hardſhip and inconvenience of making the officer liable are great. He muſt be ſuppoſed innocent of any intentional wrong, and acting merely in obedience to ſuperior orders, againſt which no one is bound to indemnify him. There was nothing in the appearance of the theatre to ſtrike his ſenſes that it could not be uſed as a dwelling-houſe. It was not a viſible impoſſibility in the nature of the building: ſome part might have been occupied by the manager or Mr. Hodgkinſon, as whoſe reſidence it was particularly deſcribed. The defendant did not therefore wilfully, with his eyes open, and when he was convinced he was doing wrong, commit the treſpaſs complained of. If the plaintiffs are injured they have their remedy by appeal to the principal aſſeſſor, who would certainly afford redreſs. Should it not be obtained, they may petition Congreſs. The wrong now complained of, if any, is that of the aſſeſſors, and if individuals are to be made liable, the action ought to be againſt them, not againſt the collector.

* What is here reported is from a few looſe notes furniſhed by a gentleman of the bar, taken without any view to publication, thoſe therefore who have heard the eloquence of Mr. Hamilton will be ſenſible how much this attempt falls ſhort of what muſt have been ſaid.

Hopkins in reply. Treſpaſs is the proper and only remedy for the plaintiffs, nor could it be maintained againſt the aſſeſſors unleſs the collector were liable: if ſo at all, it muſt be as a treſpaſſer, and he may therefore be ſued ſeparately. If it be meant that caſe ſhould be brought againſt the aſſeſſors, that action certainly will not lie, unleſs they maliciouſly and corruptly made a wrongful aſſeſſment. The rule that a proceſs regular upon the face of it, ſhall juſtify the officer, is confined to the officers of courts of record and extends to no others. The plaintiffs know the defendant, not as acting under any authority, but as a mere treſpaſſer. If he avail himſelf of any juſtification under the law of the United States, he muſt ſhew himſelf protected by it: and if the court cannot examine that authority they muſt reject the juſtification,* and then the party ſtands without defence. Numerous caſes in the books ſhew that the acts of all officers are examinable by action in a court of record. A very common one is that againſt meſſengers of commiſſioners of bankrupt. So the ſtate warrant cauſes. Treſpaſs againſt collectors of rates, fines and taxes is every day's practice. Of this the authorities cited are proofs, and the one from H. Black. is nearly analogous: the appeal to the principal aſſeſſor cannot reach the grievance complained of. His power is to † re-examine and equalize the valuations. In the preceding ſection it is expreſsly provided, "That the queſtion to be determined by "the principal aſſeſſor on appeal reſpecting the valuation, "ſhall be whether the valuation complained of be, or be not "in a juſt relation or proportion to the other valuations in "the ſame aſſeſſment diſtrict." But the complaint here is of a different nature. Suppoſe the valuation in point of fact, not too high in relation to other valuations, but much too low, ſtill it may be taxed too high, becauſe taxed as a houſe. How the tax would be affected by placing the theatre on a wrong liſt could not be known at the determination of the appeal; but even if known, the anſwer to the appeal would be a concluſive one: for if the property was valued either in a "juſt relation" to other property, or lower, the equalization which the principal aſſeſſor is authorized to make, would be no remedy for the error here complained of.

* This does not follow: there is a poſſibility of being reſtrained from examining, but being bound to obey.

† Sec. 20.

Thompſon J. This was an action of treſpaſs for making diſtreſs as collector for a tax on the theatre in New-York,

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impoſed under the act of Congreſs. It is admitted on the part of the plaintiff that the theatre cannot be conſidered as a *dwelling-houſe* in the contemplation of the law, and of courſe not taxable as ſuch. But it is contended that the collector is juſtified by his warrant notwithſtanding this, ſo that the plaintiff has no remedy againſt the officer.

Officers, acting under proceſs from ſuperior authority, ought in all caſes to be juſtified by their proceſs, where that can be done, conſiſtent with the eſtabliſhed principles of law, and the rights of parties. That the rule is not univerſal as it reſpects miniſterial officers, I think well ſettled. The diſtinction that is laid down in 10th Coke's Rep. 76 is, that where the ſubject matter of the ſuit is within the juriſdiction of the court, but the want of juriſdiction is as to the perſon or place, unleſs the want of juriſdiction appears on the proceſs to the officer who executes it, he is not a treſpaſſer; but where the ſubject matter is not within the juriſdiction of the court, there every thing done is abſolutely void, and the officer a treſpaſſer. If the preſent caſe be teſted by this rule the collector muſt be conſidered as a wrong doer. The theatre was not taxable as a dwelling-houſe, all proceedings then to impoſe the tax or collect it muſt have been without authority and wholly void, being a ſubject not within the juriſdiction of the aſſeſſors. Unleſs the plaintiff has his remedy againſt the collector or the aſſeſſors he is without redreſs in a court of juſtice, and we are driven to ſay here is an injury without a remedy. Admitting the aſſeſſors were liable, ſtill this will not, upon the principles decided in the above caſe, excuſe the collector; all are treſpaſſers. The diſtinction above taken with reſpect to miniſterial officers juſtifying under proceſs appears to me analogous to the preſent caſe, and has been repeatedly recognized in the Engliſh courts, in actions of treſpaſs againſt their commiſſioners and collectors of taxes. In the caſe from Hen. Black. Rep. pa. 72, the action was brought againſt the collector and commiſſioners jointly; and in the two caſes cited from term reports, the action was againſt the collector only. No queſtion was here raiſed with reſpect to the officer's being juſtified by his warrant, the ſole enquiry was whether the property for the tax of which diſtreſs had been made, was taxable; conceding that unleſs it was, all the proceedings were void and the officer a treſpaſſer, and not

Hard. 480. Buller. 82.

4 Term. Rep. 3. 4. 5 do. 468.

being conſidered taxable in the opinion of the court, judgment was given againſt the collector. So in the preſent caſe, the theatre, not being taxable as a dwelling-houſe, the ſubject matter was not within the authority of the aſſeſſors, and the impoſing the tax was illegal and void and could not afford ground of juſtification to the collector.

I am therefore of opinion judgment ought to be for the plaintiff.

Livingſton J. Upon no principle ought the defendant to be liable. It is made his duty on receipt of the liſt, to collect the tax, if not paid by a limited time. It was not for a ſubordinate officer who was concluded by the judgment of the aſſeſſors, to queſtion the propriety of a theatre's being claſſed as a dwelling-houſe. Having acted under a competent authority and paid the money over, why ſhould he refund the plaintiffs' loſs out of his own pocket, and be left to the liberality of government for his indemnity? If a wrong has been committed and they are diſpoſed to correct it and do juſtice, it is as probable they will act on the petition of the party aggrieved by the aſſeſſment, as on that of the collector: while a collector by being thus expoſed might be ruined by a denial to reimburſe him, no other individual can be very extenſively injured by a like refuſal. In this caſe the aſſeſſors had juriſdiction over the ſubject, and their miſtake in conſidering a theatre as a dwelling-houſe, muſt be regarded as an error in judgment, for which a collector ought not to be thus haraſſed. They might ſuppoſe, that as a theatre yielded a conſiderable rent, it was reaſonable it ſhould be ſubject to as large a tax as a dwelling-houſe. In the caſes cited from 1 H. Black. 68 and 8 T. Rep. 468, the proceedings were coram non judice. The only queſtions there related to the exemption of certain property *altogether* by the terms of the ſeveral acts of parliament. The officer's liability to refund was not made a point in the argument, but appears to have been ſubmitted ſub ſilentio; at any rate theſe are recent caſes and not obligatory here. It is better therefore to ſanction a rule ſuggeſted by the common ſenſe and feelings of men, and which affords protection to every miniſterial officer acting under perſons clothed with proper authority, than to adopt the ſubtlety and refinement of certain modern deciſions, which are calculated to deter inferior officers from a faithful and prompt diſ-

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charge of their functions, or to expoſe them to much ve tion and expence.

It is alſo much in favour of the collector that the plaint neglected to appeal. This being a remedy provided by t act, they ought not lightly to be permitted to elect another.

Radcliff J. This is an action of treſpaſs for taking a carrying away the goods of the plaintiffs. The plea is t general iſſue, and by conſent the defendant was permitted give any ſpecial matter in evidence.

On the trial it appeared that the plaintiffs were owners the new theatre in the city of New-York, that the ſame v

9th July, 1798. aſſeſſed and valued as a dwelling-houſe under the act of C greſs to provide for the valuation of lands and dwelling-hou and the enumeration of ſlaves within the United States, a was taxed as ſuch in purſuance of the act to lay and collec

14th July, 1798. direct tax within the United States. The defendant wa collector, and for non-payment diſtrained, in a regular m ner, for the tax, and juſtifies that he had a right ſo to As a theatre merely, it was conceded not to be a dwelli houſe within the intent of theſe acts of Congreſs, and it d not appear that it was ever occupied as ſuch. The aſſeſſ therefore had no authority to aſſeſs it as a dwelling-hou and ſubject it to the tax on houſes of that deſcription; could the collector derive from their aſſeſſment or from a warrant which he may have poſſeſſed, an authority to dem a tax which no one had a right to impoſe. The power the aſſeſſors was ſpecial and limited, and ought to have b ſtrictly purſued within the bounds preſcribed by law, an was incumbent on the collector to ſee that he acted wit the ſcope of their authority and his own, and by exceedin he became in the eye of the law a treſpaſſer.

In England the ſame rule prevails in regard to their offic of the revenue, and particularly in the analogous caſe of th land tax. The caſes in the Engliſh books are uniform a deciſive on this point and in none of them was there a do entertained whether the officer collecting the tax was liab Their acts on the ſubject of the land tax are numerous, a beſtow on commiſſioners, aſſeſſors and collectors pow equally extenſive with thoſe conferred on the officers pointed under the act of Congreſs. They have alſo an peal from the aſſeſſors to the commiſſioners, ſimilar to that fr

1 H. Bl. 68.
4 T. Rep. 2. 4. 8 do. 468, and the caſes cited.
Vide 4 W. & M. ch. 1, and the acts referred to in 1 H. Bl. 68.

Cited as before

ors to the principal aſſeſſor; and in the caſe of Harriſon v. Bullock and others, reported in H. Blackſtone, that appeal was made and diſmiſſed, and the collector was ſtill held equally liable. Indeed I know of no caſes more parallel in their circumſtances and more intimately connected in principle.

The deciſions on this ſubject are founded on the general rule of the common law, that ſpecial powers are to be ſtrictly obſerved, and that all miniſterial officers concerned in the execution of them are bound to ſee that they are clothed with proper authority. If there be any hardſhip in the caſe it has been experienced for ages in England, and it belongs to government to indemnify its officers when acting with good faith. Individuals ought not to ſuffer, and they can have no other *judicial* remedy than the one now ſought. I think it no anſwer to this reaſoning to ſay that the aſſeſſors had power to aſſeſs this theatre *as land*, (which would ſubject it to a different tax) and that therefore they had authority over the ſubject matter. Inferior officers are liable for an *exceſſive* exerciſe of power as well as a total want of it. If they ſtep out of the limits aſſigned to them they are equally treſpaſſers. This is ſettled even in the caſe of magiſtrates' executing a *judicial* truſt: although they have juriſdiction over the *proceſs* as well as the *perſon* and *cauſe*, they are liable if they exceed their authority. The extent of this doctrine is not only ſupported by the principles of the common law, and a current of Engliſh deciſions, but was adopted by this court in the caſe of Percival againſt Jones, in which we gave judgment againſt a magiſtrate for exceeding his powers. October term 1800.

Whether by the juſt conſtruction of the act of Congreſs it admitted of an appeal on the point in queſtion to the principal aſſeſſor, I think immaterial. The omiſſion to make that appeal, or if made the deciſion of the principal aſſeſſor againſt it, would not alter the caſe or conclude the appellant. Such deciſions would ſtill depend on the diſcretion of a miniſterial officer only, and unleſs ſuch diſcretion is declared to be definitive, or the nature of the ſubject requires it to be ſo conſidered, I deem it a maxim from which we ought not to depart, that no one ſhall be finally concluded in his rights, without an opportunity to be heard in a court of juſtice and the regular deciſion of a competent tribunal.

As to the queſtion which concerns the juriſdiction of this

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court in civil caſes, where the validity of an authority exerciſed under an act of the U. States is drawn in controverſy, I think it cannot originally be doubted. This is ſimply an action of treſpaſs and the pleadings are in the uſual form. The queſtion under the act of Congreſs ariſes incidentally upon the evidence on the part of the defendant, and Congreſs, by their act eſtabliſhing the judicial courts of the U. States, have expreſsly recognized the juriſdiction of the ſtate courts, and provided a remedy by writ of error returnable in the Supreme Court of the U. States, in caſe the deciſions of the ſtate courts ſhould contravene their laws.

I am therefore of opinion that we poſſeſs juriſdiction, that there was no authority under the act of Congreſs to impoſe or collect this tax, and that this action is maintainable againſt any officer who enforced it.

Kent J. This was an action of *treſpaſs quare clauſum* for entering the new theatre at N. York and taking away 325 dollars. The facts are, that the defendant was collector of the direct continental tax, and the theatre was taxed as the dwelling-houſe of John Hodgkinſon, for the above ſum, and the defendant entered and diſtrained for that ſum, by virtue of a warrant in which the *locus in quo* was deſignated as the dwelling-houſe of J. H. aforeſaid, although it is admitted that it was not in fact his dwelling-houſe.

The queſtion ſubmitted is, whether the plaintiffs are entitled to recover upon theſe facts.

Laws of U. S. vol. 4. 168.

Pa. 176.

Pa. 178.

Pa. 179.

The act of Congreſs of 9th of July 1798 provided for the valuation of lands, dwelling-houſes, and ſlaves, by aſſeſſors, to be appointed by commiſſioners. "Every dwelling-houſe above the value of one hundred dollars, and the lot on which it was erected, not exceeding two acres, was to be valued at the rate ſuch dwelling-houſe was worth in money, with a due regard to ſituation. All lands and town lots, except lots on which dwelling-houſes were erected as aforeſaid, were to be valued by the quantity at the average rate which each lot was worth in money, in a due relation to other lands and lots, and with reference to all advantages of ſoil and ſituation and to all buildings and other improvements of whatever kind, except dwelling-houſes aforeſaid." In making the aſſeſſments the aſſeſſors were to require from the owners or poſſeſſors of dwelling-houſes, lands, or ſlaves, ſeparate liſts of each, and

the liſts of dwelling-houſes were to ſpecify their ſituation, dimenſions, ſtories, windows, materials, &c. The liſts of lands and lots were to ſpecify the quantity of each tract or lot, the number, deſcription and dimenſions of all buildings thereon, except dwelling-houſes aforeſaid. And the aſſeſſors were themſelves to make the liſts for perſons not prepared to exhibit the ſame, and where perſons on being required or notified, refuſed or neglected to furniſh the liſts, the aſſeſſors were to enter on the lands, &c. and to make the liſts from the beſt information they could obtain. After the liſts were thus collected, the aſſeſſors were to value the ſame in a juſt proportion aforeſaid, and to arrange the lands, dwelling-houſes and ſlaves into three alphabetical liſts. The principal aſſeſſor was then to give public notice in each aſſeſſment diſtrict, of the place where the liſts and valuations were to be ſeen, and that appeals were to be received by him relative to erroneous or exceſſive valuations. Theſe principal aſſeſſors were authorized to receive, hear and determine in a ſummary way, according to law and right, all appeals againſt the proceedings of the aſſeſſors: provided that the queſtion to be determined on an appeal reſpecting the valuation of any lands or dwelling-houſes ſhould be whether the valuation complained of was in a juſt relation or proportion to other valuations in the ſame aſſeſſment diſtrict. The appeals were to be in writing, and were to ſpecify the particular cauſe, matter or thing reſpecting which a deciſion was requeſted; and to ſtate the ground of inequality or error complained of, by reference to ſome other valuations in the ſame diſtrict: and in all caſes to which reference was to be made in any appeal, the principal aſſeſſor was authorized to re-examine and equalize the valuations as ſhould appear juſt and reaſonable. After the expiration of the time for appeals, the principal and other aſſeſſors were to tranſmit to the commiſſioners of the diſtrict, copies of their liſts and abſtracts of their proceedings, and the commiſſioners were authorized if manifeſt error or imperfection appeared in any of the abſtracts, to require the aſſeſſors that the ſame be explained and corrected.

Pa. 180. Pa. 181. Pa. 181. Pa. 183. Pa. 184. Pa. 185.

Theſe are all the parts of the law that have relation to the aſſeſſment complained of.

By another act of Congreſs of the 14th July 1798, a tax was laid and aſſeſſed upon houſes, lands and ſlaves according

Pa. 205. 208. 209.

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to the above valuation, and the ſurveyor of the revenue was to make out liſts of the ſums payable for every dwelling-houſe and tract or lot of land, diſtinguiſhing what was payable for dwelling houſes and what for lands, and the collectors were to be furniſhed with theſe liſts, and were bound to collect the ſums accordingly. In purſuance of this laſt act the defendant entered and collected the ſum as ſtated in the caſe.

1. Upon this caſe I am of opinion that the plaintiffs had a remedy provided by the act for the error alleged, and that the principal aſſeſſor upon appeal was competent to redreſs the grievance. The authority was in general terms to receive, hear, and determine according to law and right, all appeals againſt the proceedings of the aſſeſſor. The limitation of the aſſeſſor's power upon appeal reſpecting the valuation of lands, &c. did not apply to this caſe, for here the appeal would not have been reſpecting the valuation, but reſpecting the error in placing the theatre, which was not a dwelling-houſe, on the liſt appropriated to dwelling-houſes. And as the plaintiffs did not avail themſelves of the remedy by appeal, they may be conſidered as having acquieſced in the proceeding of the aſſeſſors. Here is a ſpecial truſt created by ſtatute, and a ſpecial remedy provided for the correction of miſtakes in the execution of it; and I incline to the opinion, that the determination of the principal aſſeſſor upon appeal was intended by the act to be of plenary diſcretion and final authority. The multifarious and minute detail of the proceedings of the aſſeſſors ſeems to render ſuch a diſcretion abſolutely neceſſary to the due execution of the law; for I diſtinguiſh this from thoſe caſes in the Engliſh books where the aſſeſſors and collectors of their land tax have been held treſpaſſers. There the commiſſioners had no authority at all over the ſubject matter which they included in the tax. Here the theatre was required to be aſſeſſed by the aſſeſſors—if a dwelling-houſe then as ſuch, if not a dwelling-houſe then as a lot of ground with due regard to the improvements thereon; and probably the valuation would have been juſt the ſame, whether it had been placed on the one liſt or the other. The aſſeſſors had juriſdiction of the ſubject matter: they were bound to aſſeſs that building in the one view or the other, and in the exerciſe of that duty, it is alleged and admitted that they did not exerciſe their judgment duly. But this is very different from

Cowp. 524.
1 Burr. 544.

1 H. Black. 68.

the caſe in which they were not to exerciſe any judgment at all over the ſubject: in which they had ſtepped out of their path and taken cognizance of a ſubject not at all delegated to them. In ſuch an inſtance their proceedings would have been truly *coram non judice*, and they treſpaſſers. Here the ſubject was by law *ſub judice* and the grievance is a mere error, or miſtake by them while in the exerciſe of a lawful juriſdiction.

2d. Another ground that may be taken upon this caſe is, that the grievance did not ariſe under the act of the 14th *July*, by virtue of which the defendant entered. That act ordered a tax (of which the ſum collected by the defendant was a part) to be aſſeſſed upon dwelling-houſes, lands and ſlaves, according to the valuations and enumerations to be made purſuant to the act of the 9th of July. Congreſs by this law referred to, and adopted the valuations that ſhould be in fact made under the former law, without intending to diſcriminate between thoſe valuations that ſhould be accurately and truly in all reſpects made, from thoſe which ſhould be *in fact* made and returned in purſuance of the firſt law. The act of the 14th of July having adopted the valuations under the law of the 9th of July, and ordered a tax to be laid and collected accordingly, it was a complete authority to the defendant to enter as ſtated in the caſe. It would be a doctrine I apprehend of moſt manifeſt inconvenience (if it could be maintained) that if a tax be ordered by the Legiſlature and to be aſſeſſed and collected according to ſome antecedent valuation, that the collectors of ſuch tax become treſpaſſers, if peradventure there ſhould be an error in the aſſeſſment or in the arrangement of the prior valuations.

In England the annual land tax is to this day apportioned and aſſeſſed according to an antecedent valuation made as early as the year 1692, and this practice generally and neceſſarily prevails, in order to avoid the immenſe difficulty and labour of frequent valuations. The continental aſſeſſments were alſo adopted by the Legiſlature of this ſtate in the aſſeſſment and collection of a ſtate land tax; and in all theſe caſes of reference to a valuation made or to be made by a former law, the true conſtruction is that the document referred to is not to be aſſumed as accurate, at the peril of the miniſterial officer. The act adopting it neceſſarily ratifies it as found, for the

1 Black. Com. 326.

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ſpecific purpoſe for which it is to be reſorted to. And whether this reference be to a valuation under a law of five days, or five years antecedent to the time of making the reference does not appear to me to make any difference in the principle. The gravamen now complained of by the plaintiffs did not ariſe under the act by virtue of which the tax was laid and the defendant entered, but under a prior law directing the valuation, and my opinion is that the laſt act was a juſtification to the defendant, and for theſe reaſons the plaintiffs are not entitled to recover.

Lewis C. J. concurring in favour of the defendant, judgment was ordered to be entered accordingly.

Callagan and others againſt Hallett & Bowne.

A contract with a Branch Pilot of New-York to aſſiſt a veſſel in diſtreſs for a certain ſum to be paid, is abſolutely void. Query. If good any where.

THE plaintiffs were pilots of the port of New-York. The defendants owners of a brig called the Neptune. The veſſel had been driven on ſhore at Barnegat, to bring her from whence ſafe into New-York, the defendants had agreed to give the plaintiffs five hundred dollars, and the ſervice having been performed, the preſent action was inſtituted to recover the money.

The declaration conſiſted of four counts: the firſt, an agreement with the captain on behalf of his owners; the ſecond, on one with the owners themſelves; the third, work and labour at the requeſt of the defendants; the fourth, a quantum meruerunt. To this the defendants pleaded the general iſſue. A caſe was reſerved for the opinion of the court whether the action was maintainable or not.

Pendleton for the plaintiffs. It has long been ſettled that the maſter may, when in diſtreſs, hypothecate either veſſel or cargo for neceſſaries to proſecute his voyage. Moor 918.* 2 Ld. Ray. 984.† Noy 95. A fortiori he may bind to his engagements, when the veſſel muſt otherwiſe be loſt. If then the action be maintainable, this can be the only tribunal; it cannot be in the admiralty, and the reaſon is that court has juriſdiction in caſes of hypothecation on account of the extraordinary intereſt and becauſe the contract is on the credit

* Barnard v. Bridgman.
† Johnſon v. Shippen.

of the ſhip or goods and their ſafe arrival.* Owners are not liable in the Court of Admiralty. 6 Mod. 2. They muſt then be anſwerable here. Whether the contract was with the owners or the maſter is immaterial; for the contract of the maſter is obligatory on the owner. 1 Moll. 331. ſec. 14. 15. If the maſter ranſoms, the remedy is againſt the owner. Cornu v. *Blackburn*, Doug. 619. and in Yates v. Hall the plaintiff recovered on the engagement of the maſter againſt the owners, though the veſſel, for payment of the ranſom of which he remained as a hoſtage, was given up in ſatisfaction of the ranſom bill. In addition to theſe authorities, the laws of the ſtate render the contract valid.

Boyd contra. Principles of general policy and the invariable leaning of the court are againſt this action; the words of our law are concluſive. The ſpecies of contract in which the maſter can bind his owners, and the diſtinctions from this caſe will appear to the court in 1 Salk. 35. 2 Dall. 194. 1 Bro. Pa. Ca. 284. and Abbot on ſhipping.

Per curiam. The defendant moves in arreſt of judgment. The declaration ſtates,

1ſt. That the defendants were owners of the brig Neptune; that the brig, when at ſea and bound for New-York, was in diſtreſs; that the plaintiffs contracted with the maſter to bring her ſafe into port for 500 dollars; that they brought her in accordingly.

2d. The like againſt owners.

3d. The uſual counts on a quantum meruit.

Three queſtions are raiſed,

1ſt. Whether the action is maintainable on the firſt count, which involves two queſtions.

1. Could the maſter by ſuch contract bind the owners?

2. Was the contract lawful, the plaintiffs being branch pilots belonging to the port of New-York?

2d. Can the defendant move in arreſt of judgment after attending the execution of the writ of enquiry, and examining witneſſes?

* It is, with deference to the learned counſel, conceived that the reaſon why the admiralty cannot entertain a ſuit againſt owners is becauſe the proceedings are in *rem*, and not in *perſonam*. This reſtriction may perhaps be accounted for from the jealouſy of the common law which would not permit a court acting on the principles of another code, to proceed againſt the *perſon* of the ſubject.

NEW-YORK, May 1803.

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3d. May not the court order an enquiry de novo on the third count in the event of the firſt and ſecond being held bad?

The queſtion of the right of the maſter to bind owners, it is not neceſſary to decide.

The legality of the contract is moſt material.

The act for the regulation of pilots and pilotage for the port of New-York (7 ſeſſ. ch. 31. ſ. 2 & 3.) makes it *the duty* of pilots to give all the aid and aſſiſtance in their power to any veſſel appearing in diſtreſs on the coaſt, and for neglect or refuſal ſubjects them to a fine or forfeiture of their places; but for the encouragement of ſuch pilots who ſhall diſtinguiſh themſelves by their activity and readineſs to aid veſſels in diſtreſs, it enacts, that the maſter or owner of ſuch veſſel ſhall pay to ſuch pilot, who *ſhall have exerted himſelf for the preſervation of ſuch veſſel*, ſuch ſum for extra ſervices as the maſter or owner and ſuch pilot can agree upon; and in caſe no ſuch agreement can be made, the maſter and wardens of the port are empowered to aſcertain the reaſonable reward.

It being made *the duty* of the pilots to aſſiſt the defendants' veſſel, it was oppreſſion in them to exact the ſtipulation in queſtion. It would lead to abuſes of the moſt ſerious nature if ſuch contracts founded on ſuch conſiderations were held to be legal. There are ſeveral caſes in the books tending to ſhew the leaning of courts of juſtice againſt the oppreſſions of perſons in public truſt, and the illegality of exacting previous reward for doing their duty. The law allows them ſufficient compenſation for extraordinary exertion after the ſervice performed; which ſhews it was an object with the Legiſlature to prevent undue advantages being taken. We are therefore of opinion the firſt and ſecond counts are bad, as contrary to public policy and the ſpirit of the act. As to the ſecond queſtion, whether it be too late to move in arreſt of judgment after attending the execution of the writ of enquiry, we are of opinion the authorities adduced do not apply to queſtions on the merits, but only to formal defects in the pleadings.

Bridge & Caſe. Cro. Ja. 103. Stoleſbury v. Smith. 2 Burr. 924.

1 Sell. 528. 2 Wils. 38c.

On the third point we are of opinion, on the authority of Eddowes v. Hopkins in Douglas, that the plaintiff may, on payment of coſts, have (if he ſolicits it) an enquiry de novo on the quan. meruit, reſerving the queſtion however, whether on ſuch inqueſt he ſhall be entitled to more than his legal

NEW-YORK TERM REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THAT STATE.

BY ONE OF THE BAR.

VOL. I.—PART II.

NEW-YORK:

PRINTED BY WARD AND GOULD,

OPPOSITE THE CITY-HALL.

1804.

RULES.

The following RULES OF COURT having been made since the Publication of those in Mr. COLEMAN'S CASES OF PRACTICE, the Reporter thought they might be acceptable to the Profession.

SUPREME COURT,
April Term, 1800.

THE *court said to the clerk, that when the fee-bill says that in certain cases there shall be but one taxation of costs, it means that in the case where plaintiff might consolidate, and yet proceeds separately, he shall have costs taxed but in one suit, and may elect the suit.* Also decided, *That the plaintiff is not entitled to charge entries on roll until the cause has progressed to an issue or judgment.*

SUPREME COURT,
October Term, 1801.

Ordered, *That henceforth non-enumerated motions shall be entitled to preference only on the first, second, third, and two last days of each term, and that on all other days, enumerated motions shall have the preference.*

SUPREME COURT,
October Term, 1802.

Ordered, *That when a plaintiff stipulates to bring his cause to trial on payment of costs, he shall have twenty days, after a demand made by the defendant, or any one on his behalf, accompanied with service of a certified copy of the rule to pay the costs, and of the taxed bill, to pay the same; and the defendant,*

on filing an affidavit of such demand and non-payment, may, at the expiration of the said twenty days, enter judgment, as in case of a nonsuit, as of the preceding term.

SUPREME COURT, Saturday, January 29, 1803.

Ordered, *That every attorney, when he gives notice of the argument of any enumerated motion, shall furnish the clerk residing in the city where the court shall next be held, with the date thereof; who shall, by the first day of the term, make a calendar of all causes which may be noticed, according to such dates. Causes of the same date, shall be placed on the calendar in the order in which they are received by the clerk. Each cause shall be argued according to its standing on the calendar, if the party entitled to bring it on be ready; otherwise it shall lose its preference, and not be called again until all the others are disposed of. The attorney of either party may give notice of the argument. If any cause be inserted on the calendar during the term, it shall not take place, whatever be its date, of any that are on it at the opening of the court.*

Ordered further, *That to every case there shall be added a note of the questions to be made, and to them the argument shall be confined. If, however, any facts in the case give rise to other questions, these also may be argued, unless the adverse party object that they are facts not appearing material to a discussion of such new questions, in which case they shall be abandoned, or the case referred for amendment, if the court shall think it necessary.*

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF NEW-YORK,

In AUGUST TERM, in the TWENTY-SEVENTH YEAR of our INDEPENDENCE.

Jotham Post *against* William Wright and Robert Buchan.

ALBANY, Auguſt 1803.

Poſt v, Wright & Buchan.

AN inquest had been taken in this cause, at the last sitttings, in June, at New-York.

HOFFMAN moved to set it aside, on two affidavits; one made by the plaintiff, which stated, that he verily believed he had a good, substantial, and legal defence; the other by the counsel in the cause. This last set forth, that he was counsel for the Humane Society of New-York, and, in that capacity, obliged to visit the gaol on Monday in every week; that this cause being noticed for trial on a Monday, he came into court instantly after discharging his duty to the Society, when he found an inquest had been taken in the suit; that he, on the same day, wrote to the attorney of the plaintiff, offering to pay all the costs of the inquest, and to engage to try the cause in the *then* sittings, if the plaintiff would abandon his inquest, which he refused to do.

Hoffman also observed, the calendar had been gone through more than once, and that the plaintiff needed not to have lost the sittings but for his own obstinacy.

If a cauſe has been duly ſet down upon the day-calendar, and on being called, the defendant does not appear nor his counſel who is then in court, the plaintiff may take an inquest, which the court will not ſet aſide though merits be ſworn to, if the abſence of the defendant be not accounted for.

ALBANY, August 1803.

Post v. Wright & Buchan.

Woods relied on the counter affidavit of the plaintiff's torney, which stated, that the cause was duly set down in order, on the day-docket; that it was regularly ca and tried; that when called on, —— ——, esqu was in court, and in the hearing of the deponent, said he of counsel for the defendants, but as he did not see his clie nor any of their witnesses, he would not appear; that on the defendants were called, and an inquest taken.

Woods remarked, that, if after these facts the inqt should be set aside, there would be no end to these appli tions. A defendant had only to keep himself and his nesses, or even his counsel out of the way, and be sure gain a term whenever he pleased.

Per curiam. All reasonable notice to attend and def the suit, was given. The cause was on the day-docket, there is no kind of excuse why the defendant was absent. had a counsel in court, and might have been there hims with his witnesses. The defendant therefore can take noth by his motion.

N. B. Hoffman urged strongly the rigour of the pr tice, that it would operate only against the attorney of plaintiff, that this was the first instance of such strictne The court answered, there must be a first time in all proce ings, that they found it necessary to enforce their rules, a had made a determination so to do, as the only mode of ing them obeyed.

Radcliff and Livingston, Justices, abse

John P. Ryers *against* William Hillyer.

If a notice of motion for nonsuit be titled versus instead of ad sectam, and the affidavit annexed rightly titled, the notice will be good.

SPENCER moved, on the common affidavit, for judgm as in case of nonsuit for not proceeding to trial.

Hoffman resisted the application, because the notice titled William Hillyer *against* John P. Ryers, instead of W liam Hillyer, *ad. sctm.* John P. Ryers: this he said was fa there being no such suit in existence as the one in which notice was given, but he added, he would not have urge except from its being one of Mr. Colden's causes, whose st of health the whole court knew.

Spencer, contra, observed, that there could be no force the objection, unless it appeared that the party had be

ALBANY, August 1803.

Ryers v. Hillyer.

sigled.* The notice was for judgment as in case of nonsuit for not proceeding to trial, therefore it must have come from a defendant. In the next place, it was on an affidavit, a copy whereof was annexed, and that affidavit was rightly entituled. It is a mere question of who shall pay costs. There has been no countermand, and the defendant kept all the circuit with his witnesses.

Hoffman. As this is the first default, will the court oblige us to stipulate?

Per curiam. Stipulate to try at the next circuit for the city and county of New-York, and pay the costs of the present application.

Radcliff and Livingston, justices, absent.

* On the same principle where a notice of executing a writ of enquiry "on Tuesday the 14th, of Jan. inst." was given the court, of C.B. refused to set aside the execution of the writ because the 14th, was on a thursday, saying it was clear the defendant could not have been misled. Batten & Harrison 3, Bos. & Pull. 1.

James Brandt, on the demise of William Rickets Van Courtlandt, and Philip Van Courtlandt, *against* Matthias Buckhout and Abraham Buckhout.

THE issue in this cause had been joined in January 1801, and notice of trial given in the June following: it however did not come on, in consequence of the defendants' applying for a commission to obtain testimony from Virginia. On the arrival of the commission in that state, it was found the witness had removed into Kentucky, whither he was followed, and his evidence to the interrogatories taken on a deposition, made before two justices of the peace. A copy of this, accompanied with an affidavit of the facts, was served on the plaintiffs' attorney in August 1802, and communication at the same time made, that a regular commission would be sued out and sent into Kentucky. On this the plaintiff did not notice for trial; however for not proceeding to which,

If there be a neglect in not proceeding to trial, defendant must avail himself of it the first opportunity; if he do not it will be a waiver and subject him to costs if he afterwards move for judgment as in case of nonsuit.

Woods now moved for judgment as in case of nonsuit.

Spencer opposed the application, as being too late, insisting it ought to have been made the very first term after the default.

Per curiam. The defendant has not accounted for his delay; if that be not done, and the application be not immediately after the laches, the default is waived, and cannot now be taken advantage of.

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Woods hoped the court would order the plaintiff to pulate.

Per curiam. He is not bound to stipulate.

Spencer prayed costs for resisting the application.

Per curiam. Let the Plaintiff take them.

Ordered, That the defendant take nothing by his moti and pay the plaintiff his costs of opposing.

Radcliff and Livingston, justices, abs

Peter A. Camman *against* the New-York Insura Company.

The rule for consolidating applies only to ſeveral actions on one policy, and does not extend to ſeveveral policies on one riſk tho' the queſtion be the ſame on all, becauſe the contracts are ſeveral.

THE plaintiff had, for himself and several other per with whom he was variously interested, effected eleven cies on distinct parts of the cargo of the same vessel. name of the plaintiff was in each insurance, but associ with different parties, according as he was connected. point in dispute was the same in all.

Hoffman moved to consolidate the actions, or to stay ceedings in ten of the suits till the eleventh was determi the defendants being willing to pay on the residue, if should be determined against them. The object of his deavor was, as he said, to save the enormous costs w would otherwise accrue.

L. Ogden. The contracts are several; and though a n ber of actions on one policy will be consolidated, that is cause the contract is one, and therefore the very reason of practice in such a case, is sufficient to overrule the pre application.

An application was made by myself to this court, for l to consolidate five actions on five promissory notes to the s plaintiff, and refused, because of the diversity of the tracts.*

Per curiam. The contracts being separate and indepen it is not a case for consolidation, and not to be distingui from that of the notes. There never was an instance of solidating different policies.

Radcliff and Livingston, justices, ab

* By the practice of the Engliſh courts, if the defendant be he bail in two actions which might be joined, the plaintiff will be allo conſolidate and have to pay the coſts of the application. Cecil v. Bu D. & E. 639.

ALBANY, August 1803.

Shuter v. R. S. Hallett.

James Shuter *against* Richard S. Hallett.

D. L. OGDEN moved for a rule to vacate the rule for a commission which had issued in this cause in the spring of 1802. The facts, as appeared by affidavit, were these:

A commission had issued at that time, in which the defendant had joined, but not being returned, another was sued out in November last, and as there were no hopes of the first being returned, the parties agreed that the testimony taken on the second, which was on the same interrogatories, should be read in evidence on the trial. After this the cause was duly noticed, but the judge refused to let it come on, as the counsel for the defendant had joined in the commission.

If the defendant has joined in a commission, the court will not on the plaintiff's application vacate the rule by which it was granted, but will grant one to proceed to trial notwithstanding the commission.

Per curiam. The commission is as much the defendant's as the plaintiff's, and he may take the benefit of it on trial. We cannot therefore vacate the rule, but the plaintiff may have one to proceed to trial notwithstanding the commission.†

Radcliff and Livingston, justices, absent.

Bethuel Way and Hannah his wife, *against* Nicholas Bradt.

Costs.

IT was said by the court, in this suit, that when a Judge on a circuit has not time to try a cause, the costs must abide the event of the suit.

Radcliff and Livingston, justices, absent.

Ebenezer Weed, by Noah Weed, his guardian, *against* Caleb Ellis.

A younger issue tried, no proof that an older might have been heard.

Per curiam. A younger issue being tried, is not always conclusive that a cause might have been brought on. The court will sometimes take up a cause they may think short, when they will not enter into a long one.

Radcliff and Livingston, justices, absent.

Joseph Grover *against* Benjamin Green.

Court will not discharge on motion, a person arrested while attending a reference under an order of the common

THE defendant was attending a reference, under a rule of the court of common pleas for Cayuga, in a suit wherein

† See Brain vs. Rodelicks and Shivers, ante 73.

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he was plaintiff, and the present plaintiff defendant, when he (Green) was arrested by Grover, on a writ out of this court.

Emmott moved for a rule that the defendant be discharged out of custody on common bail, the plaintiff having abused the process of the court, but no notice had been given of the motion.

plea, if there be not a notice of applying; but will only grant a rule to shew cause.

Per curiam. By this means any body may get himself discharged.

Emmott. If the affidavit be false, the party may be indicted for perjury.

Per curiam. But the plaintiff may lose his debt. Take a rule to shew cause the first day of next term why he should not be discharged, and in the mean time let proceedings be staid.

Radcliff and Livingston, justices, absent.

Hugh Lackey and Joshua Briggs *against* Daniel M'Donald.

When a defendant commits a crime for which he is sentenced to the state prison, the plaintiff may discontinue without payment of costs.

THE plaintiffs, in July 1802, had stipulated to try this cause at the next circuit court, and did not do so.

M. B. Hildreth, on this ground, now moved for judgment as in case of nonsuit.

Schoenhoven read an affidavit, which was not denied, stating that the defendant, after the commencement of the suit, and before a trial could be had, was sentenced to the state prison, where he still remained, and prayed to discontinue without payment of costs.

Van Ness, amicus curiæ, mentioned, that when the defendant rendered proceedings useless, the court was always disposed to permit a plaintiff to discontinue without costs. In Jackson on the demise of Ludlow v. Webb, after issue joined the defendant abandoned the possession, and the lessor of the plaintiff having entered, did not notice the cause for trial. The defendant then moved for judgment as in case of nonsuit, but the court denied his motion, and gave leave to discontinue without payment of costs.

Per curiam. The opinion of the court is, that sufficient has been shewn to prevent the judgment of nonsuit. The defendant has by his own act deprived the plaintiffs of that

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Lackey & Briggs v. M'Donald.

remedy which they might have had against his person; his body is out of their reach, and *that* by his own act. It is not therefore necessary that they should proceed and incur expences for nothing, as there is not any property from whence they can be reimbursed. The plaintiffs therefore are entitled to discontinue, and without costs.

Radcliff and Livingston, justices, absent.

Rachel Malin *against* Ephraim Kinney.
The same *against* Nathan Lane.

If a plaintiff get relieved from his own ſtipulation he reſtores the defendant to all rights as he ſtood when the ſtipulation was entered into.

THESE causes were noticed for trial at the circuit held for Ontario in June 1802. The defendants attended with their witnesses, but the plaintiff not bringing on the causes, the defendants agreed to waive taking advantage of it, provided the plaintiff would consent that the two above suits should abide the decision of a case made in one by the same plaintiff against George Brown, which turned on the same point, and had, together with another of the same sort, been tried. The plaintiff acceded to the proposition, but at the last term applied to the court to be released from his engagement. This the court was pleased to order.

Emmott now moved for judgment of nonsuit, and that the plaintiff pay the costs not only of not proceeding to trial in 1802, but those also for not trying at the last circuit. He contended that as the agreement was done away on the application of the plaintiff, the defendant had a right to those costs which he waived only in consequence of that agreement: The agreement was the consideration of the waiver, and the consideration being taken away, he had a right to insist on not waiving. Then as to the costs of the last circuit, it was clear he was entitled; because, as the plaintiff had been released and had not tried, it was manifest he was in default and costs due.

Stuart contra, shewed on affidavit, that the rule to discharge the agreement was made at the latter part of the last term, and that from the late information he received of it, he could not avail himself, at the last circuit, of the advantage it afforded.

Per curiam. The application is for judgment as in case of nonsuit, and to pay two sets of costs; those of June

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Malin v. Kinney.

1802, and those of the last circuit. Four causes were d pending: Two were tried, and, after the court rose, the was a stipulation that the two causes not tried, should abi the same event as those which had been tried. An a plication was made in May last to be relieved; that the t causes not tried might be restored, and the plaintiff n bound by his stipulation: This was ordered, and the cau restored as in June 1802. If the plaintiff was relieved, th defendant was also; and then the stipulation being vacate the causes must stand in the same situation as in June 180 If the defendant had then applied, nothing appears why t rule should not then have been granted, at least a rule stipulate and pay costs. The only reason to excuse n offered is, that the plaintiff did not receive notice of own rule. Both circuits mentioned have passed with trial; therefore the defendant must have the effect of motion, unless the plaintiff stipulate to try the cause at next circuit, and pay the costs of that in June last.

Radcliff and Livingston, justices, abse

Ambrose Spencer *against* Samuel B Webb, on Scire Facias.

THE facts, as they appeared by affidavit, were as fo lows:

On ſci. fa. notice of entry of the rule to appear and plead need not be given, as the ſervice of the ſci. fa. is notice of itſelf, and the default may be entered on expiration of the rule; but judgment cannot be entered till four days after, if it be, the judgment will be ſet aſide, and the default if regular, ſtand. No default ever ſet aſide when regular, except accounted for to ſatisfaction of the court.

The defendant was served with a scire facias on Tue day the 3d of May last, which was returned scire feci the 10th. On the same day the plaintiff entered a rule fo the defendant to appear in four days and plead in twen after notice, or that his default be entered: Notice of th rule was not given, nor was it put up in any conspicuou part of the clerk's office, nor was any affidavit of notice g file. Default was entered, without any such affidavit, o the 14th of May, on which day the plaintiff entered judgment also. The plaintiff swore to a just and mater defence, and that he had paid the plaintiff six hundred do lars which had not been allowed him, and offered to let th judgment stand as a security.

On these grounds Van Vecten moved to set aside th default and judgment thereon, and that the defendant b let in to plead.

Spencer. There are several grounds of objection take

roceedings. One is, that notice ought to have been f the return of the sci. fa. and of the rule entered. he fourth rule of this court, made in April term it appears, that rules to appear on sci. fa. and in nt, are placed on the same footing. It is not ne- ; on entering the rule, to give notice that the rule has ntered. The notices by the sci. fa. and in ejectment, declaration are tantamount. When the attorney ap- thers notice is required: But a sci. fa. is notice in

The default therefore, being regularly entered, tand. The next question then is whether, if the dings are correct in entering the default in four he court will let the defendant in, on the merits? dd v. Stoughton,† decided the last term, is in point, there is no account given for not appearing, the de- s correct, and will not be set aside. There is no ex- for not entering an appearance, and for four days the ant certainly slept. In Edwards ad sctm. M'Kinstry, an's Cases of Practice 124, the court said that a de- must always be accounted for.

ham as amicus curiæ observed, that it being a point actice of some importance, he took the liberty to men- that according to the English practice when, on a a. to revive, two nihils were returned, judgment was d of course on shewing the returns to the officer.

n *Vecten*. We are not to obtain the effect of our n for two reasons. Because according to the English ice there are no rules on a sci. fa. and because no ac- t is given for the default. As to the first, whatever actice may be in England, our courts have established a four day rule is to be entered on the return of the and then the ordinary rule is to be given, and if the t be not entered, the defendant may come in at any

A scire facias is to all intents a new suit, and there- here should be the same practice as in other cases; may be a plea &c. In this the default has pro- no injury. There could be no judgment till next Therefore this rigid rule of saying that if you do not we will not hear you, though you give evidence of

Col. Ca. Prac. 2, 3. † Ante 6.

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reasons for our interference, can have no force when we apply to the discretion of the court. The power used in these cases is founded on justice, and whenever any thing like injustice presents itself, the court will interpose and see that no advantage is taken. Here the defendant offers to let the judgment stand, therefore the plaintiff runs no risk as the defendant's lands are bound. He swears six hundred dollars have been paid on the judgment: The question then is, whether the defendant does not necessarily deserve favor. Whether the plaintiff shall have execution for six hundred dollars more than are due when merits are sworn to. That the plaintiff is able to repay it, is no answer: the oppression of thus wringing so much from the defendant may be intolerable. Notice, either express or constructive is necessary to a default; here there is neither. Griswold v. Stoughton does not apply; it was a mere irregularity and no affidavit of merits. The court can not too much bear in view that no injury can result by letting the defendant in to plead.

Spencer in reply. I have strong doubts whether on a scire facias there can be any defence* except nul tiel record, or the judgment satisfied.

Per curiam. It appears that the defendant did not enter any appearance before the expiration of the rule, nor indeed was it until some weeks after, that any appearance was entered. It is suggested in answer, that notice ought to have been served of the entry of the rule; this is on the other hand denied; and rightly. The default therefore is regular, and no reason whatever is assigned how it has been incurred. In all such cases we have determined to hold the party to his default. The †rule of this court says "Upon the return of "writs of sci. fa. if the defendant be returned warned, or "the second writ be returned nihil, the defendant shall

* To a scl. fa. the defendant may plead in abatement, or in bar, 2 Tidd 470. But he can plead nothing in bar, which he might have pleaded to the original action. Where therefore the judgment was on a warrant of attorney, as the defendant could have had no opportunity of pleading, the court of K. B. has ordered an issue to let in the defence of usury. Cook v. Jones Cowp. 727. The defendant may also plead in abatement that there were not 15 days betwen the teste and return. Nares v. Earl of Huntingdon. Lut. 12. and for want of these 15 days the sup. court has set aside on motion the proceedings on a scl. fa. Woodman & others ad gectm. Little. Col. Ca. Prac. 54. as a scire facias is a judicial writ. See Com. Dl. title abatement. (H. 14.) † Rule of October 1791, Col. Ca. Prac. 31.

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"appear in four days, or judgment shall be entered by default." Therefore the entry of the default is perfectly consistent with the practice of the court, and must remain: but as judgment ought not to have been signed till four days after, and it appears to have been done on the very day, *that* is irregular, and therefore must be set aside.

Radcliff and Livingston, justices, absent.

William Neilson
against
Catharine Cox, Magdalene Beekman, Abraham H. Beekman, and Johannah his Wife.

In partition, if the defendants do not appear the court will on motion make an order for partition as prayed.

THIS was an application on a point of practice in partition. The defendants had not appeared, and as the act does not specify any mode of compelling them to come in, Woods, on behalf of Riggs, moved that the following rule be made absolute, which the court, after perusal, was pleased to order.

R U L E.

Rule in partition.

New-York Supreme Court.
William Neilson,
v.
Catharine Cox, Magdalene Beekman, Abraham H. Beekman and Johannah his wife.

In Partition.

The defendants having neglected to answer or plead to the petition of the plaintiff, within the time allowed them by a rule of this court for that purpose, and it appearing by the said petition, that the plaintiff is seised in fee simple, as tenant in common, of two undivided fifth parts of the premises in the said petition mentioned, and that the defendant Catharine Cox is seised in fee simple, as tenant in common, of one equal undivided fifth part thereof, and that the defendant Magdalene Beekman is seised in fee simple, as tenant in common, of one equal undivided fifth part thereof, and that the defendants Abraham H. Beekman and Johannah his wife, in right of the said Johannah, are seised in fee simple of one equal undivided fifth part thereof, which not being denied, THE COURT DOTH THEREFORE DETERMINE the rights of the said parties to be, as in the said petition is stated, whereupon and on motion of Mr. Riggs, attorney

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for the plaintiff, IT IS ORDERED, that partition of the said premises be made between the said parties, according to their said respective rights, and it is ordered, that A. B. C. D. & E. F. being three respectable freeholders of the city of New-York, be, and they are hereby appointed commissioners to make the said partition among the said parties quality and quantity relatively considered, according to the respective rights of the parties aforesaid.

N. B. The commissioners are named by the party to the court, and if approved of, appointed according to the nomination.

Radcliff and Livingston, justices, absent.

John Woods *against* Maus R. Van Ranken.

To change the venue in a transitory action, very special cause must be shewn.

VAN VECTEN moved to change the venue from New-York to Albany, in an action on the following promissory note: "On or before the 18th day of February next, for value "received, I promise to pay at the Bank of Albany, to Maus "R. Van Ranken or order, seven hundred and twenty-five "dollars. Witness my hand this 9th day of August 1802.

"DERICK TEN BROECK."

The deposition, on which he moved, stated it to have been given on a usurious consideration, but did not set forth in what the usury consisted, nor between whom it had passed.

Woods read an affidavit made by the agent of the plaintiff who was the second indorsee, denying all usury in himself or any one else to his knowledge, and that the note was taken in part payment for a bonâ fide sale of goods in New-York. In addition to this, Woods insisted on the general rule, that in transitory actions the venue is never changed except on very cogent and strong circumstances. He also relied on the deficiency of the defendant's affidavit.

Per curiam. This is an application to change the venue in a transitory action; special cause ought therefore to have been shewn. We are of opinion that what has been done is not sufficient to take the case out of the general rule adopted with respect to suits of this nature. The defendant ought to have offered as much to change, as the opposite party would have been obliged to alledge in order to retain. Supposing therefore *that* to be the criterion, he ought to

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ben the usury originated, and that the witnesses re-
re; but the affidavit does not state when the usury
e nor that the cause of action arose in Albany.
gh the note is apparently made here, and payable
ank of Albany, it was negociated in New-York,
presumption is, it was made where it was passed.
rine now acted upon is established 1 D. and E. 781.
essary to shew that the cause of action arose* and
terial testimony is to be given in the place where the
s to be removed. The defendant therefore can take
by his motion.

Radcliff and Livingston, justices, absent.

rus Jackson *against* Rodolphus Mann.

DWORTH moved for judgment as in case of non-
not proceeding to trial according to notice, on an
stating that the cause being duly noticed, the de-
issued and served subpœnas on his witnesses, after
he notice was countermanded.

If a plaintiff notice his cause for trial, and afterwards countermand it, he must pay the defendant the intermediate costs of subpœnaing his witnesses.

nhoven contra, read an affidavit setting forth that the
for want of a material witness, who could not be
nd, was unable to proceed to trial, and that notice of
mand had been given four days before the circuit court;
fore insisted there was no ground for the application,
t from the principle of Brant v. Buckhout,† the de-
could, not only take nothing by his motion, but the
was entitled to his costs for opposing.

† Ante. 113.

lworth distinguished this from the case mentioned,
efendant's having been here put to costs.

curiam. The only question here is, who shall
expence. The plaintiff must certainly bear the
of his own countermand: *That* and the notice are
is acts; the expences therefore incurred after no-
ays fall to him when he countermands. The judg-
nonsuit must therefore be refused, but the plaintiff
e defendant the costs of subpœnaing his witnesses
the countermand.

Radcliff and Livingston, justices, absent.

ote 4, and the opinion of Radcliff, J. in which the principles
this practice are concisely and accurately stated.

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Martin v. Bradley & others.

Walter Martin
against
Daniel Bradley, Bildad Beach and Nabby Beach Administrators of Elnathan Beach, late Sheriff of Onondaga.

Debt will not lie against the administrators of a sheriff, for an escape in the life time of their intestate.

THIS was an action of debt against the administrators of the sheriff of Onondaga for an escape in the life time of their intestate.

The defendant put in a general demurrer to the declaration.

Henry in support of the demurrer. The present question will give but little trouble to the court, for as it is debt for an escape against the administrators of a sheriff, it will be brought to a single point, whether this suit does not fall within the rule of "actio personalis moritur cum persona." It is founded on a tort, arising ex delicto of the intestate. 1 Black. Com. 302 is express that it is not maintainable, because the right against the intestate is derived ex delicto, and therefore dies with the person. In the case of Hambly v. Trott Cowp. 375 Lord Mansfield in settling the meaning and extent of the rule now insisted on, specifies the action of escape against a sheriff, as one which, from its cause, dies with the person. It is an injury ex maleficio, from which the intestate derived no advantage to himself, and this is the principle on which his personal representative is not answerable. Ibid. 376. The same doctrine is to be found in Fitzh. N. B. 121 A. n. c. In Berwick v. Andrews 6 Mod. 126.* case 171. In Dyer 271. a.† the same principle is acknowledged, for it is there ruled, that debt for an escape will not lie against an heir. And in Whitacres v. Onelsey and others executors,‡ it was held that it could not be supported against the warden of the fleet. From these authorities it is evident the action cannot be maintained.

Russel contra, merely referred the court to 1 Com. Dig. title administration B. 14 and the authorities there, to prove

* It was not the point in question, but a dictum of Powell, J. which Holt said he had known adjudged contrary. The law however is clearly as in Hambly v. Trott.

† That was against the heir of the gaoler. ‡ Dyer, 322. a.

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that when the ground of complaint rested on tort or misfeazance, there was a remedy against the administrators.*

Per curiam. The law has been settled, both from the time of Dyer and Fitzherbert, as stated by the counsel for the defendant, judgment must therefore be in favor of the demurrer.

The People *against* Cornelius Shaw.

ON certiorari to a conviction for forcible entry and detainer before the justices in Renselaer County. The return to the writ was

An indictment for forcible entry and detainer, must state a seisin in the prosecutor at the time of the entry, and also shew an entry by the defendant. To entitle to costs on quashing an indictment it must appear that the party traversed the indictment. This court may grant re-restitution.

"Renselaer County } AN inquisition of the people of
State of New-York, } the state of New-York taken at
"Hoasick in the county of Renselaer on the twenty fourth
"day of March in the year of our Lord one thousand eight
"hundred and one and in the 25th year of the Indepen-
"dence of the United States of America by the oaths of
"Daniel &c. good and lawful men of the said county be-
"fore John Cumstock esquire one of the justices assigned
"to keep the peace in the said county and also to hear and
"determine divers felonies trespasses and other misde-
"meanors in the said county committed; who say upon
"their oaths aforesaid that Samuel Millerman of the town
"of Hoasick aforesaid yeoman *long since* lawfully and
"peaceably *was seised* in his demesne as of fee of and in
"one messuage consisting of a dwelling house with the
"appurtenances in Hoasick in the county aforesaid and
"Cornelius Shaw of the said town of Hoasick and county
"aforesaid labourer on the fourteenth day of instant March
"at the said town of Hoasick and county aforesaid with
"strong hand and armed force the said messuage or free-
"hold aforesaid did without law or right detain and him
"the said Samuel Millerman thereof and with strong hand
"and armed force so did keep out from the said messuage
"with the appurtenances aforesaid from the said fourteenth
"day of inst. March in this present year of our Lord one
"thousand eight hundred and one until the day of the taking
"of this inquisition with like strong hand and armed force

* There is not any such authority. The reference alluded to must be the thing Dyer 24. a. in marg. but it does not warrant the position.

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"did keep out and doth yet keep out to the great disturbance
"of the peace of the people of this state and the former
"the statute in such case made and provided; we the jurors
"aforesaid upon the evidence given declare the aforesaid
"inquest taken to be true. Witness our hands &c.

A writ of restitution having issued on the conviction and the proceedings being removed, the defendant filed the following exceptions.

Supreme Court, } Cornelius Shaw, ad sectum The People.

"AND the said Cornelius by Walter Wood his attorney
"says that the said indictment aforesaid and the record of
"the said conviction now remaining in this court are and
"insufficient and void and he therefore prays that the said
"may be quashed and that he may be restored to the posses-
"sion of the messuage, with the appurtenances, which he
"been unjustly and contrary to the law of the land taken
"from him, and for causes of exception to the said indict-
"ment and record of conviction he sets down and shews
"the following:

"1st. Because it does not appear by the said record that
"any complaint was exhibited to the said justice against
"this defendant for a forcible entry or detainer.

"2d. Because it does not appear in what manner the
"defendant had notice of the said proceedings or whether
"he had any notice thereof.

"3d. Because it does not appear that this defendant was
"allowed an opportunity to defend himself below on the
"said charge.

"4th. Because it does not appear but that this defendant
"appeared before the said justice and traversed the said
"charge.

"5th. Because it does not appear that any proceedings
"were had before the said justice or any judgment given
"by him, which could warrant the issuing of the writ of
"restitution.

"6th. Because it does not appear by the said indictment
"the seisin of the said Samuel Millerman continued up to
"the time of the alleged force.

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"5th. Because it is not stated in the said indictment in what manner, or at what time this defendant entered on the said premises, or that he entered at all.

"6th. Because the said indictment is repugnant and against form."

Emmet, for the above reasons, moved to quash the indictment, and that a writ of re-restitution issue. He said, independent of the variety of causes of exception shewn, had two only been urged, the proceedings would not be allowed to stand. It is indispensable to shew that the seisin of the prosecutor continued to, and at the time of the forcible entry, whereas it was only stated he was "long since seised." 4 Com. Dig. Title Forcible Entry. D. 3. D. 4. The fourth exception is fatal on the authority of 2 Hawk. 42. b. 1. c. 64. s. 40. for it must be made to appear in what manner and at what time the defendant entered, or at least that he did enter, neither of which are shewn.

Foot contra. Two objections may be made to this motion. *First*, that as it comes before the court on certiorari, errors ought to have been assigned; the motion to quash is therefore improper. There is to be sure no express authority for this position, but it may be supported on general principles, where proceedings are removed and a return made, the practice is to assign errors. The first five exceptions are merely as to the *form* of the return. For *that* of a justice of the peace, there is none. He sends up all the proceedings before him. On examination, the court will see there must necessarily have been a complaint, and that if there had been a traverse, it would have been in writing, as all the proceedings are sent up; if therefore it does not appear it could never have been taken. The only ground is that by the charge in the indictment it does not appear when the forcible entry took place. The entry is immaterial, the detainer is the crime; the statute is against either forcible entry or detainer, therefore unnecessary to shew more than the detaining. From the nature of the institution, and the authority being given to the magistrate, complaints of this kind must necessarily be before officers not acquainted with forms, and therefore the court will not insist on a rigid adherence to them.

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Emmott in reply. The practice now adopted, is that every day both in this, and the English courts. Beca the authority in cases of this sort is given to magistrates, i contended that no kind of forms are to be observed: power is of a dangerous nature, and in a degree gives a ri to try titles to land: this court will therefore keep it un strict controul. The record should therefore set forth complaint duly exhibited according to the statute. 1 R Laws. 102. and also the regular notice ordained, ibid. 1 Nor does it appear that any judgment has been given on conviction. But the most important fact is totally omitt the entry by force when the seisin was in Millerman. T ought to have fully appeared, whereas his seisin is said have been "*long since*," and might have been discontin The statute is particularly framed against forcible entr the detaining is only a continuation of the crime of forci entry; for if the entry, was by right, and peaceably, the fendant might be entitled to detain by force.

LEWIS C. J. delivered the opinion of the court.

IN this cause, a motion is made to quash an indict of forcible entry and detainer, found in Rensselaer cou on the 24th of March 1801, before John Cumstock, Esqu The indictment states that Samuel Millerman "*long sin* was lawfully and peaceably seised, in his demesne as of of a dwelling house &c. in Hoasick, and that the defend on the 14th of the same month, with strong hand and arm force, the said messuage and freehold did without law *tain, and keep out* the said Samuel from the said 14th March until the day &c. and still doth &c.

The return of the justice, to the writ of certiorari, st the bill of indictment; the notice served on the defend the warrant to the sheriff for summoning a jury to inqu of the detainer &c. the writ of restitution issued, there stops.

There are two substantial and incurable defects in indictment.

1. It doth not state that the prosecutor was seised *at time &c.* not even by implication, and this is necessary t stated. Bacon tit. Forcible Entry and Detainer, E. vol. 5

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81; 2, 6. Cro. Ja. 214. Sir Nicholas Poynt's case. Do. 639 ridge's case.

2. It does not state any entry peaceable, or forcible by fendant, which must be stated; for without an entry, it s not appear but the party was in possession a sufficient gth of time to justify his detaining by force. Bacon tit. rcible En. and Det. E; or vol. 2. 562, 6. Cro. Ja. 19. 20. 1.—1 Hawk. c. 64. sec. 40.

From the general discretionary power this court has in se cases, they may set a restitution aside, and award a restitution (whenever it shall appear that restitution hath en illegally awarded) either for insufficiency, or defect in e indictment, or other cause 2 Ba. For. Ent. and Det. ter G, page 565.

I am therefore of opinion the motion be granted. It was cided in this court in the case of *Beebe and others, ad. sctm. he People*,* that if the indictment be bad, re-restitution ust follow of course; and in that case the indictment was ashed, and re-restitution awarded. But this case is not ithin any of the statute provisions for *costs*, and none are coverable. The statute. (1 vol. Rev. laws 104) gives costs ly when the party indicted traverses the indictment and is nvicted; and no traverse is returned, or stated in the present case.

The judgment of the court is, that the indictment and ceedings be set aside, and a writ of re-restitution award-, without costs on either side.

obert Campbell *against* Timothy Munger and others.

THIS was a motion for judgment as in case of nonsuit for e proceeding to trial. The affidavit, on which it was ounded, stated; that issue was joined in January term 802; that the cause was duly noticed for the circuit in the me year; that it was not then tried, and was noticed again r the circuit in May last, when it was not brought on, at it was one of the oldest issues on the calendar, and no ostponement of trial had been given. Van Antwerp rested the application, on a deposition made by himself, ad-

If several actions, turning on the same point, be noticed for trial, and on the hearing of the first, the judge direct a nonsuit, exception to which is taken by the counsel of the plaintiff, he shall not be liable to judgment, as in

* January term, 1802.

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Campbell v. Munger.

case of nonsuit for not proceeding to trial, on the other causes nor be obliged to stipulate, and the costs shall abide the event of the suit.

mitting the notice for the last circuit, but setting forth al
that this cause, as well as another at the suit of one Eli
Montgomery against the same defendants were actions
trespass quare clausum fregit, involving the same questi
and same defence; that on the trial of the said cause, Eli
Montgomery became nonsuit at the direction of his ho
Mr. Justice Kent, to which direction an exception
then taken, and, by consent of the defendant's attorn
the making up of the case was postponed till this ter
that it was understood and agreed, between the depone
and the defendant's attorney, that the decision in one of
causes should be conclusive in the others; and then
shortly after the trial, so as above said to have been ha
the other cause, the witnesses for both parties were
missed and that it was very doubtful whether a trial in
present action could have been had.

Per curiam, delivered by Livingston, justice.

This is a motion for a nonsuit, for not proceedin
trial at the last circuit in Saratoga. It appears that
as well as another action of Elijah Montgomery, aga
the same defendants, was noticed for trial at that cir
that they were all actions of quare clausum fregit, invol
the same questions and the same defence. The actio
Montgomery was tried, and the plaintiff nonsuited, by
rection of Judge Kent. To his opinion an exception
taken by the plaintiff's counsel. The plaintiff's atto
upon this, thought it unnecessary, until the opinion g
by the Judge could be reviewed by this court, to brin
the trial of this cause; and he swears that "it was un
"stood and agreed; between the defendant's attorney
"himself, that a decision in the cause tried should be
"clusive in the other, and that, thereupon, shortly
"the trial, the witnesses of both parties were dismiss
Without relying much on the agreement of the atto
which was not in writing, the court think the plaintif
accounted satisfactorily for not bringing this cause to
He noticed it in good faith, and appears to have been
pared to try it, but finding the opinion of the Judge ag
him in another cause embracing the same questions,
depending on the same evidence, it would have been

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proceed in the others until the judgment of this
ld be had. We think therefore, that he ought
ulate, and that the costs for not proceeding to
the event of the first.

he People *against* Amaziah Rust.

An indictment against an attorney, for extorting more than his legal fees, muſt ſtate the ſum due, & the ſpecific exceſs.

as an indictment against the defendant, for ex-
his office, as an attorney of the court of common
Montgomery county. A trial had taken place be-
stices of the peace at the general sessions, the de-
ound guilty, and sentenced to a fine of one hun-
s.

lictment was in these words.

ry county, ss.

E it remembered, that at the general sessions of
he peace of the people of the state of New-York,
olden at the *town of Johnstown*, in and for the
y of Montgomery, on Saturday the fourteenth
bruary, in the year of our Lord one thousand eight
nd one, before Abraham Romeyn, David Cady,
rt M'Farlan Esquires, and others, *justices of the*
in the county of Montgomery aforesaid, and also
to hear and determine divers felonies, trespasses
r misdemeanors committed and done in the said
pon the oath of, &c. good and lawful men of the
oresaid, then and there sworn and charged to en-
the said people of the said state, for the body of
unty, it is presented in manner and form as fol-
hat is to say,

Montgomery county, ss.

rors for the people of the state of New-York, and
ody of the county of Montgomery, being duly
l charged upon their oaths, present, That Amaziah
e of the town of Johnstown, in the said county
t law, on the first day of June, in the year of our
thousand seven hundred and ninety-eight, was,
is, and has ever since been, an attorney at law of
of common pleas in and for the said county of
ery, and that the said Amaziah Rust, so being one
[illegible] aforesaid, on the twelfth day of February

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in the year of our Lord one thousand seven hundre ninety-nine, obtained a judgment in the said court, in fa one Ichabod Roberts, plaintiff, against Alexander Ca and John Hamilton, junior, defendants. And the aforesaid, upon their oaths aforesaid, do further p That the said Amaziah Rust, being such attorney as said, and prosecuting such suit for the said plaintiff, attorney, not regarding the statutes and laws in suc made and provided, but unlawfully and extorsively, sixth day of May in the year of our Lord one thousanc hundred and ninety-nine, at Johnstown aforesaid, county aforesaid, did exact, demand, extort and r from the said Alexander Campbell, one of the defe in the said cause, the sum of *Eleven Dollars over an the fees usually paid for such like services, and due in r aforesaid, and more than was legally due to the said A Rust and the other officers and ministers of the said co their respective services in the said suit, contrary to the in such case made and provided,* and against the peace said people of the said state, and their dignity. Whe the sheriff of the said county of Montgomery is comm that he cause the said Amaziah Rust to come and a &c. And afterwards, to wit, at the same general s of the peace of the said people, holden at Johnstown said, in and for the county aforesaid, on the said four day of February in the year of our Lord one thousanc hundred and one aforesaid, before the aforesaid just the said people, and others their fellows aforesaid, c the said Amaziah Rust, in his own proper perso *having heard the said indictment read,* the said Amaziah saith he is not *guilty thereof,* and concerning thereof h teth himself upon the county, &c. And George Mc district attorney for the county aforesaid, who pros for the said people of the said state in this behalf, dc like. Therefore let a jury thereupon come before the j of the said people of the said state, at the next gener sions of the peace to be holden at the town of John aforesaid, in and for the said county of Montgome the fourteenth day of October in the year of our Lo thousand eight hundred and one aforesaid, of twelv

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and lawful men of the said county, each of whom shall have in his own name or right, or in trust for him, or in his wife's right, a freehold in lands, messuages or tenements, or of rents in fee or for life, of the value of *sixty pounds* free from all reprises, debts, demands or incumbrances whatsoever, by whom the truth of the matter may be the better known, and who have no affinity to the said Amaziah Rust, to recognize upon their oath, if the said Amaziah Rust be guilty of the premises aforesaid or not, because as well the said George Metcalfe, who prosecutes for the said people of the said state, in this behalf, as the said Amaziah Rust, have put themselves upon that jury, the same day is given as well to the said George Metcalfe, who prosecutes for the said people of the said state, as to the said Amaziah Rust. At which next general sessions of the peace, holden at the town of Johnstown aforesaid, in and for the said county of Montgomery, on Wednesday the fourteenth day of October in the year of our Lord one thousand eight hundred and one aforesaid, before Simon Veeder, John M'Arthur and John T. Visscher, esquires, and other justices of the said people of the said state, in and for the county of Montgomery also assigned, and cometh as well the said George Metcalfe, who prosecutes for the said people of the said state, in this behalf, as the said Amaziah Rust, in his own proper person, and the said jurors of the said jury, by James Hildreth, esquire, sheriff of the said county of Montgomery, for this purpose impannelled and returned, to wit. &c. who being called come, who being chosen, tried, and sworn to speak the truth of and upon the premises in the indictment aforesaid above specified, do say upon their oath, that the said Amaziah Rust is guilty of the premises aforesaid, in the indictment aforesaid above specified, in manner and form as by the indictment aforesaid is supposed against him. Whereupon all and singular the premises being seen, and by the court here fully understood, it is considered by the court here, that the said Amaziah Rust pay to the people of the state of New-York, one hundred dollars for his fine, by the court here upon him said, for and by occasion of the offence and extortion aforesaid, whereof he is in the form aforesaid convicted, and

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that the said Amaziah Rust be taken to satisfy the said ple of the said state for his said fine, and that he pay same or stand committed to the common gaol of the county, until the said fine is paid.

DAVID CADY

IT was now brought before the court on a writ of e

Emmott, for the defendant, took a variety of excepti

1st. That it is not shewn with sufficient certainty be whom the court was held. The record states the in ment to have been "before the *justices of the said peop* "Montgomery aforesaid, and *assigned* to hear and d "mine divers felonies committed and done in the said c "ty." But the act by which their authority is created, "The justices *of the peace* of the *said counties*," &c. have power to hold the general sessions. 1 Rev. Laws sec. 6. This tribunal then, as stated, is not such a c is created by the statute. It is a general principle, here complied with, that particular authorities must be cifically shewn. 2 Hawk. b. 2. c. 25. sec. 123. That *nature* of the commission ought to be set out and mani ed, whereas here it was not apparent, and must be th sult of implication alone.

2d. There has been a mis-trial; there is no issue jo for the jury to try; the record is cometh &c. "and h "heard the said indictment read, the said Amaziah said "is not guilty *thereof*." This applies to the indictment, not to the *offence*.

3d. The time at which the court was held is stated to vitiate the indictment. It is said to have been on a turday; the first meeting ought to have been shewn to been on a Tuesday, in conformity to the act, and the tinuances from thence to the Saturday, regularly set f The words of the act are, "In the county of Montgom "at the *court-house* in the said county, the court of "mon pleas on the second Tuesdays of February, June "October, and the court of general sessions on the "*second Tuesdays* of February and October." The ca is "at the general sessions holden on *Saturday* the "teenth day of February." This is fatal. It is neces to state that the sessions commenced on the day appoi

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and were continued to the day,* at which mention- have been holden. For this doctrine the court may 1 D. & E. 316, where, and also in 3 L. Ray. 41, ill see precedents in point.

There is not sufficient certainty as to place. The ent says "holden *at the town* of Johnstown,"† but rds of the act are, "*at the court-house* in the said ." The court-house is the very spot assigned by the nd for what appears, it may not be in Johnstown. It have been "in the county of Montgomery, at the t-house of and for the said county, in the town of stown." 4 Hawk. 77. b. 2. c. 25. sec. 128 is to the oint.‡

There is a total want of proper continuances. It by the act that the sessions are to be holden on the Tuesday in February and October: the continuance record is to Wednesday the fourteenth day of Octo- n which day the venire is made returnable. The day ted by law was Tuesday; and that, in 1801, was the nth, and not the fourteenth of the month. It was to esday, the thirteenth, that the court ought to have ontinued, and from thence to the day of trial. 4 . 170. b. 2. c. 27. sec. 89. Ibid. sec. 92. This is for a discontinuance is never aided by appearance. ec. 102.

. The indictment is wholly defective for want of cer- The special matter of the whole fact must be set with such precision, that it can sufficiently appear to rt that the indictors have not gone upon insufficient es. 2 Hawk. 320. Nothing material is to be taken

* Is necessary only in cases where the indictment, &c. is at a day the period of the original sessions or jurisdiction. Therefore un- sessions of oyer and terminer, which are pro hac vice, if there be ment found after the first day, the adjournments till the day on e indictment was taken, must be shewn. 2 Hal. P. C. 24. Sampson's James 420. So, on an indictment at an adjourned sessions, the day al sessions began must be stated. Rex v. Fisher, 2 Str. 865. But that be done when the sessions is by statute for a certain length of ithin which the indictment is found, as was the case here; for by section of the act of the legislature, appointing the sessions in they are directed to be held from the Tuesday, to the next Sa- clusive, a continuance therefore would be superfluous, because sessions, are, in law, but as one day. Saint Andrews Holborn v. ent Dapes 2 Salk. 606. The authorities from D. and E. and L. cannot apply. † The indictment goes further, and says, "in and for county,"

‡ [illegible] is of leaving out the county.

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by intendment or implication. 2 Hawk. 347. The indi ment is laid under the fee bill, and therefore clearly bad, i it has not charged the fact to have been knowingly or w fully done. These are the words of the statute, 2 R Laws N. Y. 88. and are indispensable. To shew that t very words of the law should be pursued, and that t court can not, from any circumstances, or by intendme supply the defect, there are two authorities exactly in poi Jackson and Randall's case, 1 Leach 305. Cox's case, ibi 82. At common law this does not hold good, for *th* falsely will imply wilfully; but, under a statute, there can no such implication. In such cases it is also necessary th the specific charge should be stated: in the present case is necessary, not only for the sake of certainty, but becau the statute declares the offence to be for taking a great reward than it allows "for any of the services *aforesaid.*" the sum taken be not for the services "*aforesaid,*" it is not offence, and therefore it should be clearly stated. If t indictment be not for an excess in the money exacted f those services, it is bad. It should also have stated the pa ty aggrieved by the crime, and for this reason; the statu is to him remedial, and gives *him* treble damages. A fu ther defect is, that the judgment does not follow the a The law ordains that the culprit "shall pay to the par "grieved treble damages, *and* such fine to the people of t "state of New-York, as the court shall think proper to i "pose." The sentence is only for a fine; totally omitti the treble damages to the party grieved, for whose co pensation the act was principally intended. Under t statute for the prevention and punishment of extortion, Rev. Laws N. Y. 120, the indictment can as little be su ported. An attorney is not an officer within that law. A officer is an agent for the public, an attorney is only a p vate agent. If, however, he is an officer, then it was n cessary to lay the offence as done by colour of his offi and for doing his office. This is an objection even at co mon law, for *there* it must be charged colore officii. Bain case, 6 Mod. 193. Nor does it appear that the money w taken in the cause; if it was, it might not have been f costs. The charge therefore wants legal precision. T

Queen v. the clerk of the peace of Cumberland, 11 Mod. 88. In that case it was laid as here,* and lord Holt held it insufficient. That it must be so, is evident from this, that it is necessary to shew how much was due. This is not done, and on that account therefore the indictment must fall. Lake's case, 3 Leon. 368. Comyns, Di. extortion, C. Baynes's case, 2 Salk. 680, 1. Holt 512. 517. Queen v. Clerk of Cumberland. 11 Mod. 80, 83.

Metcalfe, district attorney contra. The first objection that has been taken, is to the caption, in omitting after the word "justices" to add "of the peace." This exception, it is presumed, cannot be supported. On considering the nature of the offence, and how it became cognizable before the sessions, the jurisdiction will appear to have been sufficiently set out. The clause is descriptive of their sessions jurisdiction, and that was the only one they were then exercising. What are now called justices of the peace, assigned, &c. were originally no more than conservators of the peace, and chosen by the people. By the 1 Ed. 3. ch. 16. they were made officers of the crown, but still nothing more than conservators, as they antecedently were. It was not till the 34th Ed. 3. ch. 1. that they obtained their power to hear and determine, &c. It is from hence that all their sessions power was derived, and independent of that act they had not power to try. 1 Black. Comm. 349, to 354. *As then the authority of justices does not enable them to hear and determine, &c. and this authority is the only one by which they have cognizance of the offence in the indictment, it comprehends all their sessions power on the point in question, and to state *that* is fully sufficient. It is not necessary to state more than will give jurisdiction over the offence. Suppose any other subsequent authority had been conferred, would it have been incumbent to set forth *that?* The words of the caption are, "assigned to hear and determine divers felonies, trespasses and other misdemeanors;" this then is a competent description of the persons before whom the indictment was tried. It states the mode of creation, and the jurisdiction of the particu-

* briefly. The indictment there charged him with "extortion, taking that he exacted and forced from such person, more than his just fees."

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lar offence to have been delegated. The book referred to Hawk. b. 2. c. 25, sec. 123. page 360, does not make good the exception. There is no case decided that in an indictment at the sessions it is material to insert assigned to keep the peace. The power is distinct from that to try, and therefore on a case under the latter, the former need not be specified.

In answer to the second objection that the issue was not properly joined and therefore a mis-trial it is useless to argue. Three precedents (and all others it is presumed are the same way) sufficiently prove that the due forms of law have been observed. Cro. Cir. Comp. 83. Trem. P. C. 8vo. translated ed. 117. Ibid. 133.

As to the want of certainty in not setting forth the specific charge, and the fee due, this general principle may be applied. It is necessary only that the charge contain the manner and substance of the fact. Hawk. B. 2. ch. 25 sec. 54 to 68. The indictment does do all this, and when compared with others will be found to contain as much certainty as is common. It sets forth the persons time, place, object taken, manner, occasion and intent. But, it is asserted, the party injured is not set forth. The reverse of this we contend to be the fact. Mention is made of the suit, specifying the time when judgment was obtained, naming the parties, plaintiff and defendants: that Ruft conducted it as an attorney for the plaintiff and received so much money over and above what was due. This then is a sufficient description of the person from whom received, and the party aggrieved. The offence is stated to be that the eleven dollars were extorsively "exacted, demanded, extorted and "received over and above his fees." For this an authority may be found in Hawk b 2. c. 25 Sec. 57. It is there said an indictment for extortion, charging the bailiff of a hundred with taking colore officii fifty shillings, is good, without shewing for what he took it; especially after verdict.

The law never can intend that every circumstance, whether it go to the charge or not, shall be enumerated. Those only are requisite which are connected with the crime; such as go to make up the offence. Here he is charged with taking more than due. It is not necessary to

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go into a calculation and state each sum. This may be necessary to be shewn to a jury, but not to appear on a record. All the cases in Hawkin's turn on the principle stated, and leave out indifferent matters, specifying only those that constitute the offence, and without which the prisoner would have been innocent. To the same effect is 4 Com Di. 391. G. certainty to a general intent is sufficient. The same in Rex v. Brunsden, Cro. Car. 438. S. C. 448. To a general indictment against a sheriff's officer charging with having taken twenty shillings, many exceptions were taken, but on this point not one: 1 Sid 91.* the case cited from Hawkins. The court will find the same doctrine in 11 Vin. Abr. 471, 4. 14 Vin. Abr. 363 Pl. 8. n. Rex v. Cover. Rex v. Reffit 7 Mod. 220. But should it even be admitted that the charge is insufficiently made, after a verdict it is too late to be insisted on. Every circumstance that might have been fatal on demurrer cannot be taken advantage of, after trial and conviction. A verdict cures many defects; and particularly those which must have been removed before the party could have been found guilty. Rex v. Cover cited in 4 Bac. Abr. 454. No authority has been adduced to shew that it is necessary to set forth the specific charge. There is no book which will warrant it, and it is repugnant to the cases of Rex v. Brunsden and Rex v. Cover. If *they* are law the exception is good for nothing. Besides the over charge might be a sum in gross; for a regular bill might be made out for 25 dollars, and 30 be received. This will evince that it might be impossible to point out the identical charge in which he was guilty of extorting. As to not stating the due fee, this has ever been considered as an immaterial allegation, it is only a circumstance attached to the offence and it is enough if it appear in evidence. But though the omission be a defect, it is cured by the verdict. The case in 3 Leon. 208, is the only one that can be found to maintain the exception. It seems however to have turned altogether on the words of a particular statute; that of the 25 Ed. 3. ch. 9, made against clergymen who took more than their due for giving absolution. By looking at the act it will be found to have required a more than ordinary degree of cer-

*Rex v. Cover.

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tainty in the proceedings, and the court, probably themselves under its influence. That the statute deman a greater precision than the common law must necess be inferred from its being passed; for had it been oth wise it never would have been enacted. This is evi from the decision in Rex v. Reffit and Potts's Case. those a verdict was had on a general indictment, like present, and the court held it well, saying they could *then* go into the exception. In Rex v. Baines as appear Holt's report of it 512, there was no determination on point now objected. It was an indictment for taking ei shillings for a subpœna of only twelve lines. The ch was "for divers misdemeanors in the execution of "office in the articles following, viz." So that the offe were laid under a videlicit, and a mere recital. Holt that it was not charged for what fees, whether as clerk, in what capacity, it was alleged to have been done in execution of his office. Powell, one of the judges who against the articles, mentioned the case in 3 Leon. but other judges took no notice of it, and it does not appea have been at all rested upon. The court will never requ impossibilities. If this objection should prevail, in m instances an attorney could never be indicted. Supp he should refuse a copy of his bill and destroy it. To sure the court might order a copy to be produced: b then, no other than the party injured could call upon hi so that this would confine the proceedings to the per injured, and lessen the generality of the remedy. W if the attorney chose to be in contempt? He would hi himself beyond the ordinary course of law. In Re Reffit and Rex v. Cover a fee was due for one of the se ces, it was not set out, and yet the conviction dete good. For if stated it would not enable the court to for better judgment of the nature of the offence, it would g them no greater information than they now have; unl every specific service is to be charged, *then* what was d and *then* what was received. The objection is not now ta ble: for though it might have been good on demurrer, i cured by the verdict, the inference being that all the fa were proved. From hence the conclusion must be that

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, and this word is used in the charge. But, if ections be done away, it is still urged that we have it to have been done under colour of his office, and money is not stated to have been received in the r for fees. This latter exception is not true in he indictment sets it forth with all convenient, ot with all possible certainty. It states the suit, t was the attorney for the plaintiff, that being so, he prosecuting the suit for the plaintiff as *such* at- he extorted from one of the defendants eleven dol- re than were due in the suit, and more than were im, and the other officers and ministers of the court r respective services in the said suit. This there- bstantially good 1 Trem. 8vo. Ed. of English trans- 5. 4 Went. Plead. 146.* Colore officii though in the precedents in one or two reports may be d with. If it appear that the party charged with nce was acting in his office it is sufficient. In the Hawkin's relied on, B. 2, c. 25. S. 57, after enumerat- technical terms that could not be omitted, it does that colore officii is indispensable. Rex v. Baine's e objection, but it was not acceded to. The indict- ys that he was acting as an attorney; this is fully . As to the argument that the proceedings are not der either of the acts of the legislature, it may be efly answered, that it is immaterial whether it be t, if good at common law; to which its conclusion the peace &c. cannot be objected. The whole the indictment shews the money was taken by co- his office. It is doubted however whether an attor- nch an officer as is intended by the act of the 7th 1788. "For prevention and punishment of extor- Attornies are always stated to be officers of the court, m to be ministerial officers. They are licensed, d, and liable to punishment by the court, and there- atures of it. The act mentioning sheriff or other hatsoever ministerial or judical; if then an attorney ficer, the indictment will be good under that law, the words knowingly and wilfully are not in it, ecessary the under pretence of getting a dif. harge, not under co- lor, therefore could not be so laid.

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The fee bill 2 Rev. Laws 88 has these terms. It is denied but that the indictment would have been more mal had it contained these words; yet in Hawk. B. 25. s. 96, it is mentioned that if a statute contain the unlawfully, you must use it, *or something tantam* Therefore it is not necessary to use every adjective th may contain. The words of the indictment and tho the law when compared will be found to be co-signifi The question then is whether the words, taken collecti do not sufficiently indicate that the money was rece knowingly and wilfully? whether they do not impo much? This however is a public statute and it is not cessary to recite it. This principle is equally appli whether the fact charged be prohibited by one or statutes. The averment therefore against the form of statute is exabundanti and not fatal. Two words are said to be omitted, which are essential to the descri of the offence of extortion. At common law these w are not required. This is a misdemeanor, not origina on any statute; it is the old common law offence: the w of the statute only shew what would be extortion, and court will please to observe that colore officii can a only where no fee is allowed at all; which is a di ent species of extortion from the present. That the ju ment ought to have been for treble damages can be enf ed as an argument against the proceedings, only if the deemed to be on the statute, but if held to be at comm Law, it cannot prevail. The authority cited on the op site side from Cro. Car. 448 is in point to this, though it been mistaken by the party by whom used. Another ference may be made to shew an exception cannot be t for not giving damages. 2 Stra. 1048.* "quod convi "est," was adjudged enough, because every thing the *ordains* is implied and results from the words; but w *rests in discretion* must be inserted. Nor is it necess though the act order fine and imprisonment, that h should be inflicted; its being a fine only, does not viti In General Gordons case, the same thing was determi by this court.

* It is supposed Rex v. Luckup, is the case alluded to. It does not ever seem perfectly analogous.

e is no authority to support the objection on account
ing to say "at the court house;" and that which is
ainst the continuances is equally untenable. The
may adjourn to any day within the sessions in the
nner as they may make their process returnable;
rmity to which, (to the venire,) the continuance is
That the party aggrieved is not mentioned has al-
een answered, and of this the whole indictment is a
ne refutation. If this indictment prevail, deleterious
uences it is said will ensue, and that indictments can
preferred will be a doctrine dangerous to the pro-
. There is no man, continued the district attorney,
re wishes its well being than myself, but neither its
nor its honor require that practices like these should
nished. The court therefore though called on to
more certainty in this indictment than any other
be influenced by the considerations suggested: it is
law necessary, and that is sufficient.
nott in reply. The court will perceive that the
may affect the defendant most seriously: it is not
e fine he has to pay, but it may go to striking him
rolls and depriving him of the means of subsistence.
um does not induce him to come here, but, that he
have the means of support. The indictment is not
ded to have been framed on a bill of Rust's, but
estimate made by the parties who met together, cal-
what he ought to have received, and then, because
r opinion he had taken too much, they proceed in
perous manner. It perhaps would have been full as
al for the purposes of justice if they had left the
ment to the court of which he is an attorney. Two
of errors are insisted upon. One goes to the form,
we contend is materially defective. This, an in-
n of the record and authorities will prove. From
.. B. 2. c. 25. s. 123, and the cases there cited,
neral rules may be drawn. That the nature of the
ision ought to be set forth and the authority to
he court apparent on the record. It is not stated that
tices were of the peace for the county. Therefore,
standing Blackstone, when we look at our law, we

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find they must be of justices of the peace *for* the cc If you pursue the words of the indictment the same w: precision is continued. Before Abraham &c. and « "justices of the said people *in* the county of Montg« "aforesaid." There is a wide difference between ju *in*, and justices *of* a county. Suppose a magistrate another county to go there, he would be a justice *in*,* not *of* Montgomery, and could not have a right to be « the sessions of that county. It does not follow tha are the right justices, because stiled justices of the p The justices of this court are justices of the peopl they could not go to Montgomery and hold the ses Nor is this cured by its being stated "assigned to &c. for if there was a special commission to try part offences, they would under *that* be *assigned* to hea have authority to hear and determine *according to thei mission*, but *not* as *justices of the peace of the county.* answer has been made to the exception against the ti which the court was holden: it should have been s that the court was holden on the Tuesday, and then adj ed, this not being done, the omission is material ar cured. Rex. v. Warre, str. 698.† As to place the total failure. The act fixing the place at which the se are to be held, does not notice Johnstown: it mentio court-house of the county: the location of that was vate law: it ought then to have appeared that the « house was at Johnstown, that the sessions were held and not elsewhere; for, if the sessions were at Johns and the court-house in any other town, the court have no authority. Another idea presents itself resp the adjournment; suppose it had gone beyond the we which the second Tuesday fell, there would doubtles want of due continuances, and the contrary does not a now.‡ The court will recollect that this indictmen not necessary for the ends of justice, as the court of Rust is an attorney, is competent to every purpo which it can be asked. The fee-bill creates the of and from Jackson and Randall's case, and Cox's case

* In this the learned counsel is mistaken, a justice of the peace, in the eye of the law, is a justice only in his own county.

† That was an indictment stated to be held "ad festum Epiphan stead of Epiphaniae. And in the Roman calendar there is a Saint Epip

‡ The act being a public act, the judges are bound to notice the being laid within the period ordained.

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ted, it is indispensable to pursue the words of the , "knowingly and wilfully." The very charge must ifically stated, for it is only in overcharges of a par- nature, mentioned by the act, that the offence is hended. The words of the law are, "the sum of herein before allowed." If then not in one of the efore allowed, it is not an offence within the act. It be an overcharge for a letter. Admitting the demand unreasonable, it is possible it was not within those ned by the fee-bill. If it was, then the conviction rly bad, for the court should have gone on to give damages.* They are the first object of the law, as ensation to the party aggrieved, the fine alone is a of discretion, the words are "and such fine to the e of the state of New-York, as the court &c. shall proper." So by colour of his office, is equally ne- under the other act, for the words of the law have t a constituent part of the offence; but it is conceived tornies are not either ministerial, or judicial officers the meaning of that law. If the proceedings are to n at common law, then it is indispensable that colore should be expressed. Baines's case is full to this. The r of stating the charge, really amounts to nothing. e extorted "eleven dollars over and above the fees ally paid for such like services, and due in the suit esaid, and more than was legally due to the said Ama- Rust and the other officers and ministers of the said t, for their respective services in the said suit," *over ve the fees usually paid*; this does not say they were d in the cause, but only that they were received from the defendants. Should, however, the court imply ney was received in the cause, it does not appear to een for costs: there is not a word to shew it. The might have been for a part of the debt. If the court he common presumption that he was acting in good hough too much has been taken, it will not be sup- for fees; especially as they are stated not to be due, debt not alleged to have been paid. Nay, suppose ayment had been long standing, the eleven dollars

* this is to be done without action and trial by jury, Bumpsteds 6. Car. 448. Rex v. Lamsane, W. Jones 379.

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might be for interest. It is possible this extra sum might have been received, every word of the indictment in that respect true, and yet the defendant not guilty of extortion. He may have paid to another person; the sheriff may have demanded it; a thousand cases might be put to shew the want of precision. The proceedings mention *such like services*, without stating any before.

Metcalfe. It sets forth that he obtained a judgment.

Emmott. Allowed; but that is not material. In 11 Mod. the Queen v. clerk of Cumberland, the same observation was made by Holt. He says "he took ten shillings "more than his fee, why this may be, for perhaps he had "another demand upon him," and the indictment held not good. The authority in 3 Leonard, requiring the sum actually due to be specified, is acknowledged by the district attorney to be against him. The case in Holt is full for the purpose cited; the exceptions being confirmed by reason and settled adjudications, are well taken, and the indictment never can stand.

Per curiam. Delivered by Radcliff, justice. This is a case on error, from the sessions in Montgomery. The plaintiff was indicted in the sessions for *extortion*, as an attorney of the court of common pleas for that county. General errors have been assigned, and a number of objections taken to the indictment and to the record, some of which are objections of form, and others of substance.

For the purpose of the opinion we shall give, it will be sufficient to state the part of the indictment on which it is founded, and which we deem to be defective in substance.

The indictment states, that he was an attorney of the court, &c. and that on the 12th of February 1799, he obtained a judgment in favor of one Ichabod Roberts v. Alexander Campbell and John Hamilton, jun. and that he did extort and receive from the said Alexander, *eleven dollars over and above the fees usually paid for such like services, and due in the suit aforesaid, and more than was legally due to him and the other officers and ministers of the said court, for their respective services in the said suit, &c.*

The fact thus charged may be true, and the plaintiff may still be innocent of the offence. The indictment does not

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fy how much was received *on his own account* and how
i for the *officers* and members of the court. It may be
he *excess* on which the charge of extortion depended,
ccasioned by the charges made by the other officers,
ıcorporated into his bill, as for *sheriffs fees, clerk's and*
ssts, &c. In these respects the indictment is not suf-
ıtly particular, the offence is not alleged with sufficient
ision and certainty; therefore, without examining the
r objections, we are of opinion that for this cause the
;ment ought to be reversed.

Lewis, chief justice, absent.

David Combs *against* Peter Wyckoff.

HE present action was instituted to recover damages
ıot delivering a boat alleged to have been purchased by
plaintiff. Woods moved to set aside the report of the
rees on an affidavit made by the attorney in the cause
ing these grounds; that the witnesses of the defendant
re seafaring men, and that there had been an express
ement between the deponent and the plaintiff's attorney,
the referees should not make up their report until the
imony on the part of the defendant could be obtained;
notwithstanding this agreement, the referees had re-
ted without waiting for the evidence on which the de-
ıant relied; that a sum had been allowed the plaintiff for
ss, said to have been sustained by not being enabled to
y a quantity of wood to New-York, tho' it was proved
even admitted, that a part of the wood was previously
by the plaintiff, and the residue might have been con-
d to New-York had he thought fit; that the referees
nominated by the deponent without the knowledge of
lefendant, between whom and one of them a quarrel
taken place, which was not made up; that by the next
it the defendant hoped to be able to procure testimony
:h would at least diminish the damages against him.

kinner contra read his own deposition setting forth that
lid not recollect the agreement above mentioned, and
: at least it was not in writing; that the referees met
eral times, and were as often adjourned at the request of
defendant's attorney under the pretence of not being

If a party to a suit referred, cannot produce his witneſſes by the time of hearing, a judge at chambers in vacation, or the court, if ſetting, will ſtay proceedings. Defendant's attorney having nominated referees, and the party not having objected, he cannot on that ground, move to ſet aſide a report.

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Wyckoff v. Combs.

able to procure the attendance of his witnesses; that at the last meeting the defendant's attorney declined summing up; and so far from any enmity existing between the defendant and one of his referees, the very party named as being inimical was his special bail.

Per curiam. Delivered by Livingston justice. The defendant moves to set aside the report of referees, alleging:

1. That it was agreed by the plaintiff's attorney, that no report should be made until the defendant's witnesses could be procured, which was afterwards disregarded.

This agreement not being in writing, and being denied by the plaintiff's attorney must be laid out of sight. The court cannot, too frequently inculcate the necessity of reducing to writing all agreements between gentlemen of the bar. Many mistakes, much misunderstanding and controversy will by this measure be avoided. In the present case it appears that two months elapsed before the report was made, which was allowing sufficient time for the defendant to produce his witnesses. If they were abroad, he might have applied to the court, (for a term intervened between the appointment and report of the referees) for an order on them not to proceed for a reasonable time, which would have been granted, or a judge at his chambers would have ordered the proceedings to stay until application should be made to the court.

2. Another objection is, that a sum was allowed, which was not proved to be due. Of this allegation there is no satisfactory proof and therefore we can take no notice of it.

3. A third objection is, an enmity between the defendant and one of the referees.

This reference it is to be observed was nominated by the defendant's attorney, and although he might have been ignorant of the quarrel spoken of, the defendant by his acquiescence in the appointment and submitting the cause to his decision, cannot now avail himself of this challenge. He should have applied to the court to remove him and appoint another. It is somewhat remarkable however that the referee who is repugnant or hostile to the defendant, should be his special bail in this very cause.

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e defendant states that "he can now introduce
e to diminish *at least* the damages reported." This
ose to say the least. Why was not this testimony
before? and to what extent will the damages be re-
it be offered now? Will it justify a diminution of
dollar or less? If so "de minimis non curat lex,"
e discovery had been made even prior to the report
be no reason for disturbing it. Let the defendant
hing by his motion and pay the costs of this appli-

The People *against* Harry Croswell.

defendant had been convicted before his honor
tice Lewis at the last circuit, held in and for the
f Columbia, on an indictment for a libel on the
t of the United States. The proceedings were ori-
commenced before the justices in the general sessi-
ns whence they were removed into this court, and
own to the circuit in the usual manner. On his
on recognizances were taken for his appearance the
of term to receive judgment, but his counsel con-
the chief justice to have totally misdirected the
ere rather at a loss how to bring the matter before
art. It was resolved by the bench that on the cause
ought up and sent down to the circuit, the suit,
in its nature a criminal prosecution, took the course
l action; that within the first four days of the term
the conviction, a motion in arrest of judgment
e made, or the parties may make a case, and bring
ing fully before the court. This measure they ad-
s being in the present instance more explicit, and
adopted, they gave day till the fourth day of next
king recognizances from the defendant and two
or his due appearance, himself in 500 dollars, his
in 250 dollars each.

If an indictment be removed from the ſeſſions into this court, any exceptions may be taken to the charge of the judge by making a caſe and bringing it before the court, in the ſame manner as in civil proceedings.

Lusher *against* Walton.

VBCTEN. This is a motion for a rule to refer.
idavit states there are long accounts to adjust.
nott. I must oppose it. The notice does not mention

Notice to refer muſt contain the names of referees. Miſapprehenſion

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Luther v. Walton.

the name of the referees, from Bedle v. Willet* dec last term this is necessary.

Per curiam. If the cause contains long accounts cannot try it.

Spencer observed to the court that a cause could no referred at the circuit; but from the case cited, the a cation might be renewed the next non-enumerated day.

Emmott. If the court say they will hear it, I shall w the objection.

Per curiam. The omission must be accounted for, therefore we cannot say we will hear it. All notices be for the first day, if not, an excuse must be offered. a party's mis-apprehending a rule has frequently beer ceived as an excuse. The decision quoted has altere former practice, and if the party will swear he did know it, he may apply again.

Emmott waiving his objection as to the omission o names.

Van Vecten read his affidavit and another in su of it.

Emmott opposed the rule on a deposition by the pla stating that an account between him and the defendan been long ago settled, on which there appeared a ce ballance due, for which the present action was bro and that he believed the matter in dispute involved p of law.

Per curiam. From the plaintiff's affidavit it does no pear there was a final closure of accounts, so as to e to oppose the rule; besides, there are two affidavits ag him; the weight of evidence must therefore prepond and his single affidavit must give way. His second gr for resisting the application is, that on the examin questions of law will arise. This if properly stated, y have been a good reason for denying the rule; but on point the affidavit is defective: it states his information belief that it will arise; it ought to have said that " " advised by his counsel," and even then to have set the particular and specific point, to satisfy us that i exist. For these reasons therefore, as the first taken

of a rule, or ignorance of a late determination may be offered as excuses for not noticing for the first day of term. If the ground of opposing a reference be that a point of law will arise, it ought to be stated expressly what, and that it is "as advised by counsel."

* Ante. 7.

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Luſher v. Walton.

s waived, the plaintiffs' affidavit is insufficient and
idant must take his rule.

Lewis, chief justice, absent.

n on the demise of Joseph Winter, *against* Iartin M'Evoy, tenant in possession.

IDS applied to vacate the judgment entered against al ejector, and to admit Henry Masterton to be fendant, on such terms as the court might be pleas-der.

In order to be admitted as a defendant in ejectment, a privity muſt be ſhewn between the applicant and tenant. It is not enough for the party applying to ſwear he claims title and has a real and ſubſtantial defence.

the affidavit of Masterton, it appeared, that the suit ituted to recover possession of forty-five acres of he county of West Chester, to which he claimed has a real and substantial defence to make: that, on day of July last, the deponent discovered in the common rules of this court, that a rule for judg-ainst the casual ejector had been entered in the use, on the 12th day of May preceding; that the n possession never informed the deponent of any on in the said suit having been served upon him, g time after the rule for judgment had been enter-t the deponent believed the knowledge of it was d from him, owing to a good understanding between or of the plaintiff, and the tenant in possession, to *that* defence being made, which the lessor of the was, previous to the commencement of the above d by the deponent he would make, and that on e finds no record has been filed in the above cause. facts and allegations he contended were tantamount itive assertion of title, that it was impossible one to have a real and substantial defence. That would be lost by the plaintiff as a trial might be had rcuit in September. That the question would then me up whether the deponent or Winter was really

f justice. There does not appear to be any rela-ween Masterton and the tenant.

s. Perhaps the affidavit does not go quite far in stating that expressly, but surely it may well be from the whole.

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Winter v. M'Evoy.

Emmott contra. The deponent does not swear to any title, he only says he has a claim: he does not swear that he is the landlord; not even that there is a privity between him and the tenant. If then there is no title, if he is not landlord, and if there is no privity, how can he be made a defendant? If a man may thus come in and vacate a judgment, without any complaint from the tenant, there is not one, which may not be set aside. There is nothing stated which shews that notice of the ejectment ought to have been given to the deponent. The tenant is not obliged to hunt out all persons who have claims, he can only be expected to communicate to his privies.

Per curiam. The party can take nothing by his motion.

Lewis, chief justice, absent.

Jackson, on the demise of Rodman, *against* Adam Brown.

The sudden indisposition of counsel and attorney, is an excuse for not proceeding to trial, but will not exempt from costs.

SPENCER moved for judgment, as in case of nonsuit for not proceeding to trial. The notice was served on the first day of term, for argument on this. The affidavit accounted for its not being noticed for the first day, by stating that it had been delivered, on the twenty-sixth of July, to a person who was then about leaving Hudson for Albany, but who had either lost it, or left it behind with some papers of his own.

Van Vecten opposed the motion, by an affidavit of the indisposition of both attorney and counsel in the cause, when too late to employ others.

The cause was countermanded, but, after the circuit began.

Per curiam. The excuse is sufficient to prevent granting the judgment applied for, but the plaintiff must pay the costs of not proceeding to trial. It was a misfortune, it is true, that the parties should have been afflicted with sickness, but it is a misfortune that ought not to fall on the defendant.

Lewis, chief justice, absent.

Alexander *against* Esten, Administrator.

Practice as to notice.

THE court ruled that it was the practice to confine a party

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Alexander v. Eltenr.

objects specified in his notice, and the present be- set aside an execution, they would not allow it to be d to the judgment.

Lewis, chief justice, absent.

on, on the demise of Elkanah Watson, *against* John Marsh.

WOODS moved, on the common affidavit, for judg- as in case of nonsuit for not proceeding to trial.

Nine days notice is enough in Cayuga to produce papers in Albany, 180 miles distant.

mott resisted it by a counter affidavit, setting forth he cause was duly noticed for Cayuga county, but, ays before the trial, the defendant served a notice to e papers which were in Albany.

mott stated some circumstances tending to shew g practice, but nothing of that sort appeared by the it.

curiam. What is the distance from the county in Cayuga, to Albany?

mott. One hundred and eighty miles.

curiam. The plaintiff must stipulate and pay costs. is no proof of want of time.

Lewis, chief justice, absent.

amuel B. Webb *against* Thomas Wilkie.

IS was an action on a sealed note, dated on the thirti- the month. The declaration stated the date to be the nth. Emmot on the first day of term had obtained to amend the declaration by striking out the word enth" and inserting the word "thirtieth." No per- pearing to oppose, the motion was granted of course hout imposing terms.

Whenever a plaintiff amends his declaration, the defendant has an election to plead de novo.

Vecten now applied to vacate that rule, and that it sed that the amendment be on the usual terms. This was necessary, because the plea of non est factum, was then proper, might now be highly the reverse. urt was always disposed to set things right, if it lay r power. They never could mean that the plaintiff, ad been guilty of a mistake in his declaration, should hesty to amend *that*, and the defendant be held to a plea ight be inapplicable. Besides, there was ample time

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Webb v. Wilkie.

to give a plea before the next circuit, and surely the co will not shut out the defendant from pleading de no when his first plea was the result of the plaintiff's mista ment.

Per curiam. Let the former rule be vacated, and t plaintiff amend on the usual terms.

William Gilliland *against* Joseph Morrell.

All irregularities are waived by a def. ndant if he appear on trial. On judgment for nonsuit nifi, the defendant should make a demand of his costs with a copy of his rule annexed; and if not paid in 20 days, he may enter his judgment; if he do not so, the plaintiff will be regular in noticing for trial.

THE affidavit that was read stated, that in October, 180 a motion was made on the part of the defendant for judg ment, as in a case of nonsuit; which, no one appearin to oppose, was granted as of course. The judgment, tha taken, was, in the same term, set aside by the plaintiff, o the usual terms of stipulating to try the next circuit, an paying the costs of not proceeding to trial. The stipula tion was entered into, the costs taxed, and demanded, b not paid, and now continued unsatisfied; that therefore and as the defendant's only witness could not be found, h did not attend by himself or attorney at the last circuit i April.

On these facts duly sworn to, and on an affidavit of th defendant that he had a good and substantial defence, as in formed by his counsel, which he verily believed to be true; that on the merits, the plaintiff could not recover, and tha a material witness was wanting, without whose testimony the defendant could not proceed to trial, but which h could procure by the next circuit,

Van Vecten moved to set aside the verdict, and grant a new trial.

Woodworth contra, produced a certificate from the cler of the circuit court, that the trial of the above cause was had on the eighth day of April last, when Mr. Van Vecten appeared for Mr. Fisk, attorney for the defendant. On this he contended every irregularity was waived, and the verdict must stand, otherwise the chance of a verdict might be taken at any time after a little advantage obtained, and in case of a want of success, a motion to set it aside resorted to.

Per curiam. This is an application to set aside a verdict. There are many facts stated. With respect to the entry of

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ule for setting aside the judgment, as in case of non- there may be some doubt: The clerk finds no rule en- , but as there was a stipulation filed, the court take it anted that it was on the usual terms. It is neces- however, that in all cases of stipulation, there should demand of costs; this demand should be accompanied a copy of the rule, and if the costs be not paid in twenty after, then the party may enter up judgment of non- and take the effect of his application. The defendant s that he did present a bill of costs, but does not say with a copy of the rule annexed; this, too, was on rent, and not on the party, or his attorney. The de- nt, therefore, has not been correct in his proceedings, the demand was not regular, the plaintiff was regular icing his cause for last April, and bringing it on to But, admitting that in so doing he had been guilty of regularity, the defendant's appearing on the trial is a r of all advantage to which he might otherwise have entitled. It was decided last term, in the case of v. Rodelicks and Shivers,* that if a party appear, he s all irregularity. But it has been shewn there was ny; and if there was, the conduct of the defendant placed the case in the same situation as if there was The plaintiff, therefore, is regular. Against this is n affidavit of merits: on such an affidavit the court ot set aside a regular verdict. There is no irregu- ; the defendant appeared, and has shewn no excuse e did not defend; for if his witness could not have btained, the court, on the common affidavit, would ut off the trial. The defendant must take nothing by tion.

* Ante 73.

Lewis, chief justice, absent.

non Cogswell *against* Evert Vanderbergh.

When proceedings have been regular, a mere affidavit of merits is not sufficient ground to set them aside. In such a case, if there has been a mistake on which

ODWORTH, on the part of the defendant, moved to le the default, and all subsequent proceedings on two its, made by the defendant and another person, stat- t a capias ad respondendum in this suit, was duly issu- served in the month of November last; that in Fe- following, the defendant called on the plaintiff, and

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the judgment has been taken, the defendant will be relieved only on costs and terms.

offered to pay part of the debt, if he could have time for the residue; that this being agreed to, the defendant paid 80 dollars, and the plaintiff promised to stay all proceedings. the defendant's affidavit further shewed that he had frequently called on the plaintiff to settle the residue, but that he was either from home, or engaged in company, and had, notwithstanding his agreement to stop the suit, gone on, obtained a judgment by default, and taken out execution; that the defendant, relying on the agreement, had not employed any attorney, and the execution was for more than was due, credit not having been given the defendant for an account which he had against the plaintiff. The affidavit, Woodworth said, in addition to its being supported by the deposition of another person, carried internal evidence of its truth. It was not natural to suppose that a man should pay, after an arrest, so large a sum, on account of the debt, under no kind of agreement, but leave himself open to an execution for the residue, the very next moment. He therefore hoped the court would set aside the whole proceedings, as being in violation of every principle of good faith.

Van Antwerp contra, read a long affidavit by the plaintiff denying the receipt of the money on any condition, and swearing to the justness of his execution: But the defence rested on his own testimony alone.

Per curiam. This is an application to set aside the judgment, and all subsequent proceedings. The affidavits are very lengthy, and so far as they relate to merits, we put them totally out of view, for on that point they cannot be received, the plaintiff having been perfectly regular, according to the rules of this court. But the motion is made on the further ground of surprise. To this effect the defendant has sworn, and his testimony is corroborated by that of another witness to the same effect. On the other hand may be opposed the positive denial of the plaintiff: if the weight of testimony be to decide, it will be found with the defendant. There has at least been a misunderstanding in this business. The defendant thought he paid his money that the suit might not go on, and therefore did not make any defence. It is evident some great mistake has

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made; the plaintiff, however, is perfectly regular, as each side may have thought himself right, the judgt and proceedings must be set aside on payment of , pleading issuably, and taking notice of trial for the circuit.

rtin Hoffman and James Seton, *against* William S. Smith.

Want of funds belonging to the drawer excuses notice of non-payment, as well when the bill is accepted, as when not. A professional man, not employed by a party, is a good witness against him.

If a defendant read part of an answer of the plaintiff to a bill of discovery, query whether the whole is made evidence,

THIS was an action by the second indorsee, against the er of a promissory note, dated the eleventh June, 1795, ble one year after date.

he facts were briefly these; the note was originally le to one Thomas Cooper, who indorsed it to Nicholoffman. When it fell due, Smith being unable to it up, gave Nicholas Hoffman a bill of exchange on m W. Burrows, of Philadelphia, for the amount, h, when paid, was to be in satisfaction. In the mean , it was agreed by all parties, that the note should be n the hands of Nicholas Hoffman, Cooper consenting main liable, if the bill of exchange was not paid. After transactions, Nicholas Hoffman being largely indebt- the plaintiffs, indorsed the note over to them on act. The bill of exchange was presented, and accepted, not paid. The plaintiffs then commenced their action nst the defendant on his note. He pleaded the general , payment, and gave notice of special matter.

t the trial, the hand-writing of the different parties beadmitted, the plaintiffs there rested their cause.

he defendant then read in evidence a copy of a bill in ery, filed by himself against the defendants, for a disy and injunction, setting forth the preceding facts, harging a want of notice of the non-payment of the f exchange, in consequence of which he became disel, and Nicholas Hoffman responsible to him for the nt, which he was entitled to set off against the note; ing indorsed after due, it was liable to all the equities maker against the indorser.* The defendant also read dence, such part of the answer of the plaintiffs to the

* Cogswell, cited 3 D. & E. 81. Brown v. Davis, ibid. Beck v. 2 H. Black. 89. n. (a.)

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above bill, as confessed the facts first stated, and wa notice; on which he rested his cause, and moved for a suit, the plaintiffs not having proved notice to him o non-payment of the bill.

The plaintiffs counsel then proposed reading the re of the answer, which, on the part of the defendant, w jected to, but over-ruled. On its being read, it app that Burrows had no funds in his hands at the time thi with many others, was drawn, but that he had acc them to support the credit of the defendant, on his eng to provide for their due payment. That the defe had confessed this, and acknowledged he knew the bil dishonored, as he had been unable to furnish the mea had promised. The answer further stated, that Bu paid his acceptances, lent to the defendant till he w tally ruined, in consequence of which he became, and tinues wholly insolvent, having, however, large den against the defendant still unpaid. The plaintiffs p also, by the evidence of Mr. Troup, who had been p sionally employed and paid by Burrows, against the de ant, who had never retained any one, that the debt from the defendant to Burrows now exceeded 2 dollars.

The judge charged, that the acceptance of the bil primâ facie evidence of funds in the hands of the acc and made it incumbent on the plaintiff to shew the w them, which, in his opinion, had been done. That jury should concur with him, they ought to find fo plaintiffs, but if they thought the want of funds not ciently established, they should find for the defendan

The jury brought in their verdict for the plaintiff.

The defendant moved for a new trial, and it wa consent of the plaintiff's counsel, submitted to the co the points raised by the defendant, which were,

1st. That *after acceptance* of a bill of exchange, of non-payment is, under any circumstances, necessar the want of it discharges the drawer.

2d. That the want of funds could not, after accep excuse the not giving notice of non-payment;* and

* See Bickerdike v. Boleman, 1 D. & E. 411, 410, what is said on thi by Buller, J.

nt of funds was not sufficiently proved in this the testimony of Mr. Troup, and that part of the n chancery which related to the deficiency of funds, improperly received, and ought to have been ex-

nriam. Delivered by Thompson, justice. This uit on a promisory note, dated eleventh of June, able one year after date, and brought by the se- dorsee against the maker.

note being admitted upon the trial, the defendant evidence, a bill and answer in chancery, between ies, in which answer the plaintiffs admitted, that ndant made the note aforesaid payable to Thomas and delivered it to Nicholas Hoffman; that was payable, the defendant made and delivered to s Hoffman, a bill of exchange for the amount of it, illiam W. Burrows, of Philadelphia, payable in 60 hich bill, if paid, was to be a discharge of the note, t otherwise the note was to stand good; that the s accepted, but when presented for payment, fused, the said persons having become insol- The defendant then moved for a nonsuit, on the that the plaintiffs had not given evidence of *notice* to endant of non-payment of the bill.

plaintiffs then proved by Mr. Troup (who was ob- o as a witness, because the communications from ndant to him, were made in confidence, though not naracter of attorney or counsel for him, and the ob- over-ruled) that on a settlement between the de- and Mr. Burrows, he owed the latter 48,000 dol- which the defendant gave a bond the fourth of Oc- 796; that he understood explicitly from both the nt and Burrows, that the above balance arose from paid, and responsibilities incurred, by Burrows, for ndant, in order to support his credit, and from mo- friendship, under an express agreement by the de- , that funds should be provided by him, but that funds were provided; that these were the only ions between Burrows and the defendant. It was ved, that when the bill was not paid, Thomas

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Cooper, the original payee, called on the defendar the defendant said he knew the bill had not been pa that when the bill became payable, Burrows had n to take it up, and that he, the defendant, could n vide the payee with any.

The jury found a verdict for the plaintiff, and fendant now moves for a new trial, on the fo grounds.

That after acceptance of the bill, notice of non-p was requisite to hold the drawer.

That if want of funds excused; here was no su evidence of it, and that the testimony of Mr. Tro inadmissible; that the defendant was entitled to rea parts of the plaintiff's answer in chancery, as he without making the whole answer evidence.

The notice to the drawer of non payment, altho general requisite, was not necessary in this case, the drawer had no effects in the hands of the drawee therefore he would receive no injury for want of The reason for notice failing, the necessity of givi superseded. The acceptance by the drawer made teration in the rule. Notice of non payment was n

Walwyn, v. St. Quintin. 1 B. & P. 652.

cessary because of no use to the drawer. The p the event of funds was conclusive, it arose from the n confession of the defendant himself. Nor was th weight in the objection to the competency of Mr. testimony, his information being received in the ch of a friend, and not in that of counsel. The want o in the hands of Mr. Burrow's, was sufficiently pro dependant of any facts contained in the plaintiff's to the defendant's bill in chancery.

4 D & E. 759.

It is therefore unnecessary to say, whether the answer ought to have been received as evidence or n

Motion.

Joseph Hawkins and others, *against* S. Bra

On a reference if a receipt given after the rule made, be offered in evidence on the part of the de-

VAN VECTEN moved for a rule, against the ref this suit, to shew cause, why an attachment should n against them for not making up their report, or th be ordered so to do. The affidavit on which the appl was founded set forth that at the meeting of the ar

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e counsel of the plaintiffs' had opened their case, ed the nature of their demand, the counsel for the nt presented a plea to the referees on receipt of hey refused to hear any testimony on the part of ntiffs, and neither reported any thing due to them, they make any report in favor of the defendant. cer contra, resisted the application and submitted to nt a special statement of the matter in the nature of t. The facts as there stated were, that after the embling of the referees, &c. they called on the l of the plaintiffs to specify his client's demand, excepting the question of interest, was originally d by the defendant's counsel to amount to about llars, but that there was a defence, which would le the necessity of proving the exact sum claimed, it might be ascertained by the books and bills before rees; that the defence was payment of 1469 dol- ull satisfaction, for proof of which a receipt was in evidence and an acknowledgment, under the the defendant's attorney, admitting certain things he subscribing witness would have sworn to, if That the plaintiffs objected to the admission of timony, but before the question of admissibility could ved, the defendant produced the following plea. now at this day, that is to say on the 19th day of 1803, before George Hale, Samuel Edmonds and ell Hotchkis referees herein appointed, it being the day and time of their meeting hereon and upon atters referred to them in the above cause, comes id John, by Erastus Root his counsel, and says that id Joseph, &c. ought not further to maintain their ction against him the said John, because, he says, fter the 14th day of May last past, from which day, as given to the said referees to make their report he first Monday in August next before the justices supreme court, &c. at the city-hall of the city of y aforesaid, the aforesaid action was continued, to n the 28th day of May in the year aforesaid at the f Albany in the county of Albany aforesaid, the did pay to the said Joseph, &c. the sum of one

fendant, and objected to by the plaintiff, the special matter and facts should not be returned to the court, but the referees should admit it and make the report upon it that the party aggrieved may bring it fully before the court. Query if a special return of facts without a decision be, in any case a report within the meaning of the rule.

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" thousand four hundred and sixty nine dollars in ful
" tisfaction, and discharge of all and singular the matters
" things and the sums of money due to the said plaintiffs
" for the recovery whereof this aforesaid action hath
" brought and prosecuted, and which said sum of one t
" sand four hundred and sixty nine dollars was then
" there accepted, taken and received by the above plain
" in full satisfaction and discharge of all and singular
" ters and things, and of the sums of money due to
" and for the recovery whereof this aforesaid action
" been brought and prosecuted, and this, &c. where
" &c. That thereon the referees adjourned the fu
hearing and returned the said plea.

This was a report, it was all the referees could
they could not undertake to decide, whether the plea
good or not, that being matter of law.

Per curiam. The motion is that the referees be co
to make a report, they having, instead of that, made
cial return of all the facts, to which they have annexe
plea of the defendant offered to them at the hearing.
application must be granted, therefore let the rule b
the referees report by the first day of next term.

N. B. After giving the opinion of the court, Kent J. o
ed, that their honors would advise the referees in maki
their report to allow the receipt, if they believed it ge
and to have been fairly obtained, in order that the pl
on whose affidavit the application was made, if he th
himself aggrieved, or that it was improper to allow
ceipt given after the rule to refer, might apply to the
to set aside the report on that ground, at which
the question might be fully argued.

THE COURT desired that all cases submitted to
without argument should be so indorsed, because they
otherwise be laid aside under an idea that an arg
would take place.

Jackson, on the demise of Le Roy and o *against* Abraham Sternbergh.

New trial, weight of evidence.

THIS was an action of ejectment, brought for t
covery of lands situated in Scoharie, in a patent g

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dert Schuyler and others, tried at the Scoharie cir-
the 30th of May 1802, before Mr. justice Thomp-

the trial it was admitted by both parties, that the
the premises in question, was once vested in Rip
ms; and that it was included within the equal one
part of the said patent, which fell to the share of
id Rip Van Dam, who was one of the patentees of
id patent.

e that the title of the said Rip Van Dam to the whole
equal and undivided one seventh part of the said
, which included the premises in question, was le-
nveyed by the said Rip Van Dam, to Johannes
er, Henrick Schaeffer, Teunis Swart, and Henrick
alkenbergh.

plaintiffs gave in evidence, a deed from them to Jonas
y, dated in January 1730—31, realeasing "all the
full and equal seventh part of all the undivided lands
ween *Scoharie river and the hills*, from Fox's creek
place where two rivulets or runs of water come in
, and fall or run in Scoharie river, by north of Gar-
t Town." After this, was adduced the will of Jonas
oy, made in January 1749—50, by which he devised
ne half of the lands owned by him in Scoharie, to
ius Le Roy, and the other half to David Le Roy, after
eath of Maria his wife. It was then proved that Da-
ied, leaving an only son, named William, one of the
s of the plaintiff, in behalf of whom Adam B. Vro-
further testified that, about fourteen years since, the
dant himself shewed the corners of the lot called No.
and its boundaries, which included the premises in
tion, and said it was Le Roy's lot. That one of the
rs, Levinus Le Roy, about the same time requested
witness to take charge of this lot, and see that there
no waste of timber, that it had always been called Le
's lot. That it had never been cleared or fenced till
t four or five years since.

eter Becker deposed, that Le Roy's lot lay north of
's creek, and south of Crab's hill, *between* the hills and
ame creek, but he did not know whether lot No. 156,

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lay on the hills or not. It was proved by three witnesses that the defendant had sworn, before a magistrate, on a certain occasion, that he had been in possession of the premises eight or nine years, that he held the west end of the lot under Henry Lawyer, and the east end he claimed in his own right, amounting to about fifteen or nineteen acres, and also that the defendant said it had once been Le Roy's lot.

Thomas Machin, a surveyor, swore, that in June 1801, he surveyed lot 156, at the request of one of the lessors, and that, according to his survey, the premises were included in that lot.

On the part of the defendant it was contended, that the premises in question lay *on the hills*, and were not included in the boundaries above mentioned, to prove which several witnesses were examined.

Nicholas Sternbergh swore he was seventy-nine years old, and was brought up near the premises; that forty or fifty years ago Jonas Le Roy, under whom the lessors of the plaintiff derived their title, shewed him the bounds of the land above described; that he the witness was well acquainted with the premises in dispute, and knew they do not lie within those bounds, and Jonas Le Roy had told the witness, that his (Le Roy's) deed did not cover the premises that he was easterly to the hills only.

Peter Mann, a surveyor, deposed that he had run on lot 156, and the premises were not included in it.

Nicholas Sternbergh and David Sternbergh deposed, that they were acquainted with the premises in question, and that they are situated *upon* what are commonly called the Hills, and are not included in the bounds of Jonas Le Roy's deed. One witness swore that the defendant had from time to time, for forty or fifty years past, cut wood for fire and fences on the premises; and another witness testified that the defendant had cleared and cultivated the premises for about twenty years last past.

On this evidence the jury found for the plaintiff.

Tiffany for the defendant. The application is for a new trial. The verdict being contrary to law, evidence and the sense of the court. From the case it does not ap

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ver that the plaintiff, or those under whom he claims, have ever been in possesion of the lands demanded. This must in all cases be shewn. Run. Eject. 23. 4. It is indispensably necessary also that he manifest to the court a right of entry. Ibid. 42. and the reasons are clear, because, as the action is possessory, and you must enter to possess, you must establish a possession, and a right of entry to obtain that possession, from whence you are ejected. Therefore, in 1 Burr. 126,* the court decided against the remedy, though the plaintiff had a right. Because, the right to enter, on which this action is founded, was gone: so here, the defendant having been in possession more than 20 years, the right of entry is lost, and whatever may be the title of lessors of the plaintiff, a recovery cannot be had. The weight of evidence is also in favor of the defendant.

Gibbard contra. The reasons for granting a new trial must be collected from the whole of the evidence, and the nature of the case, 1 Burr. 44. Where the evidence preponderates against the verdict, the court will grant a new trial; when it does not, they will refuse. The point agitated at the trial was, whether the premises are within the boundaries of lot 156, or not. By part of the testimony, it appears, they were; and, in cases of a contrariety of evidence, the court will never take away the right of the jury, who try fact and law also. The right of entry must have been made out, or the plaintiff could not have had a verdict. The declaration of the defendant himself, as proved at the trial, is an answer to the argument respecting possession, and right of entry. He said, he held the land as tenant to the Le Roys; this was only 14 years since: as his possession was the possession of the Le Roys, it shews they were possessed within 20 years, the action, therefore, well brought. The 50 years cutting wood, does not destroy this conclusion, for it only proves a 50 years continuing to trespass. The right of the lessors is established by the acknowledgment of the defendant himself, within 20 years, and not to be prejudiced by any inference. There is nothing, therefore, to induce the court to set aside the verdict.

Tilliny in reply. The application is to the discretion of

* Taylor, ex dem. Atkyns v. Horde & al.

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the court. If there is a doubt of the propriety of the verdict, the court will not suffer the possession of the defendant to be changed. The injury might be more than a subsequent recovery by the now defendant could compensate. As to the confessions of the lessors' title, if their right of entry was gone, it could not be revived by the acknowledgment of the defendant.

Per. curiam. Delivered by Thompson, Justice.

This was an action of ejectment, tried at the Schoharie circuit, in June, 1802. The plaintiff deduced a title, to a certain piece or tract of land, lying in Schuyler's patent and which was known and distinguished by Lot No. 1[illegible] and bounded as follows; "*All the one full, and equal [illegible] part, of all the undivided lands between Schoharie river and the hills, from Fox's Creek to a place where two rivulets or runs of water come in one, and fall or run in Schoharie river, north of Garlickt Town.*" The only enquiry on the trial was, whether the premises in question were comprised within the boundaries above mentioned.

The jury found a verdict for the plaintiff, and application is now made for a new trial.

The description of the premises to which the plaintiff deduced a title, is vague and uncertain; they are described as lying "*between Schoharie river and the hills, from Fox Creek, to a place where two rivulets or runs of water come in one, and fall or run in Schoharie river, by north of Garlick Town.*" This uncertainty may account, in some measure, for the different results in the surveys made by the opposite parties, and for the contradiction which appears in the testimony. The plaintiff's eastern boundary appears to be the *hills*, and the enquiry was, where is the dividing line between the flats and the hills? The testimony on the part of the plaintiff, except that of Adam B. Vroman, is principally as to general reputation, that this was called Roy's lot. Mr. Vroman, however, swears, that the defendant shewed him the corners of lot 756, and the boundaries, and he, the witness, said, they included the premises in question. On the part of the defendant, Nicholas Sternbergh swore, that the plaintiff's ancestor, under whom they claimed, as much as 40 or 50 years ago

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: to him, his boundaries, and that they did not premises; that he was born and brought up in ourhood, and had always been well acquainted premises, that Jonas Le Roy, the ancestor ntiff, expressly declared to him when he was ut his boundaries that his deed did not cov-l, which is now in dispute. It appeared also stimony of two other witnesses that the lands in on what always has been called the *hills*, and endant has occasionly, cut timber on the pre-orty or fifty years past. The testimony is cer-contradictory, but none of the witnesses ap-e been impeached. Their testimony however very different impression when put on paper, t would, to hear them examined. Judging only ase the weight of evidence is with the de-And although this of itself is not a sufficient granting a new trial in all cases, yet from the ppears, there is well founded reason to be-has not been done. And that another exami-he cause ought to be made, before the posses-ged, we are therefore of opinion, that a new to be granted on payment of costs.

Renaudet *against* Ephraim Crocken.

is an action of trespass quare clausum fregit tried circuit for the county of Saratoga in the year re his honor Mr. Justice Kent. The only ised for the determination of the court were:

ether if a trespass be committed in a part of a h, by a division made before the commence-e action, is annexed to another township, the declare as for a trespass committed in the town-the locus in quo was originally situated?

ether, a surveyor, acting under the authority of a ointed by virtue of a power of substitution in a ttorney, ought to be admitted to testify to the ch survey, without shewing the letter of attor-h it was acknowledged to exist?

If a trespass be committed in a town, which before action brought is subdivided, the trespass may be laid as in the original township. A surveyor acting under an appointment by an atrorney, may testify without pro cing the power An agent who has promised to refund money received on account of his principal in

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3d. Whether an agent, having received several sums of money on account of trespasses alleged to have been committed on the lands of his principal, and which he promised to refund if he did not recover in the present action, was a competent witness.

The fourth was merely as to the weight of testimony.

Per. curiam. Delivered by Livingston, justice.

case a verdict pass against him in any particular suit, is a good witness in that very cause.

1. The trespass having been committed in 1797, at a place *then* within the town of Saratoga, the plaintiffs had a right to allege it was done, in that town according to the truth of the case without regard to its subsequent division. The judge therefore properly over-ruled this objection.

2d. It was not necessary to produce the plaintiffs letter of attorney to Beriah Palmer. The object of Baldwin's testimony was to shew that Jacobs lived on a lot of the plaintiff's, and acknowledged his right; that it was then regarded as the plaintiff's, taken care of as his, and possessed under him, whether this had been done under a power or not, was immaterial. The ownership and possession of, or under him were the important facts to be established.

3. Beriah Palmer was a competent witness, notwithstanding the agreement he may have made to refund the monies he had received from other trespassers, in case the plaintiff's failed in this suit. Such monies must have been received for the plaintiff, and he only, and not the witness would be affected by such refunding.

4. If the jury believed the plaintiff's witnesses, and we are to presume they did, the verdict is not against evidence and ought not to be disturbed.

Thomas Pettingal, qui tam, *against* James Brown.

In a qui tam action under the statute of usury brought, after lapse of a year, to recover the excess

THIS was an action of debt, under the statute of usury, brought in the common pleas for the county of Oneida, to recover the excess of interest paid over and above the legal rate allowed. The facts were that one Joseph Loomis borrowed a sum of money from the defendant, and by way of security assigned to him a lease as a pledge, accompanied by a promissory note (intended to operate as a bill of sale,)

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of interest paid, the borrower is, after having discharged the principal, a good witness.

nse and a cow. On repayment, the assignment and
nse, by an agreement executed by both parties, to
They were therefore, on the loan being returned,
p, and the agreement cancelled by tearing off the
and seals affixed.
year limited by the act* for suing for the penalty
elapsed, the action was necessarily, only for the
of interest. To prove the usurious contract, and
s, Loomis the borrower was called on the part of
tiff: he was objected to by the defendants counsel
petent, and his testimony being deemed inadmis-
e defendant obtained a verdict.
his excluding the evidence of Loomis, the plaintiff
t a bill of exceptions, on which the proceedings
up and the question now was on the competency
is the borrower.
d for the plaintiff. The only question for the court
mine is, whether after a man has fairly discharged
most extent, a usurious contract, by payment both
ipal and interest he shall not, in an action given by
ute to a third person, be competent to prove the
It is to be observed he can have no species of inter-
e money is paid; the debt therefore cannot be
, nor is he interested in the event of the suit, for
brought by another person, it can be only to the
ge of him, and those for whom he proceeds that
sure. This point is settled in the case of Abrams
4 Burr. 2251. so far as it is an authority in
rt. The objection that a witness shall not be per-
o testify any thing which may invalidate an instru-
which he has subscribed his name, has by later
s been restrained to negotiable paper alone. Baker
S. D and E 27. overruling in that respect the judg-
Walton v. Shelly 1 D and E. 296. Therefore the
case is clearly out of any of those reasonings on policy
ause the instruments were not negotiable, and were
. Indeed how far they ought under any circum-
to prevail may be a question since the determina-

* preventing usury, S. 2. passed 8th Feb. 1787. 1 Rev. L. N. Y. 87.

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tion in Jordaine v. Lashbroke and another, 7 D and E 601.* If the question be open in this court, it may be, with great justice contended, that the case of Walton v. Shelly is an encroachment upon the land marks of evidence, but howsoever that may be, the present is a very different question, for it does not go to the invalidating any instrument, the money on them having been paid and the whole coming within the authority of Abrams v. Bunn.

Brees contra. Public policy requires that no person who has signed an instrument shall be, in any cause, admitted as a witness to invalidate it; because no man shall be allowed to testify against his own act. By this very court in an action by the assignees of a certificated bankrupt to recover back the amount of a note given on a usurious consideration, the bankrupt was in July term 1802, held an incompetent witness to prove the usury. He was then clearly disinterested; his property was assigned to his assignees, and had they recovered, the amount of the verdict would have gone to his creditors. The case in Burrows, applies to transactions where a written security is not given: there the borrower may be a witness, and to the same effect is 2 Hawk. 386. 3 Woodeson 393. But where the contract is by writing, no one whose name is upon it can be received. Walton v. Shelly, 1 D & E. 296. 2 Hawk. 387. 3 Woodeson 303. The point therefore upon the authority of Lord Mansfield may be considered to be at rest. The distinctions since taken, are subsequent to the revolution, and therefore not binding here. In them it is also to be observed that the judges are far from being consistent. Buller 3. D. & E. 36. restrains their admissibility to cases of negotiable paper: Lord Kenyon 7. D. & E. is for receiving in all cases the testimony of witnesses who have no direct interest Ashurst J. however totally dissenting. It is true the reasoning from policy may have been stronger in the case of negotiable paper, but as the law now stands and the assignment of choses in action constantly practised, the principle has of late been much narrowed. "If a written con-

* The decision there was that the payee of a bill of exchange may, in an action by an indorsee against the acceptor, prove the bill, "void in its creation." Qu. whether this distinction be not perfectly sound.

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ıot negotiable)be assigned, theassignee may sue in the ıf the original claimant, and such original claimant ıot be permitted (at law) to undo his own transfer, ruct the suit of the plaintiff." 2 Woodeson 388.

l in reply was stopped by the court.

uriam. We are unanimous that the judgment of rt below be reversed. This case does not come any of those cited in favor of the defendant. The ere is not only satisfied but destroyed. The action o annul the security or take away a fair considera- n the defendant. There is no question of interest. ; to render a witness incompetent it has before been that the interest must be in the event of the suit. determination neither public policy, nor the interest itness can be affected, he therefore was fully com-

ın, on the demise of Williams and others, *against* Chamberlin and others.

When a plaintiff reſiſts a motion as in caſe of nonſuit for not going to trial if he inſiſts on his having been unable to try his cauſe, and others have been heard, he muſt ſhew that they were older iſſues.

SEL moved for judgment, as in case of nonsuit, for ceeding to trial. The affidavit stated, that issue ıed previous to June, 1802.

Veeten read an affidavit, setting forth that thirty- ıes were on the calendar, of which only thirteen ried, but, from the length of those, and the crimi- iness before the court, the present action could not l.

uriam. As many causes *were* tried, it is incumbent plaintiff to shew that *those* issues were older than *his*. defendant take the effects of his motion, unless the stipulate and pay costs.

Lewis, chief justice, absent.

Deas *against* Paschal N. Smith, President f the Columbian Insurance Company.

If a witneſs has been in the power of a plaintiff, he muſt ſhew endeavours to obtain his teſtimony, or he will not be allowed to urge

JE had been joined in this cause, in 1800, and two ısions had been sued out; one had been returned, ng time having elapsed, the defendant gave notice, ! last term, that he would then move for judgment, se of nonsuit. On its being brought on, the plain-

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tiff stipulated to try, at the next sittings, or circuit court, reserving to himself the right of applying to the court, for a renewal of the stipulation, in case the other commission, then pending, should not be returned.

Benson now renewed the application for judgment, on an affidavit, stating, that a few days after the above stipulation was entered into, the commission to which it alludes, arrived, and that the cause had been duly noticed for the last sittings, but had not been brought on.

Woods contra, read an affidavit by the parties, on account of whom the plaintiff had effected the policy of insurance, on which the present action was brought. The affidavit stated the loss, exhibition of proofs, application for payment, refusal to pay, commencement of suits, issuing out of commissions, and their return. That the interest was not fully proved by the witnesses examined under the last commission, as they were privy only to the lading of what was purchased by one of the witnesses, and covered by a former policy, but knew nothing of the residue; that the cause was, nevertheless, noticed for trial, under an idea of proving interest in sundry other articles of the cargo by one York Wilson, who, though a sea-faring man, the deponent believed to be permanently resident in New-York, as he had lived there for twelve months uninterruptedly, but had lately gone to the East-Indies; the deponent first learnt this circumstance during the time of the last sittings, and his witness was not expected to return before the ensuing winter; that being advised the testimony of Wilson was material, the defendant did not proceed to trial. But that he was advised, and believed, one William Robinson, shortly expected here, was a material witness for him, and that he believed he should be able to obtain Robinson's attendance at the next sittings in New-York, or the circuit thereafter; that, as the deponent was informed and believed, the ground of defence insisted on by the defendant, was the want of interest, and that the deponent understood, and believed, the defendant, or some person in his behalf, offered to return the premium, and pay costs, which offer the deponent refused to accept. That the deponent was informed and believed, the cause was one of the

the want of it for not going to trial.
Counter affidavits to those in opposition to a motion, not admissible.
If a suit be called and passed, the reasons why should be made appear by the counsel in the cause.
If offers of compromise have been made to the plaintiff, and refused, on a motion for nonsuit, the court will not order them to be imposed ut semb.

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on the calendar, but was, when called in its order, , for the accommodation of the defendant; that the nt would have proceeded to trial, but for a notice to e certain papers, which he was not prepared to do. reasons, Woods argued, were sufficient to prevent ject of the motion; at least, if a nonsuit was order- would be on condition of the defendant's abiding by n proposal, and paying what was acknowledged to e, the premium and costs of suit.

son offered a counter affidavit to shew that York Wil- as a slave, and therefore the want of his testimony never have prevented the cause from being heard, be- had he been present, his evidence could not have ceived.

ds contended, that counter affidavits were inad- e, because, in the first place, a copy had never been ed, and, in the next place, the practice was to ex- them, it being incumbent on the party moving, to t his application on his original depositions.

son acknowledged the general proposition, but dis- hed the present case by this circumstance; that the r affidavit was not to support the motion, but to con- : a collateral and independent fact asserted by the ff; and as to not being furnished with a copy, the ff had not given a copy of his.

ds. Copies of affidavits in exculpation, are never af- , those to charge or demand, are.

curiam. The application is for judgment, as in case suit: this is opposed by a depo ition read by the f, disclosing facts, to rebut which, the defendant a counter affidavit: a question is made whether it can ived. On examining into the point, the court finds ctice to be settled against its reception.* It is ex- decided, in Grove ad. sctm. Campbell, Cole. Ca. Prac- 4, "that a party can never support his motion by affidavits but those on which he originally grounds it." motion must therefore depend on the first affidavits. by the plaintiff, among other things which it , it appears, that the commission mentioned in his tion, as the one then pending, was returned before

* Ante, 13.

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the last circuit, and that he might have then gone to trial. His affidavit further states, that the return was examined, and the proof wanted, not contained in the answers to the interrogatories; that the interest required, did not appear; that there was a witness who resided in New-York, by whom it was expected to establish the same facts. That witness was not applied to, nor was any measure taken to procure his testimony till after the commencement of the court, and then he is found to be gone to the East-Indies. There is, however, another witness, who knows something material, but it is not stated what, nor that any measure is taken to procure his attendance. It is further stated, that this is one of the oldest issues; that it was called on and passed, for the accommodation of the defendant, though it is before sworn he did not proceed on trial, because the testimony of York Wilson was, as the plaintiff was advised by his counsel, material, and could not be had. The court are of opinion the reasons are not sufficient. This is a second application for judgment; there has already been a stipulation, and *that* a special one. The want of a witness is alleged, and no diligence shewn to procure him. There ought to have been immediate measures taken to subpœna him. It does not sufficiently appear that the cause was passed for the accommodation sworn to: it was necessary to have substantiated this; it rests on the single oath of the party; the counsel, himself, ought to have stated this. But though we should grant the nonsuit, we are requested to do this on condition. The affidavit, as to making the offer, is equivocal; and if, in any case, we would impose such terms, this is not one, for the plaintiff has not disclosed enough to shew the proposition was ever made.

Benson pressed the court to reconsider the case in Coleman, and weigh his distinction.

Per curiam. We shall look into it, and if we see occasion to alter our opinion, the bar will be informed of it. In the mean time, judgment of nonsuit must be entered.

Lewis, chief justice, absent.

N. B. The court never spoke to it again.

ALBANY, August 1803.

Ripley v. Wardell.

ohn Ripley *against* Robert Wardell.

was an action of assumpsit, grounded on the circumstances.

laintiff was, in 1796, a creditor of the defendant's John Wardell, on a promissory note of his, for s, payable at ninety days after date.

ember 1799, John Wardell held a promissory 11 dollars and 28 cents, made by one Jonathan and dated 16th May 1798, payable six months s and wishing to extinguish the demand of the that it might be no obstacle to his discharge un- olvent act, he offered to transfer Hayne's note to f, and at the same time accompany it with a se- ive when discharged, his own note for six shil- eight pence in the pound of the original debt: on he was to receive back the note of Haynes.

ingly the defendant, as his surety entered into ing contract with the plaintiff.

hereby agree and promise to deliver to John Rip- n Wardell's note for six shillings and eight pence ound, for a note now given up for seven hundred nety-seven dollars, dated 26th December 1796, in ninety days after date. The note which is to n by the said John Wardell is to be dated and after he is discharged by the act of insolvency, eighteen months after date; at which time pley is to return a note of hand against Jonathan , for eight hundred and eleven dollars and twen- t cents, dated 16th May, 1798, payable in six , which is the property of John Wardell, or re- s writing to Robert Wardell, and keep the note Haynes. New-York Nov. 7th, 1799. Signed Wardell."

s then was, and now is insolvent: but his note, hose being delivered to the plaintiff, he gave up of John Wardell, who was shortly after discharg- the insolvent law. Previous to the 19th of No- 1801, and after the discharge under the insolvent n Wardell obtained his certificate under the bank- of the United States.

An action will lie on an agreement by a third perſon to procure, after the diſcharge of a debtor under the inſolvent act, his note for a compoſition on the original debt due the plaintiff, in conſideration of his giving up the defendant's note, for the ſame that it might not obſtruct his diſcharge under the act. If a ſecurity be depoſited on returning of which the depoſitary will be entitled to ſomething in lieu, on tendering the depoſit, an action may inſtantly be brought for the ſubſtitute, and an offer of it, the day after ſuit brought is not a defence.

ALBANY, August 1803.

Ripley v. Wardell.

On the 19th of November, 1801, the plaintiff comm ced the present action, but, before doing so, offered to turn, and tendered to the defendant Haynes's note, d manding at the same time John Wardell's, payable eighteen months, for six and eight pence in the pound cording to the terms of the agreement. In the course the next day the defendant tendered the plaintiff, Jo Wardell's note for the composition agreed upon, and pay ble at the time stipulated. The plaintiff however contin ing to proceed, the defendant gave him a relicta and co novit actionem for 270 dollars, the amount of the six a eight pence in the pound on the original debt, subject the opinion of the court, whether on the above statem the plaintiff was entitled to recover? if they should so det mine judgment to be entered for him, if otherwise nonsuit.

Per curiam. Delivered by Livingston, justice. It w the defendant's duty, under the agreement stated this case, to make a tender to the plaintiff of John Wa dell's note immediately, or early after his discharge: t giving of such note was a condition precedent to the plai tiff's returning the note of Haynes. The tender of th note after the suit was commenced, (which was not un two years after the defendant's discharge, and after the cond bankruptcy of John Wardell) was too late. If it h been given sooner, the plaintiff might have turned it some use in the way of business without rendering him responsible. It does not appear when the plaintiff offer to return the note of Haynes. If at the time of such p posal the defendant had given him John Wardell's n antedated as he requested, it might have answered, a the plaintiff would have been bound by an offer, which my opinion was not at all necessary to entitle him to t suit; at any rate as this request was not acceded to until day after the suit was commenced, it was too late and t plaintiff must have judgment for the sum of 270 dollars

* See Cockshot v. Bennet, 2 D. & E. 763, Holland v. Palmer, 1 Bos. Pull. 95. Smith v. Bromley. Doug. 670.

ALBANY, August 1803.

The People v. Denslow.

If an act give a turnpike company power to erect a toll gate near a particular ſpot, they may place it on the very interſecting ſpot of an old road, ſo as the gate be but near the place deſignated; for near is not to be conſtrued nearest

The People *against* Chapman Denslow.

defendant had been tried, and found guilty, at the
rt of oyer and terminer for Columbia county, on an
ient for obstructing, in the city of Hudson, a pub-
or highway, leading from Poughkeepsie to Kinder-
On the trial, it was proved, that the defendant was,
the appointment of the president and directors of the
hia turnpike, keeper of a toll-gate, standing in the
Hudson, directly across the road mentioned in the
ment, and which had been a public road for more
0 years. On the part of the defendant, the exemi-
ions of two acts* of the legislature, incorporating a
y, by the name and style of the president, directors,
mpany of the Columbia turnpike road, were given
nce, and also a permission of the governor, author-
e erection of the gate, in pursuance of the seventh
1 of the law of the 29th March, 1799, incorporating
mpany. That of the 28th March, 1800, sec. 3, di-
that the most westerly turnpike, or gate, shall be
ed *near* the dwelling-house of John Van Hoesen, in
ity of Hudson." The testimony adduced, proved,
was placed 8 chains, 15 links *from* the house. By
, submitted to the court, and agreed to by the parties,
ared that the gate in question was placed just at the
ot where the old road, for the obstructing of which
dictment was brought, intersected the turnpike; so
was impossible to pursue the old road, without cross-
turnpike, and going through the gate in dispute, at
half toll was demanded.

matter for the consideration of the court was, whe-
nder the words of the 3d section of the act of the
f March, 1800, the erection of the gate on that pre-
nt could be justified: if it could, then a nol. pros.
ntered.

ncer, attorney general, for the defendant. Previous
ding the office which I have now the honor to fill, I
ntained, and that originally, on the behalf of the com-
I have considered this rather as a private than a

th March, 1799, ch. 59. ſ. 7. 2 vol. Rev. Laws 398. 28th March 1800, ch. 3. 2 vol. Rev. Laws 402.

ALBANY, August 1803.

The People v. Denslow.

public matter, and as what I have to urge, should my official situation render it improper for me to address the court will equally be advanced by some other person, it is immaterial, I presume, by whom it is uttered. I shall not, however, proceed, unless the court shall say I may do so consistently with my duties to the people.

Per curiam. Go on, Sir.

Spencer. The only question is, whether the erection of the gate, at the distance from Van Hoesen's house, mentioned in the case, is an erection within the words of the act. There are two acts of the legislature to be referred to on this occasion. The first is the act of incorporation, passed the 29th March, 1799, establishing a turnpike corporation, by the name of the president, directors, and company of the Columbia turnpike road; the second enacted on the 28th of March, 1800, to amend the first act and route by certain particular alterations. The situation of the most westerly gate, the one now in dispute, is in specific words laid down. Whether they are complied with, must be, after the facts are found, a question of law; for unless it be so, a settled determination could be made. The act says the gate shall be *near* the house of Van Hoesen; it is not ordered to be on the part of the road *nearest* to Van Hoesen's are not then 8 chains and 15 links near? Had the gate been placed more easterly, every person travelling the turnpike road, might have quitted it at Claverack, pursued the old road round the gate, and a little beyond it, have entered the turnpike again, without paying toll. It is true that by the 10th section of the first act, there is a penalty given for using the turnpike, and then going round the gates to avoid the toll; but this could not apply to persons using an old road; nor could it be carried into effect, from the impossibility of being constantly on the watch. It is to guard against these inconveniencies that the legislature has made use of this relative term "*near*," in order to give a discretion to the company to place the gate where they may think it most beneficial to the interests of the stockholders. Have the president and directors outraged this discretion so confided to them? That the gate catches people crossing the road, is no argument; and even in this, the old

ALBANY, August 1803.

The People v. Denslow.

ve shewn their moderation, for they demand
toll. From the map, it is manifest, if the gate
moved, that in numberless instances, from Kinder-
Claverack, the tolls may be evaded. The effect
be to create a depreciation of 50 per cent on the va-
the stock. To prevent this, the legislature has given
retionary power to erect the gate near Van Hoesen's,
can it be said that the company has violated the discre-
confided in them for the management of the company's
s?

e contra. The question is, whether the president
nagers have a right to make people, who only cross
ad, pay as if they had travelled along it? There is
g more, nor less, presented by the case. The gate
ed at the very place where the old road crosses
turnpike. It never could have been the inten-
of the legislature by allowing a new road to tax
ds; yet such is the consequence of the construc-
of the act now insisted on by the defendant. For it is
ar, by looking on the map, that when the turnpike is
ed, and the old road pursued, the turnpike can never
be entered on, for the old road comes in at the head of
ity of Hudson. Had the legislature been told that the
t of the act they were about to pass, would be to levy a
n the old road, they would certainly have hesitated.
ning the word near, to be, what it certainly is, a rela-
expression, it must be taken to mean near, *so as you do*
ch the rights of the community, and set up your gate
ch people who travel along their own old road, and
cross yours.

Wadsworth, same side. This is the only construction
ch can be equitable for the company and the commu-
. The intent of the act was to give a right of toll from
e who travelled along the road the company had made;
therefore, against such, there is a penalty of ten dol-
given for evading the rate allowed to be taken. This is
high to secure the company from tricks that might other-
be practised. The word near, must be understood by
ding the intent of the act. The old road was consi-
ed when the act was passed, and it never was the object

ALBANY, August 1803.

The People v. Deaslow.

of the legislature, by the word near, to shut it up. Th a trick of the company to entrap the traveller, and this, jury, by their verdict, have found, on a very full exam tion. The court will, certainly, after this, be cautio saying near is this very spot. It is granted that the w of the act will be satisfied by it, but is there no other which will do so? and may not one be found, equally unattended with any of the inconveniencies now obje against the gate?

Spencer, in reply. This is a mere question of cons tion; the case and situation is fully before the court, they will decide.

Per curiam. Delivered by Livingston, justice. The fendant has been indicted, and convicted, for obstruc a public highway in the city of Hudson.

He was keeper of a gate under the Columbia turn road company, and the gate he attends is erected 8 ch and 15 links from the house of John Van Hoesen. gate has been set up under that part of one of the law corporating this company, which declares "that the "westerly gate on said road, shall be erected near "dwelling house of John Van Hoesen;" and it is sub ted to us to say, whether it has been placed conformab these directions; if that should be our opinion, a nolle sequi is to be entered on the indictment.

2 vol. L. N. Y. 402.

It is not denied by the public prosecutor, that this is near Van Hoesen's house, but because it is not as n as it might be, and intercepts those who travel a cert road, leading from Poughkeepsie to Kinderhook, and wh crosses the turnpike at this place, he insists the g should be removed, so as to occasion no interruption of kind.

Whether this circumstance exists, or not, is foreign t our enquiry. The legislature, under a full knowledge the different roads in that part of the country, have thorised the erection of a gate *near* this house, and thereby invested a discretion in the company, which must have been expected and intended, would be exerci for their benefit. So long, therefore, as this gate be to Van Hoesen's house, which is conceded to be the c

ALBANY, August 1803.

The People v. Denslow.

have no right to interfere, by saying that this discretion has been abused, or that the company have obstructed the highway leading from the south to the north: this would be the same as to say, that they shall not do what the legislature have given them permission to do. Our opinion, therefore, is, that this gate was erected pursuant to law, and the present prosecution cannot be supported.

The People, *against* James Dole.

THE attorney general moved for a rule on James Dole, late sheriff of Rensselaer, to shew cause why an information should not be filed against him for false swearing. The motion was founded on two affidavits, and certain records on file in this court from which it appeared that Dole, while sheriff of the county aforesaid, had in his custody one Isaac Bull, charged in execution at the suit of one Edward Rawson. That Bull having escaped from custody, a suit was thereupon instituted by Rawson against the sheriff who pleaded a retaking on fresh pursuit, and pursuant to the act in such case, &c. accompanied his plea with an affidavit, that the escape was without his consent, knowledge or privity; which suit is still pending. The affidavits were by Bull and another who was in prison with him during his confinement. They state that Dole repeatedly declared to Bull that he had broken *his bail*,* was no longer his prisoner, and could go where he pleased. That Bull at length quitted the prison, and went to his own house, where he remained, until replaced in jail, under process in another suit.

20 March, 1801. sec. 2nd.

Per curiam. Delivered by Lewis, chief justice. The object of the application is to render Dole liable for the penalty of 1250 dollars imposed by the act aforesaid on any sheriff, whose affidavit accompanying such plea as aforesaid, shall at any time afterwards appear to be false. There are two objections on the part of the court, to granting this motion. The one, that neither of the affidavits state that Bull had not, as charged by the sheriff, previously forfeited his bonds by an escape, involuntary on the part of that officer. If such was the fact, the sheriff's

* Bonds entitling to liberties.

ALBANY, August 1803.

The People v. Dole.

affidavit is not falsified, though we admit every stated in the affidavits, in support of the applicati be true.

The other, and the more important objection is, suit is now pending between Rawson and Dole, in the secution of which all the facts and circumstances, re to the escape, will be fully developed and examined every object attained, for which the information is inte

The rule is therefore denied.

Under the act incorporating the first Company of the Great Western Turnpike Road, full toll is payable, tho' the person has travelled the road less than 10 miles.

James Stuart *against* Calvin Rich.

IN error on certiorari.

The plaintiff was a toll gatherer at one of the gates ed under the act passed the 15th of March, 1799, in " An act to establish a turnpike corporation, for impr " the state road from the house of John Weaver, in " Vliet to Cherry Valley," incorporating the first co of the great western turnpike road.

By a clause in the 10th section of the law recited provided that no gates or turnpikes (except a turnpik bridge before mentioned) shall be erected at a distanc than ten miles from each other. The 11th section e "That as soon as the whole, or any part of the said " shall be completed, and permission to erect a gate o " as aforesaid, be granted, the president and director " appoint toll gatherers, to collect and receive of an " all and every person or persons, using the said roa " tolls and duties herein after mentioned, *and no more* " is to say, *any number of miles not less than ten in th* " *said road*, the following sums of money, *and so in* " *tion for any greater or lesser distance*, to wit; for every " &c."

Under the 15th section, a penalty of five dollars is sed on any toll gatherer, who shall receive more to is established by the act: to be sued for before any of the peace of the county in which the offence s committed, for the use of the party injured.

Upon this clause, seven actions had been institut low, against the present plaintiff, and recoveries ob in all, for receiving at his gate, full toll from travelle had not passed ten miles on the road.

ALBANY, August, 1803.

Stuart v. Rich.

ns now submitted to the court, whether the full toll ghtly taken, or, whether there should not have been ction made from it in proportion to the distance the travellers had used the road, less than ten miles; ing to the arithmetical rule, if ten miles give so much, will seven and a half give?

e court should decide in favor of the proportional ion, the judgment to be affirmed; if against it, and e now plaintiff, a reversal to be entered.

curiam. Delivered by Kent, justice. This is a on certiorari from a justice's judgment. The ff is toll gatherer at one of the gates of the first ty of the western turnpike road, and the suit below on the 15th section of the act, R. L. vol. 2, p. 395. estion submitted is, as to the true construction of h section of the act, p. 393. The gates on that xcept the one upon the Schoharie bridge, are all re- to be *not less* than ten miles from each other, and h section gives the toll therein established for *any er of miles not less* than ten in length of said road, and *portion for any greater or lesser distance.* These last can be satisfied, by applying them to the greater or listance *above ten miles.* The gates may be twelve, or , or twenty miles apart, and then the toll is to be d rateably, according to the distance, which cannot, r, be less than ten miles. This construction is the e that is reasonable, and it will satisfy the words. e that the company must vary the toll at every ten te, on the suggestion that a person has used the r a less distance than ten miles is inadmissible, be- impracticable. The toll gatherer has no means of g whether the traveller has rode ten miles, or a less e, previous to his arrival at the gate. If this sugges- is allowed to be a ground of reduction of toll, it open a door to the greatest imposition and fraud up- company, and it cannot be considered as within the g and spirit of the act, especially as the words can fied by the other construction, which is a natural, nd practicable construction. Judgment of reversal, re, must be entered.

cliffe, justice, gave no opinion, being interested as a older.

ALBANY, August 1803.

Drake and others v. Elwyn and others.

Moses Drake and Stephen Pinkney, *ag* John Elwyn, Peter Wittaker and Samuel taker.

THIS case was submitted without argument; the and points are so well, and closely stated in the dec that it would be tautology to do more than give the op of the court, which was delivered by Kent, Justice.

This is a suit against the defendants as co-partne trade, under the firm of Elwyn and Co. on a note t plantiffs, subscribed by the said Elwyn, by the nai *Elwyn & Co.* and dated the 11th December, 1800.

On the trial his signature to the note was proved, a was admitted that Samuel Wittaker was a partn the busine:s with him, and the question that arose whether *Peter Wittaker*, the other defendant, was a partner.

To prove this, the plaintiffs gave in evidence tha the defendants, about the fall of the year 1800, wen gether in a sloop in the Hudson River, having good board, and the said *Peter* being asked whether he wa ing to keep store, replied, *yes, we are going to try it.* Peter Wittaker was frequently seen in the store with other defendants, and was there *generally as much as other defendants*, and he was once seen by a witness to spirits. That the store was sometimes called Wittal store, sometimes Elwyn's store, and sometimes Elw and Wittaker's. That the said Peter is father to the fendant Samuel, and a very old man, unable to w That after six months Elwyn became insolvent and partnership was dissolved, as it was understood from g ral report. That the said Peter told a witness who o the co-partnership, that *he must pay to him and to no one.* That it was *generally understood* that *Peter* was a part and that the son Samuel was only a clerk. That the Peter spoke to a witness of the dissolution of the part ship, as if he had been a partner, and mentioned that was *in possesion of the stock*, and that *the debts were to be to him.*

Facts from which a partnership may be inferred are matter for a jury, and should be rebutted by contrary evidence. An indorsement by one of a firm in his name, & Co. is good to bind the other partners, though the firm has been always known by the name of another partner & Co. unless it be shewn that there is such a distinct house as that, by the stile of which the indorsement is made.

ALBANY, August 1803.

Drake and others v. Elwyn and others.

as no evidence that the defendants carried on
r the firm of *Elwyn & Co.*
is evidence the defendants moved for a nonsuit.
ause the plaintiffs had not proved a partnership
e three defendants.
use the plaintiffs had not proved the existence
firm as John Elwyn & Co. or that the defen-
partners under that firm.
rt over-ruled the motion, and the question now
without argument is, whether the judge pro-
ruled that motion.
he evidence is sufficient to prove that the three
were in co-partnership as traders at the time the
ven. At any rate, it was sufficient to let the
the jury, and to prevent a nonsuit. The only
concerning the want of proof that *Elwyn and*
e co-partnership name. But as such a signature
co-partnership, and a co-partnership did exist at
tween Elwyn and the other defendants, I think
presumed that such was the name of the firm,
was sufficient to cast upon the defendants the
f proving what was the name of the house or
different name existed. They did not attempt to
presumption, and of course it belonged to the
nsider of, and to draw that presumption. A third
rises, whether the note in question was given on
hip transaction; but the same answer may be gi-
at as to the preceeding question. The intend-
at it was on a partnership account, and that in-
ought to have been repelled by the defendants, if
d in truth.
nion accordingly is, that the motion for a nonsuit
rly over-ruled, and that the defendants take noth-
ir motion.

ancroft and Lois his wife *against* Ichabod White.

A person holding under conveyances in fee deduced from the husband of the demandant in dower is estopped from controverting the seisin of the husband.

ER for lands and tenements in the town of Canaan,
nty of Columbia, claimed by the demandants, in
he wife, and as the widow of Daniel Hawes.

ALBANY, August 1803.

Bancroft and wife, v. Ichabod White

The parties agreed to the following statement of f

Daniel Hawes, the former husband of Lois Ba one of the demandants, during the coverture, and fo years previous to, as well as on the first day of Nov in the year one thousand seven hundred and eighty n possessed of the premises holding, using, and imp the same in his own right, and not in the right of a and being so possessed did, on the said fifth day of N ber, sell the same to one Jacob Brooker for two hu pounds; and by deed of bargain and sale, bearing da same day and year, in consideration of the said sum veyed the same to the said Jacob Brooker, in fee w venant of warranty.

The said Jacob Brooker entered by virtue of th deed, and continued in possession until the execution deed, next herein after mentioned, occupying in h right.

On the eighth day of June, one thousand seven dred and ninety five, Jacob Brooker, and Hulda hi for the consideration of eight hundred and ten p conveyed the aforesaid lands and tenements to Si Gardner, in fee, with covenants of seisin and for qu joyment, and containing also a release of dower wife.

The said Silvanus entered by virtue of the said de continued to occupy in *his* own right until the twent day of September, one thousand seven hundred and nine, when the said Silvanus Gardner, and Anna hi by indenture, bearing date on that day, for the consid of seven hundred and fifty pounds, conveyed the sai and tenements (except thirty acres thereof) to Ic White in fee, with covenants of seisin for quiet enje and warranty, and the said Ichabod entered by virtue of, and has continued to occupy in his own right.

By an act of the legislature, entitled "An act "sale and disposition of lands belonging to the pe "this state and for other purposes therein menti passed the twenty second day of March, one thousa ven hundred and ninety one, it was enacted as follo wit: "That all the estate, right, interest, claim a

ALBANY, August 1805.

Bancroft and wife, v. Ichabod White

of the people of the state of New-York, of, in
any lands, tenements or hereditaments in the town
aan, in the county of Columbia, now possessed
y person or persons, shall be, and hereby is granted
respective *possessors*, of such lands, tenements and
itaments, and to the heirs and assigns of *such possess-*
respectively for ever": Provided always, that such pos-
or possessors, shall be construed and taken to be the
or persons holding in *his or her own right*, and not
ing and improving in the right of another.
s not usual in the conveyances of land in the town
m, prior to the passing the above act, for the wives
rantors to join in the deed.
ots for the demandants. The question for the con-
n of the court is, whether upon this statement of
demandants are entitled to recover? We shall have
nd that they are.
der to constitute a title to dower, three things are
l by law: marriage, seisin and death.*
st and last are admitted; the second is only controvert-
this however, we think sufficiently shewn by the case.
es that Hawes, the first husband, had a possession
mber of years, using the land as his own, not un-
other person. He exercised ownership over it, in
t extensive and complete sense of the word, for he
nd that with a covenant of warranty. This, there-
enough to shew seisin sufficient to entitle to
a claim ever favored in law. But should it not in
s be enough to create a legal seisin, the defendant
ed and can never be allowed to dispute our claim,
he is derived through Hawes, the first husband of
ndant, and in his right it is that we claim. Against
er, the act stated in the case is insisted. This act
ed to confirm, not to destroy rights, and that of the
nt is protected as well as those of the persons in
n. The act operated by way of release and mitter
The nature of which was to make valid not only the
the tenant, but that of every other person connected

t pl. a.

ALBANY, August 1803.

Bancroft and wife v. Ichabod White

with it; therefore, not only the estate of Brooker, but that of every other person connected with it. To this the case in Shep. Touch. 319, is in point. "A. disseises B. "and leases for life to C.—B. releases* to A. it is good for "C." Not only the estate of the person in possession, but every one connected† with him is equally within its effect. But from the case it does not appear that the state had any right to release, if so, the seisin of Hawes must stand unimpeached.

Benson contra. This case depends on considerations of a very peculiar nature; on the known circumstances attending the lands in Canaan, and the construction of the statute recited in the case. What seisin now is, is a question. The case in Burrows‡ shews what amounts to a seisin under the ideas now entertained; a possession is not a seisin, and yet that is all the seisin here. In that sense of the word Hawes may be said to have been seised, but in Truesdale's case the court took notice that the whole county of Kings was taken possession of merely by occupancy. The case states that Hawes held merely as his own, and not in or by another. The whole country was deemed vacant, and any one took possession.

This was the view in which it was beheld by government, and therefore in 1791, they passed the law recited. The effect of this was to take no notice of prior occupancies such as Hawes's, but to confirm to such as were then in possession, and who were no longer considered as usurpers. Had Hawes derived his title under the patent he would not have been touched by the act; as he did not, it must be presumed, he had only a title by occupancy, & when he relinquished that to another, that other was confirmed against every one else, as Hawes himself would have been. The law was intended to meet cases where the right was by occupancy only. Truesdale entered on a piece of ground supposed to have been vacant; he then moved away; some one

* The word is confirm. The reasoning is this; by the disseisin a tortious fee is gained, if then the disseisor leases for life, he retains the reversion, and the reversion be confirmed, the lease for life is of course. The same by way of release of all right. Lit. Sec. 449. f. 266. p.

† This is too general. Every one through whose estate he derives title, confirmed.

‡ Taylor, x. dem Atkyns v. Horde.

tered on the same land, upon which Truesdale an ejectment, but this court held he could not recouse he could not have entered animo possedendi. 98, when Hawes took possession it was vacant he reason why his widow is considered as not endower, is, that his estate was merely that of occud not a seisin. In any other case, but that of lands nstanced, it might possibly have been a seisin, but could not be; for the whole was a usurpation and occupancy. To this, therefore, the law of seisin pplicable. The conveyance and clause of warranty awes, can work no estoppel upon us. Hawes nd possession, might have been deemed entitled to f entry, and then the warranty was no more than e of prudence. It is probable, he never sold more improvements, as was the custom in that country, as inserted merely to have evidence of a better title t usually given, which was a parol sale of the imnts. Of all these facts, the court will take notice, id in Truesdale's case: the present statement does he land was granted, and therefore the occupancy, general circumstances of the country, must be in- apply.

ott, in reply. From what is stated of Truesdale's is evident that he was a mere occupant, a squate a title is deduced by conveyance, which, as it is seisin must be presumed, and this circumstance ishes it from Truesdale's. Possession, in all cases, ce of right, and as Hawes's was relinquished after nveyance, the court will not presume otherwise, we have it not in our power to produce the title m whence he claimed. The widow has them not; to the heir, or the purchaser; and as her's is a fale, unless they are produced, the court will not infer and had no right, or that he was a mere occupant. ed that Hawes held in his own right, and this ne- that of any other person. He exercised an act of hip, and what he did, being in his own right, is in- nt with that of any in the state. If, in any case, his will warrant an inference of seisin, it will here.

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Bancroft and wife v. Ichabod White

White cannot controvert the title of Hawes; a bargainee, by mesne conveyances coming in under the husband, is estopped from denying the right of the wife, and must admit it. That the state has any claim, can admit of little doubt. The act is to confirm previous rights, and must be so construed as to effectuate that intent. Suppose this the case of a base fee, and before the condition was broken, the act had passed, would the breach of the condition afterwards alter the right of the donor? Besides, the state does not appear to have any interest, and it cannot be presumed. If the fact be so, it ought to have been in the case, which, as it now stands, we have clearly made out.

Per curiam, delivered by Kent, justice. The former husband of the demandant, for some years previous to the 1st November, 1786, was possessed of the premises, and used them as his own, and not in the right of another, and then, for a valuable consideration, conveyed the same in fee with a covenant of warranty, and the lands have passed, by subsequent conveyances in fee to the present tenant. This is sufficient evidence, in the first instance, of seisin in the husband. The wife is not bound to produce her husband's deeds, because it is not presumed to be in her power, and in the present case, the tenant claims in fee, under title derived from the husband. The marriage and death of the husband being admitted, there is no question in the case. The court are not to regard lands in the town of Canaan as an exception to the general rules, which would apply, in case the suit had been for lands in another town, nor was the case of Truesdale v. Jefferies,* which was cited upon the argument, decided upon the ground of such an exception. Judgment for the demandant.

* Report of the case of Truesdale v. Jefferies, as read in giving the above opinion. This was an ejectment for lands in Canaan and Claverham, (formerly King's district) in Columbia county, and was argued and decided in April term, 1798. The evidence was, that 18 or 20 years before the trial, the lessor was in possession and continued therein above three years, that he quitted the premises, and one Richmond occupied them; that he returned again into possession, and remained perhaps a year; that a controversy arose between him and one Knapp, when he quitted the possession, and Knapp entered, and remained in possession till his death; that Knapp died in possession, leaving a widow and four children; that the defendant married the widow, and had been seven or eight years in possession, and had so adversely. The plaintiff then gave in evidence the act of 25th July, 1[illegible], and the defendant the act of 22d March, 1791. The act of 1782 stated, that fear and uneasiness prevailed among the inhabitants of King's district, by reason of pretences that the whole, or part of the lands, were vacant, and for

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Way v. Elihu Carey.

The juſtice's court has no juriſdiction in a ſuit by an adminiſtrator.

…net Way *againſt* Elihu Carey, administrator, &c.

…s was a cause in which the only question raised, was …ed to the court without argument. Radcliff, jus… …ow delivered the opinion.

…is a case on certiorari to a justices' court. The er… …igned is, that the plaintiff below, sued in the capa… *administrator*, and that the justice had no jurisdic… …try any action in which an administrator is a party. …estion was submitted by consent without argument. …the case of Wells v. Newkerk, executor of Per… …is point was decided against the jurisdiction of the … We considered the act from which he derived his …y, as applicable only to cases in which the parties …d in their own right, and not to those in which they …d in *auter droit*. It is unnecessary to repeat all the …s of that opinion.

…e that decision, (which was made in January, 1800,) …islature, when passing the revised act concerning jus… …ourts, added a section by which, in conformity to …nciple of that decision, they denied the jurisdiction …justice in suits against an executor or administrator, …re silent as to suits in *their favor*. From this it …be supposed the legislature meant that suits in their …ight be sustained before a justice. But no such au… …can be admitted by inference or implication, and …ought not to be construed to introduce a different …

…decision in Wells v. Newkerk, is not, therefore, af… …by this act, and the rule continues, that the justice … jurisdiction. For this cause, we are of opinion that …lgment be reversed.

…ſuch fears and uneaſineſſes, it was enacted, that the intereſt or right …ſion to any lands within the ſaid diſtrict, and not within any colo… …t, ſhould not be impeached, by reaſon that the ſame were not be… …ted. The court decided that the conſtruction of the act of 1782 …t it amounted only to a legislative declaration, that thoſe lands …ot be located; that the poſſeſſion of the plaintiff was of no avail, …tered without claiming title, and relies ſolely on his poſſeſſion; that, …ſubſequent conduct, he muſt be preſumed to have renounced or …ed his poſſeſſion, and all claim under it, and (to uſe a common, but …ate expreſſion) he was to be regarded, in reſpect to the premiſes, as …quatter. Judgment for defendant.

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Manhattan Company v. Ledyard & Co.

The President and Directors of the Manha Company *against* Ledyard & Ledyard.

An indosement in the name of a firm, by a partner, is good, and may be declared on as the indorsement of the firm.

THIS case was submitted without argument. Ra justice, now delivered the opinion of the court.

This is an action by the plaintiffs, as indorsees of a missory note made by Brown, Talbot, and Co. to the de ants for 488 dolls. 17 cts. and indorsed by them tc plaintiffs.

The declaration avers, that James Brown, William bot, and John Goodere, *acting under the firm of Br Talbot, and Co.* made the note in question, the proper and firm of *Brown, Talbot, and Co.* being thereunto scribed; and that the defendants being partners, unde firm of Austin Ledyard, and Co. indorsed the said nc writing, *the proper name and style of the said firm of A Ledyard and Co.* being thereunto subscribed. The parts of the declaration are in the usual form.

The partnerships of the makers and indorsees of the and the making and indorsing of the same, as abov forth, are admitted.

The evidence on the trial was, that Brown, one of makers, subscribed the note by the partnership firm, that Austin Ledyard, one of the firm of Austin Led and Co. indorsed the same with the name of that The question submitted by the parties is, whether th dence supports the averments contained in the declarat

We have no doubt that the averments were suffic supported by this evidence. It was not necessary t forth, that one of the partners of each of the firms, and indorsed the note in the name or style of the resp partnerships. Although made and indorsed by one o partners of each house, the legal effect was the same it is in all cases sufficient to set forth a writing accordi its legal effect or operation. We are therefore of ion, that the plaintiffs are entitled to judgment.

If a sheriff levy on lands, he will be entitled to his fall

James Hildreth *against* Alexander Ellice

THIS was an action by the plaintiff, a late she the county of Montgomery, for fees due on a tes fieri facias, at the suit of the defendant against one Young.

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Hildreth v Ellice.

y vacation one thousand seven hundred and ninety testatum fieri facias issued in favour of the de- against Calvin Young, directed and delivered to tiff, as then sheriff of the county of Montgomery, rsed as follows: "Levy 7,500 dollars, with in- from the 24th of January, 1796, and 22 dollars 59 costs, besides your fees," the writ was transmitted plaintiff in a letter from the attorney of the nt containing the following directions: "Inclosed you an execution against Calvin Young, for a m of money. He purchased a piece of land from tiff, situate in the east part of your county, near , if my information is correct. Your attention to in, will oblige, your obedient, &c."

poundage on the sum indorsed though in consequence of an amicable settlement, he do not sell.

the receipt of the writ, and before its return the levied on the goods and chattels of Young, to a nount, and also went to the land, as above pointed m, and made a seizure thereof; but, before the re- of the writ, the plaintiff was requested to delay of the property so seized, the parties in the origi- having settled the said execution. The plaintiff has cution still in his possession, and has not returned old the property seized by virtue thereof.

is statement of facts it was agreed to submit to the whether the plaintiff is entitled to fees for the whole endorsed on such execution, or for any other, and n?

admitted that the value of the land seized is equal nount of the sum ordered to be levied on the ex- and that Young had also given to Ellice a to secure payment to the amount.

pson J. delivered the decision of the court. I sheriff is entitled to his full poundage on the cted to be levied. The case of Alchin v. Wells, it may be regarded as an authority here, is directly

5 Term Rep. 570.

The court there decided, that if a sheriff *levy* fi. fa. he is unquestionably intitled to his poundage, the parties compromise before he sells any of the de- s goods. The Stat. 29th Eliz. ch. 4. under which

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this decision was made, and our act correspond in
essential part, as to the plaintiff's right to poundage.
act regulating sheriff's fees says, "*serving* an executio
or under 250 dollars, two cents and four mills per d
and for every dollar more than 250 dollars, one cent
two mills." But in order to guard against the sheriff'
king poundage, for the sum contained in the body
execution where the judgment is upon a penalty (as
present case) or where he is not able to find property
cient to satisfy the execution, the act further dec
"The poundage on writs of fieri facias, and all other
for levying monies, to be taken only for the sum *l*
The true construction to be given to the act, I think is
where the sheriff proceeds to sell, he is entitled t
poundage only on the sum actually raised. And w
ever the plaintiff interposes, and a compromise takes
he is entitled to poundage on the sum realized by the
tiff, or that might have been collected from the pro
levied on. To say that a sheriff should be entitled
poundage where a compromise takes place, would be
ifestly unjust. He may have incurred all the risk
responsibility, for the safe keeping of the property,
will then be in the power of the parties to deprive h
compensation for it. It may be said, there is n
where the levy is on land, this may be true; but it
servable, that perhaps in nine tenths of the cases, th
ney on executions is raised out of personal property
the act makes no distinction. Suppose on the very
sale, and before the vendue commences, the defe
should pay the sheriff the money, would he not be
tled to his poundage? and I can see no material distin
whether the money be paid to the plaintiff or the she
that stage of the business. Cases no doubt may be
sed, where the sheriff will receive more than a valuabl
sideration for his services. But I think much less in
will be done by adopting the rule I have laid down, t
say the sheriff shall be deprived of all his poundage
ver a comprimise takes place.

Livingston, justice. I cannot concur in the
just given. It is only on the *service* of a fieri facias, t

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is entitled to poundage, and as the service is not com- til an actual sale of the property, he cannot until ve any right to this fee. Nor is there any greater p in this, than in countermanding a writ against the before service, in which case the officer loses his fee, e may have been several times to the defendant's house n him. Unless the legislature have by expressions not misunderstood, allowed poundage in cases of this kind, ould refuse it, as it will lead to great oppression, and ward in many cases will be very disproportioned to vice. An angry plaintiff may instantly after judgment n execution for no other purpose than exposing the ant to this expence, although he may have every rea- believe that the latter intended shortly to pay the

s he would be under no temptation of doing, if the ant at any time previous to a sale could protect him- gainst this charge. But it is thought hard to permit rtner to settle after lands have been seized, without the sheriff his whole poundage. This supposes the ; of land, or taking them in execution, to be a work mense labor and trouble. The truth is, that lands ten advertised without the sheriff or his deputies ever ; them, and the trouble of an actual seizure consists a riding to the lands and proclaiming that he takes in execution. And yet, for this paltry service, not to that of arresting the person, he may be entitled, on y judgment, to a most enormous reward. If we do ake the proceeds on an actual sale, our only guide in ting poundage, how shall we ascertain the value of operty seized; or who can say, that on a second sale alue would have been produced; and if we allow the F poundage here, as a quantum meruit for his trouble, not give it to him if he seizes land by the plantiff's di- n, which, as is often the case, appear in the sequel o belong to the defendant, or to be previously encum- l to its full value.

aving then little, if any doubt as to the intention of the lature, who appear to have expressed themselves with t circumspection, not only by restricting the claim of

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poundage to the *actual service* of an execution, but by claring that it shall be taken only for the "*sum levied*," in other words, the sum actually *made* or brought into co I think the sheriff not entitled to poundage for the land ken by him, on the execution issued in this case. Of case in 5. T. Rep. 470. it is sufficient to say, that it is binding on us, and that the reasoning of the court neithe tisfies me of the propriety of the thing, or that we have power to make a provision for sheriffs different from prescribed by the legislature.

Maggrath and Higgins *against* John B. Chur

All damage immediately arising from a jettison is to be contributed for, though it happen to perishable articles, which are enumerated in the memorandum, and remain in specie. Freight and vessel are to be estimated in a general average, as they then are.

THIS was an action on a policy of insurance, in wh on a special verdict, the following facts were found.

"That Le Roy, Bayard and M'Evers, of New-York, agents for the plaintiffs, who were merchants in Madeir a policy of assurance, dated the 10th of September, 1 insured 5414 bushels of Indian corn, 4000 pipe st 4000 hogshead staves, and 2500 quarter cask staves, f New-York to Madeira, on board the snow Ann and M Peter Murphy, commander. That the prime cost of corn was 2982 dolls. 98 cts. of the pipe staves, 170 d 31 cts. of the hogshead staves, 95 dolls. 50 cts. of the q ter cask staves, 31 dolls. 12 cts; that the freight for corn was to be 550 pounds sterling, for the staves, pounds, and that the plaintiffs had an interest on boar the amount covered by the policy. That there was a me randum in the policy, by which it was agreed that salt, g of all kinds, Indian meal, and all other articles perishabl their own nature, should be warranted by the assured from average, unless general. That the vessel, being fitted for sea, sailed on the voyage insured, on the 17t the same month; on the 21st, encountered squally wea and heavy seas, which continued till the 26th of the s month, when, about 1 o'clock P. M. the wind blowing olently, suddenly chopped round from E. S. E. to W. W. and laid the vessel on her beam ends, in which situa it became necessary for her preservation, and that of cargo and crew, to cut away the mainmast. That in dc

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his, it splintered off at, and below the partners, tearing away the piece of cloth called the coat, which is nailed to the deck and mast, for the purpose of keeping the water from running into the hold. That in consequence of this, the sea made a free passage over the snow, a vast quantity of water continued to rush into the hold till the stump of the mast was cut off, and a new coat nailed over it. That this occupied about an hour and a half, when there were found four feet water in the hold, though one pump was continually going, the other having been carried away in the fall of the mast, and totally disabled. That the vessel labouring much with a heavy sea, it became necessary, on the 27th, to ease her, by throwing overboard about half the staves, which was accordingly done. That the weather having moderated, the snow was found to be in so disabled a situation, that she was obliged to bear away for the nearest port, three of the crew being crippled and sick, and the captain's leg very much bruised. That, on the thirteenth of October following, the vessel got into the Capes of Delaware, and on the seventeenth of the same month, arrived at New-Castle. That there were not to be procured there, any stoves to unload the cargo, nor any assistance to obtain repairs, and that the yellow fever then raged both at Wilmington and Philadelphia. That on the 25th or 26th of the same October, Le Roy, Bayard and M'Evers, received information of the vessel's being at New-Castle, and of all the antecedent circumstances, which they instantly communicated to the underwriters, and abandoned. That the vessel lay at New-Castle till the yellow fever abated, and on the 30th of October, went up to Philadelphia. That on the abandonment, it was agreed that Le Roy, Bayard, and M'Evers, should send a clerk to New-Castle, to take charge of the cargo belonging to the plaintiffs, for account of whom it might concern, without prejudice to the rights of either party. That the vessel arrived at Philadelphia on the 30th of October, the day she left New-Castle. That, on unloading the cargo, it was found so damaged as to be wholly unmerchantable, *and that all the damage sustained by the same, was occasioned by, or in consequence of the cutting away the mast, which was done for the preservation of vessel, car-*

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go, and crew. That the articles insured, excepting such as were ejected, were, by consent of parties, sold at Philadelphia, for the benefit of those who might be concerned, and produced, after deducting charges, 924 dollars, which sum was paid to the owners of the vessel, for freight, in pursuance of an award made by arbitrators chosen for that purpose, but the defendant was not a party to the submission. That the Ann and Mary was repaired at Philadelphia, and ready to take in a cargo on the 28th of November, but as no corn of the kind of that before purchased, could be obtained, it being flint Jersey corn, the voyage was given up, and the vessel returned to New-York."

It was agreed that if, in estimating the general average, the *freight of the cargo to Madeira*, ought to have been taken into account, and *not the freight actually paid* at Philadelphia only, *then* an alteration to be made accordingly in the sum to be recovered; and, that if the assured were not bound to look to the owners of the vessel, for the proportion to be borne by the vessel, and freight, then the loss to be considered as total.

On the preceding facts and agreement, a case was reserved for the opinion of the court, whether the underwriters were liable in any, and what degree?

In a former trial on the same policy, in which Le Roy, and Co. were plaintiffs, the abandonment was, by the special verdict then given, found to have been made while *the vessel lay at Philadelphia*, where she could have been repaired for less than half her value, and the question at the time agitated between the parties was, whether the cargo being damaged more than one half of its value, was susceptible of abandonment, and the underwriter responsible, or whether he was protected by the words of the memorandum? It was contended that he was not, because they applied only to average losses, and not to those which were like the present, total.

In support of this idea, the authority of the French writers was relied on, but the bench decided, if the subject insured be in existence, there cannot be a recovery.

However, there being still an average, occasioned by the jettison, for which the assurer was bound, it became

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ry to settle *that*; but, before it could be adjusted, endant died.

induced the present action, in which the point first ed, was to be decided.

ison, for the plaintiffs, disclaimed all intention of hing the former determination, but distinguished e now before the court, from that which they had ly adjudged, by remarking on the diversity of the s, as to the periods of abandonment. He now made nts.

That the plaintiffs had a right to abandon, whilst el was at New-Castle, and had exercised that right. That even if they had no such right, still the loss be-sioned by the jettison, it was to be paid for by a average, and therefore, the underwriter answerable. a settled and acknowledged principle in the law of ce, that whenever the voyage is lost, the assured ght to abandon, though the article remain in specie. g v. Newnham, Park, 168, 9, 2 Marsh. 505.

exists as well in cases of perishable articles, as in ers. M'Andrews v. Vaughan, 1 Marsh. 150. For rranty "free from average," &c. does not destroy or the right to abandon. It only regulates the cases in compensation for average shall be claimed. Upon rinciples, it will be barely necessary to examine the stances, and see how fully they apply. The vessel n with her cargo into a port, foreign to, and out of rse of her destination; on hearing of this, and her l state, an abandonment instantly takes place. The f the parties was then compleat; the voyage could prosecuted, and it was impossible to know how long apacity to pursue it would continue. This would he abandonment *then*, and *then* the right of the as-rs ascertained. This did not depend on the me-ium; the court, therefore, will see this is a case the effect of the memorandum could not apply. In h there is a memorandum, yet it was never heard to a difference in a loss, arising from a peril of the sea ding the voyage.

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The vessel arrived at Wilmington, where there
stores, no possibility of repairs, or of pro-ecuting
age. Safely, then, may we say, with Lord Mansfie
"by a peril insured again t, the voyage be lost, th
"red may abandon." Because the cargo is comp
perishable articles, is it to remain for ever at the
the underwritten? Has he no right to abandon,
for indemnification? It is presumed that he has,
the court will say he is not bound to wait for a
ual change of circumstances. If, in the case of an
go, which may be taken off in two or three days, t
now contended for, exists, and the assured immedi
receiving advice, may abandon, will he not be entit
case like the present, where the voyage is broken up
ly this will be considered as a case within the spirit
ter of all the rules of abandonment. But admitting
is not to be supposed) that the court should be of a
ry opinion, we have still to rely on the second posi
have taken. That this is a loss arising from a gene
rage, and we therefore, in that point of view, ent
recover. The special verdict finds, that the vessel
gales of wind, which laid her on her beam ends, in
quence of which she was obliged to cut away he
That in doing this, the cloth round it, called the co
torn away, and considerable quantities of water rus
the hold. That *from this* arose the injury to the co
that it was in consequence of cutting away the mas
pre ervation of all. What is this but saying, in
words, that it was a lo-s arising immediately from t
son? If so, we are entitled to recover for the whol
injury attributed to it.

It is not the mere article thrown overboard, that
made good, but every thing is to be compensated
receives injury in consequence of the act done
preservation of all. Abb. on Ship. 278.* Therefo
finding is conclusive on the fact, and the law is but a
sary consequence. But, this very circumstance is to
ged as a reason for a new trial at least, and a questi
be made in the present discussion, whether the jury

* See. 1 Lex Mer. Amer. 231, 286.

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imony given, were justified in finding the effect of ison. It was no doubt proper for them, because ust be submitted to their determination. There is r cause stated in the evidence which can account for nage, but the jettison itself. The vessel was not nor was there any injury before. There is then suf- stated to ascertain the origin of the damage. Hav- at before them, and nothing else, to which to attri- the loss, they had a right to infer the whole, occa- l by the jettison, made for the preservation of vessel argo. That there was evidence adduced, that there person who had spoken to the captain, who had *told* the damage was *principally* owing to the jettison, is erial. They ought not to have been influenced by hearsay. The captain himself ought to have been ned as to other causes; and what does he say? that, opinion, the jettison was the principal. It is impos- to discriminate between the same damage occasioned her causes, and that which arose from the jettison. declarations ought, therefore, to be laid totally out r. The court may well imagine the captain mistaken; will be warranted in saying, there is no adequate cause ed for the damage but the jettison, and *that* the jury expressly found. The court will do well to consider, ought to enter into nice disquisitions, where cause suf- is suggested. There is no rule of discovery in these

If the party shew sufficient cause, the jury ought they cannot examine every trifling injury, it is suf- that this is the greatest. Will the court, on mere y, open this cause, having no document to discrimi- hat part was injured under the policy, and what not? was not the other side prepared to shew the quantum? ad equal opportunity with the plaintiffs: *we* have absolute evidence to satisfy the jury that the injury from the jettison exclusively; *they* rely on mere hear- me. If then the loss is the result of a jettison, this s a general average, and according to the statement verdict, the court will be of opinion that the parties titled to look for their proportion to the underwriters, ot to the owner. This, then, amounts to a total loss,

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for it appears from the sales at Philadelphia, that t ties have lost the whole of the subject matter of th rance.

Another question will then be made, as to the m which the average is to be computed. It will be co that if the average is general, another rule than that b we have been guided, ought to be adopted. It l settled, by estimating the articles according to the the ship on her value as it *then* was; and the freigh amount to be *then* paid. It could not be taken at t due in *Madeira*, for she had not arrived. It is ther be charged with average on the amount *then* earned the arbitrators gave, and is the sum to be paid: the regard to what ought to have been received in M They say, what the articles sold for in the market, right, and *that* you are to have. But this was u agreement, that what was done, should work no and not to be as if taken on account of the proprieto cargo, but left with the owner of the vessel, merel freight, and therefore as if on his account. In sett average, he is allowed what he would have been to where the corn sold. On this ground the cal was made, and this is to be considered as the just m these reasons, we conclude that the party had a r abandon, and that there was a total loss. If the c the matter in the same light, there will be no need sider it in any other point of view. Should they de not to be a case of abandonment, and that we are to take to the subject; then the average, as fixed jury, ought to prevail, by rating the freight as m and the corn at the invoice price, not as it would ha at the place of destination. If the freight is thus to mated and averaged, why not the corn? If not so, t go would contribute more than the freight. But events, as the loss of the corn is clearly a general a the court will say we are entitled to recover as for loss.

Pendleton contra. Before it can be known whet case which was argued on a former occasion is r

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that now before the court, they will advert to it. will only take a short review of it, they will perceive w agitated presents the very same subject as to the abandon, with some slight differences, and a tri- riation in the arguments and points. The special of this day, only states the abandonment to be a ther, and in all other respects the testimony is to- ike. The defendant contends, that this is not such of total loss as will warrant an abandonment. For relies on the former decision of the court, in Le Beyne, and Mc. Evers v. Governeur. The next is, whether the plaintiffs are not entitled to re- he whole amount of the subject insured as for a total Admitting that they have a right to recover for a average, the inquiry will be, what is it to be made general average is the contribution for that, which is ed for the preservation of all. If the loss be appli- ly to one, it is a particular charge. It must have r the general benefit, and have had the effect of for if by ejecting, goods be saved from one storm, st in another, they will not pay average, because ve not been saved.* The question is whether the value of the corn is to be brought into the general e. The facts stated in evidence, as connected with cial verdict, do not warrant the conclusion that all nage arose, as an inevitable consequence, from cut- ay the mast. May not the injury be attributed to r cause? did not a witness expressly testify from fession of master, mate, and crew, it was only *prin-* and not *exclusively* owing to the cutting away, that s was injured? He was examined, for no other pur- ose to prevent the conclusion of the jury as to the of damage. On the former argument it was never ded, that the corn was to be made a subject of gen- erage. This was an after-thought; an ingenuity ed to add the value of the corn to the general ave- because it could not be recovered in any other way.

* If goods be saved from the second peril, they shall contribute for an article which has saved from a first danger, tho' the ship be lost in the se- cond. 1 Last Mar. Amer. 230. and the authorities there.

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Therefore, the injury is now made an immediat quence of cutting away the mast, and then the rul applies as to consequential loss, and right to cont But the verdict shews the storm had been making over the vessel long before the mast was sacrificed, a is no evidence that the vessel did not then ship so ter: it is impossible she should not. But if the inj arisen from and in the manner stated, does it con the position of counsel? According to this, every consequence of cutting away, is to be a matter of average; and, if so, every thing, however conse will be a loss within the meaning of the term. captain, after a necessity to eject, be obliged to part of his cargo, if he place it where it receives there would be a loss,* and it must be considered a average. But supposing the corn to be consi general average, it is doubtful how the calculation be made. The whole value is now considered This surely is not correct. Goods, even that are to contribute; not all however in the present case because there was to the amount of 900 dollar This must be deducted from the amount to be into average, and ought to be taken from the cos port of shipment. And though this was given for yet it was no more than might be due, for the ve found to be able to proceed on her voyage, and st underwriter is not obliged to pay the amount o as a loss under the policy.

Hamilton on the same side. It is objected that timony, which goes to controvert the conclusio jury as to the cause of damage, is only hearsay. It well worth while to consider by whom it was addu was by a clerk of Le Roy & co. sent by them as a who related what their other agent, the captain, h he himself did not testify. This therefore was the tion of their own agent, produced by themselves, tainly *from them at least*, entitled to credit. He damage was *principally* owing to the cutting away th the inference therefore is, it was not *wholly*. The tw are not convertible, the one into the other. They

* Though consequential, it would not be immediately so.

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ctions in terms, the jury having no other data, from ce to infer, must certainly have given their verdict ist all evidence in the cause: it is impossible the jury d have drawn an inference, from any facts there. *cipally*, it must be acknowledged, is a vague term, but gatives the idea of *wholly*. It permitted the adoption ome loss from the cause alleged, but did not allow at- uting the whole. In my opinion, a bare majority of the ject, a little more than half, could be intended under view. How then would this operate? It is incum- t on a plaintiff to render a subject precise. Where he ot, it turns to his own disadvantage. There is no rion of facts. Principally is, in law, the greater part. e is no criterion for the jury to decide except the word *pally*, which leads to no conclusion except something than half. It is of considerable importance in the in- igation of causes, as it relates to truth and justice, that uch latitude be not allowed to vague inferences. This creates a disposition in the mind to draw conclu ions uncertain premises and is a reason why we should ne it to strict deductions, and adopt a rule for it to n itself. Inasmuch as there is no datum to deter- the fact, of how much, beyond half, was injured, law will intend just more than half, and nothing less. ill not be permitted in the face of evidence that it was *wholly*, that it was a little more than half damaged, to that it was wholly and entirely so. When a person knows how much, pronounces *principally*, shall a jury *olly*? are there any facts in the special verdict from ce the jury can draw such an inference? From the of the month to the 26th, the vessel was in a course ms. Can this have produced no injury? A duration days bad weather? Though possible, it is not probable should have been the case. Then comes the jettison, en the witness says, he believes the *principal* part of mage took place. But was there not something sub- nt, from which the injury might be supposed to pro- There was another storm from whence it is impos- he injury should not have been increased: it could

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not have been repaired. If what took place the next day was the consequence of cutting away the mast, within their word *principally*, I must differ from the counsel associated with me, whether some of this injury be not a subject of compensation. That which was immediate, is, I conceive, to be contributed for. I Mol. b. 2. c. 6. s. 7. not however to go further than what directly ensues. But as there was another tempest immediately supervening it is impossible to calculate the quantum of damage in one, and the quantum in the other, so as to ascertain the consequence which was immediate. In an interior view of this case the jury appear to have lumped too much; to have added together what might be attributed to precedent, and to subsequent causes; it is impossible to say the jury did not value the second tempest. The facts do not warrant their conclusion, and therefore, they had no sufficient basis to overrule the captain's own declaration, that the whole injury was not from the jettison. He had every thing under his eye, and therefore must be the best judge whether *all* the damage arose from the first tempest. If the court think that the matter must be reviewed, they certainly will not say so when the party by his agent says the reverse. In every case like this, the master is agent for every one concerned. It is not a case of total loss, in which he is the agent of the underwriter: in average losses he is the representative and deputy of each party insured. He has a duty to perform, and is responsible to them for its discharge. He is to collect the proportion to be contributed; from each his contributory share. He is bound to make this collection, and then distribute according to the general average: he is liable, if he parts with the cargo, before the contribution is settled. The result then necessary is, that the party having a claim on him, must have recourse to him for the average, and call on the underwriter for the ultimate loss. That is, the difference between the injury sustained, and the sum he is entitled to receive from the defendant in this suit. On the one hand the owner of the cargo had to receive for the injury done to the corn, on the other the owner of the ship, for the injury done to *that*. It was a complicated fact of mutual contribution. The owner of the goods was

ed to discount, so much of his demand against the owner
ship, as the owner of the ship was entitled to receive from
and cannot ask the whole loss from us. Suppose he
right to receive more for the corn lost, than he was
d to contribute for the injury done to the ship? He
ot come against the underwriter for the whole of what
ld be due for the damage without this set-off. What he
to receive might be less than what he had to pay; can
ave recourse to the underwriter for more than he did
? On a total loss the underwriter is to pay a total loss;
partial, a partial loss; and, when there is a general average,
quantum ascertained on a just calculation among all the
es. For the assured ought to recover only the amount
e loss occasioned by the jettison or other disaster, af-
deducting what he was entitled to receive, in contribu-
from the other parties concerned in the voyage. The
rwriter ought not to pay, when the assured has a sub-
on which he has a right to claim. From the insurer
ught not to recover, when his agent has in his hands a
e from whence it is to be taken. As to the arbitra-
the defendant was no party to the submission, and
fore was not bound by it. The right to abandon must,
he principle of Le Roy and others v. Governeur, be de-
. As the value of the corn was not less than the
ht, there could not for that reason also, be any ground
bandoning, especially as the vessel was repaired and
wners willing to proceed.

arrison in reply. The former decision in a case ac-
ledged to be under this policy is greatly insisted on.
this not essentially differ, the court would not now
dressed. When *that* was considered, the point *now*
itest, as to a total loss never arose. The question *then*
was, whether an abandonment could be made un-
circumstances very different than those which now pre-
themselves? *Here* the act was justified from the local
tion of the subject. *There* the ground was that being
ld no more than half the value, the party was entitled
ndon. The court must recollect that in Le Roy, v.
rneur, the plaintiffs could not give in evidence the
when the abandonment was made, *they only* being able

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to do it, and as parties to the record, inadmissible. The time is not unimportant, as on it, may depend the right of the party to a total or an average loss. For instance, suppose a capture, and the assured, a day before he hears of the vessels' safety, abandon? It will be good. If he delayed till after receipt of the information, it would be nugatory. The court will never say, that an abandonment made when the party had a right to abandon, shall be impeached by the memorandum. It is not contended that when the vessel was at New-Castle, she could have been repaired, or steam had, or that the cargo could have been conveyed to its place of destination. At that period then it clearly was a total loss. Had the assured lain by, it would have been otherwise, but they did not; they took immediate advantage of their right, which did not rest on the memorandum, but on the right to abandon. Goss v. Withers.*

The principle now contended for is, that whatever the cargo may be, or its situation the right to abandon, turns the loss on the insurer, and this point is not the one decided by the court.

The former consideration was, whether a deterioration, to more than half the value, authorised an abandonment? The consideration then turned on the distinction between the laws of England and France on that right. On this point both parties are agreed. But one question now is, whether this case ought to be sent back for examination to another jury? They were not to be bound by the relation of hearsay causes, said to have been acknowledged by the captain and others. They had facts before them, and from them they were justified in attributing the damage to whether one cause or the other. Are there not facts in the case from whence a jury might say the loss arose from the jettison? There is nothing from whence they could infer it antecedent to the cutting away the masts. Allowing all that has been said respecting the word principally; that it means exactly a little more than half, the jury have decided on the credit due to it, and they have not thought it enough to outweigh the evidence of the damage, arising *solely* from the jettison. They find the cutting away the mast arose

* 2 Burr, 694.

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ny for the preservation of all, and the injury was an im- mediate direct consequence of that cutting away. This on is clearly a loss within the meaning of general average; d being of the whole, is a total loss. But here it is said have no right to look in the first instance to the insurer; must take from the captain and others, and then apply the underwriter for the balance. Is it not however a loss om the perils of the sea, from a general average arising t of those perils? And will the court turn us round from e words of our policy to the captain, because it is said he s a lien on what was to pay us, and being our agent ought have thus applied it? Can he justify holding the ship ll the owner of goods ejected, be paid? If he has not this wer over the vessel, neither can he detain the cargo. uppose my goods thrown over board, the owner of the essel a bankrupt. The captain does not perform this duty, nd the sold by his assignees on her arrival, can the under- writers say you must look to the owner, the casus fœderis as not taken place? All that can be done is to substitute he underwriter in our place, and he will have a right to use ur names in the prosecution. It is from him we have to xpect satisfaction. The court will find the principles on which the contribution has been settled to be correct; as our loss is of the whole, and as *that* is to be contributed for, we contend both on the right to abandon, and on the ettled *rule* of law in cases of general average, that we are ntitled to resort to our policy, and leave the assurer to re- mburse himself from the others.

Per curiam. Delivered by Kent, justice. This cause comes before the court upon a *special verdict*, which states hat Le Roy, Bayard and Mc. Evers, on the 10th Sep- tember 1798, effected an insurance on goods on board he Ann and Mary from New-York to Madeira; but it was greed by a memorandum, to the policy that salt, *grain*, *f all kinds*, indian meal, fruits, dry fish, and all other icles, perishable in their own nature, should be *free from* verage *unless general*. That on the same day, defendant igned the said policy for 1000 dollars. That the above surance by Le Roy and others was made on account of he plaintiffs, who had an interest in the cargo to the

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amount of the sum insured. That the cargo shipped b Le Roy and others on account of the plaintiffs consisted i 5414 bushels of *Indian corn*, the first cost of which w 2982 dollars and 98 cents; 5000 *pipe staves*, the first co of which was 170 dollars 31 cents; 4000 hogshead staves at 95 dollars 50 cents; 2500 quarter cask staves, at 8 dollars 72 cents, for the freight whereof the master w to have 550 pounds sterling for the corn, and 148 pound for the staves. That on the 17th Sept. 1798, the vess sailed on the voyage with the said cargo and was seawor thy. That on the 21st of Sept. she met with squalls o rain and heavy seas, and the weather continuing bad o the 26th and blowing violent, the wind suddenly chopped round and blew with such violence as to lay the vessel o her beam ends, and the mainmast, masts and rigging were necessarily cut away, and after the vessel righted, there were four feet of water in her hold. That while the ves sel was in this distress, and the crew were engaged in cut ting away the mast, *and nailing* a coat over the stump (which occupied about one hour and an half,) much water rushed into the hold and over the decks. That o the 27th, it became necessary for the safety of the vessel to throw overboard one half of the staves. That the ves sel was obliged to bear away for the nearest port, and sh arrived at New-Castle in Delaware, on the 17th of October. That at New-Castle no stores could be obtained to land the cargo, or assistance procured to repair the vessel, and the yellow fever raging violently both at Wilmington and Philadelphia, she waited at New-Castle till it abated, when on the 30th of October she went up to Philadelphia. That on information of the above losses, the said Le Roy and others, on the 25th or 26th of October, while the vessel was at New-Castle, abandoned to the defendant. That on discharging the Cargo at Philadelphia, the corn was found to be so much damaged as to be wholly unmerchantable, and unfit to be re-shipped; wherefore the voyage was given up, and that the whole of the damage thereto arose from cut ting away the mast as aforesaid for the preservation of the vessel and cargo. That the cargo saved as aforesaid was sold for the benefit of those interested and produced

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after deducting charges 924 dollars, which sum was paid to the owners of the vessel for freight, pursuant to an award to which however the defendant was not a party. The vessel was repaired at Philadelphia, and ready to receive her cargo on the 28th of November.

The questions arising upon this verdict are, whether the plaintiff ought to recover for a total loss, or for a general average, or a particular average? And if the plaintiff is entitled to recover as for *a total loss*, the jury assess their damages to 1231 dollars 54 cents. If for a *general average*, for the loss sustained by the injury done to the corn, then to 909 dollars 69 cents. If neither, then to 237 dollars 51 cents. And the parties agree, that, if in estimating *the general average*, the freight of the cargo to Madeira, ought to be estimated, and not the freight actually paid at Philadelphia only, then the sum is to be altered accordingly: and they also agree that if the plaintiff was not bound to look *to the owner of the vessel* for the proportion to be borne by the vessel and freight, then the loss is to be considered as total, if plaintiff be entitled to recover a general average.

The only evidence on the question is, whether the damage *the corn* sustained was wholly or in part only owing to the cutting away of the mast. *Besides the facts found in the verdict*, there was the deposition of a witness who declared that he was informed at Philadelphia, by the captain, mate and crew, that the damage the corn sustained was *principally* in consequence of cutting away the main-mast, and another point was submitted, whether the verdict was not in this respect, against evidence. This deposition was admitted by consent as competent evidence.

Two questions have been made upon the facts stated in this case.

1. Whether the plaintiffs be not entitled to recover as for a total loss?

2. If not, then by what rule is a general average to be liquidated.

The first point was settled by this court, in the case of *De Ray, Bayard, & Mc. Evers v. Goveneur*. That case January Term, 1800. was upon this same policy, and upon facts substantially the same. The question was on the construction of the

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words in the memorandum, *free from average unless general*, and the court decided, that to make the insurer liable there must be an actual destruction of the article specified in the memorandum, and not merely such a technical loss of the article as would authorize an abandonment. Consequently as the *corn* existed in *that* instance, the insurer was not liable for it, however deteriorated it might have been by the perils of the sea.

Park 114. 1. Marshall 144. Millar 359. S. C. Esst. 25. G. 3.

This decision was warranted and governed by the case of *Cockin v. Fraser*, which was a strong and unanimous determination of the court of King's Bench, upon a case reserved on the very point in question. In that case the insurance was upon a cargo of *fish* from Newfoundland, to a port of discharge in Portugal, and which was *Figera*. On the passage the crew hove overboard part of the fish, for the general preservation of the ship and cargo, and the ship was obliged to put into *Lisbon*, which was upwards of one hundred miles from her port of discharge. It was there found upon survey that the fish were rendered of no value through sea damage, and the ship did not proceed on her voyage. The court held the insurer liable for no more than what he had paid into court as a general average on the cargo, and a particular average on the ship. Lord Mansfield observed "that the insurer was liable only for a *total* loss, and that the total loss *here* was the loss of the thing itself, and not anydamage however great while it exists. That in common cases *when the voyage is obstructed and not worth pursuing*, it is a total loss. But the memorandum goes on the idea that the insurer is not to be liable for any *damage* however great." Buller J. observed also "that *the voyage being defeated*, might be very material in cases NOT WITHIN THE MEMORANDUM." This decision therefore goes the whole length of settling that, although in certain cases a total loss may be in whatever *defeats the voyage*, and will authorize an abandonment, this will not hold in the case of perishable articles within the memorandum. The insurer *there* is to cure against all damage to them, whether great or small, whether it *defeats the voyage*, or only diminishes the price of the goods. The memorandum prevents the loss from

ity and certainty. This difficulty would remain in
e, *if* the law was otherwise, and the insurer was to
l for damage to the perishable articles, when that
e was so great as to occasion a loss of the voyage.
ue object of the rule would, in such case, be de-

e been the more particular in explaining the former
n, and giving it my full acquiescence, from an im-
n which I received at the argument of this cause,
e decision was not sufficiently understood, or that it
t give all desirable satisfaction. The observation of
Lawson, in the cause of *M'Andrews v. Vaughan*
1 Marshall 150.
ems also, as it stands at present without explanation,
pposed to the rule we have adopted; for, he said the
was liable not only when the article was actually
ed, but when the voyage was lost. If by this ob-
n was meant that the insurer was held when the
was lost, by some cause or peril not arising from
dition of the articles in the memorandum, it is not
y to the rule contended for; but if it is to be under-
extending to a loss of voyage, in consequence of
, however great, to the articles in the memoran-
is directly contrary to the decision of *Cocking v. Fra-*
I cannot be received as law

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of the voyage, and therefore, neither this, nor the former decision, apply to the case of a loss of voyage from injuries *distinct from those happening to the perishable articles*, such, for instance, as an irreparable damage to the vessel. That would be a loss of voyage in a case *not within the memorandum*, and liable to be regulated by other rules.

As the plaintiff is not entitled to recover as for a total loss, the next point that arises for consideration is, whether the plaintiff be not entitled to recover a *general average, as fixed by the verdict.*

A question here preliminarily arises, and that is, whether the verdict be contrary to evidence in stating, that "*the whole of the damage sustained by the corn, was occasioned by, or in consequence of the cutting away the mast of the vessel for the general preservation.*"

To support this finding, the evidence was; that in cutting away the mast, it splintered off at and below the partners, and tore away a piece of cloth which was nailed to the deck and mast; and, by means of the splintering, and the removal of the cloth, vast quantities of water continued to rush into the hold of the vessel, until the stump of the mast was cut off and a new coat nailed over the same, which occupied about an hour and a half; during all which time, and for several hours afterwards, the water made a free passage over the decks, and one pump was continually going, the other having been carried away, and become totally disabled *by the fall of the mast.* In addition to these facts, there is the deposition of a witness, who heard the captain, mate, and crew say, that the damage the corn sustained, was *principally* in consequence of cutting away the mainmast, &c.

Upon these facts, I am not dissatisfied with the conclusion drawn by the jury. No other cause of direct injury to the corn is found. The one stated must have essentially injured the corn. The injury was inevitable, and the cause was sufficient to have produced the *whole effect.* I think the conclusion a reasonable one. We are, therefore, to consider *the mast as sacrificed* for the general safety of the ship and cargo, and that in the act of sacrificing the mast

NECESSARY CONSEQUENCE of it, the corn was da- ...d this damage must be included in a *general contri*... The corn being damaged by the cutting away of the ... to be considered equally with the mast, a sacrifice ... upon benefit; a piece of safety to the rest: and it ... on the clearest equity, that all the property and ... ought to contribute their due proportion to ... The plaintiff is therefore entitled to recover *general average*, for the loss sustained by the injury the corn, and two remaining questions are next to ...d.

Abbott, 278. East. Rep. 228 by Lawrence, J. Park 124.

...e is, whether, in the *adjustment of average*, the ... the cargo to Madeira ought to have been esti... ...d not the freight only paid at Philadelphia. In ... I think the adjustment, as settled by the award, ... stand; for that the freight *actually gained or earned* ...yage, and not what the vessel *would have earned* if ... gone to Madeira, ought to be the rule of contribu...

Abbott 291. 2. Marshall 467.

...her question is, whether the *totality* of the con... ...due to the plaintiffs, for the loss of his corn, is re... ... in the first instance from the insurer.

...f opinion that it is, because the loss arises wholly ...eril within the policy, and the plaintiff has a right ...r his indemnity from the person who has engaged ...nify him from the peril. This argument appears ...be conclusive. This will not lead to a multipli... ...its, any more than a different rule, for if the plain... ... recover only a *contributory share* from the defen... ...would be compelled to resort to the owner of the ... the residue; and this suit over, may as well be ...y the insurer as the plaintiff, for one great object ...nce is, promptly to re-invest the assured with his ...st by the perils of the sea, and thereby enable him ...e his commercial enterprises.

...tion to this, it appears to be the English practice ...urer to pay, in the first instance, the adjusted ave-

Abbott 296.

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I am accordingly of opinion, that the plaintiff is entitled to recover a general average. That in adjusting this average, the freight has been properly estimated, and that the plaintiff is not bound to look to the owner of the vessel for the proportion to be borne by the vessel and freight, and these points being established, *the loss is to be considered a total*, according to an agreement of the parties at the foot of the case.

Lewis, chief justice observed, he had delivered the opinion of the court in the case of Le Roy, Bayard and M'Evers, against Governeur, on the same policy, and that as far as the present decision turned on the import of the exception, *free from average unless general*, when applied to the corn, he fully assented to it. That the other questions arose upon an argument between the counsel, subjoined in a note at the foot of the case, which had been omitted in copying the case delivered to him. He therefore had not considered them. He saw no objection, however, in concurring with the adjustment as to the *quantum* of freight to be charged with contribution to the general average: nor with the principle that the underwriters, and not the owners and shippers, were to respond, in the first instance, to the assured for the general average receivable on the corn, if entitled to any within the terms of the contract of indemnity. But that he had great doubts on the other point, viz. Whether the injury received by the corn from the jettison of the mast, and the consequent irruption of the sea water, could entitle it to a general average as between insurer and insured. He was strongly inclined to think it within the spirit and meaning of the terms of the exception: the object and design of which is, to avoid and shut out, between the parties to the policy, every question on the cause of injury to the corn, where it might equally arise from the perishable nature of the commodity, as from external causes. This was a case of that description, and actually involved the question, the assured intended to steer clear of. For that the evidence is, that the injury sustained by the corn was *principally* owing to the sea water getting in [illegible] the partners, before the coat could be replaced. That appeared to him rather an ingenious contrivance on the part

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the assured to obtain under the form of a *general*, what could not under that of a *particular* average. He, how-r, gave no opinion.

Livingston, justice, having been concerned in the cause, e no opinion.

George Barnewall *against* John B. Church.

A general policy, unaccompanied with any warranty, covers war risks of all kinds and of all countries. Under such circumstances, a false clearance is immaterial, and need not be disclosed. Seaworthiness is always implied, and not at the risk of the underwriter. Weight of evidence.

This was an action for a total loss by perils of the sea, der a policy of insurance on the ship Hope, valued at 00 dollars, and dated the 28th of December, 1799, "at nd from Kingston, in Jamaica, to Honduras, during er stay there, and at and from thence to New-York." ppeared, that in April 1789, the plaintiff, wishing to chase the vessel in question, employed two ship carpen-s to examine her, which they did in every part. They nd her timbers fore and aft, near and between the ins, bends, transom, breast hooks, apron, and in other ces, found her perfectly sound, and very strong. They orted her bottom to be of English elm, which never de-s under water. That she was collier built, about nine ten years old, and would last 40 or 50 years. That she med as sound as a Connecticut vessel of two years old. r iron work was good, her bottom perfectly sound, her nds doubled, the first at least five inches thick, her knees t started, but well fastened, and the chain bolts fore-ked.

On this representation, the plaintiff bought her, and ex-nded about 600 pounds in repairs. Whilst these were mpleting, some of her timbers were perceived to be taint-, and some of the planks in her wai t defective; the first re mended, and the latter removed.

After this the ve sel sailed from New-York, where she s purchased, to Kingston, in Jamaica, from whence she led on the voyage insured, and arrived safely at Hondu-s. On her passage from thence to New-York, she prung a leak, was obliged to bear away for Honduras, hich she reached in a very disabled state, and was, after survey on her duly held, condemned as not seaworthy. rom two protests of the captain, which were read in evi-dence, by consent, it appeared that the vessel, soon after

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she left Honduras, experienced some heavy gales, such as to oblige him to strike top-gallant-masts, an his top-gallant-sails, though she, at this very time, the leak which forced him, by advice of his crew, t away. It was not, however, alleged, that any ext nary press of sail had been necessarily carried to avoi shore. The captain had, in his first protest stated, had sailed from Honduras for Falmouth: in his sec explained it, by saying that he had cleared out for Fal but actually sailed for New-York. This, it was pr evidence, had been done to avoid duties to the amo 105 pounds per ton, which must have been paid i vessel cleared for any other than a British port: i however, established, that the thus clearing made n ration in the premium, for the New-York insurance c ny, after being acquainted with the circumstance, cc ed the risk on the policy they had underwritten, w demanding any thing additional.

The state of the vessel, at the period of her surv condemnation, was shewn to the jury, from the retur commission, containing the evidence of the same pe whose testimony, given on the survey, had been reli by the plaintiffs, for proof of loss, and constituted of what had been adduced to the underwriters, in s of the claim against them. By this, it was proved above two-thirds of the ship's timbers were rotten, i sequence of which, and the decay of the fastening planks had started, and several of them were also r the bends in the same situation, and loose, particulai That the defects in the timbers and upper works ap to be of a considerable standing; the bends, in part were so bad that they might have been ripped up w crow bar, for twenty feet aft. Many of the trunnels, bolts, and other fastening bolts, started; the bends so from the transom, and very much decayed. Th starting of the bolts and bends arose from the rotte of the planks and timbers, which could not hold a That the upperworks, inside and out, were mostly de her water ways open. That she could not have b staunch, tight, strong and seaworthy vessel, fit for thi

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upon the 21st November, 1799, (the day of her departure) and her general decay could not have taken place between the time of her leaving New-York, and that of her survey. To discredit the evidence under the commission, and rebut the testimony it afforded, the plaintiff adduced the two ship carpenters who had examined the vessel, and the master, who, previous to the purchase by the plaintiff, had last commanded her. The two first swore, they believed the persons examined under the commission, had testified falsely, and the latter deposed, that the vessel was staunch, tight, strong, and seaworthy, when he left her, and in her former voyage, had not made a pint of water. On this evidence the jury found for the plaintiff, as for a total loss.

A motion was now made for a new trial;

1st. Because the verdict was against evidence, the vessel not being seaworthy when she sailed.

2d. That she never sailed on the voyage insured.

3d. That if she did, and was seaworthy, there was not a sufficient disclosure, she having cleared for Falmouth, and by that means increased the risk.

Pendleton, for the defendant. Without totally rejecting the evidence under the commission, it is impossible to reconcile the verdict with the state of the vessel. That a ship was seaworthy, requires the strongest evidence to support it; it is not to be presumed that all are so, till the contrary is shewn: but if this should be the rule, still it has been complied with. The testimony of want of seaworthiness could not have been resisted but by prejudiced minds; in this case, more than any other, it ought to have been conclusive.

The witnesses on the part of the defendant were first produced by the plaintiff himself, to substantiate his claim. Surely, no man shall present a person as credible, and when he has used him for such a purpose, immediately afterwards impeach his credit. By adducing him, a credit is given, which it is fraudulent afterwards to shake. The protest and survey go to establish the credit of the witnesses, under the commission, and the facts they testify to, when interrogated on a solemn examination, corroborate, in every

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particular, the decayed and unseaworthy state of the vessel. They cannot be disbelieved without saying, almost in express words, that they are perjured: they must be so, if the vessel was not as they have represented, and they unanimously state the loss to have arisen from the rotten, unseaworthy state of the ship. To contradict this, no one extrinsic circumstance, or accident, is shewn. There is not a single fact which could work an injury to the vessel: not even a lee shore stated to give a pretext for a press of sail, and consequent straining of the ship: but this could not have rotted her planks; it might have caused her to leak: yet that circumstance is otherwise satisfactorily accounted for, by her seams being open. It is singular the plaintiff should not have produced his captain; a man who must certainly have been able to give the fullest insight into all matters relative to the present question. The examination, previous to the purchase of the vessel, and subsequent report of the ship carpenters, do not establish her seaworthiness. The same things happened with the Mills frigate.* Had the Hope been reparable, she might have obtained all that was necessary at Honduras; the only person who says it could not have been done, is Williams, who never was there, whilst the man who had been, swears the reverse. The captain, too, deposes very equivocally; he states, that he *believes* she was seaworthy when he sailed from New-York, but not even a belief is mentioned when he left Honduras. Where there is evidence on both sides, the rule generally is, to let the verdict stand; but when it is against the *weight* of evidence, and some of the witnesses are foreigners, the court will give an opportunity of establishing their credit, especially in a case, like the present, of doubt and importance.‡ The bias too, of juries, in subjects of this sort, cannot be unknown to the court. On the second point, the defendant had strong reasons to expect a verdict in his favor. The testimony of three persons evince the vessel sailed on a voyage to Falmouth, and not on one to New-York. Though this latter is afterward stated by the captain to have been the real voyage, it is to be remarked that he flatly contradicts himself, and was,

‡ See ante 29. note there.

* Park, 122 (222.)

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is of each assertion, equally upon his oath. If, in- he is to be believed, as to what he last says, the risk ceased: and if the vessel did sail on a different voy- n that insured, a new policy ought to have been ef- for the first was clearly void.

up referred the court to 2 Marsh. 364, as to the in- of the survey and report made before the voyage, ik, 192, 3, the last edition, for the Ostend case,* in the *usage* of trade was relied on.

for the plaintiff. The cause is one of those the court will grant a new trial with extreme 1. It is true it has, in one instance been done; but the loss happened by the vessel's foundering at sea t any circumstance, by which it could possibly unted for.† But though the accident should arise ly latent defect, a premium is in fact paid to insure it. This will, on investigation, be found to be . The underwriter, in forming his calculation, rs the quantity of losses in proportion to the safe . On this datum he forms his estimate; seawor- must therefore be included. Of the number foun- t sea, many must have perished from latent defects, ripping up alone, would discover. Therefore, these ave constituted part of the risks calculated. If then lculation be founded upon this, latent defects are r, and premiums actually received for them by the riter. If, therefore, she was seaworthy at the incep- the voyage, the progressive decay is at the risk of erwriter. The interest of trade requires this mode oning; for it is the policy of commerce to divide ght of loss, and throw the load upon many, rather on one. To warrant, therefore, a new trial on this it should appear clear and manifest, that the ves- not seaworthy when the risk attached; that is, on her t Kingston. There is not a particle of evidence to ct. There was therefore abundant reason for the deliberate and to determine as they have done, dibility of witnesses is also their exclusive province, this they have decided. That they might be fully

† See Dow v. Smith ante 33. note in the margin.

che v. Fletcher, Doug. 238.

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adequate to do so, a struck jury was obtained, and t from their skill in navigation, aided by their general kn ledge in mercantile transactions, have found the proba ity of truth on the side of the witnesses of the plaintiff, is in evidence that the greatest exposure to danger, possible increase of latent defects, would naturally arise and from Honduras. She might therefore have been worthy at Kingston, and in coincidence with every cir stance, have become afterwards unfit. Her cargo, in former voyage, was of a very heavy nature, and yet she ver leaked a pint. The parts which are always the to decay were bored, and found perfectly sound. E single fact, separately taken, proves her seaworthy at commencement of the voyage. The period between survey in New-York, and that in Honduras, was only months; comparing the two reports, the jury discredited last. But if they had not done so, still their verdict well warranted, the loss arising from perils of the sea, teriorating the vessel after the inception of her risq when she clearly was seaworthy. Therefore, we do impeach the credit of our own witnesses, by the exami tion of the ship carpenters residing here: we only shew what time their evidence relates; that it proves the during the time of the policy, though there may perh be some reason for supposing a little exaggeration in description. In foreign ports, speculating surveys are so times to be found, where the hope of purchasing a ve may induce her being condemned. The right of a jur to weigh the credit of both foreign and domestic witnes The course of the navigation being through keys, deman ed a press of sail; and this is another cause for finding the loss and leak arose from perils of the sea, there is a doubt in a case, as to the absolute origin of disaster, the jury are to decide, and this they have d The case of the Mills frigate is very distinguishable fr this; the examination* in *that* proved the vessel not worthy when she sailed on the voyage insured. On second point, the only evidence that could be relied on the captain's. He *only* could know the real destinatio

* The examination there was as here, at the place where she was demned, after previous examinations, finding her seaworthy.

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sel. The others spoke from the papers alone. The
t contradiction is easily reconciled, and the expla-
given in the second protest, is substantiated by the
letters, which prove the voyage sailed on, to be
ich was insured. The object of the clearance to
th is consistent with the known usage of the trade,
merely to save the British duties. This very course
was relied on in the Ostend case,* and allowed to
e the mode of clearing out. It has never been said
licious papers are fatal, when resorted to, merely to
commercial advantage to the assured. Besides in
se, the rate of premium was not affected, nor in-
uld it be for as there was no warranty, it was a war
which the underwriter guarrantees against every
of loss which may arise from capture. False papers
er only neutral policies, but cannot enhance the
f a belligerent insurance : and according to the
s of this court, the present must be of that des-
n.

sion on the same side. That a cause is of impor-
is by no means a reason for granting a new trial.
ld also be difficult, and to render it otherwise a pro-
f of obtaining new lights, by a second investigation,
be made to appear. It is observable too, that to
t that very bias, which is now urged as a reason
ording the effect of the motion, a struck and select
persons pre-eminently qualified was empannelled.
er a vessel be seaworthy or not, is a question of fact ;
ing so, the established maxim that to matters of
e jury shall answer, fully applies ; for there is not
cumstance to make an exception of the present ca e,
duce the court to exercise their power of remanding
se. Where the scales are nearly balanced, they
never be taken from the jury and carried to the
This is to destroy the most invaluable of our rights,
mit fact, as well as law to the judge. Suppose the
nt back, and then there should be verdict against
, as well as evidence against evidence, how long
court be before it shall be satisfied which ought to

* Busske v. Fletcher. Doug. 238.

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preponderate? That the vessel was seaworthy at the c mencement of the voyage, is every way reasonable. Ba wall wanted to buy a sound ship: strong, tight and sta for the purposes of trade. He was solicitous she sh be so, and his interest coincided with his wish. To certain the fact, she was critically examined in parts wl she could not be sound, if she was not seaworthy; must have weighed with the jury, and they have found cordingly. Take the account given of her before, and after her purchase, and see if it is possible that the re to the commission could be true? But to set aside verdict the court must go a step further than even witnesses under it; they must say the vessel was not not seaworthy at Honduras, but that she was not s Jamaica.

They must go still further, and say none of the d took place whilst at Jamaica, Honduras, or on the voy To constitute unseaworthiness, one or two defective bers are not sufficient. The vessel must be in such a s tion as to be unable to perform her voyage. Can thi said when the Hope left Jamaica? If not, the cause not be sent back. Besides there is no further evidenc be gotten. Therefore, there can not be any new thrown upon the subject. What is to be derived fron testimony under the commission ought, perhaps, to b ceived with great caution, if meant to affect the seaw ness of the ship at the inception of her voyage. She been a long time in a climate more than ordinary de rious to shipping; she had not been wafted from thei halcyon gales, but had encountered according to the s protest, violent winds and boisterous weather under a of sail, which made her labor, and after these events her is described. These circumstances were doubtless into consideration by the jury, and it is impossible to the case to them, under better circumstances, than have already had it. It may be alledged that we ough have produced the captain; but the court will rememb is a seafaring man, and obliged to follow his profe If, however, he was necessary, he certainly must been more peculiarly so to the opposite side; and they

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ight fit to produce him. The objection which has ade on account of the clearance vanishes before the stances of the case. That a vessel clears for a par- port is no proof of her being destined there. The y was declared in this case to the New-York insur- mpany: it appears from the letter of instructions, ptain's protest, and every thing else, that it was en- New-York transaction. The disclosure itself shews important it was: It did not affect the premium. The ntended for, is to establish that a vessel insured to rt, to which the owners declaration to one under- ; the instructions and protest of her captain show destined, shall be vitiated by a clearance to another ade for the sake of saving duties. The Ostend case s authority for this is the very reverse. A clearance er conclusive. 1 Marsh. 229. 231. It is the daily ce to clear out, from foreign ports, as will best suit oyage actually intended, and this being a belligerent levoid of all warranty, the hazards could not have ncreased by a want of disclosure, had it in no degree ade.

fman in reply. This has already been stated to be a f magnitude: It is so, not only from the sum in con- sy, but from principle. It is peculiarly important, be- without examining the testimony and shewing that a t has been pronounced on the most contradictory ffered, it is now become almost a maxim for juries to find a verdict for a defendant, when unseaworthi- r usury are relied on in defence. On the very out- the trial, the jury betrayed a prejudice, on an idea e insurer undertook to guarrantee the seaworthiness vessel. The court now has to decide whether the ny will justify the verdict. We admit that where stances speak one language and witnesses another, stances are to be believed; but where two sets of es speak contrary, and circumstances coincide with ; the other must be disbelieved. Now the circum- s at the time of survey, detailed under the commis- ncide with the evidence of Potts and others, that the could not have been seaworthy when she left New-

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This fact then is corroborated by extrinsic testimony weight of which is clearly with the defendant. To bal this as it is called, Middleton is examined as to the sta the vessel in 1795. With as much propriety the bui might have been resorted to, and with such a latitude would be singular indeed if the vessel should not be pr seaworthy at some time or other, and the number of nesses in process of examination rendered equal. That circumstance relied on by the plaintiff should be l ally true is impossible. That the ship did not make a of water, during her passage from England, neither honors, nor the jury could believe. It is what could happen in even going to Albany. But even this was months previous to her purchase, and if true, how c it that at the expiration of that time she wanted repair the amount of 600 pounds? notwithstanding which, l gan swears, she was then fit to go a voyage round world. If he and Middleton be taken away, then number of witnesses will be eight to four; and where t is a contrariety of testimoney, number ought cert to prevail. The witnesses at Honduras demand f their situation more regard than those here. Do had sold the vessel. Williams had a duty to perf and is brought forward to swear to a fact, which prove it was faithfully discharged. Can there be a d therefore, of the tendency to a bias? None of can be imputed to the witnesses under the com sion. Their testimony coincides with the survey; a vey taken by the plaintiff's captain made use of by plaintiff to substantiate his claim before the unde ters, used by him in evidence, and without which is no proof of loss. It is singular that an argu should be raised by the plaintiff against testimony w he himself, through his own agent, the captain, caused to be produced. But what is still more extra nary is, that when the survey is to be impeached, an facts it contains discredited, the plaintiff's captain, wa. present, and saw whether they were true or n passed by, and Williams, a New-York ship carpe called upon to negative them. This, to be sure, he pretty roundly, by asserting on oath, that all who

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amined 2000 miles off, swore falsely to things before yes, and which his never saw. The plaintiff never xamines his own correspondent at Honduras, but a person *here* to contradict what passed *there*. The thiness of the vessel is in no one point asserted by tain in his protests. In neither, does he shew any ue cause of decay. Giving the utmost extent to all , it could amount only to leaking, not to rottenness: ottenness which would not admit of repairs. Yet it gested she might have been perfectly seaworthy, , tight, and strong, when she left Jamaica, only reeks before. The clearance being false rendered the liable to be carried in for adjudication, and though she not be ultimately condemned, it would subject her her proof. The risk, therefore, was encreased, and to have been made known. 1 Marsh. 232.

idleton on the same side. Had the vessel been met by a French cruiser, she would, on account of her ce from a British settlement, to a British port, certain- been carried in: So, had she been met by a British steering a course different from her destination, it have been attended with the same consequence. ver papers appear false and colourable, a neuter is rse situation than a belligerent. She is exposed not be captured by one party, but by all; for every na- equally her enemy. If the court will refer to the e of the admiralty, they will find this to be the law. nsequence is, that allowing the risk of the underwri- ere there is no warranty to be a war risk; this is great- any war risk: because, among hostile parties there e friends, but a neuter thus navigating, has none, sage has not been proved.

it was observed by counsel, that the effect of colour- papers had never yet been the object of particular ion, and that if the court was disposed to hear an ent on the subject, they wished to have another day ted. This being accorded, the second argument was rds opened by

up for the defendant. The question now is whether on disclosure of the clearance being for Falmouth,

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was a concealment of a material fact. If so, *that*, var the risk, must of course avoid the policy. At the pe when it was effected, and the voyage to be perform Great Britain was involved in a war with France, Sp and Holland. The consequences therefore of a false pa would be different from those, which would arise in a t of peace. It is a settled maxim of the law of nat that neutrals, to have the benefit of their neutrality, sha in every part of their conduct, proceed with the ut good faith. All neutral ships are therefore to possess nine papers. These are, on her being boarded at sea, first objects of examination. If they present false or lourable appearances, it is on all sides deemed a suffi reason for sending in for further examination. If covered to be fraudulent, condemnation is sure to ensu fair, the only indulgence is to produce further proo neutral character, on establishing of which, though quitted, costs are invariably to be paid. For the bill ent is not in fault when the papers do not speak that w is true. The risk of interruption and detention is th fore enhanced by a false or colourable paper. Abbot 1 Moll. 329. b. 2. c. 2. S. 9. Coll. Jur. 135, 6. 1 Ad. Rep. 371, 7, 8. 124, 6. 165, 247, 8. 2 Rob. Rep. 158, 161, 349. 3 Rob. Ad. Rep. 77, 8. 80. cases cited shew that if there be an alternative destin even *that* ought to be expressed. Here not even *that* was complied with, but the clearance was positively determinately false. A usage has been on a forme urged, but the court will look to the case, and none is to be seen. If none, the underwriters could not pre the clearance would be to Falmouth. Had the vessel met with by a French cruiser the conclusion would her clearance have been, that she was in fact a E vessel with British property. This then is a risk and ger which with fair papers could not have been encoun The same would be the case let her be met with by cruiser soever. Suppose even the letter of Barnewal covered, what would then have been the conclusion? she was an American vessel carrying an English cargo. was evidently in a trade authorising seizure, runni

not contemplated, and therefore the underwriter enti- ay non hæc in fœdera veni. That no injury had d from this particular cause is immaterial, the con- ent being fraudulent. 7 D. & E. 708, 9, 10.*

rrison contra. The question is whether the conceal- be of a material fact. This certainly was a matter for determination. M'Dowal v. Frazer. Shirley v. Wil- n. Park 205, 6, 7. It ought not therefore now to avail. er v. Fletcher, was exactly the same ground of appli- n. Doug. 292. Had the fact been material it ought ave been made an object of particular enquiry before jury, and this not having been done it is now too late. position the authorities cited will establish. Planche v. ker. 1 Marsh. 345, 6. Evinces how little stress was pon the clearance. Lord Mansfield in that case says, non-disclosure of the proclamation, made no difference, ther underwriters insured *afterwards at the same rate* remium. So here, the risk was continued without advance of price; and on this very circumstance the probably have decided. The encreased risk by the rable clearance, allowing all that has been said, was in the policy. It was contemplated by the underwriter mbrace all belligerent risks; therefore there could be oncealment of a risk which was purely belligerent, and prehended in the premium. There was no warranty; re then was a risk within the policy, and the under- r cannot therefore set up as a defence, that from this r the vessel ran a risk of being taken. For, that he should nify against *this*, was a part of the contract itself. a never therefore be urged that there was a conceal- t of that, which from the nature of the agreement is narily implied, and for which a premium must conse- tly have been paid. To explicitly communicate such nstances is a refinement, in the doctrine of disclosure, rfectly novel invention. Under a general policy, for soever it may concern, unaccompanied with warranty, unnecessary to state that the proprietor is a billigerent, per. 460. In Wooldridge v. Boydell, Doug. 16, the ateriality of the clearance is allowed; and in the pre- case it must be wholly so when every war risk was ided.

* Rich v. Parker.

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Hamilton same side. It is unnecessary elaborate argue in support of that which a decision of the cour already settled. The policy covers every belligerent which could arise. It might be French, British, Spanis Dutch property, for every war peril is covered. If so, demnation is insured against. The question then is, any situation in which neutral property is placed, b tended with more dangerous consequences than when fessed to be that of an enemy in whose hands soever it fall? Can the risk of being carried in for adjudic (which is all that is attempted to be established from clearance) be greater, than the certainty of condemn against which the policy insures? I really do not k how to argue the point more forcibly, than by asking question.

Pendleton in reply. This argument presents two q tions; one general, the other particular. The ge question is whether a vessel having false documents rel to her voyage, and destination should not always fo the protection of the policy. It is of the utmost im tance to neutrals, to establish a character for good f False papers ought therefore to be discountenanced, motives of public policy, as tending to corrupt the mor the people, by inducing perjuryand dishonorable specula in covering property. It is settled that every thing in sing the hazard ought to be disclosed. The true in then is, whether the paper might not have produced a zard, the vessel would not have been subject to wit it? By the French ordinance of 1744, false papers worse than either the want, or destruction of them, a the Ostend case, it is to be remembered the usage w have them false. They invariably subject to further p The answer to the Prussian memorial, and the case o De Hoop, prove this. They even encrease billigerent For an enemy's property always receives protection one side, but false papers take it away from all. A c ance is also a public document, and comes from p officers. It ought therefore to be genuine; neither f gery, nor a falshood, because it may implicate them. are also applied to purposes of acknowledged fraud; to

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enues of other countries; policy therefore would the propriety of leaning against them, though the re- codes of foreign nations, are not noticed in our courts. e vessel been cleared for New-York, she could have kind of risk of detension; therefore on the parti- uestion, as relating to this cause, it enhanced the dan- Rich v. Parker, 7 D. & E. 705. 1 Esp. Rep. 615. is like a deviation avoids the policy, not being qual- y any usage, either general or particular.

mpson, justice. This was an action of assumpsit olicy of insurance, dated in December, 1799, on ip Hope, Edward Atkinson master, "*At, and from s in Jamaica, to Honduras, during her stay there, and from thence to New-York.*" The vessel valued at dollars—premium 12 1-2 per cent. A total loss was l, occasioned by perils of the sea. Interest of the l and the abandonment were proved. The defence was, that the vessel was not seaworthy; that her ce was for Falmouth, and a market, instead of New- as the voyage purported to be, and that this ought been disclosed to the underwriters. The cause was t the New-York circuit in June 1802, and a verdict for the plaintiff, as for a total loss; application is ade for a new trial.

substance of the testimony produced on the trial, as question of seaworthiness, was, on the part of the f, as follows:—The voyage commenced on the 21st ember, 1799. *Thomas Williams and William Pea-* ip carpenters swore, that in April 1799, previous laintiff's purchasing the vessel, they were employed to examine her; she was then laying in the harbour York; that they accordingly did examine her, bored y places that usually decay soonest, and found her ly sound. She appeared to be a very strong, well ip. That after the plaintiff had purchased her, they mployed to make certain repairs; that they stripped he old sheathing, found her bottom English elm, and ly sound; her naval hoods, and head knees sound: unk taken off so, that they could discover her top

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timbers to be sound and good: She was thoroughl paired, and fit for a voyage to the East-Indies.

Andrew Dorgan swore, he had sailed in this ship as ter for fourteen months, immediately preceding 1799; that he arrived in New-York, with her, in the M before, with a cargo of 400 hogsheads of Molasses, 100 hogsheads of sugar, besides some other articles; he sustained four severe gales of wind on the coast, b vessel received no injury; that while he was master o she was twice hove down and examined, and none o timbers found rotten or defective; that when he left he considered her a very strong, staunch and good s fit to go to any part of the world, she was ten years By the first protest of the captain, chief mate, and seaman, made 20th February, 1800, in Honduras, i pears, that when they sailed from Honduras, abou 27th of January 1800, they conceived the ship t staunch, and well fitted for the voyage; that she en tered some stiff gales and heavy weather. By the se protest of the captain alone, made in New-York, in 1800, extending and explaining the former, it appears sailed from Kingston 21st November 1799, arrived at duras 8th December following, and left that place for York the 27th of January 1800, the vessel well fitte the voyage; that he met with excessive hard winds; the navigation was difficult and dangerous, and he obliged to carry a heavy press of sail, in order to avoi reefs and keys; that he found the ship leaked so fast, he was obliged to keep the pumps continually wor that on the 2d of February, for the safety of the shi cargo, and preservation of the lives of the crew, it wa a consultation, thought adviseable to bear away for Sa Island, but as they could not get there, they then bore for Honduras; that from that time, to the time of h rival at Honduras, they experienced heavy gales and ous changes of weather. On the 17th, the ship was veyed, and condemned as unfit to proceed on the v without *considerable repairs, to do which, no workmen o terials were to be procured at that place.* The captain s that he believed, if the ship had arrived at *any port* o

ent of America, she might have been repaired, fit
r voyage, for fifteen hundred or two thousand dol-

the part of the defendant, as to the question of sea-
ness, the testimony of Philip Nicoll, James E-
Tropp, John Potts, and William Gibson, surveyors at
ras, is introduced. The three former swore sub-
ly, that on the 17th of February 1800, they were
rvey of this vessel, that above two thirds of her
s were rotten, many of the planks started by reason
f, some planks rotten, the bends rotten and loose,
arly aft; so that with a crow-bar, they might have
ript up for twenty feet; the defects in her timbers
per works, appeared to have been so, for a considera-
e. The trunnels started in many places, chain bolts
, and many of them ready to drop out. That from
eir appearance, she could not have been seaworthy on
1st of November 1799, and fit for the voyage described
policy, on account of the bad state of her upper
, and the general decay of her timbers, bends, and
, which could not possibly have been so much injured
t interval. The survey also made by eight men at
ras, states, that they had examined into her upper
s, sides, and bends, and found her to be wholly de-
e in her timbers aloft, her out side planks rotten and
d, her timbers in many places started, her bends
d, and in many places rotten; the whole of her up-
rks, inside and outside in general decayed.

th respect to the other question, it appears from the
tory, that the vessel had a clearance for Falmouth,
market; but that her real destination was for New-
. It appeared also, from the testimony of Jacob
, that he had been informed, and believes it to be true,
essels clearing out with mahogany, direct from Hon-
to Falmouth, save about 105 pounds per ton, which
d be payable if landed at a foreign port.

he two questions arising out of this case for decision

t. Whether the verdict was against evidence, on the
ion of seaworthiness; and,

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2d. Whether the plaintiff ought not to have disclosed to the defendant, that the vessel would have a clearance for Falmouth.

There is, in every insurance, an implied warranty that the ship shall be seaworthy, when the risk commences; that she shall be tight, strong, and in all respects, fit for the intended voyage. The insurer undertakes only to indemnify against the *extraordinary and unforeseen perils of the sea*, and not against the *ordinary perils*, to which every ship must be exposed in the usual course of the voyage proposed. If a vessel become incapable of proceeding on the voyage insured, the *presumption*, primâ facie is, that it arises from unseaworthiness, unless *some adequate cause* be shewn to occasion the damage. But, if any such cause be shewn, so that the loss may be *fairly* attributed to sea damage, and the underwriters mean to rely on the ship's not being seaworthy at her departure, the *onus probandi* will then lie on them. To test the present case by these rules, we find the only testimony, as to the immediate cause of the disaster, is that contained in the two protests. From the first, made by the master, chief mate, and one seaman, it appears, that the vessel left Honduras the 27th of January. That on the 28th May, she met with strong gales, so that they were obliged to close reef the fore-topsail, and close reef the main-topsail. That on the 29th, strong gales, and a heavy sea, from the northward, still under reefed sails, the vessel making much water. On the 30th, the wind abated; and nothing remarkable occurred until the 2d of February, when they found the leek increased to that degree, that they could not keep her free from water with the pumps. They then bore away for Swan's Island, which being unable to reach, they determined to return to Honduras, where they arrived the 13th of February. During the above time, they encountered, at various periods, stiff gales and heavy squalls. Thus we find the ship, from the 28th of January, until the 13th of February, a very considerable part of the time labouring under stiff gales, and heavy weather, far beyond the *ordinary* perils of the sea. The master swears, that shortly after leaving Honduras, he met with *excessive hard winds*; that the navigation was difficult and

rous, and he was obliged to carry a very heavy press , in order to avoid the reefs and keys; and that after met with *considerable injury*, and it was determined, to return to Honduras, he experienced *heavy gales, rious changes of weather*. This I think sufficient to that the loss may *be fairly* attributed to sea damage, row the onus probandi of unseaworthiness on the de- t. On this subject, the testimony is certainly very dictory, and, in my opinion, irreconcileable. The d warranty on the part of the assured is, that the was seaworthy at the commencement of the risk; as on the 21st of November, 1799, while she lay at ou. The testimony on the part of the plaintiff is sub- ly, that in April, 1799, when he had it in contem- to purchase this vessel, he procured ship carpenters mine her, and ascertain her situation, previous to ing the bargain; no possible inducement, there- o a fraud, on the part of the plaintiff. They exa- her accurately, bored in places most liable to rot, and her sound; stripped off her sheathing, found her English elm, and perfectly sound; her naval hoods nd knees sound; took off the plank so as to examine p timbers, and found them sound and good. The ony of Captain Dorgan, likewise, who arrived in preceding from the West-Indies, in this ship, with o of 500 hogsheads of sugar and molasses, tends to hat she was a very tight, strong vessel, and only ten ld. This, it is said, however, was seven months the commencement of the present insurance. But was in the situation represented by these witnesses il, it is inconceivable that she could be in the rotten ayed state represented by the defendant's witnesses ember thereafter. The examination made by the int's witnesses was in February, 1800, three months he commencement of the risk. All the progressive therefore, from the November preceding, was at k of the underwriter. But it appears incredible, that decay could have taken place in that period, for the int's witnesses represent, that when she was survey- them, two-thirds of her timbers were rotten, many

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of her plank started and rotten; her bends so rotten and loose that with a crow bar they might have been ript up for twenty feet; her upper works in a very bad state; and, in short, that there was a general decay of her timbers, bends, and plank. The master of the ship, however, swears, that had she arrived in any port on the continent of America, she might have been repaired, fit for the voyage, for fifteen hundred, or two thousand dollars; but if she had been in the situation represented by the defendant's witnesses, she must have been *irreparable*. On the whole the testimony is so directly and palpably contradictory that it is impossible to reconcile it. It thus becomes a question of credibility of witnesses, and this is peculiarly within the province of a jury to determine. Whether the vessel was seaworthy or not, is also matter of fact, to be submitted to a jury. These points have been decided by a respectable jury of merchants; and in such case, where the question is doubtful, and the testimony contradictory, I think the court ought not to interfere by granting a new trial, unless it appears that injustice has been done, or that further light may be thrown on the subject on another examination.

2 Strange 1142.

In the case of Ashby v. Ashby, the judge who tried the cause, (which was upon a promissory note for 500 pounds, which the defendant insisted was forged) certified that the weight of the evidence was with the plaintiff, as he thought the jury would have found for the plaintiff, but they found a verdict for the defendant. And on an application for a new trial, the court said, as there was evidence on the part of the defendant, the jury were proper judges to determine which scale preponderated; that it could not be said to be a verdict *against* evidence, and they refused to grant a new trial. The same rule was adopted in the case of Smith v. Huggins, and a new trial denied although the evidence was weak on the part of the plaintiff, and the judge who tried the cause, strongly inclined against the verdict.

Idem.

I am therefore of opinion, on the first point, that a new trial ought not to be granted.

With respect to the second question, I think there can be but little difficulty. There is no doubt but the real de-

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mission of this vessel was for New-York, as described in the policy, and not for Falmouth, as the clearance purported. There is no contradictory testimony on that subject, except, that in the first protest it is said, as in the clearance, she sailed for Falmouth and a market, but as to the *final* place of destination of a vessel, I think the captain, unless his testimony is impeached, is entitled to full credit. He, of all others, is the most likely to know this fact; and he, when examined as to that point particularly, declares explicitly, that she sailed for New-York, though her clearance was for Falmouth and a market; and in this he stands corroborated by the testimony of Alexander Anderson, the plaintiff's agent at Honduras. I therefore take it for granted, that the vessel sailed on the voyage insured. So far as any reasons could be discovered for taking out a clearance for Falmouth, it was to avoid the payment of certain charges, that would otherwise have been incurred at Honduras. There was no warrranty or representation, and it has been settled in this court, in the case of Murray v. U. July term 1800
S. Company, that in such cases, the underwriters take upon themselves war risks. Under a policy of *this description*, I cannot conceive how this clearance could, in any manner, prejudice the underwriter, or increase the risk; and therefore immaterial whether disclosed or not. In all the cases cited from Robinson's admiralty reports, where false and colourable papers came under consideration, the question was, as to the neutrality of the property; the papers purporting a different voyage or owners from the other testimony, and so considered a circumstance of fraud and suspicion. But as the present insurance is general, and includes war risks, this clearance was immaterial.

I am therefore of opinion, that judgment ought to be rendered for the plaintiff upon the verdict of the jury.

Radcliff, justice. On the trial of this cause, the defendant rested his defence principally on the want of seaworthiness. This objection was relied upon in the argument for a new trial, and two other grounds were also taken, viz.

1st. That the ship sailed from Honduras for Falmouth, and not on the voyage insured.

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I shall begin with considering the two points last m tioned.

As to the first of these, the evidence is, that the s cleared at Honduras for Falmouth and a market. T captain and mate, and one of the seamen, who made original protest, therein swore, that they sailed from H duras, bound for Falmouth and a market. On this den ce alone, I should have no doubt that the voyage f Honduras ought to be considered as destined for Falmo But the captain, in his second protest, explained that h fact sailed for New-York, although he cleared for F mouth. How far this explanation can be reconciled w his former deposition in the first protest, or ought to be ceived without further proof to establish the fact of his s ing for New-York, it is not important, under the circ stances of the present case, to decide. There is other dence; to wit, the deposition of Alexander Anderson, the letter of the plaintiff of the 3d of October, 1799, plaining the object of the clearance for Falmouth, whic think sufficient to justify the verdict, on the ground that vessel actually sailed for New-York.

2d. Assuming the position, that the vessel was in f bound for New-York; the second point has been tre as more delicate and important. She was bound for N York, but cleared for Falmouth. It is not stated in case whether the cargo was consigned to any person at N York, nor in what manner her other papers appeared. T objection is therefore founded on the clearance alone.

In con idering this question, it is material to obse that the insurance was general, without any warrant representation that the property was neutral. It foll according to the decision of this court, in the case of M ray v. the United Insurance Company, that it ext ed to protect belligerent, as well as neutral property, the risk, therefore, was not increased beyond wha would have been in the case of belligerent property, the cumstance of a false paper, or a clearance for a port of of the nations at war, could not be material. The un writer must be deemed to have received the premium a quate to the risk, which this circumstance implies,

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therefore, to be liable. Besides, I think it too un-
, and too great a refinement to establish a rule, that
aper, which, in the opinion of the cruisers of a bel-
t nation, may be deemed suspicious, and induce them
y in a vessel for adjudication, should be held neces-
be disclosed. It would be impossible to meet the
ity, or avoid the cupidity of that class of men, and
be a safe and practical rule on the subject.

On the point of seaworthiness, there was much con-
y of evidence.

the part of the defendant there appeared,

A survey of the vessel made on her arrival at Hon-
by *eight* persons, at the instance of the captain, who
d upon oath, that she was wholly defective in her
aloft, her upper works, inside and out, plank rotten,
herwise generally decayed; that on account of these
s, and other injuries which she had received, she was,
ir opinion, unseaworthy; and, from the difficulty of
ring workmen and materials, and the high price of
and provisions, she was incapable of being repaired
r full value, after the repairs should be completed.

The depositions of four of the above persons, who
the survey, taken under a commission, who testify,
ally, to the same effect. Three of them add, that
verily believe it was impossible the ship could have
seaworthy on the 21st November 1799, at which time
mmenced the voyage insured. Two of the three last
oned witnesses, are ship carpenters, and the third a
er. The fourth is a merchant, and speaks with more
nce of his knowledge of vessels, but says, that he
y believes that some of her timbers had been rotten a
time.

Opposition to this, the plaintiff produced,

The protest of E. Atkinson, the master, of the
ate and one seaman, who swore, that when they
from Honduras, on the 27th of January, they firm-
ved the ship was tight, staunch, and well fitted and
ded for the voyage. The master, in a supplementary
st, again positively declared, that she *was* tight, staunch
strong, and well fitted for sea.

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2d. A deposition of Andrew Dorgan, who testified, that he had been master of the ship immediately before the plaintiff purchased her, for the period of fourteen months; that during that time, she was twice hove down and examined, and none of her timbers were found rotten or defective; that during all the time he sailed in her, he thought her as strong, staunch, and good a vessel as any he had ever sailed in, and when he left her, which was in April 1799, she was, in his opinion, fit to go to any part of the world.

3d. The testimony of Thomas Williams, examined at the trial, and the deposition of William Peacock, two ship carpenters, of the city of New-York. They examined the ship at the request of the plaintiff, previous to the purchase by him, in April 1799, and reported her to be generally a sound and strong ship; after the purchase, they made some repairs to her, fitted her for sea, and had a full opportunity then to ascertain her real condition; they add, every thing was done which was necessary to render her seaworthy, and that after such repairs, she was perfectly sound in all her parts, and fit for any voyage. One of these witnesses, Thomas Williams, also said, that from the state of the ship when he repaired her in April 1799, it was impossible she could be so decayed, at the time of the survey at Honduras, as was represented by the surveyors there, and that in his opinion, they must have sworn falsely.

4th. The testimony of Samuel Middleton, and one Bird, the plaintiff's clerk. The first of these proved, that he helped to repair the ship in the year 1795, and from her condition at that time, he was fully of opinion, that she could not have been so rotten as was stated in the survey and the evidence taken at Honduras. Bird, the plaintiff's clerk, established, that the charges of the ship, after the purchase, and including her outfits, amounted to 3040 dollars, and that the purchase money was 5000 dollars. He could not distinguish how much was expended for the repairs alone.

The defendant also produced one Rose, a witness, who was a captain of a ship, and had been often at Honduras since the year 1795. He testified, that William Gibson, one of the surveyors, was a respectable merchant, and that

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r of the settlement; that Thomas Potts, another of the eyors, was one of the richest merchants there, but he w nothing particularly respecting him. That he was ainted with two of the other surveyors, but could say ing of their character. This witness also said, that vessel must have been very strong to carry the sail de- ed in the protest, with a hard north wind, and he ght she could not have done it, if the wind had been high. Two other witnesses, judging from the sail she ied, also testified, that in their opinion the weather could have been so violent as to injure a sound and strong el.

his was the principal evidence concerning the question seworthiness, which was submitted to the jury as a fact e determined by them. As that fact appears to have n generally submitted, I think it not material to examine substance of the charge in other respects. But I take opportunity to observe, that the opinions and directions judges, at the circuits, as made by the parties, appear frequently very different, both in form and substance, n what they really were.

n the present case, from the face of the charge, and the ple nature of the question under consideration, it is ma- est, that it can neither be correct nor entire. This, wever, appears to me unessential to the decision of the stion between these parties. I view it as a question de- ding on the weight of contradictory evidence. The nesses at Honduras had, no doubt, the best opportunity correct information. They saw the vessel immedi- ly after the disaster happened, and examined her. They d not be mistaken in their knowledge of the fact, whe- her she was so rotten or decayed, as they have represented, f they speak the truth, she must have been extremely leaky and unseaworthy.

On the other hand, it is difficult to reconcile their evi- nce with the testimony of the plaintiff's witnesses. The estimony of Dorgan, and the two ship carpenters in the ort of New-York, prove, that the vessel at, and shortly be- re the time she left that port, was apparently seaworthy, fair condition, which it seems impossible could admit

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of so great a decay, in the period of seven months, at t expiration of which, the voyage in question commence These, and other parts of the testimony, appear to me irr concileable. If the question is to be decided on the *cred* of the *witnesses* merely, and there be nothing to impeac those on either side, the greatest number testify to the fac that the vessel was unseaworthy. These were witnesse residing at Honduras. That circumstance, and the wa of a sufficient knowledge of their character and credibilit have been urged against allowing much weight to their te timony, when in competition with other proof. But there be any general reason to discredit the witnesses abroa other circumstances in this instance operate in their favor.

1st. As has been already observed, they possessed bette means of information. They examined the ship immedi ately after the accident happened. The examination of th two ship carpenters in New-York, from its nature, mus have been more superficial, and it took place seven month before the vessel sailed on the voyage insured.

2d. In the captain's protest no cause is stated adequate t the injuries described. A sound ship, under the circum stances therein set forth, could not, in all probability, hav been so injured. It does not appear that any material acc dent happened, no external injury was suffered, not a sp nor a sail was carried away, although a considerable pre of sail was sometimes used. I do not perceive that an thing more is represented to have happened, than wha might be expected on such a voyage, and what a ship ough to be competent to encounter.

3d. The captain, in his protest, swears in general term without designating the particular injuries sustained, an refers to the survey at Honduras, which contradicts hi testimony.

Neither he, nor any of the crew, were examined at th trial, and no reason has been given why they were no produced. I think it was to be expected from the plain tiff to produce them, and by their testimony, it was in hi power to throw farther light on the subject.

There is great reason to doubt the propriety of the ver dict, and, considering the value in controversy, and the

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more light can probably be obtained, I think the cause ought to be reviewed. The circumstance that here was a struck jury, is not of decisive weight in favor of the verdict, especially as it is founded on a point against which, as a ground of defence, it is known, considerable prejudice exists.

I am therefore of opinion, that there ought to be a new trial on the question, whether the ship was seaworthy.

Kent, justice. The ship cleared out for Falmouth instead of New-York. The clearance was for *Falmouth and a market*, although the ship was actually bound for *New-York*. She was loaded with Mahogany at Honduras, and cleared from *there*, and in 16 days after she sailed, she returned in distress.

I state no more of the testimony in the case, because the facts stated are sufficient for the only point which *I heard argued in the cause*, and on which I give my opinion, viz. whether there ought to have been a *disclosure* that the ship cleared for a different port than the one she was bound to?

In this case, the insurance was in time of war; but the case does not state that there was any warranty, or representation that the property was neutral, and we are to intend therefore, that there was none. The insurer, according to the decision in the case of *Murray v. United Insurance Company*, took upon himself the risk of *enemy's property*. The non-disclosure of the clearance for Falmouth could not then, in any possible view, be *material*, for the disclosure of the fact (if at all material) could only have been so, as it affected the *neutrality* of the vessel. July term 1800.

On this point, therefore, I am for the plaintiff, and that the verdict ought to stand.

Lewis, chief justice. An application is made to set aside the verdict in this cause, and for a new trial. Three questions are raised for the consideration of the court:

1st. Did not the ship sail on a voyage different from that insured?

2d. Ought not the fact of *her clearance for Falmouth and a market*, pursuant to the orders of the plaintiff, of the 3d of October, 1799, to have been disclosed to the underwriter?

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3d. Is not the verdict against evidence on the point *the ship's competent sanity to perform the voyage insured?*

The first question is raised on the fact of the Hope having cleared from Honduras, *for Falmouth and a marke* when the insurance was for New-York.

This would be a circumstance of some weight, were connected with others tending to shew that the real inten tion was a voyage immediately from Honduras to Falmouth but cannot, *per se*, be sufficient evidence of that fact, a certainly cannot be permitted to controul the counter testi mony, which establishes, beyond doubt, that her real destina tion was for New-York, and that the clearance for *Falmou and a market*, was probably for the purpose of saving cer tain duties, in the event of the cargo ultimately finding a mar ket at a British port. Her consignee at Honduras, from hi correspondence with the plaintiff, understood *New-Yo* to be her destination, and wrote letters by her, to h correspondents there. The letter of the plaintiff to the ca tain, containing the instruction as to his clearance, direc him, in the same period, to return direct from Honduras t New-York, as before ordered. The expressions are "*Altho you are to return direct from Honduras to this place* (viz. Ne York) *as before ordered, you will clear out the vessel from Ho duras to Falmouth and a market.*" This, in my opinio establishes beyond controversy, that New-York was th port she was bound to. The first protest of the maste mate, and one of the seamen, in which the ship is stat to have been bound to *Falmouth and a market*, is a circum stance almost too slight to be noticed; for I have obser it a practice without variation, for the protest, in this re spect, to be made according to the clearance, without re gard to the true place of destination. In the 2d protes the master states he sailed for New-York, though clear for Falmouth, thus correcting his statement, when he d covered the fact to be material.

If there is any substantial distinction between the ca of *Planché and another against Fletcher, Mayne against Fle ter*, and the present case, it is favorable to the last. the two first, the vessels cleared for an intermediate po at which they had leave to touch, the policy continuing

Doug. 238. Park 195.

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rival at the ultimate port of destination; in this the would have terminated on her arrival at an *interne-* rt, though she might afterwards have proceeded un- original clearance for Falmouth.

next question is, whether the fact of the clearance mouth ought to have been disclosed to the under-

It is not contended that the concealment was frau- and in order to render it a circumstance affecting icy, it ought to appear material to the risk. The ide we have on this occasion leads to a contrary re- There cannot be a surer test of the materiality of a ed circumstance, than its influence, if known, on e of premium.

New-York Insurance Company were also on this d near two months after subscribing the policy, d, without additional premium, that it should not be d by the circumstance of *the ship Hope having cleared Falmouth, instead of New-York.*

company must be presumed to understand its in- and their conduct on this occasion is decisive, that t concealed was immaterial to the risk, and there- e policy is not affected by it.

third and last question is on the seaworthiness of the On the argument a novel position was advanced, viz. *ent defects* are at the risk of the underwriter; that e covered by the premium, because *he calculates chan- rding to losses.* My first impression, I confess, was le to its correctness, notwithstanding the force of ty against it. But on examination I was satisfied, hough in part true, in point of fact, it is neverthe- sound in principle. It is true that losses are the a which the underwriter calculates the chances of d gain. But it is equally true that his not being able for inherent defect, or natural decay, dimin- e number of losses, and thus reduces the chances him. The implied warranty then, on the part of ured, that the ship is tight, staunch, and strong, uipped, &c. remains unimpeached, and on the fact warranty having been complied with, on the pre- sion, rests the question between the parties.

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The judge before whom the cause was tried, is, in the case made, stated to have instructed the jury "*that by law every vessel is presumed to be seaworthy.*" This I presume to be not perfectly correct, or in other words, that the instruction ought to have been less general, or rather, more precise. Every vessel is presumed to be seaworthy in the first instance, in respect to the implied warranty only; because the law will not, without cause, presume a party to have falsified his stipulation. But the instant she becomes innavigable, and incapable of proceeding on the voyage insured, the presumption is that this proceeds from age or internal defect, arising from some other cause, until it appear to have been the effect of sea damage, or unforeseen accident insured against. And with reason is it so; for the insurer engages against *extraordinary and unforeseen perils of the sea.* And this he does, in the confidence, that the ship is capable of performing the voyage, and assuring to him his premium, ordinary occurrences notwithstanding.

Marshall 365.

I am strongly inclined to believe that the verdict of the jury in this cause, was owing to the generality of this instruction. That relying too firmly on the presumption, as therein stated, they sought for positive and conclusive evidence to the contrary, thereby losing sight of the presumption arising from the want of evidence of external accident, and not duly appreciating the testimony taken under the commission at Hondura, as to the real cause of condemnation.

The vessel is stated to have been nine or ten years old at the time of the insurance being made; to have been thoroughly repaired in 1795, examined in April 1799, previous to the purchase of her by the plaintiff; afterwards repaired by the examiners, Williams and Peacock, two ship carpenters, and purchased on their report. They state, that after her last repair, she was fit for a voyage to any part of the world. This testimony is corroborated by that of captain Dorgan, who commanded her at the time she was purchased by the plaintiff; there is, however, a variance between his testimony and that of the two ship carpenters. He testifies, that she was twice hove down within fourteen months previous to the sale, some of her planks ripped off

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er timbers examined, none of which were rotten or ive. Williams and Peacock, the ship carpenters who d her, admit that some of her planks and timbers *ainted*, which Williams says were mended, and Pea- that they were replaced with new.

pposition to this, is the testimony of Nicholl and , ship carpenters, and Potts, a master of a vessel, who ed her on her return to Honduras, who testify, that rds of her timbers were rotten, several of her planks bends rotten and started. This testimony is cor- ed by that of Mr. Gibson, who is proved to be a nt of respectability there, and treasurer of the set- t. He professes to know little of a ship, but declares any of her planks were rotten, and several of her so much so, as to crumble to pieces when struck crow-bar.

se witnesses may be said to be interested in her con- tion. The fact may be so. But surely such interest t greater than that of Williams and Peacock, who, ly, had they discovered or disclosed too many defects would have deterred the plaintiff from purchasing, s lost the job of repairing her.

does not appear to have met with any weather that have affected a sound ship; yet, she made so much that the master was obliged to return into port. And ittle singular that if this was the effect of any other than natural decay, that it was not stated by the mas- ome one of the mariners. It is true, that in his se- rotest, he speaks of her having experienced *heavy gales ious changes of weather*, and yet not a spar is car- ay, no butt started, no sheathing torn off. Surely a ight, *staunch and strong*, could not have been rendered able by gales that did not require the striking of allant-mast; for we find the top-gallant-masts and tanding until the third of February, a day after that ch, by the advice of his crew, he had borne away for of safety. He speaks of strong gales on the 28th of y, and yet the top-gallant-sails were not handed un- hight. Where is the evidence then of external in- There is none. Nothing that looks towards this

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point, except his declaration, that on the survey, the da of the ship was found to have proceeded from the gales, in which they were obliged to carry an unusual sure of sail, *as* (says he) *is more particularly set forth i survey:* Now the survey says directly the reverse, and responds precisely with the depositions of the witnesse the part of the defendant.

I think the testimony will warrant no other concl than that she died a natural death. This opinion I f on the fact of no extraordinary peril having been incu and on the testimony taken at Honduras, which I thi to be preferred to that taken here; because, *those* searc for an infirmity, known to exist somewhere, were l likely to discover defects, than *these*, who gave her a cu examination for the purpose of recommending her to a chaser, and of repairing such defects as occasionall under their observation.

The cases of Lee v. Beach, and of the Mills fri were attended with circumstances much more favorabl the owners than the present case. In the former, the sel had been, as was supposed, completely repaired in diately before sailing from the Thames, and was disco to be unsound before she reached Portsmouth. In the c the ship had not only been put into dock and repaired, vious to her departure on her outward bound voyage t West-Indies, but was, while there, again surveyed b sea captains, and reported to want caulking only, she would be sufficient to carry a cargo of sugars to don. Yet, in both these cases, were the underwriters charged on the point of seaworthiness.

2 Marshall 368. Park. 221.

I am of opinion the verdict ought to be set aside a new trial awarded on payment of costs.

Livingston, justice, having been concerned in the c gave no opinion.

Practice on removing suits against aliens, into circuit court of the United States.

John J. Arjo *against* Joaquim Monteiro.

BY the court. If an alien defendant file his petition to remove the suit into the circuit court of the Un States, at the time of filing special bail, he is in se though the bail may have been excepted to.

ALBANY, Auguſt 1803.

Jackſon v. Stiles.

Jackson, on the demise of Hogeboom, *against* John Stiles, Austin Griffin, tenant in poſſession.

A TITLE to the premises in queſtion had been awarded to the leſſor of the plaintiff by the commiſſioners appointed to ſettle diſputes to land, in the county of Onondago, and he had ſerved declarations on the tenants, with the uſual notices annexed. The declarations however, contained blanks for the towns and counties, which at the time of ſervice, were not filled up, nor were they, in the copies annexed to the affidavits of ſervice, and filed with them, on which the uſual rule was entered. The declarations were ſerved on the tenants within the three years allowed by law for proſecuting the titles awarded, but they were now elapſed.

Spencer, on theſe circumſtances being diſcloſed by the affidavit of the plaintiff's leſſor, ſtating alſo the ſervices having been made with the full intent of carrying into effect the actions inſtituted, moved for a rule againſt the tenants, to ſhew cauſe, by the firſt day of next term, why the declarations ſhould not be reſpectively amended, by the inſertion of the names of the towns and counties, and that fixing up the rule in the clerk's office, ſhould be deemed good ſervice.

Emmott. Are the tenants to take notice of declarations which are mere nullities, void in themſelves, and to which they are not parties? They have not appeared, they are not in court, and John Stiles is the only defendant to the ſuit, that can be known by the record.

Per curiam. Notice having been ſerved on the tenants, it was enough to put them on enquiry. There is time enough for them to come in if they pleaſe. Take the effect of your motion.

After ſervice of a declaration in ejectment on a tenant, though it may be a totally informal one, it is ſufficient to ſet him on enquiry, and if a rule to ſhew cauſe why the plaintiff ſhould not amend be granted, affixing in the clerk's office is good ſervice on the tenant. If proceedings be commenced for lands to which a title is awarded by the commiſsioners for ſettling diſputes to lands in Onondago, within three years after, it is ſufficient, though they may be faulty, and require amendment after the three years, to entitle the plaintiff to proceed.

Cole *against* Stafford.

IN this cauſe the exoneration of bail, whoſe principal had been relieved under the inſolvent law, was oppoſed on the ground of the diſcharge not having been duly ſtamped according to the act then in force.

The want of a ſtamp to an inſolvent's diſcharge cannot be urged as a reaſon to ſhew it not duly obtained and prevent the exoneration of his bail. Fraud only can affect it.

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Per curiam. We cannot go into it; the act makes the discharge conclusive except in cases of fraud; the matter was before the court below, and they were the proper judges whether every thing was regular or not.

Garrit Abeel *against* Wolcott, who is impleaded with Van Norden.

A motion cannot be made to set aside a writ of inquiry, in the possession of the plaintiff, not returned, and on which no inquisition has been taken, but if a jury has been empannelled under it, and has given a verdict on a hearing contrary to the terms of a written agreement, the court will give leave to issue a writ of inquiry de novo.

VAN VECTEN, on behalf of the plaintiff, moved that the writ of inquiry, and proceedings stated in the affidavit on which he applied, should be set aside, and a writ of inquiry issue de novo. The affidavit set forth, that by an agreement in writing entered into between the attornies of the parties, it was stipulated that on the execution of the writ of inquiry, every defence which could have been made, had a trial taken place, should be availed of, that both sides should have the same liberty of excepting to the admissibility of evidence, reduce their objections to writing and make a case in the same manner as if the cause had been heard at the circuit. That the evidence of each party having been gone through and closed, the attorney for the plaintiff went home, after which the jury called in the defendant Wolcott's attorney, and asked him if a verdict should go against Wolcot, whether he could recover his proportion against Van Norden? and whether, if it sholud be against the plaintiff, he could carry it before the supreme court? To the first of which questions, Wolcott's attorney answered no; and to the latter, yes; in consequence of which a verdict was rendered against the plaintiff, but the writ has never been returned, but has been handed to the plaintiff's attorney, without any inquisition annexed.

Per curiam. The application is to set aside a writ of inquiry, when there is none before the court. There is no return, no inquisition, and nothing to set aside. There was a written agreement, which does not appear to have been complied with. The plaintiff is in possession of his own writ of enquiry, and we see no objection to his issuing a new one, for as the writ is not before us, we cannot grant him the effect of his motion as to setting it aside.

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ıe demise of Finch and others, *against* Johannis Kough.

ITIONS had been served in these causes s ago.

moved to amend by inserting several de- erent lessors.

After six years service of declarations in ejectment, court will on terms give leave to amend by adding new demises.

ɔsed it on the ground that it might vary the e.

observed, that in the Warren-Bush cases, ; had been done. If the defendant relin- ıce, then all the costs heretofore incurred if he abide by it, then there is no injury ısts in the first case must be paid up to the ɛ plaintiff is willing to do, and accept any cause might be brought on at the next cir-

Amend on those terms.

ın Der Mark *against* James Jackson on the demise of Ostrander.

The defendant in error cannot non pross the plaintiff's writ before it is returned.

Judgment having been entered in the Court 'leas for the county of Ulster on a verdict fendants, the present plaintiff brought his eturnable in this court. To this the Clerk ı Pleas made his return in the manner, said usually practised in that county, by annex- t of the record, and delivered it to the now ney, who sent it back with directions to an- ıl record. This was not done but the writ ı the plaintiff's attorney with only the tran- l.

ıt, without any service of a scire facias quare on, and, without giving any rule to assign ıssed the plaintiffs writ, before it had been filed, served him with a copy of a bill of d out a writ of possession.

n affidavit of these facts, moved to set aside : of nonpros for irregularity, and that if ıssession had been issued, a writ of re-res- arded.

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Per curiam. As the writ was never returned, court was never in possession of the cause; whate been done here, must therefore be set aside. Take rule.*

* See Leith v. Mac Ferlan 3 Burr 1772. Accourt v Smith 1 L. Ray, 329.

Beriah Phelps against Trisdale Eddy.

If a defendant move for judgment of nonsuit contrary to good faith, the court will make him pay the costs of opposing.

WOODWORTH, on an affidavit stating that issu been joined in this cause in November 1801, and nc for trial at the last circuit for the county of Columbi not brought on, moved for judgment as in case of suit.

Williams read a counter deposition acknowledging th tice, but adding that the attorney for the defendant di attend; that his counsel however was there, with whose sent, an agreement was made between the agent fo defendant and the plaintiff's attorney, that the cause sh not be brought on before the Friday in the second of the circuit, on the Thursday next preceding w day, the court adjourned; that it was impossible to b on the trial during the circuit, because, in consequenc the agreement entered into, the plaintiff had sent his nesses home, and they were not to return till the Fr appointed.

Per curiam. Let the defendant take nothing by motion, and pay the plaintiff his costs for opposing.

John Russel *against* Jonathan Ball and other

Service on agent. Costs.

THE court ruled in this cause, that service on the a of an attorney plaintiff, is as good as in any other and that it need not be personal. Also that though voidable occurrences may prevent judgment, as in ca nonsuit, yet they will not, separately considered, ex from payment of costs; for the misfortune of the pla ought to be borne by himself, and not work a prejudi the defendant.

Jackson on the demise of Green and others, *aga* Robert Billings.

Limits are allowable to persons in execution under an *attachment for costs.*

THE defendant was a prisoner with the privilege o limits of the gaol of New-York. While so in confinem

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attachments were issued against him in this and fifteen other suits, for contempts in not paying costs pursuant to an order of court. On their being lodged against him, the Sheriff committed him to close custody, under an idea that an attachment for a contempt was in all cases a criminal process, and the defendant therefore not entitled to the indulgence of the limits.

The case was now submitted to the court, whether the defendant was within the meaning of the privilege. The court were unanimously of opinion that he was, on giving such security as the law requires.

Gardner Herrick *against* Samuel Manly.

A plaintiff, who delivers to a constable a writ against the defendant in his own suit, on which the defendant is taken and imprisoned on the order and direction of the plaintiff, cannot in an action against him, by the defendant for false imprisonment, under the general issue, give the special matter in evidence by way of justification under the statute for "more easy pleading in certain suits," but he may do it in order to shew that the defendant was not arrested by his instructions, but by virtue of a superior authority,

THIS was an action of trespass for false imprisonment. The defendant pleaded not guilty. The cause was tried on the twenty-fifth of May, one thousand eight hundred and three, before Mr. Justice Kent, at the Rensselaer circuit. The plaintiff called Samuel Hawley, a constable, and proved, by him, that he arrested and imprisoned the plaintiff by order of the defendant. The counsel for the defendant then asked the witness, by whose authority he made such arrest and imprisonment? whether it was not by virtue of an execution issued by a justice of the peace, delivered to him as constable, against the now plaintiff, in favor of the now defendant? His honor the judge overruled these questions, being of opinion, that it was sufficient for the plaintiff to prove that Hawley imprisoned him by order of the defendant; and that it was not competent for the defendant to explain by the same, or any other witness, either the cause of the arrest, or the authority by which it was made. The defendant's counsel then stated, and offered to prove, that Manly recovered judgment against Herrick before a justice; that execution issued against the defendant on that judgment, and was delivered by Manly to Hawley, the constable; that Manly requested Hawley to imprison Herrick on the writ thus delivered, which he did; and that Herrick was liable to be imprisoned on the execution. These facts, it was contended, might properly be given in evidence, under the general issue, in-

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asmuch as the defendant came within the statute, for the more easy pleading in suits, &c. The judge overruled the testimony offered, and a verdict was found for the plaintiff for fifty dollars damages.

The case now came before the court on a motion for a new trial.

Woodworth for the defendant. Two reasons may be urged why the present verdict should be set aside. First, the judge refused evidence proper in mitigation of damages: Second, he overruled *that*, which was proper in justification. As to the last position, it may be doubted whether the defendant could justify according to the statute,* "for more easy pleading in certain suits," though he certainly must be allowed to be within the spirit of it. The words are, "If † any action upon the case, trespass, "battery, or false imprisonment, be brought against any "sheriff, &c. or any other person who in *their aid or as-* "*sistance, or by commandment*, do any thing, &c. it shall be "lawful for every person aforesaid, to plead thereunto the "general issue, and give the special matter in evidence." By a liberal construction of this act, it may well be said, that Manly acted "in aid and by commandment" of the justice. An execution had issued; it was delivered over to the present defendant by the justice, to be by him transmitted to the constable. The orders of the defendant, for the arrest and imprisonment, were nothing more than a repetition of what the justice commanded him to say. On the other point, the evidence must be considered as clearly proper to have been received, and the rejection therefore not warranted. Whether Manly had a substantial defence to defeat the action or not, could be known only by disclosing facts, which would present a different case than that stated by the plaintiff. They ought then to have come before the jury, as a measure of damages. If asked whether the imprisonment was made under a lawful authority, or of his own will, the answer, according as it was given, would lead the jury to very different conclusions. Had it been done, the plaintiff in this case would not have been entitled to more than nominal da-

* 21 March, 1801 ch. 27. 1 Rev. Laws 233.

† S. 1.

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:s. Suppose the action assault and battery, and the
dant neglecting to plead an assault demesne, rests on
:ul. At the trial the plaintiff proves an assault, but the
: witness can testify that the plaintiff struck first; can
t be shewn in evidence on the part of the defendant?
ugh this might not justify, it would greatly mitigate.*
question on the trial, on the part of the plaintiff was,
d you imprison the plaintiff by order of the defen-
nt?" The question on his part was, "Were you au-
orized to do so?" The answer would have been
s! I have the execution to shew;" but this was not
itted to be done. Whether this would have amount-
o a justification or not, is immaterial; all that was
ed was, to shew that the plaintiff was entitled to no-
l damages only, and to reduce them to that. Again,
ose an officer acting under a void process, and the plaintiff
es an arrest, would not the court allow the defendant
ew the process, though it was an illegal one? This,
rue, would not be a justification, but it would be a
gation. Therefore, in cases like this, the application
the discretion of the court, and they will see that jus-
be done to the party aggrieved, when there has been
:tion against all conscience. Instead of six cents da-
:s, 50 dollars have been given. This is not one of
: cases where the court refuse new trials, because the
recovered is so inconsiderable, that it would be ab-
to have recourse to another. The reason does not
r here, because, allowing the verdict goes the same
the court are not sure the result will be the same:
:nts only may be given, and then costs will not follow,
s the judge certify. But, as the verdict may be dif-
t, the court surely will never presume both that the
ict shall be similar, and that the judge will certify also.
:e are many circumstances to induce a new trial;
: has not been a full disclosure of facts; the whole
: has not been told, and therefore justice has not been
:.

llen contra. On the point first argued, though the
that was made, it is to be observed, that the statute

* The general rule is, that matter of justification must be pleaded. Bull. Ni. Pr. 17. Co. Litt. 282. b. But see Bingham v. Garnault, Esp. Ni. Pri. 317, where one of the plaintiff's witnesses was on a cross-examination by a defendant in an action of assault and false imprisonment, allowed to relate what was said at the time in mitigation.

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of our state is a transcript of that of James; the aut ties therefore, on the construction of *that*, will gove the consideration of the present case. The defendan avail himself of that statute, ought to shew, that he officer within its meaning; that he was acting by virtu an authority from the justice, or in his aid, or by his mand. If he does not do this, he cannot avail himse the statute 3 Burr. 1742.* Further, if the defendant is shewn to be liable, in consequence of neglect in com ing with the justice's command, he is not an officer in the meaning of the law, Doug. 307.† It is not st that he received the execution from the hands of the tice; nor that he was an officer, nor acting in pursua of any authority, nor in aid. It does not appear by means the execution came into his hands. If he m to shelter himself under the justice of the peace, he shew a connexion or privity between himself and the ma trate. This can only be done by pleading right. If tice has not been done, it is the party's own fault. mispleading is the source of his complaint. When the stable was asked whether he did not proceed upon an ecution, it was a justification; and as no notice had given, that it was intended to be relied on, the pla was not prepared, and might have been prevented from ing away its force, by showing it amounted to noth Not, therefore, having done what the law requires in a case, but relying on the general issue, the defenda now precluded. It was enough for the plaintiff to p that the defendant did imprison. This was all that c be thought necessary; the plaintiff rested his case at point, and could never imagine it would be attempte introduce a justification, of which no notice had ever intimated. The complaint, therefore, now made, o justice having been done, could never have existed, the defendant adhered to the rules of practice. The t mony, therefore, was properly overruled, because, u the general issue, notice of justification ought to have given. The witness having been the plaintiff's, does alter the matter. If the defendant is about to draw out

* Money & al v Leach.

† That was an application to enter a suggestion on the roll, that the defendant was a constable, to entitle to double costs, the verdict having been found in his favor. By our law the jury who try the cause, assess the treble damages given, &c. 2.

y not admissible, it is the same thing as if en- be given by a witness on the part of the de- l the plaintiff has a right to object. The court a case again, where the expence of going to ıl, will amount to as much as the damages

* See note ante page 255

reply. The authorities cited from Burrows , requiring a party who would justify to shew between himself and the officer, in aid of, or he acts, are not applicable. They must be ty cannot be presumed. Where no command, s, or implied, is made to appear. In the pre- implication, that the defendant did act in command of the justice, is irresistible. A l been obtained by the defendant, an execu- ı issued, and was delivered to the officer, by it must be presumed, had applied for it. It is erhaps to shew a delivery of the writ by the defendant, but as every thing would induce hat it was so, it ought to have been left to the mine from the evidence, ready to be offered, id not merely act in aid of the justice. This , so much insisted on, would have been shewn, could not but have said, the imprisonment was aid; the case, therefore, within the letter, as of the act. Though the pleadings might have stification, surely a mitigation was allowable, oint of view, the evidence was improperly re- amount of the verdict, when connected with not be so inconsiderable as is supposed; there vhom it would possibly be half their fortunes. nt, therefore, should a second investigation be

, delivered by Lewis, chief justice. An appli- made for a *venire de novo*, on the ground of , on the second point of defence.

dant having been the mere bearer of the writ n execution in his own suit) from the justice to , can neither be considered as a bailiff, or de-

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puty, within the letter or spirit of the statute, and of co not entitled, under the general issue, to give the sp matter in evidence, by way of justification. The testim as it was offered, was therefore properly rejected. T is, however, a point of view, under which had it been sented, it would have been proper, and ought to have admitted. The only ground on which the liability of defendant is contended for is, his having directed the of when he delivered him the process, to arrest and impr the plaintiff. If, then, it could have been shewn, that arrest and imprisonment was not a consequence of his structions to the officer, but in pursuance of a compet and paramount authority, his plea would have been s stantiated, and a verdict would have passed for him. Fo the arrest and imprisonment was the effect of any ot cause than the instructions he gave the officer, he was phatically not guilty, and it was not a case for justificati We are therefore of opinion the verdict be set aside; bu must be on payment of costs, as no misdirection appear

Erastus Baker and Sylvester Rowlson *against* Ri ard and Henry Arnold.

ASSUMPSIT on a promissory note by their indor against the makers.

An attorney in a suit may be examined as a witness to prove the state of an instrument when put into his hands. An indorsor of a note is a good witness to prove the indorsement made after the note was due.

The cause was tried before Mr. Justice Thompson, the Albany circuit, in September 1802. The plaint proved, by the testimony of their attorney in the s the handwriting of the makers, and, by another witn that of the indorsor who was also the original pay Having done this, they there rested their case. The fendants relied on the note's having been given on an gal consideration, and indorsed after it was due. substantiate these points they proposed to examine attorney of the plaintiffs to the following questions: Whether he had ever seen the note before the suit brought? and 2d. whether, at the time of its commen ment, the name of the indorser was upon it? This resisted by the counsel for the plaintiffs, because tend to a disclosure of facts confidentially communicated to

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witness as attorney in the cause. The defendants then said, that they would confine the question to the witness's own knowledge, and did not wish to extend it to any information derived from, or communicated by, the plaintiffs. The witness then said, he had no knowledge of the note, previous to his being retained by the plaintiffs, nor of any facts or circumstances relating to the matter in question, excepting such as had been confidentially communicated to him by the plaintiffs: but that he had, prior to the bringing the present action, instituted a suit in the name of the indorsor payee, against the defendants, which, on account of some unfair practices by them, had been discontinued, and the now pending action commenced shortly after. The defendants then called the indorsor to testify that the indorsement was made after the note fell due. The learned judge, however, rejected his evidence upon this ground; that no person whose name is on negotiable paper, and has given it a currency, shall be permitted to impeach it. The counsel for the defendants then urged that they would waive all testimony that went to impeach the note in any respect, or the original contract between the parties, or to prove that payment had been made. That they would confine their question to this; "At what time did you indorse this note?" But his honor overruled the question as improper to be put. The plaintiffs then, to repel the suggestions of the defendants, and to prove that they had treated for its payment, read the following letter.

"*Troy, March 4th*, 1799.

"Mr. SYLVESTER ROWLSON,

"Sir,

"On my return home, I immediately informed my brother of the conversation that had passed between you, Mr. Baker and myself, on the subject of our business; since which, we have been round to all our friends, to see what assistance we could get from them, or what could be done in the business, and I am very sorry to inform you, that we find it a thing impossible to raise the money, *as the situation of* several of our friends

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" is, in some respects like our own; and people in gen
" ral here, are so much embarrassed, that it is impossib
" to get them, who have got any money, to advance an
" upon land security, which is the only kind in our pow
" to give them; and I know of no possible way in whic
" we can pay it, unless you will consent to take part of
" in the lands that I proposed to you. If you will co
" sent to make a discount of 12 1-2 per cent on the not
" which is £. 330 this currency, and will take two lots
" the land, which will be 500 acres, at a dollar, which
" now stands us in, we will, by some means or other, tu
" Mr. Baker out the remainder part in money, say 2(
" dollars, and the rest in such property as he can realiz
" I wish you would shew this to Mr. Baker, and if l
" and you will consent to it, I wish you would come on
" soon as you possibly can. There will be no occasi
" for his coming, as you can do the business for him a
" yourself too.

" (Signed) RICHD. ARNOLD."

The court then charged in favor of the plaintiffs, a the jury formed accordingly. It was now moved to s aside the verdict, and grant a new trial, the judge havi rejected testimony which ought to have been received.

Woodworth for the defendants. I understand the has been a decision in this court corresponding with th in Walton v. Shelly, 1 D. & E. 296.

Court. There has.

Woodworth. I have however, to move to set aside th verdict because the judge overruled the testimony of t plaintiff's attorney, and because though the authority of Wa ton v. Shelly be admitted to its full extent, yet as the i dorsor in the present case was not called to testify to wh would invalidate the note, he was not within the letter spirit of the case relied on. With respect to the first poi we are ready to concede, that attornies and counsel are n to disclose those secrets which their clients communicat But in this case he was not called on to testify to any su circumstance. Having seen the note, he was asked merel ly, whether he had not seen it in a situation different fro that in which it was produced? This question, therefor

does not in the least contravene the general rule. He might have seen it before the suit was brought, without indorsement, and without any communication. If so, he ought to have been interrogated as to that fact. The boundaries of the line of practice in this respect, are accurately laid down in the books. Bull. N. P. 284. Esp. Di. 717. "The rule is confined to cases only, where the "attorney is called to prove facts, communicated to him "by his client, *in the course of business, and instructing "him professionally.*"

"A counsel or attorney, may be called on to prove a fact "of their own knowledge; of which they *might* have "had a knowledge without being counsel or attorney."

"As if the question was concerning a razure in a deed, "they may be examined, *whether they ever saw such deed "in a different plight;* for that is a fact of their own "knowledge, but they may not be examined as to ex-"pressions of their client." Lord Say and Seales' case, decided 10th of Anne by advice of all the judges.

"So if they are to be examined as to the true time of "the execution of a deed." Bull. N. P. 284. These authorities go the whole length of the case before the court. No communication was desired of the witness as an attorney. Had he ever seen the note without indorsement? This he must have learnt when it was put in his hands: he derived his information from that circumstance, and not from any communications made. This, therefore, is perfectly analogous to the razure in the deed; because, the inspection of the paper furnishes the answer, and the communications of the client are not wanted. No confidence is violated; a simple fact, arising from the attorney's own personal observation, is all that is required. The object of the enquiry was to obtain the true time of the indorsement; an object in perfect harmony with the case put in Buller, of an examination as to the true time of executing a deed. The period of indorsement, we endeavoured to shew, both by the attorney and indorsor. We alleged it to have been after the commencement of the suit; but the testimony of both our witnesses was rejected. If the question was pro-

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per, we were shut out from our defence, and this at once is enough to warrant a new trial. On the second point, it is material to enquire, whether the court will extend the rule in Walton v. Shelly so far as to preclude an indorsor from speaking, where what he may say does not go to invalidate the instrument, and is therefore clearly distinct from the principle of that case. It is necessary, in order to determine whether the evidence was properly refused, to observe, that we entirely disclaimed every pretence of invalidating. All we did was to aver a fact which gave us a right to defeat this suit. So, that admitting the authority of Walton v. Shelly, it does not apply here. To shew this, it may perhaps be necessary to investigate what is the point of the rule as then laid down: it seems to have been founded on public policy. By examining the defence in that case, and those of a similar description, it will appear that it went to destroy the contract, and therefore the court said, a man who has sent a note abroad, shall never contradict the instrument he has contributed to render current, and thus vitiate it in the hands of an innocent holder. If the principle be sound, an indorsor, if examined for this purpose, should be rejected. But here no attempt was made to set aside the note; no tendency towards affecting public policy is to be seen. The aim of the defendant was to impeach the practice of the attorney, and prove that issue was joined, before the right of action accrued. The plaintiffs must know when their right commenced, and to evince *that*, does not touch the instrument or consideration. An indorsor may testify to collateral facts, unconnected with the validity of the paper. He may prove payment: for that does not destroy what he has made current. Therefore, policy is out of the question: if it be admitted to operate at all, it must in favor of the defendants. When the plaintiffs commenced their action, they knew they had not any right. The indorsement was afterwards made, to do away the equitable and legal claims the defendants had to set off what might be due to them, from him who had demands against them. To the note itself, it is immaterial when the indorsement was made, whether before or after

s due: but to the defendants it is material in the high- legree, for it either affords, or takes away, their only s of defence. Before the decision in Walton v. Shel- y disinterested person, not infamous, nor incapable of ; sworn, was a competent witness, leaving his credi- to the jury. It was not till then that the principle arrowed. But as this case steers clear of impeaching alidity of the note, the indorsor ought to have been ved. The letter of the defendants does not impair defence. If the plaintiffs had not a right of action they commenced their suit, for want of an indorse- ; the letter does not cure the defect, and work as an ement. It was written under an idea of the note indorsed, and that the plaintiffs were legally entitled e. If it turn out to be otherwise, the misconception ot vary the rule of law, which ordains, that all plain- to warrant their appeal to a court of justice, must a lawful claim to what they demand.

ary contra. Two points are raised for discussion. first relates to the competence of the plaintiffs' attor- to prove the state of the note at the time of the in- tion of the suit. The second to the competence of ndorsor to establish that the note was indorsed after s due. On the first point, the law has been correctly d. Whatever facts have come to the attorney's ledge by confidential communication, he cannot be ed to disclose, but to facts derived aliunde, or from own observation, he may be compelled to testify. pplication of this rule is the only dispute. The at- y expressly declares he had no knowledge of the before the commencement of the suit, and such on- was confidentially communicated by the plaintiffs. e can therefore be no doubt as to not admitting him pon the time of the indorsement. The authority Buller makes for the exclusion. There the razure made after the deed came into the attorney's hands, subsequently, the information could not have been de- rom this client, but from his own observation. n an attorney witnesses a deed, he stands in the relation *to both parties, and is* put there for the very

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purpose of testifying. From the course of the transactio it appears, the fact enquired into could have been know by the plaintiffs' attorney, only from committing the not to him to bring the action; this, therefore, is a confidentia communication. As to the second point, the principl on which the testimony of the indorsor was refused, i exactly that of Walton v. Shelly in 1 D. and E. an Winton v. Saidler in this very court, July 1802. Ever argument from policy to be drawn from those cases, i applicable to this. If the indorsor is to shew that the in dorsement was made after the note was due, he may to tally defeat the recovery. For it lets in all equities which might be urged against the original holder, and may, in effect, destroy the note, under the pretence of not im peaching it. If so, then the rule of policy is as strong in one case as the other. In addition to this, the defend ants, by the letter of Richard Arnold, acknowledge the debt, and offer a mode of liquidation. The effect, there fore, is not only to recognize the debt, and the right of the plaintiffs, but to waive every objection as to consideration and time of indorsement. It is a plain avowal that the merits are with the plaintiffs, and surely the court will not grant a new trial to hazard that to which the defend ants allow we are entitled.

Spencer in reply. It would seem, from the argument of the opposite counsel, that our only view was to shew that the right to sue accrued after the action brought: the object really is to prevent our being excluded from our equities, by an indorsement after the note was payable, and to let in proof that this was one of the Susquehanna notes, which have been set aside whenever presented. The court will perceive that there was a former suit in the name of the original payee; *that* however was discontinu ed, because a verdict could never have been obtained in it, the present action then commenced, and a subsequent indorsement made. That the knowledge of this was con fidential, is a mere supposition of the attorney. He imag gines because the note was, before institution of the ac tion, put into his hands without an indorsement, that

fore its being afterwards indorsed, was a confidential
unication. We deny that; and so, though we al-
e cases of Walton v. Shelly and Winton v. Saidler,
ntend against their applicability to this now before
urt.

mpson, J. This was an action of assumpsit, brought
plaintiffs as indorsees, against the defendants as ma-
f a promissory note, dated the 31st day of March,
for the sum of 330 pounds, payable to one Roswell
rd, on the 31st day of March, 1799. The indorse-
f the note purports to have been made the 30th day of
, 1799. On the trial of this cause at the Albany cir-
Sept. 1802, the execution of the note, and the hand-
of the indorsor, were proved. The defendants' coun-
stated the defence to be, that the indorsement of the
although purporting to be made before the note fell
as not, in fact, indorsed until after the commencement
present suit and issue joined, and *that the considera-*
said note was illegal. To prove the note was indor-
er the commencement of this suit, Jesse Bacon, the
ffs' attorney, was called. To this the plaintiffs' coun-
ected, as it was calling on the attorney to disclose com-
ations received from his client relative to that cause;
it was ruled by the court. The defendants' counsel
aid, they confined their question to his own know-
independent of any information or communication
ed from the plaintiffs. To which the witness answer-
had no knowledge of the note, previous to his being
d in this cause, nor of any fact or circumstance rela-
the matter in question, except what had been confi-
lly communicated to him by his client.

well Lombard, the indorsor of the note, was then offer-
prove, that he did not indorse the note, until several
after the commencement of the present suit. This
ny was rejected, on the ground, that no person,
name appears on negotiable paper, and who has
it currency, shall be permitted to impeach it. The
ants' counsel then stated, that they waived the produc-
f testimony to impeach the note in any respect, or the

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original contract between the parties, or to prove any p
ment had been made, and would confine themselves so
to the question, whether the note was indorsed after
commencement of the suit? The court still determined t
an improper enquiry to be made from the indorsor.

The plaintiffs then, in order to shew that the defend
had treated with the plaintiffs, as owners of the note, p
vious to its falling due, introduced a letter from one of t
defendants, to one of the plaintiffs, dated 4th March, 17
In this he makes certain propositions respecting the p
ment of the note, and promises payment, if the plaint
would accede to the proposals *he* made. A verdict w
found for the plaintiffs for 1030 dollars, 32 cents. And
plication is now made for a new trial, on the follow
grounds:

1st. That the enquiry offered to be made of the plaint
attorney, was improperly overruled by the court.

2d. That the testimony of Roswell Lombard, the ind
sor, ought to have been admitted under the circumstanc
mentioned in the case.

With respect to the first point, I think the enquiry of
ed to be made of the plaintiffs' attorney, was manifestly i
proper, and to have permitted it, would have been a vi
tion of that rule, which the policy of the law has adopte
that an attorney shall not be *permitted* to betray a sec
with which he has been entrusted by his client. This is
privilege of the *client*, and not of the attorney. It is nec
sary to be strictly observed, in order to protect a party
the full disclosure of all the circumstances relative to
cause, without the hazard of having them divulged.
restriction, however, does not extend to facts that com
the attorney's knowledge, before his retainer, or to in
mation derived from any other source than from his cli
The enquiry offered to be made from the attorney w
whether the note on which the suit was founded, was
dorsed to the plaintiffs, when the suit was commenced, w
the avowed object of falsifying the indorsement, and sh
ing the note to be given for an illegal consideration.
judge if Mr. Bacon could answer this question, if becon

ial, previously to know, at what time, and from i he derived his information: if from his client, and the commencement of the suit, or after he was retain- prosecute it, the enquiry, I think, would have been per. Mr. Bacon, on examination, declared, that he nothing respecting the note, *previous to his being retain-* the cause, and that all his information relative to it, erived from his client. The authorities cited from r and Espinasse, instead of contravening the rule above down, are in direct confirmation of it. The cases ppt are; suppose the attorney a witness to a deed pro- l in the cause, he may be examined as to the time of tion. So, if the question was about a razure in a deed, l, he might be asked whether he had ever seen such or will in any other plight. And the reason why such ion might be asked is at the same time given, to wit, se they are facts *of his own knowledge*, not derived his client, which manifestly shews the enquiry was re- to facts which came to his knowledge previous to tainer, or in some other way than from his client. Was he case in the present instance? directly the reverse. attorney expressly declared, that all his knowledge re- ing the business, was derived from his client.

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ne next question for examination is, whether Roswel ard, the *indorsor* of the note, was a competent wit- *to falsify his own indorsement*, and prove that is was after *it fell due*, and also after the commencement present action, with the avowed object of shewing, t was made on an illegal consideration, and of course, b initio. This point I think settled, by the principles ed by this court, in the case of Winton v. Saidler. In se, according to my understanding of it, the court d, that upon principles of public policy, a person name appeared upon a *negotiable note*, and who ntributed to give it currency and circulation, should admitted as a witness, to invalidate it. In that case, was called to prove the note was made upon an consideration, and of course, void in the hands of nocent indorsor. In the present case, the object

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avowed was general, to shew the note was illegal an
It is not explicitly stated, whether the illegality of t
was to be proved by the indorsor, or by other testim
by the former, he would most clearly be incompetent
in the decision in the case of Winton v. Saidler; and
not discover why the same principles of policy do n
to exclude him from proving a collateral fact, for t
press purpose of destroying the note. The note p
to have been indorsed before it fell due. The fa
established by the indorsor was, that it was transfe
ter it fell due, and, of course, open to impeachment
was an indispensable pre-requisite; it was an e
wedge to effect its destruction. If this note was
on an illegal consideration, the same malady woul
it, if it should pass through the hands of a dozen i
indorsees, who had taken it in full confidence, th
what it purported to be; and having been indorse
it fell due, the consideration could not be impeach
the protection, therefore, of innocent indorsees, I
party to a note, ought not to be permitted to giv
to his own acts, and contribute to the destruction of
tiable note, which he has circulated as genuine i
parts. To say that a party to a note shall be comp
open the door, and progress one step towards the
tion of his own paper, and there stop, and become
petent, will, I think, be productive of uncertain
endless confusion, and will require refinements,
tinctions, too nice and subtle for general rules of e
If Roswell Lombard was the witness, to prove the
ty of the note, he was an incompetent witness w
terms of the decision in Winton v. Saidler. If he
ed to prove a collateral fact, indispensably necess
established, and thus aid and assist in invalidating
paper, I think he was incompetent within the re
spirit of that decision. It remains only to be
whether he ought not to have been admitted, afte
fendants' counsel had waived all pretence of inj
this note, or shewing it had been paid, and confine
selves to the simple enquiry, whether the note was

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he commencement of the suit. I think, considering ely as an abstract question, the witness was incom- to answer it. But the defendants here had abandoned ence on the merits, and the only object in view be- turn the plaintiffs round to a second action, every l reasonable presumption ought to be made in favor ecovery. If the plaintiffs were in possession of this as their own property, and in their own right, when ommenced their suit, the simple act of indorsing,* ereby complying with the forms of law afterwards, not to defeat their action. It is not presumable they ommence a suit on this note before they had it. In- ent of this, however, it appears from the case, that 4th of March, 1799, some time previous to that he indorsement even purports to have been made, endants, by letter, recognized the plaintiffs' right to te, made propositions for payment, and treated a every respect as the real owners. Under these stances, I think the *time* when the indorsement was made, whether before or after the commencement suit, would have been immaterial. And it never sufficient grounds for granting a new trial, to as- an *immaterial fact*.

* See this principle acknowledged, Smith v. Pickering, Peake N. P. Ca. 50.

therefore of opinion, that the plaintiffs ought to dgment upon the verdict of the jury.

gton, J. The defendants, on the trial of this insisted that the note was indorsed after com- ment of the suit, and to prove this fact produced ssor, whose testimony was not received. Whe- indorsor be a proper witness for this purpose, is sary now to decide. There is great danger in ing any one, whose name appears on a note, which bject of controversy, to be a witness at all. The ill not receive him to impeach its validity; and fit occasion offers, it will merit serious considera- hether it will not be best to exclude him altoge- is true, that a man who comes forward merely s he put his name on a note, does not excite bstantion, as one who basely obtrudes himself

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to destroy a security to which he has given currenc
affirming that it was given on an illegal, or withou
consideration. The rule of the civil law therefore, v
says, " Nemo allegans suam turpitudinem est audien
is adopted both in England and in this state: so a
Pennsylvania, the indorsor and original payee was no
mitted to invalidate his own instrument, by establi
a want of consideration, although he was a certifi
bankrupt and not interested, 2, Dall. 194. For my
it would give me less offence to see such a man expi
his fraud and effrontery in a pillory, than attesting he
in the sanctuary of justice, to the truth of assevera
which at once evince his turpitude, and destroy his c
Even in the case before us, the payee was to prove
different from the import of his indorsement, which,
not dated, is supposed to be made on the same day
the note, and is generally so alleged in declara
There was then some degree of turpitude in first pu
his name on a note, to enable the plaintiffs to recover
then appearing at the trial to destroy a right of a
created by himself. But without hazarding an op
on this point, I think the fact offered to be proved,
sidering the use to be made of it, was irrelevant.
conceded that the defendants did not wish to ascertai
precise time of the indorsement, with a view to any
stantial defence, of which the makers might have av
themselves against the payee, or against the indors
the negotiation took place after the note fell due.
sole object was to shew, that the plaintiffs were prem
in the commencement of their suit; because, at
time, there was no indorsement on the note. The
of this would be to drive the plaintiffs to another acti
which it is admitted they must succeed. This bein
avowed object, the testimony was properly rejected
is not to be presumed, that any man will institute a
tion on a note not in his possession, and in which h
no interest. Such an attempt can only be followe
certain defeat, and considerable expence. But a note
be delivered to the plaintiffs before a suit be comme

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payee neglect to indorse it. Why should a court ase prevent the plaintiffs' title being perfected by quent indorsement, and thus protect himself a- e heavy inconvenience of discontinuing his suit, ing a nonsuit, on the payment of costs? A plain- rmitted to fill up a blank indorsement, or strike ogether in court, to facilitate a recovery; but ne- enquiry made into the real time of making an nent, unless for the purpose of shewing the con- n illegal, as between the original parties, or to way for a defence which cannot be used against who receives it bonâ fide, and before it falls due. lefendants had not abandoned this ground, the ould have been proper, and it would only remain hether it could be made by an indorsor; but, hav- ssly waived every defence arising from the late the indorsement, the evidence, in my judgment, missible. The rule I adopt is this—that a court presume an indorsement to have been in season, it no evidence to the contrary, unless as intro- to a defence on the merits, but never for the sin- ose of shewing the suit was prematurely com- I had rather let the payee come in at the trial, his name on the note for the furtherance of justice, n a door to investigations of this kind.

the defendants did not relinquish the defence ari- n an illegal consideration, until all their testimony oint was rejected, it may be well to enquire whe- source from which it was offered to be drawn, was

lacon, the plaintiffs' attorney, was produced only the time of the indorsement. Whether his to the parties, exempted him from answering the proposed, is not absolutely necessary to decide; in the view which I have taken of this subject, stions were impertinent, unless the illegality of fact could be established. I think, however, that ld right in imposing silence on him after his ion, "That he had no knowledge of the note pre-

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"vious to his being retained, nor of any circumstan
"relating to the matter in question, but such as had be
"confidentially communicated by the plaintiffs." T
right which clients have to the secrecy of their couns
produces confidence and a full disclosure of every fact n
cessary to the latter's forming a just estimate of their r
veral cases; courts, therefore, are careful that this tru
shall not be abused, and will not permit even willing w
nesses, when thus connected, to disclose matters frank
confided to them in moments of doubt and difficult
Whether he *might* have derived his information from oth
sources, is here an immaterial enquiry; because, it i
proved to have come directly from his client. Mr. Bac
might have advised the plaintiffs that they had a right, b
ing in possession of the note, to commence an action, a
though it was then not indorsed, and take their chance i
getting the payee's indorsement afterwards. The fa
then of its being unindorsed at the time of bringing th
action, if such were the case, was a secret entrusted con
fidentially to Mr. Bacon, and he ought not to be permit
ted, after giving such advice and bringing the action, t
defeat a recovery by his own testimony. I can hardl
conceive a case in which the privilege of the client mor
powerfully interposes itself, than in the one before us.

The only witness then, by whom the contract could
have been impeached, was the indorsor; and he being
party to it, was properly rejected.

Upon the whole, my opinion is—that as no one was pr
duced to invalidate the note, which at one time was th
only defence set up, but the indorsor, and as his testimon
could not be received consistent with our decision in Wi
ton v. Saidler, it became improper to shew *when* the not
was indorsed merely for the purpose of compelling th
party to bring a new action. This principle is recognize
by this court in the case of Platt v. Platt, in April ter
1795, Colman Rep. 36. and Hobart 199. cited in *favour*
it. "It is regularly true," says that authority, "that
"the plaintiff will *himself* discover to the court any thing
"whereby it may appear that he had no cause of actio

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en he commenced it, his trial shall abate; of his own wing it was against him." On this our court, with- oming to a decided judgment, intimated that the de- nt could not avail himself of any such matter by plea, s the plaintiff himself discover he had no cause of at its commencement. And if not by plea a forti- he ought not to be allowed to give it in evidence. I may be well understood, I think it proper to re- that from the whole of this case, which is not very ssily drawn, it appears that the defendant had no witness to impeach the consideration of this note payee, and that as he was properly rejected, or not be admitted for that purpose, the defendants, in ing the enquiry as to the real time of the indorse- had no other object in view but to turn the plaintiffs by shewing the action was prematurely commen- for which single purpose I should have admitted no ence whatever to establish that fact. For these rea- and as no injustice appears to be done, I am against trial.

[illegible], J. The note on which this action is brought, due on the 31st March, 1799, or at the end of the days of grace thereafter. The indorsement is dated 0th March, 1799.

appears, that on the 4th March, 17 9, and previous to, there were negotiations between the plaintiffs, afterwards became the indorsees) and the defendants, ting the payment of the note; and also, that a suit been commenced before the present suit, in the name ombard, the payee, and discontinued on account of unfair practice by defendants, as was alleged by one witnesses. This evidence was not objected to, and circumstances proved that the plaintiffs were privy original transaction, or acted as trustees for Lom- the payee. On this ground alone, I am of opinion, ought shown to entitle the defendants to go into evi- of the consideration of the note.

t the principal point I think is, that Lombard was a petent witness to prove the time the indorsement was

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actually made. This would not impeach the validity of the note, and therefore is not within the decision of Winton v. Shelly, nor of Winton v. Saidler, the latter of which was determined in this court. It was merely preliminary proof, which, if it appeared that the note had been indorsed when overdue, would have enabled the defendants to go into other evidence to impeach it. If no other evidence could be produced to that effect, the note would still be valid, and the plaintiffs would be entitled to recover. The idea of policy on this subject, appears to me to be carried beyond the reason of the rule.

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I also think that the questions put to the plaintiffs' attorney, whether he had before seen the note, and whether the name of Lombard was indorsed upon it at the time of commencing this suit, ought to have been answered. It would not have been a disclosure of the secrets of his client, within the sense of the rule, which prohibits, or excuses, an attorney from making such disclosure. He was not asked to discover any thing communicated confidentially, but to answer a fact which he must have known from his own observation, and which, from its nature, could not be a secret entrusted to him. The indorsement or transfer of a note is a public act, and the discovery by an attorney whether it existed or not, ought, I think, not to be liable to this objection. The authority of Bull. which has been mentioned, is in my view to the same effect. I am therefore of opinion there ought to be a new trial.

Bull. Ni. Pri. p. 280
Esp. Di. 717.

Kent, J. A motion was made to set aside this verdict upon two grounds:

1st. Because the court overruled certain questions from being put to the plaintiffs' attorney as a witness.

2d. Because the court rejected the indorsor, as an incompetent witness for the purpose for which he was called.

With respect to the 2d point, (for I shall pass by the first at present as unnecessary to be considered) I do not think that the decisions of this court in the cases of Winton v. Saidler, and Stewarts v. Currie, go so far as to warrant a rejection of the indorsor in the present instance.

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1 D. and E.

se cases, the maker of the note in the one, and the sor in the other, were offered, to prove the note to been *usurious*. Those witnesses were therefore call- invalidate the paper they had signed. So, in the of Walton v. Shelly, upon the authority of which, I me, the above decisions of this court were founded, ndorsor, who was rejected, was called to prove the void, by reason of *usury*.

all those cases, the testimony of the witness produ- went *directly* to destroy the paper. Here the question no further than to defeat the present action, by shew- at it had been prematurely brought. Proof that a was indorsed after it was due, might indeed *let in* the to an examination of the consideration. But this quence does not necessarily follow. The object of rty may be merely to set up as a defence, payment original payee. And if it did necessarily follow, t ought not to exclude the witness, because the tes- y that *he gives*, does not violate the sanction which ame had given to the paper. The sanction his name s is, that the paper is valid, because the transaction gal and honest, and he must say nothing that contra- this. Whether the *date* of the indorsement be, or ot, correctly filled up, is a matter in which the indor- as no concern, nor to which he is considered as having his assurance, because it is now the established usage e indorsor not to date his indorsement. It is general- *blank*, and the holder fills up the indorsement after- , according to his convenience. The testimony of the nor, as to the time of the indorsement, does not, there- as of course, or by any direct or necessary conse- ce, affect the validity of the note, or violate his plight- th to the world. And because it may *possibly* lead er testimony that will impeach the note, is surely ough to render the witness incompetent. It would rying the principle in Walton v. Shelly, and the deci- of this court in pursuance of it, beyond all precedent, every *dictum*, and would lead, as I apprehend, to st inconvenience *in the administration* of justice.

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It has been the bent of the courts for a century past, t enlarge the rule respecting the competency of witnesse It must be a *present and vested, and not a future and co tingent interest*, that excludes a witness. He must be in terested *directly* in the event of the cause, and not *mere in the question put.* These are instances in which the ru as to interest, has been straightened, and defined wit the utmost clearness and precision. And I could wish t see this other rule of witnesses being incompetent, o grounds of *policy*, rendered equally manageable, by being reduced to limits susceptible of equal definition and cer tainty. To do this, we must adhere strictly to the case which produced the rule, and exclude only the witnes who is called to impeach his own paper, by shewing it to have been immoral or illegal, when he put his name to it.

My opinion therefore is, that the witness offered, was competent to answer the question put, and that there ought to be a new trial, with costs to abide the event. Lewis, C. J. concurred.

Under a general policy on goods, the assured need not disclose that his interest is only of an undivided part, but may recover according to his interest. If a vessel be captured and acquitted, the assurer is liable to the expences incurred inprosecuting an appeal, interposed against the sentence condemningthe assured in costs, and to obtain compensation for damages occasioned by plundering or embezzling, tho' the expences surpass the amount of the underwriter's subscription.

John Lawrence Junior, and Henry Whitney *against* Garrit Van Horne and David M. Clarkson.

THIS was an action on a policy of insurance, dated the 28th of April, 1797, on the cargo of the schooner Nymph, on a voyage to L'Anceveau, in St. Domingo. The declaration was for a total loss by capture, with an averment that the assured had laboured for the recovery of the cargo, and expended 4,000 dollars, of which the defendants' proportion was 250 dollars, a sum equal to that of their subscription, which was for 250 dollars only.

The invoice of the cargo, including the premium of insurance amounted to 12,061 dollars; the plaintiffs' interest third; but this circumstance was not specified in the policy, which was general, without any disclosure of the right of others in the subject insured; theirs not being intended to be protected by the instrument. From the facts given in evidence on the trial, it appeared that the vessel sailed from New-York the 1st of April, 1797, on the voyage insured; that she was captured by a Spanish privateer, and

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A paper noticed to be produced and called for, is in evidence, and the party noticing has not a right to first inspect it. Whether the expences incurred in an appeal are reasonable or not is matter for a jury.

rried into a port in the island of Cuba, where she and her rgo were libelled, but ordered to be restored. The court, wever, sentenced the claimant in costs, to the amount of 00 dollars. The captain thinking this unjust, and finding not only the cargo one third plundered, but his vessel ipped of almost every thing, appealed from the decision to the court in the Havannah, which ordered the captain of the privateer to make good all deficiencies in the rgo, and that these should be ascertained by comparing invoice with the amount of the sales which had taken ce under an order of the court below, in which they remained. Still, however, nothing was said of the costs, and captain, after having appealed to Madrid, came away. Of the capture, and various steps thus taken, he gave earliest information to his owners, and the assured in present policy, who immediately on knowing of the vessel's ng carried in, made their abandonment, which the dedants refused to accept. The plaintiffs, therefore, conued from time to time, to direct the measures to be adopt- by the captain, and paid one third of the bills he drew. e circumstances and situation of the vessel in Cuba, were oved to have been known and conversed on in one room d by some of the underwriters on the present policy, but by the defendants, though it was also in evidence, that conversations in one room are, for the sake of general ormation, carried and communicated in the other. The fendants gave notice to the plaintiffs to produce a letter the trial, which, when it came on, they refused to do, the defendants would engage to read it in evidence. s they declined acceding to, without being first permitto inspect it, and on its being denied, his Honor the je, before whom the cause was heard, ruled that the ction could not be demanded, except on the terms the plaintiffs wished to impose.

After this the trial went on, and the jury, in conformity to opinion of the court, found for the plaintiff, making, ever, a very considerable deduction from the amount of charges claimed.

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To set aside this verdict, and grant a new trial, a tion now was made.

Pendleton, for the defendants. The question is, w ther the underwriters are liable for expences incurred in prosecution of a suit for damages, after restitution, a decree of acquittal, when the captain appeals for dama but does not say on what account. His own affidavit n tions, " That after several trials, it was finally decreed " the 8th of March, 1799, that the vessel, and proceed " the cargo, should be restored to this deponent, and " any deficiency in the cargo, should be made good by " captain of the privateer, to be ascertained by compar " the invoice with the account of sales of said goods, " no damages or costs were decreed." It is no part o underwriter's contract to be answerable for damages on appeal. The policy gives the assured a right to use ex tions for saving the property, but after a decree to rest the underwritten proceeds at his own risk. Howe should it be otherwise, and the assurer be responsi here the assured has not conducted himself so as to be titled to demand any compensation from the underwri From August 1798, to January 1800, there is no appli tion to pay any thing; yet, for that time, the assu were informed of all circumstances, and bills were conti ally drawn upon him during the whole period. The assu ought not to have paid bills, given directions, and thus terfered, without the approbation of the assurers; becau if they are to be charged, he was making them liable on the policy, and for what they did not engage. It is, w loosely stated, that the underwriters knew of the proce ings going on; mere possible hearing of conversations facts. But it is not any notice, unless informed of parti lars, of and for what the proceedings were going on. is assigned as a reason for abandoning, that the under ters had assumed to pay all expences; here they were put in a situation to make that election. There is, als point of law in this case arising from the manner in w the insurance is made. It is a joint adventure, by all persons interested. The action is by one of the parties

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declaration is, that he is one third interested in the poli-
. When the insurance is on a cargo, it may be ques-
ned whether he can make such an insurance, unless the
licy be one equal undivided third part of the cargo. One
ness says he was not insured: but under this policy there
nothing to hinder *him* from claiming a part.* The aver-
nt ought to have been special, and so ought the policy;
ny one person meant to insure a separate interest. It is
ceived also, that the judge has mistaken the point of
w, with respect to the calling for papers. He ruled that
en a paper is called for, the party cannot examine it to
if it is evidence, before he uses it in the cause. But he is
more obliged to use it, than he is an answer in chancery.
re the plaintiffs would not produce the letter, unless the
fendants would agree to read it as evidence. This they
clined, unless they were permitted first to read it: and
e court determined that the defendants had no right to
previous inspection.

* The underwriter never can be called upon to pay more than he has received a premium for.

Riggs, Hoffman and Troup, for the plaintiffs. We all reverse the order in which the points have been ought forward by the defendants' counsel. We shall ot speak to that which has been last insisted on; the indirection of the judge relating to the paper called for. n this subject there is no case in the books, except the e in Espinasse,† which does not apply. The point comes this, that a party is entitled to look at every paper in plaintiffs' possession. When an application is made for pers in the possession of another, the notice to produce ers is on account of a previous knowledge of their ex-ence and contents. It is done therefore on this princi-by that there is a conviction they contain evidence use-l to those who give the notice. If the adverse party es not produce it, the other side may offer testimony of contents; should the party noticed, be ready to give paper in evidence, it does away the necessity of parol dence of its contents, to entitle to which, is the only son why the notice is given. When the paper is called by it is at the peril of the party who does so, and when called for, if produced at all, even to the adverse par-

† Sawyer v. Kitchen 1 Esp. Rep. 209.

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ty, he ought to be compelled to read it in evidence. Th attempt of the defendants, and the objection raised upon are mere speculations, and therefore not to be favore To adopt the doctrine contended for by the plaintiffs, c induce no injury, but *that* of the defendants, can produ no good. It affords an opportunity of inspecting, witho any determinate view; if the paper is favorable it read, if unfavorable rejected, and thus, every scrap o writing in the possession of another, is to be ransacke for the benefit of his adversary, without his even knowin whether it is to do him good or not. In the second place as to the question made, of the right to maintain an actio for a third part. Every man who is an owner of an undi vided part, may insure his part and bring an action on it for a joint connexion will not prevent the insurance o what one has. The insurance need not express it to be a undivided part. The contract is so drawn for this very purpose; it is general, "As well in his own name, as fo "and in the name and names of all and every other per "son or persons to whom the same doth, may, or shall ap "pertain, in *part* or in whole does make insurance, and "cause himself and *them*, and *every of them*," &c. Th engagement is to be applied as the interests of parties pre sent themselves, for their several interests are covered by one policy. This construction does not militate again the principle, that he who thus insures, shall at the t recover according to his interest; on the contrary, th very rule is founded on the principle. With respect t the first point raised by the defendants' counsel, whet the insurers were liable for expences, in a suit on an ap peal for damages, after a restitution and decree of acquit tal, perhaps if the word was taken in the full and lit sense of acquittal, and the appeal had been for imprison ment or personal damages, the insurers would not ha been bound. Yet, when the party prosecutes and partia obtains recompense, he then may appeal for damages, i the same manner as for restitution, if the whole had be condemned. The property was not so acquitted, as to per mit the captain to proceed with his cargo, in the same ma

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it had been restored, tho' charged. Even then he might appealed for his charges; but it was not so restored; it plundered of one third, and two-thirds only of the e were restored. On this account, and for this the ap- was instituted. If it was the master's duty to liti- it was his duty to appeal, in order to get the whole erty. If a contrary course had been pursued, and wo-thirds had been received without an appeal, the dants would have called on him for the third he had cted, as they would have insisted that the clause is story. The vessel was stripped of her sails, and fore she could not have gone on with her cargo, h the captain had been willing to relinquish the one plundered. If this be a restoration to make inva- endeavours to get the third plundered, it would be difficult to say what a restoration meant. The charge in the case, takes away the necessity of any further ment. The point for the jury was, were the circum- es such as to justify the appeal? whether done with, ithout the knowledge of the assurer, was a matter in evidence, and therefore left to the jury. But t be remembered, the abandonment was not accepted, therefore the assureds were obliged to adopt such con- as would establish the right of the assurers, or them- s. The defendants ought to have taken the abandon- , to entitle themselves to find fault with the appealing e plaintiffs. If the captain's conduct has been pru- and discreet, every part of it renders the insurer li-

is a general principle, that the bonâ fide conduct of aptain charges the underwriter. From the circum- es in evidence, and set forth in the case, it is probable efendants had notice, and on that probability the jury to determine. The non-objecting of the defendants, they knew what was going on, was an acquiescence ir part. The quantum of the claim was also taken nsideration by the jury, and they struck off a part, mting to several thousand dollars. Suppose the whole een destroyed, would not the captain have been ju-

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tified in instituting a suit for damages, and there the could not have been for restitution, but in termini damages. As to the formal objection made by th fendants, that the action was not maintainable, the i ance being general, and the suit for only one third. W ever weight might be in the objection itself, though it possessed any is not very evident, it, at all events, co too late. The present is an application for a new t and therefore the objection not to be attended to Does the judge below decide on rules of practice? T objection does not touch the merits, but is merely a q tion of practice: the defendant, therefore, to avail l self of it, should shew that he has suffered an injury b

Hamilton in reply. It is of importance that the lati taken by the assured in charging underwriters, thr the general agency given by the clause, under whic present hopes are founded, should be in some degree fined. The plaintiffs never asked whether they sh proceed or not, but continued for two years defend without any personal authority. The increase of ex ces was more than the whole value insured. How principles might warrant such a case, it ought not to clude them. The question was, whether the parties proceeded without authority. With regard to the int insured, it deserved the interpretation of the court. licies no doubt have a certain degree of latitude: may cover various interests; such as are equitable, even those which are undisclosed. This was a gument for an insurance of a part, and it must be al ed; but then it ought not to cover the whole, when t is a joint interest. When it does so, the whole mus intended to be insured by a party insuring generally, not that it is for his separate interest. What that int is, he should specify; the contrary leads to fraud; beca if the vessel arrive safe, a return of premium might demanded. Several policies might be affected by th veral proprietors, each for the whole, and unless disco ed, the subject of insurance might be paid for ten ti over. But nothing can justify the plaintiffs' pursu

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the conduct they adopted at the defendants' expence. Whether the power to charge the underwriter at all, under the clause of the policy now insisted on, did not terminate the instant he had notice of the disaster, is, perhaps, the true point in question. The authority was, immediately on notice, perfectly at an end. The right to charge the assurer, previous to notice, would exist without any clause; there would, and must be, an implied agency. The supercargo, or captain, would, from his situation, be constituted the agent of the parties concerned. The interests of all give him a right, according to foreign authors, to act from necessity. The clause was merely to affirm *that* principle inherent in the nature of the circumstances, and flowing from them; to remove a doubt which hung over the case of abandonment, whether the acts of the agents of the assured, should not be construed a waiver of the abandonment that had been made. This implied agency could not, in strictness, continue after the abandonment. If an election to abandon be made, the right to act for the underwriter will be destroyed; if it be not made, the assured, as owner, must act for himself. After abandonment, reason appoints the assurer to act over his own property and interest. If a part be uncovered, then the assured may pursue for that, but not so as to charge the underwriter. It was not intended to say, that the acts of the master, if left to himself, would not bind the underwriter. For he would continue, or become the agent of him, in whom, after abandonment, the property vested. The orders given by the assured in this case, are like those in cases of two routes in the iter: a direction to pursue one, by destroying the captain's right of discretion, creates a deviation. No argument can be raised against the defendants, from the circumstance of their not objecting to the intermeddling of the plaintiffs: there was a joint interest, and therefore the unassured might act for the preservation of their own, and, in such a case, could the silence of the underwriter be construed into an acquiescence? for, a mere silence of this sort, could never create an authority to charge. With respect to the decision

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of the judge at nisi prius on the point of evidence, he r
ed on the case from 1 Espinasse, 209.

Per curiam, delivered by Radcliff, J. Several questio have been made, which may be considered in the follo ing order:

1st. Whether the insurance, which was general, can ap ply exclusively to the interest of the plaintiffs, *that* bein an undivided third part of the cargo?

2d. Whether the defendants are at all liable for the ex pences which accrued subsequent to the acquittal, and i prosecuting the appeal for damages?

3d. Whether the defendants were not entitled to inspect the letter called for by them, and to elect whether it should be read in evidence?

4th. Whether the expences in prosecuting the appeal at Cuba, were reasonable and ought to be allowed?

As to the first, I consider it well established in practice, that the assured is not required to state the particular interest, or proportion of interest, which he intends to have insured. It is sufficient if he have an insurable interest to the amount in question. Whether it be a distinct, or an undivided share, cannot be material. It may often be difficult to ascertain his interest with certainty. The owners were at least equitably entitled to their shares in severalty; the interest of each, I therefore think, ought to be permitted to be severally enforced. In the present case it appears that the insurance was in fact so intended, and a witness, who was one of the partners, testified that the plaintiffs had no authority to insure except on their own account. The danger of fraud from this practice, I think is remote, and less to be apprehended than the inconveniences which may arise from a contrary rule.

2d. As to the second objection, I see no reason why the defendants should not be liable for the expences attending the prosecution of the appeal in Cuba, which was conducted with good faith and for their benefit. I am informed that it was decided by this court, in April 1795 in the case of Smith v. Scott, that an assurer is liable for similar expences, beyond the amount of his subscription;

and I believe that the underwriters have, in practice, uniformly acknowledged their liability. The appeal in the present case, I think was justifiable. The captain was condemned in costs amounting to about £1500, one third of his cargo was plundered, and the vessel stripped of every thing necessary to her equipment. The restoration of the vessel and cargo in that condition, was little better than a total loss. There is no direct evidence that the defendants afterwards had notice of the proceedings, but I think it may be fairly presumed. The capture was well known to them; an abandonment was made, and the proceedings were frequently a subject of conversation between other underwriters on the same policy. The defendants did business in the same Coffee-house with those underwriters, and though in a different room, it is proved that it is usual for underwriters on the same risk to communicate to each other the information they receive. From these circumstances, I think actual notice to the defendants may be presumed, if then they had notice, and did not signify their dissent, they ought clearly to be held liable to the result.

3d. As to the third point, I see no reason to change the opinion I entertained at the trial. A party who gives notice to produce a paper in evidence, must be supposed to know its contents. If he does not, he ought not to be permitted to speculate through the forms of law, and obtain from his adversary the inspection of any paper or document he may chuse to demand. Such a privilege would be liable to abuse, and I think neither correct in principle, nor consistent with the form of proceeding in such cases. The notice to produce a paper, requires it to be produced *in evidence*, and when once called for and produced, it is of course in evidence, and I think it cannot be called for in any other terms. I understand this to have been the practice of our own courts, and no question has arisen upon it to my knowledge, until a late decision of Lord Kenyon at nisi prius, which suggested the idea now maintained by the defendants counsel. It may be questioned whether the point decided in that case, is similar to the

1 Esp. Ca. p 210. Sayre v. Kitchin.

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present. Without examining this, it was an opinion *nisi prius*, and of itself no authority; and in addition to what has been said, I think the alternative that the party giving the notice, if the paper be not produced, may go into evidence of its contents, shews, not only that he must be supposed to be apprized of them, but that he cannot have it in his power to compel a previous inspection. If the paper be refused or withheld, he can do no more than give inferior evidence respecting it. Neither the court nor the party can enforce its production for the purpose of inspection or any other purpose.

4th. Whether the expenditures in prosecuting the appeal in the island of Cuba were reasonable and proper, under the circumstances of the captors' situation there, was distinctly submitted to the jury, and if extravagant or improper, they were directed to make such deductions as in their opinion should appear reasonable. They have, in fact, made a considerable deduction, and I cannot say that they have not done right, or ought to have deducted more.

I am therefore of opinion on all the points, that the plaintiffs are entitled to recover according to the verdict as it stands.

Thompson, J. I concur in the opinion given, except as to the third point. I am inclined to think the defendants were entitled to an inspection of the letter they had given notice to produce, without stipulating that they would afterwards read it in evidence. The practice of giving notice to produce papers, as in the present case, has been introduced to save the expence of going into chancery for a discovery, and I can see no good reason why the party ought not to be entitled to all the advantages he would have, had he resorted to his bill in equity. In that case, after a discovery, he might exercise his discretion whether to use it as evidence or not. I do not think this right of inspection would be liable to the abuses suggested by the plaintiffs' counsel, that it might lead to an impertinent inspection of papers having no relevancy to the controversy. The party calling for the paper, must appear in the first instance, to have an interest in, and right to it; he must

e to produce it. This notice must contain a descrip-
f the paper with convenient certainty, and it must be
d to be in the possession of the opposite party; after
h, it would be competent for the party having the pa-
to object against the introduction, or the proof of its
nts, as being illegal or irrelevant, in the same manner,
he party calling for the paper had been in possession
or as might be done with respect to every other piece
imony. To require a stipulation, at all events, that
per should be read in evidence, might, in many cases,
l a party to introduce testimony against himself. This
be unreasonable, and I think liable to much greater
than permitting a previous inspection. So far as the
n of Lord Kenyon ought to have an influence on de-
ing this question, we have it in the case of Sayer v.
n, at nisi prius. The defendant had given notice to
intiffs to produce his books, and after having in-
d them, declined using them as evidence. The plain-
ounsel then insisted, that the defendant having call-
the books, they were in evidence before the jury.
ord Kenyon said, it did not make them evidence;
the counsel on one side, called for the other's books,
ade no use of them, that it was only matter of obser-
to the counsel on the other side, that the entries
were in favor of his client, but did not entitle him to
m in evidence. Although this decision is in no way
g on this court, yet I think the rule there laid down
ded in good sense, and best calculated to answer the
justice, and therefore proper to be adopted. Had
intiffs, in the present case, entirely refused to pro-
e letter, there can be no doubt the court could not
a *specific* compliance with the notice, but could
mitted the defendants to go into proof of its con-
The plaintiffs, however, admitted they had the
and made no objections against delivering it to the
nts, provided they would stipulate at all events to
in evidence, which they refused to do before they
ened it, and the court decided, that the defend-
not entitled to inspect the letter, unless they

1 Esp. ca. 210.

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would afterwards read it in evidence. I think the judg ought to have said to the plaintiffs, if you have the lette and intend to produce it, the defendants have a right t inspect it, and thus make their election whether to read i in evidence, or not. If you refuse to produce it, the de fendants will have a right to go into proof of its contents

Lewis, C. J. concurred, and on the third point said, h did not consider there was any essential difference betwee the opinion of Thompson, J. and that delivered by Mr. Justice Radcliff.

Kent and Livingston, justices, gave no opinion, the former not having heard the argument, and the latter hav ing been of counsel in the cause.

Joseph Coulon *against* Walter Bowne.

A representation that a man has been a naturalized citizen since a particular time, does not mean that he hasbeen so ever since.

This was an action on a policy of insurance, in which the only questions were on the materiality and construction of the following representation: "Mr. Coulon is a naturalized citizen of the United States *since* the year 1794."

Hamilton, for the plaintiff. The question turns merely on a matter of representation: There is not any warranty, and the distinction between a representation and a warranty is familiar to every one. As no warranty was made, it affords a presumption that a belligerent risk must have been contemplated by all parties, and that the contract should not stand on the basis of neutrality; otherwise, a warranty would have been inserted. Therefore, though the representation be not precisely clear, nor totally exempt from doubt, no objection can be made on the score of a want of neutrality: for, as a representation is collateral to the contract, all ambiguities should receive a favorable construction. Let us now see if grammatical construction, will not warrant the construction for which we contend. *Since* is contrasted to *then*, and plainly signifies, he was not a citizen in 1794. If he had meant that he was a citizen in 1794, he would have said "*ever since.*" This interpretation accords with the residue of the sentence. Transpose the words and put them in their natu

rder. "He *is* a citizen of the United States, *since* ." Otherwise he must have said, "*has been*," or *er since*" This is natural. Let it be remembered, he Frenchman, and translates his own language into bad lish. Had he said, "depuis mille sept cent quatre t quatorze," the sense would have been clearly exclu- of 1794. At least, this ambiguity would set the un- riter upon enquiring whether the emigration was be- '94, or '98, to render it material.

:wis, C. J. In Duguet v. Rhinlander, it was deci- in the court of errors, that though the emigration be ante bello, and the naturalization afterwards, it is :ient to answer the warranty of neutrality in a policy surance.

amilton. May I consider, sir, that case as the set- doctrine of this court?

:wis, C. J. Certainly. This bench did think other- , but their judgment was overruled in the court e, and they are bound by that decision.

amilton. As that case goes the whole length of this, unnecessary for me to argue any further in support hat is already decided, for omne majus in se continet is.

:ndleton, for the defendant. The case may be divi- into two points. The naturalization of the plaintiff, the materiality of the representation. On the first , the question is, what ought to be understood by the esentation: If the opinion is according to the usual ning of the terms, then the naturalization was in 1794, dating ever since '94. There is no evidence that it immaterial: it was material, and if true, that he it to be considered as a neutral by belligerent parties. ies, it does not lie with him to say it was immaterial, ne it was a wilful misrepresentation. The principle nstruction of terms used in contracts, and more so in esentations, as being the foundations of contracts, is king them in the usual acceptation of the words; the ary, and not the grammatical. The representation be taken as an answer; for the underwriter must be

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supposed to have asked, "When were you naturalized the answer is, since, or ever since 1794. It must have been an answer, or why select one period more than another. He must have meant that he was naturalized in 1794, as, according to the law of Congress then in force to entitle him to that privilege, his emigration would have been before the commencement of hostilities; and this being so, he would, according to the law of nations, have been protected in his commerce from a neutral country. Great Britain allows the privileges of neutrality to her own subjects, trading with an enemy from a neutral country, if they resided there before hostilities commenced. The representation was to make the underwriters believe it was a neutral risk, mislead them, and affect the rate of premium to be paid. That representations ought to be true and exact, Park 174, 5. If false, and to lessen the premium, it was fraudulent, and being within his own knowledge, it is the same whether the fact be material or immaterial. But the circumstance is very material, as will appear from Park 180,* 182.† If, therefore, the disclosure was not true, the court will not speculate on the materiality.

Kent, J. When did congress pass the first act prescribing terms as to naturalization.

Pendleton. In 1794. The person must have resided two years,* and this would carry the emigration back to a period before hostilities. The period of emigration is therefore important, as it would determine the national character. The representation was in English, and therefore without examining the French translation that has been given, it was a false representation. That notwithstanding it has been decided that a warranty of neutrality complied with by a naturalization, after emigrating jure grante bello, it is very different from a case where there is no warranty, and the emigration must, from the re-

* Hodgson v. Richardson, 1 Black. 463. † Fillis v. Brutton, Str. G. H. of 178[illegible].

‡ The first act prescribing two years residence, passed 26th March, 1[illegible]. Then came the law of 29th June, 1795, ordering five years. This was [illegible] by the act of the 18th June, 1798, requiring fourteen years, and last [illegible] in force, ordaining a period of five years.

sentation, have been understood to be before hostilities, and therefore no naturalization required by the law of nations, the property being protected without it.

Hamilton in reply. The case of Duguet v. Rhinlander, is decisive. To adopt the reasoning of the counsel opposed to me, the court must say, that an ambiguous representation, by which neutrality and emigration before hostilities may be inferred, is stronger than an express warranty of neutrality, when the emigration and naturalization are flagrante bello and not disclosed.

Per curiam, delivered by Lewis, C. J. The only question arising in this case, is on the representation; which, admitting it to be false, cannot avoid the policy, unless it be on a point material to the risk. The decision in the case of Duguet v. Rhinlander, is not necessary to be here applied. The only view in which this representation could be material, independent of that decision, is, as it respects the naturalization or emigration of the plaintiff, *flagrante bello*. Now, whether he was naturalized in '94 or '98, must, if considered independently of the period of his emigration, be immaterial, for in either case, it was a naturalization *flagrante bello*, and the existence of a war at both those periods, was a notorious fact, of which the underwriters cannot be presumed to be ignorant, and are bound* to take notice.

* Carter v. Boehm. 3 Burr. 1095. 1 Black. 593.

But it is insisted that on just construction, the representation was that he was naturalized *in* '94, for that *since*, means *ever since*, and then by our law he must have emigrated to this country in '92, a period preceding the war. If we are to take the word *since* abstractedly, and ask its meaning, it will be found to signify *after*. If we take it in connection with the other members of the sentence, we find, by a transposition of a single word, give it the same signification: and when we consider the representation was made by a Frenchman, as was admitted on the argument, and that such transposition will make the literal translation, I presume we shall be justified in so doing. It will then read, "Mr. Coulon is a citizen of the United States, *naturalized* since '94." Thus

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will the representation comport with the fact. Th *since* 1794, are therefore too equivocal, and not su *precise*, to justify the court in considering the representing the plaintiff to have been naturalize not *after* 1794. We do not, consequently, conside presentation as materially false, and the verdict stand.

If a veſſel be rendered, by the perils insured against, unable to proceed with her original cargo, it is a loss of the voyage, tho' she may be equal to perform it with another more buoyant. When a veſſel can not be repaired for half her value, she may be abandoned. If a veſſel be duly abandoned, and the abandonment refuſed, and at a ſale for the benefit of all concerned, under an order of a Court of Admiralty, pronouncing her not worth repairing, she be bought in by a part owner ſupercargo, it is no waiver of the abandonment, tho' on her arrival at her home port, ſhe be ſold at auction, by the aſſured for more than ſhe coſt, and he at the time of action brought, have the proceeds in his hands, nor need he make a tender of her to the underwriter when ſhe *arrives, nor of her proceeds after her ſale.*

Robert Abbott *against* John Broome, Pres the New-York Insurance Company.

This was an action of assumpsit on a policy rance upon one-eighth of the ship Mary, valued dollars, on a voyage from Batavia to New-York, fore his Honor the Chief Justice, at the circuit New-York, in November 1800.

On the trial it was proved, that the vessel, in t cution of the voyage insured, encountered heavy verse gales of wind, in consequence of which, a general consultation of officers and crew, it wa mined to bear away for the West-Indies. That the the beginning of the month of January, 1799, a the island of St. Christophers, in a very disable and was there, *on the application of the master, in tion with the supercargo, who was also a part own ship*, surveyed under an order of the court of ad and afterwards unloaded for the purpose of a sec vey; upon which second survey a report was mad That the ship could not be repaired for the full her when repaired; and that she was in such a condition, without particularizing the several she received in her hull as well as rigging, that i be dangerous and unsafe to unload her cargo, ceed with her on her voyage. And to repair, he be highly detrimental to the interest of the owners underwriters of the said ship and cargo.

On this, the court, upon the like application, a sale of the vessel, for the benefit of the concern sale took place, and at it the supercargo became chaser for the account of the insured, for the

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0 dollars. Upon advice of her situation, the plain- bandoned to the underwriters, who refused to accept abandonment.

was admitted that the vessel, in consequence of the sters experienced on the voyage, was so much in- d as to render it impossible, from the high price of rials and wages, to repair her at St. Christophers (so bring on her whole cargo) for half her value.

was admitted, that in the spring following, she came ew-York with a light cargo of rum and molasses, be- bout sufficient for a set of ballast, and that she might brought a full cargo of rum, which was proved to be ry light and buoyant cargo. That the interest of all owners in the vessel was not insured. That on her al at New-York, she was not offered by the plaintiff e defendant, but was sold at public auction, without consent or approbation, for the sum of 10,100 dol- , and was afterwards repaired by the purchaser at a derable expence.

n this evidence, a verdict was rendered for the plain- s for a total loss, subject to be diminished according ch principles as the court should direct.

amilton for the plaintiff. On the facts stated in the , the application of the general and established prin- s of the law of abandonment, is so clear and plain, surely no objections can be raised on that point. The t cannot but be acknowledged, and therefore to anti- te any thing which may be urged against it, will not ttempted. The question on which we apprehend the ndant will most rely, and which, it must be confessed, sufficient importance, is whether the repurchase of vessel by the supercargo, did not turn this technical into merely an average loss according to the decision idder and Craig v. Church. So far from disputing law of that decision, it is fully admitted; but the cir- mstances of that case, as well as those in the one in Reports,* on the authority of which it was in a determined, essentially vary from the pre- Sadler and Craig v. Church, and in the case

* It is supposed that the case alluded to by the learned counsel is that of M'Masters, v. Shoolbred, 1 Esp. Rep. 237.

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in Term Reports, there was no abandonment bef repurchase. In this the reverse is the fact. By chase the court will please to understand, notice of chase; for the mere fact, it is conceived, can by no influence the question. If at any period, the right t don from what was known, perfectly and fully at if the event then disclosed warranted an abandonm right as it thus stood, cannot be impaired by any existing fact which would, if known, have taken i In the decision to which allusion had been made Kenyon observed, there had been no abandonmen notice. It is true, in Saidler and Craig v. Church, purchase was not known till after the abandonme this was followed by a subsequent proceeding of impressive nature. On the arrival of the vessel h was taken to, by the assured, repaired, fitted out, on another voyage. What did this amount to? could it amount to but a complete adoption by the of the act of their agent, as done on their accoun consequence is obvious: it turned into a partial, th that had been made for a total loss. This, therefo stitutes a material difference between the two case there is another circumstance equally important. present instance, when the offer to abandon was m assurer absolutely refused to accept it. In Said Craig v. Church, they were merely passive, and reply. When the Mary came here, she was not er and fitted out again, but as she was refused, she at auction for the benefit of whom it might concer what was done in the former case, there can be possible interpretation; that the assured took he and waived their abandonment. In *this*, no such th be inferred. Every act is consistent with the cla made. There had been a clear right to abandon, abandonment had been refused. To sell the shi duty of the assured, and only to prevent to the as total loss, which, otherwise, must ultimately have The proceeds are doubtless to be accounted for, do not weaken the present claim. The vessel, it

sold for more than she cost; but what of that? It ly so much the better for the underwriter. It does ter the right which had before been exercised, and stood unimpeached. The ground of the decision in r and Craig v. Church, was that the plaintiff had d his abandonment by taking possession, fitting out, To govern this case by that, it must first be deter- d whether a sale at auction is equivalent to a fitting and this must be done, only because there was no f her after her arrival here. And even then it must sidered whether this, as a reiterated act, and doing re than what had already been done and refused, was ary to be repeated. The sale at auction was a con- ive act, done merely to prevent any future deterio- . It was a measure dictated by what had already place. The former refusal continued as a guide to ntiff's future conduct, and on that he acted. The ty was thrown into his hands, and it may, perhaps, estion whether this did not of itself constitute him nt for whomsoever concerned? The repetition of er of the vessel, was a work of supererogation. niver of the abandonment could never be considered ct of intention, or premeditated design. It must om implication of law, and on the principle that a nugatory offer, is, by law, absolutely necessary. e mere selling a property insured is not a waiver rious abandonment, the decision of this very court s believed, firmly established. In Bowne v. the New nsurance Company, after a refusal of an abandon- e goods arrived and were sold by the assured. It was this bench, that the sale was justifiable from the t of the underwriter. To be sure, a second offer have been made, and had the advice of counsel had, it is more than probable it would ex cautelâ so recommended: but it was by no means neces- sary, the insurer had, from his conduct, render- superfluous. He, the person entitled to the ship, then in the hands of the plaintiff, constituted his refusal *to accept her*, an agent, as the foreign

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writers term it from necessity, lest an absolute loss of the whole subject matter should ensue. To preserve it, to the advantage of all parties. If the plaintiff was to h it, his interest required that care should be taken of if it was to fall to the *underwriter*, certainly *his* equ so, because he lessened his payment, and in the pres case actually made a profit.

Hoffman contra. Whether the present is to be co dered as a partial or a total loss is, in fact, the only p in controversy. That it is partial, the defendant insis for this case is in no respect to be distinguished from t of Shaw and Goold, decided in this court, and confirm on a writ of errror; so that the principles there recog zed, are now to be taken as the settled law of the la There the damage to the cargo, did not affect the policy the ship; because she was in a capacity to complete voyage, though she did not do it on account of the inj her cargo had sustained, in consequence of which it sold in Martinique. It follows, from the authority of case referred to, that as, in insurances, freight, vessel cargo, are distinct interests, the total loss of one, by means constitutes a right to abandon on the others. underwriter on the ship, has nothing to do with the car and though the Mary was sold in St. Christophers, and voyage thus broken up, as it is termed, that did not g any rights to the assured on the vessel. The interests totally unconnected; an insurance on the voyage being no means synonimous with one on the ship. For this tinction, the court will find a sanction in Poole v. Fitz rald, Willes's Rep. 641.* The fact however here was, t the voyage was not lost, for the vessel arrived with a ca and earned freight. So that, allowing the loss of the v age to mean a loss of the ship, and therefore to give a ri to abandon, and claim for a total loss, still that loss not taken place, as the vessel could have brought a full c go, though not the original one. She had lost no freight create even a technical loss of the voyage. She had ea ed pro ratâ freight to St. Christophers, and from St. Chr tophers here she made full freight. There was, then,

* Edward and Charles Goold v. John Shaw, reported 1 Lex Mer. Amer. 295.

* See the 2d point made by the C. J. ibid 636. but note the insurance there was on a policy for time.

f the voyage, but a profitable one performed; and
: ship herself, she had arrived in perfect safety.
then, this case can be distinguished from Shaw
ld, that decision must controul this, and the claim
or an average, not for a total loss. The determi-
so in Saidler and Craig v. Church, goes on all
h the present case. The facts were exactly simi-
has been attempted to discriminate between them,
s can, in operation of law, be no essential differ-
ween taking possession of a vessel and fitting her
taking possession of her and selling her. If so, it
r be meant, from the bare transaction itself, to
s otherwise, when the sale had been at an advance
than she cost, and the surplus put in the plain-
ket. It is evident the plaintiff fully intended to
purchase of his supercargo, who, it must be re-
d, was also a part owner, and designed the sale
n use. The conclusion is almost inevitable, that
man makes a sale of what was his own, to a profit,
t for himself. It had been done by the plaintiff
consulting the underwriter: from his own will,
addition to this, what had been the conduct of the
since? He had never once offered to account for
. If he had meant to have been considered as an
: the underwriter, as suggested that he was from
, he would have offered to account for the profits.
f this, he has them now in his pocket, and can
eir being there, only on the ground of the repur-
ing been made, on account of the former owners.

[illegible] allusion to the case of Saidler and Craig, v. Church, mak-
ing degree a part of the present, the reporter has thought it necessary
[illegible] it as represented in the case made for the opinion of the court.
That the insurance made in the name of Thomas White, was made
account of the plaintiffs, and that they were the sole owners of the
[illegible] in the policy.
vessel in her due course on the voyage insured, was captured by a
[illegible], and carried into Guadaloupe, and that thereby her said voyage
[illegible] was totally lost.
Guadaloupe the vessel was duly libelled in the admiralty court, and
[illegible]demned, and after condemnation was purchased by George Du-
[illegible]out, as for the account of the owners for the sum of eleven hun-
[illegible] dollars. That the said master was also a part owner. That
[illegible] fitted out the said brig and sent her on another voyage.
[illegible] the owners knew of the capture, and before they were in-
[illegible] condemnation, or of the purchase by the captain, they gave the
[illegible] of abandonment.

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It had however been said, that in Saidler and Craig Church, the underwriters had been merely passive, here they had actually refused, and that from hence a versity between the cases, would necessarily arise. Saidler and Craig v. Church, what had passed amounted a refusal. An abandonment, followed by silence and no acceptance, amounted to a refusal: for, he who does accept, refuses. If, however, any variety does prevail the two cases, in this it is stronger against the assured. Saidler and Craig v. Church, the condemnation, sale, were forcible; the result of a capture: but here they w induced at the request and instance of the part owner, supercargo. The plaintiff has received his vessel, purch sed in by his part owner; the underwriter, therefore, l ble only for repairs. Insurance is no more than a contract indemnity: if it is to be so considered now, the plaintiff c recover only for a partial loss.

Harrison, for the defendant. The decision in Shaw a Goold is conclusive on the subject. To the judgment the pronounced, every man must accede, because, in insu rances, the various subjects of vessel, freight, and cargo are perfectly distinct: what, therefore, affected the one by no means implicated the others. Suppose a total loss *cargo and freight*, let it be either absolutely or technically so, *the assured on the ship* would not, from *this*, acquir any right to abandon. *That* must depend on other cir cumstances: it cannot turn on her ability or inability to car ry her original cargo. If the vessel can be repaired fo half her value, whether she be adequate to the conveyanc of her cargo or not, can never give the assured a title t abandon, or claim as for a total loss of the ship. The ves sel in question had earned nearly her full freight: the ori ginal cargo had paid it; the substituted loading had don the same. How, then, could a total loss be claimed fo that ship which was then profitably and advantageously em ployed? Taking it, therefore, in the most complicated an connected point of view that could reasonably be suggested there could not be a total loss of the vessel, while the freigh was still subsisting. In order to establish this as a total los

plaintiff must still more closely unite the subjects of in-
rance. He must advert to the incompetency of the ves-
to bring home the cargo, and urge this as the foundation
his demand; and because the voyage is broken up on the
go, the loss of the ship is necessarily to be inferred. This
direct opposition to Shaw and Goold, the contrary of
ich was expressly determined. The trifling variations
that case from this, cannot alter the point, for it is not
y little change and alteration of circumstances, or any
change, that would take one out of another. Should
decision not be sufficient to incline the court in favor
the defendants, Saidler and Craig v. John B. Church,
govern the question. In that, as in this, it must be
ent from all the circumstances, that the purchase was
the benefit and on account of the assured. The pro-
y, when in the power of the plaintiff, was never offer-
to the defendants, and that alone is a waiver of the aban-
ment. In favour of such a construction, the facts now
ore the court are stronger than those of Saidler and Craig
hurch. There the sale was involuntary and compulsive,
e it was not only voluntary once, but twice; and the first
, even at the request of the supercargo and joint owner.
was this the whole from whence the construction of the
chase being on account of the defendant, might be
wn. There was a shipment, a cargo taken on board on
ount of the assured. In other respects the cases were
e. In that, an abandonment not accepted, in this, an
andonment refused. In one case the vessel was employed,
e other she was sold. Had not the underwriters a right
e consulted as to the time, place, and manner of the sale?
does it appear that they were not willing to retain
? The plaintiff should have offered them the freight,
the amount of the charges for repairs, &c. and then
e claimed compensation under his policy. Instead of
suing such a line of conduct, the property is disposed
without their knowledge, and is now held. If this
be done, the security of underwriters is destroyed.
would, it must be confessed, be a difference, if the

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transaction had taken place in a foreign country, wher application could be made to the underwriters; but h when all concerned were on the spot, the parties who w so active, and without making any communication, s be held to have acted for themselves. In addition to th circumstances, the court, doubtless, will observe, that plaintiff has received the freight earned by her, after being bought in by the supercargo and joint owner. Th it is conceived, is tantamount to fitting out and employ her, and is evidence of her being in the service of former owners.

Hamilton in reply. It is difficult to conceive how Sh and Goold could be connected with the present case; dissimilarity is so great, it is scarcely possible to imag how it could be pressed into the service. The case w an endeavour to constitute a total loss of the vessel, account of a loss on the cargo. It was by the special v dict expressly found, that she could have been repai for less than half her value; in the present instance it is expressly stated, "That she cannot be repaired for "full value of her when repaired." I shall, after this p liminary observation, endeavour to shew, that the prin ples of that determination will bear on this, and materi aid the plaintiff's demand. For that purpose, it will necessary to recur to the general position of the cou that in insurances, the various subjects are totally distin that in construction of law, vessel, freight, and cargo, separate interests;* and it is fully conceded, with the posite side, that the loss of one does not constitute a l of either of the others. On these data the court proce ed in Shaw and Goold. In that case, there was no in lity in the vessel; she could have pursued her voyage w her cargo, here she could not. The ability of a vesse perform her voyage with her cargo, is the very essence the contract of assurance upon her: it is the substrat of the policy. The assured warrants that she is so at commencement of the voyage, and the assurer engag that so she shall continue, against all the perils enume ted, until it be terminated. If the vessel become una

* They do not seem very separable according to the decision in the United Insurance Company of New-York v. Lenox. 1 Lex. Mer. Amer. 197.

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it with her cargo, the court must consider it
ss with respect to her, and the policy forfeited.
ıow advanced, which is not perfectly reconcile-
he distinctness of the subjects of insurance:
se of the loss of the voyage was wholly the
rose from her inability, against which the po-
:ant to protect. When that inability could not
l for half her value, then she, the very subject
:e, was technically destroyed, and, abstracted
quent circumstances, it became a total loss.
ıurchase then, was the only thing which could
vent the result. Suppose her purchased for, and
r person, how would that vary the underwriter's
r rights? In either one case or the other, he
uded or injured. The purchase on his account
red, can never be detrimental; he has the ves-
she cost, and he has also what she sells for.
of Saidler and Craig v. Church, the abandon-
verruled, solely because the employing the ves-
med a waiver. I must again beg leave to in-
agency from necessity of the plaintiff, and to
eing merely passive in cases of abandonment,
ıt to a positive refusal. The underwriter has
:fore he is under any obligation to decide on
ı abandon; during that period, circumstances
e him to be cautious, and hesitate in pronoun-
termination; at this time he is passive. The
here refused at once without hesitation. The
ust be whether the offer to abandon ought to
and in all future cases must be, repeated after
efusal to accept. Living on the spot, does not
uestion. To offer a second time, would be
esy: for after one party has explicitly taken his
that, the other may act and make it the line of
:onduct. Whether this rule is to be adopted or
r to be determined.

im, delivered by Radcliff J. In this case, the
ıtion is, whether the plaintiff is entitled to re-

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cover a total or a partial loss? Two objections have be made against the recovery for a total loss.

1st. That the case of a total loss never existed.

2d. That the purchase at St. Christophers, by the supe cargo, who was also a part owner of the ship, and the su sequent sale at New-York, without the consent of the d fendant, or a previous offer or tender of the ship to hi amounted to a waiver of the abandonment, and an ado tion of the vessel as his own.

With respect to the first, it appears that the ship w condemned at St. Christophers, as unfit to proceed on h voyage, on account of the injuries she had received; a the persons appointed to survey her there, certified, th in their opinion, she could not be repaired for her f value when repaired. It is also admitted, on the part of th defendant, that in consequence of the disasters experienc on the voyage, she was so much injured, that it was i possible, from the high prices of wages and materials, t repair her at St. Christophers for half her value, so as to e able her to bring on her whole cargo. It is again admitte on the part of the plaintiff, that in the spring followin the ship came to New-York with a light cargo of molass and rum, being about sufficient for ballast, and that s might have brought a full cargo of rum, which was prov to be very light and buoyant.

On these facts, I am of opinion, that there existed case of a technical total loss, and that the assured had right to abandon. The question, in such cases, is whether the vessel be in a capacity, or in a situation to repaired, so as to prosecute her voyage with a half, or other portion of her cargo, but whether she is capable proceeding, or of being refitted to proceed, and carry whole. A vessel is not seaworthy, unless she be in a dition to carry a full cargo. The contrary idea is and inconsistent with every principle of propriety, and ty in navigation. The vessel was insured to perform voyage, and carry her cargo from Batavia to New-Y This she was disabled from doing. The enterprise, th

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failed, by means of the perils insured against, and laintiff had a right to abandon, and claim a total loss. e second question is, whether he has waived this

The vessel was ordered by the court of admiralty Christophers, to be sold for the benefit of all concern- The supercargo, who was one of the owners, pur- d her on account of the assured. The assured had ously, on receiving advice of her condemnation, and any notice of the purchase, abandoned his interest underwriters, who refused to accept the abandon-

In what manner the supercargo, being also one of mers, might be affected by the purchase, it is unne- y to determine. The question is, whether the plain- tified his acts subsequent to the abandonment, and re- ed the purchase as his own. In the case of Saidler raig v. Church, after an abandonment, a similar pur- was made, and the assured adopted it as their own, iling themselves of the advantage it offered, and fit- ut and sending the vessel on another voyage for their ccount. Under these circumstances, we considered sured as having affirmed the purchase, and waived ndonment.

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e present case differs in this, that the plaintiff has no act to affirm the purchase. He has not appropri- he vessel to his own use, and has not attempted to de- ny benefit from the purchase. The vessel was sold tion on her arrival at New-York, and purchased by nger. Although it be not expressly stated in the case, le must be presumed to have been made for the bene- the underwriters. It is objected that the plaintiff ought to have offered to deliver them the vessel, or have con- them as to the propriety of the sale. I think this was ctly necessary. The abandonment was an offer to ll his title and the possession of the vessel, as far as the circumstances it was capable of being delivered. laintiff was not bound to do more, and it being a per for an abandonment, the defendant ought to ccepted it; or, at least, the refusal was at his pe- He did not accept, and the plaintiff was neces-

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sarily left to act as his trustee in the disposition of property. If he executed the trust fairly, he has discharged his duty, and it was not incumbent on him to follow the defendant, and repeat his application to receive what he ought at first to have accepted. The sale at auction was therefore justifiable, and the defendant ought to be charged with a total loss, deducting the proceeds of the sale, and the value of the freight from St. Christophers to New York.

Ebenezer Purdy *against* Mathew Delavan and Samuel Delavan.

An award in trespass that "the said suit shall no further be prosecuted," is sufficiently final and certain, and a good bar to an action on the case for the same offence.

This was an action for a conspiracy, in burning the plaintiff's barn, and the various articles it contained.

The declaration contained seven counts.

The first stated the plaintiff possessed of a barn and close, containing hay, &c. The defendants, knowing the premises, and contriving to injure, &c. the plaintiff, by certain conspiracy, confederacy, and agreement, did cause the barn, &c. to be set on fire, destroyed and consumed.

Second like the first, except that the defendants did conspire to set on fire, and cause to be set on fire, and consumed, and destroyed, the barn aforesaid, containing &c. and by means of the conspiracy aforesaid, the barn was set on fire and consumed.

Third. The same, stating that the defendants, by conspiracy, &c. did procure the barn, &c. to be set on fire, and destroyed, and consumed.

Fourth. That the defendants did conspire, &c. to set fire and cause to be set on fire and destroyed, the barn aforesaid, &c. with an averment, that the barn was in pursuance of the conspiracy aforesaid, set on fire and consumed.

Fifth. That the defendants, by a conspiracy before had, did cause and procure the barn to be set on fire and consumed.

Sixth. The same, only enumerating the contents of the barn.

Seventh. That the defendants conspired to set on fire

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and they, in pursuance of their conspiracy, did, &c. and did cause to be, by fire destroyed, the barn aforesaid.

All the counts began as in trespass, "For that" concluding with "alia enorma against the peace,"* &c.

The defendants separately pleaded the general issue, with a notice, that on the trial they would severally give in evidence in bar thereof, and according to the form of the statute, a former suit in trespass against the defendant Mathew, Hannah his wife, and the other defendant Samuel, for breaking the close of the plaintiff, and also for burning his barn, containing, &c. and that they could give further in evidence, a submission of the said suit by the plaintiff on the one part, and the said Mathew and Hannah for themselves, and the said Samuel their son, an infant, on the other part, to the arbitrement of certain arbitrators mentioned, and their award thereon made, by which the plaintiff was ordered to "*no further prosecute the said suit*," and to pay the defendant, Mathew Delavan, 14 dollars 68 cents costs; and further, that the suit on which the said award was made, was for the same trespass for which the present action was brought. The submission and award were in the following words:

The condition of this above obligation is such, that whereas, a barn of the above Ebenezer Purdy hath been destroyed by fire, together with hay, grain, and other valuable articles which it then contained: and whereas, the said Ebenezer Purdy hath instituted an action in the Supreme Court of Judicature of the State of New-York, against the before named Mathew Delavan, and Hannah his wife, and Samuel Delavan his son, for burning and destroying said barn, in which action the said Mathew Delavan, Hannah his wife, and Samuel Delavan, have pleaded not guilty, so that the said action is now at issue: and whereas, it is just and right that if the said Mathew, and his wife, and his son, or any, or either of them, have or hath in fact, burned or destroyed the said barn, or have or hath in any manner aided, abetted, assisted, contributed, countenanced, or been privy to the burning or destruction thereof, (which they and each of them wholly deny)

* It has been said that an action upon the case is founded upon a wrong, and concludes contra pacem. Vaugh. 101 F. N. B. 92. E. but this is a mistake, for actions contra pacem, are a species of actions vi et armis. See 1 Mor. Vad. Mec. 65.

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that then he, the said Mathew Delavan, shall pay t
said Ebenezer Purdy, all the damages he hath sust
thereby, which the said Mathew Delavan hereby a
to do. And whereas, the said Ebenezer Purdy an
thew Delavan, have mutually agreed to discontinu
said action, and to submit all *questions*, *disputes* an
troversies touching the destruction of the said ba
the contents thereof, and the damages the said E
zer Purdy hath sustained thereby, to the judgmen
award of Epenetus Wallace and Hachaliah Brown,
and Stephen Gilbert, Farmer, or any two of them
bitrators mutually chosen by and between the sai
ties, to arbitrate, award, and determine, *touchin*
premises. Now, therefore, the condition of the
ding obligation is such, that if the above bounden
ezer Purdy, his heirs, executors, or administrators
and do, well and faithfully abide by and perfor
judgment, arbitrement, and award of the said Ep
Wallace, Hachaliah Brown, Esq. and Stephen Gi
or any two of them, so that their award be made i
ting, and ready to be delivered to the said parties,
before the twenty-third day of June instant, then th
ligation to be void, or else to remain in full force or v

Whereas, a *certain suit* has heretofore been com
ced in the Supreme Court of Judicature of the St
New-York, by Ebenezer Purdy against Mathew
van, and Hannah, his wife, and Samuel Delavan
son, for the burning and destroying the barn of th
Ebenezer Purdy, by fire: and whereas, for the p
an end to the *said suit*, they, the said Ebenezer P
and Mathew Delavan, by their several bonds and
tions, bearing date the second day of June, in th
of our Lord one thousand eight hundred and one, h
come bound each to the other of them, in the pena
of two thousand dollars of lawful money of the U
States of America, to stand to and abide the awa
final determination of us, Hachaliah Brown, Steph
bert, and Epenetus Wallace, so as the said award be
in writing, and ready to be delivered to the said pa

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before the twenty-third day of June instant, as by
d bonds may appear. Now, know ye that we, the
bitrators, whose names are hereunto subscribed,
als affixed, taking upon us the burthen of the said
; and having fully examined and duly considered
ofs and allegations of both the said parties so made,
this our award by and between the said par-
manner following: that is to say, first, We do
and order, that the *aforesaid suit* shall be no fur-
osecuted: and further, We do award and order,
e said Ebenezer Purdy shall pay, or cause to be
nto the said Mathew Delavan, fourteen dollars
ty-eight cents, in full, for his costs and expences
nding the aforesaid suit, and also for his expences
endance on this arbitration. In witness whereof,
e hereunto set our hands and seals, the seventeenth
June, in the year of our Lord, one thousand eight
d and one. The defendants' counsel then moved the
direct the jury to find a verdict for the defendants,
principle, that the submission and award so given
ence, barred the plaintiff of a right to maintain his
t suit, which motion the judge overruled, declaring
nion to be, that the award was not conclusive be-
the parties, so as to bar the plaintiff of his present
with liberty, however, to the defendants to reserve
nt, which was accordingly done.

jury being charged by the judge upon the issue of
ilty, and having returned to the bar, said, they
he defendants guilty of the matter contained in all
nts in the declaration, except the last, and of
atters they found the defendants not guilty.

da for the defendants. The present motion is to set
e verdict, and, if the court should be of opinion
ns on that point, to arrest the judgment. On one
e grounds we must prevail, and for that purpose, I
ntend that the award was on the trial, final and
ive evidence to bar the action: secondly, that the
finding the defendants guilty as to the first six counts
so to the seventh, is contradictory; thirdly, that

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this action, as it at present appears on the award, not be supported, being evidently a suit in tres which will not lie for a conspiracy, as the remedy o to be by an action on the case. On the first poi must be admitted, the award was intended to be and conclusive as to the burning the barn, &c. plaintiff ought not to be permitted, after a suit for very cause, and submitting it to arbitrators, who on themselves the burthen of the award, and absol make it, to bring another suit for the same offence. plaintiff cannot, by merely varying his form of proceed (if there be any variance in this case) bring a subseq action on the same grounds. The award is final and clusive, therefore, on the *cause of action*, not the *mere pro ings*: it says, the "aforesaid suit shall be no further p cuted." This must be taken as if it had been declared, defendants shall never again be impleaded for burning barn. The rule of construction in awards, is more li than it formerly was: the courts look to what was desig because the arbitrators are judges of the parties' own ch ing, and not tied down to technical rules. In Strang v. Green, 2 Mod. 228, the submission was, by the de ant, on behalf of himself and partner, of all differe and controversies between them and the plaintiff. award was, "that all suits which are prosecuted by "plaintiff against the defendant shall cease." This, the court, has the effect of a release. So here, that "suit shall no further be prosecuted," will have the operation. Another inference is to be drawn from th thority, in answer to the objection that may be mad the submission being only by some of those who proceeded against in the first action: but they had a to refer for the other, as they were the parents of t fendant Samuel. In the case cited, one partner subm for all, and yet the award was not on that ground impe able. The same principles will be found in Kyd, 218. kins v. Colclough, 1 Burr. 274. Gray v. Gray, Cro 525. So in Harris v. Knipe, 1 Lev. 58 an award "all suits and controversies *shall cease*," was held good

al, though no other part of the award was valid. In
n v. Gavil, 1 Salk, 74. the words were, "that all suits
w depending *shall cease*," and it was urged in error to
al, "because the meaning is not that the party shall
e over and begin again, but that the suit should abso-
ely cease for ever, so that the *right* is gone, because
remedy is." Even an award "that a suit in chancery
ll be *dismissed*" is final; because the court "will in-
d this a substantial dismission and perpetual cession."
ht v. Burton. 1 Salk. 75. 3 Vin. Abr. 67. pl. 28. As
econd point will be spoken to by the other counsel in
use, it will be necessary only to go to the third. The
declaration is for a direct trespass: if so, it is not main-
ble, on a conspiracy. The mode ought to have been by an
n on the case, or a writ of conspiracy, according to
gister. That the present is a declaration in trespass
t be doubted. The beginning of each count is "For
t," and not circuitous, as is necessary in actions on
se, which being for consequential damages, com-
s with "For that whereas." This declaration there-
cannot be in case: and if it be trespass, it will not lie.
be found, on examining the authorities, that a bare
iracy, without any act done in consequence, cannot
foundation of any suit. The first six counts, though
lledge conspiracy, and that the barn, &c. was burnt,
t charge *us* with it. If, in addition to this observa-
there is any technical rule, by which this declaration
e deemed trespass, the court will apply it. In Scott
pherd, 3 Wils. 403. 2 Black. 892, the court held vi
is conclusive on the question; here the words are
t the peace of the people, which is tantamount. Are
e counts charging a direct injury to the plaintiff? Do
ot shew it in express terms? If so, shall it be permit-
e plaintiff, by adding the words conspiracy, &c. to
e declaration just as it suits his purpose? as case to
ain the suit as a conspiracy; and when objected to
count of form, to turn round and say it is trespass. If
o, it is the same as saying the defendants burnt the
and negatives that they caused it to be burnt. There

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is no method of supporting the declaration, witho
setting aside all the rules of pleading which relate t
pass and conspiracy.

Colden, Hoffman, and Munro contra. We shall first
as to the award. It is necessary that all awards sho
final; and therefore either to be nonsuit or discont
insufficient, though to enter a retraxit is good. The
sitions shew the nature of awards on this point. Th
suits shall cease comes within the rule of a retraxit
that *a* suit shall be no further prosecuted cannot: the
however, will determine whether they are tantam
But this is not the real ground of objection; the one
relied on is, that the award is not of the matters which
submitted; that it differs from the submission. If t
the case, it is void, and no averment in pleading,
even an affidavit of the arbitrators as to their meaning
help it. For this the court will find authorities in E
v. Dubarry, 12 Mod. 129. Dyer 242. b. Kyd on Aw
207. The award must set forth, that it is on the ma
submitted. What then was submitted? has the award
made in pursuance? The arbitration bond mentions,
"questions, disputes and controversies, touching th
"struction of the said barn," &c. It does not subm
question of *that suit*. The arbitrators were empowe
determine matters not the basis of that suit: yet they
fine themselves to award on that, and determine again
plaintiff. The award begins, "whereas, *a certain*
ascertaining what is meant by them. They then pr
and say, "that the *aforesaid suit* shall be no further p
"cuted," when they were to determine on *all contro*
On this account, therefore, the award is void; fo
submission was of *all*, and they have confined them
to *one*. Besides, they only say, "if he shall abid
award, and not on the premises." From the case,
pears, the award was properly rejected; it is not
that any evidence was given on the trial, of any conne
between the suit *then* brought, and the suit *referred*
the award. The rule laid down in Scott v. Shepp
no doubt correct; that case decided vi et armis to

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st. Where the declaration is not in those words, tion is in case: so here, it not being stated to be rmis, the suit must be considered as on the case onspiracy, and every count expressly alleges, that conspired to be done, was absolutely performed. he conspiracy is the git of the action, and *that* found, the words "against the peace," &c. may cted. Com. Di. Title Pleader, E. 12. 1 Bac. Ab. 1 Herne's Pleader, 235, a precedent in point will id. As then the contra pacem may be rejected, lowing that the formal commencement of each count hat" is bad in case, it is settled wherever there the same plea and judgment, different counts may ed.* Brown v. Dixon, 1 D and E. 276. Dickson on, 2 Wils. 319. Mast v. Goodson, 3 Wils. 354. :, as we have an alternative either to bring case or s, 3 Black. Com. ch. 12. p. 208, take it either as the other, it is well brought. But, at all events, w too late to take advantage of this informality d to have been insisted on; it ought to have been of demurrer to the declaration. The English au- s cannot apply exactly to the present case. By the civil injury is emerged in the felony: our tt prevents that, and therefore nothing perfectly n be found in their books. That the verdict is ictory, has not been touched on in argument, made a point in the outset. If the position of r side is true, there never can be a conviction e count of an indictment, where there is an ac- on another. The trespasses in the several counts posed to be distinct; the finding, therefore, on es not contradict that on the others, and the may take his verdict, and have judgment on that for him. The court may view this case now hem, as one with a double aspect; either to set e verdict, or to arrest the judgment. The latter er be done, where sufficient appears on the record the court to pronounce. On a general or spe- urrer, it might have been otherwise. In Brown-

* The rule is rather where the process, plea and judgment are different, the counts cannot be joined. See Tidd's practice, 12. n (w.)

† The act for regulating certain proceedings in criminal cases, 21st March, 1801, c. 60, S. 19 1 vol. Rev. Laws N. Y. 264.

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low 70, a similar declaration is to be found; an action fo a conspiracy in the nature of case, ought to be without et armis. Herne 71. 88. 147, is as here. The true di tinction has already been taken between case and trespas and there is no other; the latter is vi et armis, the oth not. To answer the position, that in an action on th case there is always a recital, it will be enough to stat that slander is without a recital.* This, therefore, prove that counts in case, begin as well with, as without on and as it is now after verdict, *against the peace* must b rejected as surplussage, and then the declaration is plain ly case. The contradiction in the verdict can be sup ported only by the court's intending that all the count are for the same trespass, but no intendment is ever made to overturn a verdict.

*The researches of the reporter have not led him to any precedent which will warrant this position.

Benson in reply. The counsel for the plaintiff contend that the declaration is right. That it is either case or tres pass: if not good as one, then good as the other. But surely they ought to elect, in what suit they will proceed; whether in trespass or in case. If in trespass, the award is clearly a bar on their own position, as it was made in an action for a trespass: if in case, why conclude against the peace? A plaintiff may count as he pleases, but he can not say trespass is case, and case trespass. The suit must be one or the other, and cannot be both. Strike out all that relates to trespass, and then there never was such a declaration seen. If the action is for the consequences of burning and the injury, it is consequential reparation that is sought, and must be case. If it is for the actual burn ing, it must be trespass. It must be one or the other, and cannot be both, at the fancy and will of the plaintiff. He cannot bring trespass, and call it an action in the nature of a conspiracy. But if one thing is to be rejected in sub stance and terms, and another to be added from intend ment and supposition, a declaration may be made out of any thing. Trespass it cannot be, for the words in all the counts are conspiring and conspiracy: and case it cannot be, for they all begin and end in trespass. The authori ties from Kyd 207. and 2 Lord Ray. will, on reading,

against Mr. Colden's positions. The case stated
: offered to give in evidence the award, and to prove
: matters submitted were the same as those charged
trespass. This was overruled, the verdict there-
ust necessarily be set aside.

curiam, delivered by Livingston J. This was an
of trespass for burning the plaintiff 's barn.

award was not considered as a bar to the present
y the judge at the circuit, under whose direction,
effect, the jury found the defendants guilty, and we
r to say whether this direction was right or not.

ıe award was certain and final, it was a bar, and
have been so received. To me it appears to pos-
th of these properties.

arbitrators were to determine—

Whether the Delavans had destroyed the plaintiff's
tc.

What retribution was to be made him for such de-
ın. If they thought the Delavans innocent, then
:re further to decide how they were to get rid of
intiffs claim, and be reimbursed for the expence
ıt had occasioned them. All these matters were
within the submission.

ıe duties might be performed either in terms, by
ıg a certain sum to be paid by a fixed time, and
ıg releases to be mutually exacted, or by a mode
ession, which, although not so explicit, could con-
other meaning. When they order the suit to be
ıer prosecuted, and Purdy to pay the costs of it,
expence of the arbitration, they hold a language
cannot be misunderstood. If that suit can be no
prosecuted, will it be right to permit the plaintiff
le a decision made by judges of his own choice,
mencing another action for the same injury? Will
ırt permit to be done indirectly what they have or-
hall not be done directly? Awards are more libe-
terpreted than formerly. This relaxation is carri-
ıch length, and very properly, that it is sufficient
are certain, according to a common intent, and

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consistent with fair presumption. It is matter of surprise, that courts should ever have disturbed awards, when from the whole of them it was fairly to be collected, that the arbitrators proceeded on the matter submitted, and had decided every thing left to them. To an avidity of business, or an excessive jealousy of the interference of laymen, in matters which they deemed exclusively of their own province, must be imputed their readiness to listen to objections against decisions of this kind, and to set them aside under pretence of their being uncertain or inconclusive. More enlarged views at length prevailed, and judges discovered a laudable solicitude to maintain these extra judicial determinations, and thus put an end to controversies, if this could be done without violating certain fundamental rules, from which it was thought unsafe to depart. If certain to a common intent, and final, courts will not easily be induced to depart from them, and send the parties to a new litigation. That the award before us has these characteristics, can hardly be doubted. Whoever runs, may read and understand. It expressly states that the arbitrators proceeded on the matter submitted, and if their directions, which are intelligible to any capacity, are pursued with good faith, their decision will be final, as well as certain; for, nothing more is necessary to render them so, than the plaintiff's not prosecuting further his suit or action, by which may be understood, his claim on this account, and paying the sum mentioned. The cases in 1. Burr. 274. and in Lord Raymond. 960. admitted of more doubt, and yet those awards were adjudged certain and final. In my opinion, therefore, this award ought to have been regarded as a bar, and the jury should have been directed accordingly. On this ground, I am for a new trial, which renders it unnecessary to examine whether the verdict be contradictory or not. There was also a motion in arrest of judgment, but if a new trial be granted, and the present verdict set aside, this application cannot prevail, and therefore it may be unnecessary to express an opinion on the grounds of it: but as this question was fully argued,

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possibly come before us again, I am ready to say
new trial had not been granted, I should not
n for arresting the judgment. Trespass, in my
is the proper remedy for a direct and immediate
this kind, and the present resembles that species
more than any other. It is true, it is somewhat
ıe common form, and that some expressions are
, it not appertaining to actions of trespass, and
ve it the appearance of an action for a conspiracy.
verdict, I should reject these expressions as sur-
, rather than cause judgment to be arrested.

J. I coincide in the opinion given, but shall state
ns a little more at large. The defendants' mo-
r a new trial, and in this application is united a
ı arrest of judgment. I shall consider only the
l in this the great question is, whether the award
have been received in evidence, as a bar to the
uit. If the award in question be good and valid, Kyd on Awards, 243.
ınce of the submission, it may undoubtedly be
pleaded in evidence; as this suit is for the same
which was the subject of the submission.

ls are to be liberally construed, because they are 1 Burr. 277. 2 Wils. 208.
judges of the parties' own choosing. But they
e two properties. They must be *certain*, and *final*.
ainty, however, is judged of only according to
intent; consistent with fair and probable pre-
. In the present case, the bonds of submission
hat the plaintiff's barn had been burnt, and that
ıstituted a suit against the defendants, and the
ıe of them, for burning the same, which charge
denied; that the parties had agreed to discon-
suit, and submit all questions and controversies
the destruction of the barn, and the damages,
rbitrators. The awards stated, that a certain
ɔeen commenced, as aforesaid, for burning the
that, for putting an end to the suit, the parties
heir bonds as aforesaid, submitted to the award
determination of the arbitrators. That the arbi-
aking upon themselves the burthen of the sub-

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mission, and having fully examined, and duly considered the proofs and allegations of the parties, did award, *that the said suit should be no further prosecuted*, and that the plaintiff should pay to one of the defendants, 14 dollars 68 cents, for his costs and expences in defending the suit, and attending the arbitration.

On this statement of the substance of the submission and award, it appears to me, that the reasonable and common intendment, from the language of the award is, a determination of the *merits* of the cause. The present cause of action was fully and explicitly submitted. The award refers to the bonds of submission, and, of course, the arbitrators had their eyes fixed on the merits of the complaint, and the *intent* of the submission. The award states, that the proofs and allegations of the parties had been examined and considered; of course, the merits must have been fully heard. It then adjudged, *that the said suit shall be no further prosecuted*, and that the plaintiff shall pay the costs. This award could not have intended merely a cessation of the suit referred to in the bond and award, with liberty to institute a fresh suit on the same matter. This would have rendered the award altogether useless and absurd. The bonds had stated already, that the parties had agreed to discontinue the suit. The palpable intent and meaning of the award was, that the *charge* of the plaintiff was not supported, and that the same should be no further prosecuted, and should for ever cease. We are to consider the award as drawn up by men who were not skilled in technical language, and that it refers to, and is bottomed upon the bonds of submission, which had declared the agreement of the parties to be, that the then existing suit should be no further prosecuted; that the parties, by their proofs and allegations, must have furnished the arbitrators, with a full discussion and knowledge of the merits of their controversy; that the law requires awards to be liberally and favorably expounded, so that they may answer the purpose for which they were intended; and under these considerations, we cannot doubt of the intent of these words, "*that the said suit*

o further prosecuted." It was as if they had said, fendant shall be no further prosecuted upon the e; for, why say the existing suit should be no fur- rosecuted, if no more was meant than what the par- id already agreed to do? why say that the suit shall further prosecuted, and the plaintiff pay the costs, w suit may be immediately brought? There was sible use in such an award. It would not answer ms or intent of the submission. Such a *literal* in- tation has no reason to support it. It would not be or favorable. It would not be judging the award mmon intent, nor rendering it consistent with pro- presumption. It would be contrary to the modern shed rules of interpretation, and is, consequently, ejected.

as indeed been held, that an award, declaring that a should be *nonsuited* in an action he had brought t the other, was not good, because it was not put- *final* end to the controversy, as a nonsuit was no a new action. Upon this case, it has been observed, id this been a new point, and res integra, it might een said, in analogy to the construction put on other that he who suffered a nonsuit, but afterwards it another action, *nominally* performed the award, *substance* was guilty of a breach. The word non- as, however, become so peculiarly appropriated, to s one particular idea, that its meaning cannot be ex- . But if an award be, that an action be *discontinued*, held to be good and final, although a discontinuance ot, in a technical sense, bind a party from bringing suit. This is a case strongly bearing upon the pre- for, awarding that a suit shall be no further prose- is equivalent, at least, in strength and efficacy, to that such suit shall be discontinued.

Kyd 140, 1. 6 Mod. 232.

Kyd 141, 2.

an award that a suit in chancery between the parties *be dismissed*, was good and final; for, it must be stood that it shall be dismissed and cease forever; a substantial dismission and cesser, and not the of one.

Knight v. Burton, 6 Mod. 232. 1 Salk. 75. & C.

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So, an award that *all suits between the parties shal* is good; for the meaning is not that the party shoul over and begin again, but that the suit should ce solutely forever, so that the right itself is gone wi remedy. The same construction was given to these in an award, that all suits *which are prosecuted* l plaintiff against the defendant, shall cease.

Squire v. Grevell, 6 Mod. 34, 1 Salk. 74, 2 L. Ray. 691. Stangford, v. Green, 2 Mod. 228. See also, Cro. Jac. 525.

The only authority I have met with, which hold contrary interpretation, is that of Tipping v. Smith 1024. There it was held, that an award that all m of proceedings, if any, depending at law, should further prosecuted, was not good, because not final. is a very short and imperfectly reported case, a against the general current of authorities I have a to. Considering, therefore, the benignity with awards are of late expounded, and the sense and of the one construction, in preference to the other, not permit it to have any influence upon the other sions. The cases appear to me, therefore, to be incidence with the reason of the thing, and to requ interpretation I have given to the award; that, acc to a common intent, the design and operation of final cesser of the controversy submitted. Ther ground for a distinction, that an award which shal suit shall be *discontinued*, or *dismissed*, or *shall c* good, and an award which shall say a *suit shall not ther prosecuted* is not good. The force and effect expressions are the same.

But it was objected at the argument, that the awa not of the matter submitted. This, however, is take. Both the bond and award state, that a suit ha instituted for burning the barn, and the bond state for putting an end to all questions and controversi cerning that charge, the submission was made. T an end finally to the suit concerning the barn, was p an end to the controversy. The award was, there I understand it, strictly concerning the premises.

2 Mod. 228. of the cases already referred to, the parties submit *controversies* between them to arbitrators, and the

, that *all suits* which were prosecuted by the one party inst the other, should cease, and it was held good. t may not be unnecessary to notice another rule appli- le to awards, which is, that they must be *mutual*, or give an advantage to one party, without an equivalent he other. But this mutuality is nothing more, than t the thing awarded to be done, should be a final dis- rge of all future claim by the party in whose favor the rd is made, against the other, *for the causes submitted*, n other words, that it shall be final. Thus in Baspole's the submission was general, of all matters and demands; the award was, that one party should pay to the other rtain sum in consideration of a debt long due, and for osts, and said no more. The award was held good; the one party received the money, and the other was harged from the debt, which was a sufficient recipro- ; So where a certain alledged trespass was submitted rbitrators, to arbitrate concerning the said trespass, and rs suits concerning the same, pending between the par- , and the award was, that the defendants should pay a tain sum and certain costs in and about the suit arising; as objected, that the award was on one side only, for it cted nothing as to the other party, there being no relea- awarded, nor words of satisfaction used: but the award , upon demurrer, held good, and therefore it may now afely laid down in the words of Mr. Kyd, that an award d not contain any equivalent terms; for a discharge to other party must necessarily be presumed from the pay- t of the sum, or the performance of the act. As I hold award to be good, it goes to the determination of this e, and it will be unnecessary for me to consider the r point that was raised at the argument. I according- nclude, that the evidence offered ought to have been ived, and considered as a full and effectual bar to the nt suit, and that the verdict ought to be set aside for direction, and a new trial awarded, with costs to abide event.

Kyd, 148.

8 Co. 97. b.

Com. Rep. 328.

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Lewis, C. J. This is, substantially, an action by the ntiff against the defendants for consuming by fire, his

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barn, together with its contents. The declaration cont seven counts. The first, charging that the plaintiff b seized and possessed of a certain close and barn, contai certain quantities of hay, grain, &c. the defendants, conspiring, *did cause* and procure the said barn, &c. t set on fire, consumed, and destroyed. The second v ant from the first, in charging, that the defendants *did spire* and agree to set fire to, and *did cause and proc* &c. and that the said barn, with its contents, was set on and consumed in consequence thereof. The 3d, 4th, and 6th counts do not vary essentially from the first second. The seventh and last count, charges *the defe ants* with a conspiracy and agreement to set on fire, &c. an actual burning and destroying *by them*, in conseque thereof.

To this declaration, the defendants pleaded the gen issue, and gave notice, that on the trial, they would giv evidence, in their discharge, a certain arbitrement, award between them and the plaintiff, on the subject m ter of the present suit, and a performance on the part of plaintiff.

On the trial, at nisi prius, the submission and award w read in evidence, but the judge, not supposing it suffici to bar the plaintiff's action, so directed the jury, and t found a verdict for him.

To avoid the effect of this verdict, two motions are n before the court. The one for a new trial, the other in rest of judgment.

In support of the first, it is contended, that the award conclusive between the parties, and that the jury ought have been so instructed.

The bond of submission states, that the plaintiff commenced a suit in trespass against the said Mathew lavan, Samuel, his son (who appears to be an infant) Hannah, the wife of the said Mathew, for breaking entering his close, burning his barn, &c. that the parti viz. the plaintiff and Mathew, had mutually agreed to continue the said suit, and to submit all questions, diff and controversies, touching the destruction of the said ba

and the contents thereof, and the damages the said Ebenezer had sustained, to the judgment and award of three arbitrators.

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These arbitrators in their award, after reciting the pendence of the said suit, and the submission of the parties for putting an end thereto, award that "*the said suit shall be no further prosecuted*, and that the plaintiff shall pay to the defendant Mathew, $14, 68 cents in full for costs and all expences."

Awards are, at the present day, construed with much greater liberality than formerly; and from a current of authorities, it appears to be now held that *an award that a suit shall cease*, or *be no further prosecuted*, not only arrests such suit, but also takes away the right of action on which such suit was founded. 1 Salk. 74, 75. Ray. 961. 6 Mod. 33.

But though this be the effect, it is necessary that such award have the essentials to a good one. It must, in some cases, be mutual, in every case certain, and final between the parties. It must be also on the matter submitted. The award before us, appears to me to want many of these essentials. It is one in which mutuality is essential, and hath not been regarded. It is not final, nor on the matter submitted. Nothing is awarded to be performed on the part of Mathew Delavan. Not even to give a receipt in full on payment of the $14, 68 cents. Nor are his hands, nor those of his son, tied up from bringing a suit, or suits against Purdy for any injury sustained, by the charge made against them, or for the suit brought against them beyond costs and actual expences. The then pending suit was no part of the submission. It is expressly stated in the bond, that *that* was, by previous agreement between the parties, to be discontinued.

I therefore think, the direction to the jury was right, and that the motion for a new trial must be denied.

In support of the motion in arrest of judgment, two points are advanced.

1. That the finding of the jury is repugnant and contradictory. This was also made a ground on which the motion for a new trial was founded.

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2. That the plaintiff has misconceived his action, and perhaps, blended actions of different species.

If all the counts in a declaration, are to be considered as constituent parts of one cause of action, there would be some foundation for the first position; though, even in that case, I should doubt its vitiating the verdict. For the meaning of the jury is, that the defendants did cause the barn to be burnt by conspiracy, but did not do it with their own hands; and it is not to be expected of them, that they shall be acquainted with principles or maxims of law. But a conclusive answer is, that the counts of a declaration are wholly unconnected, each being considered as a distinct declaration, and if a jury give a verdict on a single count, where there are several, without noticing the others, it will be good, provided they find all that is in issue on that count.

Bac. 296. 8

The only remaining questions are, whether the plaintiff has misconceived his action, or has blended distinct species of actions.

On the argument, the counsel for the plaintiff were unwilling to say whether they considered their suit in trespass or in case. The last count is in trespass beyond doubt; and I think there is not much doubt that the other six are equally so, and that the conspiracy is mere matter of inducement, or perhaps surplussage. They have two of the characteristics of trespass. The charges are *direct* without recital, and the injury complained of is stated with a *contra pacem*. It only remains then, to enquire whether this action will lie, or whether case is the appropriate remedy. Where the action is founded on tort, the boundary between case and trespass is faintly delineated, and not easily discerned. The most marked distinction is, where the injury is *immediate*, and where it is *consequential*. There are also others (which will not, however, apply to all cases) as where it is accompanied with force, and where it is not; where it is done on the immediate possesion of the plaintiff, and where done elsewhere, though it damage such possession. In the case before us, the injury, if any, was accompanied with force

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ne on the possession of the plaintiff, and must accompanied with an unlawful entry. It was ; for whether done by the defendants, or by urement, they are equally principals, and the qui facit per alium, facit per se, will apply to or will it, in my opinion, vary the case, though *acy*, and not the *burning*, should be considered he action. For, in that case, the burning must red as introduced under a per quod, which, the h of the six counts will warrant.

ot been able to meet with any authority which , that trespass will not lie for a conspiracy to respass, where an actual trespass is the conse- differs materially from the case of a conspira- a person to be indicted or arrested; for there ntion of an intermediate agent, who cannot be in the guilt, is essential to the injury. Here ediate agent, if any is resorted to, is the mere in the hand of the principal, and the injury is ly his own.

t puts this question at rest, in my opinion, is, verdict, the court never will, in a case where so nicely drawn, enquire whether the facts will spass or case. Such was the decision in Sla- r and Stapleton, recognized in Scott v. Shep- Justice Blackstone, who, while he differed in m his brethren, declared, that after verdict, rill not look with eagle-eyes, to spy out a va-

2 Wils. 359.

2 Black. Rep. 897.

refore of opinion, the plaintiff ought to have ccording to his verdict.

yle *against* Isaac Clason, and Isaac Cla- n *against* Robert and John Lyle.

If cross suits be referred to the same referees, and they make up their report in each, under the idea that one shall be a set off to the other, the court

were cross suits, brought under the following ces:

irst of September, 1793, Robert Lyle engaged n to go to Europe as his agent, and transact s at a salary of £150 per annum, New-York

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currency, besides his expences. In consequence of th arrangement, Robert Lyle embarked on board a vessel c Clason's, called the Hare, destined to Hamburgh, with a cargo of sugar and coffee. In an account made out by Robert Lyle against Clason, he charges his salary for six months at £42 3 4, ending in March 1794. No evidence appeared that Clason either then, or at any after time, discharged Lyle from his service; and in an account rendered by him to Robert Lyle, he gives Lyle credit for one year's salary at the above rate.

will set aside both, if the suits be for demands, which cannot legally be set off. An agent's agreement to give part of the profits arising from merchandize entrusted to him, in order to sell under the contract of another person, is obligatory on his principal.

In March 1794, at which time John Lyle was employed in the Loan-Office of the United States, Robert was in Paris, and while there, entered into a contract with the French government, ostensibly in his own name, but in fact, for the house, and through the influence of Delard, Swan & Co. of Paris, for the delivery of from ten to fifteen hundred tons of pot and pearl-ashes, *in any port of France*, at £53 sterling per ton, (payable as soon as delivered) two-fifths in bills on Hamburgh, and three-fifths in Louis d'ors, with a licence of exportation for the specie.

On the nineteenth of the same month, Robert Lyle wrote to Clason an account of the contract, urging him to embark in it, and inclosing a more particular letter from Swan, offering Clason an interest in the contract, by the terms of which the profits were to be thus divided: one-third to Delard, Swan & Co. and two-thirds to Clason, giving to Lyle for the use of his name, a fifth of the whole; one-third of which, was to be paid by Delard, Swan & Co. the remaining two-thirds by Clason. Robert Lyle, in his letter, cautions Clason against being too explicit in what he may write, for fear of capture, and advises him to let the language he might use, accord with the appearance the business might be obliged to assume.

In consequence of this letter, and without any other information of the contract, than what the letter of Robert Lyle contained, Clason, in July 1794, dispatched to France, under the command of one Gideon Gardner, a vessel named the Joseph, laden with pot and pearl-ashes,

; to Gardner at the same time, the following letter of
ctions :

apt. Gideon Gardner,

" New-York, 26th July, 1794.

Dear Sir,

ou will please to take charge of the ship Joseph, proceed as fast as possible to France. I shall not ine you to *any one port*, but by all means endeavor t into *any port, the first that you can make*, which, ou are fortunate enough in arriving safe, you will ediately apply to one of our American Consuls for uctions, respecting the customs of the place, and : make sale of your cargo to the best advantage for account; *perhaps you will be able to make a sale of whole to the Republic of France*, at a good profit, by g part in brandy; which, if so, and the brandy ld appear to you of a good quality, and at such a as you might judge would answer to bring here, will do it; if not, you will endeavour to sell for and if times should appear favorable in England, will remit the greater part of your avails to Messrs. , Savage & Bird, merchants in London; and if you find freight from France, or any other article that nswer, you may run to any port in England, and r load there with salt, or get freight, whichsoever nay judge will be most to my interest. However, mpossible for me to give you any positive instruc- , from the precariousness of the times; much will ad on your good judgment on your arrival. I *likely you may see or hear from Robert Lyle, if so, ll give you very essential assistance in your negocia- your business in that country.*

" I am, Sir, &c.

" (Signed) ISAAC CLASON."

lner set sail with the Joseph, and, on the 4th Sep- , 1794, arrived at Cherbourg. From thence, he ed himself to Delard, Swan, and Co. and on the October, 1794, wrote them thus:

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" Cherbourg, 9th October, 17

" Messrs. Delard, Swan, and Co.

" Gentlemen,

" I received yours this morning, of the 15th V
" maire. I wrote you yesterday, and inclosed yo
" ceipt from the garde Magazin for my cargo. Th
" of my cargo I sent you in my letter, yours now
" tions of receiving; but, agreeable to your request
" have it here inclosed. The pot and pearl ashes, a
" invoice, cost £12,012 3 0 £12,01

" One barrel ashes delivered more than
" the invoice, which I received as a bar-
" rel of beef, average 350 wt. at 46s.

" New-York currency, £12,02

" Charges here—paid charterage, 1000

" Do. weighing, 25

1,02

" I know of no other charges here; if any to be p
" the commission of commerce, you will please to c
" them in the account. If you recollect, you to
" the foots of the invoice, when I was at Paris, o
" letter I left with you. The letter I wrote you abo
" owner you mention of having found it, and say
" inclosed in yours I received this morning, but
" pect you omitted it, as it has not come to hand. I
" to forward it as soon as possible, as it may
" some alteration in my affairs. You mention of t
" certainty of receiving cash or bills for any articl
" America. I would thank you, in your last to
" mention whether WE may place full confidence in
" paying me in good bills, or cash, AGREEABLE T
" CONTRACT FOR THE QUANTITY OF ASHES SPECIFI
" THAT WAS MY PARTICULAR ORDERS FROM MR. C
" You have once mentioned it, but your two last
" leave it doubtful in my mind. I would thank y
" acquaint Mr. Lyle of my proceedings as soon
" bills are obtained. I am only waiting for the bill
" beg you to make all dispatch in your power, an
" yours. (Signed) GIDEON GARDNE

the seventh of December following, Gardner added a letter to Lyle in these terms:

" Cherbourg, 7th December, 1794.

" Dear Sir,

I received yours of 15th November. I arrived here 1 September, and *proceeded to Paris and delivered the rgo* ON THE CONTRACT OF 53; *and as Mr. C. was in vance for the whole, I arranged it for D. S. to have e third, agreeable to the account annexed.* THEY ARE O SETTLE WITH YOU FOR ONE-THIRD OF WHAT YOU RE ENTITLED TO, AND MR. C. TO SETTLE WITH YOU WO-THIRDS, after delivering the cargo, and the receipt resented for payment. There was a suspension of all ayments in bills or money. I returned to Paris, and, ter a long and tedious detention, I obtained bills on lamburgh, *though not at the rate agreed for.* They e at 90 days, and the exchange 185 livres for 100 arks banco; which bills I forwarded by post, to Lu-rt and Dumas, who, I understood, did your business ere. I was fearful you were in England by what I d heard, or I would have sent them to you. My or-rs to them were, to negotiate the bills, and remit the oney to B. S. & B. London, on Mr. C's. account, ex-pt there should be an appearance of war. In that case ey are to consult you. (*I was cautioned by Mr. C. in pect to that.*) I presented a petition for demurrage, &c. the amount of £250 sterl. which has passed 2 or 3 offi-, which I wish you to press hard for. I sent two bills different posts, and wrote you. I have two-thirds of a go of prize salt on freight; about £400 sterl. freight s almost half on board, and am taking in the rest; ll sail in a few days for New-York, and expect to re-n as fast as possible *with the remainder of the contract.* an is gone to America. Mr. C. shipped by Captain Armour about two hundred tons—Major Conolly is supercargo. They have sold to individuals for spe-. I have wrote B. S. & B. since I sent the bills, and o informed them of this other cargo.

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Account of my Cargo.

To the cost in America, as per invoice,	12,020	4	0
Insurance, 5 per cent.	601	0	2
	12,621	4	2
Interest on do. from 1st July, to 1st December, at 6 per cent.	315	10	7
My Commission,	1,000		
Freight, 1,200 Sterling,	2,133	6	8
New-York Currency,	16,070	1	5
Is, Sterling,	9,039	8	4
3,200 7 10			
1,600 3 10	4,800	11	8
	13,840		

Paper Money expences on the Cargo, was 2,795 livres, 2-3 1-3.

By Sales

Of Two Hundred and Sixty-one Tons and 286 lb. at 53 pounds per cwt. 13,840

The amount of Bills I remitted is, M. Banco, 158 786 10

To this, Delard & Co. added, "Approved this account; the assignats to be settled at ten, and Clason obliged to satisfy Lyle for two-thirds of his commission, or gratification."

(Signed)

D. S. & Co."

In the month of March 1801, Robert Lyle arrived in New-York. Clason refusing to pay the two-thirds of the fifth of the emoluments arising from the contract with the French Republic, in April 1801, Robert brought the present action against him. Shortly after which, Clason arrested Robert & John Lyle in the cross suit, for a very considerable sum of money.

In December 1801, both causes were, by order of court, referred.

On the 10th March following, the attorney for Robert Lyle submitted the following proposition to the attorney of Clason.

"As the suit instituted by Mr. Clason against Mr. "Lyle, does not include any claim for damages, arising "from the misconduct of the latter, and more particu- "larly, for damages like those claimed on the business of "the Hare, it would be proper (lest these should be made "the subject of a future suit, on the part of Mr. Clason, "on the ground of an objection to the report on the part "of Mr. Lyle) that all claims and controversies of this "nature, be included in the submission already made, "which, in a legal point of view, extends only to the sub- "ject matter in difference, in the particular suits referred. (Signed) THOS. L. OGDEN, for Lyle.

this the attorney of Clason, subjoined the follow-
emorandum:
t is understood that the demands for damages above
ntioned, and all claims and demands on both sides,
nded on contract, express or implied, are submit-
." To this addition, the attornies of both parties
l their signatures, and the consent of the litigants
ielves were given in these words, "We agree to the
ve, and that all the accounts, *as already exhibited*,
ll be reported on by the referees in these causes.

"(Signed) I. CLASON,
"ROBT. LYLE"

the 30th December, the deposition of Gardner
aken in behalf of Clason; in which, among other
, Gardner swore that his letter of instructions con-
l the *only orders* he had from Clason; that *Delard*
informed him of *their* contract with the French go-
ient, and he contracted with them; that *they* in-
d him the contract was in Lyle's name, he being a
r; that *they* informed him Lyle was to have a *grati-
n*, but what it was, he, Gardner, *never knew*; think-
nd being fully assured in his own mind, that it would
to the benefit of Clason, Lyle being his salaried
, which consideration induced him, Gardner, to con-
o Clason's being accountable to Lyle for two-thirds
said gratification, which he expected would be paid
: salary at which Lyle was retained.

the 22d of June, the referees made their report in
causes, and in each, reported in favor of the de-
nts.

the 20th of July, the report in the cross suit by
n, was, on motion in court, duly confirmed. Im-
tely after which, on the 23d of the same month,
rt Lyle, in order to set aside the report in favor of
n, made an affidavit, which stated, that the suit
uted by him in April 1801, was to recover money
nd received by Clason to the deponent's use; that
s referred, and at the meeting of the referees, the
nent, as the basis of his claim, did prove, and make

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appear, &c. (mentioning the contract and circumstances and letters detailed in the beginning of the case) that the net profits on the sales made by Gardner under the contract, were £4,800 11 8 sterling; that the fifth, to which the deponent was entitled, in pursuance of the engagement made with him, was £960 2 4, of which, by an origin account of Delard, Swan & Co. produced to the referees it was proved: Delard, Swan & Co. had paid their one third, according to the agreement with Gardner; but no payment was shewn, or pretended to have been made of the other two-thirds of the fifth, nor was there before the referees, any set off, or counter claim established against the defendant; that the deposition of Gardner (before shortly stated) was shewn to the referees, and Gardner himself personally examined: that he *then* testified *he was previously to his departure from America*, with the said cargo, per the ship called the Joseph, *made acquainted with the existence of the said contract*, BY THE DEFENDANT, *and with the terms or price therein stipulated;* that he did not consider himself bound by the instructions of *the defendant, to deliver his cargo under the contract*, nor restricted from doing so, but at liberty to act according to his discretion; that his motives for enquiring from Delard and Co. respecting the reliance to be placed on punctual payment, and also for alleging this to be done at the desire of the defendant, was to hold out the idea of future shipments, and *so* insure the payment of what had been delivered, but not settled for; that it was made to appear without any denial, that the defendant had only received his two-thirds of the profit on the contract aforesaid: that the report had, notwithstanding been made in favor of the defendant, under an idea that Gardner had no authority to bind Clason to the payment of any thing to the deponent, and that Clason had altered the deposition of Gardner after it was made, and before presented to the referees without communicating the alteration to them. On the 6th of October, 1802, Clason made an affidavit to vacate the report in favor of the Lyles, in which he set forth the instituting the two suits, their being referred; the report

in favor of the respective defendants, and that they duly filed, on the first day of July term last past, so udgment would, according to the usual course of the , be absolute, the then term; that the reports, ac- ng to his information and belief, were drawn up by ment between the counsel in both suits, that each should the report in favor of his own client; that the depo- attorney was, on the 23d of July last, served with a of an affidavit, accompanied with a notice of moving it to set aside the report in favor of the deponent; e matters contained in the affidavit, went to the mer- the case, respecting which, on account of sickness deponent's family, and absence from New-York, the ent could not make any explanations to his counsel; acquiesced in the report against himself, from a con- nothing could be obtained from Lyle, and therefore ort could operate more favorably to the interest of fendant; that the known inability of Lyle to pay, e reason why the referees were less particular in ex- g the deponent's claims against him, than they other- ould have been, deeming it unimportant; that the ports were made, and intended by the referees *as set- one against the other*, and to this end, they instruct- sel to prepare them accordingly; that, among other s against Lyle, the deponent gave in evidence, an t rendered by Lyle, in which he acknowledged hav- his hands a balance of 244,246 livres in assignats, ting, at the then rate of exchange, to $4,477, and signats were then never kept on hand, but always ted into property, to avoid depreciation; that since ount so rendered, the deponent never had any fur- ney or mercantile transactions with the Lyles, and le neither accounted for, nor made any set-off a- the said assignats, but the same were totally unac- d for; that the deponent, as soon as the sickness of ily permitted, consulted respecting measures to be bout opposing the motion, to set aside the report in r, but there was not time enough left in the term to that but for the application of Lyle to set aside the

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report in favor of the defendant, he should never have applied to set aside that in favor of Lyle, for the insolvency of Lyle made it of no consequence.

The notice of motion with which this affidavit was accompanied, was repeated on the 7th of January, 1803.

To oppose this, Robert Lyle made, on the 14th of January, 1803, an affidavit, stating, that he, and his brother John, the other defendant, acted, in the year 1795, as agents for Clason, in which capacity they had received various large sums of money, the whole of which had been faithfully accounted for; that the suit against Clason was for money due individually to the defendant, on another concern, and for damages for libellous letters and slanders published against him by Clason; that he and his brother were arrested, as before mentioned, and the two causes referred; that in the suit against the deponent and his brother, (the declaration on which was for goods sold with the usual money counts only) Clason produced an account with charges, against the deponent and his brother, for breach of orders and neglect of duty, to a very large amount; that on asking for some evidence, by which it might appear, those charges were included in the submission, the agreement of the 10th March, 1802, was produced; that the same was intended merely to extend the powers of the referees to claims of the nature of those mentioned in, and warranted by, the declarations to which the deponent had confined himself; that his, and his brother's faithful agency, and due accounting for all sums of money, were fully proved; that in the cross-suit against the deponent and his brother, the referees made their report on a conviction nothing was due to Clason, and not from any regard to the deponent's insolvency or circumstances, as he was, by the referees themselves, personally informed; that the deponent proved, to the satisfaction of the referees, that the value of the assignats mentioned in Clason's affidavit, was, *at the time he specified*, only £278 2 9, and *not* [illegible]; that they were *not* then usually converted into property, but held by many persons in hopes of their rising, and that the said assignats *were not only not made use of by the*

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ent, or kept in his hands, BUT HAD, FROM THE TIME IEIR FIRST RECEPTION, BEEN PAID OVER BY HIM TO CORRESPONDENTS OF CLASON, LUBBERT, FRERES & OF BORDEAUX, BY WHOM THEY WERE CONVERTED SPECIE, FOR THE USE OF CLASON, AND ACCOUNTED VITH GARDNER, WHEN ACTING AS CLASON'S AGENT; so far from the acquiescence of Clason in the report st him, for the reasons he had assigned, he had, after made, purchased protested bills, on which the de- t's name was as an indorsor, and had commenced against the deponent upon them, in order, as he be- , to create a set-off against the verdict the deponent ultimately obtain.

er some struggle by Hamilton on the part of Lyle, criminate the two suits, the court was pleased to or- ie arguments to set aside the several reports to on together.

milton for Lyle. After stating the circumstances, ommenting on them, and the affidavits of Clason and ier, observed, that it was very singular Gardner, ut any knowledge of the contract of Delard, Swan . with the French Republic, or of Lyle's intent, l deliver exactly under that contract, and write a acknowledging the very interest Lyle claimed under d that Clason should pay him what he was thus en- to. Gardner, without knowing the contract, goes r; he asks Delard & Co. if the French government e punctual in paying, and *this*, he adds, Clason de- him to enquire about. Clason too, ratifies the en- ent of Delard & Co. and Gardner, with Lyle, by ing the account with Delard & Co. and receiving that account the two-thirds, by the very express of it, charged with the payment of the two-thirds le's fifth. To argue on the assertions of Gardner, be really superfluous. The referees must have ht Gardner had no right to bind Clason. This idea rly repugnant to every principle of law. He that ts another with general powers, must abide the re- f his agent's conduct. Therefore, though the re-

as a set-off to the other, and to effect this object, were desired to frame the reports in such a ma might best obtain the desired end. The various pear in the affidavits before the court; but it is ma state, that the party who first made the applicatio turb these reports, has not presented any origina ment, on which his suit is founded. Delard, Swa made a contract with the French government, fo tain quantity of pot and pearl-ashes: as these arti ter into the composition of gunpowder, it was n to have a neutral name in the business. It is dif say, what ought to be the true relative compensa the protection a neutral character would afford; to be observed, that Delard & Co. were the real c ors; Lyle a mere nominis umbra: for this, howe says he is to have one full fifth, one-third of paid by Delard, Swan & Co. the other two-thirds son. These terms, it is alleged, were stipulate formal contract, yet this contract, which Lyle mu had, is never produced; on the contrary, ins relying upon it, he rests on a letter received Gardner. In addition to the inference to be draw this fact, it appears, that at the very time when th tended contract was made, Lyle was in Europe.

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ient will induce them to do it in one of the now
s, will have equal force in the other; for if the re-
have been mistaken in their endeavors to create
l set-offs, both reports will be set aside; or, on the
hand, if they have acted properly, both will be con-
; for the court will not, unnecessarily, do away
he referees have done. In making their determi-
they considered that the power to sell, and the
to give away profits, were two things: to this lat-
cannot be contended, that the authority of an
r a factor can extend. There is no question about
it's right over the property passed to him, but he
enter into collateral engagements: he may sell and
t a title; but not give away the property. If he
n any degree, do this, he may go on indefinitely,
ke away with the whole. He may go on making
ts ruinous to his employer, and contrary to the
:s of his delegation. Under a power to sell, if he
be allowed even to exchange, can he be authorized
t difference? The boundary of his power to bind,
e connected with that of his authority to sell; it
: confined to that, and will not warrant him to give
rofits; to pay another sum of money on another
: than that of the sale. The point turns on whether
r had a competent authority to bind Clason, to
-thirds of a fifth of the profits. It was derived
e letter of instructions. That letter delegates only
al power. From the exercise of such a power, the
nnot be supported. That a factor may sell by a
and give a commission, if customary, is not con-
but it is contested, that a factor or agent, having
eneral authority to sell, can give away a substan-
t of the merchandize when it is sold; that he can
here is not a dictum in the books. It would be, in
nable him to dispose of a portion of the property he
ted to vend. It would give rise to the most se-
nsequences; a fraudulent collusion would com-
lestroy the interests of the principal, by enabling
[illegible] a sale regular in its form, the precise mode

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of which could not be easily foreseen. The intentio Clason's agent must be taken into consideration, and motives on which he proceeded, permitted to explain l he meant to bind his principal. Gardner never k what the gratification to be paid Lyle actually was. T inducement he had to consent to any, was, that he deen the amount immaterial; for as Lyle was in the service Clason, at a fixed salary, Gardner naturally conclu all Lyle's labour would accrue to Clason. On the prin ples of natural justice, the demand cannot be substan ted. He lends his name to Delard, it being necessary make use of a neuter. The douceur must certainly according to the situation of the party. The letter Clason, containing the terms of the contract, does state the sum to be paid. It is obvious, therefore, t this was never intended. It was considered as too t fling to specify.

Gardner knew, when he left America, that Lyle w a salaried agent. This is not a case of good faith betwe an agent, and a person totally a stranger, and therefo the principal called on to pay; but we are called upon, the strength of a little memorandum touched into the fo of an account. It is not to be forgotten that the refere were merchants, and well knew the course of trade a business, when the transactions took place, as well as t rights of an agent at a fixed annual allowance. The cla too, goes by the express name of a gratification; and w ever heard of a partnership share (which this in fact i er being known by the appellation of a gratificatio When was £600 sterling ever considered as a gratific tion for a person at a salary of £150 per annum, Ne York currency? The referees might, therefore, have ju ly ejected the claim. No inference can be drawn fro Gardner's letter, speaking of a contract: he might ha sailed on another. But it was not the mere matter of t contract that was referred; subsequent matters were ad ed, not included in the two causes: this was by agree ment of the parties, and how can the court say the fu claim on the contract has not been allowed, when it migh

have been counterbalanced by damages and misconduct in the matter of the Hare? This, therefore, being an application to the equitable jurisdiction of the court, they will so mould and blend the two causes as will but answer the ends of justice; and, if in the suit by Lyle, the report be set aside, the court will do it on terms, and vacate the report in that against him.

Clason declares he never heard what Lyle's compensation was, till after the suit was brought. But can the court say, this particular claim ought not to be disallowed? After the rules to refer, other matters were added and blended; all contracts, "*express or implied*," were submitted. It cannot be said, there were not other claims to extinguish this demand of two-thirds of the fifth. It might have been admitted, and liquidated by a counter claim. Referees and arbitrators may so consider the subject matter before them, as will best answer the ends of justice: they may take into view matters both of law and of fact; perform the offices of judges and jurors, and be entitled to found their decision either on law, or principles of general equity. The whole of this was delegated to them, and they have determined, on a view of all matters in controversy blended together in one mass, all the objects in these two causes, even in that against both the Lyles, as consolidated before them. Whether they have been perfectly accurate in thus beholding them, is immaterial, if they did so consider them, have acted under that idea, and have attained the real ends of justice, though perhaps by extraordinary means. It was evidently the wish of the parties, to set all controversies between them fully at rest, and this has been accomplished. The court, therefore, will never say, that one report shall be confirmed, and the other set aside. The consideration of the report in the suit *by* Clason, might have influenced the making up *that*, in the action against him. That it did so, is evident, because the reports were intended as mutual set-offs. Whether this could be supported on strict legal reasoning, had been doubted: but the spirit of

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the case in 8 D. & E.* might perhaps fully warrant conduct of the referees. It may be a question also, h far Gardner could give such an interest, as might, p haps, create a partnership between Lyle and Clason.

Harison and Hamilton in reply. If, in cases of full a fair investigation before juries, this court will interpos when a verdict has been rendered on an evident mista of the law, they certainly will do so in the case of a repo made by referees, however appointed. That this reaso ing applies to the suit of Lyle v. Clason is manifest, and will, therefore, be sent for further examination. With r spect to the contract made between Lyle, and Gardne the agent of Clason, it is for the court to determine whe ther it be obligatory or not. The affidavits on the part o Clason, do not state that he was ignorant of the contra with the French government, but of the claim of Lyle It appears from Lyle's deposition, and is not controverte that in March, 1794, letters were written by Lyle an Swan, informing Clason of the contract; of Lyle's right and that he (Clason) might share, if he thought proper The letters were produced, and that they were received Clason's conscience would not let him negative. Ther was a stipulation to compensate, with a share of the actu profits, for the use of the neutral name of Lyle; when thes profits were ascertained, the right of Lyle attached. Ther is, to be sure, no express recognition by Clason of the con tract, but in the Sept. following, the date of Lyle's letter Gardner arrives in France with exactly such a cargo as th contract demanded. Are there not circumstances enough to think he went there for the purpose of acting under it But even allowing there are not, does not the letter of in structions substitute Gardner as owner of the property b carried, and invest him with all Clason's power over it He is to exercise his judgment; do his best; sell fo French brandy; sell to the French government, &c.; h had therefore a right to make any contract under the word of the letter. He arrives in France with a power to dis pose; he finds Delard possessed of a contract, in the name of Lyle, under which, the power to dispose may be

* Glaister v. Hewer & ors. 8 D. & E. 69 is, it is presumed, the case alluded to; but it seems hardly to bear out the inference.

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sed with great advantage. He does exercise it, re- the emolument, settles with Delard & Co. but refu- do so with us. The inquiry then is, had Gardner a , and has he exercised it? That he had, and has, no can be entertained; and as little, that it was under ntract; for the affidavit subsequently made by Gard- oes not deny, but admits the fact. He says, how- hat he knew not what the gratification was: this is dinary: he seems to have forgotten his own letter very few months; and though *that* does not specify ct sum, the two-thirds for which he mentions Clason tle, it affords an internal evidence that he did know it, tronger than his own assertion to the contrary. Gard- tter of the 7th December, 1794, particularizes two- and gives an account of the sales. Allowing, how- Gardner not to be apprized of the exact sum, as Lyle's was ascertained and perfected under the contract h Gardner consented, acceding to the payment of rds by Clason, it follows Clason must be bound. le is, that he who places confidence, shall suffer by se of that confidence; Clason, therefore, and not is to be the loser by Gardner's actions. It is extra- y that Clason should have remained ignorant of the t of Lyle's claim, four years after Gardner's return dering an account of his transactions. If Gardner aving an authority to bind Clason, did so, and Cla- s received the benefit of that transaction, Lyle's s perfect. The assertion of his being a salaried does not affect the claim. His time of service ex- n September. Beyond that, Clason himself, allows ary, and Gardner's letter is dated in December. r himself acknowledges Lyle's right, by telling to pay one-third of it. Had it been otherwise, r would have said, you are not to pay the third of h to Lyle, but to Clason, for whose benefit Lyle is . There is a further proof in the letter to Lyle. r there says, "*Mr. Clason is to settle with you* for thirds." Here then is a clear established right in o receive from Clason, two-thirds of the fifth of the

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whole profits. If so, the arbitrators have been guilty mistake, in point of law, in considering Gardner u thorized to bind Clason, and this the court will assu set right. There is also another ground on which have clearly erred; for if they have blended the re in the two causes, or made one enter into the compos of the other, they are manifestly wrong. There is no dence of any thing against Lyle's right, but the dem in the cause against him and his brother. Though causes were referred, the referees have not any rig blend matter extraneous to the respective suits. R Lyle's action is for his own separate account. Th Clason against Robert and John Lyle, is against the nership, and the one cannot be set off against the o being in different rights. This is very wide from the of a surviving partner, where the rights and duties c in one person. The agreement does not alter this, was merely to allow of such matters as were admis against the same parties, though not specifically proce for; to settle all disputes for which actions might be tuted against the respective defendants; to allow o mages arising from breach of contracts, express or imp by the Lyles, to be settled under the reference of the against them, in which counts were used not applicab actions for damages, but never to permit one suit to b off against the other, or make Robert Lyle give up th nefit of his claim against Clason. They did not even it into consideration, as they considered it not due; th port, therefore, in favor of Robert and John Lyle, well be suffered to remain, and that in favor of Clas set aside; for the amount of the profits claimed from not being taken into consideration in the accounts by referees, now remain unsettled. If, therefore, witho cluding this demand, Clason has not any demand a Robert and John Lyle, the report does not prevent R from having a demand against Clason. Besides, it dent the contract must have been known to Clason Gardner, by the latter's expressing an intention of re ing with the residue. The not mentioning it in the

tructions, was to avoid the risk of capture and con-
ation; fates that were sure to attend a cargo of a con-
id nature, going under an avowed contract with the
h government. The receipt by Clason, of the pro-
of the cargo, is a ratification of every contract under
it was made, and no disavowal of Gardner's authori-
be permitted. Clason enjoys the benefit, and if any
s do accompany the agreement, it is to be taken
nere. The allowance of the account by Delard,
& Co. is conclusive on the terms.

ris, C. J. delivered the judgment of the court.

ese actions were referred under rules of court to
referees, who have reported in each against the re-
ve plaintiffs, declaring nothing due on either side.
ns are now made to set aside the several awards.

he first cause, in which Lyle is plaintiff, the appli-
is founded on a presumption that the referees have
nistaken in point of law. That they have either
d a contract entered into by the defendant's ship-
r and consignee, as not obligatory on his principal,
e set off the balances found for the plaintiffs, in the
tive causes against each other.

this the defendant answers, that he was not bound
engagement of his ship-master, who was also his
nee, and that if the referees have made such off-
ey were justified on principles of law, and by an
nent entered into between the respective attornies.
far as the facts can be collected from affidavits and
ients furnished the court, they are these: That the
being engaged in busines in France, were charged
ome commercial concerns of Clason, on which he
a balance of account, and on which they deny any
o be due. That Robert Lyle, while in France, was
ged by the house of Delard, Swan & Co. there es-
ed in business to negotiate a contract, for the sup-
certain quantities of pot and pearl-ashes to the
h government, which he effected, and for which they
o allow him one-fifth of the profits. That the Com-
as well as Robert Lyle, wrote to Mr. Clason in

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March 1794, acquainting him with their contract, proposing to him to make shipments thereon. That September, a vessel called the Joseph, belonging to t plaintiff, arrived in France loaded with ashes, consign to Gideon Gardner, the master, who had general instru tions to sell to the government, or to individuals, at h election. That Gardner, after making enquiries as to th government's punctuality, agrees with Delard, Swan Co. to turn in his cargo under their contract, which is a cordingly done, and neats a profit of £6,800 11 8 sterling whereof Clason received two-thirds in consideration his having made the advances, and the house of Delar Swan & Co. one-third. On the adjustment of this a count, it appears that the Company and Clason were t account to Robert Lyle for his one-fifth, according to th proportions of profits by them respectively received.

Captain Gardner's powers being discretionary, he wa perfectly justifiable in making the disposition he did of th cargo entrusted to him, and even if he was not, it doe not appear that Mr. Clason ever denied that transactio his sanction, but that on the contrary, he has received b remittances to Bird, Savage & Bird, of London, the pro ceeds of the cargo, including his proportion of the pro fits. Under these circumstances, there can be no doub that Captain Gardner, having turned in his cargo unde the contract, bound Mr. Clason to the fulfilment of th terms of that contract; and the latter, having received the full two-thirds of the profits of the adventure, unde the stipulation made by his agent, that he should accoun to Lyle for two-thirds of his *douceur*, or whatever else may be called, (for names will not alter the essential qua lity of the thing) he is bound to perform such stipulation

If, therefore, the referees have not admitted this claim they have erred as to the law, and the award ought to be set aside.

If, on the contrary, they have admitted it, then they must have allowed a balance found due to Clason in the other suit, as a set-off against it. This also, is incorrect for the suits are not between the same parties, and the

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ship funds should have been first appropriated to charge of the partnership debts. The agreement the attornies, does not authorize such set-off. object, is the admission of certain demands which not fall within any of the counts in the respective ions, in order to avoid further litigation. award therefore, in each suit, ought, in my opi- be set aside. The one against Clason, for the above-mentioned, and the one in which he is ; because there is a probability that the referees balance there due to him, which he would other- e the benefit of. The judgment of the court is, h awards be set aside.

M. Brett and John Bunn *against* Mathew Hood.

plaintiffs had in the last term recovered a verdict the defendant, who on making a case, had obtain- usual certificate to stay proceedings; to set aside the plaintiffs gave notice of a motion, but not at- to argue it,

s for the defendant, on the last day of term, ap- r costs, which the court was pleased to order. . It was during this term intimated by the bench, y would not hear any argument to set aside a certificate to stay proceedings on a case made.

If a plaintiff give notice of motion to set aside a judge's certificate to stay proceedings, and do not attend to argue, the defendant will be allowed costs. In no case will the court hear an argument to set aside a judge's certificate to stay proceedings on a case made ut semb.

Rathbone *against* Blackford.

service of a notice in this cause, was stated in avit to have been on a person in the office of the

uriam. It is not sufficient. There does not ap- be any relation between the party served and the . The notice might have been given to a mere . A connexion ought therefore to have been so that the court migh be convinced of a privity i the party to whom the notice is delivered, and rney on whom it is meant to take effect.*

An affidavit of service on a person, in an attorney's office, must shew that there is a relation between him and the person served.

* See Ante 73.

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Parkman v. Sherman.

Parkman *against* Sherman.

IN this cause the court determined, that when both
tice and affidavit are wrong titled by reversing the par
and putting the defendant in the place of the plaintiff,
error is fatal; and this case was distinguished from t
of Ryers against Hillyer,* because there, though the p
ties were reversed in the title of the notice, yet in t
of the affidavit they were rightly named: so that, in
pendent of the object of the notice in *that* suit, there
a proper title to rectify the mistake, but in this, where
every paper the action was, as if by the defendant agai
the plaintiff, there was not any thing by which the m
take could be cleared up, and the notice might theref
be in a cross-suit, where the parties actually were
versed.

When the notice and all the papers are titled versus instead of adsectam, it is fatal.

* Ante 112.

John Milward *against* Richard S. Hallett.

Amendments to a case made must be contained in the case served, or refer to the line and page in which it is proposed to amend. The party served cannot draw up a new case.

THE plaintiff had recovered a verdict against the d
fendant, on whose part a case had been made, and a co
served on the attorney of the plaintiff. Many inaccu
cies being observed in it, a full statement was drawn
on the part of the plaintiff, and served on the defendan
attorney, who, on receipt of it, objected to the informal
of thus making a new case. The usual time for objecti
to the amendments having elapsed, the attorney of t
plaintiff gave notice of argument, set the cause down
hearing, and served copies of the cases he had drawn

Caines on an affidavit, to which was annexed a copy
the altered case, made on the part of the plaintiff, and
a copy of the service of notice, moved to bring on the
gument, or that the plaintiff have leave to enter up
judgment.

Benson contra resisted the application, contending t
the case now before the court was a new, and not an
mended case. That the rule allowing amendments to
proposed, did not authorize making an entire new on
like that on which it was wished to proceed.

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Milward v. Hallett.

ines in reply, hoped the court would not hearken to a nction which really did not seem to have any solidity. y case differing from that first served, was in fact an ed, or amended case. The objection resolved itself his, that every amendment must be written on the piece of paper which held the case served. If so, lines, narrow margins, and great omissions, would r every case superior to amendment, and totally ex- all, that the party who made it, might please to re- It was however conceived, every variation noticed, h on a separate piece of paper, was as much an lment, as if the diversity had been marked on the containing the case originally made.

curiam. Every amendment must be on the case or refer to the line and page in which it is proposed inserted. This, not because it is less an amend- when written on a separate piece of paper, but in to inform the judge before whom the cause was tried, to direct his attention, in case the facts should be ed, and not reduce him to the necessity of reading nd comparing two cases: the plaintiff can take no- by his motion.

l and Thomson, *against* the Columbian Insurance Company of New-York.

If a witness under a commission disclose a collateral fact to which the enquiry was not directed, a second commission may issue to examine as to that fact.

not moved for a second commission in this cause, xamine the same witnesses to a particular fact dis- , and from which, as the answers then stood, it be supposed, a deviation had been made, to which he former investigation was not directed.

ion contra. It is now too late; there was never ance of a second commission to examine the same ses. The answer shows the defence that arises on urn, and this is an attempt to do it away.

not in reply. The application may be novel, but it unreasonable. Suppose the witness had been ex- l in court, and had testified to a certain fact, which, vithout any explanation, would have one effect, if ed, another, might not a question be asked to ex-

ALBANY, August 1803.

Nichol and Thomson v. Columbian Insurance Company.

plain? especially when it comes out collaterally. He the deviation was not the object of enquiry. The que tion was simply to and from what places were you boun There may be an apparent, though not a real deviatio for there might be a custom to go that rout.

Per curiam. Take your commission. The answer b ing directed to another point, may be explained by an i terrogatory to the one which it discloses; for it may a sign very sufficient reasons for the iter adopted. Th commission, however, must be at the peril of the party

Ex parte Caskaden.

No interest allowed to run against a prisoner in execution, to impede his discharge under the insolvent law.

The court determined, that a prisoner will be entitled to relief under the insolvent law, if the amount with which he stands charged be under that limited by the act, though it would be above the sum specified, if the interest was added; for in the computation, interest on judgments against him, is not to be computed.

END OF AUGUST TERM.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF NEW-YORK,

IN NOVEMBER TERM, IN THE TWENTY-EIGHTH YEAR OF OUR INDEPENDENCE.

Jonah Hopkins *against* Thomas Beedle.

NEW-YORK, Nov. 1803.

Hopkins v. Beedle.

THIS was an action for words spoken of the plaintiff in the discharge of his duty as an overseer of highways in the county of Cayuga.

In the 1st count, the charge was for saying, "You have sworn to a lie, and I will prove it."

In the 2d, "You have sworn to a lie."

In the 3d, "You have perjured yourself as one of the overseers of the town of Washington, and I can prove it."

The jury having found for the plaintiff, a motion was now made by the defendsnt, for an arrest of judgment, on the following grounds:

1st. For that the words in the first and second counts in the said declaration, in the above cause alleged to have been spoken by the defendant, of the plaintiff, are not in themselves actionable, and no special damages are al-

Action not maintainable for saying one is forsworn, alter, that he is perjured. In an action for words, if those in some counts be actionable, and those in others not, and entire damages be given, judgment will be arrested. But had the plaintiff applied, he might, on payment of

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leged in the said counts to have been sustained by t
plaintiff.

2d. For that it is not alleged, in the said first and se
cond counts in the said declaration, that the lie, declare
by the defendant to have been sworn to by the plaintiff,
had been sworn to, or any oath had been taken by the
plaintiff, touching the same, in any court of justice, or
before any person having competent authority to adminis-
ter an oath or oaths by the laws of this State.

costs, have had a venire de novo.

3d. That the charge of perjury, alleged in the third count, to have been imputed by the defendant to the plaintiff, cannot, by the laws of this state, amount to a charge of perjury, the same necessarily being a charge of violating the promissory oath taken by the plaintiff, as one of the overseers of highways of the town of Washington, in the county of Cayuga aforesaid.

4th. For that the verdict in the above cause is general, and that the said first and second counts being obviously vitious, judgment cannot be rendered for the said plaintiff, and for these causes, and for others apparent on the said declaration, the defendant insists the judgment ought to be arrested.

The case being submitted without argument, the opinion of the court was now delivered by

Kent, J. This is a motion in arrest of judgment. The declaration states, that the plaintiff was an overseer of highways in Cayuga county, and that the defendant said to him in the hearing of divers people,

1st. You have sworn to a lie, and I will prove it.

2d. You have sworn to a lie.

3d. You have perjured yourself, as one of the commissioners of highways of the town of Washington, in the county aforesaid, and I can prove it.

The verdict was a general one for the plaintiff. It is urged, on the part of the defendant, that the words in the first and second counts are not actionable, and that it is not alleged that any oath was taken, by the plaintiff, before any person competent to administer it. It is further urged, that the charge in the third count relates only to the promissory

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ath of office, for which an indictment for perjury will ot lie.

We are of opinion, that the objection to the first and second counts, is well taken. Swearing to a lie does not *necessarily* imply that the party has, in judgment of law, perjured himself. It may mean, that he has sworn to a falshood, without being conscious at the time that it was a falshood. Actionable words, are those that convey the charge of perjury in a clear unequivocal manner, and which admit of no uncertainty. The charge is defective in not stating any court, or competent officer, before whom the plaintiff swore. It may mean extrajudicial swearing, and therefore it is held that a charge that one is *foresworn*, is not actionable; because it shall not be intended in a case where perjury may be committed. On the other hand, a charge that one is *perjured*, is actionable, for that implies the direct legal crime.

Com. Di. tit. action on the case for defamation, F. 5. F. 18.

1 Roll. Abr. 39. n. 40.

With respect to the third count, we are of opinion, that t is sufficient to sustain an action; but as the verdict is geeral, the judgment must be arrested; the plaintiff, howver, on application, might have been entitled to a venire le novo, on payment of costs.*

Christopher Miller *against* John R. Livingston.

THIS was an action of assumpsit brought by the plaintiff, as the factor of the defendant, for the amount of his ommissions on selling a quantity of leather.

Where commissions are allowed to a captain on his sales and investments, this will not entitle to them on goods he carries, to deliver according to a contract antecedently made by his employer, and for which he does not receive payment. Copies of letters, &c remaining in a foreign court of admiralty, and duly authenticated under the seal of the court, when re-

The cause was tried before his Honor Justice Kent, t the New-York Circuit in March 1801, when the following facts were given in evidence.

That in January 1795, the plaintiff sailed, in the chaicter of master and supercargo of the ship Somerset, elonging to the defendant, on a voyage from New-York Bordeaux, in France. The vessel was laden with a ry valuable cargo, consisting of a variety of articles, sides a quantity of leather, which the defendant had, an engagement entered into between him and the mi-

* Anger v. Wilkins, Barnes 478. Smith v. Haward, ib. 480. S. P. So pr. Bullr J. in Eddowes v. Hopkins, Doug. 377. See also Grant v. Astle, Doug. 722.

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nister of the French Republic in the United States, agreed to deliver to the French government. By the terms of the contract, the leather was to be paid for on delivery, and if not, the minister bound himself that it should be paid for at the Treasury of the United States, out of the debt due to the French Republic. In March following, the plaintiff arrived at Bordeaux, and after encountering some difficulties, delivered the leather, which, not being then paid for, the plaintiff according to his orders, made a regular protest against the French Republic, completed the sale of the residue of his cargo, and invested the proceeds in another, with which he set sail for New-York; but in the course of his voyage, was captured and carried into Bermuda, where vessel and cargo were condemned by the Vice-Admiralty Court of that Island. All the papers, relating to the outward cargo being on board, were, according to the custom of the admiralty in matters of prize, lodged in the registry of the court. To prove therefore his letters of instructions, and authorities under which he acted in the disposal of the leather, the plaintiff offered in evidence the deposition of the Registrar of the Vice-Admiralty Court, annexing, under its seal, authenticated copies of all the original letters and papers found on board the Somerset, together with a full copy of the proceedings against her and her cargo.

turned to a commission issued from this court, may be read in evidence.

To the reading of these, the defendant's counsel made objections, which were overruled, and they were accordingly received.

From these, it appeared that the defendant, in his first letter of instructions, dated the 3d of January, 1795, says, "You have the invoice and other papers that respect the "cargo now on board the ship Somerset, and which goes "consigned to your address. The commissions upon the "*sales* and *investments* will be 2 1-2 per cent." He then proceeds to direct the conduct the plaintiff was to pursue in delivering the leather, and how he was to manage in order to obtain payment, but no authority whatsoever is given to sell.

In a subsequent letter, dated the 3d of March, 1795,

defendant says, " If you find that you can not get our money for the leather, agreeable to contract, and ou can sell at near the price, it will be best so to do." n the transaction of the ship's business at Bordeaux, plaintiff employed under him the house of Barton, son & Barton, at a commission of 2 1-2 per cent, out he commission of 5 per cent allowed him by the de- lant; but they charged no commission on the leather. t appeared also in evidence, that the whole amount on ch a commission was charged, was $ 59,415; that the ain's wages were only $ 30 per month, though mas- for such voyages, usually *then* received $ 50 a month; that the plaintiff had signed a receipt in full, at the of an account in which commissions for the leather been charged, for the balance claimed by him from lefendant, after deducting the commissions now de- ded; but the words " in full," were written, with a drawn through them.

nder these circumstances, the jury found for the tiff the amount of the commissions claimed by him, 2 1-2 per cent on the invoice cost of the leather de- ed, subject to the opinion of the court, whether he ntitled to any commissions, and at what rate? ac- ng to which, the verdict was either to stand or be nished, but if the court should determine that no com- ons were due, then judgment to be entered for the dant.

milton for the plaintiff. The principal question is, her the plaintiff is entitled to a commission on the er? There is another supplementary point, as to the sibility of the evidence of the admiralty proceed- from whence we derive the testimony of the defen- s letter. The right to the commission, will depend e construction of the defendant's letter. By that, rgo is consigned to him. There is a little apparent guity relating to the two and a half per cent, whether taken on the sales and investments distributively or atively. But on this, there is no actual difference of on, for the counsel on the other side agreed to the

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distributive acceptation of the words, with this only exception, of bills and money. The dispute now, is as to the leather. On the latter there can be no doubt. The circumstances of the case, shew there can not be a different construction. The plaintiff was consignee of the whole cargo. The mere being a consignee, according to mercantile law, entitles to commissions: for commission is incident to consignment. He was to have a commission on the sales. The leather was *only* contracted for here. That contract, and the sale in consequence of it, was both consummated by the delivery, which the plaintiff had to perform. All writers distinguish contracts from sales. The latter are perfected only by payment, or delivery; and this last the plaintiff had to perform, under a load of discretionary power, which he had to exercise, in weighing or delivering, as circumstances might require: besides, he had an alternative power to sell, *or* deliver: he was therefore agent and consignee. The defendant, it is understood, relies on the contract and sale of the leather being *here;* therefore, being the effect of his own labor and exertions, that the plaintiff, in this respect, was a mere captain, and can not claim any commission. This has been already confuted; the trouble the plaintiff was to have, is stated in the letter of the defendant, and it is not presumable that he was to have it for nothing; especially as his situation charged him with a responsibility, which the court can never suppose to be gratuitously undertaken, as general consignee of the whole cargo, commission on all must be implied. On the admissibility of the proceedings, the court will observe, that papers often gain respect in consequence of the situation where found. Old papers with wills, &c. are not accredited merely from their antiquity. There can be no doubt that sentences in the Admiralty, for the purpose of establishing any fact they contain, and all the proceedings incident, are prima facie evidence. The question now is, whether proceedings relating to the subject of controversy, shall be received, when that subject was not the matter before the court there: If decided against the plaintiff, it will only turn

round to a court of equity, which the court certainly not do. The objection to the admission is the want roof of the hand-writing of the defendant—The court remember there has been a notice to produce the ori- al; that the letter in question has every circumstance nake it believed a fair and regular document, it was guide of the plaintiff's conduct, and has been forcibly en from him; it was against his consent, and without concurrence that it was placed in the archives of the rt of Admiralty, where it is irrevocably fixed, from ence it can never be removed: It is adduced only as ma facie evidence, therefore the defendant was at lib- y to rebut its contents. In our own courts a copy thus henticated, would be good evidence, and the almost ossibility of sending a person to authenticate by in- ction, is an argument, from the excessive inconveni- e, why the evidence should be received. No one can believe the fact. The only difficulty is the technical one, establishing the hand-writing; but in the present case, document ought, abstracted from the rule of law, to e its weight.

Hoffman and E. Livingston, contra. First, as to the nissibility of the testimony—the court must depart m every rule, before they can be inclined to admit it. ppose the letter itself had come into court, and been pro- ed, would that have been enough, to have it read before ry? Must not the hand-writing, the execution as it ght be called, have been first established? Waving, refore, technical reasoning, shall a letter read in the rt of Admiralty, and made an exhibit there, become his circuitous mode, evidence here, where the letter lf, *the very exhibit* would not be testimony? A plain- cannot, by merely producing a paper, make it evidence him. But the argument is, that if he will first exhi- it, in a foreign court of Admiralty, the copy shall be tter than the original. The difficulties and inconvenien- s, arise, as they ever will, in consequence of departing m established rules, and is not an admissible argument. he law points out a mode, a bill in equity—In the admi-

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ralty, no proof is made of the genuineness of t nothing but a mere naked possession. But ev ing it, the case itself, when plainly stated, so difficulty. The leather was only to be *delivered* not *sold*—that business was done here: the pla two characters, and each consistent; he was to leather as master, in this capacity he was a me the residue of the cargo he was to sell; and he consignee, to receive the commission of 2 1-2 p sales and investments, distributively. The q was the leather sold by him? If so, he is to commission; if not so sold, he is not entitled to must, according to the counsel's own position and deliver to make a sale. The plaintiff deliv only on the principles relied on; he did not sel for in France, 2 1-2 per cent. commission was t ed. It is not now paid for, and the plaintiff can leather, claim a commission: it can be put in shape. The delivery, therefore, was all the pl formed, as to the leather; that was in the line of captain, and for *that* he has his wages. These missions were charged and relinquished. In th which makes a part of the case, they were claim being objected to were stricken out, and a rec for the balance without them.

Commissions are claimed by the words of th directions; if then they are not plain, explicit, an the fullest proof, they are not to be allowed. be ignorant of the English language if they o words are "the commissions upon the *sales* a *ments*." Was there a sale, was there a receipt or bills, was there an investment? In these th commissions were to be allowed, not otherwise. qualification of consignee confers, it is said, rights. That the mere character, implies a titl missions. Consignment alone gives no commis complying with that consignment, and the cond which made. Commission is the child of sale. sult of benefit to the parties, not the mere plac

* A copy of a note of hand refused to be read, there being no proof that the original note was genuine. Goodier v. Lake, 1 Atk. 446. N. B. The rules of evidence are the same in equity, as at law.

ds of another, when nothing is done: still less when t is done, is contrary to orders. The instructions are,) be delivered, their *paying you on delivery.*" Non- lience of this positive order, is an answer to the claim ommission. The contract being in the alternative, ayment here, or in France, is nothing to the purpose. defendant was to decide on the place, and he chose be at that of delivery, and on delivery only. That wages were less than ordinarily given, was the natu- nd reasonable consequence of circumstances. The ntiff was made consignee of the cargo, and had he ed his instructions, by receiving payment on delivery he leather, and investing the proceeds for an India ge, as was contemplated, his emoluments would have excessive. He has acted in contradiction to his or- , and therefore instead of commissions, is liable to onsibilities. As to the evidence, it may be procured nother way.

Hamilton in reply. It will be necessary to add only or two observations to the reasons for admitting this mony. It is not asked to be received as conclusive, only as prima facie evidence, subject to be rebutted. erefore, is not put on the same footing as a letter with and-writing, or execution as it has been termed, fully blished: in this last case, it would be final. The de- ination of the court is of immense importance; but will recollect, that the original letter was not *volun-* ly brought into a court, to forward the interests of the y adducing it. The question is, whether an agent on sea, in the prosecution of his business, in possession ll the papers and documents necessary to establish his cy and claims, shall not, when despoiled of them, a copy from a court of admiralty, where they are de- ted, in testimony, as *prima facie* evidence? for it is ined to that. The circumstances with which the pro- tion is qualified, the court will please to observe, take y all idea of fabricating papers to make use of them timony. Then will the court turn us round to a bill city? We deny that the plaintiff was to deliver only

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he was to exercise discretion, and that takes him out the line of a mere carrier. The bill of lading is filled to him as consignee; he had even a power to sell the l ther on certain events, and his character of captain d not necessarily destroy or merge that of consignee. T prospects and hopes of a secondary voyage, we conte the court cannot infer as a consideration. It does appear; a mere chance cannot, by intendment of law, b come a consideration for meritorious services, when the is a written contract. The captain could not be a me carrier; for if he had been so, delivery to him would ha been delivery to the French Republic, and he could ha no power to withhold. On the receipt, it is necessa only to state, that it was first written "in full:" so stood when the balance was struck, including the co missions on the leather. When those were objected and deducted, the words "in full" were struck out, drawing a pen through them. Why? Because, as th commissions were not paid on the leather, the receipt wa not in full, and those commissions are the object of th present suit.

Thompson, J. now delivered the opinion of the court.

The two questions presented for the opinion of the cou in this case are,

1st. As to the admissibility of the evidence taken u der the commission.

2d. Whether the plaintiff was entitled to any commi sions on the leather delivered to the French government and if to any, what rate was to be allowed?

I shall pass over the first point, as to the admissibili of the proof, the other being the principal question and going to the merits of the action. Admitting the le ters to have been sufficiently proved, I think they will n warrant a construction, that the plaintiff was to have co missions upon the leather. By the contract made betwe the defendant and the French minister, respecting th leather, as appears from the plaintiff's witness, no condi tion was annexed, or option left with the defendant to sell in case payment was not made. The stipulation on the

dant's part, was absolute to deliver it; and in case ent was not made on delivery, the French minister l himself to pay for it at the Treasury of the United , out of the debt due to the French Republic. This the contract with respect to the leather, it is hardly nable that it could be the intention of the parties, ie captain was to receive a commission of 2 1-2 per or such delivery, especially as he was master of the and received pay as such, though $20 a month un- ie usual allowance. But he was always to receive issions on a very valuable cargo, (amounting to 15, exclusive of the leather,) and this was probably ason why his wages, as master, were reduced. circumstances are mentioned as aiding, in some re, the explanation of the letters, which may, per- appear doubtful. In mercantile language, I be- it is well understood, that *commissions* mean an nce or compensation made upon the sale or pur- of goods; and in conformity to this understanding, d the defendant's letter, which is made the founda- f this action. He says, "*The commissions upon the nd investments, will be* 2 1-2 *per cent.*" Has there sale or investment of this leather? certainly not; r was there, by the first letter, any authority or di- n given the plaintiff on any event to sell the leather; is to deliver it to the agents of the French govern-

I confine myself now entirely to the first letter, se that is the only one that speaks of any commis-

We do not find the plaintiff, when the French go- ent declined receiving the leather, offering it for ut he repeated his efforts to deliver it, until he suc- l. This serves to shew what his conceptions were, spect to his directions for disposing of this leather. nd also, that Messrs. Barton, Capon and Barton, gents with the plaintiff in the sale of the cargo, made rge of commissions upon this part of the cargo. It , the defendant, by a letter dated the 3d March, two months after the vessel sailed, directed the plain- he could not get the money for the leather, agreeable

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to contract, to sell it, if he could get nearly the same price. This letter, however, could not alter the plaintiff's *right* to commissions under the former contract, which was consummated previous to the sailing of the vessel. If this letter gave directions to make a different disposition of the cargo than his former instructions would warrant, and he had accordingly done so, it might, perhaps, have afforded grounds for a claim of commissions, or an action on a quantum meruit for such services; or if he had received the money from the French government, and invested it according to his first instructions, he might have been entitled to his commissions on such investments. But all this is completely answered, by shewing that he made no sale, or other disposition of the leather, but barely delivered it to the French government, pursuant to the first directions of the defendant. The opinion of the court, therefore, is, the plaintiff was only entitled to commissions on the *sales and investments* of the cargo; that here has been no sale or investment of the leather, but only a delivery of it to the French government, according to the defendant's contract with their minister, and, of course, no commissions due him; and that judgment ought to be for the defendant.

James Jackson ex dem. of Francis I. Putnam and others, *against* William Bowen.

Parol testimony cannot be received to shew that a deed, stating a course for 36 chains, was intended to express 29. An adverse pedis possessio for 20 years and upwards, with a claim of title in other lands, in right of that pedis possessio, which lands are part of the lot on which the pedis possessio is taken, is a bar to a recovery in ejectment.

THIS was an action of ejectment for lands situated in Johnstown, in the county of Montgomery, tried there at the last circuit before his Honor, Mr. Justice Thompson.

The lessors of the plaintiff, and the defendant also, derived their titles under the will of Victor Putnam, their grandfather. He had devised in severalty, 100 acres of undivided land to each of his children, and the overplus to be divided among his four sons. Johannes, the father of the lessors of the plaintiff, was one of the children, and Mary Bowen, the mother of the defendant, was another.

By a deed of partition, reciting the will, the 100 acres devised to Mary, were set out, and the residue of the patent apportioned among the four sons.

The north and south lines of Mary and Johannes, were the same; the dispute was respecting the east and west

boundaries. If the lines and courses were run according to the deed of partition, the lands in controversy would fall within the limits of the plaintiff's division, but Mary Bowen would not then have her 100 acres. If, on the other hand, the acknowledgments of the ancestor of the lessors and themselves, together with a claim of right, but not a pedis possessio of the whole, were to prevail, the defendant would be entitled.

On the trial, it was attempted to prove, by parol testimony, that the partition deed, in giving a north course on the east side of the lot of the lessors for 36 chains from the southern line, was a mistake, and that it ought to have been extended only 29 chains; in which case, by running the line west to the common north and south boundary, the right of the defendant would be established, in conformity to the several quantities of land, the will and partition deed purported to be the right of the various claimants under them, and also in strict coincidence with known landmarks.

The judge, however, overruled the testimony, as contradictory, and not explaining the deed.

Upon this, and the testimony adduced, which is set forth so fully in the decision of the court, that it is unnecessary here to relate it, the jury found for the plaintiff. A motion was now made to set aside the verdict, as contrary to evidence and law, and also on account of the misdirection of the judge to grant a new trial.

Cadey for the defendant, to shew the mistake in the partition deed, ingeniously located the 100 acres devised to Mary Bowen, and the quantity to which the lessors of the plaintiff would, under that, and the will of Victor Putnam, be entitled; and as this could not be done, but by running the north and south lines on the eastern boundary of the plaintiff, 29 instead of 36 chains, the deed was felo de se, unless so explained. He contended also, that the action was not maintainable, as there had been an adverse claim of the whole lot, accompanied with an actual possession of part, in right of the title to the whole, and adverse to all others.

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Van Vecten contra, insisted on the inadmissibility of th parol evidence to do away the words of the deed, and tha a purchase might be presumed of any extra quantity. He strongly urged the impropriety and danger of extending the effect of adverse possession beyond the land actually inclosed.

Per curiam, delivered by Thompson J. This was an action of ejectment for lands in Montgomery county, tried at the Circuit in that county, in June 1802. A verdict was found for the plaintiff, and application is now made for a new trial, on two grounds.

1st. That the verdict was against evidence, and

2d. That the court improperly precluded the defendant from shewing that there was a mistake in the partition deed, under which, the parties respectively claimed, by which the lessors of the plaintiff had more land, than was intended to have been conveyed.

From the testimony, as stated in the case, it appears that Johannes Putnam, the father of the lessors of the plaintiff, and Mary Bowen, the mother of the defendant, were brother and sister, and children to Victor Putnam; under whose will, bearing date the 5th of July 1755, they derived title. That on the 19th day of September, 1765, the children of Victor Putnam, executed a partition deed, whereby lot No. 1, was conveyed to Johannes Putnam, father to the lessors of the plaintiff, and lot No. 8, to Mary Bowen, mother to the defendant; and the question between the parties is, where is the line of division between the two lots? The plaintiff having made out a title to lot No. 1, and the defendant to lot No. 8, James Lansing a surveyor, and witness on the part of the plaintiff, testified that he had run the western and northern lines of lot No. 1, according to the partition deed; and that according the premises in question, according to such survey, were included in that lot.

Jacob Rees, a witness on the part of the defendant, swore he was 55 years old, and that as long ago as he could remember, Mary Bowen was in possession of the land now held by the defendant, and that she died in

m; she had some land inclosed in fence down as far uth as the road; she used to live 4 or 500 paces south the road, but that just before the war, she moved down ose to the north side of the highway. That about 14 r 15 years ago, Johannes Putnam shewed him his west ne, and told him he began at the Mohawk-river and run ortherly nearly to the highway, to a pine tree, and that he land north of that was his sister's, Mary Bowen. That when Johannes shewed him this line, Mary was in ossession of the land north of the road. That about 7 r 8 years ago, Francis I. Putnam, put up a stone near he pine tree shewn him by Johannes, and said that was is corner, and that at this time the defendant was in possession of most of the land on the north side of the road, which he now holds. That the whole of the land now held by the defendant, was not cleared or in fence, at the ime of Mary Bowen's death.

Jacob Hall, another witness on the part of the defendant, swore that about 36 years ago, Johannes Putnam old him his land went no further north than the road, and hat Mary Bowen owned the land north of the road. That t this time, or shortly after, Mary Bowen lived near the oad; she had before lived farther north. Johannes Putam called the witness particularly to shew him where his ne was. It appeared also, by the testimony of Abraham ouyne, that about ten years ago, he applied to Francis I. utnam, to rent him part of a house that stood near the oad, on the north side; that the said Francis declined iving it to him, but referred him to the defendant, of hom the witness leased the house for one year; the itness understood that Putnam did not claim north of e road. Lewis Clement also testified, that about seven eight years ago, he assisted Francis I. Putnam in makg a fence between these lots on the south side of the ad; that the defendant came to them, and enquired of utnam if he was making the fence on the line, to which answered that he was, as it had been shewn by Jacob ox and the defendant. It appeared also, that Mary owen died about 15 years ago.

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On the part of the plaintiff it appeared, that part o premises in question, adjoining the road, were unim ved at the expiration of the war. It also appeared, about 6 or 7 years ago, the lessors of the plaintiff clai the premises, by threatening to dispossess one Peter L rence, who afterwards took a lease under them. Lawrence had the possession from Jacob Rees, who under Abraham Conyne, who it appears had hired it f the defendant.

The partition deed between the ancestors of the pa bears date, in the year 1765, wherein lot No. 1, clai by the lessors of the plaintiff, is described as beginnin the Mohawk river, and running a northerly course 36 ch describing no monument at the termination of this line. appears from the testimony of the surveyor, that to ext this line northerly the number of chains given in the d and then pursue the other given courses, would include of the premises in question. But the testimony on the of the defendant appears to me to be strong and irres ible, with respect to the actual possession for a long se of years; and that in fact, no possession was ever ha the premises by the lessors of the plaintiff, or their fat under that deed. And that admitting the deed to cove land, still the plaintiffs, and those under whom they cl have abandoned it, for such a length of time as to prec them from a recovery, at least in this form of action. is true, a man may be mistaken with respect to his title perhaps ought not to be concluded by his confessio made under circumstances inducing a suspicion of imp tion or ignorance, neither of which appears in this ca stance, and when acquiesced in for the length of time the present case, he ought to be concluded. It appe that the premises lay north of, and adjoining to the hig which is the division line between the parties, accord their present possessions: the lands of the plaintiff to the south, and those of the defendant to the north road. Two witnesses on the part of the defendant, t that as much as 36 years ago, which must have been shortly after the partition, Mary Bowen was in po

of the premises; the possession of Johannes Putnam going no farther north than the highway; and it appears by the testimony of one witness, that as far back as the period above mentioned, Johannes Putnam shewed him the line between him and his sister Mary, and declared to him that his land went no farther north, than to the road; that the land north of the road was his sister Mary's: the same declaration was made to another witness about 14 or 15 years ago, and since the death of Johannes Putnam, the lessors of the plaintiff have repeatedly recognized the same line, both by their declarations and acts, and never shewed any dissatisfaction until about 6 or 7 years ago. Thus, I think it is clear and conclusive from the testimony, that the defendant, and Mary Bowen his mother, under whom he claims, have been in possession of the premises for at least 36 years, claiming them and using them as their own, adversely to any other claim, and with such repeated recognitions by the lessors of the plaintiff, and their father, of the right of Mary Bowen, as to shew conclusively that they disclaimed having any right or title to the premises, which is sufficient to rebut every presumption that Mary Bowen held under them. The premises being held under such circumstances, for such a length of time, is, I think, sufficient to protect the proposition against this action.

I am of opinion therefore, that the verdict is against evidence, and that a new trial ought to be granted. Being in favor of a new trial, it would be unnecessary for me to give an opinion on the other question, did I entertain the least doubt on the subject. The plaintiff's deed gives 36 chains on the first line; the defendant contended it ought only to have been 29 chains, and the testimony offered and overruled, was to prove that fact: this was not to explain any ambiguity, but was directly contradictory to the deed, and manifestly inadmissible.

Henry Peyton *against* Richard S. Hallett. The same *against* John Delafield.

THESE were actions on two policies of insurance, one on the body, the other on the cargo of the sloop Ruby,

A warranty of being "the property of an A-

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on a voyage from Charleston to the Mantanzas, in Cuba warranted the property of an American citizen. On the voyage, the vessel was carried into New-Providence where she, on the 9th of December, 1801, was acquitted but her cargo condemned as lawful prize. The abandonments were made the 7th of January, 1802. The defendants having no defence, put the plaintiff to his proofs. To shew his interest, one George White was called, who was objected to by the defendant's counsel as incompetent, on account of an interest in the event of the suits. It appeared that White, who was sworn on his voir dire, had received, for a debt due to him from the plaintiff, an order on his agent, to be paid out of the sums to be recovered in these actions, but the agent had not accepted the order, though he promised the debt should be paid out of them, and the witness expected to be paid accordingly. White, however, further swore, that as his right did not depend on the event of the suit, he should look to Peyton for payment, whether he recovered or not. On this, his testimony was admitted, and the plaintiff went on to prove his interest in the *vessel*, by the evidence of White, which was again opposed, but overruled.

merican citizen," is proved by reputation, employ, and domicil. Interest in a vessel, by a person who saw the original register, in the name of the owner, when she was about to sail on the voyage insured. Interest in a cargo, by knowing the articles bought by the plaintiff, and seeing them go on board: a witness who has an order to be paid out of the sum to be recovered in a suit, drawn upon the agent who is to receive such sum, is not a competent witness, though the order is not accepted.

Whitet hen testified that he had seen a register of the vessel, in the name of the plaintiff, and that she sailed under it on the voyage insured. In corroboration of this, the proceedings in the vice-admiralty, under seal of the court, were produced, setting forth a copy of the register in due form. It also recited a bill of lading, in which freight was mentioned to be payable in the following manner "as customary no. primage and average accustomed."*

The interest in the cargo was established by the [illegible] witness, who swore to having attended the plaintiff to select the articles purchased, some of which he saw on the wharf where the vessel lay, and going on board. The counsel for the plaintiff, as additional proof, adduced [illegible] of parcels of the articles specified in the invoice, and [illegible]

* That is, when an underwriter does not know why he should not pay, he puts the insured to evincing legally why he should. If on the trial, the [illegible] not made out according to the precision of law, the assurer gets discharged, because the plaintiff did not make out his case.

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y the vendors, whose hand-writing he offered to
; but this latter testimony was rejected.*
other reason than the capture was offered for the
roduction of the vessel's register and bill of lading.
substantiate the citizenship of Peyton, a copy of a
l of his naturalization was offered, which being ob-
to as informal, was withdrawn; and the counsel for
aintiff then relied on the testimony of White, who
that he had known Peyton to have resided in Charles-
ur or five years, but how much longer he could
l: that he had known him to command vessels re-
ed as American, sailing under the American flag,
arrying ten or twelve guns; but that he had heard
aintiff say, he was born in Ireland; though he had
eard him say, he was naturalized in 1787, and that
s reputed an American citizen.

establish the abandonment, the agent of the plaintiff
lduced, who deposed, that on the 7th of January,
he left letters of abandonment, (a copy of which
the same time offered) at the office of the broker who
d the insurance, to be delivered to all the underwri-
s the vessel and cargo, but whether they were deli-
or not, he could not say. The clerk however of the
r, certified, that if the letters were left, they must,
he regular course of business in the office, have been
red, though he himself remembered nothing of the
ction.

ice to produce the letter of abandonment, had never
given to the defendants.

this a nonsuit was moved for, it being contended that
aintiff had not shewn enough to entitle him to reco-
The judge who tried the cause, seemed to think the
ship not sufficiently established, but that a verdict
be taken, and this, together with the other points,
ed by the defendant.

jury accordingly found for the plaintiff, in both suits;
t, on a case to be made by the defendant, to the opi-
f the court, whether a nonsuit should be entered, or
trial granted.

* See Russel v. Boheme, 2 Stra. 1187. contra.

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Pendleton in behalf of the defendant, made the f
lowing points:

1st. That George White was not a competent wi

2d. That the vessel being American, parol proof c
ership was not admissible.

3d. That parol proof of the abandonment was i
missible, the abandonment having been made in w
and notice to produce it not having been given.

4th. That there is no proof of the property beir
of a citizen of the United States.

5th. That admitting these points to be against hi
plaintiff cannot recover *on the vessel*, as she was ac
at New-Providence the 9th of December, 1801, a
abandonment not made till the 7th day of January foll

On the first point, it is only necessary to read the
by this it will appear, that White's interest was direc
was to be paid out of the fund. Can any man doub
he who is to be paid out of a fund, is interested in cr
that fund? In Powel v. Gordon, 2 Esp. 735, hav
a power of attorney to receive the money for which t
was brought, excluded the holder of it, from be
witness. It is true, the order was not obligatory
agent, but still it was a lien on the fund. A mortgage i
collateral security for a debt; the mortgagee, howe
not, in an ejectment, a witness for his mortgagor. I
answer to this to say, that here the matter was but a
in action, for, of that chose in action, the order
White an assignee pro tanto, which a court of equity
notice. Row v. Dawson, 1 Vez. Sen. 331.* So in
v. Groves, 1 Vez. J. 280. the holder of an order a
cepted, but verbally promised to be paid out of the
was held to have a lien on the fund.† He therefore
direct interest.

On the next point, there can be no doubt. Ma
record can be proved only by record. By the ninth s
of the register act of the 31st December, 1792, it
acted, that "The several matters herein before req
"having been complied with, in order to the re
"of any ship or vessel, the collector of the district

* That was a case between the assignees of a bankrupt and the holder of an order drawn by the bankrupt, on money due him on an exchequer warant, and that order lodged with the teller. This was held an assignment against the assignees, who represented their bankrupt.

† That also was a case against assignees, to declare a lien on the money in their hands.

rehending the port to which she shall belong, shall ake and keep in some proper book, A RECORD or re- istry thereof, and shall grant an abstract or certificate such RECORD of the registry, as nearly as may be, in form following," &c. We see thus, that by an act of general government, the register of a vessel is made a ter of record, and therefore, its contents should be ed by an exemplified copy, and not by parol.

arol proof is equally inadmissible in cases of abandon- t, where that abandonment has been made in writing, use the writing is to speak for itself, and therefore no- to produce is always given. Many of the first prac- ners at this bar, have suffered nonsuits on this very t, merely on account of notice not having been given. o the proof of citizenship, there is none. The very ence called, establishes that the plaintiff was born in nd, and the English courts of admiralty have deci- , that an English subject cannot trade with an enemy, e port of whom the vessel in question was bound. ensible was the plaintiff's counsel of the inadequacy stimony on this point, that he almost abandoned it by drawing what was called a certificate of naturaliza-

he last argument on which we mean to rely, is, that abandonment was clearly out of season. The sen- e was on the 9th of December, and the abandon- t not till the 7th of January. The usual passage from lau to New-York, is 8 or 10 days; here nearly 30 ied: and at least as to the vessel, it was too late; for was acquitted; and it may well be supposed, the of her liberation arrived with the account of the cap-

ines contra. Against retaining the verdicts, which been given in our favor, a long list of five objections been urged. First, that White was not a competent ess, and for this, the reason assigned is, that he had terest in the event of the suits. To judge whether is so or not, it will be necessary to advert to the spe- of interest which he possessed. A recurrence to the

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case will evince it to be no more than an order to be paid out of the money that *might* be recovered under the policies on which we now proceed. This order was not even accepted, and so little did White rely upon it, so little did he feel himself concluded by the result of these actions, that he swore his right to look to the plaintiff did not depend on the suit, and whether a recovery was had or not, he looked to Peyton for payment of his demand. With respect to witnesses, the courts have, especially of late days, confined the objections to their credibility, rather than to their competence. Notwithstanding Watt's case, this has long been established. It is not a decision of modern times; we can trace it back to the earliest periods of law. In Gunston v. Downs, 2 Roll. Abr. 685. pl. 8 it is laid down, "That if three persons join in one de- "position, and three separate indictments are preferred "against them, each is a *competent* witness, the one for "the other."

Hard. 332.

Livingston, J. Shew how the interest here, does not incapacitate.

Caines. Every interest to render a witness incompetent, must be direct, and not circuitous. Bent v. Baker, 3 D. & E. 27. Your Honors have already decided this very point. In Baker and Rowlston against Richard and Henry Arnold,* an indorsor of a note was held to be a good witness to prove the indorsement made after the note was due, though by his testimony he might let himself into all the equities subsisting between him and the maker. The reason of this is obvious: a possible advantage cannot exclude to render incompetent, the benefit must be inevitable. When it is not so, it affects only the credit of the witness, and on that, like all other matters of credit, it is for a jury to determine. If they think the witness worthy of belief they receive; if not, they reject his testimony. On these principles, therefore, it has been ruled, that where a man has laid a bet on the event of a suit, he is still a competent witness. Barlow v. Vowel, Skin. 586. George v. Pearce cited by Grosse J. in Baker v. Bent, 3 D. & E. 27. [illegible] if the wager be that he will convict the defendant of [illegible]

* Ante 258. And see what Kent J. says, page 276.

indictment, the law is the same. Rex v. Fox, 1 Str. 652. and per Lord Mansfield in Da Costa v. Jones, Cowp. 736. So a creditor was allowed to prove, that his debtor did not come within a species of insolvent law, called the mint act. Norcott v. Orcott, 1 Str. 650. Surely in this last case, there was as great an interest as in the present; for, if the creditor established his debtor to be out of the provisions of the act, he had an immediate recourse against the person of the insolvent, and so came directly within the event of suit. But, as it was only possible that the result might terminate to the advantage of the witness, he was adjudged to be competent. It is expressly laid down in Bull. N. P. 288, 89, 290, that a remote interest can never exclude. It is not in one or two places alone, that this doctrine is to be found; it is scattered and diffused through every portion of the law. A surety for an administrator, notwithstanding he may become liable on his bond for the faithful discharge of the administration, is a good witness to prove a tender in a suit to recover a debt due from the intestate. Carter v. Pearce, 1 D. & E. 163. It is from these authorities, evident therefore, that a *possibility of interest*, goes not to the competence, but to the verdict of a witness. Even this, to men of liberal minds, it would hardly touch. The objection, however, comes from the parties who now make it, in a manner peculiarly ungracious. They first create the necessity of borrowing, and then use that necessity as a means to avoid paying. From whom is a man kept out of his right to borrow, if not from him who is connusant of that right? There is not, to be sure, any express decision exactly in point, but so far as a dictum of the whole court of King's Bench can operate in our favor, we have it now to advance, In the case last cited,* their Lordships unâ voce said, "if a *creditor* of the administrator had been offered as a witness, there could have been no objection to his being received." This then goes the whole length of our positions. Every creditor has an interest in the event of his debtor's suit; but as it is such a one as is remote, and merely possible, it cannot affect his

* Carter v. Pierce.

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competence. Were the law to be otherwise, it would, i a mercantile country, be hardly possible to substantiat by oral testimony, any species of debt whatsoever. An we find, that in proportion as commerce has extended, th rigour of ancient rules respecting interest in witnesses, ha been constantly relaxed. Against us some maxims an some decisions have been relied on, which, however, i is conceived, do not in the least invalidate the force o our arguments. It is said that the order in favor of White created a lien on the property in the hands of the agent Allowing this to be so, that lien was but a possibility. There might have been five hundred previous orders, each to be preferred to this; or the agent himself might have had claims, more than enough to absorb the whole of the funds when in his possession. That *equitable* liens should work *legal* incompetence, is perfectly new in law: if it be so ruled, the court may perhaps see the doctrine of in- competence pervade cases, as yet but little supposed to be within its influence. The case of a mortgagee being inad- missible in an ejectment to testify for his mortgagor, is widely different from this. There the mortgagee has a direct legal interest, by the operation of a legal instru- ment. His mortgage gives him an interest at law. I am aware, that after receipt of the sums in demand, there may perhaps be a remedy at common law for recovery of the amount of the order; that an action for money had and received, may be maintained. But let it be remem- bered, this species of proceeding is, in its nature, like a bill in chancery. It admits of every equitable plea and defence: set-offs, prior liens, and the whole train of con- currences which would give the defendant a title to pay- fer others to the plaintiff. The cases from Vezey Senior and Vezey Junior, are nothing more than chancery deci- sions respecting funds in possession, and Powel v. Hea- don,* is an authority directly in our favor. There the witness had a power of attorney to receive the money when recovered, so that the fund out of which his debt was to be paid, would have come into his *own hands*. Your honors will please to observe that Lord Kenyon

* 2 Esp. 735.

ld him, if he was willing to permit any other person to receive the money, and it was not till he refused this, hat he was deemed incompetent. The reasoning then f this decision is, that had the money gone into the hands f another, the witness would have been admissible, ough it is certain, his letter of attorney would have war- nted him in demanding it from the receiver. The pos- ibility of intervening claims, did away the objection. o with us, as the money was not to go into White's nds, but into those of another, he stands precisely in e situation of the witness in Powel v. Gordon, had he onsented to another's receiving the sum in litigation.

It has therefore, it is presumed, been shewn,

1st. That objections run more to the credit than to the mpetence of witnesses.

2d. That to affect the competence, the interest must be mediate.

3d. That White's interest was not immediate, but con- quential.

4th. That admitting a lien to have been created by the der, *that* does not vary the matter.

5th. That the very case of a creditor witness, was put y the whole court of King's Bench, and allowed not to capacitate; and

6th. That the inferences, unavoidably resulting from owel v. Gordon, fully establish the competence of hite.

The reasoning antecedently used on this point, cannot, is thought, be better concluded than in the words of r. Fonblanque,* when speaking of the rule respecting e interest of witnesses in causes, on the trials of which ey are brought to give evidence, it is, he says, "the most flexible in its application of any."

* 2 Fonb. 457.

The next objection to which it is necessary to advert is, That parol testimony of ownership was inadmissible." or this it has been relied on, that the register act has ade a certificate of registry a legal record. It surely ill never be imposed on me to demonstrate that such an strument, or the book in which it is kept, is not a *legal*

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record, in the technical sense of the word, importing a verity, which admits not of being controverted or substantiated by oral proof. I shall only observe, that in a case in Espinasse* Lord Kenyon ruled, exercising acts of ownership, paying of men, directing the loading, &c. were sufficient testimony of interest in a vessel. For, in commercial contracts, the highest degree of evidence is not always required. The purpose of the register act was not to make the proceedings under it of record, but merely for stated reasons, to enable to collect the duties on tonnage, by ascertaining what ships belong to foreigners, and what are our own.

* Amery v. Rogers. 1 Esp. 209.

It is thirdly insisted by the defendants, that as the abandonment was made in writing, and notice to produce it not given, parol proof of the abandonment ought not to have been received.

It is worthy of observation, that the abandonment is not denied; it is only asked that we should not be permitted to shew it. It cannot be argued that it is indispensable to make the abandonment in writing. We admit it to be usually so done: that however is nothing more than matter of caution. It was, on that account, done here. But there is no case to shew we were obliged to do it. If so, we may prove the contents, or effect of the letter of abandonment, without notice to produce it, because it now becomes a fact, like every other, to be established by parol testimony. In order to decide on the necessity of giving a notice to produce any written paper served on the opposite party, we have only to call to mind the reasons why it is in any case required. They are, lest a misrepresentation should be made, of any fact, which constitutes the *foundation of the action*, and which, though in possession of the opposite side, yet being unnecessary to his case, might not be brought by him. When, therefore, the contents of the paper in question are not the foundation of the action, a notice to produce it is totally superfluous. Therefore, in cases of notices to quit, notices to a magistrate previous to commencing an action

ainst him; the demand in writing of a warrant before xceeding an officer; or any similar case, notice to produce : notice, need not be given. Jory v. Orchard, 2 Bos. & l. 39. So an attorney's bill, on which an action has n brought may be proved without notice to produce one delivered under the statute. Anderson v. May, los. and Pul. 237. So, payment of rent by a tenant in session can be established, without notice to produce receipt. Run. Eject. 289. Because, wherever the tter is collateral, parol evidence is adequate to every pose. The idea of this necessity of giving notice, has ien from a confounding of cases. From mistaking that e the foundation of the suit, which is only used in proof the demand. It is but a mere formality, on which the ht of action by no means depends.

Another reason may also be offered to evince the nuoriness of a notice to produce the letter of abandonnt. It was sufficient to establish it by the copy offered he trial. Wherever, a number of copies are simultanely made, they are in law, all originals. Because, be- created uno flatu, one is considered the same as the er, and may equally be read in evidence without notice. dieb v. Danvers, 1 Esp. 456. So the counterpart of entures, Burleigh v. Stibbs, 5 D. & E. 465.*

Having, it is hoped, obviated the three first difficulties our retaining our verdicts, the fourth which presents lf, is, "That there is no proof of the property being he property of a citizen of the United States;" or in er words, that the warranty of American citizenship, not been complied with.

In combatting this objection, we beg leave to state, that this country there are three different kinds of citizens.

st. Those who became so at the declaration of indedence.

d. Those who, since that period, have become so, by uralization.

d. Those who are so by domicil and employment.

Thus much being premised, it will be necessary to call attention of the court to those doctrines, on which

* In that case the counterpart signed by the defendant only, was allowed to be given in evidence to prove an apprenticeship to him by a third person, merely because it recited such an indenture.

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the law of warrantics has been held to rest. Accor to those, it suffices if the warranty be complied wit conformity to its *letter*, without any regard being ha its *spirit*. In consequence of this principle, an opp maxim has been sanctioned, that no *virtual* fulfilling warranty can be allowed. What then, in the present can be deemed to fulfil the warranty of American citi ship? Will it be pretended, that the person warra must be a citizen, such as those who became so at th claration of independence? This will hardly be said; should it be, there is no case to warrant the assertion there any decision, which declares he must be a cit by naturalization? none; for this would exclude all ginal citizens. Neither can it be insisted, that he be a citizen, with all the rights and privileges of an A rican. Because, a naturalized American, one who not become a citizen by the declaration, is not eligibl the office of President of the United States, or that of G ernor, to any individual state. Both positions are equ untenable. Of what species of citizens, then mus be? One by domicil* and employ. Why? Because, embraces every class of citizens, and answers every pose of the warranty. Let us for an instant recur to reasons on which a warranty is given. It is to assur underwriter, that the subject matter of the policy is A rican, and within the protection of the law of nation has been long ago settled, that personalties follow the son. On this account domicil for ever regulates distr tion of effects. That the principle is peculiarly adh to in matters of prize is notorious. The merchandi a friend, resident in the country of an enemy, is liabl confiscation; for it is the domicil that stamps the neut character. So the employ of a master of a ship invari fixes the nation to which he belongs. The Embde Rob. Ad R. 16. The Vigilantia, and cases there ci ibid 1. The Harmony, 2 Rob. Ad R. 322. Mr. O meyer's case, ibid, 41. Mr. Johnson's, ibid 17. Ow of the sloop Chester, v. Owners of the Experiment, 2 I 41. The case states Peyton a resident, and known as

* Ramsay v. United In. Co. Oct. Term 1799. u. Co. N. Y. The warranty of American property held, not complied with from the assured's domicil being in a belligerent country, though it was admited he was an American citizen. Mss. Kent J.

American vessels, naturalized from residence and em-
oy. In this view he is beheld by the admiralty court in
assau, and the property they acknowledge as his, they
quit as neutral. Every protection then has been afford-
which the warranty was meant to confer, and Peyton,
the eyes of a foreign tribunal, and according to the law
nations, stands confessed an American citizen. In
ery part of insurance law, the same principle is to be
und. If within the letter of the clause it is enough.
ship was warranted well, on such a day, she was well
6, but lost at 8 o'clock, and held a compliance. * So
re warranted the property of an American citizen. Not
citizen with all the rights and privileges of an American
tizen; not even a naturalized citizen; but a citizen ade-
uate to all the purposes of protection, intended by the
arranty, a citizen de facto, though not de jure. I am
are the ground now taken is, in cases like the present,
rfectly new. It is not, however, a ground on which this
urt has never trodden. We but follow their footsteps
other causes. In Goold and another v. Gracie, June
. 1798, under a clause in a policy, that if an assurance
as effected in Europe, the premium was to be returned,
educting one half per cent. it was held, *unanimously*, that
policy de facto was within the meaning of the words, and
e insurer exonerated, though the policy was void ab in-
io, and, therefore, a recovery could never be had. So,
Buller, J. in Wilkinson v. Payne, 4, D. & E. 568, a
arriage de facto, was said to be sufficient to entitle to re-
ver on a promissory note.

* Blackhurst v. Cockell, 3 D. & E. 300.

If, however, the court shall be against us on this princi-
e, still we shall contend that the citizenship of Peyton is
bstantiated by evidence in the cause.

It is an acknowledged action, that every man's testimony
to be received or rejected in toto. You cannot cut and
rble it. Take one line, if it suits your purpose, and then
ject the next; his alienage is before the court, *from his
n confession*, and so is his naturalization. If you believe
m on his word that he was an alien born, you must believe
m on his word that he has been naturalized since. As a

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man is charged, so he shall be discharged. If his own declaration is to determine him an alien, his own declarati shall shew him an alien naturalized. His acknowled ment of his foreign birth is nothing more than *presumpti evidence* of his being now an alien. He might have bee one by birth, and yet have become a citizen at the Decla ration of Independence. General Gates, Governor Clin ton, Washington, himself, were all aliens by birth: being therefore born an alien, is no more than presumption of hi being so now, and presumption may always be rebutted by presumption. Tysen v. Clark, 3 Wils. 541, Run. Ejec 262. Allowing, then, for argument's sake, the declaratio of having been naturalized to be laid aside, what presump tion does the case afford to counteract this presumptive evi dence of alienage. First, there is a general reputation o the plaintiff's being a citizen. It will not be denied, that in many instances, reputation is, of itself good testimony. I is adequate to establishing a pedigree or a marriage, pe Holt, C. J. in Dr. Harcourt's case. Yet in each of those certificates may be adduced, and the doctrine of Holt i now allowed in England, tho' registers in both those cases are ordained by statute law, and certificates of each may be, and are every day adduced. So to ascertain who wa the patron of a living in the Bishop of Meath, v. Lor Blissard, 1 Wils 215; presumption was allowed. If eve there was a country in which presumption of citizenshi ought to be conclusive, it is this. I may again instance General Washington; nay, your honors who now sit o the bench, have nothing else to offer: you have no natu ralization, no document to shew, but the places you fil and general reputation would give to you the character and to your children a title to the estates you may leave So with Peyton, were he to die to-morrow, his issue woul take his real estate, in right of his citizen father. Sha then, his reputation of citizenship be good to support claim to land, and yet be inadequate to one against an in derwriter? Are three thirds of the community to be cut o from the only mode by which they ever had, or can hav a possibility of substantiating their right to the American

? If more proof be required of the plaintiff's citizen- it is afforded, and that by the case itself.

fore it is attempted to evince this, I shall beg leave to own three maxims.

. That all things done, are presumed to be rightly

That situations occupied, shall be supposed to be y filled.§

That fraud and misconduct shall be imputed to no

If necessary, I shall first substantiate, and then ap- ese principles.

ris, C. J. The principles will not, I fancy, be dis-

nes. In order to apply them, it will be incumbent to to the testimony in the case.

in evidence, that the plaintiff commanded an *Ame- vessel* carrying guns: in order to capacitate him for ommand, he must have been antecedently proved, to tisfaction of the officers in the Custom-House, an can citizen; for none, but an American citizen could y such a station. If so, then, we are fully within two maxims, we have complied with their letter and pirit; it is therefore to be presumed that what has one, was rightly done, and that the situation which n did fill, was legally occupied. The inference con- tly, becomes clear as day, that the plaintiff is an can citizen. If we hesitate for a moment in pro- ing him so, we violate every one of those three max- hich have already been conceded. First, we must ne, that what was done, was not rightly done: se- , that the station filled by the plaintiff was not le- ccupied. We cannot even stop here; we must go d not only presume fraud and misconduct, but take nted, perjury upon perjury: all the penalties of the r act incurred, and a long connected system of wearing, as if by vocation. These are the mild in- es suggested on the part of the defendants: they ch as your Honors will surely never make; we re are peculiarly justified, on asking for those for

* Griffin v. Stanhope, Cro. Car. 445. Rex v. Morris, 2 Burr. 1189. 1 Wils. 275.

§ Lord Halifax's case, Bul. h. p 298. Lord Purberk's case cited, Cowp. 104.

† Chattle v. Pond, G. L. Ev 103.

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which we contend, because when reputation is accompanied with facts, it is good evidence. Per Grosse Roe v. Parker, 5 D. &. E. 32. Here then was reputation accompanied with the fact of Peyton's having manded an American armed vessel. His citizens therefore established—

1st. By his domicil and employ.

2d. By the evidence of White.

3d. By reputation.

4th. By reputation accompanied with facts.

5th. By necessary and unavoidable presumption.

The last point is confined to the vessel, and resolv self into the abandonments having been made too late after an acquittal. It will be sufficient on this, to rem that whenever a legal right, becomes once vested, a exercised, subsequent occurrences do not affect it. the capture, the plaintiff had a right to abandon, the quittal of the vessel, as it does not appear to have b known, when the abandonment was made, cannot inv date the right. The only question then is, whether it in due season. On looking at the dates of the diffe circumstances, it will be found that there was an in vention of only 29 days, from one period to the ot This, it is presumed, cannot be deemed too great a le of time, considering that the news of the capture, have travelled from the Bahama Islands to Charleston, from thence to New-York. Upon every ground, there it is trusted the verdicts that have been rendered, wi confirmed.

Pendleton in reply. The cases of Barlow v. Va George v. Pearce, and Rex v. Fox, proceed on this gro that a person who is a witness, shall not, by a subseq act of his own, deprive others of the benefit of his t mony.* The principles of admissibility are no wh better laid down than in Omichund v. Barker.† The in no instance of a person, not a citizen by birth, or ralization, being held an American citizen: and as t inference from his employ, he may qualify himself t master of a vessel by his own oath. None of our ob

* That is the true point of the decisions

† That case goes only to the admissibility of delats not believing in the Christian religion.

have been answered. In peculiar, that against parol nce of the register, for, if congress chooses to make cord, this court cannot deny it all the privileges of

ingston, J. now delivered the opinion of the court. ese are motions for new trials on the part of the de- nts, and among the objections to the verdict, it is al- l that George White, who was examined for the iffs was an incompetent witness. This objection ap- to me to be well taken. He was a creditor of the iffs, who had given him an order on his agent, Tho- Napier, for the amount of his debt, to be paid out of onies to be recovered on the policies, on which those were brought, and had promised him the debt should d out of the same. This order was not accepted, e witness said "he expected to be paid according- He added that, whether the plaintiff recovered or e should look to him for payment, as his right did pend on the event of the suit. Here was an intent, opinion, sufficiently direct, and dependent on the of the cause in favor of the witness, to render him petent. The order he had obtained, amounted to signment of this property, to the extent of his de- ; and the agent, after its exhibition to him would, peril, have parted with it to the plaintiffs, or to any person. It is not a satisfactory answer to this diffi- to say that White still retained his remedy against intiff, if this fund failed. If land be assigned, with ant on the part of the obligee or assignor, that he will amount, in case it be not recovered from the obligor, the court permit the assignee to be a witness in a the land. I think not, and yet I percieve no great nce in the cases. Nor will it answer to say, that Na- ay have had a right to appropriate this money in ano- ay. This might have been shewn on his examination; was not done, we are not now to presume it contra- he expectations of the witness himself, which no doubt from promises made to him by the agent, for with- me assurance of the kind, he would have abandoned

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every hope from that quarter. No doubt can be entertained of Napier's being the plaintiff's agent to recover this money. The bill was drawn on him, to pay out of this fund, which implies, an authority to receive it. He had the policies, for he made the abandonment, and the case itself gives him that appellation. It was also said on the argument, that it was not certain the agent would ever receive these funds, and until that was the case, White could have no claim on them. For this very reason, he had an interest to place them in the agent's hands, that his debt might be satisfied out of them. It is certainly dangerous to permit a person, who has an interest, or who, on good grounds, thinks he has an interest in a particular fund, to testify concerning it. In case of the insolvency of Peyton, there can be but little doubt, that he might have compelled the agent, in a court of equity, to pay his whole demand out of this money. 1. Vez. 332.

If a man promise a witness, that if he recover lands, he shall have a lease of them, this excludes his testimony. 2 Keb. 576. So, if a person be promised payment out of the sum in controversy, which is the case here, he ought to be excluded, unless he will release such interest. As that was not done here, I think a new trial ought to be had with costs to abide the event of the suit.

Lewis, C. J. There is no difference of opinion amongst us in this cause, but on the point on which the court have set aside the verdict: viz. the competency of Mr. White, the witness produced on the part of the plaintiff. I do not concur in the opinion that he was incompetent. The bill drawn in his favor, on Napier the agent, has never been accepted, nor has the fund out of which it was to be paid, ever come to his hands. White, then in my conception, had no interest in this fund: the doctrine of lien has never, that I know of, been extended so far as to vest an interest in one man, in a fund, which may or may not come into the hands of another. Neither of the cases relied on, go to such extent. In Row v. Dawson, Swinburn was in possession of the fund, and Lord Chancellor Hardwick considered the bill of Gibson, as an assignment to the

nt of the draft. In Powel and Gordon, the witness imself the agent who was to receive the fund, by vir- f a special power for the purpose, and refused to let into the hands of another, which had he assented to, l, we are to infer, have established his competence. r case the power was in the hands of a third person ly; and therefore, within the spirit of the decision in l and Gordon, White was a competent witness.

President, Directors and Company of the Uni- n Turnpike Road *against* Thomas Jenkins.

ame *against* the same, in three other actions.

an act of the 3d of April, 1801,* certain persons ncorporated, for the purpose of improving the road New-Lebanon to Hudson, under the name of "The lent, Directors, and Company of the Union Turn- load."

the second section of the act, it is ordered "that ert Jenkins, and Elisha Williams be, and they are by appointed commissioners, to do and perform the ral duties hereafter mentioned: that is to say, they l, on or before the first day of May next, procure books, and in each of them enter as follows: *We, se names are hereunto subscribed, do, for ourselves, our legal representatives, promise to pay, to the Pre- t, Directors, and Company of the Union Turnpike, l, twenty-five dollars, for every share of stock in the company, set opposite to our respective names, in such ner and proportion as shall be determined by the said ident, Directors, and Company;* and every subscri- shall at the time of subscribing, pay unto either of aid commissioners, the sum of ten dollars, for each so subscribed; and the said commissioners, shall, on as one thousand shares have been subscribed, an advertisement to be inserted in the public s-paper, printed in Hudson, giving at least ten days e of the time and place the said subscribers shall for the purpose of choosing five directors, who shall ock-holders, for the purpose of managing the cor-

* Ch. 118.

The President and Directors of a company when legally chosen, are the proper persons to execute acts ordered to be done by the President, Directors, and Company, and a promise to pay as the latter may order, is broken bynot paying according to the order of the President and Directors. The interest acquired by subscribing for shares in the stock of an incorporated company, is a good consideration to support an action against the subscriber. The promise to pay in such cases as the President, Directors and Company may order, is not such a promise as will support an action as for a promissory note. Where there are some good counts and some bad, and a general

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"cerns of the said Company, for one year; and the day "of choosing the said directors, shall thereafter be the an- "niversary day of choosing directors; and the directors "elected by the votes of the stockholders, shall immedi- "ately proceed to the choice of one of their members for "President; and the said President and Directors shall "and may meet from time to time, at such time and place "as they may by their bye-laws direct, and shall have "power to make such bye-laws, rules, orders and regula- "tions, not inconsistent with the constitution of this or "the United States, as shall be necessary for the well or- "dering of the affairs of the said corporation: PROVIDED, "that, at the election of the directors, every person shall "have a number of votes equal to the number of shares "owned by such person, if such number shall not exceed "fifty, and one vote for every three shares owned by such "person exceeding fifty."

verdict on the whole, if the evidence has been on the good counts only, the verdict may be amended from the judge's notes, after notice of motion in arrest of judgment.

By the last section it is enacted, "That it shall be law- "ful for the said directors, to call for, and demand, of, and "from the stockholders respectively, all such sums of mo- "ney by them subscribed, or to be subscribed, at such "times and in such proportions as they shall see fit, under "pain of forfeiture of their shares, and of all previ- "ous payments made thereon, to the said President, Di- "rectors and Company."

The defendant had subscribed for 280 shares, but, at the period of writing his name in the book, as directed by the first section, the $10 therein ordained to be, at that time paid, were neither so paid, nor were demanded. Two orders for paying in $5 on each share subscribed, were made, with which the defendant refused to comply, and for their amount the present actions were brought. The first count in the declaration stated the passing of the act, and incorporating the company. It also set forth the second section, omitting, however, that part requiring the payment of the $10 on each share at the time of subscription; it went on averring the compliance with the requisites of that section, the subscription of the defendant, and of 2900 shares; it stated the election of a President and

ctors, and two orders made by them for payment of instalments, of $5 cash, on each share subscribed, no- and by reason whereof, &c.

he second count was in these words, "And whereas, o, the said Thomas Jenkins, on the seventh day of ril, 1801, at the city of Albany, in the county of Alba-, madehis *certain promissory note* in writing, by him, his own proper hand-writing subscribed, the date ereof is on the same day and year aforesaid; where- the said Thomas, promised for himself, and *his legal presentatives*, to pay to the President, Directors and mpany of the Union Turnpike Road, the sum of 5 for every share of stock set opposite to his name, in h manner and proportion, and at such time and place, should be determined by the said President, Direc- s, and Company, and the said Thomas did then and re set opposite to his name, fifty shares," with an ment of their determining that he should pay $5 on , on the 10th of September, then next, with notice, lity, and assumption.

he third count was in the same form on a promissory , for 230 shares.

he causes were tried at the Albany circuit, in January and general verdicts found for the plaintiffs.

fter this, the defendant gave notice of moving in ar- of judgment, and assigned the following reasons:

t. That the first counts in the declarations in the said es, being founded upon the statute, do not set forth the said defendant *at the time* of subscribing the said cription, paid to the said commissioners, the $10 on share, by him subscribed, according to the regulati- of the said act, and that it appears by the said counts, the commissioners therein named, did not, as soon as thousand shares were subscribed, in the manner di- d by the said act, proceed to give the notice by the act required, for the purpose of chosing Directors, that no order and determination of the President, Di- ors, and *Company*, in the said declarations mentioned, ated in the said first counts, for the payment of any

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money, upon the shares of stock, therein mentioned to have been subscribed; so that the defendant never became liable to pay any such money, and that the promises in the said first counts stated, are void for want of consideration.

2dly. That the second and third counts, in the declarations in the said causes, are founded on agreements or promises in writing between the parties, as on a note of hand, which is not within the statute, &c.; and that the said counts do not set forth any good or valid consideration, upon which the said agreements in writing were made and given.

Immediately after service of notice of the above reasons, in arrest of judgment, on an affidavit stating, that the evidence offered at the trial, was under the first counts in the declarations, and calculated to support them in particular (the second and third counts not being read to the jury, nor referred to by the counsel) the plaintiffs gave notice, of a motion, to amend the verdicts in the several suits, from the judge's notes, so as to make them apply only to the first counts in the several declarations, and to enter verdicts on the second and third counts for the defendant, and to amend the postea and rules for judgment entered thereon, in conformity to such order as the court might make.

Champlin for the defendant. The first objection is, that the ten dollars, ordered by the act to be paid, was not done. The contract then, on which the action is founded, is not according to the order of the statute. In the next place, the orders stated by the declaration to have been made for payment of the sums demanded, are not in pursuance of the law. By that, the order is to be by the President, directors, and *company*; the declaration sets forth one, by the president and directors only. This is fatal; for as the plaintiffs have a particular authority, they ought to shew a strict literal compliance with the law, by which they are authorized. If they have a right to omit the company in their orders, they may the directors, and so the president alone may govern the affairs of the corporation. The two last counts are plainly bad: they are on

romissory notes, under the statute, where those notes ppear to depend on a contingency. The declarations, herefore, on them cannot be maintained. Carlos v. Fanourt, 5 D. & E. 482. For a note on a contingency is not note within the statute. Not that such a note cannot be declared on, but then it must be as a special agreement, and the consideration set out. As to the notice to mend, it is before the court; they, perhaps will not be disosed to allow it. We object, however, that the aplication is too late, because a term has intervened, and he evidence which was given in one count, would equally pply to all. Yet, if we are wrong in this, if the court hould give leave to amend, they will not do it, without rdering at the same time a new trial. Tomlinson v. Blacksmith, 7 D. & E. 132.*

Williams and Van Ness contra. The application on he part of the defendant, is to amend the verdict from the notes of the judge, so as to apply the evidence to the first count only, and to enter verdicts for the defendant on the second and third. It is evident that the testimony could have gone only to the first, for the two last are stated simply as contracts, though the form be somewhat like that on a note of hand. They were engagements to an organized company, and it was only in relation to *that* company, that were taken; they must, therefore, comport with the defendant's liability to that company, under the first count. When a general verdict is given, it is almost, of course, to amend, if *that* verdict does not correspond with the judge's notes. 3 D. & E. 659.‡ So in Eddowes v. Hopkins‖, it was ruled, that if the evidence be only on a good or consistent count, and there be others bad in point of law, a general verdict given on the whole declaration, shall be amended according to the judge's notes. Even in a criminal case it has been done, and the criminal executed according to the amendment. Grant v. Astle, Doug. 370.

In slander, it is true, where some counts are for words not actionable, and others for words actionable, on a general verdict, judgment will be arrested, but even then the

* In that case, the amendment was by altering the verdict from a small to a larger sum; which amendment was moved for, on the face of the declaration The court said, in fact we cannot load the defendant with more than the jury of his country has determined, without sending him back to another jury.

‡ Petrie v. Harmay. There were two issues in that case, the verdict was on one, and no notice taken of the other, the amendment was allowed after error brought, and this assigned as a cause, on payment of costs.

‖ Doug 376, See also, Williams v. Breedon, 1 Bos. Pul. 329.

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court will order a venire de novo to assess damages on good count. An application like the present, is never late. In 1 D. & E.* it is said an amendment will be or ed even after error brought, and the record sent back t the Exchequer Chamber. The same principle is four Taylor v. Whitehead, Doug. 746.† If we are successfi the point of an amendment, all objections taken to th cond and third counts are at an end. But even sh these be objected to, we contend they are good. Th strument declared on, is an engagement in writing which the defendant promised to pay. The being a in writing is enough, and purports a consideration the none be stated. 2 Black. Comm. 446. Pillans v. Van rop. 3 Burr, 1670.§

Kent, J. That doctrine has been completely overr in a case where Skynner Baron delivered in the Hou Lords the unanimous opinion of the twelve judges Caines. Amicus curiæ. Rann v. Hughes, 7. D. & 350.

* Green v. Rennet, 783, per Buller J. But that case does not apply to amendments of verdicts. It relates to amending mistakes by the act of the clerk, where there is something to amend by. As if he enter against an executor, judgment de bonis propriis, instead of de bonis testatoris

† The decision referred to, is very different. A verdict had been foun the defendant, a motion for a new trial on account of the verdict's against evidence had been denied, after which the plaintiff obtained a ru shew cause why he should not be allowed to enter up judgment on that because, notwithstanding the finding of the jury, the point of law was vor of the defendant. The court said this being a motion in the nature for an arrest of judgment, was never too late before judgment entered

§ The two books cited, will certainly warrant the position of the le counsel, but the parts referred to are not law. In Sharington v. Strotton, 3 8 it is said, "By the law of this land, there are two ways of making " tracts, or agreements for lands and chattles: the one is by words, wh " the inferior method; the other is by writing, which is the superior. " because words are oftentimes spoken by men unavoidably and without " beration, the law has provided that a contract by words shall not bind " out consideration. But where the agreement is by deed, there is more " for deliberation; for which reason they are received as a lien final to " party, and are adjudged to bind the party without examining upon " cause or consideration they were made." The reader will observe, that Plowden speaks of contracts by writing, he means by deed under seal. is more explicitly declared in the case of Rann v. Hughes. Baron Skynner says, "All contracts are by the law of England distinguished into agreem " by SPECIALTY, and agreements by PAROL: nor is there any such third " as some of the counsel have endeavored to maintain, as contracts in wri " If they are merely WRITTEN, and not SPECIALLY, they are PAROL, a " consideration must be proved." In Pillans v. Van Mirrop, Wilmot J. a ed, that if a stipulation, which was only by words, was, according to the law, binding without consideration, a fortiori, so must be an agreement in ing. But the civil law itself will not warrant this reasoning. The oblig force of a stipulation arose from the words being spoken in a precise f before a public officer; for, if that form was not adhered to, the stipulation void: therefore if to the question PROMITTIS, the party stipulating had ans ed SPONDEO, the stipulation was a nullity. I am therefore disposed to th that the stipulation was taken in the manner of our recognizances, and w acknowledged became a species of record. I am peculiarly induced to this nion, from the manner in which they are now entered among the acts of court, in those of the English tribunals, which follow the civil code; and

Van Ness. A written contract without consideration ay be declared on as it is.

Lewis, C. J. This court has decided that a contract erely in writing, does not supersede the necessity of a nsideration.

Williams. That the contract was not consummated by yment of the $ 10 required by the act, is also urged as a ason why the action cannot be maintained, but surely e commissioners might have dispensed with this. As the objection that the promise was given to pay such m as the President, Directors and Company should or- r; and that the order was only by the President and irectors, it can hardly be thought the defendant ever ped to rely upon it. The President and Directors are e agents of the company, duly chosen by them to physi- lly and legally express their will. The order made by e President and Directors, is an order made by the Com- ny. This follows necessarily, for the President and irectors are by the words of the law, to manage the con- rns of the company to act: when they were chosen, the wers of the company to act, were transferred to them, d this being under the letter of the statute, they were e only persons to make the order. Had it been com- ied with, the defendant would never again have been lled upon for any thing paid under it.

Harrison in reply. In support of the notice in arrest of gment, nothing can be more clear, than, that where en- damages are given, and one count is bad, the judgment st be arrested. But in this declaration, there is not good count, and this apparent on the face of the re- rd without any aid aliunde. On the first count, the jection, as to the order, is certainly fatal. The act ope- ting like a charter, specifies a particular manner in which

[illegible] considering, that the reduction of a contract into writing did not, even by the rules of the Roman jurisprudence, preclude from entering into the consideration on which it was made. By that system the obligatio literarum arising from the contracts ex literis was invariably contestible in the three following cases: 1st. When the consideration was not expressed 2d. Even then in two years. 3d. In all cases of loans of money, by the exceptio de non numerata pecunia, which threw the onus of proving a consideration upon the suit. The codex too is express that no form of words or writing, but assent alone formed the contract. Cod. lib. 2 tit. 3 l. 17.

by which the company is incorporated. If of those by whom a specific act is ordered to be d dispensed with, another may, and there is no far this principle is to be carried; no power car ed under the statute, but what is created by it cuted in the manner it prescribes. On the poi deration, the authority from 5. D. and E. is d consideration appears by the declaration, the asked must be denied, because it is evident wh to support the first count, must have been a the second and third counts, which were on th as that mentioned in the first: if so, Eddowe kins relied on by the plaintiffs, shew the ame not be granted.

Per curiam delivered by Radcliff, J. In thi is a motion in arrest of the judgment, founde tions made to all the counts in the declaration.

The counts are three in number, and the obje apply to all are,

1st. That the promise or contract set forth in tion is void for want of consideration, and con this is another objection, which was distinctly the first instalment of $10 not being paid, the c incomplete, and not obligatory on the company

4th. To the second and third counts there is a further objection, that the plaintiffs have declared on the promise or subscription in writing, as upon a promissory note within the statute.

As to the first, the form of the subscription which contains the promise, is prescribed by the act in the following terms: "We whose names are hereunto subscribed, do for 'ourselves and our legal representatives, promise to pay 'to the President, Directors and Company of the Union 'Turnpike Road, the sum of $25 for every share or stock 'in said company, set opposite to our respective names in 'such manner and proportion, and at such time and place 'as shall be determined by the said president, directors 'and company." The declaration states the plaintiff's subscription in these terms, but does not aver that the $10 on each share were paid, and which the act required the defendant to pay at the time of subscription.

I cannot discover any ground on which this promise ought to be considered as void. The subscription was taken by commissioners who were authorised to receive it, and in the form prescribed by the act. That form contains an absolute promise to pay the money to the president, directors and company. On the one side the interest of the company in selling the shares, and the public advantage to be derived from the success of the institution, and on the other the expected profits to accrue from the stock, were sufficient considerations to unbold the promise. By force of the act itself also it must be considered as good. The legislature also must have intended that it should be obligatory, or else the formal manner in which it was prescribed to be taken would be senseless and nugatory. I cannot imagine that a contract in terms so express and complete should be designed to mean nothing.

The last section of the act by which the company was created, cannot in my opinion destroy its effect. It is thereby further enacted, that the directors may call for and demand the sums so subscribed, at such times and in such proportions as they shall see fit, under pain of the forfeiture of the shares and all previous payments. This provision was

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designed as an additional security for the proportion of the shares which should remain unpaid, and to enable the company by a decisive measure to compel the prompt payments which the objects of the institution required. They had an election to adopt this expedient, and exact the forfeiture, or to enforce payment in the ordinary course by a suit on the original contract. Not having insisted on the forfeiture, they of course have a right to maintain this action.

The objection which is founded on the idea that the contract was not obligatory on the company, and therefore not mutual in its operations, I also think is not well taken. The subscription was for the full sum originally due for each share. The $10 on each share were due immediately, and the engagement with respect to that sum was like a note or obligation payable on demand. The contract was complete, and the defendant had a right to tender the payment of the $10, and demand its performance on the part of the company, who had an equal right to enforce it against him. Neither party could revoke it without mutual consent, or a default on the adverse side. I therefore consider the contract as reciprocally binding, and founded on a valid consideration.

The second objection is, that the commissioners appointed by the act did not as soon as 1000 shares were subscribed, give notice to the stockholders to choose directors. This was I think properly relinquished by one of the defendant's counsel. It does not appear when the precise number of 1000 shares was subscribed. The defendant subscribed his shares on the 17th of April, 1801, and it is averred, that on the 21st of the same month upwards of 1000 shares, to wit, 1990 were subscribed, and that the commissioners, on that day, gave notice, to choose directors. The particular time of giving this notice, after 1000 shares were subscribed, could not be material. The act in this respect was merely directory to the commissioners, and if they did not strictly execute their trust, it could not affect the existence of the company, nor any contracts made with them.

e third objection is, that no order or determination president, directors and *company* requiring the pay- of this instalment, is averred. It is averred that *resident and directors only* made the order. The ise was made to the president, directors and *company*, ding to the form prescribed by the act, and it is fore argued that this order ought to have been made : *company* as well as by the president and directors. criticism ought not to prevail against the only prac- e construction that can be given to the mode of ex- ig the powers of this corporation. It is obvious that ompany in their collective capacity, can never act. resident and directors are their representatives, and lone are authorized to manage the concerns of the ny. The act invests them with this power, and it s set forth in the declaration. They alone could e the payment in question, and the order was pro- made by them.

. The last objection applies to the 2d and 3d counts in which the plaintiffs have declared on the defend- ubscription as upon a note of hand, without setting the act or any consideration to support the defend- promise. It is not expressly declared upon as a note the statute concerning promissory notes, but the s can be supported on that idea alone, for they do ate any consideration independent of the making of te. The shares of stock to which the defendant would itled, are not set forth as the consideration of the se, but merely as descriptive of its extent, and as ating the amount he undertook to pay. These s, therefore, cannot be maintained unless the note sidered to come within the statute, which I think it ot. Although by the note the defendant promised $25 for each share, it depended on the future ope- s of the company, which was not yet organized, er the whole or any part of that sum would finally nanded or become due. The payment was there- ncertain and contingent, and such a note has fre-

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tors, with propriety, have refused to consider Mr. Jenkins as a stockholder, on account of his not having made the payment required by the act on his subscribing? I think they could. No *positive* benefit then, arising from the future emoluments of the company transactions, can be considered as a consideration for the promise, and if it could, none such is stated on the record.

Notwithstanding the motion to amend, it was insisted the suit was maintainable on the 2d and 3d counts. I think not. For a promise to pay on a contingency, which may, or may not happen, cannot be declared on as a note of hand. The instrument must be *payable at all events.*

The propriety of amending, I need not consider, as I am of opinion, no suit can be maintained on the first count, for want of a consideration.

I am of opinion judgment ought to be arrested.*

The People *against* Samuel S. Freer.

If a defendant has been prevented by adverse winds, from shewing cause against a rule for an information, and the same has been made absolute for want of cause shewn, the court will set it aside of course, on an immediate application.

A RULE had, in the last term, been granted against the defendant, to shew cause on the first day of the present term, why an information should not be filed against him, and no cause having been shewn on the day appointed, the rule was made absolute.

Hoffman now stated to the court, that the defendant had been prevented by adverse winds, which detained his counsel and papers, until after the rising of the court on the first day of the term, and prayed that the rule might be overated.

Per curiam. It is of course—take your motion, and shew cause, on the first nor enumerated day.

James Brandter ex Dem'. Timothy Fitch and others *against* Ammon Marshall.

If a tenant enters under a lease, holding over after its expiration, is not evidence of adverse possession So, if the tenant's son come in under him.

EJECTMENT for lands in West-Chester, tried in June, 1801, before his honor the Chief-Justice. The case stated, that the plaintiff produced and proved:

* After pronouncing the judgment of the court, Radcliff, J. observed that he thought the regular practice was to obtain the certificate of the judge before whom the cause was tried, that the evidence applied only to the case in which it was meant to enter judgment. Kent, J. who tried the cause, thought the affidavit of the plaintiffs' attorney was correct, and therefore he deemed sufficient for the amendment. In this the bench concurred.

1st. A paper signed Joseph Marshall, the father of the fendant, dated 6th September, 1758, by which he acowledged that he had, about six years before that period, ten possession of the land in question, under Thoas Fitch, and John Raymond, and that he then held the me under them as his landlords.

2ndly. The counterpart of a lease executed by the said seph Marshall, by which the said Thomas Fitch and hn Raymond, demised to him the premises, for three ars, then next ensuing, at a reserved annual rent of one illing, of any payments of which, no testimony was giv- ; but it was given in evidence, that some time subseent to the lease, two suits for forcible entry and detainer, re brought against the said Joseph Marshall, relative to e land in question, and that, on these occasions, Joseph arshall applied to Thomas Fitch, who defended him erein: that he was turned out of possession in one of ose suits, but afterwards restored: that Joseph Marall died intestate, in 1774, and letters of administration re granted to his son Joseph: that Joseph Marshall, the ther, died in a house on the premises, in which he resid- with several of his sons, who were of age, and had, r some years past, worked the farm, but whether on their n account or that of their father, did not appear. It as further proved by two witnesses, that they were pre- nt at a sale by auction, of the effects of the intestate, ere they were told by the administrator and auctioneer, at the defendant had purchased the *possession* of the land question. One of the witnesses, who was a neighbour f the defendant, deposed, that according to his supposiion, the defendant held the lands ever since by virtue of e purchase; and another proved that he was the youngst son of the intestate, and not his heir at law. It was so in evidence, that the defendant had in his possession e lease granted to his father: that Thomas Fitch died 775, and some of the lessors of the plaintiff are his heirs. n the part of the defendant it was established that he had en in the actual and peaceable possession of the premisfrom the death of his father to the present time, hold-

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ing and claiming them as his own, and that no ever been paid by, or demanded from, him.

The judge on this evidence, charged the jury they believed the defendant held the land unde ther's title, they ought to find for the plaintiff; o direction the jury brought in their verdict accord

On these facts a motion was made for a new tr

Hoffman for the defendant. We contend tha circumstances as presented by the case, the judge have directed for the defendant, and not for the The facts, indeed, are but limited; some princip ever are involved, which it is of the utmost impor have decided. For, admitting that the defendant under his father, still we insist the plaintiff, as from the case itself, is not entitled to recover. T no evidence of title whatsoever from the expiratio lease in 1758. That then, being only for three ye pired in 1761. After '61, the lease is no eviden posessory right in the plaintiff to have the premises subsequent acts of the defendant can be shewn eq to an acknowledgment that his title was under th Without resorting to authorities, principles of bear out the position. The lessor's right comme 1761. It was incumbent on him then to have ent have exacted some acknowledgment, which rend entry unnecessary. He was out of possession for without receipt of rent or profits; if his right did crue, and was not pursued, the defendant remai quiet possession, the court will not intend he hel the present plaintiffs. For the holding was tortious, their right. If this be not so, where is the doctrin opposite side to carry us? If it beacceded to, a *entering* under a lease, is forever to be supposed under it; 200 years quiet possession might be sho yet no title acquired. To evince, that when the l termines, the plaintiff should have entered, Run. 60 is fully in point. "Nor is a common person "by the statute of limitations, where the possessi "the hands of his tenant, who has paid him rent wi

e of limitation; for the possession of a lessee for years, is the possession of his lessor, and payment of it is an acknowledgment of the possession. So that ing the continuance of the lease, and payment of t, the lessor is in no sort of default, for he can not er and take the *actual* possession till the lease be ex- ed; but *then* it seems he should, because his right of ry *then* first accrues." The court will find the same iple recognised in 4 D. & E. 682.* It was there rul- at a man entering under a lease, cannot, pending the , contradict his lessor's title, but after the time has ex- , he may prove his landlord not entitled, by produc- e lease; in which case, the landlord must shew a r title. The lease, therefore, given in evidence, on- ews a right of possession against us till 1761, and no r. Even for that time, no rent was paid, and it is to served, that the reservation is merely nominal. But act really is, that *none ever was paid.* It is next to be ved, that the jury were not warranted in finding the ook under his father. There is no evidence of this

The defendant might have taken as a stranger, and this lease would have been totally out of the question, se he would have come in as a third person and not ed by it. He was also the youngest, and not the eld- n. The testimony that he did derive title under his r, is hearsay throughout, and therefore the judge t to have charged, that it was not entitled to any cre- The auctioneer, and some one else, told the witness- t the defendant had purchased the possession; but as not done in his presence, nor is any acknowledg- of the fact substantiated: the declaration was made third person, and never assented to. This, surely cannot be evidence. On the contrary, the testimo- behalf of the defendant demands a presumption that ld adversely, and so the judge ought to have charg- t ought to have been laid down to the jury, that there fficient for them to presume an adverse holding. principle of this doctrine has been recognized in this , in Van Dyck v. Van Beuren and Vosburg. That

* England v. Slade.

Ante 89.

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was a case of tenancy in common, and yet there the said, after 40 years possession by one tenant in com the jury ought to have been directed to presume an o If, then, this be law, between tenants in common, a f ri between others. It is impossible here to pre otherwise, for could it be so, the doctrine would exte infinitum, and a lease once shewn, would be an argu for holding under it forever. The inconvenience would lead to, ought to be an argument against it. plaintiff, therefore, should have shewn, as his lease expired 40 years ago, a title paramount; for it is pos neither party have a right.

Harrison contra. It has ever been a principle of that where a person enters under a title from another person so entering never can dispute the right of the ginal holder. So where the relation of landlord and ant has subsisted between the parties, though there sh be a holding over, the tenant in an action against him not contradict the title of the lessor. If this be a take, it is so in the very foundations of the law. the general principles thus stated, and to shew that a see cannot dispute the title under which he has ent the court will find an authority in 2 Black. Rep. 1 These positions are not altogether denied by the co for the defendant, but they are qualified by saying the lease expires, if the party entitled to the poss does not enter, the relation of landlord and tenant an end. Surely, however, if the lessee on the expir of his term continues to possess, by the tacit cons his landlord, he is tenant at will, or at least from y year accountable for the value of the rent, when the er may think proper to demand it. But he may los right to the rent, by neglecting to apply for it wi years. On examining the doctrine in Runnington, be found to apply merely to leases taken by third pa Where the lessee parts with the land, if he pays still the statute does run. This is not the case of and lessee, but of an assignee of a lessee. So this sion in 4 D. & E. will be seen to have settled only

* Doe v. Lawrence. In this case the lessee who was the defendant, had paid rent to the lessor of the plaintiff.

ere a person enters under a landlord, it shall be competent to shew that the title of the landlord has terminated, and that the landlord himself held by a lease hich has expired.* If this had been so, then it might ve been shewn that Fitch himself held only as lessee. ot till shewn it cannot be presumed, for in all cases the resumption of law is that the party under whom the holding is, has a fee.‡ Therefore, unless it be shewn to the ontrary, it must be taken that Fitch had the fee, and the arty continuing in possession held under that fee. Should his be the law, it is asked what becomes of the statute f limitations? This brings it to the question, whether he statute applies when the possession is not adverse? The whole of the facts stated by the case, shew no more han a holding by sufferance, and under such circumstanes the statute does not apply. For though 100 years nay have elapsed without payment of rent or any acknowledgment, it is immaterial if the first entry was by he landlord's consent, as no tenancy by sufferance is adverse, and only in adverse cases does the statute of limitations run. In Bishop v. Edwards,§ Bull. N. P. 102. the court will find the whole of these positions laid down. As to the reservation of the rent being nominal, the value is immaterial, a pepper corn would be sufficient to create the relation between landlord and tenant. If this be right, the relation did subsist, provided the son entered under the father, as holding by his title. This is a question of fact, and as in all other cases, the jury were at liberty to infer either for, or against. What then are the circumstances here? The father enters into possession under the lessors of the plaintiff, lives in the house, cultivates the land with his sons, who, in his old age do so likewise, and on his death, continue in the same course. On this is a disseisin to be supposed? Is it not more reasonable to imagine the sons preserved the tenure, and held as their father had done? It is said, however, that this could not be, because in such a case the eldest son would have taken. True, had there been a disseisin, because then a fee would have been acquired. But as the

* The case is exactly so.

‡ See Stokes v. Berry. 2 Salk. 241.

§ B. 3, C. 2, title ejectment.

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title to the premises was a chattel interest, it past to the personal representative, and therefore, it was properly left to the jury to determine, whether on the facts of the sale by the administrator, the defendant did not enter under his father's title. To say that the court and jury ought not to presume on facts, when they all lead to one point, would be an outrage to common sense; it might, perhaps, be thought, that if it was so, notice to quit was necessary. But when the defendant disclaimed to hold under the plaintiff, notice was unnecessary, and therefore an ejectment was brought. Admitting the case of Van Dyck v. Van Beuren and Vosburg, to be as stated, it only shews, there was from the circumstances enough to suppose an ouster, but here the reverse is the fact, and therefore we contend the charge and verdict were equally right, and a new trial must be refused.

Hoffman in reply. That a jury may infer from circumstances is not disputed; but then there must be legal evidence of those circumstances before the court. That which was given, was inconclusive; it rested on hearsay, and ought not to have had any weight with the court. The sale of the premises was merely hearsay, and it is to be observed, that the vendue was of personal estate, as if land was totally out of the question: the lease is much relied on, expired in 1761. Had we then disavowed holding under the lessor of the plaintiff, the statute would have run. Can there be a stronger disavowal, than taking to ourselves the rents and profits for forty years? After thirty years the law will intend an adverse possession. It is not reasonable that a proprietor should permit a person to go on for forty years, improving, and then set up an old dormant lease, after lying by so long. The jury ought to have been directed to presume an adverse holding, for the instant we are called upon, we assert our own right, and deny that of the lessor. On the grounds contended for by the plaintiff, had the lease been dated on the day of first taking possession of this country by the British, it would have been equally efficacious. The interests of the community require a different doctrine; if, for no other reason, the plaintiff ought to

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w a title beyond the lease. Improvements have been ıde, and his connected with a forty years exclusive oyment of rents and profits, ought to have induced from : judge, a charge to the jury, that an adverse possession ıs a presumption of law, and on which they ought to find.

Per curiam delivered by Livingston, J. This is a mo- ɔn for a new trial for misdirection of the judge, and be- ıuse of the verdict being against evidence.

It appears that Joseph Marshall, father of the defend- ıt, in 1758, held the premises by virtue of a lease from homas Fitch and John Raymond for 3 years, reserving ıe shilling annual rent. It did not appear that any rent ıd been paid or demanded. In 1774 Marshall died on ıe premises; in 1775 Thomas Fitch died, one of the ssors, and his heir at law

Joseph Marshall died intestate, in 1774, when letters of dministration were granted to his son.

A witness also declared, that after Joseph Marshall's eath, he was present at a vendue of the personal estate, hen the auctioneer and the administrator, not in the de- ndant's hearing, told him that the former had sold the ossesson of the lot in question to the defendant. This itness was a brother and neighbour of the defendant, and as always supposed he held the said land by virtue of this ale. The defendant has been in possession since 1774, laiming the land as his own.

On this evidence, the chief justice charged the jury, hat if they believed the defendant held under his father hey should find for the plaintiff, which they did accord- ngly.

This direction and finding of the jury were both cor- ect.

When a person enters under another, and transfers the ossession, his grantee is supposed to hold under the same itle. Although the lease be expired, he will be regarded s holding by consent of the original landlord, and as his enant at will; unless he can shew that, since the expira- ion of it, he has acquired a new title, either from, or pa- amount to that of the party under whom possession was

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taken. Joseph Marshall, the father, it is admitted, held under Fitch. He, therefore, under this rule would not, on his mere possession, be permitted to prevail against the title of one acknowledged by himself. The presumption that he continued to hold under Fitch is a reasonable one, nor would it work any hardship to him, as it would not preclude him from shewing a better title, when he had continued in so lo long after the lease had expired. The possession, therefore, in 1774, when Joseph Marshall died, must be considered as that of Fitch. The next question relates to the proof of the present defendant holding under his father. The testimony was sufficient to go to a jury, and we think they have drawn the proper conclusion.

The defendant is not only his son, but the cotemporaneous declarations of the vendue master and administrator, although not in the hearing of the defendant, were properly admitted, and unless the defendant produced some other title, would satisfy any reasonable mind that such was the case.

There can then be no adverse possession; for until 1774, Joseph Marshall did not set up, for aught that appears, any title to that of Fitch, and since that time twenty years, deducting the period of the British war, have not elapsed. The rule, sherefore, for a new trial must be discharged with costs, and the plaintiffs have judgment.

William Nash *against* Samuel Tupper.

On foreign contracts, our statute of limitations is a good plea.

THIS was an action on two promissory notes, made in the state of Connecticut, and dated 28th November, 1791.

The plaintiff declared in the common manner, adding a count for money had and received.

The defendant pleaded non assumpsit, and actio non accrevit infra sex annos.

The plaintiff replied specially, as follows: "And the said "William, by his attornies aforesaid, says that he, by any "thing by the said Samuel above secondly in pleading alleged, ought not to be barred from having and maintaining his action thereof, against the said Samuel; because

says, that the two several promissory notes, mention- in the two first counts of his, the said William's decla- ion, were made and given by the said Samuel to the d William, and that the cause of action in the two st counts of the same declaration mentioned, arose thin the llmits and jurisdiction of the State of Con- cticut, and was contracted with reference to the laws d customs of the state, to wit, at Whitestown in the unty of Oneida; and the said William says, that by act of the Legislature of the State of Connecticut, titled, *An act for the limitations of prosecutions in di- s cases civil and criminal*, amongst other things it is acted, *That no suit, process, or action, shall be brought any bond, bill, or note under hand given for the pay- nt of any sum or sums of money, not having any other ndition, contract, or promise therein, but within the ce of seventeen years next, after an action on the same all accrue.* And the said William avers, that by the w of the said State of Connecticut above recited, the id William at the time of exhibiting his bill against e said Samuel, to wit, on the nineteenth day of Ja- ary, in the year of our Lord one thousand eight hun- ed and two, had a good and sufficient cause of action ainst the said Samuel, as contained in the two first unts of this said declaration, and this he is ready to rify, wherefore he prays judgment if he ought to be rred from having and maintaining his said action ereof against the said Samuel; and the said William re freely in court confesses, that he will not further osecute his action against the said Samuel, of and up- the third count in his declaration aforesaid, but doth solutely disavow and refuse to further prosecute of id upon the said third count of his said declaration ainst the said Samuel."

To this the defendant put in a general demurrer, on ch it came before the court.

Emmott for the defendant. From the pleadings it appear, that this is an action of assumpsit on two missory notes, dated the 28th November, 1791. That

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the defendant has pleaded the statute of limitations, to which a special plea has been filed, and on that a general demurrer. From the facts contained in the replication, it will be seen that the present question really is, how far the laws of Connecticut shall control the operation of those of our own state. The contract is set forth, not only to have been made in Connecticut, but have been there made with a reference to the statutes there in force, and therefore, that the seventeen years limitation of the right to sue, formed a part of the contract. There can be no hesitation in allowing, that the lex loci shall regulate, when we are to decide on the validity of a contract. Our statute of limitation is; "All actions upon the case," &c. shall be commenced within six years after the cause of action accrues, excepting in those cases, contained in the proviso, and to be entitled to the benefit of which, the plaintiff must shew that he comes within it: he should have gone further. In addition to the contract being made in Connecticut, he ought to have shewn, that the defendant continued to reside there till within the last six years. By the English statute the absence of the plaintiff takes the case out of it, with us it is only that of the defendant: and therefore a suit may be brought here, when it could not there. This greater strictness, in denying the effect of the proviso, to absent plaintiffs, will make this court less inclined than even the English, to extend the saving of the statute. If, therefore, the statute would be a bar in England, a fortiori in the State of New-York. In Robinson v. Bland, Black. 241, it is acknowledged that the statute of limitations may be pleaded to a foreign contract. The words of Mr. Blackstone, in that case are, "The statute of limitations has "been frequently allowed to operate on transactions "abroad," and in the same book, 257, Mr. Wedderburne, in his reply, admits this, but observes, that it runs only when both parties are in England; it does not affect the validity of the contract, but only the mode of recovering it: that is, it goes only to the remedy, and not to the right. This case, therefore, is inapplicable to the rule

down, respecting the lex loci. The general one, as n by Lord Mansfield, ibid 258, is, that the law of the e where the the action is brought, is to be considered, xpounding and *enforcing* the contract. To the same :t is Duplein v. De Roven, 2 Vern, 540. In 2 Kaimes, . ed. 3. it is, on this subject said, "Several questions ise from the different prescriptions established in dif- rent countries. In our decisions upon this head, the se is commonly stated, as if the question were, whe- er a foreign prescription, or that of our own country ght to be the criterion. This should never be made question; for, our own prescription must be the rule in 'ery case that falls under it, and not the prescription of y other country." Admitting, therefore, fully the lex in expounding contracts, this is not a case of exposi-, and does not, therefore, come within those authori- Lodge v. Phelps, is a case in our favour. There indorsee of a Connecticut note was allowed to proceed is own name against the indorsor. This goes to shew in all cases, where the question turns on the form of on, the law of the country, where the defendant is d, and not that where the contract was made, ought to ail. Therefore, as it is not shewn that Tupper was out e state till within six years, the suit cannot be main- ed.

ould contra. By the pleadings in the case, the truth hich stand confessed by the demurrer, the court will that the defendant entered into the contract with a re- ce to the laws of Connecticut alone. It must have been ded then, that the rules of those laws should be ex- vely resorted to, as the measure of justice between the ies. By the code, ordained as the law of Connecticut, ations by specialty, and simple contract demands, are ed on the same footing. When therefore in that state a of hand is taken, the creditor takes, and the debtor s the same security as would be created *here* by a spe- y, or sealed obligation. As they are thus equal in their re, the statute of limitations couples them together, one uniform rule applies to both. If then the creditor

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regards the continuance in his debtor of the duty to pay on every specialty which is taken, both parties imagine and agree, that there is for seventeen years a continual obligation to satisfy the demand whenever called on. When the debtor executed these notes, he consented to be bound for payment of their several amounts, and so to continue for seventeen years; during that period, it is a further part of his agreement, that no presumption of payment shall be made. It is on this presumption of payment that every statute of limitations is founded. Therefore a promise to pay, as it rebuts the presumption, and shews the debt has not been paid, is allowed on all hands to take the case out of the statute. Nothing then can be more fairly inferred, than that the debtor has consented that these securities should create an obligation for seventeen years, and that, during such time, the creditor might safely repose upon it. But a distinction is taken between the contract and the remedy; that the former may remain when the latter is lost. This is like taking from the shipwrecked his plank, with a profession that you do not mean to drown. When a man takes a security, he looks to the period for which his debtor is obliged; thinks it shall last till then, and with a view to that it is taken. In Connecticut, the state has put notes and bonds on the same footing; but when the creditor comes to New-York, he is told, they consider the contracts of a different nature, and what he took as a specialty, shall be no more than a simple contract. What is this but to expound the lex loci contractus, according to the law of the lex fori? There is no decision exactly in point, no judicial determination but the following authorities, may, more or less, bear on the subject. This is a mere question of exposition, of how the parties contracted; in support of the lex loci contractus, 2 Fonb. 442, cites from Hub. Præl. tom ii. l. 1, tit. 3, the passage at full length: there, after laying it down that the laws of a state are properly confined to transactions within its limits, Huberus says, that in case of a conflictus legum, or variance of the laws of different countries, the laws of that where the contract is made, shall prevail with the exception of cases where, in the contract, a reference

as had to the laws of another state. So, a marriage contract, made in France, shall be carried into effect in England, according to the laws of France, though contrary to those of England, Feaubert v. Turst. Prec. Chan. 208. So in Alves v. Hodgson, 7 D. and E. 241, the court of King's Bench refused to receive in evidence a note given in Jamaica, and not stamped according to the laws of that island. The same principle is acknowledged in Wright v. Nutt, 1 H. Black, 148, 9, where it was ruled, that the laws of Georgia, on a question of confiscation, were to be regarded in Westminster Hall as much as in Georgia, whatever might be the opinion of the court as to their policy. To the same effect may be cited Burrows v. Jemimo, 2 Stra. 732, 5 Vin. Abr. 511. Pl. 22, and in Jewson v. Reed Loft Rep. 138, Lord Mansfield said, a contract made in France, must be governed by the laws of France. A further authority, if the credit of the reporter will make it so, is from the same book, Crawford v. Witten, 154, where to an action of debt on a judgment of the Mayor's Court of Calcutta, it was admitted, that the statute of limitations of the lex fori was not pleadable to foreign contracts. In that case, Mr. Justice Aston observed, that an action must be determined by the laws of the country in which the action accrued. But the next case which will be relied on, goes to the very remedy. It is that of Melan v. the Duke de Fitzjames,† 1 Bos. and Pul. 138, in which the court determined that a man cannot be held to bail in England upon a contract to pay money, made in France, if by the laws, his person is not there liable to be restrained for the debt. And in order to prove that such was the case then in dispute, Pothier on obligations, and an affidavit of a counsellor of Paris were received as evidence. Here the remedy alone was the point in question; as the laws of the community where the debt arose, gave no lien on the body, it was disallowed in a case where, by the English code, the defendant was immediately liable in his person, and might be held to special bail. The English bench, against the course of their own court, and against the laws of their own land, adopted those of France, in determining the

† This case has been doubted, and it was observed, that a very learned judge (Heath) was absent when it was determined.

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extent to which a debtor had pledged himself by his gagement. Chief Justice Eyre, in giving his opinion ly adopts the doctrine of the lex loci, and observes wh ver would constitute a defence to the action in Fra would in Westminster hall. The reverse of this mus equally true, what is no defence in Paris, will be non London. This, however, is now denied, and while lex loci contractus is admitted to create the contract, y is attempted to interpose the lex fori to protect the deb under the idea of the laws of the jurisdiction affecting remedy, but not the contract. It is with due submissi imagined, that the defence set up by the opposite party tached on the contract, and made a part of it. It is of t utmost importance, that a creditor should know, how lo he may repose without its being presumed that he h been paid. In this state by taking a bond he would hav intended to protect himself against this presumption f twenty years. To create an equal bar to presumption, suc as an obligation would have inferred, must have been i the contemplation of the parties in Connecticut, becaus the law gives the security taken, the same advantages. I the maker and payee had, in Connecticut, been asked t expound their own contract, they would have said it is t last and continue, firm and good against all presumption for seventeen years. This then, attaches itself to, and i an integral part of the original contract, and therefore re pels the bar growing out of a foreign jurisdiction; our sta tute of limitations, pleaded in bar. If the act did not ope ate on the contract, but merely suspended the remedy; i would be matter of abatement, not bar: because bar goe to the right not to the remedy, and the statute presume payment made, therefore the judgment is in chief, and exhausts the debt, which becomes, as it were, dead. If the defendant meant to avail himself of our limitation act he should have stated that the notes were made with a re ference to our laws, or at least should have gone on to set forth his own residence for six years last past. The court will refer to the pleadings, and see that they shew the lex loci contractus to have attached on the contract, and if the

sidence of the defendant would affect the question, that cumstance should have been specially set forth to exerate him from the operation of the laws of Connecticut. the case of Phelps the court guarded against the conclun that might be drawn against the lex loci contractus, and e courts of Connecticut have allowed the indorsor of a New-ork note to prosecute in his own name; giving thereby a medy according to the lex loci, which would have been enied by the lex fori. Let us, for one moment, advert to e consequences of refusing to adopt the principles for hich we contend: the laws of many states place simple ontract debts on very different footings. One fifth of the oney lent out, may be advanced on securities, like those n which the present action is grounded. These, after six ears, are here presumed to be paid; suppose the maker f a note removes to Connecticut, it will be in vain that he will say, by the laws of New-York the debt is barred; the creditor will proceed and recover, when in the country where the whole transaction took place, he could never get a shilling. If this rule is to prevail, a creditor has only to watch his passing debtor, arrest him in transitu, and attain payment long after every hope was, by law and the implied basis of the contract, totally gone. The court, therefore, will be cautious in making a decision, which, by rejecting the laws of a foreign state, in expounding the terms of a contract made there, becomes a necessary precedent to that state, in regulating the justice it is to measure out to the people of New-York; which will, out of the limits of New-York, create a seventeen, instead of a six years limitation. One contract, may, by this means, have a dozen different interpretations: a debt is contracted in New-Hampshire; the debtor comes here, and a six years quiescence discharges him; he goes to Connecticut, and the debt revives; according as the limitation is long or short, he by his own act settles the period of his creditor's demand. It s impossible to deny him this power, if the intention of the arties to the contract, and their resulting duties arising from reference to the laws of the country, where that contract as made, are to be departed from: for instead of placing the

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agreement on those resulting duties, and the basis contemplated by the parties, it leaves *that*, and the duties to which they bind themselves to the sport and controul of the most contingent and capricious events, to the debtor's locomotive will, to the laws of any and every state or kingdom in which he may from time to time elect, from among all the nations of the earth, to take up his residence. Instead of one plain and uniform rule of construction, what an endless and perplexed confusion is suggested? A suggestion which fixes nothing, but unsettles every thing; which renders every judgment insecure, and all suits every thing, but final. Such must be the consequence, though it may be attempted to shew the contrary, by refined distinctions between the remedy and the contract. There is another point of view in which this case may be presented. Among the nations of Europe, a principle of comity has introduced a respect for each other's laws and constitutions. Between the individual states which compose the Union, it is submitted, whether there is not a far more cogent reason to respect; even as a bond to preserve the federal government. There is a part of the constitution by which it is created, that "no "state shall pass any law impairing the obligations of con"tracts." Does not this impose on the court an additional obligation to respect the laws of a sister state, in the exposition of a contract made *there*, than what arises from the mere comity of nations? If the court will apply a principle drawn from the laws of their own state, contrary to those of Connecticut, and not contemplated by the parties to the contract when it was made, does it not impair the force of obligations? Besides, under this construction, full faith cannot be given to the judicial claims of the citizens of different states. This is mentioned merely as a feature in the constitution, to shew with how much circumspection the court ought to proceed. Suppose the case had arisen in a court of the United States; that a Connecticut creditor on a contract made there, had sued a New-York debtor, can it be supposed that there would have been the hesitation of a moment in adopting the lex loci contractus, the laws of Connecticut?

is submitted whether an act of this state, which should bridge the period given by a foreign contract to a creditor, within which he should not be obliged to demand his debt; which should deny him the right to have recourse to his contract for any part of the time which was allowed by the laws of the state where it was made, it is submitted, I say, whether such an act would not, under the constitution, in the extensive sense of the terms, impair the obligation of the contract?

Emmot in reply. An objection has been raised against the force of our plea of the statute of limitations, from a clause, or part of a clause in the constitution of the general government; that no act shall be passed to impair the obligations of contracts. From the use made of this passage, it will follow that all statutes of limitation must invariably remain as they now are, and that no state can ever lengthen or shorten the period; because, that would be to impair the rights of others, in existing obligations. The meaning of the words are, that no state shall pass laws tending to impair the validity of contracts made in other states. The argument on the part of the plaintiff seems to suppose, that if the statute be allowed, the debt cannot be recovered, not so; the contract remains as it was; all that is said by us is, that when attempted to be enforced against our laws, they interpose; but if it be carried back to Connecticut, then our statute, or a judgment under it, is of no avail. The security was taken, subject to any variations the state in which it was given, might make, and also to such as any other might adopt, where it should be put in suit. After the defendant has resided six years in this state, the statute attaches wherever the contract was made. For the words of the act are direct and positive. "No action shall be commenced," &c. without reference to the citizens of this or any other state. Under the letter and spirit of the act, the suit ought to be brought within six years, or the plaintiff should shew himself within the proviso. If the legislature choose to pass a law, the court cannot say they have no right to do so; and it is to be observed, that this statute is only a continuance of a

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former act. Allowing the defence does not deny the tract; on the contrary it admits, but avoids. We say have brought your suit here, and all that you can clair the benefit of those laws to which you choose to resor

Per curiam delivered by Lewis, C. J. This is an on of assumpsit on two promissory notes made by the fendant to the plaintiff. The plea is *actio non accrevi fra sex annos*. To this the plaintiff replies, that the ca of action arose in the State of Connecticut; and was c tracted with reference to the laws and customs of t state, and also that the period of limitation in that state personal demands is seventen years. To which the fendant demurrs, and the plaintiff joins in demurrer.

The question arising on this state of the pleadings shall the *lex loci contractus* govern, or shall it not?

It is a well settled rule, that contracts, with a few ceptions, are to be construed according to the laws of t country, in reference to which they are made. But it equally well settled, that the remedy on them must prosecuted according to the laws of that country, in whi the remedy is sought. In the case of Duplien v. De ven, the cause of action arose in France; it was o judgment obtained in that country. The defendant ple ed the statute of limitations, and held a good bar to action.

In Lodge v. Phelps, decided in October term, 179 was held that though promissory notes, made in Con ticut, were not there negociated, they might be nego ed here, and a suit maintained on them in the name of indorsee. For that the principle of the *lex loci*, shall affect the form of action, but shall have reference only the nature and construction of the contracts, and its effect; not to the mode of enforcing it.

In a much earlier case, viz. that of Page and G decided in this court, in April term, 1795, the pre question now before us, came under consideration was an action of assumpsit, on a promissory note in Connecticut, by George Cable, to Jonathan Cable defendant, and by him indorsed, to David Page, the pl

iff. The whole transaction took place in Connecticut. The plaintiff declared, first, under our statute, as indorsee —secondly, on the indorsement as a special agreement; setting forth the contract as originating in Connecticut, and the defendant as guaranteeing the payment by G. Cable, and on his default engaging to pay for him.

The defendant pleaded the statute of limitations of this state, and the plaintiff demurred; alleging for cause, that no such statute existed in Connecticut, where the cause of action arose.

The court said, that the defendant having elected, to prosecute his suit in this state, he must pursue his remedy agreeable to our laws, and that our courts could not dispense with an adherence to the requisites of time, place, and manner, of commencing and prosecuting a suit, because the cause of action arose in another state. They conceived, that such adherence by no means impaired the obligation of the contract, and they gave judgment for the defendant. The correctness of those decisions, I feel no disposition to controvert, but conceiving the law on the point as settled, I am of opinion, judgment must be for the defendant, and with this opinion the Scotch and Dutch laws accord, as will appear from Erskin's Institutes, vol. 2, 581-2; Kaimes' Equity, vol. 2, 358; Huberi Prælectiones, vol. 2; book 1, Tit. 3, De Conflictu Legum, sec. 7.

Livingston, J. To this action, which is brought on certain promissory notes made in 1791, the defendant pleads the statute of limitations, or that he did not assume within six years.

The plaintiff replies, that the notes were made in Connecticut, and with reference to the laws of that state, which sustain an action of this kind at any time within seventeen years after it shall accrue.

To this plea, the defendant demurs; so that no other question occurs than whether we are bound to enforce the limitation enacted by a statute of our own state, or allow the plaintiff the same time as he would have had before a tribunal in Connecticut?

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In the exposition of foreign contracts, courts take notice of the laws of the state in which they are made, or manifest injustice would ensue. This is a dictate of common sense, and is become a principle of general law. In suits on contracts made abroad, the parties in their pleadings must observe the forms of the country where the action is depending; but in deciding on the merits, the lex loci will be the rule. This distinction is found in the Roman and French law, and Emerigon speaks of it as adopted by all elementary writers.

"Pour tout ce qui concerne l' ordre judiciaire (or form "of action,") says that author, "on doit suivre l' usage "du lieu ou l' on plaide, mais pour ce qui est de la deci- "sion du fon, (or the merits) ou doit suivre, en regle "generale, les loix du lieu ou le contract à été passé ex "consuetudine ejus regionis in qua negotium gestum."

Another author on the same subject, holds nearly the same language. In his quæ respiciunt litis decisionem, servanda est consuetudo loci contractus. At in his, quæ respiciunt litis ordinationem, attenditur consuetudo loci ubi causa agitur.

Emerigon also mentions an instance of a suit between two Englishmen in France, in which the plaintiff insisted on proving by witnesses a parol contract for a loan exceeding one hundred livres. The defendant pleaded an ordinance resembling in some respects our "act for the "prevention of frauds," which required contracts of that amount to be in writing, and no other proof was to be received of it, but the instrument itself. The Parliament of Paris, however, determined that this being a valid contract in England, when it was made, the ordinance did not apply, and the plaintiffs recovered. "Il fut jugé, (says the author who reports this decision) parle parlement de Paris, que l' ordonnance n' avoit point lieu, d'autant qu' elle va *ad litis decisionem*, or to the git of the action." Traité des assurances, ch. 4. sec. 8.

On a point of general law, where we have no rule to the contrary, I cannot well err in conforming to one, which we find adopted by a foreign tribunal, heretofore among

most distinguished in Europe, for the purity and wis-
i of its decisions: a necessary consequence of the
it learning, integrity, and independence of its judges.
the same rule I conceive prevails here. A note bear-
a yearly interest of more than 7 per cent. if made abroad
i lawful there, may be recovered here, notwithstanding
' statute against usury. I see no reason why the same
pect should not be paid to the limitation acts of ano-
r state. Our statute against usury is quite as impera-
: in avoiding the security, as that which prescribes the
ie after which a suit shall not be brought; yet courts
re invented, or sanctioned several exceptions, not with-
ts provisions, to prevent a failure of justice. Thus, an
nowledgment of the debt has defeated its operation, or
ested its course. Why then not regard an exception
ated by the parties themselves, which must be presum-
to be the case whenever they contract, with a view to a
ferent limitation? No violence is done to our law, by
mitting them to establish for themselves, a rule differ-
: from that which would take place in case of their si-
ice. If the defendant had agreed in writing not to avail
nself of the statute of limitations of this state, if the suit
re commenced in seventeeen years, a doubt can hardly
entertained of our giving effect to such an agreement.
erceive but little if any difference between a written
ntract of this kind, and a case in which the defendant
nt be presumed to have had in eye, the laws of his own
te, and therefore, have virtually agreed to pay these
es, if sued within that period. To leave his state, there-
re, prior to that time, and then set up a defence in vio-
ion of his own engagement, and the understanding of
e plaintiff, is an injustice which ought not be suffered, if,
thout a breach of duty, we can prevent it. It may be
ld, that if a party becomes a suitor with us, he must be
und by our laws. This is true, as it respects the form
action, or mode obtaining the remedy. Courts will and
ght to adhere to their own forms, but in deciding on the
rits of the demand, or defence, they do not derogate
m their dignity, by enforcing the laws of a state, where

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the contract originated. The present defence is a p tual bar to the action, and therefore involves in it, the rits, and not a mere question of form. If so, the la Connecticut should be our guide, and not those of our state. In foro conscientiæ, the plaintiff's case is a clear The defendant by his demurrer admits, that if he hac come to this state, the plaintiff might and ought to l recovered. It would be matter of regret, if we were c pelled to listen to as unjust a defence, considering the understanding of those parties, as was ever obtruded on a court of justice. It would not be easy to assi reason why an obligation incurred in one state should cancelled by either of the parties flying to another. are not, in any opinion, under the necessity of establ ing a principle or practice which may so easily be abu and must always be followed by great injustice. So l as we are at liberty to expound contracts lege loci, it is duty to discountenance a defence, which in such cour would not be allowed. When the defendant left Conn ticut, the plaintiff had a good cause of action against h which ought not to be defeated by his own act, in com among us. I think, therefore, that as this defence nothing to do with the form of action, but strikes at plaintiff's right to recover at all, we should apply to case, the limitation act of Connecticut, and that as sev teen years have not run since these notes were made, plaintiff should have judgment.

The People of the State of New-York *against* Ca Brown and others.

Intrusion for a forfeiture of lands granted in fee, will not lie before office found. Intrusion must be on the actual possession of the people. The people can acquire seisin or possession of lands forbreach of condition by matter of record only.

THIS was an information filed at the direction of legislature, by the late attorney-general, against the fendants, for an intrusion on certain lands lying in county of Otsego.

The defendants claimed under letters patent, of the September, 1770, for 9200 acres, granted by his Maj George the third, of Great Britain, France and Irel King, &c. at a quit rent of two shillings and six p sterling, for every hundred acres. After the usual

ations of mines and white pine trees, for masts, the grant contained the following proviso. "PROVIDED, further, 'and upon condition also, nevertheless, and we do here-'by for us, our heirs and successors, direct and appoint, 'that this our present grant shall be registered and enter-'ed on record, within six months from the date hereof, in 'our secretary's office, in our city of New-York, in our 'said province, in one of the books of patents, there re-'maining; and that a docquet thereof, shall be also enter-'ed in our auditor's office there, for our said province, 'and that in default thereof, this our present grant shall 'be void and of none effect, any thing before in these pre-'sents contained, to the contrary, thereof, in any wise, 'notwithstanding."

It was admitted, that no docquet of the said letters patent, had been entered in the office of the auditor, pursuant to the said proviso, but the following entry made since the year 1797, is found in a memorandum took of patents in the office of the comptroller, of this state, to wit. "1758, patent granted to Leonard Lispenard,* and 'others, for 9200 acres of land, in Albany county, dated 'the 6th of September, 1770, at two shillings and six 'pence sterling, for every hundred acres." About the same time, when the above memorandum was made, Samuel Jones, Esq. comptroller of this state pursuant to the laws relative to quit rents, caused the aforesaid tract of land to be advertised‡ for payment of the quit rents due.

It was further admitted, that on the 3d of April, 1799, the sum of $3 84 cents, was paid into the treasury of this state, by George Stanton, one of the original patentees, in pursuance of the act, for the collection of quit rents, as the arrears and commutation then due, on lots no. 41, and 42; and that on the 28th of October following, $3 82 cents were in like manner paid, on 50 acres of the grant, by one Jesse Clark, who had purchased under the patent, from which the defendant, Brown, derives his title; but neither the lots 41 and 42, nor the 50 acres on which the said $3 82 cents were paid, constitute any part of the lands in his tenure.

* The name of the first patentee.

‡ Under the 8th section of the "act concerning quit rents," passed the 8th of April, 1801.

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On these facts it was submitted to the court, whe the defendants were or were not guilty of the intru complained of.

Spencer, Attorney-General. It is admitted that t was no docquet entered in the auditor's office, accord to the proviso in the letters patent. The informatio grounded on this principle; that the forms required by grant, created a condition, proviso, on limitation, wh was to make it void, on the not doing a certain act by patentees. If, therefore, this act has not been perform the instrument is a nullity, and the people have a righ consider all persons now on the land as intruders. It m perhaps be urged in behalf of the defendant, that the concerning quit-rents has done away the forfeiture: es cially as the officers of government have received the qu rents due, and have, therefore, considered the patent as existence and good. That, however, will depend on wh ther the not docketting the patent within the time limit did not cause the estate of the patentees to instantly cea or whether, even allowing the contrary, the payment co purge the forfeiture for more than those very lands which made, and which do not include those for wh the intrusion is brought. There can be no doubt that ery grantor, whether a state or an individual, may annex his grant whatever conditions he pleases, provided th are not repugnant to principles of law. Here the con tion is, that the grant shall "*be void and of none effe* Therefore, the acceptance of rent could not restore w was gone. Sir Moyle Finch's case, Cro. Eliz. 331, sho the soundness of this position. This, it may be said, the case of a demise for years. A distribution, therefo may be attempted between *that* and the present, whic of a fee. In fact, however, the diversity does not ex This the court will see in 17 Vin. 81. pl. 1. n.* it is that in one case the estate is void, and in the other voi ble; but whether the determination be by the same as create the interest. The proviso here was a limitat which ended the estate on non-performance, because was created by matter of record, so it was to be destroy

* The decision alluded to is Stephens v. Potter, Cro. Car. 100, 2 Res. but that merely determined that a lease for years reserving rent payable at the exchequer,

y matter of record. It is generally true, that where a eehold is to be defeated, entry is necessary, but it is not o where an act that ought to appear of record is not done. t is laid down that if an estate granted by the crown de- ermine by a condition broken, the King shall be suited without office found, where the breach is apparent upon ecord. 7 Com. Dr. 53. (D. 70.‡) It is the revesting of he estate which we contend for here. This makes the ifference between the present question, and that of Van lchaick in 1796, in which it was decided, by the court of rrors, that a new grant would not be made till after of- ice found, not that an information would not lie before. There can be no doubt of the words used in the grant cre- ting a condition, Lett. Ser. 329. which was a limitation r qualification of the estate. For this purpose the word "provided" was certainly the most fit. On breach of it, he estate must be judged in the grantor, or, as here, the eople, Litt. Ser. 350.* So here as the nonperformance as a record, the right to proceed by intrusion accrued efore office found, the estate of the patentees being to- ally divested. The next consideration is, whether any hing has been done to waive the forfeiture. This may e laid down as an established position, what is void can- ot be confirmed, what is voidable may. As then the in- erest of the patentees was absolutely annulled, the receipt f the quit rents could not revive it, Jenkins v. Church, Cowp. 482, Doe v. Butcher, Doug. 50. Even in voida- le cases the mere acceptance of rent, unaccompanied ith any other circumstances, will not work a confirma- on.§ No receipt can revive or confirm, unless taken ith a knowledge of the forfeiture and an intent to waive. he act concerning quit rents does not recognize any loss f title in the defendant, or others holding under the same stent. No payment therefore to an officer acting by au- hority of a general law, with a power merely to extin- uish quit rents could revest. All that he could do was to ve the right of the people on them when due, and not by hing them if not due, to give away the land of the state.

is void on non-payment, without office found whereas, if the rent be payable to the receiver general, non-payment without office found does not vi- cate. The reason is obvious, as the crown can grant only by record, it can be informed only by record; the non-payment to the receiver is a matter in part, when found by office it is of record, and so is non-payment at the exchequer. See this, however doubted 2 Rols. Abr 216, (H.)

‡ The cases there referred to, are of leases.

* The case of a lease for 5 years with condition to have fee, on paying of forty marks at the end of two years, and livery of scisin, according to the deed. Revested by implication because grantor could not enter upon the breach, as by his own grant, the grantee had three years in the land.

§ See Green's case, Cro Eliz. 3 Roe v. Harrison, 2 D. & E. 425.

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Emmot and Van Vecten contra. Though from length of time the defendant, and those under who claims have been in possession, the case is a hard still we are ready to exculpate both the present and attorney-general, from all imputation of rigour. T have acted only in obedience to resolutions of the leg ture. The case divides itself into two questions. Whether the grant be void, or voidable? 2d. Whet if so, the present form of action is the appropriate re dy? Whether, void or voidable, will depend on a num of subordinate enquiries. We did not, it must be conf ed, expect that the proviso would have been urged as mitation, which goes on always to a certain expres of determination; it is a condition* and nothing more which case, as the estate might continue over, it was vo able and not void. But the words in question, crea neither the one nor the other; they were merely direc ry on the officers of government, and did not oblige us do any thing: they are separated from the conditions which the grantees were bound by specific acts. T words are "we direct and appoint." The clause itsel rare, this being the only grant we can find in which it contained. The officers of government ought, the cla being directory, to have given notice to the patentees come in and docket; for, to the patentees, themselv the act was nugatory, as they had complete evidence the right by the grant itself. But, considering the cla as a condition, then we contend it is repugnant to the gr and void. It was for an act to be done by the offic of the crown, for the benefit of the crown alone. It the same as if a grantor had conveyed, on condition he should himself lodge the consideration money within days in the United States bank, or the conveyance void. The result would be to put the whole grant with the power of the crown; or what is the same thing, in that of its officers. But should the condition in proviso be deemed a valid one, and obligatory on us say it has been performed; for if the intent be compli with, it is sufficient. That the leaning of the court

* As to conditional limitations, see Fearne Con. Rem. 6 ed. 9.

inst forfeitures, we cite Bull. N. P. 96; and that the
nt, and not the letter of the words, ought to regulate,
p. Touch. 139,* 1 Alk. 375,‡ Dalcy v. Desbouveire,
lk. 261, and the cases cited in p. 1. What then was
intent to be answered by this docket? Merely to in-
m the court of the existence of the grant, and the value
he reserved rent, that no interfering patents might is-
, and the amount of its revenue be known. The entry,
refore, in the comptroller's office, taken from the old
nutes there, was fully adequate to every purpose. For
ugh two acts are mentioned in the proviso, to be done,
loes not follow that both are necessary to be performed.
ng v. Dennis,§ 4 Burr. 2052. In the present case,
wever, after a lapse, of 30 years, in a country circum-
nced as this was, during a revolutionary war, and when
very record may be supposed to have been taken away
the officers of the crown, to presume a docket regularly
ered, is no more than what the law will warrant. Be-
's Case, 12 Rep. 5. Should it nevertheless be held that
forfeiture was incurred, we still contend that it has
en waived. The argument urged against this position,
t there is a distinction between the acts of individuals,
d those of officers of government, is contrary to the im-
cation arising from the case of sir Moyle Finch, relied
on by Mr. Attorney. For the people is bound by the
s of its agent, in the same manner as any common per-
n. What then are those acts? First, the permitting 30
ars, to elapse in silence; next, the comptroller has
de a record or docket, by entering the memorandum
ted in the case, to have been written in 1797: it fully
s forth the dates, parties, and rents: this too, is an act
a public officer. Thirdly, by advertising these very
ds for the quit rents due, under the authority of the act
ntioned in the case. For the language of the adver-
sment is, we claim not the lands, but the quit rent due.
irdly, the comptroller has received, from one of the
tentees, and from a person holding under the grant to
m, quit rents for some of those lands, and though they
ve been paid but upon portions of the tract, yet they will
crue to the benefit *of the whole* grant. Goodright v.

* That is if the act done be in law tantamount to the condition expressed, as if to enfeoff; and a lease release be executed. So in the case put Litt. Sec. 352 on the doctrine of cy pres.

‡ Harvey v. Aston, the condition there was marrying with consent. The other authority from Alkins, relates also to conditions in restraint of marriage.

§ That also was a decision on a case in restraint of marriage, in which the conditions were held to be in the disjunctive, performance therefore of one sufficient.

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Davids, Cowp. 803.* Pennants case, 3 Rep. 6 Greens case, Cro. Eliz. 3§, 3 Salk. 3.¶ Independe ever, of what has been before advanced, we conte an information for an intrusion cannot be supporte office found. This is absolutely necessary to en people to proceed. In the case of common person intended to destroy an estate for a condition brok indispensable that an entry should first be made Touch. 153. Whenever an entry is required of a dual, an office must be found for the King, 9 Rep. 16 Vin. abr. 84, pl. 24. p. Ibid. 83, pl. 19, 20. where the whole estate has become void by the nonp ance of the condition, still an office must be found the tenant can be held an intruder, Sir Moyle Finch 2 Leon. 143. Payne's Case, ibid, 206. The pr which the attorney-general relies, being a conditi the estate under the patent taking effect immediate plain that the grant was voidable only, and not ab void. This being so, and nothing done to avoid the and put the people into possession, intrusion cannot it is essential to intrusion that it be on the actual pos of the crown, 3 Black. Com. 261, Moor, 375. Th in all cases of forfeiture, &c. intrusion will not lie t found, this being the legal substitute for entry by a person, and the only means for the crown to regain session, for the injury to which the intrusion is b Litt. Abr. p. 97. (E.) Moor, 296, 7. That this is be done by office found, Parstow v. Corn, Cro. El is an authority fully in point. Besides, the title cre the patent was matter of record, and of course avoided by that which is of equal solemnity, Plo and the cases there cited. The only method then been pursued, was, by an office finding the forfeitu intrusion upon that. This will appear still more e we consider the effect of the different proceedings. inquest of office, performance of the condition, or by the creditor which is tantamount,** might ha shewn, but this could not be done under an inform intrusion, which merely states the possession of the and the defendant's intrusive entry, Case of Alton,

* The point there was that acceptance of rent after condition broken, with notice of the breach, is a waiver of the forfeiture.

‡ Which of the resolutions there made is alluded to, I know not; possibly the third, but that goes on the distinction between void and voidable leases.

§ Determined that receipt of rent due, does not prevent re-entry, but if accompanied with a receipt calling the lessee, his firmer or tenant, it does

¶ That was an acceptance of rent from the executor of an assignee of a lease knowing him to be the executor, held a waiver of the forfeiture for assigning.

‖ Sir George Fenwel's case.

† The words in Moor are, "an "information "for intrusion "is not a real, "but personal "remedy, and "resembles in "all points, a "trespass a- "gainst a sub- "ject, for it "suppo "the "Queen in "possession."

** 10 Rep. 67. b. 2 Res.

1 Rep. 28, Plow, 479. The necessity therefore of these measures must appear, that the parties might have notice of the grounds of the claim against them. This cannot be done by the information now brought, which is not like a writ of escheat that sets forth the whole claim on the part of the crown. If what has been laid down already for us be true, that the docketing was a duty to be performed by the officer, then it is for the honor of the crown, as the old books say, to be presumed that it has been done, Case of the Churchwardens of St. Saviour, Southwark, 10 Rep. 66. For it can never be imagined, that the crown would make a grant, dependent for its validity on acts to be performed by itself, and omit those acts. Let it be observed too, that no form of docketing is prescribed by the grant; and as the revolutionary war has intervened, it may well be intended that the entry made in the comptroller's office in 1797 was by way of docket, which would be no more than a memorandum for the guidance of the officers of the crown. If, however, the proviso be a voidable condition, then the doctrine of waiver will apply. For government can never be supposed to do so great a wrong as to permit men to make improvements, then offer to receive a commutation in discharge of quit rents due on those very lands which they claim as forfeited, receive the amount, and then attempt to defeat their grant. Because, having dispensed with the condition in part, by a partial receipt of quit rents, the condition is dispensed with in the whole. Cro. Eliz. 816.* This species of construction is due to the liberality and honor which we are to suppose, constantly actuate the proceedings of government, and is a principle universally acknowledged. 9 Rep. 131. Benley's Case. Rolyn's Case, 6 Rep. 5. 10 Rep. 67. In a more peculiar manner is this to be adhered to after a lapse of 30 years, when the rights of third persons, bonâ fide purchasers, and others, are implicated. In Van Schaick's case, it was settled, that where a forfeiture was apparent by matter of record, then a scire facias should go; when it arose on matter in pais, an office must be found. The information therefore must fall.

* Dumper v. Sims.

Spencer in reply. The words of the proviso are sufficient to shew the docketing was not directory to the officers of

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the crown. The grant was to be valid on doi
acts, some in pais, some in record. If not perfc
certain time, the letters patent were to be *void*.
direct and appoint, are declaratory *to the patente*
estate granted should be subject to the conditio
registering and docketing. This must always
request of the parties, who must do an act towar
he, according to the colonial system, had to pay
ing done, and therefore was clearly a duty in th
is coupled with a stipulation, that if it be not p
the letters patent shall be *void*. This makes the
limitation; and when so, it is not necessary that
should be found, because the crown would be im
reseized. Poph. 53. Whether, however, it be c
as a limitation, or a condition, is immaterial; fo
was necessary. It is required only to make the
known by matter of record. Here the docket fo
of record, and whether the grant was docketec
would appear by inspection of the records. The
therefore being thus by matter of record, needed
found by office. The authorities cited by the oth
in conformity to this position. 2 Roll. Abr. 215.
100. Stephens v. Potter. On the not docketing
to the terms of the proviso, the estate of the pate
gone, and this being by matter of record, the po
reseized. No act, therefore, of their officer in tal
not due, could revive an interest absolutely av
null. The cases from Croper and Douglas wh
into, will shew this, though they are quoted as a
against the people. The principle they settle is
acceptance will waive a forfeiture, without knowle
the circumstances by which that forfeiture was
The people had acquired fee on breach of the c
The quit rents therefore were merged, and a tortio
by their officer of what was not due, not knowing
be due, can never waive their rights.

Van Vecten. We say, by the act he was co
judge, whether quit rents were due or not.

Spencer. We say he was not; that he was a
ceiver, delegated to receive alone. The act of a

n making the entry in 1797, was allowing his acts to ensue to the advantage of the defendant, yet it was not in time. In arguing from the presumption the 30 years lapse has afforded, the counsel seem to forget, that there is a law* by which the limitation of suits by the people for land, is settled at 40 years. It is an absurdity to settle a limitation at 40 years, and presume against it at 30. Nor can any thing be presumed from the revolution, because the court knows all the papers in the various offices were preserved. In one of the cases referred to, the presumption arose from this; that as the deeds were delivered in to be cancelled,† the officer should be presumed to have cancelled them; but were the deeds here delivered to be docketed? On every ground, therefore, we consider the people entitled; especially as the want of docketing is proved by the records, and an office found would be only surplusage.

* Act for limitation of criminal profecutions, and of actions at law. 1 Rev. Laws, 562.

† 10 Rep. 67. 2d Rev.

Per curiam delivered by Lewis, C. J. This is an information of intrusion, filed by the late attorney-general, and now prosecuted by his successor in office. It comes before the court on a case, which sets forth, that a royal grant, by letters patent issued, in 1770, to Leonard Lispenard and others, for 9,200 acres of land, now in the county of Otsego, but then in the county of Albany, on the annual quit-rent of 2s. 6d. sterling per hundred acres. The grant contains sundry conditions, on the nonperfomance of any of which it is declared to be void and of none effect. Among the number, are the following, that the grant shall be registered and entered on record, within six months from the date, in the secretary's office; and that a docket thereof shall be also entered in the auditor's office. It is admitted, that though, the letters patent were duly recorded, no docket was found in the auditor's office; but that a note of them is found, entered in a memorandum book of patents, kept in the office of the comptroller of the state, bearing date in 1797, and that the quit-rents, on parts of the tract, have been paid to the existing government.

The defendant claims title under the said patent, and the question for the court is, Guilty or not Guilty.

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May 1799, caused a writ of capias ad respondendum to be issued against him, which was returned not found; whereon they, on the 10th of August 1799, caused an alias capias ad respondendum to be sued out, which was also returned not found, and that they had not been able, by the means aforesaid, to compel payment of the several sums of 1000 dollars due on the 1st of May 1799, nor of the sum of 1000 dollars due on the 1st of May 1800; by reason whereof the Defendants became liable to pay the same. Nevertheless they had not paid the same, &c. and so the said Abraham and Conradt say, the said George and Benjamin have not kept their covenant so made as aforesaid, &c.

debtor; and the assignee of his bond is not precluded from his action against the assignor because he has not proved the amount under the debtor's estate.

To this the Defendants (after demanding oyer of the bond, condition, assignment, and covenant) pleaded in bar,

1st. That the Plaintiffs "did not use all due diligence, "and take all legal measures by prosecution at law to re- "cover the said bond, immediately after the said several "sums mentioned in the condition thereof, respectively be- "came due," and this they are ready, &c. wherefore they pray, &c.

2d. By protestation denying that Rennington was, at the several times after mentioned, insolvent, or was, and yet is unable to pay and satisfy the said bond; they further pleaded, that when the first instalment of 1000 dollars, with interest, became due, on the first of May 1798, Rennington did not, nor hath since paid the same; so that the bond then became forfeited, immediately after which the plaintiffs did not, nor until long afterwards, to wit, on the first of May 1799, take any legal measures on the bond against the obligor and this, &c. Wherefore, &c.

3d. That they did not prosecute in like manner for the instalment due in May 1800.

4th. As to the instalment due in May 1799, that Rennington at the time of executing the bond in question, transferred also as a further security, a mortgage on land in Renselaer county, which they had assigned together with the bond to the plaintiffs, who, on the first of November 1799 sold the premises for 1510 dollars, and thus paid themselves the instalment of May 1799.

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5th. As to the inſtalments due in May 1799, and May 00, that Rennington, after the firſt of May 1799, and be- re the firſt of May 1800, to wit, on the firſt of November 99, paid and ſatisfied to the plaintiffs the ſeveral ſums of 00 dollars due by the condition aforeſaid.

To the ſeveral pleas thus put in, the plaintiffs replied the, 1ſt, payment of the 1000 dollar inſtalment due 1798, on the firſt of May according to the condition; d as to the ſum of 1000 dollars due on the firſt of ay 1800, Rennington's abſconding on the 25th of ecember 1798, and due diligence as to the inſtalment 1799.

To the 2d, Payment by Rennington of the 1000 dollars e in 1798.

To the 3d, That before the ſum therein mentioned be- me due, to wit, on the 25th December 1799, Rennington ſconded.

To the 4th, That they had not been paid, the 1000 dol- s due in May 1799, by the ſale of the mortgaged premiſes, the defendants in their fourth plea had alleged.

To the 5th, That Rennington had not paid the inſtal- ents of 1799 and of 1800.

To the firſt replication, the defendants demurred gene- ly.

To the ſecond, rejoinder, that Rennington did not pay as plaintiffs had replied, and iſſue thereon.

To the third, a general demurrer.

To the fourth, rejoinder, that the plaintiffs were paid, iſſue thereon.

The plaintiffs having joined in the demurrers, the cauſe s now argued by Harriſon and Emmott for the defend- ts, and Van Vechten and Woodworth for the plaintiffs.

Emmott. This is an action of covenant, and is brought fore the court on two demurrers by the defendants, to firſt and third replications of the plaintiffs. The plead- gs are by no means intricate, and though it might be ſuf- ient to confine ourſelves to the demurrers only, yet it is ieved the declaration itſelf is defective, and therefore plaintiffs can never recover. The declaration ſtates a

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ſuit been proſecuted, judgment would have been recovered for the whole penalty, which would have ſtood as a ſecurity, and would have bound the lands of the obligor. As therefore nothing of this ſort is ſtated, the declaration is in itſelf wholly defective.

Woodworth and Van Vechten contra.—The plaintiffs come before the court as fair purchaſers; therefore, ſhould they recover any thing, it is only getting back their own, and the defendants are not injured. The queſtion is, what does the law require that they ſhould do before they can have a right to recover. This we are told cannot ariſe till all the inſtalments are due. The words of the bond and covenant are an anſwer to this; for they are, that the money is to be paid by inſtalments, and *that*, as they become due, meaſures are to be taken for their recovery; on failure of which, the defendants are to pay ſuch ſums as may be "*then*" due. It is incongruous to ſuppoſe a bond to pay by inſtalments ſhould not be put in ſuit, till the laſt inſtalment is due; and it is equally ſo, that a covenant to pay, if ſuch bond ſhould not be faithfully diſcharged, muſt reſt unavailed of, when the bond is not complied with. The argument againſt the declaration, for not ſetting forth the payment in 1798, cannot be maintained. Nothing more is neceſſary than to ſtate a right to reſort to the defendants; *that* did not accrue till 1799. They are called upon for nothing previous, and if we are ſatisfied as to the payment in 1798, it is all the better for them, who are liable for every ſeparate portion of the whole. Neither can the averment be objected to; we ſtate Rennington became and was inſolvent. The covenant requires no more; it does not exact a continuance of his inſolvency to be ſhewn. If he was at any time unable to pay, it is ſufficient; for the covenant does not require that we ſhould wait till he becomes ſolvent again. If this reaſoning is good in one inſtance, it is in a thouſand, and may be inſiſted on over and over again. We ſhew the inſolvency by the abſconding and proceedings under the abſconding debtors' act; the non-payment on the firſt of May 1799, and the legal meaſures taken by iſſuing the writs mentioned. The next objection

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the want of due diligence. We are required to inſtitute its only as the ſums become due: that is all the diligence quired. The inſtalment of '98 muſt be preſumed to ve been paid: unneceſſary, therefore, to ſue for that; d a writ did iſſue for the one in '99. To continue proedings on to outlawry, without any chance of recovery, as not only uſeleſs, but would have been unjuſt, as all the ſts would have fallen on the defendants, the record itſelf newing every part of Rennington's property aſſigned under e law againſt abſconding debtors. It could, therefore, ever have been the intention of the parties to thus unneceſſarily ſaddle themſelves with expences, and it is a geeral rule that covenants and conditions ſhould be ſo exounded, as to ſerve the intention of the parties. This pecies of diligence could, therefore, never have been conmplated. The covenant of the defendants was in caſe f Rennington's inſolvency or inability, to place themſelves i his ſituation, and pay as he would have done, by inſtalments. The inadequacy of the eſtate of Rennington to pay more than 10*s.* in the pound, is a proof of his incapability, and it does not appear that even *that* has been paid, or could have been received. Allowing Rennington to have property abroad, and ſo *in fact* not inſolvent, we are not to look to any thing beyond this ſtate, and the juriſdiction within which the covenant was made. On our part nothing appears to bind us to prove our debt. It was not our duty; the defendants are the legal creditors, and we could be only at the moſt truſtees. They, therefore, having the legal right, are the parties who ought to have come forward to ſubſtantiate the demand. As to the payment of '98, we are at iſſue on that, though we ſuppoſe, whether paid or not, is immaterial; for, as we may now remit the whole, and exonerate from all, we ſurely have the ſame right over a part.

Harriſon in reply. That the intent of the parties is to govern, we are on both ſides agreed. What that is, muſt, however, be ſhewn from the inſtrument; nor can the court look beyond it. The caſes in which the defendants are to be liable, depend on conditions precedent. If ſo, then not

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only an insolvency, and inablity in Rennington to pay must be shewn, but instantly afterwards, due diligence and legal measures. Even the insolvency and inability is not shewn positively; it is only "et sic;" now a seizure and sale of all a man's estate and effects in *one county*, and their being insufficient, is not enough; there may be more than enough to pay all his debts in another. In trover, a demand and refusal is evidence of a conversion; yet, if stated in the pleadings, that the articles by finding came into the hands of the defendant, who on demand refused to deliver them, and so he converted them, it would not be good, because the demand and refusal might not amount to a conversion. The necessity of further proceedings than the mere issuing a capias and an alias capias will fully appear, if it be considered, that had a judgment been obtained, it would have bound subsequently acquired lands, and even in the hands of executors. Besides, the diligence covenanted for requires more. The plaintiffs held the only evidence of the debt due from Rennington; this they ought to have proved under the assignment made by virtue of the absconding debtors' act, that those for whom it was held might come in for the benefit of a dividend on the amount. Allowing, therefore, the insolvency and our liability, the court will necessarily say we are, on this ground, discharged. The passing over the first instalment is not quite clear. It is contended the plaintiffs might remit that payment. No such thing; for if unable, and in tottering circumstances, legal steps ought to have been instantly taken, and a judgment obtained for the amount of the whole bond to give that priority and lien which now is lost. It was giving time, and that will make the debt the plaintiffs' own. The obtaining payment of the first instalment, was a condition precedent to our liability, and ought therefore to have been shewn. As it has not, the defendants cannot be called on in this action.

Thompson J. The exceptions taken to the declaration are,

1st. That no action could be maintained on the covenant against the defendants until the last instalment in the bond fell due, which was in May 1801. The present action was commenced in 1800.

2d. The insolvency, or inability of Rennington to pay, is not sufficiently averred.

3d. It does not appear that due diligence has been used against Rennington, to recover the money.

4th. No notice is taken of the payment that fell due first of May '98.

I think all the objections untenable. The reason urged in support of the first is, that although Rennington might have been insolvent in the year '99, the time alleged in the declaration, he might not have been so in the year 1801, when the last instalment fell due; and that the covenant only goes to the eventual responsibility of Rennington. This construction appears to me not warranted, either by the terms of the covenant, or what may reasonably be presumed to be the intention of the parties. The bond is made payable by instalments; the general object of the covenant was, to make the defendants responsible for those payments, and a fair interpretation would be, unless a contrary intention was clearly inferable from the terms of the covenant, that they became security to pay, according to the condition of the bond, in case of Rennington's insolvency, or inability to pay. This construction is conformable to the general intent and understanding of parties with respect to securities, and there seems nothing peculiar in the phraseology of this covenant, to warrant a different conclusion. The covenant expressly refers to the bond, and purports to guarantee the payment, I think, according to the condition; and if so, there is a breach of the covenant, whenever there is a failure of payment agreeable to the terms of the bond. The assignees have pursued the obligor according to the provisions contained in the covenant. If this covenant would warrant a different construction, it would be, I think, that the whole sum was payable by the defendants, immediately on the insolvency of Rennington; for the covenant concludes, that then, and in such case (alluding to the insolvency) they were to pay "the *amount of the said bond, or such part as remained due.*" The result, however, as it respects the present question, would be the same, on either construction. The insolvency or inability of Rennington to pay, ap-

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pears to me to be fully, and sufficiently averred. The averment is in the very terms of the covenant, to wit, That on the said first day of May 1799, and long before *the said Jonathan was insolvent, and not able to pay and satisfy the said bond.* It is said, however, this is a dependent averment, and is alleged as a conclusion drawn from a detail of facts, and which do not warrant the inference. The facts stated, appear to me, fully to warrant the conclusion drawn. They are, that Rennington had some time previously absconded, and departed from this state to parts unknown, and still doth continue absent from the state at some place unknown; that he had been duly proceeded against as an absconding debtor; and that the result was, that his estate was not sufficient to pay his creditors ten shillings in the pound. It was admitted, on the argument, by the defendants' counsel, that if the averment had been general, that Rennington was insolvent, and unable to pay, without detailing the facts from which the conclusion was drawn, the declaration would have been good. Admit the declaration to have been thus drawn, and issue had been taken upon the solvency of Rennington, and the facts detailed in the declaration had been proved on the trial, would they not have warranted the jury in pronouncing him insolvent, or unable to pay the bond? I think, clearly, they would. These facts being admitted by the demurrer, I think the court is bound to make the same conclusion. It is also said, the plaintiffs ought to have shewn, how much they had received on a distribution of Rennington's estate among his creditors. This appears to me to be rather matter of defence, and incumbent on the defendants to prove. If the plaintiffs had received any thing, it would have been proper evidence, under their plea of payment by Rennington. Besides, the declaration does contain an averment that they have not received payment for the instalments, for which the action is brought.

The third exception is, that the plaintiffs have not shewn due diligence in prosecuting Rennington; that they ought to have proceeded to outlawry. I think it manifest, that such *extraordinary proceedings* were not in contemplation of the parties; and, therefore, that the covenant ought not to

ceive ſuch a conſtruction as to make them requiſite, unleſs clearly warranted by the terms. The plaintiffs were to uſe all due diligence, and take all legal meaſures, by proſecution at law, to recover the money from Rennington. By which I would underſtand, all ordinary legal meaſures proſecuted with good faith. In the preſent caſe, the plaintiffs allege, that ſoon after Rennington abſconded, proceedings were commenced againſt him as an abſconding debtor, and proſecuted with due diligence, in order to ſecure his property; and, for the purpoſe of arreſting his perſon, ordinary proceſs iſſued on the very day the payment fell due; all which, I think, ſhew due diligence, ſufficient to ſatisfy the terms of the covenant, and the intention of the parties.

The laſt exception is, that no notice is taken of the payment that fell due on the firſt of May '98. It is, I think, a ſufficient anſwer, to ſay, that no demand is made of the defendants for that inſtalment; and the preſumption is, that it has been paid, ſince the plaintiffs were bound to proceed againſt Rennington as ſoon as the payment fell due, which they appear to have done with reſpect to the ſecond inſtalment, the very day it became payable. Any delay or laches of the plaintiffs in this reſpect, however, it appears to me, can only be alleged, when a demand is made upon them for that inſtalment. It is ſaid, that if a ſuit had been commenced on the bond for the firſt payment, the judgment would have been for the penalty, and would have been a ſecurity on his property for the future payments. This objection fails, without aſſuming ſeveral facts of which nothing appears. No evidence, that there was any default with reſpect to this payment; or, but that a ſuit was commenced, and ſatisfaction made before judgment; or that he had any real eſtate which the judgment would have bound. If there were any circumſtances of this kind, whereby any loſs might probably be ſuſtained for want of due diligence in procuring payment of the firſt inſtalment, it might have been proper evidence for the defendants to have availed themſelves of on the iſſue with reſpect to due diligence, but can never be ground for the demurrer to the declaration.

I am, therefore, of opinion, that neither of the excep-

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tions are well taken, and that the plaintiffs ought to have judgment.

Radcliff J. The firſt and principal objection is founded on a ſtrict and literal conſtruction of the terms of the covenant. The bond is conditioned for the payment of four annual inſtalments, of 1000 dollars each. The defendants aſſigned this bond to the plaintiffs, and covenanted, that in caſe the obligor ſhould become inſolvent, or not be able to pay the *ſaid bond*, and if the plaintiffs ſhould uſe due diligence, &c. to recover *the ſame*, " immediately after the ſaid *ſeveral ſums of money expreſſed in the condition, ſhould reſpectively become due*, and ſhould not be able to compel the payment *thereof*, then the defendants would pay to the plaintiffs, *the amount of the ſaid bond with intereſt, or ſuch part thereof as ſhould then remain due.*" It was contended by the defendants' counſel, that by the terms of this covenant, the defendants cannot be held to pay, until all the inſtalments ſhall become due; becauſe the covenant is entire, and contemplates a ſingle payment of *the amount of the ſaid bond, or ſuch part thereof as ſhall remain due.* Confined to theſe terms, it would be ſuſceptible of this interpretation. But, I think, it would equally admit of the oppoſite conſtruction: that on the failure of the obligor to pay the firſt inſtalment, the defendants ſhould be liable to pay the whole. The event in which the defendants were to become anſwerable, was the *inſolvency* of the obligor, or as it is expreſſed in the covenant, if he ſhould not be able to pay the *ſaid bond*, &c. and if the plaintiffs could not recover *the ſame* (the bond) then the defendants would pay the amount of the *ſaid bond*. If the obligor was not able to pay *the bond*; and the plaintiffs not able to recover *the bond*, immediately after the *reſpective* inſtalments became due, then the caſus occurred, and the defendants were to pay *the bond*, not any particular inſtalment. Now, if the term *bond*, is to be conſtrued in the ſame ſenſe throughout this covenant, as the penalty would become legally forfeited on the failure of the firſt payment, the defendants, according to the letter of their engagement, might be conſidered liable to pay the whole bond. There is an additional reaſon too, in favour of this

ınſtruction: for, the moment the inſolvency of the obli- or happened, there could remain little hope or expectation f recovering the ſubſequent inſtalments from him; and it night rationally be intended, that the defendants ſhould it once take back their ſecurity againſt him, and pay the plaintiffs the conſideration of the aſſignment which they had already received. But I think either of theſe conſtructions too rigorous, and oppoſed to the intent of the covenant. The bond was due to the defendants by inſtalments. The ſums in the condition were, in reality the debt. By the aſſignment, they meant to ſubſtitute the plaintiffs in their ſtead, and they guaranteed the ſolvency of the obligor, and the payment by him, according to the terms of the condition. This was the ſubſtance of the contract, and the foundation of the covenant; which, I therefore think, ought to be taken diſtributively, and deemed a continuing covenant, on which the defendants would be liable on the failure of the payment of each inſtalment.

With reſpect to the other objections which have been ſtated, I acquieſce in the opinion already delivered, and generally for the reaſons which have been aſſigned.

I am, therefore, of opinion, that the plaintiffs are entitled to judgment on the demurrers.

Kent J. This caſe comes before the court on demurrer to the firſt and third replications. Upon the argument of theſe demurrers, the counſel for the defendants, relied upon what they contended to be ſubſtantial defects in the declaration. It was there that the firſt fault was to be found, and to which they choſe to reſort.

The action was commenced in July term 1800, and the laſt inſtalment on the bond, was payable on the firſt of May 1801; and it was contended, that the defendants were not liable upon their covenant until all the monies on the bond became due. An important queſtion accordingly riſes on the conſtruction of the covenant. It was to pay *the amount of the bond with interest, or such part as should remain due, and unpaid.* But there were two conditions precedent to recovery upon this covenant:

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1ſt. That the obligor ſhould become inſolvent, or not able to pay and ſatisfy the *bond*.

2d. That the plaintiffs ſhould have uſed all due diligence, and have taken all legal meaſures, by proſecution at law, to recover *the ſame*, and that too, immediately after the ſeveral ſums of money ſhould reſpectively have become due, and ſhould not have been able, by ſuch means, to have compelled the payment *thereof*. The bond was payable by inſtalments; and, there can be no doubt, but that the obligor was liable to ſuit on default of payment of any of the inſtalments. 1 Wils. 80. Sayer 29. Buller 168. 2 Black. Rep. 706. As to the caſes in Co. Litt. 292. b. and 1 H. Black 547. they relate only to *debt* on ſimple contract, or ſingle bill. But the covenant, was not, by the terms of it, to indemnify by inſtalments: It was, to pay *the amount of the bond*; and that too, only upon the condition that the obligor was not able to pay *the bond*, and that the plaintiffs had uſed all legal means to recover the ſame, immediately after the ſums had reſpectively become due, and had not been able to compel payment. The language of the covenant throughout, has reference to the bond, as one entire debt, and the payment to be made by the defendants in purſuance of the covenant, was of one aggregate or entire ſum; or, ſo much thereof, as ſhould remain unpaid. I am of opinion, therefore, that the defendants were not liable, on their covenant, until all the payments on the bond had become due. The burthen of ſuing and collecting the inſtalments was, by the aſſignment, caſt upon the plaintiffs; and if they could reſort to the defendants on the firſt, or any default prior to the ultimate one, they muſt be entitled to recover the whole *amount of the bond* from the defendants before all the inſtalments were due, and before the legal means had been uſed to aſcertain whether the obligor was, or was not, competent to pay. This would be contravening the expreſs words of the covenant, which were, that the defendants were not to pay until all ſuch means had been uſed, as the inſtalments reſpectively became due. It would be caſting back upon the defendants the burthen of uſing theſe means, which the plaintiffs had, by the contract, aſſumed. Theſe conſequen-

appear to me to result from the doctrine maintained by plaintiffs, and they are too inconsistent, with the cove- it, to be admitted. If, however, the plaintiffs were not itled to recover the whole amount of the bond, but only amount of the instalment in arrear, then it would follow, t the defendants would be subject to different suits, upon : covenant, as the defaults on the part of the obligor uld respectively arise. But this consequence would be inst the rule of law: that, for one entire contract, there ll be but one action, and would subject the defendants the manifest inconvenience of not having it in their pow- by the return, and re-ownership of the bond, to try the periment of legal means, on their part, against the obligor. r, I take it for granted, that while the plaintiffs were law- owners of the bond (and they would continue owners, til default in the last instalment) the defendants could t institute a suit upon it; for this might lead to the absurd- of concurrent suits, at the same time, on one instrument, the same penalty, and for the use of different persons.

In every view which I can take of this covenant, it ad- ts of but one construction. It was one simple and tire engagement. The insolvency of the obligor, and the orts of the plaintiffs, were to be first shewn with respect *all* the instalments. It might be, that the obligor would urn, and be able to pay the bond when the last instalment l due. The present suit being brought before this period, s prematurely brought, and before the cause of action se. I am, therefore, of opinion that, on this ground, lgment ought to be given for the defendants.

There was another ground taken by the defendants, that ght merit some consideration. I mean, the want of an rment in the declaration, that the first instalment was id, or that due means had been used to recover it. But is not necessary for me, at present, to examine any other int than the one I have considered.

Lewis C. J. The question now before the court is, Has re been, on the part of the plaintiffs, a failure in the per- mance of the condition, on which the defendants, cove-

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nanted to pay, in the event of the inability or insolvency of the obligor?

It is contended on the part of the defendants, that the plaintiffs were not entitled to recover until the last instalment should have fallen due; and then only, on shewing that they had duly prosecuted for each as they respectively became due. That the absconding of Rennington, and the proceedings against him under the absconding debtors' act, were not conclusive evidence of his insolvency. That though, perhaps, insolvent on the first of May 1799, when the second instalment was payable, he might have been solvent at the time of the third or last instalment becoming due. That the terms, "*all due diligence*," could only be satisfied by a prosecution to outlawry; and that the plaintiffs ought to have applied for, and received, their dividend under the assignment.

There are two events, in either of which, the defendants engage to be responsible. The one is, *the insolvency of Rennington*. The other, *his not being able to pay and satisfy the bond*. These might be considered one and the same thing, were it not that the parties intended to distinguish between them. They are in the disjunctive: the one coupled with a condition, the other unconditional. The distinction, in the understanding of the parties, could be no other, than that between an incapacity in Rennington to discharge his debts generally, and a mere inability to discharge the bond, according to its condition. In the first instance, the condition compelling the plaintiffs to prosecute, would have been useless; in the second, it might eventually secure the debt.

The first question then, is, was Rennington insolvent within the meaning of the contract? It is stated, and not denied, that he had absconded before the instalment payable in '99; had absented himself from the state, and continued without it, at the time of bringing the suit. That also, previous to that period, his property had been assigned under the absconding debtors' act; and that it netted a dividend of but 10*s.* in the pound. On such assignment, the debtor's property is divested, his mercantile operations are suspended. No payments can be made to him, nor can he

iſpoſe of his property. This, in my conception, is a complete ſtate of inſolvency. Proceedings under the inſolvent act are not neceſſary to conſtitute it. That act is intended as a benefit to the unfortunate, who muſt be *actually inſolvent* before they can have relief under it.

But, admitting that in contemplation of the parties, no diſtinction was intended between the caſes of the inſolvency of Rennington, and his inability to pay, according to the condition of the bond. But that, in every event, he was bound to proſecute on default of the obligor.—Has he not complied with ſuch condition? On the very day on which the firſt default took place he iſſued a capias, and on its return, an alias. Rennington could not be taken, being out of the juriſdiction. To proſecute to outlawry, a man whoſe property had been already aſſigned for the benefit of his creditors, would have been an uſeleſs expenſe, and could not have added to the ſecurity of the debt. The law, therefore, would not impoſe it upon them. And as the ſuit was in the name of the defendants, and in effect, for their benefit, they might have continued the proſecution had they choſen ſo to do.

As to the plaintiffs inſtituting a new ſuit on the ſecond default, viz. on the nonpayment of the inſtalment due in 1800, this alſo would have been uſeleſs. For, could a recovery have been had in the firſt ſuit, it would have anſwered every beneficial purpoſe. The judgment would have been for the penalty, and would have remained a ſecurity for the future inſtalments.

With reſpect to the plaintiffs' not applying for a dividend, there appear two anſwers to the objection: Firſt, It does not appear, on the pleadings, that the dividend has not been received. Second, The defendants were the proper perſons to apply for it. They were the obligees originally, and, when the aſſignment under the act took place, the poſſibility of recovery was defeated; they, by the terms of the contract, then became the ſubſtitutes of Rennington to the plaintiffs, and were to look to him, or his property, for an indemnity. On every ground, I am of opinion, judgment muſt be for the plaintiffs.

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Jackſon v. Reynolds.

James Jackson, ex dem. Nicholas Low and others, *against* James Reynolds.

If a defendant has acknowledged the title of the plaintiff, he cannot afterwards diſpute it.

THIS was an action of ejectment to recover part of lot No. 37, in Romulus, in the county of Cayuga. On the trial, the plaintiffs deduced a regular title from the original patentee. He alſo gave in evidence, acknowledgments of the defendant's, confeſſing that he had entered without title, and that he had agreed to purchaſe of the leſſor of the plaintiff, the premiſes in queſtion, ſo ſoon as the Onondaga commiſſioners ſhould award the lot in which they were contained, to Low. He further proved, by the teſtimony of one of the commiſſioners, that lot No. 37 had been awarded to Low, and the award directed to be made out by their clerk, who, however, died in February 1801; before it was compleated, in conſequence of which, as their commiſſion expired in March of the ſame year, nothing further was ever done.

The defendant relied on his having entered by virtue of a conveyance from another, though for another lot, and offered parol teſtimony of a diſſent having been entered to the award of the commiſſioners; inſiſting, that as parol teſtimony had been received of the award, ſo it was admiſſible to ſhew the diſſent. This being overruled, the jury, in purſuance of the judge's charge, found for the plaintiff.

Application was now made to ſet aſide the verdict, on account of miſdirection.

Per curiam. Reynolds has, by his admiſſions, recognized Low as his landlord; he cannot, therefore, be admitted to diſpute his title. Whether, therefore, the evidence was properly or improperly received, cannot be enquired into, nor can the defendant take any thing by his motion.

Mark Bordes, Jun. *against* Richard S. Hallet.

Neither an acquittal nor a reſtitution of goods, prejudice an abandonment once duly made.

This was an action on a policy of inſurance, dated the 21ſt May 1800, to recover the amount of a trunk of merchandize valued at 800 dollars, and the expences incurred in claiming the property in a foreign court of vice-admiralty.

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The cauſe was tried before his Honour Mr. Juſtice Radliff, at the ſittings in November 1802.

The caſe, as it appeared in evidence, was as follows:

The plaintiff ſhipped the articles in queſtion, on board the ſchooner Trimmer, bound from New-York to St. Jago de Cuba. On the 18th of May 1800, he embarked with his property in the veſſel; which, during the courſe of the voyage was captured, and carried into the port of Kingſton, in the iſland of Jamaica, where ſhe and her general cargo were condemned; but the trunk of the plaintiff, for which he had interpoſed a claim, was acquitted. Notwithſtanding, however, this acquittal, and the decree for reſtoration, the agents of the captors refuſed to deliver it up, unleſs the plaintiff would give ſecurity* for its value; which, as a ſtranger, not being able to procure, they actually opened and took out the contents of the trunk, and the ſame were, for want of the ſecurity demanded, left in their hands. On the return of the plaintiff to New-York, in Nov. 1800, he abandoned to the defendant, and duly notified him of all the antecedent circumſtances. He alſo, after proving his intereſt by a bill of lading, ſigned and acknowledged by the captain, ſubmitted an account of his expenſes in the proſecution of his claim for the goods inſured; which, in an average account, apportioning the whole, was ſettled on the back of the policy, at 9 dollars 48 ct's per cent. by Mr. Ferters, who acts for the defendant and other underwriters in adjuſting claims againſt them. Mr. Ferrers, however, teſtified, that though he was thus employed, and though the underwriters did uſually aſſent to, and pay according to his reports; ſtill, he had no binding authority on them, for that they often diſputed his ſtatements; notwithſtanding, they had not to his knowledge, on the preſent occaſion, either aſſented to or diſſented from the calculation he had made.

To this teſtimony, the counſel for the defendant objected, and inſiſted that the plaintiff was not entitled to recover. A verdict was, however, taken by conſent, in favour of the plaintiffs for 978 dollars 74 cents, ſubject to the opinion of the court, on the following points:

caſe of a reſtitution of goods to an owner at the port into which a veſſel is carried, he is not bound to ſend them on to their port of deſtination. Though an adjuſtment made by the agent of the outdoor underwriters (Mr. Ferrers) does not conclude the inſurers from ſhewing errors in it, if they do not diſſent, they are bound.

* It ſeems from this, that the captors had entered an appeal from that part of the ſentence, acquitting the trunk; in which caſe, they were not bound to deliver the property, without ſecurity for paying the value, in caſe of a reverſal.

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Whether the plaintiff was entitled to recover for a total loſs and the expenſes? If ſo, the verdict to ſtand. But, if, in the opinion of the court, the plaintiff was not entitled to recover for the expenſes, but for a total loſs of the goods, then the verdict to be reduced to 902 dollars 90 cents; and if the plaintiff was not entitled to recover for a total loſs, but for expenſes only, then the verdict to be entered for 76 dollars 84 cents; otherwiſe, a verdict to be entered for the defendant.

Hoffman for the plaintiff. From the facts preſented to the court, it is manifeſt, there was a capture of the veſſel. This operates as a technical total loſs, and, therefore, whether an acquittal ſubſequently took place or not, is immaterial; for the capture alone is ſufficient to warrant the abandonment. After this, the aſſured, who from the moment of capture becomes the agent of the aſſurer, returns, and making a full avowal of what had taken place, ſays, I have done all I could; but the event does not alter the law, I am now, for the firſt time, able to communicate with you and abandon. It is not, however, from the capture alone that the plaintiff is entitled to abandon. A loſs of the voyage affords an equal right. Here the goods were bound to St. Jago de Cuba, and the veſſel was carried into Jamaica, where ſhe was condemned. The only queſtion that can ariſe is, whether on Mr. Ferrers' ſettlement of the average account, the defendant is bound to pay what he has indorſed on the policy to be due? But ſuch is the ruin brought on this poor plaintiff, whoſe little all has been locked up by the refuſal of the defendant to pay, ever ſince 1800, that rather than not have a deciſion on the principal queſtion this term, he is ready to give up his expenſes. As to theſe, without going minutely into the teſtimony, the queſtion ought to reſolve itſelf into this: What is the relative ſituation of Mr. Ferrers with the defendant? All claims, when made on the out-door underwriters, of whom the defendant is one, are referred to Mr. Ferrers. He gives his opinion, whether liable to a total or a partial loſs. We do not ſay, that when he gives his ſentiments if he totally miſtakes the law, that they are, on the facts ſubmitted, obliged to pay a

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total, when only a partial loſs is due. But when an average loſs is acknowledged, and the ſettling it referred to him, and he adjuſts the ſum, then, as the agent of the underwriters, they are bound by his report. This is not by affording an authority to ſettle a point of law, but as yielding a power over items of an account, the principles of which they acknowledge. Nay, even allowing the underwriters not concluded as to the principles, ſtill, if in law at all liable, the quantum, except in caſes of erroneous calculation, can never be queſtioned. It is like the caſe of a perſon deputed to audit the amount of claims; when the balance is struck, it is, errors excepted, final. The doctrine already relied on as to the right of abandonment is not impaired by ſubſequent reſtitution. For this the court will find authority in 2 Marſh. 484.

Pendleton contra. A principal queſtion in this cauſe is as to the expenſes in the vice-admiralty. The claim for theſe reſts only on the report of Mr. Ferrers; for this is the only evidence in the caſe that any were incurred. Such teſtimony, however, cannot bind the underwriters; for Mr. Ferrers himſelf ſtates his employment to be merely that of reporting; after doing which, his ſtatement is frequently diſregarded, and his adjuſtment diſputed. This would never be, had Mr. Ferrers an obligatory authority. The fact is, he is a mere examiner of accounts, and cannot bind his principals beyond the ſcope of his authority. He ſtates, his principals had a right to diſſent from his ſtatements, of which the preſent action is in itſelf the ſtrongeſt proof. But a queſtion is certainly made, whether the abandonment was in due ſeaſon. The veſſel ſailed in May, was captured on her voyage, and the abandonment not made till November following. This, conſidering the diſtance of Jamaica, was a groſs delay. We find, however, from the teſtimony of the captain of the veſſel, that this property was acquitted. The plaintiff, therefore, might have had it again had he ſo deaſed. It is a poſition not to be controverted, that every court is inveſted with power to enforce its own authority: therefore, if after reſtitution awarded, it was not obtained, it muſt have ariſen from the neglect of the plaintiff, or ſome

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other worſe cauſe; for, he might have applied to the court, and have obtained an order for it. In caſe of refuſal, the proceſs was eaſy, attachment for a contempt.* It is ſaid, however, that as the voyage was loſt, that circumſtance would juſtify an abandonment. This will preſent a queſtion to the court that has not, we believe, ever been decided. Whether an owner of goods, where the veſſel in which he ſhips is incapable of proceeding on her voyage, by reaſon of any accident, is not obliged† to proceed with his goods in ſome other veſſel? Nothing of this ſort appears to have been determined. Suppoſing him, however, bound, ought not the aſſured to entitle him to a recovery, to ſhew that no veſſel could be obtained to forward the property; or ought the inſurer to ſhew, by way of defence, that there was? The principle is, that the captain ought to get a veſſel, if ſuch a one be to be found; and it is only in caſes of neceſſity that he is authorized to abandon the voyage; if in his power to proceed, he ought to do ſo; had it been otherwiſe, it ought to have appeared in the caſe. 2 Marſh. 378. So in Manning v. Newnham, Park 168. Lord Mansfield lays the ſtreſs of the caſe on the captain's not being able to get another veſſel to go on. It is ſettled, that when the bottom is neceſſarily changed by ſhifting the goods from one veſſel to another, the underwriter continues liable. Sending on the goods, therefore, in another ſhip, would not have exonerated the defendant; and as it was the plaintiff's duty, he ought to make out his caſe by ſhewing another veſſel could not be obtained. This, certainly, is more proper than for the defendant to be put to prove a veſſel might have been procured; becauſe, the aſſured is to be preſumed to have a correſpondent where his property may be carried, but the underwriter is not. Beſides, the plaintiff was on the ſpot, and as he might have procured reſtitution from the court of admiralty, he may, admitting all the evidence in the caſe to be true, be now in another country with all the property in his poſſeſſion.

Hoffman in reply. That it is the duty of an aſſured, as to goods, in caſe of capture and reſtitution, to ſend on the goods to the port of their deſtination before he can be entitled

* See ante note 445.

† A ſhip owner contracts to carry; a ſhipper does not; therefore, he who does not engage, can never be obliged to perform.

:cover, is a poſition, till now, unheard of in inſurance He may, perhaps, do it under the general clauſe, em- ering him, or his agents, to act for the inſurers; and, na fide done, they may, perhaps, be liable. But no au- ity, we preſume, can he have to change a neutral into a gerent riſk, as it is probable muſt be done, in ſending the port of a nation at war. But, allowing it to be as ended, it ought to come from the defendant, becauſe it ged as an excuſe for not paying a total, but a partial

The plain caſe is, there was a capture, and the voy- totally defeated. Either event will juſtify an abandon- t. The reſtitution is for the benefit of the aſſurer, who proſecute his claims upon it, by forcing the captors to n with their appeal; but, on no principle can it be con- led, that the aſſured muſt follow it up, to entitle him to ver. This would deſtroy the very intent of inſurance, ch is, in caſe of loſs, to put the underwriter in the place he underwritten.

'er curiam delivered by Lewis C. J. The objections to plaintiff's recovery, on this ſtatement of facts, are,

ſt. That he had no right to abandon after the acquittal he property inſured.

d. That the abandonment was out of time.

d. That he was bound to have procured another veſſel.

th. That the defendant was not bound by the adjuſtment.

t is ſtated in the caſe, that the veſſel ſailed about the 17th May 1800; but when ſhe was captured, or when con- med, does not appear. It appears, however, that though trunk of goods, on which the inſurance was made, was, the ſentence of the court of vice admiralty decree to be ered, the plaintiff could not regain the poſſeſſion of it, that he abandoned it to the underwriters, on the 22d of tober following.

Within what preciſe period an abandonment ought to be le, has never been determined. The time permitted to e- ſe between the condemnation, order of reſtitution, and ndonment in the preſent inſtance, connot be inferred n any thing in the caſe. It is certain, however, that the was total on the 22d of October, and has ſo continued

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to the preſent moment. The voyage to St. Jago de C was compleatly broken up, and the plaintiff has never h in his power to convey the goods thither, even had it b incumbent on him ſo to do, for he has not been able to re ver the poſſeſſion of them. There is no ground then, which either the firſt, ſecond, or third objections can be ported. Had the plaintiff even recovered the poſſeſſion o goods, it would not, in my opinion, alter the caſe. No rect intercourſe can be preſumed to ſubſiſt between the c nial ports of two belligerents; and were the contrary fact, this is not a caſe, impoſing an obligation on the pl tiff to procure another veſſel.

The fourth is rather an objection to the quantum of mages, than to the right of recovery. By the general p miſſion in the policy, to labour &c. without prejudice t the inſurer became liable to an average of the expence curred in the attempt to recover the captured proper It is true, he was not bound by the adjuſtment of Mr. F rers, and was at liberty to have ſhewn that it was erroneo But this was not even attempted. A circumſtance whic when taken in connection with the character and emplo ment of that gentleman, will warrant the concluſion, t his adjuſtment is correct. We are, therefore, of opini judgment be for the plaintiff, for the largeſt ſum found the jury.

John Given *against* Bartholemew Driggs.

A bond to indemnify againſt an eſcape, given after an eſcape ſuffered, is good. A judgment by default, is not in itſelf fraudulent, and unleſs fraud be ſhewn is within a condition to bear harmleſs from what the plaintiff might be obliged to pay "after due proceedings had againſt him, and adjudged and decreed."

THIS was an action by the Sheriff of Albany, on a bo of indemnity, dated 22d April 1798. The declaration in the common form; for debt, 862 dollars.

The defendant, in his plea, ſet forth the condition of bond, reciting, that on the 10th March preceding, two of capias ad ſatisfaciendum had been iſſued out of the preme court, againſt George Driggs: one, at the ſuit Wendover and J. Hopkins, for 305 dollars; the other the ſuit of B. Dudley, for 126 dollars, returnable on third Tueſday in April in the ſame year; that George D *had been taken*, on both theſe ſuits, by S. Hamilton, one the plaintiff's deputies; that the condition of the obligat

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ras, that if the defendant ſhould pay all ſuch ſums of money, charges and damages whatever, as the plaintiff ſhould e obliged to pay, after due proceedings at law had againſt im, and adjudged and decreed, by reaſon of the *aforeſaid aking* of the ſaid George Driggs on the ſaid writs, then the bligation to be void, otherwiſe, &c. The defendant then pleaded the ſtatute, for preventing vexatious and oppreſſive ureſts, and, that the plaintiff took the writing aforeſaid, for eaſe and favor to George Driggs, and by colour of the plaintiff's office:

2dly. That the plaintiff had not been damnified. To theſe pleas the defendant replied,

1ſt, That at the time when the bond was given, George Driggs was not a priſoner of the plaintiff, nor of Hamilton on the writs of ca. ſa. but was then at large, and diſcharged from his impriſonment thereon; and that the bond was given to indemnify the plaintiff for taking George Driggs, and diſcharging him from the arreſt and impriſonment aforeſaid, traverſing the eaſe and favor.

2d. That in April term 1799, Wendover, ſurvivor of Hopkins, and B. Dudley, impleaded the plaintiff, for taking and arreſting the ſaid George Driggs, and permitting him to go at large; that, in July term following, judgment was obtained againſt the plaintiff, for the debts and coſts in the above ſuits, avering, that he is bound, and charged to the ſatisfaction of the judgments, and that he was damnified by the ſuits and judgments thereon.

Rejoinder; that the plaintiff, fraudulently, and deceitfully, and with intent to deceive and defraud the defendant, permitted the ſaid judgments to paſs againſt him by default, and that he fraudulently and deceitfully neglected to make any defence to the ſaid actions.

Surrejoinder; that the plaintiff did not fraudulently and deceitfully neglect to defend, nor did ſo ſuffer the judgments to paſs againſt him by default, and iſſue thereon.

The cauſe came on for trial before Mr. Juſtice Thompſon, at the Albany circuit in September laſt, when the counſel agreed that the only two points in queſtion were,

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1ſt. Whether the bond in queſtion was given for eaſe and favor, and deliverance of the ſaid George Driggs, contrary to the form of the ſtatute, and therefore void.

2d. Whether the judgments aforeſaid, were entered thro' fraud and deceit of the plaintiff, or were negligently and fraudulently ſuffered or not. The pltff. proved that judgments in the two ſuits of Wendover and Hopkins, and of Dudley, were duly obtained, and executions regularly ſued out againſt George Driggs. That he was taken upon them *ſome time in March* 1798, by one of the deputies of the Sheriff, named Hamilton, and that, at the time of the arreſt, many threatening obſervations were made, by the defendant and George Driggs, in caſe the Sheriff ſhould detain his priſoner in cuſtody, as they inſiſted he was not liable to be held, having lately obtained his diſcharge under the inſolvent act; that at the ſame time, there was ſome converſation about giving a bond to try the validity of the arreſt, and ſecure the Sheriff, in caſe the ſaid George Driggs ſhould ultimately be liable to the above executions; that, directions were given to one Frazer, the attorney in the ſuits againſt George Driggs, to prepare ſuch a bond; but before it was finiſhed, the defendant told Frazer he need not go on, for that he [the defendant] would have nothing to do with it; that ſince the arreſt, Hamilton had declared he had permitted George Driggs to go at large; that George Driggs went a journey to the weſtward, and the defendant ſaid he would ſee him forthcoming in ten days; that Frazer did not conſent to George Driggs' going at large, but on being aſked, whether he could be regularly ſet free, on ſome perſon's undertaking for his return into cuſtody; Frazer anſwered, ſo it had been practiſed by others; that Driggs had been ſeen, after coming back from the weſtward; and that Hamilton had been heard to ſay, George Driggs had returned according to his agreement; that on *the 23d of April* 1798, the bond, on which the preſent action was inſtituted, was drawn by Frazer, at the requeſt of Hamilton and the defendant, when George Driggs was not preſent, and that it was executed by the defendant, at a houſe to which he and Hamilton went for that purpoſe; that the arreſt took place on the 10th or 12th of March preceding;

tween which time, and the 23d of April following, when e bond was executed, George Driggs had been frequently n in the ſtreets of Loonenburgh, where he and Hamilton ſided; that, previous to the execution of the bond, Joſeph opkins conſented to its being given, and told Hamilton he ould be ſafe if he took it; that, at the time of its execu-n, the defendant ſaid he was not afraid of the bond, as he is poſitive his ſon's diſcharge was good; but, that he did t wiſh the ſheriff to be hurt. The plaintiff here cloſed his ſe. The defendant gave in evidence, by a witneſs preſent hen the arreſt was made, that Hamilton agreed with George riggs, that he might go a journey to the weſtward, and at the defendant became his ſurety that he ſhould return ten or twelve days; that he *did* return within that time, d was delivered up by the defendant to Hamilton; that e attorney, in the cauſes againſt George Driggs, ſaid the eriff would be ſafe in letting him go, if the defendant was rety for his return; that from Hamilton, it was under-ood, that George Driggs was not his priſoner, at the time e bond was given. Frazer's aſſent to Driggs's being ſet at ge, was denied by Hamilton, who ſaid, he himſelf per-itted Driggs to go the journey to the weſtward, on condi-n of the defendant's undertaking for the return of Driggs, priſoner; that he did come back, as was promiſed; but t Hamilton recollected no ſurrender of him into cuſtody; t the defendant ſaid he was willing to give a bond to in-nnify the ſheriff, and, on Hopkins's conſenting to the bond queſtion, it was executed; but that, at the time of its ex-tion, George Driggs was abſolutely at large, and had n ſo ever ſince his return; nor had the ſheriff exerciſed r authority over him, as the deputy did not conſider him uſtody, in conſequence of Hopkins's conſent to the bond; t of ſuch conſent, the plaintiff, ſhortly after the ſuits a-nſt him were commenced, was informed, and that he had ſfied the judgments obtained therein againſt him, within ut five pounds. On this teſtimony the jury found a ver-t for the defendant.

The preſent application was for a new trial.

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Metcalf and Emmot for the plaintiff. The motion now made, is for a new trial, the verdict being contrary to law and evidence; and it may be added, though it does not appear in the case, contrary to the opinion of the court also. It is an action of debt on a bond of indemnity, with a condition after a recital, as follows: "The condition, therefore, "of the above obligation, is such, that if the said Bartholo- "mew Driggs, shall well and truly pay, or cause to be paid, "to the said John Given, or his assigns, all such sums of mo- "ney, charges and damages whatsoever, as he, the said John "Given, as sheriff, as aforesaid, shall be obliged to pay, af- "ter due proceedings at law had against the said John Given, "*and adjudged and decreed against him*, the said John Given, "or his assigns, by reason of the aforesaid *taking* of the a- "foresaid George Driggs, on the said writs as aforesaid, then, "and in such case, the above obligation to be void, otherwise "to be and remain in full force and virtue." To this the defendant has pleaded, that the bond was given by him to the sheriff for ease and favor. The first question is, whether the bond was so given, and therefore void? the second, whether the judgments obtained against the plaintiff were deceitfully or negligently suffered? The first point includes matter of law and matter of fact. Whether a bond to indemnify a sheriff from an escape given subsequent to an escape, and when not in custody, be a bond for ease and favor and therefore void by the statute is the question of law! Whether the party was then in custody or not is *that* of fact. By recurring to the testimony in the case, it will appear that Driggs, for whose ease the bond is alleged to have been entered into, was out of custody long before it was executed, and the very right of taking him was questionable, as he had been discharged under the insolvent act. Against what is advanced, the agreement to let him go, on a promise to re- turn, cannot be urged; for, though he did return, he never was in custody, and the liberation itself, under the agree- ment, was an escape, *after which* the bond was given. Is then, this bond, such a bond, as is made void by the statute? It expressly refers to bonds given for deliverance, and refers

one in cuſtody only. 3 Vin. Abr. 453. pl. 8. Notis* Ibid. 454. pl. 13.† 19 Vin. Abr. 445. a bond given to indemnify againſt paſt eſcapes, is good. 6 Mod. 225.‡ which cites 1 Salk. 438.‖ Ibid. 653. So 5 Com. Di. tit. Pleader (2 W.) 26. page 648. 11 Mod. 93.§ 5 Vin. Abr. 96. pl. 20. If then, the law be ſo, the firſt defence is entirely falſe; for, it is not a bond under the ſtatute, and, therefore, is not void. Had any thing been ſaid about its being given, at the time of liberating George Driggs, it might, perhaps, have been invalidated; but it was not only not then in exiſtence, but not even contemplated. As to any fraud in the plaintiff, from ſuffering the judgments to be had againſt him, it ſurely will not be contended *that* is proved, becauſe they went by default. There might have been no defence, and then a judgment by default was the only honeſt one that could be had: for any other would have been diſhoneſt, as it could have no effect but to encreaſe coſts. There was a clear eſcape, and a recovery was inevitable; for, no conſent to the diſcharge of George Driggs, was given either by Hopkins or the attorney in the ſuit. None of the words made uſe of imply it; they only mean, that as the plaintiff would be liable to Wendover and Hopkins, he might make himſelf ſecure by a bond: and to prove that this was the true idea the parties entertained, Hopkins, as ſurvivor of Wendover, inſtantly commenced a ſuit againſt the plaintiff. Had there been a wiſh to exonerate the ſheriff, and permit the liberation of George Driggs, Hopkins would have taken the bond to himſelf. At all events, Dudley did not aſſent, and whatever may be urged reſpecting Hopkins's judgment, it cannot apply to that by Dudley, and to neither one nor the other of the ſuits, could the ſheriff juſtify under the inſolvency of George Driggss. In the caſe of Lanſing v. Fleet, October 1800, in this court, it was ruled, that a return into cuſtody does not purge an eſcape; but, that the party may go at large again when he pleaſes. They, therefore, relied on that authority, in addition to thoſe cited, to ſhew that the bond could not be for favour. Alſo 6 Mod. 27. (127) 2 Leon 89.* 1 Salk. 271. 10 Vin. Abr. 111. M. 1.

Spencer contra. If it be made appear, that the plaintiff

* Stepney v. Loyd Cro. Ella 647. The defendant was illegally arreſted, and the bond held void as obtained by dureſs.

† On a fi. fa. the ſheriff took a bond to pay the money into court at the return of the writ, and held good. 10 Rep. 99 b. Bewfages' caſe.

‡ Fox v. Tilly.

‖ A bond to be a true priſoner good.

§ Hacket v. Tilly, that was a bond from an officer to the ſheriff, to indemnify againſt eſcapes. See Holt, 201.

* It is a citation from the year books, but, in my

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cannot, under the preſent ſtate of pleadings, recover, though a new trial ſhould be granted, the court will certainly let the verdict ſtand. Where a jury have found againſt law, if ſending back the cauſe, be, for a trifling purpoſe, and the damages ſmall, the court will not interfere; a fortiori they will not, if they ſee no poſſible uſe can accrue. At the trial it was not made a point, whether, from the condition as ſet forth, the plaintiff could, under any circumſtances, recover *for an eſcape*. The words are, that if the plaintiff ſhould pay, &c. "*by reaſon of the taking of the* aforeſaid George Driggs." To the action on the penalty of the bond there are two pleas; one to the caſe and favor, the other, that the plaintiff had not been damnified. The replication means to raiſe this fact, whether the bond was given after George Driggs had eſcaped, and to indemnify for that, or to obtain his deliverance at the moment when executed. The action is intended to recover what has been paid for an eſcape ſuffered, and not in conſequence of having arreſted. The defendant has engaged for nothing but for the taking; he does not ſay for the ſuffering to eſcape. This is a clear departure in pleading. The count, as appears by the condition, is for a taking, and the replication ſhews damage by an eſcape. The queſtion, therefore, which now ariſes is, whether it be competent for the plaintiff to aver a condition which does not appear on the bond. He cannot aver any thing which is not apparent. The bond is to indemnify only againſt *taking* on the writs. If Given cannot bring himſelf within the condition, he has no right to bring the action. Nothing can be averred which varies the condition. 19 Vin. 447. U. pl. 2. No averrment againſt the condition of a bond. The contrary would overturn all legal principles of agreements, and on which the plaintiff reſorts to recover damages. If there be a recovery, it muſt be by parol teſtimony directly oppoſed to the condition of the bond. With reſpect to the validity of the inſtrument, it is to be obſerved, that it is to indemnify for *taking* Driggs. When the writs were put into the ſheriff's hands, he was to execute them: no ſecurity from a third perſon, to protect him from the conſequences of doing his duty, can be good. But, admitting that it is valid, if the

Leonard from that of Henry the ninth. I have ſearched in Henry 6th, and in Brooke, but do not find the caſe, which is that a releaſe by the plaintiff to his debtor who was in execution, is no plea in an action for an eſcape before the releaſe.

plaintiff cannot depart from the condition, and in order to maintain his action, he muſt do ſo, let the verdict be as it will, the court will not grant a new trial. For, ſuppoſe it was done, and a verdict for the plaintiff, a motion would be made in arreſt of judgment for the variance; and as it appears on the face of the record, that the condition is for the ſheriff's doing his duty, it is illegal, and the ſuit not to be maintained. Either of theſe reaſons would be fatal, and both are certainly enough to warrant the refuſal of a new trial. The ſecond objection, ſtated in the rejoinder, ſtill remains unanſwered. The defendant was to be anſwerable only after *due proceedings* had againſt the plaintiff *by reaſon of the aforeſaid taking*. Theſe words preclude every idea of a default. The condition contemplates a payment after a trial had between the parties. Againſt all that is advanced on behalf of the defendant, it is urged, that if a party taken on execution, eſcape, and afterwards a voluntary bond be given to indemnify, it would not be within the purview of the act. But this is not ſuch a caſe. There were converſations at the time of taking, reſpecting an indemnification, and an agreement, that George Driggs ſhould be forthcoming. The whole teſtimony evinces this. Yet, were it otherwiſe, the law will not bear out the poſition of the other ſide. 4 Bac. Abr. 464.* is expreſs, that if a party be taken, eſcape, return, and give bond to indemnify, it is void by the ſtatute and common law†. On the point of fraud, the jury were the proper judges; it was ſubmitted to them by His honor who tried the cauſe, and they have determined. The caſes cited apply to tranſactions between the parties, and not to thoſe between the ſheriff and a ſtranger. It is relied on, that under no circumſtances does this bond afford a ground for action, being void and a nullity in itſelf, that the condition is to indemnify againſt the *taking*, and that evidence of damage from an *eſcape* cannot, therefore, be adduced.

* The caſe alluded to is Philips & Stones' caſe 2 Leon. 118. but the debtor there was taken on a ca. fa.

† The authority does not go quite ſo far.

Emmott in reply. We are here to argue on a queſtion for a new trial. It is ſomewhat of a novelty, that we ſhould be called on to ſpeak againſt an arreſt of judgment; all we have to ſhew is, that on the pleadings, the verdict is againſt evidence, and that we were entitled to recover. If the court

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will look at the bond and teſtimony, they will ſee it was a bond to indemnify againſt an eſcape, and not againſt a mere taking. The intent of parties is always to regulate in matters of contract. The intent appears from the plea; for, the defence is, that the bond was for eaſe and favor; which it could not be, if it was to keep harmleſs for taking alone. The teſtimony on both ſides went to the point of eaſe and favor, and tended to ſhew it was to indemnify, after a going at large, from actions of eſcape, which might be brought for that which had taken place. If there had been no taking, there could have been no eſcape; and, therefore, the bond, tranſactions, pleadings and teſtimony, all ſhew that it was to indemnify for an eſcape which had long before been permitted. This objection, on the word *taking*, was overruled at the trial, as the judge muſt recollect, though it does not now appear.

Thompſon J. My recollection is confined to the caſe.

Emmott. The dates ſtated, and before the court, will ſhew that the bond could not be for eaſe and favor. The arreſt was on the 10th or 12th of March. George Driggs was then liberated by the ſheriff, and the bond not dated till the 22d of April following. Lanſing v. Fleet is in point to ſhew that had George Driggs returned to the ſheriff himſelf, he could not have been held, or conſidered as a priſoner. Where then could be the eaſe and favor in diſcharging a man that was actually at liberty? For the reaſons already given, a defence by the plaintiff, to the actions againſt him, might have been highly improper; to ſhew the judgments therefore, fraudulent, it ought to be made appear, that there was a good and legal defence, which the plaintiff neglected to make. This was afforded neither by the diſcharge under the inſolvent act, nor by the words of Hopkins. It is worthy of obſervation, that it does not appear George Driggs ever was diſcharged, as has been aſſerted. Nothing of the kind was proved at the trial, and nothing appears in the caſe; but had it been otherwiſe, the plaintiff could not have juſtified under it, for he could not take upon himſelf to determine on its legality, as it might poſſibly have been void from fraud. The only ſections in the act for the relief of

ſolvent debtors, applicable to the preſent diſcuſſion, are the 7th, 11th, and 12th; the firſt, after authoriſing a diſcharge from debts and impriſonment, goes on thus, "which diſ-"charge, or the record thereof, ſhall be ſufficient authority "to the ſheriff for ſetting ſuch priſoner at large, and the diſ-"charge ſhall alſo be concluſive evidence in all courts, of "the facts therein contained." The ſecond authoriſes the pleading of the general iſſue. The third declares, that if the inſolvent be guilty of perjury or fraud, the diſcharge ſhall be void. Two caſes, therefore, and only two, are ſpecifically provided for; that of an inſolvent's being impriſoned at the time, when the diſcharge is obtained, and that of his being ſubſequently arreſted. In the firſt, he will be liberated on producing the diſcharge; in the ſecond, he may plead the general iſſue, and give the diſcharge in evidence. It is a mere ſtatutory releaſe, to be taken advantage of like any other, and avoidable by proof of fraud. If, therefore, the defendant meant to inſiſt, that it ought to have been uſed by the plaintiff, he ſhould have ſhewn it below, that the plaintiff might have rebutted it by proving fraud. But it never could have been availed of by the plaintiff, as the judgments on which the ſuits againſt him were founded, are in exiſtence. When the writs of execution againſt George Driggs came into the plaintiff's hands, it was his duty to execute them: to obey their precepts, not to judge of their effect; his duty being purely miniſterial. On this head, the law is ſo ſtrict, that it will not permit a ſheriff to ſet up a payment, without ſatisfaction is entered of record. 6 Mod 27. nor a releaſe 2 Leo. 89. It is ſubmitted, therefore, that as the defence would have been uſeleſs, it could not have been intended; that the bond being given when George Driggs could not be eaſed nor favored, could not be for eaſe and favor; and that, as no kind of fraud is imputable in the recovery on the judgments, the verdict is againſt law and evidence, and muſt, therefore, be ſet aſide.

Per curiam delivered by Kent J. There can be no doubt that the verdict is againſt evidence. The one iſſue is upon the allegation, that no bond was given, and that it was for his deliverance from ſuch cuſtody. But the evidence on

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both ſides concurs, that when the bond was given, George Driggs was not a priſoner, but at large, and had been ſo for ſome days, by the permiſſion of the ſheriff. The other iſſue is upon the allegation, that the judgments were ſuffered by the plaintiff, to be entered by default fraudulently. But there is no evidence of ſuch fraud, and no ground from which to infer any. A judgment by default is no preſumption of colluſion, if no real defence appear, or could have been made. The verdict muſt, therefore, be ſet aſide, unleſs we perceive *clearly*, from the caſe, that the plaintiff can never ſuſtain a ſuit upon the bond, and then a new trial would be uſeleſs. A bond given to indemnify againſt an eſcape *already happened*, is good. The bonds, which are void under the act, as being given for eaſe and favor, are thoſe given by a perſon in cuſtody. (Dawſon v. Brumer, cited in 10 Co. 100. a. Moore 542. Caſe 717. 11. Mod. 93. and 2. L. Raymond 1207. S. C. 6 Mod. 225.) There is, therefore, no reaſon to conclude, from the teſtimony as it appears in the caſe, that the bond is void; and it ought at leaſt to appear *manifeſtly*, before the court could notice it under the preſent motion.

The verdict muſt, therefore, be ſet aſide on payment of coſts.

Lewis C. J. and Livingſton J. abſent.

Samuel Hitchcock and Jabez G. Fitch,
against
Daniel Aicken.

A judgment in a ſiſter ſtate is only prima facie evidence of a debt, and the conſideration, therefore, examinable in our courts.

THIS was an action of debt upon a judgment obtained in the Supreme Court held at Middlebury, within and for the county of Addiſon, in the ſtate of Vermont; plea nil debet, at the New-York ſittings in November, 1803, a verdict was taken for the plaintiffs for the ſum of

Subject to the opinion of the court on the following caſe:

The plaintiffs commenced their ſuit againſt the defendant, being a citizen of this ſtate, in the county of Middle-

, in the ſtate of Vermont, by attachment. They charg- 1 their declaration, that the defendant, on the tenth day November, 1795, in conſideration that the plaintiffs ld buy of the defendant a horſe for the ſum of ſeven dred and fifty dollars, promiſed the plaintiffs that the e was ſound, with an averment of the payment of the ey by the plaintiffs, and that the horſe was unſound. defendant, having been ſummoned, appeared by his rney, and pleaded in abatement of plaintiffs writ—for the defendant is not an inhabitant of Pawlington, in county of Dutcheſs in the ſtate of New-York, as de- bed by the plaintiffs in their writ, but an inhabitant of derickſtown, in the ſaid county. The plaintiffs demur— afterwards the court having conſidered the plea inſuffi- it, the defendant pleaded non aſſumpſit; upon which a r trial was had and a verdict was found for the plaintiffs he ſtate of Vermont.

Jpon the judgment, thus rendered by the court in Ver- nt, this action was brought, and it is now ſubmitted to court to determine—whether it was competent for the endant to go into evidence as to the merits of the judg- nt obtained in Vermont: or in other words, whether this gment is to be conſidered as a foreign judgment, and on- rima facie evidence of the debt; if ſo, the verdict found his cauſe to be ſet aside and a new trial granted; other- e the judgment to ſtand.

Thompſon J. The queſtion now ſubmitted to the court whether it was competent for the defendant, on the trial, go into evidence as to the merits of the judgment ob- ned in Vermont; or, in other words, whether this judg- nt is to be conſidered as a foreign judgment and only ma facie evidence of the debt.

This caſe was ſubmitted without argument, and the only nt, I conceive, preſented for conſideration is, whether it s competent for the defendant on the trial, to open the lgment, and go into an inquiry into the original merits of action tried in the ſtate of Vermont. I ſhall aſſume in examination of this queſtion as points conceded, and ich I think the caſe will fully authoriſe me to take for

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granted, that there was a fair and impartial trial had between theſe parties in the ſtate of Vermont, and that by the laws and uſage of that ſtate, the judgment would be concluſive between the parties there. If ſuch was not the caſe, it was incumbent on the defendant either to diſcloſe it by pleading or ſet it up as a defence, under a general plea. Nothing is here ſet forth in any way impeaching the juſtice of this judgment, nor any allegation that it was irregularly or unduly obtained. If I am correct, then as to the true queſtion preſented by the caſe, and the object of the defendant was to go into an examination of the cauſe on his part, as if it had never been before tried, I ſhould ſay, it was not competent for him to go into ſuch an examination, but that the judgment was concluſive between the parties. As a general rule on this ſubject, I ſhould conſider judgments in neighbouring ſtates, prima facie evidence of the demand, but liable to be opened and examined in the ſame manner only as they would be in the ſtate where they were rendered. This I think a plain and ſimple rule, calculated to promote the ends of juſtice, and the one neceſſarily reſulting from the political connection between the ſtates; impoſed by the conſtitution, and law of the united government relating to this ſubject. To ſay that every action of ſlander, aſſault and battery, &c. or for a fraud, as was the caſe before us, and which had been fairly tried, and fully examined in a neighbouring ſtate, and judgment rendered, ſhould be again opened, as if no trial had been had, would be manifeſtly unjuſt and tending to oppreſſion. To ſay that the judgment ſhall be concluſive between the parties would, in many inſtances, be giving it a more binding force than it has in the ſtate where rendered; and to put it on the footing of foreign judgments altogether, would be conſidering that part of the conſtitution relative to the records and judicial proceedings of other ſtates as a dead letter: and beſides, to ſay this judgment is to be conſidered in the light of a foreign judgment only, might perhaps leave the queſtion doubtful and undecided how far it was examinable. In the caſe of Walker vs. Witter, it is decided that a foreign judgment is prima facie evidence of the debt, by which I underſtand the court to mean,

Doug. Rep. 4.

hat it is not incumbent upon the *Plaintiff*, in the firſt inſtance, to prove the ground, nature and extent of the demand on which the judgment had been obtained. Thus far I think judgments obtained in ſiſter ſtates ought to be conſidered analagous to foreign judgments; and in the caſe of Sinclair vs. Fraſer, decided in the Houſe of Lords, on an appeal from the court of ſeſſions in Scotland, the ſame principle was adopted as to a foreign judgment being prima facie evidence of the debt; but the court there ſaid, that it was competent to the *defendant to impeach the juſtice of it, or to ſhew it to have been irregularly or unduly obtained.* Theſe would appear to be terms ſufficiently broad to authoriſe the opening the judgment in every poſſible caſe, for it would be impoſſible to decide, whether injuſtice had been done by the original judgment, without examining the whole merits of the action. Independent, however, of this conſideration, I cannot view the judgment obtained in the ſtate of Vermont in the light of a foreign judgment only, without diſregarding the conſtitution of the United States, and the act of Congreſs, as having no relation to the ſubject. The 4th article of the conſtitution declares, "That full faith and credit ſhall be given in each ſtate to the public acts, records and judicial proceedings of every other ſtate, *and the Congreſs may, by general laws, preſcribe the manner in which ſuch acts, records and proceedings ſhall be proved, and the effect thereof.*" This article, I think, manifeſtly preſents two ſubjects for legiſlative proviſion:—1ſt, To preſcribe the manner of proving ſuch acts, records and proceedings; and 2dly, their effect. In purſuance of this power we find Congreſs, by an act paſſed the 26th of May, 1790, after preſcribing the mode of proof, declaring, "That the ſaid *records and judicial proceedings*, authenticated as aforeſaid, ſhall have *ſuch faith and credit* given to them, in every court within the United States, as they have by law or uſage in the courts of the state from whence the ſaid records are or ſhall be taken." The framers of this conſtitution doubtleſs well underſtood the light in which foreign judgments were viewed in courts of juſtice, and muſt have intended, by this article, to place the ſtates upon a different footing with reſpect to each other than that

Doug. 5. in note

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on which they ſtood in relation to foreign nations; had not this been their intention, they would have been ſilent on the ſubject. I am aware that the old confederation contained a ſimilar article, declaring, that "Full faith and credit ſhall be given in each of theſe ſtates to the records, acts and judicial proceedings of the courts and magiſtrates of every other ſtate." The conſtruction to be given to this article, came in ſome meaſure under conſideration in ſeveral of the ſtate courts prior to the adoption of the conſtitution, but in no caſe, as far as my reſearches have extended, under circumſtances analagous to the preſent; and, ſo far as the caſes that I have examined look to the preſent queſtion, I think we ſhall find principles recognized which are in perfect uniſon with thoſe I have adopted. In the caſe of James vs. Allen, decided in Pennſylvania, in the Court of Common Pleas, in Philadelphia county, in the year 1786, the queſtion directly before the court was, whether the defendant's *diſcharge from imprisonment*, by virtue of an inſolvent act of the ſtate of New-Jerſey, would entitle him to a like diſcharge in Pennſylvania, and the court determined not. But the deciſion was founded on the nature and terms of the New-Jerſey inſolvent act, ſaying it was a private act, local in its nature and local in its terms, and went no farther than to diſcharge him from imprisonment in the *gaol of Eſſex county in the ſtate of New-Jerſey*. And the caſe of Phelps vs. Holker, decided in the Supreme Court of Pennſylvania, in the year 1788, was an action of debt, brought on a judgment obtained in Maſſachuſetts, under their foreign attachment act, and the court decided that it was not *concluſive*, on the ground that it was a proceeding *in rem*, and ought not to be extended farther than the property attached, the act declaring that the judgment and execution in a foreign attachment ſhall only go againſt *the goods attached*. The caſe of Kibbe vs. Kibbe, decided in the ſuperior court of the ſtate of Connecticut, in the year 1786, was an action of debt upon a judgment obtained in Maſſachuſetts, and the court refuſed to ſuſtain the action, on the ground that the defendant had not been perſonally ſerved with proceſs to appear in the original cauſe. The court ſaying, *full credence* ought to be given to the

4th article.

1 Dallas, 188.

1 Dallas, 261.

Kirby Rep. 119.

judgments of the courts in any of the United States, where both parties are within the jurisdiction of such courts at the time of commencing the suit, and are duly served with the process, and have or might have had a fair trial of the cause. Thus we see in these cases that the court examined into the law of the state where the proceedings were had, in order to determine their operation and effect. But, as far as any decision in the circuit court of the United States ought to have weight in giving a construction to the constitution and act of Congress, we have the question settled in the case of Armstrong vs. Carsons, decided in Pennsylvania, in the year 1794. The question before the court was, whether nil debet was a good plea to an action of debt on a judgment obtained in the superior court of New-Jersey; and Wilson, justice, said, *if the plea would be bad in the courts of New-Jersey, it is bad here;* for whatever doubts there might be on the words of the constitution, the act of congress effectually removes them, declaring, in direct terms, that the record shall have the same *effect* in this court as in the court from which it was taken. The rule intended by the court to be prescribed here, clearly was, the one which would have been adopted by the court in the state where the judgment was rendered. Although the act of congress does not adopt the term *effect* as stated by the judge, yet, if it means any thing it means to declare the effect. It says, "The said records and judicial proceedings, authenticated as aforesaid, shall have *such faith and credit* given to them, in every court within the United States, as they have, by law or usage, in the courts of the state from whence the said records are, or shall be taken." If the constitution, instead of saying the records, &c. shall have *full faith and credit* given them, had adopted the precise language of this act, it appears to me, there would have been but little doubt but that it would have been considered equivalent to declaring such records to have the like *effect* in every court within the United States as in the courts of the state where rendered. It being a subject within the power of congress to declare the *effect*, I do not see why the act ought not to receive the same construction. If nothing more was intended than to declare the manner of

2 Dallas, 302.

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authenticating ſuch records and proceedings, this part act is uſeleſs, nay worſe, it is miſchievous, being calc to miſlead. I am the more inclined to think congreſs in ed to declare the effect becauſe the rule there adopted pears to me to be the only one that could, with propriet preſcribed, as there was no general and uniform practi the different ſtates on this ſubject. If a judgment, i ſtate of Connecticut, would not be concluſive there, but prima facie evidence, it would be unreaſonable to conſi concluſive here; and if concluſive there between the pa I can ſee no ſubſtantial reaſon againſt conſidering it ſo. When the matter has been once litigated and the merits ly tried, it appears to me, to be contrary to ſound princi and tending to promote litigation, and againſt the very us and ſpirit of the article of the conſtitution above, ſub to, again to open the judgment. I think the rule laid d by the court in the caſe of Kibbe vs. Kibbe, above cite founded in juſtice and good ſenſe, that the judgment courts, in ſiſter ſtates, ought to receive full credence w both parties were within the juriſdiction of the court at time of commencing the ſuit, and were duly ſerved w proceſs, and had or might have had a fair trial of the m This I take to have been the ſituation of the caſe now be us, and on this ground, I am of opinion, it was not co tent for the defendant to go into evidence as to the m the original judgment.

Livingſton J. This is an action of debt on a judg of the Supreme Court of Vermont, and we are to de "whether, after a full defence in that ſtate, its ju "impeachable, or, in other words, whether it is to "garded as a foreign judgment, and as ſuch, only "facie evidence of a debt."

As the court are not unanimous, it is matter of that a queſtion, ſo important, is to be decided w gument. To me, it appeared ſomewhat extraordi the firſt hearing of this caſe, that it ſhould be ar open the judgment of a ſiſter ſtate, when the party arreſted, and made his defence. It ſtruck me as and, that on being ſatisfied of its exiſtence, it ought

rce it, without examining into the grounds of it, or e conduct of the court or jury, who decided it. mpreſſions, inſtead of being effaced, have acquired n from poſterior reſearch.

ne common law of England, the conſideration of fo- udgments need not be ſtated in the declaration, for e received as evidence of debt, liable to be impeach- he defendant, on the ground of injuſtice, or becauſe g irregularly, or unduly obtained. When a perſon, obtained judgment in one court, applies to the tribu- nother ſtate to put it in force, the interpoſition of er, it is ſaid, is not *ex neceſſitate*, but only *ex comitate*, nerefore, it may enquire into the original merits, to ether there be a good ground for awarding execution; iſe, it might ſanction injuſtice. This reaſoning is plau- nd has been adopted, among others, by Lord Kaims Principles of Equity, a work, of which no profeſſional nan ſhould be ignorant. But, with proper deference, I e allowed to obſerve, that this method of treating a judgment, renders it little better than a dead letter. whole merits are to be reviewed, the party may as cur at once to his original cauſe of action, as to a re- hich the defendant is at liberty thus to impeach. he has appeared, and the matter has been fully liti- nefore a foreign tribunal, it would perhaps be a rule ble to exception to admit it, without any examination, :luſive of every thing within it, between the immedi- ties thereto. The rule, however, in England, and the e here, are otherwiſe; nor can I perceive, in any of es, a difference between the effect of a foreign judg- y default, and one where a defence had been interpo- hough Lord Kaims appears to think a diſtinction ex- For, after ſtating a caſe, in which a court in Scotland l to carry into effect a judgment rendered by the king's he obſerves, that this decree was reverſed by the houſe ds, becauſe, "in England, the decree of a foreign fu- ne court has ſuch credence, that judgment is immedi- given, without entering into the merits, *provided the r has been litigated.*" Finding no authority for this

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diſtinction, found as it is, I am not at liberty, if the judgment before us is to be regarded as a foreign one, to avail myſelf of it, in deciding this cauſe, and to ſay, here the matter was litigated, and therefore the judgment is concluſive.

It becomes neceſſary then to enquire, whether, by the conſtitution of the United States, any difference be created in this particular, between judgments rendered out of, and within the United States. The former, for the ſake of diſtinction, we will call foreign, the latter, domeſtic judgment, although this appellation in common parlance be confined to judgments of our own courts.

We cannot ſuppoſe that thoſe who penned the conſtitution, were ignorant that a judgment, when the ground of action in its native ſtate, if the expreſſion be allowed, could not be conteſted, while others were ſubjected to the ſtricteſt ſcrutiny. In the latter deſcription, were included, as well judgments recovered extra territorium, as within any one of the United States, which at common law were all on the ſame footing. To introduce a diſtinction between domeſtic and foreign judgments, and to place the former on the moſt favoured footing, muſt have been their intention; otherwiſe, they would have been ſilent, or uſed terms *declaratory* only of the common law, ſo as to render them evidence of debt, but not concluſively ſo. It remains to be aſcertained whether this intention has been well expreſſed, or whether the terms uſed, are ſo ambiguous or unintelligible as to render this article of the conſtitution ſenſeleſs and nugatory, which muſt be the caſe, if the juſtice of this judgment can be examined by us. When the object of an inſtrument admits of no doubt, we ſhould not haſtily reject the expreſſions as not adequate, or incompetent thereto. Without too much conſtraining their meaning, it is our duty, if they will bear the ſenſe which they were intended to convey, to underſtand them accordingly. The firſt ſection of the fourth article declares "That full *faith and credit* ſhall be given in each ſtate, to the "public acts, records, and judicial proceedings, of every "ther ſtate. And congreſs may, by general laws, prescribe "the manner in which ſuch acts, records, and proceedings "ſhall be proved, and *the effect thereof*." It is difficult to

ake choice of language more apt to render a domeſtic judg- ent as binding here, as if it had been obtained in one of rown courts. What other ſignification, ſo natural or obvi- us, can be affixed to the terms "*full faith and credit*," as at when the exiſtence of theſe judgments is once eſtabliſhed o aſcertain which required no conſtitutional proviſion) they *hall* be received as containing the whole truth and right be- ween the parties, and that the matters, or points ſettled by hem ſhall not be drawn into diſpute elſewhere. If open to tigation, there is an end of all faith and credit whatever, nd the pretenſions of the parties are inveſtigated as if they ad not already been diſcuſſed, and properly adjuſted. Now, o give full faith and credit to a record, cannot conſiſt with ot believing it ourſelves, or permitting others to make a- erments againſt it. If the conſtitution impoſes on us the rſt of theſe duties, we diſregard the injunction the moment re allow others, or permit ourſelves to diſcredit or im- each a domeſtic judgment. I am at a loſs to conceive, how he true import of this article could ever become a ſubject f debate, or receive a conſtruction deſtroying it altogether, nd with it, one cement of union between theſe ſtates. When re give credence to an inſtrument we do not barely believe s its being or exiſtence, but, aſſent to its contents; ſo if redit be given to an ambaſſador, by the court to which he s ſent, the latter do not thereby only admit that he is inveſt- d with that character, but that what he ſays is true. It is the me when a witneſs is credited; it is his relation which is elieved; not merely that he appears as a witneſs. In like anner, if full faith and credit be given to a depoſition, it oes not only imply, that we admit there is ſuch a writing, ut that we fully and implicitly rely on its contents. Why hould a different meaning be adopted when ſimilar terms re applied to a judgment? If we take them in the ſame enſe, and in my eſtimation, they admit of no other, then, y giving full faith and credit to a judgment, we not only a- ree that ſuch judgment has been rendered, (which depends together on the proof of that fact) but that we believe it o be juſt, and that the matter, in diſpute, was properly de- ided. If it be otherwiſe, ſo long as we obey a conſtitution-

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al injunction, we cannot do wrong in regarding it in a light which the terms of the inſtrument import, and which appears to have been the deſign of thoſe who compoſed it.

At the time of our confederation (for a like article is found in that firſt band of union) it was natural, after it had been agreed, that the "free inhabitants of each ſtate ſhould "be entitled to all the immunities of free citizens in the other ſtates," to engraft a proviſion on this ſubject, and conſidering the general conformity between the laws and judicial proceedings of the different ſtates, it would not have comported with courteſy, mutual confidence, or good ſenſe, to pay no more reſpect to domeſtic adjudications, than to thoſe of foreign nations, of whoſe laws we were ignorant, and whoſe modes of proceeding did not accord with thoſe with which we had been familiar, and which we had been accuſtomed to regard as the beſt, for the attainment of juſtice. Little doubt, therefore, can remain, as to the intention of thoſe who conſented to this article of the conſtitution.

But if the language of this article be of doubtful ſignification, ſome have ſuppoſed every ambiguity removed by the act of congreſs which paſſed the 26th May 1790. After preſcribing the mode in which the records and judicial proceedings of one ſtate, ſhall be authenticated, ſo as to be admitted as proved by the court of another, this act provides: "That "the ſaid records and judicial proceedings, authenticated as "aforeſaid, ſhall have ſuch faith and credit given to them in "every court within the United States, as they have by law "or uſage, in the courts of the ſtate from whence the ſaid "records are taken."

1 Vol. L. U. S. p. 115. Folwells' edition.

This law was paſſed in virtue of powers given to congreſs by the 4th article of the conſtitution; and if they poſſeſſed the right of declaring the effect of domeſtic judgments, and theſe words apply to that object, they are intelligible and effectual. If underſtood in that light, we are compelled to eſteem a judgment rendered in Vermont, when properly authenticated, as binding and final, as it would be regarded by the court from which the exemplification comes; and as there is no proof of its *not* being conclu-

, we muſt preſume it to be ſo, and, of courſe, it muſt equally ſo *here*. But my opinion is drawn from the con- ition, and is altogether independent of this act; for, it is clear, that congreſs had any thing to do with the effect lomeſtic judgments. It is extraordinary, to ſay the leaſt, : after the conſtitution had declared, that "full faith and dit" were to be given them, it ſhould be left with con- s to vary their operation, if they thought proper. The ct could as eaſily be ſettled by the conſtitution, as refer- to congreſs. I am, therefore, inclined to think, that the *fact*," ſpoken of in the 4th article, refers to the proof to preſcribed by congreſs, that being its immediate antece- t. They were firſt to ſay how theſe judgments were to proved, and then declare the effect of ſuch proof, and haps this is the true intent of the act, which ſubſtantially , that ſuch proof (after preſcribing its nature) ſhall be as d evidence *abroad*, of the exiſtence of the judgment, as record itſelf is *at home*. Inſtead, then, of expecting con- s to ſettle the effect of domeſtic judgments, we muſt not k further than the conſtitution itſelf, which will be found iciently explicit. I am not apprized, that a ſerious diffi- ty has ever been entertained by the courts of the United tes, reſpecting the true meaning of this article. In the uit court of the United States, for the diſtrict of Penn- rania, when Judge Wilſon preſided, the point we are now cuſſing, was conſidered as a clear one.

An action of debt had been brought on a judgment ren- ed in New-Jerſey, in which the plea was nil debet. The intiffs inſiſted, that this plea was inadmiſſible, and that ul tiel record," being the only plea which the courts of w-Jerſey would ſuſtain if the action had been brought re, (by which the exiſtence of the judgment is denied) s the only proper plea in Pennſylvania. . 2 Dall. 3c :.

It is ſtated in the report, that Ingerſoll, who was con- ned for the defendant, declined, arguing the point, aking it clearly againſt him.

Wilſon, in delivering the opinion of the court, ſays, There can be no difficulty in this caſe. If the plea would be bad in the courts of New-Jerſey, it is bad here; for,

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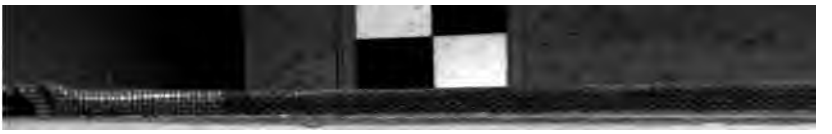
"whatever doubts there might be, on the words of the constitution, the act of congress effectually removes them; declaring in direct terms, that the record shall have the "*same effect* in this court, as in the court from which it was "taken. In the courts of New-Jersey, no such plea would "be sustained, and, *therefore*, it is inadmissible in any court "sitting in Pennsylvania."

This decision, of a court of the United States, although not of the last resort, is entitled to a respectful consideration.

I am aware that, in some instances, mischief may result from making this rule universal, or from too rigid an adherence to it; particularly when the proceedings are by foreign attachment, or without a personal summons or arrest of the defendant. Sitting here "Jus dicere et non jus dare," it would be a sufficient answer to all complaints of this kind to say, "Ita lex scripta est"; or, perhaps we *possess* the power, and I think we do, in extraordinary cases, and where it is manifest the proceedings have been ex parte, of considering them as exceptions to the general law, and as not contemplated by the constitution. This would be a better course than to render null and void one of its most important and salutary provisions. A case of this kind occurred in Pennsylvania, where an action was brought on a judgment in Massachusetts, obtained in a foreign attachment, whereon the sheriff had seized a blanket as the defendants's reputed property. The supreme court of that state determined, not that domestic judgments were not conclusive evidence of debt, generally speaking, but, that this being a proceeding in *rem*, was not to be extended further than the property attached, for by the very words of the Massachusetts' law which was read, it appeared, that judgment and execution in a foreign attachment, were confined to the goods attached. This case happened under the confederation "whose "articles," says the chief justice, "must not be construed "to work evident mischief and injustice." This decision, in which there is much good sense, instead of derogating from, harmonizes with my construction of the constitution. Let a law be ever so plain, cases must and will happen which

1 Dall. 254.



t foreſeen, or would have been provided for; and courts aſt then determine, according to the reaſon and ſpirit of e proviſions, whether they include the particular ſubject fore them. Theſe are the caſes, which, "lex non exacte definit, ſed arbitrio boni viri permittit." Now no violence done to my underſtanding of this article in ſaying, that it es not embrace a judgment which has been rendered ainſt a party to whom no opportunity was afforded of con-verting his adverſary's demand, and who, inſtead of be-g defended by himſelf or by counſel of his own choice, d no other repreſentative than an old blanket, or a log of ood. A ſentence thus obtained, in defiance of the maxim audi alteram partem," deſerves not the name of a judg-nt: it is rather a ſilent and neceſſary act of the court, not oceeding from an exerciſe of diſcretion and reflection, or unded on a conſideration of the reſpective rights of the rties, but the conſequence of certain rules which allow a dgment in ſome caſes to be entered, whether the defend-t has been ſerved with proceſs or not. If, in the caſe hich aroſe in Pennſylvania, the plaintiff, inſtead of pro-eding againſt a blanket, had arreſted the defendant, who d thereupon interpoſed a plea, it can hardly be doubted t the court would have held the judgment concluſive— the ground of reaſon alone, it ought to prevail as a gene-l rule, that a judgment like this, ſhould be binding and al throughout the United States. The fear of committing juſtice, by blindly enforcing it, has too much of refine-nt in it. It is not ſo much becauſe a court abroad has ne right, that we lend our aid to carry its decrees into ef-ct, as becauſe it was competent to decide the queſtion and e parties were heard before it. Wantonly to open ſuch judg-ents from an apprehenſion of doing iniquity, will be attend-l with great hardſhip and inconvenience to the ſucceſsful rty. At an immenſe expenſe, and after great labor and de-y, he has had a trial with us, and ſucceeded; the moſt emi-nt counſel have been employed; witneſſes, from different rts of the world, have either attended in perſon, or been ex-ined on commiſſion, and a jury of twelve men have pro-unced in his favor, whoſe verdict has been confirmed by

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the court:—But, before execution, the defendant eſcapes to another ſtate, where he is ſued on this judgment. It is alleged there, that the merits have not been fairly tried, and the judges, giving way to certain qualms leſt they may commit a wrong in carrying our judgment into effect, try the cauſe again. By this time, perhaps, the plaintiff's witneſſes are dead, or not to be found: at any rate, the additional coſts, pains, and delay, are intolerable. Thus the inconveniencies of opening domeſtic judgments, on the ſuggeſtion of the party who pretends to be aggrieved, will far outweigh thoſe which may be the conſequence of a contrary rule, to which it will be eaſy to make exceptions as fit caſes occur.

As then, this is a judgment neither in rem, which, like ſentences in the admiralty, bind *only* the property and ſecure the vendee; nor by default, where the defendant was not ſummoned; but is againſt the perſon; and after a full defence and hearing, the conſtitution of the United States, and the reaſonableneſs of the thing, conſtrain me to regard it as concluſive of every matter determined by it, between the parties to the record. I cannot, therefore, liſten to any allegation to the contrary, nor conſent to another trial, the avowed object of which is, to impeach its verity and juſtice, and to bring on before us a new diſcuſſion of the original merits.

Radcliff J. The queſtion ſubmitted to our deciſion is, whether the judgment in Vermont, is to be conſidered in the light of foreign judgments, and evidence prima facie only of the plaintiff's demand, or ſhall conclude the defendant. If it is to be viewed in the light of foreign judgments only, then a new trial is to be awarded in the preſent action, otherwiſe, judgment is to be rendered for the plaintiffs.

This queſtion ariſes on the firſt ſection of the [illegible] article of the conſtitution of the United States, and the [illegible] of congreſs, made in purſuance of it, and may ſeriouſly affect the adminiſtration of juſtice, in every ſtate. It is, therefore, peculiarly intereſting, that it ſhould receive a certain and uniform deciſion. It has, on former occaſions, incidentally occurred in this court, and opinions have been intimated, but it has not received a direct determination.

From the beſt conſideration I am able to give it, I am [illegible]

ncluſion, that the judgments of the courts of other the union, are to be viewed in the light of foreign its only.

endent of the conſtitution of the United States, and of congreſs alluded to, it is clear, that the judgments es of the courts of a neighbouring ſtate, when made nd of an original ſuit here, would be conſidered as judgments, and as ſuch, by the Engliſh law and our uld be received as prima facie evidence of the juſtice aintiff's demand, but liable to be examined and im- by the defendant. This would follow from the ſin- deration that the juriſdiction of each ſtate, with ref- ts internal adminiſtration of juſtice, is diſtinct and lent of every other. It remains, therefore, to be ether the conſtitution and act of congreſs have cre- fferent rule.

examination of this ſubject, it may be proper to that the former confederation contained a ſimilar . By the confederation it was declared, that "*full nd credit* ſhould be given in theſe ſtates, to the re- acts, and judicial proceedings of the courts and rates of every other ſtate." At an early period, ppear to have ariſen as to the import of the terms *and credit*. In the caſe of Phelps v. Holker, report- Dall. the ſupreme court of Pennſylvania decided, article of the confederation ſhould not be ſo con- s to make a judgment, obtained on a foreign attach- Maſſachuſetts, concluſive in Pennſylvania.

conſtitution of the United States, it ſeems, intended ve theſe doubts, and plainly diſtinguiſhes between *and credit* which ſhall be due to ſuch records, acts, icial proceedings, and their *legal effect or operation*. leclares, nearly in the terms of the confederation, *ll faith and credit* ſhall be given to the public acts, ls, and judicial proceedings of any other ſtate," and tinctly provides, that "congreſs may, by general prescribe the manner in which ſuch acts, records, udicial proceedings ſhall be proved, and the *effect* f." The full faith and credit, intended by the con-

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ſtitution, cannot be interpreted to mean their legal effect, for otherwiſe, the ſubſequent proviſion that congreſs may preſcribe, the *effect* would be ſenſeleſs and nugatory. The conſtitution marks a plain diſtinction between *credit* and *effect*; and that diſtinction, I think, is conſiſtent with that principle of the common law, which aſcribes abſolute verity to the records and judicial proceedings in our own courts. When a judgment, or recovery in our own courts is pleaded, it is alleged as a fact, the record of which cannot be denied, and is concluſive of the fact, and it is, accordingly the ſubject of a peculiar mode of trial; but its legal effect, or operation on the rights of the parties, is ſtill to be conſidered, and frequently may form a diſtinct queſtion. The proviſion, in the conſtitution, relative to the judicial proceedings of the courts of the different ſtates, can extend no farther.

Congreſs have the power to preſcribe the mode of proof, and the effect. By their act, of the 26th May 1790, they have preſcribed the mode of proof, but they have not declared the effect, unleſs the following words of the act be conſidered in that light: "And the ſaid records and judicial proceed-"ings, authenticated as aforeſaid, ſhall have *ſuch faith and* "*credit* given to them, in every court within the United "States, as they have by law or uſage in the courts of the "ſtate from whence ſaid records are, or ſhall be taken."

At firſt view, the framers of this act ſeem to have intended a regulation beyond the proviſion contained in the conſtitution; but if this was their intent, I think, they have not accompliſhed the end. The conſtitution itſelf declares, that *full* faith and credit ſhall be given to ſuch proceedings. This imports *abſolute verity*. It cannot be increaſed in degree, and congreſs had not the power to diminiſh the credit. When, therefore, the act declares, that *ſuch* faith and credit ſhall be given to them, as they have by law or uſage, in the courts of the ſtate from whence they are taken, it can mean no other than full faith and credit. From the nature of the thing, it can mean no more, and without impeaching the abſolute verity aſcribed to them by the conſtitution, it cannot mean leſs. It, therefore, leaves the credit and the queſtion, as to the legal effect and operation, preciſely where

hey were, and the power to preſcribe the effect remains inexecuted.

It is eaſy to perceive, that ſerious difficulties would occur n attempting to carry this power into execution, and theſe difficulties have, probably, embarraſſed and deterred congreſs from exerciſing it. In their act, we find the ſame terms, "*faith and credit*," which are uſed in the conſtitution, and thoſe only. The conſtitution, however, makes the diſtinction, as has been ſhewn, between credit and effect. With his diſtinction, plainly drawn, I cannot ſuppoſe that congreſs meant to confound it by treating the terms faith and credit, as ſynonimous with effect. On the contrary, they muſt be conſidered as conveying the ſame ſenſe, both in the conſtitution and the act; and of courſe, that congreſs have not executed the power of declaring the effect. Until that be done, the legal operation of ſuch judgments, muſt be the ame as it was before there exiſted any legiſlative proviſion n the ſubject. Nothing more than the mode of authentication was, therefore, provided for by the act of congreſs. When o authenticated, they are entitled to full faith and credit; ut they are to be received as *evidence* merely, by which their contents are undeniably eſtabliſhed, and their effect or operation, not being declared, remains as at the common law.

I am ſenſible, that the caſe of Armſtrong v. Carſon ands in oppoſition to this doctrine. That was an action of debt in the circuit court of the United States, for he diſtrict of Pennſylvania, brought on a judgment obtained in New-Jerſey, in which the counſel for the defendant ielded the poſition, that the judgment was concluſive; and he court, without a previous diſcuſſion, adopted the idea, n the ſuppoſition, that the act of congreſs had declared the ffect to be concluſive. The preſiding judge, in delivering he opinion of the court, ſtates the act, as having *expreſsly declared the effect*. In terms he was evidently inacurate, and whatever reſpect may be due to the deciſions of that court, s opinion, in this inſtance, does not appear to me to be correct, nor to have been founded on a deliberate examination f the ſubject. 2 Dall. 302.

Upon the conſtruction of this article of the conſtitution,

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and the act of congreſs, I am, therefore, of opinion, that the judgments of other ſtates are to be conſidered in the light of foreign judgments, and when made, the foundation of ſuit in our own courts are not concluſive, but from comity are to be admitted as preſumptive evidence only of a title to recover, according to our own laws. To allow them a greater effect, might be attended with much inconvenience, and produce an irregular interference of juriſdiction between different ſtates, and, in ſome caſes, enable them to prescribe the law to each other. The conſequences cannot eaſily be foreſeen, and might often lead to injuſtice and individual oppreſſion.

I am of opinion, that the verdict be ſet aſide, and a new trial be awarded.

Kent J. The important queſtion ariſing in this caſe is, what is to be the effect in this court, of the judgment in Vermont, according to the conſtitution and laws of the United States?

The conſtitution declares, that a full faith and credit ſhall be given in each ſtate, to the public acts, records, and judicial proceedings of every other ſtate, and that congreſs may, by general laws, preſcribe the manner in which ſuch acts, records, and proceedings, ſhall be proved, and the effect thereof.

This injunction, that they were to receive *full faith and credit* in every ſtate, made a part alſo of the articles of confederation; but, under thoſe articles, it ſeems to have been underſtood, that the queſtion on the *effect* of ſuch records and judicial proceedings, was ſtill left open. In the caſe of *James v. Allen*, in the court of common pleas at Philadelphia, in the year 1786, a queſtion aroſe on the effect of a diſcharge under the inſolvent law of New-Jerſey, and the conſtruction of this article in the confederation was brought into diſcuſſion, and it was contended, that a judgment or other judicial proceedings of another ſtate, was, by this article, rendered unexaminable and concluſive evidence.

1 Dal. 188.

But the court ſaid, that the article would not admit that conſtruction, and that it was chiefly intended to oblige each ſtate to receive the records of another, as full evidence

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1 Dallas, 261.

Kirby 119.

ſuch acts and judicial proceedings. Again, in the caſe of helps v. *Holber*, in the ſupreme court of Pennſylvania, in pril term '88, an action of debt was brought upon a judg- ent in Maſachuſetts; which judgment was obtained againſt e defendant by default, and founded on an attachment of blanket, which was ſhewn to the ſheriff as the reputed roperty of the defendant, and the queſtion was, whether e judgment was concluſive evidence of the debt. It was ntended, on one ſide, that the judgment was, by the arti- les of confederation, rendered concluſive, and that it made o difference in the caſe, that the judgment was obtained by e proceſs of a foreign attachment. The other ſide inſiſted, hat the articles of confederation, provide only, that *in mat- rs of evidence*, mutual faith and credit ſhould be given, and ſpecially, that they ought not to be concluſive when found- d on foreign attachment. The court decided, that the de- endant was ſtill at liberty to controvert and deny the debt, nd that the articles of confederation muſt not be conſtrued o work ſuch evident injuſtice, as was contained in the doc- rine urged by the plaintiff. Another caſe I ſhall mention, as that of *Kibbe v. Kibbe*, decided in the ſuperior court of Connecticut, in the year 1786. It was an action of debt on judgment obtained in Maſachuſetts by default, and found- d on the attachment of a handkerchief, and ſo, like the pre- ding caſe, a proceeding in rem. The queſtion came before he court on demurrer, and judgment was given for the efendant, on the ground, that the court in Maſſachuſetts had o juriſdiction of the cauſe; but, the court admitted, that all credence ought to be given to judgments in other ſtates, here both parties were within the juriſdiction of the court, nd the defendant duly ſerved with proceſs, and had, or ight have had, a fair trial of the cauſe.

It appears from theſe deciſions, that judgments in other ates were not regarded under the confederation, as of bind- g and concluſive effect; and the defendant was admitted deny the regularity and equity of the proceedings, by hich the judgment was obtained. This was placing the dgments of the other ſtates on the baſis of foreign judg- ents, which are received only as *prima facie evidence* of the

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debt; and it lies with the defendant to impeach the juſtice thereof, or to ſhew them to have been irregularly or unduly granted.

Such being the received conſtruction of the injunction, that *full faith and credit* was to be given to the judicial proceedings of other ſtates. It remains to ſee, whether the caſe is altered under the exiſting conſtitution of the United States. That conſtitution, by authoriſing congreſs, to preſcribe not only the manner in which the acts, records and proceedings of other ſtates ſhall be proved, but their effect evidently diſtinguiſhed between giving *full faith and credit*, and the giving effect to the records of another ſtate, and until congreſs ſhall have declared by law what that effect ſhall be, the records of different ſtates, are left preciſely in the ſituation they were in under the articles of confederation.

Sinclair v. Fraſer. Cited in Doug. 5. note and in appendix pa. 6—7. in the caſe of Galbreath and Neville.

Laws vol. 1. 115

The act of congreſs of 26th May 1790, is entitled "an "act to preſcribe the mode in which the public acts, records, "and judicial proceedings in each ſtate, ſhall be authenti- "cated, ſo as to take effect in every other ſtate." After preſcribing the mode of authentication, it declares that the records and judicial proceedings, ſo authenticated, ſhall have *ſuch faith and credit* given to them in every court within the United States, as they have by law or uſage in the courts of the ſtate from whence they are taken. This act leaves the queſtion as to the *effect* of ſuch records preciſely where it found it. The articles of confederation, in the firſt inſtance, and the conſtitution in the ſecond, had already declared that ſuch records and proceedings, were to receive *full faith and credit*, and this act, without precribing the effect, defines, or rather qualifies the faith and credit they are to receive. Inſtead of *full* faith and credit, they are to receive *ſuch* faith and credit. We are bound to give the judgment faith and credit, and this faith and credit was conſidered by the ſtate courts, while ſitting under the government of the articles of confederation, as requiring full aſſent to the proceedings contained in the record, as matters of evidence and finality, but not as abſolutely barring the door againſt any examination of the regularity of the proceedings, and the juſtice of the judgment.

I ought here to notice the caſe of *Armſtrong* v. Executors Carſon, as leaning againſt the concluſions I have drawn. was an action of debt, brought in the circuit court of the ited States for Pennſylvania diſtrict, on a judgment ob- ned in the ſtate of New-Jerſey.

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2 Dallas 302.

The queſtion was, whether the plea of *nil debet* was good, d the court was of opinion, the plea being bad in New- rſey, was bad there alſo, for that whatever *doubts* there ight be on the words of the *conſtitution*, the act of congreſs fectually removed them, by declaring in direct terms, at the record ſhould have the *ſame effect* in that court, as the court from which it was taken. But the reaſon given r this opinion, if the report of the caſe be correct, is clear- founded in miſtake.

The act of congreſs does not declare the record ſhall have e ſame *effect*, but only the ſame *faith and credit*, and there a manifeſt and eſſential difference between the one mode expreſſion and the other. If, therefore, as the court in- nated, there were doubts on the words of the conſtitution, oſe doubts, ſo far from being removed, are rather increaſ- by the law. The language of the conſtitution is, at leaſt, cogent and comprehenſive, if not more ſo, than the lan- age of the law.

It is pretty evident, that the conſtitution meant nothing ore by full faith and credit, than what reſpected the evi- nce of ſuch proceedings; for the words are applied to blic acts, as well as to judicial matters, nor ought the act congreſs to be carried further than the words will war- nt. When we reflect in what manner judgments may, in me inſtances, be obtained, as in the caſes cited by the at- chment of a handkerchief or blanket, it is more favorable to e harmony of the union, and to public juſtice, that the dgments of the ſeveral ſtates ſhould be put on the footing foreign judgments, than that they ſhould be held abſolutely nding and concluſive, or as much ſo, as they may be by e laws of the ſtate which authoriſed the proceeding; and we may queſtion the binding force of the proceeding or lgment in one caſe, we may in another; for, the act of ngreſs has no exceptions, and muſt receive an uniform

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conſtruction. If a debtor be diſcharged from imprisonment, or from his debts by the inſolvent act of ſome other ſtate; or if their courts be authoriſed to grant a ſtay of ſuits for a time, are we bound by theſe acts; for they all are, or may be, judicial preceedings. There are no conſiderations of national policy that could induce us to ſuppoſe the act of congreſs went the whole length of cloſing the inveſtigation of the judgment. It would be going further than ever was done in any civilized country, even with reſpect to its own dominions. Between England and Scotland, England and Wales,* or England and its colonial eſtabliſhments, the union is as intimate and as intereſting, as between the ſeveral ſtates; and yet the judgments in Scotland,† or Wales, or Jamaica, for inſtance, are held to be foreign judgments. So the court of ſeſſions in Scotland conſider judgments rendered in England as foreign judgments; that they have no intrinſic authority *extra territorium*; and that in actions upon them, they are to be preſumed juſt till the contrary be proved; and if they are ſhewn to be unjuſt or irregular, the ſuit upon them will not be ſuſtained.

* Walker v. Witter. Doug. 1. Sinclair v. Fraſer cited in the notes, and Galbreath v. Neville 29. G. 3. cited in the appendix pa. 5.

† Kaims' Equity vol. 2. 365, 377.

The judgments of other ſtates have been treated in this court, in the light of foreign judgments, by admitting the plea of *nil debet*, to be the proper plea, inſtead of the plea of nul tiel record. The court had intimated doubts on the queſtion in prior caſes;‡ but in the caſe of Poſt and another v. Nerdy, in January term laſt, they decided, that nul tiel record was a bad plea, and it follows pretty concluſively, that if a judgment of another ſtate is not to be treated in the pleadings as a record, it cannot have the ſame obligatory force. So in the caſe of *Phelps v. Bryant, adminiſtrator*, decided at the laſt term, we refuſed to ſuſtain an action on a decree of the ſuperior court of Connecticut, founded on the ſervice of a ſummons within this ſtate. An act of the legiſlature had rendered all judgments and decrees founded on ſuch ſervice, void, as far as reſpected our own government. But if the decree in that caſe was of concluſive effect under the conſtitution and laws of the union, the [illegible] to the merits of that decree, as reſulting from the irregular commencement of the ſuit, would have been bad, notwithſtanding our ſtatute.

‡ La Coute v. Pendleton, April term 1799, & Cobbet ads. Ruſt, January term 1801.

The reſult of my opinion is, that the judgment in queſtion is to be conſidered in the light of a foreign judgment, and only prima facie evidence of the demand.

Receptum eſt optima ratione in executione ſententiæ alibi latæ, ſervari jus loci in quo fit executio, non ubi res judicata eſt.—Huber. vol. 2. page 540.

Lewis C. J. The queſtion between theſe parties is both important and difficult; and my opinion upon it, has been formed with diffidence and deliberation. Were the whole caſe or both parties before us for conſideration, it would be eaſy to determine on their reſpective merits. But we, are called to decide an abſtract propoſition. Whether, under the article of the conſtitution, and the act of the general government, referred to, the judgments of courts of another ſtate, ſhall be ſo concluſive here, as to exclude all further examination of their merits? Had this article gone no further than that of the confederation on the ſame ſubject, I ſhould have doubted the correctneſs of the principles of deciſion in Phelps againſt Holker, as applicable to it; and ſhould have underſtood *full faith and credit* in the ſame ſenſe, that *implicit faith* is applied in Weſtminſter Hall, to the records of a court of record; which is, that they are not to be controverted. But the latter part of the ſection precludes ſuch underſtanding, and qualifies the ſenſe, in which the former is to be accepted. For, where is the uſe of congreſs preſcribing, by general laws, the effect of ſuch judgments, or of the proof of them, which is the ſame thing, (ſhould that be the gramatical conſtruction,) if by *full faith and credit*, abſolute verity is intended.

The next queſtion is, does the act of congreſs preſcribe the effect of ſuch judgments. In terms it certainly does not. On the contrary, it limits and reſtrains the generality of the firſt period of the article under conſideration, by declaring that ſuch judgments, when authenticated in the manner preſcribed, ſhall be entitled to *the ſame faith and credit in every court within the United States, as they have by law or uſage in the courts of the ſtate from whence they are or ſhall be taken.* But admitting the act of congreſs to be an execution of the power veſted in that body by the conſtitution, it will not, in my

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conception, have the effect of rendering ſuch judgments concluſive here. It will become neceſſary to examine their effect in the ſtate in which they are pronounced, and we know that ſome of them, which are founded on attachments iſſuing in neigbouring ſtates, againſt abſent debtors, are not concluſive in thoſe ſtates. And it certainly never could be intended to give ſuch judgments greater effect here, than they would have there. We have had inſtances alſo, of proceſs iſſuing from a court of a neighbouring ſtate being ſerved here, in violation of a poſitive law of our own ſtate, which we are bound, by ſuch law, to conſider as illegal and void.

By pronouncing them concluſive, we ſhould alſo preclude all inquiry into fraud, which certainly would vitiate them in every ſtate poſſeſſing a regularly organized ſyſtem of juriſprudence.

I cannot, therefore believe, that a juſt conſtruction of the conſtitution and law of the United States will warrant the concluſion, that ſuch judgments are in no caſe re-examinable in an action founded on them in another ſtate; and, therefore, as we are called upon to pronounce on this queſtion in the abſtract, my opinion is, that the verdict be ſet aſide.

Jackson ex Dem', Edmund Prior, Abraham Knap and Eli Knap, *againſt* Haley Brown.

Though the act of God be the cauſe of not proceeding to trial according to notice, yet, if the impoſſibility of proceeding be diſcovered in time for a countermand, which the plaintiff neglects to give, he muſt pay coſts.

THIS was an application for coſts for not proceeding to trial. The plaintiff relied on the prevalence of the yellow fever, which, after noticing for the circuit, prevented him from obtaining a paper neceſſary on the trial.

Per curiam. It does not appear any countermand was ever given, though there was time for doing ſo, between the period when the impoſſibility of procuring the document was diſcovered, and the day fixed for the circuit. It is true, the act of God is, to work injury to no one; but when, as here, the impoſſibility induced by that act, could have been communicated to the defendant in ſeaſon, to have prevented his attendance on the circuit, and this was omitted, the fault was with the plaintiff, and he muſt pay coſts.

Thomas Kirby *againſt* Salmon Cogswell.

Practice on certificate to ſtay proceedings,

IT was ruled in this cauſe, that, after a certificate of pro-

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rable cauſe to ſtay proceedings, both parties may notice for argument, and that the not entering and noticing for argument by the party obtaining the certificate to ſtay, is no cauſe for a motion to diſcharge the order ;* eſpecially if made without notice.

* Vide ante 343.

The People *against* Freer, printer of the Ulster Gazette.

On a rule to ſhew cauſe why an attachment ſhould not go for a contempt in publiſhing things reflecting on the court, in a cauſe then pending, the defendant ſhould appear in perſon on the day for ſhewing cauſe. Denying any diſreſpectful intent, is only an excuſe, but no juſtification, if the words publiſhed be, in the opinion of the court, contemptuous.

A RULE was granted laſt term, for the defendant to ſhew cauſe on the firſt day of this, why an attachment ſhould not iſſue againſt him, for a contempt, in publiſhing ſome paragraphs in the Ulſter Gazette, reſpecting the trial of Harry Croſwell, for a libel on the Preſident, then ſub judice.

Hamilton, on bringing in the affidavit of the defendant (who did not himſelf appear in court) moved for an enlargement of the rule till the next term, to conſult with the defendant as to expunging ſome part of the matters introduced, as irrelevant. The idea of an intentional contempt was, he ſaid, denied, but there were circumſtances introduced, which counſel thought had better be omitted.

Per curiam. If the application had been to ſupply any new fact, and that fact had been made to appear by affidavit, it would have been attended to ; but we cannot enlarge a rule merely to give counſel an opportunity to conſider of the propriety of expunging parts of an affidavit, which, we muſt conſider, has been made according to the truth of the caſe.

Hamilton then read the affidavit, which did not deny the publication, but only went to negative any intentional contempt or diſreſpect towards either the court or its members.

Sandford contra. The publication being confeſſed, the court has only to pronounce, whether it amounts to a contempt or not. The intention, giving it the utmoſt latitude, can be taken only in mitigation. It cannot make the publication leſs a contempt. A man cannot juſtify his conduct by ſaying, I have offended, but did not mean to ſin. The queſtion is ſimply this, ought an attachment to go for this

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publication? In deciding this queſtion the court is not to look beyond the words contained in the paper.

Hamilton in reply. I can not ſubſcribe to the doctrine, that the court will not look beyond the paper itſelf. This is extending the doctrine of libels. I have heard, that there the truth may not be given in evidence, but never yet did I hear, that another paper, or circumſtance, may not be given in evidence to ſhew the intent. So here, the motive of publication may ſurely be urged to prove, that no contempt, in fact, exiſted.

Per curiam. The affidavit does not juſtify the publication. It is at beſt but an excuſe. On ſuch occaſions as the preſent, the defendant ought to appear in perſon and anſwer. Let, therefore, the rule for an attachment be made abſolute.

James Houghton *againſt* Peter B. Strong.

The declaration in a juſtice's court ſhould be ſo far formal as to ſhew the cauſe of action, or it will be fatal on error.

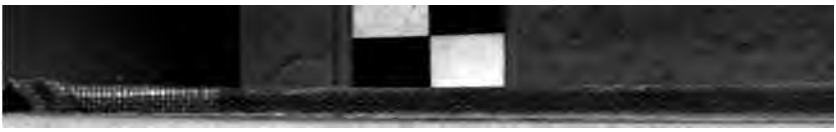
ON certiorari from a juſtice's court. The declaration, as appeared from the return, ſtated, that the defendant "privily, wilfully and maliciouſly, by certain conduct, damaged "the plaintiff to the amount of twenty-five dollars." General errors were aſſigned; and it was principally relied on, that no cauſe of action was ſtated in the count, ſo as to ſhew the juſtice had cognizance of the ſuit.

Per curiam. The declaration is bad. It ought to have ſtated, not only the injury, but how it aroſe. If this be neceſſary in this court, it is more ſo before inferior tribunals, whoſe proceedings may be reviewed here. Unleſs the cauſe of action be ſtated with certainty, it is impoſſible for us to know whether the juſtice had juriſdiction or not. This very ſuit may, for aught that appears, have been in ſlander, or for an aſſault and battery, or for ſome other matter not cognizable before a juſtice. Nor does it appear by any part of the record (none of the teſtimony being returned) what kind of action was proved by the witneſſes. The judgment muſt, therefore, be reverſed with coſts.

Mylo Knapp *againſt* John Palmer.

Certiorari amended according to the affidavit on which obtained

ERROR on certiorari. The affidavit, on which the certiorari was granted, ſet forth, the action to be *debt*, the certi-



NEW-YORK, Nov. 1803.

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ari itſelf ſtated it to be *treſpaſs on the caſe*. The defendant id ſerved the plaintiff with a rule to aſſign errors, before e expiration of which, an application was made to his onor Mr. Juſtice Kent, at Chambers, for an enlargement f the time; this his Honor was pleaſed to order on an affiavit of the plaintiff's attorney, ſpecifying the original cauſe f action, and that the deſcribing the cauſe as treſpaſs on he caſe, was a miſtake. To this affidavit the plaintiff had nnexed a copy of a notice to move the court to allow the mendment of the certiorari, and had duly ſerved the deendant's attorney. Woods now moved for leave to amend he certiorari, by ſtriking out the words "treſpaſs on the caſe," and, in their ſtead, inſerting the word "debt."

Ordered accordingly.

by ſtriking out the words "treſpaſs on the caſe," and inſerting "debt."

Livingston *againſt* Rogers.

THE Court ruled, that cauſes which had been noticed for rgument, and duly entered by the clerk, if not brought on, re to be re-noticed to the clerk for him to re-enter, as they will not be, *of courſe*, carried over to the calendar of the next term.

Practice as to entering cauſes for argument.

Den *againſt* Fen.

IF, in a feigned iſſue from the court of chancery, an inqueſt be improperly taken, relief muſt be ſought in this court. If an inqueſt be taken at a circuit court by default, and notice of trial has not been given, it will be ſet aſide, with coſts, to be paid by the plaintiff's attorney.

Feigned iſſue inqueſt.

Margaret Jones *againſt* Joseph Emerson.

THE defendant had obtained his certificate under a commiſſion of bankruptcy, iſſued againſt him in Connecticut; he was afterwards arreſted, in this ſtate, at the ſuit of the plaintiff, but, on production of his certificate, the court ordered him to be diſcharged.

On production of a certificate, under the bankrupt law of the United States, granted in a ſiſter ſtate, the court will diſcharge.

Andrew Zobieskie *againſt* Michael U. Bauder.

THIS was a motion by the defendant to change the venue, in an action of ſlander, from the county of Albany to

The court will not change the venue on an

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affidavit ſaying there is a party ſpirit in a county againſt the perſon applying.

that of Montgomery, on an affidavit that "the cauſe of ac-
"tion aroſe in the latter county and not elſewhere, and that
"the attendance of a large number of witneſſes, on his part,
"will be neceſſary at the trial, all of whom reſided in Mont-
"gomery and its contiguous county, Herkimer." The plain-
tiff, to retain the venue where he had laid it, ſwore, "that
"*ſome* of the ſlanderous words, for which he inſtituted this
"ſuit, were ſpoken of him, as he verily believes and has
"been informed, in relation to his public capacity, as can-
"vaſſer of an election for ſenators for the weſtern diſtrict;
"that the defendant is claſſed among thoſe whoſe political
"opinions are different from his own; and that, on account
"of the violent party-ſpirit which prevails in Montgomery,
"he believes, an impartial trial cannot be there had."

Per curiam. We do not think the plaintiff entitled to retain the venue in Albany. The court will not preſume that an impartial trial cannot be had, merely becauſe the parties differ in politics, and a violent party ſpirit prevails in Montgomery. If the plaintiff had ſtated, that the inhabitants of that county had generally prejudged the queſtion; or were particularly intereſted in it; or that, for certain reaſons, they entertained a prejudice againſt him; or, that the defendant was a perſon of uncommon influence, it might have altered the caſe. It does not follow, that becauſe ſome of the words were ſpoken of him as canvaſſer of an election for the weſtern diſtrict, that the inhabitants of Montgomery will be more partial than thoſe of any other county, for in the event of ſuch an election, the citizens of the whole ſtate have nearly the ſame intereſt. If violence of party ſpirit (which in free governments will always riſe to a certain degree) be a reaſon for changing a venue between ſuitors of various political ſentiments, there will be no end to applications of this kind; and after all, where will a county be found entirely free of it? We hope, that no difference of this kind will ever influence deliberations within a court of juſtice, or prevent the deciſion of any controverſy, on its real merits.

NEW-YORK, Nov. 1 803.

Bowne v. John Shaw. The ſame v. Neilſon and Bunker.

R. Bowne, ſurviving partner of John R. vne and Samuel Embree *againſt* John Shaw. ſame *againſt* William Neilſon and George ıker.

SE were two actions on a policy of aſſurance, on the f the ſchooner Polly, in which verdicts were taken plaintiff, ſubject to the opinion of the court on a caſe with liberty to turn the ſame into a ſpecial verdict. only queſtion was on the effect of the warranty a- ɔſs, "by capture, or detention for, or on account of llicit trade, or trade in articles contraband of war." facts were ſhortly theſe: The property inſured, no which was contraband, really belonged to the plain- his deceaſed partner, who were alſo owners of the r. They, however, as agents for Joſeph M. Stanſbu- ıped on his account, in the ſame veſſel, other articles were contraband, and Embree even made out the in- ı his own hand writing. The difference of premium n contraband and other goods for that voyage, was cent. At the time, however, of ſubſcribing the poli- w knew there were contraband articles on board: ı and Bunker did not; and as ſoon as they did know ted on being diſcharged from the policy. This the F agreed to do, but did not eraſe their names from rument. The veſſel was taken, and together with go condemned as lawful prize. In promulging the e, on the 13th of December 1800, the judge reſted on the general intereſt of the plaintiff in the con- t. This he inferred from its appearing that Stanſbu- part owner of the veſſel in the September preceding, ere being no evidence of his having ever alienated his He alſo relied on the invoice of the contraband being hand writing of Embree. It was, however, admitted, ? plaintiff had not either directly or indirectly any in- n the contraband articles.

ıe caſe of Neilſon and Bunker, the return of premi- s the ſole object of ſuit. The defendants contending ıker was as much the debtor for the premium to the , as to the aſſurer, and, therefore, the action impro-

If both inſurer and inſured in a policy containing the uſual clauſe of warranty againſt contraband, know there is contraband on board, the warranty will apply only to the goods inſured. The ſuit for a return of premium muſt be againſt the underwriter, not the broker, though the aſſured be themſelves underwriters, and the broker employed by both parties.

NEW-YORK, Nov. 1803.

Bowne v. John Shaw. The same v. Neilson and Bunker.

perly brought. The facts on this point are fully detailed in the opinion of the court.

Hoffman for the plaintiff. The court is called on to say, whether the warranty is confined to the goods insured by the policy, or shall be considered so extensive as to guard against all losses, whatsoever they may be, arising from any article on board which may be contraband. There is no position of law more known, or more acted on than this; the mere letter of a contract is not to be the rule of exposition. It is to be construed according to the spirit, and expounded according to the intent. If so, though the words be large enough to cover all goods, we may examine into the intent, which cannot be better done than by inquiring into the reason of introducing this clause. The mischief it was meant to redress, and the remedy it was designed to afford. It owes its origin to Seton, Maitland & co. They insured contraband merchandize without communicating its nature, and this court decided, a neuter need not avow the quality of his shipment, all goods being to him lawful trade. To communicate to the underwriter, the particular species of commodity shipped, and yet to warrant only as to that commodity, was the clause introduced into our policies. The conduct of Neilson and Bunker shew this construction ought to be adopted. On being informed there were contraband articles on board, they desired to be released from their responsibility; this was unnecessary, if the warranty covered those articles. The generality of the construction is against it. An importer must warrant against transactions and parties thousands of miles distant, and always in the dark. This would destroy insurance itself. Besides, Shaw underwrote with a knowledge of all the circumstances, and must be presumed to have taken the risk of consequences from contraband articles on himself. Our construction, therefore, in favor him must prevail.

Pendleton and Harrison contra. The intention of introducing the clause, on the construction of which the whole of this controversy depends, was to relieve the underwriter from his general liability. It was an exception from what was considered as the effect of the policy. Being so, the in-

ception must be co-extenſive with the effect. The words alſo uſed for this purpoſe are equally large. They are, "for, "or on account of *any* illicit or prohibited trade." But in deciding the preſent caſe, it is not neceſſary to determine the univerſal operation of the clauſe in queſtion. The plaintiff here was owner of the veſſel. He is preſumed connuſant of all that comes on board. By the old maritime law, his veſſel was liable to confiſcation for having contraband on board, merely from the circumſtance of his ſuppoſed knowledge. This, on general principles, would affect the cargo which belonged to him, becauſe the taint of contraband is communicated wherever there is privity.* It is only in modern days that we have had the rule relaxed, but that is only when actual knowledge is not proved. Here the reverſe is the caſe, and the circumſtance of the plaintiff's partner having written out the invoice, was a principal ingredient in cauſing the condemnation. In the caſe of Neilſon and Bunker, allowing the plaintiff entitled to recover, it muſt be from the broker, and not from the defendants.

NEW-YORK, Nov. 1802.

Bowne v. John Shaw
The ſame v. Neilſon and Bunker.

* See the caſe of the Franklin 3 Rob ad. rep. 217, and the note there page 221 (a), where this point is ably treated.

Hamilton in reply. It is contrary to the principles of a warranty, that it ſhould extend to all things. It can relate only to the ſubject matter inſured. When we warrant of a certain thing, we warrant of that thing alone. When we warrant againſt acts, we may warrant againſt the acts of all the world. The intent of the clauſe cannot be doubted. It was framed by myſelf, to avoid the conſtruction contended for on the other ſide, and to confine the operation of it ſimply to the article inſured. I have heard that every new clauſe in an inſtrument, is but a fertile ſource of litigation, and it is with regret I find in myſelf a perſonal verification of the truth of the remark. But whatever may be the conſtruction of the effect of the warranty, it cannot touch the preſent caſe, becauſe all was known to the defendant. I cannot, however, agree, that the operation of the clauſe is to be different againſt different perſons. The rule of law muſt be the ſame as to all.

Per curiam delivered by Lewis C. J. The queſtion between the parties to this ſuit ariſes upon *the warranty againſt loſs by capture or detention for trading in articles contraband of war*. The effect which contraband ſhall have upon lawful

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De Peyſter & Charlton v. Gardner.

goods, when going to the port of a belligerent, would be here a proper ſubject of inquiry, had the fact of the Polly's carrying ſuch contraband been ſecreted from the inſurer at the time of ſubſcribing the policy. But it is ſtated in the caſe, that the circumſtance was within his knowledge. It is, therefore, only neceſſary to inquire into the underſtanding the parties had of the contract they entered into. The goods covered by the policy on which this ſuit is brought were lawful, and inſured at a premium of nine per cent. Certain contraband articles were ſhipped in the ſame veſſel by the plaintiffs as agents, and inſured at a premium of 30 per cent. With a knowledge of this fact, the defendant ſubſcribed the policy, and as both parties muſt be preſumed equally acquainted with the law upon the ſubject, he doubtleſs took the riſk of all the conſequences that might reſult to the lawful from the illicit goods: The warranty extending in the underſtanding of the parties, to the goods only which were the ſubject of the policy.

I am, therefore, of opinion, the plaintiff is entitled to recover as for a total loſs.

In the caſe of the ſame plaintiff againſt Neilſon and Bunker, I think the former entitled to a return of premium. The broker who held funds of both parties, debited the plaintiff in account, with the whole amount of premium due on the policy, and credited the defendants for their proportion. In May 1801, he ſettled with the plaintiff, and paid him a balance which did not include the premium in queſtion. On two ſeveral accounts rendered the defendants, the amount of premium ſtill ſtood to their credit. And altho' a balance in their favor has always lain in the hands of the broker to a greater amount than the premium, it does not appear to have been left there for the purpoſe of re-payment to the plaintiff. No authority for this purpoſe has ever been given, and the defendant muſt be conſidered as ſtill withholding it from the plaintiff.

Frederick De Peyster and John Charlton *againſt* Andrew Gardner.

In a policy on commiſſions on lawful

ON error from the Mayor's court upon a judgment rendered againſt the now plaintiffs.

NEW YORK, Nov. 1803.

Jackſon and Staring v. Defendorf.

By the ſpecial verdict, it appeared the inſurance was effected on the commiſſions of the defendant on "lawful goods" conſigned to him, ſhipped in the ſame veſſel, and r the ſame voyage, as were mentioned in the preceding ſes againſt Shaw, and Neilſon, and Bunker. The defendit was alſo conſignee of the contraband goods of Stanſbu- , and maſter of the Polly; but the commiſſions on the ntraband were not inſured. It did not appear that the laintiffs knew any contraband was on board. In other reſects, the facts correſponded with thoſe in Bowne v. Shaw.

goods, the warranty againſt contraband is not broken, tho' the aſſured be captain and conſignee of illicit articles ſhipped on board without the knowledge of the underwriter.

Per curiam delivered by Livingſton, J. The aſſured in is policy has, certainly, made out a caſe of more favor, an the one we have juſt diſpoſed of. For he was not own- , but only maſter of the Polly, and, therefore, could not efuſe to take the goods of Stanſbury; nor had his intereſt, r agency, any influence on the confiſcation. The judgment f the court below muſt, therefore, be affirmed with double oſts.

James Jackson ex Dem', Henry Staring *against* Jacob Defendorf.

THIS was an ejectment to recover lands in the county f Herkimer.

If a lot be granted by deed, and its number ſpecified with a reference to a map, the whole lot will paſs by the deed, tho' it there be mentioned : s containing fewer acres than it abſolutely does.

The plaintiff, in ſupport of his title, adduced a deed to his ſor, by which Nicholas Staring granted to him one certain t of land, diſtinguiſhed by the name of lot No. 10, in the ew Patent, in the ſecond tract, on the ſouth ſide of the ſohawk river, "butted, bounded and deſcribed, as can be ' more fully made to appear by a map of the ſaid patent, ' the ſaid lot No. 10, *ſaid* to contain two hundred acres more ' or leſs." The deed then went on ſpecifying the "ſaid two hundred acres" in the habendum, covenant of ſeiſin and lauſe of warranty. It appearing, however, that lot No. 10 ontained more than two hundred acres; the judge ordered a nonſuit to be entered. Application was now made to et aſide this nonſuit, and the only queſtion was, whether he deed would carry the whole lot, as it contained more an two hundred acres.

Per curiam. The intent was to convey the whole lot. t referred to the map. When the quantity of acres is men-

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tioned, it is only as deſcriptive of the lot according to common acceptation. The nonſuit muſt be ſet aſide.

REGULÆ GENERALES.

ORDERED, that in future, the days for non-enumerated motions, be Monday and Thurſday, in the firſt week of term, and Friday in the ſecond week.

N. B. This alteration was occaſioned by the late act of the legiſlature fixing the terms of this court, in conſequence of which, Thurſday is become the quarto die poſt. The rules of October 1801, and July 1802, are, therefore, annulled.

ORDERED, that every perſon who ſhall have regularly purſued juridical ſtudies, under the direction or inſtruction of a profeſſor or counſellor at law, for four years within this ſtate, or ſhall have been admitted to the degree of counſellor at law in any other of the United States, and practiſed with reputation as ſuch for four years in ſuch ſtate, ſhall be entitled to a licence to practice as counſel in this court; and that the ſecond rule of October term 1797 be annulled.

In this vacation Mr. Juſtice Radcliff reſigned his ſeat on the bench.

END OF NOVEMBER TERM.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF NEW-YORK,

IN FEBRUARY TERM, IN THE TWENTY-EIGHTH YEAR OF OUR INDEPENDENCE.

Job Atterbury *against* William Teller, Junior.

ALBANY, Feb. 1804.

Atterbury v. Teller, jun.

In an action on a promiſſory note, if, in conſequence of the plaintiff's attorney having no agent in Albany, the ſuit be non-proſſed there for want of declaring, and judgment by default be obtained in New-York, & the damages aſſeſſed by the clerk indorſed on the note,

THIS was an action on two promiſſory notes, on which the clerk had, according to the practice of the court aſſeſſed damages.

A former ſuit had been brought on the ſame notes, which were the foundation of the preſent action. The attorney for the plaintiff lived in New-York, and had not any agent in Albany, near to which the attorney of the defendant reſided. Whilſt the plaintiff's attorney was proceeding in New-York, to obtain judgment, the defendant's attorney placed up, in the clerk's office in Albany, the uſual notice of appearance, and of a rule to declare, after the expiration of which, no declaration having been received, the defendant, after the regular affidavit of due ſervice, entered a non-proſs for not declaring. During theſe tranſactions in Albany, the plaintiff went on in New-York, and there obtained, ſubſequent to the entry of non-proſs in Albany, a judgment

ALBANY, Feb. 1804.

Jackson v. Hammond.

by default; after which, the clerk of the court duly aſſeſſed damages, and indorſed the amounts on the reſpective notes. The attorney on record for the plaintiff having been changed, the preſent attorney diſcovered the above circumſtances, and as the judgment of non-proſs had been entered in conſequence of the original attorney for the plaintiff not having had an agent in Albany, he paid the defendant's attorney the coſts of non-proſs, and agreed to vacate his own judgment, which was accordingly done.

the court will, when the coſts of non-proſs have been paid, and the judgment in New-York vacated, order the damages aſſeſſed and indorſed, to be ſtruck out that the plaintiff may, in a ſecond action, proceed to trial without any embarraſſment from the former proceedings.

A ſecond action being now commenced, the plaintiff was apprehenſive, that the aſſeſſment of damages under the firſt, might be made uſe of on the trial, as a ſpecies of judgment already recovered.

Pendleton, on affidavits containing the above facts, moved for liberty to ſtrike out the aſſeſſment indorſed, and proceed to trial on the merits, in the ſame manner as if the damages had never been aſſeſſed. Van Antwerp reſiſted the motion, relying on the aſſeſſment being concluſive as to the amount.

Per curiam. Take the effect of your motion, with coſts of this application, to be paid by the defendant.

James Jackson, on the demise of Silas Smith *against* John Hammond.

New niſi prius record, allowed to be filed, and a poſtea indorſed thereon, according to a judgment of 6 years antecedent, and execution thereon, upon affidavits ſhewing the probable loſs of the originals.

IN this cauſe, on an affidavit, ſtating a verdict having been, in 1792, taken for the plaintiff, ſubject to the opinion of the court, on a caſe agreed on between the parties, on which judgment had been given in 1798, for the plaintiff; and alſo, that the niſi prius record and iſſue roll, were not to be found in the office of the clerk of this court, nor the niſi prius record among the papers of the former clerk of the circuit, in which the cauſe was tried, and if left with the plaintiff's attorney, had been burnt or loſt, leave was given, to make up and file a new niſi prius record, with a poſtea, to be indorſed thereon, conformable to the minutes of the trial, and alſo, to enter up judgment, and iſſue execution for the plaintiff, according to the opinion of the court in 1798.

No oppoſition.

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Graham v. Woodhull.

Charles M. Graham *against* Richard M. Woodhull.

In ſlander for ſaying of the plaintiff that he was perjured, and a particular perjury pleaded in juſtification, the court will, on affidavit of the abſence of the witneſs by whom it was to be proved, give leave to amend by pleading another perjury, on payment of coſts.

THIS was an action brought againſt the defendant, for ſaying, that the plaintiff had been guilty of perjury. To this the defendant had pleaded the general iſſue, and a juſtification, ſetting forth a particular perjury committed in an examination before Thomas Cooper, Eſquire, one of the maſters in chancery.

Hoffman moved for liberty to plead another plea, or to give notice of ſpecial matter, to be given in evidence on the general iſſue, in addition to the pleas already pleaded. The application was founded on an affidavit ſtating the above facts, and alſo, that the pleas were delivered in Auguſt laſt, and iſſue ſoon after joined; that at the time of pleading the above pleas, one Gleeſon, who could have proved the truth of the above juſtification, was in New-York, or its vicinity, and the defendant relied on being able to produce him at the trial; but, that ſince that time, Gleeſon had quitted this ſtate, and was gone, the defendant knew not whither; that the charge of perjury was true, and that under the idea of being able to have the benefit of Gleeſon's evidence, the defendant had not given notice of juſtifying by proof of another perjury by the plaintiff before the recorder of New-York, in an application for relief under the inſolvent law.

Bogert contra. The defendant's plea of juſtification is confined to that before the maſter. The other may, even allowing it to be true, have taken place long ſince. The queſtion, therefore is, whether the court will allow a ſubſequent perjury, admitting it to have been committed, to juſtify a former charge of perjury. This is an action of ſlander, and out of the general rule of amending and adding pleas.

Hoffman in reply. The declaration is general; and for any thing that appears, both perjuries might have preceded the action, nay, cotemporaneous, as they might be in relation to the ſame diſcharge. We only aſk to amend on the uſual terms of paying coſts.

After ſome little converſation on the bench, in which it was conceived, this practice might poſſibly lead to hunting for inſtances of perjury, the court granted the motion on

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payment of coſts, ſaying, they could not make any diſtinction between actions of ſlander, and other caſes.

Arden & Cloſe v. Rice & others.

Ambrose Spencer *againſt* Ezra Sampson.

If a cauſe be important or intricate it is cause for a ſtruck jury In actions for words to obtain it, the truth ought to be denied and the cauſe at iſſue, ut ſemb.

THIS was an application on the part of the plaintiff for a ſtruck jury, in an action on the caſe for a libel. The affidavit on which it was founded ſtated, that the words ſpoken of the plaintiff, were concerning him in his official character as attorney general, were falſe, and that the cauſe was at iſſue.

W. W. Van Neſs oppoſed the motion, and urged, that to entitle to a ſtruck jury, the cauſe ought to be important *and* intricate: that though he might allow the importance of every cauſe relating to character, yet, its intricacy he muſt deny, and both theſe circumſtances are neceſſary by our ſtatute.

Per curiam. The words of the ſtatute are, "intricate *or* important." It is of great conſequence to this court to protect its officers, and thoſe of the public in the diſcharge of their duty. Take your rule.

Foot *againſt* Harry Croswell

S. P. and for want of thoſe circumſtances the rule refuſed.

THIS was a ſimilar application: the affidavit ſtated the action to be for libellous words ſpoken of the plaintiff, exhibiting him in an odious point of view, as guilty of ſwindling: that a right determination was important to his character in ſociety, and iſſue joined.

Per curiam. The plaintiff can take nothing by his motion, his affidavit is defective, in not ſtating that the words were ſpoken of him in his official character of diſtrict attorney, and in not ſwearing to their falſehood.

Richard D. Arden and Epiphalet W. Cloſe *againſt* Randal Rice, Conſider White, and Henry Townsend.

If the court be ſatisfied, a demurrer is put in merely for delay, and the oppoſite ſide has noticed the demur-

THIS cauſe had been noticed by the plaintiffs for judgment, at the laſt term, on a general demurrer filed by the defendants to the declaration; the court had, on the ſtatement of the plaintiffs' counſel, that the demurrer was merely for delay, overruled it, and granted a rule for judgment, the

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Gilchrift v. Van Wagenen and Moore. Lawrence v. Van Wagenen.

ſumſel pledging himſelf to open the rule any day on an affidavit of good cauſe of demurrer, or of merits. On ſervice f the rule for judgment, the defendants gave a cognovit, on hich the plaintiff entered up his judgment in the laſt vacaon.

Foot moved to ſet aſide the judgment, contending that it uld not be entered but in term.

Some little variance of opinion exiſting on the bench, reſecting the practice, on this point it ſtood over till the laſt ay of term, when the court thus decided.

Per curiam. By the 8th rule of April '96, judgment, after default entered, may be entered *at any time* after 4 days a term have intervened. The rule of July term, 1796, ordering all rules for judgment to be entered in term, and not a vacation, was aboliſhed, in April term 1799, and reſtord the firſt rule. There is no good reaſon why 4 days in term hould be given in this caſe to the defendants, any more han on a warrant of attorney to confeſs judgment. The deendants take nothing by their motion.

Spencer J. diſſented, on the ground that the practice had een different.

rant for argument, who does not appear, the demurrer will be overruled, and a rule for judgment ordered, the party obtaining it, ſtating himſelf ready to open the rule if good cauſe of demurrer or merits be shewn. Judgment may be entered upon a cognovit, in vacation.

Robert Gilchrist *against* Peter Van Wagenen and John I. Moore.

Augustine H. Lawrence v. Peter Van Wagenen.

THIS was an application by the attorney of the plainiffs, for liberty to file ſpecial bail in both ſuits, to enable im to ſurrender the defendant.

The circumſtances as diſcloſed on affidavit, were theſe : he defendant, Van Waganer, had been arreſted in both ctions, one of which was for 4000 dollars, and the other r 400 dollars, at a very late hour of the night, and was, by e officer who took him, carried to the houſe of the plainff's attorney, who was then in bed. Being called up, the dendant requeſted him to take asbail one John S. Moore, ho was at firſt refuſed. But on the defendant's repreſenting e diſtreſſed ſtate his family would be in, and the ſhock it ould be to his credit, ſhould he go to jail, the attorney, on ceiving faithful aſſurances, that ſufficient bail ſhould be t in by nine o'clock the next morning, agreed to accept

Where an attorney has been from peculiar circumſtances, induced to authoriſe the sheriff to diſcharge a priſoner, on a ſingle bail, who afterwards turns out inſolvent, the court will, if no oppoſition be made, and the attorney's conduct appear bona fide, allow him, after filing common bail under the ſtatute, to put in ſpecial bail, for the purpoſe of obtaining a ſurrender of

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the defendant's body, to save himself from liability.

John S. Moore, as bail for that night, and the defendant was, accordingly, suffered to go at large. The defendant, however, instead of putting in satisfactory bail, as he had promised, went immediately on board a vessel that he owned, which was bound for the West-Indies, though he knew at the time that Moore, who has since been declared a bankrupt, was then insolvent. On this the plaintiffs' attorney filed common bail in each of the suits, according to the provisions of the statute; but having been threatened by the plaintiffs with being called on for the amount of their debts,

Boyd made the application above mentioned, which, not being opposed, was granted.

Ex parte Peter Reynolds.

If a man be turned out of possession, by a mistake in executing a writ of possession against him, instead of another, the court will, on motion, grant relief, and order restitution.

THIS was an application for a writ of restitution. The facts are stated in the opinion of the court, which was delivered by,

Spencer J. It appears by the affidavit of the deponent, (and the allegation is uncontroverted) that in October last, upon a writ of habere facias possessionem issued out of this court, in the case of John Jackson ex dem' Nicholas Low and others, the deponent was turned out of possession of a house and 50 acres of land, being part of lot No. 37, in Romulus, in the county of Cayuga; that the possession held by him, was delivered by the agent of Mr. Low; that the deponent was, prior to the commencement of the ejectment against James Reynolds, in peaceable possession of the land from which he was expelled; that the object of the suit against James Reynolds was, for the recovery of different lands which he held on another part of the lot, and that the two possessions were separate and distinct.

It is a settled rule of practice, that no tenant, who was in possession anterior to the commencement of an ejectment, can be dispossessed upon a judgment, and writ of possession, to which he is no party. It is the opinion of the court, that Peter Reynolds is entitled to relief, and that a writ of restitution issue to re-instate him in the possession of the premises, from which he has been thus irregularly ousted.

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Jackſon v. Stiles & Griffin

iſha Durkee *againſt* Ichabod Bracket, q. t.

IIS was an application for a rule or certiorari, to be ed to the juſtice of the peace, before whom the cauſe ried, requiring him to certify, whether Ichabod Brack- e plaintiff before him, was not by him, permitted to be as a witneſs, and teſtify in his own cauſe.

rriſon in ſupport of the motion. As no bill of excep- will lie in this caſe,* the injury will be without re- , unleſs the court, by virtue of their ſuperintending ju- tion, pleaſe to interpoſe. This they have authority to om their general controling power. This differs from pplications to return evidence, becauſe, there it would aſſume a right to determine on facts, matters cogniz- y a jury alone. The granting of a certiorari, is not con- to reaſons that appear on the record. In 4 Vin. 342. r D. pl. 7. title certiorari, the writ was allowed to in- , whether the defendant, who had pleaded his protec- as the King's ſervant, was attending on the King, for wn buſineſs, or the King's.

nry contra. This is in ſubſtance to bring up the fact ; his court has decided, it will not oblige a juſtice to re- evidence.

r curiam. Take your rule or certiorari as you may be d.

If a juſtice of the peace, in a cauſe before him, admit a plaintiff to be ſworn and teſtify as a witneſs in his own cauſe, this court will grant a rule or certiorari, as the party may be adviſed, to have that matter returned.

* 1 Rev. Laws 376. The words of the act are, "When any one who is impleaded before any judges or juſtices, doth allege an exception, &c. Therefore, query as to this and ſee 2d Inſt. 427. (2).

es Jackſon, on the demiſe of Stephen Hoge- om *againſt* John Stiles, and Auſtin Griffin, nant in poſſeſſion.

this, and ſeveral other actions under demiſes from the leſſor, the tenants moved to ſet aſide the rules which een entered to appear, and enter into conſent rules, or udgment go againſt the caſual ejector.

ie notice of motion ſtated, that the applications would ounded on an inſpection of the declarations, notices, ffidavits on file, by which it would appear, that three e notices were directed in blank, and one to James *Per-* inſtead of the tenant, James *Kerman*.

rriſon. In Ejectment, the declaration is analigous to ſs, and ought, therefore, to be governed by the ſame

In ejectment. On a motion to ſet aſide, the rule to appear and enter, &c. if the application be founded on irregularities to be ſupported by inſpection of the declaration &c. on file, & the plaintiff produce affidavit of due ſervice &c. it will be preſumed that all was re-

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rules. If a ſheriff were to ſerve one man with a writ, directed to another, it certainly would not be a legal ſervice, and in ejectment, a notice to A. is not a notice to B. *Kerman* can never be *Perkins*; the court will not permit the poſſeſſion of one man, to be changed by proceedings againſt another. Ex parte Reynolds this term.*

gular, the tenants not producing the declarations & notices ſerved, eſpecially, if by granting the motion, the ſtatute of limitations would attach.

Woodworth, attorney general, read an affidavit, ſtating, that James Kerman was perſonally ſerved, and that the declaration, with notices annexed, were ſerved on the tenants. The court will ſee theſe facts alſo appearing in the 2d part of the reports of this court 249,† which was an application in this very cauſe. If the effect of the preſent motion be allowed, it will, in fact, be to try and decide the cauſe againſt the leſſor of the plaintiff, as the limitation of the ſtatute will then apply.

* Ante. 500
† Jackſon v. Stiles. Ante.

Harriſon in reply. The effect of the ſtatute cannot be taken into conſideration. Suppoſe treſpaſs for carrying away goods brought, inſtead of aſſumpſit, and the ſix years paſſed, would the court interfere to prevent the operation of the ſtatute? This caſe deſerves no indulgence; twelve months elapſed before the application to amend in Auguſt laſt was made.

Per curiam. The application in theſe ſuits is founded on a reference to the proceedings on file, by which, it is ſaid, it will appear, that one of the notices was miſdirected, and the others in blank. In the affidavit on behalf of the plaintiff, it is ſworn, that the direction of the one ſerved on James Kerman, was to him in his name, and that the tenants were duly ſerved; if the facts were otherwiſe, it would have been very eaſy to evince them, by producing the ſeveral notices, &c. actually ſerved, without referring to thoſe on file. It is, therefore, to be preſumed, that the ſervices have been regular. The corut will, in the preſent caſe, ſupport this preſumption, as otherwiſe, by the intervention of the limitation of the ſtatute, the plaintiff would be barred. The caſe of Reynolds is very different from this; there no proceedings had been ſerved on him; a different tract of land was claimed; the firſt intimation he had was by an execution which turned him out, and that very execution againſt

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the poſſeſſion of a different man. We there protected the right of the party, and we do ſo here. The tenants can take nothing by their motion.

John Kirby and Edward Kirby, *against* Edward Watkies.

Practice as to commiſſion.

The defendant had, after due notice, obtained a rule in the laſt term for a commiſſion, in which the plaintiff did not join, to examine a perſon in Port Republican, and ſince then had not given any notice of further proceedings under the commiſſion. On theſe facts

Harriſon moved to vacate the rule.

Per curiam. Let the rule be ſo far vacated as to permit the plaintiffs to proceed to trial notwithſtanding the commiſſion.

N. B. On a commiſſion to England the court will, after eight months without a return, give leave to proceed to trial, notwithſtanding the commiſſion; but this does not prevent cauſe being ſhewn at the circuit, why the trial ſhould not then be put off.

James Jackson, on the demise of Rosekrans, *against* John Stiles, Benjamin Howd, tenant.

In ejectment the court will allow of excuſes for defaults to protect the poſſeſſion which in other caſes would not be received. If the conſent rule, &c. have been actually forwarded in time to be delivered to the attorney of the plaintiff in ejectment, and be, by miſtake filed in the clerk's office, inſtead of being ſerved, the court will ſet

THIS was an action of ejectment, brought to recover lands to which the tenant derived title under the ſtate.

The declaration, &c. had been duly ſerved on the tenant, and by him delivered to the attorney-general on the 14th of April laſt. The notice was of courſe for the laſt May term, and the conſent rule, and plea were, immediately afterwards, drawn and forwarded to a clerk in the office of the clerk of this court in Albany, directed to the attorney for the plaintiff who the attorney-general believed to reſide in or near Albany. The conſent rule, and plea were duly received, but from inattention in the clerk to whom they were tranſmitted, they were filed, inſtead of being ſerved. The conſent rule, and plea not having been received, the plaintiff took

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his judgment by default againſt the caſual ejector, ſued out a writ of poſſeſſion, and turned out the tenant. On theſe facts it was intended to move the court laſt term to ſet aſide the judgment and writ of poſſeſſion, and that a writ of reſtitution ſhould iſſue; but, it being inconvenient to both parties to bring it on then, a written agreement was entered into, conſenting to poſtpone the application till this term, and that the delay ſhould not be deemed a laches in the tenant.

aſide a judgment on ſuch a default, and if a writ of poſſeſſion has iſſued, award reſtitution, on payment of coſts.

Caines, on the above facts, ſubſtantiated by affidavit, now moved to ſet aſide the default and ſubſequent proceedings, and that a writ of reſtitution ſhould iſſue. There were, he ſaid, but two objections which could be made to the motion. Firſt, that the default was not accounted for; ſecondly, that the application ought to have been made at an earlier day. As to the firſt, this court had allowed the miſcarriage of pleas when ſent by the mail to excuſe a default,* and though this was not exactly that caſe, it was within its principle; for, the defendant's attorney had taken every neceſſary ſtep in due time. On the ſecond point, the written agreement was a complete anſwer. In addition to this, no injury could be induced by granting the application; if the plaintiff had any right, he would, on a trial, be able to prove it; on the other hand, if the motion was denied, it might be of the utmoſt prejudice, as it would ſhut out the defendant from all poſſibility of ſhewing his title. Beſides, the rule was not aſked for but on payment of all coſts, ſo that the plaintiff would be where he was, with all his rights, titles, and even his pocket unimpaired.

* Hudſon v. Henry. Ante 67.

Van Vechten contra, read affidavits ſtating, that the leſſor of the plaintiff had been duly put in poſſeſſion of the lands in queſtion by the ſheriff of the county, and had, on the ſame day, granted a leaſe of the premiſes to a third perſon; that in converſations with the leſſor of the plaintiff, he had acknowledged that he held under the patent of Clifton park, whereas thoſe delivered were claimed under that of Kayoderoſſeras, and that the leſſor of the plaintiff had acknowledged he believed the premiſes, delivered under the writ, were in Kayoderoſſeras. It was, therefore, inſiſted, that, as now the right of a third perſon was implicated, the court

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would not interfere; that the title was acknowledged and it would, therefore, be uſeleſs. The excuſe of the default was alſo denied to be ſimilar to the caſes relied on.

Caines in reply. The leaſe granted ſince the execution of the writ, and before the ſigning of the agreement, muſt have been ſo recent as to admit of no improvements. The third perſon, therefore, can ſuſtain no injury. Allowing the right to be with the leſſor, ſtill it cannot be thus tried on affidavit. A jury is the tribunal for its determination. In referring it to a jury, he has all his rights, and the expenſe he has been put to, we agree to pay. He, therefore, cannot ſuffer; but the defendant may, as he cannot obtain compenſation from the ſtate, unleſs he ſhews a defence, to which alone he aſks to be admitted.

Per curiam. The proceedings, on the part of the defendant, certainly have not been perfectly regular, for they ought, in ſtrictneſs, to have been ſent to the agent of the plaintiff's attorney. It appears, however, that every meaſure neceſſary for the defence was actually taken, though, from an idea on one hand of the clerk of the defendant's attorney, that the plaintiff reſided near Albany, and a miſtake on the other, in the office of the clerk of the court, the papers never reached their proper deſtination. In ejectment, as it is the creature of the court, every thing will be done to promote the juſtice of the caſe, according to right, and the court will go further to protect the poſſeſſion, when it can be done without injury to the plaintiff's claim, than it is willing, in other caſes, to proceed. As, therefore, there was a full knowledge in October laſt of an intention to make this application, and the tranſactions are all of a recent date, we are of opinion, that the default entered againſt the caſual ejector, the judgment thereon, and the writ of poſſeſſion ſued out, be ſet aſide, and a writ of reſtitution iſſue, on payment of coſts.

Edmund Kirby *againſt* Samuel Cogswell.

An indorſee of a firm of which he is a member may, on an indorſement made by himſelf in the

THIS was an action on a promiſſory note by the indorſee againſt the maker. It appeared on the trial, which took place during the laſt Albany circuit, that the plaintiff was one of a firm, and had indorſed the note, in the name of the houſe,

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ſtile of the partnerſhip, maintain an action againſt the maker of a promiſſory note. A Judge's certificate of probable cauſe, does not ſtay proceedings unleſs accompanied with notice of motion.

* See ante 344 Milward v. Hallett.

to himſelf, and now ſued in his individual capacity. On this account, an objection was taken, the defendant inſiſting that the plaintiff could not by his indorſement in the ſtile of the co-partnerſhip transfer to himſelf, in his private character, the note ſo as to give a right of action. This, however, being overruled by his Honor, Mr. Juſtice Kent, the defendant, within the time limited by rule, made a caſe, and ſerved it on the plaintiff's attorney. He, obſerving it to be incorrect, made another, detailing the facts accurately, and alſo ſerved his, titling it an "amended caſe."* On the of November laſt, being the firſt day of November term, the plaintiff filed his certificate of trial, niſi prius record, with the poſtea indorſed, jury proceſs, and entered a rule niſi for judgment. On the 8th of November the defendant, taking no notice of the caſe intended as an amendment, obtained, on his own ſtatement of facts, a certificate from Mr. Juſtice Kent to ſtay proceedings. This, with a copy of his caſe, but without any notice of motion, he ſerved the next day on the plaintiff's attorney, obſerving to him, at the ſame time, that the amendments, according to the practice of the court, ought to have been propoſed and not ſent in the ſhape of a new caſe. The plaintiff's attorney then offered to make a fair ſtatement, as ſhould be agreed on, alleging his ignorance of the ſtrict rules of making a caſe. The defendant's attorney ſeeming to evade this, the plaintiff on the 16th of November ſerved a copy of a bill of coſts in the ſuit, with regular notice of taxation, which he proceeded to execute, ſigned judgment, and iſſued a fieri facias.

Van Antwerp now moved to ſet aſide the judgment and all ſubſequent proceedings, inſiſting that the certificate of the judge was a complete ſtay, without any notice of motion annexed, for the plaintiff had, as well as the defendant, a right to bring on the argument on the caſe.

Per curiam. The queſtion is, as to the operation of a certificate of probable cauſe to ſtay proceedings. The 4th rule of January, 1799, ſettles, that, at the time of ſervice of the order, it muſt be accompanied with a notice of motion. The right of the oppoſite party to notice for argument, does not take away the neceſſity of notice, for the mere certificate is

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ıf is no ſtay. The defendant, therefore, can take nothing y his motion, and muſt pay the coſts of the preſent appli- ation.

ın the matter *Between* { The Mayor, Aldermen and Commonalty of the City of New-York, *and* The President and Directors of the Manhattan Company.

THIS was an application to make abſolute a rule niſi, ob- ained laſt term, to confirm the report of William Popham, Abijah Hammond and Richard Hatfield, three perſons who, nder the fifth ſection of the act incorporating the Manhat- an Company, had been nominated and appointed by his Honor, Mr. Juſtice Kent, to eſtimate the damage done to the avements of the ſtreets of New-York by the Manhattan Company, in laying down the pipes which convey water hrough the city.

A judge cannot revoke his own warrant, appointiug appraiſers under the 5th ſection of the act incorporating the Manhattan Company. A freeholder in the city of New York is, under that ſection, incompetent to act as an appraiſer of the damage done to the ſtreets by laying the Manhattan pipes. Want of time and place in a notice of preferring a petition is fatal. A rule niſi leaves the party at liberty to come in and oppoſe when the court is applied to, for making it abſolute.

Harriſon, in ſupport of the rule, read a petition from the Mayor, Aldermen and Commonalty of New-York, ſtating, hat all the ſtreets and highways in the city are, by law, veſt- d in them and their ſucceſſors, and were ſo previous to the d of April, 1799.

That the Preſident and Directors of the Manhattan Com- any, ſhortly after their incorporation, and without licence rom the petitioners, had dug in ſeveral of the ſtreets trenches or laying the water pipes of the Company, and materially njured the pavements.

That ineffectual endeavours had been uſed to bring the Company to an agreement with the petitioners, and there- ore they prayed perſons to be appointed to eſtimate, &c.

He ſtated alſo, from affidavits, that on the ſixth of July ſt a copy of the above petition was ſerved on the Manhat- n Company by delivering the ſame to their caſhier; that iis was previous to the delivery of it to Mr. Juſtice Kent r his warrant, (but how long previous the affidavit did not ate); that on the 12th day of the ſame month the warrant, ppointing the three perſons above named, was iſſued; that r the twenty-ſixth day of the ſame July a copy of the war-

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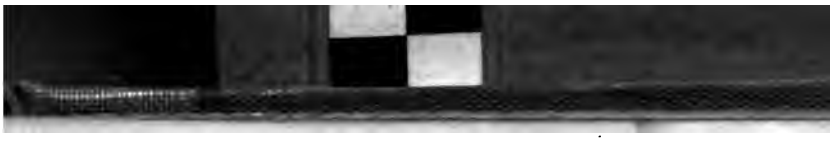
rant was ſerved on the caſhier of the Company, and on the next day a notice that the perſons, ſo appointed, would meet at 10 o'clock of the ſame day to proceed in the duties aſſigned them.

Hamilton, contra, inſiſted that, from the facts as they appeared on the affidavits of the other ſide, it was manifeſt the notice of an application to appoint perſons to eſtimate was imperfect; it ſpecified neither time nor place, when and where the Company might attend to oppoſe the nomination of improper perſons. That this was analogous to, and by the act intended as a ſubſtitute to a trial by jury; that, therefore, the ſame rights, as would be had in that mode, ought to be preſerved in this—and of thoſe rights, that of challenge was one. He then read an affidavit by the Preſident of the Manhattan Company, ſhewing, that Mr. Hammond was a very large freeholder in New-York, and there had his principal reſidence; and alſo, that the original coſt of paving the places was only 3525 dollars, though the damages which had been aſſeſſed, as a compenſation for the injury, amounted to 6881 dolls. From hence he contended, that Hammond was an intereſted perſon (tho' he might have acted perfectly conſcientiouſly) as the houſes of proprietors were aſſeſſed for the pavements oppoſite their lots, and the more was gotten from the Company the leſs would the freeholders be called on to pay. The notice, alſo, of attending the meeting of the perſons, appointed by the judge's warrant, was of a piece with the reſt; it was, as appears by Mr. Remſen's affidavit, ſerved on him, as caſhier of the Company, only ten minutes before the aſſeſſors were to aſſemble. In the next place it may be a queſtion how far any ſervice was valid, which was not on the Preſident himſelf, he being the head of the Company. It is alſo doubtful whether the judge had any juriſdiction; the act gives him authority only when the Company and the Corporation *diſagree*; the petition does not ſtate this, but that they *did not agree*.

Harriſon in reply. The act does not preſcribe any time at which notice is to be given. It is evident, however, that there was no intention of ſurpriſe as there were ſix days between the ſervice of the petition and the judge's warrant



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uppoſing the analogy to trial by jury to be correct, ſtill the ompany were too late. The ſervice of the petition was ough to ſet them on enquiry, and they have lain by till e whole buſineſs is finiſhed, and then, becauſe they think iemſelves aggrieved, they come forward. Were a party to thus ſilent, and take the chance of a verdict, it would be o late for him to urge any challenge to a juror. The peti-on ſtates that all endeavours to bring the Company to an greement were ineffectual; whether this amounted to diſ-greeing, or only to not agreeing, and the diſtinction to be iken between them, he declined to argue.

Per curiam, delivered by Thompſon, J. The application is affirm the report of appraiſers acting under the fifth ſec-on of the ſtatute incorporating the Manhattan Company. he act directs, that "in caſe of diſagreement, &c. it ſhall be lawful for the Judges of the Supreme Court of this ſtate, or any one of them, (not being an inhabitant of the ſaid city,) upon the application of either party, to nomin-ate and appoint three indifferent perſons to view, examine and ſurvey the ſaid lands, &c. and to eſtimate the injury ſuſtained as aforeſaid, and to report thereupon without de-lay; and upon the coming in of ſuch report, and the con-firmation thereof by the ſaid court, the Company ſhall pay the ſum mentioned in the report," &c. On the part of he Company the firſt cauſe ſhewn againſt confirming is, that he application to Mr. Juſtice Kent was made without due otice. The ſecond, that one of the appraiſers was intereſt-d, and, therefore, an improper perſon. The third, that the amages awarded are exceſſive. As to notice it is not denied hat it was neceſſary, though it is inſiſted that which was iven was ſufficient. The petition appears to have been ſerv-d on the caſhier, and contains neither time when, nor place here the application would be made to the judge. The no-ice then is altogether irregular. It wants the neceſſary re-uiſites of time and place to enable the oppoſite party to at-end and object to the appointment of appraiſers. On the econd point the affidavit of the Preſident ſhews, that one f the perſons nominated was intereſted; and this again roves the importance of notice, for had the company ap-

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peared they might have ſhewn his intereſt and hindered his appointment. This intereſt is not denied by the corporation, they merely urge that it is alleged at too late a period. As to the damages, an injury to the amount of 6881 dollars is aſſeſſed on that which originally coſt only 3525 dollars. The corporation, it is true, ſay that the ſtreets were much injured, but this ought to have been ſhewn more ſatisfactorily, and is ſufficient to ſend this matter for further inveſtigation. A queſtion, however, has been made, whether the Company can now avail themſelves of theſe objections? They muſt be at liberty ſo to do now, or they would be remedileſs. There was not any notice given them to attend before the judge; therefore, to him they could not ſtate their objections. Nor could they have applied to the judge who granted the warrant to make a further or other appointment, for under the words of the act, the judge cannot revoke his warrant. He, therefore, is functus officii. The only reſource then is to this court. They have no authority to interfere till this application is made to confirm, and then the matter being before them, they may proceed on the objections taken. The report was returned on the laſt day of the laſt term, and from the manner in which the corporation have taken their rule, they ſeem to ſuppoſe it might now be oppoſed by ſhewing cauſe. There can be no ground, therefore, for imputing laches, as the company have come forward at the earlieſt period they could, after the court was in poſſeſſion of the cauſe by filing the report. But it is contended that the notice, though defective, was enough to put the Company on inquiry, and they ought to have applied to this court directly after ſervice of the petition. The rule of practice in this court, as to defective notices, does not apply to this caſe. It is a ſpecial mode of proceeding under a particular act, and therefore, not within our regulations as to defaults. The court are of opinion, that the report be ſet aſide.

Kent, J. I diſſent from this determination. The fact is that the bank had notice of the petition and of the allegations of that petition. The denial of notice goes only as to time and place. The firſt intimation they received was on the 6th of July, and the warrant was not iſſued till the

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They then again, on the 26th, received a further notice, and it is not till the 28th of November, that the report is made. The Bank remained inactive, seeing the whole business progress, and, had its termination been favourable, they would have abided by the event; as they deem it otherwise, they now come to us. It is a rule of moral justice, that no man shall be permitted to speculate on his own delay. It is against all rules of practice, which require due diligence. If a party has a short notice of trial, it is enough to set him on inquiry; and if he does not immediately come forward at the next term, we never set aside the verdict he has permitted to go against him. M' Evers v. Macklan and Gelston, January term, 1800. The bank might have applied in the last term, either to a judge or the court.

The People *against* the Judges of the court of Common Pleas in and for the County of Washington.

Mandamus lies to the court of Common Pleas for not signing a bill of exceptions.

RUSSEL moved for a peremptory mandamus to be directed to the Judges of the Common Pleas, for the county of Washington, ordering them to sign a bill of exceptions.

Per curiam. Take your rule to shew cause the first day of next term. The practice is, not to grant a peremptory mandamus in the first instance.*

Manhattan Company *against* Brower.

If a person in custody, on mesne process, sign a warrant of attorney, the nature of which is explained to him by an attorney, who does not witness it as his attorney, the court will not ut semb. set it aside.

THE defendant in this suit being in custody on mesne process, executed a warrant of attorney to confess judgment for the amount of the debt, but it was not witnessed by any person as his attorney, acting in that capacity for him.

Hoffman, on this ground, moved to have the warrant of attorney delivered up to be cancelled, and to vacate the judgment entered.

Hamilton contra read some affidavits shewing that the defendant at the time of executing the instrument, was perfectly well apprised of its nature, which had been explained

* The Reg. Brev. 181, contains a writ, grounded on the stat. Ed. 1, commanding the judges to put their seals juxta formam statuti. If they make a false return, an action lies against them. See 2 Inst, 427—Show, Pa.Ca.117.

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to him, by an attorney, though not actually *his* attorney, or the attorney of the plaintiffs, and that the whole tranſaction was bona fide, and without ſurpriſe.

The inclination of the court appearing to be againſt the application, the proceedings having been within the ſpirit of the rule relied on; and, it being ſuggeſted at the bar, that it was doubtful, whether the Engliſh rules of E. 15. Car. 2. and E. 4. G. 2, had ever been made a rule of this court, though the practice was acknowledged to have been in conformity to its regulation,

Hoffman conſented to withdraw his motion, and let the judgment ſtand as a ſecurity for the debt, the plaintiffs delivering a declaration, and agreeing to go to trial on the merits.*

Stephen Ross and others *againſt* Nehemiah Hubble and Jemima, his wife, adminiſtratrix of Ichabod Paterſon.

Where it is neceſſary only to indorſe an appearance on the writ, bail not being required, it is the duty of the clerk of the court to enter the appearaance of record. If judgment be ſigned before it is ſo entered, it is good, and the court will order the appearance to be entered nunc pro tunc.

THIS was a motion to ſet aſide the default entered in the cauſe, and all ſubſequent proceedings with coſts.

The affidavits contained a variety of unimportant facts, but the only queſtion, worth noticing, which was relied on, was one of practice, whether it was regular to a writ, which was in treſpaſs only, and returned with the names of the defendants indorſed, to enter their appearance in the clerk's office, after judgment was ſigned.

It was contended that, as the court would order it to be done on application, it was, in fact, doing no more than that, which the court would ſanction.

Per curiam. It is ſaid that no appearance of the defendants, by ſpecial or common bail, or an entry of appearance was of record, when the default and judgment were returned. As the proceſs in the cauſe did not require bail, the defendants indorſed their appearance on the capias. It was the buſineſs of the clerk, and not of the attorney, to have

* In Hutſon v. Hutſon 7 D. & E. 8, court of King's Bench, held that the benefit of the Engliſh rules referred to, could not be waved by a priſoner and that the preſence of the plaintiff's attorney was inſufficient, tho' [illegible] for the priſoner at his requeſt, and entreaty, and though preſſed to ſign another attorney, to witneſs the inſtrument, with the nature of which the defendant was perfectly acquainted,

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red their appearance. This may be done nunc pro tunc. laches of the clerk ought never to prejudice the attor- We, therefore, deny the motion with costs of oppo-

ıry Waterbury and another *against* John Delafield.

Where a suit has been consolida- d, and a commission ſued out in the consolidated cauſe, in which the defendant has joined, the court will allow the evidence taken under it, to be read in the trial of the principal suit.

HIS was the principal suit in several actions on a policy of ance, in which a consolidation rule had been granted. ommiſſion to examine had been taken out, titled in a olidated cauſe; in the commiſſion, the defendant join- ıd titled his croſs interrogatories in the ſame manner. ffman moved to read, in the principal cauſe, the evidence ı under commiſſion, titled in that which had been olidated. The court, after ſome words by Pendleton in ſition, granted the motion, with coſts to abide the e- of the ſuit.

he matter of Paul Richard Randall, an absent debtor.

If the truſtees of an absent debtor's eſtate admit there will be a ſurplus after payment of all demands, the court will, on petition, order a part to be paid to the debtor, or his agent.

HE attornies of the debtor, who was ſtill abroad, ap- l to have the ſum of five thouſand five hundred dollars to them by the truſtees of the creditors, on a petition ıg, that after payment of all demands then eſtabliſhed, keeping in hand a ſufficient ſum to anſwer any which ıt appear, there would remain, of the money, now in Manhattan bank, to the credit of the debtor's eſtate, a large ſurplus.

heſe facts being admitted by the truſtees, the court was ed to grant the prayer of the petition.

'id Gordon, survivor of John Munro and David Gordon, *against* Walter Bowne.

Where a plaintiff has neglected to file a capias and enter an appearance for two terms, though there be an affidavit ſwearing to an agreement that all the proceedings ſhould be conſidered as of a third term antecedent, the

HIS was an application for leave to file the capias, and : the defendant's appearance nunc pro tunc as of the Auguſt term.

he facts as they appeared on the ſeveral and long affi- s read, were, that the plaintiffs were the aſſured on a y of inſurance, underwritten by the defendant; that, ; in embarraſſed circumſtances, and unable to meet

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court will not give leave to file the capias and enter the appearance nunc pro tunc as of the third term past, especially if it appear that it be asked with a view to prevent a set off, of a not falling due since the third, and before the second term, but will order the capias &c. to be as of the second term past. Indorsing an appearance on a writ of a term past, is not evidence of an agreement, that the proceedings shall be considered as of that term.

their payments, they entered into a composition with their creditors, of whom the defendant was one, to pay them, on receiving a release from all demands, fifteen shillings in the pound; ten shillings to be paid by approved indorsed notes, and the remaining five shillings, by their own; the indorsers to receive an assignment of a part of the property of the of the plaintiff and his partner, by way of security against their indorsements; that in pursuance of this agreement, the defendant received his two notes of ten shillings and five shillings in the pound, executed a release, and the policy in question was assigned to persons for whose benefit the present action was brought; that the note for ten shillings in the pound was duly paid by the assignees of the policy. The attorney for the plaintiff called on the defendant, a few days before August term, to inform him of the intended suit, when the defendant assured the attorney, that the matter would be accommodated, and, if not, that he would consent to proceedings being as of August term; that a capias was afterwards sued out on the second of August last, returnable the sixth, but not served till after August term, at which time the defendant indorsed his appearance, and as the plaintiff's attorney verily believed with intent, that all proceedings should be deemed as of August term; that the declaration was titled as of August term, though the capias has not been yet filed; that since August, the plaintiff has become a bankrupt, and that the defendant had pleaded, giving a notice of setting off a note which fell due on the 8th of September last, and was the very note for five shillings in the pound given by the plaintiff and his partner, in composition for their debts.

Hoffman insisted, that the indorsement of the writ by the defendant, was tantamount to a written agreement, as it was evidence in writing of the agreement, which was further corroborated by the pleadings.

Curia advisare vult.

Spencer J. delivered the judgment of the court. The defendant resists the application, relying principally on this: that he holds to nearly the amount of the plaintiff's demand, a note against him due on the 8th of September;

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aft, which he intends to ſet off. The object of the plaintiff's motion, is, if poſſible, to exclude this effect; on this ground, hat his demand is aſſigned for the benefit of certain perons who have paid debts for him, incurred by indorſeents to his compounding creditors. The defendant denies otice of ſuch aſſignment; both parties admit the inſolvency f the plaintiff. The verbal agreement between the attorney or the plaintiff and the defendant, cannot be attended to; rule of this court forbids ſuch agreement being alleged.

There has been laches on the part of the plaintiff, in not ntering his ſuit as of Auguſt term, and to avoid that laches, he court is now applied to. In granting favors of this kind, he court ought to be careful not to do injuſtice, and it apears to them, that granting the rule as applied for, might ave that effect; for, moſt certainly, the defendant's claim offset, is better founded, than that of the aſſignees to reover. Let a rule be entered, that the plaintiff have leave to le his writ, and enter the defendant's appearance, as of the aſt term.

Thompſon J. I am ſorry to be under a neceſſity of difering from the court; but I think the indorſement of appearance is evidence of an agreement as ſtrong as if it had een reduced to writing, and ſufficiently indicatory of the ntent of the parties, to avoid any of the conſequences aainſt which the rule in queſtion was framed. How far the lefendant may, by filing the capias, and entering an appearnce of Auguſt term, be precluded from a ſet-off, or by the reſent rule entitled to it, is unneceſſary to determine. My pinion is, that the plaintiff ought to have the effect of his notion.

Kent J. I concur in the opinion laſt given. I deem it a oint of moral rectitude to enforce all agreements, when he evidence is ſuch, as is not contravened by any rule of w. But as the judgment of the court is, to deny the full ntent of the plaintiff's application, he can take no more an has already been pronounced.

Masters *versus* Edwards.

If a defendant be diſcharged

THE defendant had been ſurrendered in exoneration of

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his bail, final judgment obtained againſt him, and after three months, he was, on regular notice to the plaintiff, ſuperſeded, for want of being charged in execution in due time. Notwithſtanding this, the plaintiff's attorney ſued out an execution againſt the body of the defendant, upon the judgment on which he had been in cuſtody, and took him upon the ca. ſa. thus iſſued.

for want of being duly charged in execution, he can never be taken, on a ca. ſa. iſſued on the judgment in the ſuit on which he was in cuſtody.

Henry, on theſe facts, diſcloſed by affidavit, moved, that he ſhould be diſcharged. This caſe is to be diſtinguiſhed from that of Brantingham: in that, the court held the plaintiff entitled after notice of a rule for a ſuperſedeas, to come in, charge in execution, and ſhew that circumſtance as a cauſe for refuſing the application. Blandford v. Foote Cowp. 72. recognizes the principle of the application. The court there decided, that a man releaſed for want of being charged in execution, might be taken on a ca. ſa. in an action founded on the judgment, in the original ſuit. It is to be inferred, therefore, that on an execution ſued out in the original ſuit, he could not be taken.

Benſon and Riggs contra. The Engliſh courts proceed on this maxim: "once ſuperſedeable, and ever ſuperſedeable." This we have departed from, and overruled in Brantingham's caſe. Beſides, the whole object of the motion is, to prevent us from doing that directly, which they allow we can accompliſh circuitouſly; for they ſay, we muſt proceed by action on the judgment, and have execution in the ſecond ſuit. This is contrary to the ſettled principle, that circuity, and multiplicity of actions are abhorred in the law.

Henry in reply. The doctrine contended for by the plaintiff, would go to ſhut out, from a defendant, any right of ſetoff. Suppoſe a man diſcharged; in the courſe of fair dealing, he, by ſervices, or other means, pays a part of the debt; if he is to be taken, on the original judgment, he is excluded from ſhewing, perhaps a full ſatisfaction, till he applies to the court for relief, and during that period is deprived of his liberty.

Per curiam. In Brantingham's caſe we certainly did depart from the Engliſh practice. We there allowed, on a rule to ſhew cauſe, the being charged in execution ſubſe-

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dent to notice of the application, to be ſhewn as a reaſon r denying the ſuperſedeas. The court proceeded there on ie idea, that the ſtatute gave the plaintiff a right of elect- ig to have execution againſt the body, or the goods; and iat he was not obliged to manifeſt this election till called on. The preſent caſe is not of that deſcription; the ſtatute was nly to prevent double executions. The plaintiff has elected o relinquiſh the perſon of his debtor, who, having been nce actually ſuperſeded, muſt continue ſo, and the plain- iff ſhall never have liberty again to reſort to his firſt judg- nent. Let the defendant, therefore, be diſcharged, but with- out coſts.

Coles, Titford and Brooks *against* James Thomson.

Practice as to commiſſions

BOYD moved for judgment, as in caſe of nonſuit, for not going to trial, on an affidavit, that the cauſe was at iſſue in Sept. 1802, noticed for trial in November following, and has not ſince been noticed.

An affidavit contra was read on the part of the plaintiff, ſtating, that on the 9th of laſt March a commiſſion iſſued to London to examine witneſſes on his behalf, which had not been returned, but was daily expected.

Per curiam. In the cauſe of Juhel v. The United Inſurance Company, October term, 1801, we held, that three months was a ſufficient time for executing and returning a commiſſion *arrived* in London. In Miller and Graham v. De Peyſter and Charlton, January term, 1803, it was decided, that where a plaintiff has delayed his own cauſe by a commiſſion, and it does not appear that due diligence has been uſed, the defendant may apply for a rule for nonſuit, and compel the plaintiff to ſtipulate or be nonſuited, as if no commiſſion had iſſued. In the preſent caſe, it does not appear, that the plaintiff has uſed due diligence in cauſing his commiſſion to be executed, as eight months elapſed between iſſuing it out and the ſittings. Unleſs, therefore, he ſtipulate, the motion muſt be granted.

Bowne *against* Richard S. Hallet.

If judgment be ſigned for

JUDGMENT had been ſigned for the whole penalty of

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a very large bond on account of the breach of condition in non-payment of the intereſt. On motion of Boyd for the defendant, the court ordered that execution ſtay, on payment of intereſt and coſts, the judgment, however, to ſtand as a ſecurity for the debt.*

the whole penalty of a bond not due, but forfeited for non-payment of intereſt, execution will be ſtayed on bringing in intereſt & coſts, the judgment ſtanding as ſecurity.

Shuter *against* Richard S. Hallett.

A VERDICT had been obtained, in this cauſe, againſt the defendant, on which a caſe had been made, and a judge's certificate of probable cauſe duly granted.

D. A. Ogden, on an affidavit by the plaintiff ſtating his fear of loſing his debt, from the circumſtances of the defendant, moved to have the amount recovered brought into court.

* See Black. Rep. 706 Marſden v. Toucher S P

Pendleton contra, cited Hallett v. Cotton,† in May term laſt.

After verdict and certificate of probable cauſe granted, the court will not order the amount of the ſum recovered, to be brought into court.

Per curiam. The practice of the court has never been according to the application. It would be often oppreſſive, and amount to a denial of right, as the defendant may not be able to comply with the condition, yet have a complete defence to the ſuit.

† Ante pa. 11

The People *against* Samuel Freer.

Vide ante page 485.

THE defendant being brought into court, Kent J. thus delivered their opinion.

The intent of a publication will not juſtify it, if it be in the opinion of the court, contempt againſt the court.

The defendant is brought before the court, for publiſhing paragraphs in the Ulſter Gazette of Auguſt laſt, containing remarks on the trial of Harry Croſwell. The paper being laid before the court at the laſt Auguſt term, it appeared to be intended to prejudice and influence the public mind againſt the court, before which the trial was held, and to intimidate and influence this court in deciding on the motion pending before it, for a new trial in the cauſe. A rule was accordingly granted, that the defendant ſhew cauſe by the enſuing term, why an attachment ſhould not iſſue againſt him for a contempt.

This proceeding was correct and neceſſary. Publications, ſcandalizing the court, or intending unduly to influence, or overawe their deliberations, are contempts which they are

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horized to puniſh by attachment, and, indeed, it is eſſen- to their dignity of character, their utility and indepen- ce, that they ſhould poſſeſs and exerciſe this authority. e defendant did not ſhew cauſe in perſon, in purſuance of rule, but he appeared by attorney, and in an affidavit diſ- wed any intentional diſreſpect to the court, or any in- t that was contemptuous, and unlawful. He ſtated, that offenſive remarks were produced in the courſe of an edi- al controverſy on the ſubject of Croſwell's trial, with ther newſpaper, entitled the Plebeian. The court ſidered this affidavit as not going in a juſtification, but y in excuſe of the publication; and that, on ſuch occa- ıs, the defendant ought to appear in proper perſon, and wer. Accordingly, the rule for an attachment was made ılute. He is now brought in upon attachment, and ad- s himſelf the publiſher of the remarks in queſtion, and in clears himſelf by oath of all intentional diſreſpect or tempt. We have no reaſon to doubt the truth of the de- ndant's affidavit, which exculpates him from any crimi- deſign, and we have nothing to do under the preſent ceſs, with the ſeditious or libellous nature of the publica- s, any farther, than they relate to a charge of contempt inſt this court. The defendant's excuſe is entitled to its conſideration. On the one hand, we cannot but per- e, that the diſavowal of any bad intent will not do away pernicious tendency or effect of publications* reflecting udicial proceedings which are before us. On the other d, when the cauſes which led to the publication, are ıkly ſtated, and that the diſcuſſion originated in an op- te and rival paper; when we conſider the irritation ch theſe publications muſt have produced, and the un- rded licence with which all queſtions of general con- ı have been uſually treated in our public prints, we think preſent caſe under all its circumſtances, does not require ſerious animadverſions. When a caſe is made out, in ch there appears ſufficient evidence of an intentional tempt, we ſhould deem it our indiſpenſable duty to be a puniſhment which was more ſtrong and exemplary. , we truſt, the notice we take of the preſent caſe, will

* Therefore, a good intent would not be a juſtification at ſemb.

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anſwer all the ends of juſtice, by ſerving, as a ſufficient warning to the defendant and others, not to preſume to uſe language, which muſt be underſtood as reflecting upon, or threatening the court in reſpect to queſtions then under inveſtigation. The judgment of the court, therefore, is, that the defendant pay a fine of 10 dollars, and ſtand committed till it be paid.

Benjamin M. Mumford and Gurdon S. Mumford, *against* Paſchal N. Smith.

If the facts given in evidence manifeſtly ſhew a want of ſeaworthineſs, & a jury find againſt them, the court will ſet aſide the verdict, notwithſtanding the jury, at the time of giving it in, declare they have reſted their deciſion upon the whole matter in evidence.

THIS was an action on a policy of aſſurance on the cargo of the ſloop Mary, conſiſting of flour and corn, valued at 6720 dollars, of which 3220 dollars were underwritten by the defendant, at a premium of 9 per cent. from New-York to Kingſton, in the iſland of Jamaica. The claim was for a total loſs by the perils of the ſea.

On the trial, which was before Mr. Juſtice Radcliff, on the 23d of November, 1803, at the ſittings in New-York, it appeared, from the evidence, that the following were the circumſtances of the caſe:

The Mary was conſtructed in 1795 of oak of the beſt quality, and faithfully built in every particular. When off the ſtocks, ſhe was firſt employed as a packet between New-London and New-York. After this, ſhe made ſeveral voyages to the ſouthward and the Weſt-Indies. In 1798 ſhe was raiſed, not on account of any decay, but to render her more burthenſome. At this time ſhe appeared ſtout and ſtrong. New top timbers were put in. Some of her beams, and other pieces of her timbers were of good cheſnut. Her plank all of white oak, except her decks. In 1800 ſhe was graved and caulked. She then appeared ſound, ſtrong and tight; ſo much ſo, in the opinion of one witneſs, that he offered for her 2000 dollars. She ſailed on the voyage inſured, but was leaky from the time of leaving Sandy-Hook. On the 11th of Auguſt, 1800, ſhe met with heavy gales and ſevere weather, in conſequence of which ſhe ſuffered much injury and was rendered very leaky, making ſo much water that it was with difficulty ſhe could be kept free. This compelled her to bear

way to the neareſt port to refit, and on the 15th of the ſame month ſhe put into Hamilton, in the iſland of Bermuda. After unloading the cargo a ſurvey was had upon her. She was bored by the ſurveyors in ſeveral places, and adjudged ſea-worthy; they even declared they had ſcarcely ever examined a tighter or ſtauncher veſſel. Upon a report being made to this effect, her repairs were commenced. In the courſe of their proſecution, one of the caulkers ſtruck his iron into a plank on the ſtarboard quarter and found it ſo rotten as to be unable to hold oakum. This induced a further examination round that ſpot, when four or five other timbers were diſcovered to be conſiderably decayed. Two others alſo, on the larboard quarter, appeared ſomewhat unſound. But thoſe amid-ſhips, on both ſides, were perfectly good. On this the captain procured a ſecond ſurvey to be held, when the ſame ſurveyors, after inveſtigating her quarters, immediately pronounced her unfit for ſea, obſerving that her ſtarboard quarter alone was ſufficient to condemn her. No other parts, except her quarters, were examined; and, according to the mate's teſtimony, (on which, as to the ſituation of the veſſel in Bermuda, the preceding facts were diſcloſed) ſhe might have been refitted without much expenſe. He added, that he would have been willing, after very little repairs, to have ſailed in her to any part of the world. In ſails, &c. ſhe was well found.

The ſurvey itſelf, dated the 2d of September, 1800, ſtated, that a plank being taken off on both ſides of the Sloop's waiſt, not one top-timber was found; on the contrary, they were generally rotten. That ſhe could not have been made fit for ſea, without renewing the whole of her ſides, above the wales. That this would have been attended with a very heavy expenſe, and perhaps as much as ſhe would ſell for, when done. But that, however, the other parts of her hull appeared ſound. Nor was there any fault in her maſts or ſpars; yet her ſails and rigging were indifferent, having been much worn.

The ſurveyors, who were admitted to be men of character, when examined under a commiſſion iſſued for that purpoſe,

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confirmed the facts contained in the report, and they were further corroborated by the agent of the veſſel.

It was acknowledged, that the Mary, previous to her ſailing, had, in March, 1800, been hove down to get at her keel, but her upper-works were not then examined, nor were her timbers bored. At that time one witneſs had offered 2000 dollars for her, conſidering her ſtaunch and tight. After the ſurvey ſhe ſold for only 34 pounds 10 ſhillings, and was purchaſed by one of the ſurveyors, who, however, never put her into ſervice, but broke her up as not worth repairing.

It appeared that in 1800 there was but little intercourſe between Bermuda and Kingſton. During the ſummer of that year, no neutral veſſel could have been procured to go from thence to Jamaica. Britiſh bottoms might have been had at an enormous freight, and inſurance was alſo immenſely high. Workmen too were with difficulty to be obtained.

It was admitted the cargo did not ſuſtain a damage amounting to an average, the injury being leſs than five per cent.

On the trial the counſel for the defendant inſiſted the plaintiff was not entitled to recover for theſe reaſons:

1ſt. That the veſſel was not ſea-worthy.

2d. That if ſea-worthy and reparable at leſs than half her value, ſhe ought to have been repaired, and proſecuted her voyage.

3d. That if irreparable, another veſſel ſhould have been procured, and the cargo taken to the port of deſtination.

4th. That the damage was leſs than an average.

The judge charged, that if the witneſſes examined at Bermuda, and the witneſſes examined on the part of the defendant in New-York, were to be believed, (and their characters were admitted to be reſpectable) the verdict ſhould be for the plaintiffs for the premium only, on account of the unſeaworthineſs of the veſſel. That if the damage ſuſtained by the veſſel, during the voyage, was reparable at leſs than half her value, the maſter ſhould have repaired her, and proceeded to Kingſton with the cargo, and on this ground the verdict ſhould be for the defendant, there being no average.

That, upon the firſt point, the weight of evidence was

with the defendant, if the teſtimony taken under the commiſſion and here on his part, was to be credited. That on the ſecond point, he was ſtrongly inclined to think the evidence in favour of the defendant.

Upon this the jury found a verdict for the plaintiffs for a total loſs, and gave the following reaſons:

1ſt. That they conſidered the veſſel ſea-worthy.

2d. That it would have coſt more than half the value of the veſſel to have repaired her at Bermuda, taking into view her whole condition; but as to the quantum of injury ſuſtained by the perils of the ſea ſeparately, they gave no opinion, reſting their verdict upon the whole matter.

Theſe explanations making by agreement a part of the caſe, a motion was made to ſet aſide the verdict, as contrary to evidence.

The ſame points, made by the defendant at the time of trial, were now again inſiſted on, but as the deciſion of the court went totally on the weight of evidence as to ſea-worthineſs, it is unneceſſary to do more than ſtate the deciſion itſelf, which was delivered by

Livingſton, J. It is conceded that the right to recover, cannot exiſt, unleſs the veſſel at the time of ſailing on the voyage inſured, was ſeaworthy; that her not being ſo, will affect as well an innocent ſhipper of goods, as the owner of the veſſel. This is certainly ſo, and however hard the law may bear on perſons of this deſcription, the underwriter is entitled to the full benefit of it, and ought not to be held to payment when this implied warranty has been violated. Whether ſuch has been the caſe is principally a queſtion of fact, and we would not willingly diſturb a verdict given againſt an aſſurer of goods on a defence of this kind, where there had been a contrariety of teſtimony, or where the proofs were nearly in equilibrio; perhaps not unleſs their deciſion was moſt manifeſtly againſt the whole of the evidence; ſuch we think is the caſe here. No one who reads the teſtimony can heſitate in ſaying that the breaking up of his voyage was not occaſioned by any one of the perils inſured againſt. The Mary muſt then either not have been ſeaworthy when ſhe left New-York, or ſo far decayed as to re-

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quire repairs at an intermediate ſtage of the voyage, which it was either impracticable to give her, or which would have coſt more than ſhe would, when repaired, have ſold for. In either caſe the defendants are not liable. The mate does not ſtate particularly what injury ſhe received from the gales ſhe encountered, except that of making more water, for ſhe leaked when ſhe left the hook; this induced the maſter to bear away. On her arrival at Burmuda, ſhe is thoroughly examined and found to be in a most decayed ſtate. This rottenneſs in her timbers, it is certain could not have taken place in ſo ſhort a voyage, but muſt have exiſted when ſhe left New-York. If we give no credit to ſurveys of this kind, which beſides being ex parte, are too eaſily, and ſometimes fraudulently procured, we *muſt* believe the ſurveyors when examined under our own commiſſion. They bear the character of reſpectable men, and the abandoned ſtate of the veſſel after her condemnation and purchaſe, is a great proof that they acted with integrity and good faith. Nothing to the contrary ſhould be inferred from one of them becoming a purchaſer. This he could not foreſee would be the caſe in a ſale at auction, and at any rate it does not appear that he made much by the bargain. The agent is alſo a ſtrong witneſs on the ſame ſide. To all this, nothing is oppoſed but an opinion of the mate, that ſhe might have been repaired, and proof that the Mary was well built, and once a ſtrong veſſel. A carpenter repaired her previous to her ſailing on her laſt voyage, but did not examine her upper works, or bore her timbers. Now all this may be true, and yet it does not, in any degree, derogate from the credit due to the witneſſes who laſt examined her; who were in a ſituation to form a correct opinion, and who purſued the beſt and only means of coming at an accurate concluſion. It muſt always be difficult to determine, with certainty, what portion of the injury is occaſioned by latent defects, and what by perils of the ſea; but here it is ſufficient to ſay, that the injuries which required repairing at Bermuda and produced a termination of the voyage there, could not have ariſen from any accident inſured againſt, becauſe it is expreſsly ſtated, by the witneſſes, that theſe repairs were rendered neceſſary by the imperfect

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the timbers; not by her leaky condition, which was effect of the weather ſhe met with. If no further ad been diſcovered but a leak, this could have been and the veſſel would ſoon have purſued her route. inion is, that this is a verdict palpably againſt evi- rhich eſtabliſhed, beyond doubt, the innavigability of el, and that a new trial muſt, therefore, be had, on nent of coſts by the defendant. It is, of courſe, un- y to decide the other point made in this cauſe.

n Brown and Anson Kimberly *againſt* Villiam Neilson and George Bunker.

s was an action, brought after March, 1802, on a f inſurance for four calendar months, commencing n day of November, 1800, and expiring the 28th of 1801, upon the body of the ſchonner Almira. declaration averred the loſs to be, by perils of the ſea, s to the termination of the limited period. veſſel ſailed from Norfolk in Virginia, on the fourth ch, 1801, bound to New-York, and to prove the hin the time, the plaintiffs offered evidence to ſhew, violent ſtorm had taken place the day after her de- , in which, they contended, ſhe had periſhed. To counſel for the defendant objected; but, on its being ed, the plaintiff ſubſtantiated the fact, and by the itneſſes it appeared, that veſſels who ſailed with the , arrived in about ten or twelve days, though, that rſelf could hardly, with a head wind, have arrived

In judging whether a veſſel has been loſt in a voyage inſured, the uſual, and not the utmoſt length of ſuch a voyage, is the period on which the jury is to proceed. If two ſtorms are given in evidence on a policy for time, the one within and the other without the period, it is for the jury to ſay in which the loſs has happened. An inſurance made on freight and cargo after a previous knowledge of a ſtorm, does not conclude a jury from finding that the veſſel was loſt in ſuch prior ſtorm.

uſual paſſage from Norfolk to New-York, was eſ- d to be from five to ſix or ſeven days; one witneſs, r of a veſſel, ſwore, he never knew of an inſtance 14 days; from the teſtimony of two other perſons it ed, that there had been one inſtance of a ſafe arrival ing 40 days out, and another after 60. On the de- t's part, the exiſtence of a ſevere tempeſt, all along w-York coaſt, on the 29th of March, the day after nination of the policy, was proved. They offered alſo, ce, that the aſſured, when fully appriſed of the firſt

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ſtorm, effected, on the 14th of March, a policy on the cargo at 3 per cent. and another on the 18th, upon the freight at 18 per cent. This, however, the court refuſed to admit.

Upon theſe facts, the judge charged, that there was not any time fixed by law after which a miſſing veſſel ſhall be preſumed to be loſt; that if the jury thought the veſſel was probably loſt within the time limited by the policy, they ought, in his opinion, to find for the plaintiffs; that he thought the rule ought to be, if a veſſel did not arrive within the moſt uſual limits of the voyage ſhe was profecuting, ſhe ought to be preſumed to be loſt, and that *it would* not be reaſonable to calculate on the utmoſt, or greateſt *limit* of it; that they ought to decide, according to their judgment of the greater probability of her being loſt in the firſt ſtorm, or in the laſt.

On this the jury found for the plaintiffs, and ſaid, they had calculated intereſt from the 5th of March.

A certificate of probable cauſe for a ſtay of proceedings, having been obtained by the defendants, a caſe was made on his part, in which the following points were raiſed:

1ſt. That the judge was miſtaken in ſtating the rule of law, as to the preſumption of loſs from miſſing veſſels.

2d. That the facts proved, were not ſufficient to enable the jury to find the loſs to have been within the time for which the Almira was inſured.

3d. That the inſurances made by the plaintiffs on the freight and cargo of the ſame veſſel, *after* they were appriſed of thoſe facts, ſhew, they did not themſelves conſider them as ſufficient to warrant the preſumption of loſs from the ſtorm on the fifth of March, and the evidence of it, ought to have been admitted for that purpoſe.

On the caſe being opened, the court thought there was no ground for ſtaying proceedings, and ordered judgment for the plaintiff according to the verdict.

George Codwiſe junior, Peter Ludlow and James Codwiſe, *againſt* John Hacker.

If a maſter of a ſhip, be guilty of a breach of

THIS was an action on the caſe for diſobedience of or-

ders.

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e plaintiffs were owners of a ſhip called the Young , of which they had given the command to the defend- n a voyage from New-York to Martinique, from thence w Orleans, and in caſe no freight ſhould offer at the place for New-York, then to proceed to the Havanna, om that port, home. In Martinique, the defendant was ſſed to Meſsrs. Ranci and Co. with injunctions to con- im in what manner to beſt promote the intereſt of the e, and to let their opinions have due weight. The let- inſtructions, in addition to this, contained the follow- aſſages. " It is our deſire that you ſtrictly adhere to following inſtructions, which are to be conſidered as ling on you, and not to be deviated from. From Mar- que you are to proceed with all poſſible diſpatch to w Orleans, and there value yourſelf on Mr. James Car- , to whom the ſhip is addreſſed there, and to whom have letters, and then uſe your intereſt and addreſs to cure a full freight home to New-York. Should there ortunately be many veſſels there, loading for New- k, you muſt then try whether, offering to take freight nore reaſonable and lower terms than the other veſſels, ıld not be the means of procuring you a full freight reference to them. If ſo, it is our orders that you take ght at under rate, in preference to returning home in aſt. Although the ſhip is conſigned at New-Orleans, are nevertheleſs to adviſe in all matters relative to our reſt, with the conſignee. You muſt pay particular at- ion to ſee whether our conſignee attends to our inter- in his exertions to get the ſhip a freight, and if not, will of courſe ſee the neceſſity of your redoubling your rtions to procure freight, and not to place your depend- e on the conſignee, you will therefore pay ſtrict atten- ı to the foregoing requeſt, as our chief dependence is ed on your exertions. Further, as a laſt reſort, in caſe can procure no freight for the United States, you may ı take freight for the Havanna, and from thence to w-York, provided you have one that offers, that will wer. You will conſult in the Havanna, with Santa ria Cueſta and Co. Finally, if after obtaining the beſt

orders, by purſuing voyages contrary to his inſtructions, and invest the proceeds of his freight, in articles swhich his owners take to, this, if accompanied with a declaration that they find no fault with him, but for not writing, will be a walver of any right to ſue for damages, on account of diſobedience.

The acts of a principal, are to be liberally conſtrued in favor of an adoption of the acts of an agent.

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"information, whether freight can be procured or not, and "giving the ship a fair chance, by waiting two or three "weeks, if none offers, you'll then return back to this port, "with all possible dispatch. It is our orders that you take "freight at under rate, in preference to returning home in "ballast, or if a full freight was to offer for Philadelphia, "or Boston, or any port in the United States, you might "take it."

The vessel sailed from New-York, arrived at Martinique, and departing from thence, reached New-Orleans safely on the 2d of October, 1799. Whether any freight then offered for New-York, was not shewn. But the defendant procured one for the Havanna, to the amount of 5225 dollars, with which he sailed, in 30 days, after his arrival. On the passage, and within six hours sail of his port, the defendant wrote by a brig he met, a letter to the plaintiffs, saying, that if he could get permission, he should go from the Havanna to Campeachy. Having safely reached the Havanna, the defendant received payment of his freight, partly in cash, and partly in a bill on R. Rolf of New-Orleans. With the cash he purchased sugar, which he shipped to his owners in a vessel, named the Ohio, and having delivered his cargo, weighed anchor on the 29th of December, 1799, for New-Orleans, where he arrived after a tempestuous voyage of 40 days. He there received on the 8th, or 9th of February, 1800, a letter from his owners, dated 2d of January 1800, ordering him, by no means to go to any Spanish port, but rather to return in ballast to New-York. In a subsequent one, directed to the Havanna, dated the 29th January 1800, and written on the very day of recieving an account current from Santa Maria Cuesta and Co. charging them with 50 boxes of sugar, paid on account of the freight of 5225 dollars, the plaintiffs blame the defendant, for not writing by every opportunity; and request him, immediately to return, to any port in the United States, alleging as a reason, that the rate of insurance, on vessels trading from one Spanish port to another, was so high as to run away with every thing made: at the conclusion however, of the letter, the plaintiffs add, "all the fault we find, "and which is a great one, is, your omission and neglect of "writing us, by every opportunity, and conclude with wish-

ing you ſpeedy back." From New-Orleans, the defendant note, acknowledging the receipt of the plaintiffs poſitive rections to return, but ſtating at the ſame time, the impoſ- ility of his immediate compliance, as he had with the pro- eds of the bill on Rolf, purchaſed on account of the plain- ffs, a cargo of ſugar boxes, with which it was his intention go to the Havanna, and inveſt the proceeds in a cargo for ew-York. In conſequence of this, the defendant ſailed om New-Orleans to the Havanna, where after a paſſage of days, he arrived on the 7th of April, 1800, ſold his boxes, ought with the amount of the ſales, a cargo of Molaſſes, ipped them on board his own veſſel, ſet ſail for New-York, nd reached the quarantine ground in the month of June, 800.

The plaintiffs here took poſſeſſion of the veſſel and her argo, which they ſold on their own account.

It was admitted that the plaintiffs had inſured the molaſ- es as their own property, and had alſo effected policies on he veſſel on her ſeveral voyages. The defendant gave in evi- ence, that on his firſt arrival at the Havanna, in December, 799, the veſſel was defective in her ſpars, and the witneſs who teſtified to this, depoſed, that he would rather not ave come to the United States, than have embarked in her n December. He further added, there was then no convoy or the United States from the Havanna.

It appeared, however, on the caſe, that in the 40 days paſ- age from the Havanna to New-Orleans, the ſhip, notwith- ſtanding the bad weather encountered, never complained in body or rigging.

The general veracity alſo, of the defendant's witneſs was mpeached. From the log-book it appeared, that no mention was made of any failure in the maſts or rigging; that, in he laſt voyage, much tempeſtuous weather was experienced off Sandy-Hook, in which water mixed with molaſſes was pumped up, and ſometimes more molaſſes than water. Some ooſe declarations of the plaintiffs, made to particular friends of the defendant, were given in evidence, tending to ſhew hat the defendant had acted according to the beſt of his nowledge, and that he was an honeſt man; confeſſing alſo

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that he had taken the bill on Rolf to purchaſe a cargo on their account; and that, though they were diſſatisfied with his not writing, they never ſaid any thing about his diſobedience of orders. The defendant, in addition to this, offered to prove that he had, in every part of his conduct, adviſed with the correſpondents of the plaintiffs and followed that courſe they ſanctioned.

The counſel for the defendant contended, at the trial,

1ſt. That the words in the letter of inſtructions, "as a laſt "reſort, in caſe you can procure no freight for the United "States, you may then take freight for the Havanna, and "from thence to New-York, *provided you have one that "offers that will anſwer*," left the defendant to exerciſe his diſcretion in the employment of the ſhip, in caſe no freight ſhould offer for the United States.

2d. That the plaintiffs declaring themſelves ſatisfied with the manner of employing the ſhip, and declaring, *in writing*, that the only fault they found with him was, *his not* writing oftener, was either a waiver of any claim for deviation, or was evidence of the defendant's having diſcretionary power of employing the veſſel, in caſe no freight offered at the Havanna.

3d. That the ſeaſon of the year, ſtate of the ſhip, the want of freight, convoy and advice of agents, formed a juſtification.

4th. That the inſuring by the plaintiffs the veſſel and cargo from Havanna to New-York, and accepting them on their arrival here, and exerciſing every act of ownerſhip over them, was an adoption of the conduct of the defendant, and a complete bar to a recovery in this ſuit.

His Honor, Mr. Juſtice Radcliff, before whom the cauſe was tried, having over-ruled all theſe points, charged in favor of the plaintiffs, and the jury found accordingly.

On theſe circumſtances, and on the four antecedent reaſons, it was moved to ſet aſide the verdict and grant a new trial.

Hamilton for the defendant. It will be contended that the facts, as they appear on the caſe, evince an abſolute breach of orders. But we rely that, even allowing they were broken

in various particulars, there has been an adoption of all the acts. If ſo, then they will be conſidered as done on account of the plaintiffs, and the defendant ſtands excuſed from anſwering in damages. This is evident, becauſe in their letter to him, after full information of all that had paſſed, they not only do not diſavow a ſingle tranſaction, but go ſo far as to adopt them, by ſaying the *only* fault they find with him is, that he did not write. This certainly is exactly the ſame as ſaying, we are perfectly ſatisfied with your conduct. In converſations with individuals the ſame ideas were, after a full knowledge of all circumſtances, in more then one inſtance reiterated. The expreſſions of diſcontent, which the letters of the plaintiffs contain, are all referable to tranſactions previous to the laſt letter, and were written before the account of the ſhipment of ſugar by the Ohio had arrived. This was received by them, and ſold on their own account. Was there no other circumſtance to ſhew the plaintiffs' adoption of the defendant's acts, this would ſuffice; but others are preſented, from which they cannot eſcape. Knowing all that had happened, they inſure the laſt cargo, that of molaſſes, on their own account, receive it from capt. Hacker when he arrives, and ſell it on their own account without ever communicating with him in the leaſt. Every one of theſe acts are, after a full knowledge of the molaſſes having been purchaſed and ſhipped, on their account. In commercial affairs between agent and principal, for ſuch the parties here really are, the ſlighteſt aſſent of the principal ſhould be conſtrued as an adoption of his agent's acts, becauſe it is neceſſary, from their ſituation abroad, that they ſhould occaſionally act in a latitudinary manner. If, what is thus tranſacted be bona fide, the moſt trivial circumſtance ſhould be ſeized by this court, to ſay it is a ratification of all that has taken place. The court will ſee that this rule ought to be ſtrictly enforced againſt the principal. Its being ſo will not, in the leaſt infringe on the rule of law which makes the agent reſponſible. If the principal deſires to enforce it, he is at perfect liberty ſo to do; but if he does not take his poſition on the rigid letter of legal doctrine, any equivocal act ought to be deemed an aſſent. It is his duty to diſavow by ſome open act. In

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other countries this is invariably the caſe; the principal by ſome judicial proceſs, before a notary, proteſts againſt his agent, and this is a ſufficient proof of the diſpoſition with which any ſubſequent act is done. Though our juriſprudence does not know any tribunal to have recourſe to for this, yet ſome method ought to be purſued to ſhew the quo animo of the principal in taking goods if he does not mean to be bound. He ſhould not lay by and wait events; if the reſult be favorable abide by them, if unfavorable refuſe; this would be mala fides. But let that be how it will, the reception of the cargo by the Ohio, the inſurance, and ſales by the plaintiffs, are concluſive againſt them. Little ſtreſs can be laid on the circumſtance of that cargo being the amount of their own proceeds, becauſe, if ſo, it legalizes the voyage. The court will not permit any one, when an agent has acted contrary to orders, to inſure the ſubject matter as his own, and call on the underwriters to pay when he had an intention to conſider it the property of another. For it would be a fraud on the underwriters. The ſtate of the cargo ought to be declared, or the inſurance made for whomſoever it may concern; for no man can in his contracts have various intents, on the ſame ſubject. It is no anſwer that the principal might, for caution, ſecure himſelf; ſo he may, by taking the property into poſſeſſion, but he ought not to ſell, for then the act of ſale is deciſive, if made as his own; eſpecially when the agent is on the very ſpot, for he might then, on a diſavowal of his acts, have paid them their money and taken to his goods. Either then the plaintiffs converted the property, or received it on their own account, and thus ratified the principles of the voyage. The court will not allow them to ſay they converted, becauſe no man ſhall be permitted to ſay he is a wrong doer, when his conduct will bear an innocent conſtruction. For the general principles which govern in caſes of adopting the acts of another, the court will find all that has been advanced fully confirmed in Smith v. Cologan,* 1 D. & E. 188, (a). Againſt this we are aware Cont.

* This was an action by a principal againſt his agent for breach of orders in making inſurance; one of the plaintiffs, whilſt the execution of the orders was depending, had the ſtate of affairs ſubmitted to him, and approved of all

rall v. Wilson, 1 Vez. Sen. 509,† may be cited; in that ase, however, when the goods arrived they were disavowed; nd it was from the subsequent acts that even the disavowal as controuled by acts like these, for there the goods were sured and sold by the principal. Instead of the disavowal here, in express terms, we here find the plaintiffs acnowledging themselves contented with the defendant's eneral conduct, and dissatisfied only with his not writing.

Hopkins and Harison contra. The present is a simple tion by a ship owner against his captain for disobedience f orders. It is not a case between a merchant and his facr: but of a master against a servant employed to do special act, and no more. Here the defendant was enaged for a particular voyage, which the plaintiff calculated ould expire at a certain time, at which period, he counted n being able to employ his vessel in another service. The ase states the connexion between the parties, and it is unnecessary to read it. But the facts shew an original intention o deviate from instructions; for, when off the Havanna, nd going into that port in obedience to his orders, he writes letter to the plaintiff saying, he should go to Campeachy. After this, any expressions from them, evincing no *thorough* disapprobation, can be deemed no more than a matter of prudence to get back their vessel. Her various voyages, the facts in evidence prove, were not from a disability in her rigging to encounter this coast. The defendant was clearly a servant acting under orders; to enable, however, the plaintiffs to have recourse against him for a breach of these orders, it is said they must abandon the property about which he was ordered to act. This is really new law. For surely it is not a principle, that where an owner of property sues his agent for misfeazance respecting that property, he must abandon the property or its proceeds to entitle him to his action. Or if a bailor misuse goods bailed, must the bailor relinquish the goods before he can institute a suit? or should he take them back, is his right of action gone? We conceive, unless the law is widely mistaken, that he may take back his property, and

† In that case the principal insured, but the act of insuring to the port of original destination was explicitly held not to be an adoption. Nor was it between master and owner. It was an order to a factor to buy goods on account of the defendant who, when they arrive, re-shipped them to be sold at another port. They were disavowed on account of the price at which purchased, being greater by 25 pounds than that limitted, and the factor saved 50 pounds on the freight. See the case.

that had been done. This approbation, with full knowledge, was held an adoption of the agent's acts, and that the plaintiffs had to look to the underwriters.

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then have recourſe to his action for damages, without truſting to the perſonal reſponſibility of the defendant for every kind of recompence. Suppoſe a ſhip and cargo to the Eaſt-Indies, conſigned to the captain, who groſsly diſobeys, on his return is the veſſel and proceeds to be given up, if compenſation for damage is ſought? This would make it an affair of calculation, in which the loſs muſt be balanced againſt the means of the defendant. The plaintiffs ſeem to confound original property, owned by a principal, and entruſted to order, with orders given to acquire property by their execution: they want to ſet up the taking back a man's own from his ſervant, as the adoption of the acts of a factor in purchaſing goods. It is ſaid, however, that the court ought to lean in ſupport of acts of adoption in favor of the agent, and againſt the principal, if the conduct be bona fide. However that may be, is indifferent to the preſent queſtion, which is ſimply aſſumpſit, charging no fraud, but a mere breach of duty in not performing the orders he undertook to obey. For doing which, he ſhews no kind of excuſe, and as every miſfeazance is, in preſumption of law, mala fide, ſome juſtification ought to appear. No argument of approbation can be drawn from a few concluding words in one of the letters. The whole tenor of the correſpondence on the part of the plaintiffs, ſhews diſſatisfaction, and not only repeated complaints of his diſobedience, but continued injunctions to obey the orders given him. When it is conſidered that the defendant was abroad with the property of the plaintiffs, and *that* property ſo eaſily moved from place to place, the court will ſee the neceſſity and caution that the plaintiffs were obliged to uſe in concealing their intention from a man who was violating every direction he received. This will eaſily account for all thoſe expreſſions, either in writing, or converſing, which ſeem to imply no blame. The inſurance was rightly made, becauſe the plaintiffs did no more than inſure their own, and of courſe, taking back their own, cannot waive any cauſe of action which they had for diſobedience of orders. On this very point, the court will ſee the caſe from Veſey directly in favor of the plaintiffs, and that every inſurance is for the benefit

ſet of all whom it may concern, the face of every policy ſhews. In the citation from Durnford and Eaſt, there was an expreſs approbation; ſo that, taking the preſent caſe every way, it makes againſt the defendant. This is an action for breach of orders. Thoſe orders, the caſe ſtates explicitly, nor do they admit of any deviation. Even the advice of the correſpondents of the plaintiffs can be no excuſe, for they were to be conſulted only, on the manner of carrying the orders into effect, not whether they were to be totally laid aſide; for, with reſpect to one, the defendant was abſolutely put on his guard, and cautioned. But the formality of their ſanction cannot be pretended, for the letter of the defendant written off the Havanna, declares an avowed plan of diſobedience. Of this, at the time of the converſations and letter relied on, the plaintiffs were ignorant. They, therefore, could never have approved what they did not know. Beſides, they took place with third perſons, and can, therefore, never be applied to a ratification of what paſſed with another. The doctrine contended for is this, that if a captain of a veſſel employ her, contrary to all the orders of his owners, and defeat every plan they had arranged, yet if they take what has been purchaſed with the earnings of their own property, the captain is exonerated from all reſponſibility for the miſuſe of it. The fact is, the owners take back no more than their own; and at the utmoſt, it can go only in mitigation of damages. Suppoſe a cargo ſent to be ſold at a certain price, and the conſignee ſells at an under rate, if the proceeds be received, ſhall the party be prevented from recovering the exceſs which it might be ſhewn could have been gotten? Should the court ſanction the reaſoning on the other ſide, a maſter of a veſſel may go on from voyage to voyage, employ himſelf for ten years, and if his owners ſhould take back their own veſſel and her freight, he not only ceaſes to be reſponſible for a breach of orders, but his acts are adopted, and he of courſe becomes entitled to wages for the whole time. The reſult of ſuch a poſition muſt be ruinous to all commerce, and is not to be ſupported by any authority whatſoever. In 13 Vin. 6, 7, 8. the court will ſee, that accepting an article purchaſed, or the proceeds of one ſold, is not always a releaſe of damages ariſing from diſobedience of orders.

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Hamilton in reply. The defendant was more than a mere maſter ſailing according to his letter of inſtructions. He had a general diſcretionary power over the veſſel, and was, in various ſituations, to act as he thought fit. The queſtion then does not reſolve itſelf into a ſtrict compliance with orders, but whether there has been a bona fides, in which caſe, there is always a great allowance made. It was offered at the trial to be proved, that every ſtep taken by the defendant, was with the advice and concurrence of the plaintiffs' correſpondents: this alone is enough to evince that good faith which will lead the court to conſtrue every act of the plaintiffs as done in a ſpirit of adoption, for in no one inſtance do they allege a breach of orders. We contend, that the having received the freight is an adoption of the acts by which it was earned, and exonerates from all reſponſibility on account of diſobedience.

Thompſon J. This was an action on the caſe brought by the plaintiffs againſt the defendant, who was captain of a ſhip and in their employ, for breach of orders.

This, on the part of the plaintiffs, is ſuch conduct as will ſubject the defendant to pay all the damages ſuſtained in conſequence thereof. On the part of the defendant it is alleged, that the inſtructions veſted ſome diſcretionary powers in him; but that, admitting he had violated his inſtructions, ſtill the plaintiffs have, by their conduct, adopted his acts, and thereby waived all claim to compenſation. The general principles of law, as applicable to caſes of this deſcription, are not controverted. There can be no doubt, but that a captain is reſponſible in damages to his owners for diſobedience of orders; and there can be as little doubt, but that the owners may adopt ſuch acts as would be deemed a violation of inſtructions, and thereby waive all claim to damages on that account. The great difficulty ariſes in the application of the law to the caſe before us. The original inſtructions of the plaintiffs are very particular, and ſeem not to give any great latitude to the exerciſe of diſcretion. They ſay, "it is our deſire that you ſtrictly adhere to the following inſtructions, which are to be conſidered as binding "on you, and not to be deviated from." They then proceed

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o point out the voyage, and the conduct to be obſerved by the captain. It appears to me clearly, that the defendant's returning to New-Orleans from the Havanna, inſtead of coming to New-York, was a breach of orders. But the moſt important queſtion appears to be, whether there has not been a waiver by the plaintiffs of their claim for damages? The circumſtances relied on by the defendant, to ſhew that his acts have been adopted by the plaintiffs, are various. Their force and importance, will depend much on an accurate attention to dates. I would, in the firſt place, obſerve, that there is no pretence but that the defendant acted in good faith, and in a manner, as he ſuppoſed beſt calculated to promote the intereſt of the plaintiffs. The great confidence, which they uniformly, in all their letters, avow to repoſe in him, even after a breach of the orders, as appearing in the caſe, afford a ſtrong preſumption, that the defendant at leaſt, if not the plaintiffs themſelves, ſuppoſed he had ome diſcretion left him, as to the employment of the ſhip. Theſe conſiderations ought to induce us to give the moſt favorable conſtruction to his acts. The defendant, by letter, of the 25th of November, 1799, when at ſea on the voyage rom New-Orleans to the Havanna, informs the plaintiffs, hat if, on his arrival at the Havanna, he finds no advice rom them, he intended to go to Campeachy if he could get ermiſſion. If he could not, he ſhould run down to New-Orleans for a freight home. This communication is unaccountable, if the defendant ſuppoſed no diſcretion left him, and that he was bound by the ſtrict letter of his inſtructions. He probably placed great reliance on that part of his orders which expreſſed ſo much confidence in him, and declares hat, the chief dependence was placed on his exertions. It oes not appear, that the defendant received any advice whatever from the plaintiffs while at the Havanna the firſt time. Their letter, directed to him at that place, bears date the 8th day of November, 1799, the very day he arrived there, nd there is no evidence that he received it before he left hat place, which was on the 29th of the enſuing month, on is voyage back to New-Orleans. It does not appear, that ny freight offered for the United States, or that the cap-

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tain ſought for any. The plaintiffs, by letter, dated the 2d of January, 1800, acknowledge the receipt of the information from the captain, that he propoſed going to Campeachy, or returning to New-Orleans, and they greatly lament ſuch determination, *on account of the high premiums of inſurance* on that voyage, but ſay nothing about his having broken his orders. Again, by letter of the 29th of January, 1800, the plaintiffs complain much of the defendant, for not writing oftener, and adviſing them of his ſituation, ſo that they might keep *the ſhip and cargo covered by inſurance.* This letter, which may emphatically be ſtiled a letter of complaint, is ſo far from containing any ſuggeſtion of a violation of orders, that it expreſsly declares, "*All the fault we find (and which is a great "one) is your omiſſion and neglect of writing us by every op-"portunity.*" When this letter was written, the plaintiffs had full knowledge of the ſituation of the ſhip; they well knew, that the defendant was purſuing a different line of conduct, than the one they had marked out for him; ſtill, they found no fault with this—the only complaint was, that he did not keep them adviſed of his ſituation, ſo that they might ſecure themſelves by inſurance. And by the teſtimony of Mr. Bloodgood, it appears, that in the month of February, 1800, and after the plaintiffs knew of the defendant's intention of going from the Havanna to New-Orleans a ſecond time, Mr. Ludlow, one of the plaintiffs declared, that captain Hacker was an honeſt man, and that, he believed, he did the beſt for their intereſt, and the only fault he found was, his not writing. He made no complaint of diſobedience of orders. Theſe acts and declarations, I think, afford an irreſiſtible concluſion, that the plaintiffs intended to adopt all the acts of the defendant of which they were apprized, the beginning of February, 1800. Theſe acts included the voyage from the Havanna to New-Orleans. It remains to be examined, whether the plaintiffs have, by any ſubſequent conduct, adopted the acts of the defendant after that time. It appears by the defendant's letter, dated at New-Orleans the 23d of February, 1800, he had received the plaintiffs' letter dated the 2d of January, 1800, wherein, they gave him poſitive orders to come immediately home with the ſhip

But by the ſame letter he apprizes them, that he had previouſly purchaſed a cargo on their account, from which he could not retract, which made it neceſſary for him to proceed on the ſame rout he went before. And by another letter of April the 19th, he apprizes them of his arrival at the Havanna a ſecond time. After this, we find the plaintiffs inſuring this ſhip and cargo, as their own, on the voyage from the Havanna to New-York. On her arrival at New-York, they took poſſeſſion of her, ſold the cargo, received the proceeds, and treated them, in every reſpect, as their own. This conduct, it appears to me, is concluſive to ſhew, that they conſidered the reaſons aſſigned by the defendant, for going to the Havanna a ſecond time, as ſufficient; and that they intended to adopt his acts. In the caſe of Smith and others v. Cologan and others,* it was decided by Buller juſtice, that where a principal, with knowledge of all the circumſtances, adopts the acts of his agent for a moment, he ought to be bound by them. So alſo, in the caſe of Cornwall v. Wilſon.† where a factor in the purchaſe of goods had exceeded the price limited, yet the principal received the goods, and diſpoſed of them as his own; and it was held, that this was an adoption of the factor's act, notwithſtanding, the principal, by a letter, had expreſsly diſavowed receiving the goods on his own account. Lord Chancellor Hardwick declares, the principal conclude by his own acts; by taking the goods to himſelf, and treating them as his own, and that theſe acts being ſubſequent to the letter diſaffirming the contract, explained the nature of the whole tranſaction, and the intent with which he acted. Theſe, I think, are ſalutary principles, and ſuch as the facts before us will fully warrant us in applying to the preſent caſe. I am, therefore, of opinion, a new trial ought to be granted.

* 2 D & E 188, in a note.

† 1 Veſey. 509.

Kent J. There can be no doubt, I think, but that the defendant was guilty of a breach of orders, in returning back to New-Orleans from the Havannah. Here the deviation from his inſtructions commenced, and the only queſtion is, whether the plaintiffs have, by their acts and declarations, ratified his conduct, and precluded themſelves from the preſent ſuit. The rule is, that if, with a knowledge of all its cir-

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cumſtances a principal adopts the acts of his agent, he is bound by them. 2 D. and E. by Buller J. 1 Vez. 509. This principle was recognized by this court, in the caſe of Towle and Jackſon v. Stevenſon, decided in Oct. term, 1799. In that caſe, the defendant received a bill of exchange to collect for the plaintiffs, and to enable the indorſor to ſecure himſelf, he ſurrendered it up to the indorſor, without receiving the money, and conſequently, made himſelf liable. This fact was afterwards diſcloſed by him to the plaintiffs, who, without any expreſs diſcharge to him, or ratification of his act, aſſumed the buſineſs of preſſing the indorſor for payment. The indorſor failed, and this aſſumption of the buſineſs, after a full diſcloſure had been made, was held to exonerate the defendant. The defendant, in the preſent caſe, ſeems not to be liable to the charge of any intentional wrong. Although the great outline of the voyage was preſcribed to him, he was, in every other reſpect, left with large diſcretionary powers. It is admitted, as not liable to diſpute, that an explicit approbation of the conduct of the defendant, would be a waiver of any remedy on the part of the plaintiffs, and are not the circumſtances in this caſe equivalent to ſuch approbation? When a factor is entruſted with large power requiring the exerciſe of much ſound judgment, and he acts with an honeſt, though miſguided zeal, for the intereſt of his principal, it is juſt and politic to conſtrue the acts of the principal pretty liberally in favor of an adoption of thoſe of the agent. After the plaintiffs had full knowledge of the defendant's ſecond voyage to New-Orleans, they inſure, on their own account, the cargo and freight of ſuch ſecond voyage, and of the ſubſequent voyages back to the Havanna, and to New-York. They receive, ſell and take to themſelves the proceeds of the molaſſes, which were an inveſtment by the defendant at the Havanna, of what was to be traced back, as the reſult of part of the freight of the firſt voyage from New-Orleans to the Havanna, and which molaſſes the defendant had ſhipped to the plaintiffs on their account. They declare by letter to the defendant, that they have full confidence he would uſe his beſt endeavours to promote their intereſt, and that they find no fault with him,

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except in his neglect in not writing to them, and they declared the ſame to other perſons. Theſe acts and declarations amount to ſomething more than an equivocal adoption of the defendant's acts. They are a clear and intelligible approbation. The molaſſes were the reſult of a converſion by the defendant of the freight, and yet the plaintiffs accept the molaſſes, as ſhipped on their account, and ſell them as their own. During all theſe acts, there is not a diſavowal in any ſhape of the defendant's conduct. In the caſe of Cornwal v. Wilſon,* the factor, in the purchaſe of hemp, exceeded his limited price. The principal, by word, refuſed the contract, as he had a right to do, but he ſtill took the goods to himſelf. He acted with them as his own; ſold them as his own, and not as factor for his factor. Lord Hardwick held, that notwitſtanding what he ſaid, he meant to take them as his own, and decreed accordingly; that the principal was bound by the price given. The preſent caſe is certainly as ſtrong for the defendant, and, I am of opinion, that the plaintiffs have ſufficiently ſanctioned the defendant's departure from his inſtructions, and are not entitled to recover againſt him on that ground. The verdict is accordingly againſt evidence, and ought to be ſet aſide, on payment of coſts.

* 1 Vez. 509

Lewis C. J. The plaintiffs, as owners, proſecute the defendant for breach of orders, as maſter of their ſhip Young Eagle.

The defendant has committed a breach of thoſe orders, and for this he is liable in damages, unleſs juſtified by the peculiar circumſtances of his ſituation, or diſcharged by the ſubſequent conduct of the plaintiffs.

The ſtate of the ſhip created no impediment. She was completely repaired at New-Orleans on her firſt arrival there. The ſeaſon of the year was a fact known to the owners, at the time they gave the inſtructions. The want of freight and convoy, cannot form a juſtification, as they were not events by which the conduct of the voyage was to be influenced.

For a diſcharge, on the ground of the plaintiffs' having adopted his acts, the defendant relies on certain converſations between Mr. Ludlow and Mr. Bloodgood, the letter

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of the plaintiffs of the 29th of Jan
ing insurance on the unauthorize
ceiving and selling the cargo of I
Havanna to New-York. The sub
tions was, that Mr. Ludlow believ
man, that he did the best for their
fault he found was his not writing
tions took place does not precisely
one was about the 6th of Februar
the spring of that year. The lette
is to nearly the same effect; cont
*all the fault they found, was the defe
them.*

It must be remembered, that at
sations, and of writing the letter c
does not appear that the plaintiffs k
committed a breach of orders. Th
plated it when at sea on the 25th c
of his not meeting at Havanna wit
cannot then be construed into an a
which they probably were ignoran
the approbation relied on to excu
parol merely, ought to be unequi
mere declaration of a belief in the
the defendant, and a refusal to con
not be sufficient. Many an honest
which have rendered him liable i
injured one has refused to complai

The acts of the plaintiffs remai
procuring insurance on the unauth
receiving and selling the molasses.
ciple on which either of these acts
adoption of the conduct of the de
gulation ruinous to commerce, if
merchant's property is sacrificed by
the master of his ship or consignee,
to jeopardise the remainder, befor
a recovery in damages. In the pre
property, in neither the vessel, her

was in any wiſe changed by the conduct of her maſter. They were, therefore, perfectly correct in what they did, and their right to recover remains unimpaired. I am of opinion the defendant take nothing by his motion.

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The act of the legiſlature, of 1798, re-enacted on the 3d of April, 1801, contains no implied grant of the ſoil under-water, therein mentioned, to the corporation of New-York. They are under that act, only attornies for the public. The reſervation in their reſolve or bye law, of June, 1801, of the slipage ariſing from piers, erected under grants, made by them, in purſuance of that law, is void. The corporation has no right to slipage on the piers, running into the Eaſt River, in front of South ſtreet. A slip is an interval or vacancy between two piers. In an action for money had and received, the plaintiff muſt ſhew a right in himſelf.

The Mayor, Aldermen and Commonalty of the City of New-York, *againſt* Richard Scott.

THIS was an action commenced in the Juſtices' court of the city of New-York, to recover 18 dol. 50 cts. for wharfage. The ſuit being removed into the Supreme Court, a verdict was, by conſent, entered for the plaintiff, ſubject to the opinion of the court, on a caſe, which was ſhortly this.

The lands which the corporation of New-York, under their charter hold, on Manhattan Iſland, and within the city, extend to low-water mark, and four hundred feet beyond that, into the Eaſt River. To theſe are annexed, "the right, "benefit and advantage, of all docks, wharfs, cranes and ſlips, "or ſmall docks within the city, with the wharfage, cranage "and dockage, and all iſſues, rents, profits and advantages, "ariſing, or to ariſe or accrue, by, or from, all, or any of them." By an act of the legiſlature, paſſed on the 7th of March, 1793, it is declared, that "all the right, title, intereſt, claim "and demand, of the people of this ſtate, of, in, and to all "lands, at any time heretofore left for ſtreets or highways, "in the city of New-York, by any perſon or perſons whom-"ſoever, ſhall be, and hereby is veſted in the Mayor, Alder-"men and Commonalty of the city of New-York, and their "ſucceſſors, for the uſe of ſtreets and highways."

In the various grants by the corporation, of their water-lots on the north-eaſterly ſide of the coffee houſe ſlip, they had given in fee, the right of wharfage in front, and in conſideration of erecting certain piers, given to their grantees for 20 years, the wharfage &c. of the ſouth-weſterly ſides of ſuch piers, provided they ſhould not grant away the water-lots on that ſide, which they reſerved to themſelves a right to do, in which caſe, the wharfage on the ſouth-weſterly ſide was to ceaſe.

The corporation having granted away the whole of the land to which they were entitled, under their charter, appli-

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ed in April, 1798, to the legiſlature, for an act to authorize them to run ſtreets or wharves, of 70 feet width, in front of the water-lots already granted. This, by a law of that month and year, (re-enacted on the 3d of April, 1801,) the legiſlature was pleaſed to grant; and by the ſame act, the proprietors of lots, on the front of which, the ſtreets or wharves might run, were to fill them up, and make piers, according to the directions of the corporation. On non-compliance, the corporation were to be at liberty ſo to do, and receive the wharfage to their own uſe. It was alſo further provided, that the corporation might grant to ſuch proprietors in fee, a common intereſt in ſuch piers, in proportion to the breadth of their reſpective lots, under ſuch reſtrictions, and within ſuch limits as the Mayor &c. might deem juſt and proper.

In purſuance of the authority, conferred by this act, the corporation laid out a ſtreet, called ſouth ſtreet, in front of the lots they had granted, joining the Eaſt River, and on the firſt day of june 1801, made a bye-law, or ordinance, by which they ordered the reſpective owners of lots, fronting and bounded on South ſtreet, from the Wall ſtreet ſlip to the Fly-Market ſlip, to make a pier on the north eaſt ſide of Wall ſtreet, and complete it according to the directions therein given, before the firſt day of November 1802; on doing which, the corporation would grant the piers to the owners of the ſaid lots, "reſerving in the ſaid grants, the excluſive "right in the corporation of this city, of wharfage and ſlip-"age, on the ſide of each pier, adjoining a public ſlip, and "that the ſaid piers be, in all reſpects, conſidered as public "ſtreets or highways, and maintained and kept in repair, by "the grantees, their heirs and aſſigns."

Previous to the paſſing the act of April, 1798, the corporation had laid out the plan of South ſtreet, and had granted to the proprietors of lots, bounded by the Eaſt River, the vacant water-lots between them and South ſtreet.

Among the grants thus made, there was one the 10th of May, 1797, to John Murray, under whom the defendant claimed.

By this grant, Murray was to make a wharf or ſtreet, of 70 feet in width, along the whole front of the lot, granted.

to him, (which was to be South ſtreet,) and another of at eaſt 25 feet, along the whole weſt ſide of the ſame lot, and of the ſtreet of 70 feet. The ſame to be and remain public ſtreets; in conſideration of upholding, maintaining, and keeping of which, in good and ſufficient repair, he was to have all wharfage &c. accruing or ariſing, by or from the ſame, fronting the Eaſt River, or by or from any part thereof.

Murray accordingly built the wharves and ſtreets, ſpecified in the grant, and alſo, under the direction of the corporation, a pier running in front of South ſtreet, into the Eaſt River, the ſouth weſt ſides of which, and of the wharves and ſtreets he had erected, are bounded by, and in a line with Wall ſtreet ſlip, which runs in front of Wall ſtreet, and the wharf of 25 feet, built along the ſouth weſt ſides of South ſtreet, and the lot granted by the deed of 10th May, 1797, to John Murray. This pier, ſo erected, was not only oppoſite to the water-lots mentioned in the indenture of 1797, but ran about five feet more to the ſouth weſt, upon lands within the bounds of the city, as expreſſed in its charter, and oppoſite to the wharf, covenanted in the grant, to be built by Murray, which land however, was not granted to the corporation by their charter.

The pier, from the time of its being made, had been upheld by Murray, and no grant of a common intereſt in it had been made by the Mayor, Aldermen and Commonalty, agreeable to the act of the Legiſlature already recited.

The ſole queſtion was, whether the defendant, to whom by meſne aſſignments the rights of Murray had been conveyed, was entitled to the wharfage on the ſouth-weſt ſide of the pier, which ran in front of the five feet of the city lands? If he was, then a non-ſuit to be entered.

Riggs for the plaintiffs. The inſide of all public ſlips have been conſtantly reſerved in the Corporation grants for the ſake of convenience to the city, that its ſupply by market-boats, &c. might not be impeded. They are under the controul of the plaintiffs, and have, in many inſtances, as in the preſent, been widened that they might be the more effectually cleanſed by the tide. For this purpoſe, in the act of '98,

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the piers (which form the ſlips) are under the direction of the Corporation. By this act a grant to the plaintiffs of the land, on which the new piers, in front of South-ſtreet, were to be erected, muſt neceſſarily be implied, for they are authoriſed to grant a common intereſt in them, to the proprietors of lots in front of which South-ſtreet ran, according to the reſpective widths of the ſame, under ſuch reſtrictions and regulations as the Corporation may think proper. They could not grant what they had not. Beſides this implication is acknowledged by John Murray. He, therefore, and thoſe under him, are eſtopped from controverting it. He built under an ordinance exerciſing the right of an implied grant, by making a reſervation, in the true ſpirit of all the former grants of the Corporation, and for the ſame beneficial purpoſes. It may further be obſerved that, by running a line from the extreme ſouth-weſterly point of John Murray's lot, it will not ſtrike the place for wharfage at which the plaintiffs inſiſt on a right.

Troup and Hamilton contra. The act gave no beneficial intereſt to the Corporation. They were ſimply truſtees, or rather attornies to grant to others a right in conſideration of a ſervice or duty performed. This duty was the erecting the pier and created a conſideration for the grant. Therefore, the reſerving a portion of the emoluments was, ſo far illegal and void; for a truſtee cannot take to himſelf, and withhold from his *ceſtui que truſt*, part of the ſubject of the truſt. Allowing then an intereſt to have paſſed by implication, it was a truſt. Then, although the act authorizes them to grant under ſuch reſtrictions and within ſuch limits as they may think proper, ſtill this is no more than a power to regulate the mode and place of enjoyment; for reſtriction, can never ſignify a right of acquiſition. To ſhew how completely the building of the pier was the conſideration for the wharfage; who ever did erect was to have the profits; and, on this principle, when made by the Corporation, after neglect of the proprietor of the lot, they were, on performing what he was to have done, to ſtep into his place, with a full title to wharfage. We admit we have no right to wharfage in the ſlip, becauſe the wharf there, was on ſoil the property of the Cor-

ion, and they might, in that inſtance, reſerve. The pre-
reſervation is a manifeſt attempt towards a breach of
at the expenſe of the object for whom it was created.
action is for money had and received, the court, there-
will recogniſe all equitable rights which we may have.
annot be eſtopped by the ordinance for we are not par-
o it by ſealing and ſigning.

ggs and Harriſon in reply. This is a cauſe in which the
c convenience of the city of New-York is deeply in-
ed; therefore, the act and grants muſt be liberally con-
d, with that object always in view. For public benefit
he cauſe of the reſervation of wharfage and ſlipage, on
nſide of public ſlips, originally made. This would be
ly defeated by the defendant's claim, for if he has a
to wharfage on the ſide of the pier next to the public
e will have a right to lay a veſſel outſide of that, faſt-
to the pier, and another outſide of that, ſo as to ob-
, if not entirely fill up the acceſs to the public ſlip.
ſhews the neceſſity of implying by the act a grant to the
oration of the ſoil under-water beyond the 400 feet
ioned in their charter. The conſtruction put on the
; "reſtrictions," &c. cannot be correct, for the mode
lace of enjoying wharfage rights is, by an expreſs diſ-
law, under the regulation of the harbour-maſter. In
ghts, as expreſſed by the ordinance, there is an ample
leration for building the piers, for the perſons thus do-
, have the emoluments ariſing from the ſides adjoining
ivate property; as in the preſent caſe, thoſe on the
-eaſt ſide within the baſon. This is further proved by
enſe of the Legiſlature, expreſſed in an additional clauſe
the act of 1798 was re-enacted; previous to which
the proprietors of lots were entitled only to a
nunity of wharfage in front of their properties; but,
ie clauſe alluded to, the Corporation were impow-
to grant, under the reſtrictions we contend for, that
nunity of intereſt mentioned in the law.

e counſel ſeem to forget that a man may be eſtopped
actions as well as by his deed. Having no original in-

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tereſt of his own, Murray acts under our title, ſuch as it is, and cannot now be allowed to diſpute it.

Per curiam, delivered by Livingſton, J. This is an action for money had and received by the defendant, as wharfage for veſſels lying in what the plaintiffs call a ſlip, adjacent to that part of a pier which ſtands oppoſite Murray's wharf. From the form of action the plaintiffs muſt ſhew a title in them to demand this money. It is, therefore, unneceſſary to enquire whether it belongs to the defendant or not. The Corporation can have no ſuch right, in as much as the land, on which the pier is erected, was never granted to them, nor was the ſoil under the water where the veſſel lay, for which this wharfage was paid. No implied grant is contained in the act of the legiſlature. The corporation are only to grant as attornies of the public, in caſe piers are ſunk. That this is to be done under certain reſtrictions and regulations means, not that they ſhall have a right to reſerve the wharfage to themſelves, which is to be theirs only in caſe of default in the owners of the lots in ſinking piers, but that they are to regulate in what manner the right to wharfage ſhall be enjoyed. Nor does the reſolve of the Common Council of the 1ſt of June, 1801, make a difference. The reſervation therein contained, if in an indenture, might have been binding on the defendant; but, the corporation having exceeded their powers in making this reſervation in a reſolve of this kind, it cannot be binding on him. They had no right, in this way, to impoſe any terms they pleaſed, or they might arbitrarily have deprived the owners of lots of the right, which the Legiſlature intended they ſhould have, of ſinking theſe piers. It cannot, therefore, be regarded in the light of a contract; for the defendant had a right to make theſe piers and bridges without thereby ſanctioning any terms which might thus be impoſed on him. Nor can it be ſaid that the Corporation, not having executed the powers veſted in them by the act, the individual has the right to receive the wharfage. This would be to take advantage of their own wrong and neglect; nor does it follow, as has already been obſerved, that the money belongs to the Corporation, if it be admitted that the defendant was wrong in taking it.

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s is no ſlip, which is an opening between two pieces of
r wharves. This pier extends into the Eaſt-river and is
t from the ſide of the ſlip. The grant to John Murray
y, 1797, is alſo important, for by this he is entitled to
iarfage of 98 feet.
; the opinion of the court, that the defendant have
ient.

Blagge *againſt* the New-York Inſurance Company.

IS was an action on an open policy of aſſurance, dat-
18th of May, 1799, at a premium of 10 per cent. for
im of 20,000 dollars, on the cargo of the ſhip Flora,
Lovett, maſter, at and from Carthagena, or any other
n the Spaniſh main to New-York. The inſtrument con-
the uſual clauſe againſt illicit trade, and at the bot-
ie following memorandum was written.
Warranted American property proof of which if requir-
o be made in New-York riſk of ſeizure or deten-
in port excepted."
ſk of ſeizure, &c. was in a ſeparate line, but there
ot any ſtop between the words. From the caſe made,
eared the maſter of the Flora was formerly a joint
r with the plaintiff in a ſchooner called the Betſey, and
in February 1798, failed in her to La Guira with a
, in which they were mutually intereſted. That on his
l there the market was overſtocked, and, hearing that
ort of Carthagena was opened for the admiſſion of neu-
he proceeded to that place, off which he got on ſhore.
information proving untrue, he was, on being carried
the harbour, ſeized and condemned for approaching the
, with a deſign to trade, contrary to law. After a very
derable time, he, on an appeal to the Vice Roy, obtain-
reverſal of the ſentence, and an order for reſtitution.
ing his ſtay, he became acquainted with one Thomas An-
Thorres, who propoſed to him a ſyſtem of commercial
courſe, for the purpoſe of introducing into Carthagena
ls from the United States in American bottoms, under
ſanction of the Royal order of His Moſt Catholic Ma-

Property warranted to be neutral, muſt not only have every document neceſſary according to treaties and the law of nations to prove its neutrality, but it muſt not be accompanied with any papers that compromit its neutral character. If under ſuch a warranty on goods the outward cargo appear to have produced leſs than the homeward has coſt, the aſſured muſt, in a voyage from a belligerent country ſhew, that the exceſs was derived from neutral funds.

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jesty of the 17th November, 1797. To accomplish this i[illegible] necessary that the articles should appear to be Spanish [illegible]perty; and to effect this, it was agreed that they shou[illegible] consigned to Thorres as his own property shipped for hi[illegible] Blagge, his agent in New-York, and that Thorres sh[illegible] have one fourth of the net proceeds for lending his na[illegible] the transaction. In consequence of this, and the advan[illegible] which the speculation held out, Blagge, in April, 1799, [illegible] on his own account a cargo amounting to near 70,000 [illegible] by the ship Flora to Carthagena, where she arrived a[illegible] the sixth of May following. She there disposed of her c[illegible] for [illegible] dollars, and in part return took in cotton, [illegible] twenty-one ingots of gold, and 3500 milled doubloo[illegible] to the value of 55,000 dollars in the whole, leaving, to pay [illegible]ties and be collected, the remainder of the sales, in Thorr[illegible] hands and outstanding debts. Being thus loaded, she [illegible] sailed with a clearance for Cadiz, stating her loading to c[illegible]sist only of the cotton and fustic, on the risk and account [illegible] Don Ermenel Garcia del Rio, and also with a clearance [illegible] New-York, but granted by another officer without speci[illegible]ing on whose risk the cargo was shipped. In neither the [illegible] nor the other was any mention made of the ingots or d[illegible] However, through Lewis [illegible] in Carthagena, bills of lad[illegible] to the supercargo, for delivering both in New-York; and [illegible] landing the cotton and fustic in Spain, Thorres gave a bo[illegible] in a very considerable penalty, which could only be cancell[illegible] by production of a certificate of its having been duly di[illegible]charged in some European Spanish port, or on proving, [illegible] evidence, that the vessel had been captured and condem[illegible] by the British. After the Flora left Carthagena, the maf[illegible] as appeared from his depositions, made out an account [illegible] the [illegible] the outward cargo, which he stated at 55,000 d[illegible] [illegible] the homeward cargo, which [illegible] [illegible] any statement of [illegible] [illegible] the Flora [illegible] [illegible] within the Cape [illegible] [illegible] by a British ship of w[illegible] [illegible] only his fictitious [illegible] [illegible] ports of New-York, except[illegible]

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the bill of lading for the ingots and doubloons. On being queſtioned whether he had any other cargo than that mentioned in the fictitious invoice, or any other papers than thoſe relating to the New-York deſtination, to both he anſwered repeatedly in the negative. On a ſtrict ſearch, however, the captors found ſecreted on the perſon of Lovett, and in the veſſel, the clearance for Cadiz, declarations of Thorres, that the property belonged to Don Emanuel Garcia del Rio, the cuſtom-houſe bond for landing the cargo in Cadiz, and ſeveral letters giving directions how to cover the ſhipments and returns, ſo as to avoid the effect of the Royal order of 17th November 1797, and alſo one to the plaintiff from Lovett, written immediately after his arrival at Carthagena, in which he ſaid, "he had delivered the cargo to the "owner." The captors having alſo diſcovered the bullion and doubloons, carried the Flora into Jamaica, where ſhe was duly libelled in the court of Vice Admiralty. In the anſwers on oath of Lovett and Paſchal N. Blagge, to the ſtanding and other interrogatories exhibited to them, they ſwore poſitively, that the outward and homeward cargo (excepting a few adventures of themſelves and one Drake, who had been ſupercargo in the voyage to Carthagena) were the whole, ſole, and excluſive property of the plaintiff, a citizen of the United States; that the appearance of its being Spaniſh was entirely fictitious, but indiſpenſably neceſſary to its introduction into Carthagena under the royal order of '97; for had any other name than that of a Spaniard been ſeen, the whole cargo would have been confiſcated. That the clearance for Cadiz, or ſome other Spaniſh port, and cuſtom-houſe bond to land the articles, were the only means of clearing out, but that he (Lovett) underſtood, a ſimple letter from him ſtating his capture, would have been ſufficient to cancel the bond, and that the reaſon why the bullion and doubloons did not appear in the papers granted at Carthagena was, becauſe the exportation of bullion and ſpecie from the Spaniſh colonies is prohibited, the whole on board having been ſmuggled into the ſhip by himſelf and P. N. Blagge, at the riſk of impriſonment for their lives if diſcovered. That they were not mentioned in the invoice of the cargo, from an apprehenſion

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left the knowledge of ſo much treaſure on board ſhould excite the known cupidity of the Britiſh cruizers, and be a certain inducement to capture, but that the whole was the exclusive property of the plaintiff. Thorres never having had any intereſt in the articles, was merely allowed a fourth of the net proceeds, for lending his name to introduce the cargo under the royal order of '97. The cargo, however, being condemned "as good and lawful prize," the preſent ſuit was brought againſt the defendants, for the amount of their ſubſcription, and the jury having found for the plaintiff, a motion was now made to ſet it aſide and grant a new trial, the verdict being againſt evidence.

Hoffman and Hamilton for the defendants. The goods, on which the preſent inſurance was made, contain the uſual warranty againſt illicit trade, and are alſo warranted American property. If then, from any circumſtances of trade, or breach of neutral conduct the capture was juſtifiable, the underwriter muſt neceſſarily be diſcharged. It is important to obſerve, that the abandonment was on the capture, and not on the condemnation: for, the abandonment was on the 1ſt of October 1799, and the condemnation not till the 17th of the ſame month. Whatever then was the ſtate of the aſſured's right at that period, muſt govern the deciſion of this day. The queſtion then will be, whether, from the circumſtances of the caſe, there was probable cauſe of capture; for that is the point, however the condemnation may be, tho' from the words of the ſentence "good and lawful prize," it is manifeſt the ſentence proceeded on the ground that Thorres was intereſted with Blagge. On warranties of property the rule of law is, that the warranty is not only affirmative that the property ſhall be ſuch as it is ſaid to be, and have all documents and papers neceſſary to protect it by convincing its neutrality, but it is alſo negative, that there ſhall be no papers tending to a contrary concluſion. 1 Mem. of Ins. 317, to 319. Rich. v. Parker 7. D and E 705. So that though a veſſel may be furniſhed with every document to eſtabliſh her neutral character, yet if others, tending to a contrary concluſion be found, the warranty of neutrality is not complied with.* It is neceſſary, therefore, that a neutral ſhould

* A court of admiralty is

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the voyage, act with the moſt perfect good faith to belligerents; to do this, he ſhould ſhew the whole of his , which ought to be ſtrictly genuine; none falſe or us, and if any ſhould be ſo, they ought to be candid- duced, and the reaſons faithfully related. If the in- f the cargo be fictitious, if there be any concealment rs, allowing even that the circumſtances ſhould be ards explained, they juſtify carrying in, and at leaſt, to further proof. It is immaterial to the underwri- ether the explanation given be received as an excuſe d condemnation or not; as between him and the un- tten it is a forfeiture of neutrality, and the inſurer is ated by the mala fides of the inſured, though between d the captor it may be only a matter of further proof. nſequences, however, as they ariſe from the conduct ſured, are wholly at his riſk. Having made theſe pre- y obſervations, it will be eaſy to ſhew the negative of e that has been laid down was broken, and *that* accom- , to evince that the affirmative has not been complied Firſt then as to the negative, that there were papers lead- ſuſpicion of the want of neutrality. This is evident from idavit of Lovett himſelf: he ſwears that he made out ious invoice and account of ſales. Theſe are his words, I knowing the depredations heretofore made by Brit- ruiſers upon American property, where the ſame ap- ed valuable, and particularly ſo if in ſpecie or bullion, deponent was induced, from what appeared to him lential conſiderations, to make a fictitious invoice of cargo of the ſaid ſhip Flora out from New-York, and count of ſales of the ſame in Carthagena, alſo an invoice bill of lading of her cargo from Carthagena to New- k, whereby it would appear, that the ſame was only cot- and fuſtic, in order, that if ſhe was boarded by a Britiſh ſer, he might be permitted to proceed on his voyage e readily than if his cargo was fully expoſed to view." not till after repeated denials of any other cargo, not rmations over and over, that there was no other cargo he cotton and fuſtic on board, that the real invoice, ie ſeveral clearances were delivered up; and even then

not ſo rigorous. If the papers be neceſſary to the trade the neuter bona fide carries on, they will not affect her. See the caſes of the Immanuel and Providentia in 2 Rob. Ad. Rep.

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not till the bullion and ſpecie were diſcovered. Theſe two articles were totally omitted in the invoice exhibited to the captors at the time of boarding the Flora. This alone was enough to authoriſe the detention of the veſſel, nor is any attempt made at an explanation till the veſſel is under libel in the court of admiralty. With what degree of credit that explanation could be received is worthy of obſervation. There is a bill of lading in which Lovett acknowledges the cargo to be ſhipped by Thorres on account and riſk of Don Emanuel Garcia del Rio of Cadiz; and though it may be ſaid, that a clearance to a Spaniſh port was neceſſary, ſtill the manner in which the letter of advice mentioning the ſhipment is worded, does not tend to remove the impreſſion of its being Spaniſh property, and the place of deſtination uſed merely as a blind. In that letter ſhe is ſaid to ſail properly regiſtered for Cadiz, "or any other port which might be to "her advantage to avoid any riſk ariſing from the enemy." If then any other port was open to her, it is to be hoped, no ſtreſs will be laid on the circumſtance of her being in the track or route for New-York. Spaniſh property may as well be ſent to New-York as to Cadiz. Allowing, however, this to be no more than a conjecture which a court of admiralty might make, it is impoſſible to get over the cuſtom-houſe bond,* given to land the cargo in Old Spain, and pay the duties. Is not this ſuch a paper as the veſſel ought not to have had? And let it be remarked that no explanation of this and the other papers evincing Spaniſh property, was given to the commander of the Britiſh frigate at the time of the capture. All that have been enumerated were found concealed, denied and perſiſted in. After the delivery of the fictitious papers, others were aſked for and denied: a ſearch took place, and they were found. Have you any other cargo than cotton and fuſtic was demanded? None was the anſwer; in a moment after the bullion and doubloons were diſcovered. Was not this having and doing every thing a neuter ought not to have had and done? Under all the circumſtances of the caſe, can any one ſay the condemnation was not well warranted? For who would believe the explanations of the man whoſe whole tenor of conduct had been

* "As to the condition to return to ſome port of Spain, which from his paying Cadiz duties, it is ſaid, might be impoſed upon the maſter, I ſee nothing in that which will materially affect him, after the various caſes from Surinam, in which, although bonds had been given to return to Holland, this court has reſtored, on the maſter's making ſatisfactory proof, that they did not intend to comply with

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him unworthy of credit? The court of admiralty would naturally conſider, whether the explanations were conſiſtent with the circumſtances, and the former declarations of the parties. Allowing it problematic whether Thorres was the whole and ſole owner, no court nor jury on earth but what would be juſtified in ſaying Thorres was intereſted with Blagge. But when the papers are examined, (and this court is not confined to the ſentence) it will be ſeen, that Thorres was the actual proprietor. In a letter, written by Drake, the ſupercargo of the outward voyage, the confidential friend of the plaintiff, and dated a few days after the arrival of the veſſel, he ſays, "The day after we entered the veſſel we "began to unload her, and deliver the goods *to the owner*, "who at the end of eight days diſpoſed of the whole." Who could this owner be but Thorres, to whom the goods were addreſſed. We are aware of the explanation given by Lovett and Drake of the arrangement made at Carthagena, that the property ſhould be ſhipped in the name of Thorres. This, for eluding the revenue laws, might be neceſſary, but why continue the deception to Blagge himſelf? Is it not rather to be ſuppoſed that the truth came out? Every one muſt think ſo, and no doubt can be entertained of this letter, which certainly was not a document to prove neutral property, having influenced in its condemnation. That this was a juſt and proper concluſion, is manifeſt from the letter of Thorres to Don Emanuel Garcia del Rio. The conſignment of the veſſel from Blagge on Rio's account is fully ſet forth, and the account of return cargo, agreeing with the actual quantity of cotton and fuſtic, is mentioned. This letter is inſtantly followed by one from ſome Spaniards of the names of Matteo Arrage and Juan de Franciſco Martin, to a Don Charles Frazer of New-York, whom we have never yet diſcovered, and to this ſucceed ſeveral letters pointing out the whole ſyſtem of covering, by tranſmitting forms of invoices, &c. &c. to cloak the property. It is remarkable, that this letter is dated the fifth of June 1797, and ſpeaks of the order of the November afterwards. This too was one of the ſecreted papers, and evidently is meant for purpoſes which do not meet the eye. At all events, it is one of thoſe negative papers,

the condition and intended to ſubmit to the penal forfeiture." Pr. Sr. W. Scott in the Providentia 1 Rob. Ad. Rep. 153. Eng. edition.

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which a neuter ought not to have. If the court will for one inſtant advert to the ſecurityſhip of Thorres, and conſider the amount to which it extends, they will naturally ſay it is impoſſible that it ſhould be entered into by any perſon not abſolutely a partner in the concern. It was to be cancelled in a manner that proves Spaniſh intereſt. Either by a certificate, that the articles were landed in Spain, or by proof of a capture and condemnation in an Engliſh court. How could ſuch papers be procured? The very idea of their being to be brought forward, if the facts of capture and condemnation did not exiſt, leaves a moſt unfavorable impreſſion on the means that muſt have been adopted. But it is not from inferences and reaſonings that we are obliged to prove this was not American property. There is a written document, preſerved on the declaration of Lovett himſelf, that the property is Spaniſh. In the clearance for Cadiz it is expreſsly ſo ſtated, and that is an official paper deſerving full faith and credit. If the invoice be attended to, it is equally a ſuſpicious paper. The amount of the ſales of the cargo out, are ſtated to be 55,000 dollars; the cotton and fuſtic, it is true, balance this, but from whence have the 30,000 dollars in ingots and ſpecie ariſen? Blagge had no funds in Carthagena; and his outward cargo is by the invoice ſtated to be only 55,000. Theſe circumſtances ſhew ſuch a mixture of intereſts between Blagge and Thorres, that the court of admiralty, unable to diſcriminate the portions, juſtly condemned the whole partnerſhip concern. That this was the principle on which the admiralty proceeded is manifeſt, for they condemned what was claimed for Blagge, but acquitted Lovett's and Drake's proportion. The invoice in cyphers, however the character might have been explained, was an unneceſſary and dangerous paper. It is ſaid, to be ſure, to have been made for the amuſement of the ſupercargo, but it ſerved to throw a further air of myſtery over a tranſaction already ſufficiently myſterious. It is curious to obſerve the reaſon aſſigned for the taking out a clearance for Spain: That it was impoſſible to obtain one for any other place; and yet there is on board the Flora another clearance directly for New-York, and both obtained from the ſame office. It is true

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Lovett's depoſition ſays, he does not know whether they were ſigned by the ſame officers. But that is immaterial, they eſtabliſh the poſſibility of having a clearance for New-York, and from the cuſtom-houſe too. This then contradicts the pretence of neceſſity. From the caſe it appears, that on the trial "it was admitted, that all trade between the A-"merican and Spaniſh colonies is generally prohibited, and "that it is notorious that it is ſo; but that ſometimes fo-"reigners do obtain ſpecial licence to trade with the Span-"iſh colonies." As then this trade without a licence is prohibited, and the clauſe againſt illicit trade is preſerved in the warranty "ſeizure or detention in port only excepted," it is plain the riſk of illicit trade any where elſe was expreſsly at the hazard of the aſſured. If this be ſo, certainly the conſequences of ſuch trade was equally a peril he undertook, himſelf to bear. It can never be contended, that though the principal is not at the hazard of the underwriter, yet that he is chargeable for the incident or reſult. This doctrine would be againſt the words of the policy, and againſt reaſon itſelf. It cannot be preſumed, that under a warranty of American property, which implies, that the property ſhall be accompanied with all documents neceſſary to prove it American, the underwriters contemplated that it ſhould have every paper to give it the appearance of Spaniſh. A riſk not neceſſarily to be encountered, is never to be imagined as included. The riſk in port taken by the inſurers would have covered the conſequences of ſmuggling the money: but as to any other riſk from illicit trade it was expreſsly declined. No uſage can, in the preſent caſe, be ſet up. It was the very firſt voyage. Therefore, none of the arguments to be derived from the Oſtend caſe* can here apply. Allowing that the papers made uſe of were neceſſary for the voyage, yet, as it was a new trade,† the warranty being againſt illicit commerce, it was incumbent on the plaintiff to acquaint the underwriters of the circumſtance, becauſe it undoubtedly encreaſed the riſk. On the principle of concealment then there cannot be a ſtronger caſe. In the caſe of Seton, Maitland & Co. there was not only a diſcloſure of the articles being contraband, but the very manner in which they would

* Planche v. Fletcher, Doug 238.

† See Kenneway v. Noble, Doug. 510 contra.

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be ſhipped was ſpecified. But here nothing of this ſort take place, and the goods are at the uſual premium for American property ſent forward with all the riſk attending Spaniſh. Independent of this, at the time of the capture, the aſſured being guilty of ill faith towards the belligerent, affords a juſtifiable cauſe of ſeizure and detention by the breach of neutrality committed, and thus exonerates the underwriter. It is no anſwer that the double papers and concealment of them was with a view to prevent being carried in: The fact is, that the reverſe was induced, and though falſe papers, or even ſecreting them, may not lead to condemnation, yet when theſe circumſtances are mixed with falſehood, they warrant confiſcation, and in the preſent caſe falſehood upon falſehood appears; denial after denial of papers and cargo, all of which on inveſtigation are found to be totally deſtitute of truth. It is evident then the negative part of the warranty is broken throughout. Let us then advert to the affirmative; that there ſhall be every document to prove the neutrality. From Lovett's own anſwer to the ſtanding interrogatories it appears the veſſel had no ſea brief. The effect of this paper is that of a paſſport: and it is indiſpenſable for a veſſel to be furniſhed with it. Price v. Bell 1 Eaſt 663. Rich v. Parker 7 D. and E. 705. That ſhe had it not, is evident from the admiralty proceedings, and the liſt of papers exhibited there. It may perhaps be contended, that as the treaty with France was abrogated, the doctrine in Eaſt v. Price, which was the caſe of an American veſſel captured by a French privateer, and condemned for want of a paſſport, does not apply. It is not, however, only by the treaty with France that this document is required. By thoſe with Spain, Holland and Algiers,* it is equally neceſſary. The importance of the paper cannot be better evinced than by referring the court to the argument of Lord Kenyon in Rich v. Parker before cited. It is evident, therefore, either that the aſſured has not acted as he ought to have done; in conſequence of which, the veſſel was carried in and condemned, and, therefore, the underwriter diſcharged, or that ſhe was not properly documented, being deſtitute of a ſea brief or paſſport, a paper eſſential to the ſecurity of veſſel and cargo. Under either of theſe poſ-

* The paſſport by the Algerine treaty is a very different paper from the ſea brief. See the form of it 1 Lex Mer. Amer. App. vi. No. x.

tions the inference muſt be the ſame, and a new trial, it is hoped, will be *awarded*.

The court in its deciſion may look beyond the ſentence, and into the other general proceedings. In Bernardi v. Motteux, Doug. 575. the proceſs verbal was received. So in Colvert v. Bovil 7 D. and E. the court adopted the ſame principle, and adverted to things dehors* the ſentence. Whenever the maſter has been guilty of mala fides, even further proof is not allowed, nay, condemnation inevitably enſues. The caſe of the Welvaart, 1 Rob. Ad. Rep. 124. and that of the Vrouw† in the ſame book 164. fully eſtabliſh this.

Hariſon contra. This is a voyage by an American merchant to Carthagena. It is unneceſſary, therefore, to refer to the evidence before the court to ſhew that the nature of this trade, and the neceſſity of a Spaniſh name, were well known and notorious to all the world. No one is, or was ignorant that foreigners had been prohibited from commerce with the Spaniſh colonies, and that even their own ſubjects could not traffick from neutral countries, till after the order of the 17th of November, 1797. Up to that period, the whole trade of the American dominions of Spain had been confined to Spaniards trading from Spain. In '97 the order above mentioned made the relaxation alluded to; and, for the ſake of ſupplying their foreign territories, the Spaniards allowed importations from foreign countries. This will furniſh a clue to a great part of this buſineſs, and ſhew the conſtruction we ſhall contend for to be right. As to the poſſibility of licences, whether they exiſt or not is immaterial. The want of one was never made a part of the defence. It is enough to advert to the nature of the trade, and if this was notorious, and could be carried on but in the name of a Spaniard, then that it ſhould be uſed, muſt be conſidered as intended by the aſſured, and taken as part of the contract by the aſſurer. That a licence was never in contemplation is manifeſt from the exception at the foot of the policy: "riſk of ſeizure and "detention in port excepted." What then is the language of the policy? We will not take this riſk in port, becauſe we know the trade. Under a licence it cannot be, for the licence

* This is a miſtake in the learned counſel; the court theed looker at the ſentence alone, which ſtated unwarrantable reaſons for condemnation.

† The Vrouw Hermina is the caſe alluded to.

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would protect you there: under the royal order it is equally impossible, because then, a Spaniard could have no danger against which to wish an indemnity; but against a seizure in port, an American would have to guard, because there alone could there be danger to him, and this we undertake. Therefore, granted that the usual clause of warranty against illicit trade is retained in the policy, this only stands in opposition to the clause at the bottom, and shews the nature of the trade known to be an attempt to evade the royal order of '97. If this construction be right, then is the policy consistent throughout. No risk, say the underwriters, *do* we undertake from contraband trade, except when in port. *All* others are at your hazard, but as to the necessary means to cover the trade that you, the assured, must use for our security, and as freely as you think fit. Therefore, want of good faith is not to be imputed to the plaintiff, all that he did, being in the course of trade; equally within the view of himself and the underwriter. If, then, the vessel departed from hence to avail itself of the order of 1797, the necessity of the property assuming a Spanish appearance must appear to the court, and this alone will unravel the whole proceedings. Lovett's depositions in the admiralty shew it was necessary to clear out for Spain, nor does the clearance for New-York convict him of a falsehood in this respect. It is requisite, for the carrying on the system of trade the plaintiff embarked in, that the vessel should be *registered* as having cleared out for Cadiz, to enable him to protect his cargo against their own guardacostas, and still they may give him another clearance for New-York, which never was entered in the registry of the Custom-House. This violation of principle is not according to moral duty we confess, but the transaction was with a Spanish Custom-house, and it is evident that the two clearances were not by the same officer; so that the explanation given, stands perfectly with the nature of the trade. That the money has not been included in the clearances is elucidated by the same means; by a reference to the commerce insured. The case states it; the exportation of coin and bullion are prohibited; to take them out of the country recourse is had to smuggling, in which, if discovered, impri-

ſonment for life is the mild penalty of the law. How then could it be entered and cleared? The concealment then, here ſo much cried out upon, aroſe from the nature of the trade, and was a meaſure to which the aſſured was neceſſarily reduced. This furniſhes, in part, an anſwer to the outcry of "American property," "warranted American property," "to be furniſhed with all documents to prove it American "property, "and none to ſhew it Spaniſh," in ſhort, to all that has been urged on the negative and affirmative doctrine of warranties. This appears more fully on viewing the memorandum at the foot of the inſtrument. Proof of property is by that, to be made in New-York. What can this mean, but that the aſſured will not be concluded by any foreign determinations, that he reſerves to a trial of his own countrymen the queſtion of American property or not, and will not ſubmit it to extra forenſic tribunals? Why is this to be ſo? Becauſe the tranſactions were to bear the ſemblance of Spaniſh intereſt, and the contrary could not, in any place, be ſo well ſhewn as here, where all the property and buſineſs could be eſtabliſhed; where, it was neceſſary only to ſhew it actually American, however it might appear. In 2 Val. 128, this poſition is acknowledged. There the trade was notoriouſly illicit, being of ſilk from Barcelona to France, yet, under ſimilar circumſtances as the preſent caſe, the underwriter was, on account of the notoriety, held liable. The concealment, therefore, here, is no more than a means of carrying on the trade. If this be correct, all the obſervations on concealment and documents are overthrown, for they are in the courſe of trade, and done for the benefit of the underwriter. It is true the court leaned to that idea in Goix v. Low, but the court of errors reverſed that determination; and here it is to be obſerved, the nature of the trade demanded the papers made uſe of. They were obtained in the moſt perfect bona fides, and can it be ſaid that the contract is thereby deſtroyed? Againſt the ſuppoſition of a joint intereſt between Blagge and Thorres, the depoſitions in the admiralty are full evidence. The ſame was teſtified here; ſo that the proof of property, under the policy, is complete. All this, however, is to be done away by circumſtances

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which the nature of the tranſactio clearance for Cadiz, and all the otl Spaniſh aſpect to the buſineſs, are s enable the plaintiff to avail himſelf c The letters on the ſubject detail the for that purpoſe, and though it is m the goods had been delivered to the recollected it was poſſible *that* letter hands on the coaſt. But, whoever it not deceive him to whom it was addı inſuperable objection to all the arg Spaniſh property in the cargo is, tha ly from circumſtances, whereas the perty in the plaintiff is derived from vits. The animadverſion on the dat worth anſwering. It could not, by in June, 1797, and ſpeak of the orde ing; but if we make a rational ſup the date, '97 was, by miſtake, inſer whole myſtery vaniſhes. This ſeem letter came by a veſſel which ſailed any contradiction in Lovett's teſtimc papers; becauſe, when examined u rogatories, they were all actually d ſure, adopted by the maſter of the dential; and, therefore, if bona fide argument can be drawn from the c entered into only for merely a fourth have the ſame tranſactions here ever ſion. That ſea brief and paſſport, ar be doubted—1 Marſh, 317. But wh terial, for the veſſel carried fully a She was commiſſioned as a letter c ſtronger could be produced to ſubſt racter. That this ſhould have been c derwriter cannot be urged, becauſe, ſigned to cruize, the being commiſſi immaterial fact. The objection, hov the trial, cannot now be heard. All i

* The counſel on both ſides argued this cauſe, as if the letter was from Drake to Blagge, whereas it was to one Don Manuel Thorres.

†Moſes Byron is ſuppoſed to be the caſe alluded to—6 D. & E 379.

ating to ſhips' papers, is totally irrelevant, as the warranty only to the cargo and not to the ſhip. The whole caſe prets a ſtatement of American property engaged in a trade toriouſly to be carried on under Spaniſh appearances; and, erefore, if the court ſee the warranty of property has been mplied with from the general tenor of facts ſubmitted, the rdict ought to ſtand.

Hamilton in reply. To its being ſo our objections are o-fold: one from the conduct of the maſter as the agent* the plaintiff; the other on account of the defect in comying with the warranty. His conduct is connected with e queſtion of warranty, becauſe it is to be ſuch as will not mpromit the property. Therefore, if the conduct of the ured has that effect, it is a breach of the neutrality warnted. In Jackſon v. ———, in this court, it was held that ough the property warranted American, was actually ſo at e time of effecting the policy, yet, as the aſſured had, by ransfer, altered the nature of the ſubject matter, the warnty was not complied with. In the preſent caſe, the miſnduct was glaring. Firſt, as to the falſe papers; ſecond, in the behaviour manifeſted at the time of capture. On e full effect of the former, in caſes like the preſent, there no deciſion. But if it were held as fatal, it would not, perps, be too ſtrong a concluſion. An underwriter ought to ow how to calculate his riſk; this is never to be done if e aſſured has it in his power to give any aſpect he may ink fit to the property inſured. In another point of view it ght to be fatal; no court ought to conſider that men will t on a principle of deceiving any power whatſoever. Even olicy will ſuggeſt this rule, for who can blame belligerents r intercepting our trade when they ſee it has been direct- in a continued courſe of deceptive commerce? On this gain the books afford no authority; the only caſe is that f the Oſtend† veſſel, and there the court went on the notoety of the trade; nothing but this will afford a juſtifica- ry reaſon. The conduct adopted by the plaintiff's agent ave to an American adventure all the danger of a belligert riſk, and this at only a premium for a neutral hazard; is circumſtance affords one of the indicia by which we are

* A captain of a veſſel is not the agent of the ſhipper of goods not even when the ſhip is owned by the ſhipper, and ſtill leſs when, as in the preſent caſe there was a ſupercargo.

† Planche v. Fletcher, Doug. 251, where the court went on exactly the reverſe of the moral poſition of the counſel, becauſe the uſage was merely in contravention of political and poſitive, not natural and moral duties.

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to judge no ſpecies of illicit trade could be in the contemplation of the underwriters. The clauſe at the bottom of the policy does not contradict this poſition; it is coupled with the proof of American property; there is no ſtop to diſconnect them, and, therefore, the court muſt take them together, and not with a reference to the clauſe againſt illicit trade. In this ſenſe, therefore, the exception is nothing more than that, in caſe of ſeizure or detention in ports, proof of American property ſhall not be demanded in New-York. It is not, as contended for, a diſavowal of being bound by the opinion of other tribunals; if they are not *concluſive* they are to be looked into, and even all other documents *on which* the ſentence has been framed; will not then the court look into the general conduct of the plaintiff's agent, as it appears by the proceedings, and ſee if it does not amount to that of a breach of neutral conduct which amounts to a breach of warranty, and, therefore, the verdict neceſſarily to be ſet aſide?

Per curiam, delivered by Lewis, C. J. The effect and fulfilment of the warranty of neutrality, are the points on which the controverſy, between theſe parties, principally turns. A diſtinction is ſet up between this and a general warranty of neutrality on account of the qualification, as it is termed, contained in the ſtipulation that *proof, if required, is to be made in New-York*. The deſign of introducing this clauſe in policies is notorious. It was to ſteer clear of the doctrine of the concluſiveneſs of foreign ſentences, and cannot affect the eſſence of the warranty. The obligation of that muſt remain the ſame wherever the proof of performance may be exhibited. A warranty of neutrality, in a policy of inſurance, imports, not merely that the property is neutral, but, that it ſhall be accompanied, on the voyage, with all the accuſtomed documents to inſure it reſpect as ſuch, within the laws of nations. And, although the queſtion has never, to my knowledge, been decided, the ſame principle will require, that it be unaccompanied with any document that ſhall compromit its neutral character. Where the aſſured, by means of falſe papers, or by any other improper conduct, inveſts the property with the double character of neutral and belligerent,

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be his motives what they may, he ſubjects it to a riſk, againſt which the underwriter did not inſure, and, of courſe, releaſes him from all reſponſibility. The aſſured ſtipulates, by his warranty, that the inſurer ſhall be liable for a neutral riſk alone. The inſtant, then, that he attempts to put him to the hazard of a belligerent riſk, he forfeits his claim to an indemnity. Nor does the dictum, cited from Valin, if admitted in its broadeſt latitude, in the leaſt ſhake this principle. For, although the underwriter may be bound to know the nature of a trade notoriouſly illicit, it does not follow that he is to be liable to the conſequences of every ingenious device that may be reſorted to as a cover for the property. But, were it otherwiſe, the doctrine of Valin would not apply to the caſe before us. The trade, in which the Flora was engaged, was not notoriouſly illicit, for it is ſtated to have been ſometimes permitted, at others prohibited. The underwriters appear to have intended to guard themſelves againſt the conſequences of an illicit trade by excepting from the riſk, *ſeizure or detention in port.*

2 Val. 128.

There is another circumſtance in the preſent caſe which militates ſtrongly againſt the plaintiff's right to recover. It is a maxim that neutral commerce is to be conducted with good faith towards belligerents. *Their* rights are to be reſpected as well as thoſe of neutral nations. It is not ſufficient that a part only, but the whole property, covered by the policy, muſt be neutral. And if a cover is attempted for *enemy's* property, by an intermixture with *neutral*, it is held to ſubject the whole to confiſcation. In the preſent inſtance it is ſtated, that the homeward cargo was purchaſed with the proceeds of the outward. Now the latter ſold for 55,500 dollars, and the former coſt 89,000 dollars. It was incumbent then on the aſſured to ſhew, that the exceſs was alſo American property. This might have been ſhewn had the fact been ſo. It does not appear, however, that this was attempted. And, although it was a queſtion ſubmitted to the jury, I think, we are bound to ſay that, as to this, their verdict was againſt evidence.

I am of opinion, that the verdict ought to be ſet aſide and a new trial awarded.

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John Imlay *against* Joshua Sands.

THIS cauſe came before the court on demurrer. It was an action of treſpaſs againſt the defendant, collector of the cuſtoms at the port of New-York, for ſeizing, and taking in April 1799 the plaintiff's brig and her cargo, under the act of the 13th June 1798* ſuſpending the commercial intercourſe between the United States, and France, and the dependencies thereof.

A collector of the cuſtoms or other officer making ſeizures under the revenue laws of the United States, are not juſtified by a probable cauſe of ſeizure.

The declaration was in the common form, to which the defendant pleaded, firſt the general iſſue, and ſecondly actio non "Becauſe that at the time when the treſpaſs a-"foreſaid in the declaration aforeſaid mentioned is above "ſuppoſed to be committed and long before and afterwards "the ſaid Joſhua Sands was collector of the cuſtoms of the "diſtrict of the city of New-York, to wit at the city and "ward and in the county aforeſaid, and the ſaid Joſhua "further ſaith that after the firſt day of July in the year "of our Lord one thouſand ſeven hundred and ninety-"eight, and before the end of the ſeſſion of congreſs "next after the tenth day of June in the ſame year, "to wit, on the eleventh day of March in the year of "our Lord one thouſand ſeven hundred and ninety-nine "upon waters navigable from the ſea by veſſels of ten or "more tons burthen in the diſtrict of New-York to wit at "the city and ward and in the county aforeſaid John Lasher "Eſquire ſurveyor of the cuſtoms for the diſtrict for the "city of New-York by the command of the ſaid Joſhua (he "the ſaid Joſhua being then and there collector of the cuſ-"toms for the diſtrict of the city of New-York as aforeſaid) "did ſeize to the uſe of the ſaid United States as forfeited "the ſaid brig and the coffee and ſugar in the ſaid declara-"tion mentioned, the ſame coffee and ſugar being then and "there the cargo of the ſaid brig. for that the ſaid brig after "the ſaid firſt day of July and before the end of the ſeſſion "of congreſs next after the thirteenth day of June in the ſame "year of our Lord one thouſand ſeven hundred and ninety-"to eight, wit on the firſt day of September one thouſand ſeven

* 4 U. States Laws 129.

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undred and ninety-eight, at the city and ward and in the ounty aforeſaid being then owned by a perſon reſident rithin the United States of America, to wit, by one John 'aneman a perſon reſiding at Philadelphia, that is to ſay, t the city and ward and in the county aforeſaid, departed n a voyage from the United States, to wit, from Wilington in the ſtate of North-Carolina that is to ſay rom the city ward and county aforeſaid for the iſland of aint Thomas in the Weſt-Indies and before her return rithin the United States, to wit on the firſt day of Janu-y in the year of our Lord one thouſand ſeven hundred nd ninety-nine, was allowed to proceed from thence to a ort in the Weſt-Indies under the acknowledged govern-ent of France, to wit, to port Liberty in the iſland of iſpaniola contrary to the form of the act of congreſs of e United States of America entitled *an act to ſuſpend the mmercial intercourſe between the United States and France d the dependencies thereof.* And the ſaid Joſhua Sands fur-er ſaith that afterwards, to wit, on the ninth day of A-il in the ſaid year of our Lord one thouſand ſe-n hundred and ninety-nine a libel was filed for and on e behalf of the ſaid United States in the diſtrict court of e ſaid United States for the New-York diſtrict held at e ſaid city againſt the ſaid brig and her ſaid cargo r the attorney of the ſaid United States for the ſaid ſtrict praying that the ſaid brig and her cargo might r the cauſe aforeſaid and others appearing, be con-mned as forfeited to the uſe of the ſaid United States, d ſuch proceedings were thereupon had in the ſaid urt that the ſaid brig and her ſaid cargo afterwards, to it, on the eleventh day of July in the ſame year, were the ſentence and decree of the ſame court at the city d ward and in the county aforeſaid condemned and ad-dged to be forfeited to the uſe of the ſaid States, which tence and decree remained in full force and virtue, un-the ſame was afterwards, to wit, on the firſt day of ptember in the ſaid year of our Lord one thouſand ſe-n hundred and ninety-nine, reverſed by the judgment

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"and decree of the circuit court of the United States for "the diſtrict of New-York in the eaſtern circuit, to wit, at "the city and ward aforeſaid, and the ſaid Joſhua further "ſaith that the ſeizing of the brig aforeſaid and her ſaid "cargo for the cauſe aforeſaid is the ſame taking away of "the ſaid brig coffee and ſugar in the declaration above "mentioned, and this he is ready" &c.

To this plea was ſubjoined a notice of giving all the ſeveral facts it contains in evidence, and alſo that the judge of the diſtrict court did on, &c. "at a diſtrict court of the ſaid "States held in and for the ſaid diſtrict at the city and "ward and in the county aforeſaid certify that the defend-"ant had probable cauſe for the ſaid ſeizure."

The plaintiff joined iſſue on the firſt plea, and to the ſecond put in a general demurrer, in which the defendant joined.

Hoffman for the demurrant. The only queſtion is, whether the facts ſet forth on the record be a ſufficient juſtification of Sands, the collector, for the treſpaſs with which he is charged. It has long been ſettled that probable cauſe of ſeizure cannot be urged by a cuſtom-houſe officer in excuſe, if the event prove that there was no legal and actual reaſon for the taking. In Legliſe v. Champante,* the defendant had ſeized ſeveral hogſheads of French wines belonging to the plaintiff under pretence of their being lees; on an information in the exchequer it was determined againſt him, and in an action by the plaintiff for the treſpaſs, the court, on debate, held that in theſe caſes the officer ſeizes at his peril, and that probable cauſe is no defence. So in Boſtock v. Saunders† the ſame principle is recognized and extended; for there the officer acted under a warrant obtained on oath from the commiſſioners of excife,‡ who were authoriſed to grant it on an affidavit of a ſuſpicion that the revenue laws had been infringed. The ſame caſe is to be found in 3 Wils. 434, where the court will perceive that the doctrine is a little more ſtrongly laid down. It is there ſaid that notwithſtanding the proviſions of the 13 and 14 Car. 2. c. 11. S. 32. which gives the writ of aſſiſtance in revenue caſes, and enacts that all perſons acting under it ſhall be

* 2 Stra. 810

† 2 Black. Rep. 912.

‡ 10 G. 1, 6, 10. S 12, & 13.

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ſaved harmleſs, yet if he, who enters under it, find nothing, he is a treſpaſſer ab initio. To ſupport the grounds of this action is no more than conſonant to reaſon and juſtice. The court on viewing the reſult of a contrary procedure will certainly ſtrengthen the poſitions we have taken, with all their power. It is peculiarly neceſſary in this country: we have not a ſtatute like that in England as to ſeizures on the oath of a third perſon. Every thing here is left to the diſcretion of the cuſtom-houſe officer, and the property of each individual expoſed to the attacks of a collector or other officer who is intereſted in having it condemned. It is indiſpenſible therefore, that every legal check ſhould be laid on their proceedings, and if the defendant ſuffer in this action, he may perhaps have redreſs from the United States.

Hariſon contra. As to the point of probable cauſe, it may in general be a true principle, that it is not a juſtification if there be no real cauſe. But on recurring to the proviſions of the federal law as to the duty of collectors, it will be ſeen to be ſpecially enacted* that wherever a proſecution ſhall be commenced on account of any ſeizure, if reaſonable cauſe of ſuch ſeizure appear to the court before which the proſecution is tried, the court ſhall cauſe a proper certificate or entry to be made of it, and in ſuch caſe the perſon who made the ſeizure, or the proſecutor for ſuch ſeizure, ſhall not be liable to action, ſuit or judgment on account thereof. That this has been literally done is not inſiſted, but whenever ſentence has been paſſed, and the property condemned, it is tantamount to a certificate. For it is the judgment of the court that there was real cauſe. But it is not on this that it is intended to reſt our defence; we mean to conſider the caſe on its merits. In this view therefore, the court will conſider whether the facts actually on the record, and now before the court, do not plainly ſhew a forfeiture under the act of congreſs ſuſpending the intercourſe with France. The words of that act expreſsly declare "That no ſhip or veſſel "owned *hired or employed*, wholly or in part by any perſon "reſident within the U. States and which ſhall depart there-"from after the firſt day of July next,† ſhall be allowed to "proceed directly, or from any intermediate port or place

* 4 Vol. United States Laws 429. 2 March 1799, c. 128, ſ. 89.

Section 1

† July 1798

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"to any port or place within the territory of the French "Republic, or the dependencies thereof, or to any place in "the Weſt-Indies, or elſewhere under the acknowledged "government of France, or ſhall be employed in any traffic "or commerce with or for any perſon reſident within the "juriſdiction or under the authority of the French Repub- "lic, and if any ſhip or veſſel in any voyage thereafter com- "mencing, and before her return within the United States "ſhall be *voluntarily carried or ſuffered to proceed to any French "port or place as aforeſaid*, or ſhall be employed as aforeſaid, "contrary to the intent thereof every *ſuch ſhip or veſſel, "together with her cargo ſhall be forfeited*, and ſhall accrue "the one half to the uſe of the United States, and the other "half to the uſe of any perſon or perſons, citizens of the "United States, who will inform and proſecute for the "ſame; and ſhall be liable to be ſeized, proſecuted and "condemned in any circuit or diſtrict court of the United "States, which ſhall be holden within or for the *diſtrict* "where the ſeizure ſhall be made"

Section 2. It is further enacted, "That after the firſt day of July "next, no clearance for a foreign voyage ſhall be granted to "any ſhip or veſſel owned, hired or employed, wholly or in "part, by any perſon reſident within the United States, un- "til a bond ſhall be given to the uſe of the United States, "wherein the owner or employer, if uſually reſident or "preſent where the clearance ſhall be required, and other- "wiſe his agent or factor, and the maſter, or captain of "ſuch ſhip or veſſel for the intended voyage ſhall be parties, "in a ſum equal to the value of the ſhip or veſſel and her "cargo, and ſhall find ſufficient ſurety or ſureties to the a- "mount of one half the value thereof, with condition that "the ſame ſhall not, during her intended voyage or before "her return within the United States, proceed, or be carried "directly or indirectly to any port or place within the ter- "ritory of the French Republic, or the dependencies there- "of, or any place in the Weſt-Indies or elſewhere under the "acknowledged government of France, unleſs by diſtreſs "of weather, or want of proviſions, or by actual force or "violence to be fully proved and manifeſted before the ac-

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"quittance of such bond; and that such vessel is not, and "shall not be employed during her intended voyage or be- "fore her return as aforesaid in any traffic or commerce, "with or for any person resident within the territory of that "republic, or in any of the dependencies thereof."

All these facts thus set forth in the act as working a forfeiture of the vessel and cargo, are expressly stated in the plea. The vessel is alleged to be the property of Vaneman a person resident in Philadelphia; to have been voluntarily carried to port Liberty in Hispaniola, a port under the acknowledged government of France, in short, every circumstance specified by the act is spread on the record, and consequently the vessel must be liable to seizure. If this appears fully to the court, it is enough, and the forfeiture is an inference of law which they are, from the pleadings, authorized to draw. If so, the statement of a contradictory sentence is immaterial, and makes no difference in the reasoning. If the defence is sufficient without the sentences, it is enough. On the facts taking place the forfeiture attached; and these appearing on the pleadings are data for the court to go upon, and preclude all argument against there not being an actual and real cause of seizure. In Lockyer v. Offley,* the court on the circumstances in the case, drew the inference that a forfeiture had attached and decided accordingly. So in Wilkins v. Despard,† the fact of forfeiture being admitted by the pleadings the court would not allow the legality of the seizure to come in question on the record. The subsequent matter of condemnation is immaterial, and of course the reversal, because there is a perfect evidence previously on the record that shews a forfeiture. For the doctrine as to averments and allegations the court will see sufficient authority in 2 East 452.‡ It is there said by Lawrence J. "With respect to what averments are necessary to be prov- "ed, I take the rule to be, that if the whole of an averment "may be struck out without destroying the plaintiff's right "of action, it is not necessary to prove it, but otherwise, if "the whole cannot be struck out without getting rid of a "part essential to the cause of action; for then though the "averment be more particular than it need have been, the

* D & E 252

† 5 D & E 112.

‡ Williamson v. Allison.

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"whole muſt be proved or the plaintiff cannot recover." Apply this doctrine to the pleadings, ſtrike out all beyond the facts, and the defence is complete, therefore the reſidue need not be maintained, and the court will go on what is ſufficient for the defence. It may be ſaid that Vaneman did not ſend the veſſel, but this, if material, ought to have been ſtated, for it might have varied the caſe.

Hoffman in reply. We do not diſagree on general principles: That is, though Sands had probable cauſe of ſeizure, ſtill he would have been liable to the plaintiff. It is contended that the record ſets forth enough to have *led to* a forfeiture and condemnation, and therefore the court *muſt lay* out of the queſtion all beyond the forfeiture, and judge that there was a real, and not a mere probable cauſe. The court will determine on the whole record, and not take up a part, to ſay the court of the United States has not decided according to law. This is a queſtion under the laws of the United States. To them the defendant applied to be judged; we purſue that judgment through his own tribunals, the courts of his own chuſing; and they decide againſt him. This deciſion is pronounced in a court of excluſive and adequate juriſdiction. It would be nugatory to make any determination contrary to the judgment of the federal courts, becauſe even now the preſent ſuit may be carried up to them. If the effect of the ſtatute is to be conſidered, that might have been done, and the plaintiff puniſhed under it. The court will ſee in the ſecond ſection the penalty of the bond is the conſequence of certain infringements, that may have been pronounced, and the veſſel declared not forfeited. If the judgment was wrong Sands might have appealed further, but he has himſelf acquieſced.

Hariſon. We do not conſider ourſelves concluded by the deciſion of the United States' court. Suppoſe the evidence there in our favor was defective, and we afterwards acquire full proofs in our juſtification, ſhall we not uſe them?

Hoffman. You ſhould then have ſtated them in your plea; that merely follows the words of the act, and nothing further is to be intended.

Per curiam, delivered by Thompſon J. The facts de-

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in the defendant's plea are admitted by the demurrer true, and the queſtion then ariſes whether thoſe facts fford a juſtification to the defendant. It is ſaid that ntence of condemnation in the diſtrict court, evinces ıere was probable cauſe for this ſeizure, and will afford ds of juſtification for the defendant who was acting as lic officer. Admitting there was probable cauſe for the e, ſtill this will not ſhield the defendant from reſponſi-

In the caſe of Legliſe v. Champante* it was expreſsly ɜd, that in ſuch caſes the officer ſeizes at his peril, ıat a probable cauſe is no defence. This point ſeems ſettled in a variety of caſes. The officer here is a mere ːeer, and acts at his peril, and his juſtification depends ː event.† It is not like the caſe of a miniſterial officer ıcts under proceſs which he is bound to execute. That was no real ground for the ſeizure appears by the de- ıt's own ſhewing. He ſtates that the ſentence of con- ıtion pronounced by the diſtrict court, was on appeal ed by the judgment of the circuit court. The act of eſs under which the ſeizure was made, makes no pro- for the exoneration of the cuſtom-houſe officer. No- appears but that the defendant acted in good faith, lthough it would ſeem reaſonable, that where the offi- ːted bona fide, and according to his beſt judgment, he to be protected. Yet, we are bound to pronounce the ɜ we find it, and leave caſes of hardſhip, where any ex- legiſlative proviſion. Lord Kenyon, in the caſe of e v. Varley,‡ treats this queſtion as long ſince at reſt in nd. He ſays that cuſtom-houſe officers were, until a ːt of parliament was paſſed to protect them, liable to an ı for ſeizing goods, if it ultimately turned out that the were not the ſubject matter of ſeizure, even though was a probable cauſe for ſeizing them.

n, therefore of opinion, the plaintiff ought to have ıent.

* 2 Stra. 820

† 3 Wil. 440 2 Black. Rep. 912

‡ 6 D and E 443

91 G. 2 ch. 34 ſ. 16

isha Leavenworth *againſt* John Delafield.

The ſame *againſt* Robert Dale.

Wages and provisions, dur-

[ESE were two actions on policies of aſſurance from

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New-York to Havre de Grace. The firſt on the freight valued at 2000 dollars; the other on the ſhip valued at 7000 dollars.

The facts, as they appeared from the caſe, were theſe:—

23d July, 1801—The veſſel ſailed from New-York on the voyage inſured.

4th Sept. 1801—She was captured in the Britiſh channel and carried into Ramsgate.

12th Nov. 1801—An abandonment was made on both policies to the defendants in the two cauſes, which they refuſed to accept.

4th Jan'y, 1802—She was liberated, and afterwards ſailed for Havre, where ſhe arrived and delivered her cargo.

November, 1802—The defendants accepted the abandonments, and conſented to verdicts againſt them, ſubject to calculations as to the amount to be recovered againſt them on incidental cauſes.

It was agreed that the court charges and other expenſes attending the reclamation of the property, including port charges, and excluſive of wages and proviſions, amounted to 4121 dollars and 24 cents.

That the ſhip's crew conſiſted of a captain, mate, ſeamen, a cook and boy, whoſe monthly wages amounted to 221 dollars, their proviſions to 110 dollars and 50 cents.

That the veſſel had performed 8-9ths of her voyage, as to diſtance, when ſhe was captured.

On theſe facts and admiſſions the following queſtions were made:—

1ſt. Whether the wages and proviſions of the crew are to be brought into general average, or to be a charge on the freight only?

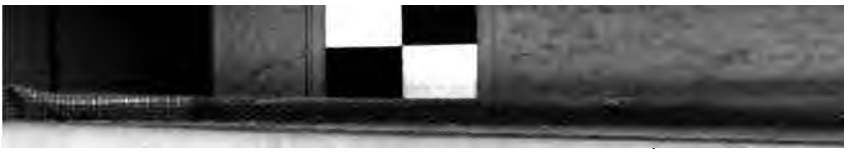
2d. If on the freight only, whether,

1ſt. The plaintiff is entitled to recover the whole from the underwriters on freight? or,

2dly. Whether the underwriters on the veſſel ſhall pay the whole? or,

3dly. Whether the plaintiff is to recover part from

ing the detention of a veſſel captured and carried in for adjudication, are ſubjects of general average. If a veſſel be captured during her voyage, in ſettling the proportion of average, the freight will be chargeable up to the day of capture. The amount on which a general average in caſes of capture is to be calculated is, the cargo on its firſt coſt or invoice price, and charges at the port of departure. The veſſel on four fifths of its value at the ſame place. The freight at one half agreed to be paid.



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the underwriters on the freight, and the reſidue from the underwriters on the veſſel?

3d. If the latter is to be the reſult, then whether,

1ſt. The underwriters on the freight are to pay eight-ninths of the expenſes, for wages and proviſions, and thoſe on the ſhip, the other ninth?

2dly. Or, are the underwriters on the freight to pay ſo much as accrued up to the 12th of Nov. 1801, the day of abandonment, or the 4th Sept. the day of capture; and the underwriters on the veſſel what happened from that day to the 4th January, 1802, when the property was liberated? or,

3dly. What other rule of apportionment is to be adopted.

4th. In calculating the general average, is the coſt of the cargo here, or value at the port of deſtination, to be the ſum on which the eſtimate is to be made.

Per curiam, delivered by Livingſton, J. It is matter of ſurpriſe that queſtions, which muſt frequently have occurred in ſo commercial a country as Great Britain, and where ſo large a capital is employed in inſurance, have not been decided in any of her courts. We muſt, therefore, endeavour to diſcover, what is reaſonable and moſt conformable to the ancient laws and uſages of other commercial nations; for, where precedents are not to be found, the practice of ſuch countries may be deemed the beſt guide on the ſubject of maritime law.

We are then, firſt, to determine whether wages and proviſions, during a detention after capture, form a general average, or fall on the freight only.

When it is conſidered that capture is a diſaſter which generally happens without fault of the owner of goods or veſſel, but by ſuperior force, againſt which no human precaution can always provide, and that the expenſes, here in diſpute, are incurred in conſequence of this *vis major*, or *caſus fortuitus*, and for the common benefit of all, it is not eaſy to aſſign a reaſon why they ſhould be borne by one of the parties in misfortune, rather than another. Of little advantage would it be to claim a valuable property, after cap-

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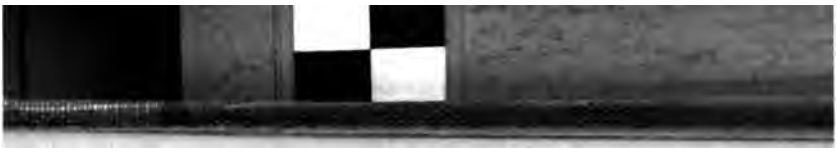
ture, unleſs the mariners remained for the purpoſe of proceeding to the port of diſcharge in caſe of liberation. It would otherwiſe, if acquitted, be expoſed to periſh, or be ſold at great diſadvantage. It was ſaid on the argument, that the maſter was not obliged to detain his crew. Whether it be compulſory on him to do ſo or not, is of no moment. It is ſufficient that he has done it in the preſent caſe; that he has acted with good faith, and that ſuch detention was manifeſtly for the general weal. It may well be doubted, however, whether it be not obligatory on him to keep them, at leaſt a reaſonable time; for, idle would it be, *in many* caſes, to labor for a recovery of the property unleſs it could afterwards be conveyed to its intended port. The cargo, in this caſe, might have been ſacrificed in England, if the crew had been immediately diſcharged. Nor is it juſt, as it reſpects this uſeful claſs of men, inſtantly to diſmiſs them in a foreign country after an accident of this kind, without affording them an opportunity of knowing the fate of the property, and a chance of defending and recovering their wages. At any rate, the objection comes aukwardly from any of thoſe who have derived a certain benefit from the detention of this crew, without which there would probably have been a total inſtead of a partial loſs. But without recurring to firſt principles, or ſearching for precedents, is it not matter of contract between the different claſſes of underwriters, to regard expenſes of this kind as a ſubject of general contribution? Every policy contains a clauſe that "in caſe of loſs or misfortune, if it ſhall be neceſſary for the aſſured, his factors, "ſervants or aſſigns, to ſue, labor and travel for, in and about "the ſafeguard and recovery of the property;" and the ſeveral underwriters "promiſe to contribute to the charge there"of, according to the quantity of the ſum by them inſured." Now, if a charge for extra wages and proviſions be one, as it certainly is, which accrues in conſequence of the labor and travel thus enjoined, and be abſolutely neceſſary to give effect to ſuch purſuit, the parties to the different inſurances have conſented to its being apportioned among them.

In conformity with this ſtipulation, is the practice of moſt of the commercial nations whoſe uſages are known to us.



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Ricard, who treats of the commerce of Amſterdam, and after him Beawes in his Lex Mercatoria, ſays, "If a ſhip be "taken by force and carried into ſome port, and the men re- "main on board to take care of and reclaim her, the wages "and expenſes of the ſhip's company, during the arreſt, "ſhall be brought into general average"—page 150. For this rule the author juſt cited aſſigns this very obvious reaſon—"As the crew," ſays he, "remained on board, during "an endeavor to reclaim her, theſe expenſes were occaſioned "with the ſole view of preſerving the ſhip and cargo for "their proprietors."

In England it is ſettled, that if a ſhip be obliged to put into port to repair, and this be neceſſary for the ſafety of all, the charges of unloading, reloading and taking care of the cargo, and alſo, the wages and proviſions of the workmen hired to repair her, become a general average—Da Coſta v. Newman, 2 E. & E. 407. The accident in the caſe of Da Coſta v. Newman had happened to the ſhip alone, and might, in ſome meaſure, have been owing to her feeble or impaired condition. It would have been more reaſonable, therefore, that her owner, or underwriter, ſhould have defrayed all theſe expenſes himſelf, than in caſes where the peril falls at once, as well on the goods as on the veſſel, without room to impute fault or neglect to the owner of either. In ſuch a caſe then, it can hardly be doubted that the court of King's Bench to be conſiſtent, would conſider every conſequential expenſe for the preſervation of the whole, a general average. In Da Coſta and Newman, the crew having been diſmiſſed before the veſſel was repaired, it became unneceſſary to decide by whom a charge for ſeamen's wages and proviſions was to be borne.

In France the extra wages of a crew, when a veſſel puts into port and remains there to avoid an enemy, are a groſs average—Emerigon, 1 vol. 556. The ſame author informs us, that all bona fide expenſes, to obtain the releaſe of a veſſel, become a general average, if the property be releaſed; and, after quoting the ſame paſſage from Ricard which has been cited from Beawes, he obſerves, that, in France, the

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queſtion has uniformly been thus decided whenever it occurred—ib. 631.

As we are of opinion, therefore, that the ſums expended in this way, during a detention which follows a capture, are to be reimburſed rateably by all, the ſecond queſtion may be conſidered as alſo diſpoſed of, and we will next ſee,

If, in the preſent inſtance, the underwriters on the freight are to pay eight-ninths of the ſum aſſeſſed on that article, and thoſe on the ſhip the other ninth; or, whether the former are to pay ſuch part as accrued before the abandonment, and the latter what aroſe between the abandonment and the time of her releaſe?

According to a deciſion of this court, in the caſe of the United Inſurance Company *againſt* Lenox, the underwriters on the freight are entitled, in virtue of the abandonment, to all the Sophia's earnings previous to her capture; that is, to eight-ninths, and thoſe on the ſhip to the remaining ninth. Hence a difficulty is ſuppoſed to occur to apportion the part of the average, which falls on the freight, among thoſe two claſſes of aſſurers. The apportionment, although a little more complex, is, nevertheleſs, eaſily made. As all freight would probably have been loſt, in conſequence of the capture, if the property had been condemned, the underwriters on freight and on veſſel being ſeverally entitled to eight-ninths and one-ninth thereof, ſuch was the ratio of their reſpective intereſts in this ſubject while in the admiralty. It, therefore, follows, that in the ſame proportion ſhould they contribute as it reſpects the freight to the expenſes of reclaiming it, regardleſs as to how much had accrued antecedently, and how much ſubſequently to the day of abandonment. By a reſtoration of the property, the inſurers on freight receive eight-ninths, and thoſe on the veſſel one-ninth. Nothing, therefore, can be clearer than that the expenſes, as they relate to this article, muſt be defrayed by them in like proportion.

The laſt point ſubmitted reſpects the manner of calculating the average. Is it to be on the firſt coſt of the cargo, or on its value abroad, and how are the veſſel and freight to be appraiſed?

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It is difficult to adopt any rule ſufficiently certain and yet free of every exception.

In an average ariſing from Jettiſons, the Engliſh practice is, to regulate the contribution by the clear price which the goods would have yielded at the port of deſtination, "it be- "ing equitable," ſays Abbott, "that the perſon whoſe loſs has "procured the arrival of the veſſel ſhould be placed in the "ſame ſituation with thoſe whoſe property has reached its "port in ſafety"—Abbott, 262. If all the goods, as well thoſe which arrive as thoſe which have been caſt into the ſea, are to be eſtimated at their foreign value, the reſult will be nearly the ſame, provided there be an equal advance on all, as if the firſt-coſt be reſorted to as the ſtandard of their worth. I cannot, therefore, perceive much force in the reaſon aſſigned by the learned author in favor of this mode. With regard to veſſel and freight, various regulations have been eſtabliſhed by different ſtates as to the degree in which they ſhall be liable to contribute, which only ſhew how impoſſible it is to find any rule that ſhall operate univerſally and with equal juſtice on the different perſons concerned. In England, Marſhal, following Molloy, and ſpeaking of Jettiſons, ſays, the ſhip contributes for her full value at her port of delivery, and the freight pays according to its value at the ſame place, after deducting ſeamen's wages and certain other charges—Marſhal, 467. I cannot ſubſcribe to the equity of this mode of adjuſtment, as it relates to the veſſel and freight. Pothier, in his treatiſe on maritime contracts, alſo exclaims againſt it—"As the freight," ſays he, "is only due to the owner of "a veſſel, as a kind of indemnity for her deterioration and ex- "penſes incurred by the voyage, it is ſubjecting him to a dou- "ble burthen to make him contribute for the entire value of "the veſſel and of the freight. Our ordinance, therefore," ſays he, "has adopted the middle courſe of making him contri- "bute for one half of the value of each"—2vol. n. 119. p. 411. Other States make the veſſel contribute for half her value and one-third of her freight—Marſh. 467. As the rule is not accurately defined by the law of England, and the one adduced applies to caſes of Jettiſon only, we are at liberty to make one for ourſelves. The injuſtice of making the ſhip

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and freight contribute for their full value has already been ſtated. The firſt will be injured by the voyage, and oftentimes the whole freight received will not be equal to the expenſes and diſburſements to which the owner has been expoſed. Valuing the property at the port of diſcharge, is alſo liable to difficulty and embarraſſment. In many caſes of a contribution, the veſſel may not reach her port, which would have been the caſe here if ſhe had been condemned; and if ſhe does, the veſſel is very rarely ſold there, and ſome calculation muſt always be neceſſary, to exhibit what are the net ſales of the cargo. It will, therefore, be a *rule leſs liable* to objection, will ſuit the greateſt number of caſes, and *not* be affected by the fluctuations of markets or other contingencies, and certainly moſt eaſy of practice, always to value the goods at the invoice price, that is, at their firſt coſt without regard to their price abroad. What value to put on the veſſel and freight, to do complete juſtice, is more difficult, perhaps impracticable. To take their full worth will not do. After the beſt reflection I have been able to beſtow on the ſubject, I am for valuing the veſſel at four-fifths of her original coſt, reckoning nothing for proviſions or wages paid in advance; and the freight at one half of the groſs ſum agreed to be paid. This rule may be deemed arbitrary; ſo will any that can be deviſed; and yet, perhaps, it will come as near as any other in producing a contribution in proportion to the real intereſt of each which may be in jeopardy. It is ſeldom a veſſel will ſell for more, after a voyage, than four-fifths of what ſhe coſt, and, of courſe, the owner is not more than *that* a gainer by her being releaſed: ſo neither will his freight clear to him more, if as much, as one half which is contracted to be paid. The ſame courſe of adjuſtment muſt be purſued between underwriters.

Upon the whole, therefore, our judgment is, that the mariners' wages and proviſions, from the time of the Sophia's capture to the day of her leaving Ramſgate, (it not appearing that ſhe remained there unneceſſarily after her liberation) be added to the other expenſes of reclaiming the property; and that this aggregate ſum be paid by the ſeveral underwriters on the veſſel, cargo and freight. That in a ſecurity

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ing the proportion or amount of their reſpective contributions, the cargo muſt be valued at its firſt coſt and charges at the port of departure; the veſſel at four-fifths of her actual value, at the ſame place, excluſive of out-fits, and without regard to any valuation in the policy; and the freight at one half of what was agreed to be paid at Havre. That the underwriters on freight pay eight-ninths of the ſum which, on this calculation, ſhall fall on the freight; and thoſe on the ſhip, the whole of the contribution which ſhall belong to her, and alſo, one-ninth of that which is to be borne by the freight; and thoſe on the cargo, the reſidue.

Robert Lyle *againſt* Iſaac Claſon.

Sending a ſealed libellous letter to the plaintiff himſelf is not a ground for an action by him. Every letter ſent is to be preſumed to have been ſent ſealed. In an action for a libellous letter on the plaintiff, publication muſt be ſhewn. Stating it to have been by means of its being ſent to, and received by the plaintiff, is bad, and as ſhewing on the record itſelf, no publication, is good cauſe for arreſting the judgment.

THIS was an action on the caſe for writing and publiſhing a libel.

The firſt count of the declaration after alleging that the defendant "wrote and publiſhed, or cauſed to be written "and publiſhed," a certain libel, proceeded thus, "which "ſame libel in the form and manner of a letter ſubſcribed "by the ſaid Iſaac Claſon on the — day of —— was wrong- "fully, falſely and maliciouſly ſent and cauſed to be ſent by "the ſaid Iſaac Claſon to the ſaid Robert Lyle at, &c. and "the ſame was *by means of ſuch ſending thereof received and "read* by the ſaid Robert Lyle, and *thereby* publiſhed by the "ſaid Iſaac Claſon."

Judgment having gone by default, the plaintiff ſued out and executed a writ of inquiry, on which the jury gave general damages.

For this reaſon the defendant now moved in arreſt of judgment.

Hopkins for the defendant. The firſt count ſhews no cauſe of action. The introductory, is to be connected with the latter part, and then the allegation of having wrote "and publiſhed," &c. is ſo explained as to ſhew there was not any writing and publiſhing in legal contemplation. The manner in which the injury complained of, was perpetrated is always ſtated, to have been in the hearing, or ſome other ſpecific mode of communicating the libel and of making it known. Raſt. Ent, 18. Went. Plead. titles, Slan-

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der, and Libels. 1 Com, Di. tit. action upon the case. (G 4.) Cro. Eliz. 486.* Cro. Jac. 39.† 3 Cro. 199.‡ These cas all turn on the general principle, that the git of the actio must be stated in *express* terms, for *generals* will not do. In assault and battery, prosecutions for conspiracy, &c. the same rule holds. The present action is for damages to com pensate for an injury sustained in the opinion of others. I others knew not of the libel, no injury could have been sus tained. Hicks' case Hob. 215. Poph. 139. S. C. Barrow v. Lewellin Hob. 62. Edwards and Wooten 12. Rep. 35.

Harrison and Hamilton contra. The second count states that the letter was sent to France open. A publication may therefore be presumed, especially, as by suffering the judgment to go by default, and an enquiry to be executed, the defendant has acknowledged a cause of action. On this reason the latter part even of the first count may be rejected as surplusage, and the first allegation of publishing held to be confessed. It is allowed that by the English law a verdict would have cured the objection, a question, however may be made, whether the distinction between verdicts and defaults, established by the English code is known to our jurisprudence. Our act of amendments and jeofails extends to judgments by confession, nil dicit and non sum informatus. Perhaps then it may be consistent with our principles to say that on a default the rule is the same. It is not law to say the mode in which a libel is made known ought to appear on the declaration. That it was published is enough. So in assault and battery, that he assaulted and beat, without the addition of knives, staves, &c. is well. Saying he published is, therefore, saying the libel was made known. Besides, the suit itself shews it has been communicated. The expressing in the count that it was made known to others, is superfluous. Bell v. Stone 1 Bos. and Pul. 331.* At all events, the second count states a possible publication to the person by whom sent, and we are entitled to a venire de novo. But it is strange to say the letter was not published, when the very cases adduced, by the counsel for the defendant, shew an indictment would have lain. The mere writing libellous words gives a right of action to the party against

* Hall v. Heneely
† Kellan v. Mansby.
‡ Smart v Dr Faldole After verdict, it's not bad gallged to be "in the hearing" of any one, in an action for words nisi ca fa'o arrest the judgment.

* In that case the letter was to a third person, and so stated in the declaration.

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whom it is written. On the execution of the writ of inquiry, the plaintiff might have abandoned his firſt count, and proceeded on the ſecond; this, therefore, the court may now well intend to have been done.

Troup in reply. It is not pretended that after judgment by default, a motion in arreſt of judgment may not be made, 2 Bur. 899.* If a libel, or ſlanderous word reach only the ears or eyes of the perſon libelled or ſlandered, no action lies. If a man after receiving a libellous letter, makes it known, he is the publiſher, and volenti non fit injuria. To the authorities cited we may add 1 Mod. 58. Lake v. King. In addition to this, there is no rule better eſtabliſhed, than that where a declaration contains good and bad counts, and a general verdict is given, the judgment muſt be arreſted; becauſe it is not known to which the verdict can be applied.

* Collins v. Gibbs. See ante 104. Callagan & others v. Hallett and Bowne.

Per curiam delivered by Kent J. I agree with the counſel for the defendant, that the firſt count is to be conſidered, when taken together, as ſtating no other publication than the ſending a letter ſealed up from the one party to the other. A letter is always to be underſtood as ſealed, unleſs otherwiſe expreſſed, and the law is too well ſettled to be now ſhaken, that ſending a letter is no publication on† which to ground a private ſuit. The baſis of the action is damages for the injury to character in *the opinion* of *others*. This cannot ariſe but from publication. A criminal proſecution for ſending a libellous letter is not founded on publication, but on the inducement which it produceth to a breach of the peace.‡ The provocation is the ſame in the breaſt of the party libelled, whether the libel be or be not publiſhed to the world. The firſt count, therefore, does not ſtate a cauſe of action, and the damages being general, the judgment muſt be arreſted, unleſs the plaintiff wiſhes for a *writ of inquiry de novo* which he is entitled to, on payment of coſts agreeable to the deciſion in the caſe of *Hopkins v. Bedle.**

† Hick's caſe in Hob. 215. Poph. 139 S. C. Hob. 62. 12 Co. Edwards and Woſten. Cro. Eliz. 487.

‡ This is the reaſon why a libel is a crime. Its falſity is not the offence.

* Ante 347.

John R. Livingston *againſt* William Rogers.

THIS cauſe came before the court on three ſeveral motions, which the counſel upon the argument agreed ſhould

In aſſumpſit on mutual promiſes they muſt

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be taken, and considered together. The first was a motion by the defendant in arrest of judgment. The second, one by the defendant also, for a new trial on the ground of a discovery of evidence. The third, by the plaintiff, for leave to amend his declaration, by increasing the damages laid, so as to cover the extent of his demand.

The decision of the court was confined to only the first and third motions; and, as it embraces all the points relied on by the counsel, it is unnecessary to give the arguments used.

In support of the motion in arrest they relied on two reasons;

1st. That the several assumpsits in the three first *counts* of the declaration (which was on a stock contract) were void, for want of consideration.

2dly. That there was no record in the office, to warrant the circuit record, by virtue of which, the trial was had.

The counts complained of, stated the agreement to deliver and receive the stock, and that in consideration the plaintiff had, *at the defendant's request*, promised to perform his part, the defendant *afterwards, to wit, on the same day* promised, &c.

Per curiam delivered by Kent J. This is a case of mutual promises, where the one is intended to be the consideration for the other. It is a well settled rule, that in such cases, the promises must be stated to have been made at the same time.* Otherwise, the one antecedently made will be without consideration, and consequently not sufficient to support the other. The question here is, whether a valid promise is laid, on the part of the plaintiff, so as to form a consideration for that on the part of the defendant. The case in Hobart uses the strong language, that the promises must be at one instant, or they are nude pacts. It was once held, in Howlett's case,† that to lay the defendant's promise, *afterwards on the same day*, was sufficient; because the court would not allow of any division in a day. But in other respects that case is not altogether applicable. There the defendant's promise was in consideration of an antecedent sale and delivery in part; and the point advanced, of not allowing a division in a day, is repugnant to the case of Cooke v. Oxley‡ It was in

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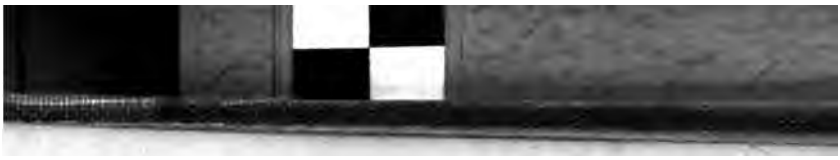
be laid in the declaration as concurrent. If stated to be "afterwards to wit, on the same day" it is bad, and the promise a nudum pactum. If however there be one good count & the damages entire it may be amended. If the court of errors award a venire de novo, it must be sued out to warrant a second trial. If the cause is tried without, it is a defect of record, not amendable, and fatal in arrest of judgment. But a motion may be made for an award of the venire awarded. The court of errors has not authority to award a venire out of this court.

* Esp. Di. 132 Bull. N. P. 146, 7. Hob. 88 1 Bac. Abr. 257 (n) in Mar. new edit. on. Cro. Eliz. 137. Kirby v. Cole.

† Latch 150

‡ 3 D & E 653



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that decided, that if one party has till a different time of the ſame day to aſſent to the agreement, the other party is not held to his prior promiſe, and the promiſes are nuda pacta. It is clear, therefore, from this laſt deciſion, and from the reaſon of the thing, that mutual promiſes, where one is the conſideration of the other, muſt be made not only on the ſame day, but at the ſame time: they muſt be concurrent engagements. The plaintiff's promiſe is here ſtated to have been made at the requeſt of the defendant. If, inſtead of a naked promiſe, the plaintiff had, at the defendant's requeſt done an act, which was either a damage to himſelf or a benefit to the defendant, it would have been ſufficient to have ſupported the defendant's promiſe. An aſſumpſit founded on a paſt conſideration of beneficial ſervice rendered to the defendant at his requeſt, is good. Such are the caſes of Franklin v. Bradell,* Church v. Church,† and Stile v. Smith.‡ The reaſon that a paſt conſideration, beneficial to the defendant, muſt be laid to have been done upon requeſt is, that it is not reaſonable, that one man ſhould do another a kindneſs, and then charge him with a recompenſe. This would be obliging him, whether he would or not, and bringing him under an obligation without his concurrence. In many caſes a requeſt§ may be implied from the beneficial nature of the conſideration, and the circumſtances of the tranſaction. But in the preſent caſe the plaintiff's promiſe being laid to have been made upon requeſt, gives it no validity from that circumſtance; for the requeſt alone creates not, of itſelf, any conſideration. In addition to the requeſt, there muſt be ſomething made or done between the parties, beneficial to the one, or onerous to the other. There muſt either be a conſideration executed, or executory. Even one executed will do if laid to have been done upon requeſt. The plaintiff's promiſe in the preſent caſe can be valid only becauſe made in conſideration of the defendant's promiſe; and if the latter was not made at the ſame time, but at a ſubſequent period, the plaintiff's promiſe was without conſideration and void. I am of opinion this is the juſt and neceſſary concluſion in this caſe; for the promiſes are not laid as concurrent, but as made at different times. The caſe of

* Hutton 84.
† T. Ray 260
‡ 2 Leon. 111. Vide alſo Cro. Eliz. 282

§ See 1 Saund. 264. note 1 by Williams, S. rjt. who has collected the law on the ſubject of aſſumptions laid upon requeſt. See alſo 1 Fonb. 336. & Hob. 106.

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Hayes v. Warren* I regard as perfectly in point. That was an action on the caſe upon promiſes, and after judgment by default and entire damages, it was alleged, in error from the common pleas to the King's bench, that on the fourth count, which was for work and labor done, the conſideration was laid as paſt and executed, and not to have been done upon requeſt. Although the work and promiſe were both laid on the ſame day, it was held that it muſt be taken to be a paſt conſideration, as it was ſtated that "poſtea" he promiſed; and the judgment was reverſed. The work and labor here were beneficial to the defendant, but not being *laid* to have been done upon requeſt, the court would not declare *it ſo*. They ſeemed however, to doubt whether a requeſt might not be inferred from ſome other expreſſions in the count, and rather intimated, that had the judgment been after verdict, the requeſt might have been inferred. But there appeared to be no doubt, that the defendant's promiſe, by being laid as being made afterwards, although upon the ſame day, was to be deemed ſubſequent, ſo as to render the plaintiff's act, a paſt and executed conſideration. In a caſe in Burrows† this deciſion is pronounced by Wilmot J. to be abſurd. It was not, however, on the ground that the conſideration was not juſtly deemed as executed, but becauſe, in his opinion, according to the caſes I have mentioned, a paſt beneficial conſideration, with circumſtances to imply a requeſt, was ſufficient to ſupport the promiſe. The caſe, therefore, for the purpoſe that I cite it, ſtands unimpeached, and is concluſive on the queſtion. If we conſult the precedents of declarations‡ upon mutual promiſes, they uniformly ſtate the promiſes to be concurrent; that when the plaintiff had promiſed, the defendant in conſideration thereof *then and there* aſſumed upon himſelf. From hence I conclude that the promiſes in the three firſt counts of the declaration, are not laid as a ſufficient conſideration for each other; becauſe they are not ſtated to have been made concurrently, or at the ſame time, but at different times of the ſame day. According to the deciſion in Strange, and according to common underſtanding, the meanings of the expreſſions "afterwards" and "at the ſame time" are totally diſtinct. The

* 2 Stra. 933

† Pillans v. Van Mierop. 3 Burr. 1671.

‡ 3 Mor. Va Me. 142. 2 Rich. C. P. 73

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laſt count is good, but the damages being entire,* the judgment muſt be arreſted. The caſe of Croſby v. Adams and Bellamy, decided in this court in July term 1795, and afterwards reverſed upon error, is ſtated alſo to be in point. The counts in that cauſe were preciſely the ſame, as to laying the time of the mutual promiſes, and if the court of error went upon the ſame objection that I have been conſidering, as was ſuggeſted in the argument† of this cauſe, that deciſion is ſufficient to uphold this opinion. Though it is not now neceſſary to conſider the want of a record authorizing the trial, which was urged as another ground for arreſting the judgment, yet, as connected with the other, it may not be inexpedient to notice it. It appears from the record, that on the firſt trial a verdict was given for the defendant, and an exception taken to the opinion of the judge. That, upon the removal of the cauſe into the court of errors, the judgment of this court in favor of the defendant was reverſed, a venire de novo ordered, and the record was remitted back to this court. This order of the court above was correct. Not having the record before them, but only a tranſcript of it, they could not of themſelves award a venire de novo, but, agreeably to the Engliſh precedents, they very properly adjudged that the court below ſhould make ſuch an award.§ This is all that appears before us. This court never has made an award of a venire de novo in purſuance of the direction of the court of errors. The ſecond trial was conſequently without any authority, and in my opinion, altogether null and void. There certainly never was an inſtance of a new trial had without any award by the court for the ſame, and without any record of ſuch award, and ſuch new trial held good, merely in conſequence of the appearance of the defendant. A defect of record is moveable in arreſt of judgment,‖ and is a deficiency that is not in any ſhape amendable. Irregularities in the content, or in the execution of jury-proceſs are amendable. The proceſs is amendable by the roll, and the circuit record is amendable by the iſſue-roll. So mere continuances may be entered after judgment, but no caſe ever came up to the preſent. In this there was a trial without any award for it whatſoever, either upon the record or the minutes of the court. The circuit judge had no authority to try a ſe-

* 3 Wils. 185 Cowp. 276.

† By Benſon, who was at that time on the bench.

§ 2 Saund. 101. v. 1 D & E 783. 4 Bro. Pa. Ca. 288. 1 Lill. Ent. 243. Yelv. 76. Cro. Jac. 206. 1 Salk. 403. 1 L. Ray. 10 Carth. 319. Skin 514. 2 H. Black. 211.

‖ 1 Rol. Abr. 200 pl. 27. Bac. Abr. tit. Amendment. (D.) 4. Ib. tit. Juries J.

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cond time the matter in iſſue on the iſſue-roll; without award of a venire de novo by the court. There are c where a trial has been held void, becauſe the venire was warranted by the roll, and the cauſe was tried by a differ jury than that which the record directed.* To hold this mendable in the preſent caſe would be unprecedented, in my opinion, would tend to the abolition of all regular form and order in our practice and judicial proceedings hold it eſſential that it ſhould be made to appear, that pre ous to the laſt trial there was an order for a venire de no the court of errors not having of themſelves *made ſuch* order, and not having the authority to do it. As *then t* ſecond trial was without any award of a venire, it was an ab ſolute nullity, the judgment muſt be arreſted, unleſs the pa ty chooſe to move to award a new venire. As there is o good count in the declaration, the plaintiff may, if he choo on the firſt ground ſue out a venire de novo, and may al amend his three firſt counts by ſtriking† out the words "*g "terwards, to wit,*" being the ground on which the judg ment ought to be arreſted. This, however, muſt be on pa ment of coſts ſince declaring. On the point of amending enlargement of the damages laid, the court§ is divided, co ſequently the plaintiff in this reſpect takes nothing by h motion.

* 1 Latch. 194. Hob. 76.

† 7. D. & E. 56

§ Conſiſting of only Kent and Thompſon J's no others giving any opinion.

Rathbone *against* Blackford, Manucaptor of Murray.

If commiſſioners of bankruptcy in their declaring a man a bankrupt, ſpecify the day when he became ſo, it is not concluſive as to the time, they having no authority to decide it. If a man go to priſon on the firſt of the month, continue there 60 days, in the courſe of which time he is fixed as bail for another, and at

IN July term 1801 judgment was entered againſt Mu ray, for whom the defendant was ſpecial bail. In the ſa term a capias ad ſatisfaciendum was returned non eſt agai Murray, and thereupon a capias in debt on the recognizan of bail was iſſued againſt the bail, which was alſo return and ſerved on the 3d day of July, being the laſt day of term. A judgment was obtained againſt him in the Octo term following.

Blackford was committed to priſon on meſne proceſs the firſt of July 1801, and continued there 60 days with finding bail. A commiſſion of bankruptcy iſſued againſt h the 20th November 1801, and the commiſſioners declared became a bankrupt on the firſt of July 1801; and

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is regularly discharged under the bankrupt act. Since his charge a fi. fa. had issued, and Blackford's goods taken on it.

Per curiam. A motion is now made on the part of the fendant to set aside this execution, and to stay all further oceedings against him. He contends that his act of bankptcy was not complete till the expiration of sixty days af- his confinement, or until the first of September 1801; d, that inasmuch as he was fixed as Murray's bail on the st of July 1801, this debt could have been proved under e commission, and that, therefore, the present proceedings e irregular.

the expiration of that period be declared bankrupt on a commission duly sued out, he will be exonerated from his recognizance, and an execution taken out upon it be set aside. In such a case the plaintiff may prove his debt under the commission.

This naturally produces an inquiry,

First, As to the time of Blackford's becoming a bankpt, and

Secondly, Whether this demand could have been proved ider the commission against him; for if so, it is not denied at he is entitled to relief.

By the first section of the act of congress "establishing an uniform system of bankruptcy," the remaining in prin two months or more on being arrested for debt, is made act of bankruptcy. Blackford went to jail on the first of ly 1801, and continued there above sixty days; the plainF insists that by relation he became bankrupt on the day went into confinement, and that not being then fixed for urray's debt, the present demand was not proveable under e commission. The commissioners, it is true, have undertken to fix that, as the day on which he became a bankrupt; it in this, if they have not exceeded their powers, they ve at least done a nugatory act which is binding on no ne. They are to declare the party a bankrupt, but no auority is given to ascertain the day of his becoming so. or would it have been discreet to have vested such power them, for their proceedings being somewhat ex parte, d very summary, so important a fact in which many, ho had no opportunity of being heard might be interested, ould not, unless absolutely necessary, have been left to e settled by them. Thus in England, the commissioners eing satisfied of the debt, the trading, and act of bankrupty, declare and adjudge, that the party became bankrupt ge-

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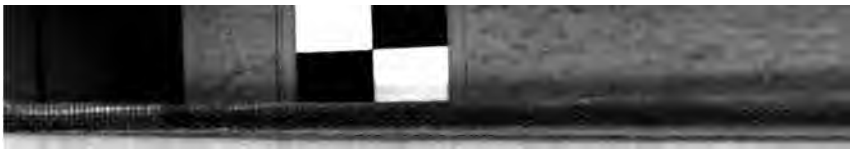
nerally before the date of the commiſſion without a r preciſe ſpecification of time. Fixing the time even thus is merely diſcretionary and, for caution, the Engliſh ſtat having no where directed them to do it, nor is their de ration, as to the period, ultimately binding on any Cull. Bank. laws, 77. Without any doubt, therefore, competent to the defendant to controvert this act of the c miſſioners ſo far as it reſpects the fixing on the day of becoming a bankrupt, and to ſay that it was not till l after he became ſo. It becomes neceſſary then to determ whether the act of bankruptcy ſhall relate back to the ti of the party's going to jail, or whether it be only inchoate the arreſt, and not complete till the ſixty days expire. En liſh deciſions on this point will afford us but little aid, b cauſe it is provided by their law, that if a man "lie in priſ "two months he ſhall be accounted a bankrupt *from the ti* "*of his firſt arreſt*," 21 Jac. 1 ch. 19. S. 1. This is thoug to be reaſonable from a preſumption that no man will lie long in priſon without paying his debts or procuring ba unleſs *he be inſolvent at the time of the arreſt*, 2. Burr. 81 However ſtrong this preſumption, as the legiſlature of t United States have thought proper not to adopt this pro ſion of the Britiſh ſtatutes, we are at liberty to apply a co ſtruction of our own. This relation to the moment of co mitting an act of bankruptcy is conſidered as one of the ha eſt caſes of which the Engliſh law admits, but was thoug neceſſary to ſecure creditors againſt fraudulent diſpoſitio of their property by bankrupts, whether by their own a or under colour of legal proceſs 1 Vez. 328. It is cert that men in tottering circumſtances have too much temp tion, as well as opportunity of defeating their creditors an equal diſtribution of their effects. But while interp ing checks againſt practices of this kind, we ſhould careful not unneceſſarily to adopt fictions which may o rate with ſeverity on other perſons as well as the bankru and therefore, where it is impoſſible any fraud can be pr tiſed in creating a debt to injure other creditors, and wh the evidence of it is matter of record, and the tranſaction evidently bona fide, I would not exclude it from proof and



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a commiſſion by fictitious relations, provided it fell due, or the contingency on which it was payable happened at any time previous to the expiration of the ſixty days. It is hard that the future induſtry of a bankrupt, after a fair ſurrender of his property, ſhould be taxed or burthened with claims which were in a ſtate of maturity at the time of iſſuing the commiſſion; and it is equally ſo on a creditor of this deſcription to be denied any part of his eſtate, and to be compelled to truſt for payment to the precarious profits of his ſubſequent exertions. Without, therefore, preſcribing a general rule, which is not neceſſary, I ſhall only ſay that in this caſe, the act of bankruptcy ſhould not be regarded as conſummated until the lapſe of ſixty days. We are now to ſee,

Whether the plaintiff's demand, on this principle, could have been proved againſt the eſtate of Blackford.

The 34th ſection of the bankrupt law provides, "that "the bankrupt ſhall be diſcharged from all debts by him "due or owing *at the time* he became bankrupt, and all "which were or might have been proved under the com-"miſſion." But for this proviſion, the certificate would operate unequally, for if creditors whoſe debts aroſe ſubſequent to the bankruptcy, were permitted to ſhare with thoſe whoſe demands accrued before, the latter would be expoſed to the hardſhip of having only a dividend under the commiſſion, while the former, beſide an equal dividend, would retain a remedy for the reſidue againſt the brankrupt himſelf and his future property. The privilege, therefore, of creditors to prove, and of the bankrupts to be diſcharged from debts, is wiſely made co-extenſive and commenſurate, 1. Atk. 119. Still difficulties muſt occur in the application of this rule as to the time when a debt ſhall be ſaid to accrue. To aid in ſolving theſe difficulties, debts have been claſſed into ſuch as are *abſolute* or *certain*, that is, payable *certainly* and *at all events*, and *contingent* or payable only on the happening of ſome uncertain event or contingency.

The demand againſt Blackford is of the latter kind. Murray did not pay the condemnation money, or render himſelf to the ſheriff for the ſame: Blackford contracted to pay it for him. If the contingency of Murray's not paying

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the money, or not ſurrendering himſelf, had happened at the time of the bankruptcy, the debt as againſt Blackford could certainly be proved.

Without examining how long after the return of a ca. ſa. and of a writ on the recognizance, the bail may ſurrender, it is ſufficient as it reſpects the preſent enquiry, to ſay, that after the return of non eſt inventus, on a capias ad ſatisfaciendum, the condition of the recognizance is broken, and the bail are regarded as fixed in law. If the principal dies after that day, and before a ſurrender, he is fixed beyond relief; and were the plaintiff to apply to prove his debt while the bail were in that ſituation, the aſſignees would have *no right* to ſay, that the bankrupt ex gratia might yet ſurrender his principal, and thus defeat his claim. He might with propriety anſwer that what the bankrupt would do, he could not tell, but that until a ſurrender was made, which he would not compel the bail or his principal to make, the poſſibility of ſuch an event ought not to be alleged againſt proving an exiſting demand, which accrued the moment the recognizance was forfeited.

In my judgment, therefore, Blackford was ſufficiently fixed as the bail of Murray at the time of his bankruptcy to confer on the plaintiff a right to prove his debt under the commiſſion againſt him, and that the fieri facias iſſued ſince his diſcharge muſt accordingly be ſet aſide with coſts.

Samuel Governeur and Peter Kemble *againſt* the United Inſurance Company. The ſame *againſt* the ſame.

* If a commander of a convoy make a friendly capture of one of his convoy it will not exonerate the underwriter, being a caſe of abandonment as for a total loſs.

THESE were two cauſes, the one a policy on the cargo of the ſhip Indiana, the other on a ſimilar policy on that of the barque Bekkeſkow; verdicts having been rendered for the plaintiffs. Two queſtions were ſubmitted without argument;

1ſt. Whether the verdicts for the plaintiffs were agreeable to evidence.

2d. Whether they were agreeable to law.

The material facts in both caſes were the ſame. The veſſels and cargoes were Daniſh, inſured as ſuch at war premi-

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ums, at a time of actual hoſtility ſubſiſting between Denmark and Great-Britain.

The circumſtances on which the queſtion ſubmitted aroſe were, that theſe policies were effected for account of a Mr. Murphy, a merchant of the iſland of St. Thomas, on voyages from thence to the United States. That Capt. Barry, commander of the American ſhip of war *United States*, being on the Weſt-India ſtation, for the protection of the American commerce, was requeſted by Mr. Murphy, on whoſe account the inſurances were made, to take both veſſels under his care, and protect them all in his power. That for this purpoſe captain Barry, when at ſea, took from the maſters of both veſſels their papers, againſt their opinion and conſent, and put on board of them prize maſters, ordering them for the United States as prizes to his ſhip. That after parting from the ſhip *United States*, they were ſeverally captured, the one carried into Halifax and there acquitted on payment of coſts; the other into Bermuda and there condemned as good and lawful prize.

Per curiam, delivered by Lewis, C. J. The conduct of captain Barry was certainly not authorized by the requeſt of Mr. Murphy. He acted, however, with the beſt intentions; and his meaſures, appear to me, rather to have leſſened than to have increaſed the riſques. The acquittal of the one veſſel was probably owing to them; for, their papers, ſhewing the property to be Daniſh, muſt have inſured the condemnation of both. I can ſee no reaſon, therefore, why the underwriters ſhould not be held to their reſponſibility, and am of opinion the verdicts are neither againſt law nor evidence.

In a ſuit to recover a ſtake depoſited on a wager, evidence of money due on a note of hand, cannot be given. If the declaration be for ten dollars and the judgment for fifteen, it is fatal on error from a juſtices' court.

Peter Delamater *againſt* James Borland.

IN error on a certiorari from a juſtice's court. The declaration was for ten dollars depoſited in the hands of the defendant below as a ſtake on a wager. The demand at the trial was for 25 dollars due on a note, on which five had been paid, and the judgment was for fifteen dollars.

Per curiam. It appears that the plaintiff below declared for one thing, and gave evidence of another totally variant.

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To this the defendant made an objection, which was ove ruled. In the next place, the declaration is for ten dollar and the judgment for fifteen. Both errors are fatal, and ther muſt be a reverſal with coſts.*

* The multiplicity of caſes from the Juſtices' Courts will excuſe the i ſertion of the following determination, by which it was decided, that th have no juriſdiction under the joint debtor act.

Joſiah Jones and Joſiah Crawford v. David Reid.

JANUARY TERM, 1799.

Per curiam. It is a clear and ſalutary principle that inferior juriſdictio not proceeding according to the courſe of the common law, are confin ſtrictly to the authority given them. They can take nothing by implicatio but muſt ſhew their power expreſsly given them in every inſtance.

The ſound rule of conſtruction, in reſpect to Juſtices' Courts is accor ingly this: to be liberal in reviewing their proceedings as far as reſpect reg larity and form, and ſtrict in holding them to the exact limits of juriſdi tion preſcribed to them by the ſtatute.

To apply theſe principles to the preſent caſe:

The act making joint debtors anſwerable to their creditors ſeparately an giving a new mode of proceeding, is poſterior to the act granting civil juri diction to juſtices of the peace, and makes no mention of them. It direc that proceſs ſhall iſſue againſt the joint debtors in the manner then in u and if either be taken and brought into court, he ſhall anſwer. This a contemplates, in every inſtance, a compulſory proceſs on which the defen ant is taken and brought into court and until that be done the court cann proceed in the cauſe; whereas the ten pound act giving civil authority Juſtices, intends only a ſummons in the firſt inſtance againſt freeholders an inhabitants, having families, and if the ſummons was perſonally ſerved an the defendant does not appear, the juſtice cannot compel him, but is proceed and try the cauſe without his either being taken or bro't into cou The joint debtor act accordingly gives a power and juriſdiction differe from and unknown to the ten pound act. So in reſpect to executions u joint debtor act directs, that the execution ſhall be againſt all the debtors; b ſhall not, however, iſſue againſt the body or ſole property of the one not t ken and brought into court. Whereas, by the ten pound act, execution is d rected to go againſt the entire goods and chattels of the perſon againſt who it is granted, and for want of ſufficient goods of ſuch perſon, to take his b dy. Here are new powers and new modes of proceedings, applicable to t courts of common law and contrary to the expreſs forms and directio given to the Juſtices' courts and in which no mention is made of them.

We are, therefore, of opinion, that, according to the ſettled rules of inte pretation, juſtices of the peace have no juriſdiction in the caſe of joint deb ors, unleſs both are duly ſerved with proceſs, and, therefore, that the jud ment in this caſe muſt be reverſed.

PROMOTIONS IN THIS TERM.

Ambroſe Spencer, Eſq. as Judge, vice Radcliff Judg reſigned.

John Woodworth, Eſq. Attorney General, vice Ambro Spencer, promoted.

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7. An act concerning ſheriffs and their duties in reſpect to proceſs, arreſts and the keeping of priſoners, 181. 450
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11. An act for the ſale and diſpoſition of lands belonging to the people of this ſtate, and for other purpoſes therein mentioned, 185
12. An act relative to the harbour-maſter and maſter and wardens and pilots of the port of New-York, 104
13. Act for more eaſy pleading in certain ſuits, 253

Action.

See Agreement, 1. Aſſumpſit. Breach of Orders, 1. Contract, 1. Corporation, 1. Eſcape, 1. Libel, 3. Money had and received, 1. Practice, 29. Promiſſory Note, 2. Slander, 1. Venue, 1.

1. Cauſe of action muſt exiſt before ſuing out the writ. If it appear on the record to be otherwiſe, it will be fatal on demurrer. *Lowry v. Lawrence*, 69
2. An action is not maintainable for ſaying one is forſworn, aliter that he is perjured. In an action for words, if thoſe in ſome counts be actionable and thoſe in others not, and entire damages given, judgment will be arreſted; but had the plaintiff applied, he might have had, on payment of coſts, a venire de novo. *Hopkins v. Beedle*, 347

Acquittal.

See Inſurance, 16.

Adjuſtment.

See Inſurance, 2. 16.

Adminiſtrator.

See Eſcape, 2. Juſtices, 1.

Adoption.

See Agent, 2.

Adverſe Poſſeſſion.

See Holding over. Poſſeſſion.

Affidavit.

See Merits. Practice 70.

Agent.

See Commiſſions, 1. Inſurance, 16. Practice, 32, 67. Witneſs, 3. 6.

1. An agent's agreement to give part of the profits ariſing from merchandize entruſted to him, in order to ſell the reſidue under the contract of another, is obligatory on his principal. *Lyle v. Claſon*, 223
2. The acts of a principal are to be liberally conſtrued in favour of an adoption of the acts of an agent. *Cadwiſe and another v. Hacker*, 526

Agreement.

See Agent, 1. Contract. Evidence, 8. Frauds, ſtatute of, 1. Practice, 22. 63.

1. An action will lie on an agreement by a third perſon, to procure, after the diſcharge of a debtor under the inſolvent act, his note for a compoſition on the original debt due the plaintiff, in conſideration of his giving up the defendant's note for the ſame ſum, that it might not obſtruct his diſcharge. If a ſecurity be depoſited, on returning of which the depoſitary will be entitled to ſomething in lieu, an action may be inſtantly brought on tendering the depoſit, and an offer of it the day after ſuit brought, is not a defence. *Ripley v. Wardell*, 175

Aliens.

See Practice, 61.

Amendment.

See Certiorari, 1. Practice, 8. 27. 29. 34. 55. 62. 64. 73. 91. 95. Sheriff, 2. Slander, 1. Venue.

Anſwer in Chancery.

See Evidence, 2.

Appeal.

See Inſurance, 9.

Appearance.

See Forcible Entry and Detainer, 1. Practice, 33. 36. 56. 78. 89. 91.

Appraiſer.

See Manhattan Company, 1.

Apprentice.

See Infant, 1. Phyſician, 1.

Arbitration.

See Award.

Arreſt.

See Bankrupt, 1. Evidence, 3. Practice, 41.

Arreſt of Judgment.

See Action, 2. Libel, 3. Practice, 35. 73. Venire, 1.

Aſſeſſment of Damages.

See Practice, 82.

Aſſignment.

See Covenant, 1.

Aſſumpſit.

See Action.

1. If a perſon bind himſelf under hand and ſeal to do a certain act for a certain conſideration, aſſumpſit will lie to recover back the conſideration paid, if the act be not done. *Weaver v. Bentley*, 47
2. Aſſumpſit will not lie, by a branch pilot of New-York, on a contract made with a veſſel in diſtreſs. *Callagan and others v. Hallett & Bowne*, 104
3. In aſſumpſit on mutual promiſes, they muſt be laid in the declaration as concurrent, if ſtated to be afterwards, to wit, on the ſame day, it is bad and the promiſe a nudum pactum. *Livingſton v. Rogers*, 583

Attachment.

See Limits, 1. Practice, 78.

Attorney.

See Indictment, 2. Practice, 28. 67. 70. 88. Witneſs, 2. 5.

Auction.

See Inſurance, 3. 11.

Average.

See Inſurance, 4. 7.

1. Goods laden on deck and ejected are not ſubjects of general average. *Smith & Stanley v. Wright*, 43
2. Wages and proviſions during the detention of a veſſel captured and carried in for adjudication are ſubjects of general average. If a veſſel be captured during her voyage, in ſettling the proportion of average, the freight will be chargeable up to the day of capture. The amount on which a general average, in caſes of capture, is to be calculated, is the cargo on its firſt coſt or invoice price and charges at the port of departure; the veſſel on four fifths of her value at the ſame place; the freight at one half agreed to be paid. *Leavenworth v. Delafield*, 573

Averment.

See Pleas and Pleading, 1.

Award.

1. An award in treſpaſs that "the ſaid ſuit ſhall be no further proſecuted" is ſufficiently final and certain, and a good bar to an action on the caſe for the ſame offence. *Purdy v. Delavan*, 304

B

Bail.

See Bankrupt, 2. Inſolvent, 1. Practice, 22. 30. 61.

1. If bail be fixed after their principal has been diſcharged under the inſolvent or bankrupt law, an exoneretur will be ordered on payment of coſts. *Seaman v. Drake*, 9

2. When an attorney has been, from particular circumſtances, induced to authorize the ſheriff to diſcharge a priſoner, on a ſingle bail, who afterwards turns out to be inſolvent, the court will, if no oppoſition be made, and the attorney's conduct appear bona fide, allow him after filing common bail under the ſtatute, to put in ſpecial bail for the purpoſe of obtaining a ſurrender of the principal. *Gilchriſt v. Van Wagenen*, 499

Bankrupt.

1. On production of a certificate under the bankrupt law of the United States, granted in a ſiſter ſtate, the court will diſcharge from cuſtody on motion. *Jones v. Emerſon*, 487

2. If commiſſioners of bankrupt, in their declaring a man a bankrupt ſpecify the day when he became ſo, it is not concluſive as to the time, they having no authority to decide it. If a man go to priſon on the firſt of the month, continue there 60 days, in the courſe of which he is fixed as bail for another, and at the expiration of that period be declared a bankrupt on a commiſſion duly ſued out, he will be exonerated from his recognizance, and an execution taken out upon it be ſet aſide. In ſuch a caſe the plaintiff may prove his debt under the commiſſion. *Rathbone v. Blackford*, 588

Bar.

See Award, 1. Limitation, 1. Poſſeſſion, 2.

Bill of Exceptions.

See Mandamus, 1.

Bill of Exchange.

See Partners and Partnerſhip, 1. 2. Promiſory Note. Witneſs, 5.

1. The want of funds belonging to th drawer excuſes notice of non-payme as well when the bill is accepted as wh not. *Hoffman & Seton v. Smith*, 15

Bond.

See Covenant, 1.

1. A bond to indemnify againſt an eſcape i given after an eſcape ſuffered is good. Within a condition to ſave harmleſs from what the plaintiff might be obliged to pay "after due proceedings had "againſt him, and adjudged and decreed," a judgment by default may be ſhewn, ſuch judgment is not in itſelf fraudulent, and unleſs fraud be ſhewn, i is a damnification within the bond. *Given v. Driggs*, 450

2. If judgment be ſigned for the whole penalty of a bond not due, but forfeited for non-payment of intereſt, execution will be ſtayed on bringing in the intereſt and coſts, the judgment ſtanding as ſecurity. *Bowne v. Hallett*. 518

Breach of Orders.

1. If a maſter of a ſhip be guilty of a breach of orders, by purſuing voyages contrary to his inſtructions, and inveſt the proceeds of his freight in articles which his owner takes to, this, if accompanied with a declaration that they find no fault with him but for not writing, will be a waiver of any right to ſue for damages on account of diſobedience. *Codwiſe and another v. Hacker*. 526

C

Cargo.

See Inſurance, 1.

Carrier.

See Commiſſions, 1.

1. For goods ſhipped on deck, and ejected, an owner is not liable as a carrier. *Smith & Stanley v. Wright*, 43

Capture.

See Inſurance.

Caſe made and making.

See Practice, 12. 19. 20. 34. 49. 72.

Certificate.

See Bankrupt, 1. Judges' Certificate. Stay of Proceedings.

Certiorari.

See Witneſs, 7.

1. Certiorari amendable according to the affidavit on which obtained. *Knapp v. Palmer*, 486

Challenge.

See Collateral Iſſues, 1.

Chancery.

See Practice, 80.

Circuit.

See Coſts, 2. Iſſue, 1.

Clearance.

See Inſurance, 8.

Cognovit.

See Practice, 24.

1. Judgment may be entered on a cognovit in vacation. *Arden & Cloſe v. Rice & others*, 499

Collateral Iſſues.

1. On collateral iſſues the firſt ſection of the act for regulating certain criminal proceedings does not extend. If on ſuch the priſoner ſtand mute the court will enter a plea for him, on which no peremptory challenge. *The People v. Youngs*, 37

Commiſſion.

See Practice, 1. 33. 40. 85. 90. 93.

1. If a witneſs under a commiſſion diſcloſe a collateral fact, to which the enquiry was not directed, a ſecond commiſſion may iſſue to examine as to that fact. *Nicoll & Thompſon v. Col. In. Company*, 345

Commiſſions.

See Inſurance, 18.

1. Where commiſſions are allowed to a captain on his ſales and inveſtments, he will not be entitled to commiſſions on goods he carries to deliver according to an antecedent contract made by his employer, and for which he does not receive payment. *Miller v. Livingſton*, 349

Commiſſioners of Bankrupt.

See Bankrupt, 2.

Compoſition.

See Agreement, 1.

Compromiſe.

See Practice, 25. 60. Sheriff, 3.

Concealment.

See Inſurance, 6. 8. 9.

Condition.

See Bond. Intruſion, 1. People, 1.

Conſideration.

See Agreement, 1. Aſſumpſit, 1.

Conſignor.

See Corporation, 1. Judgment, 1.

Conſignor, Conſignee, Conſignment.

See Commiſſions, 1. Inſurance, 18. Privilege, 1. Trover, 1.

Conſolidation.

See Practice, 25. 39. 90.

Contraband.

See Inſurance, 17.

Contempt.

See Libel, 1. 2. Practice, 78.

Contract.

See Aſſumpſit, 2. Limitations, 1. Practice, 39.

1. A contract for the benefit of a third perſon will ſupport an action by him with whom the contract is made. *Miller v. Drake*, 45

Conviction.

See Practice, 30.

Copies.

See Evidence, 5. Inſurance, 15.

Corn.

See Inſurance, 7.

Corporation.

See Manhattan Company.

1. The preſident and directors of a company, when legally choſen, are the proper perſons to execute acts ordered to be done by the preſident, directors and company, and a promiſe to pay as the latter may order, is broken by not paying according to the order of the preſident and directors. The intereſt acquired by ſubſcribing for ſhares in the ſtock of an incorporated company, is a good conſideration to ſupport an action againſt the ſubſcriber. The promiſe to pay in ſuch caſes as the preſident, directors and company ſhall appoint, is not ſuch a promiſe as will ſupport an action as for a promiſſory note. *Union Turnpike Company v. Jenkins*, 381
2. The act of the legiſlature of 1798, which was re-enacted on 3d April, 1801, contains no implied grant of the ſoil under water therein mentioned, to the corporation of New-York. They are, under that act, only attornies for the public. The reſervation in their reſolve of June, 1801, of ſlipage ariſing from piers erected under grants made by them in purſuance of that law, is void. The corporation has no right to ſlipage, from piers running into the Eaſt-river, in front of South-ſtreet. A ſlip is an interval or vacancy between two piers. *Mayor, &c. v. Scott*, 543

Coſts.

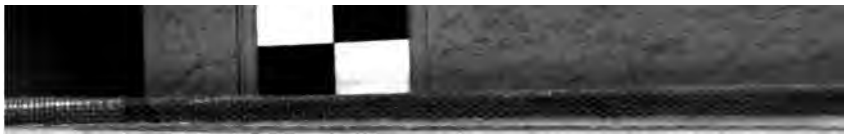
See Action, 2. Bail, 1. Forcible Entry and Detainer, 1. Limits, 1. Nonſuit, 1. Practice, 11. 15. 16. 22. 24. 25. 38. 42. 47. 50. 56. 66. 69. 76. 86.

1. Query, whether coſts ſhould not follow in all caſes of delay. *Townſend v. New-York Inſurance Company*. 5
2. Coſts muſt abide the event of the ſuit when the circuit judge has not time to try the cauſe. *Way v. Bradt*, 118

Covenant.

See Venue, 1.

1. A covenant in an aſſignment of a bond payable by inſtalments from the aſſignor, that "if the obligor ſhould become inſol-"vent or not able to pay, and the aſ-"ſignee ſhould uſe all due diligence, and "take all legal meaſures, immediately "after the ſeveral ſums of money ſhall "reſpectively become due," is broken on the inſolvency of the obligor, on the



falling due of the firſt inſtalment, and the aſſignor is then liable for the whole amount, the aſſignee not being obliged to wait till the laſt inſtalment is payable. If the firſt inſtalment be not demanded in the declaration, it will, unleſs the contrary be ſhewn, be preſumed to have been paid. The aſſignee is not precluded from his action againſt the aſſignor, becauſe he has not proved his debt under the obligor's eſtate. *Ten Eyck & Elmendorf v. Tibbits*, 427

Countermand.

See Practice, 50. 76.

Counter Affidavits.

See Practice, 60.

Court of Errors.

See Venire, 1.

Croſs Suits.

See Practice, 68.

Cuſtom-Houſe Officer.

See Juſtification, 1.

D

Damages.

See Action, 2. Breach of Orders, 1. Practice, 82. 95.

Day Calendar.

See Practice, 2.

Debt.

See Eſcape, 2.

Declaration.

See Aſſumpſit, 3. Frauds, ſtatute of, 1. Juſtices' Court, 2. Libel, 3. Partners and Partnerſhip, 2. Practice, 15. 17. 95.

Deeds.

See Grant, 1. Military Lands, 1. Preſumption, 1.

Default.

See Bond, 1. Practice, 2. 26. 28. 44. 82. 86.

Demurrer.

See Practice, 29.

1. If the court be ſatisfied that a demurrer is put in merely for delay, and the oppoſite ſide has noticed the demurrant, who does not appear, the demurrer will be overruled, and a rule for judgment ordered, the party obtaining it ſtating himſelf ready to open the rule if good cauſe of demurrer or merits be ſhown. *Gilchriſt v. Van Wagenen*, 498

Depoſit.

See Agreement, 1.

Depoſition.

See Witneſs, 1.

Deſire.

See Truſt, 1.

Diſcontinuance.

See Practice, 42.

Diſcovery of New Evidence.

See Practice, 21.

Diſtreſs.

See Aſſumpſit, 2. Inſurance, 5. Treſpaſs, 1.

Dividend.

See Covenant, 1.

Dower.

See Eſtoppel, 1.

E

Ejectment.

See Poſſeſſion, 2. Practice, 13. 15. 52. 62. 64. 84. 86. Reſtitution, 1.

1. If a defendant has acknowledged the title of the plaintiff, he cannot afterwards diſpute it, and whether evidence has been properly or improperly received for, or rejected againſt ſuch title, cannot be enquired into by the defendant. *Jackſon, ex dem. Low and others v. Reynolds*, 444
2. In ejectment the court will allow of excuſes to protect the poſſeſſion, which in other caſes they will not receive. *Jackſon v. Stiles*, 503

Election.

See Infant, 1.

Error.

See Juſtices' Court, 2. Practice, 65. 95. Venire, 1.

Eſcape.

See Bond, 1. Sheriff, 1. 2.

1. In an action of eſcape from a priſon in one county, that the judgment on which the ſuit againſt the priſoner was founded is of record in another county, is not ſuch a ſubſtratum, as makes the action local where the judgment is recorded. Query, if the county where the eſcape happens be not the proper county for the venue. *Bogert & Lewis v. Hildreth*, 1
2. Debt will not lie againſt the adminiſtrators of a ſheriff for an eſcape in the lifetime of their inteſtate. *Martin v. Bradley and others*, 124

Eſtoppel.

1. A perſon holding under conveyance fee deduced from the huſband of demandant in dower, is eſtopped fi controverting the ſeiſin of the huſba *Bancroft v. White*,

Evidence.

See Award, 1. Ejectment, 1. Holding-ov 1. Inſurance, 15. 19. *Judgment*, 1. Pra tice, 21. 58. 73. 75. 90. *Promiſſory* No 1. Sea-worthineſs, 1. Witneſs, 1.

1. If a defendant read part of the anſwer o the plaintiff to a bill of diſcovery, query whether the whole is made evidence *Hoffman & Seton v. Smith.* 15
2. Weight of evidence is not always a reaſo for granting a new trial; yet if it ap pear that juſtice has not been done, will be ſo. *Jackſon v. Sternberg*, 16
3. A plaintiff who delivers to a conſtable writ againſt the defendant in his own ſuit, on which the defendant is take and impriſoned on the order of th plaintiff, can not, in an action againſ him by the defendant, for falſe impri ſonment, give, under the general iſſu the ſpecial matter in evidence, by wa of juſtification, under the ſtatute fo more eaſy pleading in certain ſuits, bu may do it in order to ſhew that the de fendant was not arreſted by his inſtruc tions, but by virtue of a ſuperior autho rity. *Herrick v. Manly*, 25
4. A paper noticed to be produced, and cal led for, is evidence; and the party no ticing has not a right to firſt inſpect i *Lawrence & Whitney v. Faulkner & Clarkſon*, 27
5. Copies of Letters, &c. remaining in a fo reign court of vice-admiralty, and dul authenticated under the ſeal of th court, when returned to a commiſſio iſſued from the ſupreme court, may b read in evidence. *Miller v. Living ſto* 34
6. Parol evidence cannot be received t ſhow that a deed ſtating a courſe for ſ chains was meant to expreſs only a *Jackſon, ex dem. Putnam v. Bowen*, 35
7. An aſſignment of property under the a ſconding debtors' act is evidence of in ſolvency in the debtor. *Van Ryck & Elmendorf v. Tibbits*, 42
8. Indorſing an appearance on a writ of term paſt, is not evidence of an agree ment that the proceedings ſhall be ſta

sidered as of that term. *Gordon v. Bowne*, 513

9. A note of hand cannot be given in evidence in an action to recover a ſtake depoſited on a wager. *Delamatter v. Berland*, 598

Exceptions.

See Mandamus, 1. Practice, 47. 49.

Excuſe.

See Ejectment, 2. Nonſuit, 1. Practice, 4. 6. 44. 51. 53. 74. 76.

Expenſes.

See Public Proſecutions, 1.

Extortion.

See Indictment, 2.

Executors.

See Adminiſtrators. Juſtices, 1.

Execution.

See Limits, 1. Practice, 12. 27. 92. Priſoner, 1.

Exoneretur.

See Bail, 1.

F

Falſe Impriſonment.

See Evidence, 3.

Falſe Papers.

See Inſurance, 8.

Fees.

See Indictment, 2. Phyſician, 1.

Feigned Iſſue.

See Practice, 80.

Fine.

See Practice, 11. 23.

Forcible Entry and Detainer.

1. An indictment for forcible entry and detainer muſt ſtate a ſeiſin in the proſecutor at the time of the entry, and alſo ſhew an entry by the defendant. To entitle to coſts it muſt appear that the party traverſed the indictment. The ſupreme Court may award re-reſtitution. *The People v. Shaw*, 125

Forfeiture.

See Intruſion, 1. People 1.

Fraud.

See Bond, 1. Inſolvent, 1.

Frauds, Statute of.

1. The ſtatute of frauds does not require the agreement to make a conveyance to be ſet forth in the declaration, in an action for not conveying according to covenant, 45

Freight.

See Average, 2.

French Intercourſe Bill.

See Inſurance, 5.

G

Grant.

See Corporation, 2.

1. If the grant of a lot of land by deed, ſpecify the number of acres, with a reference to a map, the whole lot will paſs according to the map, though the deed ſpecify fewer acres than the map gives. *Jackſon v. Diffendorf*, 493

General Seſſions.

See Indictment, 1.

H

Holding-over.

1. If a tenant enter under a leaſe, holding-over after its expiration is not evidence of an adverſe poſſeſſion. So if the tenant's ſon come in under him.— *Brandter, ex. dem. Fitch v. Marſhall*, 394

I

Indemnity.

See Bond, 1.

Indictment.

See Collateral Iſſues, 1. Forcible Entry and Detainer, 1. Practice, 49.

1. Indictments for a ſecond offence, where the puniſhment is encreaſed, muſt ſet forth the record of the former conviction; of ſuch, for grand larceny, the general ſeſſions has no juriſdiction. If a priſoner be indicted before them for ſuch ſecond offence, and brought up to the ſupreme court to receive ſentence, on a ſuggeſtion that this is the ſecond offence, the ſupreme court cannot pronounce any other judgment than the court below might have done. *The People v. Youngs*, 37
2. An indictment againſt an attorney, for extorting more than his legal fees, muſt ſtate the ſum due and the ſpecific exceſs. *The People v. Ruſt*, 131

Indorſement.

See Bill of Exchange. Evidence, 8. Partners and Partnerſhip, 1. 2. Practice, 89. Promiſſory Note. Witneſs, 5.

Infant.

1. An infant of fourteen years of age put on trial with a phyſician, cannot elect to become a ſtudent without the approbation of his father, ſo as to charge the father with the amount of a ſtudent's fee. *Hart v. Hoſack*, 25

Inqueſt.

See Practice, 36. 63. 80.

Inſolvent and Inſolvent Law.

See Covenant, 1. Priſoner, 1.

1. The want of a ſtamp to an inſolvent's diſcharge can not be urged as a reaſon to ſhow it was not duly obtained, and prevent the exoneration of his bail. Fraud only can affect it. *Cole v. Stafford*, 249

Inſurance.

See Average, 1. Practice, 39. 81. Seaworthineſs, 1.

1. Two perſons, including the maſter, are not a ſufficient crew for a veſſel of 35 tons from New-York to Edenton, in South Carolina; and of this, if it appear in evidence on the caſe made, the court will judge. *Dow v. Smith*, 32
2. An adjuſtment, if made on a diſcloſure and knowledge of all circumſtances, is never to be opened, except for fraud or miſtake in facts not known, *ibid.*
3. Information being received at the ſame time of a veſſel's capture, re-capture, and being carried into a port of the country to which bound, takes away the right to abandon. In ſuch a caſe, if ſhe and her cargo be ſold at auction, the charges fall on the aſſured. Query, whether newſpaper information be ſuch on which an abandonment can be made? *Muir v. Un. In. Com.* 49
4. If goods be ſold at auction, to aſcertain their deterioration on a partial loſs, the underwriter is liable ut ſemb. *ibid.*
5. If a veſſel be driven by diſtreſs into a French port, where part of her cargo is taken away by the officers of government, and ſhe prevented from taking away her original loading, ſhe may, without incurring the penalty of the French intercourſe bill, purchaſe and load with the produce of the country. A paſſport granted by any particular country, to protect againſt its own cruiſers, is not a ſailing under the protection of the flag of the government granting the paſſport, ſo as to ſtamp a national character, and break a warranty of neutrality. *Jenks v. Mallet & Bowne*, 60

6. In a policy on a veſſel in a diſtant port from whence ſhe is to ſail, and ſtated to be there on a certain day, "at and from" mean the day on which ſhe is mentioned to be there, and the policy takes effect from thence. It is not neceſſary to diſcloſe how long a veſſel has lain in port antecedent to a policy. The two per cent. deducted on a total loſs, is in caſes of diſaſter a part of the premium. *Kemble v. Bowne*, 75

7. All damages ariſing immediately from a jettiſon are to be contributed for, tho' they happen to periſhable articles which are enumerated in the memorandum and remain in ſpecie. Freight and veſſel are to be eſtimated in a general average at the place where the one is paid, and the other is at the time of ſettling. *M'Grath & Higgins v. I. B. Church*, 217

8. A general policy unaccompanied with any warranty, covers, if made by a neuter, war riſks of all kinds, and againſt all countries. Under ſuch circumſtances a falſe clearance is immaterial and need not be diſcloſed. Seaworthineſs is always implied, and never at the riſk of the underwriter. *Barnwall v. Church*, 217

9. Under a general policy on goods, the aſſured need not diſcloſe that his intereſt is only of an undivided part, but may recover according to his intereſt. If a veſſel be captured and acquitted, the inſurer is liable to the expenſes incurred in proſecuting an appeal interpoſed againſt the ſentence condemning the aſſured in coſts, and to obtain compenſation for damages occaſioned by plundering or embezzling, though the expenſes ſurpaſs the amount of the underwriter's ſubſcription. Whether the expenſes incurred in an appeal be reaſonable or not is matter for a jury. *Lawrence & Whitney v. Van Horne & Clarkſon*, 276

10. A repreſentation that a man has been naturalized "ſince" a particular time, does not mean that he has been ſo "ever ſince." *Coulon v. Bowne*, 288

11. If a veſſel be rendered, by the perils inſured againſt, unable to proceed with her original cargo, it is a loſs of the voyage, though ſhe may be able to perform it with another more buoyant. When a veſſel cannot be repaired for half her value ſhe may be abandoned. If a veſſel be duly abandoned, and refuſed, and after a ſale for the benefit of all concerned, under an order of a court of admiralty, pronouncing her not worth repairing, ſhe be bought in by a part owner ſupercargo, it is not a waiver of the abandonment, though on her arrival at her home port ſhe be ſold at auction by the aſſured for more than ſhe coſt, and he at the time of action brought have the proceeds in his hands. Nor need he make a tender of her to the underwriter when ſhe arrives, nor of her proceeds after ſale. *Abbot v. Broome*, 292

12. The implied warranty of ſeaworthineſs in a veſſel is, that ſhe ſhall be able to perform her voyage with the cargo with which then loaded. *ibid.*

13. If, after a veſſel has been abandoned, ſhe arrive in port, and be there fitted out by her former owners, and ſent on another voyage, it will be a waiver of the abandonment. *Saidler v. Church*, (n.) 297

14. Receipt of freight earned by a veſſel abandoned is not a waiver of the abandonment if the underwriter did not accept. *Abbot v. Broome*, 292

15. A warranty of being the property of an American citizen is proved by reputation, employ and domicil. Intereſt in a veſſel, by a perſon who ſaw the original regiſter in the name of the owner, when ſhe was about to ſail on the voyage inſured. Intereſt in a cargo, by knowing the articles bought by the plaintiff, and ſeeing them go on board. To prove an abandonment parol evidence is admiſſible, and it is not neceſſary to give notice to produce the letter of abandonment, to enable to ſhew in evidence the original of which it was a copy. *Peyton v. Hallett*, 363

16. Neither an acquittal nor a reſtitution of goods prejudice an abandonment once duly made. In caſe of a reſtitution of goods to an owner, at a port into which a veſſel is carried, he is not bound to ſend them on to their port of deſtination. Though an adjuſtment made by the agent of the out-door underwriters does not conclude the inſurer from ſhewing errors in it, if they do not diſſent, they are bound. *Bordes v. Hallett*, 445

17. If both inſured and inſurer in a policy containing the uſual clauſe of warranty againſt contraband, know there is contraband on board, the warranty will apply only to the goods aſſured. *Bowne v. Shaw*, 489

18. In a policy on commiſſions on lawful goods, the warranty on contraband is not broken, though the aſſured be captain, and conſignee of illicit articles, ſhipped on board without the knowledge of the underwriter. *De Peyſter & Charlton v. Gardner*, 492

19. In judging whether a veſſel has been loſt in a voyage inſured, the uſual, and not the utmoſt length of ſuch a voyage is the period on which the jury is to proceed. If two ſtorms are given in evidence, on a policy for time, the one within and the other without the period, it is for the jury to ſay in which the loſs happened. An inſurance on freight and cargo after a knowledge of a ſtorm does not conclude the jury from finding the veſſel loſt in a previous ſtorm. *Brown & Kimberly v. Neilſon & Bunker*, 525

20. Property warranted to be neutral muſt not only have every document neceſſary to prove its neutrality, according to treaties and the law of nations, but it muſt not be accompanied with any papers to compromit its neutral character. If under ſuch a warranty on goods, the outward cargo appear to have produced leſs than the homeward one coſt, the aſſured in a voyage from a belligerent country muſt ſhew that the exceſs was derived from neutral funds. *Blagge v. Un. In. Com.* 549

21. If a commander of a convoy make a friendly capture of one of his convoy, it will not exonerate the underwriter, and is a caſe of abandonment as for a total loſs. *Governeur & Kemble v. Un. In. Com.* 592

Inſtalment.

See Covenant, 1.

Intereſt.

See Inſurance, 9. 15. Priſoner, 1.

Intruſion.

1. Intruſion for a forfeiture of lands granted in fee will not lie before office found. Intruſion muſt be on the actual poſſeſſion of the people. *The People v. Brown*, 416

Iſſue.

See Practice, 59.

1. A younger iſſue being tried at a circuit is not always concluſive that an older might have been brought on. *Weed v. Ellis*. 115

J

Jettiſon.

See Average, 1. Carrier, 1. Inſuran

Judge.

See Manhattan Company, 1. Pra 48. 69.

Judges' Certificate.

See Practice, 75. 77. 87. 94.

Judges' Charge.

See Practice, 47. 49.

Judges' Notes.

See Practice, 73.

Judgment.

See Bond, 1. 2. Cognovit. Eſcape, 1. P tice, 2. 16. 35. 44. 56. 57. 82. 86. 95.

1. A judgment in a ſiſter ſtate is only pr facie evidence of a debt, and the co deration examinable in our co *Hitchcock & Fitch v. Aiken*,

Judgment, as in Caſe of Nonſu

See Nonſuit.

Judgment Interlocutory.

See Practice, 2. 28. 44.

Juriſdiction.

See Forcible Entry and Detainer, 2. dictment, 1. Juſtices, 1. Practice, 4

Jury.

See Struck Jury.

Juſtices.

See Practice, 95. Witneſs, 7.

1. The juſtices' court has no juriſdiction in ſuits by, or againſt executors or adminiſtrators. *Way v. Carey*, 191
2. The declaration in a juſtices court ſhould be ſo far formal as to ſhew the cauſe of action, or it will be fatal on error. *Houghton v. Strong*, 486

Juſtification.

See Evidence, 3. Libel, 2.

1. Probable cauſe of ſeizure is not a juſtification to a cuſtom-houſe officer, ſeizing under the revenue laws of the United States. He ſeizes at his own peril. *Imlay v. Sands*, 566

L

Larceny.

See Collateral Iſſues, 1. Indictment, 1.

Levy.

See Sheriff, 3. 11.

Libel.

See Practice, 78.

1. The denying any diſreſpectful intention in a libellous publication on the court, is no juſtification, if the words publiſhed be, in the opinion of the court, contemptuous. *The People v. Freer*, 485
2. The intent of a publication will not juſtify it, if, in the opinion of the court, it be a contempt againſt them. *The People v. Freer*, 518
3. Sending a libellous letter to the plaintiff himſelf is not a ground for an action by him. Every letter ſent is preſumed to have been ſealed. In an action for a libellous letter, the plaintiff muſt ſhew a publication. Stating it to have been, "by means of its being ſent to and received by" the plaintiff is bad, and, as ſhewing on the face of the record no publication, is good cauſe for arreſting the judgment. *Lyle v. Clafon*, 581

M

Mandamus.

See Practice, 9.

1. A mandamus lies to the court of common pleas for not ſigning a bill of exceptions. *The People v. the Judges of Waſhington County*, 511

Manhattan Company.

1. If a judge under the ſixth ſection of the act incorporating this company, grant a warrant, for the appointing appraiſers, he cannot revoke it. A freeholder of the city of New-York is under that ſection incompetent to act as an appraiſer of the damages done in the ſtreets by laying the Manhattan pipes. *Corporation v. Manhattan Company*, 507

Map.

See Grant, 1.

Maſters of Ships.

See Breach of Orders, 1.

Memorandum in a Policy.

See Inſurance, 7.

Merits.

See Practice, 18. 57.

Military Lands.

1. Under the Act of the 8th of January, 1794, for regiſtering deeds of military lands, &c. a prior deed not depoſited in the clerk's office, is void againſt a ſubſequent purchaſer for a bona fide conſideration, whoſe deed is depoſited. *Jackſon, ex. dem. Potter v. Hubbard*, 82

Miſtake.

See Practice, 8. 16. 51. 57.

Mitigation.

See Evidence, 3.

Money had and received.

1. In this action the plaintiff muſt ſhew a right in himſelf. *Mayor, &c. of New-York v. Scott*, 543

Money, paying into Court.

See Practice, 10. 94.

Mute, Standing.

See Collateral Iſſues, 1.

N

Naturalization.

See Inſurance, 10.

Neuter.

See Inſurance, 8. 20.

New-York.

See Corporation, 2. Manhattan Company, 1.

New Evidence.

See Practice, 22.

New Trial.

See Evidence, 2. Practice, 10. 21.

Niſi Prius Record.

See Practice, 83.

Non-enumerated Motion.

See Practice, 18. 32. Rules, 2.

Nonproſs.

See Practice, 65. 82.

Nonſuit.

See Practice, 4. 16. 26. 37. 38. 47. 56. 60. 66. 93.

1. Though unavoidable circumſtances may be an excuſe for not having judgment as in caſe of nonſuit, yet they will not excuſe coſts. *Ruſſel v. Ball*, 252

Notice.

See Bill of Exchange, 1. Evidence, 4. Inſurance, 15. Practice, 3. 5. 6. 8. 13. 26. 31. 32. 37. 41. 44. 50. 51. 53. 56. 59. 60. 71. 80. 87.

O

Obligation. Obligor. Obligee.

See Bond.

Office found.

See Intruſion, 1. People, 1.

Onondaga Lands.

See Military Lands. Practice, 62.

Ouſter.

See Poſſeſſion, 1.

P

Papers noticed to be produced.

See Evidence, 4. Inſurance, 15.

Parol Evidence.

See Evidence, 6. Inſurance, 15.

Partners and Partnerſhip.

See Promiſſory Note, 2.

. Facts from which a partnerſhip may be inferred are matter for a jury, and ſhould be rebutted by evidence. An indorſement by one of a firm in his name and company, is good to bind the other partners, though the firm has always been known by the name of another partner and company, unleſs it be ſhewn that there is ſuch a diſtinct houſe as that by the ſtile of which the indorſement is made. *Drake and another v. Elwyn and others*, 184

1. An indorſement in the name of a firm by a partner, is good, and may be declared on as the indorſement of the firm. *Manhattan Company v. Ledyard*, 192

Partition.

See Practice, 7. 14. 45.

Paſſport.

See Inſurance, 5.

Performance.

See Pleas and Pleading, 1.

People, The.

1. The people can acquire ſeiſin or poſſeſſion of lands granted in fee for a breach of condition, only by matter of record and office found. *The People v. Brown*, 416

Perjury.

See Slander, 1.

Periſhable Articles.

See Inſurance, 7.

Phyſician.

1. There is no ſettled fee for phyſicians in the city of New-York for taking a ſtudent. *Hart v. Hoſack*, 25

Pilot.

See Aſſumpſit, 2.

Pleas and Pleading.

See Award, 1. Forcible Entry and Detainer, 1. Frauds, Statute of, 1. Limitations, 1. Libel, 3. Slander, 1. Treſpaſs, 2.

1. An averment of being "ready and prepared to execute a conveyance according, &c. but that the defendant did not attend, and has refuſed," is a ſufficient ſtating of an offer to perform by the plantiff. *Miller v. Drake*, 45

Policy of Inſurance.

See Abandonment, 1. Adjuſtment. Average, 1. Inſurance. Seaworthineſs.

Poſſeſſion.

See Holding-over, 1. Intruſion, 1. People, 1. Preſumption, 1.

1. A ſole poſſeſſion for 40 years, by one tenant, in common amounts to an ouſter. *Van Dyck v. Van Beuren and Voſburg*, 84
2. An adverſe pedis poſſeſſio for twenty years and upwards, with a claim of title in other lands in right of that pedis poſſeſſio, which lands are part of the lot on which the pedis poſſeſſio is taken, is a bar to a recovery in ejectment. *Jackſon, ex. dem. Putnam v. Bowen*, 358

Poſtea.

See Practice, 63.

Poundage.

See Sheriff, 3.

Practice.

See Action, 2. Certiorari, 1. Commiſſion, 1. Cognovit. Demurrer. Inſolvent, 1. Intruſion, 1. Juſtices Court, 2. Partners and Partnerſhip, 2. Struck Jury. Treſpaſs, 2. Venue.

1. If notice for applying for a commiſſion ſpecify names of commiſſioners, and the party ſerved do not then object he is concluded. *Townſend v. New-York In. Com.* 4
2. In an action on a note or bill, if, after default, rules for interlocutory judgment and aſſeſſing damages be not entered, the court will ſet aſide the proceedings, though if the default be regular, that will ſtand, with liberty to perfect the judgment in the term, if the plaintiff can ſo do. *Griſwold v. Stoughton*, 6
3. Trial by record muſt be brought on by notice, as in caſes for argument. *Manhattan Company v. Herbert*, 6
4. After ſtipulation the court will on ſpecial circumſtances allow a ſecond excuſe againſt a motion for judgment, as in caſe of nonſuit. *Livingſton v. Delafield*, 6
5. Notice of motion to refer muſt contain names of referees; the court only appoints and does not nominate them. *Bedle v. Willett*, 7
6. Notice of motion may be for ſome other than the firſt day of term, but then it muſt ſhew an excuſe why not given for the firſt day, *ibid.*
7. In partition the rule to appear and plead, muſt be moved for, and is not of courſe. *Seaman v. Davenport*, 7
8. Miſpriſion of a clerk in drawing up a rule of court will be amended; and if notice of the error has been immediately given to the adverſe party, the ſame benefit may be had as if the rule had been right. *I. B. Church v. United In. Comp.* 7
9. Peremptory mandamus will be ſet aſide on motion, if unfairly obtained. *Everitt adv. The People*, 8
10. On moving for a new trial the court will not order the amount of the verdict recovered to be brought into court though admitted to be due, the ſpecial bail bankrupts, and the principal, on the eve of inſolvency. *Hallett v. Cotton*, 11
11. Coſts of a fine levied by the ſheriff are not payable by the party on whom levied. *Gilbert v. Brazier*, 13
12. Liberty to turn a caſe into a ſpecial verdict, ſtays execution till the next term after deciſion given. *Van Dyck v. Beuren & Voſburg*,
13. In ejectment againſt ſeveral defend... though they ſever in pleadings, and ... ter into ſeparate conſent rules, the ne... and pleadings muſt be entitled againſt ... *Jackſon ex. dem. Jauncey v. Stiles*,
14. In partition only notice and affidavit ... ſervice is read, not the petition. *B... v. Rhinelander*,
15. If the plaintiff in ejectment count up... demiſes by perſons who are dead, ... defendant after entering into the conſe... rule may apply to have their nam... ſtruck out of the declaration witho... coſts. *Jackſon ex. dem. Low v. Re... nolds*,
16. Miſtake by an attorney of a rule of pra... tice may prevent judgment, as in caſe ... nonſuit, but will not prevent coſt ... *Sheffield v. Watſon*,
17. On producing the certified copy of a ... original writ, the count in the declar... tion may be amended by it. *Fallmer ... Steele*,
18. On a non-enumerated motion for irregu... larity, merits cannot be entered int... but on merits, irregularity may b... ſhewn. *Remſen v. Iſaacs*,
19. If a caſe made do not ſet forth the m... rits of the cauſe as they appeared on th... trial, and the amendments propoſed d... not reach the hands of the counſel em... ployed within a time agreed on, an... within which they might, but fo... accident have arrived, the court wi... grant a further day. *Hun v. Bowne*,
20. All caſes intended for argument muſt b... duly noticed before the term to the cle... that he may enter them. *Anonymous*,
21. The court will not grant a new trial whe... there has been evidence on both ſide... Applications for new trials on ſubſ... quent diſcovery of new and materi... teſtimony muſt ſtate it, that the cou... may judge of its materiality. *Hal... v. Watſon*,
22. Entering into an agreement in the n... ture of a rule to ſtay proceedings on ... bail bond, and (after notice of bail) d... claring in the original ſuit, is a waiv... of a right to a plea in the bail bond fi... If the plaintiff proceed on the bail bon... he will be entitled to coſts, only up ... the time of notice of ſpecial bail, a... on payment of thoſe all ſubſequent pr... ceedings will be ſtayed. *Hagget v. Ha... lett*,
23. Laſt proclamation of a fine made nu... pro tunc. *Van Neſs v. Gardiner*,
24. If after ſuit brought, the ſum be redu... ed by a partial payment, below $1

dols. and a cognovit taken for the reſidue, ſupreme court coſts cannot be taxed. The plaintiff ſhould have taken his cognovit and entered his judgment for a ſum above 250 dols. *M'Gregor v. Loveland*, 66

25. If a ſuit be compromiſed between the parties without the knowledge of the attorney, and nothing ſaid about the coſts, each party pays his own. *Watſon v. De Peyſter*, 66

26. Notice of motion for judgment, as in caſe of nonſuit, ſent by the mail, is not good, though it might ſave a default. *Hudſon v. Henry*, 67

27. To an application for a ſuperſedeas for not having been charged in execution within three months after judgment, it is a good anſwer that the defendant has ſince been charged. *Manhattan Comp. v. Smith*, 67

28. Attornies on being retained ſhould examine the ſtate of proceedings, though it is but fair that on notice of retainer the plaintiff's attorney ſhould diſcloſe them; for want of ſo doing in a ſuit againſt bail after default entered, writ of inquiry and judgment thereon ſet aſide. *Steele adm. Tenant*, 68

29. The ſuing out of the writ is the commencement of the ſuit, and if it appear on the pleadings that the cauſe of action be ſubſequent, it is fatal on ſpecial demurrer. *Lowry v. Lawrence*, 69

30. The court will not pronounce judgment on a priſoner convicted at oyer and terminer, if the record be not before them. *M'Neil's Caſe*, 72

31. Service of a notice of motion on a perſon in the houſe of the attorney is not ſufficient. It ought to be on the clerk. *Anonymous*, 73

32. Service of notice on an agent for non-enumerated motions may be on the firſt day of the term for the next non-enumerated day; but there muſt be an excuſe for not noticing for the firſt. *Moyle v. Gillingham*, 73

33. A commiſſion to examine [illegible] be before iſſue joined. A rule for a commiſſion ſuſpends the trial till the rule be vacated. But if the defendant appear at the trial and examine witneſſes, it will be a waiver of the rule to vacate. *Brain v. Podelicks & Shivers*, 78

34. When there are croſs cauſes, and the plaintiff in each ſuit has a verdict, if material facts be omitted in the caſe made by the defendant, and the papers from whence they are to be aſcertained, be in the hands of the plaintiff, the court will not order judgment to be entered becauſe caſes have not been delivered, but will give leave to amend and perfect. *Cockwiſe v. Hacker*, 74

35. A motion in arreſt of judgment may be after default, and the defendant's coming in and examining witneſſes on the execution of the writ of inquiry, if it appear on the face of the record that the action is not maintainable. *Callagan v. Hallett & Bowne*, 104

36. If a cauſe has been duly ſet down on the day calendar, and on being called, the defendant does not appear, nor his counſel, who is then in court, the plaintiff may take an inqueſt which the court will not ſet aſide, though merits be ſworn to, if the abſence of the defendant be not accounted for. *Peſt v. Wright & Buchan*, 111

37. If a notice of motion for nonſuit be titled *verſus* inſtead of *ad ſectam*, and the affidavit rightly titled, the notice is good. *Ryers v. Hillyer*, 112

38. If there be a neglect in not proceeding to trial, the defendant muſt avail himſelf of it the firſt opportunity, or it will be a waiver, and ſubject him to coſts if he afterwards move for judgment as in caſe of nonſuit. *Brandt ex. dem. Ricketts v. Buckhout*, 113

39. The rule for conſolidating applies only to ſeveral actions on one policy, and does not extend to ſeveral policies on one riſk, though the queſtion be the ſame on all, for the contracts are ſeveral. *Camman v. Un. In. Comp.* 114

40. If the defendant has joined in a commiſſion, the court will not on the plaintiff's application vacate the rule by which it was granted, but will grant one to proceed to trial, notwithſtanding the commiſſion. *Chater v. Hallett*, 115

41. The court will not diſcharge, on motion, a perſon arreſted, whilſt attending a reference under an order of the common pleas, if there be no notice of motion, but will only grant a rule to ſhew cauſe. *Grover v. Green*, 115

42. When a defendant commits a crime, for which he is ſentenced to the State Priſon the plaintiff may diſcontinue without payment of coſts. *Lackey & Briggs v. M'Donald*, 116

43. If a plaintiff get relieved from his own ſtipulation he reſtores the defendant to all rights as he ſtood when the ſtipulation was entered into. *Malin v. Kinney*, 117

44. On ſci. fa. notice of entry of the rule to appear and plead need not be given, as the ſci. fa. is notice of itſelf, and the default may be entered on the expiration of the rule, but judgment cannot be entered till four days after. If it be,

the judgment will be ſet aſide, and the default, if regular, ſtand. No default ever ſet aſide when regular, except when accounted for to the ſatisfaction of the court. *Spencer v. Webb*, 118

45. In partition, if the defendant does not appear, the court will, on motion, make an order for partition as prayed for. *Neilſon v. Cox and others*, 121

46. To change the venue in a tranſitory action ſpecial cauſe muſt be ſhewn. *Woods v. Van Ranlin*, 123

47. If ſeveral actions, turning on the ſame point, be noticed for trial, and on the hearing of the firſt, the judge direct a nonſuit, exceptions to which is taken by the counſel for the plaintiff, he will not be liable to judgment as in caſe of nonſuit for not proceeding to trial on the other cauſes, nor be obliged to ſtipulate, and the coſts muſt abide the event of the ſuit. *Campbell v. Manger*, 129

48. If a party to a ſuit referred cannot produce his witneſs by the time of hearing, a judge at chambers, or the court if ſitting, will ſtay proceedings. The defendant's attorney having nominated referees, and the party not having objected, cannot on that ground move to ſet aſide the report. *Combs v. Wyckoff*, 147

49. If an indictment be removed from the ſeſſions into the ſupreme court, any exceptions may be taken to the charge of the judge by making a caſe, and bringing it before the court in the ſame manner as in civil proceedings. *The People v. Croſwell*, 149

50. If a plaintiff notice his cauſe for trial, and afterwards countermand it, he muſt pay the defendant the intermediate coſts of ſubpœnaing his witneſſes. *Jackſon v. Mann*, 123

51. Notice to refer muſt contain the names of the referees. Miſapprehenſion of a rule, or ignorance of a late determination may be offered as excuſes, for not noticing for the firſt day of term. If the ground of oppoſing a reference be, that a point of law will ariſe, it ought to be expreſsly ſtated what it is, and that it is as adviſed by counſel. *Laſher v. Walton*, 149

52. In order to be admitted as a defendant in ejectment, a privity muſt be ſhewn between the applicant and the tenant; it is not enough that the party claims title and has a real and ſubſtantial defence. *Jackſon, ex. dem. Winne v. M'Evoy*, 151

53. Sudden indiſpoſition of counſel and attorney is an excuſe for not proceeding to trial, but will not exempt from coſts. *Jackſon, ex. dem. Robinſon v. Brown*, 152

54. Nine days notice is enough in Cayuga, to produce papers in Albany, diſtant 180 miles. *Jackſon, ex. dem. Watſon v. Marſh*, 153

55. Whenever a plaintiff amends his declaration, the defendant has an election to plead de novo. *Webb v. Willie*, 153

56. All irregularities are waived by a defendant if he appear on trial. On judgment for nonſuit, niſi, the defendant ſhould make a demand of his coſts, with a copy of his rule annexed, and if not paid within twenty days, he may enter judgment, and if he do not ſo, the plaintiff will be regular in noticing for trial. *Gilliland v. Morrell*, 154

57. When proceedings have been regular, a mere affidavit of merits is not ſufficient to ſet them aſide. In ſuch caſe, if there has been a miſtake, on which the judgment has been taken, the defendant will be relieved only on coſts and terms. *Cogswell v. Vandenberg*, 155

58. On a reference if a receipt given after the rule made be offered in evidence on the part of the defendant, and objected to by the plaintiff, the ſpecial matter and facts ſhould not be returned to the court; but the referees ſhould admit the evidence, and make the report on it, that the party aggrieved may bring it fully before the court. Query, if a ſpecial matter of fact, without a deciſion, be in any caſe a report within the meaning of the rule. *Hawkins v. Bradford*, 160

59. When a plaintiff reſiſts a motion for judgment, as in caſe of nonſuit for not proceeding to trial, if he inſiſts on not having been able to try his cauſe, and others have been heard, he muſt ſhew they were older iſſues. *Jackſon, ex. dem. Williams v. Chamberlin*, 171

60. If a witneſs has been in the power of a plaintiff he muſt ſhew endeavours to obtain his teſtimony, or he will not be allowed to urge the want of it for not proceeding to trial. Counter affidavits, to thoſe in oppoſition are not admiſſible. If a ſuit be called and paſſed, the reaſons why ſhould be made appear by the counſel in the cauſe. If an offer of a compromiſe be made to the plaintiff and refuſed, on a motion for a nonſuit the court will not order them to be impoſed, ut ſemb. *Deas v. Smith*, 171

61. If an alien, on removing his ſuit into the federal court, file his petition at the time of filing ſpecial bail, he is in ſeſſion, though the bail have been excepted to. *Arjo v. Monteiro*, 248

62. After ſervice of a declaration in ejectment on a tenant, though it may be a

totally informal one, yet it is ſufficient to ſet him on enquiry, and if a rule to ſhew cauſe why the plaintiff ſhould not amend be granted, fixing it in the clerk's office is good ſervice on the tenant. If proceedings be commenced for lands, to which a title has been awarded by the commiſſioners for ſettling diſputes relating to lands in Onondaga, within three years after, it is ſufficient, and though they may be faulty, and require amendment after the three years, is is ſufficient to entitle the plaintiff to proceed. *Jackſon, ex. dem. Hogeboom v. Stiles*, 209

13. A motion cannot be made to ſet aſide a writ of enquiry in the poſſeſſion of the plaintiff not returned, and on which no inquiſition has been taken, but if a jury has been impannelled on it, and has given a verdict on a hearing, contrary to the terms of a written agreement, the court will give leave to iſſue a writ of inquiry de novo. *Abeel v. Woolcot*, 250

14. After ſix years ſervice of a declaration in ejectment, the court will, on terms, give leave to amend. *Jackſon, ex. dem. Finch v. Kough*, 257

15. The defendant in error cannot nonproſs the plaintiff's writ before it is returned. *Van Der Mark v. Jackſon, ex. dem. Oſtrander*, 251

16. If a defendant move for judgment of nonſuit, contrary to good faith, the court will make him pay the coſts of oppoſing. *Phelps v. Eddy*, 252

17. Service on the agent of an attorney plaintiff is as good as in any other ſuit, and need not be on the plaintiff perſonally. *Ruſſel v. Ball*, 252

18. If croſs ſuits be referred to the ſame referees, and they make up their report in each on the idea that the one ſhall be a ſet-off to the other, the court will ſet aſide both, if the ſuits be for demands which cannot legally be ſet off. *Lyle v. Claſon*, 323

19. If a plaintiff give notice of motion to ſet aſide a judge's certificate to ſtay proceedings, and do not attend to argue, the defendant will be allowed coſts. In no caſe will the court hear an argument to ſet aſide a judge's certificate to ſtay proceedings, ut ſemb. *Brett & Bunn v. Hood.* 342

20. Affidavit of ſervice on a perſon in an attorney's office, muſt ſhew that there is a relation between him and the party ſerved. *Rathbone v. Blackford*, 342

21. When the notice and all the papers are titled *verſus* inſtead of *ad ſectam*, it is fatal. *Parkman v. Sherman*, 344

22. Amendments to a caſe made muſt be in the caſe ſerved, or refer to the line and page in which it is propoſed to amend. The party ſerved cannot draw up a new caſe. *Milward v. Hallett*, 344

23. Where there are ſome good counts and ſome bad, and a general verdict on the whole, if the evidence has been on the good counts only, the verdict may be amended from the judge's notes after notice in arreſt of judgment. *Union Turnpike Company v. Jenkins.* 385

24. If a defendant has been prevented by adverſe winds from ſhewing cauſe againſt a rule for a criminal information, and the ſame has been made abſolute againſt him for want of cauſe ſhewn, it will be ſet aſide of courſe on an immediate application. *The People v. Freer*, 394

25. The regular mode of ſhewing that evidence applies to one count only, or to any particular counts, is by certificate from the judge, though if he be on the bench, and an affidavit be made which ſtates the facts as they are, and he aſſents to them, it will be ſufficient. *Union Turn. Com. v. Jenkins*, (n.) 394

26. Though the act of God be the cauſe of not proceeding to trial according to notice, yet if there be time to countermand, and the plaintiff neglects to do ſo, he muſt pay coſts. *Jackſon v. Brown*, 484

27. On certificate of probable cauſe both parties may notice, but if not done by the party obtaining the certificate, it is no cauſe for diſcharging the order. *Kirby v. Cogswell*, 484

28. On a rule to ſhew cauſe why an attachment ſhould not go for a contempt in publiſhing matter reflecting on the court in a cauſe then pending, the defendant ſhould appear in perſon on the day of ſhewing cauſe. *The People v. Freer*, 485

29. Cauſes which have been noticed for argument and duly entered in one term, are not, without a new notice to the clerk, carried over to the next. *Livingſton v. Rogers*, 487

30. On a feigned iſſue from chancery, if an inqueſt be improperly taken, relief muſt be ſought here. If an inqueſt be taken by default at a circuit, and notice of trial has not been given, it will be ſet aſide with coſts to be paid by the plaintiff's attorney. *Dun v. Fen*, 487

31. The action for a return of premium muſt be againſt the underwriter and not againſt the broker, though the aſſured be himſelf an underwriter, and the broker employed by both parties. *Bourne v. Neilſon & Bunker*, 489

82. In an action on a promiſſory note, if in conſequence of the plaintiff's attorney having no agent in Albany, the ſuit be nonproſſed there for want of declaring, and judgment by default be obtained in New-York, and the damages aſſeſſed by the clerk, indorſed on the note, the court will, when the coſts of nonproſs have been paid, and the judgment in New-York vacated, order the damages aſſeſſed and indorſed to be ſtruck out, that the plaintiff may proceed in a ſecond action without any embarraſſment from the former proceedings. *Atterbury v. Teller*, 495

83. A new niſi prius record allowed to be filed, and a poſtea indorſed thereon, according to a judgment of ſix years antecedent, and execution thereon upon affidavit, ſhewing the probable loſs of the originals. *Jackſon, v. Hammond*, 496

84. In ejectment on a motion to ſet aſide the rule to appear and enter, &c. if the application be founded on irregularities to be ſupported by inſpection of the declaration, &c. on file, and the plaintiff produce affidavits of due ſervice, &c. it will be preſumed that all was regular, the tenant not producing the declarations and notices ſerved, eſpecially if by granting the motion the ſtatute of limitations would attach. *Jackſon v. Stiles*, 501

85. If a defendant obtain a rule for a commiſſion, in which the plaintiff does not join, and a term elapſe without notice of any proceedings under it, the court will ſo far vacate the rule as to permit to go to trial notwithſtanding the commiſſion. On a commiſſion to England, and eight months, without any return, the court will permit to go to trial, but this does not prevent ſhewing cauſe on the trial, why it ſhould not be put off. *Kirby v. Wathes*, 503

86. If the conſent rule, &c. in ejectment have been actually forwarded in time to deliver to the attorney of the plaintiff, and be by miſtake filed in the clerk's office inſtead of being ſerved, the court will ſet aſide a judgment on ſuch a default, and if a writ of poſſeſſion has iſſued, award reſtitution on payment of coſts. *Jackſon v. Stiles*, 503

87. A judge's certificate of probable cauſe does not ſtay proceedings, unleſs accompanied with notice of motion. *Kirby v. Cogſwell*, 505

88. If a priſoner in cuſtody on meſne proceſs ſign a warrant of attorney, the nature of which is explained to him attorney who does not witneſs it attorney, the court will not ſet it ut ſemb. *Manhattan Company v. B*

89. Where it is neceſſary only to indo appearance on the writ, bail not required, it is the duty of the cl the court to enter the appearance cord. If judgment be ſigned bef is ſo entered, the court will order tl pearance to be entered nunc pro *Roſs and others v. Hubbie et ux.*

90. Where a ſuit has been conſolidated a commiſſion ſued out in the conſc ed cauſe in which the defendar joined, the court will allow the evi taken under it, to be read on the tr the principal ſuit. *Waterbury v. ſield*,

91. Where a plaintiff has neglected tc capias and enter an appearance fc terms, though there be an aff ſwearing to an agreement, that proceedings ſhould be conſidered third term antecedent, the cou not give leave to file the capias a ter the appearance, nunc pro tun the third term paſſed, eſpecially i pear that it be aſked with a view vent a ſet-off of a note falling du the third and before the ſecond ter will order the capias &c. to be enter the ſecond term. *Gordon v. Boton*

92. If a defendant be diſcharged for w being duly charged in execution, never be taken in execution on a iſſued on the judgment in the f which he was in cuſtody. *May Edwards*,

93. Three months are ſufficient for exe and returning a commiſſion arri London. If after a commiſſion the plaintiff do not uſe diligenc defendant may apply for judgmen caſe of nonſuit, which will be gr unleſs the plaintiff ſtipulate. *and others v. Thompſon*,

94. After verdict and certificate of pr cauſe granted, the court will not the amount of the ſum recovered brought into court. *Shuter v. lett*,

95. If there be one good count, an others bad, and entire damages af it may be amended. *Livingſton gers*,

96. If the declaration in a juſtices co for ten dollars, and the judgme fifteen, it is fatal on error. *Dele v. Burland*,

Premium.

See Practice, 81.

Presumption.

See Partners and Partnership, 2. Possession, 1.

1. A conveyance will be presumed after 50 years, where there has been a right to claim a deed, and the possession has for that time gone with the right. *Van Dyck v. Van Beuren & Voshurg*, 84

Principal.

See Agent.

Prisoner.

See Practice, 27. 88. 92.

1. No interest is allowed to run against a prisoner in execution, to impede his discharge under the insolvent law. *Ex parte Caskaden*, 346

Privilege.

See Trover, 1.

1. A mate having privilege in a cargo cannot, after a sale of the whole by the consignee, pick out any specific parts, and sell them. *Heyl v. Burling*, 14

Proclamation.

See Practice, 23.

Profits.

See Agent, 1.

Promises.

See Assumpsit.

Promissory Note.

See Agreement, 1. Bill of Exchange. Corporation, 1. Evidence, 1. Indorsement. Evidence, 9. Partners and Partnership, 1. 2. Practice, 82. Venue, 2. Witness, 5.

1. If a man borrow a note of another, and give his accountable receipt for it, when the note is settled the accountable receipt should be taken up, or it may be given in evidence in an action for money lent and advanced, or for money had and received. *Hart v. Hosack*, 25
2. An indorsee of a firm of which he is a member, may, on an indorsement made by himself in the name of the firm, maintain an action against the maker of a promissory note. *Kirby v. Cogswell*, 505

Provisions.

See Average, 2.

Publication.

See Libel.

Public Prosecutions.

1. A public prosecution must be at the expence of the prosecutor, unless on disclosure of his circumstances the court find him an object of public charity. *Ex parte Manning*, 59

R

Receipt.

See Practice, 58.

Record.

See Escape, 1. Intrusion, 1. People, 1. Practice, 3. 30. 83. Venire, 1.

Reference and Referees.

See Practice, 5. 41. 48. 51. 58. 68.

Regiſter.

See Inſurance, 15.

Releaſe.

See Witneſs, 1.

Report.

See Reference, Referees.

Repreſentation.

See Concealment. Inſurance, 10.

Rereſtitution.

See Forcible Entry and Detainer, 1.

Reſtitution.

See Inſurance, 16. Practice, 86.

1. If a man be turned out of poſſeſſion by a miſtake in executing a writ of poſſeſſion againſt him inſtead of another, the court will on motion order reſtitution. *Reynolds ex parte*, 500

Return.

See Sheriff, 1. Witneſs, 7.

Roads.

See Turnpikes.

Rules, Entry of.

See Practice, 2. 44.

Rules of Court.

1. Rule in Partition. *Neilſon v. Cox*, 121
2. Rule as to non-enumerated and numerated motions, 194
3. Rule as to admiſſion of perſons as counſellors, 194

S

Scire Facias.

See Practice, 44.

Seaworthineſs.

See Inſurance, 1. 8. 11. 12.

1. If the facts given *in evidence* manifeſtly ſhew a want of ſeaworthineſs, and the jury, find againſt him, the court will ſet aſide the verdict notwithſtanding the jury, at the time of giving, declare they reſt their deciſion on the whole matter in evidence. *Mumford v. Smith*, 520

Seiſin.

See Eſtopple, 1. Forcible Entry and Detainer, 1. Intruſion, 1. People, 1. Venue, 1.

Seizure.

See Juſtification, 1.

Service.

See Practice, 31. 32. 62. 67. 70.

Seſſions.

See Indictment, 1.

Set-off.

See Practice, 68.

Severance in Pleading.

See Practice, 13.

Sheriff.

See Eſcape, 1. 2. Practice, 11.

1. A former ſheriff after a lapſe of five years will not be ordered to amend his

return, according to the truth of the caſe, by ſtating that the defendant had eſcaped from priſon, if it was at a time when many others forcibly broke out. *Potter v. Briggs*, 57

2. An action will not lie againſt a ſheriff under the 22d ſection of the act concerning ſheriffs, for the penalty of 1250 dollars, for falſe ſwearing on a plea of retaking and freſh purſuit, if it appear that the priſoner had before broken his bonds, and an action be pending againſt him for the eſcape. *The People v. Dale*, 181

3. If a levy be made on lands, the ſheriff will be entitled to his poundage on the ſum indorſed, though, in conſequence of a compromiſe, he do not ſell. *Hildreth v. Ellice*, 192

Ship-owner.

See Carrier, 1. Inſurance, 11.

Slander.

See Action, 2. Struck Jury, 1. 2.

1. In ſlander for ſaying of the plaintiff that he was perjured, and a particular perjury pleaded in juſtification, the court will, on affidavit of the abſence of the witneſs by whom it was to be proved, give leave to amend by pleading another perjury, on payment of coſts. *Graham v. Woodhull*, 497

Slipage.

See Corporation, 2.

Stay of Proceedings.

See Practice, 48. 69. 77. 87. 94.

Stake.

See Evidence, 9.

Stamp.

See Inſolvent, 1.

Statute of Frauds.

See Frauds, Statute of.

Stipulation.

See Practice, 4. 43. 47.

Striking out Counts and Demiſes.

See Practice, 15.

Struck Jury.

1. If a cauſe be important or intricate it is a cauſe for a ſtruck jury. But the cauſe ought to be at iſſue ut ſemb. and if the action be for words, the truth of them ought to be denied. *Spencer v. Sampſon*, 498

2. For want of theſe circumſtances a ſtruck jury denied. *Foot v. Croſwell*, 498

Supercargo.

See Inſurance, 11.

T

Tenant in Common.

See Poſſeſſion, 1.

Tender.

See Agreement, 1. Inſurance, 11. Pleas and Pleadings, 1.

Title.

See Ejectment, 1.

Titling Cauſes and Pleadings.

See Practice, 13. 37. 71.

Tolls.

1. Under the act incorporating the firſt company of the great weſtern turnpike road,

the toll is payable though the perſon has travelled the road leſs than ten miles. *Stuart v. Rich*, 182

Traverſe.

See Forcible Entry and Detainer, 1.

Treſpaſs.

1. Treſpaſs will not lie againſt an inferior officer for executing a warrant of diſtreſs on a houſe liable to be aſſeſſed, though the aſſeſſment be erroneous. *Henderſon v. Brown*, 92
2. If a treſpaſs be committed in a town, which, before action brought, is ſubdivided, it may be laid as in the original townſhip. *Remsdet v. Crocker*, 167

Trial.

See Practice, 3. 47. 56. Iſſue, 1. Coſts, 2.

Trover.

1. A right of privilege in a cargo does not give ſuch an intereſt as will enable the purchaſer of it to maintain trover, if the conſignee has not aſſented to the ſelection of thoſe parts which are purchaſed. *Heyl v. Burling*, 14
2. Trover reſts upon property and poſſeſſion, *ibid.*

Truſt.

1. A truſt in a will ariſes on the word "deſire." *Van Dyck v. Van Beuren & Voſburg*, 84

Turnpikes.

See Corporation, 1. Tolls, 1.

1. If a turnpike act give the company power to erect a gate near a particular ſpot, they may place it on the very interſecting ſpot of an old road, ſo as the gate be but near the place deſignated. For near is not neareſt. *People v. Denſlow*, 177

U

Uſury.

See Witneſs, 4.

V

Venire.

See *Action*, 2.

1. If the court of errors award a venire de novo, it muſt be iſſued out to warrant a ſecond trial. If the cauſe be tried without, it is a defect of record, not amendable, and fatal in arreſt of judgment. But a motion may be made for an award of the venire awarded. The court of errors has not any authority to award a venire out of this court. *Livingſton v. Rogers*, 583

Venue.

See Eſcape, 1. Practice, 46.

1. The venue will be changed to where lands lie in an action on a covenant of ſeiſin. *Clarkſon v. Gifford*, 5
2. The venue will be changed in an action on a promiſſory note if there be no oppoſition. *Allen v. Brace*, 107
3. The court will not change the venue on an affidavit, ſaying there is a party ſpirit in the country againſt the perſon applying. *Zobiſki v. Bander*, 487

Verdict and Special Verdict.

See Practice, 10. 12. 63. 73. 94. Seaworthineſs, 1.

1. On a ſpecial verdict the court will not intend any thing which is not found. *Jenks v. Hallett & Browne*, 60

W

Wager.

See Evidence, 9.

Wages.

See Average, 2.

Waiver.

See Breach of Orders, 1. Inſurance, 11. 13. 14. Practice, 4. 22. 23. 56.

Warranty.

See Inſurance, 5. 8. 12. 15. 17. 18. 20.

Warrant of Attorney.

See Practice, 88.

Will.

See Truſt, 1.

Witneſs.

See Practice, 60. 88.

1. A witneſs releaſed after his depoſition taken, will not make his depoſitions evidence. *Heyl v. Burling*, 14
2. A profeſſional man, not employed by a party is a good witneſs againſt him, though his knowledge be derived in the courſe of buſineſs. *Hoffman & Seton v. Smith*, 157
3. A ſurveyor, acting under an appointment by an attorney, is a good witneſs without producing his appointment. An agent who has promiſed to refund money received on account of his principal, in caſe a verdict paſs againſt him in any particular ſuit, is a good witneſs in that very ſuit. *Renaudet v. Crocken*, 167
4. In a qui tam action, under the ſtatute of uſury, brought after a lapſe of a year, to recover the exceſs of intereſt paid, the borrower, after having diſcharged the principal, is a good witneſs. *Petingal v. Brown*, 169
5. An attorney in a ſuit may be examined as a witneſs, to prove the ſtate of an inſtrument when put into his hands. An indorſer of a note is a good witneſs to prove the indorſement made after the note was due. *Baker & Rowlſon v. Arnold*, 258
6. A witneſs who has an order to be paid out of the ſum to be recovered in a ſuit, drawn upon the agent who is to receive ſuch ſum, is not a competent witneſs, though the order is not accepted. *Peyton v. Hallett*, 363
7. If a juſtice admit a plaintiff to teſtify in his own cauſe, the court will grant a rule or certiorari to have that matter returned, as the party applying may be adviſed. *Durkee v. Brackett*, 501

Words.

See Action, 2. Slander.

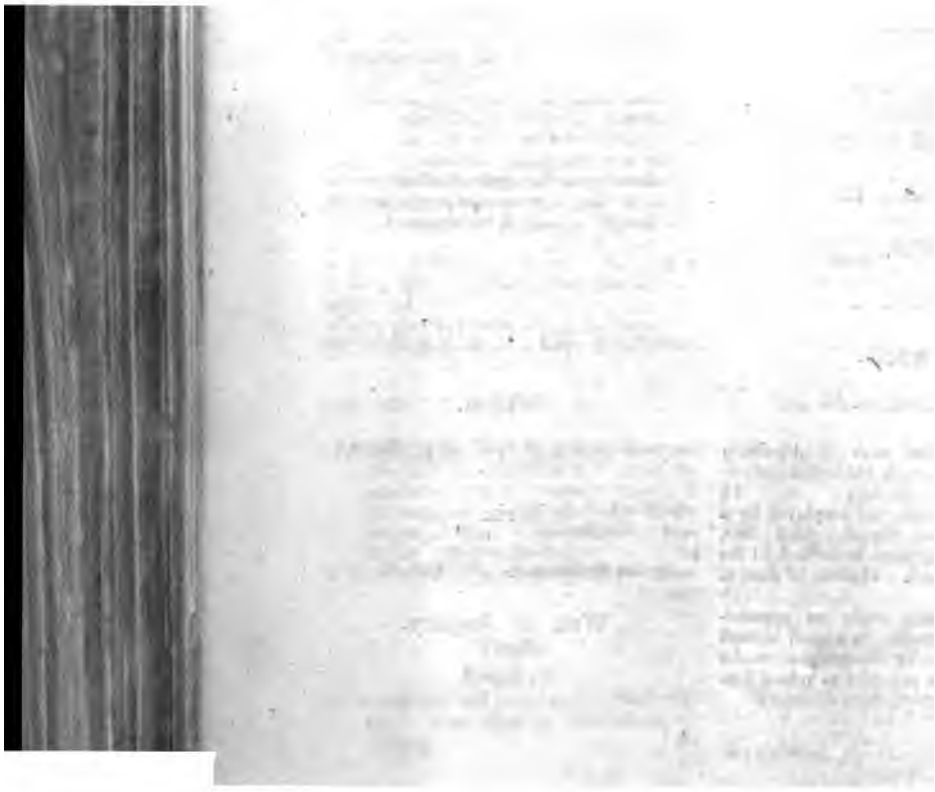
Writ.

See Evidence, 3. Practice, 29.

Writ of Inquiry.

See Inqueſt.

FINIS.



ERRATA.

Page	3,	in the margin after "286" dele the comma, and put a full ſtop.		
—		line	11	from bottom, for "me," read "us."
—	4	—	6	from bottom, for "direction" read "diſcretion."
—	8	—	14	after "that" inſert "the."
—	9	—	16	from the bottom, for the 1ſt "another" "an alias," for the 2d "a pluries."
		—	15	from bottom for "another" read "a ſecond pluries."
—	13	—	2	in margin for "Plaiſter" read Pfiſter."
—	17	—	15	for "vender" read vendor."
—	26	—	5	for "Doctor" read "Phyſician."
—	27	—	12	from bottom, after "opinion" inſert "to."
—	44	—	3	from bottom, dele "general."
		—	2	from bottom, before "they" inſert "to general average."
—	45	—	10	place the inverted commas after "Defendant."
—	50	to 54		incluſive, in the margin, for "U. S. Co." read "U. I. Co."
—	55	—	4	from bottom, for "would" read "could."
—	68			in the margin, for "I. & S. Watſon v. Depeyſter, & Co." read "Manhattan Company v. Smith."
—	69			in the margin, for "I. & S. Watſon v. Depeyſter, & Co." read "Lowry v. Lawrence."
—	70	—	14	for "final" read "firſt."
—	71	—	8	from bottom, for "caſe" read "eaſe."
—	72			in the margin, for "Marſhalſee" read "Marſhalſea."
		—	4	from bottom, for "ſurrendered to" read "appeared on."
		—	3	from bottom, for "bail" read "recognizance."
—	111	—	6	for "plaintiff" read "defendant,"
—	112	—	22	for "plaintiff" read "defendant."
—	122	—	4	for "reſpectable" read "reputable."
—	125	—	23	for "oforeſaid" read "aforeſaid."
—	160	—	24	for "event" read "want."
—	169	—	14	after "proceedings" inſert "were."
—	180	—	17	from bottom, for "nollo" read "nolo."
—	188	—	4	in notis, for "p." read "b."
—	195	—	19	for "partner" read "party."
			9	from bottom, for "that" read "what."
—	202	—	22	after "corn" inſert "was."
—	215	—	5	for "piece" read "price."
—	292	—	22	for "cooperation" read "co-operation."
		—	8	from bottom, for "unload" read "reload."
—	330	—	8	after "proved" dele the colon.
—	353	—	16	after "exceſſive" dele the comma.
—	357	—	6	from bottom, for "Capon" read "Caſſon."
—	372	—	10	for "ſtated" read "ſtate"
—	375	—	7	from bottom, for "action" read "axiom"
—	376	—	3	from bottom, for "three" read "two."
—	377	—	15	in margin, for "h." read "n."
—	378	—	4	from bottom, dele "in."
—	379	—	19	for "intent" read "intereſt."
		—	12	from bottom, for "land" read "bond."
		—	8	

Page	384	line	13	from bottom, before "done" inſert "ſo."
—	396	for "396" after the page 385 read "386."		
—	386	when corrected as above, in note, line 13 from bottom, for "ſpecially" r		
				"ſpecialty."
—	394	—	6	from bottom, for "not" read "non."
		—	8	from bottom, for "overated" read "enlarged."
—	402	—	23	after "title" inſert "adverſe."
		—	25	for "sherefore" read "therefore."
—	404	—	6	from bottom, for "Wedderbrune" read "Wedderburne."
—	409	—	6	for "indorſor" read "indorſee."
—	412	—	12	from bottom, for "negociated" read "negociable."
—	414	—	13	for "cequi" read "ce qui."
		—	14	for "ou" read "on."
		—	7	from bottom, for "parle" "par le."
—	418	—	9	from bottom, for "diſtribution" read "diſtinction."
		—	11	from bottom, for "331" read "321."
—	419	—	5	for "ſuited" read "ſeiſed."
		—	14	for "Lett. Ser." read "Litt. Sec."
		—	18	for "Lett. Ser." read "Litt. Sec."
		—	24	in margin, for "part" read "pais."
—	429	—	13	for "goes on always to" read "always goes on."
		—	6	in margin, for "Rom." read "Rem."
—	421	—	3	for "Daley v. Deſbonveire" read "Daley v. Deſbouveire."
		—	25	for "is" read "are."
		—	26	for "its" read "their."
		—	5	from bottom, for "repriſal" read "refuſal."
		—	4	from bottom, for "creditor" read "officer."
		—	32	in margin, for "firmer" read "farmer."
—	422	—	8	for "he" read "they."
		—	14	for "reſeized" read "reſciſed."
		—	26	for "reſeized" read "reſeiſed."
—	424	—		for "Croper" read "Cowper."
—	425	—	1	after "was" inſert a comma.
				for "enſue" read "enure."
—	426	—	10	for "Croke" read "Coke."

Callagan and others *againſt* Hallett & Bowne.

This caſe is miſreported.

Judgment having gone by default, the defendants came in upon the execution of the w
of inquiry, and examined witneſſes. Boyd after this moved in arreſt of judgment upon t
ground, that the action, on the face of the record, appeared not maintainable.