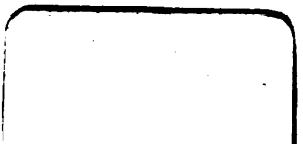
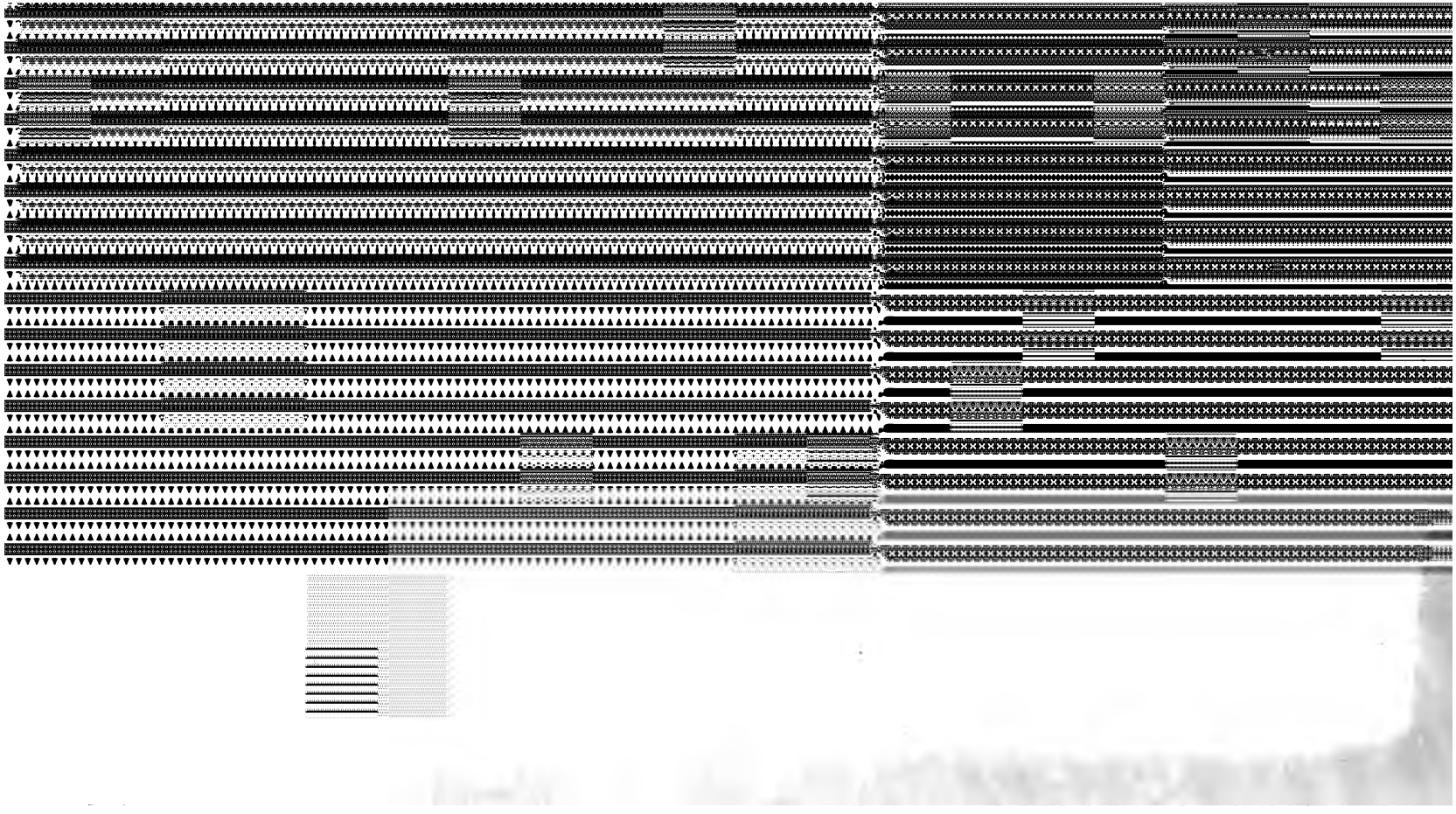




REPORTS

OF

CASES DETERMINED

IN THE

CIRCUIT COURT OF THE UNITED STATES,

FOR THE THIRD CIRCUIT,

COMPRISING

THE DISTRICTS OF PENNSYLVANIA AND NEW-JERSEY.

COMMENCING AT APRIL TERM, 1803.

Published from the Manuscripts of

THE HONOURABLE BUSHROD WASHINGTON.

One of the Associate Justices of the Supreme Court of the United States.

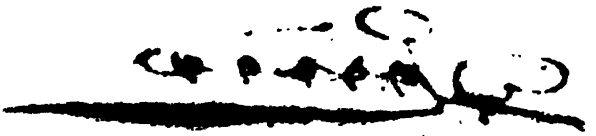
VOLUME I.

PHILADELPHIA:

PHILIP H. NICKLIN, LAW BOOKSELLER.

PRINTED BY LYDIA R. BAILEY.

1826.



EASTERN DISTRICT OF PENNSYLVANIA, TO WIT:

BE IT REMEMBERED, That on the eighth day of (L. S.) May, in the fiftieth year of the Independence of the United States of America, A. D. 1826, RICHARD PETERS, JUN. of the said District, hath deposited in this Office the Title of a Book, the right whereof he claims as Proprietor, in the words following, to wit:

"Reports of Cases determined in the Circuit Court of the United States, "for the Third Circuit, comprising the Districts of Pennsylvania and New-"Jersey. Commencing at April Term, 1803. Published from the Manu-"scripts of the Honourable Bushrod Washington, one of the Associate Jus-"tices of the Supreme Court of the United States. Volume I."

In conformity to the Act of the Congress of the United States, intituled, "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." And also to the Act, entitled, "An Act supplementary to an Act, entitled, 'An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned,' and extending the benefits thereof to the arts of designing, engraving, and etching, historical and other prints."

D. CALDWELL, *Clerk of the Eastern District of Pennsylvania.*

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WHEN, in 1819, the editor published "REPORTS OF CASES DETERMINED IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE THIRD CIRCUIT," it was his intention to proceed with a work which would have placed in the hands of the Profession, the decisions of that Court from 1815 to the present period. This purpose has been suspended, in consequence of an impression, derived from the limited sale of the volume, that the publication of the earlier cases, should have preceded those which were then printed.

That these cases would have appeared long since, was an expectation entertained and expressed at the period referred to. It was understood, that they had been prepared for the press, by a professional gentleman, who had devoted much time and attention to the trust; and who intended to complete the work within a short time.

These expectations have been disappointed; and in accordance with the wishes of Judge Washington, these "Reports" are now published; this volume being the first of a series, which will contain all cases decided in the Third Circuit, during the time that distinguished and learned gentleman has presided in the Court. The cases are taken from the manuscripts of

the Judge, and they will be found to contain all the matters essential to be known, and a full and accurate statement of the opinions of the Court, in every case.

It may be claimed with confidence, that this work will contain a body of law, of the highest interest to the community. The jurisdiction of the Circuit Court of the United States, extends to international and commercial questions, of the greatest, and of the most general importance: its particular province to examine and decide upon revenue, and questions arising under the patent laws; and the final determination by the Court, of the many principles by which the land titles of a very considerable portion of Pennsylvania are regulated—these circumstances, together with the various and changing relations of the United States, between 1803 and 1815; our neutrality; our belligerent and peaceful positions; gave rise to very many of the most intricate and important legal investigations.

The volume now published will be immediately followed by others, and the work will be completed as early as possible.

RICHARD PETERS, JUN.

Philadelphia, May, 1826.

LIST OF CASES

CONTAINED IN VOLUME I.

A.

	Page
Allen vs. Ogden,	174
Allwine, Lessee of Camac vs.	466
Anonymous,	84
Anthony, Seth Barton vs.	317
Arbunkle, Browne's Lessee vs.	484
Armstrong vs. Brown,	43

B.

Baker, Jackson vs.	394
Baker, Jackson vs.	445
Baker vs. Gallagher,	461
Balfour's Lessee vs. Meade,	18
Barclay, Ship Lavinia vs.	49
Barker & Ansley, Marks et al. Assignees of Anthony & Pleasants, Bankrupts, vs.	178
Barnes et al, Assignees of M'Claws, a Bankrupt, vs. Billington & Corless, and Israel Israel, Sheriff,	29
Beale vs. Pettit & Bayard,	241
Bernard, Merrick vs.	479
Biays vs. Union Insurance Company,	506
Bisset, Ketland vs.	144
Blanchard B. Jolly vs.	252
Blight's Assignees, Humphreys vs.	44
Brenell, Vuyton, Administratrix of Vuyton, vs.	467
Brown, Armstrong vs.	43
Brown, Hylton's Lessee vs.	204
Brown, Lessee of Hylton vs.	298

Page

Brown, Hylton's Lessee vs. - - - - - - 343
Browne's Lessee vs. Browne, - - - - - - 429
Browne, Browne's Lessee vs. - - - - - - ib.
Brown vs. John Jackson, - - - - - - 512
Burrus, Huideköper vs. - - - - - - - 109
Burchan & Pennington, Lessee of David Harris vs. - 191
Burrus, Huideköper vs. - - - - - - - 257
Burnell, Camfranque vs. - - - - - - 340
Browne's Lessee, Arbunkle vs. - - - - - 484
Butler vs. Hopper, - - - - - - - 499

C.

Cabrera *ex parte*, - - - - - - - - 232
Calbreath vs. Gracy, - - - - - - - 198
Calbreath vs. Gracy, - - - - - - - 219
Camac's Lessee vs. Allwine, - - - - - - 466
Camfranque vs. Burnell, - - - - - - 340
Carpentier, Courtois vs. - - - - - - 376
Carson's Executors vs. Jennings, - - - - - 129
Caze, Lamalere vs. - - - - - - - 413
Caze, Lamalere vs. - - - - - - - 435
Childs vs. Shoemaker, Assignee of Denison, a Bankrupt, 494
Corser vs. Craig, - - - - - - - - 424
Courtois vs. Carpentier, - - - - - - - 376
Cowqua vs. Lauderbrun, - - - - - - 521
Coxe vs. Penington, - - - - - - - 65
Craig, Corser vs. - - - - - - - - 424
Crammond, Thelasson vs. - - - - - - 319
Crammond et al. Executors of Cay, surviving Partner of Clow & Cay, Perry et al. Assignees of Nantes, a Bankrupt, vs. - - - - - - - 100
Crousellat, De Taslet, et al. vs. - - - - - 504

D.

Delancey's Lessee vs. M'Keen, - - - - - 354
Delancey's Lessee vs. M'Keen, - - - - - 525
Delaware Insurance Company, Hogan vs. - - - 419

Page

Delaware Insurance Company, Myers Moses vs. - 385
Delaware Insurance Company, Snell et al. vs. - - 509
De Taslet et al. vs. Crousellat, - - - - - 504
Dignum, Schooner Phœbe vs. - - - - - 48
Douglass, Lessee of Huideköper vs. - - - 258
Dorsey, Holt et al. vs. - - - - - - - 396
Durnell, Hurst vs. - - - - - - - - 438
Durnell, Hurst's Lessee vs. - - - - - 262
Dusar vs. Murgatroyd, - - - - - - 13

F.

Faussatt, Snell et al. vs. - - - - - - 271
Felichy vs. Hamilton, - - - - - - 491
Fisher et al. Assignees of Peter Blight, a Bankrupt, The United States vs. - - - - - 4
Fitzsimmons, Hicks vs. - - - - - - 279
French, Pigou vs. - - - - - - - 278

G.

Gallagher, Baker vs. - - - - - - - 461
Gallagher, Roberts vs. - - - - - - 156
Gallagher's Executors vs. Roberts, - - - - 320
Gardner, Ruan vs. - - - - - - 145
Gordon et al. James's Lessee vs. - - - - 333
Gordon's Lessee vs. Holliday, - - - - 285
Gordon's Lessee vs. Kerr, Clossam, & Lowry, - - 322
Gracy, Calbreath vs. - - - - - - - 198
Gracy, Calbreath vs. - - - - - - - 219
Groff et al. John & Richard Penn's Lessee vs. - 390
Gurney et al. The United States vs. - - - 446

H.

Harris's Lessee vs. Burchan & Pennington, - - 191
Hamilton, Felichy vs. - - - - - - - 491
Harrison, Brig Tryphenia vs. - - - - - 522
Hicks vs. Fitzsimmons, - - - - - - - 279
Higbie vs. Hopkins, - - - - - - - 230
Hogan vs. Delaware Insurance Company, - - 419

Page
Holiday, Gordon's Lessee vs. - - - - - - 285
Holt & Co. vs. Dorsey, - - - - - - - 396
Hopkins, Higbie vs. - - - - - - - 230
Hopper, Butler vs. - - - - - - - 499
Hughes, Swan's Lessee vs. - - - - - - 216
Huideköper vs. Burrus, - - - - - - - 257
Huideköper vs. M'Clean, - - - - - - 136
Huideköper vs. Stiles, - - - - - - - 135
Huideköper's Lessee vs. Burrus, - - - - - 109
Huideköper's Lessee vs. Douglass, - - - - - 258
Humphreys vs. Blight's Assignees, - - - - 44
Hurst & Carr's Lessee vs. Wickerly, - - - - 276
Hurst *ex parte*, - - - - - - - - - 186
Hurst, Hurst vs. - - - - - - - - - 56
Hurst, Morris vs. - - - - - - - - - 433
Hurst vs. Durnell, - - - - - - - - - 438
Hurst vs. Hurst, - - - - - - - - - 56
Hurst vs. Rodney, - - - - - - - - - 375
Hurst's Lessee vs. Durnell, - - - - - - 262
Hurst's Lessee vs. Ker, - - - - - - - 189
Hurst's Lessee vs. M'Neil, - - - - - - 70
Hurtin vs. Phœnix Insurance Company, - - - - 400
Hurtin vs. Union Insurance Company, - - - - 530
Hylton's Lessee vs. Brown, - - - - - - 204
Hylton's Lessee vs. Brown, - - - - - - 298
Hylton's Lessee vs. Brown, - - - - - - 348

I. & J.

Insurance Company of North America, Kohne vs. - 93
Insurance Company of North America, Kohne vs. - 123
Insurance Company of North America, Kohne vs. - 158
Insurance Company of Pennsylvania, M'Gregor vs. 39
Jackson vs. Baker, - - - - - - - - - 394
Jackson vs. Baker, - - - - - - - - - 445
Jackson, John, Brown vs. - - - - - - - 512

Page

Jackson, Sims vs. - - - - - - - - - 414
James's Lessee vs. Gordon & Bowen, - - - 333
James's Lessee vs. Stookey and others, - - - 330
Jennings, Carson's Executors vs. - - - - 129
John & Alice, Ship; Whitesides and Samuel Hurry, Nicholas Hurry vs. - - - - - - - 293
Johns, United States vs. - - - - - - 363
Johnson, *ex parte*, - - - - - - - - 47
Johnson vs. Phœnix Insurance Company, - - 378
Jolly vs. Blanchard, - - - - - - - 252
Joy & Lawrence vs. Wirtz et al. - - - - - 417
Joy et al. vs. Wurtz et al. - - - - - 517

K.

Knowrs & Graunt, Reutgen vs. - - - - - 168
Kerr, Clossam & Lowry, Gordon's Lessee vs. - - 322
Kerr, Hurst's Lessee vs. - - - - - 189
Ketland vs. Bisset, - - - - - - - - 144
Ketland, Stone et al. vs. - - - - - - 142
Kincaid et al. Kingston vs. - - - - - 448
Kincaid et al. Kingston, Stephen vs. - - - 454
Kingston vs. Kincaid et al. - - - - - 448
Kingston, Stephen, vs. Kincaid et al. - - - 454
Klyne, Penn's Lessee vs. - - - - - 207
Kohne vs. Insurance Company of North America, - 93
Kohne vs. Insurance Company of North America, - 123
Kohne vs. Insurance Company of North America, - 158

L.

Lamalere vs. Caze, - - - - - - - 413
Lamalere vs. Caze, - - - - - - - 435
Lauderbrun, Cowqua vs. - - - - - - 521
Lawrence, Wallace's Lessee vs. - - - - 503
Ledley, Philips vs. - - - - - - - 226
Lavinia, Ship, vs. Barclay - - - - - 49

M.

	Page
Magill, the United States vs.	463
M'Clean, Huideköper vs.	136
M'Gregor vs, Insurance Company of Pennsylvania,	39
M'Keen, Delancey's Lessee vs.	354
M'Keen, Delancey's Lessee vs.	525
M'Neil, Hurst's Lessee vs.	70
Maley, Shattuck vs.	245
Marks et al. Assignees of Anthony & Pleasants, Bankrupts, vs. Barker & Ansley,	178
Martin vs. Taylor,	1
Meade, Balfour's Lessee vs.	18
Merrick vs. Bernard,	479
Miller, Maze vs.	328
Morris vs. Hunt,	433
Murgatroyd, Dusar vs.	13
Myers Moses vs. Delaware Insurance Company,	385

N.

Nicholas Hurry vs. Ship John & Alice, Whitesides, and Samuel Hurry,	293

O.

Ogden, Allen vs.	176

P.

Penington, Coxe vs.	65
Penn's Lessee vs. Klyne,	207
Perry et al. Assignees of Nants, a bankrupt, vs. Crammond et al. Executors of Cay, surviving partner of Clow & Cay,	100
Pettit & Bayard, Beale vs.	241
Philips vs. Ledley,	226
Philips's Lessee vs. Wilson,	470
Phœbe, Schooner, vs. Dignum,	48

Page

Phœnix Insurance Company, Vale vs. - - - 283
Phœnix Insurance Company, Johnson vs. - - 378
Phœnix Insurance Company, Hurtin vs. - - - 400
Pigou vs. French, - - - - - - - - 278

R.

Reutgen vs. Kanowrs & Graunt, - - - - 168
Ritchie's Lessee vs. Woods, - - - - - 11
Roberts vs. Gallagher, - - - - - - 156
Roberts, Executors of Gallagher vs. - - - 320
Rodney, Hurst vs. - - - - - - - 375
Ruan vs. Gardner, - - - - - - - 145
Russel vs. Union Insurance Company, - - - 409
Russel vs. Union Insurance Company, - - - 440

S.

Seth vs. Anthony, - - - - - - - 317
Shattuck vs. Maley, - - - - - - 245
Shoemaker, Assignee of R. Denison, Childs vs. - 494
Simonds vs. Union Insurance Company, - - - 383
Simonds vs. Union Insurance Company, - - - 443
Sims vs. Jackson, - - - - - - - 414
Smith, Walker et al. vs. - - - - - - 152
Smith, Walker vs. - - - - - - - 202
Snell et al. vs. Faussatt, - - - - - - 271
Snell and others vs. Delaware Insurance Company, - 509
Sparks vs. West, - - - - - - - - 239
Stiles, Huideköper vs. - - - - - - 135
Stone et al. vs. Ketland, - - - - - - 142
Stookey and others, Lessee of James vs. - - 330
Swan's Lessee vs. Hughes, - - - - - 216

T.

Taylor, Martin vs. - - - - - - - 1
Thelasson vs. Crammond, - - - - - 319
Tryphenia vs. Harrison, - - - - - - 522

U.

	Page
Union Insurance Company, Biays vs.	506
Union Insurance Company, Hurtin vs.	530
Union Insurance Company, Russel vs.	409
Union Insurance Company, Russel vs.	440
Union Insurance Company, Simonds vs.	382
Union Insurance Company, Simonds vs.	443
United States vs. Fisher et al. Assignees of Peter Blight, a Bankrupt,	4
United States vs. Gurney et al.	446
United States vs. Johns	363
United States vs. Magill,	463
United States vs. Wickham,	316
United States, Willing & Francis, vs.	125

V.

Vale vs. Phœnix Insurance Company,	283
Vuyton, Administratrix of Vuyton vs. Brenell,	467

W.

Wade vs. Wade's Administrators,	477
Walker et al. vs. Smith,	152
Walker vs. Smith,	202
Wallace's Lessee vs. Lawrence,	503
West, Sparks vs.	238
Wickerly, Hurst & Carr's Lessee vs.	276
Wickham, United States vs.	316
Willing & Francis, United States vs.	125
Wilson, Philips's Lessee vs.	470
Wirtz et al. Joy & Lawrence vs.	417
Wirtz et al. Joy et al. vs.	517
Woods, Ritchie's Lessee vs.	11

CIRCUIT COURT OF THE UNITED STATES.

PENNSYLVANIA, APRIL TERM, 1803.

BEFORE { Hon. BUSHROD WASHINGTON, Justice of the Supreme Court.
Hon. RICHARD PETERS, District Judge.

MARTIN *vs.* TAYLOR.

Action of covenant upon an agreement under seal, containing a penalty amounting to less than *five hundred dollars*. The Circuit Court has jurisdiction, the action being for damages exceeding five hundred dollars, as laid in the declaration.

If an agreement contain a penalty, the plaintiff may bring debt for the same, and for no more; or covenant, and recover more or less damages than the penalty.

The defendant, against an express acknowledgment under seal, cannot deny the effect of such obligation, from expressions in the instrument, which amount only to an implication to the contrary.

COVENANT upon an agreement under seal, whereby the defendant, in consideration of a Virginia treasury land warrant for twenty thousand acres of land, *which he acknowledges to have received of the plaintiff*, and of a sum of money agreed by plaintiff to be paid on the performance of the work, stipulated by the defendant; agrees to enter the said warrant on vacant and unappropriated land in the state of Virginia, of a particular description, and to have the same surveyed and regularly returned, all at the expense of the defendant; except

the surveyor's fees. The defendant, in another clause of the agreement, covenants, immediately on receipt of said warrant, to proceed to locate and survey, &c. The parties, for the true and faithful performance of all and singular the covenants, &c. bind themselves each to the other in the penalty of £120, Virginia currency.

Breach assigned in the words of the covenant. Plea, covenants performed. Replication, supporting the breach in the declaration.

Mr. Dallas objected to the reading a deposition which Mr. Ingersoll, for the plaintiff, was about to read, because not signed by the deponent. Ingersoll: The deposition was only intended to prove the execution of the covenant; and as on this plea it is unnecessary to prove it, I shall not insist upon the deposition.

Dallas moved for a nonsuit, on the ground that the £120 was in lieu of liquidated damages, and that as the plaintiff could recover no greater sum than that, the court had no jurisdiction of the case.

Washington, J. Where there is a penalty in an agreement under seal, the party injured, may, at common law, sue for the whole penalty, and must be satisfied with it; or he may bring covenant, and recover in damages more or less than the penalty. (a) If, in the latter case, the sum stipulated to be paid is not a penalty, but intended as a compensation for non-performance, it must govern the jury in the assessment of damages. But that is not the present case; and yet more, it is unimportant on the present motion, which is to nonsuit the plaintiff for want of jurisdiction. The action sounds in damages. The declaration claims more than 500 dollars; and by the decisions in the Supreme Court, the amount of the plaintiff's claim laid in the declaration, furnishes the rule for testing the jurisdiction of the federal courts. Motion overruled.

(a) See 4 Burr. 2225. 6 Bro. Parl. Cases, 470.

Ingersoll endeavoured to prove a receipt of defendant, by comparison of hands. Per Cur. This kind of proof is inadmissible.

Ingersoll, having proved the Virginia treasury price of a land warrant, closed the opening. Dallas insisted, that the plaintiff had not proved delivery of the land warrant, and therefore was not entitled to recover. That the acknowledgment of having received it, in the first part of the instrument, was contradicted by the latter part, which says, that "on receipt of the warrant, the defendant shall proceed to locate," &c. Per Cur. The defendant cannot, against an express acknowledgment of the receipt, do it away by these expressions, which at most amount only to an implication of the contrary.

The Court, after stating to the jury that the only proof exhibited was the articles and the price of a Virginia land warrant at the Treasury, left the quantum of damages upon this proof to the jury.

United States *vs.* Fisher et al. Assignees of Peter Blight, a Bankrupt.

Claim, by the United States, of priority of payment out of the effects of an insolvent and bankrupt debtor.

THE action was brought to recover from the assignees of Blight, a bankrupt, the amount of a protested bill of exchange endorsed by Blight, with damages, &c. as settled at the Treasury. The bill was purchased by the cashier of the Bank of the United States, for the Secretary of the Treasury, and paid for by a warrant on the Bank. It was protested, and notice given on the 11th of April, 1800. Blight having committed an act of bankruptcy, a commission issued against him on the 10th of April, 1801. On the 25th, a provisional, and on the 30th of May, an absolute assignment of his effects were made. Previous to these transactions, viz. in January 1801, Blight had deposited a part of the cargo of the ship China with the collector of some port in Rhode Island, to secure the duties on that cargo; of which the commissioners having notice; they some time in April sent their messenger with a warrant to seize these goods as the property of Blight; and they gave notice of the claim of the commissioners to the collector and marshal of the district. On the 16th of June, 1801, an attachment was taken out in the name of the United States, and levied on the goods in the hands of the collector, for the debt due on account of the bill before mentioned; but they were afterwards delivered to the defendants, under an agreement that they should pay the debt due to the United States, if it should be decided that the United States were entitled to have the same first satisfied. An agreement has also been entered into on the part of the government and the defendants, that an ac-

tion for money had and received should be brought, and the general issue to be pleaded, defendants to admit sufficient funds in their hands, of Blight's property, to pay the claim of the United States, but not enough to pay all his debts. The question to be, whether the debt due to the United States from Blight is first to be satisfied out of his money and effects, or any part thereof, in the defendants' hands, by virtue of the attachment in their agreement mentioned, or of any Acts of Congress. If judgment in the affirmative, to be entered in favour of plaintiff for $——: if in the negative, to be entered generally for defendants.

Dallas contended that the 5th section of the Act of the 3d March, 1797, 3d vol. Laws, p. 428, gives a priority to the United States in cases of insolvencies, in all cases whatsoever of debts due to the United States; and that the 62d section of the Bankrupt Law clearly protects and secures this right of priority, so as not to be affected or impaired by that law. That the United States not being within the operation of the Bankrupt Law, the attachment gave a priority to the claim of the United States. He principally relied upon the case of the United States vs. King, decided in the late Circuit Court for this state, Wallace's Rep. p. 13.

Ingersoll and Tilghman opposed this construction, upon the ground that the Act of 3d March 1797 gave no preference to the United States, except against public agents; and therefore they are not in other cases to have a priority.

After a very long argument by these gentlemen, *Washington, J.* stopped Lewis, who was about to argue also for the defendants, and desired Dallas to conclude.

Charge. After stating the case. The single question is, has the United States a right to be paid the whole of the debt due from the bankrupt out of his estate, in preference to the other creditors? This will turn entirely upon the construction of the Act of the 3d March, 1797, and the Bankrupt Law; for I at

once lay the attachment out of the case; because, unless the priority of the United States be established by those laws, the attachment, being laid after the assignment, could give no lien and no right of preference to the United States; for at that time the property belonged not to Blight, but to the assignees. This right of preference, upon prerogative principles, has been wisely disclaimed by the district attorney, who founds it upon a legislative grant solely. The 62d section of the Bankrupt Law declares, that "nothing contained in this law shall in any manner affect the right of preference to prior satisfaction of debts due to the United States, as secured or provided by any law heretofore passed, nor shall be construed to lessen or impair any right to or security in money due to the United States, or to any of them."

Mr. Ingersoll seemed to suppose, that as the king is not within the operation of the Bankrupt Laws in England, this section was only intended to express, in regard to the United States, the same legal principle. Mr. Tilghman appeared to think that the United States had an election to come in under the commission and receive a dividend, or to refuse to do so, in which latter case the bankrupt's certificate would be no bar of her claim. It is unnecessary to give any opinion, whether the United States may elect to come in under the commission or not, because this is not a question wherein they have put in any claim, or in which the bankrupt is endeavouring to protect himself by his certificate. The United States contend for a right to be paid the whole of their demand, and found this right on the section recited, and on the 5th section of the Act of the 3d March, 1797. The 62d section of the Bankrupt Law does not give a preference to the United States, but merely saves the rights of the United States in cases where such a preference had by law been previously granted. This then brings me to the Act of the 3d March, 1797, which, it is contended on behalf of the United States, gives them a preference in all cases of debts due to them, no matter by whom or on what account

The title of this law is "An Act to provide more effectually for the settlement of accounts between the United States and *receivers of public money*." The objects of the 1st section are *revenue officers* and persons accountable for public money, and directs who shall institute suits against such of them as are delinquents, and declaring what interest shall be recovered. The 2d section defines the kind of evidence to be received in such suits, for establishing the demand. The 3d section directs the trial of the cause to take place at the return time. The 4th section provides for the defendant, and points out the mode in which he is to establish his credits, if he claims any. The 5th gives to the United States a preference in case of insolvency; and the 6th is upon the subject of execution after judgment obtained.

The 5th section declares, that "where any revenue officer or *other person* thereafter becoming indebted to the United States by bond or otherwise, shall become insolvent," the debt due to the United States shall be first satisfied. The words *or other person*, are certainly broad enough to comprehend every possible case of debts due to the United States, and the Court is now called upon to give to this section its proper construction. On one side it is said, that the words must have a literal interpretation, so as to extend to all persons indebted to the United States; and on the other, a limited interpretation is contended for, so as to confine the meaning of those words to persons accountable for public money.

Where a law is plain and unambiguous, using either general or limited expressions, the legislature should be intended to mean what they have plainly expressed, and no room is left for construction. But, if from a view of the whole law taken together, or from other laws *in pari materia*, the evident intention is different from the import of the literal expressions used in some part of the law, that intention ought to prevail, for that in truth is the will of the law-makers. So, if the literal expressions would lead to absurd or unjust consequences, such a con-

struction should be given as to avoid such consequences, if, from the whole purview of the law, it can fairly be made. These rules are founded in law, and in plain honest good sense; and I think will give us light enough to pursue the present inquiry with success. Now what would be the consequence of a literal construction in this case? Not only a preference and inequality in favour of the United States, but such as no prudent citizen could guard himself against. As to public officers and agents, they are or may be known, and any person dealing with them does it at the peril of having his debt postponed to that of the United States—he acts with his eyes open. But if this preference be extended to all persons dealing with the government, there is no mode by which other citizens can be put on their guard against them, and consequently all confidence between man and man will be destroyed. If however the law is so, it must be submitted to. But we must see if such consequences may not be avoided, by a fair and reasonable construction.

The object of the law, as declared by the title of it, is to provide for the effectual settlement of debts due from accountable agents to the United States. To effect this, suits are directed, the species of evidence to support the claim pointed out, a speedy trial provided, and a preference given to the United States in case of a deficiency of estate to satisfy the judgments. Here then is one entire connected system; the different provisions constituting the links of the same chain—the members of the same body. The title, though it cannot control the positive expressions of the law, may assist other parts of the law in limiting the extent of their meaning. It is admitted that the three first sections of the law apply to those only who are declared by the title to be the objects of the law; the 4th section is the first which uses general expressions, without a reference to those who had before been spoken of; but when we come to the 5th section, the reference is again taken up, with the addition of the words "or any other person;"

and we are to say, to what extent these general expressions are to go. In the first place, what necessity was there for departing from the mode of expression used in the 4th section, which for the first time is general, without particular reference to any of the persons before described? Would it not have been as well in the 5th as in the 4th section, to say, that "where *any individual* hereafter becoming indebted to the United States, shall become insolvent," &c.?

What reason can be given for the specification of one of the persons mentioned expressly in the first section, and intended by words of reference in the 2d and 3d, unless to show, that if the primary object of the law had been interrupted by the 4th section, it was intended to be resumed in the 5th? Secondly: What necessity was there for the specification of *revenue officers*, if all persons whatsoever are comprehended, who are debtors of the United States? for those words would certainly have comprehended revenue officers. Unless they are construed to limit and restrain the generality of the other words, they are without any use whatever. If the preceding sections of the law had applied *only to revenue officers*, then, from necessity, we must have construed the words "any other person," as broad as their natural import would warrant; because we could derive no rule whatever, from the law itself, to limit the generality of the expression. But the law professing by its title to relate to all accountable agents, and the first section specifying amongst those accountable agents *revenue officers*, we have a rule by which to limit the generality of the expressions in the 5th section, viz. "or any other person *accountable for public money*," or, "or other person indebted as aforesaid." This construction renders the law uniform, and consistent with what it professes. And thirdly: The special wording of the 62d section of the Bankrupt Law, furnishes another strong argument in favour of this limitation of the 5th section of the law, more immediately under consideration. If the United States were entitled to a preference in every possible case of debts due to them, what

necessity for speaking of "the right of preference to prior satisfaction of debts due to the United States, *as secured and provided by any law heretofore passed*"? This mode of expression was calculated to induce an opinion, that the legislature supposed there were some cases where the priority had not been provided for by law; for if otherwise, it would have been enough to declare, that the Bankrupt Law should not extend to or affect any debts due to the United States. Upon the whole, I am of opinion that the law is with the defendants.

The Jury found a verdict for the defendants.

Upon an appeal, this judgment was reversed. (*a*)

(*a*). *The United States* vs. *Fisher*, 2 *Cranch* 358. 396.

In this case, the Supreme Court decided—

1. The Acts of Congress, securing to the United States a priority of payment out of the effects of their debtor, in all cases of insolvency or bankruptcy, are constitutional.

2. The government is to pay the debts of the Union, and is authorized to use the means which appear to itself most eligible to effect that object. It has consequently a right to make remittances by bills or otherwise, and to take those precautions which render the transaction safe.

3. It is no objection to the claim of priority on the part of the United States, that it interferes with the right of the State sovereignties respecting the dignity of debts, and will defeat the measures they have a right to adopt to secure themselves against delinquencies, on the part of their own revenue officers. This result, so far as it may happen, is the necessary consequence of the supremacy of the laws of the United States, on all subjects to which the legislative power of Congress extends.

If the *end* be legitimate, and within the scope of the Constitution, all the *means* which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect. Wharton's Digest, 81, 82.

Lessee of Ritchie *vs.* Woods.

Under the laws of Virginia, the certificate of registry of a patent, which is required to be given, is not necessary to the title to lands under it. The law is as to this matter merely directory.

By the decisions of the Courts of Virginia, a right of settlement cannot prevail against a right under a patent.

THE title of the plaintiff was under a proclamation warrant, issued by Lord Dunmore, governor of Virginia, to B. Lucas, in 1774; by him assigned to the lessor of the plaintiff, who had the same regularly surveyed in 1775, and a patent granted to him by the governor of Virginia, 20th July, 1780. The disputed line between Virginia and Pennsylvania having been settled by commissioners appointed by those states, and agreed to in September 1780, by Pennsylvania; she, in April 1784, passed a law confirming the rights of all persons claiming prior title under Virginia.

Dallas objected to the patent as evidence, because no certificate of its being registered is annexed, as directed by the law of Virginia.

Washington, J. The certificate forms no part of the title, which passes by the signing of the governor, and the affixing the public seal. What follows is merely directory to a public officer.

The plaintiff went on to prove the location of the land, by two surveys, which he had directed to be made; and by testimony also; to prove the possession of the defendants to be within those bounds.

Ingersoll, for plaintiff, relied upon the case of Jones *vs.* Williams, in the Court of Appeals of Virginia, 1 Wash. Rep.

280, that the title by settlement set up by the defendant, would not prevail against a patent right.

The Court informed the jury, that the law of Virginia must govern this case, and that the legal rule is fixed by the decision in Jones *vs.* Williams. Of course, that the plaintiff's title is complete, and must entitle him to a verdict, if the jury should be satisfied that defendants are in possession of the land in question.

Verdict for plaintiff.

Dusar *vs.* Murgatroyd.

The true rule, in cases of bankruptcy, is, that if the *original* ground of action is founded in contract, but the immediate cause arises *ex delicto*, and the claim is for damages unliquidated by express agreement, or such as will not be implied, the certificate is not a bar, as such a claim could not have been set up under the commission.

If the defendant had agreed to pay a certain sum on failure to perform his agreement; or if the plaintiff could bring either trespass, or money had and received, and waives the former by bringing the latter; the damages are due, which the law implied a promise to pay, and may be proved under the commission.

The owner of a vessel is answerable for the carelessness or unskilfulness of his master, and by the common law nothing can excuse him, but the act of God, or of the enemy, or of the party complaining.

When goods are destroyed, or materially injured, on board a vessel in the port where they are shipped, the damages must be ascertained by the difference between the prime cost and charges, and the sales at the port of shipment; and not by the probable profits if the goods had gone safe to the port of destination. (*a*)

THE plaintiff put on board a vessel belonging to the defendant, a quantity of sugars, to be carried to Hamburg. The day, or day after she had received her load, she nearly filled with water, in consequence of which the sugars received an injury of about fifty per cent., for which this action was brought; stating, as is usual, the agreement to carry the goods safely, (the dangers of the sea excepted,) and that they had been greatly injured by the neglect and unskilfulness of the defendant. Pleas, 1. *Non assumpsit* (but to be considered as *non cul* if the latter be the general issue in the case.) 2. That the defendants be-

(*a*) See Gilpins *vs.* Consequa, 1 Peters' Rep. 86. Willings *vs.* Consequa, Idem. 172. Vonqua *vs.* Nixon et al, Idem. 221.

came bankrupts after the loss, as stated in the declaration, and had obtained their certificate.

The plaintiff introduced a number of witnesses to prove that the accident happened in consequence of the lumber port having been opened, and not sufficiently secured before the cargo was taken in.

But the defence principally relied on was, that the cause of action, if founded now, existed and was complete long before the bankruptcy of the defendants, and therefore the certificate is a bar of the action. The certificate was signed 15th July 1802, and approved 16th August 1802. The loss took place 27th October 1800.

WASHINGTON, J. charged the jury. It is greatly to be wondered at, that so little satisfactory information is to be derived on this subject; from the decisions of the courts in England, where bankrupt laws have so long existed. The cases which have been cited, are not only of modern date in general, but are inapplicable to the present case. They have generally arisen on contingent debts, debts not due at the time of the bankruptcy, or cases where the creditor had an election to sue, as for a tort, or for money had and received. There is no contingency in the present demand, no action but the present could have been brought, and the cause of it was complete before the bankruptcy. It is not easy to extract from the cases cited any principles laid down, and so uniformly adhered to by the judges, as to entitle them to that respectful consideration which I always pay them, even where they do not bind as authority. But I think enough may be gathered from those cases, and from the general principles of law, to enable us to lay down a rule which will decide this and other cases of the kind. The question is not whether the demand is connected with contract or tort, but is the plaintiff a *creditor*, and does he claim a *debt?* These are the operative words of the statute, and their legal import must be attended to.

It is not the breach of every contract which creates a *debt*. If a carpenter covenant to build a house, and then refuses to do it, or does it unskilfully, though there is a contract, yet the immediate ground of the action is an injury, for which the plaintiff may be requited in damages. These damages, before they are assessed by a jury, cannot be said to constitute a *debt*. So in the present case, there was a contract to carry the goods of the plaintiff, safely. But the ground of the action, is for an injury sustained by the neglect of the defendant's servant. The plaintiff is seeking a reparation in damages for this injury—it is no debt, and consequently could not have enabled the plaintiff to lay such a claim before the commissioners, as to entitle him to a dividend. If so, the consequence is inevitable, that he is not barred by the certificate. The true rule seems to be "that if the *original* ground of action is founded in contract, but the *immediate* cause of action arises *ex delicto*, and is a claim for damages unliquidated by an express agreement; or that, as the law will not imply an agreement to pay, it is not such a claim as would be brought before the commissioners." To explain the rule: The immediate cause of action in this case arises *ex delicto*, from the fault of the defendant; and the damages being unliquidated by the parties, and the law creating no implied contract on the part of the defendant to pay money in consequence of it, there is no *debt*. But if the defendant had engaged to carry the goods safely, and on failure to pay 1000 dollars; he would on the failure have become a debtor for 1000 dollars, the liquidated damages; and it would not have been in the power of the plaintiff to receive more, though he could prove the damage to have exceeded that sum. So if plaintiff had his election to bring trespass or action for money had and received, and he waives the tort, by bringing the latter action; here the damages, though unsettled, become a debt, which the law implies a contract in the defendant *ex æquo et bono* to pay. So in running accounts, though the balance is unliquidated, yet the law creates a contract to pay the balance.

I was struck, upon the argument, with the summary mode of ascertaining and settling claims by jury, and at first supposed that this variance from the bankrupt laws of England, was intended to let in all kinds of claims, and to facilitate the adjustment and liquidation of them. But I am now satisfied, that this provision was only intended to give to the commissioners or the creditor, an election as to the mode of adjusting such claims for *debt*, as are meant by the 34th section of the law, and not to let in any claims not of this description, if due and owing at the time of the bankruptcy. Upon this point therefore, I am of opinion the defendants cannot protect themselves against the present demand by their certificate. (*b*)

(*b*) See the case of Ottenson *vs.* Vernon. 3 Durn. & E. 539. 4 Durn. & E. 570.

In Hammond's edition of Sir John Comyn's Digest, Tit. Bankrupt, Vol. II. p. 103, all the decisions upon the competency of a creditor claiming damages of the bankrupt to prove under the commission, are collected. Their insertion here may be useful:—

"1. Where the demand rests in damages, and cannot be ascertained but through the intervention of a jury, it cannot be proved; thus, for mesne profits, or a breach of covenant to do any other act, except to pay money. Dougl. 584. 6 T. R. 469. 7 T. R. 612.—2. If a demand is partly liquidated, partly not, as the difference of price upon a re-sale, creditor having a security may apply it first to the former, then to the latter, and may prove for the residue. 6 Ves. 94.—3. If a demand, in the nature of damages, be capable of being liquidated, and ascertained at the time of the bankruptcy taking place, so that a creditor can swear to the amount, he may prove it as a debt under the commission.—4. As in an action of assumpsit on a *quantum meruit*. Dougl. 167.—5. Or if a bond be given to replace stock on a given day, and the bond is forfeited before the bankruptcy of the obligor, it may be proved, and the amount to be proved is the dividends due before the bankruptcy, and the value of the stock at the day the commission issues. Co. Bt. Laws, 149. 7 Ves. 302.—6. Or if money be paid by one partner to another (who afterwards becomes bankrupt) for the purpose of being paid over as his liquidated share of a debt to their joint creditors, and it is not so applied, it may be proved by the solvent partner as a debt under the commission. 1 East, 20.—7. So a demand in trover, if for a liquidated amount, may be proved under a commission. Dougl. 168.—8. Damages

The next point is, are the defendants liable for damages, and what should be the measure of them?

The owner of the vessel is liable for all injuries, which those who employ him sustain by the misconduct, negligence, or unskilfulness of the captain. Nothing can excuse him by the common law as understood in England, but the acts of God, the public enemies, or the fault of the party complaining. The present case however does not require us to proceed upon the most rigid extent of that rule. The defendant does not shew himself to be within any of the exceptions which can excuse him, and the evidence of both parties has been confined to the condition of the lumber port at the time the lading was taken in. Witnesses were examined to prove that it was usual and necessary to confine this port within by wedges, and secure it without, by caulking and paying over. One witness was of opinion that the inside lashing had sufficiently secured it. Upon the whole, if you are of opinion that the lumber port was not secured as is usual, and sufficiently for the safety of the cargo; or that the injury arose from the carelessness, neglect, or unskilfulness of the captain in any other respect; you will find for the plaintiff such damages as you may think right. The profit which might have been obtained, if the sugars had gone safely to Hamburg, was claimed at the opening, but was properly abandoned by the concluding counsel. The difference between the prime cost and charges, and the sales here, forms a fair measure of the damages sustained.

The jury found a verdict for 4825 dollars, or thereabouts, being the difference between the prime cost and charges, and the sales at auction.

liquidated by a security; thus, a note given upon compromising an action for seduction, are proveable. 15 Ves. 289.—9. Where a bankrupt, at the time of his bankruptcy, is indebted in an ascertained or ascertainable sum, it may be proved under the commission, and is discharged by the certificate. 3 T. R. 539. 4 T. R. 570.—10. Equitable demands are proveable. 1 Sch. & Lef. 48. 3 V. & B. 40.—11. Though the debt be contracted after the bankrupt quitted trade, it may be proved. 1 Ld. Raym. 267."

Balfour's Lessee *vs.* Meade.

To constitute a *settlement* upon lands in "the new purchase," under the provisions of the ninth section of the Act of the Legislature of Pennsylvania, passed April 3d, 1792; there must be an *occupancy*, accompanied by a *bona fide* intention immediately to reside upon the land, either personally or by a tenant; and without this, the mere improvement of the land, is of no importance; except as evidence of an intention to settle.

The proviso of the 9th section of the Act, applies only to those who had an incipient title at some time by actual settlement, preceding the necessity which obliged them to require the benefit of the proviso; or by warrant; and such settlement, if so made, would be sufficient, although it were prevented, by the existance of hostilities, from being such a one as this section requires, by the occasion mentioned in the proviso.

Who is an *actual settler* to whom a warrant may issue, under the law.

Actual settlement, under the 9th section, consists in clearing, fencing, and cultivating two acres of land, at least, on each 100 acres; erecting a house thereon, fit for the habitation of man, and a residence continued for five years, &c.

The survey made for the plaintiff in this case, gave no title, because—1. it was not a returnable survey; 2. it was not authorised by a warrant; 3. it was not made for an actual settler; 4. it was not made by an authorised surveyor.

A warrant of acceptance gives no title under the law, it not having been founded on a settlement.

The dismissal of the caveat filed by the defendant, did not settle the question of title, but left the same to be decided by an ejectment if brought within six months.

THIS was an ejectment for four tracts of land, lying south and west of the Ohio and Alleghany rivers and Conewango creek in Pennsylvania. The plaintiff's title rested upon settlement rights, surveys, and warrants. In 1793, the plaintiff was a surgeon in the army, in garrison at Fort Franklin. He took some of the soldiers, went out, cut down a few trees, and built up five pens or cabins, about ten feet square; and without put-

ting covers on them, returned back to the fort in about six or seven days. In April 1795, he had these five tracts surveyed in the name of himself, Elizabeth Balfour, and four others, each four hundred acres. The deputy surveyor had, upon application of the plaintiff, directed one Wilson to make the survey, but something preventing him from doing it, the plaintiff employed one Steel to do so, and upon returning the surveys to Stokely, he prevailed upon him to write an authority to Steel to make the survey, which Stokely says he did, and antedated it, in order to make it appear to precede the survey. In May 1795, he obtained warrants of acceptance for two of the surveys of two of the tracts, having paid the consideration money for the whole.

In autumn 1794, Meade the defendant, finding no person settled upon these lands, built cabins upon the four tracts in controversy, covered them, or some of them, and then went off, not returning again until November 1795, when he came with his family to reside in one of the cabins, and fixed settlers upon the other tracts. In July 1795, the plaintiff gave notice to the defendant that he claimed the lands in question, that he intended to settle them, and forewarned him to proceed further with his improvements thereon.

In January 1796, the defendant caveated the plaintiff in form; and the same being tried before the board of property in March 1800, the caveats were dismissed, and warrants were ordered to issue; but they never did issue, in consequence of doubts afterwards existing respecting the plaintiff's title.

In April 1796, the plaintiff made engagements with some persons to settle these lands for him; but after they had seen and approved the lands, they declined going on them, upon hearing of the defendant's claim.

It was in proof by many witnesses, that the war with the Indians rendered it dangerous to settle in that country during the years 1793, 1794, and 1795, and that but few settlements were attempted before the spring or summer of 1796.

Mr. Dallas and Mr. Edward Tilghman contended, that the plaintiff had acquired a good right by settlement, survey, and warrant, to the lands in question, under the laws of Pennsylvania, and particularly the Act of the 3d of April 1792, 3 vol. 209; and that the settlement of Meade in 1795, was in violation of the plaintiff's prior right, and of course void. That the plaintiff had been prevented by the Indian hostilities from settling or fixing settlers until the peace of *Fort Grenville*, made in August 1795, was ratified; in December 1795; and that he had attempted it in a reasonable time after that event. They cited 1 Dall. 6. 2 Dall. 98. 3 Dall. 457. Addis. Rep. 215. 218. 354.

Mr. Ingersoll and Mr. M'Kean contended, that the plaintiff never had made a settlement within the meaning of the law, not having accompanied it with actual residence or intention to reside; that of course he never had an inceptive title to be protected, by the proviso in the 9th section of the Act of 1792. They cited Addison's Rep. 246. 335; the case of the Holland Company *vs.* Cox, in the Supreme Court of this State; and the decisions of the Judges of that Court, in a feigned issue tried at Sunbury.

The case was argued very much at length (beginning on Saturday and not ending before Tuesday at 2 o'clock, the Court sitting until 9 o'clock at night on Saturday and Monday,) and with great abilities on both sides.

WASHINGTON, J. charged the jury. The importance of this cause led the Court to wink at some irregularities in the argument of it at the bar, which has tended to protract it to an unreasonable length. Depending upon the construction of the laws of this state, and particularly on that of the 3d of April 1792, it had at first the appearance of a difficult and complicated case. It is not easy at the first reading of a long statute to discover the bearings of one section upon another, so as to obtain a distinct view of the meaning and intention of the Legislature.

But the opinion I now entertain was formed on Saturday before we parted, open however as it always is, to such alterations as ulterior reason and argument may produce.

The better to explain and to understand this subject, it will be necessary to take a general view of the different sections of the Act of the 3d of April 1792, upon which this cause must turn. The first section reduces the price of all vacant lands, not previously settled or improved, within the limits of the Indian purchase made in 1768, and all precedent purchases, to fifty shillings for every hundred acres; that of the vacant lands within the Indian purchase made in 1784, lying east of Alleghany river and Conewango creek, to five pounds; to be granted to purchasers in the manner authorized by former laws.

The second section offers for sale all the other lands of the state, lying north and west of the Ohio, Alleghany, and Conewango, to persons who will *cultivate, improve, and settle* the same, or cause it to be done, at the price of seven pounds ten shillings per hundred acres, to be located, surveyed, and secured, as directed by this law. It is to be remarked, that all the above lands lie in different districts, and are offered at different prices. Title to any of them may be acquired by *settlement*, and to all except those lying north and west of the Ohio, Alleghany, and Conewango, by *warrant* without settlement.

The third section, referring to all the above lands, authorizes applications to the Secretary of the Land Office, by any person having settled and improved, or who was desirous to settle and improve a plantation, to be *particularly described*, for a warrant for any quantity of land not exceeding four hundred acres; which warrant is to authorize and require the Surveyor General to cause the same to be surveyed and to *make return of it*, the grantee paying the purchase money and fees of office. The eighth section, which I notice in this place because intimately connected with the third section, directs the deputy surveyor to survey and mark the lines of the tract, upon the application of the *settler*. This survey, I conceive, has no other validity

than to furnish the *particular descriptions* which must accompany the application at the land office for a warrant.

The fourth section, amongst other regulations, protects the title of an *actual settler* against a warrant entered with the deputy surveyor posterior to such actual settlement.

The ninth section, referring exclusively to the lands north and west of the Ohio, Alleghany, and Conewango, declares, that "no warrant of survey of lands within that district shall give a title, unless the grantee has, prior to the date of the warrant, made or caused to be made, or shall within two years after the date of it make or cause to be made, an actual settlement, by clearing, fencing, and cultivating, two acres at least in each hundred acres, erecting thereon a house for the habitation of man, and residing or causing a family to reside thereon for five years *next* following his first settling the same, if he shall so long live; and in default of such actual settlement and residence, other actual settlers may acquire title thereto."

Let us now consider this case as if the law had stopped here. A title to the land in controversy lying north and west of the Ohio, Alleghany, and Conewango, could be acquired in no other manner but by *actual settlement*. No sum of money could entitle a person to a warrant, unless the application was preceded by actual settlement on the land; or if not so preceded by actual settlement, the warrant would give no title unless it were followed by such settlement within two years thereafter.

The question then is, what constitutes such an actual *settler*, within the meaning and intention of this law, as will vest in him an inceptive title, so as to authorize the granting to him a warrant? Not a pedis positio—not the erection of a cabin—the clearing, or even the cultivation of a field: these acts may deserve the name of *improvements*, but not of *settlements*. There must be an occupancy, accompanied with a *bona fide* intention to reside and live upon the land, either in person or by that of his tenant;—to make it the place of his habitation, not at some distant day, but at the time he is improving; for if this inten-

tion be only future, either as to his own personal residence, or that of a tenant; then the execution of that intention by such actual residence fixes the date of the commencement of the settlement, and the previous improvements will stand for nothing in the calculation. The erection of a house, and the clearing and cultivating the ground, all or either of them, may afford evidence of the *quo animo* with which it was done—of the intention to settle; but neither, nor will all, constitute a settlement, if unaccompanied by residence. Suppose these improvements made, the person making them declaring at the time that they were intended for purposes of temporary convenience, and not with a view to settle and reside. Could this be called an actual settlement, within the meaning and intention of the Legislature? Surely not. But though such acts, against the express declarations of the quo animo, will not make a settlement, it does not follow that the converse of the proposition will; for a declaration of intention to settle, without actually carrying that intention into execution, will not constitute an actual settlement.

How do these principles apply to the case of the plaintiff? In 1792 he leaves the fort at which he was stationed, and in which he was an officer, with a few soldiers, cuts down some trees, erects four or five *pens*, (for not being covered, they do not deserve the name of *cabins*) and in five, six or seven days, having accomplished the work, he returns into the fort to his former place of residence. Why did he retreat so precipitately? We hear of no danger existing at the time of completing those labours, which did not exist during the time he was engaged in them. What prevented him from proceeding to cover the cabins, and from inhabiting them? Except the state of general hostility which existed in that part of the country, there is no evidence of a particular necessity for flight, in the instance of this plaintiff. It is most obvious, that the object of his visit to this wilderness was to erect what he considered to be improvements, but they were in fact not inhabitable by a human

being, and consequently could not have been intended for a present settlement. He was besides an officer in the army, and whilst in that service he could not settle and reside in his cabins, although the country had been in a state of perfect tranquillity. In short, his whole conduct, both at that time and afterwards—his own statements when asserting a title to the land—the recitals in his warrants of acceptance and certificates of survey,—all afford proof, which is irresistible, that he did not mean in 1793 to settle. Mistaking the law, as it seems many others have done in this respect, he supposed that an improvement was equivalent to a settlement, for vesting a right to those lands. It is not pretended, even now, nor is it proved by a single witness—not even by Crouse, who assisted in making the improvements—that he contemplated a settlement. It has been asked, could the Legislature have meant to require persons to set down, for a moment, on land encompassed by dangers from a savage enemy? I answer, no: at such a time, it was very improbable that men would be found rash enough to make settlements. But yet no title could be acquired without such a settlement; and if men were found hardy enough to brave the dangers of a savage wilderness, they might be called imprudent men, but they would also deserve the promised reward, not for their boldness, but for their settlement.

The first evidence we have of an intention in the plaintiff to make an actual settlement, was in the spring of 1796, long after the actual bona fide settlement of the defendant with his family; for I give no credit to the notice from the plaintiff to the defendant in July 1795, since so far from accompanying it with actual settlement, he speaks of a future settlement, which however was never carried into execution. Every thing which I have said, with respect to the four hundred acres surveyed in the name of George Balfour, will apply, *a fortiori*, against the three other surveys in the names of Elizabeth Balfour, and the other warrantees, who it is not pretended were ever privy even to the making of the cabins, or ever contemplated a settlement upon those lands.

If the law then had stopped at the proviso, it is clear that the plaintiff never made such a settlement as would entitle him to a warrant. But he excuses himself from having made *such a settlement* as the law required, by urging the danger to which any person, attempting a residence in that country, would have been exposed. He relies on the proviso to the ninth section of the law, which declares, that "if any such actual settler, *or* any grantee in any such original or succeeding warrant, shall by force of arms of the enemies of the United States, be prevented from making such actual settlement, or shall be driven therefrom, and shall persist in his endeavours to make such actual settlement as aforesaid; then, in either case, he and his heirs shall be entitled to have and to hold the said lands, in the same manner as if the actual settlement had been made and continued." Evidence has been given of the hostile state of that country during the years 1793, 1794, and 1795, and the danger to which settlers would have been exposed. We know that the treaty at Fort Grenville was signed in August 1795, and ratified in December of the same year. Although Meade settled with his family in November 1795, it is not conclusive proof that there was no danger even then; and at any rate it would require some little time and preparation, for those who had been driven off to return to their settlements; and if the cause turned upon the question whether the plaintiff had persevered in his exertions to return and make such settlement as the law requires, I should leave that question to the jury, upon the evidence which they have heard.

But the plaintiff, to entitle himself to the benefit of the proviso, should have had an incipient title at some time or other; and this could only have been created by actual settlement, preceding the necessity which obliges him to seek the benefit of the proviso, or by warrant.

I do not mean to say, that he must have had such an actual settlement as this section requires to give a perfect title; for if he had built a cabin, and commenced his improvements in such

manner as to afford evidence of a bona fide intention to reside, and had been forced off by the enemy at any stage of his labours; persevering at all proper times afterwards in endeavours to return when he might safely do so; he would have been saved by the proviso. But it is incumbent on the plaintiff, if he would excuse himself from the performance of what has been correctly called a condition precedent, to bring himself fully and fairly within the proviso which was made for his benefit. This he has not done.

Decisions in the Supreme Court, and in the Common Pleas of this State, have been cited at the bar; two of which I shall notice, for the purpose of pointing out the peculiar marks which distinguish them from the present, and to prevent any conclusions being drawn, from what has been said, either to countenance or to impeach those decisions. The cases I allude to are; the Holland Company *vs.* Cox; and the feigned issue tried at Sunbury.

The incipient title under which the plaintiffs claim in those causes, were *warrants*, authorized by the third section of this law: the incipient title in the present case is *settlement*. The former was to be completed by settlement, survey, and patent, these to precede the warrant: and for the better explanation of this distinction, it will be important, to ascertain what acts will constitute an *actual settler* to whom *a warrant may issue*, and what constitute *an actual settlement* as the foundation of a title. I have before explained, who may be an actual settler to demand a warrant—namely, one who has gone upon and occupied land with a bona fide intention of an actual present residence; although he should have been compelled to abandon his settlement, by the public enemies, in the first stages of his settlement. But actual settlement intended by the ninth section, consists in clearing, fencing, and cultivating, two acres of ground, at least on each hundred acres; erecting a house thereon for the habitation of man, and a residence of five continued years next following his first settling, if he shall so long live. This kind of

settlement more properly deserves the name of *improvements*, as the different acts to be performed clearly import. This will satisfactorily explain what at first appeared to be an absurdity in that part of the proviso, which declares, that "if such *actual settler* shall be prevented from making such *actual settlement*." The plain meaning is, that if a person has once occupied land with an intention of residing, though he has neither cleared nor fenced any land, and is forced off by the enemies of the United States, before he could make the improvements, and continue thereon for five years, having once had an incipient title, he shall be excused by the necessity which prevented his doing what the law required, and in the manner required. Or if the warrant holder, who likewise has an incipient title, although he never put his foot upon the land, shall be prevented by the same cause from making those improvements, &c.; he too shall be excused, if, as is required also of the settler, he has persevered in his endeavours to make those improvements, &c.

But what it becomes such a grantee to do, before he can claim a patent, or even a good title, is quite another question, upon which I give no opinion.

As to the plaintiff's surveys and warrants, they cannot give him a title. Not the surveys; First, Because they are a mere description of the land, which the surveyor is authorized by the eighth section to make, and the applicant for the warrant is directed by the third section to lodge in the land office at the time he applies for a warrant. It is merely a demarcation or special location of the land, intended to be appropriated; and gives notice of the bounds thereof, that others may be able to make adjoining locations without danger of interference. This is not such a returnable survey, so as to lay the foundation of a patent. Second, It is not authorized by a warrant. Third, It was not done for an actual settler. Fourth, It was not made by an authorized surveyor, if you believe upon the evidence that the authority to Steel was antedated, and given after the survey was returned.

Not the warrant—First. Because it was not a warrant of title, but of acceptance. Second. It is not founded on *settlement*, but *improvement*; and if it had recited the consideration to be actual settlement, the recital would have been false in fact, and could have produced no legal or valid consequence.

As to the caveat; the effect of it was to close the doors of the land office against the further progress of the plaintiff in perfecting his title. The dismission of it again opened the door; but still the question as to title is open for examination in ejectment, if brought within six months, and the patent will issue to the successful party.

The plaintiff therefore having failed to show a title sufficient to enable him to recover in this action, it is unnecessary to say any thing about the defendant's title, and your verdict ought to be for the defendant.

The Jury found for the defendant.

SHERIFF.

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sheriff, had sold the goods of the bankrupt, after an act of bankruptcy committed, and notice of the title of the plaintiffs.

The case is fully stated in the charge given to the jury by *Washington, Just.*, after a very full argument of two days, by Ingersoll, Lewis, and Dallas, for the plaintiffs, and Tilghman and Ross for the defendants.

WASHINGTON, J. The facts in this case, not disputed, are, that on the 9th of August 1800, Billington relieved M'Claws, a trader within the meaning of the Bankrupt Law, from being taken on a bail piece, by giving his note to the creditor. To secure Billington, M'Claws gave him his bond with a warrant of attorney to confess judgment, which was accordingly entered up on the 12th, on which day an execution issued, and was delivered to the sheriff.

On the 13th of January 1801, M'Claws gave his bond to Billington and Corless, with a warrant of attorney to confess judgment, for about 5,400 dollars. This was given to secure them for certain notes which they had, in November and December 1800, given to judgment creditors of M'Claws, at sixty and ninety days, and which relieved him from those creditors. Judgment on this bond was entered up on the 14th of January, on which day an execution issued, which was delivered to the sheriff, and returned in the following words, viz: "levied on goods as per inventory." No inventory however was made or accompanied the return. The goods, by the permission of Billington and Corless, remained in possession of M'Claws, in his store in Chesnut street, where he continued to carry on his trade, buying and selling, until the 31st of May; when the sheriff, under the execution of the 14th of January, took possession of all the goods in this store, and put a lock on the door.

On the 1st of June following, a capias issued against M'Claws, at the suit of Goodwin. The property seized by the sheriff to satisfy Billington and Corless's execution, was advertised for sale on the 1st of June, and was sold on the 8th.

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ing claims, but enabled him to go on again with his business as formerly, and quieted the alarm which his embarrassments had excited. He admits, that at that time he informed Billington and Corless that he could pay twenty shillings in the pound if he should be fortunate in collecting his outstanding debts. No security whatever was taken by Billington and Corless at that time, but on the 13th of January they pressed him for security, saying that it was desired on account of the wife and family of M'Claws, who were strangers. Though he considered this as giving them a preference, yet his gratitude for the aids they had offered him, induced him to acquiesce. He accordingly gave them, at their request, the bond with a warrant of attorney to confess judgment, as before mentioned. He says, that on the 31st of May he was informed by Billington and Corless, that they had ordered the goods in the store in Chesnut street to be sold to satisfy their execution, issued on the 14th, that he complained of this treatment, and offered to release them from their liability by security, if they would wait twenty days. They were inexorable, and on the same day he gave notice of this proceeding to his principal creditors. On the 1st of June, Suter, (as appears by his deposition) being a sheriff's officer, was applied to by Goodwin to serve a writ upon M'Claws. He desired Goodwin to go to the house and wait for him, and he would join him there in a short time. When he came, he found Goodwin there, the door of the house fastened, and admittance refused by some person from within, who said M'Claws was not at home. Shortly after, however, M'Claws raised up a window, and informed the officer he could not see him, and that he would not be arrested at that time. Upon quitting the house, Goodwin offered Suter two dollars, at which he was surprised, but at length said "I suspect you want to make M'Claws a bankrupt; if so, the fee on those occasions is eight dollars." Goodwin replied that he should be paid the eight dollars. Some time afterwards he applied to Goodwin for the six dollars, who replied, that M'Claws would pay him

This M'Claws refused to do, and Suter was obliged to warrant Goodwin for it.

Fisher and Stricker, two sheriff's officers, state, that M'Claws was publicly out as usual in December, and so on as long as he lived in Chesnut street; that he frequently came to the sheriff's office, and requested, if any thing should come against him, to let him know, and he would at once give bail; that he spoke of making arrangements to pay Billington and Corlese' judgment, which Stricker says led them to postpone the sale of his property, as he thinks. Reed and Jones also speak of seeing M'Claws publicly in the street in December, and up to May, and discovered no difference in his conduct, or any attempt to withdraw himself.

Upon this evidence, the first question is, did M'Claws commit an act of bankruptcy on the 1st of June 1801, or at any preceding period, within six months of the 5th of June, when the commission issued. If he did, then, secondly, what effect would it have upon Billington and Corless' execution of the 14th January?

First. In examining the first question, we must proceed by steps. Did he commit an act of bankruptcy at any time before the 13th of January 1801?

M'Claws and Mathews give evidence of his embarrassments, of his orders to be denied to creditors, and it appears that he actually was denied. Other witnesses say that he went out publicly, and carried on business as usual. But, though it were clear that he did attempt to conceal himself from his creditors, and was denied to them, this would not constitute an act of bankruptcy under the Bankrupt Laws of the United States, though it would under the Bankrupt Laws of England. The first class of cases in our statute, which constitutes an act of bankruptcy, is going out of the State, remaining absent therefrom, concealing himself within the State, or keeping his house with intent to delay or defraud his creditors, so that he cannot be served with process. So that concealment from or

denial to creditors, is not an act of bankruptcy, if it does not prevent the service of process.

But it seems that he was denied to Hartung, a sheriff's officer, in December 1800. As to this, the law is, that if the debtor, with intention to delay or defraud his creditors, shall so conceal himself or keep his house, that he cannot be served with process, this is an act of bankruptcy. Mathews proved that this officer called and was denied, but does not say on what day in December. It is immaterial whether the order of M'Claws to his clerk was to deny him to creditors only, or to them and others; for, if in consequence of concealment from *creditors only*, a denial was made to an *officer*, who was thereby prevented from serving process upon him, it would have been an act of bankruptcy.

But there are two reasons why the refusal to Hartung did not constitute an act of bankruptcy: First, because it does not appear that he came to *serve him with process*, and secondly, if it did so appear, it should also be proved to your satisfaction that the circumstance took place on or after the *5th of December*, within six months previous to taking out the commission. As to the first point, it is clear, that unless the officer goes to the house of the debtor to *serve process*, it cannot be said that the concealment *prevented* him from serving process. Upon the same principle it is, that in England, where denial to a creditor will constitute an act of bankruptcy, it must be a creditor coming to demand payment of a debt. The officer or the creditor might call as a friend or neighbour, and not with a view to serve process or to demand a debt.

The next period to be noticed is the 13th of January 1801. The bond executed on that day, it is said, was giving a preference to Billington and Corlies on the eve of, and in contemplation of a bankruptcy. If this were true, yet the preference would not constitute an act of bankruptcy, though it would be void, as a fraud upon the general creditors; but still it would be incumbent on the plaintiffs to establish an act of bankrupt-

cy, to entitle them to recover. It is true, that the execution issued upon the judgment which this bond authorized, might amount to an act of bankruptcy, if it was done at the request, or through the procurement of M'Claws; as if at the time he gave the bond, it was agreed that judgment should be entered up, and execution taken out and levied immediately. But if the entering up the judgment and award of execution were acts of Billington and Corless, unsolicited by M'Claws, or not agreed upon when he gave the bond, it is not an act of bankruptcy. On the one hand, the unwillingness with which M'Claws gave this security, seems to discountenance the idea of his having requested or procured what followed. On the other, considerations of benefit to his family, thrown out by Billington and Corless, might have influenced him to wish it. This, however, is a subject more proper for the decision of the jury than of the Court, and therefore it is left to them to say, upon all the circumstances given in evidence, whether the taking the goods of the defendant in execution, was or was not by his procurement.

We now come to the 1st day of June, when, prima facie, an act of bankruptcy was committed. Suter was at the house of M'Claws with process, and was prevented from serving it by the house being locked up, and M'Claws within, refusing admittance to the officer. If the jury should be of opinion that this was a fair, adversary transaction, between Goodwin and M'Claws, then there is no doubt, that on the 1st of June an act of bankruptcy was committed. If on the other hand they are of opinion, that it was a concerted measure, between M'Claws and Goodwin, or between M'Claws and some of his creditors, then it is not such an act as will give validity to the commission against creditors not privy to the plot, because it cannot be said that he concealed himself, so that process could not be served upon him, with intent to delay and defraud his creditors, when it was done at the request and by concert with his creditors or some of them.

The circumstances attending this transaction are, that on the 31st May, in consequence of Billington and Corlass' determination to proceed to the sale of M'Claws' goods, he called that day upon his principal creditors and informed them of it. The next day, Goodwin carried the officer to serve process on M'Claws. Goodwin first got to the house, and had time to apprize M'Claws of the approach of the officer, so that the door might be fastened, if it was a concerted thing. The refusal to open the door; the offer to Suter of two dollars; his suspicions and demand of eight dollars as the fee on such occasions; the implied acknowledgment of the truth of these suspicions by Goodwin, in stating that he should be paid, and referring him to M'Claws for the money, are circumstances, which, taken together, afford strong ground to suspect that the whole was a concerted business. On the other hand, as most of the suspicious circumstances passed between Goodwin and the officer, not in the presence of M'Claws, it does not follow with any degree of certainty, that M'Claws was refused in order to favour the views of Goodwin or of the creditors. Upon the whole, this is a question depending so much upon evidence, that I leave it to the jury to say, whether the transactions of the 1st of June were adversary or concerted. If the latter, the verdict must be for the defendants, unless the jury should be of opinion that the execution of the 14th January was issued and levied by the procurement of M'Claws, in which case the act of bankruptcy will defeat the execution of Billington and Corless, however legal it might be in other respects. But, if the jury should be of opinion against the plaintiffs upon that point, and should think that the proceedings of the 1st of June were adversary, the plaintiffs will have established the act of bankruptcy on that day; and then it will be necessary to inquire, secondly, what legal effect it will have upon the execution of Billington and Corless of the 14th of January.

The 31st section of the Bankrupt Law, excepts from the general mass of creditors who are to come in pari passu under

the commission, those who had obtained a lien by an execution, *executed* upon the estate of the bankrupt previous to the act of bankruptcy. The question is, was this execution *legally executed* before the 1st of June?

The facts are, that after the execution was levied, the goods remained in the possession of M'Claws, by the permission of Billington and Corlese; and he continued to exercise every act of ownership over them, until the 31st of May or the 1st of June.

It was strongly contended at the bar, by the defendants' counsel, that if an execution be once levied, a lien attaches, which will prevail against subsequent executions and subsequent purchasers, although the property seized has been re-delivered to the debtor, has remained in his possession for any length of time, and so continued at the time of such subsequent execution or sale. I was surprised at this doctrine, but the more so when the authority of the Supreme Court of Pennsylvania was quoted in support of it. I should certainly examine with great caution any question decided by the learned Judges of that Court, before I ventured to pronounce a different opinion. Although not bound by their decisions, they are and ought to be highly respected; but if there be a question which has long since been settled and at rest; if there ever was a point settled upon correct and solid principles, it is the present; and in direct contradiction of the arguments for the defendants. Nothing could be more mischievous, than to permit a dormant execution to rise up, at any distant period, to defeat a subsequent sale fairly made, or a posterior execution. And in what does an execution in the sheriff's hands differ from one which has been levied, and the property re-delivered to the debtor; enabling him thereby to acquire a false credit, and to defraud those with whom he may deal? Possession of personal property is the only indicium of property; and for this reason; if the vendor of such property remain in possession, it is fraudulent and void against creditors and purchasers. It cannot be said that an execution is really executed where the debtor is permitted by

the plaintiff to retain possession, and exercise the same acts of ownership over it which he before had done. The effect of a seizure is to change the property in the goods, and to vest it in the sheriff; but no change in this case was produced; no lien created; both were prevented by the fraud which the law implies; where the property being changed, possession remains with the former owner, and that with the consent of the person entitled. I am pleased to find that this opinion corresponds with that of the Supreme Court of Pennsylvania in the case of Chancellor and Phillips, although I do not yield my assent to the distinction, there taken, between household furniture and other goods. The decision in the late Circuit Courts in the case of the United States vs. Cunningham, contains a full and able investigation of this doctrine, and is in perfect unison with the English decisions, and with my opinion. But there is another objection to the title of Billington and Cogless under the execution, which is equally fatal, and that is the insufficiency of the levy. The sheriff must always designate the property seized under the execution, either in the body of his return, or by reference to a schedule accompanying it. The reason is obvious; the execution creating a lien, it should be known to others who may take posterior executions, or who may deal with the debtor, what property is affected by the lien, and what is not. In this case, the return is, "levied on goods as per inventory;" but no inventory was made, or returned with the execution. As M'Claws continued from January to June to sell and buy as usual, no person can say whether any, and which of the articles sold on the 8th of June, were levied upon on the 14th January.

Upon the whole, if the jury are of opinion that an act of bankruptcy was committed by M'Claws on the 13th or 14th of January, or on the 1st of June; they must find a verdict for the plaintiffs, notwithstanding Billington and Cogless' execution; if otherwise, they must find for the defendants.

M'GREGOR *vs.* THE INSURANCE COMPANY OF PENNSYLVANIA.

The alleged custom, in Philadelphia, to strike off *one-third* of the *gross* freight, for charges, and to pay *two-thirds* only to the assured, in a policy on freight, where a total loss has occurred; is *unreasonable*, and is in direct opposition to the terms of the policy.

Quere, if such an alleged custom were generally known by those interested in its operation, what would have been its operation?

The rules of law in relation to the proof, and nature of customs.

COVENANT upon a policy of insurance on 12,000 dollars, for the freight of the Hercules from New-York to Hamburg. She was lost near the port of her destination, and the cargo, except a few articles, totally perished.

The insurance company, upon notice of the misfortune, adjusted the loss according to the following account, and offered to pay the balance, which the plaintiff refused.

Statement of the Account.

Amount of freight, as per freight list produced by assured, - - - - - - - - -	$ 11,559	98
Deduct one-third, -	3,786	66
	7,773	32
Premium to cover at 5 per cent., 2 per cent. in case of loss, and ½ per cent. commissions for effecting insurance on $ 8,403 58, - -	630	26
	8,403	58
The sum insured by the company was - -	12,000	00
Over-insured, - -	3,596	42

Insurance company are liable for			
total loss on - - - - - -	$8,406 58		
2 per cent. as usual, - - - - - -	168 07		
		8,235	51
And for return premium on $3,596 42,			
over-insured, at 5 per cent. -	$179 82		
½ per cent. as customary, - - - - -	17 98		
		161	84
		8,397	35

There will also be a deduction from the above for such proportion of the freight as the insured received on goods saved.

Mr. Levy, for the plaintiff, having added the primage to the freight list, demanded the aggregate amount, insisting that provisions for the crew were a charge upon the ship, and that wages were not earned when the ship did not arrive, and consequently could not be charged to the freight.

The defendants' counsel, to justify the statement which they had made, and by which they were willing to settle; called a number of witnesses, who were or had been insurers in Philadelphia, or who had been employed in the adjustment of losses; who stated, the uniform and invariable practice of the offices in Philadelphia, as well as of the private underwriters, had been for many years past, in the case of a total loss of freight insured in an open policy; to strike off from the freight list one-third of the amount, to cover the wages, provisions, and other charges upon the freight, and to add the premium to cover at five per cent. and two per cent.; in other words, that two-thirds of the freight list formed (according to uniform usage in Philadelphia for twenty or thirty years back, and as far back as the witnesses could remember) the nett freight, and was considered as the interest really insurable. The adjusting clerk in the insurance company stated, that where no loss happened, the company would at any time, upon demand, return the premium upon one-third of the freight list, though he recollected but

one instance where it was done, or had been demanded. One witness said that he had been concerned in procuring insurances, as well as in underwriting at Lloyd's Coffee-House, in London, for ten years, and that the custom there was the same.

The plaintiff lived in New-York, when this policy was effected for him by Mr. Taylor of Philadelphia. Taylor stated, that he never had heard of such a rule being established; that being desired at the office to give his orders for the insurance, he gave them in the words of his principal. Some of the witnesses stated, that they had very frequently advised those who applied to insure, to value their policies instead of having them open.

Mr. Rawle, to show that the construction of policies is controlled by usage, cited Parke on Insurance, 30. 44. 58. 60. That nett freight is what remains after wages, provisions, and other expenses, are deducted. He cited 1 Abbot on Shipping, 228. 1 Magins, 52. Westc. 244. Marshall, 467. 329. 571. 627.

Levy contended, that the cases cited, are as to the usage of a particular trade, which is not like this case: he cited Parke on Insurance, 104.

WASHINGTON, J. Customs acquire the force of law; because, as they must be ancient, uniform, and reasonable, they must have been generally received, known, and approved. The custom of merchants is founded on general consent and usage practised amongst merchants; and may or ought to be known by all who enter into negotiations within the influence of this law. The usage of a particular trade, is supposed to be known by those who engage in that trade; it is or ought to be equally well known by the person who insures against the risks incident to that trade, as to the person engaging in it. But that which is called a usage, in this case, is nothing more than a rule established by a particular class of men, to control a contract entered into by them with others, not privy nor consenting to the rule; and who are and can be under no legal obligation to know of its existence. It is a law governing this species of

contract, different from the general law upon the subject, and varying the general rules of evidence. I will not say, that if both parties consented, the assured might not bind himself to agree to such a mode of adjustment; or that if the assured knew of the rule, and that it was uniform, he would not be bound by it under an implied consent. But I hold it necessary, that notice to the assured of such a rule should be proved, or the evidence should be such that the jury might fairly presume it. The rule in this case is in direct hostility with the plain meaning of the contract, and is intended to make it speak a language totally different from the obvious import of the words. The policy obliges the company to pay the value of the nett freight, and the rule excuses them from this obligation, upon their paying two-thirds of the gross freight. The face of the contract, so far from leading the assured to make inquiries respecting this rule, is calculated to deceive the party into a contrary belief. The rule is unequal and unreasonable, because the same deduction being made whether the voyage be long or short, the indemnity, in two cases exactly alike, except as to the length of the voyage, might be complete in one case, and fall very short of it in the other. If the assured always knew that the rule of the office was not to insure more than two-thirds of the nett freight, he might make it a valued policy, or cover the residue in some other office. The introduction of a very few words into the policy, would remove all inconvenience, by expressing the interest intended to be covered.

That the rule is very little known, even by those who have been insured, is clear from the evidence of the adjusting clerk; who can furnish but one instance of a return premium upon the one-third not covered, where the vessel went safe; and yet it is scarcely to be supposed, that if the rule had been generally known, similar returns would not always have been demanded.

Upon the whole, I think the plaintiff is entitled to recover one-third of the nett freight, which the jury would adjust.

In conformity with this charge, the jury found a verdict for 11,804 *dollars.*

Armstrong *vs.* Brown.

A commission directed to *five* commissioners, to be executed *by them*, must be executed by the whole five persons; although the commissioners nominated by the party objecting to the execution, were present, but did not act.

The drawer of a bill of exchange, protested after acceptance, having paid the damages, cannot set off the same, in an action against him by the acceptor, on another account, although the acceptor had funds in his hands to pay the bill, the damages being unliquidated.

RULED in this case, that if a commission for taking depositions be directed to five commissioners, of whom three are named by the plaintiff and two by the defendant, and is executed by three only, or by any number less than the whole; the deposition is not well taken, and cannot be read; although the two commissioners named by the defendant, by whom the objection is made, were present. Their authority is special, and must be executed according to the tenor of it. It is unusual to require that more than two or three of the commissioners named shall act, so that one in each nomination be present, to execute it.

Secondly: It was ruled that the drawer of a bill which was protested, having paid twenty per cent. damages thereon, cannot, in an action against him by the acceptor on another account, offset them against the acceptor, who had funds in his hands to have paid the bill, because they are unliquidated damages.

Humphreys *vs.* Blight's Assignees.

The holder of negotiable paper, payable "without defalcation," under the laws of Pennsylvania, assigned after a commission of bankruptcy has issued, may come in under the commission, allowing all just offsets, existing at the time of the bankruptcy; and which would have been admitted, if the assignment had not been made.

The purchaser of a negotiable note, who becomes so after a commission of bankruptcy has issued, may prove under the commission; and he holds the note, subject to all legal offsets.

After a commission of bankruptcy had been issued against Blight, the plaintiff took an assignment from Murgatroyd of two notes of hand due from the bankrupt. He applied to Blight, informing him of the assignment, and desiring to know what dividend of his estate would be made; and was informed it would pay ten shillings in the pound, without mentioning any offsets existing against the notes. The plaintiff put in his claim under the commission, and demanded a trial by jury, which was directed by the commissioners; and an agreement was entered into to try, on a feigned issue in this Court, the questions—1st, whether the plaintiff could come in under the commission? and if he could, 2dly, if he was bound to admit offsetts against the notes. If decided in the affirmative, the settlement to be referred to arbitrators. The notes were made payable "*without defalcation*," and were protested for non-payment.

Rawle, for the defendants, insisted, that the notes of a bankrupt, after a commission issued, are not negotiable. 2dly. That the notes in this case having been protested, the assignee took them liable to offsets, or any equity which existed between Blight and Murgatroyd. That a debtor of the bankrupt cannot after an act of bankruptcy purchase up debts due from the

bankrupt, to offset them. 4 T. Rep. 714. 6 T. Rep. 57. 2 Strange, 1234. The reason of these cases applies to this.

Hare, for the plaintiff, controverted the first point, upon the ground that there is nothing in the Bankrupt Law which forbids an assignment of a debt due from the bankrupt, after the commission. That if the plaintiff could not come in under the commission, it would put it in the power of an ill-natured creditor of the bankrupt to harass him, by assigning over claims against him after the commission issued; for where the claim could not be proved under the commission, the certificate does not bar it.

On the second point, he insisted that he was not obliged to admit offsets, because the Act of Assembly of Pennsylvania, of 27th February, 1797, 4 vol. 102, declares that notes payable *without defalcation* shall not be liable to offsets or equity.

Cases cited by Mr. Hare—1 Atk. 73. 2 Wils. 135. Cullen's Bank. Law, 99, 100. Evans, 220. Co. Bank. Law, 10. 3 T. Rep. 80. 2 Dall. Rep. 396, 7 T. Rep. 479. 2 Fonb. 150. Anstruther, 427.

WASHINGTON, J. The first question must be decided on principle, as the Bankrupt Law is silent upon this subject, neither permitting nor forbidding the assignment of notes due from the bankrupt, after a commission has issued against him. It would be unreasonable that such an assignee should not be allowed to prove under the commission, since the debt would most certainly be barred by the certificate, being *a debt due at the time of the bankruptcy*, and such a one as might have been proved under the commission. It can produce injury to no person, as it can make no difference to the assignees, whether the debt be proved as due to A. or to his assignee; and as they ought not to be injured, so they ought not to derive a benefit from this change, not of the debt, but of the creditor. It will be perceived that the very principle upon which this first point is decided, decides the second. It struck me, at first,

that if the plaintiff's counsel were right as to the first question, they must be wrong upon the second. If by the assignment the assignee would take the debt, discharged of offsets, or of any equity attached to it in the hands of the assignor, it would furnish a decisive objection to the right of the assignee to prove under the commission. It is true, that in general, a negotiable instrument passes to a fair bona fide assignee, discharged of any equity attached to it, of which the assignee had not notice; for having paid value for it, his equity is equal to that of the debtor, and he has the law in his favour. If payments have been made, or mutual demands exist between the parties, and they do not accompany the instrument, a fair purchaser ought not to be injured by the omission of the parties to endorse such offsets, and thus to give notice of their existence. The assignment therefore passes a right to the entire sum appearing due on the face of the instrument. But the Bankrupt Law declares, that where mutual debts have existed between the bankrupt and any other person, at any time before he became a bankrupt, no more shall be paid than the balance due after an adjustment of the accounts. By force then of this law, a creditor of the bankrupt can assign, and the assignee can purchase, no more than the balance due from the bankrupt after all credits are admitted.

The rule therefore may be laid down to meet the present case, that where a creditor of the bankrupt assigns a negotiable paper, or one payable "without defalcation," under the laws of the State, after a commission has issued against the debtor, and the assignee may come in under the commission, but he must allow all just offsets existing at the time the debtor became bankrupt, and which must have been admitted if the assignment had not been made.

The Jury found according to the charge. Referees were appointed to settle the accounts.

Ex parte Johnson.

A witness recognised and attending the Court on the part of the defendant, if sworn and sent before the grand jury on the part of the United States, is entitled to be paid by the United States for his attendance on the trial.

IN the case of the United States *vs.* Coalter and another, who were indicted this term for murder committed on the high seas, and acquitted; it appeared that a Mr. Johnson, who had been recognised to appear as a witness for the defendants, had nevertheless been marked on the indictment, and sent up to the grand jury by the district attorney. It was now moved that the marshal should pay him for his attendance, as if he had been recognised on the part of the United States.

The district attorney opposed the motion, and declared that he was not sent up as a witness on the part of the United States, but from a wish, on his part, that the jury should hear as well the witnesses for, as against the prisoners.

WASHINGTON, J. I have no doubt but that Johnson was sent to the grand jury from the best motives on the part of the attorney, but I cannot say that I approve of the practice, and would not have permitted it, had the subject been mentioned in Court. As the indictment, when found, amounts to nothing more than calling upon the accused to answer, it is highly improper that the grand jury in their retirement, and without the legal aid of the Court as to what is and what is not proper testimony, should in fact decide the cause, which they do if they through mistake of the law should not find the bill.

The accused having the benefit of a speedy, candid, and open trial, under the direction of the Court, where all his witnesses are heard; can suffer no inconvenience from this rule. If therefore the attorney chose to make use of the defendant's witness, and marked him on the indictment as a witness for the prosecution, he must be paid by the United States.

The Schooner Phœbe *vs.* Dignum.

To entitle the owner of a vessel to the forfeiture of the wages of a seaman, absenting himself from the vessel more than forty-eight hours, the entry of the absence of the seaman must be made on the log-book, *on the day* on which the seaman so absented himself.

THIS was an appeal from a sentence of the District Court, decreeing to the appellee his wages as a seaman on board said schooner, on a voyage from Philadelphia to Jamaica, and back. The answer of the owners and captain admitted, that the libellant had entered as a mariner for that voyage; but insisted that he had, whilst at Jamaica, absented himself from the vessel, without the consent and against the will of the captain, for four days, which, under the Act of Congress, amounted to a forfeiture of his wages up to the time of such absence. The sentence of the District Court was given upon the libel and answer.

By the Court: Absence for more than forty-eight hours from the vessel, without leave of the master or officer commanding on board, is a forfeiture of all the wages due to that time; provided the officer having charge of the log book, shall make an entry therein of the name of such seaman, *on the day* on which he shall so absent himself. The reason of this is obvious; if no such entry be made, it repels any presumption that such consent took place, or that the forfeiture was intended to be waived.

If no such entry be made, it is to be presumed that the absence was not injurious, and was not objected to. As it does not appear in this case any such entry was made, the appellee is entitled to his wages, and therefore,

Let the sentence be affirmed with costs.

The Ship Lavinia vs. Barclay.

To make a hypothecation bond, executed by the master of a vessel, valid, the necessity of raising the funds advanced upon it, by such means, must be shown.

If one of the owners of the vessel reside at the port where the bond is given, it is not good.

The consignee of a vessel is bound to advance the freight, for the supply of the necessities of the voyage, to be so applied by the master.

While the freight is in the hands of the consignee, he cannot advance money to the master on marine interest, unless he has been directed by the consignor to appropriate the freight to another purpose.

THIS was an appeal from a sentence of the District Court, in favour of the appellees, the obligees, in a bottomry bond against the ship Lavinia; the property of the assignees of Peter Blight, a bankrupt. The case is stated in the opinion of the Court.

WASHINGTON, J. The material facts in this case appear to be as follows: The Lavinia, commanded by captain Vicaray, sailed from Philadelphia to London, about the 10th day of January 1800, with a cargo consigned to H. H. Pentham, the correspondent of Peter Blight. Both ship and cargo belonged to Blight, although to protect them against his creditors in England, he made a feigned sale of the ship to Mr. Reid, one of his clerks, some time previous to her sailing; and the cargo, by the bill of lading, was to be delivered to the order of Reid, upon his paying freight, as *per charter party*.

The whole was a contrivance: there was in reality no charter party; the sale to Reid was a mere pretence to cover the ship from attachments by Blight's creditors; and the cargo was the property of Blight. The nature of this transaction is fully dis-

closed in a confidential letter from Blight to Fentham, of the 1st of January 1800. But to give a colour to this plan of deception, a letter was written on the same 1st of January, by Blight, to Fentham, informing him of the interest of Reid in the cargo, and introducing him to Fentham. This was accompanied by another letter from Reid to Fentham, giving directions respecting the disposition of the cargo.

Captain Vicaray was compelled to put into Plymouth, from whence he went by land to London; and on the 8th of February, he delivered to Fentham, (who had previously been declared a bankrupt,) the letters of the 1st of January from Blight and Reid. The contents of these letters were not at that time made known by Fentham to the appellees, (his assignees) but he informed them that the cargo should be delivered to them, which being at first refused, a messenger was despatched by the commissioners to take possession of the ship and cargo, which was done. Finally, the captain consented to deliver the cargo to the assignees, upon certain terms stipulated in an agreement signed by the captain and the assignees, (the libellants,) on the 10th of February. These terms were; that the libellants should apply the nett proceeds of the cargo, after paying freight, commission, expenses of taking and keeping possession, and delivering the said cargo, duties, and all other charges and expenses relating to the said cargo; towards satisfaction of bills or other engagements accepted, contracted, or made by Fentham, on account of Peter Blight. The latter part of this agreement seems to have been intended to conform to the directions of Mr. Blight, contained in his letters to Mr. Fentham, in which he orders the proceeds of the cargo to be applied to the discharge of Fentham's engagements on his, Blight's, account.

Captain Vicaray having, between the time of entering into this agreement and the 19th of May, incurred debts to the amount of £1420 2s. 6d. for repairs made to the Lavinia, for the outfits of her return voyage, for repairs made at Plymouth previous to her proceeding to London, for the wages and sup-

port of his [illegible] and other incidental expenses; applied to the appellees for money to discharge those debts, who consented to advance for this purpose the above sum of money, upon receiving security for the repayment of the same, by way of hypothecation of the vessel and freight, a bottomry bond was accordingly executed on the 21st of May by captain Vicenay; differing from the usual form of similar instruments in no other respect than in its recital, which states "that the captain had incurred sundry expenses, and had delivered the cargo to the assignees of H. H. Fentham, without being able to recover any part of the proceeds of the said cargo, or any freight for the same, and that the obligees had advanced him money for defraying those expenses," &c.

On the same day an agreement was signed by the solicitor for the appellees, referring to the bottomry bond, by which he agreed on the part of the appellees, that in case a less sum than that mentioned in the bottomry bond should be paid to the appellees, in London, at any time within six months from the date thereof, that the same should be accepted in lieu of the said bottomry debt.

The Lavinia arrived safe at Philadelphia, the part mentioned in the bottomry bond, and after the day of payment stipulated in the bond had passed, but within the six months mentioned in the agreement, this libel was filed, to have satisfaction of the debt due by the bond.

The first point made in the cause was, that the libel was prematurely filed, as the owner of the ship had six months to discharge the ship from the lien created by the bottomry bond, upon paying a smaller sum. Considering the agreement in the light of a defeasance to the bond, I intimated to the bar an opinion in support of this objection, but as the success of this objection could only operate to delay the libellants, I recommended it to the parties to make some accommodation as to this point, which has been done upon terms, so that the objection is waived.

The defence upon the merits, raised by the answer, and which has been much pressed in the argument is, that the appellees ought to have advanced from the proceeds of the cargo, the sum necessary for discharging the debts incurred by the captain on account of the ship; or at any rate, so much as the freight of the cargo would have amounted to, if the ship and cargo had belonged to different persons. On the other side it was contended, that the appellees have performed every article stipulated by them in the agreement of the 10th of February. That they have paid all the duties and expenses attending the delivery of the cargo, and have applied the residue of the nett proceeds of the cargo to the discharge of Fentham's engagements for Blight, and that as the ship and cargo belonged to the same person, no freight was due, and consequently nothing on that account could have been demanded by the captain.

The question is, have the appellees a right to recover the debt secured by the bottomry bond, under all the circumstances of this case? The right of a captain to hypothecate his ship for advances made in a foreign port, to enable him to prosecute his voyage, is essential to commerce. But to give validity to such a contract as against the ship, the necessity of raising money in this way, and for the purposes of the voyage, should be made clearly to appear. If therefore one of the owners reside at the port where the expence is incurred, the power of the captain to raise money in this way is not permitted, inasmuch as the necessity does not exist. In like manner the consignee of the cargo at the port of delivery, is bound to advance to the ship owner, (whose agent the captain is,) the freight due on the cargo; which the captain can employ in defraying the expenses necessary for prosecuting his voyage; and therefore the consignee cannot, whilst possessed of this fund, retain the same, and burthen the owner with a new debt at marine interest. This rule as to the consignee may admit of exceptions, and the present case seems to furnish one, independent of the special agreement of the 10th of February. If Fentham had

not filled, and the cargo had been received by him, he might fairly have applied the whole proceeds of the cargo to the discharge of his own engagements, entered into on account of Blight, and have justified such an appropriation under the positive and unqualified instructions of Blight, contained in his letters of November and December, directing him so to apply the proceeds of the cargo. I do not say that Fentham was so absolutely bound by these instructions, that he might not have applied a part of those funds to the discharge of the expenses incurred in repairing and refitting the ship, for her return voyage; but I am of opinion that he was under no obligation to do so; and consequently he might have applied the whole proceeds as directed by Blight, and have advanced his own money for the expenses on the security of the ship.

The assignees of Fentham having obtained possession of the cargo under a special agreement with the captain, the question as to them must depend upon the import and fair construction of that agreement. If that agreement left in the hands of the appellees sufficient funds to cover their advances to the captain, they had no right to advance other money upon marine interest. It is not disputed but that the proceeds of the cargo have been disposed of in the manner stipulated in the agreement, except the freight, which it is contended ought to have been applied to the discharge of the expenses for which this bond was given. It is admitted by the appellant's counsel, that the freight is due where the owner of the ship is also owner of the cargo; but it is insisted that the fair meaning of this contract was to pay the same sum, under the name of freight, as the ship would have earned, if in truth different persons had owned ship and cargo. With respect to the facts, important in this part of the case, there is considerable obscurity. It is certain that the appellees had at one time reason to believe that Blight was owner of the ship; because it is proved by Fentham, that they had received all Blight's letters to him dated in November and December 1799, and had pursuant to instructions contained in one of them,

effected an insurance on the ship in the name of Blight. It also appears, that previous to the 10th of February 1809, the appellees were informed by Fentham, that the cargo, though stated in the bill of lading to belong to Reid, was in fact the property of Blight. These circumstances seem strongly to show, that when the appellees agreed on the 10th of February to accept the freight out of the payments on account of Fentham's engagements for Blight, they knew that strictly and technically speaking, no freight could be due, and that the only way to discharge them from a meditated deception upon the captain, is to construe the contract as contended for by the appellant's counsel; falsity appearing upon the face of the bill of lading in stipulating for freight according to *charter party*; thus holding out the idea, that whoever the real owner of the cargo might be, he was answerable to some other person as ship owner for the carriage of the cargo.

The mystery in which these transactions are enveloped, will not permit me to say with confidence, that the appellees either did or did not know the real truth of the case. If they were acquainted with it, they were attempting to practise a deception upon the captain, for which they ought not to derive an advantage. But as fraud is not to be presumed, I am not prepared to decide that any was meditated in this case.

A disclosure of the confidential letter from Blight, of the 1st of January, would at once have cleared up all the doubts which hung upon this transaction; but the contents of that letter were not communicated to the appellees until after the agreement of the 10th of February, and prior to the advances made by them to the captain. It would seem that this discovery produced an explanation of the agreement of the 10th of February, and that the captain, abandoning his claim to freight, where in reality none was due, consented to raise the money he required, by hypothecating the ship. Whether the captain knew, on the 10th of February, that the ship and cargo both belonged to Blight, is not certain, though it is strongly to be inferred. If

he did not, it would seem from the recital in the bottomry bond, that after discovering this to be the fact, he was satisfied that the obligation of the appellees to pay freight was at an end. The recital does not state that the appellees had *refused* to pay the freight, but that the captain was *unable to recover it*; implying thereby a want of right to recover it, since it does not appear that any attempt had been made to coerce the payment.

It is contended by the counsel for the appellant, that the costs of the repairs made at Plymouth, and of the seamen's wages and provisions, ought at any rate to be deducted from this bond, because they were the expenses of delivering the cargo, which the appellees were bound to pay. It by no means appears that the cost of the repairs made at Plymouth is to be considered as an expense attending the delivery of the cargo, because it is not pretended even in the answer to the libel that they were necessary to enable the ship to proceed from Plymouth to London; as the captain was directed by Blight to have the ship repaired before her return, it is more probable that these put upon her at that port were done in execution of those instructions, and with a view to the return voyage. As to the seamen's wages and provisions, the way to understand whether they were intended to be included under expenses of delivering the cargo, let it be supposed that the freight had been paid—it would then be clear that seamen's wages and provisions could not have been claimed; because the answer would have been conclusive, that those expenses were chargeable to the freight and to be paid out of it. These expressions were only intended to comprehend wharfage, lighterage, and such petty charges.

Sentence affirmed.

HURST *vs.* HURST.

In what cases Courts will interfere, and set aside an award of referees.
In Pennsylvania, it is not necessary that a mistake by the referees in point of law, should appear on the face of the award, to induce the Court to set it aside; they will re-examine the documents on which the referees decided.
In such an examination into an award, no new evidence can be admitted.
Whether the debt of one partner, in a joint concern with others, not yet closed, can be set off in an action by one partner against the other?
The nature of set off.

THIS was a motion made to set aside an award. The case was stated at large by *Washington, J.* as follows:—

On the third day of May 1801, an agreement was entered into between Charles Hurst the plaintiff, and Timothy Hurst the defendant, which recites, that five actions were then depending between them, and which are more particularly described as follows: 1. An action on the case in the Supreme Court of Pennsylvania, in which Charles is plaintiff and Timothy defendant. 2. An action of sci. fa. in the Supreme Court of Pennsylvania, in which Charles is plaintiff, and John Norris, administrator of John Baron, is defendant; in which Timothy alleges himself to be interested as assignee of all the estate of the said Baron. 3. An action of false imprisonment, brought by Timothy against Charles, in the Mayor's Court of the city of New-York. 4. A bill in chancery depending in the Circuit Court of New-York, wherein Timothy is complainant, and Charles and others are defendants. For the settlement of these controversies, the parties mutually agree to discontinue the above suits, in which they are respectively plaintiffs; such discontinuances however not to operate as releases of the several demands involved in those suits. For the adjustment of three of those

suits, the parties agree each to furnish the other with their accounts, to enable them to effect an amicable settlement of their differences; and in case this could not be effected, they agree to submit their differences to arbitrators to be appointed by this Court, such arbitrators in matters of law to be guided by the opinions of certain law characters named by the parties.

On the 20th September 1801, an amicable action was docketed in this Court, wherein Charles Hurst is plaintiff and Timothy defendant; and by a rule of Court, the same was referred to three persons, to hear and determine the matter in difference between the parties, which are recited in the agreement of the 3d of May 1801, and according thereto.

The referees have made their award, by which they report a balance due on the *scire facias* suit from Charles to Timothy, in right of Baron, of 13,085 dollars, 87 cents. That this balance is exclusive of the real estate, goods and chattels of the said Baron, in the possession of Charles Hurst, and which the referees award to be assigned and given up to Timothy on demand.

In the false imprisonment cause, they award to Timothy 656 dollars, 67 cents.

In the chancery suit, the sum of 2,607 dollars is stated to be due from Charles to Timothy, which is awarded to the latter; and the estate, which had been conveyed by Timothy to Charles in trust for certain purposes, yet remaining unsold, is awarded to be re-conveyed.

As to the action on the case, Charles *vs.* Timothy, the referees say, that "upon the settlement of accounts to the 1st of May 1801, comprehending the sums above mentioned, they find the sum of 15,171 dollars, 70 cents, is the balance due from Charles to Timothy."

It is agreed that the fifth action mentioned in the recital to the agreement, has been settled, and is not involved in the present dispute. It is also clear, that in the action on the case by Charles *vs.* Timothy, a deduction is made from the aggregate

amount of the three sums found due to Timothy, of 1,[illegible] dollars, 84 cents; which gives the amount of the award in favour of Timothy in that suit, although it is informally stated in the report. This will appear by deducting the 15,171 dollars, 30 cents, from the aggregate amount of the three sums found due to Timothy.

Exceptions to this report having been filed within the proper time, a motion is now made in behalf of Charles Hurst to set aside this award, for the following reasons: 1st. That jurisdiction is not laid in the declaration. 2d. That the referees were guilty of a mistake in refusing to admit sundry credits, which are specially enumerated, to which Charles was entitled. 3d. That the award is uncertain. 4th. That damages are awarded to Timothy in the action of assault and battery, whereas that suit was not submitted. 5th. To the award of the 2,607 dollars on the chancery suit.

To support the second and fifth exceptions, it was necessary for the plaintiffs to go into the examination of the written evidence upon which the referees decided, in order to make out the title of the plaintiff to the credits claimed, and to show the mistake in allowing the debit mentioned in the fifth exception. Upon a hint from the Court that this attempt to impeach an award was unusual, the Act of Assembly of this State was read, and a decision of the Supreme Court of this State was strongly relied upon as expounding the statute. Without being satisfied that the statute and decision referred to had varied the rule as laid down in the English cases, the Court allowed the plaintiff to proceed with the examination, and determined to look into the legal principle more at leisure.

The statute of Pennsylvania, passed in 1705, declares, that where a reference is made under a rule of Court, the award of such referees being made according to the submission, *and approved by the Court*, and entered upon the record; shall have the same effect, and be as available in law, as a verdict.

The Chief Justice of the Supreme Court, in the case of

Williams and Craig, (*a*) lays it down; that where there is an evident mistake in matter of law, or a clear mistake in matter of fact, the Court cannot approve the award, and ought therefore to set it aside.

In the case of Kunckle and Kunckle, (*b*) in the Common Pleas of Philadelphia, the President narrowed very much the rule laid down in the above case, by saying, that the Courts never enter into the merits of the case decided by the referees, or set aside their report, but for misbehaviour, or where objections to it arise on the face of the proceedings. This is the strict rule in England. In the case however of Pringle and M'Clanagan, (*c*) afterwards decided in the Common Pleas, the Court set aside a report, because it appeared that the referees had proceeded upon a mistaken principle; and this mistake, as I understand the case, did not appear upon the face of the award, but from the evidence which was before the referees. Now, there is very little difference between the principle of this case and that of Williams and Craig. In both, the Court corrected a mistake in point of law which did not appear on the face of the report, but was made out by a re-examination of the documents upon which the referees had decided. The error committed in the latter case was not by declining the consideration of a particular subject, but by adopting a principle which, when applied to that subject, led to a conclusion not warranted by the rules of law. The rule in England is, I think, too rigid to consist with the spirit of the law in this State—that contended for at the bar by the plaintiff's counsel, is much too loose.

It is too much to say, that because the Court might not have drawn the same conclusions as the referees have done, from the evidence, that therefore they will set aside their report. If awards were liable in every instance to be opened, and the questions, which the referees have decided, to be re-tried and re-examined by the Court, the utility of this mode of deciding controversies would certainly be very questionable.

(*a*) 1 Dall. Rep. (*b*) Ib. (*c*) Ib.

If, on the other hand, awards were to be confirmed that discredited, to be impeached; if, notwithstanding the most [illegible] mistakes have been committed, every door is to be closed against the Court's arriving at the knowledge of the facts upon which the referees decided, I should strongly incline to doubt, whether this mode of trial would deserve half the encomiums, which have been passed upon it. It would be to say, that whatever may be the degree of injustice committed by the mistakes of arbitrators, yet the Court must approve and give validity to those mistakes, if the referees have been cautious enough not to spread them upon the face of the award.

Upon the whole, I am perfectly satisfied, that the inquiry in this case has been proper. That it was the duty of the Court to examine the accounts and documents laid before the referees, to see if they had refused to allow the credits claimed by the plaintiff. In such an examination, no new evidence can be admitted; and in deciding upon that which was before the referees, if they have drawn conclusions from conflicting evidence, different from that which my mind would approve, it would be improper, on that account, to say, that their conclusion is wrong. If, on the other hand, plain facts or principles of law have been misapprehended, I could not say that I approved of their report.

The principal sum reported in favour of Timothy Hurst, is 13,085 dollars, 87 cents, due from Charles to John Baron; to which Timothy is entitled as general assignee of the estate of Baron. No exception is taken to this debit; but it is pointed, that Baron was indebted to Charles Hurst in four several sums advanced by him in the purchasing and securing certain lands in which Baron, Morris, Charles, Timothy, and John Hurst, were interested as tenants in common, which credits, it is contended, ought to be deducted from the debt awarded to be paid to Baron's assignee. The answer to these claims is conclusive. At the time when this land company was formed, an agreement was made between the three Hursts, the original members of

the copartnership, and Baron and Morris, by which the former agreed to advance all the money necessary for purchasing and securing the lands, in consideration of the personal services to be rendered by Baron and Morris, in pointing out the lands proper to be purchased; and by an express stipulation in that agreement, whatever sums of money should be advanced by the Hursts, were to be charged upon *the lands*, and were to be repaid, by sales of any part of them, before a division should take place between the partners. The credits now claimed by Charles Hurst, are for Baron's proportion of advances made on account of the partnership fund; and consequently, are, by the agreement, to be charged, not *personally* to Baron or his assignee, but to the joint fund, the land. This fund, it is admitted, has always been, and still is, under the management and control of Charles Hurst, who consequently has within his own power the proper fund for satisfying these demands. But it is said, that the agreement does not discharge the person or the estate of Baron, from this demand; and that it is only intended to constitute the joint stock as an auxiliary fund. This construction of the agreement, is inadmissible. The most that can be contended, is, that Baron might be made ultimately liable to make good these advances; and in that case, it should appear, that the fund first to be charged was exhausted, before these advances could be converted into a personal demand. But this is not pretended.

But is it true that Charles Hurst has not received credit for the sums now claimed? With respect to the first sum of 2,692 dollars, 98 cents, for Baron's proportion of advances, as settled in England, the referees (who have been examined) state that they opposed to this sum the consideration money of a tract of land, sold by Baron to Charles Hurst, in the year 1799. It is true, there is endorsed upon the conveyance of that land, a receipt for £600, the purchase money; but this does not furnish satisfactory evidence that the money was actually paid by Charles Hurst to Baron; because it is usual to endorse

a receipt for the consideration money on all deeds of bargain and sale, although not a farthing be paid, and because Barton being at that time indebted to Charles Hurst for his proportion of the advances now claimed, it is at least probable that that conveyance was intended as a satisfaction of those advances. At any rate, I have not sufficient light to say that the referees have made a clear mistake in refusing to admit these credits. As to the other credits of 5,175 dollars, 76 cents, and 2,147 dollars, 77 cents, claimed under the second exception, it is most obvious that Charles Hurst, in the account stated between him and the joint fund, has credit for the whole of these advances against the money raised out of those funds, and which are there to be placed to his debit. That which is so clearly proved by figures, cannot be rendered more clear by argument and explanation.

The objection made by Charles Hurst, in his fifth exception, to the allowance of 2,607 dollars, is certainly without foundation. Charles Hurst and Timothy Hurst united in a bond to a Mr. Brownjohn, to indemnify him against his responsibility as surety for them, in a bond to Foliot, for money lent to them, to enable them to purchase lands for the company. Charles Hurst, of course, was not only bound in law to indemnify Brownjohn, but retaining the possession and management of the joint funds, he was bound in equity to indemnify his partner Timothy Hurst. It is true, that Charles Hurst was sued by Brownjohn, and judgment against him was rendered and satisfied. His obligation to Brownjohn was thereby at an end. But the Court of Chancery of the State of New-York determined, in a suit against Timothy, that Brownjohn was entitled to a farther sum for his complete indemnification, and by its decree compelled Timothy Hurst to pay to the executors of Brownjohn, the sum now objected to. This decree, made by a Court of competent jurisdiction, it would ill become this Court to question, by producing an injury to Timothy, which Charles might and ought to have prevented, and against which

he was entitled in equity to be indemnified by Charles Hurst, furnishes Timothy with a well founded charge against Charles, and consequently the amount of that injury was properly debited to Charles.

The fourth exception is so totally unfounded, that little need be said respecting it. I presume it would not have been made, if the counsel for the plaintiff had not been misled by the erasure in the counterpart of the agreement which Charles Hurst had.

The third exception is to the uncertainty of that part of the award, which directs Charles Hurst to deliver up to Timothy, the real and personal estate, which were of John Baron, remaining unsold, and now or lately in his possession; and also the estate conveyed by Timothy to Charles, in trust. To which is added, in argument, though it forms no part of the exceptions, that those parts of the award are not within the submission. As I am perfectly satisfied that these parts of the award are not within the submission, and that the objection appearing upon the face of the award may be taken advantage of, without an exception being filed, it will be unnecessary to give any opinion respecting the uncertainty of it. The submission is not general, of all matters in controversy; but is special, and confined to the matters in dispute, in four actions then pending between the parties. The right of Timothy to recover a debt due from Charles to Baron, in the action of *sci. fa.*, or to be indemnified against a decree obtained against him by Brown-john's executors, and for which his suit in Chancery in the Circuit Court of New-York was brought, or to be compensated in damages for false imprisonment (the three suits in which Timothy was plaintiff and which were submitted) could never directly or incidentally involve the questions, whether Charles Hurst, as trustee for Timothy, in Timothy's own right, or as assignee of Baron, had a right to retain those estates, or was bound to assign them to Timothy. The agreement of 1797 can

by no fair means be pressed into the service, in order to clothe the referees with the power of deciding those two points. But as those parts of the report are entirely independent of the other parts of it, the award, though void as to them, is good as to such other parts, and must be confirmed. Should Timothy attempt to execute the parts of the report now declared void, the Court can prevent him from proceeding.

COXE *vs.* PENINGTON.

Whether, under the provisions of the Act of Congress of 5th June 1794, sugars, remaining in the place in which they were refined, when the law was repealed, were liable to pay the duties.

THIS was a feigned action, brought as upon a wager, to try the question whether sugars refined before the 30th day of June 1802, and then remaining in the house where they had been refined, were subject to the duty of two cents per pound, imposed by the Act of 5th June 1794? Demurrer to the declaration.

Dallas argued the case for the plaintiff, and Rawle and Ingersoll for the defendant.

WASHINGTON, J. The Act, which passed on the sixth day of April 1802, for repealing the internal taxes, discontinued the duty upon refined sugars, amongst other articles, from and after the 30th of June 1802, and repealed the laws which had imposed them, except as to the recovery of such of the duties, as on that day had *accrued and remained outstanding*; as to which, the provisions of former laws were left in full force. The question then is, whether upon refined sugars, *not sent out of the house* where they were manufactured, on or before the 3d of June, the duties *had accrued and then remained outstanding*?

On the part of the plaintiff it is contended, that the duty accrued upon the sugar, as soon as it was refined, though the payment of it was to depend upon the act of sending out the sugar. On the other side it is insisted, that the duty did not accrue until the refined sugar was actually sent out. There is undoubtedly difficulty in the question; but after the best con-

sideration which I have been able to give it, I am inclined to favour the construction contended for by the plaintiff's counsel.

To decide this question, we must look not only to the fair and legal construction of the law imposing this duty, but it will be useful to take a wider range, and compare it with the general system of duties and excises imposed upon other subjects. The second section of the Act of the 5th of June 1794, (3 vol. of the Laws, 1794,) declares, that "after such a day, there shall be levied, collected, and paid, upon all sugar refined within the United States, a duty of two cents per pound." In like manner certain duties are imposed by other laws, and to be collected, levied, and paid, upon imported goods, spirits distilled within the United States, upon sales at auction, &c. &c.; in all which cases, an event is fixed upon which the duty accrues, a mode provided for ascertaining the *subject* on which it is imposed, and a *time of payment* clearly pointed out. On imported goods, the duty accrues on the importation, and is to be paid at a future day. On sales by auction, the duty accrues on the sale; the amount of the sales, and consequently of the duty, is ascertained by the book of entries and quarterly report, which the auctioneer is required to make; but no time of payment is allowed, because the auctioneer has received the duty before he is called upon to pay it. Upon distilled spirits, the duty accrues upon the spirit the moment it is distilled, and payment is to be secured before it is removed, but the duty is not demandable, until nine months after the date of the bonds, and then only upon so much spirit as had been removed within three months after the date of the bond. Here then, in language nearly the same, and upon a principle precisely parallel, the duty of two per cent. is imposed, and to be collected and paid, upon all refined sugar. Sugar refined within the United States is the *subject* of the duty. So are spirits distilled within the United States. To ascertain the value and amount of these subjects of taxation, certain customary regulations are made. The sugar refiner is to report his house, and the implements

employed in his manufactory. He is to enter in a book, to be kept for that purpose, all the sugar which he shall refine from day to day, and also the quantities which he shall send out from time to time. He is also to make reports, quarterly, to the proper officer, of all refined sugar which has been removed from his house during the last preceding three months; producing at the same time, for the inspection of the officer, his book of entries, that it may be compared with his report. Now the removal of the sugar is a mere *circumstance*, of which the quarterly report and book of entries are the *evidence*. The report of this circumstance is required, for what purpose? That the duties which had accrued upon the sugars refined, and noted in the entry book, and which having been removed are liable to be demanded; may, when the report is made, either be paid, or secured to be paid, at a future day. What has the *circumstance* of sending out the sugars, to do with the essence of that which constitutes the subject of the duty? It is important as it respects the time of payment, but is unconnected with the debt before incurred either by the words or spirit of the law. Not by the words, because the second section of the law imposes the duty not on refined sugar *sent out*, but on all refined sugar. To connect the circumstance of removal with that, which by this section is made the subject of the duty, we must read the second section as if it had declared, that the duty should be collected and paid upon all sugar refined and *sent out*. Not by the spirit of the law, if it be fair to consider this law as a part of a general system; because throughout that system the subject of the duty on which the obligation to pay arises, is separated from the circumstance, by which the time and mode of payment are prescribed. By construing the law in this way, no violence is done to the words of the Legislature, and the same harmony is preserved, which marks the order and arrangement of the different sections and clauses of the law. What reason can be assigned why the right of the United States to the duty should not attach upon sugar and snuff, as soon as re-

fined or made; and yet in all other cases, it attaches at a period antecedent to that when payment is to be made or secured? With respect to distilled spirits, payment cannot be demanded before removal. But will it be said that the duty has not accrued before the removal, though the time of payment be postponed? The distiller must give bond to secure the payment, before removal. Will it be said that this duty, if not paid on the 30th of June 1802, was not outstanding, because on that day the spirit might not have been sent out? How does that case differ from this? In that, the bond is given before removal; in this, it is given afterwards. But the law, in the latter case, imposes an obligation as imperious as the bond in the former case. If it be said that the duty had accrued in the one case, but not in the other; I would ask, upon what principle could the Legislature intend to make the distinction.

It was said at the bar, that as the house containing the sugar might be burnt down, or the sugar might melt, the Legislature did not mean to impose the duty whilst it remained liable to these accidents. I ask, are not distilled spirits subject to the same perils? But the conclusive answer is, that though the duty had once accrued, and had become a debt due, yet it cannot be demanded if it be destroyed before removal, because the event, upon which the *solvendum* is made to depend, can never happen. It was said there were two contingencies, viz., refining and sending out, both of which must happen before the duty accrues. I admit there are two contingencies, on the happening of one of which the duty accrues, to be demanded when the other shall happen.

If this construction of the Act of 1794 be correct, it furnishes a ready answer to many of the ingenious arguments used by the defendant's counsel. For then the remedy is not gone, but preserved by the repealing law, and of course the right remains. The repealing law, which professes to discontinue the internal taxes, is not, under such a construction, broader than the law which imposed these taxes.

As to the argument, that according to this construction, it would be in the power of the sugar refiners, by keeping on hand a small portion of refined sugar, to impose upon the government the necessity of keeping in office a number of officers, upon salaries, to collect the duties; there are two answers, —First, that the sugar refiners could have no motive for such conduct, and therefore it is not to be presumed; but secondly, the President is authorized to diminish the number of those officers, to any number he may think proper to retain, by consolidating the districts.

Judgment for plaintiff.

This case was taken by writ of error to the Supreme Court of the United States, and the judgment of the Circuit Court was reversed. 2 Cranch, 33.

CIRCUIT COURT OF THE UNITED STATES.

PENNSYLVANIA, APRIL TERM, 1804.

BEFORE { Hon. BUSHROD WASHINGTON, Associate Justice of the Supreme Court.
Hon. RICHARD PETERS, District Judge.

HURST'S LESSEE *vs.* M'NEIL.

The freehold estate which vests in a re-lessee, under deed of lease and release, by enlargement, is an estate at common law, which did not require the aid of the statute of uses to execute the possession to the use.

The mere calling a deed of trust, mentioned in the recitals of other deeds, a *deed of trust*, does not render it so.

The record of a trial, and verdict against the plaintiff, in a suit brought by him against another person; cannot be given in evidence by another defendant.

The doctrine of a purchaser without notice, applies only to equitable rights, where a legal title is obtained, without notice of a prior equitable title; when the former will prevail in equity, if fairly acquired.

In the case of legal titles, the rule is *caveat emptor*.

Length of time cannot be presumed by a jury, but must be proved.

Length of time may properly induce a jury to presume a grant in support of such possession; which presumption may be repelled, or accounted for.

The assent of the grantor to a deed, clearly for his benefit, may be presumed; yet if a consideration is to be paid, the assent must be proved, or nothing passes by the deed.

A deed executed for the purpose of giving jurisdiction to the Federal Court, will not be countenanced so as to sustain the jurisdiction.

EJECTMENT for one undivided fourth part of 5,000 acres of land in Chester county.

The plaintiff's title was as follows:—

September 4th and 5th, 1682, William Penn, the first proprietor, by deeds of lease and release, conveyed to Sir John Fagg 50,000 acres of land, to be thereafter located in Pennsylvania, to him, his heirs and assigns; in trust, as to one-half thereof, to the use of his son William Penn; and as to the other, to his daughter, Laetitia Aubrey; both children of his first marriage. This deed not produced, being lost, but sufficiently proved, as the plaintiff insisted, by recitals in subsequent deeds.

Some years after this, but when does not appear, five thousand acres, part of the above fifty thousand acres, were surveyed in Chester county, without saying for whom, but endorsed "Wm. Penn's Manor." This is the land in question.

In 1716, William, the second, died intestate, leaving Springett, his eldest son, William, Gulielma, and Maria, who afterwards married Mr. Fell. By the intestate law of Pennsylvania at that time, the eldest son took one-half, and the second son and the daughters, one-fourth each.

24th January 1730, Springett, by will, devised his half to his brother, William, the third, who thereby became entitled to three-fourths of his father's estate.

10th February 1740, a warrant issued to re-survey *William Penn, Jun.'s. Manor;* which was done, June 1741, and found to contain five thousand acres, endorsed "Wm. Penn's Manor." This was accompanied with a list of the settlers on this manor, amongst which is found the name of William Porter.

Mr. Fell died intestate, having three children, Robert Edward, Mary M., who afterwards married John Baron, and Gulielma Maria Frances, who married Mr. Newcum.

Mr. and Mrs. Baron, in February 1768, conveyed their interest to Crispin, who re-conveyed to John Baron in fee.

In 1770, Robert Edward Fell and Mrs. Newcum, by their attorney, and in consideration of £4,000, conveyed to Timothy Hurst all their lots and lands in South street in Philadelphia,

and all other their lands in Pennsylvania, and elsewhere in North America.

13th January 1774, Timothy conveyed to Charles, Thomas, and John Hurst, in fee, as tenants in common, all his lands in America.

2d December 1783, Charles Hurst, as attorney in fact, under a power from Thomas and John, and in his own right, conveyed all the above lands to Clement Biddle; and the next day, received a re-conveyance of the same; and on the

8th September 1791, Charles Hurst and John Baron conveyed to the lessor of the plaintiff, a British subject.

Defendant's Title.

4th May 1742, William Penn, the third, who was only entitled, under the law of Pennsylvania, to three-fourths of the five thousand acres, reciting the deed to Sir John Fagg, (*ut supra*) conveyed the whole of Penn's Manor to John White, in fee. In this deed, he styles himself heir at law of William Penn, the second; and covenants that he has a right to convey, &c.

12th December 1747, a patent was granted for these five thousand acres of land, to John White, by the then proprietors, Thomas and John Penn.

12th February 1753, White, by attorney, conveyed 298¾ acres, part of Penn's Manor, to William Porter, in fee; who, by will, dated 26th May 1781, devised the same to the defendant.

The Attorney General (Mr. M'Kean,) moved to nonsuit the plaintiff, on the ground that the deed to Sir John Fagg conveyed to him the legal estate, and that the estate of William Penn, the second, and Lætitia, was a mere trust, not executed by the statute; and of course, that the plaintiff, if he be entitled, must assert his right in a Court of Equity. The plaintiff cannot, against the express words of the various recitals, from which alone the deed to Sir John Fagg is established, say, that this [illegible] a trust estate, when those recitals declare the contrary.

It is clearly to be inferred, that the conveyance was not only to Sir John Fagg, his heirs and assigns, but the usual words added, "to his only use and behoof, in trust," &c.; in which case, the statute would only execute the first use in Fagg. The lease to Fagg, which was no doubt by bargain and sale, most certainly passed only a use to him; and if a second use had been declared, the statute would not have executed the second use. The release, then, only *enlarged* that estate to an estate in fee, without *changing its nature*; and therefore, only the first use to Fagg and his heirs was executed by the statute, leaving the second use a mere trust estate. Cases cited by Messrs. Edward Tilghman, and Rawle, who supported the motion: 1 Eq. Ca. Ab. 383. Dougl. 709. 2 Black. Com. 335, 336. 339. 2 Woodeson, 301. 296.

Lewis and Ingersoll, against the motion: The plaintiff may recover either on the warrant and survey, which, by the decisions of the Pennsylvania Courts, and by that of the Supreme Court of the United States, are determined to give a legal right of entry, which is sufficient in ejectment; or under the deed to Sir John Fagg, which conveyed a use to the children of William Penn, executed by the statute. The general scope of the statute was to execute all uses and trusts; for both are mentioned; and those which were not considered to be executed, were exceptions made by construction, by the subsequent decisions of the Courts of Law and Equity. Those were terms for years, double uses, and cases where it was necessary for the trustee to retain the possession, to enable him to execute the trusts. If this case comes within either exception, the defendant must shew it. The conveyance by lease and release to A, to the use of B, to the use of C, passes but one use. Cases cited: 2 Black. Com. 332. 335, 336. Christian's note. 2 Woodeson, 296, 297. 294.

The answer to the title set up under the warrant and survey, was, that this doctrine only applied where they formed the *in-*

sejtion of title; *aliter* of another estate, as in this case, had been created prior to the survey.

WASHINGTON, J. delivered the opinion of the Court. The distinction laid down by the defendant's counsel, seems to be a rational and sound one. There is certainly a difference between a title derived originally under a warrant and survey, and one under a prior deed from the proprietor; in which case the warrant and survey seem rather intended to locate and ascertain the land granted, than to pass an estate. But upon this point, we give no positive opinion, as we are against the motion upon the other point.

A lease at common law, required the actual entry of the lessee, to enable him to receive a release to enlarge his estate. But after the statute of uses, this formality was rendered unnecessary; because, the lease being made by a deed of bargain and sale, the lessor stood seised to the use of the lessee for a year; and the statute, by executing the possession to the use, put the lessee in possession, and enabled him to receive a release. But the freehold estate, which became thus vested in the re-lessee by enlargement, is an estate at common law, which did not require the aid of the statute to execute the possession to the use; and therefore an estate conveyed by lease and release to A and his heirs, to the use of A and his heirs, to the use of B and his heirs, is no more within the statute of uses as to the estate of A, than if it had passed by *feoffment*; and consequently, the first to be executed, would be that to B. There is, therefore, no second use in such a case. But if the conveyance be by bargain or sale, or covenant to stand seised, the statute executes the first use, which is distinct from the possession of the bargain or covenantor, which remained in him, and required the aid of the statute; and consequently, the second use was supposed not to be executed, but remained a trust. This doctrine, if my memory serves me, is well explained by Hargrave, in his notes to Coke Lyttleton.

But it is contended, that the recitals in the various papers relied on to establish this deed, denominate this a trust, which the plaintiffs cannot now deny. No person can doubt that the intention of the statute of uses was to leave no cases of trusts unexecuted. But the common law Courts having unfortunately determined, that in three cases, the use remained as at common law; the Courts of Equity very readily, and in my opinion very properly, laid hold of those decisions, treated such cases as exceptions from the statute, and entertained jurisdiction over them, as they had done over all trusts before the statute.

We must therefore consider them as exceptions; and when we hear of a trust estate, it is to be understood a use executed, unless it appear to be a case coming within one of the exceptions. There is no magic in the word *trust*, any more than in the word *use*—they were controvertible terms before the statute, and still are so, except distinguishable by the subject matter of them.

Motion overruled.

In the further progress of the cause, the defendant's counsel offered to read the record of a trial between the present lessor of the plaintiff, and Pemberton; respecting part of the five thousand acres; which was objected to, by the plaintiff's counsel.

Washington, J. Such evidence is inadmissible. If there be a point completely settled, and at rest, it is this; that a verdict between different persons cannot be given in evidence, in a suit of one of the parties against a stranger. It is true, that in that case, Hurst, against whom the verdict is offered, had an opportunity of cross-examining; yet it cannot be offered against Hurst, unless he might have offered it, had it been in his favour. This is the settled rule. *Non constat* that the evidence necessary, or supposed necessary by Hurst, in that case, was the same as in this. He might have been unsuccessful there,

for many reasons which do not now exist—the absence of witnesses, or the like.

Cases cited by defendant's counsel: Car. 181. Gilb. Evid. 33. 69.

Jonathan H. Hurst was examined as a witness, who proved that when Charles Hurst executed the deed to the lessor of the plaintiff, the latter was in England, and had no agent present—that no person was present, but the grantor and the witnesses; nor did any consideration, or security for the consideration, (mentioned in the deed as the consideration,) pass.

It further appeared in evidence, that Kirkbride, the executor of Robert E. Fell, having instituted a suit to foreclose a mortgage given by Timothy Hurst on the South street lots, for securing the consideration money to be paid him; a settlement took place between the parties, by their attorneys, when some allowance was made to Hurst for certain estates in Pennsylvania, which he had been prevented from recovering under the deed from Fell; but none was made on account of Penn's Manor.

After the decision of the Court upon the motion to nonsuit, the defendant accidentally heard that the deed to Sir John Fagg was in the city; and he produced, before the argument had closed, a deed to Sir John Fagg, dated 5th September 1682, from William Penn, for fifty thousand acres, but without declaring any uses to William Penn and Lætitia.

The ground relied upon by the plaintiff, was, that by the death of William Penn, the second, intestate, one-fourth of the five thousand acres of land descended to Mrs. Fell, which has been regularly passed by the lessor of the plaintiff. That the conveyance of William Penn, the third, to John White, could only pass his right, which was to three-fourths of the five thousand acres.

Washington, J., asked the plaintiff's counsel if the conveyance to Timothy Hurst, during the adverse possession of Porter, could pass a valid title by the laws or decisions of this State; and if an alien could take and hold lands here.

Mr. Edward Tilghman, for defendant, admitted that it had so frequently been ruled in the Supreme Court, and other Courts of this State; that a conveyance of land, where at the time there was an adverse possession, is good to pass the estate; that he could not question the plaintiff's title on this ground. Also, that at the time the conveyance was made to John Hurst, an alien could purchase and hold lands in Pennsylvania.

The defendant's counsel objected to the plaintiff's title on the following points:—

First. That it is not to be believed that Mr. Fell and Mrs. Newcum could have intended, by the general words in the deed to Hurst, to convey more than the South street lots, for the trifling consideration of £4,500. That if the jury should be of opinion that this was the intention of the parties, the intention must prevail; and they cited 1 T. Rep. 701. Cowp. Rep. 9. The price being outrageously low, is clear evidence of a fraud. 1 Vesey Jun. 219.

Second. That Hurst received compensation for all the lands, except the South street lots, in the compromise made with Kirkbride, the executor of Fell.

Third. That after so great a length of time, and so long an acquiescence on the part of Fell, the jury are at liberty to presume a possession long enough to bar the plaintiff; or that Mrs. Fell parted with her right to her brother William Penn, the third. Cases cited, 2 Inst. 118. 12 Rep. 56. 3 Black. Com. 188. 1 Equi. Cas. Abr. 306. 2 Atk. 71. 67. Skin. 77. 2 Vern. 391. Cow. 108. 214. 218. Bull. 75. 2 Atk. 83. 9 Mod. 37. 1 Lord Raym. 389. Salk. 421. 1 Brow. C. C. 554. 2 Vesey Jun. 583. 13. 2 Burr. 961. 2023. 3 Term. Rep. 310. Cowp. 108, 109. 3 Atk. 629. 4 T. Rep. 683.

Fourth. That this Court has no jurisdiction, as the deed from Charles to John Hurst, under all the circumstances of the case, was undoubtedly a fictitious conveyance, and intended to give jurisdiction, whilst Charles Hurst remains the real, and John merely a nominal, plaintiff. Besides, it now appears by

the deed to Sir John Fagg, that the legal estate vested absolutely in him, and that no uses whatever were declared. Cases cited, 2 Dall. 381, where the Circuit Court, on proof that the conveyance was merely to give jurisdiction, struck the cause off the docket. 2 Black. Com. 296. Assent to a deed by grantee necessary. Shep. Touchs. 283.

For plaintiff on first point: That no evidence or presumption can be offered to contradict, or vary the general expressions of the deed. It was a land lottery, and at that time it was impossible to say, whether the consideration was too high or too low.

Second. The argument of compensation, is repelled by the testimony of Fisher.

Third. Admit that where a deed appears which would be invalid, without certain formalities, as seisin, surrender, or the like; the jury may in favour of a long uninterrupted possession presume them; but it is going too far to presume a conveyance from Mrs. Fell, or an agreement to sell to her brother, without the slightest evidence. The presumptions relied upon in this case are completely repelled.

Fourth. John Hurst had certainly an equitable interest in this land, and if Charles Hurst conveyed the legal estate to him, it does not affect the jurisdiction of this Court.

WASHINGTON, J. charged the jury. After stating the plaintiff's, and then the defendant's title, observed that the former was regularly deduced down to the lessor of the plaintiff, whereas the defect was obvious in that of the defendant, since it was derived from William Penn, the third, who was entitled to only three-fourths of the five thousand acres of land, and consequently could convey no more to White.

But objections have been made to the plaintiff's right of recovery, and if they or any of them should be sustained, the verdict must be for the defendant; notwithstanding the defect in his title.

The first objection made to the plaintiff's title was, that it

appears from the smallness of the consideration, that it was not the intention of Fell to convey any thing more than the South street lots. That being a resident in Great Britain, it is hardly probable he knew that he was entitled to a part of Penn's Manor, and many other manors in Pennsylvania, which were mentioned by some of the witnesses, and to which Hurst has laid claim. That it appears Hurst was much better acquainted with the rights of the Fell family than they were, and it was a fraud in him, to throw in the general sweeping words contained in the deed to him, without disclosing to them his knowledge.

Answer.—We must judge of men's intentions, in solemn acts of this kind, by the language they use. If they are clear of ambiguity, there is no room left for construction, and we must give effect to the words which are employed to convey their meaning. If nothing is to pass under the deed to Timothy Hurst, but the South street lots, then the descriptive words of other property must be rejected altogether, and if any operation whatever is to be given to them, where can we stop, or by what rule can we limit them? Can we obliterate the words, "and all other their parts of land in Pennsylvania, or elsewhere in America," or say that they did not mean to pass away such rights, if they possessed them? This doctrine can never be tolerated. There is no evidence of fraud on the part of Hurst; and the whole argument is bottomed on surmises and conjectures. It was said by the counsel for defendant, that White and Porter were fair *bona fide* purchasers, without notice of the claims of Fell. But this doctrine only applies to equitable rights, where a legal title is obtained without notice of a prior equitable title, in which the former shall in equity prevail, if acquired fairly for valuable consideration, and without notice of the latter. In this case, the title of Mrs. Fell was a legal title, and therefore as to White, the principle *caveat emptor* applies in all its force.

Second objection. Hurst has been satisfied in the compro-

the deed to Sir John Fagg, that the legal e… npletely
ly in him, and that no uses whatever … es that no-
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For plaintiff on first point: … rgued that the jury
can be offered to contradic… fficient to create a bar,
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Second. The arg… n of time can be presumed. If the
testimony of Fish… as a bar, he must prove it by some evi-

Third. Adm… ive or circumstantial, so as to satisfy the jury
invalid, with… No evidence in this case has been given of a pos-
like; the ju… prior to 1741; and the jury therefore, cannot extend it,
presume … presumption.
from M… for the jury may presume a deed from Mrs. Fell, or some
the s… other agreement between her and William, the third, by which
cur… she passed to him her fourth part of Penn's Manor. This pre-
sumption, if warranted by such evidence as will satisfy your minds that the fact existed, may be made in favour of this long and quiet possession under William Penn. But those circumstances may be accounted for, and repelled; and after weighing all the evidence, you must decide which preponderates.

The circumstances relied upon to induce the presumption are, the long acquiescence of the Fell family, from the year 1716, when William Penn, the second, died, until 1774, when Robert Edward Fell and his sister sold to Hurst; during all which time no claim was made, or any attempt to exercise any act of ownership over the land in question. The good character of William, the third, and the consequent improbability that he would convey away the rights of his sister. The strong covenants in his deed to White, demonstrating the confidence he felt in his right to convey the whole. That this being a family transaction, the probability that some agreement was made with

Mrs. Fell, is stronger than if the right had belonged to a stranger. Thomas Penn, the proprietor, who granted a patent for this five thousand acres of land to White, was also the guardian of the young Fells; and it is scarcely possible that he was ignorant of their rights, if they had been parted with. If they had not, that he would have united in conveying them away; on the contrary, it is to be supposed that he would have taken proper steps to assert and secure them for his wards.

The plaintiff answers these circumstances in the following manner. William, the third, as well as his sister, lived in England. He knew that by the laws of England, he was entitled by descent to the whole of his father's real estate, as heir at law; and that he claimed it in that right, appears from the deed to White, in which he styles himself heir at law; it is hardly probable that he knew of the intestate law of Pennsylvania. He either knew of his sister's right to one-fourth, or he did not. If the former, and he had purchased it from her, then he would have thought it as necessary to state the fact, so as to show his right to that fourth, as he did to set out the right under which he claimed the three-fourths. If the latter, then he never could have purchased it. As to the long acquiescence on the part of the Fell family; this was accounted for by the residence of that family in Great Britain; their ignorance probably of their rights; the little value of the property at that time; and the policy of the proprietors in encouraging settlers on their lands, instead of making attempts to disturb them. That as to the patent to White from Thomas Penn, this proves nothing as it was a mere office conveyance in the name of the proprietors, but by the lieutenant-governor in this province, the proprietors themselves living abroad.

I was much struck with the expression in the deed to White, where William Penn styles himself heir at law; which seemed to show that he had mistaken or was ignorant of the law of Pennsylvania, and claimed the whole, not by purchase of his sister's fourth, but in character of heir at law. It is however

to be remarked, that William did not claim three-fourths as heir at law of his father; because Springett was heir at law, and as such was entitled to one-half, which by his will he devised to his brother. But after the death of Springett, without issue, William acquired the character of heir at law to his father; and therefore, when he styles himself such in the deed to him, it is rather to be considered as a *descriptio personæ*, than as a description of his title. It was also argued by the defendant's counsel, that when the great family settlement between the descendants of the first William Penn was made in 1731, it is highly probable, the counsel who were employed on that occasion had informed themselves of the law of Pennsylvania, and would then have discovered Mrs. Fell's right.

The jury will weigh the circumstances relied upon to warrant the presumption, and the answers which have been given to them. If they, upon their oaths, feel satisfied that Mrs. Fell did, in some way or other, convey away her right to William, the third, they will find for defendant; otherwise, for the plaintiff, unless the remaining objections be against him.

Fourth. This objection is to the jurisdiction of the Court.

By the deed of the 15th January 1774, from Timothy Hurst, Charles, Thomas, and John became entitled to the land therein conveyed, as tenants in common.

The deed from Charles Hurst to Biddle, and the reconveyance to Charles, vested the legal estate in this land in Charles; but John and Thomas, it is admitted, were not thereby divested of their rights in equity, though they might be at law. Now the deed to John Hurst was meant to be several deeds, or was merely fictitious, and intended to enable John Hurst to sue in this Court. If the former, it was void; for the assent of the grantee was not given at the time, nor has it ever been since given: for though the assent of a grantee to a deed, clearly for his benefit, may be presumed; yet, if a consideration is to be paid, as in this case, (£1,000 is mentioned,) the assent must be proved, or nothing passes by the deed. If it was not meant,

as a real conveyance, then it may operate to pass to John Hurst a legal title to his own third, which had become vested in Charles, but to which John still retained an equitable title. As to any thing more, the deed cannot be supported; because, as to the rights of Charles and Thomas Hurst and John Baron, they remain unaffected by the deed to John; and being merely a fictitious thing, to give jurisdiction to this Court, it will not receive our countenance.

As to the deed to Sir John Fagg, which has been produced, it is either not the deed so frequently recited in the title papers which have been read, or there was some other deed executed on the same day, declaring the uses in the fifty thousand acres of land to William Penn, the second, and Mrs. Aubrey. This, therefore, forms no objection to the plaintiff's title.

Jury found a verdict for defendant.

Ingersoll and Lewis, for plaintiff.

M'Kean, Attorney General, Edward Tilghman, and Rawle, for defendant.

Anonymous.

Indictment for perjury under the Bankrupt Law of the United States.

When a bill of sale is made fraudulently and colourably to the bankrupt, if he swears that the property mentioned in it belongs to him, it is perjury. But, if he swears to such ownership from mistake, resulting from a misconstruction of a paper, it would not be perjury.

If an offence be created by law, and before prosecution, the law be repealed, the offence cannot be punished, unless there is a reservation of jurisdiction over the offence, in the repealing law.

Under the act of 19th December, 1803, repealing the Bankrupt Law, there is no reservation for such purposes; and it would only be for perjury committed after the repeal of the law, in cases, which, by authority of the repealing act, may be completed, that an indictment could be sustained.

Perjury committed in proceedings under the Bankrupt Law, cannot be prosecuted under the general Criminal Law of the United States, the 18th section of which applies to perjuries committed in *judicial proceedings*, whether orally or by deposition.

For a perjury under the Bankrupt Laws, an indictment will not be supported at Common Law; because, there must not only be a false oath, but it must be taken in *some judicial proceedings*, in a matter material to the issue.

THE defendant was indicted for perjury committed before the commissioners of bankrupts, where, being asked, "at what time did you own the brig Abigail, and when did you cease to own her," answered, on oath, "I cannot tell exactly the time; I believe it was at the latter end of 1799 that I first owned her; I ceased to own her, I rather think, in the year 1800." Whereas in truth and in fact, the said defendant never did own the said brig at any time during the year 1799, or before or after. The first count laid the offence against the Bankrupt Law, and the second against the general Criminal Law of the United States.

On not guilty pleaded, Mr. Rawle for the defendant stated, that he should endeavour to satisfy the Court there was no law to support the indictment; and submitted whether this should be done before the jury were sworn, or after, and before a verdict were rendered; or in arrest of judgment, should the verdict be against the defendant.

The Court thought it most proper to proceed in the ordinary way, leaving both law and fact to the jury, under the charge of the Court; or to a motion in arrest of judgment, should the jury find the defendant guilty.

Byrd Wilson, the secretary to the commissioners, proved, that the question, as stated in the indictment, was asked the defendant, and that he answered it on oath as there stated; that the question was put, and the oath administered, in the presence of the commissioners, and by their direction, on the 20th September, 1803. The question and answer were committed to writing by the witness, and was not signed by the defendant.

Phineas Daniel proved, that he wished to purchase the brig; and, being an alien, he, with a view to give her the character and privileges of a vessel owned by a citizen, got the defendant to let the bill of sale be made to him; but that he, Daniel, paid for her, and to give colour to the cover, obtained a power of attorney from the defendant to manage the vessel, and also one charter party to Bristol for one voyage, and afterwards another for ten years.

Both this witness and Williams, a partner of defendant, proved that the defendant never claimed or exercised any acts of ownership over the vessel, or made any demands for freights, profits, &c. In fact, the testimony on this point was complete.

There were witnesses examined to discredit Daniel, who said very hard things of his general character and credit, and some contradictions appeared in his testimony. But his evidence respecting the property in the vessel, was strongly corroborated, by Williams, Robert Whittle, and A. Brown; the

power of attorney, charter parties, and the accounts kept by defendant.

Mr. Dallas, the District Attorney, contended, that the defendant was indictable under the Bankrupt Law, although it was partially repealed before the prosecution, because the proviso saved from the operation of the repealing clause, all cases where commissions had previously issued; and that unless perjuries committed under such commission could be prosecuted and punished, it would affect *the execution of the commission*. To prove that the intention of the Legislature is to prevail, cited Bac. Abr. 390. 2 Leach, C. Law, 800. He referred to many other repealing laws in the code of the United States, where savings had been made as to offences previously committed. 3 vol. laws, 163. 6 Idem, 80. 58. 3. 61. 4 Idem, 456. 5 Idem, 126. 3 Idem, 80. 4 Idem, 468.

Second. That if this case be not within the proviso, still the repeal does not prevent the prosecution afterwards. The doctrine applies only to cases of misdemeanor and felony. 2 Hawk. 87. 1 Idem, 306. 1 Hale, 291. 525. 2 Idem, 195.

Third. Defendant, if not indictable under the Bankrupt Law, may be under the general Criminal Law; for in this case, the false oath was taken in a deposition taken under the authority of the United States, as expressed in the section of that law.

Fourth. If not indictable under either of those laws, he may be convicted at Common Law, though indicted *contra formam statuti*, 1 Hale, 529, if the Court should think the Common Law obligatory in the courts of the United States.

He contended, under the first head, that the execution of the commission would not be completed as long as any thing might remain to be done, and this might happen in a variety of cases, even after certificate granted, as if an estate should afterwards vest in remainder, or descend to the bankrupt, &c. &c.

Under the third head, that the general Criminal Law was not repealed by the Bankrupt Law, as to perjury; because not

inconsistent with it, cited 1 Hale, 705. 4 Burr. 2026. Leach, 253. 1 Hawk. 306. Leach, 501.

Mr. Dickerson and Mr. Rawle, after arguing the matter of fact to the jury, addressed the Court and jury on the law. They contended, first, that the false swearing must be material to the issue. 4 Black. 136. 1 Hawk. 331. Cro. C. 382. Cro. Eliz. 148. It must be given with deliberation. 1 Salk. 374. So, too, if he swears under a false impression respecting the construction of a paper, or of his title, it is not perjury. 1 Espin. Rep. 281. Now, in this case, the interrogatory and answer only applied to the *time* of his owning and parting with the vessel, which was entirely immaterial. The answer was made here immediately; the question was put without the defendant's taking time, and as the legal title was, by the bill of sale, in defendant, he might have naturally supposed that it made him the owner, particularly as the notes given for the vessel, were either signed or endorsed by defendant.

As to evidence, there must, to convict in perjury, be one credible witness, and strong evidence besides, sufficient in the minds of the jury to establish the guilt. 10 Mod. 195. Daniel, the only positive witness, is not to be credited.

Where a statute creates a new offence, and fixes the punishment, the prosecution must be against that statute. 10 Mod. 286. Cro. Ja. 644. 3 Mod. 78. 2 Ld. Raym. 995. 1 Burr. 543. 4 Idem, 2026. Cowp. 297. Leach, 252. The punishment being different under the Bankrupt Law from what it is under the general Criminal Law, and not cumulative, the defendant cannot be indicted under the latter—disqualification, under the general law, is to be part of the punishment. In other cases, it is not part of the sentence. 2 Salk. 513. Many parts of the laws of the United States referred to, showing the punishment of perjury in certain cases. 4 vol. 427. 102. 3 vol. 337. 2 Idem, 21. 157. 193. 6 Idem, 27.

The repeal of a law creating an offence, whether it be felony or misdemeanor, sweeps away all prosecutions against it, with-

out a saving for the purpose. 1 Black. Rep. 451. 1 Hale, 309. 291. Instances where such savings have been introduced, 4 vol. Laws, 446. 523. 541. 202. So similar saving in the statute 6 Ed. VI. ch. 12. As to the Common Law, Mr. Dickerson denied its validity in the United States Courts, but his colleague, Mr. Rawle, admitted it.

WASHINGTON, J. charged the jury. As it is the opinion of the Court, that the law is in favour of the defendant, I shall spare the jury and myself the trouble of going through the evidence. If, in the opinion of the jury, it is insufficient to establish the fact against the defendant, I would not wish to disturb that opinion; if it has a different operation, I shall not press it against him. But I must notice one of the observations made by Mr. Dickerson, lest those who heard it might suppose it had received the countenance of this Court; and it is this, that the defendant, having a bill of sale for the brig, might, under the circumstances of the case, have taken an oath that he was owner of her, without committing perjury. It is true, that where a mistake is shown to be the result of a misconstruction of a paper, it is not perjury; but no such misconstruction could take place in a case like this. The oath must be considered in reference to the subject and occasion of it. It was taken for the purpose of disclosing the property and effects belonging to the bankrupt. The defendant, if Daniel's evidence is believed, was a mere nominal owner, made so with his own consent, and with a view, understood by him, to cover Daniel's property under his name. In no sense of the word could he suppose that he owned, or had a property in the vessel. Such a doctrine would defeat the important provisions of our navigation law, if a citizen might cover the property of aliens, and yet safely swear that he was the owner.

Every offence for which a man is indicted, must be laid against some law, and it must be shown to come within it. Such law may be the general unwritten or common law, or the

statute law. The offence must not only come within the terms of such law, but the law itself must, at the time, be subsisting. It is a clear rule, that if a statute create an offence, and is then repealed, no prosecution can be instituted for any offence committed against the statute, previous to its repeal. The end of punishment is not only to correct the offender, but to deter others from committing like offences. But, if the Legislature has ceased to consider the act in the light of an offence, those purposes are no longer to be answered, and punishment is then unnecessary. Perjury is said to be *malum in se*. False oaths of all kinds are prohibited by the divine law; but civil institutions punish them only in certain cases, and upon reasons of policy. A false oath taken before the commissioners of bankruptcy, was declared to be perjury, and subjected the offender to punishment; but, the moment the law was repealed, it remained a false oath, but ceased to be an offence punishable by municipal law. There are many offences that are *mala in se*, which are not prohibited by human laws; and, therefore, if in any case they should, by such laws, be deemed criminal and made punishable, the repeal of those laws places the acts committed under them, upon the same ground as they were before the laws passed.

As to civil rights, the rule is, that rights acquired under, or barred by an existing law, are not defeated by the repeal of the law.

In short, the cases which were cited at the bar, and the language which the Legislature of the United States has used in the cases cited, when it has intended to except out of the operation of the repealing law, prosecutions for offences committed before the repeal, are conclusive to show that the above doctrine is not to be shaken.

The next question is, to what extent was the Bankrupt Law repealed by the Act of the 19th of December, 1803? Until we come to the proviso, it is a general and absolute repeal. Had it stopped here, what would have been the consequence? That

all commissions then proceeded in, to various points of their execution, must have been arrested, and infinite mischief have been produced. A proviso is always intended to limit the generality of the enacting clause, or to save or except certain cases out of its operation. If the proviso be ambiguous, its explanation may best be obtained by understanding the scope of the enacting clause, and discovering the mischief to be remedied. Now, here the mischief would have been what I have stated, and the proviso applies precisely to, and remedies it. It declares, that "the repeal shall in no wise affect the execution of any commission of bankruptcy, which may have been issued prior to the passing of this act, but every such commission shall be proceeded in, and fully executed, as if this act had not been passed." The commissions then are still to go until finally executed. But what has the punishment of a perjury previously committed, to do with the progress of such a commission to its final execution? I have no doubt, though it is not now necessary to decide the point, that even in the defendant's commission, though he has obtained a certificate, yet if it be not to be considered as finally executed, and in all other commissions not so executed, should perjury be committed after the repeal, it may be punished; because if otherwise, it would affect the final execution. The difference is this: in the construction which I give to the proviso, I give it a prospective operation; that contended for by the Attorney, gives it a retrospective operation, a construction not favoured in civil, much less in criminal cases. In the cases of future perjury, the not punishing them would affect the execution of the commission, but not so as to perjuries previously committed. Upon the whole, if the Legislature intended to except from the operation of the repealing clause all cases where commissions had previously issued, it was easy to have expressed such intention generally, and not confine the proviso to the *execution* of commissions; and in every instance where they did intend to leave open to

prosecution, offences committed before the repeal, they have declared it in plain unambiguous terms.

If, then, the indictment cannot be supported upon the first count against the Bankrupt Law, can it be sustained upon the second, as against the general Criminal Law of the United States?

If the case could be brought clearly within the 18th section of this law, no doubt that the indictment might be supported. But this section plainly refers to perjuries committed in judicial proceedings, whether orally, or by deposition. The words relied upon by the Attorney cannot, I think, be construed to extend the crime of perjury to all cases of depositions taken under the authority of the United States, because that would be to make the same false oath perjury, and punishable if put into the form of a deposition, which would be dispunishable if given orally. This would be a great absurdity; but, if it be construed to extend to depositions taken in judicial proceedings, then the consequence will be, that false oaths taken in judicial proceedings, whether orally or by deposition, when taken under the authority of the United States, are declared to be perjury. Besides, if the construction contended for be correct, the many laws declaring what should be perjury in particular cases, would have been unnecessary. And what is conclusive upon this point is, that, admitting the construction, the defendant has not committed this perjury in any deposition; for the answer taken down by the secretary in this case, though committed by him to writing, cannot be called a deposition.

But if the defendant can be indicted under the general law now, he might have been before the repeal of the Bankrupt Law—if so, he might upon conviction have been punished with fine, imprisonment, and pillory; although under the Bankrupt Law, the punishment was confined to imprisonment only, which proves either that false oaths, taken in judicial proceedings, are not made punishable by the law in question; or if they were, that the law *quoad* oaths, taken before commissioners of bank-

ruptcy, was repealed by that law; for otherwise the legislative declaration of what should be the punishment in such a case, would be defeated by the prior law, and the act of the public officer in preferring to indict under it. A bankrupt, though deprived of every thing, and therefore excused from paying a fine under the Bankrupt Law, might be fined to the amount of 800 dollars under the general law. This cannot be contended for. If then the defendant could not have been indicted under the general law, had the Bankrupt Law been still in force, to say that he can be so indicted after the repeal, would be to place him in a worse situation by the repeal than he was before it, whereas the effect of the repeal was to excuse, or rather to render him dispunishable for this offence.

If he cannot be indicted under either of those laws, can the Common Law be pressed into the service? I think not; and for the same reasons I have assigned why he cannot be indicted under the general criminal law. First. Because the Common Law description of perjury is, a false oath taken in some judicial proceeding in a matter material to the issue, and the punishment is fine and imprisonment. In this case the offence does not answer the description, and the punishment is different.

The Jury found the defendant not guilty.

KOHNE *vs.* THE INSURANCE COMPANY OF NORTH AMERICA.

The agreement of insurance having been made while both parties were ignorant of the loss, and the policy having been completed and executed, although not delivered; it is valid and binding; and the plaintiff is entitled to recover, if there be no other valid objection.

The omission to mention that the voyage from a second port had commenced, at the time of the insurance, if the vessel was in good order at the time of her departure from the first port; does not seem material.

Whether the British regulations respecting the colonial trade be consistent with the laws of nations or not; the effect of them, and the decisions of their Courts upon them, are the same to neutrals, as if they were so.

If a concealment that the cargo insured had been shipped at a colonial port, and had not been landed in the United States, was material to the risk; the facts ought to have been disclosed.

If a foreign regulation be known only to the insurer, he must ask for information as to the facts; if known to the insured, he must disclose the same. *Quere.* If these regulations are not of general notoriety, whether assurer or assured is bound to disclose them, unless express notice of them is proved.

THIS was an action of trover for a policy of insurance. It was admitted on both sides, that if the agreement for insurance was perfected, and the plaintiff would have recovered upon the policy, that the want of it should produce no difficulty.

The case was, that the plaintiff directed his agent to effect an insurance on goods on board the ship Gadsden, from Newport in Rhode Island, to Port Passage in Spain. The agent, on Saturday the 12th of October 1799, applied to the president of the company, and left with him the orders of insurance; which were, upon the cargo of the ship, at and from Newport to Port Passage; the ship an excellent one, copper bottomed, &c. &c. The agreement was made at per cent., for which a note was to be given with approved security. The agent left the office before the policy was filled up, but it was done in a few hours

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ent with the law of nations, and even if it be a regulation of that government, derogatory to the law of nations, still the disclosure of the fact was necessary; and that to avoid the charge of a direct trade, not only the duties should be paid in the country of the neutrals, but the cargo should be landed. 3 Rob. Rep. 78. 2 Rob. Rep. 186. Marsh. 352. Rob. Rep. Case of the Emanuel. 2 Rob. Rep. 301. The Polly. Parke 195.

For the plaintiff it was answered,

1. That the contract was complete, and the policy executed, before notice of the loss.

2. That the misrepresentation, respecting the commencement of the voyage, was immaterial. Cited the case of Pine *vs.* Pratt, Supreme Court of Pennsylvania. As to the case of Hodgson *vs.* Richardson, the goods were never landed at Genoa, were perishable in their nature, and the insurers were liable to average. In this case, they were free of averages, were landed at Newport in good order, and taken on board in like order.

3. The vessel was in excellent order when she left Newport, and at the time the insurance was made, and therefore not necessary to disclose her having struck on the bar.

4. Neutral nations are not bound by the arbitrary decisions of the belligerent powers; and the instructions of the king respecting the trade of neutrals are not warranted by the law of nations. Cases cited, 2 Dall. 274. 2 Rob. Rep. 12. 6. 165. 391. 1 Rob. 249. Marsh. 317. 4 Rob. 100. 3 Idem, 72. 154. 188. 2 Idem, 84. The instructions in question were given in 1796, and the decisions of Sir William Scott are bottomed on them. They also cited on this point, 8 T. Rep. 434. 1 East. Rep. 663. Ld. Hawkesbury's Rep. on the conduct of Great Britain in respect to neutrals. But if the fact was material, it was the duty of the underwriter to ask for information. 2 Bosanq. & Pull. 210.

WASHINGTON J. charged the jury.

The first objection to this action was not much relied upon by the defendant's counsel, and there is certainly nothing in it.

There is no charge of unfairness on the part of the agent of the plaintiff; nor is it pretended that he knew of the loss on the 12th, when he waited upon the president of the insurance company. It appears that every thing was agreed upon; and although on account of the fever then in the city, he did not wait to receive the policy; yet it was immediately after he left the office filled up and signed by the president, and has been produced on the trial. The contract therefore was not inchoate, but perfected, before notice of the capture by either of the parties.

The objections to the recovery relied upon are, a material misrepresentation, and a concealment of two facts material to the risk.

The misrepresentation is stated to be in respect to the commencement of the voyage. It must be admitted, that there was a misrepresentation; but unless it was material to the risk, it is not sufficient to avoid the policy. I cannot perceive what consequence it was to the underwriters, to be informed whether the voyage commenced at Charleston or at Newport. The cargo was put on board at Newport in good order, and the insurers were free of average; which was not the case in Hodgson and Richardson. Besides, that case turned upon a usage proved on the trial, that if the insurance was effected in the middle of a voyage, it was necessary to disclose the circumstance. In this case no such usage has been proved.

The next objection is, concealment of the injury the vessel sustained from Charleston to Newport. The matter for the jury to decide on is, whether, at the time the risk commenced, the vessel deserved the character given of her. If the jury should be of opinion that she did; the accident that happened to her in her voyage from Charleston, does not, to the Court, seem material.

The last and most important objection, remains to be considered. It is, that the defendant should have disclosed the importation from Laguira to Charleston, and the not landing of the cargo. A great deal has been said of the rights of neutral

nations; and the principle contended for by the British government, has been pronounced repugnant to the laws of nations. I mean not to enter into the consideration of this question, because, whether the principle asserted by the British government and practised by its Courts, be authorized or not by the laws of nations; yet the consequence to neutrals is the same. If they act improperly, the matter must be adjusted between that and our nation; but as to the individuals of our nation, they certainly incur a risk if they trade in contravention of the rule, thus established, whether it be right or wrong.

The principle contended for is, that neutral nations shall not trade, *directly*, in time of war, from the colonies of one of the belligerent powers in Europe, unless to the nation to which the neutral belongs, or carry on a trade from such colonies to the mother country, in time of war, which in time of peace is interdicted. The first branch of the question then is; if the concealment was material to the risk, was the plaintiff bound to disclose it, or was the insurer to ask for information?

An insurance is a contract of indemnity, and the assurer agrees to stand in the place of the assured, and to take the risk upon himself. It is therefore necessary that the latter should possess the former with a knowledge of every fact, with which he is acquainted, material to the risk, that he may know how to estimate the premium. If a foreign regulation, which may affect the risk, be known only to the insurer, he must ask for information. But if known also to the assured, it is his duty to state such facts as may be material, to enable the insurer to see the extent of the hazard to which such regulation exposes him. The absurdity, stated in argument, if the assured should be obliged to inform himself of all the various regulations of the different belligerent powers which may endanger his property, is not greater than to lay the same burden on the shoulders of the insurer. But in neither case does the principle apply, unless such regulations be public and generally known, or if not so, can be proved to have been known by one party and not by the other; in which case, the assurer, if he only knows of it,

must take the risk upon himself; and if known only to the assured, it is a fraud if he does not disclose it.

The second branch of the question is, was the nature of the cargo, and the not landing it at Charleston, material to the risk; or in other words, was there a *bona fide* importation into Charleston, to avoid the charge of a *direct* trade from Laguira to Spain? This must depend upon the evidence. It is clear, that if the vessel had merely called at Charleston, the circumstance of stopping there would not have amounted to an importation into that place. The cases cited from Robinson's Reports, admit that paying duties and landing, are *prima facie* evidence of a *bona fide* importation; but these are only circumstances, which may be repelled by other evidence, showing that the importation was not *bona fide*; and I confess I cannot see why the paying duties may not afford satisfactory evidence of a *bona fide* importation; if other circumstances concur to prove it so; though the case is certainly not so strong as if the cargo were landed. The evidence relied upon to prove that this was a direct trading, from a colony of Spain to the mother country, is certainly very strong. The passport to Laguira; the passport from thence to Charleston; the permission not to land, upon the ground that this is usually granted where the cargo is intended to be re-exported for benefit of drawback; the passport and certificate of the Spanish consul at Charleston, found amongst the papers, and describing the cargo as coming from Laguira, and intended for Spain; afford evidence of the original destination of the cargo, very difficult to be reconciled with the assertion of a *bona fide* importation into Charleston.

If the jury, upon that evidence, are of opinion, that the calling at Charleston, and paying or bonding the duties, under all the circumstances of this case; were with a view to proceed on to Spain, or to land some of the cargo and take in other articles; it will be very difficult to maintain the argument, that the circumstances were immaterial to the risk, and in that case their verdict ought to be for the defendants.

The Jury found for the plaintiff,

CIRCUIT COURT OF THE UNITED STATES.

PENNSYLVANIA, APRIL TERM, 1804.

PRESENT, { Hon. BUSHROD WASHINGTON, Associate Justice of the Supreme Court.
Hon. RICHARD PETERS, District Judge.

PERRY ET AL. ASSIGNEES OF NANTES, A BANKRUPT,

vs.

CRAMMOND ET AL. EXECUTORS OF CAY, SURVIVING PARTNER OF CLOW & CAY.

When an accommodation bill goes into the hands of a *bona fide* holder, even with notice of its particular character, he is entitled to recover the amount thereof from the drawer.

Bills, drawn for an illegal consideration, or for one which happens to fail, cannot be enforced, by one having notice of their character.

Bills, delivered after the death of the drawer, to a person who had made advances upon their faith, to the drawer, who had them in his possession, for the purpose of raising money for the drawer; may be enforced against the representatives of the drawer.

THIS suit was brought by the assignees of Nantes, surviving partner of Muilman & Company, to recover £18,000 sterling, the amount of forty-seven bills of exchange, with damages at the rate of twenty per cent. The case, from the evidence, was as follows: Joseph Hadfield, in London, was the confidential friend of Clow & Cay of Philadelphia, received their remittances, and negotiated their business to a large amount. The

affairs of Clow & Cay getting considerably embarrassed, and Hadfield, having exhausted his ingenuity to keep their credit afloat, by accepting and taking up a great number of bills drawn on him and others; at length advised him to send on to him a number of bills drawn upon him, Hadfield, in favour of any one of his clerks, varying the name, which he, Hadfield, could use as occasion might require, to raise money, until remittances of a more substantial kind could come. In pursuance of this advice, the bills in question were sent forward, drawn on Hadfield, at sixty days, part of them in favour of Murdock, and part in favour of Reddick, two of the clerks of Clow & Cay, and were endorsed in blank. They were received by Hadfield in February and March, and remained in his possession until the transfer to Nantes took place. Muilman & Company were the friends of Hadfield, and enabled him, by great advances, to keep up not only his own credit, but that of Clow & Cay; who, by letter to Muilman & Company, in March or April, agreed to guaranty any negotiations which might take place between them and Hadfield, their friend; and, on their account, subsequent to this letter, and on the ground of it, viz. in April and May, 1793, upwards of £19,000 were advanced by Muilman & Company to Hadfield, which was by him applied to the use of Clow & Cay. It appears, by an account stated by the Master, in a suit instituted in the Court of Chancery, in England, by the defendants, against the plaintiffs and Hadfield; that, during the months of April, May, June, July, and August, 1793, balances, from £6,000 to £17,000, were due from Clow & Cay to Hadfield; but, by remittances made in August and September, they were discharged: and, finally, a balance of about £8,000 was reported to be due from Hadfield to Clow & Cay, without including the bills in question.

Clow died on the 24th of September, of which Hadfield and Nantes heard the last of October, and it was confirmed the 6th of November, 1793; on which day, also, the death of Cay was known; and Nantes, knowing that Hadfield had in his posses-

sion the bills in question, and the purpose for which they were deposited with him; he, on the 6th of November, demanded of Hadfield, that he would accept those bills as of the 4th of September, that they might be protested on that day, viz. the 6th November, and delivered to him, Nantes, as a further and better security for the advances made by Muilman & Company, for the use of Clow & Cay. All this was accordingly done, and the bills were then sent over here to be put in suit. At a subsequent period, an arbitration took place between Nantes and Hadfield, and a balance found due from the latter to the former of the £19,000; and £100 said to have been advanced to Hadfield, and by him applied to the use of Clow & Cay; but it does not appear by this award, or by the report of the Master in the suit above mentioned, that this £19,000 was, or was not introduced into the account between Hadfield and Clow & Cay. Muilman & Company kept no account whatever with Clow & Cay; and, by Hadfield's accounts, none of his advances are stated as being made by Muilman & Company, but generally as by himself. Hadfield, in his answer to the defendants' bill, and in his deposition taken in this cause; states, that the advances were made for the use of Clow & Cay, and were so applied; and, that the bills in question were delivered to Nantes, in order to give him a priority against the estate of Clow & Cay; and that the amount of them was to be carried to the credit of Hadfield, on account of the advances made by Muilman & Company to him for the use of Clow & Cay, *and otherwise*; and, by that means, to lessen the balance due from Clow & Cay to Hadfield, or, in other words, the balance due from Hadfield to Muilman & Company.

It further appeared by the evidence, that Hadfield communicated, at all times, freely and fully, to Muilman & Company, respecting the affairs of Clow & Cay; and that the remittances made by Clow & Cay to Hadfield, passed into the hands of Muilman & Company.

Hadfield, in his answer and deposition, states; that the bills

were deposited with him for his own indemnification, as well as to enable him to obtain advances.

When Hadfield delivered the bills to Nantes, it was agreed that Nantes should proceed immediately against Clow & Cay; it not being intended that he, Hadfield, was to pay when they became due.

The defendants' counsel objected to the recovery:

1. That these were accommodation bills, sent to Hadfield for a particular purpose, and used for a different one; and this being known to Nantes, he stood in the shoes of Hadfield, and could not recover. The letter from Hadfield to Clow & Cay, of November, 1792, calling for these bills, states, that "they may be useful to support *our mutual credit*," which shows that they were not merely for the use of Clow & Cay; and, therefore, passed to Hadfield without consideration, or with a knowledge that they were not to return here as protested bills. They cited, 3 T. Rep. 80.

2. The agreement of Nantes, not to resort to Hadfield, defeats his remedy against the drawer, as such an agreement is repugnant to the acceptance, which binds the acceptor absolutely to pay; and such a discharge defeats the remedy over which the drawer might have. Chitty, 82. 84. 3 Brow. Ch. Rep. 1. 2 Bosanq. & Pull. 62. 4 Ves. jun. 829.

3. The debt due from Clow & Cay, if it existed at all, was for the advances made to Hadfield on their account, and on the foot of the guarantee; and it was, therefore, a mere simple contract debt; and Hadfield, as an agent, had no right, after the death of Clow & Cay, to change the nature and dignity of the debt, to one upon protested bills of exchange; which, by the laws of Pennsylvania, have a preference over other debts due from a deceased person. The authority of the agent was superseded by the death of Clow & Cay, and notice thereof to the agent.

4. The antedating the acceptance was an irregularity, contrary to the usual course of mercantile negotiations; and, upon

this ground, the plaintiffs cannot recover. It was precipitating the time of payment, which the drawer could not lawfully do.

In answer to these objections by the plaintiffs' counsel, it was said:

1. That though these may be called accommodation bills, yet, they were for the accommodation of the drawers, and to indemnify the drawee for his own advances, or to enable him to raise money upon; consequently, not only Hadfield, but any person making such advances, were entitled to recover upon them. Hadfield, as agent, had a lien for any balance due him, as well on these bills as upon any other property of the drawers in his hands. Cowp. Rep. 251.

2. The doctrine was admitted, in cases where, by the discharge of the drawer, or a prior endorser, you destroy the remedy over which the endorsee might have. That case is unlike the present; for Hadfield, being a creditor of the drawers, to the full amount of the advances made by Muilman & Company for their use, the discharge of the drawee, could not, in any event, affect the rights of Clow & Cay.

3. The bills being deposited with Hadfield, for the purposes before mentioned, he had an interest coupled with his powers as agent, and might endorse the notes for the purpose of his own indemnification, as well after, as before the death of the drawers. 2 East. 227.

4. In cases of bills regularly negotiated, the doctrine contended for is admitted. But this is a peculiar case; and the purpose for which the bills were lodged, impliedly authorized Hadfield to accept or use them, in any manner most likely to effect those purposes.

WASHINGTON, J. charged the jury. These have been called accommodation bills, and, in one sense of the term, they may be so considered; but it does not follow, that an endorsee of them, for a valuable consideration, though with full notice of every circumstance attending them, may not recover. If they

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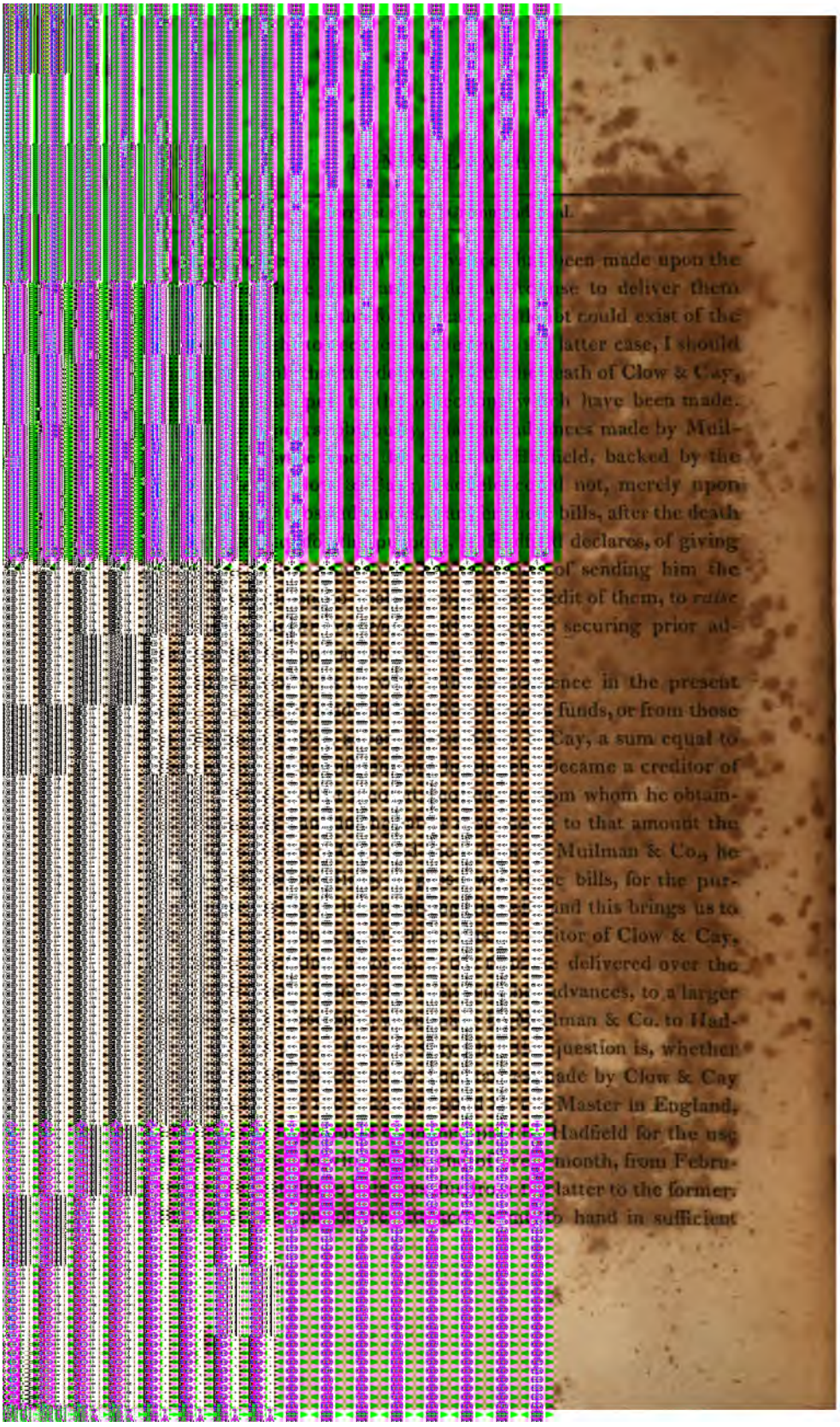

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at least one much to be wondered at, that in no part of Hadfield's deposition or answer, does he state that the advances made by Muilman & Co., and applied to the use of Clow & Cay, were not debited in his account with the latter; and in his deposition he states, that the amount of the bills delivered to Nantes, was to be carried to the credit of him, Hadfield, on account of advances by Muilman & Co. to him, for the use of Clow & Cay, *and otherwise*, so that it is left to conjecture, from this impression, which sum remained unpaid of the advances made by Muilman & Co., and what portion of these bills were to be applied to the credit of other accounts.

As to the objection, on the ground of the acceptance being antedated, as well as other irregularities attending the negotiation of the bills, I will not say, that they would be fatal in a transaction so peculiar in its nature as the present, if Nantes appeared to have been a fair *bona fide* purchaser, upon the ground of a debt due from Hadfield to him for money advanced to him for Clow & Cay, and from them to Hadfield, still remaining unpaid; because from the nature of the trust reposed in Hadfield, he could not easily negotiate them in the ordinary way, to answer the purposes for which they were deposited with him.

The question then, for the jury, will be, whether Hadfield was a creditor of Clow & Cay, for advances to the amount of the bills in question; so as to authorize him or his endorsee to recover upon the ground of indemnity. If not, the verdict ought to be for the defendant; if otherwise, for the plaintiff.

Verdict for the defendant.

Ingersoll, Lewis, and Binney, for plaintiff.
Edward Tilghman, and Rawle, for defendant.

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The proviso in the Act of 1792, only dispenses with the forfeiture incurred, according to the law, by not making the settlement, and continuing it, *within and during the time prescribed* by the enacting clause; and requires that it must be made as soon as the prevention ceases.

The prevention to settle upon lands in "the new purchase," continued until the end of the year 1795; and after that time a reasonable time should be allowed to those who claimed titles to lands within the same, for preparing to make settlements.

A warrant and survey of lands within "the new purchase," without a compliance with the terms thereof, enjoining a settlement of the land, would not be sufficient to maintain an ejectment.

THIS ejectment was brought to recover four hundred acres of land, situated on Lake Erie; in the triangle conveyed by the United States to the State of Pennsylvania, in March 1792.

Under the Act of April 1792, passed by that State, authorizing the sale and settlement of this tract of country, three hundred and ninety warrants, of 400 acres each, were taken out by a company under the name of "The Population Company;" who, in the fall of 1792, delivered those warrants to the surveyor, to be laid upon the lands within the triangle; and accordingly, in the spring of 1794, the warrants were surveyed, by running lines, by actual survey, from north to south, quite from the point of the triangle, eastward to the New-York line. These lines being protracted, the east and west lines were laid down, not by actual survey, but separating the different tracts on the plat by the intersections of the east and west lines. The surveyor returned this connected survey to the proper office; but finding that he had omitted to lay off the State reserve of two thousand acres, he was directed by the Surveyor General to lift the warrants laid upon the land: but finding that this could not be done without altering most of the lines as laid down by the first survey, he went upon the land, and made a new and actual survey, in 1795, marking all the lines and corners of the different tracts.

The warrant, which was laid upon the land in question in

1795, was in the name of William Smith, druggist; and was laid, in 1794, upon a tract some distance from that on which it was laid in 1795. The first warrant, which was in the name of Mary Nicolson, was particularly described on all its sides; and the other three hundred and eighty-nine warrants were adjoining; and adjoining each other.

The survey of 1795 being returned, a certificate, called a prevention certificate, was granted in the name of William Smith, druggist, (as well as in all the other cases;) stating that he had been prevented from settling by force of arms of the enemies of the United States, and that he and his assigns have persisted in their endeavours to make such settlement. This was granted in September 1798, in pursuance of a regulation of the Board of Property; which prescribed this form of certificate, and that patents should issue, where the surveyor and two justices should certify those facts. Certificates having been obtained as directed by the above regulations, patents issued to the managers of the Population Company, for all the lands laid off within the triangle, (except the reserved lands,) on the 6th of March 1799.

The defendant, Burrus, claims by settlement under the Commonwealth; and adversely to the Population Company.

The points made by the plaintiff's counsel, were—

First. That the patent is conclusive as to the title of the plaintiff, against a tortious entry and settlement by the defendant.

Secondly. That if the regularity or validity of the previous steps can now be inquired into, the plaintiffs were entitled to their patent; because, though no settlement was made under the enacting part of the 9th section of the Act of April, 1792; yet, the Population Company were prevented, first, by the danger of doing so during the Indian war, and the hostilities committed in this country during that period; and afterwards, by the opposition of certain intruders, (amongst which the defendant was one,) who associated themselves together in

large bodies, drove away settlers placed there by the company, and deterred others from coming; and lastly, because the defendant, in 1795, with his associates, agreed, with the agent of the company, to take certain tracts under the company, (in which the present was included,) upon certain terms agreed upon; that the defendant entered, in 1796, by virtue of this agreement, and afterwards disclaimed to hold under the company, and held in opposition to them. In the construction of the 9th section of the Act of April, 1792, it was urged, that persistance for two years was sufficient, under the proviso, to save the forfeiture; or, if not so, if continued for five years, it was sufficient. In either case, the plaintiff's right was preserved, as the company, after the war, persisted in making their settlements, but were prevented.

The plaintiff's right to recover, was resisted upon the following objections:

1st. That the 390 warrants were all taken out by the Population Company, though in the names of different persons; whereas the law does not contemplate any one person obtaining a warrant for more than one tract.

2d. The warrant in 1794, was surveyed on a different tract of land from that now in dispute; and, therefore, the surveyor, having executed his authority, could not resurvey, in 1795: and it is under this last survey, that the land in question was located. The survey of 1794 was merely upon paper; and the Act of Assembly of April, 1785, declares that the surveyor shall go upon the ground, and mark all the lines and corners.

3d. The condition of settlement is precedent to the vesting of the estate, and the plaintiff cannot recover until he has made a settlement under the proviso in the 9th section. If not a condition precedent, it is a limitation to any settler upon failure of the warrant holder to make the settlement, and no entry of the commonwealth is necessary. 2 Blacks. 155. Harg. Co. Lit. 214. b.

4th. The plaintiff was bound, as soon as the impediment

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part of the subject, because, if persistance is made a substitute for settlement, I shall endeavour to prove, that this *settlement* means *improvement*, and five years residence; and if so, it is still incumbent on the plaintiff to show that he persisted for that time, in his endeavours to make and continue his settlement. But, as I never expect to hear this point better argued than it has been, or to have a better opportunity of considering it; I think it best to give an opinion upon it, that the parties may either regulate themselves in respect of the other ejectments, or may take an exception, and have the point settled in the Supreme Court.

I prefer the construction given by the counsel for the defendant, because it is more consistent with the acknowledged spirit of the law, which was to encourage the population and improvement of this country; and it is liable to fewer difficulties, when applied to the various cases, that may be supposed as occurring under the law. By this construction, settlement and improvement are obtained instead of *endeavours;* and a precise criterion, as to the degree and continuance of those endeavours, is afforded by the law itself, instead of being left to fancy and conjecture. If it be asked, how long is the warrant holder, (after a prevention has taken place,) to persist in his endeavours to make a settlement, the answer is afforded by the law itself, "until such actual settlement is made;" for to that object are the exertions to be applied. If it be asked, how such actual settlement is to be made? it is again answered, by the enacting clause of this section,—by making certain improvements, and residing thereon for five years next following the first settlement.

If, on the other hand, these questions be put to those who support a contrary construction, they answer—First. That the persistance, if it continue *two years*, is a performance of the condition. This, I think, cannot be supported; for he is to persist in his endeavours to make *such actual settlement as aforesaid*, which I take to mean residence as well as improvement; because the ninth section has declared what an actual

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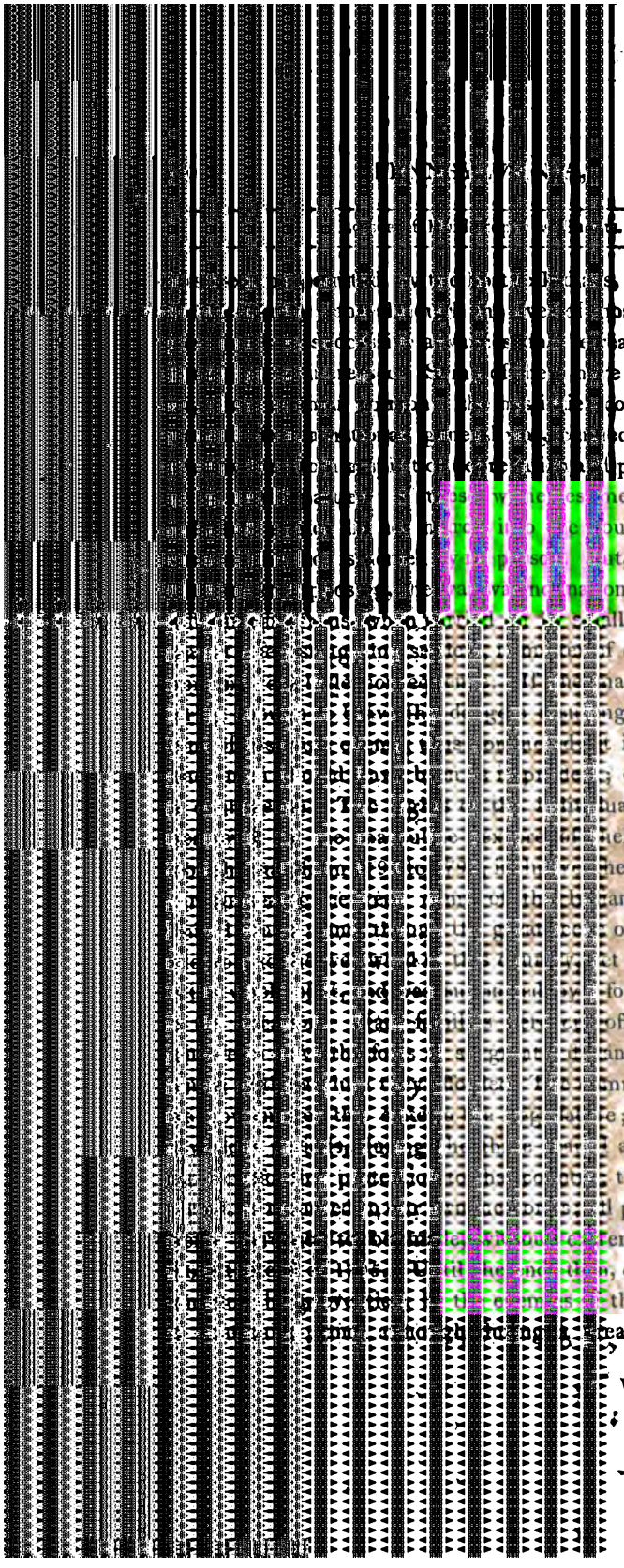

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title, under the warrant, as will enable them to maintain a possessory action against a tortious possessor; for this was essential to enable them to perform the condition. So, although no proof is given to fix upon the defendant any specific act of violence, and, although the mere circumstance of his being associated with a company of intruders, would not make him a principal in the trespasses they committed, unless he was present; yet, if a settlement of this tract was prevented by this society, it would be highly unjust to permit the defendant to avail himself of the defence, now set up, under such circumstances.

The Jury found a verdict for plaintiff.

Ingersoll, Lewis, Ed. Tilghman, and Dallas, for plaintiff.
Wm. Tilghman, M. Levy, and Foster, for defendant.

See post—Huidekoper *vs.* M'Clean.

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WILLING & FRANCIS *vs.* THE UNITED STATES.

It is not the *sale* of an American vessel to an American citizen, which subjects the vessel to a forfeiture of her privileges; but *the neglect to obtain a new register*, when the circumstances of the case, and the provisions of the Act of Congress, will permit the same to be obtained.

THIS was an action of debt upon a custom house bond given by the appellants, for securing the duties due upon the cargo of the ship Missouri, the property of the appellants, when she sailed from Philadelphia for Canton; but which ship, before her return, and whilst at sea, was in part sold by parole to certain persons, citizens of the United States, who, in like manner, resold their share to the appellants, after her return to port, but before her entry. These facts were disclosed to the collector before she was entered, and the appellants offered to take the oath, required by the 17th Section of the Act of Congress, passed 31st December 1792.

The cause was argued by Rawle for the appellants.

Mr. Dallas for appellee.

WASHINGTON, J. The pleadings in this case disclose the above facts, and being very long, have not been looked into very particularly by the Court; as it was agreed on both sides, that the only question was, whether the goods imported in the Missouri, were subject to pay foreign or domestic duties.

By the 1st section of the Act concerning the registering and recording of ships or vessels, passed 31st December 1792, all vessels which should be registered, pursuant to the directions of that law, were to be denominated and deemed vessels of the United States; and all vessels of the United States were, by law, entitled to certain benefits and privileges, denied to

foreign vessels; provided that those privileges should cease, whenever such vessel should cease to be owned, wholly, by citizens of the United States, and to be commanded by a citizen.

The ship Missouri was registered according to law, and has never ceased to be owned or commanded by citizens; so that she continued to be a ship of the United States, and entitled to the privileges allowed to such vessels, at the time she returned to port; unless she lost that character by the sale made to citizens, during the time of her being at sea. Whether such a consequence results from that transaction, must depend upon a correct construction of the 14th section of the above law, with such illustrations as may be drawn from some other of the sections; although I think the case may be decided upon that section, taken in conjunction with the first.

The first sentence of this section declares; that when any registered vessel shall be sold to a citizen, she shall be registered anew by her former name, or she shall cease to be deemed a vessel of the United States; and her former certificate of registry shall be delivered up to the proper officer, at the time the new registry is applied for. And, by the second sentence of the same section, the sale of such vessel is to be evidenced by an instrument of writing, in the nature of a bill of sale, which is to recite the said certificate at length; or otherwise a new registry cannot be obtained, without which, by the third sentence, the vessel is not to be entitled to any of the privileges of a vessel of the United States.

It is not easy to imagine, why the want of a new registry should in the first sentence be declared, within a parenthesis, a forfeiture of the privileges to which the vessel was entitled; and then the declaration of the same consequence, upon the same circumstance, should be repeated in the third sentence. But the latter is obviously tautology; for if the former could be construed to destroy the character of the vessel, *eo instante* that the sale was made, it was unnecessary to repeat, that she should not at any subsequent period be entitled to that charac-

ter. The obvious meaning of both is, that the character should be lost, not upon the *sale*, but upon the *sale and neglect to obtain a new registry*. But how is the new registry to be obtained? By producing to the collector a bill of sale, reciting at length the old certificate of registry, and by delivering up, at the same time, such old certificate. But that certificate, in a case like the present, is at sea; because the law so requires it, and consequently the party has it not in his power to deliver it up.

If, however, this must be done, or the privileges of the American character of the vessel be lost; then the law either requires the performance of an impossibility, which it is never supposed to intend; or it amounts to an absolute prohibition to our own citizens, to dispose of their vessels to other citizens, when they are at sea. But from no part of our navigation laws can we collect such an intention, and upon what policy is it, that we can presume it? If the cargo be privileged, until the moment of sale, why should the privilege be lost in consequence of the sale to a citizen? But the truth is, it is not lost in consequence of the sale; but the failing to obtain a new registry. If this be not done, the omission is punished, *as a fault*, by depriving the vessel of her American character. But can that be called a fault, which the party could not avoid, and which was produced by the injunctions of the law itself? No worse consequences would have resulted, if the sale had been made to a foreigner; and yet in the latter case, the Legislature thought proper to declare the forfeiture in express terms, and it arises *eo instante* that the sale is made; but not so if made to a citizen.

The fourth sentence of the same section is worthy of notice. If the time of sale be the period, when the old certificate should be surrendered, and if it be not then delivered up, the owner is subject to a penalty of 500 dollars; then the construction contended for by the District Attorney, not only prohibits the sale of a vessel at sea by one citizen to another, on pain of forfeiting the privileges of the vessel from that moment, but inflicts upon

him a penalty; although it is utterly impossible that he could do the thing, for which he is to be punished.

But, a vessel no more ceases to lose her American character, by the act of selling her, than by that of making an alteration in her construction. Now, suppose the vessel should be altered, either in the port to which she belongs, or in any other, would she lose her character, before it was in the power of her owners to apply for a new registry? And, if not, why shall she lose it before the same application could be made in consequence of a sale?

The provisions of the 17th section were intended to force a discovery of any alienations of the vessel which may have been made, in order that it might be known, whether the privileges she had acquired, were continuing. If it appeared, that she had been transferred to a foreigner, then her privileges were lost from that moment. If sold to a citizen, then it would enable the custom house officers to determine, whether foreign or domestic duties should be paid in future, in case a new registry should not be applied for.

I am, therefore, of opinion, that the appellants are not bound to pay more than the duties payable by a vessel of the United States; and, consequently, that the judgment of the District Court must be reversed.

Note.—This judgment was affirmed by the Supreme Court. 4 Cranch, 48.

Carson's Executors *vs.* Jennings.

The District Court of Pennsylvania, exercising admiralty jurisdiction, cannot proceed against a captor, into whose hands the proceeds of the capture have never arrived; the same being in the hands of the officer of another Court, in another State.

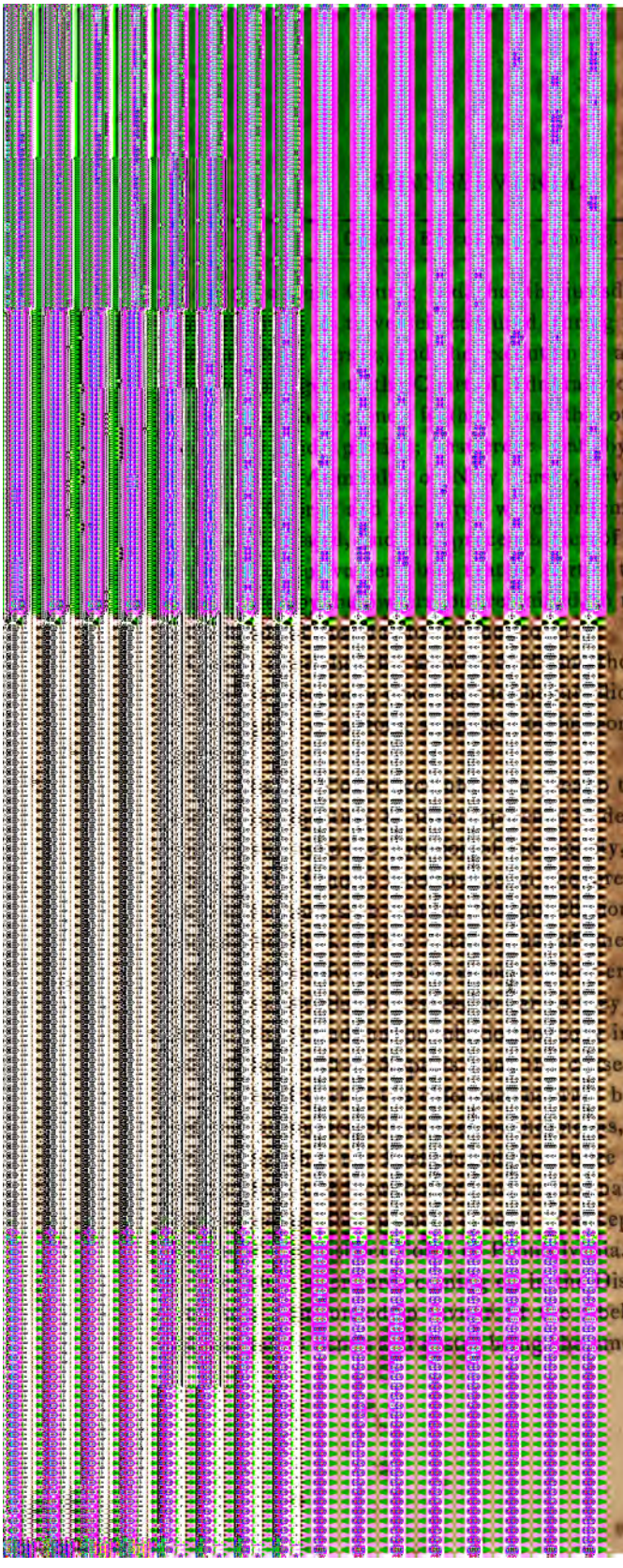
A Court of Admiralty can only proceed *in rem*, against the thing itself; or *quasi in rem*, against the proceeds thereof.

The execution of the sentence of a superior Court, can only be by a Court of Admiralty having the thing, which is ordered to be restored, within its power.

The captured, who has omitted to enforce a decree of a superior Court, reversing the decree of a Court of Admiralty; cannot claim, as damages, the loss he may have sustained, by a depreciation of the funds in which the proceeds of the capture may be invested. He should have applied to the Court below, to enforce the decree of the Court of Appeals; and, omitting so to do, the loss will fall upon him.

THIS was an appeal from the District Court of Pennsylvania. A libel was filed in that Court, by William Downing Jennings, late owner and proprietor of the sloop George, and her cargo, against Joseph Carson, one of the owners of the privateer, called the Addition. The original and supplemental libels state, that the George, with her cargo, being the property of the libellant, was, some time in August, 1778, on the high seas, captured, as prize, by the Addition, Moses Griffin, commander; was carried into New Jersey, where she was libelled, in the Court of Admiralty, and condemned; but, upon an appeal to the Court of Appeals, in prize causes, that sentence was reversed. The libel, in this cause, contains no specific prayer whatever; but Carson was arrested, and a monition was served on Griffin, the commander of the privateer.

Carson, after pleading to the jurisdiction of the Court, that



the moneys paid to the Marshal of New Jersey, according to the continental scale of depreciation, as established in that State; and interest thereon from the date of the decree of the Court of Admiralty, until two months after the reversal, and from the time of commencing this suit in the District Court, to the final decree.

WASHINGTON, J. In the argument of this cause, many points were raised, and debated at considerable length. But, as it may be decided upon its real merits, I shall avoid giving any opinion upon the preliminary points.

Whether the District Court of this State can, under any circumstances, enforce against the owners of the privateer, residing here, the sentence of the old Court of Appeals, directed to the *Court of Admiralty of New Jersey*; the proceeds of the prize being there, and always afterwards, in the hands of the marshal of that Court, under its order; and no part thereof having ever come to the possession of the owners of the privateer; is a great question, which it is not, perhaps, absolutely necessary to decide at this time. But, I shall not conceal the opinion I at present entertain, that the District Court of this State cannot, in such a case, grant relief against the person of the owner. Prize causes are always *in rem*, against the vessel and cargo, or one of them; *in quasi in rem* against the proceeds, wherever they are. But, when the object of the libel is to execute the decree of the Court, the proceedings of the Court are limited by the decree, to be enforced against the thing directed to be restored.

I shall now consider the case upon its merits; and the question will be, whether, under the peculiar circumstances attending this, the appellees are entitled to relief against the owners of the privateer.

At the threshold, we are at once struck with the antiquity of the demand. The sentence of the Court of Appeals was pronounced on the 23d of December, 1780, ordering restitution of

the George, and her cargo, but without damages; and directing the Admiralty Court of New Jersey to issue all proper process for executing that sentence. The cause appears to have slept from that period until the year 1790; when it revived, in the form of a libel, for the value of the vessel and cargo; filed in the District Court of Pennsylvania, against the owner of the privateer, and afterwards against the present appellants, his executors. The privateer, and her cargo, had been sold under an order of the Court of Admiralty of New Jersey, in the year 1778, and the proceeds remained in the hands of the marshal; or, at least, they were never called out by any order of that Court. It was fairly asked by the appellants' counsel, why this delay had taken place? and, if no substantial injury had resulted to the appellants by the delay; it might have been well answered, that it was unimportant to account for it. But, the counsel for the appellees have endeavoured to account for it, in a manner by no means satisfactory to me. They say, that the States of Pennsylvania and New Hampshire, denied the right of the old Court of Appeals to take cognizance, by way of appeal, of the decrees of the Courts of Admiralty of these States. Admit the fact; yet, it does not appear that this point was ever controverted by the State of New Jersey. It is true, that the representatives of that State in Congress, voted against the exercise of this right, in the case of the sloop Active; but that vote was overruled by a majority of Congress; and, I presume, the vote of the majority was submitted to. But, if the objection I am now considering, be attached to the substantial merits of the case, it is incumbent on the party who would repel it, to show, by clear proof, that *an attempt had been made*, to have the sentence of the Court of Appeals executed, by the Admiralty Court of New Jersey; or, that such an attempt would have been ineffectual. This is not stated in the record, and has only been mentioned in argument. I do not notice the objection with a view to a bar of the remedy, from length of time; but does it materially affect the interest and rights of the

appellees? What would have been the situation of Carson, if an application had been made to the Admiralty Court of New Jersey, to execute the sentence of the Court of Appeals, as soon as it could have been done? Most clearly, the former would have directed the marshal to pay over the proceeds of the vessel and cargo, then remaining in his hands, to the appellees. If the money for which the vessel and cargo had been sold, had, in the meantime, been diminished in value by depreciation, could that Court have gone into any calculations to ascertain the loss; and to fix it upon the shoulders of the captors? I think, clearly not. By what rule could they have graduated the scale of depreciation? Congress had established none at that time; nor do I know that the State of New Jersey had. The loss had resulted from the circumstances of the revolution; which it would have been as invidious, as it would have been mischievous and unpatriotic, for a Court of Justice to have admitted, as the consequences of depreciation. Besides, the duty of the Court of Admiralty was to execute the sentence of the Court of Appeals; not to new model, and totally to vary it, by decreeing damages, or an additional sum, in nature of damages, against the captors; which the Court of Appeals, knowing of the sale, and consequently of the depreciation, had not thought proper to award.

The loss then, by depreciation, took place either before the sentence of reversal, or afterwards. If before, it was a loss which the appellees must have borne; if they had, (as it was their duty to do,) applied to the Court of Admiralty, to carry the sentence of the Court of Appeals into execution. If so, can they by any act or omission of their own, shift the loss from their own shoulders to those of the appellants, who had no control over their actions? If the loss by depreciation happened afterwards, then the argument against the appellees is still stronger; because they might have obtained the money, of its then value at least; and it would be monstrous to contend, that they could claim all the subsequent loss from the captors, by

neglecting to do what they not only might, but what it was their duty to have prevented. If a loss must be sustained by one of these parties, does it consist with the principles of equity, or even strict justice, that he who has caused it, shall fix it upon another; who neither caused it, nor had it in his power to have prevented it? For, it is to be remarked, that it was in the power of the appellees, at any time after the sentence of the Court of Appeals, to have compelled the payment of the proceeds of vessel and cargo; but the appellants could exercise no power whatever over the subject. It is therefore of no consequence, at what period the loss by depreciation took place.

When I consider the object of this libel, as being to enforce execution of the sentence of the Court of Appeals, I view it in a light most favourable to the strict right of the appellees. The case is too entirely destitute of equity, to stand upon the ground of an original claim for damages.

Upon the whole, I am of opinion, that the decree of the District Court should be reversed, and the libel dismissed with costs.

NOTE.—In February 1807, this decree was affirmed in the Supreme Court, 4 Cranch. 2. The Supreme Court of the United States determined, in this case; 1. That the District Courts of the United States, as Courts of admiralty jurisdiction, have authority to enforce a decree of the Federal Court of Appeals. 2. The District Courts of the United States, are Courts of Admiralty; and, as no law has regulated their practice, they proceed according to the general rules of the Admiralty.

HUIDEKÖPER *vs.* STILES.

Justices of the peace of the State of Pennsylvania, may receive proof of the service of process of ejectment, issuing out of the Circuit Court of the United States.

What will be deemed a sufficient service of a declaration in ejectment.

MOTION for judgment against the casual ejector, on notice to the tenant in possession, served and proved by the affidavit of the deputy marshal, before D. Meade; who, by a certificate of the prothonotary, is stated to have qualified as a justice of the peace, of the Common Pleas of Crawford county.

Levy objected, that a State magistrate has no power to take proofs of service of process. His having a power to administer the oath of office to the deputy marshal, in a particular case, 4 vol. Laws 274, shows that he has no such authority in other cases. He also objected to the affidavit, that it did not state positively, that the tenant found in possession was tenant in possession; it is left to implication: it is said to have been served on A. B., tenant in possession. 2 Bac. Abr. 162. The affidavit should be positive, that J. D. was tenant in possession, or acknowledged himself to be so. Affidavits of service on A. B., tenant, or C., his wife; or the wives of A. & B., who, or one of them, are tenants, are not sufficient. Ibid.

In one of the cases on which this motion is made, the declaration was delivered to the father of the tenant in possession, on the land, and in the house of the tenant in possession. In another, it is served by nailing the declaration on the door of W. M., on the premises. But the defendant does not state that the house was empty. If the defendant did not live there, but the marshal knew where he lived, it ought to have been served personally on him.

The Court granted a rule to show cause, at the adjourned Court, why judgment should not be entered up.

Huideköper *vs.* M'Clean.

By the practice of Pennsylvania, relative to land titles, if a warrant is taken out for land adjoining A. B, and it is found that the land adjoining A. B. has been previously taken up; it may be laid upon land adjoining that so held by a previous title.

The inceptive title of a warrant holder for lands in "the new purchase," is a mere right of possession, to be consummated by a compliance with the requisites of the law; and unless they were performed, no estate vested in him, and he lost his right of possession.

Upon a forfeiture being incurred, by a non-compliance with the terms of the warrant, no third person could enter on the land; no vacating warrant could issue, as it is provided by the law, that it can only issue to an actual settler.

THIS case did not differ materially from that of Huideköper *vs.* Burrus. In 1796, a cabin was built by a person claiming under the Company, and some land was cleared; but upon the evidence, the question left to the jury was, whether a settlement was commenced within a reasonable time after the prevention ceased; and whether ten acres were cleared within five years after the first settlement.

But in this case, the following objections were made to the plaintiff's title:—

First. That the warrant was issued to Charles Levi, for four hundred acres, north, or adjoining land this day granted to Charles Hall. But the land in question did not adjoin Charles Hall; there being between this and Charles Hall's, another tract to which another was entitled.

On the part of the plaintiff, the construction of the law was re-argued, much as in the former case, with this additional observation; that if actual settlement means improvement within two years, and residence for five, that this absurdity would

follow; that by the preceding part of the ninth section, it would require a settlement of five years to be performed in the course of two.

The plaintiff also relied upon a prevention, from unlawful combinations of settlers.

WASHINGTON, J., charged the jury: As to the objection made by the defendant; it sufficiently appears in evidence, that the warrant for four hundred acres, in the name of Charles Hall, was claimed by a prior improvement of Luke Hill; and that Charles Hall's warrant was considered as a lost one. Consequently the company could not survey Charles Hall's warrant on that land, and were necessarily obliged to go on to the next adjoining, to survey Charles Levi's warrant. This is the constant practice in this State, and a contrary decision now, would be of most mischievous consequences. The patent states, that it is for the land surveyed for Charles Levi, by virtue of his warrant, which must be adjoining Charles Hall, unless an interruption had taken place.

It has been contended by the plaintiff's counsel, that even if they have failed to comply with the law; yet, until the Commonwealth has taken advantage of the forfeiture, no other person can enter upon the land, and defeat the title of the plaintiff. We think there is no weight in this argument. It is true, the warrant holder had an incipient title; but it was merely a right of possession for particular purposes; that is, to settle and improve, so as to comply with these conditions, on the performance of which an estate was to vest in him; but unless those conditions were performed, no estate did vest in him, and he lost his right of possession. The State was not bound to pursue any particular mode for regaining the possession. The law authorized any person to acquire a title to lands, for which warrants had been granted, and the condition not performed by warrant or settlement. But if no person can enter and settle on lands, where the warrant holder has neglected to per-

form the conditions on which he was to have an estate in it; then no vacating warrant could ever issue; as that must be to an actual settler, and yet by the express words of the law, such a warrant may issue, in cases where the conditions imposed on the warrant holder have not been complied with.

I come now to the construction of the law. I have listened with great pleasure to the second argument of this question, with a mind I think unprejudiced by the opinion I delivered in the case of Huideköper and Burrus; and if I know myself, I would with pleasure have retracted that opinion, if I felt myself convinced by the able and ingenious argument I have now heard.

My opinion then was stated to be, that actual settlement meant improvements made within two years, and residence for five. This is controverted, upon the ground that it would be to require a five years' residence, to be performed in the space of two. This absurdity really grows out of the literal reading of the enacting clause of the 9th section; but we must see if it may not be avoided, by such an interpretation as will make all the parts of the law consistent and harmonious.

The words are "that no warrant or survey, &c. shall vest any title to the lands therein mentioned, unless the grantee has, prior to the date of such warrant, made, &c., or shall within two years next after the date of the same, make, or &c. an actual settlement thereon, by clearing, fencing, and cultivating, two acres on each hundred, erecting a habitation for the residence of man, and residing, or causing a family to reside thereon, for five years next following his first settling the same, if, &c."

Now, the actual settlement is thus declared to consist; in making certain improvements within two years; and a residence for five; but the apparent absurdity arises merely from the order in which the sentence is arranged, and by an easy transposition will be removed. I read the sentence thus,—that to give a title, there must be an actual settlement, by making certain improvements thereon within two years after the date of

the warrant, and residing thereon for five years, so as to make an actual settlement consist in those two things, improvement within two, and residence for five years after date of the warrant. That this is the plain legislative definition of actual settlement, appears obvious to me, from the words of the law itself, as above quoted. If actual settlement means improvements, made within two years, independent of residence, then the difficulty I stated in the case of Huidekoper *vs.* Burrus must exist; viz. that if a man had made the improvements required in the enacting clause, but had been driven off, so that he could not continue his residence, he would have been exposed to the complete operation of the enacting clause, without being saved by the proviso; for the latter could not apply to such a case.

But in truth it is of no consequence in this, any more than in the other case, whether actual settlement means both improvement and residence, or only the former; because, in neither is it pretended that the improvements were made, within two years from a reasonable time after the prevention ceased. The great question is, whether persistance to make the settlement, was intended to consist in *endeavours* merely, or in actually making the settlement; whatever may be sufficient to constitute it. If the party is not to persist to effect, after the prevention had ceased, that which he must have done had it never existed; then he must persist, during the time when he is prevented, whether that be long or short. Now, to require persistance in doing what he is prevented, and therefore excused from doing, is, to my comprehension, an absurdity, with which the Legislature should not be charged. Persist how, and for what purpose? The law supposes the party to be driven off and prevented from settling; and if, under such circumstances, he is to persist in his endeavours to settle, nothing short of actually settling himself upon the land can do; for although he may risk his life in the attempt, yet if he can attempt it, and run the risk, and if he is not to go thus far, what is he to do to afford evidence of persistance? Will his hovering on the borders of the

land; sometimes in a moment of tranquillity, going on at the imminent hazard of his life, and then flying when he hears of an enemy, answer the purpose? Could the law have intended this? Is not its meaning obviously otherwise? And if he was not required to do this, by what scale are we to graduate the degrees of persistance? Would not a man, who, (during a period when it was madness to attempt a settlement,) resided generally in the interior of the country, without spending a thought upon his intended settlement, until the danger was over, be considered as having complied with the conditions of the law, as fully as the company, whose agents had made preparations for settling when the danger should be over? If not, then how will the company enter into competition, upon the score of merit, or rather of hardihood, and culpable temerity, with those fearless adventurers, who went on the lands at a time when they associated arms of defence with the instruments of agriculture: who never went to their fields but with their rifles, and carried them from one cornhill to another. The truth is, that persistance can never be considered as contemporaneous with prevention. So long as prevention continues, the law excuses the party from persisting; for it would be unavailing. But if persistance was to consist in making not one effort, during the period of prevention, then to say that such a persistance is a compliance with the requisites of the law, is to substitute, in the place of a substantial good, viz. the settlement of the country, a sort of merit merely imaginary. The only way therefore to make sense of the law, and to comply with the manifest intention of the Legislature, is to construe the proviso as requiring the party to do that, after the impediments had ceased, which he must have performed had they never existed. He must persist until his endeavours are crowned with success. Instead of being obliged, at the risk of his life, to improve within two years from the date of his warrant, and to reside for five, it is enough, under the proviso, if he does the same things after the prevention had ceased.

As to what shall be deemed a reasonable time for commencing the settlement, after the prevention had ceased, I shall leave it entirely to the jury to decide, upon the circumstances of that country, after the war had entirely ceased, and the preparations necessary for such an undertaking.

As to the combinations of associated intruders, if they went no farther than to support what they supposed to be their rights, for it appears they asserted titles adverse to that of the company; I do not think that this ought to excuse the plaintiffs, for not making their settlement in time; if you should be of opinion they were not made in time, neither do I think, that, if their opposition was unlawful, and to support tortious intrusions, that they should affect the defendant, unless he appeared to have been one of the associates, or to have opposed the settlement of the country.

The Jury found for the plaintiff.

CIRCUIT COURT OF THE UNITED STATES.

PENNSYLVANIA, OCTOBER TERM, 1804.

BEFORE { Hon. BUSHROD WASHINGTON, Associate Justice of the Supreme Court.
Hon. RICHARD PETERS, District Judge.

STONE ET AL. *vs.* KETLAND.

A master of a vessel, who at sea bears down on another vessel to leeward, which has hoisted her colours, is justified in bearing down upon her, if it is a custom to do so.

The master of a vessel is bound to his owners, and he and they to every one who may be affected by his acts, for his skill and care in the management of the vessel under his command.

If from want of care or skill he injures another vessel, the owner of the vessel under his command is answerable.

THE case was, that the Washington, the property of defendant, in her passage from Batavia to Philadelphia, observing a schooner, the property of the plaintiff, on her outward passage, and with colours flying, bore down upon her, supposing she wished to speak her. Upon approaching her, the wind variable and dying away, it was found she would not obey her helm, which was put in the proper situation to avoid running against the schooner; finding that this was now inevitable, the captain ordered the helm to be changed, and the sails put aback, to deaden her way, and diminish the shock. The consequence however was, that the schooner was upset and sunk. This ac-

tion was for damages. The defence was, that the Washington was justified in bearing down upon the schooner, it being the acknowledged and universal understanding at sea, that if a vessel to leeward hoists her colours, it is always understood by a vessel to windward, that she wishes to speak her; and this custom was clearly proved by many respectable sea captains. That the Washington, in bearing down on the schooner, with this view, was managed in a manner which the most skilful and attentive commander could have done. There was contradictory evidence upon this point, both as to facts and opinions. The defendant also relied upon the repeated acknowledgment of the captain of the schooner, that the accident was inevitable, and that no blame attached to captain Williamson, the commander of the Washington.

In charging the jury, *WASHINGTON J.* laid down the rule, that a man who undertook to navigate a ship, was pledged to his owners, and he and they to all the world who might be affected, for his skill, care, and attention. That it was not sufficient for him to say he had exercised his best judgment; but in case any person sustained an injury from him, he was bound to show that he possessed and had exercised the judgment of a skilful and careful commander. That the signal, as understood at sea, was a justification for the Washington, in departing from her course, and bearing down to the schooner, if, in the opinion of the jury, the custom was sufficiently proved. That it was for the jury to say, whether, in doing so, the captain had conducted himself with skill and care; whether he manœuvred as he ought to have done, and in due time; if not, the defendants were liable. That the acknowledgments of the captain, were to be considered as evidence corroborating the opinions of the defendant's witnesses, that captain Williamson had acted properly, and that the accident was inevitable, and nothing farther.

Jury found for the defendant.

Ketland *vs.* Bissett.

The character of the defendant not being impeached, evidence to support it cannot be admitted.

It seems that depositions sworn to, but not signed by the witness, may be read in evidence.

Each interrogatory in a commission should be answered separately, at least in substance; and the omission of such answers is fatal to the whole commission; although the witness in answering the general interrogatory, says that he knows nothing further material to either party.

THE plaintiff directed defendant to ship for him good Madeira wine, for the Bombay market; he shipped the wine, and the only question was, whether he had shipped such wine as was directed; the plaintiff alleging that it was unsound, would not sell at Bombay, and was necessarily carried to Calcutta, where it was sold for one hundred rupees less, than a cargo of indifferent wine, carried to Bombay, at the same time, was sold for.

On the trial, the following points of evidence were decided:

1. That the defendant's character not being impeached, evidence by the defendant to support his character was improper.

2. Depositions were offered, and objected to, because not signed by the witnesses. Evidence being given that the opposite counsel had waived the objection, *Washington J.* admitted the depositions, and observed, that he was inclined to think, that without the waiver, the objection was not good, but gave no opinion.

3. The depositions are in answer to interrogatories, but many of them are not answered or noticed. The answer to the general interrogatory, is in the usual way, that the witness knows nothing farther, &c. The whole commission was objected to, for this reason. The Court thought the objection good; each interrogatory should be answered, at least in substance, and not to have examined the witnesses to each, is fatal to the whole commission.

RUAN *vs.* GARDNER.

In an action on a policy of insurance, on goods; one of the part owners of the vessel, not interested in the insurance, may be examined to prove the loss, and other facts.

H. S. at the request, and for the use of the plaintiff, effected insurance on five hogsheads of sugar, on board *The Brothers*, and on ten hogsheads of sugar on board *The Sisters*; and in describing the same, by the supposed marks, a mistake was committed; but the intention to insure the quantity of sugar, according to his letter of instructions, was declared to the insurance broker. The property of the plaintiff was proved to be on board. The mistake in the marks was declared not to be material. *Quere*, if the assured had other sugars on board, and the claim had been for a partial loss?

Proof, that possession was taken of the vessel, by a privateer under Spanish colours, and that she was carried into Porto Rico; is sufficient evidence of a total loss, after three years; during which time, nothing has been heard of the vessel or cargo; and to enable the assured to recover, it is not necessary to show a condemnation.

The agent, who makes the insurance, after purging himself on his *voire dire*, is a good witness for the assured, to prove matters respecting the policy.

The protest of one of the sailors of the captured vessel, made after his return to the United States, at the first port, and left with the broker of the assurers, to fix the period from which the loss was to be paid; may be given in evidence for that purpose; but it is not evidence of any fact contained in it.

Evidence to prove a particular course of trade, or other matters in the nature of facts, is proper; but not to prove what, or how, the law is considered by merchants.

Witnesses cannot be examined to prove a custom, that when insurance is made on goods, with a particular mark; those goods, *so marked*, must be on board, in order to entitle the assured to recover.

A suit, on a policy of insurance, is properly brought, if instituted in the name of the owner of the property intended to be insured; and, if the assured is a citizen of another State, the Circuit Court has jurisdiction; although the agent, whose name only appears in the policy, is a citizen of the State of Pennsylvania.

Ruan vs. Gardner.

THIS was an action against the defendant, as an underwriter, upon a policy effected at the office of Shoemaker & Barret, in the name of Henry Sparks, and all others interested, (in the usual form,) on five hogsheads of sugar, marked D, on board the Brothers, at, and from, Santa Cruz, to Philadelphia; valued at 551 dollars. The vessel, on her passage, was captured by a Spanish privateer, and carried to Porto Rico. Sparks, having received information of the loss, gave notice at the insurance office, and offered to abandon; which was refused.

The plaintiff, to prove the loss, and the other facts, offered the deposition of J. Tatem, one of the part owners of the Brothers, which was objected to by Wells, for defendant, on two grounds; first, that this being a valued policy, it was to be presumed, the freight was included in the insurance; and, therefore, he was interested. Second; that he was interested to fix the loss on the underwriters, in order to get rid of the obligation imposed upon him by the bill of lading, to deliver the goods at Philadelphia. He cited 1 Dall. 7. 62. *By the Court.* (Peters, J. present.) There is nothing in the first reason; because, whether the freight of the sugar was covered by the policy or not, the witness has no interest in the recovery of the plaintiff, or his failure; since, if he has insured the freight, his right to recover cannot be affected. But, at any rate, it is nothing but presumption that it was covered. As to the second ground of objection, should the plaintiff sue the owners on the bill of lading, the verdict would not be evidence in favour of the owners; and, though a recovery against the underwriters, on account of a loss by capture, would, in all probability, prevent a suit against the owners on the bill of lading; yet, this is merely a consequence too remote to affect the competency of the witness. If he have any interest, it goes to his credit, and must be submitted to the jury. *Judge Peters* added, that the plaintiff's demand in this case, being grounded on a loss by capture, would be evidence against him in an action against the owners.

It was then objected to the reading of the depositions, to prove the loss; that the protest of the captain is essential to prove it; and, that no other evidence would do; to prove which 1 Dall. 317. 2 Idem, 196, were read.

Per Cur. These cases prove what we admit; that, where the captain's protest is offered in evidence, it being contrary to the common law rules of evidence, it is essential, that the protest should be made at the first port where the protest can be made; whilst the facts stated, are fresh in the recollection of the captain, and are free from any influence afterwards derived from conversing with the owners, or others.

But, in this case, there is no protest offered; and, therefore, no question as to its validity. But, no case can be shown, that, in an action against underwriters, on a loss by capture, the captain's protest is essential to prove the loss. Other evidence may be offered. It would be strange to say, that the owner of goods should lose his remedy against the underwriters, because the master, the servant of the owners of the ship, had neglected to make a protest; and though, if the protest were necessary, he would have his remedy against the owners of the vessel; yet he would be deprived of his remedy against the underwriters; which might, in many cases, be the only effectual one. Indeed, protests of captains are not admitted as evidence at all in some of the State Courts; and it is at least questionable, whether they have been admitted upon perfectly clear ground in any.

The defendant then objected to admitting the examination of Henry Sparks, in whose name the policy was effected, upon the ground of interest; since it appears from the face of the policy, that it was effected for him; that this Court could not entertain jurisdiction of the cause, since Sparks was a citizen of Pennsylvania, and was substantially the plaintiff.

By the Court. The objection being to the testimony of the witness on the ground of interest, he must be sworn on the *voir dire*; and, as to the jurisdiction of the Court, that is a distinct ques-

tion, which cannot be understood until he is examined. Sparks, being examined, and denying any interest in the event of the cause, was sworn in chief, and stated; that he was written to by the plaintiff, to effect an insurance on five hogsheads of sugar, on board the Brothers, and ten on board the Sisters. The order for insurance was received in a triplicate letter, at the top of which were these marks—O. pr. Sisters—D. pr. Brothers. That not knowing these initials stood for *original* and duplicate, but mistaking them for the marks on the sugars, he designated the five hogsheads in question, and had them insured by the mark D. But, to prevent any inconvenience which might result, if he should be mistaken as to the meaning of these initials, he informed the insurance broker, Jacob Shoemaker; that, let the sugars be marked as they might, his intention was to insure the five hogsheads mentioned in that letter; and, to identify it, he got Mr. Shoemaker to put his name at the foot of it, with the date. The latter part of his evidence was strongly supported by Shoemaker. He further stated, that, during this conversation with Shoemaker, the defendant came into the room. He afterwards received one of the bills of lading, by which he found the sugars were marked W. R.; also notice of the capture; of which he immediately gave notice at the insurance office, and offered to abandon to the underwriters.

The loss was proved by captain Tatem, who was part owner of the Brothers and Sisters, commanded the Sisters, sailed in company with the Brothers, when both of them were taken by a privateer under French colours, and the Brothers was carried into Porto Rico. He further states, that he has never heard of the captain or any of the crew since, except one sailor, who returned to Philadelphia: also, that the plaintiff had on board the Brothers, only the five hogsheads of sugar, marked D.

This sailor made his protest in Philadelphia, which was delivered in at the office of Shoemaker, in consequence of a clause in the policy, that payment was to be made within thirty days

after proof made of the loss. This protest was offered by Levy, as evidence of a compliance with that provision in the policy, and objected to by Wells, as inadmissible; being made by a sailor, and not the captain, and not made at the first port.

By the Court. The evidence is proper, for the purpose for which it is offered; but, the facts stated in it are not evidence, to be laid before the jury, to prove the loss.

Wells then offered witnesses to prove, that it is the custom, when insurance is effected on articles with a particular mark, they must be on board, to enable the party to recover. Cited Cumming, 230.

By the Court. You may examine witnesses to prove a particular course of trade, or other matters in the nature of facts; but not to show what the law is. Nothing could be more dangerous, than to fix the law upon the opinions of particular men. Overruled.

The defence was, that there was not sufficient proof of loss; that there is no sentence of condemnation produced; that the property insured, was different from the property lost, the former being marked D. and the latter WR.; in consequence of which, had the vessel come safe, the assured might have demanded a return of the premium; and, if so, he cannot claim the loss.

It was further contended, that the Court had not jurisdiction of the cause, since the policy is in the name of Sparks, a Pennsylvanian; and, lastly, that if the Court had jurisdiction, Ruan cannot recover on a policy made in the name of Sparks.

In answer to the last objection, Levy contended, that it had long been settled, that, until the act of Parliament, which requires agents to insert in policies the names of their principals, the action might be brought in the name of the trustee, or *cestui que trust*. He cited Cumming, 276. 1 Show. 151. 4 T. Rep. 342, 343. 1 East's Rep. 335.

The Court were of opinion, that there was no weight in the objection to the juriadiction, or to the action. As to the first;

because Ruan is not only the nominal, but substantial and real plaintiff—it being clearly proved, that Sparks effected the policy upon property belonging to him, and at his request. As to the second; that the action might certainly be supported in the name of the principal, though not specially mentioned; the policy being in the usual form, in the name of Sparks, and of all other persons having interest.

WASHINGTON, J. charged the Jury. This is an action to recover the loss upon a valued policy, effected by Sparks, for the benefit of Ruan, the plaintiff. Tatem has been examined, and states, that he was in company with the Brothers, when she was attacked by a privateer under Spanish colours, was made prize of, and carried into Porto Rico. There is no opposing testimony; and Tatem, in point of credit, stands unimpeached by any other witness. Independent of this positive evidence, it is now three years since the capture, and nothing has been heard of the vessel and cargo. As to a sentence of condemnation, none is necessary; because the voyage having been put an end to by the capture, the assured had a right, on notice of it, to abandon to the underwriters; which it appears he did in due time.

The next and most important question, is, whether sufficient evidence has been given, that the five hogsheads, shipped by the plaintiff, were covered by the policy, or not. It appears, that the agent of the plaintiff acted under a mistake, when he insured the sugar as marked D; but, doubting whether it was or was not a mistake, he did every thing he could, to satisfy the broker, who, (*pro hac vice*,) was the agent of the underwriters; that the sugar insured, was the five hogsheads on board the Brothers, shipped by the plaintiff. It was perfectly immaterial to the risk, what were the marks on the hogsheads, provided the risk undertaken by the underwriters, was neither charged nor increased. Nor was it the case; since it is in proof, that the plaintiff shipped but five hogsheads on board the Brothers. If,

indeed, he had had more, some marked D, and others with other marks, and a partial loss had happened; it would not have been competent to the plaintiff to shift from one mark to another, so as to alter the risk, and possibly make the underwriters liable for hogsheads not insured. But this was not, and could not be the case, in the present instance.

The plaintiff, therefore, having proved the loss; property in the goods insured; notice and proof of loss at the insurance office, and an abandonment; if the jury believe the witnesses, their verdict must be for the plaintiff.

Jury found for the plaintiff.

WALKER ET AL. *vs.* ROBERT SMITH.

No man can compel another to render him acts of friendship, or service, of any kind whatsoever, gratuitously, or with a view to compensation. But if the person applied to consents to render the service, and undertakes the business, he is bound to act in conformity to the terms on which the request was made.

In commercial agencies, this rule should be strictly enforced.

The relinquishment of commission on an agency, does not release from the effects of negligence.

An agent who does not comply with his instructions, is liable for the loss occasioned thereby, although the services were gratuitously rendered.

In suits for vindictive damages, the jury have the right to decide on the amount, without the control of the Court; but where they are extravagant, the Court will interfere. But in other cases, where a rule can be discovered, the jury are bound to follow it; and where a sum of money has been lost to the plaintiff by the negligence of the defendant, the amount of damages which a jury can give, is the sum the plaintiff has been thus deprived of, and no more.

THE plaintiffs, merchants in London, having been applied to by a Mr. Brown of Philadelphia, for a parcel of goods, and doubting his solidity, were introduced by the mutual friend of the plaintiff and defendant, to the defendant; and on this introduction, they sent the goods to him, and in a letter, stating their apprehensions of Brown; requested him to receive the goods, but not to deliver them to Brown, without payment for the amount being received, or such security given, as the defendant should approve; and in case neither was done, he, the defendant, was to dispose of them for account of plaintiffs. The defendant received the goods, and delivered them to Brown, without receiving payment or security. Brown afterwards failed; and by a compromise, part of the debt was received, and remitted to the plaintiffs; and this action was brought to recover

the balance. In the account forwarded by the defendant, to the plaintiffs, after the failure of Brown, and the compromise, no commissions are charged.

Ingersoll, for defendant, contended, that a discretion was given the defendant to take security or not; that he acted for the best, without a view to any compensation whatever; and having himself trusted Brown, he had done for plaintiffs, as he would have done for himself. He therefore argued, that the plaintiffs were not entitled to recover at all. But if they were, he insisted, that it was in the discretion of the jury to find such damage, less than the loss sustained by the plaintiffs, as they might think right; taking into consideration all the favourable circumstances which attended the defendant's case. He cited, 1 Dall. 180. 2 Wils. 328. 2 Bac. Abr. 266. Bull. 156. 1 Espin. 179.

Both these positions were ably combated, by Sergeant and Dallas, for the plaintiffs.

WASHINGTON, J., charged the jury. This is a short and perfectly clear case. The facts are few, and agreed between the parties. It is my duty to state to you the law, and to apply it to the case. The principles of law, as applied to the duties and obligations of agents, have been correctly stated by the plaintiffs' counsel. No man can compel another to render him acts of friendship, or services of any kind, whether gratuitously, or with a view to a remuneration. But, if the person applied to, consents to render the service, and undertakes the business, he is bound to act in conformity to the terms on which the request was made. This rule is universal in its application, whatever may be the situations or professions of the parties; but, in commercial agencies, it is of great consequence, that it should be rigidly enforced. The defendant, by receiving the goods, and undertaking to act concerning them, bound himself to hold them, until paid for, or secured by Brown; and on his failure to do either, to dispose of them for account of the plain-

tiffs. But what has he done? He delivered them to Brown, without receiving payment or security; he did the very thing he was cautioned not to do. The discretion which the defendant had, was confined to the kind of security to be taken, and did not leave him at liberty to take security; or deliver the goods without any, as he might think proper. Had he taken security, which afterwards became insufficient, he would have been excused; provided he acted with that caution and prudence, which he would have observed in his own case. The defendant, by the very nature of the transaction, was entitled to a commission, as certainly as if the plaintiffs had promised it; and his relinquishing this compensation, after the loss had taken place, cannot alter the case. Indeed, he would have been liable, if it had been undertaken gratuitously. There was no ambiguity in the plaintiff's letter upon the subject; and therefore, the defendant is without excuse, and has taken upon himself to answer for the loss. He has made himself a guarantee of the debt.

The next question is, as to the damages? I admit the principle, that in cases sounding in damages, the amount of those damages depends upon the sound discretion of the jury. In cases, where merely vindictive damages are sued for, the jury act without control on this subject; because there is no legal rule by which they can be measured; and unless they are so extravagant as to induce a suspicion of improper conduct, the Court will not interfere. But in these cases, where a rule can be discovered; the jury are bound to adopt it. That rule is, that the plaintiff should recover so much, as will repair the injury sustained by the misconduct of the defendant; and applying this rule to the present case, what other measure of damages can be thought of, but the sum lost to the plaintiff by the violation of his orders? The sum demanded, is of no great consequence, perhaps, to either of the parties, on the score of its amount. But the question itself is important to the commercial

interests of this country; in its intercourse with foreign nations. A precedent is to be set to determine in a case like this, whether an agent is liable for a breach of orders, and to what amount.

The jury found for the plaintiff; but a sum much inferior to the loss he had sustained.

ROBERTS *vs.* GALLAGHER.

A bill of exchange remitted in payment of a debt due to the person to whom it is sent, where the amount of the bill is lost by the negligence of the person to whom it was transmitted, is to be considered as payment of the debt.

If a bill is remitted to an agent to negotiate, or collect, and the amount is lost by negligence.

If a bill of exchange, or a promissory note, is given and received in satisfaction of a precedent debt, the laches of the holder, by which the amount due upon the bill is lost, will prevent a claim upon the person from whom it was received in payment.

THIS was a motion for a new trial; and 2 Blacks. Rep. 955. 5 Burr. 2633 were cited, to show cases in which they had been granted, and supposed to apply to this case.

To prove that the bill of exchange, remitted by defendant to plaintiff, ought, if by plaintiff's neglect it was made his own, to amount to a payment. 2 Wils. 353, was cited.

WASHINGTON, J. It does not appear by the defendant's own statement, that if the cause were now to come on again for a new trial, it would differ at all from what it appeared on the trial the other day. The Court left it to the jury to say, upon the evidence, whether the bill was remitted to the plaintiff in payment, or on account of the debt due to the plaintiff; and if they were satisfied of that fact, and that by the neglect of the plaintiff the debt had been lost, they were to consider it as a payment. But if it were only remitted to plaintiff as an agent, to negotiate or collect, and it had been lost by his negligence, he could only be liable in damages for his misconduct, but it was no payment. If only accountable for damages, they could not be offset.

By the evidence, nothing more appeared, but that Robert Morris had sold a bill to the defendant, in December 1793; that such a bill was protested in June 1794, as appeared by a charge in the plaintiff's account, of the costs of the protest, and that in 1794, or perhaps 1795, Morris was able, and would have taken it up, if it had been returned to him. But no evidence was offered to show on what account the bill was remitted, nor is it now stated that this could be shown. Upon this evidence, the jury disallowed the credit, and we cannot say, that they ought to have done otherwise.

In Clark *vs.* Mundall, it was determined, that a bill of exchange, or note, was not a payment of an antecedent debt, because of the same dignity, unless it was not received as such, and the laches of the holder did not make it a payment. After this, the statute Anne passed, and I admit the doctrine to be now general in England, that if a bill or note be given in payment, satisfaction, or on account of a precedent debt, that the laches of the holder may make it a payment. But it must appear to have been received as a payment of a pre-existing debt.

Besides, the defendant in this case, was faulty in two respects. Notice was given to him, to produce letters, from which it might have appeared whether notice of the protest had, or had not been given. The plaintiff could not be expected to prove notice, since he was not apprized of the defendant's intention to claim this as a credit. On these grounds, it would be improper, I think, to grant a new trial.

Judge Peters was also against the new trial.

KOHNE *vs.* THE INSURANCE COMPANY OF NORTH AMERICA.

Action on a policy of insurance.

The underwriter, by consenting to take upon himself a risk, which the assured is not willing to bear, does it always under an implied condition; that he shall, as to all facts within the private knowledge of the assured, be equally informed as himself; have the same opportunity of measuring the extent of the danger; and be enabled to judge of the compensation, at which he would think it prudent to enter into the contract.

The underwriter is always supposed to be acquainted with public transactions, foreign laws or ordinances, the course of nature and of trade.

All circumstances in themselves peculiar, and which may be material, and which are in the knowledge of the assured only; should be stated to the assurer.

The laws of the United States, relative to the importation of merchandise, require that the goods imported shall be *landed*. It is not a compliance with those laws, to bond, or pay the duties on importation, and permit the goods to be re-exported, *without being landed*.

THIS cause came on to be re-tried at this term. The evidence given at the last term, was again produced, and in addition thereto, a complete record of the proceedings in the Vice Admiralty Court at Halifax, was produced, and read. In it is stated at length, the following papers.

A passport from the Spanish Consul, at Charleston, to the plaintiff, 17th February 1799, to go to Laguira, to attend to his concerns there. A clearance for the Gadsden and cargo at Laguira; stating that a cargo of cocóa and tobacco had, by special permission of the intendant, been shipped on board the Gadsden, for Charleston, with leave to touch at Porto Cabello; and that the said goods were free of duty, by order of the intendant. Another clearance at Porto Cabello, for the United States, the duties being paid. A passport of the Spanish Consul at Charleston, dated 18th June 1799; for the plaintiff to go to

Spain; and a certificate that the cargo was from Laguira, and Porto Cabello, as appears by the above mentioned Spanish papers, which he certifies.

The following new testimony was given: Mr. Buntin was in Laguira, when plaintiff arrived there. He sold part of his cargo to the intendant there; and was to receive in return, cocoa, tobacco, and some specie, and to be free of duties upon his inward, as well as outward cargo; from thence he went to Porto Cabello, where he sold the rest of his cargo, and took in cocoa, hides, &c. and left a quantity, which he could not bring away, in the king's warehouses. It was proved by two or three witnesses, that it was practised in Charleston, and had been done in a few instances at Philadelphia; for vessels coming from the Spanish colonies, by special permission of the collector, to enter there, secure the duties, and clear out for Spain; without landing the cargo. That policies on such cargo had been underwritten at Charleston, and by private underwriters in Philadelphia; and upon a disclosure of those facts, they had been done at ten per cent.; and that the circumstance of *not landing* made no difference in the premium; until it was known that the British Courts condemned such vessels and cargoes. That it was some time after the insurance in question, that the difference was made.

Amongst the papers, found on board the Gadsden, when she was captured; was a letter from plaintiff to his clerk in Charleston, saying; that he did not wish to run any risk except as to the ship, but that the cargo must be insured, cost what it would. In Kohne's answer to the libel, he states, that special permission to enter and clear, without landing, was granted to some, as matter of favour, but not to every one.

The only point argued at this trial, was the materiality of the circumstances which attended this cargo, particularly the not landing at Charleston, and whether the plaintiff ought to have disclosed them. To prove that it was an importation, though not landed, the plaintiff's counsel cited, Bunb. 79. 12 Cok. 17.

In addition to the arguments urged by the defendants, at the last trial, they contended; that by the revenue laws of Congress, the goods ought to have been landed at Charleston; and they relied upon certain passages in the 4th vol. of the Laws of the United States, in pages 380. 397. 399. 400. 411.

WASHINGTON, J., charged the jury. I am much pleased that a new trial was granted in this cause. I was not satisfied with the verdict, yet I felt some little hesitation about setting it aside; not knowing whether the jury went upon the immateriality of the circumstance of not landing the cargo, to the risk; or upon some legal point, on which the Court had charged them. But I was principally influenced by the importance of the question, and an expectation that the evidence would be more complete; and the counsel would be better prepared to devote their attention to the only question in the cause. In both respects, I have been gratified; instead of extracts of the proceedings at Halifax, we have now the entire record, (*a*) and new testimony has been introduced, as to the custom of not landing, and the materiality of that circumstance to the risk. The question, what is a legal importation, according to the Laws of Congress, was only hinted at then; and has now been thoroughly argued.

This is the case of an insurance on a cargo on board the Gadsden, at and from Newport, to Passage in Spain, effected on the 12th of October 1799. But as the previous history of the ship and cargo, forms the whole ground of difficulty in the case, it becomes necessary for the jury perfectly to understand it.

It appears, that the plaintiff left Charleston in February 1799, in this ship, with a cargo of flour for Laguira; taking with him a passport from the Spanish Consul at Charleston, to go to Laguira, to attend to his concerns; that he arrived at Laguira on the 23d, entered into a contract with the intendant for the

(*a*) Read without objection; and the evidence it afforded, argued from on both sides.

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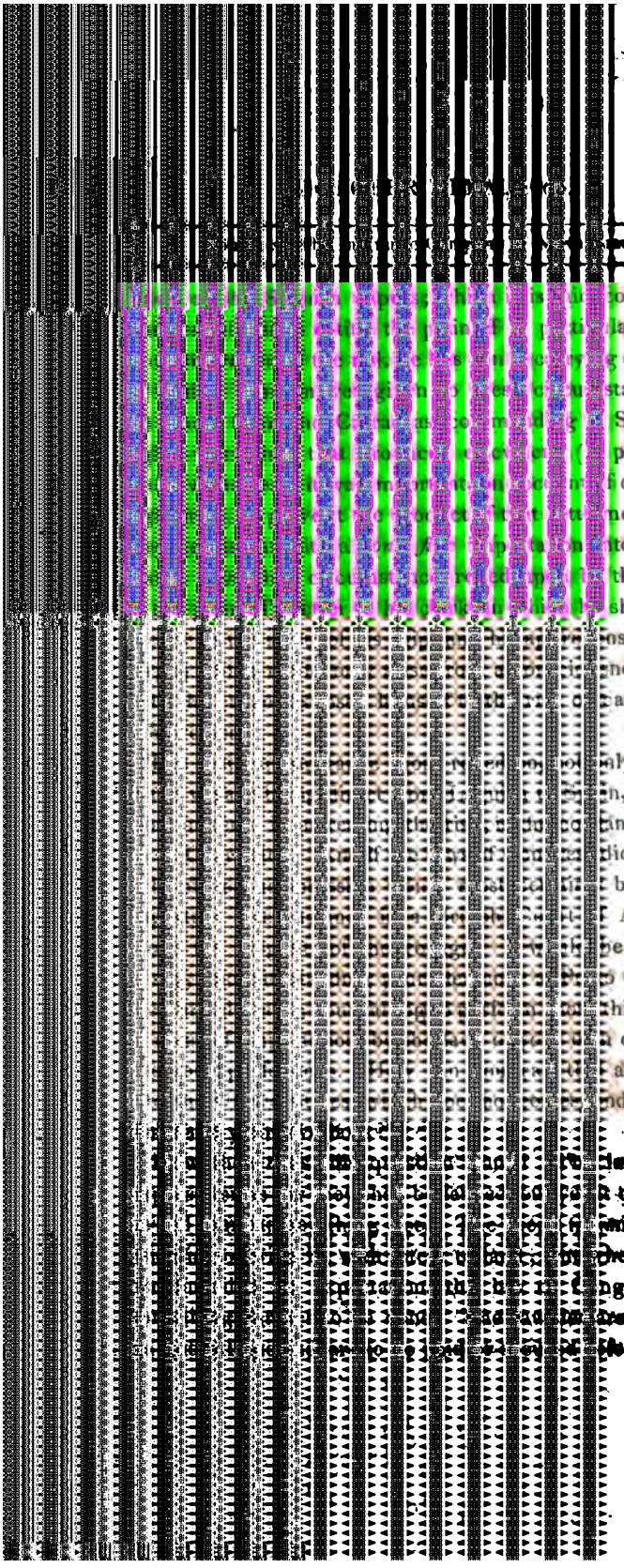
So on the other hand, if the voyage had really been to Charleston, the cargo landed, entered, and duties secured; a determination, formed on second thought, to send the cargo to Spain, would not render it a direct trading from Laguira to Spain, though the goods never were warehoused or removed from the wharf. The circumstance of warehousing, would be no more evidence of a *bona fide* importation—a kind of testimony of the sincerity of the transaction.

It has been insisted by the defendants' counsel, that the evidence is strong enough to prove, that the original voyage was from Laguira and Porto Cabello to Spain, and that the calling at Charleston was merely colourable. To prove this, the defendants rely on the following circumstances: the nature of the cargo, cocoa and indigo, which could not have been intended for consumption in the United States. The answer to this is, that the plaintiff had an ulterior view, as no doubt he had, to the Spanish market for these articles; if the voyage from Laguira was really to Charleston, and the importation there complete; it could not be termed a direct trade between Laguira and Spain; and this conclusion, I think perfectly just. The other circumstances relied upon are, the reasons assigned for the special permission not to land, to save time and expense, and granted only in cases where the goods are intended for exportation. The passport of the Spanish consul to Laguira, which, though it had answered its intended purpose as soon as it was shown to the Intendant there, was still carefully preserved, and was found amongst the papers at the time of the capture. The sale to a Spanish officer, under a contract, in no manner accounted for; and of an exemption from duties on the inward and outward cargo. The clearance at Laguira and Porto Cabello. The passport, of the Spanish consul at Charleston, to Spain, and his certificate that the cargo (not landed at Charleston) was from Laguira and Porto Cabello, with his authenti-



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consideration. It is proved, that the defendants always rejected such risks, or demanded such high premiums, as to turn away applicants. On the other hand, it is proved, that in Charleston, and by private underwriters in Philadelphia, those circumstances made no difference in the premium. The defendants, no doubt, construed the English orders, and the Acts of Congress, as the Court does—the other underwriters differently.

With these observations, I shall leave the case with the jury.

The jury found a special verdict, in which they ask the opinion of the Court, whether a landing at Charleston was necessary.

Judgment on the verdict for defendants.

...GRAUNT.

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...r rounding iron. It

appeared in evidence, that the defendant, Kanowrs, was a farmer, and had on his farm, a common tilt, or hammer and anvil, worked by water. The plaintiff, a German, and poor; informed Kanowrs, that he had invented a machine for rounding iron; but, from want of funds, had not been able to bring his theory to practice. He proposed to Kanowrs, to convert his common tilt into such a machine, and that he would work at it, for the benefit of Kanowrs, for a certain sum for each ton of such iron which he should make. Having disclosed his plan, which was to use hammers of different concaves; Kanowrs objected to that, and proposed, instead of different hammers, the use of swedges. After some disagreement, whose plan should be adopted, a compromise took place, by agreeing first to try the swedges, which was done, and found to answer so well, that they were never altered. The plaintiff, after working a year or two for Kanowrs at this tilt, in 1797, took a lease of it, (together with a part of the farm,) for three years; in which was a covenant, on the part of the plaintiff, to deliver back, at the end of the term, the tilt, with every thing belonging to it, in as good condition as he had received it. This was accordingly done; and the plaintiff, having thus acquired the mistery, removed from Kanowrs'; and, in 1801, erected a tilt, precisely like the one he had left. The defendant, Kanowrs, then rented the old tilt to the other defendant, Graunt; who has continued to use it ever since. It was proved, that the plaintiff and Kanowrs were to be in partnership in the benefits of this discovery, and were to obtain a patent in their joint names. But the plaintiff took it out in his own name, in the year 1796; and it is not accounted for, how the defendant's name was omitted. One witness said, that he had, since the erection of this machine, seen imported bolts, which appeared to him to have been rounded with a similar machine.

The cause was argued by Dallas and Sergeant, for plaintiff, and by Messrs. Ingersoll and Charles J. Ingersoll, for defendants. The objections to the plaintiff's recovery were, that the machine

used by defendant, was different in principle, from that mentioned in the plaintiff's specification: that there was sufficient evidence for the jury to say, the plaintiff was not the original inventor; but had brought it with him from Germany: that he could not, at any rate, recover; as there was a partnership agreement between the parties, sufficient to constitute the plaintiff a trustee for defendant, Kanowrs: that the lease from Kanowrs to plaintiff, was an acknowledgment of his right to the machine in question; the only one which it was pretended the defendants had used: and, lastly, that there being no evidence that Kanowrs had ever used the machine himself; this action, being joint against Kanowrs and Graunt, the plaintiff cannot recover, though he has proved it to have been used by Graunt.

The demand of the plaintiff was, under the Act of 17th April, 1809, for three times the value of the damages sustained.

WASHINGTON, J. charged the jury. Your first inquiry is, whether the plaintiff was the original inventor of the machine mentioned in his patent and specification. One witness has stated, that he has seen imported bolts, since those made by the plaintiff, which seemed to have been made with the same machine. Whether the invention is of European origin, and imported here by the plaintiff; or has, since the erection of his machine, been carried to Europe, is a question most proper for your determination. It is only necessary for me to state; that, if the invention was brought over, that is, if it appears that the plaintiff was not the original inventor, in reference to other parts of the world as well as America, he is not entitled to a patent. This point has been decided otherwise in England, in consequence of the expressions of the statute of James I. which speaks of new manufactures *within the realm*.

Your second inquiry is, have the defendants, or either of them, used a machine similar to the one mentioned in the plaintiff's patent and specification. The specification states the parts to be, a strong platform, of a given form, with two up-

right posts, for a hammer to move in, and to be operated by a cog-wheel, connected with the handle of the hammer; the force; water, or any thing else; corresponding concaves in the hammer and anvil. The machine used by the defendant, Graunt, is of that description; but in addition, swedges are used. The question is, is the defendant's improvement of swedges, an improvement on the *principle*, or the *form*, or *proportions* of the plaintiff's machine; if the first, he has as much right to use his improvement, as the plaintiff has to use his original invention. If otherwise, and the defendant has used the original invention, thus altered, it is a violation of the plaintiff's right.

The next inquiry is closely connected with the last. Does the specification contain the whole truth, relative to the discovery; and if not, has it been concealed *with a view to deceive?* As to the materiality of the thing concealed, could an artist, after plaintiff's right is expired, construct such a machine by looking at the specification? This also is a question for the jury.

I have hurried over these points, because it strikes the Court, that there remain to be considered, much more important objections to the plaintiff's right to recover.

It is in proof, (if the witnesses are credited by the jury,) that the machine used by the defendant Graunt, was erected on Kanowrs' land, at his expense. That before it was done, Kanowrs, upon hearing the plan, suggested the improvement of swedges, which was adopted, and has since received the plaintiff's approbation. That the plaintiff frequently acknowledged the joint right of the defendant, to the invention, as partnership property; and that the patent was to be taken in their joint names. If the jury are satisfied of these facts, and that the defendant did not relinquish his right to a joint interest in the patent right, then the plaintiff was guilty of a fraud, in obtaining it in his own name; he is in equity a trustee for the defendant; and though, possibly, at law, a verdict must be rendered for plaintiff, still, the jury may give merely nominal damages.

But there is another point still stronger. The law gives an action against any person who violates the right of the plaintiff, *without his consent in writing*. Now, this machine was erected on the defendant's land, by the plaintiff, and at the defendant Kanowrs' expense. After this, the plaintiff took a lease of it for three years; thereby acknowledging the right of the defendant, Kanowrs, to this particular machine, and covenants to deliver it up to him at the end of the term, with every thing belonging to it, in as good order as he received it. That is, to deliver up, not the hammer, and anvil in its original form; but the whole tilt, with the improvements made on it by the plaintiff. Now, this covenant acknowledges the right of Kanowrs to this identical machine, and necessarily the right to use it. If he has granted the tilt to the defendant, he has, in law, granted the use of it; and consequently he cannot now say, that the defendant has used it without his license in writing. If he has a right to the machine, and to the use of it, he has a right to work it himself, or by his servants, or to lease it out to any other person.

As to the last point made by the defendant's counsel; I am of opinion, that if the above points were in favour of the plaintiff, he might recover against Graunt, though no proof were given against Kanowrs. For all torts are joint, as well as several, and the plaintiff may recover a verdict against one, though the other defendant be acquitted: otherwise in contract.

Jury found for the defendant.

Note.—If the contract of several, be joint, and either of the parties be sued, he may plead in abatement, that the others are not joined; but he cannot take advantage of it at the trial, although it appear on the face of the declaration, that there are other parties to the contract. But, if one agree or bind himself to several, and one sue; the defendant may demur, upon oyer, of the contract; or in assumpsit, he may take advantage of it on the trial. 2 Blac. Rep. 696. 1 Saund. 154. n. 291.

If, in trespass against two, they both plead jointly; a several verdict cannot be given against all, if all be found guilty. But, if they sever in their

pleas, several damages may be assessed. The jury may find them severally guilty as to part, and not guilty as to part; but may assess damages severally. 1 Esp. N. P. 419, 420. Bull. 93. 2 Strange, 1140. 5 Burr. 2790.

In all cases of trespass, the jury may find one defendant guilty, and the other not guilty. 1 Esp. N. P. 322. But in contracts, if the action is against several, and it cannot be supported against all, it wholly fails. See 3 East, 62. Evans's Pothier, 2 vol. 67. If one of the joint contractors be an infant, the other two may be sued; and if they plead in abatement, the plaintiff may reply the infancy of that one. But if he sue all, and one plead his infancy; judgment must be given against the plaintiff. 2 Evans's Pothier, 67. This is stated in a note, but the authority is not given. W.

Allen *vs.* Ogden.

Where a power to an agent is general, he may do any thing to bind his principal, which is within the scope of his authority.

If the agency be special, every thing is void, which may be done, unless in strict conformity with the authority.

If, upon demand, the defendant said he would retain the goods demanded, and that he knew a suit would be brought; this is evidence of a conversion.

When a party, holding goods in his possession adversely, has paid rent for the premises in which they are stored; it is not necessary to tender the rent, in order to enable the owner of the goods to recover them in an action of trover.

Liens depend upon contracts, express or implied; and none can be implied, where the defendant acts adversely to the rights of the person for whom he has paid the money.

THE case will appear in the charge of the Court.

WASHINGTON, J. This is an action of trover and conversion, for forty-one tons of pig iron. John Davis, in January 1802; being possessed of a quantity of pig iron, at different places, and amongst others, the quantity in question, it being in Swarteut's yard, in New-York, rented by Davis as a place of deposit for that article; empowered a Mr. Champlain, in New-York, in writing, to sell the same for the highest market price in cash; or if this could not be done, to offer the same to the defendant, at the market price, on condition that he should pay down 6000 dollars, and that the residue might go to the credit of Davis, against a demand which Ogden had in his own right, or as agent against Davis. The offer was made to Ogden in February, but he took time to consider, and never afterwards gave

an answer to that proposition. Champless sold the iron to Watkins; but afterwards, upon receiving a letter from Davis, informing him that he had sold all the iron to the plaintiff, he, Champless, cancelled the sale he had made. The sale to the plaintiff was made on the 6th of February, at 25 dollars a ton; which, with the expense of removing a great part of it, was supposed equivalent to the market price in New-York, and the amount was to go to Davis's credit, against a demand of the plaintiff; and if the iron should be sold for more than the 25 dollars, and expenses, the excess was also to be placed to the credit of said Davis. On the 19th of February, a bill of parcels was delivered to the plaintiff, on which day, the credit was entered on the plaintiff's books. The sale to the plaintiff, is proved by Davis, to have been real and *bona fide*. Late in February, Champless being alarmed by a letter from a Mr. Bond, stating, that unless a note of Davis's for 600 dollars was paid, the iron would be sacrificed, thought he would benefit Davis by selling it to Ogden, provided this could be done. The subject was proposed to Ogden, and the original power to Champless laid before counsel; and the sale to the plaintiff revealed both to the defendant, and his counsel. The counsel thought the sale to the defendant might nevertheless be valid, and in consequence of this, the sale was made, on the 1st March, for $2 50 cts. less than the market price; and the whole amount was agreed to be put to the credit of Davis, against the claim of defendant, as before mentioned. The defendant paid the rent due to Swartout, and removed the iron from the yard. The defendant informed one of the witnesses, that the plaintiff had claimed of him the iron, and that there would be a suit about it. The defendant also said he would retain the iron.

Upon this case, if the witnesses who prove it on the part of the plaintiff, (for the defendant has called none,) be believed, one thing is clear, and that is, that whether the plaintiff has a right or not, the defendant most clearly has none. The authority to

Champless was special, and therefore he had no power to sell the iron to the defendant, upon any other terms than receiving 6000 dollars in cash; yet it was sold on terms very different. Where a power is general, the attorney may do any thing to bind his principal, which is within the scope of his authority. But if it be special, every thing is void, if he does not act in strict conformity to his authority. But, if the power had been general, still, every thing done under it, after it was revoked, and this made known to the defendant, (as in this case it was,) was void.

As to the plaintiff's title, it is complete, if the witnesses be believed. The moment the sale took place, Davis was receiving credit for the amount; as much so, as if he had received so much money: delivery of the iron then was not necessary.

Two objections were made to the plaintiff's right of recovery; first, in the form of a motion for a nonsuit, and then before the jury. First, that a conversion is not proved. It is proved that the iron had been demanded, and the defendant said he would retain it, and that a suit would be brought. This is evidence of a conversion. Secondly, that the plaintiff ought, before he brought his suit, to have tendered the money paid by defendant, for the rent of the yard. No case can be produced, in which it is necessary to do this, where the defendant acts under a claim of property, adverse to the plaintiff's right. Here, Ogden, without a shadow of title, interferes with the plaintiff's property; removes it from the place where he had deposited it; and now claims what he had officiously paid, in order to give him possession. Liens depend upon contracts, express, or implied; and none can be implied, where the defendant acts adversely to the right of the person, for whom he has paid the money.

Cases cited, to show that a lien exists in this case. 2 Rob. Rep. 239. 2 Show. 261. 2 Salk. 654. Ld. Raym. 866. 4 Burr. 2214.

Cases cited to show, that if a man assumes a right to an-

other's property, as if they were his own, it is a conversion. 3 T. Rep. 357. 6 Mod. 212. 6 Bac. Abr. 679, last edition.

Verdict for plaintiff.

NOTE.—He who has an absolute or general property, may bring trover, though he never had the actual possession; for *property*, in personal things, draws to it the *possession*, to enable him to bring trover or trespass against a stranger who takes it away: but, he must have a *right of possession*. Yet, if a person having a special property as a bailee, sells and *delivers* the goods to another as his own, *bona fide*, and without notice; the general owner cannot bring trover, or any other action, against the vendee; for, by the sale, his property is altered. So, possession, with an assertion of title, or even possession alone, gives such a property, as will enable a man to bring this action against a *wrong doer;* for possession is *prima facie* evidence of property, sufficient to put the defendant upon proof of property. So, the finder of a thing, may bring trover against a stranger, who converts it. If the goods come to the defendant by delivery or finding, the plaintiff must demand them; and refusal is *evidence* of a conversion. But, it is not evidence of a conversion, where it is obvious that the defendant has made no conversion; as if he has cut down trees, and left them lying there; nor in the case of a carrier, &c. where the goods were lost through negligence, or were stolen; but action on the case is the remedy: but, if it does not appear that they were lost, or if the carrier had them, when he denied to deliver them, it is a conversion. Bull. 44. Nor where that carrier has a lien on the goods for a debt due him, which is not paid, nor tendered; but trover will lie, if the carrier breaks open the box containing the goods, or sells them, or has them in possession when the demand is made. Not only claiming the property as *one's own*, but asserting the right of *another* over it, is, upon demand and refusal, evidence of a conversion. Denial to one who has a right to demand goods, is an *actual conversion*, and not merely evidence of it; for the assuming upon one's self the property in, and right of disposing of, another's goods, is a conversion. So, where one intrusted with the goods of another, puts them into the hands of a third person, without orders, it is a conversion. Making up of a thing found, or delivered, is a conversion; so is a misuse of it. So, *taking* and *carrying* away is a conversion, without demand or refusal. 2 Saund. Rep. 71. n. 1. Wilbraham *vs.* Snow. 3 T. Rep. 357. 6 Mod. 212. 6 Bac. Abr. 679.

In 4 Burr. 2218, Lord Mansfield lays it down, that Courts are disposed to maintain liens: 1. Where there is an express contract. 2. Where it is implied from the usage of trade. 3. Where it may be implied from the manner of dealing between the parties, in the particular case. 4. Where the factor claims it, for the balance of his general accounts.

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MARKS ET AL. ASSIGNEES OF ANTHONY & PLEASANTS, BANKRUPTS, *vs.* BARKER & ANSLEY.

No debt, but *such as is due and owing at the time of the bankruptcy*, can be proved under the commission; and, consequently, an endorser or acceptor of a bill of exchange, drawn by the bankrupt, who has not paid it before the bankruptcy; cannot prove the debt.

The acceptor or endorser of a bill of exchange, who pays the bill, after the bankruptcy of the drawer, may offset the same against the bankrupt's assignees; but, he must show the debt to be a subsisting one in him, at the time the action was brought; for this is a case of *mutual* credit, given before the bankruptcy, although the money was not paid until after.

Set-off. Where it will be allowed, in relation to claims upon the bankrupt's estate, arising from transactions not completed, before the bankruptcy.

Whatever *lien* might have existed upon goods *unsold*, in the hands of a consignee, shipped to him upon a particular account, and under an agreement, which he has not kept; when these goods have been *sold*, the lien is at an end; and the proceeds of the goods will become the subject of mutual accounts, and of set-off between the parties.

ACTION of *indebitatus assumpsit*, for money had and received to use of bankrupts, and goods sold and delivered by them. Plea, *non assumpsit*, and notice to offset. The case was—Anthony & Pleasants, having shipped a cargo of tobacco and flour to John Waring, in Bristol, and intending to ship more; drew bills, as they were permitted to do, on Waring, for two-thirds the cost of those cargoes; which they got the defendants in Philadelphia, to endorse, and negotiate for them on the usual commission. One of the bills having returned protested; and, the defendants entertaining apprehensions for the fate of the others; they requested Anthony to come on from Richmond, in Virginia, where his house was settled, to Philadelphia, on this business. He did so; and then the defendants insisted, that

Anthony should give them security, to indemnify them against their endorsements on the bills drawn on Waring. This, Anthony declared he could not do; and, if it were insisted upon, his house would be obliged to stop. The defendants objected to this step, lest it should decide the fate of the bills, not then protested; and would, in other respects, be injurious not only to Anthony & Pleasants, but to the defendants. To prevent this measure, and, at the same time, to secure the defendants; they, on the 1st of April, 1802, committed to writing, but it was not signed, the following proposition, in substance, viz. that they would accept a bill, drawn by Anthony & Pleasants, on them, for 3600 dollars, in favour of H. Gilpin, on condition, that Anthony & Pleasants would ship them forty or fifty hogsheads of tobacco; and that Anthony & Pleasants should ship them other cargoes, which they would sell to the best advantage, and would accept their bills, for the amount to be drawn, on advice received by Anthony & Pleasants, that the cargoes had come to hand. Anthony; (who, having executed a release of any benefit by an increase of the funds, in consequence of this suit, was admitted as a witness,) deposed; that a parol agreement was made, that Anthony & Pleasants might draw on the defendants, on forwarding them bills of lading of the cargoes to be shipped them; and that no part of the proceeds were to be appropriated to the discharge of the European bills, drawn on Waring. At the time this negotiation was going on, and, to secure the defendants against their endorsements of the bills on Waring; Anthony, for his house, assigned over to the defendants, the cargoes shipped to Waring, for securing the defendants as endorsers; and the balance to be for the benefit of Anthony & Pleasants.

Anthony & Pleasants, accordingly, shipped to the defendants different cargoes of tobacco; but, having drawn upon them before they came to hand, those bills were protested. The cargoes of tobacco shipped to the defendants, were sold prior to the 27th July, 1802.

On the 26th August, a commission of bankruptcy was taken out against Anthony & Pleasants, and an assignment made to the plaintiffs.

The bills drawn on Waring were all protested, *before* the bankruptcy of Anthony & Pleasants.

The defendants paid these protested bills *after* the bankruptcy. The cargoes in England, were sold for so much less than was calculated upon, as to induce Waring to protest so many of the bills drawn upon him, as to oblige the defendants to take them up, to a larger amount than the proceeds of the tobacco shipped to them, and which they did pay, after the bankruptcy of Anthony & Pleasants, but before the bringing of this suit.

It was contended by the plaintiffs' counsel; that, from the evidence in the cause, it appeared, that the tobacco shipped to the defendants, was appropriated to a particular purpose; and, that the defendants had bound themselves not to make use of it, to discharge any prior claims against Anthony & Pleasants, for which they were secured by the assignment. That this amounted to a waiver of their lien on these cargoes, and, consequently, of their right to offset those debts against this demand for the proceeds of the cargoes. They cited 2 Vern. 189. 2 Black. Rep. 1269. 6 T. Rep. 258.

On the other side it was insisted, that the contract was that which was reduced to writing; and circumstances were relied upon to discredit Anthony. That, at any rate, there was no evidence against the defendants of a waiver of their right to set off. That the fund provided in England, for the security of the defendants, having failed, they were not bound by their promise to Anthony & Pleasants, however strong it might be against them. Cases cited, 1 Term Rep. 285. 1 East's Rep. 98. 375. Cowp. Rep. 185. 3 East, 325.

The plaintiffs' counsel, when near concluding, started this point: that the defendants, not having paid the protested bill, on which they were endorsers, and which formed the mass of

their claim, now attempted to be offset, until after the commission of bankruptcy, could not, under the bankrupt law, be entitled to set off those payments. He laid down the following propositions:

1st. That nothing but a subsisting debt, or a balance on a general account, or a liability to pay at all events, *at the time of the bankruptcy*; could be set-off.

2d. That a debt depending upon a *contingency*, which does not happen until after the bankruptcy, cannot be set off.

3d. That no debt can be set off, which might not be proved under the commission.

The conclusion from the premises is, that an endorsee, who has not paid the bill before the bankruptcy, is only liable upon a contingency: he could not, in such case, prove under the commission, and consequently cannot set off. He cited Co. Bank. Law, 568. 126. 204, 208. 1 Atk. 119. 8 T. Rep. 499. 3 Idem, 437. 4 T. Rep. 714.

The Court informed Mr. Dallas, the concluding counsel, that this was quite a new point, which the counsel who had opened, and argued on the part of the plaintiff, had never started; that this was an irregularity. But the point being important, the counsel for the defendant ought be at liberty to discuss it.

Rawle and Lewis, for the defendant, insisted that the credit having been given prior to the bankruptcy, it came within the 49th section of the Bankrupt law, respecting offsets: and they cited Co. Bank. Law, 572. Comp. Rep. 251. 4 T. Rep. 211. Offset, 227. 7 T. Rep. 348. Co. Bank. L. 572.

Upon the last point, *Washington*, J. delivered the opinion of the Court. The proposition that no debt can be set off, which cannot be proved under the commission, if true, would settle this point. But it is not. The two questions depend on different sections of the law, very differently expressed. The cases cited to show what debts cannot be proved under the commission, go upon the words of the statute; which declares, that the certificate shall protect the bankrupt against all debts due and owing at

the time of the bankruptcy. Consequently, the endorser or acceptor of a bill, who has not paid before the bankruptcy, cannot say that it was due, and owing from the bankrupt, at that time. But the question of offset depends upon the construction of the words, "*mutual credit,*" in the section where they are found. I was at first struck with the propriety of giving them a limited construction, extending them no further than to debts payable at a future day, so as to assimilate, as nearly as possible, the case of offsets to that of debts, provable under the commission; but, after reflecting that, by thus narrowing the construction, a man who had given credit, by endorsements or otherwise, in confidence of the security he possessed, in retaining what he might owe to that amount, I should take from him a plank on which he had intended to save himself; I thought I should be more likely to fulfil the intention of the Legislature, by extending it to all cases of credit, given before the bankruptcy, though not to be terminated at a particular day. In this case, the defendants, by endorsing the bills of Anthony & Pleasants, in order to give them credit, did most certainly give credit to Anthony & Pleasants; and, therefore, the words "mutual credit," are broad enough to comprehend this case, if their meaning is not narrowed by construction. This section of our law is copied almost verbatim from the British statute.

The argument urged by the the plaintiff's counsel; that if the section in question be construed to extend to this case, the estate of the bankrupt might be twice charged, viz. by the defendant and by the holder, is without foundation; because, clearly, before the offset is allowed, the defendant must show the debt to be subsisting in him alone. This is the doctrine in common cases of offset, that the debt attempted to be set off, must be a good and subsisting one, at the time *the action* is brought. The Bankrupt Law permits such an offset on a credit given before the bankruptcy, which, without this section, would not have been allowed. I consider the case of Smith and others *vs.* Hodson, 4 Term Rep. 211, as no ways distin-

distinguish from the present, because, in this case, the bills having been protested before the bankruptcy, the defendants, as endorsers, were as much the principal debtors, as the acceptor in the case cited; and in both, the bills were, at the time of the bankruptcy, in the hands of third persons. We are, therefore, of opinion, that the defendants are not deprived of the right of set-off, on account of their not having taken up the bills before the bankruptcy of Anthony & Pleasants.

WASHINGTON J. After stating the case *ut supra*, proceeded—It is perfectly immaterial to this cause, whether the agreement of the 1st of April be such as the defendants contend it was, or such as is proved by Anthony; for except as to the time, at which Anthony & Pleasants were to be at liberty to draw, which is quite unimportant to the question in this cause, the two contracts are substantially the same; the declaration, which Anthony says was made by the defendants, that they would not appropriate the cargoes to be sent to them towards the European bills, was only expressing what necessarily resulted from the written promise, to appropriate them to another purpose, viz. to the taking up the bills which Anthony & Pleasants should draw on the defendants, to the amount of those cargoes.

What, then, by this contract, were the defendants bound to do? To accept Anthony & Pleasants' bills, drawn upon them, either when the bills of lading for the tobacco were sent on, or on the arrival of the cargoes. But instead of this, these bills were protested.—What then? The holders might possibly have sued the defendants, as acceptors, in consequence of their previous engagement to accept. But they protested the bills and returned them. Suppose Anthony & Pleasants had sued the defendants for a breach of their contract, in protesting their bills, having funds with which to take them up. They might have recovered damages, unless the defence now set up to justify their conduct, would have protected them. And most certainly, if the insufficiency of the funds assigned to the defend-

ents, in Waring's hands, be made out, it would be a sufficient defence. Because that assignment was the consideration for the promise of the defendants; and if that failed, though without the default of Anthony & Pleasants, yet the defendants were thereby released from their promise. For what could have induced the defendants to agree to relinquish their lien, on future cargoes coming into their hands; but a belief that the indemnity they had received, against their prior engagements, was sufficient? This, I have no doubt, was the belief of all the parties at the time, but they were unfortunately mistaken. This, then, would have been the fate of such an action, as the one I have mentioned.

But this is *indebitatus assumpsit*, for the value of the cargoes sold by the defendants. In answer to this, the defendants say, the bankrupts owe us more than you demand. Whatever construction may be given to the contract, it will not be pretended that the defendants, by agreeing not to appropriate the proceeds of the tobacco to the English bills, gave up their right to claim from Anthony & Pleasants, whatever sums of money they might be compelled to pay, on account of those bills. Now suppose Anthony & Pleasants were plaintiffs in this cause, and were defendants in a cross action to recover the amount of those protested bills, and judgments should be rendered on both actions. If the defendants' judgment exceeded that of Anthony & Pleasants, would not a Court of Chancery enjoin Anthony & Pleasants from proceeding on their judgment; particularly if it were stated that they would not, after receiving the defendants' money, be able to satisfy their judgment? Surely they would; and if so, the whole of the cause has dwindled down into a mere question of form; viz. whether the defendants shall be paid a demand, to which they are clearly entitled, in the way of a set-off, or a cross action, or an application to a Court of Chancery.

The plaintiffs' counsel have clearly been misled by applying the doctrine of lien to this case. When the defendants, by their agreement of the 1st of April, waived their lien on the tobacco,

in consideration of a security for their engagements, on account of the English bills; they had another security, which they never waived, and that was, the personal responsibility of Anthony & Pleasants. Had Anthony & Pleasants, or the plaintiffs, brought trover and conversion for the tobacco, that being yet unsold; they might then have argued against the defendants' claim of lien, that it was waived.

But the lien was gone by the sale, and the whole becomes now a question of personal responsibility, that is, to offset a debt admitted to be personally due, from Anthony & Pleasants, to the defendant, which debt never was given up, nor the right to set off expressly or impliedly waived. (a)

The jury were out two or three days, and, on being called, the plaintiff suffered a nonsuit.

(a) During the trial, it was ruled, that what either of the bankrupts had acknowledged before bankruptcy, might be given in evidence against their assignees.

An acknowledgment by the bankrupt, that he was indebted to the petitioning creditor, if made before suing out the commission, is good evidence to support it. 2 Esp. 592. N. P. Cases 168. A man cannot be a witness to prove an act of bankruptcy, committed by himself; but his confession to a third person at the time, that he went out of the way to prevent an arrest, or to such like facts as are acts of bankruptcy, is admissible. 5 T. Rep. 512. Neither can a bankrupt be a witness, to prove the petitioning creditor's debt, or any other fact to support the commission; though he has a certificate. 2 H. Blacks. Rep. 279. After his certificate is allowed, he may be a witness to any thing relating to the bankruptcy, except only to the act of bankruptcy. Ib. note. Though he releases. 2 Strange, 889. The bankrupt is an admissible witness to explain a doubtful act, which may or may not be an act of bankruptcy; as whether an arrest, relied on as a concerted and fraudulent one, was so or not. 1 Esp. Rep. 287. W.

Ex Parte Hurst.

A party to a cause, depending for trial, is privileged from arrest, during the continuance of the Court, at which the trial will take place.

This privilege extends, not only to prevent his arrest, when attending the Court, and when coming to, and returning from it, but while he is at his lodgings.

Mr. Ingersoll moved, on behalf of Timothy Hurst, to be discharged from arrest under a *capias ad satisfaciendum* that issued against him from the Supreme Court of Pennsylvania, executed on him whilst he was attending this Court as a suitor and witness.

The motion was founded on the affidavit of Hurst; that, in consequence of a letter from his counsel, Mr. Ingersoll, informing him that his suit against Charles Hurst would come on for trial this Court; he left New York, his place of residence, on the 9th of the month, reached Philadelphia on the 11th, and put up at Hardy's tavern, where he was arrested under the execution. That after he arrived, and before the arrest, he was served with a subpœna from this Court, commanding his attendance as a witness, in a cause depending to be tried this term.

Mr. Ingersoll supported the affidavit as to the suit, and Mr. Wallace as to the subpœna; but neither were required by the other side to make an affidavit, and it was admitted on the other side, that his attendance on both accounts was *bona fide*.

In support of the motion, Mr. Ingersoll cited Barnes' Notes 200. An attorney attending his business to execute a writ of inquiry, will be discharged from a *ca. sa.* 5 Bacon's Abr. last ed. 621. A member of Parliament, discharged from a *ca. sa.* 6 T. Rep. 686. A member of the king's family, discharged from a *ca. sa.* 5 Bac. Abr. last ed. 617. All persons are protected from arrests within view of the Court, or near enough to disturb it.

Hy. Blacks. Rep. 636. Any persons going to, attending, or returning from Court, who went there *relative* to business in the Court, which called for their attendance, are privileged from arrest, and a single judge may discharge. 4 Bac. 284. 5 Bac. 678. were also cited. 1 Tidd's Practice 61, 62, parties to a suit, and witnesses attending Court, going to or returning from it, privileged.

The party so privileged and arrested, may apply to the Court whose protection he asks, or that from which the process on which he was arrested issued, whichever first sits; to be discharged. 2 Stra. 990. Dyer, 60. a. Privilege allowed where the party is an executor. 3 Dall. 478.

Rawle, for the creditor, against the motion, contended, generally; that the privilege only extended to the party coming to, attending, or returning from Court; but he was not protected when at home; and Hurst must be considered as being at home at his lodgings, where he was arrested. That the cases cited prove no more; and if a contrary doctrine were admitted, that every citizen in Philadelphia, from the time he was served with a subpœna, or who had a cause in Court, would, during the whole time, be privileged from arrest.

He relied upon 1 Dall. Rep. 356, where it was ruled, at *Nisi Prius*, by the Chief Justice, that the privilege did not protect against a *ca. sa.* though it did against mesne process.

The arrest must not be near the Court, or at Court. 2 Brownlow, 15. To an action of escape from *ca. sa.* the defendant plead a custom of London to discharge suitors, that the party was arrested going to Court, and was discharged by the Court, not good on demand, for the reason just mentioned, 2 Ch. Cases, 69.

Protection does not extend against arrests in execution. Tho. Ray. 100. 2 Ld. Raym. 1524. Wood's Inst. 478. 571, Brook's Abr. 159. Same point. 5 Com. Dig. 89. If taken in execution, he shall not be discharged, for then the creditors would be without remedy. If the Courts of Pennsylvania should adhere

to the decision given as reported in 1 Dall. the Sheriff might, if sued for the escape in the State Court, be made liable.

By the Court. It is clear, from the cases cited, that the applicant was privileged from this arrest, and that it is our duty to discharge him, that the proceedings of this Court may not be impeded, or justice defeated. If the privilege in such a case does not extend to the party at his lodgings, as well as coming to and returning from Court, the protection which the law affords him, would be a mere mockery. His lodgings are as much a sanctuary for him as the Court House; but when his business is done, he must return, so as not to be guilty of a material deviation.

As to the danger to the sheriff, this is merely imaginary. For, though the Supreme Court should differ from us upon the point, and adhere to the opinion of the Chief Justice, at *Nisi Prius*; yet, after Hurst was discharged by a Court, having competent jurisdiction of the case, it would discharge the sheriff, though we should decide incorrectly. It would be a strange situation to place the Sheriff in, who, if he refused to obey our order, would be subject to be committed for a contempt, and if he obeyed, should subject himself to an action for an escape.

LESSEE OF HURST *vs.* KER.

Ejectment.—After the defendant in ejectment has appeared, and entered into the common rule, he may take a rule on the plaintiff for trial, or *non pros*, although the declaration has not been changed, so as to make it against the real defendant. This is the neglect of the plaintiff, and he cannot take advantage of it.

THIS ejectment, and many others, were returned to April term 1803, and were then put to issue, the defendants agreeing to enter into the common rule. The suits, however, were not set down on the docket, for trial at the last term, or at this, and the change in the declarations were not made, so as to make them against the real defendants, until a few days ago, under a rule made this term.

Ingersoll now moved for an order, that these suits should be tried at next term, or that *non pros.* should be entered, and notice given at bar; and he relied on the laws of this State; that if the plaintiff, after the cause is at issue, do not try, he shall be *non prossed*, if notice in Court was given at the preceding term. Read's Dig. 66. He stated, that though the new declarations were not filed until this term, yet it was mere form, and cited the case of Lessee of Cherry *vs.* Aikens; where it was decided in the Supreme Court of Errors and Appeals, that if the parties go on upon the old declaration, to verdict and judgment, it is not error; he also cited, 2 Dall. 156.

Mr. Levy insisted, that the causes were not at issue, until after the new declarations were filed; which being after this term commenced, they could not have been tried.

Washington, J., observed to Mr. Levy, that he had no doubt, from the beginning, that the causes were to be considered as being at issue, before the new declarations were filed; that is, at the time the pleas were put in; and that the altering the

declarations, to introduce the name of the real defendant, was a mere matter of form. But the difficulty with him was, whether the defendant might not evade the effect of the order, by agreeing to try; and yet most certainly, the causes could not be tried at this term, as no venire had, or could issue.

Mr. Rawle, in answer to this difficulty—By the practice of this State, no person but the plaintiff can set down the case for trial, unless he is compelled by a proviso rule; so that he pleads his own negligence, to prevent the rule from being made.

WASHINGTON, J. I am satisfied with this answer. I did not know that such was the practice here. I was misled by the Virginia practice, where it is the clerk's duty to put down the causes on the trial docket, as soon as they are at issue. But if only the plaintiff can do this, unless hastened by a proviso rule, we ought surely to grant it.

Judge Peters concurred.

Rule granted.

LESSEE OF DAVID HARRIS *vs.* BURCHAN & PENNINGTON.

Ejectment.—A survey made and returned, and having every appearance of regularity, must be taken as regular, until the contrary is shown.

After a survey has been once regularly made under a warrant, under the directions of the warrantee, although not in conformity with the terms of the warrant; the warrant is *functus officio*, and cannot afterwards be revived, and a survey made under it.

A right by settlement and improvement, if a survey of the land included in it shall be made, under a warrant, by the owner of the settlement and improvement; will be merged, in the higher title. But, if the surveyor, without the knowledge of the warrantee, makes such use of the warrant, the rights of the warrantee are not thereby affected.

THE defendants set up a title in themselves, as holding under James Potter, and deny the title of the plaintiff, upon the ground that his warrant, calling for particular boundaries, was removed to the land in question, but the survey not actually made.

On the 27th July 1774, the plaintiff obtained a warrant for three hundred acres of land, bounding south on W. M., T. M., &c. Hickory ridge; north by the foot of a mountain, including a run that sinks at the mountain's foot; east by S. Matlock's survey, and west by vacant lands. On the 30th August 1783, Wm. M'Clay, the surveyor, returned a survey of this warrant for three hundred and thirty acres; but it neither joins W. M., nor S. Matlock, by two hundred perches; though it would seem, by the plat annexed to the report, that it was bounded on the east by his land. He states, in his return, that the survey was made on the 30th November 1774. The plaintiff rested his title and right to recover according to the laws of this State; on his warrant and survey, returned into the office.

The defendant, Pennington, sets up a title under James Potter, who, before 1773, settled and improved a part of the three

hundred and thirty acres; and on the 5th January 1773, obtained a warrant for one hundred and fifty acres, to include his improvement adjoining the land of T. M., and to include the sapling hickory ground. This warrant was, on the 18th June 1774, surveyed by Wm. M'Clay, to the southward of the land in possession of Pennington, and the survey was returned into the office in 1783. Upon the return of the plaintiff's survey, Potter entered a caveat against a *patent's* issuing to the plaintiff; he claiming one hundred and fifty acres of the land, by a prior warrant, founded on settlement and improvement. The Board of Property, reciting the survey made for Potter, and that *it appeared to them*, that a survey had been made for Harris, on the 10th November 1774; and that it was doubtful, whether Potter's improvements had been included in his survey; directed James Harris, another surveyor, to lay down the two surveys, that the board might be enabled to decide this point. A survey was accordingly made in 1783, laying down these two surveys, and the adjoining tracts of land, by which Potter's improvements are placed out of the boundaries of his land; but by M'Clay's survey, the lines would include them. Nothing further was ever done in the caveat. Potter dying some years after it was entered; no steps were taken to carry it on. Burchan, the other defendant, lived within the lines of the plaintiff's survey, but out of the lines claimed by the defendant.

The counsel for the defendants, Messrs. Ingersoll and Duncan, contended; 1. That the survey made by M'Clay in 1774, of Potter's warrant, was not confirmable to his warrant, because it did not include his improvements, and the hickory sapling ground; and was a fraudulent location of his warrant, to favour the plaintiff, his brother-in-law and friend. To prove that his improvements were not included, they relied upon the diagram made by James Harris in 1783, which leaves them out; and upon the depositions of three or four witnesses, who speak of his improvements in 1774, and say, that when James Harris

made the survey in 1793, they were left out. They therefore insist, that Potter had a right to survey his warrant over again in 1793, on the land in question, which he did; and at any rate, his warrant entitled him to the land in question, as against the plaintiff.

But they principally relied, for both defendants, that the plaintiff's title was defective; because his warrant called for land very different from that in dispute; and that *no actual survey* of the land in dispute had taken place; but that it was made without going upon the ground, running the lines, and blazing and marking the trees, agreeably to the instructions of the Surveyor General to his deputies. They admitted, that if the warrant be special, it gives a right before survey, to the tract so described; and that the surveyor might, notwithstanding, remove the warrant, and survey it elsewhere, if no intermediate rights accrued to be affected thereby; and that even in this latter case, an actual survey was not necessary, provided the circumstance of its being made off the ground, and that it was removed, was disclosed to the officer to whom the survey is returned, and that it is then accepted. But in this case, no such disclosure appeared to have been made, and the caveat prevented the acceptance. As to the fact, that the survey was not actually made; they relied upon depositions, proving that the witnesses were with James Harris, when he made the survey in 1793, and that they saw neither blazes nor marks, except where they came to the lines of old surveys. That the plat, returned by M'Clay, states it to adjoin S. Matlock; whereas it was two hundred poeches from it; a mistake no otherwise to be accounted for, than by supposing it to be a chamber survey, and that Wm. M'Clay, in his deposition, taken in this cause, important as he knew the fact to be, does not state that the survey was actually made. The case of the Lessee of Milsaw. Penner, decided by Judge Smith, on the Circuit, was cited: viz. that in case of a removed warrant, unless an actual survey took place, the plaintiff claiming under it, could not re-

cover in ejectment. That where there were many warrants put into the hands of the surveyor, if he runs the outer lines of the whole, he may cut it up in the interior as he pleases. That where the warrant is special, the survey of the same land need not be made on the ground.

On the other hand, it was contended, that it sufficiently appears to the jury, that the survey was actually made on the ground, although the presumption being in favour of the return, evidence to impeach it should be produced. The circumstances relied on are: the caveat in 1782, in which Potter does not state this as a ground of objection; the declaration of the Board of Property, twenty years ago, and only ten after the survey was made, that it appeared to them, that the survey had been made on the 10th November 1774; that if, in fact, it were not made, it was wonderful that the land had not been since appropriated by others. Strange, that a man in his chamber, could plot an irregular figure like the present; more likely that he should lay down straight lines; that he could include a spring or run, called for in the warrant; that as to his calling for Matlock's land, it does not certainly follow, upon looking at the plat, that he intended to say, that Matlock adjoined it; and if he did, it must have been a mistake, from his not knowing Matlock's lines. They insisted, that even if the jury should be satisfied that the survey was not actually made on the ground, yet it stood accepted, notwithstanding the caveat.

WASHINGTON, J. charged the jury; and after making the aforegoing summary of the case, the arguments of counsel, and the evidence, proceeded: The questions which I shall first consider are, has James Potter a title to the land in possession, of both the defendants, or either; and secondly, has the plaintiff a title? As to the land possessed by Burchan, it is admitted, that Potter's warrant for one hundred and fifty acres, or his survey in 1783, would not include it; so that if the plaintiff has a title, he must succeed against Burchan, whatever may be Potter's

title, in respect of the land held by Pennington. As to this, it appears that a survey was made of Potter's warrant, by M'Clay, in June 1774, and that the survey was returned into the office in 1783; and therefore having all the appearances of regularity, it must be taken *prima facie* to be regular, unless the contrary appears. To prove it irregular, and therefore not binding on Potter, the testimony of three or four witnesses is relied on; who state, they attended J. Harris's survey in 1783, and that Potter's improvement was not comprehended in the survey. But it is worthy of remark, that those witnesses do not speak of M'Clay's survey in 1774, but refer to the lines as run by Harris in 1783; and by comparing Harris's survey with M'Clay's, which it presumes to follow, or ought to have followed; it appears that if one of the lines of Harris's survey had been extended as far as M'Clay's run, the improvement, as laid down in Harris's diagram, would have been included. Against this evidence, is opposed the testimony of William M'Clay himself, who states; that Potter himself pointed out the improvement and hickory sapling on the ground, and that they were included, and that he was present at the survey. Now, most clearly, if Potter chose to locate his warrant as it was surveyed, even though the improvement had been left out; it does not lie in his mouth now, to say that it was not properly located by survey. And if M'Clay's testimony is believed by the jury; and unless they are satisfied, that the warrant was improperly surveyed; then in point of law, Potter has, and of course the defendant Pennington has no title to the land, for which this ejectment is brought; because if the warrant was once properly surveyed, and returned into the office, it was *functus officio*; it merged the prior title by improvement and warrant, and the same warrant could not afterwards be surveyed on the land in question, or on any other vacant land. If, on the other hand, the jury should be satisfied that Potter's consent was, without his knowledge, or against his consent, removed by the surveyor, to lands to which it did not relate; then the survey was not binding on Potter; his title stands

now on the ground it did prior to that survey, and being prior to the plaintiff's warrant, his title is the best, to one hundred and fifty acres, to be laid off in a reasonable shape, so as to include his improvement. You are the proper and sole judges of the credibility of witnesses, and the weight of evidence, and must ascertain this fact; if it be in favour of Potter's pretensions, your verdict ought to be in favour of the defendant, Pennington; if otherwise, in favour of the plaintiff.

The next question is, has the plaintiff a title? because, if he has not, then he cannot recover, however weak the defendant's may be, and this question involves the interest of both defendants. The questions of law raised as to this point, I forbear to give any opinion about, because, upon the fact, it will perhaps be unnecessary; and because the points are of extreme importance—viz. whether, in a case like this, the want of actual survey is sufficient to defeat the plaintiff in ejectment; and whether upon the principles conceded by the defendant's counsel, the survey, *quoad* every thing not stated as the ground of the caveat, (which does not oppose the survey, but the issuing of a patent for one specified reason,) is not to be considered as accepted; and whether it is incumbent on the party claiming under the survey, to prove that all the necessary circumstances were disclosed by the surveyors. But how is the fact? I have already stated the evidence on both sides, and the arguments urged by each. That the survey is to be presumed regular, until the contrary appear, is a clear principle. Extremely mischievous would be the consequences, if a man, having a paper title, apparently regular, should be compelled, in asserting his title, to prove that the public officers performed their duty. It would be substituting a title, dependant upon the uncertain tenure of men's memories, for a written one. You will therefore consider and weigh the evidence, and the credit of the witnesses, and you must be perfectly satisfied in your consciences, that the survey *was not* actually made, before you can find a verdict grounded on that as a fact.

If the survey was regularly made, then most clearly Potter could not survey, under his warrant in 1784, the land in question, held by Pennington; even although you should be of opinion that M'Clay's survey under his warrant, in 1774, was irregular, and not binding upon him; and in this case, your verdict, as to Burchan, must of course be for the plaintiff, and as to Pennington, also, unless you should be of opinion, not only that his warrant was improperly laid in 1774, but that the plaintiff's also was irregularly surveyed, by his not going on the ground.

The Jury found for the plaintiff.

Calbreath *vs.* Gracy.

Motion for a new trial.—Although the omission of the Court to charge the jury, on important questions of law, involved in the case, is not in itself a reason for granting a new trial; yet the Court will exercise a discretion; and, if they think the justice of the case will be promoted, they will grant it.

This was an action on a policy of insurance on goods on board the Martha, at and from Havana to Carthagena, and at and from Carthagena, to Philadelphia, with leave to touch at Laguira, and one or more ports on the Spanish Main, and the West India Islands; warranted American property, proof whereof to be made in any of the Courts of the United States, if questioned.

The vessel was captured by a French privateer, on her voyage to Carthagena; and recaptured by a British privateer, in May 1795; carried into Providence; and libelled as enemies' property. A claim was put in by Hernandez, the supercargo and consignee of the cargo; who stated himself also to be the captain; and in his answer, he swore that the cargo belonged to him, a subject of the king of Spain; the vessel to Juan de Santa Maria, also a subject of the king of Spain; and he claimed restitution, upon the footing of a treaty lately concluded between England and Spain. Sixty days were allowed the party to produce the treaty, which not being done, the vessel and cargo were condemned, as enemies' property. The condemnation took place on the 25th of August 1795.

To prove the loss, and that the property was American, the plaintiffs produced the protest of captain Bonner, dated 10th July 1795, and the deposition of William M'Connel; who stated the capture, recapture, and condemnation, as above; and also that he understood that the cargo was the property of the plain-

tiffs, I. Wheatland George Meade, American citizens. The bills of lading signed by Bonner, the real captain, stated the cargo to be shipped on account of Calbreath & Co. and George Meade, to be delivered at Carthagena to the order of Hernandez, who was on board as consignee and supercargo, and interposed the claims as above mentioned. The proceedings in the Court of Vice Admiralty were relied upon at the trial, to prove; that whether the property was American or not, the condemnation had resulted from the claim put in by the agent of the assured, in stating the property to belong to subjects of Spain.

It appeared that a charter party had been executed, at the Havana, before the vessel sailed, by which Hernandez was stated to be one fourth concerned in the cargo. Notice of the capture was given to the underwriters, on the 14th July, but no demand of payment or offer to abandon. The demand for a total loss was made of the underwriters in December last; but no abandonment was offered.

The cause was tried before the late Circuit Court; no charge was given by the Court, and a verdict was given for the plaintiff. A rule having been obtained to show cause why a new trial should not be granted, the cause came on to be argued at this Court.

Rawle and Chauncey, in favour of the motion, contended; that it was incumbent on the plaintiffs to prove an abandonment, which, in all cases where the loss was total, was essentially necessary, because, wherever there was a possibility of saving any thing, that chance should be transferred to the underwriters. That in this case, although the capture was in May, and the condemnation took place in August, yet the first notice the assurers had was in December; whereas had the plaintiff abandoned at once, the assurers might have prevented the condemnation, or at least appealed after it had passed. They cited Parke 143, 171, 178. 2 Rob. Rep. 1.

2d. That it appeared clearly, that the property was not Ame-

wican, but Spanish. The true construction of the warranty is, that the property was *American*, and should continue so during the voyage. 7 T. Rep. 705. If warranted American property, she must have all the necessary papers to entitle her to the privileges of an American vessel. 8 T. Rep. 196. 230. Vessel warranted Danish—she must not lose her neutral character, during the voyage, by the conduct of those on board. Being warranted *Danish*, is, in effect, being warranted *neutral*. 8 T. Rep. 444. Parke, 359. 369. This vessel, it appears, had on board Spanish papers. She and the cargo were claimed, by the agent of the assured, as Spanish property; and it appears, by the charter party, that a Spaniard was part owner of the cargo. These circumstances lost to her, her neutral character, and were as much a breach of the warranty; as if she had not carried the papers necessary to support that character. 2 Wood. 442.

Ingersoll and Heatley, against the motion, contended; that the plaintiff may sue for a total, and recover for a partial loss; and the only difference between abandoning and not abandoning, is; that, in the latter case, the plaintiff can only recover such loss as he may be able to prove; but, in the former, he recovers the whole value, although the loss might only be partial. They cited 2 Burr. 683. Parke, 183.

As to the second point. It was a matter of perfect notoriety, and, therefore, must have been known to the underwriters, that, to carry on a trade to the Spanish colonies, which is interdicted by that government, you must carry Spanish papers, a Spanish supercargo, who must appear to have an interest in the cargo. This is the course of the trade, and was, or ought to have been known to the underwriters; of course, the conduct of the assured was consistent with the warranty. And, although no evidence of this sort was given at the trial, yet the counsel for the assured relied upon the knowledge of the jury, as to that fact.

WASHINGTON, J. Important points of law were involved in this case, and the Court ought to have charged the jury upon them. Though their not having done so, is no reason *per se*, for granting a new trial; yet, there is reason to apprehend, that, under the circumstances of the case, justice has not been done. As the case now appears to me, the verdict does not seem to consist with legal principles; although I mean not to give any decided opinion. I think, the ends of justice will be most likely to be attained, by granting a new trial.

Rule made absolute.

WALKER *vs.* SMITH.

Motion for a new trial.—In an action to recover damages, although the jury, by their verdict, gave the plaintiff less than the Court thought him entitled to, a new trial was refused.

The Court will always set aside a verdict, when it is against law: it will always respect the right of the jury to decide upon facts.

If the Court had jurisdiction of the cause, when the action was commenced, the repeal of the law, which gave the jurisdiction, will not take away the plaintiff's right to costs.

RULE for a new trial; the jury having found, contrary to the charge of the Court, which laid down, as the rule for estimating the damages, the loss which the plaintiff had sustained, by the misconduct of the defendant, in violating his orders. The jury have given only the principal sum due, without interest; have allowed the defendant his commissions, though he claimed none; and have rated the exchange at par, when it was higher. Besides which, they have said, that the plaintiff shall not have costs.

WASHINGTON, J. We cannot say, that we are satisfied with the verdict; since we are of opinion, that the jury ought to have given interest on the principal sum, in the name of damages. But, ought the Court, on this account, to set aside the verdict? If, indeed, the verdict were against the charge, we would not hesitate to do it; and would continue to do so, as often as such a verdict should be given. For, whilst we will always respect, and secure to the jury, the privileges to which they are entitled, which is, to decide upon the facts; we will take care, that the rights of the Court, to decide the law, shall never be impaired by the jury.

But, the Court certainly never meant to direct the jury to find interest, in this case; although, we think they would have

been justified, in giving it in the name of damages. But, if the jury saw any mitigating circumstances in the case, to induce them to refuse interest in such a case; it would be going too far, to set aside their verdict on that account.

As to the allowance of commissions, though they were not claimed, yet it was admitted at the trial, by the plaintiff's counsel, that the defendant was entitled to them; and so we think.

As to the rate of exchange, no evidence was offered to the jury upon that subject; but the difference is very trifling.

As to the costs; the Court had jurisdiction of the cause at the time the suit was brought, and, though the verdict is given after the repeal, and for less than 500 dollars; yet, costs must follow of course.

Rule discharged, and judgment to be entered, with costs.

Hylton's Lessee *vs.* Brown.

In an ejectment, the plaintiff must show, and it will be sufficient for him to show, a right of entry; or, in other words, a right of possession.

If plaintiff proves twenty years' possession, or the seisin of his ancestor, and a descent cast, it is a sufficient *prima facie* title; and the defendant can only succeed, by showing a better right in himself, or out of the plaintiff.

If the plaintiff shows a right of possession in himself, it is sufficient against every person, but the proprietary; or one claiming under him.

In an ejectment, the plaintiff, who has shown title in himself, is not bound to show the title to the same land, to be out of the proprietary.

If a defendant rely upon the original title of the proprietary, he must show it to be a subsisting title, either in the proprietary, or in himself, claiming under the proprietary.

A RULE was obtained at the October term, in 1803, to set aside the nonsuit entered in this cause; and the question now came on to be argued.

WASHINGTON, J. During the vacation, I have considered this question; and I am now satisfied, that the Court was wrong, in ordering the nonsuit. I permitted my judgment to be influenced, more than it ought to have been, by the *nisi prius* opinion of the Chief Justice of this State, as reported by Mr. Dallas.

I think, that in an ejectment, the plaintiff must show, and it is enough for his purpose, if he does show *a right of entry*; or, in other words, a right of possession. If he prove twenty years' possession, or the seisin of his ancestor, and a descent cast, it is in general sufficient, *prima facie*, unless the defendant show a better right. But, the defendant may succeed, by showing a better right in himself; or, by showing it out of the plaintiff.

But, is it sufficient for the defendant to show an original title in the proprietary? If the plaintiff show a right of possession in himself; this, I think, is certainly sufficient against every person, but the proprietary. If the defendant rely upon the original title of the proprietary, he must show it to be a subsisting title, either in the proprietary, or in some one claiming regularly under him. I admit the rule, as laid down in the case cited, to be correct, if the suit be against the proprietary, or one claiming under him; but not otherwise.

Nonsuit set aside.

NOTE.—This opinion requires some explanation; for, though it seems to be correct, as applied to the very case before the Court; yet, the principles seem to be laid down too general. It is, I think, quite clear, that the plaintiff must show a right of entry; that is, his right of entry must not be taken away. If he prove twenty years' uninterrupted possession, or possession in his ancestor, and a descent cast; his title must prevail against a complete paper title in the defendant, or any third person. Salk. 421. 685. 2 Esp. N. P. 431. 1 L. Ray. 741. But, still this title is not conclusive. For instance; the defendant may defeat it, by showing, that the plaintiff's possession had not been adverse; that he and the defendant claim under the same title; that the ancestor of the plaintiff had not possession for five years, under the statute Henry VIII., and so on. So the defendant may set up a better title in himself: as for instance, a deed from the plaintiff himself to the defendant, or, as in the very case under consideration, that the estate of the plaintiff had been legally confiscated by the State, and his title passed to the defendant, or to some other person. 3 Esp. N. P. 433, 434, 435. 437. In all these cases, the right of entry in the plaintiff, is only *prima facie* evidence of his title; but it is sufficient to drive the defendant to disprove the title thus shown, or to show a better some where else. In short, wherever the defendant claims under the plaintiff's title, the possession of the plaintiff cannot be said to be adverse; and, of course, his right of entry, though *prima facie* good, may be repelled. But, if the defendant does not claim under the title of the plaintiff, the right of entry in the latter will prevail over that of the defendant, however valid it might be in case a writ of right had been brought. In this case, Hylton proved a right of entry, and the title of the defendant, was under an act of confiscation against Griswold, under whom Hylton claimed. It was, therefore, unnecessary to show the title out of the proprietary, in this suit; though it might have been, had the

survey, however, was not returned into the land office, but into that of the council. Being supposed to be lost, another warrant issued in 1762, stating the loss, and directing a re-survey of the Manor of Springettsbury; but directs the location of it specially. The survey was made, and duly returned into the land office, in the year 1768. This last survey comprehends a great part of the land surveyed in 1722, and a large body of land not included within that survey. But the land in question lies within both surveys.

The defendant showed a complete title to a part of the land in question, and a warrant and survey for the balance, prior to the year 1762; but did not prove payment of the consideration money to the proprietaries.

The defendant insisted that the survey of 1722 was void, as the governor had no authority to issue the warrant in 1722. That the survey of 1762 was void, being made as an original survey, though the warrant only authorized a re-survey; consequently, that the land in question was not part of a manor surveyed according to the terms of the divesting law; and was, therefore, confiscated by that law: not being within the exceptions of it. But, that if the plaintiff had a title, still, the defendant's was a better, being founded on a warrant and survey, which is a good legal title, in this State, against all the world; and, as to the consideration money, the jury, after such a lapse of time, might and ought to presume it paid.

WASHINGTON, J., charged the jury. In this cause there are two questions. First; has the lessor of the plaintiff shown a title to the lands in question? If he has, secondly, has the defendant shown a better right?

1. The lessors of the plaintiff, or those under whom they claim, were once the sole owners and proprietaries, not only of the government, but of the soil of Pennsylvania; not in a political, but in their private capacities; not as trustees for the people, as to the whole, or any part of the soil, but in absolute

fee simple for their individual uses. This right was no otherwise weakened by concessions or agreements, made by the first William Penn, or his descendants; than to render them trustees for such individuals, as should acquire equitable rights to particular portions of land, under general or special promises, rules, and regulations, which the proprietaries may, from time to time, have entered into, and established.

The right of the proprietaries to appropriate to their own use, particular portions of the waste lands within the province; was not derived from, or founded upon any such rules or concessions; but flowed from their original chartered rights, which vested in them a perfect title to the whole of the soil.

But, since it was their interest to encourage the population and settlement of the province, they erected an office, and laid down certain rules for its government, and the government of those who might desire to acquire rights to the unappropriated lands within the province; reserving to themselves a right to appropriate one-tenth of the whole to themselves, for their private individual use.

From hence the following principles resulted. That all persons complying with the terms thus held out, acquired a right to the portion of land thus appropriated, not only against other individuals, who might thereafter attempt to appropriate the same tract, but even against the proprietaries themselves; unless they had previously, and by some act of notoriety, evidenced their intention to withdraw such land from the general mass, and to appropriate it to their private use. As a necessary consequence of this principle, whenever such was their intention, it was made known by a warrant of appropriation, and a survey to mark out, and locate the ground thus withdrawn. These steps gave notice to all the world, that no right to the land thus laid off for the proprietaries, could be acquired by other individuals, without a *special agreement* with the proprietaries or their agents; and this might or might not be upon the *common terms*, as the proprietaries might choose. But, if before

such special appropriation by the proprietaries, an individual had, in compliance with the office rules, obtained a warrant, and made an appropriation of a tract of land, lying within the boundaries of the tract thus laid off for the proprietaries; such prior appropriation of the particular tract, could no otherwise affect the right of the proprietaries, than in relation to such particular tract. Their right to the residue would remain as perfect, as if such interference had not taken place.

On this ground, the right of the first proprietary stood at the time of his death, and so continued to exist in his legal representatives, until the year 1779; when a law of the State was made, divesting the proprietaries of all their estate, right, and title, in or to the soil of Pennsylvania, and vesting the same in the Commonwealth. But this law excepted certain portions of land, the right to which is confirmed and established in the proprietaries for ever. The lands thus confirmed, are all their private lands, whereof they were possessed, or to which they were entitled in 1779, and such as were known by the name of their tenths and manors, which had been surveyed and returned into the land office before the 4th of July 1776.

The lessors of the plaintiff, who most undoubtedly are entitled to all the rights of the proprietaries, are now compelled to date their title from this law; and therefore it is necessary for them to show, that the land in question, is part of a tract called and known by the name of a proprietary tenth or manor, which was duly surveyed, and returned into the land office, on or before the 4th of July 1776.

They are to prove: 1. That the tract of which the land in question is a part, was, in 1779, called and known by the name of a proprietary tenth, or manor.

The words of the law are peculiar. As to their *private rights*, they must be such, whereof they were, in *1779, possessed, or to which they were entitled.* But as to the *tenths, or manors*, it is sufficient if they *were known by that name*, and had been *surveyed and returned* before the 4th of July 1776.

These explanations respecting the manors, were rendered necessary, to avoid giving to the word *manor* a technical meaning. For there were no manors in Pennsylvania, in a legal acceptation of that word; but there were many tracts of land, appropriated to the separate use of the proprietaries, to which this name had been given.

The first inquiry, therefore, under this head, is, was the land in question, part of a tract called and known as a manor, on the 4th of July 1776, or in 1779.

To prove this fact, the licenses granted by Thomas Penn, to about fifty settlers in different parts of the first, as well as the second, survey, in all of which this is called the manor of Springettsbury; are strongly relied upon, to shew, that even in that early period, it had acquired this name. The tener of the warrants, afterwards granted for lands within this manor, varying from the terms of the common warrants; and this variance proved by many witnesses, as marking this for manor land, is also relied upon. In addition to these, the following circumstances are strongly insisted upon by the plaintiff's counsel.

The testimony of witnesses, to shew that the west line of this manor, was always reputed to go considerably beyond York to Opetem. The practise of the surveyors, and other public officers, whenever warrants were issued to survey lands in this manor.

But even if this tract of land had never acquired the name of a manor, prior to 1768, the survey made of it in that year, *as of a manor*, is conclusive. From that period, it acquired by matter of record the name of a manor; and so it appears, by the evidence in the cause, it was called and known, if that evidence be believed.

Secondly. Was it duly surveyed, and returned into the land office, before 4th July 1776?

That it was surveyed in 1768, is admitted; but it is contended, that it was not *duly* surveyed.

The argument of the defendant's counsel, on this point, is,

that the survey was not duly made; because the land was surveyed in 1732. That this survey was void, because made without authority; the governor having no authority to issue the warrant. That it was not executed by the Surveyor General, and was returned into the Council of State's Office, instead of the land office. Presuming these points to be established, it is then deduced from them, that the illegality of the survey of 1732, vitiates that of 1768; the former being considered as the *foundation*, and the latter as the *superstructure*. It is argued, that the survey of 1768, is executed under a warrant of *re-survey* in 1762; and consequently, that the repetition of an act, which has no validity, cannot make it valid. It is further contended, that the recital in the last warrant, of the loss of the first survey, is a mere pretence, since it was afterwards found; a fraud to enable the proprietaries to change the location, for the purpose of getting good, instead of bad lands.

Now, I confess, that I do not understand this kind of logic. If the invalidity of the first survey, can have any effect upon the second, I should suppose it would establish it beyond all doubt; because if the first survey were good, and if the warrant of 1762, were merely an order to retrace the lines of that survey, the counsel might, with some plausibility at least, have argued, that the surveyor was bound to pursue the lines of that survey; and this might give colour to the observations, founded on the mistake of the public officers, as to the proper lines of the survey.

But, if the first survey be unauthorized, and utterly void, then the second could not, in the nature of things, be a *re-survey*; whatever might be the language of the warrant on which it was founded. There is no magic in the word *re-survey*. If in fact there never was a former survey, there could not be a re-survey; and consequently, the survey of 1768 was an original survey, founded on a special warrant, marking out the lines and boundaries, by which the surveyor was bound to go; and such is the fact in this case. As to the imputation of fraud, I see nothing

to support it. The proprietaries had no motive to petition it, since the lands included in the second survey, which were not within the first, being at that time unappropriated, (some few parcels excepted,) they had a perfect right to appropriate them without the aid of a fraud.

Although the survey of 1722 is referred to in the warrant of 1762, yet, the lines of the manor to be surveyed, under the second warrant, are specially described; and consequently, it is not a re-survey in fact, as to any lines not included in the first survey. To the lines thus described, the surveyor was confined; and had he departed from them, the surveys, unless ratified by acceptance, would have been void, as against the proprietary who might have directed it to be made, conformable with the warrant. It is not denied, that the survey of 1762, is in conformity with the warrant. It was accepted as a valid survey, and I cannot see upon what ground the defendant, or any other person, can now say that it was void.

Had not the proprietary a right to appropriate, to his private use, the land included within the survey of 1762, in part of the quota which had always been reserved? And if the warrant and survey made this appropriation, what does it signify whether there was a prior survey or not, or whether it was good or bad? I admit, that if, previously to the warrant of 1762, third persons had acquired a right to parcels of this land, or had done so afterwards, and before the survey of 1762, but without notice of the warrant; the proprietary would have been bound to make them titles, upon their complying with the common terms; but this could not impeach the title of the proprietaries, to the residue of the land, comprehended within the lines of the survey.

Upon the whole, then, the Court is of opinion, that this manor was duly surveyed; and it is admitted, that the survey was returned into the land office, before the July 1776.

The next question is, has the defendant a better legal title, than that of the lessors of the plaintiff?

He claims by a warrant dated in 1747, the title to which is regularly deduced to him, for ninety five acres, part of the land in dispute. He has no patent; but yet, by the Common Law of this State, a warrant and survey, if the consideration be paid, gives a legal title against the proprietaries; as much so as if a patent had been granted. If the consideration be not paid; then the legal title is not out of the proprietaries; but still, the warrant holder has an equitable title, which he may render a legal one, by paying what is due to the proprietaries.

No proof is given of payment by the defendant, or any one under whom he claims, but the jury are called upon to presume it from length of time.

In a case of this sort, there is no room for presumption. The very circumstance of the defendant appearing in Court, without a patent, or without showing or pretending that a patent ever was granted, destroys the presumption, which length of time might otherwise have created. For, if he had paid the consideration money, he would, that moment, have been entitled to a patent. The one was a necessary consequence of the other. A man might, for a long time, forbear to call for this consummation of his title, from his inability to pay the consideration money; but that he should pay it, and not go on to perfect his title, is altogether improbable, and certainly not to be presumed.

But, if the jury could presume any thing from length of time, yet that presumption may be repelled, and in this case there is strong evidence to repel it. The original grantee, in his deed to Shultz, in 1771, states, that it had not been paid; and such is the statement in the deed from Shultz's executor, in 1794, to Stamp, under whom the defendant claims.

The defendant therefore has not a legal title, so as to enable him to succeed in this suit.

But he has an equitable title, and may compel the lessors of the plaintiff to make him a conveyance, upon his paying, or tendering, what is due to the plaintiff's lessors, with interest, costs, &c. And if the plaintiff's lessors should, on such pay-

ment or tender, refuse to make a conveyance, this Court, sitting in Equity, would compel them, at the expense of costs in that suit.

I understand, that in the Courts of this State, the jury, in a cause of this kind, may make a special or conditional finding, in consequence of there being no Courts of Equity in Pennsylvania. But the reason not applying to this Court, the verdict must be general.

Verdict for plaintiff.

CIRCUIT COURT OF THE UNITED STATES.

PENNSYLVANIA, APRIL TERM, 1806.

BEFORE { Hon. BUSHROD WASHINGTON, Associate Justice of the Supreme Court.
Hon. RICHARD PETERS, District Judge.

LESSEE OF SWAN *vs.* HUGHES.

Ejectment.—The certificate of the commissioners of Virginia, appointed under the law of that State, to adjust the claims for settlement and pre-emption rights to lands, which were afterwards found to be within the limits of Pennsylvania; being *ex parte*, is not evidence of a settlement on the lands in dispute. The holder of the certificate must prove, by other testimony, his settlement to be prior to that, under which the defendant claims.

THIS cause turned almost entirely on the evidence; and therefore it is only necessary to state here, such of the circumstances as may be required to explain the only law point which occurred in it.

The plaintiff, in 1781, obtained from the commissioners in Virginia, who were appointed, under a law of that State, to adjust the claims for settlement and pre-emption rights, a certificate for four hundred acres of land, on the waters of Ten Mile creek, in Monongahela County, to include his settlement made in 1770. A survey was made, by a Virginia surveyor, after the compact which took place between Virginia and Pennsylvania; and therefore was not relied on as an official survey. In

1777, plaintiff purchased from one Gregg, an adjoining tract, claimed by him in right of settlement. But the same land was also claimed by Millar, in right of a prior settlement, which it was admitted he had made. Swan's certificate right was founded on a purchase of Woodfield, who, it appeared by the evidence in the cause, first settled it in 1774. It was clearly established and admitted, that Millar made his settlement in 1773.

In 1778, Millar sued Swan, who claimed under Gregg, and laid the demise as of four hundred acres. He recovered a general verdict. Swan then sued Gregg, in an action of covenant on his deed of warranty, conveying him this four hundred acres, same as his, and laid his breach as general as the deed. He recovered a compensation in damages.

In this case the plaintiff contended, that the certificate was evidence that Swan's settlement was made in 1770, and consequently his right was prior to Millar, (under whom the defendant claims.) Secondly—If not so, that yet Millar had agreed to fix a dividing line between him and Swan; so as to leave to Swan the land now in dispute; and that he was bound by this location. Witnesses were produced, on the part of the plaintiff, to prove this location; and on that of the defendant, to show that Millar had claimed a boundary, so as to include it, and had pointed out (pending his suit with Swan,) to the surveyor, that line as his boundary.

With respect to the evidence attempted to be drawn from the certificate, to establish Swan's prior settlement; the Court stated to the jury, that Millar claimed the land in question adversely to the plaintiff, in 1778, as proved by some of the witnesses; and that this must have been known to Swan. That his certificate being obtained *ex parte*, without notice to Millar, he cannot rely upon it as evidence, on a question whether he or Millar was the first settler, to prove that he was. If Millar had been before the commissioners, it would have been otherwise. But to bind him, by a judgment stating that Swan's settlement was in 1770, without his having had an opportunity to

controvert the fact, was repugnant to every principle of justice and law. The question here is, who had the first settlement? Millar proves his in 1773, and Swan endeavours to prove his to have been in 1770, and relies upon an *ex parte* judgment to establish the fact. This is improper.

Swan's certificate only states, that he had made a settlement in 1770, on Ten Mile creek; but on what part, is not stated. It might be so remote from the land in question, that he could never reach it; consequently it is incumbent on him, to shew to the jury, where it was; and therefore he must prove his settlement, and locate it. Whether he has done so; or whether the agreement of Millar to fix the dividing line as contended for by plaintiff; or whether the recovery of Millar was for the whole land, to include the part in dispute; are facts left to the jury.

If no such line was established, or if the land now in dispute was recovered by Millar against Swan, for which Swan was compensated by Gregg, then the verdict should be for defendant; if otherwise, for plaintiff.

Verdict for defendant.

Calbreath vs. Gracy.

Under the clause introduced into policies of insurance, relative to the sentence of a foreign Court of Admiralty, the foreign sentence is not conclusive, in our Courts, to falsify the warranty, which the assured is still at liberty to vindicate. The underwriters may, nevertheless, read the proceedings of the foreign Court, as evidence; though not as conclusive evidence.

Whether it was the course of trade, to put on board a Spanish Supra-cargo, with Spanish papers, and colours; is a question of fact for the jury; and if this is proved to their satisfaction, the underwriters, who are bound to know the course of the trade, cannot object that such circumstances were concealed from them.

It is a breach of warranty of neutrality, that a vessel and cargo, warranted American property, shall be navigated and claimed as Spanish property; and that all the evidence to prove the neutrality of the vessel and cargo, is concealed, from the captors.

In case of such warranty, it is not only necessary that the cargo should be in truth neutral, but also that no act of commission or of omission should be performed, to jeopardize the claim to a neutral character, whether by the owner, or by his agents.

THIS cause came on to be retried, (see *ante* 198,) and such additional facts and arguments as are omitted before, are stated in the charge. But in the opening of the cause, on the defendant's side, the plaintiff objected to their reading the proceedings in the Court of Vice Admiralty in New Providence; in consequence of the clause in the policy, that if the American character of the cargo should be questioned, it should be sufficient for the assured to prove it so in any Court of the United States.

WASHINGTON J. delivered the opinion of the Court. This is a new clause, which has been introduced into policies of insurance by some underwriters, within a few years past. The sooner it receives a construction the better. To under-

stand it, we must pursue the rule adopted as to the exposition of statutes. We must find out what was the mischief it was intended to remedy, and then the extent of the remedy. The mischief was, that the sentence of a foreign Court of Admiralty, condemning a vessel as enemies' property, or as lawful prize; was considered in England, and has been so decided in some of the States, as conclusive proof of that fact against the assured, so as to forfeit their warranty of neutrality, and this too, although he should be able to prove the falsity of the conclusion. The remedy was to meet and correct this, which often in former wars, and still more in those which have lately happened, was a crying evil. We have all heard of the conduct of some of the West India Courts of Vice Admiralty, and the shameful abandonment of all correct principles, which have discharged many of their decisions. The assured did not choose that the property, when really neutral, and which they could prove to be so, should be declared otherwise in consequence of a sentence of those Courts. But they never meant to go farther, and it would be improper to have done so. They are, notwithstanding the sentence, to be at liberty to vindicate the truth of their warranty. But the underwriters may combat that fact, by reading the sentence of the foreign Court of Admiralty as evidence, but not as conclusive evidence. Indeed it may often be essentially necessary, in order to prove the loss.

Charge. *WASHINGTON, J.* The facts in this cause are shortly these. The Carolina, being an American bottom, commanded by an American captain, and belonging entirely to Americans; and being, in the year 1795, at the Havana; took in a cargo of goods, purchased by the plaintiffs and others, American citizens, to be carried to Carthagena. But previous to her sailing, and perhaps to the purchasing of her cargo, a charter party was entered into, between Wyhoff, who represented the owners of the vessel, and some of the past owners of the cargo, Robert Meade, and Cuesta and Hernandez, two Spa-

niards, by which it was agreed, that the cargo should be put on board by Wykoff and Meade, in which Cuesta and Hernandez should be concerned one-third, Wykoff one-third, and R. Meade one-third. That she should proceed to Carthagena, and from thence to Philadelphia. The cargo to be consigned to Hernandez, who was to go the voyage in order to manage the affairs of the concern, but who was to receive no commission for his trouble. The cargo, taken in at Carthagena, was to be sold in Philadelphia on her arrival there, and one-third of the nett proceeds to be paid to Wykoff, one-third to Meade, and the other third to Cuesta and Hernandez.

A bill of lading was signed by Bonner, the American captain, in which Calbreath and Meade, are stated to be the owners of the cargo. On the 8th April, Meade gave to Wykoff a receipt for the cost of one half of the cargo, paid him by Wykoff, deducting 2816 dollars; being Cuesta and Hernandez' one-third of the cost and expenses on said invoice.

The vessel sailed some time in April, having Spanish as well as American papers and colours; with Hernandez on board, as consignee, and the apparent master of the vessel. She was met with at sea by a French privateer, made prize of, and ordered for Cape Francois. A few days afterwards, she was retaken by a British privateer, and carried into Nassau in New Providence, where she was libelled as belonging to citizens of France. Hernandez filed a claim, in which he stated, and in answer to the standing interrogatories, swore, that he was sole owner of the cargo, and Santa Maria of the vessel. He relied upon a treaty between Spain and England, whereby the regulations of the British Prize Laws as to re-captures, were mutually adopted by both countries. Not being able to produce such a treaty, within the sixty days, allowed him to do so; for in fact there was none such; sentence of condemnation passed on the 24th of August.

On the 14th of May, the plaintiffs wrote to a broker in New-York, to effect insurance on this vessel and cargo, at and from

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No proof is given of payment by the defendant, or any one under whom he claims, but the jury are called upon to presume it from length of time.

In a case of this sort, there is no room for presumption. The very circumstance of the defendant appearing in Court, without a patent, or without showing or pretending that a patent ever was granted, destroys the presumption, which length of time might otherwise have created. For, if he had paid the consideration money, he would, that moment, have been entitled to a patent. The one was a necessary consequence of the other. A man might, for a long time, forbear to call for this consummation of his title, from his inability to pay the consideration money; but that he should pay it, and not go on to perfect his title, is altogether improbable, and certainly not to be presumed.

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But he has an equitable title, and may compel the lessors of the plaintiff to make him a conveyance, upon his paying, or tendering, what is due to the plaintiff's lessors, with interest, costs, &c. And if the plaintiff's lessors should, on such pay-

ment or tender, refuse to make a conveyance, this Court, sitting in Equity, would compel them, at the expense of costs in that suit.

I understand, that in the Courts of this State, the jury, in a cause of this kind, may make a special or conditional finding, in consequence of there being no Courts of Equity in Pennsylvania. But the reason not applying to this Court, the verdict must be general.

Verdict for plaintiff.

former as the sole property of Santa Maria, and the latter as the sole property of himself; and this claim he seals by an abominable perjury. Nothing but Spanish papers are produced. The documents, to prove the vessel and cargo American, are carefully concealed. Both are consequently condemned; as Hernandez did not, and could not support the ground of defence which he had taken. Had the truth been told, I must say, judicially, that the whole would have been restored; because it ought, by the law of nations, to have been restored. Spain and France were at war; but Spain and England were at peace with each other, and united in the war against France. America was at peace with all the world. The trade which this vessel was carrying on with the Spanish colonies, was lawful, in respect of Spain; because, in her instance, it was specially permitted. It was not a cause of condemnation in a British Court, because Spain and England were in amity; and the British orders, which forbid the colonial trade of neutrals in time of war, which was interdicted in time of peace, could not apply to a trade with one of the colonies of a power, then at peace with England. The war between England and Spain did not take place till the spring of 1796.

But,* as Spanish property originally, and taken by her enemy as prize, she became subject to confiscation to the British captors; so that, if Hernandez had been employed to procure the condemnation of this cargo, he could not have done it more effectually, than by the course he pursued. How then does such conduct comport with the engagement made by the assured? What did that engagement amount to? That the cargo was American property. Not only so; but, that she should not lose that character, during the voyage insured, by any act or omission of the assured, or of his agents. That she

* This, upon the ground of *reciprocity*; because Spain does not restore the property of a friend, *taken* by her enemy, on salvage. 1 Rob. Rep. 63. The Santa Cruz.

should have all the necessary documents to establish her neutrality, if questioned, which were required by treaties, or by the law of nations. In short, to use the emphatic words of Lord Mansfield, in an important case, she must be neutral, *to the purpose of being protected.* The expressions contain the pith and marrow of such a warranty; and a volume written on the subject, could not make the nature of this engagement more plain to the meanest comprehension.

She must not forfeit her neutral rights, by any act or omission of the assured, or of his agent. Yet, by their act, she is provided with documents, to prove her Spanish property. When met with by the vessel of a nation at war with Spain, but at peace with America, he shows the Spanish papers, and conceals the American. When carried into New Providence, instead of claiming her as a neutral vessel, and the cargo as neutral; as if mad, or worse, he claims them as Spanish. In short, the assured have exactly "done the things they ought not to have done, and have left undone the things they ought to have done." And can it be seriously contended, that the warranty has been complied with? But, it is said, that Bonner was the real master, and the only agent of the assured. Why then did he not put in a claim for ship and cargo, on the true ground of American property? It was his duty to have done so. His *omission* is the same, as if, by his acts, he had produced the condemnation. He says, in his protest, that he was not permitted to do so. I totally disregard his protest, being *ex parte.* But who prevented him? He does not pretend to say, that the Count prevented him; and, if Hernandez, or any other person attempted it, it is no excuse. But, the fact is, that Hernandez was, by the charter party, constituted supercargo and consignee of the cargo, and was appointed to manage the concerns of the owners. He then was the agent of the owners, and they are liable to all the consequences of his misconduct. This objection, then, to the plaintiff's recovery, cannot be got over.

Jury found for the defendant.

PHILIPS *vs.* LEDLEY.

The master of a vessel, from the necessity of the case, may bind his owners for repairs; unless it appears, that some other person has authority to manage the concern, in the particular instance; and that this was known to the creditor.

The mortgagee of a vessel, before possession delivered, is not responsible for repairs made by the mortgagor; nor is he entitled to the earnings of the vessel.

By the law of the United States, relating to the registering and enrolment of vessels, the inaccurate recital of the certificate of registry, in a bill of sale, does not, as in England, avoid the sale; but merely deprives the vessel of her American character.

If a *registered* vessel is assigned to a foreigner, she is only deprived of her American character.

The sale of a *licensed* vessel to a foreigner, is not void; but the vessel is liable to forfeiture.

THIS was *indebitatus assumpsit*, for work and labour done and performed by plaintiff, as ship carpenter, on the sloop Industry, the property of the defendant. The material facts were; that the defendant, before the repairs were made, sold the sloop to one Vasy; and the contract, which was in writing, stated, that "J. C. Ledley, (the person now sued as defendant,) doth bargain and agree with J. Vasy, for the sloop Industry, for 380 dollars; payable one half on delivery of the vessel, and the remainder in three months. The said Ledley holds the enrolment, till the balance of the money is paid." Vasy paid down 20 dollars, and in about sixteen days afterwards received possession of the vessel, and then completed the first payment. He also stated in evidence, that he carried with him, on his first voyage, the license and enrolment, but no change was made in the name. Vasy brought the vessel to Philadelphia, and employed the plaintiff to repair her; informing him that he had

purchased her from the defendant. The repairs being made, to the amount of 632 dollars, Vasy gave his note for the amount, payable at one hundred and ten days, and then went on a trip to Baltimore, where he left her, and returned to Philadelphia. The note having become due, and he being unable to pay it, he was sued, judgment recovered, and being thrown into jail, he took the benefit of the Insolvent Law, and the plaintiff was appointed one of his assignees. Vasy sold the sloop to one Paul, who, at considerable expense, brought her to Philadelphia, and consented that she should be sold, and after paying these expenses, the residue should be applied to the discharge of so much of the original purchase money, as was yet due the defendant. She was sold for 400 dollars. It appeared from the plaintiff's books, that he had charged these repairs to Vasy, for the sloop Industry. The plaintiff, not being able to receive payment from Vasy, brought this suit.

The Court informed the counsel, that the only question was, whether, under the circumstances of this case, (about which there was no dispute,) the plaintiff could recover against Ledley, the defendant; and suggested, that the case should be argued as a point of law. The counsel on both sides assenting, Smith, counsel for defendant, moved for a nonsuit. He contended—First, That the defendant at no time was responsible for these repairs, and relied on the cases of Jackson *vs.* Vernon, 1 H. Black. 114, and Chinnery *vs.* Blackburn ib. 117, to show, that even the mortgagee of a vessel, out of possession, is neither entitled to the earnings of the vessel, nor liable for repairs or expenses. That perhaps it might be contended, that under the 29d section of the Act of 18th February 1793, 2d vol. Laws of Congress, p. 193, the sale to Vasy, who, it is admitted, was then an alien, by producing forfeiture of the vessel, prevented the title from ever passing out of the defendant. But in answer to this, the title passed to, and remained in the vendee, until the forfeiture was completed by conviction, and therefore, in respect to his acts, he was to all the world the owner. But, if the

sale produced the forfeiture, then the right vested in the United States, and on that ground the defendant could not be made answerable.

Second.—The plaintiff, by resorting to Vasy, looking to him, taking his note, and suing him, discharged Ledley, if he ever was liable. 2 Stra. 817. Abbot on Shipping, 85. The plaintiff lost his lien on the vessel, which the law of Pennsylvania gave him, because he suffered her to make one voyage to sea.

Messrs. M. and S. Levy, for plaintiff, contended; that the sale to Vasy passed neither a legal nor equitable title to the vessel. The contract was nothing more than an agreement to sell, on condition the whole purchase money was paid; not an equitable estate, because the purchase money was never paid. Ledley, therefore, continued the owner; and to show his liability, although the contract was not made with him, they relied on the case of Westerdale & Dale, 7 T. Rep. 306. Cited also 1 Dall. 129. 392. 3 Idem 491.

The Court stopped Mr. Milner, who was about to reply.

WASHINGTON, J. This is an action of *indebitatus assumpsit* against defendant, in common form, for repairs done to his vessel, at his request. To support it, the plaintiff must prove the *assumpsit* of the defendant, either expressly, or by such an implication as the law will raise; that is, that the work was done, at the request of the defendant, or of some other person who had authority to bind him, either express or implied, from the nature of the transaction. The principle upon which the master may bind his owners for repairs, &c. results from the general authority with which, from the necessity of the case, he is clothed; and which nothing but proof that some other person was intrusted to manage the concern, in the particular instance, and this known to the creditor, can defeat. The cases of Chinnery *vs.* Blackburn, and Jackson *vs.* Vernon, support, to the full extent, this doctrine. For a mortgagee of a vessel, even before possession delivered, has the legal title; and yet he

is not responsible for any repairs, nor entitled to any of the earnings of the vessel. If this be the case as to a mortgagee, the argument is *a fortiori*, in the case of an absolute vendee in possession, whatever defect there may be in his title. The question always must be, with whom was the contract made, and on whose credit?

The case of Westerdale *vs.* Dale is not apposite to this. For there, Dale and Wharton were partners in the vessel; and, of course, both had an authority to bind the other. The insufficient recital of the certificate, in the conveyance from Dale to Wharton of his half, rendered the whole a nullity, under the particular provisions of the Navigation Laws of England; and of course, Wharton still retained the authority, once vested in him, to bind his partner. But in this case, Vans never had authority to bind the defendant, before the purchase; and the sale could not, in its nature, communicate such a power to him. The difference between the Law of England on this point, and the Law of the United States, is striking. The inaccurate recital of the certificate, avoids the deed there: here, it only deprives the vessel of the privileges of an American bottom. If a *sea vessel* is assigned to a foreigner, the consequence is the same. If a *coasting vessel*, the sale is not void; but the vessel is liable to forfeiture only. In this case, the sale was absolute, not conditional or executory; and was perfected by delivery of possession. The agreement that Ledley should retain the enrolment, created a lien on that paper; but the title to the vessel itself, passed by the sale. In this case, however, it appears that both the license and enrolment were delivered up.

Nonsuit, directed.

Higbie *vs.* Hopkins.

If A loan the note of a third person to B, B must use due diligence to recover the amount due by it; and if the debt is lost, by the insolvency of the maker, and by B's want of diligence, B must pay the amount of the note to A.

If the answer to a bill, contain a denial of the allegations; the plaintiff must support the statements in the bill, by testimony, and corroborating circumstances.

On the 21st August, the defendant gave a receipt to plaintiff, for James Watson's note to Love, for 1380 dollars, endorsed by Love to plaintiff, and for Joseph Watson's note for 1075 dollars; which the defendant promised to be accountable for to the plaintiff, when requested.

The defendant filed a bill on the equity side of this Court, against the plaintiff; in which he charged, that these notes were merely put into his possession for collection; and if they could not be so collected, he was to place them in the Bank of Alexandria; that he did place them there; and that the plaintiff received the small note; but that the bank delivered out the other to Joseph Watson. He also claimed a sum of 200 dollars for a negro, (Joe,) sold by plaintiff to him, to which he had no title; and that defendant, Hopkins, was obliged to pay a judgment against him, for his value, to the above amount.

The answer contained a positive denial of all these allegations; and a replication having been put in, the present defendant took some depositions, to prove the insolvency of James Watson and his endorser, at the time their note became due; also, to support the allegation about the negro.

It appeared, pretty clear, from the evidence, and from some letters, that the notes were loaned to Hopkins. That Joseph Watson, as the agent of Hopkins, put into the Bank of Alexan-

dria, the note of James Watson, and withdrew it the day before it became due. That in ten days after it became due, Hopkins, supposing it had been paid, gave Higbie an order for the amount, but when he applied at the bank, he was informed that Joseph Watson had withdrawn it. On the 3d December, one month after the date of the order, Hopkins offered James Watson's note to Higbie, which he refused. Some evidence was taken, which left it a matter of doubt, whether Watson and his endorser were able to pay or not, when their note became due.

WASHINGTON J. informed the jury, that as to the note, it was clearly a loan to Hopkins, and he was bound to use reasonable diligence to receive the money. If the amount of the note had been lost, by his failing to use such diligence, he was liable to the plaintiff. The jury were to weigh the evidence, as to the solvency of the drawer and endorser, when the note became due, and before it was offered to Higbie. When Higbie received information from the bank, that Joseph Watson had withdrawn the note, it does not appear that any application was then made for it. An offer to return it was made in a month after, and refused. As to the value of the negro, the allegation in the bill, that he was sold by Higbie to Hopkins, is denied. The answer, then, must be considered as true, unless contradicted by one witness, and circumstances to give it a preponderance.

Verdict for plaintiff.

Ex Parte Cabrera.

A secretary, attached to the Spanish legation, is entitled to the protection of the laws of nations, against any civil or criminal prosecution: but, the Circuit Court cannot discharge him from criminal process, issued under the authority of the State of Pennsylvania.

The Courts of the United States, and the justices thereof, are only authorized to issue writs of *habeas corpus* to prisoners in jail, under, or by colour of the authority of the United States; or committed by some Court of the United States; or required to testify, in a cause depending in a Court of the United States.

The jurisdiction of the Courts of the United States, is limited; and, the inferior Courts can exercise it, only in cases in which it is conferred by an Act of Congress.

The laws of the United States, which punish those who violate the privileges of a foreign minister, are equally obligatory on the State Courts, as upon those of the United States; and it is equally the duty of each, to quash proceedings against any one having such privileges.

The injured party may seek his redress, in either Court, against the aggressor; or, he may prosecute, under the 26th section of the law.

The Circuit Court cannot quash proceedings against a public minister, depending in a State Court; nor can the Court in any way interfere with the jurisdiction of the Courts of a State.

DON JOSEPH DE CABRERA, was brought up on a *habeas corpus, ad subjiciendum* awarded, some days ago, directed to the keeper of the debtors' apartment of the jail of the city and county of Philadelphia. The writ was awarded upon the affidavit of the party, stating, that he was, at the time of his commitment, in the character of secretary, attached to the Spanish legation; and had been committed, by a warrant from the governor of this State, on the ground of a criminal charge.

The return to the *habeas corpus*, states, that the petitioner is detained in the custody of the jailor aforesaid, by virtue of a

warrant from the governor of Pennsylvania, dated the 27th of August, 1804; "commanding him to arrest the petitioner, Don Joseph de Cabrera, attached to the legation of Spain, near the United States; who is charged, on oath, with having presented to the Bank of Pennsylvania, certain counterfeit checks, drawn in the name of the Marquis de Casa Yrujo, minister of his most catholic majesty. By the law of nations," continues the warrant, "he (the said Cabrera,) is entitled to all the privileges of one in the train of the minister; and, therefore, he may not be amenable to our laws: yet, he may be secured with the consent of the minister, till it shall be known whether his sovereign will order him to Spain for trial, or to be delivered up to the justice of this State. You will, therefore, furnish him with a room in the debtor's apartment, and him safely keep, *under the directions of the minister*, until further orders."

He was also detained by virtue of a warrant, bearing date the 7th September, 1804, issued by M. Hillegas, one of the city aldermen, on the complaint of the cashier of the Bank, that a forged check, in the name of the said minister, had been presented by a servant of the said Cabrera; "and it is stated, by Joseph B. M'Kean, that the Spanish minister has withdrawn, (at the request of the said Cabrera,) the protection of the rights of embassy; and whereas said Cabrera is charged with having forged said check," the officer is commanded to apprehend said Cabrera, and to bring him before him, to answer the said complaint; and to be further dealt with, according to law.

It appeared, that a bill of indictment was found, in the Mayor's Court, against the petitioner, for this forgery; but, upon a representation of his character and privileges to the Court, a *nolle prosequi* was entered.

To prove the illegality of these proceedings, and the title of the petitioner to the immunities of the law of nations, he produced his commission from the Court of Madrid, appointing him secretary, attached to the Spanish legation; a certificate

from the Spanish minister, acknowledging him as adjoint to the secretary of legation, appointed under the denomination of gentleman ambassador, and entitled to the protection of the law of nations: also, a letter from the Secretary of State, certifying, that he had been received, and treated in that character, by the government of the United States.

It was argued, on the part of the petitioner, by S. Levy, and Mr. Heatly; that a secretary of legation, appointed by his sovereign, is entitled, equally with the minister himself, to the protection of the law of nations; and, unlike the private secretary of the minister, who is appointed by him, is not subject to his control; and cannot be deprived of his privileges, by any act of the minister. Vatt. B. 4. c. 9. s. 122. He cannot divest himself of his privileges, without the consent of his master. Ib. c. 8. s. 11. Mart. Law of Nat. 250. A minister cannot be prosecuted criminally, or civilly, for a breach of the municipal laws. 4 Inst. 153. 1 Rob. Abr. 175. Molloy, 139. 1 Com. Dig. title Ambassador, L. B.

To prove the power of this Court to relieve; the Constitution, the 25th section of the law to punish crimes, and the 13th and 14th sections of the judicial law, were relied on.

Peters, J., gave a written opinion, in which he condemns the proceedings against the petitioner, as illegal and unwarrantable; but is of opinion, that we have not jurisdiction to relieve in this way.

WASHINGTON, J., after stating the case. The documents produced by the petitioner, fully establish, to my satisfaction; that, previous to his arrest and commitment, under the warrants before mentioned, his claim to the character of adjoint secretary of the Spanish legation, was well founded; and there is no evidence before the Court, that he has since been removed by his master. We must, therefore, consider him, as now entitled to that character. If so, it is not, and cannot be denied, but that he is under the protection of the law of nations;

and is not amenable to the tribunals of this country, upon a civil or criminal charge.

Whether the ground, stated in the governor's warrant, be sufficient or not, to authorize his detention, until the further order of the minister of his master be known, need not be decided; until we have first ascertained the power of this Court to relieve him, or to pass an opinion on that point.

The question is not, whether Congress might, within the terms of the Constitution, have conferred this power on the Courts of the United States, in cases of this nature; but, have they done it? For, it has been frequently decided, by the judges of the Supreme Court of the United States, that the inferior Courts can exercise jurisdiction in those cases only, where it is conferred upon them by a law of Congress. The reason of this is obvious. The only Court, by name, whose jurisdiction is defined by the Constitution, is the Supreme Court; and, therefore, Congress has no power to restrain it in those cases where it is defined. But, the residuum of the judicial power is vested in such inferior Courts, as Congress may, from time to time, ordain and establish. Now, it follows, that when Congress has established such inferior Courts, it lies with that body, to parcel out the judicial powers amongst them, in such manner, as may seem to them most proper. Accordingly, we find that certain tribunals, under the denomination of Circuit Courts, are authorized to hear and determine a class of cases, particularly pointed out, whilst other cases are assigned to Courts, under a different name; sometimes exclusive of, and sometimes concurrent with the Circuit Courts.

The question then is, has this Court jurisdiction of the present cause, by virtue of any law of Congress, so as to discharge from confinement, any person, no matter what may be his character or privileges; committed by a warrant from the governor, or any judicial magistrate, of this State?

The counsel for the petitioner rely, for the establishment of our jurisdiction, upon the 35th section of the law, entitled,

"An Act for the punishment of certain crimes against the United States." It declares, that all process sued out in any of the Courts of the United States, or of any particular State, or by any judge or justice therein, respectively, against the person or effects of any public minister, or of his domestics, shall be deemed null and void; and the next section declares, that the person suing out the same, shall be punished, on conviction, with fine and imprisonment.

This law is not less obligatory upon the State Courts, and State judges, than upon those of the United States. If a public minister be sued in the latter Courts, it will be the duty of those Courts to quash the process, as altogether void. If he be sued in the former, that Court is equally bound, by the same law, to give the same decision. The injured party may also have redress against the aggressor, in either Court, or may prosecute him under the 26th section of the law.

But, where is the law which gives to the Circuit Courts, a right to quash a writ sued out from a State Court, and there depending against a public minister? If the Circuit Court can do this, why may not the District Court do it? For the claim of either is equally warranted by the Constitution. But, the law, which must be our guide, has given it to neither. It is one thing, to declare the process void; but, another to define the tribunal, which is to decide. The natural tribunal is that, where the process is depending; or which has the superintending control over such Courts.

Either Court, that is, the Federal Circuit, or the State Court; might entertain jurisdiction of a suit brought to redress the injury, if the sum, residence of the party, and other circumstances, which respect the general jurisdiction of these Courts, respectively, be such as the law requires. But, I apprehend, that neither Court can dictate to the other, the conduct it shall pursue, or interfere in causes there depending, unless properly brought before it, under the provisions of law.

We come then to the remedy. The petitioner is detained by

virtue of the two warrants before mentioned. Can this Court take him, by force of a *habeas corpus*, from the custody of the law of this State, and set him at large?

The 13th section of the judicial law, which was referred to, and relied upon, by the counsel for the petitioner, relates entirely to the jurisdiction of the Supreme Court of the United States.

The 14th section, which was also relied upon, is applicable to the question under consideration. It declares, that all the Courts of the United States, as well as the justices thereof, shall have power to issue writs of *habeas corpus*, provided that such writs shall in no case extend to prisoners in jail, unless where they are in custody under, or by colour of the authority of the United States, or are committed for trial, before some Court of the same, or are necessary to be brought in to testify. But, Don Joseph de Cabrera is a prisoner in jail, and is not in custody by authority, and was not committed for trial, before any Court of the United States; neither is he wanted to testify in this Court. The consequence is, that, by the express injunctions of the law, this writ of *habeas corpus* cannot extend to the present case.

Whether it would have been wise in Congress, to have vested in the national Courts, the power of deciding, in some way or other, every national question, authorized by the Constitution; is another point. I am one of those, I confess, who have always thought it would have been better, if the Legislature of the Union, in allotting to the several Courts the jurisdiction they were to exercise, had occupied the whole ground marked out by the Constitution; but, I am not one of those, who think it a commendable quality in a judge, to enlarge, by construction, the sphere of his jurisdiction: that of the Federal Courts is of a limited nature, and cannot be extended beyond the grant.

Whether the petitioner may, or ought to be relieved, in the Courts of this State, it would be improper in me to say. It is clear, that, upon this motion, we cannot relieve him.

The prisoner was remanded.

Sparks *vs.* West.

Action, by the owner of a vessel, against the defendant, for having put on board of her, without the knowledge of the owner, and against the regulations of Havana, a quantity of silver, which occasioned the seizure and detention of the vessel. Held, that the defendant is liable to answer for the damages sustained by the plaintiff, if they were occasioned by such illegal act.

Quere, whether, in any case, the protest of the captain is admissible in evidence?

THIS was an action brought by the plaintiff, owner of the ship Hope, against the defendant, for putting on board of the ship, at the Havana, a quantity of dollars, without the knowledge, and against the orders of the captain given to his officers; whereby she was detained, for a long time, by the Spanish officers, in order to be searched.

Mr. Levy offered in evidence, the protest of the captain of the Hope; and, to prove that this was always admitted as evidence in the Courts of this State, he cited, 1 Dall. 1. 6. 10.

Mr. Condie mentioned another case, similar to these: also, one in the Court of Common Pleas, where an action was brought for the deviation of the captain. (*a*) He cited also other cases, to show some of the exceptions made to the general rules of evidence.

It was opposed by Messrs. Ingersoll and W. Tilghman, as being contrary to the general rules of evidence, and as not being admitted in England.

Peters, J., was of opinion, that, as a general rule, it ought not to be admitted; that there might be cases, where there might be an exception, but this was not one.

(*a*) 7 T. Rep. 158. The protest refused as evidence.

Washington, J., observed, that he by no means approved of admitting such evidence. That, if any long and uniform decisions of the State Courts had been produced, showing the principle to be otherwise settled, he should have felt himself perplexed. But, all the cases cited, have related to actions on policies of insurance; where it was not easy to perceive clearly any interest in the captain. But, this is an action of tort, for an injury sustained by the plaintiff, for which the captain is liable; unless he can make out such an excuse for himself, and fix the wrong on the defendant, so as to enable the plaintiff to recover against him. No train of decisions has been produced or mentioned, in such a case. He was of opinion, this protest is inadmissible evidence.

WASHINGTON, J. The declaration is a special action on the case, and states the seizure, search, and detention of the vessel; as the consequence of the defendant's putting on board this money without the permission of the captain. It certainly was an unlawful act, and the defendant is liable to pay all the damages, which the plaintiff can prove to your satisfaction to have resulted to him from this act. But, it does not follow, that, because the act was unlawful, the defendant is liable for all the damages sustained by the plaintiff; unless the act was the occasion of the damage. As, suppose the 400 dollars put on board by defendant, had not been found; or it appear, from other evidence, that not this, but some other thing was the cause. Upon this point, the parties are at issue. The plaintiff, to prove the injury sustained to have arisen from this act, relies upon the following circumstances: that, the search commenced the day after it was put on board. The answer to this, is; that the vessel was to have sailed the next day. That the money was found concealed; and, therefore, was calculated to excite suspicions, that a search would discover more hidden treasure in other parts of the ship: that, when 136 dollars were found in the steward's chest, the officers declared, that they

would restore it, if no more was found; that, after finding the money put on board by defendant, they took the vessel to be searched.

But still, this goes only to show, that this money was possibly the cause of the search and detention, but not of the seizure.

In opposition to these circumstances, the defendant relies upon the following: the superior value of the outward, to the homeward cargo; the number of passengers to return in the vessel; the ground on which the vessel was moored, which a witness has said, was best calculated for smuggling; were all calculated to excite suspicions, in the Spanish officers, that there were contraband goods on board. They, in fact, found money and other things in the steward's chest, which they seized and detained. But, above all, the certificate of the Spanish officers, who made the seizure and search, and which they left on board as a kind of *procès verbal*, is relied upon to show, not only that this money was not the cause of the seizure, but that it was not the cause of the search or detention.

They state, that having received information of many thousand dollars being on board the vessel, they had been induced to make the search; that they found 536 dollars, (viz. the 400 dollars put on board by the defendant, and the 136 dollars found in the steward's chest,) and some and that, in consequence of this information, and the finding of these articles, they had caused the vessel to be unloaded, and searched.

This is a summary of the evidence, and of the arguments of counsel. I have stated the legal principle, by which you are to be governed. You will say, what damages, if any, the plaintiff is entitled to.

Verdict for 1,092 *dollars and* 98 *cents.*

(*The claim was for upwards of* 4,000 *dollars.*)

BEALE *vs.* PETTIT & BAYARD.

Action on a policy of insurance.

A certificate given by a supra-cargo, upon his return from the voyage injured; and who at the time it is offered, is dead; is inadmissible to prove the plaintiff's interest in the return cargo. Evidence cannot be given to prove what the supra-cargo had declared on this subject.

In an open policy, the plaintiff must prove his interest, and the value of his property; or he cannot recover. The bill of lading of the outward cargo, is no proof of the interest of the plaintiff in the homeward cargo.

Quere, whether, when at the time of an offer to abandon, the property was restored; the assured can recover for a total loss?

ACTION on a policy of insurance, on goods from Norfolk to Aux Cayes, and on the return cargo. The outward cargo was carried safe. The vessel took in a return cargo; was captured and carried into Jamaica; and libelled. The vessel, and most of the cargo, was restored, on stipulation to answer the appeal; and the vessel arrived, with the cargo, in safety, at Norfolk. As soon as the plaintiff had notice of the capture, he gave notice to abandon; but at that time the cargo had been restored, and was on its return home; but this not known to the plaintiff. The bill of lading, invoice, or an account of sales of the return cargo, were not produced; nor did it appear that any had ever existed. The supercargo, after his return, gave a certificate, on oath, that he had sold the outward cargo, belonging to the plaintiff, and invested the whole in a return cargo. But the Court refused to let this certificate be read, or hear evidence of what the supercargo, (now dead,) had declared in his life time, on this subject. The notice to abandon was given on the 6th of May, and the captain's protest, to prove the loss, was sent to the underwriters the 4th of November, at which time the vessel had arrived at Norfolk.

Ingersoll, for the defendants, objected to the recovery; 1st, because, at the time the abandonment was made, no proof of loss or property was made; 2d, because, at that time, the vessel was in fact in safety. 3d. No proof of property and value.

WASHINGTON J. charged the jury. This policy is made in the name of one Leamy, for, and on account of all persons concerned in the cargo. The plaintiff states himself to have been owner of a part of the return cargo; and if so, it is clear that he has a right to sue. But proof of his interest, and, (the policy being open,) of the value of it, must be made out to your satisfaction. It is of the very essence of this action, that he prove his interest. The protest of the captain is inapplicable to this point. The bill of lading, for the outward cargo, is no proof that the plaintiff was interested in the return cargo. The evidence most relied upon is, a paper delivered by the defendants to the plaintiff, in which they state, that no proof of property had been laid before them, but the declaration, on oath, of the supercargo; for which reason they refuse to pay. Now this paper does not make that declaration evidence, which we have declared is not evidence; particularly as the defendants state it as the ground of their refusal.

Should the jury not be satisfied with the proof of property, they will find for the defendants. If otherwise, they will find, subject to the opinion of the Court, in a case to be stated, so as to enable us to decide more deliberately, the question, (a) whe-

(a) This question is more difficult than I at first supposed it. Marshall, p. 486, says, that if the assured at the time he receives advice of the loss, or before he has abandoned, receives advice also that the property is recovered, he cannot abandon; because he can only abandon *while* it is a total loss, and he knows it to be so; not after he knows of the recovery. The rule, he says, is, that if the thing insured be recovered before any loss is paid, the insured may claim for a total or partial loss, according to the final event; that is, according to the state of the case at the time he makes his claim.

In the case of Hamilton ss. Mindez, 2 Burr. 1198, Lord Mansfield says,

ther, under the circumstances of this case, the plaintiff would abandon, and go for a total loss.

The plaintiff agreed to be called, as soon as the jury returned to the bar, and suffered a nonsuit.

"the question is, whether the plaintiff, who at the time of his action brought, at the time of his offer to abandon, and at the time of his being first apprized of the accident, had only sustained a partial loss, ought to recover as for a total one?" It is repugnant to recover as for a total loss, when the final event has proved it only an average loss.

"The assured cannot elect before advice of the loss; and if that advice shows the peril to be over, he cannot elect at all; for he cannot abandon, when the thing is safe." The present is the first attempt that has been made to charge the insurer as for a total loss, upon an interest policy, after the thing was recovered. "If the thing *in truth* be safe, no artificial reasoning can set it up for a total loss."

"In case the ship be taken, the insured may abandon; provided the capture, or the total loss occasioned thereby, *continues to the time* of abandoning and bringing the action." He again lays down the principle in the following words: "That the plaintiff can only recover an indemnity, according to the nature of his case, at the time of the action brought, *or* at most, at the time of his offer to abandon." I give no opinion how it would be in case the ship and goods were restored in safety, between the offer to abandon, and the action brought, or between the commencement of the action and the verdict." Here the event had fixed the loss to be an average only, before the action brought, before the offer to abandon, and before the plaintiff had notice of any accident.

Park, p. 145, says, that it may be collected from Boccus, that in order to entitle the plaintiff to recover for a total loss; it must continue total at the time the offer is made to abandon, at the time the action is brought, or at the time of the payment of the money.

From what is said above, it is clear, that if at the time of the offer to abandon, the assured *had notice* of the recovery, he cannot abandon. But the question is, if at that time the property was in fact recovered, and in safety, and this unknown to the assured, can he abandon, if afterwards the fact appears?

In the case of Goss vs. Withers, and Hamilton vs. Mendez, the assured knew of the recovery before his offer to abandon. But the Judge, throughout, in laying down principles, speaks of the fact of recovery, before action brought, or offer to abandon. From which I should conclude, that if before

the action brought, or offer to abandon, it should appear, that the property was in safety, the assured can only recover as for a partial loss. But suppose at the time of the offer to abandon, she was still detained, by virtue of the capture; but liberated before action brought? This is the question which Lord Mansfield says he does not mean to decide. But I think it clearly proves, that the question depends upon the fact, not upon the assured having or not having notice of it. Indeed, I cannot see why that circumstance should make any difference in the principle, which certainly is intended to prevent a loss, partial in its nature, from being converted into a total one.

In Marshall vs. Delaware Insurance Company, decided in this Court, at a subsequent session, and affirmed in the Supreme Court, 4 Cranch, 202, it was decided; that the right to abandon depends on the state of the fact, at the time of the offer, and not the state of the information received.

SHATTUCK vs. MALEY.

An officer of a public armed vessel of the United States, who made a seizure of a neutral vessel on the high seas, may excuse himself, by showing probable cause for having made it; but the ground of excuse should be very strong—stronger than in case of a capture of a neutral, by a belligerant. If such an excuse is made out, he is not liable for consequential damages; but otherwise, he is liable for all damages which have followed the seizure. What will be deemed probable cause of seizure.

THIS was an appeal from a sentence of the District Court, entered, *pro forma*, against the appellant.

The appellant filed a libel in that Court, stating, that being, in May 1799, a naturalized subject of the king of Denmark, and resident at St. Thomas, and owner of the Mercator, an American built vessel, which he had *bona fide* purchased from the owner, in November 1799; he, in May 1800, put on board of her a cargo, and sent her to Jaquemel, or Port au Prince, in the island of St. Domingo, consigned to the captain, and properly documented to prove her neutrality. That on the 14th of May, when near the port of Jaquemel, she was met with by captain Maley, commander of the United States' armed vessel the Experiment, and seized, without having proceeded to adjudication; and prays a *monition* to compel him to do so. Maley appears, and answers under protest: admits the capture, but states, that the Mercator being an American registered vessel, owned and employed by citizens residing in America, sailed from Baltimore, and at the time of the seizure she was proceeding directly, or from some intermediate port, to Jaquemel, within the dependencies of France, and not to Port au Prince, agreeable to her letter of instructions. That the captain appeared to be an Italian, and his crew Portuguese and Italian.

The captain did not show his burgher's brief. Shattuck was a citizen of Connecticut, and had never expatriated himself. That under all these suspicious circumstances, he took her as violating the non-intercourse law, and sent her, with an officer and men, to captain Talbot, the commander on that station, lying off Cape François, for his orders. Six hours after she left the Experiment; she was captured by a British privateer, carried into Jamaica, libelled as belonging to France or Spain, and condemned. Of this, the libellant had notice; and his captain interposed a claim; but the vessel and cargo, (except the captain's part,) was condemned. An appeal was prayed, but was afterwards abandoned.

The replication gives the proofs of the naturalization of Shattuck in 1789 or 1790. That the original destination was to Port au Prince, and so were the instructions; but just before sailing, verbal orders were given to touch at Jaquemel. That the libellant was the sole owner of the Mercator, that she was navigated as a real Danish vessel; she had on board, when seized, the king's passport, a certificate of measurement, muster-roll, a bill of sale, a burgher's brief of the captain, clearance, invoice, and bill of lading, duly attested as to the ownership and neutrality thereof; the captain's instructions, and the certificate on oath of sundry respectable merchants of the island of St. Thomas, attesting the citizenship of the replicant.

Mr. Duponceau, for the appellant, insisted, 1st. That the capture was not such as to render Maley a *bona fide* possessor, because, being properly documented, and no circumstance to render her suspected, he had no right to capture her. But if he did take her, it was his duty to send her immediately to the United States, for adjudication; and not to Cape François, out of her course to the United States, to be examined by the commodore. See 4 vol. Laws United States, 196.

2d. Even if he were a *bona fide* possessor, he has forfeited the protection of that character, by not resisting or remonstrating against the capture by the British, and by not afterwards

endeavouring to defend the property in the Court of Admiralty. 4 Rob. Rep. 280.

3d. That the capture by the British was the consequence of his illegal conduct, and he is liable for all consequent damages. 1 Rob. Rep. 78. the case of the Betsey.

4th. The sentence in Jamaica is not conclusive. But if it be, the capture by Maley was illegal: as the Mercator, it is admitted, was unarmed.

5th. The claim at Jamaica, put in by the captain of the Mercator, does not bar the appellant's remedy. 2 Rob. Rep. 308.

The principal answer, by Dallas, for appellant, was, that the destination of the vessel differing from the written instructions to the captain; the former citizenship of Shattuck in this country; the instructions to the officers of the American navy; justified Maley in sending her in for examination. That it does not appear that the loss proceeded from his having done so.

WASHINGTON, J. Previous to the inquiry, whether the appellant has shown sufficient reasons to excuse him for having captured the Mercator, and to what degree his responsibility for having done so extends; there is a preliminary question, which deserves examination. It is, whether the commander of an armed neutral vessel, in the execution of a law of his country, can excuse himself for the violation of the rights of other nations, on the high seas; by showing sufficient ground to suspect, that the vessel thus captured, came within the scope of the law, and of his authority? In other words, whether probable cause, to any and to what extent, will excuse him, if the event should prove, that he judged wrong upon the fact which he has to decide? This question was very much agitated in the cases of the Charming Betsey, and Flying Fish, in the Supreme Court; but did not receive a positive decision by the Court.

The common law doctrine, as to torts, committed by officers

acting under authority of law, is certainly very rigid. They act at their peril; and if they by mistake act wrong, there are but few cases in which they can be excused. But a reason may exist for this severity, in cases happening on land, which does not exist where similar cases occur at sea. In the former, the means of obtaining correct information are more within the power of the officer; and the officer may, in most cases, if he doubts as to the fact, insist upon being indemnified by the party. But at sea this cannot be done.

The Act of Congress, prohibiting the intercourse of the American merchants with the dependencies of France, considered strictly as a municipal regulation, unconnected with war, was binding upon our citizens, whether within the limits of the United States, or at sea. These officers, who were in any manner charged with the execution of that law, were bound to obey it. The Courts of this country, when cases arising under it are brought before them, must decide in such a manner as to give effect to the law; whatever may be the hardship which such decisions may impose upon the subjects of other nations.

The law authorised our armed vessels to stop, and examine any vessel of the United States, on the high sea, which there may be reason to suspect to be engaged in traffic, contrary to the provisions of that law; and if it should appear, that she was sailing to any port within the territory of the French Republic, contrary to that law, the commander of our vessel was to seize, and send the vessel engaged in such illicit trade to the nearest port in the United States.

Every thing incident to the power here granted, and without which it could not be executed, is impliedly granted. But as the character of a vessel at sea, could not always be discovered but by her papers; it necessarily followed, that the commanders of the armed vessels of the United States, might, under the sanction of this law, stop the vessels of other neutral nations, in order to make this examination; for otherwise, it would be impossible to say, whether she was not a vessel belonging to

American citizens, engaged in this illicit trade. The right of examination, essentially implies the right of judging, upon the evidence exhibited to them, whether the character assumed was real or covered. To hold the officer responsible, according to the event, would be to render the law nugatory; since few men would be found bold enough to insure the eventual solidity of his judgment, however strong he might suppose the grounds of it to be. But to excuse him from damages, if he should, in the execution of this limited authority, violate the rights of others; he must show such reasons as were sufficient to warrant a prudent, intelligent, and cautious man, in drawing the same conclusions. This is what is called probable cause; which excuses a belligerant for an unauthorized seizure of a neutral vessel; which he has reason to believe to be, in fact, an enemy, or engaged in a trade which renders her liable to confiscation. The principle of the two cases is the same; though the facts which would afford probable cause in one case, would not in another. For instance: vessels belonging to neutral States, must not only act so as to entitle them to the protection of that character; but they must carry with them the documents necessary to satisfy any of the belligerent powers, who may demand it, that she is neutral. If this be not done, the neutral cannot complain, that he is arrested on his voyage, and exposed to all the losses which may result from an examination into the fact of his neutrality, in the Courts of the captor. But as she is under no obligation to prove her neutrality to another neutral nation, it would be no excuse for her capture, by such neutral nation, that she did not exhibit the same proofs as a belligerant might have required. But, if, as in cases within the non-intercourse law, there be reasons to suspect the vessel to be the property of Americans, and engaged in a trade prohibited by the laws of the United States; it would be incumbent on the commander of such vessel, to free himself from those suspicions; and if the officer of the American armed vessel,

had reasons, apparently well founded, to warrant the belief, that she came within the law, which he was bound to execute; I should hold him excused. But these reasons ought to be very strong, to entitle him to the character of acting *bona fide*; a character which ought most undoubtedly to protect him against any consequential damages, provided they are not produced by any subsequent misconduct of his own, or of those intrusted by him with the property.

These being the principles which ought to govern this case, how do they apply to it?

The Mercator, when met with at sea, was found possessed of every necessary document to prove her to be the property of a Danish subject, and employed in a lawful commerce, not only in relation to the American government, but to the belligerent powers. I cannot discern, in the history of this transaction, a single circumstance, which ought to have excited a suspicion, that she was not, in fact, what she appeared to be. The certificate found on board, attested by the oaths of respectable men at St. Thomas, fully established the fact that Shattuck was a subject of his Danish majesty. The bill of sale proved the vessel to be Danish, not American property. The invoice and bill of lading afforded the usual and proper evidence of the voyage she was pursuing, and which she was authorized to pursue. These facts being established, what was it to this government, whether she was sailing to a port different from that mentioned in the written instructions? The circumstance of the captain's appearing to be a Frenchman, which has been mentioned as sufficient to excite suspicion, was of itself calculated to dispel it. For, is it likely that an American owner, engaged in this trade, would intrust his property to a French captain and consignee, in a vessel navigated entirely by foreigners?

In short, I cannot imagine a case so totally destitute of the means of being defended, as the present. Without inquiring into the subsequent conduct of the appellee, it is sufficient to

say, that the taking the Mercator out of her way, was an unlawful act, and makes captain Maley answerable for all the damages which have accrued.

This decision was affirmed in the Supreme Court, 3 Cranch, 458.

CHARLES JOLLY *vs.* B. BLANCHARD.

The Court will not set aside the report of referees, merely because they might not have drawn the same conclusions from the evidence, which the referees have deduced.

An agent or factor, who is ordered by his principal to ship goods in his possession, has no right to retain more than enough to secure any lien he may have upon the goods.

He may do this, and obey the order to ship the balance; or, he may ship the whole of the goods, consigning them to a third person, with orders to deliver them to the owner, on payment of the sum due to him.

If he retains the whole, because of a lien for a small sum, and any loss follows his breach of orders, he will be liable for the same.

THIS cause having been referred to arbitrators, under a rule of this Court, and a report being made; Duponceau, for the defendant, moved to set it aside; because, the arbitrators had manifestly erred, both in matter of law and fact; in awarding to the plaintiff 1,009 dollars, the value of a quantity of goods, consigned by the plaintiff to the defendant in St. Domingo; upon the principle, that he had retained them after he had received orders to send them back, in consequence of which, they were seized and destroyed by the brigands: whereas the orders he received were not peremptory, but left the defendant at liberty to return, or retain, the goods, as he pleased; and, independent of this, the defendant had made advances for the plaintiff, to the amount of about 400 dollars, which gave him a lien, of which he could not be deprived, or blamed for not surrendering.

The arbitrators were examined, as to the grounds of their decision; who stated, that they were of opinion, that the defendant ought to have sent back the goods as soon as he re-

ordered the plaintiff's orders; and that it was in his power to do so: that, the only reason assigned by the defendant before them, for not having sent back the goods, was his lien. But, the arbitrators thought, that he might have retained enough to satisfy his advances, and should have returned the others, or sent them here to his own consignee, to be delivered to the plaintiff, on being satisfied for his advances. The arbitrators met three or four times, devoted much time to the investigation, and always had the parties before them. They allowed the plaintiff the value of the goods here, had they been returned, after deducting insurance and all expenses. They agreed, that the defendant relied very little upon any other ground, for his conduct, than the one above mentioned. The arbitrators decided upon the papers laid before them, and what fell from the defendant.

By the correspondence laid before the arbitrators, it appears, that, on the 14th of April, 1803; the plaintiff wrote the defendant, that he had seen some of his accounts of sales sent in to another house, and hopes that he will receive more favourable accounts of the sales of his cargo. That, if there be not a probability of selling them, rather than make so great a sacrifice, or any thing like it, he would prefer having them sent back. He adds: "you will, therefore, I hope, study our interest very attentively." On the 16th of June, the plaintiff, in another letter, expresses his apprehension, that war will take place between England and France; and, supposing that property at the Cape, would be more safe from brigands, in the hands of an American, than a Frenchman; suggests the policy of depositing his goods in that way; but, leaves every thing to his discretion, in full confidence of his doing the best for plaintiff's interest. On the 8th of July, the plaintiff wrote to the defendant as follows:—"It is now certain, that war has commenced between England and France. Upon the slightest danger of the French evacuating St. Domingo, ship my goods to America; but, I hope, before this, they are sold."

In his letter of the 17th September, he informs the defendant, that, as he had refused to make an advance on the goods, and had not complied with his request, he should hold him liable, if any accident befel them.

The plaintiff's letter of the 14th April, got to hand the 9th of June; and, the defendant states, in answer, that, after having paid high duties on the goods, it would not be to the interest of the plaintiff to re-ship them. He hopes to sell, now and then, by small parcels. He says, however, that if the plaintiff insists upon the goods being re-shipped, he, the defendant, will do so.

On the 25th of July, the plaintiff's letter of the 16th June, got to hand; and defendant, in answer, says: that he does not know if war is positively declared, though it may be considered as certain, many hostilities having been committed on our coasts; speaks of the consequent distresses of the island; that he will neglect nothing in his power, to make the plaintiff's goods safe, by putting them into the hands of an American merchant, as requested.

November 11th. The defendant sends plaintiff a bill, for the amount of such goods as he had then sold.

WASHINGTON, J. The letters from the plaintiff left, in my opinion, a great deal to the discretion of the defendant. If they could not be sold without sacrifices being made, the defendant was bound to re-ship them; and, in case of war, he advised, that the goods should be placed under the care of some American merchant. This is the substance of the two letters, of the 14th of April and 16th of June. The letter of the 8th July, is more positive in ordering the goods to be re-shipped, in case of danger that the French would evacuate the island.

The defendant's answer to the plaintiff's first letter, seems to assign a plausible, if not a satisfactory reason, for retaining the property; and the new order, contained in that of the 14th of

June, the defendant promises to obey, in his answer of the 29th of July. When the defendant received the plaintiff's letter of the 8th of July, does not appear; neither does it appear, when the prohibition took place. But, it is obvious, from the defendant's letter of the 29th of July, that, although he had not certainly heard of a declaration of war between England and France, yet, that partial acts of hostility had occurred on the coast of St. Domingo; and he states the commercial embarrassments they had produced, in pretty strong colours. But, whether, under all circumstances, it would have been most prudent to ship the plaintiff's goods to America, or to retain them, might be extremely questionable. If I were called upon to decide upon the correspondence, I might probably differ in opinion from the arbitrators. But ought I, for this reason, to set aside their award?

In the case of Walker *vs.* Smith, the Court refused to grant a new trial, although we were not satisfied with the verdict, and where we had heard the whole evidence laid before the jury. But, in this case, the arbitrators had the advantage of hearing the observations and acknowledgments of the defendant himself, as to the motives of his conduct, and it appears that they were, in some measure, governed in their opinions, by this species of evidence.

It was, perhaps, not going too far for the arbitrators to conclude, from the excuse so entirely relied upon by the defendant, that no other existed; and that, if it had not been for his claim upon the goods, for securing his advances, made on account of the plaintiff, he would have considered himself bound, by the order he had received, to return the goods. But, this excuse was by no means a sufficient one; and, I think the opinion of the arbitrators upon this point, was perfectly correct. An agent has a lien upon the property of his principal, for any balance due him; but, if he is ordered to part with the possession of such property, shall he disobey these orders, and retain goods, to a large amount, in order to satisfy an inconsiderable

debt? This defendant might have retained such a part of the goods, as would have been sufficient to secure him; or he might have consigned the whole to his friend here, to deliver them up, on being paid what was due.

Upon the whole, I do not think that the arbitrators have been guilty of those obvious mistakes, in matters of law or fact, which ought to invalidate their report.

HUIDEKÖPER *vs.* BURRUS,

Motion for arrest of judgment; because, the ejectment against the casual ejector, was wrong entitled, and for other defendants. The declaration to which the real defendant had pleaded, was right. The motion was overruled.

MOTION in arrest of judgment, because the action is brought, as of April sessions, 1802, in the Circuit Court of the United States, in and for the eastern district of Pennsylvania; whereas no such sessions was ever held or established by law. 2d. The land is not stated to be in the *eastern* district of Pennsylvania, though the action is brought in and for the eastern district. 3d. No title in the plaintiff at the time of the entry and ouster, stated in the declaration. (*a*)

Mr. Ingersoll, for the plaintiff, admitted; that, in the declaration against the casual ejector, there exists the mistake alleged; but, a new declaration was filed in the present Circuit Court, and properly entitled; to which declaration the defendant pleaded, that the land, in this declaration, is stated to lie in the district of Pennsylvania; which, after the repeal of the former Circuit Court law, was sufficient.

Rule discharged.

(*a*) Ante, page 109.

LESSEE OF HUIDEKÖPER *vs.* DOUGLASS.

What was *prevention* from making a settlement on lands within the "new purchase?"

What was the *persistance* required by the law of Pennsylvania, under which those lands were sold?

THIS cause resembled the two former cases of the same plaintiff, against Burrus and M'Clean, (*a*) and was tried at the last term. The judges differing in opinion, upon the construction of the 9th section of the law, the case was adjourned to the Supreme Court; who have certified their opinion, that a warrant holder, who, from 10th April 1793, to the first of January 1796, was prevented by the enemies of the United States, from making such settlement as the law required, but who, during that period, persisted in his endeavours to make such settlement and residence, is entitled to hold his land in fee simple, although after the prevention ceased, he made no attempt to make such settlement.

The cause now came on, and was tried on the same evidence.

WASHINGTON, J. charged the jury. The plaintiff appears before you, with a regular paper title, from the warrant to the patent. When this cause was tried before, the counsel for the defendant insisted, that the plaintiff's title was bottomed upon a contract, which he had not complied with. That he was to make a settlement, such as the enacting clause of the 9th section requires, unless prevented from doing so, by the enemies of the United States; in which latter case, he was not only to prove a persistance in endeavours to make the settlement, during the period of the war, but was to go on to make it after the

(*a*) Ante, pages 109. 136.

prevention ceased. This question was so difficult, as to divide not only this Court, but the Courts of this State. The question was adjourned to the Supreme Court, which has decided that a warrantee, "who, from 19th April, 1793, to the 1st of January, 1796, was prevented by the enemies of the United States, from making such settlement as the law required, but who, during that period, persisted in his endeavours to make such settlement and residence; is entitled to hold his land in fee simple; although, after the prevention ceased, he made no attempt to make such settlement." This we must consider as the law of the land, and govern our decision by it.

The questions then are, 1st. Was the Holland Company, from April 1793, to January 1796, prevented from making their settlement? and 2d. Did they persist in endeavours, during that period, to make it?

What is the legal meaning of *prevention*, and what the meaning of *persistance in endeavours*? 2d. Were they prevented, and did they persist within this meaning? The first are questions of law, which the Court are to decide; the latter are questions of fact, proper for your determination.

What were they to be prevented from doing, in order to excuse them? The answer is, from clearing, fencing, and cultivating two acres of land, in every hundred acres, contained in their warrant; from building a house thereon, fit for the habitation of man, and from residing, or causing a family to reside thereon. To what extent were their endeavours to go? The answer is, to effect these objects. It was not every slight or temporary danger which was to excuse them from making such settlements; but such as a prudent man ought to regard. The plaintiffs stipulated to settle as a society of husbandmen, not as a band of soldiers. They were not bound to effect every thing which might be expected from military men, whose profession it is to meet, to combat, and to overcome danger. To such men it would be a poor excuse, to say, they were prevented by danger from the performance of their duty. The husband-

man flourishes in the less glorious, but not less honourable walks of life. So far from the Legislature expecting that they were to brave the dangers of a savage enemy, in order to effect their settlements; they are excused from making them, if such dangers exist. But they must persist in their endeavours to make them. That is, they are to persist, if the danger is over which prevented them from making them. For it would be a monstrous absurdity to say, that the danger, which, by preventing them from making the settlements, would excuse them, would not at the same time excuse them from endeavours to make them, so long as it existed. It would be a mockery to say, that a man should be excused from jumping down a precipice, provided he would persevere in his endeavours to do it, because by making the endeavours he certainly would do it, although the consequences would be such as he was excused from incurring. If, then, the Company were prevented from making their settlements, by dangers from a public enemy, whom no prudent man would or ought to encounter, and if they made those endeavours, which the same man would have made to effect the object; they have fully complied with the proviso of the 9th section.

How then are the facts? That a public war between the United States, and the Indian tribes, subsisted from April 1793, and previous to that period, until late in 1795, is not denied; and though the great theatre of the war lay far to the north-west of the land in dispute, yet it is clearly proved, that this country, during the period, was exposed to repeated irruptions of the enemy; killing and plundering such of the whites, as they met with in situations where they could not defend themselves. What was the degree of danger, produced by these hostile incursions, can only be estimated by the conduct of those who attempted to face it. We find them sometimes working in their fields, in the day time, in the neighbourhood of the forts, and retiring within their walls at night, for protection. Sometimes giving up the pursuit in despair, and retiring to the

settled parts of the country; then returning to this country, and again abandoning it. We sometimes meet with a few men, hardy enough to attempt the cultivation of their lands; associating implements of husbandry, with the instruments of war, the character of the husbandman with that of the soldier. And yet I do not recollect any instance, where, with this enterprising, daring spirit, a single individual was enabled to make such a settlement as the law required.

You have heard what exertions were made by the Holland Company. You will consider what was the state of that country, during the period in question; you will apply the principles laid by the Court, to the evidence in the cause; and then say, whether the title is with the plaintiff or not.

Verdict for plaintiff.

Lessee of Timothy Hurst *vs.* Durnell.

The proprietary of Pennsylvania, by his promise to first purchasers, did not deprive himself of the right to lay off the manor of Springettsbury, north of the city of Philadelphia.

A warrant without a survey, made under a legally authorized surveyor, does not, by the practice of Pennsylvania, give a right of entry to support an ejectment.

The contract for Liberty land, between the proprietary and those who entitled themselves to it, by taking up lands in the country, operated severally with each purchaser, and not with the whole, so as to constitute them tenants in common.

Those who were entitled to Liberty lands, were bound to have them laid off, by surveyors regularly appointed, as in other parts of the then province; the law being the same, as to those lands, as to other lands in Pennsylvania.

The proprietary was neither an agent, nor a trustee, for the first purchasers.

THE title of the lessor of the plaintiff, was as follows:—

4th March, 1681. The grant of the government and soil of Pennsylvania, was made by Charles II. to William Penn, the first.

William Penn, married his first wife in 1672, and had three children, Springett, William; and Letitia, who married Aubrey. His first wife died in 1696, and afterwards he married again, and had John, Thomas, Richard, Dennis; and Hannah who married Mr. Frame.

Springett and Dennis died in his life time. William Penn died in the year 1718, on the 30th of July.

William, the second, died intestate, in the year 1720, leaving children; Springett, his eldest son, William, and Gulielma, a daughter, who married Charles Fell.

Gulielma died, leaving issue Robert E. Fell, Gulielma Maria

Pell, who married Mr. Newcomb; and Mary Margaretta, who married John Baron.

Previous to the first William Penn's coming to America, viz. on the 24th of October 1681; with a view to induce persons to come over and settle upon his lands in Pennsylvania; he agreed with them to lay out a large town in some eligible place, and to give to each person who would take up five hundred acres of land in the country, ten acres in the town. The list, containing the names of the persons with whom this agreement was made, is called, by way of distinction, the list of first purchasers. William Penn came over in 1682; when, it is admitted, that some alteration took place in this first agreement, but the precise terms of it are unknown. The original plan of a city, to contain ten thousand acres, was abandoned; and it was confined to about 1200 acres; and about 10000 acres, adjoining the city, were laid off for the benefit of the first purchasers, in compliance with the first agreement, and was called Liberty land.

The name of William, the second, was put down on the list of first purchasers, for 5000 acres; for which a warrant was issued on the 13th September 1683; and also, one for 200 acres, his proportion of land within the liberties of the city. The former was duly surveyed; the latter was never surveyed, but in the manner hereafter mentioned.

By the will of William, the first, he left certain parts of his private estate, to the children of his first wife; and the government and soil of Pennsylvania, to the children of his second wife.

The two branches differing about the will, an accommodation finally took place, the 23d of September 1731, between the children of William Penn, the second, and his sister Lætitia, the children by the first venter, and those by the last wife; by which the former surrendered their claim to the government and soil of Pennsylvania; reserving their right to all their private lands, whether derived under specific bequests, in the will of William, the first, or otherwise acquired by them.

By the intestate law of Pennsylvania, at the time of the death of William, the second, his eldest son, Springett, became entitled to one half of his real estate; William, the third, to one-fourth; and Gulielma to one-fourth.

Upon the death of Mrs. Fell, her eldest son, Robert E. Fell, became entitled to one-half of her one-fourth of the estate of William, the second; and his two sisters, to one-fourth each, of that one-fourth.

Being thus entitled, Robert E. Fell, in his own right, and as attorney for his sister Gulielma; conveyed to Timothy Hurst, in fee, by deed dated 10th May 1770, all the lands to which he or his sister were entitled, in Pennsylvania, or elsewhere in America.

On the 13th of June 1770, the Surveyor General and Secretary of the land office, having refused to issue a warrant to Timothy Hurst, for surveying the proportion of Liberty land, to which he was entitled, in right of Robert E. Fell and his sister, under the warrant for 200 acres, issued to William Penn, the second; the original warrant was put into the hands of Joseph Hall, a surveyor, but not an authorized one; who laid it upon 31 acres on the Delaware, adjoining Vine Street and Pegg's run, at that time built upon, as was proved by a witness in the cause.

Wallace, Lewis and Levy, argued for the plaintiff, and contended: 1st, upon the evidence, that the land in question was part of the Liberty lands, which William Penn, the first, had agreed to appropriate to the use of the first purchasers; and that he had no right to appropriate any part of it to his private use, as would be relied upon in support of the defendant's title.

2d. That William Penn was a trustee for the first purchasers; and therefore, that the act of limitation did not run. They cited 2 Will. 144.

The ground taken by Ingersoll and Rawle, for the defendant, was; 1st, that the land in question, was laid off by the proprietary, for a manor, which he called *his manor of Springettsbury*,

in the year 1681; and, though no warrant or survey appears, yet the boundaries of it are sufficiently proved by the testimony.

2d. That plaintiff has no title, having only a warrant, without a legal survey.

3d. That the plaintiff is barred by the Act of Limitation.

4th. Length of time creates a presumption against the title.

The arguments of counsel, and the evidence, are pretty generally noticed in the charge.

WASHINGTON J. On the 23d of September 1731, an agreement was made between the younger and elder branches of the Penn family; by which the right of government, and soil of the province of Pennsylvania, was confirmed to the younger branch, and the private rights of the elder branch were confirmed to them.

The plaintiff claims under the elder branch, and he founds his title on the warrant to William Penn, the second, for 200 acres of Liberty land; to which he was entitled in virtue of his character as first purchaser. The defendant claims under the younger branch of the family, who became, by the will of the first William Penn, and the subsequent family compact, entitled to all the proprietary rights in this province.

The title of the defendant is founded upon the right of the first William Penn, to a certain district of country lying between Vine Street, Pegg's run, the Delaware, and so north and west to the Schuylkill; which it is said was appropriated by the proprietary to his own use, as a manor; and consequently that the first purchasers had no right, to lay their warrants upon lands, thus appropriated to the use of the proprietary.

The first great inquiry is, was the land in question laid off by the first proprietary for a manor; or was it laid off and appropriated as Liberty land, for the use of the first purchasers? This is a question of fact for the consideration of the jury.

Second. If it was laid off for a manor, had the proprietary a

right to appropriate it to his private use? This is a question of law for the Court.

1st. To prove that the tract, containing 1840 acres, of which the land in question is a part, was laid off for a manor, the defendant relies upon the following evidence:—

1. An account of Mr. Fairman, formerly a surveyor of the proprietaries, dated in 1682; in which he charges the proprietaries "for taking an estimate of a vacancy on both sides of the town, divided from the Liberty land; which the proprietary accepted, and afterwards called it the manor of Springettsbury.

2. An old map, supposed to have been made, and by comparison of hands, believed to have been in the handwriting, of Edward Pennington, Surveyor General, about the year 1701; in which the manor is laid off, in the manner contended for by the defendant. The boundaries of this manor have lately been laid off, according to adjoining surveys, calling for the manor; and found to correspond with this ancient map. The admission of this map was objected to, but admitted by the Court as an old paper which supports, and has gone along with the possession; and though not signed by Edward Pennington, yet from the similarity of the handwriting, with that found in the office of the same person, whilst he was Surveyor General, it was supposed by the Court to be proper to leave it to the jury, to give to it such weight as the support it may receive from other parts of the evidence, might, in their opinion, entitle it to.

3. As a further corroboration of the manor having been once surveyed, as distinct from the Liberties; we find, in the year 1703, a warrant for re-surveying it, as also the Liberties.

4. Then follow the lines of all the adjoining surveys, calling for, and fixing the boundaries of this manor. Ancient boundaries are frequently established, by the reputation and understanding of the neighbourhood. When no better evidence can be obtained, even the hearsay of old persons, now dead, as to the reputed bounds, is often, and properly, resorted to. The lines of junior patents, calling for those of elder patents, contribute

to establish the latter. But upon a question which not only involves the boundaries of this manor, but the right of the proprietary to lay it off, surveys, and grants binding upon the manor, and calling it the property of the proprietary, and this within a few years after it was laid off, are the strongest kind of evidence. It is the testimony of men, who must have been well acquainted with the fact; attesting the truth of it, by *acts* which leave no room for doubt. We find more than twenty surveys, fixing the lines of the manor, as laid down in the map, said to be Pennington's; and all of them calling it, the manor of Springettsbury—proprietary's, or governor's land. These surveys, grants, and warrants, were made from the year 1686 to 1691. Then come the proceedings of the Commissioners of Property, in 1691, which fix the boundaries of the manor at the north end of the city, bounding on the Delaware and Pegg's creek.

In the sales of Hartzfelter's tract, made by Pegg to Fitzwater, in 1720; from Fitzwater to Stenner, in 1737; from Stenner to Wishart, in 1759; they all call this "Governor's land, in the Northern Liberties." In 1696, upon a division amongst the Swanson family, they attest the same fact. And, in 1736, we find by a petition, called the Stone quarry petition, signed by a great number of persons, amongst whom are some of the first purchasers, the same admission is made.

This is the evidence, and proves the existence of the manor, and of its bounds. The proofs are progressive, and are afforded in different ways, from the year 1684 to 1759.

On the other side, the plaintiff has produced a great number of surveys, warrants, and grants, extending from the south-west side of the Schuylkill, and surrounding the manor as far north and east as Cohocksink creek; in which the lands they cover are called Liberty lands. Now this evidence does not, in any respect, conflict with, or disprove the fact asserted by the defendant; because the establishment of Liberty lands does not disprove the existence of a manor, unless those surveys of Liberty lands had been located within the bounds of the manor;

which is by no means the case. The defendants prove the existence of a manor, and admit there were Liberty lands adjoining Philadelphia, and adjoining also the manor.

The jury will therefore say, upon this point, whether, at the distance of one hundred and twenty years, the proofs of the defendant are satisfactory, to establish the lines of this ancient manor.

2d. The next question is, had the proprietary a right to establish this manor? He certainly possessed the right, unless he precluded himself, by the concessions made to the first purchasers. But this was by no means the case. He stipulated to lay off so much land, for the benefit of the first purchasers, adjoining the city; and the warrant to Noble, in 1682, directing him to survey and surround a certain quantity of land adjoining the city of Philadelphia, for the benefit of first purchasers; may well be considered as evidence of this fact. Now the Liberty lands do adjoin the city on the west; and as this warrant does not say that it is to adjoin it also on the north, the promise of the proprietary is complied with; although he appropriated to his own use the land at the north end of the city. But whatever was the nature of the last agreement, made with the first purchasers; it was in the power of all the parties concerned, to alter it; and the entire acquiescence of the first purchasers, to the establishment of this manor, ought at this day to be considered as evidence of an agreement, by which the proprietary was permitted to make such an appropriation. Even William Penn, the second, by having never surveyed his warrant for 300 acres, though he was careful enough to survey his warrant for country land; affords evidence that he had no right to locate it within the manor.

3d. The next question, also a question of law, is, can the plaintiff recover on his warrant and survey? It is agreed by the counsel on both sides, that a warrant, without a survey, does not in this State give a legal right of entry; and it is also agreed as a general rule, that the survey, to be valid, must be made by

an authorized surveyor, which has not been done in this case. But it is contended by the plaintiff's counsel, that as soon as the Liberty lands were laid off, the legal estate thereto became vested in the first purchasers, as tenants in common; and that either tenant in common, might lay off his part, in severalty, without the aid of an authorized surveyor. If the first part of the position were established, I do not know that the consequence would follow. I should doubt the power of one tenant in common, to carve for himself, and say; that by virtue of such an act, he had appropriated this or that particular spot to his own use, in severalty. But the truth is, that the contract was made, not jointly, but severally, with each first purchaser; and the laying off the Liberty lands, was only saying, that within these bounds, each first purchaser might locate his Liberty land. But the same political reasons, which required an authorized survey to locate warrants in other parts of the province, applied with equal force to this particular territory. The warrants, with respect to these lands, were severally issued, and were directed to the Surveyor General. He, then, or his deputies, could alone execute them.

4th. The next question is, is the plaintiff barred by the Statute of Limitations? The warrant issued in 1682—it is argued that it was never executed till 1770, and that the plaintiffs never were in possession. It is said that there was a trust in this case, and William Penn, the first, was called the trustee. Under the 3d point, it was said, the legal estate passed to the first purchasers. The counsel perceiving the dilemma to which he was exposing himself, endeavoured very dexterously to avoid it, by calling William Penn, an agent for the first purchasers: but I do not see any ground for this. He issued warrants to each, authorizing them to survey Liberty lands. This they might do or not, as they pleased, and he had no control over them, nor had he any agency in the business.

But it is said, that when the proprietary took up this manor,

he must have intended to include the rights of his two children, William, the second, and his sister.

There is no kind of proof of this. But suppose it were the case, then it would follow, that William, the son, had only an equitable claim to lay his warrant somewhere within the manor; which would be a complete objection to his recovery at law.

Jury found a verdict for the defendant.

SNELL ET AL. *vs.* FAUSSATT.

It is incumbent on a defendant, who claims a vessel under a condemnation, by a foreign tribunal, to prove that the tribunal was properly constituted. Failing to do this, the condemnation is a nullity.

Where a condemnation is by a foreign Court, it will be presumed to be a legal one, if the constitution of it be not known.

Where its constitution is known, it is proper for the Court to examine into it; and, if it has been constituted by a different authority, from what is usual in civilized nations, it becomes him, who would support its jurisdiction, to prove is was erected by proper authority.

The erection of Courts, is, in all civilized nations, the act of the sovereign; although he may delegate the authority to subordinate agents.

It is unusual for a military commander to exercise the right to erect Courts; and nothing will be presumed in favour of tribunals so established.

TROVER for a quantity of coffee. The case stated by the plaintiff, was; that the Charlotte, being his property, took in at Cape François, in 1783, a quantity of coffee for the plaintiff, and some for other shippers; and whilst on her return to New-York, was captured by a British frigate; part of her hands taken out; a prize-master put on board, and ordered for Jamaica. After being in possession of the British prize-master for some days, she was captured by a French privateer, and carried into St. Jago de Cuba. Having lain there for a short time, her cargo, or a part of it, was transhipped into a vessel called the Messenger, and was brought to Philadelphia; came to the possession of the defendant; who, on demand by the plaintiff, refused to deliver it up; saying, it had been purchased at Cuba for him, by his supra-cargo.

The defence was, first, that the evidence adduced by the plaintiff, did not show his property in the coffee, delivered to the defendant; that the marks of the barrels and bags, as entered at the custom house here, did not correspond with those

put on them at St. Domingo; and therefore, that if the coffee taken in by the Messenger at Cuba, was proved to have come from the Charlotte, yet it might as well be the coffee of the other shippers, as of the plaintiff; and if so, a recovery in this action, would be no bar to an action by those persons.

2d. That by an order of General de Noailles, general of brigade, commander in chief of the right northern division of the army at St. Domingo, dated the 6th of November 1803, a council of prizes was established for Cape St. Nicolas Mole; who, on the 30th November 1803, in consequence of a report made by their officer on the 29th, "that the Charlotte was cleared from the Cape, for New-York, and was captured and recaptured, as before; that he is positive she was first detained, and afterwards condemned, by the captain of the British frigate; that it is evident she was prize to the English, and was found with an English prize-master on board; and concludes by stating, as the result of all this, that she and her cargo ought to be considered as English property, and ought to be condemned;" they do condemn the vessel and cargo, as good prize, taken from the British, and order her to be sold for the benefit of the captors. The vessel lay at St. Jago, at the time of the condemnation; and the transhipment into the Messenger, took place on the 5th November. She was entered at Philadelphia on the 5th of December.

The counsel contended, on these facts, that the condemnation was conclusive as to the property. That the vessel being in a Spanish port, was no objection. That *prima facie* the Court must presume, the tribunal that gave the sentence, was duly authorized to pass it; and that it is no objection to the condemnation, that the cargo was previously sold. Cases cited on this point. 3 Rob. Rep. 269. Bynk. B. 1. Ch. 15. Vatt. p. 515. B. 3. 5132. 1 vol. Corp. de pri. 8. 370. Mart. 98. Lampridi, p. 182. 2 Rath. 594. 4 Rob. 51. 8 T. Rep. 192.

3d. If all this be against the defendant, yet they are *bona fide* possessors; and according to correct opinions of civilians,

the plaintiff, if he recovers, ought to pay the amount of what the coffee cost, or what it is reasonable to think the plaintiff would have given for the release of the property. That fraud, according to the understanding of civilians, consists in combination, and secures benefit to ourselves, and injury to others. On these points, 2 Kaimes P. Eq. 390, 391. 2 Koch. 708. Grot. 1 vol. 395. Puff. 451. 1 Ruth. 135. Case of the Neptune, before the District Court of Pennsylvania.

On the other side, were cited 2 Vat. 272. Martin, 105. Peak. Ev. 47, 48. 1 Rob. Rep. 119. 135. 2 Rob. 209. 4 Rob. 35. 3 Rob. 192. 53. 83.

The defendant moved to nonsuit the plaintiff, upon the ground, that this being a cause dependent on the question of prize or no prize, it belonged exclusively to the District Court. Cases cited. 3 T. Rep. 341. Cro. El. 685. 13 Co. Rep. 52. 3 Bulstrod, 27. 1 Sed. 320. 2 Lev. 25. 2 Sand. 259. 12 Mod. 134. Carth. 423. 474. Dougl. 572. 3 T. Rep. 333. 3 Dall. Glass and Gibbs. 2 Dall. 165. 1 Dall. 218. Mart. 100. Dougl. 592. 2 Brown C. and A. L. 213. 2 Rob. Rep. 198. 3 Id. 82.

On the other were cited, Comb. 120. Carth 31. 3 Keb. 297. 360. 364. 1 Lev. 243. 12 Mod. 16. 143. 1 Tuck. Blacks. App. 51, 52. 2 vol. Laws U. S. 516. 1 Dall. 95. 2 Dall. 4. 3 Dall. 333. 2 Wood Lac. 451. 454. 2 Burr. 685. 1209. 10 Mod. 80. 4 Rob. 232. 240. 2 Dall. 81.

The motion for a nonsuit was overruled; the Court dividing upon it. (a)

(a) Upon the motion for a nonsuit, the Court was divided in opinion. Judge Peters thought we had jurisdiction. I was of a different opinion. No reasons were given. But those which governed me, were, shortly, as follows: The Charlotte was captured by the English frigate, as prize; was recaptured by the French privateer, as prize; sent into Cuba, and afterwards condemned. The plaintiff, at the time of the capture, had an indisputable title to the property in question, if it is identified; but, if it was lawfully seized and condemned, the right of the plaintiff was divested. The very question in issue, therefore, is, whether the property in dispute was

WASHINGTON, J., charged the jury. This is an action of trover and conversion, the ground of which is, property in the plaintiff in the goods claimed, and a conversion by the defendant. The evidence, to establish the right of the plaintiff to the goods brought in the Messenger, and delivered to the defendant, is very contradictory. It is essential to the plaintiff's recovery, that he should satisfy you upon this point. It appears, that other coffee than that belonging to the plaintiff, was shipped from the Cape; that the marks upon the packages of the plaintiff's coffee, were different from those which appeared on the packages entered at the custom house at Philadelphia. It therefore becomes highly important, that you should carefully examine the evidence; and, unless you are satisfied, that the plaintiff has established his right of property, in the very coffee delivered to the defendant, your verdict must be for the defendant. But, if you should be of opinion, that the plaintiff has proved ownership in that identical coffee, delivered to defendant, then we are of opinion, that the condemnation at the Mole did not affect it. A condemnation of neutral property, by an unauthorized tribunal, is not to be regarded by the Courts of other nations. It is contended, that, *prima facie*, the Council of Prizes at the Mole, is to be considered as a legitimate Court. I admit, that, where we find a condemnation by a foreign Court, of the origin of which we are not informed; we ought to presume it a legitimate tribunal. But, when the source of its authority and constitution is stated, we ought to examine it; and, if it be contrary to the usual mode of constituting Courts, it shifts the burden of proof upon the party who would support the condemnation; particularly as it is more easy to prove the legitimacy of the Court, than

captured as prize, and lawfully condemned, so as, by the law of nations, to change the property. The question, therefore, of prize or no prize, is the very gist of this action; and all the cases, from the earliest period, prove that such a question, as well as the consequences of it, belong exclusively to the Court of Prizes; and, in this country, to the District Court. W.

to disprove it. We know, that the appointment of Courts is, in all civilized countries, by the sovereign power. This, however, may be lodged by the sovereign, in a subordinate civil officer; nay, in a military commander, if the sovereign so chooses. But, this latter mode is so unusual, that, when we hear of a Court being constituted by a military commander; and, particularly where it is not clear, that he was, at the time, commander-in-chief, it destroys the presumption of its legality; so as to require the party, who would support the condemnation, to show that the Court was instituted by lawful authority. The Court being agreed upon this point, we think it unnecessary to decide the other objections to this sentence. (*a*)

The Jury found for the plaintiff.

(*a*) I can meet with no cases at all applicable to this point; but, upon principle, I think the distinction is correct. Marshall, 209, says; "that the Court, in which the sentence was pronounced, *must appear* to have been *lawfully constituted*, and of competent jurisdiction."

NOTE.—If the question be, whether there has been a legal condemnation, to alter the property in a suit or claim, by the former British owner, it can only be made in the Prize Court, to decide whether she had become legal prize, and whether the property had been altered or not. 2 Brow. Civ. & Am. Law, 214. 2 Rob. 239. In p. 129, et seq., this author, Brown, is clear upon the points, that, in such a case, the question belongs exclusively to the provincial Court. If the taking be not as *prize*, action, to repair the damage, may be at law; *aliter*, if taken as prize. Dough. 593. 4 T. Rep. 290. The prize jurisdiction does not depend on locality, but on the *subject matter*. Brown, C. and A. Law, 222. If the subject matter be prize, it excludes the Common Law Courts. 1 C. 225.

LESSEE OF HURST AND CARR *vs.* WICKERLY.

It is no ground for a continuance of a cause, that there has been published a report of the evidence, the arguments of counsel, and the charge of the Court, in a case which had been tried; depending upon the same facts and principles.

The publication of such a report of the proceedings of the Court, is proper.

WHEN this cause was called for trial, the plaintiff moved to put it off, because a statement had appeared in a newspaper, since the trial of the case of Hurst *vs.* Durnell; in which a short account of the evidence, of the points made by the counsel, and of the charge of the Court, was given; and, in which it was mentioned, that that was one, out of about eighty causes, depending for property in the Northern Liberties. The ground of the motion was, that this statement, which Mr. Ingersoll admitted had been inserted by one of the defendant's counsel, was calculated to produce a prejudice against the plaintiff.

WASHINGTON, J. It is very improper for either party to a cause, to publish his case before the trial takes place; because, he must necessarily make partial statements of the law or the fact, or both; which are always calculated to excite prepossessions unfavourable to an impartial trial. The facts stated, are not what have been proved, according to the rules of law; and, the law is not stated, as the judges have pronounced it. The whole is *ex parte*. But, this is the first time that I ever heard it contended, that the report of what had passed in a Court, whose proceedings and doings are all public, was improper. On the contrary, I wish that reports were made of all important trials, so soon as they have taken place. And, because there may be a cause on the docket, depending on the

same principles, shall this information be suppressed, until it shall appear, that every such case has been determined? But, it is said, that such a publication affords a cause for continuing the other causes, because of the prejudice it may have produced on the public mind. Now, my opinion is quite otherwise. We all know, that prejudices become more inveterate, as they ripen by age, and in the soil of ignorance. We seldom recollect the particular facts and arguments, which have led our minds to particular prejudices. The impressions gather strength, and take deeper root, the longer they remain unremoved. The sooner, therefore, the attempt is made to remove them, the better. But, I cannot perceive how a report of a trial in one cause, can create an improper bias in another, though depending on the same principle; and still more difficult is it to discover, how such a prejudice, if it exist, can be less next term than it now is. Will the plaintiff endeavour to remove it, by the same means that it was created? This he cannot do, if his principles be correct.

In the case of Hurst *vs.* Durnell, three verdicts were read, given in cases depending on the same title, as persuasive evidence in that cause. This was not objected to. How then can a statement of a fourth verdict, be considered as an improper attempt to create a prejudice?

I am, therefore, of opinion, that the reason assigned is not sufficient for continuing this cause.

Judge Peters gave a separate opinion; in which he concurred, that the reasons assigned, were not sufficient to continue the cause.

PIGOU *vs.* FRENCH.

One who has become surety for another, cannot recover the amount of his responsibility, without showing that he had paid it, before action brought.

THE plaintiff proved his account, by evidence of the defendant's acknowledgment of all the items; but, two of them were for the plaintiff's guarantees for the defendant's engagements in England, in which the plaintiff, as his surety, had become liable to pay before the bringing of this action: but, no proof of payment was offered, and the plaintiff's counsel insisted, that the jury ought to presume it. The defendant had endorsed to the plaintiff a bill of exchange, endorsed to him by Dusar; which the plaintiff, by the endorsement, was to receive for the use of the defendant. The plaintiff had brought suit on the bill, but had not received the amount. The defendant insisted, that the plaintiff, not having returned the bill, he was entitled to a credit for the amount.

WASHINGTON, J. The plaintiff cannot recover the two sums for which he became surety for the defendant, without showing that he had paid them before action brought; and, the jury ought not to presume it, from the circumstance of his having before become liable to pay, and the good character of the plaintiff. Indeed, the presumption would be otherwise; since his liability arose in October, and, if he had paid those sums, it would have been easy to prove it at this day. As to the bill of exchange, the plaintiff holds it as an agent and creditor of the defendant; and so it is plain that the plaintiff understood it. It is a collateral security, which he is entitled to retain; and, he will not be accountable for the amount of it, until he has received it.

Hicks *vs.* Fitzsimmons.

Action to recover the amount of three bags of Spanish dollars, which had been taken from the vessel on the voyage, during which she was boarded by the crew of a privateer.—The plaintiff must prove the loss to have occurred, by some one of the perils insured against; but, a loss by embezzlement of the crew, is not included in the policy.

The nature of the interest, which excludes the examination of a person, as a witness; and, an examination of the law, in reference to the interest, which excludes a witness. (*Note.*)

THIS was an action on the case against the defendant, president of the Delaware Insurance Company, on a policy, dated the 6th of December, 1803, on 5000 dollars, in specie, at and from New-York, to the city of Santo Domingo; with liberty to proceed to any other port, Cape François excepted, in the island, and back to New-York. The policy was in the usual form. The plaintiff was owner of the vessel and cargo; the captain was the consignee. The bill of lading was for 17 bags, containing in all 5000 silver dollars. To prove the loss, the plaintiff offered the captain as a witness. He was objected to by Condy, for the defendant; who stated, that the captain was interested to fix the loss on the underwriter, so as to avoid the personal responsibility, which the bill of lading attached to him. He cited Peak on Evidence, 113. 4 T. Rep. 589. Ld. Ray. 1007. Abbot on Shpp. 105, Am. ed.

Mr. Hallowell relied on the case of Ruan and Gardner, in this Court. (*a*) The objection was overruled. (*b*)

(*a*) Ante, page 145.

(*b*) The general rule is, that the objection to a witness, on the ground of interest, goes to his credit, and not to his competency, unless he be directly interested; that is, may be immediately benefited or injured, by the event

The captain stated, that he, at the request of the plaintiff, put two of the bags, containing six hundred dollars, in his

of the suit; or, unless the verdict to be obtained by his evidence, or given against it, will be evidence for or against him, in another action, in which he may be a party. Any smaller degree of interest, as that he may possibly be liable to an action, in a certain event; or, that the verdict may influence the jury in his own case, being similar; does not affect his competency. The admission of a person, immediately interested in the event of the cause, nay, party to it, from *necessity*; as the person robbed, in an action against the hundred; the defendant's wife; oath made on an indictment for robbery, in an action against the husband for a malicious prosecution; are exceptions to the general rule. So, likewise, persons who become interested in the *common course of business*, and who alone can know the fact; as a servant, who, in the way of business, delivers out goods, though the evidence, whereby he charges the defendant, exonerates himself from his liability to his master. Peak's Evid. 93 to 101. So in the cases of Martin *vs.* Morvell, 2 Stra. 66, 67; and Salk. 280; depend on the same principle. If not in the usual course of business, he must be released. Cowp. 199.

So the objection, on account of interest, may be taken out of the general rule, by a counter interest in him; as, where his interest, in the event of the cause supported by his evidence, is counteracted by an equal or greater interest, that it should be decided otherwise. Peak's Evid. 102. So, if the witness stands indifferent, in point of interest, between the parties; being liable to pay to one or the other; as, if in a suit between A and B, for the recovery of money, paid by A to C, for the use of B, C may be a witness, to prove he received it as agent for B. So the acceptor of a bill of exchange, in an action against the drawer, to prove that he had no effects. 7 T. Rep. 480, 481, *note*. Peak's Evid. 102. But, in an action against the master, for the negligence of the servant, the servant is not a witness for his master, unless he is released. For, though he is equally liable to the master, in case of a recovery against him, and to the injured person, if he fail; still, as the master in a former case, may, in the action against the servant, use the verdict to prove the *quantum* of the damages, though not the facts; this is an interest which renders him incompetent. 2 Ld. Ray. 1411. 4 T. Rep. 589.

Green *vs.* New River Company. In an action on a policy on goods, the master and owner was held incompetent, to prove the ship seaworthy, without a release by plaintiff; because, though this verdict could not be read in

chest, in the cabin, and the other bags in the hold of the vessel, under the ballast: that he was brought to, near St. Domingo,

evidence, in any action, by or against the owner; yet, the witness, by his testimony, seems to exonerate himself from the action of the owner of the goods, for the want of seaworthiness of the vessel. Peak, N. P. Cases, 84. So, if the loss stated, be barratry of the master, he cannot be a witness for the defendant, to prove the deviation made with consent of the owners, unless released by defendant; for, if plaintiff succeeds on the barratry of the master, he is answerable to the underwriter. Esp. Cases, 339. For, if the underwriters suffer by the fault of the master, they may maintain an action *ex delicto*, against the person who subjected them to it.

The principle of these cases, seems to militate very strongly against the decision in Ruan vs. Gardner, and the present. In the case of actions against the master, for injury suffered by neglect of the servant, the incompetency of the servant to give evidence for the master, without a release, must proceed on the ground, that the success of the master, exonerates the servant from his action; and the verdict, besides, would be evidence of the *quantum* of injury the master had sustained. It is true, the servant is liable to the action of the same plaintiff; but, he has an interest to get rid of one action, particularly when the verdict may be read against him. This is not like the case of Ilderton and Atkinson, 7 T. Rep. 480; or Evans vs. Williams, Idem, 481; or Staples vs. O'Kenis, Esp. 332: because, in all those cases, the witness's liability to one of the parties, was not disputed; and, it was of no consequence to him, to which he paid, or which of the parties succeeded. In the cases of Bothers vs. Elton, P. N. P. Cases, 53; and Thompson vs. Bird, Esp. Cases, 339, the liability of the master was disputed. His evidence was to exonerate himself from the charge of barratry, and having an incompetent vessel; and, consequently, from the claim of the owner of the goods in one case, if he should fail on account of the unworthiness of the vessel, and of the underwriter in the other, for the barratry, in case the underwriter should be made liable. So in the case in the text. The master was liable, by his bill of lading, to the owner of the 5000 dollars; but, exonerated himself entirely, by proving a loss by capture. It is true, he might be sued by the underwriter, if he was guilty of embezzlement; but not under equal circumstances with the other case; for, I presume, the underwriter would be bound to prove the barratry; whereas, the owner might rely on the bill of lading, and put it upon the master to prove his excuse. Besides, he would be also liable in the cases before mentioned. I doubt the solidity of

by a French privateer, and ordered, with his papers, on board: that, whilst he was there, some of the privateersmen went on board his ship, returned two or three times in the boat, to the privateer, with articles from the vessel; after which, he was permitted to return to his vessel, and proceed on his voyage.. On his return, he found the two bags of dollars taken from his chest.

St. Domingo being blockaded, he went to Jamaica; staid two or three days; and, while there, on examination, he found one of the 15 bags in the hold gone. The evidence was of such a nature, as to leave great room to suspect, that the third bag was embezzled by the crew; but, nothing positive appeared, to show whether it had been taken by the crew, or by the French.

WASHINGTON J., charged the jury. That it was necessary for the plaintiff to prove his loss to have arisen from some of the perils mentioned in the policy, and in the way stated in the declaration. That, as to the third bag of money, it was for the jury to say, by what means it was taken. If by the French, the plaintiff was entitled to recover the amount, as well as of the other two. But, if they thought it had been taken by the crew, the plaintiff could not recover for it in this action; since the loss, stated in the declaration, was attributed to French spoliation, and not to barratry.

The jury found the amount of the two bags only, with interest from the demand, or so many days after, as the policy mentions.

the reason given by Judge Peters; because, if the plaintiff had misconceived his action, by stating a loss by capture, I do not see that this would preclude him from suing the master, for a loss by a different cause. W.

Vale *vs.* Phœnix Insurance Company.

In contracts of insurance, good faith, a fair, open, and candid conduct in both parties, is essential. Every material circumstance of the risk, should be communicated to the underwriter.

A concealment of facts, material to the risk, and within the knowledge of the insured, and which the insurer is not bound to know, vitiates the policy.

THIS was an insurance on goods, at and from Norfolk to Newbern, in North Carolina. When the captain left the bay, and after he got out at the capes of Virginia, the wind blew very hard. Captain Kenris, in a vessel destined for Newbern, left Norfolk three days later, being afraid of the weather; and when he arrived at Newbern, the unsound vessel had not arrived. The plaintiff endeavoured to get his goods insured at the Newbern office, but in consequence of the report brought by Kenris, of the vessel in question having left Norfolk before him, in bad weather, they refused to take the risk: apprehensions were pretty generally entertained, in Newbern, that a vessel was lost. The plaintiff knew that the cause of the refusal of the office to insure, was founded on those apprehensions. He wrote to his agent, in Philadelphia, to effect an insurance there; but mentioned nothing of the above circumstances. It was not perfectly clear, whether this information was received by plaintiff, at the time he wrote his letter, on the second of the month; but there was very strong ground to suppose he did then possess it, or on the fourth, when the letter was post-marked at Newbern.

WASHINGTON, J. charged the jury. In contracts of insurance, good faith, a fair, open, and candid conduct, on the side of both parties, is essential. The underwriter is never sup-

posed to know of the particular circumstances attending the property insured, other than is disclosed to him by the assured; taking the risk which the assured is unwilling to bear. He ought to have every means of estimating its extent, in the power of the assured to give; because, as he consents to run the risk for a stipulated consideration, and since the amount of the consideration is a matter of calculation, which must depend upon the degree of danger, he does not stand upon equal or fair ground with the other contracting party; unless he is equally informed of facts within the private knowledge of that party, which may be material to the risk. The rule therefore is clearly settled, that a concealment of facts material to the risk, and within the knowledge of the insured, and which the insurer is not bound to know, vitiates the policy. The first question then is, were the facts related by captain Kenris, material to the risk? Would a missing ship, under the circumstances of this vessel, be insured at the same premium, with one exposed only to the common hazards of such a voyage? If you answer this affirmatively, the next question is, were these facts known to the plaintiff? I do not mean, is a knowledge of them brought home clearly to the plaintiff; but are you satisfied upon the evidence, that he must have heard of them before he wrote his letter, or before it left Newbern. He did not write for some days after the arrival of Kenris. The report he brought, and the apprehensions it occasioned in this small town, were general. It had got to the ears of the new Insurance office, and determined their conduct, and this was known to the plaintiff. There is strong ground to suspect, from the evidence, that he knew all this before his letter was sent off. Of this, however, you must judge; and, if you are of opinion that he did know it, and that the facts were material to the risk, your verdict ought to be for the defendants.

The jury found for the defendants.

LESSEE OF GORDON *vs.* HOLIDAY.

Where two names have the same original derivation, or, where one is an abbreviation or corruption of the other, but both are taken promiscuously, and according to common use, to be the same, though differing in sound; the use of one for the other, is not a material mismomer.

If the name be wholly mistaken, and repugnant to truth, the mismomer is fatal.

Query, if *Henry*, for *Harry*, is a mismomer.

Operation of the treaty of 1783, upon the exercise of legislative powers for the confiscation of the property of those who had been engaged in hostilities against the United States; or who neglected to surrender themselves, when called upon by law so to do.

HARRY GORDON, being seized of the land in question in fee simple, on the 6th of March 1778, as well as on the 20th of March 1781; an Act of the Legislature of Pennsylvania was made, on the former day, attainting certain persons therein specially named, of high treason, and forfeiting their estates, unless they surrendered themselves by a certain day, and took their trials for high treason; and declaring that all persons, subjects or inhabitants of that State, or those who have real estates therein, who adhere to, and willingly assist the enemies thereof, or of the United States, and whom the Supreme Executive Council of the State, by their proclamations, should name and require to render themselves, by a certain day therein to be mentioned, to some one of the justices of the State, and abide their legal trial for such their treasons; and who should not render themselves accordingly, and abide their said trials, should, from and after the day fixed by such proclamation, stand, and be attainted of high treason; and should suffer such pains and penalties, and undergo all such forfeitures, as persons attainted of high treason ought to do. The law then proceeds to autho-

rize the President of the Executive Council, to appoint agents to sell such forfeited estates, and to make conveyances to the purchasers. On the 20th of March 1781, a proclamation was issued, reciting the names of sundry persons, and among them *Henry* Gordon, now or late an inhabitant of the State of Pennsylvania, and required him by the name of *Henry* Gordon, now or late a military officer in the British army, now or late of Kennet township, in the county of Chester, who had been guilty of aiding the enemy, and adhering to them; to render themselves to some magistrate, on or before the first of November following, to take and abide their trials for their treasons; which, if they fail to do, they shall be, and stand attainted of high treason, and stand the consequences thereof. Harry Gordon did not render himself, in compliance with this proclamation; in consequence of which, the lands in question, and other tracts, were, on the 18th of April 1782, sold by auction to John Woods, the highest bidder; who paid for the same on the first day of May, in the same year; and on the second of October 1783, a deed was made by the governor of Pennsylvania to Woods, under whom the defendant claims. On the 31st of January 1783, the Legislature passed a law, entitled "an Act for the attainder of *Harry* Gordon, unless he surrender himself, and for other purposes." It recites, that Harry Gordon was seized of certain lands in this State, and it was alledged that he did adhere to the enemies of this State, and the governor did require *Henry* Gordon to render himself by a certain day to take and abide his trial, thereby intending to require the said Harry Gordon to surrender himself, &c. and that the said Henry Gordon did not surrender himself, pursuant to said proclamation; and the said Executive Council did dispose of his real estate, in this State, as if he had been legally attainted; &c. and that application had been made to the General Assembly, to cure the said misnomer, and to confirm the rights of the purchasers of the said estates of the said Harry Gordon. It then proceeds to enact, that if the said Henry Gordon do not surrender himself,

on or before the 24th of July following, and abide his legal trial for high treason, he shall, from and after that day, stand and be attainted of high treason; and shall suffer, and forfeit his estate to be disposed of, in the same manner, as if he had been *legally and rightly* called upon by the aforesaid proclamation: and then it proceeds, in the event of his not appearing, to confirm the rights of the purchasers. The law then, in another clause, declares; that the heir, devisee, or alienee, of persons whose estates had been forfeited, under and by virtue of proclamations, should not be permitted to recover against the Commonwealth or purchaser, in consequence of any misnomers, where the Court and jury, before whom the cause should be tried, should be satisfied that the person so attainted, was the person really intended to be called upon, by the proclamation. Harry Gordon did surrender himself in consequence of this law. He died about the year 1787, and the lessor of the plaintiff, is the heir at law, of the oldest son of the said Harry Gordon, who died intestate, and without issue. Many depositions were taken in Scotland, which proved, that Harry Gordon, the father of the lessor of the plaintiff, was baptized by the name of *Harry*, and that he was always called by the name of Harry, and not Henry; that he came to America long before the Revolution, and left it in 1775; and held a military commission in the armies of the king of Great Britain. Whilst in America, he lived in the township and county mentioned in the proclamation.

The plaintiff's counsel contended, first: that Harry Gordon never was legally attainted, by the act of 1778, and the proclamation of 1781; that Harry, and Henry, are different names. They cited 1 Com. Dig. 19. Cro. El. 57. 202. 2 Stra. 1214, where Harry, was called Henry; and the Court directed an amendment, which would have been unnecessary, if they were the same. 2 Hale P. C. 175, 6, 7. 2 Hawk. 185, ch. 25. s. 69. 1 P. Wms. 613. Where, in an act of attainder, where major-general Alexander Gordon, Laird of Oquintool, was attainted by

though differing in sound; the use of one for the other is not a material misnomer. If, in common use, the names be the same, the person cannot be misnamed, if either be used. Griffith's case is a strong one to illustrate the rule. Saunders and Alexander, which differ entirely in sounds, are stated not to be distinct names of baptism; because, usually, Alexander is called Saunders; so Piers and Peter, Joan and Jane, Franciscus and Francis, Garret, Gerald and Gerard. But if the name be wholly mistaken; if it be repugnant to truth, as if Alexander be used instead of Thomas, the misnomer is fatal. The question therefore always is; are the names different, not in sound, but in derivation, or in common use. No cases directly in point, have been cited. By the case from Willis's Reports, it seems that two of the judges thought they might be used as being the same. But the judges certainly thought them different, in the case of the King *vs.* Roberts, 2 Stra. 1214, or the amendment would have been unnecessary. That the Legislature of this State thought the names different, is very clear.

The Act of the 31st of January 1783, after reciting the proclamation, and the proceedings under it, and that fears were entertained by the purchasers of the validity of the sales, on account of the misnomer, and praying to have them confirmed; proceeds to legislate upon the subject. Instead, however, of confirming the sales, which would have been proper, if the names had really been the same in the mind of the Legislature; they do the very reverse. They pass the law, the title of which is "an Act for the attainder of Harry Gordon," &c. They order him to appear, and take his trial, by a certain day; which, if he fails to do, he is *from thence* to stand attainted, and to forfeit his estate, to be disposed of in the same manner, as if he had been *legally and rightly* named in the proclamation. Here, then, we have a legislative declaration, that Gordon had not been legally and rightly named in the proclamation; and so entirely fatal did the Legislature suppose the misnomer to be, that they afford him a new opportunity of saving his life and

fortune, from the consequences of an attainder. If he had appeared, and shown himself never to have owed allegiance to the State of Pennsylvania, he certainly would have escaped those consequences. The former attainder is done away by this law, unless two attainders against the same person, can exist, and be in force, at the same time: for, by this law he is to stand attainted, and to forfeit his estate, from and after the 24th of July, if he then fail to appear. This, too, was the meaning of the Legislature. For if it was intended to cure the misnomer, on the ground of its immateriality, what had the Legislature to do, but to confirm the former attainder and sales. And, if in the case of the King and Roberts, the Court could cure the error, by an amendment; could not this Legislature, in their omnipotence, do it, if they supposed the misnomer immaterial? By setting all aside, and directing proceedings *de novo*, they, in language most emphatic, pronounce their opinion, that the name by which he had been called upon, was repugnant to truth, and that common justice and humanity required the thing to be done over again. This, then, brings us to the consideration of this law; and to the operation of the treaty upon it. The sixth article declares, that there shall be no future confiscations, &c. The preliminary articles of peace were signed on the 20th of January; eleven days before the passing of this law; and was recognised, and in fact ratified, by the government of the United States, some months before the day appointed for Harry Gordon to appear, and take his trial. Upon this state of the case, it is quite unnecessary to decide, whether the treaty took effect on the 20th of January, when it was signed, because it is not to be questioned, but that it did so, at the moment it was known in this country; and was ratified either formally, or impliedly. The effect of this treaty was, to do away so much of this law, as was calculated to produce a confiscation of Gordon's estate, on account of the part he had taken in the war; to subject him to the meditated prosecution, or to expose him to future loss or damages in his person or property.

If he had appeared on the 24th of July, agreeable to the notice, he could not have been tried; neither could judgment pass against him, by default; the treaty, intervening between the law, and the completion of the confiscation, repealed the former, and prevented the latter; for it was not the law attainted his person, and confiscated his estate; but his conviction, if he had appeared and abided his trial, or his failing to appear. This settles also the last point; for the treaty not only prevented the confiscation of Harry Gordon's estate, during his life, but protected his interest and estate, in the land that was a fee simple, with all the privileges attending such an estate; so that, on his death, it might be willed or devised; or he might have alienated it. To say that his interest was protected during his life, but that it was to stand confiscated as against those claiming under him, would be a fraudulent construction of the treaty, which protected the whole. But I do not think that this clause extended to the case of persons claiming under Gordon, but to those who claimed, in consequence of misnomers in the proclamations. But Gordon was to be specially tried anew, by his right name, under the law. I am therefore of opinion, that the verdict should be in favour of the plaintiff.

Verdict for plaintiff.

Nicholas Hurry *vs.* The Ship John & Alice, Whitesides, & Samuel Hurry.

Libel on a bottomry bond.—An instrument, claimed to be an hypothecation of a vessel, is not such, if it was given to the consignee, when he had funds in his hands to secure the advances made by him for the vessel.

A consignee, under such circumstances, cannot enter into a maritime contract with the master of the vessel, so as to bind him to pay marine interest.

The cargo and freight is subject to the payment of extraordinary demands, for completing the voyage; and the consignee takes these funds *cum onere*, and under an implied engagement to make the necessary advances.

The master, being also owner of the vessel, may give a specific lien on her, for securing advances made for any purpose; but if this is not given by virtue of his authority as master, it will not be a marine hypothecation.

The master cannot hypothecate for a pre-existing debt; but only for advances for a purpose necessary to enable him to complete his voyage, *made at the time the necessity existed.*

A bond executed as an hypothecation, but not upon the principles which govern such securities, cannot be enforced in a Court of Admiralty; but must be proceeded upon in a Court of Common Law.

THIS ship was owned, one-third by Whitesides, who was also master, and the other two-thirds by Samuel Hurry. The former, previous to his first voyage to England, was authorized, by letter of attorney from Samuel Hurry, to borrow money on his account, and to secure it by a bottomry bond on the vessel. In July 1802, she arrived at Liverpool, when Whitesides obtained from the appellant, Nicholas Hurry, £343 0*s*. 4*d*. sterling, for the disbursements of the vessel; and Samuel Hurry being a considerable debtor to the appellant, the master, to secure so much thereof, as well as the above sum of three hundred and forty-three pounds and four pence, gave a bottomry bond, for fifteen hundred pounds sterling, on the vessel. In November 1802, the ship having performed her homeward voyage to Philadel-

phia, returned to Liverpool, with a cargo, consigned to the appellant; when he advanced for the disbursements of the vessel, £1195 19s. 8d. but with no security. She returned to Philadelphia, and again arrived at Liverpool, in June 1803, with a cargo consigned to the appellant; who advanced for her disbursements £424 2s. 8d. and then took a bottomry bond in June 1803, £1693 2s. sterling, being the amount of the three sums of £343 0s. 4d., £1195 19s. 8d., £424 2s. 8d. He also chartered the vessel back to Philadelphia, and was to pay £500 for freight. On the arrival of the ship in Philadelphia, after the giving the last bond, she was libelled by Nicholas Hurry, in the District Court, to enforce the payment of this bond. Answers were put in by Freeman, claiming one-half of the ship, by virtue of a bill of sale, for a valuable consideration, made by Samuel Hurry before his bankruptcy, and dated 2d July 1803. Also by the assignees of Samuel Hurry, who committed an act of bankruptcy on the 13th July 1803. The District Court dismissed the libel, and there was an appeal to this Court.

Mr. Dallas, for appellant, contended, that the sums advanced for the disbursements of the vessel, at the three several periods, were for a maritime consideration; that the master had authority, not only as such, but as owner, to hypothecate the ship. That as to jurisdiction, the question depends on the subject matter, not on the locality of the transaction. No objection to this bond, that it was taken by a consignee. He cited 1 East's Rep. 6. Park. 413, 414. 2 Marsh. 639. 679. 4 Rob. Rep. 1, 2. 2 Id. 192. 4 Rob. 201. 3 Id. 267. 6 Mod. 18, 14. Vin. 328, 329. 3 Rob. 221. 225. 112. 3 T. Rep. Minitur & Gibbons. 2 Brow. Civ. Law. 71. 196. 2 T. Rep. 649. 2 Marsh. 632. 2 Bl. Com. 457.

Mr. Hare and Mr. Chauncey, for appellee. The bond was given for a pre-existing debt, which cannot lay the foundation for a maritime hypothecation. The advances made were for ordinary disbursements, and not for extraordinary necessaries. They were made by a consignee, with funds in his hands, and

where a part owner was present. As to the power of attorney, the bond was not given in execution of it. Though Whitesides was a partner, yet he could not bind his co-partner. General partners may bind each other; but not so in special partnerships, like the present. Though the power of Whitesides to hypothecate the ship be admitted, yet he could not give a maritime hypothecation, so as to give jurisdiction to the Court of Admiralty; because not given by the master, *quoad* master, in a foreign country, for necessaries furnished; without which he could not complete the voyage. They cited Abbott, 118. 2 Moll. B. 2. c. 2. § 11. Hop. Rep. p. 1. 1 Ves. 155. 1 Ld. Ray. 378. 3 Mass. 540. 5 Burr. 2724. 1 Wills. 103. Abbt. 60. Hopk. Rep. 23. 2 Brow. Civ. L. 72. Abbt. 113. 112. 1 Ld. Ray. 152. 750. 2 Id. 905. 982.

WASHINGTON, J. The bond in question, was given on the 7th of July 1803, by the master, who was also part owner, and having a cargo in the hands of the consignee, for a sum of money composed of £340 0*s.* 4*d.* advanced by the appellant, in July 1802, and secured by a bottomry bond then given, for a sum including this, and so much more as amounted to £1500; of £1195 19*s.* 8*d.* advanced by the same person, on a subsequent voyage, in November 1802, and £424 2*s.* 8*d.* advanced when this bond was given. Now this bond has not one feature in it, which can resemble it to a maritime hypothecation. The implied power of a master, as such, to bind the ship of his owner, for advances made in a foreign country, for necessaries furnished, to enable him to complete his voyage, without which it must miscarry; is a provision purely of maritime law; produced by the necessity of such a predicament. The master, being also owner, may give a specific lien on his vessel, without resorting to this law. He does it in virtue of his title as owner; not by force of an authority, connected with the nature of his employment. Viewing Whitesides in his capacity of master only, this bond, as a maritime hypothecation, cannot be

supported. First, because it was given to a consignee, with funds in his hands sufficient to secure the advances he was required to make. In this situation, he could not enter into a contract with the agent of the consignee, obliging him to pay marine, instead of common interest, for moneys advanced by him. The cargo, or the freight, where the freight is payable, is subject to the payment of these extraordinary demands, in cases of necessity; and the consignee, by receiving either, takes it *cum onere*, and under an implied engagement to discharge the expenses, when the outfits of the vessel may require, to enable her to complete her voyage; after this, he cannot expose the owner of the ship, to the payment of exorbitant interest, and take from the master a hypothecation of the vessel. Second; because, as to the sums of £343 0*s*. 8*d*. and £1195 19*s*. 8*d*. they had not been advanced for any purpose necessary to enable the master to complete the voyage he was about to perform, *at the time the necessity existed for making the contract.* Where was that pressing necessity, which can alone warrant the exercise of this extraordinary authority, in the master, at the time this bond was given? Suppose it once to have existed, it had then passed away. These advances may have created a debt to be discharged by the owner; but, on the 7th of July 1803, it was a pre-existing debt, which the master and part owner, had no power to secure by a marine hypothecation. As to the sum of £424 2*s*. 8*d*., I do not discover any one charge in the account, which is not of the most ordinary kind, and would in almost every voyage, become an item in account between the consignee and the owner; and if the former could subject the ship to the payment of marine interest, for such advances, hypothecation bonds would be the constant attendant of every voyage. As to the power of attorney to Whitesides, admit it remained unexecuted, on the 7th of July 1803, and that Whitesides acted under its authority; it would convert this bottomry bond into a common hypothecation, to be enforced by the same remedy, as would be proper in other cases of

mortgages, made by the owner of personal property, in person or by attorney. If the subject matter of the bond was of a maritime nature, that is, for advances made to enable the ship to complete the voyage; and if it were clear of the objections above mentioned, the master might give a maritime hypothecation, without the aid of this special authority; and if it were not of this nature, the special power could not make it such an hypothecation, though it might enable the master to give a security on the ship, to bind it and his owners. Upon the whole, I am of opinion, that the subject matter of the present suit, belongs not to the jurisdiction of the Court of Admiralty.

Sentence affirmed.

Note.—The master, for advances made for seamen's wages, previous or afterwards, for the *necessary repairs and use of the ship during the voyage*, may bind his owner personally. Abbot, 86 to 91. Am. ed. By the maritime law, the master may hypothecate both ship and cargo, for repairs, &c. during the voyage; which arises from his authority as master, and the necessity of the case: but not for repairs done in this country. Idem, 95. Not only may the master, *under certain circumstances*, pledge the ship by bottomry bond; but the owners and part owners may do so, *in any case*, to the extent of their interests. In the latter case, the lender has not a remedy in the Admiralty Court against the ship, as he has in the former, where the master gives an hypothecation for necessaries, furnished in a foreign port. Idem, 9th S. to 101. In the place of the residence of the owner, the master cannot give a bottomry bond, by the maritime law. In a foreign country, he may, for any purpose necessary to the voyage, whether the occasion arise from any extraordinary particular, *or from the ordinary course of the adventure*, if he cannot otherwise obtain it, and this binds the vessel; but the owner is not personally liable. Idem, 101, 102. If the obligee, being unwilling to take upon himself the risk of the voyage, is content not to demand maritime interest; it is competent to the master to pledge the ship, and the personal credit of the owner. In this case, the bond was for payment absolutely, and not on consideration of safe arrival. Idem, 102. 1 Ves. 443. The master may hypothecate, in a foreign country, for necessaries, where he has no owners, nor any goods of theirs, nor of his own, and cannot obtain them by exchange or otherwise. 2 Molloy, 126. W.

CIRCUIT COURT OF THE UNITED STATES.

PENNSYLVANIA, (ADJOURNED) OCTOBER TERM, 1806.

BEFORE { Hon. BUSHROD WASHINGTON, Associate Justice of the Supreme Court.
Hon. RICHARD PETERS, District Judge.

LESSEE OF HYLTON *vs.* BROWN.

The operation and effect of the attainder laws of Pennsylvania.

It is premature, before the jury are sworn, and the trial commenced, for either party to call upon the other to produce a paper, which he has received notice to produce on the trial.

It is sufficient for one party to *suggest* that the other is in possession of a paper, which he has, under the Act of Congress, given him notice to produce at the trial; without offering other proof of the fact; and the party so called upon, must discharge himself of the consequences of not producing it, by affidavit, or other proof, that he has it not in his power to produce it.

The Court will not, upon a notice of the defendant to the plaintiff, to produce a title paper to the land in dispute, which is merely to defeat the plaintiff's title, compel him to do so; unless the defendant first shows a title to the land.—Merely showing a right of possession, is not sufficient to entitle him to the aid of a Court of Chancery, or of this Court, to compel a discovery of papers, which are merely to defeat the plaintiff's title, without strengthening the defendant's. It is sufficient, in order to entitle him to call for the papers, to show title to the land, although none is shown to the papers.

Evidence of the political character and conduct of a particular person, was allowed to be given, in order to satisfy the jury, that he was not the person meant and intended by a proclamation, under the attainder laws; but not to impeach the attainder or confiscation of property; on the ground, that the person was not guilty of the crime imputed to him.

The copy of a will of land lying in Pennsylvania, made in New-York, proved before the Surrogate of New-York, by one of the subscribing witnesses, who also proved, that the other two witnesses attested the same in the presence of the testator, the copy being authenticated under the seal of the Surrogate's Office, and entered in the Register General's Office in Pennsylvania; is not admissible in evidence, in the State of Pennsylvania.

In all cases, no matter where the will is made and proved, if it concern land in Pennsylvania, it must be proved by two witnesses.

What will constitute a residence, in contradistinction to temporary domicil.

PREVIOUS to the jury being called to try this cause, the defendant read a notice to the plaintiff's counsel, to produce, at the trial, the will of Joseph Griswold, who, by deed, had leased the land in question to the plaintiff: also, an affidavit, to prove that the original will was in the plaintiff's possession, by his own acknowledgment. It was objected, by the plaintiff's counsel, that the motion was premature, and should be made during the trial; because, the Act of Congress says, that the Courts shall have power, *in the trial* of actions at law, on motion, and notice, to order papers to be produced, which contain *evidence pertinent to the issue*; so that the Court, until the trial is gone into, cannot know whether it is pertinent or not; and the order is to be made on the trial. The Court overruled the motion.

The jury being empannelled, the plaintiff deduced his title from the proprietors to Joseph Griswold; who, in the year 1789, leased the land in question to the lessor of the plaintiff, at a pepper-corn rent, for twenty-one years; but, to cease, and be void, on the lessor's conveying away the same by deed, or disposing of it by will.

The defendant, after proving a possession for a number of years, renewed his motion for a production of Joseph Griswold's original will. To prove the land in possession of the plaintiff, he offered, only a copy of the will, proved in the surrogate's office at New-York, by one witness, and the payment of the expenses of probate, and an *ex parte* affidavit, to prove the

plaintiff's acknowledgment that he had it. This latter was objected to, as the other party had no opportunity to cross examine.

By the Court. The suggestion of the defendant is sufficient, without more, to authorize him to call for the production of the deed. If the possession is denied, the affirmative must be proved, to enable the party to derive any advantage from the non-production of it.

Upon this, the plaintiff gave the will to the Court, and then insisted, that this was not a case in which, under the Act of Congress, they were compellable to produce the will. The words of the law are, that a party may be compelled to produce a paper, which contains evidence pertinent to the issue, *in cases, and under circumstances, where they might be compelled to produce the same, by the ordinary rules of proceeding in Chancery.* That, to enable the plaintiff to obtain this relief in equity, he must show a title to the thing. Whereas here, the defendant relies merely on possession. Cases cited, Finch, 36. 44. 1 Vern. 479. 35. 2 Idem, 255. 50. Mitf. 19. 50. 53. 68. 215. 1 Eq. Ca. Ab. 772.

The defendant relied, that possession was a sufficient title to authorize the interference of a Court of Equity.

Washington, J., delivered the opinion. The remedy provided by the Act of Congress, is merely cumulative; and, to save the time and expense of a bill of discovery, it enables this Court to do, in a summary way, what they might do, if a bill of discovery were filed on the equity side of the Court, and no more. Now, if such a bill were filed, the Court would not compel a discovery, unless the defendant showed a title to the land. A right of possession might protect the party in ejectment, unless the plaintiff can avoid it, and show a complete title in himself. But, this would not be enough to enable him to come into a Court of Equity, for a discovery of papers, which merely tend to defeat the plaintiff's title at law, without strengthening that of the plaintiff in equity. It is not alone ne-

cessary for the party applying, to show a title to the paper; for, if he show a title to the land, and the paper called for be necessary to its establishment, the Court may relieve him; though, strictly, he has no title to the paper called for. At law, the defendant may not only shelter himself under his possession, without disclosing a better title; but, may do so by showing a subsisting title out of the plaintiff, and, consequently, out of himself. But, if in his bill of discovery he were to state this, or it was otherwise to appear, he could not be relieved.

The defendant then proceeded to show; that the land in question was confiscated, as the land of Joseph Griswold, distiller, late of the Northern Liberties of Philadelphia; and had been regularly forfeited under the laws of this State, and sold to persons, who sold and conveyed to Charles Thompson, under whom the defendant claims. This sale, and the conveyance from this Commonwealth, took place in 1780. Having shown this title, the motion to produce the will of Joseph Griswold, was again renewed; but, the Court was of opinion, that the defendant had no right to call for the will, which he does not pretend is necessary to strengthen his own title, but merely to defeat the plaintiff's. (*a*)

The plaintiff's counsel then proceeded to show, by evidence, that Joseph Griswold, under whom the lessor of the plaintiff claims, was not the person intended by the proclamation, but Joseph Griswold his son; by the examination of certain witnesses, who stated, that Joseph Griswold the father, always resided at New York, and only came here in 1775, and remained for about eleven months, to instruct his son in the art of distilling brandy. When the plaintiff's counsel were about to read certain depositions, to prove the political character and conduct of Joseph Griswold, during the war; the defendant's counsel objected, on the ground that the Court and Jury were precluded, by law of Pennsylvania, from inquiring into the guilt

(*a*) See Fonb. 484, which fully supports the opinion of the Court. W.

or innocence of the person attainted. The Court observed, that the evidence now intended to be offered, was proper, not to authorize a decision against the confiscation and sale, on the ground, that the person was not guilty; but as a circumstance, combined with others, to satisfy the jury, that the person, whose estate had been sold, was not the person named in, or intended by, the proclamation. The defendant, after the testimony was gone through, offered in evidence a copy of Joseph Griswold's will; proved before the Surrogate in New York, by one of the subscribing witnesses, who also proved, that the other two witnesses attested the same, in the presence of the testator, authenticated by the seal of the Surrogate's office. This was opposed, because the probate was not conformable to the laws of Pennsylvania. The Act of 1705, declares, that all wills in writing, whereby any lands, tenements, or hereditaments, within this province, shall be devised, being proved by two or more credible witnesses, on their solemn affirmations, or by other legal proof in this province; or being proved in the Chancery of England, &c. or being proved in the Hustings' or Mayor's Court, in London, or in some manor Court; or before such as shall have power in England, or elsewhere, to take probate of wills, &c. and a copy of such will, with the probate thereof annexed, being transmitted hither, under the public or common seal of the Courts or offices where the same have been taken or granted, and recorded or entered in the Register General's office in this province; shall be good, &c. to pass lands here, &c. This copy was entered in the Register General's office here. The plaintiff's counsel contended, that by this law, the proof of the will, wherever made, must be by two witnesses; although it is not necessary that they should be subscribing witnesses; for such are the express words of the law; whereas, by the Statute of Frauds in England, where proof in the manner this will was proved, is allowed, requires only, that the three witnesses shall subscribe their names in the presence of the testator; but as to the mode of proof, it is left open to the common

law rules, of proving any written instrument. On the other side, it was insisted, that the fair construction of the law is, that if the will be proved in this State, there must be two witnesses; but if proved elsewhere, it is sufficient if it be proved according to the laws of the country where it is so proved.

Judge Peters, having consulted the late Chief Justice Shippen, and Mr. Chew, formerly President of the High Court of Errors and Appeals in Pennsylvania, as to the common understanding and practice of the State, in this case, (for there were no cases cited, but 1 Dall. 2. 66, and 278. 288, which were not express, and Mr. Ingersoll and Mr. Lewis differed on the practice under the law,) and being informed by them, that they never knew it questioned; but that in all cases two witnesses were necessary; the Court informed the Bar, that the will was not sufficiently proved, to authorize a copy of it being read in evidence. If the law had not uniformly received this construction in practice, and the common understanding of men, the correctness of it might have been doubted, in consequence of the repetition of the words "being proved;" which would seem to make each disjunctive part of the paragraph a new sentence, unconnected with the first, which prescribes the mode of proof in this State.

Mr. Dallas commenced the summing up, and made two points: first, that Joseph Griswold the elder, was not intended by the proclamation; and second, that he was not sufficiently described. He relied on the evidence, which proved, that the father always resided in New York; was never here, but for eleven months, in 1775, and 1776, frequently within that time returning home; that he came here for a special purpose; that he never adhered to the enemy, but acted during the revolution as a peaceable citizen. That the proclamation describes him as being late of the Northern Liberties, in the county of Philadelphia, and State of Pennsylvania; whereas, he never was here, after Pennsylvania became a State, and never did inhabit the Northern Liberties at all. That this description fitted Joseph Griswold the son; of course

the former could not have been meant, neither was he sufficiently described. Cases sited 1 Dall. 53. Chapman's case. 60 Buffington's case. 1 Wills. 164. 1 P. Wms. 612. Foot. 79. 1 Stra. 51. 60. 594. Salk. 7. 6. 2 Hawk. Ch. 46. s. 4. Ch. 26. s. 120, 121. Ch. 25. s. 69, 70. 4. Burr. 2563. Show. Parl. Cas. 50. 2 Hawk. C. 23. s. 108. 120.

The Court asked the plaintiff's counsel, after Mr. Dallas had finished, and one of the defendant's counsel had partly entered upon the argument, whether they meant to contend, that the Act of the 31st of January 1783, which cured all misnomers and defects in prior attainders, was invalidated by the preliminary articles of peace; since, in the opening, this had been hinted at, and the foundation laid for the objection, by referring to the period at which the treaty was signed, made public, and ratified, in this country; but that no notice had been taken of it, in the summing up. That the validity or invalidity of that law, might have a material effect upon the decision of this cause. That this point was not decided, in the case of Gordon *vs.* Holiday, at the last term; because, the day fixed for the appearance of Gordon, being long after the preliminary articles were ratified, or acted upon, by our government, there was no necessity to decide it.

Mr. Dallas, to prove that the treaty was complete before the passage of this law, and consequently avoided it, laid down the rule; that unless it be postponed till the ratification, it takes effect from the signing; it is binding on the governments from that time, though not on individuals, till made public. He cited Vattel B. 4. c. 3. s. 24. p. 647. B. 2. c. 12. s. 156, 157. Martens 332. Grot. B. 2. c. 11. s. 18. Park on Ins. p. 75. Rob. Rep. 151, case of the Mentor, 4th January 1784, Congress recommending to the States, the restoration of confiscated estates, between the 30th November 1782, and the ratification of the treaty. 3 Vol. Gord. Hist. 362. Correspondence between Mr. Jefferson and Mr. Hammond, p. 13. 15. 24. 41. 29. 28. 48. Vatt. B. 3. c. 16. s. 6. 36. 339.

The Attorney General, and Mr. Ingersoll, for defendant, con-

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sidered, that Joseph Griswold had committed treason, by adhering to the enemy within this State; because, it is so stated in the proclamation, which became a sentence or conviction by his non-appearance.

That the Act of 1783 was not a law of confiscation, but merely a confirmatory law, and therefore not contraventive of the treaty.

But if it were, still, the Act of the 29th of March 1779, protects the rights of the purchaser; though the attainder should be avoided, for error or any other cause whatever, except as to a paramount title. But the plaintiff's is not such an one; because he claims under Joseph Griswold, the father, who was attainted, and his estate sold.

Lewis, in reply, answered all the points made by the defendant, and pressed the one of which he gave notice, viz. that the forfeiture is made the consequence of the attainder, and consequently, if that attainder be invalidated, the forfeiture cannot be supported. The Executive Council acted upon a delegated authority, which was, to call upon all persons by name, inhabitants of this State, or who had real estate here, and *who now do, or hereafter may, adhere to the enemy, by joining their armies, &c.*; not those *charged* with doing these things.

To support this attainder, then, it should appear, that Joseph Griswold, the father, did, then or thereafter, adhere, &c.; the contrary of which appears by the evidence. In England, in cases of this kind, the greatest strictness is used, in requiring proof of every thing necessary to give validity to the attainder. Fost. C. L. Harvey's case.

WASHINGTON, J. charged the jury. This is a cause of consequence, and attended with considerable difficulty. It has been argued with great ability on both sides. Many preliminary questions have been discussed, and disposed of; by which means it will now be presented to the jury, narrowed down to a single point.

You will dismiss from your minds, every attempt which has been made to enlist your passions, on either side, by the supposed hardship which the plaintiff or defendant may be exposed to, by a verdict unfavourable to his pretensions. To correct minds, appeals of this kind, if they disgust not, can never be successful. We must ascertain the material facts in the cause, and the law applying to them; and then declare the result, let that be what it may. As to Mr. Thompson, who, it is argued, will be without redress, should he now fail; it seems to be agreed, that if the plaintiff recovers by a title paramount to the attainder, that the door is left open for him to ask and receive compensation from the State.

The Court admit the right of the State of Pennsylvania, to confiscate the estates not only of its own citizens, but of non-residents who failed to surrender themselves, in conformity with the requisitions of the law of March 1778; and we mean to enforce that authority, and the subsequent laws, according to the true intent and meaning of them; unless we should be of opinion, that any of them are abrogated by some superior law.

The facts in the case, and which seem not to be disputed, are as follows: Joseph Griswold, the father, whose land was seized and forfeited, always, from the moment we hear any thing of him, lived in the State of New York; was a married man, and a father. He carried on his trade, which was that of a distiller, in the city of New York, from the year 1759, and before, until about the year 1776; when he left that city, and retired with his family to his country residence on Long Island. Having a son also named Joseph, whom he wished to instruct in the same trade, and to establish in business, he came to Philadelphia in the summer of 1775, unattended by his family, bringing this son with him: in pursuance of this, the primary and sole object of this visit, he rented a distillery in the Northern Liberties, which, until the spring of 1776, was conducted under his name; at which place the son received that instruction, which enabled him afterwards to carry on a distillery upon

his own account. The father, during the whole of the time that he continued in Philadelphia, was a boarder in Strawberry alley, within the limits of the city, where he lodged and took his meals, spending much of his time at the distillery, where his business required his presence; in the space of ten or eleven months that he was so employed, he returned three times to New York, to visit his family, no part of which, (his son excepted,) ever came to Philadelphia, to remain or to live with him. In April or May 1776, having accomplished the business which brought him here, he left Philadelphia, and never returned again into the State, to the knowledge of any one of the numerous witnesses who have been examined. His political character was that of a loyalist, although it does not appear that he ever was guilty of a single overt act, resembling treason against his country. He was nevertheless arrested upon suspicion, by order of the commander-in-chief, and sent to Connecticut; where, after remaining three or four months, he was permitted to return to his family on Long Island, under parol of honour, to behave himself as a good citizen during the war. This promise, it does not appear from any witness, he ever violated. He continued quiet; inactive, and inoffensive, during the rest of the war, so far as we have received information respecting him, from the witnesses. We know much less of the history of his son. He continued to live in Philadelphia, after the departure of his father; and at different periods rented two distilleries in the city of Philadelphia, where he carried on the trade in which he had been instructed; not as an apprentice, but as a principal distiller. Whether he lived in the City, or Liberties, does not appear; but we find that he married in Philadelphia, some time in the year 1777; that he continued his residence in this place, until the approach of the British army. He went off in American uniform, and became a resident of the State of New Jersey. He was reputed a whig; yet we find, in November 1780, that he was apprehended by a warrant from the Supreme Executive Council of this State, upon a charge

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in consideration of services rendered to the proprietaries; and it recited a prior warrant, dated in 1754, which had not been executed. On the 2d of May 1762, this warrant was surveyed, so as to comprehend the land in question; and on the 13th September following, it was duly returned. On the 14th of April 1770, Richard Peters, in consideration of 2000 acres of land granted him by the proprietaries, in another place, released to them, as joint tenants, his right to the land thus surveyed for him. On the 17th of May, a grant was made to Harry Gordon, (to whom the lessor of the plaintiff is heir at law,) for the above land surveyed for Mr. Peters, in consideration of £900. Harry Gordon devised the land in question to his eldest son, who dying without issue, it descended to the lessor of the plaintiff. The same evidence in this as in the former cause, (*see ante*, p. 285) to prove that the father of the lessor of the plaintiff was christened and known by the name of *Harry*, and not *Henry*. The defendant set up a title to the land in question, under a warrant to James Rankin, dated 3d February 1755, for 300 acres, to include the White Hunter's cabin, and to adjoin the land of James Lowry; who, on the same day, took out a warrant for 300 acres, to include Frankstown.

It did not appear, that any attempt was made by Rankin, to get his warrant executed, until the year 1765; when his agent Lowry, applied to a deputy surveyor to execute it. When on the ground, the surveyor was directed to lay the warrant on the land in question, which he refused to do, because it had been before surveyed for Mr. Peters. The agent refused to have it executed on a piece of land surveyed for a Mr. Lyons, lying between James Lowry's survey and that of Mr. Peters. Nothing therefore was done in the business; and it did not appear that Rankin, ever after, did any thing to complete his title. It appeared that Armstrong was the agent of Mr. Peters, and that Morris was his agent to survey other warrants; and that in 1761 he had notice that Rankin had a warrant for the land where the White Hunter's Cabin was; and which it was proved was within the survey made for Mr. Peters.

The defendant offered a survey under Rankin's warrant, made by Harris, a deputy surveyor, for a different district from that in which this land lies, under a special authority from the Surveyor General; who directed to lay it off according to the calls of the warrant, and such evidence as might be offered on the ground. This was objected to, as a survey; because made by a deputy out of his district, which is against the law of the State; and as a deputy constituted for this district, it was said to be equally ineffectual; since, no deputy could be appointed by the Surveyor General, without the approbation of the governor.

The Court declared that this was not a legal survey, and therefore could not be read as such; neither could it be used as evidence *per se*, to show the location of the warrant; because it was made on *ex parte* evidence. But that Mr. Harris, the surveyor, might use it as a memorandum, to show the jury how the land might be located, from the calls of the warrant itself.

On the part of the defendant, it was objected, that the plaintiff had no title to the estates of his father, having been confiscated. They argued as formerly, that Harry and Henry are the same name, and as an additional authority to those cited in the former case, relied upon 2 Sta. Trials 310, where Henry Martin, being excepted out of the act of oblivion, urged that his name was *Harry* Marten, but not allowed. That if no misnomer, then his attainder was valid, and could not be, and was not, set aside by the Act of the 31st January 1780, as against the purchaser under the attainder. 2d. It was argued, that the defendant was prevented by the Indian war, which continued till the treaty of Paris, in November 1762, and indeed afterwards, till 1764, when peace was concluded with the Senecas and some other tribes. That the refusal of the surveyor, in 1765, to execute this warrant, completed Rankin's title, as much as if he had obtained a survey; and at any rate, Gordon was bound by the notice to the agent of Mr. Peters.

These points were all disputed by the plaintiff's counsel, who relied; that the equity set up by the defendants' counsel, was destroyed by the long forbearance on the part of Rankin, to get his tract surveyed.

WASHINGTON, *J.* charged the jury. In the case of Gordon *vs.* Holliday, I entertained some doubts, whether Harry and Henry were the same name; my mind rather inclined to the opinion that they were. I thought myself however authorized, in laying hold of a legislative declaration, that they were not the same names, and that a misnomer had taken place, sufficient to invalidate the attainder.

This opinion, in the present cause, has been combated by an argument not thought of, or used in the former, which is, that if there was in fact no misnomer, the attainder was complete, and the sale of Gordon's estate under it so entirely valid, that the Legislature could not, in 1763, defeat it directly, or by the declaration of an opinion, which was solely of a judicial nature. This objection, I suppose, is founded upon the Constitution of the State, though it was not read, nor referred to. But be this as it may, even that Constitution must yield to the treaty of peace, which is supreme. The fifth article stipulates, that Congress should earnestly recommend to the States, a revision of their confiscation laws, so as to render them consistent with justice and equity, &c. and should also recommend to them the restitution of confiscated estates. This was not considered as an idle provision, but was intended to be effectual; provided the different States, or any of them, felt disposed to comply with the recommendation. If the States thought proper to restore, their power to do it grew out of this treaty; and so far neutralized any article of their Constitution, which prohibited, in other cases, the exercise of such a right. The State would no doubt feel itself compelled to make compensation to the purchasers, but their power to restore could not, I think, be questioned. If they could restore absolutely, they could do

any other act short of that, and tending to better the situation of those whose estates had been confiscated; and of course, to declare that in this case a misnomer had taken place. I think that this law amounts to the granting a new trial, and the setting aside a former attainder.

As to the rights of the parties in this cause, this will depend upon the facts, which have been already stated. Upon them, the lessor of the plaintiff, appears with a regular and unexceptionable legal title to the land in question. It will not do, after this, for the defendant to rely upon his possession; but he must show a better title, either legal or equitable. When I say equitable, I speak in reference to the laws and usages of this State. If he rely upon an equitable title, it must be such as a Court of Equity would sustain. What is it? A special warrant, dated in 1755, kept in his pocket till 1765; and then an ineffectual attempt made to survey it; which failing, we hear nothing further of it, or of Rankin's pretensions, until the order given to Harris to survey it. The rule in this State, as it seemed agreed at the bar, is, that if a man, having a warrant, do not use due diligence to survey it, so as to afford notice to others, he loses his priority. We feel well disposed to adopt this rule, because it is highly reasonable. I presume, however, that if, during the suspension, a third person, with notice of the warrant and its location, should survey the land, he would lose the benefit of his vigilance, in consequence of that notice; and for this reason it was, I suppose, that the notice of Morris in 1761, was so much relied upon by the defendants' counsel. But there is nothing in that, even if the notice had been more precise, because notice to Mr. Peters, would not affect Gordon, who purchased without notice, (2 Fond. 152.) The delay of Rankin is attempted to be excused, on account of the Indian war. You have heard what was the degree of danger, in surveying in this part of the country, after 1758; and you can determine on the validity of the excuse. But, after the survey for Mr. Peters in 1762, what prevented Rankin from contesting his right to the

land? This survey was returned in 1762. The agent of Rankin had express notice of it in 1765; yet no caveat was entered; no objections made; no complaint to the proper tribunal, of the supposed misconduct of the deputy surveyor, in not executing the warrant in 1765. The whole subject rests in profound quiet, and concealed from the light, until the year 1774, when an innocent man, not suspecting this or any other sleeping title to the land, pays £900, and obtains a grant. What kind of figure would this defendant make in a Court of Equity, with his dormant title, against a fair *bona fide* purchaser, without notice, and shielded by a legal title? If, then, I have stated the evidence in the cause truly, there can be no doubt that the title of the defendant, cannot prevail against that of the lessor of the plaintiff.

Verdict for plaintiff.

MAZE *vs.* MILLER.

A receipt for so much money, is only evidence of a payment, which may be explained by parol, or other proof.

If the payment acknowledged in the receipt, turn out to be a note, bill, or the like; and, if the same were not paid or received in satisfaction, and turn out unproductive, it is no payment.

In order to make such bill or note a payment, it is necessary that it be received in satisfaction, and the receiver to run all risks; or, where the receiver has made it his own, by neglecting to give notice.

A RULE was obtained to set aside an execution issued against the defendant, upon the ground, that the judgment was satisfied by a note of hand, given by the defendant, with an endorser, and a receipt by the plaintiff's attorney in fact, endorsed on the power of attorney, and given up to defendant, as follows: "Received from J. Miller, the sum of 1177 dollars, being in full, including costs and expenses of property he sold in Alexandria, belonging to J. Maze."

The note, when it became due, having been protested, and the defendant having become insolvent, the plaintiff sued out execution of the judgment, to set aside which this motion was made. The affidavit of the plaintiff's attorney, proves that he did not receive the note as a satisfaction of the debt or judgment, and that it was not paid as such; or so intended by defendant, as he believes; and that no agreement was made, tending to show such an intention. The defendant's attorney stated, that when the negotiation was made, respecting the note, he never thought upon the subject, whether the payment was to operate as a satisfaction, or merely as a collateral security.

WASHINGTON, J., delivered the opinion of the Court. After stating the above facts, the rules of law applicable to this

case are, that the receipt of so much is only evidence of a payment and satisfaction, and may be explained by parol, or other evidence. This was gone into, and we find that the note was neither paid nor received as satisfaction; but, to constitute a good plea of accord and satisfaction, both should be averred.

(*a*) The plaintiff, then, received a note, which proved unproductive; and it is clear, that it was no satisfaction of this debt, or a discharge of the judgment, unless it were received as such, and the party agreed to run all risks; or, by his after conduct, made it his own.

Rule discharged.

(*a*) Carth. 238, *note.* A receipt in full, with full notice, is a discharge. Espin. Rep. 174, cited by the counsel, in favour of this motion.

Lessee of James *vs.* Stookey and Others.

Ejectment.—The declarations of a person exercising authority, that he possesses it, can never be received as evidence of the fact of his authority.

If a record be produced to prove a fact, and is found to be deficient or imperfect, it cannot be assisted by evidence *de hors* the same; but the perfect record must be produced.

Surveys of lands in Pennsylvania, made by order of the Commissioners of Property, have been supported in Pennsylvania.

A diagram made of the tract of land in dispute, and of the adjoining land, offered to show the boundaries of the land, cannot be given in evidence, because it was not made under the order of the Court.

The Court refused to admit in evidence, a verdict and judgment, given in the Supreme Court of the State, in a case where the person who had lands called for by the warrant; because it was between different persons, and upon a different question.

THIS was an ejectment for a tract of land in Berks county. The plaintiff claimed under a warrant to Richard Hockley, and others, dated in 1762, which recited, that a former warrant had issued to the same persons for this land, and had been surveyed, but not returned. He then offered in evidence a survey of this land, or rather a re-survey made by one Jacobs, who was not an authorized or commissioned surveyor; in virtue of a letter to him from the Surveyor General, in which he stated; that, at the request of Mr. Peters, who had an interest in the land, the governor had instructed him to direct the said Jacobs to make the survey. This being objected to as an unauthorized survey, since the Surveyor General had no right to appoint a deputy, without the approbation of the governor or proprietary, as appeared by his commission; the plaintiff offered in evidence, a decision of the Board of Property, in a caveat filed by the assignee of Clark *vs.* Dougherty, stat-

ing the survey returned; that it should be received and confirmed, and directing a patent to issue.

The plaintiffs, in this case, claimed under Hockley and others, by mesne conveyances. They also insisted, that, on the former trial of this cause, in May last, when a juror was withdrawn, that this survey was read, and not objected to. They contended, that the declaration of the Surveyor General, that the direction was given by order of the governor, was sufficient evidence of his approbation; and, that the order of the Board of Property, accepting and confirming the survey, cured any defect in the appointment. The motion was for a nonsuit.

WASHINGTON, J. This direction of the Surveyor General, is not given to an officer duly appointed and commissioned; and, it is clear, that, according to the authority given by the proprietary to the Surveyor General, he had no authority of himself, to make such a deputation as this, without the approbation of the governor; and such seems to have been the common understanding and practice, so far as I can collect; for, strange as it may seem, no judicial opinion on the point has been given, or it would have been referred to. But circumstances, to show the approbation of the governor, may be resorted to; and, on this ground, the plaintiff relies upon the statement of this fact, in the letter of the Surveyor General, and the order of the Board of Property. As to the first, the regulation of the proprietary, that no deputy should be appointed without his approbation, would be quite nugatory; if the bare declaration of this officer, that this approbation had been obtained, would give validity to his appointment. This, then, *per se*, will not do.

As to the judgment on the caveat; this might be very important, if it appeared to us judicially, that that judgment referred to this survey. An attempt was made to establish this fact, by an agreement between Anderson, who styles himself agent for Dougherty & Smith, and James; stating the exist-

WASHINGTON, J. It is a great inaccuracy, to say, that the legal title was in Drumgold. The warrant merely gave him an equitable title, and not that, unless he paid the money; and the questions are, whether the warrant was applied for by him, or by Peters & Clark; and whether this is not a proper case to leave to the jury, to presume that the warrant was really taken out by those who paid the money, and who merely used the name of Drumgold as a nominal person, a practice common in this State, where one man takes out many warrants? The warrant, issued in 1763, is paid for in 1765, by Peters & Clark, who had it executed and returned; and it is received for their use. The defendant does not pretend to claim under Drumgold, or to show a subsisting right in any person under him; and the plaintiff appears in Court, with the original warrant as one of his title papers. The jury may certainly presume, that the name of Drumgold was merely used by Peters and Clark, the real grantees.

Motion overruled.

The defendant read an agreement, between George Crogham on the one part, and William Peters, J. Wander and A. James, assignees of Clark, in which is recited a deed formerly made by Crogham to Peters and Clark, of a number of tracts of land, to secure a debt from Crogham, which was then proved; and stipulating for a re-conveyance, on certain terms, of particular parts of the land, to be ascertained and determined by arbitrators. A copy of the award, from the records of one of the Courts, attested by the proper officer, was now offered; and objected to, because not a paper directed by law to be recorded. The law of 1715, authorizes the recording of all deeds and conveyances, of, and concerning lands, or whereby they may be in any manner affected, to be acknowledged by the grantors, or proved by two witnesses; or if they be dead, or cannot be had, their handwriting may be proved, or if not, then that of the grantors. In this case, the signatures of the arbitrators were proved, and

of one of the witnesses; but it does not appear that the witness could not be had.

The objections were: 1st. That this was not a deed; 2d. If it were, the other witness should have proved it, or it should appear that he could not be had.—Answer. That the defendants do not claim under this award, but it was a paper put on record by Peters & Clark. That this is a paper connected with the agreement to which it refers, and it does affect land.

By the Court. The law clearly relates to deeds, and this is not a deed; of course an attested copy given by an officer, who is not directed by law to record it, is not evidence. If the original were lost, or in possession of the adverse party, the contents might be proved by a witness; but the attestation of the clerk is not evidence.

The defendant offered a paper in evidence, signed by Richard Peters, as attorney for William Peters.

By the Court. You must produce the power of attorney, under which the agent acted.

The defendant then offered a deed, dated in 1774, from the commissioners for selling lands, on which the taxes had not been paid, to the person under whom the defendant claimed; he being the highest bidder. Objected to, because it did not appear that assessors had been appointed; and in cases of this kind, the greatest strictness is required, in proving that every requisite of the law was complied with. The law required the assessment to be made by the county and district assessors; and it should be shewn that the latter were regularly appointed; and a number of strong cases were read, decided in the Supreme Court, in support of this doctrine, as applied to sales for non-payment of taxes, and other similar cases.

By the Court. This point may be reserved till we have gone through the opening; because the rule laid down, that every delegated authority, particularly to deprive men of their property, contrary to the rules of the Common Law, should appear to be strictly pursued; yet it may be an important

question, whether a defendant, who has for a great number of years been in quiet possession, under such sales, may not call in the aid of presumptions, which would not be allowed to a person out of possession.

The defendant then offered a deed, dated in 1787, signed by the commissioners, for another part of the land in question, which concludes thus, "as witness our hands, and to which we have caused our common seal to be affixed." There are three seals in the upper margin of the deed. The grantors acknowledged the deed, in Court, to be their act and deed. This was objected to, because it was sealed with a common seal; whereas the law directs a deed to be given by the commissioners, under their hands and seals. Instead of affixing their individual seals, they put a common seal, as if they were a corporate body.

Another objection to the deed was, that the laws, preceding the first sale, did not authorize the commissioners to *convey*, though it authorized them to sell. The words are nearly as follows, "that if the taxes are not paid within a certain time, the commissioners shall *sell* so much, as may be necessary to raise the sum due, and upon all sales *made by the sheriff or coroner as aforesaid*, the said sheriff, &c. shall convey." So that whether the sheriff is to convey, or the commissioners, it is *casus omissus*. The deed was directed to be read without prejudice.

The principal questions in the cause were, 1st, whether in fact the land sold, and in the possession of the defendants, is the land mentioned in the warrant granted to F. Drumgold, and surveyed for him; or whether it is not the land granted to James Maze, in whose name it was sold? If the former, then the plaintiff produced the receipts for the taxes, due at the time of the first sale. 2d. Objection, that the assessors were nominated by the commissioners, instead of being elected by the freeholders, as the law of 1758 directed; and that the conveyance was made by the commissioners, without authority. These objections went to the first sale and conveyance in 1774.

3d. As to the sale and conveyance in 1787, it was admitted, that, by the law of 1702, the commissioners are to convey, but they are to do so under their hands and seals; and this conveyance is made under their common seal. Many decisions by the Supreme Court of this State, were referred to, in which it was determined, that the party claiming lands under these sales, was obliged to prove the regularity of the proceedings in every point, and even the notice of the commissioners was deemed necessary, in the case of Weester *vs.* Cameron.

WASHINGTON, J. charged the jury. Perplexed as this case has been rendered, by the mode in which it has been conducted, it now appears to turn within a very narrow compass, and to depend upon the ascertainment of a single fact, which will be left to you; that is, whether the land now in possession of the defendants, and which they claim under deeds from the commissioners of taxes, is the land surveyed in the name of Francis Drumgold or not. If it be not, then the plaintiff cannot succeed in this action; because the foundation of his title is a warrant, taken out in the name of Francis Drumgold, in 1763. The consideration money was paid by Peters & Clark, in 1765, for a survey of 516¼ acres in the same year, and returned and accepted into the office, in 1770, for the use of the assignees of Daniel Clark, under whom the lessor of the plaintiff deduces his title. Now, this being the title, if the defendants are not in possession of this land, the plaintiff must fail, whether the defendants have title or not. On the other hand, if this be the land surveyed for Francis Drumgold, then the plaintiff is clearly entitled to recover, because the only title of the defendants is derived from a conveyance from the commissioners; who acknowledged in the deed itself, that the land so conveyed had been sold, as the land of J. Maze, for non-payment of taxes. I therefore put out of the question all the other objections made to the legality of the sale, since it is clear, from the deed itself, that it was advertised, and in

every respect treated as J. Maze's land; and therefore the notice required by law to be given, was in this case worse than omitted, since it misdescribed the land.

To prove that this is the land granted in the name of Francis Drumgold, the plaintiff relies upon the survey itself, which corresponds expressly in courses, distances, calls of adjoining lands, and quantity, to a quarter of an acre. Besides this, he has the evidence of Mr. Taylor, a witness, whose credit has not been impeached, who swears positively to the fact.

Against this is opposed, a draught or diagram, of a number of tracts of land, made in consequence of a warrant of resurvey, ordered by the Board of Property in 1788, at the request of Doctor Smith, who was tenant in common with Peters & Clark, in a great number of warrants, issued to them in 1763, in different names; of which that to Francis Drumgold was one. To this warrant of resurvey, is annexed a list of those warrants, amongst which, are two to James Maze, one to Francis Drumgold adjoining Maze; and the one in question, adjoins this other tract. The surveyor was directed to lay down these tracts, to show their interferences, and what parts had been sold for taxes. Upon the diagram thus returned, the land in question is marked for James Maze's land, and two tracts adjoining it are marked for Francis Drumgold.

Upon this piece of evidence, the following considerations occur to me, which I deem it my duty to submit to the jury. 1st. This resurvey was made twenty-three years after the original survey was made; and as the surveyor does not inform us by what evidence he was guided in locating these several tracts of land, its accuracy may well be doubted.

2d. It does not appear, that a survey for James Maze, or of Francis Drumgold's other tract, ever was made; for they are not mentioned in the original list of surveys returned in 1770, and accepted for the use of the assignees of Clark; and it is therefore probable, that these were lost warrants. 3d. The tract laid down on this paper, as James Maze's, corresponds

with the survey originally made for Francis Drumgold, in courses, distances, calls of adjoining tracts, and in quantity, to a quarter of an acre; whereas that laid down for Francis Drumgold, has no resemblance to the original survey in any of these particulars, and is more than 100 acres short in quantity. 4th. G. Woods, who received in 1774 and 1776, the taxes due on Francis Drumgold's land, is admitted by both sides to have been well acquainted with these lands; and in that receipt, he calls it Francis Drumgold's land, and distinguishes it by the precise quantity, to wit: of 516¼ acres. The jury then must decide this fact, whether the land sold was for Francis Drumgold or not: if they are satisfied that it was, their verdict must be for the plaintiff; if otherwise, then for the defendant.

Verdict for plaintiff.

CAMFRANQUE *vs.* BURNELL.

The laws which, in any manner, affect a contract, whether in its construction, in the mode of discharging it, or which control the obligation which the contract imposes, are essentially incorporated in the contract.

A contract is governed by the law of the country where it is made, and may be enforced, in foreign countries, according to their own form of proceeding; but, in such a manner, as to give effect to the contract, according to the law which gave it validity.

A law of a foreign country, which protects the party to a contract from execution, will, in the Courts of the United States, protect the same individual from arrest upon the same contract.

DUPONCEAU obtained a rule on the plaintiff to show his cause of action, and why the defendant should not be permitted to appear on common bail.

Moylan, for the plaintiff, produced a promise in writing from the defendant, to pay the money sued for; and a judgment obtained upon this writing, before the regular tribunal in St. Domingo, where both plaintiff and defendant then lived. It was admitted, that they are both French subjects.

In answer to this, Duponceau produced, and relied upon an *arreté* of the French government, passed in 1801, which suspends all process and proceedings, to enforce the payment of debts contracted before 1792, for slaves purchased by the people of this island, until a period which has not yet arrived; but it permits suits to be brought for the liquidation of such debts, where necessary; but execution is not to issue before the stipulated period. The debt in question came precisely within this *arreté*.

It was contended, for the defendant, that this Court ought to regard the law of the country of which the parties are subjects; and, of course, that upon two grounds, special bail should not

be required. First; because the instrument, which is the evidence of the debt, is not a bill of exchange; nor does the contract appear to be between merchant and merchant, but a merchant and a planter; and, therefore, under the ordinance of Louis XIV., the debt does not bind the person; and, of course, bail is not demandable. 1 Bosanq. & Pull. 138. 3 Ves., jun. 447. 4 Ves., jun. 877. Clement *vs.* Boyer, in the Supreme Court of this State, 1 Blac. Rep. 258. 1 H. Black. 665. 4 T. Rep. 184.

Second; that the *arreté*, suspends all proceedings in any shape, and of course special bail should not be demanded. To this it was answered, that the debt became due, and judgment was obtained long before the *arreté* was passed; and, therefore, ought not to be affected by this law: that the law only intended to prevent executions issuing; and, therefore, if this Court thinks itself bound by that law, still the defendant can only complain when execution issues against him.

But this regulation forms no part of the essence of the contract, and the *lex loci contractus* is never regarded by foreign tribunals, as to the remedy used for enforcing a contract made abroad. The act of limitations barring a debt in one country, will not be regarded by a foreign Court. 4 Ld. Kaimes, 567. Vern. 540. 3 Dall. 373. If then foreign acts of limitation are not to be regarded, acts which merely suspend payment, ought not. As to the first point, it was argued, that, from the nature of this contract, it would appear to be between merchant and merchant.

By the Court. We think that the defendant should be allowed to appear on common bail, for the following reasons: That those laws, which, in any manner, affect a contract, whether in its construction, in the mode of discharging it, or which control the obligation which the contract imposes, are essentially incorporated with the contract itself. The contract is a law which the parties impose upon themselves; subject, however, to the paramount law—the law of the country where

it is made. Contracts thus made, and thus regulated, may be enforced by foreign tribunals, according to their own modes of proceeding, and such tribunals aim only to give effect to the contracts according to the laws which gave them validity. We think that the *arreté* which has been read, had once a binding force upon the contract, and upon the parties to it, from which they ought not to be discharged by a foreign tribunal, professing only to give effect to a contract so regulated: that this *arreté* protected the defendant against any further process upon the judgment, by means of execution, as much so, as if the plaintiff had bound himself upon record, to stay the execution, to a period not yet arrived; and, therefore, it protects him from *arrest*, which may, in its consequences, subject him to inconveniences, as great as if he were exposed to the full operation of an execution.

Rule made absolute.

CIRCUIT COURT OF THE UNITED STATES.

PENNSYLVANIA, APRIL TERM, 1806.

BEFORE { Hon. BUSHROD WASHINGTON, Associate Justice of the Supreme Court.
Hon. RICHARD PETERS, District Judge.

HYLTON'S LESSEE *vs.* BROWN.

The Court, upon the authority of an adjudged case, not cited in a former trial, admitted that the defendant had a right to insist upon the production of a paper, which went to deface the plaintiff's title, without fortifying his own; contrary to a decision in the former trial of this case.

Although a paper has been produced by one party on notice from the other, it does not become evidence, unless from its legal character it is entitled to be such.

An original will of lands, not proved according to law, cannot be read in evidence; although produced on the notice of the opposite party, as the will of the person named in it.

A party who claims lands against an attainder, the correctness of which he denies, could not, upon the principles of the Common Law, controvert the title of the purchaser under the attainder, in a collateral action; but would be compelled to reverse the attainder, and thus obtain a judgment of restitution.

The principles and provisions of the laws of Pennsylvania, in relation to attainders, examined.

The operation of a treaty, before ratification by the governing powers of the State, by whose agents it has been signed.

THIS cause, which was tried at the adjourned Court, in January, (*a*) and in which a *venire de novo* was awarded, came on now to be tried again. The evidence was the same as at the former trial.

(*a*) *Ante*, page 298.

The defendant, having stated and shown his possession and title, called for the production of the will of Joseph Griswold, after proving a notice to the plaintiff to produce it, and also that it was in his possession. In addition to the cases formerly cited and relied on, Metcalf *vs.* Hervey, 1 Ves. 248, was now read; in which Lord Hardwick determined, that a defendant in possession, whether rightfully or tortiously, and being sued in ejectment, might call upon the plaintiff in equity, to set out his title, that it might be seen whether the title was not in some other person than himself.

The plaintiff's counsel endeavoured to explain this case, by saying, that this only meant, that the defendant at law, might seek this discovery, to enable him, at the trial, to be prepared, and to show, if he could, that the title was out of the plaintiff. That, at any rate, the case did not authorize the defendant in this case, to compel the plaintiff to do more than he had already done, *i. e.* to set forth his title; but this was a different thing from compelling the plaintiff to exhibit evidence to defeat his title, without strengthening that of the defendant. They cited, in addition to the cases formerly read, the following. Hinde's Practice 36. Milford 52. 138. 100. 162. 215. 98. 160. 161. 2 Ves. 445. 2 Fonbq. 484. 487. 482. 3 Ves. Jun. 222. 243. 1 Woodeson, 207. 2 Ves. 189. 2 Atk. 393. 392. The defendant cited Mitf. 160. 161. Parker, 144. 1 Ves. 56.

Judge Peters thought, that upon reason and principle, the decision given on this point, at the former trial, was right; but he yielded to the express authority now read, of Metcalf and Hervey.

Washington, J. The doctrine laid down in 2 Fonbq. 484, in the note, coincides entirely with my opinion on this point; but the case of Metcalf & Hervey, is an authority binding upon us, and is too strong to be got over. The explanations, which have been attempted to be made of this case, are ingenious, but not satisfactory. That was to every purpose a

bill of discovery, and was entertained as such by the judge; it was brought by a person not claiming title; and it called upon the defendant for a discovery, which could not be necessary to protect the possession of the defendant; but merely to defeat the claim of the plaintiff at law. If the heir of Mrs. Harmer should be found to be really entitled, the effect of the bill was merely to show, that the title was out of the plaintiff, and furnished the defendant with a defence against the plaintiff at law; but without affording validity to his title. What is the present case? The defendant calls upon the plaintiff to exhibit a paper in his possession, pertinent to the issue, in order to prove the title out of the plaintiff. There is no distinguishing the cases. But it is said, that the case only warrants the demand of what the plaintiff has already done; and that the bill was entertained in that case, to enable the defendant, to prepare himself for trial. But Lord Hardwick would never mean to sanction so absurd a doctrine, as that the defendant, in every case, (for he lays it down as broad as possible,) might, previous to the trial of an ejectment, call upon the plaintiff in equity, to set out his title. If so, a bill of discovery, would be the necessary and constant companion of an ejectment; and why should the defendant have this advantage more than the plaintiff? But he clearly explains his meaning, by stating the purpose for which the discovery is compelled; *i. e.* that it may be seen whether the title is out of the plaintiff; not by any proof, which the defendant might be able to produce, but by the title set out by the plaintiff at law. None of the cases cited by the plaintiff, are so strong as that from Vesey; and I therefore feel myself compelled, by its authority, to yield my former opinion.

The plaintiff then produced a *copy* of Joseph Griswold's will, but insisted, that before the defendant could read, or have the advantage of it, he ought to make an affidavit, that he had not the original or a copy.

By the Court. This is not necessary.

The defendant then objected, that the plaintiff must produce the original will. To this it was answered, that the notice is, to produce the will *or a copy*, and being in the alternative, he is at liberty to produce either; and as the copy now produced, was determined at the last trial not to be evidence, the original not having been proved in conformity with the laws of this State, it was objected, that, though produced, it could not now be read. In reply to this, it was insisted, and Peake's Evidence was cited, that the will coming from the hands of the plaintiff himself, it must be considered as the will of Joseph Griswold, without further evidence of its execution.

Washington J. The difference is between a paper, the proof of which may be supplied by the acknowledgment of the party, who produces it, so as to make it available; and one which is inoperative, unless certain forms or proofs are pursued, or given, to establish it, and make it effectual.

Thus a deed or letter may be established, by the acknowledgment of the grantor, or the person producing the letter. But all that can be inferred from the production of this copy, is, that it is a copy of the will of Joseph Griswold. What follows? This will not establish it, so as to pass land in this State, for to give it this effect, the will must be proved by two witnesses. Even if the plaintiff were to produce the original will, still it would not avail the defendant, unless the execution of it were proved, in conformity with the laws of this State; and as the defendant does not pretend that he can do this, it is unimportant whether the original, or a copy, is produced.

Judge Peters was of opinion, that the will could not be used, without proving it as the law of this State directs.

The cause was argued upon its merits, much as formerly. On the subject of what constitutes *inhabitancy*, the following additional cases were cited by Plaintiff. Burr. Settl. Cases. 569. 529. 535. 536. 243. 129. 586. 825. 2 Idem, 290, 291. 420. 1 Dall. 152. 158. 240. 348. 2 Rob. Rep. 322. On the other side, 4

Enc. Abr. 753. 2 Strange 924. 2 Inst. 702, 703. Carter's Rep. 118. 3 Burns' Justice, 12.

As to the period when the treaty took effect, the defendant's counsel cited in addition. Vatt. B. 2. c. 12. s. 156, 157. 1 vol. Abbe Mably, 113 to 217.

The charge was much the same as was delivered at the last trial, except that as to the construction of the Act of March 1779, and the validity of the Act of the 31st of January 1783, the following opinion was delivered by

WASHINGTON, J. The question is, what is the operation of the Act of March 1779, on the rights of these parties? It is contended by the defendant; that the lessor of the plaintiff, claiming under Joseph Griswold the father, who was attainted, and his land seized, and sold, he is barred of all remedy against the purchaser, but must look to the State for indemnification. But this argument is built upon a begging of the question. The defendant asserts, that the father was the person attainted, which the lessor of the plaintiff denies. If, in fact, he was the person attainted, and the only question was, is the attainder erroneous; then upon general principles, independent of the 6th section of this Law, he, or those claiming under him, could not controvert the title of the purchaser in a collateral action; but would be compelled, first, to reverse the attainder, and then to obtain a judgment of restitution. This would have been the case, but for this section; which, upon reversal, prevents the judgment of restitution, as against a *bona fide* purchaser, and substitutes the State as bound to make reparation. In cases of attainder, under the law of 1778, there were three modes of proceeding to obtain redress, where an injury had been done to the person attainted, or to third persons, pointed out by law. First. Third persons claiming by deeds under or paramount; the attainted person might, within a limited time, interpose their claims to the land, or to satisfaction thereout of debts charged on it, which were to be decided in a particular way.

This remedy did not extend to the traitor himself. Secondly. The attainted person himself, his heirs, executors, and administrators, or those who were prejudiced by the attainder, might, if it were erroneous, reverse it upon the principles of common law; and having succeeded, he would be entitled, not to a judgment of restitution against a *bona fide* purchaser, but to indemnity against the State. Or, thirdly, any person, other than the attainted traitor, or those claiming under him, might bring an ejectment to recover land, to which he has a title, which had been sold in consequence of an attainder.

Now, in this case, the plaintiff does not complain, that there is any error in the attainder; but on the contrary, it is admitted, or at least nothing appears to the contrary, that Joseph Griswold, distiller, at the time of the proclamation, or theretofore, an inhabitant of the State of Pennsylvania, was correctly called upon and attainted; but he contends, that Joseph Griswold, whose land was sold, was not called upon, and therefore was not, and could not be attainted. If so, this Joseph Griswold could not have reversed the attainder, however erroneous it might be, because he was neither party, privy, nor was he prejudiced by it; and of course he could not make himself party to the record. If *Thomas* Griswold had been called upon and attainted, *Joseph* Griswold could not have brought a writ of error. The error complained of, is not in the attainder, but in the subsequent seizure and sale of Joseph Griswold's land, in consequence of the attainder. But, if on a judgment against A, the property of B is taken in execution, the execution is void as to B, and he may recover back his property, or sue the officer and party; but he could not sue out a writ of error to reverse the judgment to which he was neither party nor privy, nor which (*judgment*) had prejudiced him at all. The true distinction is this;—if a person be attainted under process, which is *incomplete in describing him*, as, if the proper additions be omitted; this is an error of which he may avail himself by writ of error; because, having been truly named, he is a party to

the record, and may maintain the writ. But, if the description be *variant ad dum*, as if he be called by a wrong name, or title, or if he be named as being of a place, which is not true; then the description does not apply to him. He never was party to the record; if so, he never was attainted; and therefore he cannot reverse the attainder; but then he is not bound by it, and may consequently sue for his property, which has been seized or sold, in execution of the attainder, as if no such attainder had taken place. How was it in Burlington's case? Did he attempt to reverse the attainder? By no means. He could not have done it, since he was not attainted. But when called upon to shew why execution should not issue, he pleaded that he was not the person attainted, and this was the opinion of the Court, upon the ground, that he was described to be of East Bradford, instead of West Bradford township, and this, though there was another person known, who answered the description. In Lord Fitzlego's case, and in Gordon's, they did not attempt to reverse the attainder, but filed their claims upon the ground of a *false description*. If then Joseph Griswold has been falsely described, he is expressly within the 6th section of the law, and the plaintiff is not barred of his action.

The next question is, was the law of the 31st January, 1782, passed posterior to the treaty, or not? If it was, then Mr. Ingersoll has admitted it to be void, as being in contravention of the treaty.

This question, I consider in two points of view. First; at what time does a treaty take effect, if no period is fixed in the body of it, or by the agreement of the ministers? Second; at what period did the treaty of peace between Great Britain and the United States take effect, from the terms of the provisional articles? Vattel, b. 2. c. 12. §. 156, 157, says: "That every treaty made by the proper, within the terms of his commission and his powers, is binding on his constituents. At present, to avoid all danger, princes reserve to themselves the power of ratifying what has been concluded by their ministers. The

commission of the plenipotentiary is but a precaution *cum libera*. As princes cannot be compelled, but by force, to fulfil their engagements, it is customary to place no dependence on their treaties, till they have agreed to ratify them. Thus, as every agreement of the minister remains invalid, till sanctioned by ratification, there is less danger in giving unlimited powers. But, before a prince can honourably refuse to ratify a compact, made in virtue of such plenipotentiary commission, he should be able to allege strong and substantial reasons; and, in particular, to prove that his minister has deviated from his instructions."

In this extract, I understand Vattel merely to state, that a government is bound to fulfil an agreement of its ministers, if made within the scope of their authority; but, if it refuses to ratify, it is not bound by the agreement; because, according to modern customs, the power of ratifying is reserved by the government, to avoid the inconvenience and danger, which might result from the minister exceeding his authority; and, if so, then the same author declares, that the sovereign is bound by the agreement, and, unless its operation is postponed by the terms of the agreement, to a particular day, it takes effect from the signature. The Abbe Mably does not contradict this, but merely contests the position of Grotius, that the treaty binds from the signature, whether it is ratified or not. Rutherforth is still more express. He says, 2 vol. 581, "that what a government does by their deputies, is their own act; and, consequently, in respect of *the nation*, it produces the same effect as if they had done it themselves. In public compacts, which sovereigns make by their deputies, the law of nature is the same as in promises which individuals make by proxy; what they do under the authority of their public commission, binds their principals, even though they should exceed some private instructions from their principals."

Second. When does the treaty between Great Britain and the United States take effect, from the terms of it? Answer;

from the time that terms of peace are agreed upon between Great Britain and France, and Great Britain shall be ready to conclude the same. It is argued, that all this means, from the time the agreement is not only made and signed, but is ratified also. If this was the intention, why was it not so expressed? The ministers knew the full import of the expressions they used, and would never have expressed themselves loosely, when plain, unambiguous expressions were at hand. In the treaty between Holland and Great Britain, the effect of the treaty is suspended till ratification, by express terms. Whether the treaty between England and France was so suspended, does not appear; and it is not to be inferred, from the circumstance of certain periods from the ratification being fixed upon, when hostilities are to cease in particular places. But, be this as it may, the provisional articles between Great Britain and the United States being, by the terms of it, to take effect, when terms of peace are *agreed* upon between Great Britain and France, and *Great Britain* is ready to conclude the same. Let us examine these expressions, and see what they mean. "*Agreed upon*:" that is, when the ministers have come to an understanding, as to the terms of the treaty, and have reduced them to writing. "*Concluded*:" that is, when the agreement, thus understood, has received its last form, by being signed and duly executed by the minister. It is this which concludes all agreements, whether made by nations or by individuals. That this is the meaning of the word *concluded*, is plain from the above quotation from *Vattel*, and from other expressions used by him in b. 3. c. 18. p. 238, speaking of truces, where he uses the words as importing a signature, either by the sovereign, or by his general. But it goes on, and says: "And Great Britain shall be *ready* to conclude the same." Now, when the treaty was signed by her ministers, she had shown her readiness to conclude it. That *ratification* was not considered as a necessary condition, is plain from the sentence to conclude, being applied only to Great

Britain; and this further proves, that Great Britain and the United States would have been at peace, and yet Great Britain and France be at war. For, if Great Britain had concluded the treaty, and even ratified it; yet, though France had refused, still the treaty would have been in force between Great Britain and the United States. If ratification had been meant, it would have provided for the exchange of ratifications, as, in most other treaties is common. The fact is, and we all know it as a matter of political history, that the United States were anxious to hasten, and France as much so to prevent, the conclusion of the negotiations; and the ministers of the United States, did not think it prudent or necessary, to delay the completion of the treaty, after the terms of peace were agreed upon between Great Britain and France, and was finally concluded by the signature of their ministers.

Mr. Jefferson's letter to Mr. Hammond has been read, but so much in detached parts, that it is impossible to say which side may place most reliance on this authority; and it is impossible so do justice to his argument, without going through the whole of it. As a proof of this, look at what is said in the text, page 39, in which he speaks of the treaty being signed by the ministers of Great Britain and France, of which notice had been given to Congress; and then adds: "the event having *now happened*, on which the provisional articles were to come into operation," &c. *Now happened*, must relate to the signature, or to the notice. It cannot relate to the latter; because, in the notes, he cites authorities to prove, that the *nation* is bound so soon as the treaty is concluded. The *people*, from the time it is made public. He then must refer to the signature; and, if so, it is a complete authority for the opinion we hold. Yet, immediately after, he speaks of this very law of the 31st of June, 1783, as being out of view upon the subject of infractions of the treaty. If the United States were bound by the signature, so were the State governments, who stood in a very different situation from individual citizens; the former of whom

could not be punished for contravening the treaty, as individuals might. Upon the whole, we are constrained to say, that the treaty between Great Britain and the United States, was in force from the 20th January, 1783; and, consequently, upon the admission of counsel, of what could not be questioned, the Act of 31st January, 1783, is out of the question.

The jury found for plaintiff. Exceptions were taken, but no writ of error was prosecuted.

Lewis, Tilghman, and Dallas, for plaintiff.
Ingersoll, Rawle, and M'Kean, for defendant.

Lessee of Margaret Delancey *vs.* M'Keen.

If an equitable estate has been forfeited under the attainder laws, the legal estate will not be allowed to be set up, to bar a fair purchaser of the equitable interest.

Mere possession of land, or offering to sell it, or even partial sales actually made, are not, alone, sufficient to authorise a presumption of ownership; for these may be the acts of a tortious possessor, or of an agent.

The payment of part of the purchase money of land, the property of a *feme covert*, in her presence, cannot prejudice her right to claim the land, after the termination of the coverture.

The title of a *feme covert* to land, cannot be affected by acts of commission, short of those required by law to bind her; much less, by acts of omission. Even, if by any acts during coverture, other than those which by the provisions of law may clearly bind her, a *feme covert* may have bound herself, they are proper for the decision of a Court of Equity, and not of Law.

In order to protect the rights of a *feme covert*, in property forfeited as belonging to her husband, on his attainder, it is not necessary that the husband should put in a claim to the same, for her; as, by the supplement to the attainder laws of Pennsylvania, passed 29th March, 1779, the rights of persons claiming paramount to the attainder, are saved.

Where a party has been absent from the country during a war, the period of the war should not be construed against him, in computing the length of time in which an ejectment can be brought.

A deed, acknowledged before a Judge of the Supreme Court, and recorded in one county, may not require to be recorded in every county in which the lands conveyed by it, were supposed to be situated.

EJECTMENT, to recover 100 acres of land, in Northampton county. The plaintiff deduced a regular title, from the proprietary to William Allen, for 1853 acres of land; and read the copy of a deed from William Allen, in 1771, to James Delancey, and the plaintiff his wife, in fee, for 1000 acres, part of the above 1853 acres; of which 1000 acres, the land in ques-

tion, are parcel. The deed from William Allen, was acknowledged in 1773, before a *Justice of the Supreme Court* of Pennsylvania, and was recorded in the *county of Philadelphia*. The deed produced, was an exemplification from the register's office of that county. The plaintiff survived her husband. The above deed contained a grant of lands lying in the county of Philadelphia, and of lots in the city of Philadelphia, as well as of the above 1000 acres.

The defendant set up a title, under a deed from the commissioners of forfeited estates, who sold the same as part of the estate of Andrew Allen, a son of William Allen, and brother of the plaintiff, who was regularly attainted; his estates were sold in September 1778, and the deed executed in 1779. It was contended, that, from certain acts of ownership, exercised over the land of Delancey and wife, by Andrew Allen, there was ground to presume, that he had purchased the 1000 acres from them; but no evidence of such a deed, or of any contract for the sale of it, was offered.

Evidence was given, that in 1775, Andrew Allen, entered into contracts for the sale of parcels of this land; that he offered the whole 1853 acres for sale, and that he received the consideration money for such parcels, as he had sold. That these payments were made, sometimes to himself, sometimes to William Allen for his use; and that at one time, Mrs. Delancey, the plaintiff, was in the room, when a sum for a part of the land was paid by the purchaser. It appeared in evidence, that James Delancey left the United States in the fall or winter of 1775; that he passed first into Canada, from whence he went to England, where he always afterwards lived, until the year 1799 or 1800, when he died. That Mrs. Delancey went to England early in 1799. That in 1788, Mr. Delancey brought an ejectment for the land in question, and a verdict and judgment was given against him.

The defendant offered in evidence, a claim put in by Wilson, (who purchased from Andrew Allen part of the 1853 acres,) in

the Supreme Court, to so much of the land of Andrew Allen, which had been confiscated, as he had purchased, which was allowed.

By the Court. This is nothing more than an attempt, in this suit, to give evidence of a judgment rendered in a case between different parties, for a different piece of land, and different title. The evidence was refused.

Mr. M'Kean and Mr. Dallas relied, that the acts of ownership, exercised by Andrew Allen, were sufficiently proved; and that upon such a case as this, the jury might presume a conveyance from Delancey and wife, to Andrew Allen, or at any rate, an agreement to sell, which would be sufficient to pass an equitable estate to Andrew Allen; upon which, as well as upon legal estates, the Act of Confiscation operated. Upon this point, they read 1 Equity Cases Ab. 305, 306. Skinn. 77. Cowp. 108. 9 Mod. 37.

They objected to the plaintiff's title; 1st. That the exemplification of the deed, from William Allen to Delancey and wife, was not evidence, since it was not acknowledged or proved before a justice of peace, in the county where the lands lie, or recorded in that county. That this point was to be determined under the Act of 1715, which establishes in each county an office of record, for recording deeds, and declares "that all deeds, for lands in this province, may be recorded in said office, the same being proved by two of the witnesses present at the execution, or acknowledged before one of the justices of the peace of the proper county, or city, where the lands lie." Though the words of the second section are general, yet it will appear, by the whole law taken together, that the deed must be recorded in the county where the lands lie. The fourth section provides for the proving deeds, made out of the province, and, says; that they, being certified in the manner mentioned in this section, and recorded in the *county where the lands lie*, shall be as valid, as if the same had been made, acknowledged, or proved, in the *proper county where the lands lie*. The fifth section

declares, that all deeds made, and proved or acknowledged, and recorded as aforesaid, shall have the same force, for giving possession and seisin, and making title, as deeds of feoffment with livery, or deeds enrolled in England, are there; and that copies or exemplifications of deeds, so enrolled and certified, under the seal of the proper officer, shall be allowed, in all Courts, as good evidence, and as valid as the originals. The 8th section declares, "that no deed or mortgage, or defeasible deed in the nature of mortgage, shall be good to pass any freehold, or interest, or for life, or years; unless the same be acknowledged, or proved and recorded, within six months after the date thereof, where such lands lie, as herein before directed for other deeds."

Secondly. It was contended, that under the 14th section of the Confiscation Act, 2d vol. of Carey & Bioren's ed. Ch. 773. p. 173, the plaintiff and her husband were bound by the attainder, confiscation, and sale of Andrew Allen's lands; as they did not interpose their claim before the justices of the Supreme Court, within the time mentioned in that law.

The plaintiff's counsel insisted, that to open the door for a presumption of a deed to Andrew Allen, some proof should first be given, that there was a deed, 1 P. Wms. 652; and that, at any rate, there was not the slightest ground of presumption in this case. That, if the jury presumed any thing, they must presume a deed from Delancey and wife, and her privy examination regularly taken under the Act of 1770. That it was not enough to presume a contract for a sale, which could only pass an equitable estate, which would not be a title to be noticed in this Court.

As to the copy of the deed from William Allen to Delancey, it was the universal understanding in this State, that all deeds made before the year 1775; (a) (when another law was passed

(a) This law directs, that all deeds executed in this State, of lands here, shall be acknowledged or proved by one or more of the subscribing witnesses, before one of the judges of the Supreme Court, or one of the ju-

on the subject,) might be proved before a justice of the Supreme Court, who is considered as a justice of peace in every county, and might be recorded in any county in the State. That as to the 8th section, it had lately been determined in the Supreme Court, that it was to be construed to extend only to mortgages, or deeds in nature thereof.

As to the necessity of a claim, the supplement passed 29th March, 1779, to the Act which has been read, saves the rights of all persons claiming, paramount to the person attainted, as was determined in this Court, in the case of Hylton and Brown, and in Gordon's cases.

WASHINGTON, J. The single question is, whether a conveyance of the land, to which Delancey and wife were entitled, under the deed from William Allen to them, was made by Delancey and wife, to him, any time, prior to the attainder of Andrew Allen? If such conveyance was made, then the title of the defendant is unquestionable; since no person will doubt the power of this State to attaint Andrew Allen, and to confiscate his property, and none have been suggested, as to the regularity of the proceedings against him, and of the sales which took place under them.

If, on the other hand, no such conveyance was made, then the confiscation is out of the question, and the plaintiff must

tices of the Common Pleas of the county where the lands lie, and recorded in the office for recording deeds in the county where the lands lie, within six months after they are executed; and, if not proved and recorded as aforesaid, they are void against any subsequent purchaser or mortgagee, for a valuable consideration—unless they be recorded as aforesaid, before the proving and recording the deed under which such subsequent purchaser or mortgagee shall claim. If made out of this State, and acknowledged; or proved, as directed by former laws; or proved by one or more of the subscribing witnesses, before any supreme judge of this State, they shall be recorded in the office in the county where the land lies, within twelve months from the execution.—*Note*, this law, as well as that of 1715, in this last case, does not mention the *acknowledgment* of the grantor. W.

receive, if his evidence is regular; because, having shown an undisputed title to the land sued for, no objection is pretended, except that the land was sold to those, under whom defendant claims, as part of the confiscated lands of Andrew Allen. But, if Andrew Allen had no title to the land, previous to his attainder, the confiscation of his property, because of his offences, could not affect an innocent person, and thus deprive Mr. and Mrs. Delancey of their land; who, claiming paramount to the attainder, were not bound to interpose a claim, in order to save their rights.

In support of the defendant's pretensions, that the land in question was conveyed, by Delancey and wife, to Andrew Allen, no deed, no contract of any kind, no receipt for any part of the consideration money, have been produced; and no witness examined, to prove that he ever saw, or heard, that any such existed.

In this situation, without having any ground to stand upon, you are called upon to presume such a conveyance; that is, a deed executed by Delancey and wife, made valid by the privy examination and consent of the plaintiff. Cases sometimes occur, where, certain things necessary to the perfection of a deed, or even a deed itself, may be presumed. Where a feoffment has been made, or a copyhold disposed of; livery of seisin, and a surrender, after long and quiet possession, may be presumed. So, too, if a man continues for a great length of time to enjoy land, and to treat it as his own, to the knowledge, and with the apparent approbation of the true owner, he knowing of his rights; I am inclined to think, that a deed or contract for a sale, might be presumed, if a proper foundation is first laid, on which to build the presumption. But, in all such cases, the acts of ownership, thus exercised, should not be of an equivocal nature, and should be with the full knowledge of the supposed grantor. The mere possession and receiving of the profits, or offers to sell, or partial sales actually made, may as

well be the acts of a *tortious* possessor, or of an agent, as of one *claiming title* under the real owner.

Consider what would be the consequences of a doctrine more relaxed than that just laid down. A man living here, and owning lands at a distance, might, after some years, find them in possession of another; and the demand of restitution would be met by this novel, extravagant, and pernicious doctrine, that the claimant had sold and conveyed his right to him in possession. No deed, contract, receipt for money, or testimony, that any, or either of those evidences of title ever existed, would be produced; but, he would rely upon a tortious possession, short of the limitation, which by law may give a right, as evidence of a conveyance. Of what consequence is it, that men should, in the transfer of real estates, require regular conveyances, executed with all due solemnities, or that they should so cautiously endeavour to preserve these muniments of title; if all may be prostrated by the destroying and pernicious doctrine, which we have heard maintained in this cause.

What, then, is the present case? Delancey and wife, being the acknowledged owners of the land in question, (provided the copy of the deed to them should be determined to be proper to be given in evidence,) lived in the province of New-York. In 1775, the equivocal acts of ownership, exercised over this land by Andrew Allen, took place. It does not appear, that they were ever communicated to, or known by Delancey, or even by his wife. In the autumn or winter of the same year, he left the United States, passed into Canada, from whence he went to England, and never again returned to this country. The war commenced before his departure, and continued until 1783; and, in 1788, as soon as it is probable he could obtain information of his affairs in this country, he brought an ejectment for the land in dispute, which failed. The acts of ownership by Andrew Allen, set up as a title for the defendant, prove nothing against the plaintiff; and, as to a long and quiet possession, what was it? I should reject the whole period of the war

in the computation of time, as applying to a case of presumption, where one of the parties was beyond sea; and, of course, there was not a quiet possession for more than five or six years. But, what has all this to do with the lessor of the plaintiff, who labored under two disabilities, coverture, and absence beyond seas, until the year 1780, or 1781, when the joint estate vested in her by survivorship? It is said, that Mrs. Delancey was present, when part of the purchase money was paid for a parcel of the land; and, on this ground, it is contended, that her silence ought to postpone her to a fair, *bona fide*, purchaser. To this, there are three answers. First; that, being a *feme covert*, she could not bind herself by acts of *commission*, short of those directed by law to bind her, much less by acts of *omission*. Second; that it does not appear, she knew on what account the money was paid: and, Third; that, if all these points were against her, the principle contended for is inapplicable to matters of title, in a Court of common law.

As to the point made, that Delancey and wife should have put in their claim, it is sufficient to answer; that, the rights of persons claiming paramount to the attainder, are saved by the supplement to the Act.

Whether the copy of William Penn's deed, ought to have been read in evidence, is a question of considerable difficulty. I am satisfied, that, under the true construction of the Act of 1715, the recording of a deed in the county in which the land lies, is not necessary *to its validity*; and, I am also clear, that the eighth section only extends to mortgages, or deeds in nature thereof. The latter words prove this; for all the first mentioned deeds are directed to be recorded where the lands lie, as herein before directed for *other deeds*; which would be nonsense, if the word deeds, in the first part of the section, meant *all deeds*. But, whether a copy of a deed, from an office where it was recorded, different from that in which the lands lie, can be offered in evidence, is another question. There is no adjudged case. The counsel concerned, are equally positive, on

both sides, as to the practice and general understanding. Three gentlemen of the bar, not concerned, say, they have always understood, that the deed must be proved, in the county in which the lands lie. Under these circumstances, I must recommend to the jury to find, subject to the opinion of the Court, upon this question.

The jury found for the plaintiff, subject to the opinion of the Court, whether the exemplification of the above deed could be read in evidence.

M'Kean and Dallas, for defendant.
Lewis and Tilghman, for plaintiff.

The United States *vs.* Richard Johns.

Indictment for casting away and destroying a vessel, of which the defendant was owner, on the high seas, with intent to prejudice the underwriters.

The defendant has a right to challenge *thirty-five* of the jurors; the number of challenges allowed at Common Law, in capital cases.

The law not making it an offence in the *owner* to destroy his *vessel*, to the prejudice of the underwriters *on the cargo*, no evidence can be given to establish a charge against the defendant, for such destruction, to the prejudice of the underwriters *on the cargo*; even if such a charge was contained in the indictment. Evidence of the value of the property insured, may be given, for the purposes of shewing inducements to destroy or to preserve it.

The prosecutor must show that the insurance was a valid insurance; and if made by an incorporated company, the act of incorporation must be shown; and it must be shown, that the contract of assurance was executed, so as to bind the company.

The president of the incorporated insurance company, by whom the property was assured, although a stockholder, may be a witness to prove the handwriting of the defendant, to the manifest of the cargo; because, the conviction of the defendant would not be evidence in a suit on a policy against the company.

A law of a State certified by the clerk of the Executive Council, and the seal of the State annexed, is good evidence of *the law*, according to the provisions of the Act of Congress, passed 26th May, 1790. As to public acts of *judicial* bodies or *others*, except the *laws* or *acts* of a State, it directs *who* is to authenticate them.

The words in the indictment, that the defendant destroyed the vessel, "with intent to gain corrupt advantage to himself," are mere surplusage, and need not be proved. It is necessary to state that "the intent was to prejudice the underwriters."

The legal meaning of the term *destroy*, as used in the Act of Congress, is to unfit the vessel for service, beyond the hopes of recovery, by ordinary means. This, as to the extent of the injury, is synonymous with "cast

away." Both mean such an act as causes the vessel to perish,—to be lost,—to be irrecoverable by ordinary means.

Quere.—Whether a corporation is a *person*, within the meaning of the Act of Congress.

THE defendant was indicted for casting away and destroying a vessel, on the high seas, of which he was owner, with intent to prejudice the Baltimore Insurance Company, who had underwritten thereon. There were four counts, the two first of which charged him, generally, with casting away and destroying his vessel, and differed from each other only in this, that he is charged with having directed, or procured it to be done. The 3d and 4th have the same difference, but they state the particular manner in which the destruction was caused, viz.: by boring three holes in her bottom. Before the jury were sworn, it became a question, how many of them, the prisoner might challenge peremptorily. The counsel for the prisoner insisted, that he had a right to challenge *thirty-five*, this being the number which might be challenged in all capital cases at common law, 4 Hawkins 389. 4 Black. Com. 353; and the Act of Congress, (Laws, U. S. vol. 1. p. 113,) which limits the number to twenty, refers expressly to the crimes therein mentioned; whereas this law was not passed till 1805.

Of this opinion was the Court.

The amount of the evidence was, that the prisoner, being the owner of the schooner Enterprise, lying at Baltimore, determined to make a voyage to Porto Bello, and to take with him a cargo of goods, which he and Butler were to purchase on credit. In June 1805, he applied to captain Snyder of Baltimore, to get the insurance effected for him, valuing her at 2700 dollars. Snyder, after objecting to the danger of the voyage, but advising, that in case he should persist in it, that he should take a particular route, so as to avoid the St. Domingo privateers, which he would fall in with, by passing between that island and Cuba, called the Moro passage; and being assured by the prisoner, that he intended, and should pursue the

route thus advised; agreed to get the insurance done, and to give his notes for the premium, which he accordingly effected. The prisoner also applied to Snyder, to effect an insurance on the cargo, valued at 12000 dollars. Snyder expressed his surprise, that the prisoner and his partner could get credit for so large a quantity of goods, but was assured, that there would be no difficulty. Snyder accordingly agreed upon the premium, and gave his notes for the amount of this sum, insured on the cargo. By the manifest of the cargo taken on board, it was stated at 9690 dollars. It appeared by the testimony of Snyder, that the prisoner purchased from him a spike gimlet, at the price of twenty-five cents, but the precise bore could not be ascertained. He sailed on the voyage, and it appeared by the testimony of one of his sailors, that there was no opportunity, during the passage to sea, for him to unlade any part of his cargo. He was met with, not far from Cuba, by a French privateer, who took the captain and all his hands on board the privateer, and put the whole of them except Taylor, the witness for the prisoner, under the hatches. This witness stated, that for three hours, the boat was constantly passing to, and returning from the Enterprise, and at one of the trips, though surrounded by the privateersmen generally, he saw goods and packages in the boat. The captain and crew were afterwards permitted to return to their vessel. On going on board, they found all the hatches open; great destruction appeared; and the store room, fixed between the two bulk heads, in which all the dry goods had been deposited, entirely emptied. They made sail, and the next day, about twenty hours after they had left the privateer, they perceived the vessel to leak. It gradually increased, and at eleven at night, all hands were called on deck; but by twelve she was cleared, after which, the witness declared they could not free her by constant pumping. The next morning, the water covered the cabin floor; and about seven o'clock they all abandoned her, waterlogged, having only time to take with them, a small piece of raw, and another of boiled beef, and a small

quantity of bread. At this time, they were in sight of land, which they reached that afternoon. Not finding water where they landed, they coasted along, and in about thirty-six hours, reached St. Jago de Cuba.

In a day or two after, captain Hughes, of the Friendship, met with the Enterprise at sea, her decks covered, and the water flowing through the hatches. He went on board, and by pumping, relieved her so, that with great difficulty, he was able to tow her to the Moro castle. He found her sails cut, and her light sails gone. With the assistance of ten or a dozen hands, obtained from a *garde de costa*, lying at the castle, and two pumps, he entirely freed her of water, in about eight hours, and then perceived three auger holes in her bottom, about the size of his forefinger to the knuckle, near the keel, and in the store room, the ceiling having been first cut away. After stopping these holes, the schooner was perfectly tight. He carried her up the next day to St. Jago, and moored her about fifty yards from a vessel, in which he saw the prisoner then standing. The prisoner never, at any time, came on board the Friendship, or made any inquiries respecting his vessel, except that the day after she came up, he inquired of one of captain Hughes's sailors, without any question from the sailor leading to it, where the holes were. Captain Hughes applied to the consul, who sent a letter to the prisoner to attend at his office. He there offered to compromise with Hughes, which he refused, but charged the prisoner with having destroyed the vessel. This the prisoner denied. The cargo was taken possession of by the government, and after twenty days' public notice, was sold, with the vessel, producing eleven or twelve hundred dollars. Hughes put in his claim, which was not admitted, but the proceeds were retained, and the claim of Hughes is still pending. None of the witnesses ever saw the prisoner at the coffee house, where the Americans resorted, or in company with any of them, whilst at St. Jago. Mr. Douglass advised the prisoner to clear up the reports which where circulating, that he caused the de-

struction of the vessel. This he promised to do, but never took any step in the business. When first charged with the fact by Hughes, he said, he was not insured—said the holes were made by the privateersmen, who had robbed him of goods to the amount of 6100 dollars. At another time, he said they had robbed him of goods to the amount of 12000 dollars. The French privateer arrived at St. Jago about this time, and one of the officers called upon Hughes to go with him in search of Johns. They went to a house where they understood he lodged. Saw him pass from the front to the back room, but he was denied by the keeper of the house. The prisoner never attended at the sale of the vessel and cargo, or at all interfered to interpose his claim. He never gave notice to captain Snyder of the loss, or made an offer to abandon.

These were the circumstances relied upon to establish the guilt of the prisoner. On the other side, it was insisted, that they were too slight to convict him, and that there was good ground to suppose the holes to have been bored by the French privateersmen.

During the examination, the following points were made at the bar, and decided by the Court: 1st. It was objected by the counsel for the prisoner, that any evidence should be given respecting the insurance on the cargo. That the Act of Congress only applies to the casting away, burning, or destroying, a vessel, by any other than the owner, or if by the owner, then it must be to the prejudice of the underwriters on *the vessel*, or the owners of the cargo, or the other owners of the vessel; provided the Court should think itself at liberty to reject the word *if*, which in that part of the sentence, which respects the owners of the cargo, or the other owners of the vessel, makes nonsense of the sentence (*a*.)

(*a*) The words are; "if any owner of a ship or vessel, shall wilfully cast away, burn, or otherwise destroy said ship or vessel, with intent to prejudice any person who hath underwrote, or shall underwrite any policy thereon; or *of* any owner or owners of goods laden therein, or *of* any other owner

By the Court. The law does not make it an offence in the *owner* to destroy his vessel, to the prejudice of underwriters on the *cargo;* and if it did, this is not charged in the indictment; and consequently no evidence can be given, to establish a charge against the defendant, for a destruction to the prejudice of underwriters on the cargo. But the attorney may nevertheless give evidence, and so may the defendant, of the cargo being insured, and the value of it, in order to show the *quo animo*, the motive which might have influenced the defendant to destroy, or to save the vessel. If the cargo was greatly overvalued, it might suggest a motive to the prisoner for destroying the vessel; and the reverse, if not overvalued; and still more if undervalued.

The district attorney offered to read the policy of insurance on the vessel, which was objected to, without producing the charter of incorporation of the Baltimore Insurance Company. 2 Lord Raym. 1532. 1 Bos. & Pull. 40.

By the Court. The gist of the offence is, that the vessel was destroyed to the prejudice of this company. Unless a valid insurance was made, it could not be to the prejudice of this company, as laid in the indictment. To prove that the company can act under, and be bound by a common seal, it must appear that they are legally incorporated and authorised so to act. That the president *pro tempore*, who affixes the seal, could thereby bind them. The charter of incorporation, therefore, must be produced.

It was accordingly read.

Mr. M'Kim, the president of the Baltimore Insurance Company, was now offered as a witness, to prove the handwriting

or owners of the said vessel, he shall suffer death," &c. &c. This section is intended to be almost a literal transcript of the fourth and eleventh of George I.; except that those statutes say; "to the prejudice of any person, &c.; or *of* any owner or owners," &c. But, in this law, the words are changed to "with intent to prejudice;" and *if* is inserted, instead of *of*. But, to make sense of it, the word *if* must be entirely expunged. W.

of the defendant, to the manifest of the cargo. He was objected to, as being a stockholder, and therefore interested to convict the prisoner. 1 P. Wms. 595. 1 Macnally 42, 53, were read.

By the Court. The conviction of the prisoner would be no evidence, in a suit on the policy, against the company, and therefore the witness is not interested. (*a*)

Upon producing the Act of the State of Maryland, incorporating the Baltimore Insurance Company before mentioned, it was certified by the clerk of the Executive Council, and the seal of the State was annexed. This was objected to, because it did not appear, that it was authenticated by an officer, who had power to do it, and to affix the seal of the State.

By the Court. The Act of Congress, as to all public acts of judicial bodies and others, except the laws or Acts of a State, directs who is to authenticate them; but as to the latter, it merely requires the seal of the State to be annexed. This law, being so authenticated, is proper evidence, within the true construction of the Act of Congress. (*b*)

(*a*) This opinion is supported by the cases of King *vs.* Bray, Cases Temp. Hard. 358; Rex *vs.* Boston, 4 East, 572; Abraham *vs.* Brown, 4 Burr. 2251; Smith *vs.* Prager, 7 T. Rep. 60; Mastins *vs.* Drayton, 2 T. Rep. 496. See also Philips's Evd. 38. 87.

The only exception appears to be the case of forgery; and this is considered as an anomaly, and is much shaken by a case decided in New-York, 1 Philips's Evd. 90. I have no doubt that it ought to be now overruled. Whether a conviction in a criminal proceeding can be given in evidence in a civil action, is a *vexata questio*. 2 Philips's Evd. 237. W.

(*b*) As to the proof of entries in public books, it is clearly settled, that where an original is of a public nature, and admissible in evidence, an *examined copy* will equally be admitted. 2 Phillips's Evd. 390.

It is a general rule, that a copy, authenticated by a person appointed for that purpose, is good evidence of the contents of the original, without proof of its being examined. Idem, 292. Where a deed is by law to be enrolled, the endorsement by the proper officer on the back, is evidence of enrolment. Idem. Examined, sworn copies of all acts of a public nature, may be given in evidence. Gilb. Evd. 47. Peake's Evd. 24. It would seem, on

The points of law, raised in the argument, were as follows:

1st. That a vessel cannot be said to be "cast away or destroyed," if she is afterwards recovered and restored to her former situation. A vessel was stranded by the captain, and was afterwards got off: upon an indictment against the captain, under the Stat. 4 Geo. 1. c. 12, and 11 Geo. 1. c. 29, it was determined, that if a vessel be run aground, or stranded on a rock, to defraud underwriters, and is got off in a condition to be easily refitted, she cannot be said to be cast away, or destroyed. East's Pleas of the Crown 1097, 1098, decided in 1765. Johnson's Dictionary was quoted. Cast away, means to shipwreck; shipwreck is to destroy, by dashing on rocks or sands. Wreck is where a ship perishes. In this case, the vessel was easily repaired; and by pumping, and plugging the holes, was as tight and staunch as ever.

2d. That presumptive evidence is not sufficient to convict the prisoner; and to prove this, the counsel read 8 Mod. 67. 96. 74.

3d. That the indictment states, that the prisoner destroyed the vessel with intention to prejudice the Insurance Company, and to *gain corrupt advantage to himself*; whereas it was proved, that the vessel was not insured for a farthing more than she was worth.

4th. The words of the law are, "to prejudice any *person*, or *persons* who hath underwrote;" but a *corporation* is not a person, or persons. Plow. Rep. 177. 1 Leach Crown Law 215. 2 Strange 1241.

In answer to this last point, Mr. Dallas cited 1 Woodeson 125. 1 Mod. Rep. 164. 2 Instit. 702, 703.

5th. The indictment states the prisoner to be owner of a certain ship or vessel, called the Enterprise of *Baltimore*; that

the whole, that an office copy, certified, is not sufficient, unless the office is expressly authorised to give copies, though he be the keeper of them, and is authorised to record the original—they must be examined and proved in the ordinary way to be copies.

the company insured said ship or vessel, called the Enterprise, not saying "of Baltimore." The objection taken, was twofold: 1st, the variance; and 2d, her being called a vessel or ship in the disjunctive. An indictment that A forged, or caused to be forged, is bad. 2 Hawk. 25. s. 90. 2 Roll's Abrid. 80. 5 Mod. 138.

6th. To prove that captain Hughes, the salvor, was interested, so far at least as to discredit him, it was contended; that if the Enterprise was voluntarily injured and abandoned, she became a derelict, and belonged to the first finder; and of course, if Hughes should be able to convict the defendant, he would be entitled to recover from the Spanish government, the whole proceeds of the vessel and cargo: *aliter*, if she be abandoned from a necessity, not voluntarily produced by the master of action. 2 Black. Comm. 9. 2 Vern. 317. Leach 207, were read.

WASHINGTON, J. delivered the charge as follows: The Court think it unnecessary to give an opinion upon these objections, which appear upon the face of the indictment, and particularly that which is made to a corporate body, being included in the words "person or persons," because the defendant may avail himself of them, should he be found guilty, on a motion in arrest of judgment. As to the third objection, that he is stated to have destroyed his vessel, with a view to gain corrupt advantage to himself, &c. these words are merely surplusage, and need not have been stated. The intent to defraud the underwriters, it was necessary to state, and it is stated.

Before the prisoner can be found guilty, you must be satisfied of the following facts: 1st. That Johns was the owner of the Enterprise: this is acknowledged. 2d. That she was insured: this is proved. 3d. That she was cast away, or otherwise destroyed. This is a mixed question of law and fact. The question of law is new; and in giving a legal definition of those words, we have very few sources of information to resort to. But after the fullest consideration, which we have been able to

give the question, we are of opinion, that to "destroy a vessel," is to unfit her for service, beyond the hopes of recovery by ordinary means. This, as to the extent of the injury, is synonymous with "cast away;" it is the general term. Casting away is, like burning, a species of destruction. Both of them mean such an act as causes the vessel to perish; to be lost; to be irrecoverable by ordinary means. Whether, upon the evidence, and agreeable to this definition, the Enterprise was cast away or destroyed, is a matter of fact for your decision.

4th. That the prisoner perpetrated the act, or directed or procured it to be done, positive evidence is not necessary. Circumstantial evidence is sufficient, and is often more persuasive to convince the mind of the existence of a fact, than the positive evidence of a witness, who may be mistaken; whereas a concatenation, and a fitness of many circumstances, made out by different witnesses, can seldom be mistaken, or fail to elicit the truth. But then those circumstances, should be strong in themselves, should each of them tend to throw light upon, and to prove each other, and the result of the whole, should be to leave no doubt upon the mind, that the offence has been committed, and that the accused, and no other, could be the person who committed it. Under these precautions, let the case of the prisoner be examined. The first we hear of him is at Baltimore, the owner of this vessel, and having it in contemplation to make a voyage, with a cargo belonging to one Butler and himself, to Porto Rico. He procures her to be insured by the Baltimore Insurance Company, at 2,700 dollars, and the witness, who was his friend on the occasion, and appearing on the part of the prosecution, declares that she was fully worth that sum. What motive, then, could he have to destroy her? He would not only be a loser in respect of the value of the vessel, but all his objects of trade, and all the profits which he no doubt anticipated, (for why else should he undertake this voyage?) would be thereby defeated. In the next place, we find him insuring 12000 dollars on a cargo, appearing by the manifest to

be worth only 9,000 dollars. At first view, this appears an overvaluation, and consequently to afford a temptation to destroy the cargo. But since it does not appear, that the freight was insured, and since a man, without meditating a fraud, may wish to insure expected profits, he would probably be a loser even in respect of the cargo; or at any rate, there could exist little, if any temptation, to perpetrate the crime with which he is charged. We then follow him from Baltimore into the West India seas, and find him in the possession of French privateersmen; whose conduct, if the witness be believed, would prove them rather to deserve the name of pirates. It appears, by the testimony of the same witness, that the whole of the cargo taken in at Baltimore, fell into the hands of these men, and you will judge, from his evidence, whether any, and what part, was taken out by them. In about twenty hours after the prisoner and his crew were restored to the vessel, she was discovered to leak; the difficulty of freeing her increased; but yet we find, that in one hour, from eleven to twelve, she was freed; after which, every exertion was made in vain. It afterwards appeared, that the leak was produced by three holes bored in her bottom. These must have been made by the privateersmen, by Johns, or by some of his crew; because she was waterlogged when they abandoned her. If by the privateersmen, it is extremely difficult to account for her not leaking, for so long a time after her liberation, and that the leak should increase in the proportion it did, without any new apparent cause. I say it is difficult to account for this, unless we suppose, that after making the holes, they were imperfectly filled up, and afterwards forced open in succession, by the pressure of the water. As to this, you must be the proper judges. Still it is not clear, that the prisoner made the holes. The store room, it is true, communicated with the cabin; but it appears that the key generally remained in the door, and it is possible that opportunities may have offered for the crew to have done the act. These things are merely suggested for your consideration.

It is not less difficult to account for the prisoner's conduct, after he saw his vessel in safety at St. Jago. If he had not wished her destruction, nothing could have been more natural, than that he should immediately have inquired into the circumstances by which his vessel had been saved; into the causes which had produced her supposed loss, and that he should have taken steps to reclaim her. Instead of this, he at no time called upon the salvor, but, on the contrary, he seems to have taken pains to avoid him. When charged with being guilty of having done the act, and advised by his friend to clear it up, we find him contenting himself with a simple denial of the charge. He never appeared at the sale of the vessel or cargo, or interposed a claim for either. His inconsistencies; at one time declaring that he was not insured; sometimes saying, that he had been plundered of goods to the amount of 6000 dollars; at another, of 12,000 dollars; his avoiding the company of the Americans; being denied to persons, who came after him: can with difficulty be reconciled with the character of fairness—whether with that of innocence, you must decide. It is proper, however, to remark, that these circumstances do not necessarily prove more, than that he regretted the recovery of the vessel and cargo. A man, whose property is fully, or more than covered, may not be sorry that it is lost; and yet he might be very far above the commission of a criminal act to produce the loss. It is for you to say, whether this construction should be given to his conduct.

Upon the whole, you will weigh the evidence, and not convict the prisoner, if you doubt of his guilt.

Jury found the prisoner not guilty.

Rawle, C. and J. R. Ingersoll, S. Levy, and Ewing, for defendant.

HURST *vs.* RODNEY.

What will be considered a covenant, running with the land, and binding on the party in possession; although such party has not executed the deed conveying the same to him.

THIS was an action of covenant, brought against defendant for many years ground rent, due upon a lot of ground, conveyed by plaintiff to one Perkins, in fee, and by him conveyed by indenture to the defendant, subject to the ground rent. The declaration states these deeds, and the entry of defendant, and the non-payment of rents, due since her possession under the deed to her.

The deed to the defendant, not being executed by the defendant; her counsel contended, that it was not her deed, and that she could not be sued on it.

By the Court. The defendant is bound by the covenant to pay the rent, in the first deed to Perkins, which runs with the land, so long as it is retained by the defendant.

Verdict for plaintiff.

COURTOIS *vs.* CARPENTIER.

Action on a note payable in *sugar*, and given in *Guadaloupe*, where a particular custom prevails, in relation to the payment of such notes, in *sugar*.

The law of the country, where the contract is made, must govern it; but, as in the Courts of the United States, a judgment can only be given in money, no other recovery can be had upon a note for a certain sum of money to be paid in sugar, than for the sum of money mentioned in the note.

When, by the law or custom of the country where such notes are given, no interest is payable upon them until judgment is obtained upon them; in the Courts of the United States, interest before judgment, will not be allowed.

THE plaintiff and defendant having been once subjects of the French government, and residents at Point Petre, in Guadaloupe, the defendant gave his note, 12th April, 1793, promising to pay to the order of plaintiff, 7812 livres, 16 sous, *in sugar*, as money, value received. The defendant is now a naturalized citizen of the United States.

The defence was, that these notes, in the island of Guadaloupe, form a kind of circulating medium; there being very little cash passing between the merchants and planters, or merchant and merchant. That when payment is to be made, or suit brought, three persons are called upon to value the sugar, and say how many pounds of sugar should be delivered, in satisfaction of the sum mentioned in the note: that these sugar notes are always in a state of depreciation, from twenty-five to forty per cent. below cash: that, in 1793 and 1794, it would have been easier to pay 3000 dollars in sugar, than one in cash: that these notes only bore interest from the time judgment was rendered, or they were registered before a notary.

On these facts, which were proved, the defendant insisted, first; that the jury should value the 7812 livres at the depreciation thus proved; and, secondly, should give no interest.

WASHINGTON, J., charged the jury. The laws of the country, where this contract was made, must govern. These notes were payable in Guadaloupe, in sugar, at a valuation. The defendant, being sued here, cannot complain, if his situation is not made worse than it would have been in Guadaloupe. But, as according to our forms of proceeding, (and, as to them, the laws of our country must govern,) a judgment cannot be rendered for sugar; the value in money must be given, which, in effect, is the precise sum stated in the note. For, whether the sugar was worth one livre or seven livres per pound, still, when that sugar is turned again into money, it must come to the same sum. As to the fact of the depreciation of these notes, it should not be considered any more than in rendering judgment on bonds here, which we all know will sell, in some cases, at a considerable discount for cash. As to interest, none should be allowed; because, it is proved, that, at Guadaloupe, they do not carry interest, but from the judgment or registration.

The jury found a verdict for plaintiff.

Rawle, for plaintiff.
M. Levy, for defendant.

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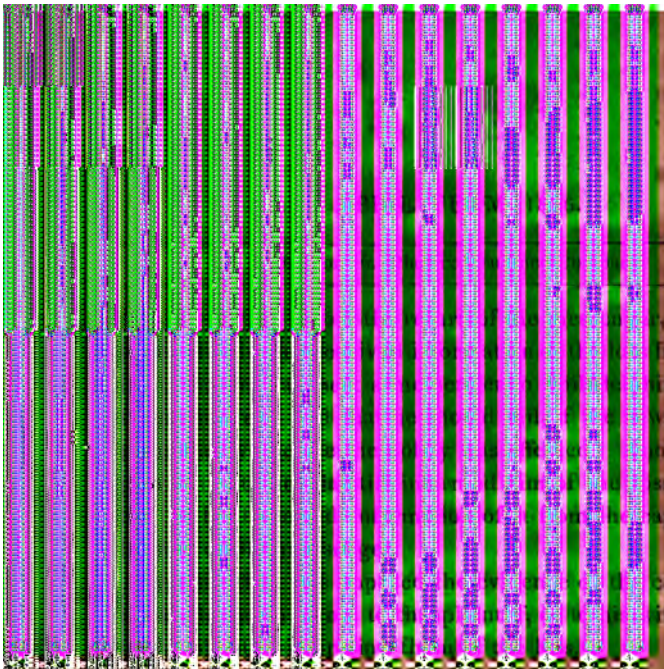

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he ordered the insurance, either would avoid the policy. That if the jury should be of opinion, that the captain, in his letter to the plaintiff of the 1st of November, informed him of his intention to sail that day, it might be very material to the risk, that he should have disclosed this information to the defendants; and if so, the defendants would be exonerated. The time of a vessel's sailing is always important; particularly, if, at the time the insurance is effected, the vessel is out of time. The average voyage from Richmond to Philadelphia, is ten or twelve days. This vessel was insured, twenty-four days after she had sailed, and of course it was important for the underwriters to know, that she had been twenty-four days out. But it does not appear, that the captain informed his owner when he should sail. The order of insurance mentions, that, on the 1st of November, she was loaded; and we must presume, that this was the information communicated to the owner by the captain, as the contrary does not appear. It would seem, as if the underwriters understood, from the expressions used, that she had sailed on that day; as no reason for detention, beyond it, appeared, by their demanding ten per cent. premium, whereas the common premium, on such a risk, is proved to be from two to four per cent. As to the letter from Hampton roads, it does not appear that it ever came to hand.

The next point is the most serious; because, if the jury believe the defendants' witnesses, they fix upon the plaintiff a knowledge of the loss, before he ordered insurance. Against these witnesses, is opposed the testimony of the captain. The evidence cannot be reconciled: one, or other, has sworn to an untruth; and therefore, as is common in such cases, circumstances to prop the positive evidence have been resorted to, and the characters of the witnesses have been attacked on the one side, and supported on the other.

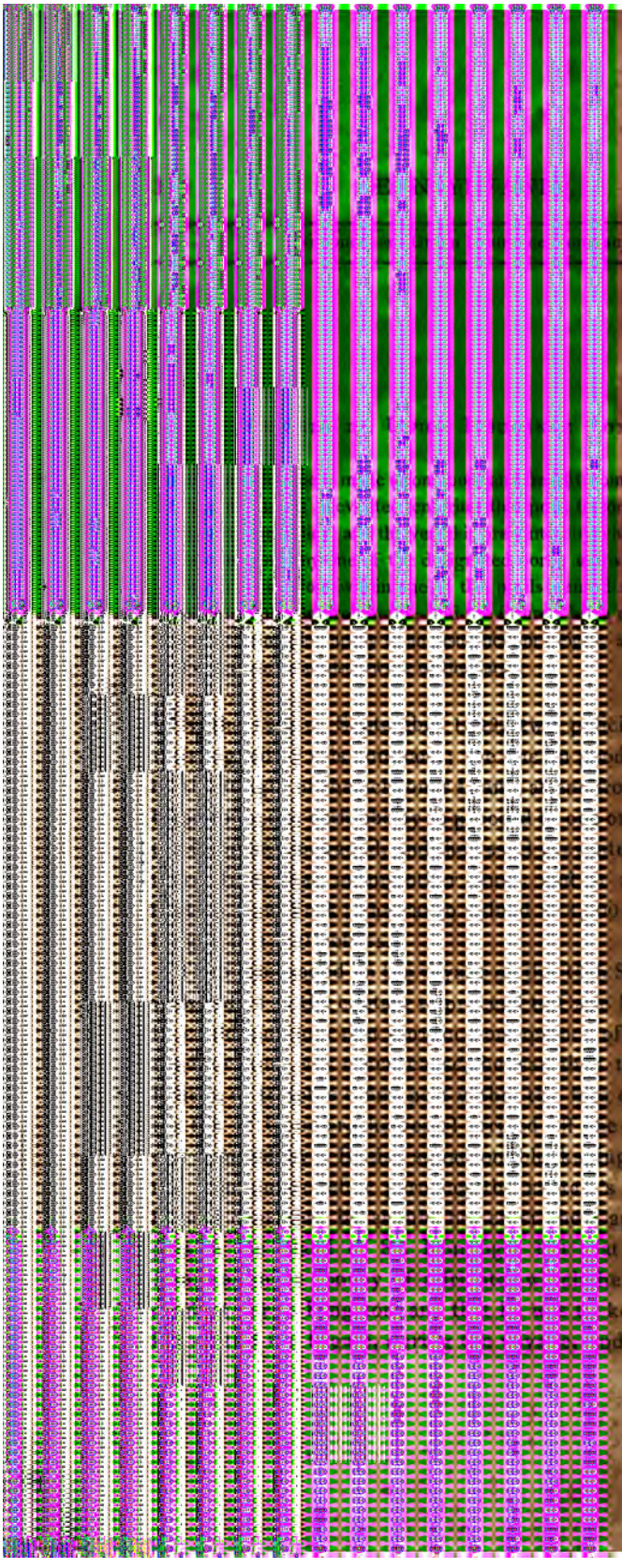
The circumstances are the following: The captain arrived at New York, on the 18th, might have written on the 19th; his letter would have got to Philadelphia on the 20th, and would

have reached the plaintiff on the 22d. The messenger, we find, was sent off to Philadelphia in great haste, which might be the night of the 22d; would reach Philadelphia in the evening of the 23d, so as to cause the insurance to be effected the day it was. A free letter did go on the 20th, to the office kept by the plaintiff; and he was the only person there, or in the neighbourhood, entitled to this privilege. The hurry of the plaintiff, just about the time, when the mail, in the regular course, would arrive, in sending off a messenger, and the time necessary for the journey, which would bring him here, on the day, or preceding evening, when the insurance was effected. But if the letter, ordering the insurance, was truly dated, when it was written, and was immediately sent off; then it is almost impossible that the plaintiff could have heard from the captain after his arrival at New York. In answer to this, it is contended, by the defendants, that the letter must have been antedated, because, if written on that day, it might have been sent off by mail on the 21st, so as to have got here before the 24th, and therefore there could have been no reason for sending a special messenger. If the letter was antedated, then this itself is strong evidence of fraud, and gives to the whole transaction the appearance of unfairness. But if not antedated, still, if the plaintiff knew of the loss, before it was sent away, the consequence is the same, and he cannot recover. You are the proper judges, of the credit, and of the weight of evidence; and you must decide, upon an impartial consideration of all the circumstances and facts, whether the fraud, imputed to the plaintiff, is proved, or not.

The plaintiff suffered a nonsuit, after the jury had returned, and were ready to give in their verdict.

Tod, for plaintiff.

Smith and Hallowell, for defendants.



fired into. The captain then requested leave to go to Cuba; but was refused; and he was informed that he should go to no other place but Jamaica. The vessel was accordingly carried in, by the frigate, to Kingston, where her cargo was unladen, under the care of a custom-house officer, who had previously refused to permit the captain to clear out to any other, than a port in the island. The cargo was delivered by the captain into the custody of a merchant at Kingston, who advanced a part of its value, and the captain then returned to New-York. The cargo sold for 3,600 dollars.

On notice of what had happened, the plaintiff abandoned to the underwriters, which was refused.

Dallas, for the defendants, contended, 1st. that the plaintiff could not abandon, from the terms stipulated in the order for effecting the insurance; which stated, that the plaintiff was not to abandon, if the vessel should be prevented from entering the port of Cape François, from blockade or other cause, but with liberty to proceed to some other port. Secondly. That on general principles, the plaintiff could not abandon. If he could not enter at the Cape, he was at liberty to go to some other port. He did so. Kingston was that other port. If a vessel is prevented from entering a port, because it is blockaded, it is not a cause of abandonment. He cited the following cases. 1 Esp. Rep. 237. 2 Marsh 434. 2 Burr. 1198. 1212. 1 T. Rep. 107. 3 Bos. & Pull. 388. 5 Esp. Rep. 50. Miller 305. 5 T. Rep. 388.

On the other side, it was contended by Mr. Rawle, for the plaintiff, that the other port to which the liberty of going was insured, was mentioned in the captain's instructions, viz: Port au Prince, or some other port in the bite of Leogan. That being prevented by one of the perils insured against, from proceeding to any port in the island of St. Domingo, and compelled to go to Jamaica, was a total destruction of the voyage; and therefore, the plaintiff had a right to go for a total loss of cargo and freight, giving credit for what the cargo sold for.

WASHINGTON, J. charged the jury. The voyage insured, is from New-York to Cape François; and if prevented from entering there, then to some other port, mentioned in the orders to the captain. If the jury should be of opinion, on the evidence, that the captain was prevented, by the British squadron, from entering any of the ports mentioned in the instructions, and was compelled to end his voyage at Jamaica; then it was within one of the perils insured against, and the voyage was completely broken up. If so, the insured was at liberty to abandon, and claim for a total loss.

As to the freight, the same principle applies. The voyage being defeated, the freight was lost. This would certainly have been the case, had the vessel and cargo belonged to different persons; and there is no difference, where the owner of the one, is also owner of the other.

The jury found the whole sum for plaintiff.

MYERS MOSES *vs.* THE DELAWARE INSURANCE COMPANY.

Insurance on goods on board the Liberty, from Philadelphia to Charleston, lost or not lost.—It was the duty of the assured, to communicate to the underwriters, a letter received by him, containing particulars of a hurricane which had occurred at Charleston after the vessel sailed; although the fact of there having been severe gales on the coast of Carolina, was known to the defendants. The knowledge of the plaintiff was particular, that of the defendants was general.

ACTION on a policy on goods, on board the Liberty, lost or not lost, at and from Philadelphia, to Charleston in South Carolina. The Liberty sailed from Philadelphia, on the 28th or 29th of August 1804, and the policy was signed on the 22d of September 1804. The vessel was found at sea, some time in September, turned bottom upwards. Great part of the cargo was thrown upon an island on the Carolina coast, and was sold, under a sentence of the District Court, and salvage paid thereout.

The defence was, that the plaintiff had concealed from the underwriters, a material fact, within his knowledge.

The evidence was, that on the afternoon of the 21st September, the plaintiff met with Mr. Steel in the street, who asked him if he had not shipped goods on board the Liberty, and whether he was insured. Being answered in the negative, Steel informed him, that he had that day received a letter from Charleston, dated the 9th, giving an account of a dreadful storm, which had happened there the day before, and that he communicated the contents of the letter to the plaintiff, every word, so far as he recollected. The words of the letter are, "yesterday, the most dreadful storm happened here, that has ever been experienced; the damage amongst the shipping very

great." Mr. Steel, who also was directed to insure the Liberty, applied at the different offices on the 21st, and was informed, that there had been severe gales on the coast, and much damage heard of. Most of the presidents disliked the risk. The Pennsylvania Office spoke of asking seven per cent.; at the others, five was asked, which was double the usual premium. The president of the Delaware Office informed him, that he had heard of the loss of the Patient Sally, which sailed on the 4th from Savannah, and which he should have to pay. The Sincerity sailed from Charleston on the 4th, and had arrived here, after experiencing great damage from the gale. The usual passage from here to Charleston, was proved to be ten to twelve days, but a vessel was not much out of time at eighteen days. It did not appear that the hurricane at Charleston, was known at any of the offices, until between ten and eleven o'clock of the 22d, after the arrival of the mail. The president of one of the offices declared in evidence, that after this account was received, no insurance could have been effected at his office, under fifty per cent., if at all. It was proved by the same person, and by one of the directors of the Philadelphia Insurance Office, that the accounts which came by this mail, did not state the storm in as strong language, as the letter before alluded to. After the arrival of the mail, the Liberty was insured at the Philadelphia Office, at five per cent., though the account of the storm, as stated by this conveyance, was known: but the office calculated, that the Liberty had not been out long enough to reach that part of the coast, where the severity of it was felt. Upon reference to the papers, from the 15th to the 21st of September, it appeared, that very heavy gales had happened on the coast, and vessels and wrecks found in the latitude of Charleston.

The plaintiff, on receiving the communication from Mr. Steel, on the afternoon of the 21st, expressed himself satisfied as to the Liberty, as she might not be affected by the storm at Charleston. On the evening, however, of that day, he called at the Delaware Office, to insure this cargo, but the

president was not within. Early on the morning of the 22d, he called again, and effected the policy; but, the instrument not being filled up, he called two or three times for it, and finally received it between eight and nine o'clock in the morning. On the same morning, he informed an acquaintance of his of the dreadful storm which had happened at Charleston, and expressed his satisfaction at having got his insurance effected.

The defendant insisted, that the policy was annulled, in consequence of the concealment of this letter. Park on Insur. 209. N. York T. Reports, 2 vol. 57, in point.

The plaintiff contended, that the existence of the storm was known to the defendant; and, therefore, need not be communicated. 1 Marsh. 354. 4 Burr. 1906. Park, 185.

Philips and Moses Levy, for plaintiff.

Rawle and Condy, for defendant.

WASHINGTON, J., charged the jury. It is admitted, that the plaintiff did not communicate to the office, the information he had received of the storm at Charleston, or that there was a letter in town respecting it; but, it is contended, by the plaintiff, that this was unnecessary, since it was sufficiently known to the defendants, to render the communication unnecessary. The rule is, that the insured must disclose every fact, material to the risk, within his own knowledge, which the insurer does not know, or is not bound to know. They were not bound to know of the particular storm mentioned in this letter; and, there is no evidence which brings home to them, in any respect, a knowledge of it. The only question, then, is; whether the communication of the contents of that letter, was material to the risk, taken in connexion with the knowledge, which the defendants had obtained through other channels.

The defendants knew generally, that there had been heavy gales on the coast, in the latitude of South Carolina; that da-

mage had been the consequence; that a vessel, which had left Savannah on the fourth, was lost; that another had experienced its violence, was damaged, but had arrived. But, the plaintiff knew of a particular storm, more violent than had ever been experienced, which had done great injury to the shipping at Charleston, the port to which the Liberty was destined. She had been out ten or eleven days previous to the storm, and the usual voyage is from ten to twelve days, but not much out of time if extended to eighteen. She might, or might not, be within the fury of this particular storm. Was there any material difference, between the general information, which the defendants possessed, and that which the plaintiff possessed, as it respected the fate of the Liberty? If there was, the latter should have been communicated. Would you, after seeing this letter, and being yet ignorant of the fate of the vessel, have deemed the risk increased, from what it would have been estimated, with the general information possessed by the defendants? What was the plaintiff's opinion on the subject? At the time he received the account from Steel, he was his own insurer. Though he seemed to think lightly of the information given in the letter, he yet applied to insure the same evening; repeated it the next morning; and, after evident marks of impatience, got it concluded before the arrival of the post. If you think, that this conduct was induced by the contents of that letter, then it is plain, that he at least thought the information very material; and, on this point, furnishes strong evidence against himself. What was the conduct of the insurance offices? Under the impression of the general information of gales on the coast, double premiums were thought sufficient. After the news of the Charleston storm had reached one of the offices, they still insured at five per cent.; but they did not know, that it was as severe as the letter to Steel had stated it, and they calculated, that the Liberty had not reached the place where it happened. After it was known, it appears, that, at another

office, the risk would not have been taken at fifty per cent., if at all. Now, if the information of this particular storm was material, the defendants ought to have known it, so as to have had an opportunity of deciding, whether to take the risk, and at what premium.

The plaintiff suffered a nonsuit.

LESSEE OF JOHN AND RICHARD PENN *vs.* GROFF, &c.

The proprietaries of Pennsylvania, by authorizing their agent, in 1733, to adjust the claims of settlers, on the west side of the Susquehannah, within the boundaries of a body of lands, which was afterwards resurveyed as the manor of Springettsbury, and to allow to those persons common terms for the same; did not, thereby, deprive themselves of the legal right to appropriate all the residue of these lands, as part of the proprietary tenths, and to claim the said residue as part of their said manor.

THIS case was, in every respect, like that of Penns and Kline, (a) and the argument at the bar, was nearly the same; except that this point was started by the counsel for the defendant, (Mr. James Ross of Pittsburgh, and Mr. Hopkins, who were employed by the State of Pennsylvania,) and very much pressed; that is, that after settlements were made on the western side of the Susquehannah, on the common terms, the proprietary had no right to lay off his tenths there, so as to enclose a single settler, although the residue should be clear of settlers, and even though no more should be demanded from such settler, than what was paid by others, purchasing upon the common terms. The reason assigned was, that every person, settling there upon common terms, was not only entitled to the privilege of paying no more than the common price, but to retain the advantages he had also expected from a close population, and the certain consequence of increase of value to his land, which might be prevented, by being enclosed within the boundaries of a manor. That the commission from Thomas Penn to Blunston, in 1733, in which he speaks of certain persons, who had settled west of the Susquehannah, under promises from the governor, and of applications of others to settle,

(a) Ante, page 207.

and appointing him to adjust any differences among the settlers, and to grant them licenses for their lands, for which warrants should issue on the common terms; amounted to a contract, on the part of the proprietary, to grant out all the lands, west of the Susquehannah, on the common terms; and, consequently, that he had no right afterwards to enclose those settlers within a manor, and compel them to take out warrants to agree; which left the settlers, as to the price of their lands, entirely at the mercy of the proprietary.

The Court read to the jury the charge, in the case of Penns and Kline, and then noticed this new argument, as follows: It seems to be contended, on general principles, that, after settlements were made west of the Susquehannah, the proprietary could not lay off his tenths on that side of the river. Whether the settlers would be benefited, or injured, by being thrown within the limits of a manor, might be a questionable thing; at any rate, the Court are of opinion, it is too entirely hypothetical to form any solid reason, why the principle contended for, should have existed. The doctrine is novel, and, we think, very extravagant; because, it goes to cut the proprietary out of his acknowledged right to one-tenth of the lands on the west of Susquehannah, as well by the prior settlement of one solitary individual in that country, as if thousands had settled there. But, what law is it, that sanctions this doctrine? His right to the whole of the soil, by his charter, is no otherwise diminished by his concessions, than as to nine-tenths; as to which, it is clear of all restraints, but such as he might please afterwards to impose. But, it is said, that his commission to Blunston amounted to a contract, not only with those who had, but with those who might thereafter settle on those lands, that they should hold them on the common terms; therefore he could not appropriate those lands as part of his tenths: whether this is the proper construction of that commission, we avoid deciding now, lest we should prejudge the case of these defendants, should it be brought before us on the other side of the Court.

But, if the construction be as contended for, still, the consequence does not follow. For, let it be conceded, that the proprietary bound himself by that commission to let the lands on the west side of the river, to be taken up on the common terms, this would not prevent him from appropriating a tenth as private property. Those, to whom he issued warrants, might say, that he could not exact more than the common terms; but, yet, he might exact those terms. The legal right to the soil would be one thing; the terms on which others could acquire it, was quite another. The argument which we have heard, might have done very well in the Legislature, which passed the divesting and confirming law, and the reasons, if sound, might properly have been urged to induce that body, either not to confirm the title of the proprietaries to their tenths, or to qualify the law, so as to compel the proprietaries to demand the purchase money, only at the rate on which the general lands had been sold. They might do in the State Court, where, I understand, the defendant, though a verdict were found against him, might redeem the land, by paying the purchase money to such amount, as the jury might find. They might do this on the equity side of this Court, if the defendant were applying to be secured in his possession, on paying the purchase money. But, the question for you to decide, is not what sum the defendant shall pay for the land; but, who has the legal title to it? Now, if this land was part of a reputed manor, which was duly surveyed and returned, before the fourth of July, 1776, then the legal title is in the plaintiff; and, it is admitted, that the defendant has only a survey, without a patent, and without having paid the consideration. If you find for the plaintiff, then the defendant may compel the plaintiff, on the equity side of this Court, to receive what is justly due, that is, £15 10*s.* a hundred, if he is entitled to hold on the common terms; or such other sum as may be thought the value of the land, if he be not so entitled. But you have nothing to do with this now.

Upon the whole, then, if you are of opinion, upon the evidence, that the land in dispute, is part of a tract called and known by the name of a proprietary's tenth, or manor, and was actually surveyed in the year 1768; then, it is the opinion of the Court, that the manor of Springettsbury, was duly surveyed; and, it is admitted, it was returned into the land office before the fourth of July, 1776: and, therefore, the plaintiff is entitled to recover.

Verdict for plaintiff.

JACKSON *vs.* BAKER.

Where a commission merchant takes a bond for a simple contract debt due to him for goods sold on commission, and includes in the same instrument a debt due to himself, he makes himself answerable to his principal for the amount of the goods; as he has deprived him of the means of pursuing his claim against his debtor, by extinguishing the debt due by simple contract.

THE plaintiff consigned a number of boxes of hats, to the defendant, to sell. The only question in dispute was, as to one box, which the defendant sold on credit for 211 dollars; the amount of which, the defendant included in a bond, taken to himself, from the purchaser, for a much larger sum, part of which was due to the defendant personally.

Hallowell, for the defendant, insisted, that the plaintiff ought not to recover the above sum of 211 dollars, as the defendant had not yet received it, from the person who purchased that box of hats; and that his taking a bond for the amount, made no difference. 2 Dallas. Price *vs.* Ralson.

The Court stopped Meredith, who was for the plaintiff; and informed the jury, that the defendant ought either to have paid this money to the plaintiff, or enabled him to look to the purchaser. But that he had not done the former, and had disabled himself from doing the latter. That the plaintiff could not have sued the purchaser, because the simple contract debt was extinguished by the bond; and the defendant, having mixed the debt due to himself and to the plaintiff, in one bond, taken in his own name, that the plaintiff had no remedy in the bond; and it does not appear, that any offer was made to assign the bond. If the plaintiff cannot recover from the defendant now,

when can he recover? Sue him when he pleases, the defendant may keep him at arm's length, by saying, "I have not yet collected the money." Whereas, the debt having been originally due to the plaintiff, he might have sued for it at any time, in his own name, if he had not been prevented by the conduct of the defendant; who, if he is the cause why the plaintiff cannot sue the real debtor, makes himself the debtor.

The jury found accordingly for the plaintiff.

Holt & Co. *vs.* John Dorsey.

A and B shipped a cargo of goods for C, but consigned them to D, the partner of E. Before the arrival of the goods, D died, C became bankrupt, and the defendant, under a power of attorney from E, took possession of them, sold them, and remitted part of the proceeds to E; at the same time informing A and B of his having taken possession of the goods; and when he remitted in part their proceeds to E, he advised A and B of such remittances, who approved of the whole of his proceedings. Held, that the defendant did not become the agent of the shippers, but was the agent of E; and that any remittances made to E, of which advice was not given by the defendant to A and B, that they were for the proceeds of the goods, were not a payment to A and B.

THE plaintiffs living in an interior part of England, in 1799, they shipped a cargo of goods, intended for a merchant in Baltimore; but to secure themselves, in case of any accident happening to the person so intended, they sent them to order; and a Mr. Willis, of that town, the partner of M'Call Medford of London, was authorized to receive them. At the same time, Medford, the friend of the plaintiffs, but who was not authorized thereto, by the plaintiffs, sent out a power of attorney, to the defendant, to act in this business, if necessary. Before the arrival of the goods, Willis, the agent of the plaintiffs, died; and the person on whose account the goods were sent, having become bankrupt, the defendant took possession of the goods, and brought them to Philadelphia, where a part of them were disposed of. He informed the plaintiffs what he had done; and received their approbation and thanks, recognising the act of Medford, in procuring his interference upon the event, which had taken place, of the death of Willis, their agent. The defendant made remittances, through Medford, to the plaintiffs, which the plaintiffs received. The goods not sold, were deli-

vered over to Mr. Lyle, the agent of the plaintiffs, in this country. The defendant corresponded with the plaintiffs, respecting these goods, and promised to remit the proceeds to them; and when he did remit, through Medford, he informed Medford, as well as the plaintiffs, on what account it was made. The defendant was the agent of Medford, in other transactions, and remitted them large sums of money, generally without making an appropriation of them; except in the cases above mentioned, where specific sums were remitted for the plaintiffs. A balance still remained due to the plaintiffs, which had not been remitted to the plaintiffs, or to Medford, on their account, by any specific appropriation. The plaintiffs, in a letter to the defendant, requested him to remit either to them, or to Medford, for them. It appears, by an award made in a dispute between the defendant and Medford, that a balance was due from the former, to the latter, of a larger sum than is now claimed by the plaintiffs, which the defendant was adjudged to pay, provided he received a full indemnification against the claim of the plaintiffs, for a part of that sum. The referees were of opinion, that the defendant was liable to Medford, and he to the Holts. Medford became a bankrupt two or three years ago.

It was argued by the plaintiffs' counsel, that if the defendant remitted the sum now claimed to Medford, unless he ordered the same to be paid over to the plaintiffs, the plaintiffs were not bound by it. That it appearing, that the defendant was a debtor to Medford, unless such an application was made, Medford had a right, which it appears he exercised, to apply the same to his own debt. That the defendant was a mere volunteer in this business, having been appointed by Medford, as the substitute for Willing, and of course, he had no right to remit to Medford, so as to bind the plaintiffs, further than he was authorized by the plaintiffs to do; and consequently, that when he remitted to Medford, it was his duty to give notice both to Medford and to the plaintiffs, that the remittance was for them. But as the defendant was the acknowledged debtor to Medford,

Hurtin vs. Phœnix Insurance Company.

Action on two policies of insurance; one a valued policy on the vessel, the other an open policy on the cargo; on a voyage from New-York to Gibraltar.—The vessel was captured, and carried into Algesiras; and there, although the cargo was not condemned, as it was not permitted to the vessel to sail with it, unless security was given that it would not be carried to a British port in the Mediterranean, it was sold by the supra-cargo; and the vessel, which had not been detained with a view to her condemnation, sailed for New-York, with a cargo on freight, and was lost.

It is not necessary to disclose to the underwriters on the cargo, the particular language of the bills of lading; and if they are general, so as to comprehend the port to which insurance is made, it is sufficient.

The seizure and carrying into Algesiras, and the prohibition to carry the cargo away without security, was a complete destruction of the voyage, and authorized an abandonment of the cargo.

The sale of the cargo by the supra-cargo, if he acted for the interests of all concerned, was proper; and he had a right though to convert a partial into a total loss.

The insured must, within a reasonable time after notice of the loss, make his election, and give notice of his intention to abandon; but he may take a reasonable time to decide upon the subject.

The refusal to give a deed of cession of the cargo, unless the defendants would accept the abandonment of the vessel, insured in another policy, did not vacate the abandonment of the cargo. A deed of cession is not necessary to transfer to the insurers the right to the property, the same being completely transferred by the abandonment.

The vessel not having been detained with a view to condemnation, and the inhibition of exportation of the cargo, but upon security, not affecting her; the assured had no right to recover for a total loss.

The assured not having abandoned the vessel at the time he abandoned the cargo, and having at that time refused to do so; his right to make the same is gone, and cannot be regained.

In case of abandonment, the underwriter is entitled to all the proceeds of the thing abandoned, and to all the profits arising from the investment thereof.

The expenses incurred by the detention of the vessel at Algesiras, are subjects of general average; but her repairs are entirely chargeable to the vessel, the cargo having been previously landed. All repairs made necessary by any of the risks insured against, must be paid by the underwriters.

THIS was an action on two policies; one on the Monongahela Farmer, and the other on her cargo, from New-York to Gibraltar; the former a valued, and the latter an open policy. The vessel sailed on the voyage insured, and was seized by two Spanish privateers, in the Gut of Gibraltar, and carried into Algesiras, where attempts were made to condemn her cargo, but without success; the cargo consisting of articles in general contraband of war, but within the exceptions of the treaty between Spain and the United States. The government consented, that the captain should depart, upon his giving security, not to carry the cargo to any British Port in the Mediterranean. The supra-cargo, under these circumstances, considering it most for the advantage of all concerned, to dispose of it at Algesiras, procured this to be done, under an order from a judge; and the sales amounted to about half the sum insured on it. The detention produced by this step, kept the vessel at the port of Algesiras, from about the 13th of May, till the 17th of July; during which time, the supra-cargo, by means of a credit, which the plaintiff had given to him, on certain merchants there, purchased a brig and cargo, and sent her to the United States. About the 17th July, he went with the Monongahela Farmer, to Malaga, where he took in a cargo of wines, on freight to New-York; but she was lost, returning to the United States. On, or before the 30th July, in the same year, (1805,) the plaintiff received notice of the capture, in two letters from the supra-cargo, of the 21st May and 11th June; which stated, that he had been cleared, on condition of not going to any British port in the Mediterranean; advising him to abandon the cargo, and that the vessel would return with a cargo of Malaga wine, on freight, and advising him to insure her. On the 30th

July, the plaintiff wrote to Macky, his agent, in Philadelphia, to abandon the vessel and cargo. Macky, after perusing the letters from the supra-cargo, advised him not to abandon the vessel, as he would thereby lose the freight she would earn from Malaga. The plaintiff, in answer to this letter, on the 3d August, desires him to abandon the cargo; observing, that if he should do so, as to the vessel, he should lose the freight. On the 5th, the agent went to the office, and gave in a written abandonment of the cargo; and showed the two letters, from the supra-cargo to the plaintiff. The president inquired if he did not mean to abandon the vessel; to which he answered, that he had no orders to do so. The abandonment was accepted in writing, and the president agreed to pay the loss; but required that the plaintiff should send on a regular *cession*, proofs of property, and a full disclosure of all circumstances respecting the loss, and respecting the vessel and cargo on the voyage. This answer was immediately communicated to the plaintiff, who, having now determined to abandon the vessel also, wrote on the 6th to his agent, to do so, and agreeing to send on a cession of the cargo, as demanded by the company; provided they would agree to accept the abandonment of the vessel also. The company refused the abandonment of the vessel; and, considering the refusal of the plaintiff to make a cession, as a waiver of his abandonment of the cargo, they declared themselves exonerated from their former acceptance of it, and refused to pay the loss on the vessel or the cargo.

The objections to the recovery were, 1st, that the insurance was on a voyage to Gibraltar, and that the bills of lading were to the Mediterranean generally; which circumstance, probably, produced the seizure and detention; and being therefore material to the risk, it ought to have been disclosed, that she was to take a general bill of lading.

2d. That the loss of the cargo was not total, as the supra-cargo was at liberty to go to any other port in the Mediterranean, except a British port, and the loss being thus partial; the su-

pro. cargo had the right to make it total, by a voluntary sale at Algesiras.

3d. That the vessel could not be abandoned, as she was at liberty at all times to pursue her voyage, and did in fact take in a cargo, on freight, for the United States.

4th. That, if the plaintiff had a right to abandon, he had not done so in a proper manner, or in proper time. As to the cargo, the refusal to make the cession, was a waiver of the abandonment, made and accepted on the 5th; and, it was the usual practice in Philadelphia, to make formal cessions in writing, of property abandoned. As to the vessel, the plaintiff elected not to abandon; and, when he changed his mind, it was then too late: nor was it done in due time.

5th. That the brig and cargo, purchased at Algesiras, were purchased with the proceeds of the cargo of the Monongahela Farmer; and, if the plaintiff had a right to claim for a total loss, the defendants were entitled to credit for the proceeds of that vessel and cargo.

6th. That, at any rate, the proceeds of that cargo, ought to be considered, so far as it goes, to have been invested in that purchase, to the amount of which investment, the defendants were entitled to credit; notwithstanding it appears, by the account rendered, that a great part of it was laid out in repairs of the Monongahela Farmer at Algesiras; and because, it is improperly made a charge against the *cargo*. Cases cited, 1 Espin. Rep. 237. Wallace's Rep. 33. Craig *vs.* Murgatroyd, Supreme Court, Pennsylvania. 2 N. Y. T. Rep. 290. 3 Reb. Rep. 240.

WASHINGTON, J., charged the jury. The first objection, if well founded, goes to the destruction of both policies; but, it appears, that, as it is usual to carry general bills of lading, if you should be satisfied of this, then the assured was not bound to mention the circumstance. It would rather seem, that the risk was lessened, than increased, by having a general bill of

lading. But, if it is intended to carry out this idea, you are the proper judges, whether the not disclosing the circumstance, was material to the risk. The important question is, whether the plaintiff can recover, as for a total loss on the vessel and cargo, or either; and, in considering each case, it will be proper to inquire, first, whether the plaintiff had a right to abandon; and, secondly, whether the abandonment was made in a proper manner, and was effected.

As to the cargo.

1st. Had the plaintiff a right to abandon? The cargo was destined for Gibraltar, but was captured and carried into Algeziras, from whence it could not be removed without security being given, not to carry it to a British port. This amounted to a complete destruction of the original voyage; and it appears, that the supra-cargo, who, upon the spot, must have been the best judge what it was most prudent to do, considered it most for the benefit of the parties concerned, to sell it there, under the sanction of the government. It does not appear that he could have done better, had he gone elsewhere; but, even if he could, he was not at liberty to leave the port, without giving security not to carry the cargo to a British port. He was the agent of the assured; and, I think, that as such, he could not, without necessity, convert a loss, but partial in its nature, into a total loss. But, here the voyage was broken up; it could not be further prosecuted; and, if he acted for the best, for all concerned, of which you are the judges, then the loss became total, and the plaintiff had a right to abandon.

2d. It is true, that, as soon as the assured receives notice of the loss, he must make his election to abandon or not; and, in the former case, he must, within a reasonable time, give notice of his intention. What is a reasonable time, must always depend upon circumstances, to be judged of by a jury. If he waits a reasonable time to obtain advice, whether he may legally abandon or not, the delay, being in all respects fair and bona fide, it might well enter into the consideration of the question,

whether the determination was communicated in due time. There may be other circumstances also, if he waits with a view to place the loss on the underwriters, events might turn up to induce it prudent or otherwise, although not but desirable before he has received any further information on the subject; the delay would be less excusable.

Now, in this case, the plaintiff made an absolute abandonment of the cargo, within five days after he appears to have received notice of the loss, which was accepted. It is said, however, that his refusing to make a cession, except upon terms with which the insurers were not bound to comply, amounted to a waiver of the abandonment. If a cession, as it is called, had been necessary to make the abandonment complete, there might be something in the argument. But, this is not the case. The abandonment amounts to a legal transfer of the right of the insured, and to enable the underwriters to pursue, to sue for, and to receive the property, as effectually as if a regular deed had been made to them. It is said to be the uniform practice in Philadelphia, for the insured to make a formal conveyance. This may be so; because, I presume it is never objected to. But, when it comes to be made a question, whether the abandonment is indeed, if the cession is refused, we must say it is not; because, such an instrument is not necessary to pass the right of the insured to the underwriters. The refusal, therefore, of the plaintiff to execute such an instrument, did not affect the prior abandonment, which had been made and accepted. It appears, that he was ready to send forward all such papers, as might be required to prove the property. Upon the policy on the cargo, therefore, the plaintiff has a right to recover the total loss.

Next, as to the vessel.

1st. Had the plaintiff a right to abandon?

It is true, the vessel was detained for a short time, with a view to ascertain the loss upon the cargo; but the captain was at liberty to [illegible] displeased with [illegible] he could not take the

cargo with him, without giving security, not to carry it into a British port in the Mediterranean. If the captain had landed his cargo immediately, there was nothing to prevent the departure of the vessel, which was in perfect safety, free from injury by any of the perils insured against, except a temporary interruption. It is said, that the voyage was broke up. As to the cargo, it was; and therefore the underwriters, on that and on the freight, are answerable; but this is nothing to the underwriters on the vessel. Suppose she had been met with at sea, by pirates, and plundered of all her cargo, and then dismissed; would the underwriters on the vessel be answerable, because *the object of the voyage* was put an end to? Certainly not. But it is contended, that she was detained for two months at Algeziras, as is proved by the depositions of the supra-cargo and mate. The conclusive answer is, that the same letters, which informed the plaintiff of the loss, informed him also, that the vessel was clear, and would proceed to Malaga, to bring home a cargo of wine; and the supra-cargo, to prove his idea of her safety, desired the plaintiff to abandon only the cargo. Knowing, therefore, that the danger was over, at the same time that he knew of the capture, it was not competent to the plaintiff to abandon. But, if these letters had informed the plaintiff, that the vessel was still detained, so as to authorize an abandonment, the plaintiff is not entitled to recover, as for a total loss on her; because, 2dly, the abandonment was not made in proper time, and in a proper manner.

As soon as the insured hears of the loss, he should make his election, and communicate to the underwriters his determination to abandon, if he chooses it. But if he makes his election not to abandon, and particularly, if he communicates this determination to the underwriters, he cannot afterwards change his mind, and say, he will abandon; and thus throw the whole loss on the underwriters. And here is the difference between the vessel and the cargo, in the present instance. In the latter case, he made his election promptly, to abandon, and it was accepted.

Martin, &c. Phœnix Insurance Company.

In the former, he first determined to abandon all; but adopting the advice of his agents, he directed them to abandon only the cargo; assigning the very reason, which should prevent him from afterwards changing his mind, namely, that he should, by giving up the vessel, lose the freight, which the latter from the supra-cargo induced him to accept. This letter, confining the abandonment to the cargo, was shown to the defendants, on the 4th, at the time the abandonment of the cargo was accepted. The plaintiff knew that he had barred himself of a right to abandon the vessel, by stipulating, afterwards, the acceptance of it, as the condition of his making a formal cession of the cargo. The plaintiff, therefore, cannot recover on the vessel, more than for any partial loss, which he may prove.

5th point. The argument, that the underwriter, in case of abandonment, is entitled to the proceeds of the thing abandoned, and if they be invested by the agents of the insured, in other articles which produce a profit, to those profits also, is well founded, but does not fit this case. It is clearly proved, and was at first admitted, that the brig and her cargo, purchased by the supra-cargo at Algesiras, was paid for, by bills drawn on the plaintiff, and by money received on letters of credit; the defendants at first supposed, and insisted, that this brig and her cargo should be accounted for. But it would seem, that they were afterwards satisfied upon this subject.

6th. It is contended, that the money, for which the cargo was sold, is stated to have been laid out in the repairs and expenses of the vessel, at Algesiras, which could not legally be done; and therefore, that sum, at least, must be considered as invested in the purchase of the brig and cargo, to the proceeds of which, the defendants are entitled. Whether the cargo could, or could not, be charged with the repairs and expenses, it is a sufficient answer to this claim, that they were in fact appropriated to the making of these repairs; and therefore could not also have been invested in the purchase. It is not enough to sanction the claim, to say, that they might have been

so invented; it cannot be supported, unless it appear, that in reality they were so invented, for the benefit of the insured, or for the consigned.

It, however, becomes a necessary question, what part of the proceeds of the cargo sold at Algeziras, is to go to the credit of the defendants. It appears, by the account, that the expenses, incurred during the detention at Algeziras, amounted to between four and five hundred dollars; and that the repairs of the vessel exceeded the sales of the cargo. As to the former, that may properly be a subject of general average; but as to the latter, they are certainly not chargeable against the cargo, either *in toto*, or as general average; since, being landed at Algeziras, it was to receive no benefit from the future repairs of the vessel. They may be charged to the ship, if they were rendered necessary, from any of the risks mentioned in the policy; and as the defendants are underwriters, on both ship and cargo, it will come to the same thing.

The counsel agreeing, that if the jury should find for a total loss on the cargo, and a partial loss on the ship, the adjustment would be made by consent,

The jury found accordingly.

Ingersoll, for plaintiff.

Rawle, and Hallowell, for defendants.

Note.—*Sarlos* vs. *Insurance Company of North America.*—The Court determined, that the protest of the captain, could not be read in evidence by either party.

Russel vs. Union Insurance Company.

Action on a policy of insurance, on the cargo of a vessel, in which the interest of the assured, was that of a surety for the payment of the value of the same, in case of its condemnation by a Court of Appeals in Spain, the cargo having been delivered to him for his indemnity.

This is an insurable interest, and may be covered by an insurance on the cargo, without the particular circumstances of the case having been communicated to the underwriters.

A factor has an insurable interest in goods, on which he has a lien for advances.

The restitution of the property to the original owners, and thus taking it out of the possession of the surety, and depriving him of his means of indemnity, was a loss by one of the perils against which the plaintiff had insured; and he was at liberty to abandon.

After a record of the proceedings of a foreign Court of Admiralty have been read in evidence, without objection, it is too late to object to it in argument.

THIS was a policy effected by the plaintiff, for all persons interested, on goods on board the Hibberts, at and from Havana to New York, to the amount of ten thousand dollars. The vessel and cargo were taken by a British ship of war; and it appearing, that the vessel and cargo belonged to British subjects, that they had been captured and carried into the Havana, and there proceeded against, she was ordered to be delivered up to the original owners, on salvage. It appeared, by the record of the proceedings before the Admiralty Court at Halifax, where this sentence took place; that the vessel and cargo were delivered up, by order of the government, at the Havana, to a Mr. Cruset of that place, on his entering into a stipulation, secured by a mortgage on real property, to the amount 32,000 dollars; to be accountable for that sum, the valued amount of vessel and cargo, in case the vessel and cargo should, upon an appeal to the Courts in Spain, be condemned as prize. This appeared, by the papers on board, and was confirmed by the depositions of

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may cover it under a policy on *the cargo*. The only instances, where the particular interest must be mentioned, are bottomry and respondentia. An expectation of profit may be insured. Grant vs. Parkinson, 1 Marsh, 111. 3d. That the letter from Cruset, stating his engagement on account of this vessel and cargo, and the stipulation which he had entered into, which was shown to the defendants; was a sufficient disclosure of the interest he meant to insure. 4th. That the loss of the possession by capture, was a loss within the policy. As to the proof of interest, it was contended, that the record having been read without opposition, it was to be considered as evidence.

WASHINGTON, J. charged the jury. The record of the proceedings in the Court of Admiralty, having been read without oppdsition, it is too late to object to it in the argument. Many inconveniences might happen, if the rule were otherwise. The party might be surprised, and lose the opportunity of supplying it by better evidence, if the objection had been made in time. From this record it appears, upon the papers found on board of this vessel, and which are copied into the record, that this vessel and cargo originally belonged to British subjects. That she was captured by a French privateer, brought into the Havana, and there proceeded against; but on what ground, does not appear. That, to avoid the expense to the captors of keeping her there, and the injury to the owners, an order was obtained from the government, to deliver her to a Mr. Frazer, on security, to abide the event of a final decision of the cause in Spain; and in case of condemnation, to pay the sum of 32,000 dollars, at which the whole was valued. Mr. Cruset being applied to, he gave the security, and took from the mate, (the captain having left the vessel,) a bill of lading in his own name. That this bill of lading was endorsed by Cruset, to Mr. Hill of New-York, with orders to sell the vessel and cargo, and to retain the proceeds, to reimburse and indemnify Cruset. This evidence proves the interest of Cruset; and the first question is, whether

it was an insurable interest, or not? It is clear, that a factor, who has a lien on goods in his possession, has an insurable interest. It also appears, that even in England, where wager policies are prohibited, that an expected profit may be insured on a valued policy. So the captors of a vessel, who depend on a grant of the prize from the crown, have such an expected interest, that they may insure it: *a fortiori*, may a special interest, like the present, be insured here; where there is no law which prohibits wager policies. The reason why, in almost every case, the assured is required to prove an interest, arises from the forms of policies, which are generally upon interest, as it may appear. Cruset had complete possession of this property, and had a right to retain it, until he was relieved from his engagements on account of it. Whether he might ever be called upon, in consequence of the stipulation he had entered into, was not more uncertain, than was the interest of the assured, in the cases cited. But he certainly had an interest in the property insured, until he was discharged or indemnified.

2d. The Court is of opinion, that this interest might be covered under a policy on the cargo.

3d. The interest which Cruset had, was a lien on this property in his possession, and which was to be sold for his indemnity. The risk insured against, was a loss of this property, and the means of his indemnity. This loss has actually happened by one of the perils insured against, though the property is restored to the original owners; and though the loss may not be total in its nature, if the sentence and restitution should not destroy the lien, yet it is such a loss as the assured might, by abandonment, throw upon the underwriters.

Verdict for plaintiff.

NOTE.—The averment of interest in the assured, may be either general or special. Under the former, the plaintiff may give evidence of any interest he may have. It is sufficient not only as to the *title* or claim of the assured; but also as to the *quantum* of interest. 2 Marsh, 509. In a policy on goods generally, the insured may give, as evidence of his interest, a mortgage or special lien. But, bottomry and respondentia, cannot be insured as goods. 2 Marsh, 613.

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WASHINGTON, J. As I entirely concur in the opinion given by the judge of the District Court on this question, and for the reasons assigned by him, I deem it unnecessary to discuss the subject much at large. It is admitted, that no decision is to be met with in the English Courts, precisely like the present; nor have we any municipal regulations, which govern the case. We must, therefore, resort to those marine laws, which have always been acknowledged as authority in England, as well as in most of the European commercial nations; unless, where they have been altered, or modified, by the laws of particular States; but which alterations are binding only on such States.

The seventh article of the Laws of Oleron declares; that, if a mariner be taken sick on the voyage, he ought to be put on shore, and care should be taken of him at the expense of the ship. When the vessel is ready to sail, she is not to wait for him; but, still, he is to be entitled to his full wages, if he recover; and if he does not, his wife, or next of kin, is to have them; deducting only such charges as the master has been at for him. Now, the only questions in this case are, first; did the mariner die on the voyage? and, second; does the expression, "full wages," in the above article, mean such as he had earned by his services, to the time of his death, or such as he would have earned, had he lived and served out the whole voyage to Philadelphia? Most unquestionably, the deceased was bound by his contract to perform the whole voyage, which is described in the articles to be, from Philadelphia to Batavia, and back again; and he would have forfeited the whole, had he deserted the ship, at any time previous to the vessel's return to Philadelphia. I agree with the judge of the District Court, that the stipulation to pay wages by the month, does not break the entirety of the contract for the voyage, but only furnishes a rule to adjust the quantum for the voyage. It protects the owners against an overpayment, in consequence of a short voyage; and the mariner against the risk of receiving too little, in case of a

long one. It prevents either from speculating upon the other, by accommodating the reward to the length of service.

2d. Does the expression, "full wages," apply to what would have been due, if the mariner had served out the entire voyage; or, are we to limit it to such as have been earned by services performed? If a certain sum for the voyage be agreed upon, that sum would constitute the full wages, and is distinguishable from no wages at all, as where they have been forfeited, by the misconduct of the mariner; or wages *pro rata*, where they have been partly earned, and are not forfeited. But, every doubt with respect to the meaning of these expressions, is cleared away by the decision in the case of Chandler *vs.* Greaves. (a) A mariner was engaged on a voyage from London to Honduras, from thence to Philadelphia, and back to London. The articles were drawn in the usual form, and such I take to be the articles in the case now before us. The mariner being disabled, and totally disqualified from rendering any future service on the voyage, was left at Philadelphia, and the vessel returned to London. The Court determined that he was entitled to his full wages, and he accordingly recovered the same wages to which he would have been entitled, had he proceeded with the vessel to London. This case not only determines a principle, which is, in all its parts, applicable to the present; but it decides, that full wages, mean the aggregate amounts of all the monthly sums, which would have accrued, upon the completion of the voyage. This decision is expressly founded upon the seventh article of the Laws of Oleron, which entitles a sick sailor, who is left behind, to full wages; and the same article declares, that what such sick sailor would be entitled to, passes to his widow, or next of kin, in case of his death.

I am, therefore, of opinion, that the decree of the District Court ought to be affirmed.

Milnor, for appellee.

Moylan, for appellant.

(a) 2 H. Blac. 606, *note*.

JOY & LAWRENCE vs. CHARLES WIRTZ & W. WIRTZ ET AL.

A & B were indebted to the plaintiff and others; and A having become insolvent, and a commission of bankruptcy having issued against him, the creditors of A & B joined in releasing A from all the debts due to them from the firm of A & B. The commission of bankruptcy being superseded, the plaintiffs filed a bill on the equity side of the Circuit Court, to set aside the release. Held, that all the parties to the release of A should have joined in the bill; and the demurrer, for want of such parties, was sustained.

Where creditors are to be paid out of a particular fund, or are all united in the same transaction, so as to produce privity between them; all should join in a bill which may bring their proceedings into the consideration of a Court of Chancery.

To set aside a release, in such a case, all the parties to it must apply by name to the Court; and one cannot act for the whole.

THE defendants having been indebted to the plaintiffs, and to several other persons, and the defendant, Charles Wirtz, having got into insolvent circumstances, his property, under the Bankrupt Law of this State, was assigned over to certain persons, for the benefit of his creditors; upon which, they executed a release to him of the debts due to them, from Charles & William Wirtz. The commission of bankruptcy, being afterwards superseded, because the petitioning creditor was not such a person, as was intended by the law; the plaintiffs brought their action against William Wirtz, to recover the debt due from Charles and William Wirtz; but failed, in consequence of the above release, given to one of the joint debtors, being pleaded. This bill is filed by two of the creditors, who joined in the release, for the purpose of having it set aside, and for obtaining payment of their demand, out of the estate of the said William Wirtz, in his possession; and to set aside certain voluntary conveyan-

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the above sum, being the amount of the advances made as above mentioned. The defendant put in two pleas. First; the general issue: and, secondly; an attachment by Barry, Cole & Barry, against Corser, on which the defendant was summoned, as garnishee, in September, 1803, on which judgment was rendered in December, 1804, for 2029 dollars and 93 cents. To the second plea, the plaintiff replied, in substance, that this debt was assigned to, and vested in Petit & Bayard, long before the suing out the above attachment; on which issue was joined.

On the trial, it appeared that Corser continued debtor to Petit & Bayard, to a larger amount than the sum now demanded; and, it was agreed, that the jury should only try the question, whether Craig was liable to Corser in any, and what sum; reserving the question, whether the attachment and judgment, under the circumstances of the case, are a bar to the recovery of the sum which the jury should find, or to any part of it.

The only question for the jury to decide, was, whether Chanceaulm had authority to borrow this money, to lay out upon the repairs and disbursements of the vessel. The jury found a verdict for the whole sum, with interest.

The cause coming on upon the point reserved, Ingersoll, for the plaintiff, contended, that the bill of exchange was an assignment of this debt to Petit & Bayard; and, though the bill being refused acceptance, their title was only an equitable one; yet, that was sufficient to protect the debt, in the hands of Craig, from the attachment of the creditors of Corser. Cases cited, 1 Atkinson, 124. *Ex parte*, Bias. 1 Stra. 165, 166. Amb. Rep. 297. 1 Ves. jun. 280. Doug. 365. 1 Dallas, 139. 2 Idem, 215.

Hopkinson, on the other side, insisted, that a bill, drawn on the personal credit of the drawee, generally does not operate as an appropriation, or assignment of the debt; and that it is absurd for Corser to recover this money, upon the ground of showing that Petit & Bayard, not he, is entitled to it. That

great mischiefs would happen, if these latent equities receive the sanction of Courts; particularly, if they are to be so far noticed, as to overreach the judgment obtained by another creditor upon attachment. But that, at any rate, Petit & Bayard could not be noticed, unless it appeared on the face of the proceedings, that the suit was brought for the use of the equitable claimant. Cases cited, 2 Dallas, 276, 1 Ves. 332. 1 Ves. jun. 280.

WASHINGTON, J., delivered the opinion of the Court. The point reserved is, whether, under the circumstances of this case, the plaintiff is prevented, by the attachment and judgment, from recovering the sum found due by the verdict, for the use of Petit & Bayard. In considering this, there are two questions which present themselves: First; did the bill of exchange, separately, or taken in connexion with the letter of the 22d March, from the plaintiff to Petit & Bayard, amount to an assignment and appropriation of the debt due from Craig, (and for which the bill was drawn,) to Petit & Bayard? and, secondly; if it did, is that right so far protected by law, that it could not be attached, in the hands of Craig, by other creditors of Corser, so as to defeat the right of Petit & Bayard? First; what is the nature of a bill of exchange? The definition of it is, "an instrument, by means of which a creditor may assign to a third person, the legal, as well as the equitable interest in a debt raised by it, so as to vest in such assignee, a right of action against the original debtor." (*a*) It is an open letter of request, from one person to another, authorizing that person to pay the sum therein mentioned, to a third person; and is an assignment, to such third person, of a debt due from the drawee to the drawer. If the drawee acknowledge that the debt thus assigned is due, by accepting the bill, then the holder may

(*a*) 1 H. Black. 602. Chelty, 1, 2.

recover against him in his own name; bills of exchange being considered in favour of commerce, exceptions from the common law rules, respecting the assignment of choses in action. If the drawee refuse to accept, and pay the bill, the right of the holder, to the debt once assigned to him, is not thereby impaired; although he may not be entitled to recover the same in his own name, for the want of a promise to pay. But he may sue the drawer, or the drawee, in the name of the drawer, for the debt originally due, in consequence of the implied contract of the assignor of a chose in action, that the debtor shall pay, and on failure, that the assignor will. The bill being retained after protest, by the assignee, is evidence, that the amount has not been paid by the drawer, or any of the endorsers. I see no possible mischief which can result from this doctrine. For, if after payment refused, and protest made, the drawee should pay over the funds in his hands to the drawer, or to his order, without notice from the first assignee, that he should retain the bill, and look to him for the amount, so far as he was bound to pay; this would be a good defence against a suit brought in the name of the drawer. If, then, the debt in question was assigned to Petit & Bayard, by the bill of exchange, and the same remains still unsatisfied to them, and unpaid by the defendant; can third persons, creditors of Corser, but not claiming as assignees from him, defeat the right of Petit & Bayard, by an attachment served on Craig, as the debtor of Corser? It is now a long time since those objections, which once existed to the assignment of choses in action, have ceased to be more than formal. Courts of law, imitating the example of Courts of equity, take notice of such assignments, and will, to every substantial purpose, give them effect; although they have not yet ventured to sustain an action brought in the name of the assignee. But the beneficial interest vested in the assignee, is so far regarded, that the defendant is allowed to set off a debt due from the assignee, in the same manner, as if the action had

been brought in his name. (*a*) Regarding Petit & Bayard, therefore, as being substantially the plaintiffs in this action, and beneficially entitled to the debt, upon which this attachment is levied; they have a right to recover under the name of Corser, notwithstanding the attachment and judgment against him in the State Court.

Judgment must be entered for the plaintiff.

(*a*) Whether it is necessary, that the interest of the *cestui que trust*, should be mentioned in the writ and declaration, need not be determined; because, if such be the rule, it is sufficient, if it appears in any part of the pleadings; and this replication states fully, the title of Petit & Bayard; which title the second issue is intended to try. See Viner *vs.* Keeley, 1 T. Rep. 619.

BROWNE'S LES[illegible]

Ejectment. The lessor of the plaint[illegible]
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of a large body of lands in Pennsy[illegible]
originally in three trustees, who, b[illegible]
veyed the land, the object of this su[illegible] with other tracts, by lease, for six years; subject to an annual rent, and to a covenant, by the lessor, to bring suits to recover the land, and, at the end of the term, to deliver it up to the trustees. Held, that the title of the lessor of the plaintiff, was sufficient to give the Circuit Court jurisdiction of the case.

The lessor of the plaintiff had an equitable estate in the land, before the conveyance by the trustees; and the Court could have compelled them to convey the legal estate to him, in which case, he could have maintained a suit in the Circuit Court. The conveyance of the trustees, having been voluntary, does not impair the jurisdiction.

A tenant in common, who is a citizen of another State, may sue in the Circuit Court for his portion, although his co-tenants, who are citizens of the State where the lands are, cannot maintain such a suit.

A conveyance of lands, of which the grantor is out of possession at the time of the execution of the deed, is valid, according to the common law of Pennsylvania.

THE defendant filed a bill, on the equity side of this Court, against the lessor; charging, that his title to the land in question, was derived under some colourable conveyance, by persons living in this State, with intent to give jurisdiction to the Circuit Court; and praying a full discovery. The answer states, that the defendant in equity, is a resident of New-York; and that he is a member of the Population Company, and holds 165 out of 2500 shares in a large body of land, of which the premises in question are a part. That the legal estate was vested in three trustees, residing in Pennsylvania, who, on the fifth day of October, in the year 1805, conveyed the land in question, being 400 acres, as also about 19 other tracts, of the same

be[illegible]ntity, by way of lease, for six years, from first January, 1805; rendering for each 400 acre tract, an annual rent of 40 dollars; by which lease, the said defendant covenants to bring suits for, and to recover said lands; and, at the end of the term, to deliver up the same to the trustees, who are to allow a certain sum for the improvements: that no other person is interested with him under the lease: that this suit has been instituted by the desire of the managers of said company; but, that he did not institute it for the purpose of trying the right of the company, but to recover the possession: that he intended to bring the ejectment before it was brought; but he first heard of its being brought, by a letter from one of the trustees, who is also attorney in the cause, dated 22d October, 1805; who, at the same time, informed him, that the leases were executed, and the counterparts ready to be executed. The suits were brought to October term, 1805.

Rawle and Levy now moved, on this answer, to strike off all these ejectments, upon two grounds: first, that the tract in dispute, is not worth 500 dollars; but no evidence of this was produced; and, as authority on this point, they cited cases, where Judge Chase, at the Circuit Court of Delaware, called upon the plaintiff to prove the value of the land in dispute; and, failing to show its value to amount to 500 dollars, he struck off the suit. Secondly, that the conveyance is merely colourable, as appears from the answer, and the circumstances of the case; viz. the execution of the deed, and bringing of the suit without the knowledge of the plaintiff: the short term, and high rent for wild, uncultivated lands, holden by adverse possession. 2 Dallas, 381. 365. 3 Idem, 378. Thirdly; that the lease is void, (the grantors being out of possession,) by the common law. The Court informed the counsel, that this question was at rest in this State, and that this Court had determined, in Hurst *vs.* M'Neil, that this was no objection.

The defendant's counsel also offered some evidence to discredit the answer, which, being opposed by the other side, the

answer being conclusive; (see Blight and Hopkins,) Rodney insisted, that this rule applies in Chancery, where no replication is put in; it is not the case, where the answer is made use of at law. He cited Hinde's Prac. 37. Douglass, 788. Peake's Evid. 84. 37. (a)

On the other side, Ingersoll and Lewis insisted, that the plaintiff has an equitable title, and also a legal title, and that this is like the case of Hurst and M'Neil: that plaintiff may sue on an equitable title; and, if it be objected, that he cannot recover on it, though in Sims and Irvin the decision was otherwise; still the objection should be made at the trial, and it is no reason for dismissing the suits.

By the Court. The lessor of the plaintiff has an equitable title, as tenant in common, to 165 out of 2500 parts of the entire tract of land vested in the trustees, for the benefit of those who compose what is called the Population Company. The trustees have conveyed to the lessor of the plaintiff in severalty, the lands in question, for the term of six years; and if they had conveyed it to him in fee, though for the express purpose of enabling him to recover on the law, instead of the equity side of this Court, how would this oppose either the letter, or spirit of the Constitution and Act of Congress? Not the former, because the parties are citizens of different States; nor the latter, because this Court has jurisdiction of the cause without the deed, and it is merely *the mode* of proceeding, which is changed by it. Suppose, instead of 1800 partners, there were but two, the one living in New-York, and the other in Pennsylvania, and, that the trustee should convey to the New-York citizen, one-half of all the land in severalty. Upon what ground could his right to recover that half be resisted, even although

(a) *Query*, as to this point, whether there is not reason for this difference; because, in equity, if plaintiff do not reply, defendant cannot take depositions to support this answer, nor indeed can a commission go. W.

it appeared, that, as soon as he should recover, it was his intention to vest one-half of the land recovered, in the other tenant in common? Could he not, without the deed, have recovered the same land, by filing a bill on the equity side of this Court, against the trustees and the other equitable owners, so as to compel the trustees to convey to him in severalty his half of the land; and after that, could he not institute suits on the law side of this Court, against the tenants in possession? If the trustee could be compelled to make such a conveyance, and this would most certainly be the case, though the plaintiff should state in his bill, that his object was to sue on the law side of this Court, as soon as the conveyance was made; may not the trustee make the conveyance, without a decree against him? The Pennsylvania tenant in common, could never sue in this Court, either at law, or in equity, for his part; nor would the avowed intention of the New-York tenant, to convey one-half of the land to his companion, after the recovery; be an objection with this Court, on its equity, side to ordering a conveyance. The objection could only arise, when the New-York tenant in common should attempt to recover more than his proportion under his existing equitable title, or under a colourable conveyance for such purpose. I cannot, I confess, distinguish this case from that of Hurst and M'Neil; and, as we are not satisfied, that that opinion was wrong, we think it right to decide this question in the same manner. At any rate, this motion is improper at this time; because, if the deed be good, the plaintiff may maintain his ejectment upon it, beyond all dispute; and, if void, so that his only title is an equitable one, the objection to his recovery, on such title, can be only proper at the trial.

Rule discharged.

Morris *vs.* Hurst.

In an action of *assumpsit*, if one party relies upon an account delivered by the other party, without other proof to establish his demand, the party producing the account may discharge himself, by relying on the items of credit, on the other side of the account.

If the credit side of an account is taken to charge the person who delivered it, the items on the debit side must also be admitted as proved by the account.

This cause came on under a rule for a new trial, on the ground of surprise, and misdirection. The plaintiff, having delivered in an account before bringing the action, in which many years transactions between the parties were included, to a considerable amount; the plaintiff only proved one item, of a modern date, to the amount of about £230, being rents received by the defendant, which belonged to the plaintiff. The defendant attempted to meet this demand, by selecting out of the account, a credit to a larger amount, but without attempting to prove it; relying on it, as an admission by the plaintiff. The Court informed the counsel, at the trial, that if he relied upon the credit side of that account, as evidence against the plaintiff, he must admit the debit side, unless he could falsify it by evidence. Upon this, the counsel let the jury go out, who found the £230, with interest, which had been established.

M. Levy, now contended, that after receiving the account, he expected the plaintiff would be obliged to go through the whole; and that he could not pick out one item, and upon proving it, recover to that amount; that therefore he was surprised at the trial. 2d. That though a defendant may, by his answer, charge himself, his answer is not always sufficient to discharge him; and therefore, the account rendered, was

good evidence against; but not for the plaintiff. Gilb. Law of Evid. 152. 2 Vern. 194.

By the Court. If a man is called upon to render an account, for the purpose of enabling the plaintiff to establish a demand against the defendant, if he is obliged to rely upon this statement to charge him; the defendant is entitled to be discharged by it. If he is called upon to state, whether a particular sum is not due, and the defendant states, that it was to be paid on a condition not performed, you must take the acknowledgment altogether. An account is composed of items, and they are placed on the debit and credit side. If the defendant produces the account, you can no more take the items on the credit side to charge him, and reject the debits; than, in the case first supposed, you can take the acknowledgment of what was agreed to be paid, and reject what he states, with respect to the condition. The verdict therefore was right.

Rule discharged.

LAMALERE *vs.* CAZE.(a)

The plaintiff and the defendant were partners in a particular shipment, made by the former to the latter; and the proceeds thereof were to be remitted to the plaintiff, to be invested in another shipment on the same account. No second shipment having been made, the plaintiff claimed half the proceeds of the first joint transaction, and instituted this suit for the recovery thereof. It was held, that although the defendant alleged he had shipped a sum of money to the plaintiff, amounting, as he stated, to more than his portion of the proceeds, the action of *indebitatus assumpsit* could not be sustained, as the accounts between the partners could not be considered as settled.

To constitute a settlement of accounts between partners, all must consent to and be bound by it, or none can be; and this consent must be express, or to be implied from circumstances.

Until a partnership is dissolved, the accounts of the partners liquidated, and a balance struck, one partner cannot sue another in an action of *indebitatus assumpsit*.

THIS was an action for money had and received, by one partner against another, for the balance of a particular shipment, in which they were jointly interested in profit and loss; and the proceeds, when remitted by defendant, from St. Thomas, were to be invested in another cargo, to be sent out on the same account. The defence at the trial was, that 1,100 dollars, which was more than the balance of the cargo not remitted, was sent in a certain vessel, which was lost, and with her the money. The defendant, on his arrival, being called upon by the wife of the plaintiff, gave different and contradictory accounts of the remittance; and to the agent of the plaintiff he stated, that he had sent, in the vessel lost, the money due to plaintiff; which sum was ascertained to be 1,100 dollars; and that he had writ-

(a) See ante, page 413.

ten to plaintiff to pay 160 dollars, part of that sum, which exceeded the sum due the plaintiff, to the order of the defendant. The jury, believing the witnesses, who proved the contradictory accounts given by the defendant, of the transaction, rather than the captain, who swore positively to the shipment and loss of the money, found for the plaintiff; but a much less sum than was claimed, reserving the point, whether this action could be sustained.

The question now came on, upon a motion to enter up a nonsuit. Mr. Reed, in support of the motion, insisted that the partnership was still continuing, notwithstanding a new cargo was not sent out, and that it was not to terminate till that was done, or till it was dissolved by the parties. That until dissolution, and an account liquidated by the partners, and a promise by one to pay the balance, this action, or *indebitatus assumpsit*, will not lie. 2 Durn. & East, 478, 479.

Duponceau, against the motion, argued, that the partnership was ended, by the defendant's not remitting; and that one partner alone may dissolve, though, if contrary to agreement, he may be liable to his partner in damages. He admitted, that this action, by one partner against another, cannot be maintained, unless after the dissolution the balance was struck, and a promise to pay. But that the partnership here was dissolved, and the defendant had acknowledged what was the balance due, and said that he had remitted it; which allegation, however, is falsified by the verdict. He read 2 N. Y. T. Rep. 293.

By the Court. The law being admitted, there can be no doubt in this case. Even if the evidence proved more clearly than it does, that the defendant acknowledged the balance due the plaintiff to be the 1,100 dollars, after deducting the 160 dollars, this is not a balance upon a *settled account*; for, to constitute such an account, all the parties must consent to it; all must be bound by it, or none are. This consent, must be either express or implied. I am inclined to think, that if, after dissolution,

one partner were to state the account, and send it to the other, who should by his conduct show his acquiescence, by retaining it for a considerable time, without objections, that he might be bound by that statement, as well as the other, and that this action for the balance, might then be maintained. But, in this case, the plaintiff never did assent to the balance, as stated by the defendant, but on the contrary, claimed in this action more than the 940 dollars, and much more than the jury supposed to be the balance; which shows that the balance was not struck, so as to bind both parties. The action, then, cannot be sustained.

Nonsuit awarded.

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however, to which the suits were returned, Ingersoll and
Rawle were employed, to appear to all the suits, and received
a payment of some money. They afterwards received other
fees, for the arguments in the two causes which were tried.
Mr. Gibson was offered an additional fee, but from delicacy to
the other gentlemen, refused. The names of all the gentle-
men were entered on the docket for the defendants, and all the
rules taken in the causes, defences, and motions, were taken
and made by Ingersoll and Rawle. No warrant of attorney was
given to either, nor is it usual in this State to give them; though
it has sometimes been done.

By the Court. If a warrant of attorney had been given to Mr. Gibson, the gentleman first employed, he would have been exclusively entitled to the attorney's fees. But this not being the case, the defendant had a right to employ as many attorneys as he pleased; and it appears that the three gentlemen were employed generally, to appear, without any distinction made or contemplated between their duties as counsel and attorney. We can only judge of the nature of their employment, by what they did, and all of them appear equally to have performed the duties of attorneys. All, therefore, are equally entitled to divide the attorneys' fees.

Binney and Hopkinson, for Ingersoll and Rawle.
Lewis and Levy, for Gibson.

Russel *vs.* Union Insurance Company.

Motion for a new trial, on the ground that the Court had allowed a record of a foreign Court of Admiralty, to go to the jury as evidence; the same not having been legal testimony. The record had been read on the trial, without objections. The Court refused to grant a new trial, as the application is too late.

THIS cause came on upon a rule for a new trial. (*a*) The ground was, that the Court was mistaken in point of law, in stating that the papers, which respected the interest of the plaintiff, in the record of the Admiralty Court at Halifax, was evidence, and therefore, that the plaintiff, not having proved his interest by other evidence, ought not to recover. Tilghman and Dallas, in favour of the motion, contended, that as the *sentence and proceedings*, were clearly legal evidence, the defendant's counsel, could not properly have objected to the reading of the whole record; but still, the papers found on board, were not proper evidence, and their omitting to object to the reading of them, did not make them evidence. That in argument, this was contended for, and that that was the proper stage of the cause, to make the objection. Where a record is offered in evidence, the whole must be read. Gilb. Evidence, 19. 23. We informed the plaintiff's counsel, before the trial came on, that we should object to their proving the interest by that record.

Ingersoll and Rawle, against the motion. The time to object to improper evidence, is, when it is offered; but it comes too late, after the counsel have begun to sum up; and if part of a record be improper, the objection should be made when it is offered to be read.

See ante, page 409.

WASHINGTON, J. I am sorry that this motion is made; for, though every care should be taken to protect insurance companies against frauds, and to give them every legal advantage, whilst they are legally enumerated from the risk, yet they ought, I think, to refrain from objections which have an appearance of being captious. If, however, they choose to make such, they must, like all other suitors, be entitled to the benefit of them, where they are well supported. It was on this account, that I thought it highly proper, at the trial, that they should allow the record to be read through, without objection, as it was plain, that the defendants relied upon a legal question of great difficulty, connected with the merits; which was, whether the plaintiff had an insurable interest or not? I think the counsel are not obliged, in any case, to make objections which go merely to form, and which are only calculated to produce delay, or to turn the other party around, to bring another action: and, one or the other of these, would have been the case, had the objection been made in time. The case might have been different, had there been any well grounded reason to question the authenticity of these papers. But, who could doubt, that the papers found on board this vessel, showing the interest of Cresset in the cargo, in consequence of the responsibility he had entered into for the owners, were true and genuine? How else could she have been released? Having a bill of lading for the whole cargo, why should he send with it papers, to prove that he had only a special interest, unless such was the fact? I do not admit, that all the papers and evidence, found in a record of a Court of Admiralty, form a part of that record, or must necessarily be read, in an action between insured and insurer, because the sentence is read. The sentence and proceedings are certainly proper, to show the condemnation, and the grounds upon which the Court proceeded. But, it does not follow, that every paper stuffed into the record, unconnected with the condemnation, and affecting third persons only, must of course be read, if the sentence be.

S. K.

If an objection was intended to be made to the evidence of the papers found on board, and set forth in the record; it ought to have been taken, when an attempt was made to read them; or at any rate, before the counsel for the plaintiff had finished his opening. Were a different rule to be pursued, great inconveniences and irregularities would follow. If it appeared, that injustice had been done, in consequence of the reading of these papers, it would be a sufficient reason for setting aside the verdict. But there is no ground laid for such a suggestion; and therefore, the verdict ought to stand.

Judge Peters concurred. He added, that he thought, as Cruset had, in his letter, which was shown to the company, stated, that these papers would be on board, that he was bound to have them there; and, it appearing by the record that they were so, strengthened the position of the plaintiff's counsel, that they were proper evidence.

Rule discharged.

Simonds vs. Union Insurance Company. (a)

Where the supra-cargo of a vessel which had been captured, the voyage broken up, and the cargo abandoned to the underwriters, has invested the proceeds of the outward shipment in another cargo, upon the sales of which a freight has been made; the underwriters are entitled to the profit.

When the outward voyage of a vessel is broken up, and the vessel insured earns freight on her return voyage; the underwriters upon her, on her outward voyage, have no claim to the freight earned after the voyage insured has been broken up.

RULE for new trial. Dallas, for the rule, argued, 1st. that the only ports to which this vessel could go, were Cape François, or some port in the bite of Leogan; and as the whole island was in a state of blockade, the underwriters would have been exonerated, if she had attempted to enter either of the ports to which she was destined; and consequently, that they could not be liable, if she was prevented from entering them. The proof relied upon, to establish the fact that the whole island was under blockade, was the captain's protest.

2d. That the proceeds of the cargo, were invested in another cargo, taken in at Jamaica, to which the defendants were entitled, but it had not been allowed.

3d. That the return freight ought to have been allowed.

WASHINGTON, J. The deposition of the captain is positive, that only Cape François was blockaded; and there is reason to believe, from the whole evidence, that she was warned off from St. Domingo, in consequence of a suspicion that she had gunpowder on board. The protest of the captain was read, merely to impeach his deposition, and the jury believed,

(a) See *ante*, page 382.

that only the Cape was blockaded. The vessel was compelled by force to go to Jamaica, and there to end her voyage, which was a complete destruction of it. The plaintiff of course was entitled to claim for a total loss.

2d. No evidence was given, of what were the proceeds of the homeward cargo, nor was it made a point on the trial. It is as likely that there was a loss, as a profit. If, however, the return cargo was purchased with the proceeds of the outward cargo, the underwriters should have credit for the proceeds of it, if there was any profit. As to the proceeds of the cargo, as it was sold at Jamaica, it was allowed. If more was made, the defendants should be credited for them. But this is no reason for setting aside the verdict, though it may be a reason for this Court relieving in another way.

3d. This claim is totally without foundation. The voyage was to have been out and home; but being broken up, it terminated at Jamaica; and the defendants might as well insist upon all the freights, which this vessel might have earned, if she had gone from Jamaica on a trading voyage to Europe, or the East Indies, until her return; as to the freight from Jamaica to the United States.

Rule discharged.

JACKSON *vs.* BAKER. (*a*)

Motion for a new trial.—Where an agent, who has sold the goods of his principal, has taken a bond for the amount of the sale, in place of the simple contract debt originally contracted for the goods, and has included in the bond a debt due to him on his own account, by the debtor for the goods; a demand of the bond, before action brought against him by the principal, for the proceeds of the sale of the goods, is not necessary.

Aliter, if the bond had not been taken for any sum but that due for the goods of the principal.

RULE for new trial: 1st. Because the defendant was not answerable, until he should have received the money. 2 Dallas. 134. 2d. That *indebitatus assumpsit* for money had and received, will not lie in this case.

On the first point, I repeated what was stated in the charge to the jury. (*b*) Secondly. That the conduct of the defendant, by extinguishing the original debt, and destroying all privity between the plaintiff, and the person to whom the goods were sold, is to be considered as a receiver of that debt, to the use of the plaintiff, as much so, as if he had released the debt.

Rule discharged.

(*a*) See *ante*, page 394.

(*b*) The principal ground used on this argument for a new trial, was, that the plaintiff ought to have demanded the bond, before he brought the suit. The Court, in answer to this, observed, that if a bond had been taken for this debt alone, this argument might have weight in it. But, as it was mixed with the defendant's money, such demand was unnecessary; because, the plaintiff could not have compelled the defendant to deliver the evidence of a debt due to the defendant, though in part it contained money due to the plaintiff.

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By the Court. The replication is certainly double, as either non-payment on the day, or non-acceptance in satisfaction, is an answer to the plea, though perhaps not a legal one; but if not so, both together cannot be. They are perfectly distinct matters, and not the component parts of a plea. But, as this determination would require us to decide upon the validity of the bar set up to the plea, which is attended with great difficulty, we think it best to adjourn the cause to the Supreme Court, upon a disagreement of the judges; which, however, is not real.

Dallas, for United States.
Rawle & Tilghman, for defendants.

Note.—This opinion affirmed by the Supreme Court, February 1808. Cranch.

KINGSTON *vs.* KINCAID ET AL.

Exceptions to the report of referees.

It is a general rule, according to the law and practice of Pennsylvania, that awards shall be so plainly expressed, that, by a fair construction of the whole instrument, or by reference to something connected with it, the parties may know precisely what they are to do. If certainty can be obtained, by a reference to something *dehors* the award, the party may, by an averment, cure an objection, otherwise fatal.

In the case of common awards, not under the laws of this State, the arbitrators cannot be called upon, either at law or in equity, to discover the grounds upon which they made their award.

When, after sundry meetings, and after every effort to obtain a coincidence of opinion among them, the third referee, who would not sign the award, withdrew, and declared that it would be unnecessary to call upon him, to meet on the subject of the reference again; the remaining two referees had a right to proceed, and make an award.

THIS cause came on upon exceptions to a report, made under a rule of Court, referring the cause to three referees, or any two of them. The report found 10,000 dollars due to the plaintiff, reserving to the Court, the question as to provisions delivered, or payments made to Henry Kingston; and, if allowed by the Court, then to be deducted from the sum awarded; as also a bill of exchange for £200, drawn by H. Kingston, [illegible] dorsed by the plaintiff, which is to be deducted, with damages and interest, on the bill being delivered up to the plaintiff. The exceptions went, some of them, to the merits, and some of them were to the form of the report, as not being final, or certain. Another exception was, that only two of the referees decided, without giving notice to, or consulting with the third. Upon the examination of the referees, it appeared, that the three referees met often on the subject; but, as one could not agree with the other two, on the important points in dispute,

he said it was unnecessary to call upon him again, and he withdrew. Some evidence was given by the referees, to show what was the nature of the claim for provisions furnished, and payments made to Henry Kingston, and fixing their amount. It was argued by Rawle and Gibson for defendant, and Ingersoll for plaintiff.

WASHINGTON, J., delivered the opinion of the Court. The objections made to the form of this report are, that it is neither certain nor final. The rule, as to awards in general, and which applies with equal reason, to reports under the Act of Assembly of this State; is, that they should be so plainly expressed, that, by a fair construction of the whole instrument, or by reference to something *dehors* the award, the party may, by averment, cure an objection, which might otherwise be fatal. As, if the award be, that one of the parties should pay his proportion of the loss, which should happen to the ship during the voyage, and of the expenses of the voyage; or to pay the charges of a suit; or all such moneys as the other had expended in the prosecution of a suit; these uncertainties may be cured, in the first instance, by calculation; in the second, by reference to the attorney's bill; and, in the third, by showing, in fact, what sum was laid out. But, if there be no means of arriving at a reasonable degree of certainty, by the aid of the thing referred to, the uncertainty cannot be helped by averment; as, if the defendants be ordered to pay so much as is in conscience due, or to pay for a certain quantity of wheat, so much as that article is then sold for, without naming some place, there is no possible means of ascertaining what sum should be paid; and the arbitrators were the persons chosen to ascertain it.

The principles upon which these rules are founded, apply with equal force to reports made under rules of this Court, in virtue of the law of this State, as to common awards. I can perceive no reason for a more liberal extension of them to the

former, than to the latter. There is, I admit, an important difference between them, as to the means of obtaining information of the grounds on which the arbitrators proceeded. In the former, the referees may be called upon to disclose the facts upon which they formed their opinion; whereas, in the latter, this cannot be done at law; and even in equity, the arbitrators may demur to a bill to compel them to discover the grounds on which they made their award. We have examined all the printed cases, adjudged in the superior Courts of this State, upon the subject of these reports, made under rules of Court; and cannot find a single instance, in which the referees have been called upon to explain, what, upon the face of the report, appeared vague and uncertain. In Young *vs.* Reuben, $75 was reported to be due on a certain day, prior to the meeting of the referees, with interest on the same. But, the report was set aside for uncertainty, although the referees must have meant, that it was due on the day the report was made, and might so have explained it, had they been called upon. Perhaps the Court might, without going too far, have so construed the report; but, it proves, that a remedy for the mistake was not sought for in the explanation of the referees. In Brown vs. Scott, where five several actions were referred, and only one report made, the majority of the Court were of opinion, that the agreement of reference, amounted to a consolidation of all the actions, and, on that account, confirmed the report; but, it seems never to have occurred to either of the judges, to cure the mistake by examining the referees, with a view to divide the sum, as was proposed by the counsel. In the case of Hart and James, the report was set aside, because the referees had consolidated two actions, and the Court refused to receive a supplementary report, which the referees had voluntarily given, stating how much was due in one action, and how much in the other. The objection to the last report, as being irregular and *ex parte*, was, we think, a solid one; but, still, there was no attempt to cure the mistake, by examining the

referees in Court. The only points decided in Kunckle and Kunckle were, that, if one of the parties be ordered to perform a specific act, he may be compelled by attachment to do it; and, that it is no objection to entering up judgment for the other, that the remedy for each party is not the same. The Court also determined, that, in general, they would see that the report was executed, agreeable to the intent of the referees, and the justice of the case.

That Court, possessing a mixed jurisdiction of law and equity, might, very properly, impose equitable terms on the parties; and so would this Court, either on its law, or equity side, where a proper case for their interposition was made out. But, no question arose in that case, upon the form of the report.

Concerning enquiries, then, by the rules above laid down; which are not opposed, but, on the contrary, seem to be sanctioned, by the decisions of the superior Courts of this State; it remains to be inquired, whether the objections to the present report, are well founded, or not.

The referees reserve the question respecting provisions delivered, or payments made to Henry Kingston, for the decision of this Court. It is objected, that the amount, or value, of these provisions is not ascertained; nor is it stated, that they were delivered. If the *submission* does not refer these subjects of controversy to the Court, then this part of the report is susceptible of another objection, equally fatal, *i. e.* that it amounts to a delegation of the powers, confided by the parties, to judges of their own choosing, to others, to whom the subject was not submitted. As to the provisions, it was agreed by the submission, that in case the referees should give, or allow, credit for certain provisions delivered to Henry Kingston, then the said item should be subject to the decision of the Court, whether, under all the circumstances of the case, the same was a legal payment, binding on the plaintiff, and for which, the defendants are to have, and what credit. The obvious meaning of the parties was, that the referees should pass an opinion on the sub-

ject, and should ascertain the amount of the credit, which they were to allow, in case they thought it ought to be allowed; subject, however, to the decision of this Court, whether it was a legal payment, and whether it ought, or ought not to have been allowed. But the referees did not decide, whether this was a proper credit; from a misapprehension, I presume, of the meaning of the submission, from which they seem to have supposed, that this subject was exclusively reserved for the opinion of the Court.

As to the payment made to Henry Kingston, the plaintiff's counsel were candid enough to acknowledge, that this part of the report cannot be supported; and to cure the error, offered to release so much of the sum awarded the plaintiff, as they say these payments amount to. But, in order to ascertain the sum so to be released, we must rely upon the explanations of the referees, which the principles before laid down, are intended to reprobate.

The latter part of the report is still more exceptionable, on the ground of uncertainty; because, even the referees themselves have come to no decision on the subject, which could assist the Court, in ascertaining the credit, to which the defendant is to be provisionally entitled. It declares, that a bill of exchange drawn by Henry Kingston, for £200 sterling, endorsed by the plaintiff, with damages and interest, is to be deducted from the sum reported due to the plaintiff, so soon as the said bill is delivered up to the plaintiff. Now, we cannot discover, from the report, whether this is a bill which entitles the holder to twenty per cent., or to any other rate of damages, fixed by law, or to interest. On the contrary, it appears, from the examination of the referees, that both are uncertain, and might depend upon circumstances, respecting which, different opinions might be formed. Were judgment entered upon this report, and should the bill, at some future day, be delivered up, I know not how execution could issue, or in what manner the

Court could enforce, by attachment, the performance of this part of the report.

The 7th and 8th exceptions to the conduct of the referees, in excluding the third referee, are not supported by the evidence; inasmuch as it appears, that after every effort to produce a coincidence of opinion, between that third referee, and the two who signed the report, the former withdrew, and declared, that it would be unnecessary for him to be again called to meet on the subject.

We avoid saying any thing upon the merits of the case, that we may feel ourselves perfectly at liberty, should this cause be tried before a jury.

The report set aside.

TED STATES.

, 1806.

sociate Justice of the
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The following short statement, will be sufficient to explain the principal points, which arose in the cause; the particular facts on which those points rested, will be noticed in the charge.

The plaintiff, Stephen Kingston, a merchant of Philadelphia, in July 1799, sent two of his vessels, the Spy, and the Eliza, to Barbadoes, with cargoes, under the management of his brother Henry, the supra-cargo, who was invested with certain powers, as to the destination of both of them, after the sale of their cargoes. Henry Kingston, after getting to Barbadoes, not being permitted to land his cargoes, which consisted of provisions, went to Martinique, and not selling there, sent the Eliza to the defendants at Jamaica, to whom he wrote several letters, containing orders, respecting the voyage, upon which she was to be sent, from thence. The first and great question was, whether the defendants, by sending her to New-York, with a cargo on freight, consigned to other persons than the plaintiff, committed a breach of the orders given to them.

The plaintiff, after the above transaction had terminated, gave a power of attorney to George Kinghorn of Jamaica, to collect from the defendants, a balance which he claimed of them, with full powers to compromise and compound, as to him might seem right. Wishing, afterwards, to have his dispute with the defendants arbitrated, and that the said George Kinghorn, should act as an arbitrator on his part, he wrote to him, requesting him to substitute Henry Kingston, as his, the plaintiff's, attorney, in order that he, Kinghorn, might be free from all objection. This was accordingly done. On the 19th, 20th, or 21st of September 1801, it appears by a bill of parcels, made out by defendants, against Henry Kingston, that they sold to him provisions, to the amount of £291 5s. 3d., and on the 23d of the same month, the defendants gave Henry Kingston a receipt for that sum, as so much paid for the above goods; and on the same day, Henry Kingston gave the defendants a receipt for £291 5s. 3d. received by him, on account of the plaintiff.

The second question was, whether this sum was a proper charge against the plaintiff.

When the Eliza returned to New-York, she brought in a parcel of sugar, on account of the plaintiff, which was sold at a considerable loss, and the third question was, whether this loss should be fixed on the plaintiff, or should be borne by the defendants. On the part of the former, it was argued, that the shipment was unauthorized. On that of the latter, that when the plaintiff had notice of it, he merely expressed his regret that it was made, but did not object to it, until four days afterwards, when he wrote to the defendants, that he should sue them, for their account. The cause was argued by Mr. Ingersoll for plaintiff, and Rawle and Gibson for defendants.

WASHINGTON, J. charged the jury. To aid the case of the second question at once, it is only necessary to observe, that all the powers communicated to Kinghorn, by the letter of attorney, were transferred to Henry Kingston, by the substitution. That Kinghorn had an authority to take goods from the defendants, in discharge of their debt to the plaintiff; and consequently, Henry Kingston had the same authority. But an attorney authorised to receive a debt, due to his principal, cannot commute that debt, for one due from himself to the debtor, by the mere operation of exchanging one for the other. The debtor cannot say, that he has paid his debt to the attorney, by showing an agreement of the attorney, to credit the debtor, and debit himself with the amount of what he himself owes. From the bill of parcels, it would appear, that these provisions were sold to Henry Kingston, on the 19th, 20th, or 21st September, in his individual capacity. But two days afterwards, the parties seem to have agreed to settle that claim, which the defendants had against the attorney, by charging it to the plaintiff. If these transactions were separate, then, according to the above principles, the claim is inadmissible. But, if, in truth, the whole formed but one transaction, and it was originally

agreed, that the sale was on account of the plaintiff, then he is bound by it. This fact would be completely established, by Porter's deposition, if he had fixed the precise day, when such agreement was made, and it appeared to have been at the time the sale was made, or before. But, as he speaks of it, as having been made in September generally, and it appears, from the two receipts, that such an agreement was made on the 24th of September, two days after the sale; I shall leave it to the jury to say, whether they are satisfied, that the agreement was made before, or at the time of sale.

The first, is the important question; and in the outset, I lay down the following principles. An agent, if a discretion be given him, is bound to act to the best of his judgment, for the benefit of his employer. If the orders he receives be positive, he must either refuse to act, or he is bound to a strict observance of them. He is not to exercise his own judgment, but as to the best mode of executing the orders, according to the terms of them. On the other hand, if the orders be ambiguously expressed, the construction must be taken most strongly against him, who has been guilty of the ambiguity.

It is plain in this case, that at the time Henry Kingston left America, charged with these vessels, the plaintiff had no definite object, as to their ulterior destination. He says in his instructions, an extract from which was enclosed by Henry Kingston, to the defendants, on the 10th October 1799, as will be hereafter mentioned; that if Henry Kingston should not be able to fill both ships, he was to determine to take a good freight for the Eliza, and her cargo consigned to the plaintiff, if sent to Philadelphia, or to ship a few hogsheads of sugar and some rum, and send her to Honduras, to load with logwood and mahogany, and thence to Philadelphia, or if late in the season, to Norfolk. After which, he gives a sketch of the funds to be employed in purchasing these articles, and the probable price of them. He also speaks, in the same letter of instructions, of the vessels proceeding from Honduras to Liverpool. The

power of deciding upon these different voyages, is vested in Henry Kingston, and was communicated to the defendants.

After Henry Kingston left America, we lose sight of the plaintiff, who never again appears upon the stage, until the defendants had adopted the course which is complained of, and after it was too late for him to prevent it. Henry Kingston was then the effective man; and all our attention must be drawn to the letters, written by him, to the defendants.

On the 3d September 1799, he writes to defendants, that he shall probably send the Eliza to Honduras, and that possibly she may call at Jamaica, and their aid may be asked. On the 27th, Henry Kingston writes to defendants, that he shall send her to them in a few days, and that from Kingston, they are to despatch her to Honduras. On the 9th October, he actually sends her, and desires them, out of certain bills, which he encloses, to reserve enough to complete her loading at Honduras, and desires them to lose no time in despatching her; and to give them a conception of his brother's idea *of the bay voyage*, he says, he encloses them an extract from his brother's instructions of the 20th July, in which he says, that "if the Eliza and the other vessel should not be filled, he, Henry Kingston, is to determine to take a good freight for the Eliza if offered, the cargo to be consigned to the plaintiff, if she returns to Philadelphia; or to ship a few hogsheads of sugar and rum, and send her to Honduras, to load with logwood and mahogany, for Philadelphia, or if late in the season, for Norfolk, or to Liverpool. Forgetting to enclose the extract, Henry Kingston, on the next day, writes another letter to the defendants in which it is enclosed. In this letter he gives further directions about the voyage to Honduras, and then adds, "though I can think of no other eligible voyage, should you be able to procure a good freight for the Eliza, direct back to *Philadelphia*, particularly, if you can influence the consignment to my brother, I doubt not, he would prefer it."

If it had not been for this latter sentence, there could not

exist a doubt, but that the defendants had no alternative, but were bound to send her to Honduras. The letters of the 27th September, 9th October, and the first part of this letter, tied up their hands, as to this single voyage. The latter part, untied them, it is true, but to what extent? The vessel was to be sent to Honduras, or on freight to *Philadelphia*; yet the defendants did neither. How do they excuse themselves? They say: that the vessel and captain were unfit for the bay voyage; that the demand for dye woods was great, and that they had fallen in price; that they did not send her to Philadelphia, because she was too late in the season. Answer: The defendants had no choice, but to embrace one of the alternatives. The only scope for the exercise of their judgment, was, whether the bay voyage, or that to Philadelphia, was to be preferred? It was for them to weigh the advantages and disadvantages of both, and then to choose the most eligible. If it was too late to come to Philadelphia, it was a conclusive reason for sending her to Honduras. If a man is bound to do one of two things, and one is rendered impossible by the act of God, he must do the other. He cannot excuse himself by doing a third thing, which he is not authorized to do. He had no right to depart from his orders, from an opinion, however well founded, that the bay voyage would not answer. Of this, the plaintiff was entitled to be the judge.

2d. It is said, that the defendants, being referred to the extract of the plaintiff's instructions enclosed in the letter of the 16th of October, were at liberty to govern themselves by that extract. To this, there are conclusive answers. The first is, that they are expressly referred to that extract, not to give a view of the plaintiff's general plans for the destination of this vessel, (which, had that been the case, would have been an important part of the defendants' defence,) but, to give the plaintiff's ideas of the *bay voyage*; and, consequently, the reference goes to strengthen the argument, that this was the great and primary voyage intended, and the return voyage to the United

States only secondary. The second answer is, that the defendants themselves, did not understand the plaintiff's, or H. Kingston's views. For, in their letter of the 26th October, to the plaintiff, speaking of H. Kingston's letter of the 10th, and the extract enclosed, they say, that they understand the plaintiff's wishes to be, that they are to send the vessel to Honduras, provided a freight back, *consigned to the plaintiff*, cannot be obtained. Yet, they neither send her to Honduras, to Philadelphia, nor did she come consigned to the plaintiff. You are the proper judges of the amount of damages sustained by the plaintiff, if any were sustained, by this breach of orders.

As to the third point, respecting the loss on the sugars, it is too plain to be argued. It is not necessary for the plaintiff to show, that defendants were not forbidden to ship them on his account; the defendants must prove, that they were ordered. This is not pretended. But, it was argued, that the plaintiff did not object to the shipment, in the first instance. Answer: he was not obliged to do so. He had a right to deliberate; and, though his first letter seems like a tacit acquiescence, yet, in four days after, he expressly refused to receive them on his own account; and it is probable, that both letters were received, at or about the same time. The plaintiff has a strong reason for contending, that his apparent acquiescence in his first letter, should not bind him, viz. that, having committed the management and destination of his vessels to H. Kingston, then in the West Indies, he could not at first tell how far he might have sanctioned this shipment. But, within four days, having heard from him, or, without doing so, he determined, at all events, to refuse. The loss, therefore, must be borne by defendants.

Verdict for plaintiff.

Baker, vs. Gallagher.

When the drawer of a bill of exchange has no funds in the hands of the drawee, neither protest nor notice of non-acceptance or non-payment to the drawer, is necessary to enable the payee to recover.

The payee must either state that the bill was protested; or show that it was not incumbent on him to protest it, because the drawer had no funds in hands to pay the bill; but this omission can only be taken advantage of by special demurrer.

Where the drawer had no funds in the hands of the drawee, an action may be brought by the holder, upon the bill, before the time it would be payable, if it had been accepted. It may be brought immediately on non-acceptance.

THIS action was instituted, to recover the amount of a bill of exchange for £224 sterling, drawn by the defendant on a merchant in Liverpool, in favour of the plaintiff, with interest from the date of it. The drawer, having no funds in the hands of the drawee, acceptance of the bill was refused; and, to avoid the legal consequence of a protest, to fix upon the drawer payment of damages, which, by an agreement between drawer and payee, were not to be demanded, the bill was returned without being protested, this agreement having been communicated by the defendant to the drawee. This action was brought before the time for payment by the drawee would have arrived, had he accepted the bill.

Ewing, for the plaintiff, stated, first, that where the drawer has no funds in the hands of the drawee, neither protest, nor notice to the drawer, is necessary to enable the payee to recover. 1 T. Rep. 714. 410. 2 Idem, 717. 5 Idem, 239. Plaintiff must either state that the bill was protested, or show that it was not incumbent on him to protest; as, that the drawer had no effects in the hands of the drawee; but, the omission

can only be taken advantage of by special demurrer. 1 Salk. 131. 1 Show. 125. Doug. 684. N. 144. Not even necessary to present it for acceptance. Chitty, 68. 2 H. Blacks. 336, and post.

2d. That the action was not brought prematurely. It may be commenced immediately on non-acceptance. 3 Burr. 1687. Doug. 55. 3 East. 481. Chitty, 64. 100. These points were admitted by Mr. Dallas for the defendant, who stated the case to be, that the defendant was indebted to one Niblie, of New-Orleans, who again was indebted to the plaintiff: that, by the correspondence between Niblie and the plaintiff, it appeared, that the defendant was to pay to the plaintiff, what he owed to Niblie. In August, 1804, Niblie drew an order on the defendant for 500 dollars, in favour of one Vertner, at sixty days, which was accepted. This bill was drawn in December, afterwards. He contended, that the plaintiff was to be considered as the agent of Niblie; and, as the bill was drawn for the whole sum, which had been due from defendant to Niblie, without crediting the above 500 dollars, the defendant was entitled to a credit for that sum, the suit being between the original parties to the bill.

WASHINGTON, J., charged the jury. The argument, founded on the idea of the plaintiff being the agent of Niblie, is ingenious, and would be sound, if the case would bear it out. If the plaintiff had not been the creditor of Niblie, we might have considered him as his agent. But, as the case is, it is nothing more than a promise by the defendant, to pay to the plaintiff, a creditor of Niblie, a debt due to him by Niblie, and the bill is evidence of this promise. It is of no consequence, if the defendant, instead of having paid a part, had previously discharged the whole of his debt to Niblie; he is still bound to fulfil his engagement to the plaintiff.

Verdict for plaintiff, for his whole demand.

The United States *vs.* Magill.

Indictment for murder.—The first count laid the stroke, and the death, on the high seas; the second, laid it in the haven of Cape François; the third, laid the stroke in the haven of Cape François, and the death on the land in Cape François. The only count proved was the last.

The law of the United States declares, that murder committed on the high seas, shall be tried in the district where the offender is apprehended, or into which he is first brought; and therefore the Circuit Court has jurisdiction over this case, arising under the authority of the United States.

The Legislature, making use of a technical term, its meaning must be ascertained by the Common Law; and therefore, the definition of *murder* must be taken from that code.

To constitute the offence of *murder*, under the law of the United States, cognizable in the Circuit Court of the United States, not only the *stroke*, but the *death*, must happen on the high seas.

The right of the defendant to challenge the jurors, in this case, is limited to *twenty*.

THE prisoner was indicted for murder. The first count, laid the stroke and the death on the high seas. The second, in the haven of Cape François. The third, the stroke in the haven of Cape François, and the death on land, in Cape François. The evidence proved the last count, but not the first and second.

Mr. Ingersoll and Mr. Read objected to the jurisdiction of the Court. The Circuit Court, under the 12th section of the Criminal Law, 1 vol. p. 53, passed April 30 1790, has cognizance of murders committed on the high seas. But to constitute murder, there must be a death, as well as a stroke. The death consummates the offence. The person is murdered *where he dies*. Till the death, the offence is only a misdemeanor. 1 Hale's P. C. 425, 426, 427. 4 Rep. 43. 2 Hale's P. C. 288. 3 Hawk. 338. Leach, Cr. L. 723. 432. 4 Black. Com. 303. 2 Rep. 92. 1 East's C. L. 365. 1 Leon. 270. Cro. El. 485.

Dallas, for the plaintiff: By the constitution, Congress has power to define and punish piracies and felonies, committed on the high seas. By the 2d section of the 8th article, the judicial power extends to all cases of admiralty and maritime jurisdiction. The 12th section of the Judicial Law, 1 vol. p. 55, declares, that the Circuit Court shall have cognizance of all offences cognizable under the authority of the United States, except where it is otherwise provided. Where the stroke is at sea, and the death in a foreign country, the Courts of this country, according to the civil law, have cognizance, and the civil law is the rule which governs the Admiralty Court. From hence, I infer, though I can meet with no English cases where the Admiralty has taken cognizance of such case; yet, that it is of Admiralty jurisdiction; and if so, it is a crime punishable by the constitution, in the Courts of the United States, and of course, in the Circuit Court; being an offence arising under the authority of the United States.

2d. I admit the English cases as cited, but they go upon the idea of venue; whereas, in cases of murders on the high sea, venue is out of the question, and the reason of the doctrine bearing there, is no foundation for its adoption here. There is no law of the United States, which declares, that the stroke and death must be in the same place. The cases in England, which take away the jurisdiction of the Admiralty Court, where the death is not at sea, arise under the Statute, passed since the Statute of Richard. See East's C. L. 3 Inst. 48.

It may be a question, if the law at present does not give jurisdiction in this case, to the Circuit Courts, as a matter of Admiralty and maritime jurisdiction; whether Congress, under the constitution, can provide for it.

WASHINGTON, J. The 11th section of the Criminal Law declares, that murder, committed on the high seas, shall be tried in the district where the offender is apprehended, or into which he shall be first brought; and of course, in all such cases,

the Circuit Court has jurisdiction, being a case arising under the authority of the United States. The Legislature making use of a technical term, without defining it, we must inquire, what, according to the Common Law, constitutes murder. It is the unlawful killing of another, with malice. If murder, then, on the high seas, is cognizable here, it must be a case where there has been an unlawful killing on the high seas. But this cannot be, where the death is at land.

I should be very sorry indeed, if it is beyond the power of Congress to provide for this case. But, certainly, it is otherwise, if they can define and punish felonies on the high seas; a stroke at sea, if followed by death at land, may be declared felony, and the punishment may be such, as Congress may direct.

Judge Peters gave a separate and concurring opinion.

Verdict for defendant.

Note.—In calling the jury to be sworn, the Court informed the defendant's counsel, that he could only challenge twenty, as this is an offence mentioned in the first Criminal Law, and is of course referred to, in the section which speaks of challenges. In Johns' case, he was indicted for destroying his vessel, which was made an offence by a subsequent law. W.

LESSEE OF CAMAC *vs.* ALLWINE.

After a judgment in ejectment, upon a covenant of re-entry for non-payment of rent, and the plaintiff in ejectment having been put into possession by a *habere facias possessionem*, the defendant paid the amount of the debt and the costs, and obtained a rule to show cause why the possession should not be re-delivered.

The Court refused to interfere in this summary way, but left the defendant to his remedy on the equity side of the Court, particularly, as the parties did not agree as to the amount of the rent due.

THE lessee of Mr. Camac obtained a judgment in ejectment, against Allwine, upon a covenant of re-entry in a lease, for non-payment of rent, and was regularly put into possession, under an *habere facias possessionem*.

Hallowell, some days before, paid into Court, for his client, the tenant, all the arrears of rent which he said were due, with the costs; and obtained a rule to show cause, why the defendant should not have the possession restored.

Gibson now showed cause, and insisted, that the defendant had no remedy, but in equity. He stated, as an additional reason against an interference in this summary way; that all the rent due had not been paid, and that the defendant, after possession delivered, had entered and violently pulled down some of the buildings.

Hallowell admitted that in England, the Courts do not relieve after possession delivered; that they do so after judgment. Under Stat. 44. 2. if rents be paid in six months after judgment, equity may relieve. He cited 2 Stra. 900. 8 Mod. 345. 6 Bac. 34.

The Court (Peters absent,) refused to interfere in a summary way; and said that the dispute, about what is due, would alone be conclusive, even if it were otherwise proper, to relieve in this way.

Rule discharged.

VUYTON, ADMINISTRATRIX OF VUYTON, *vs.* BRENELL.

In an action to recover the balance of a settled account, and of certain bills of exchange accepted by the defendant; the defendant offered to prove that the plaintiff's intestate acknowledged himself to be indebted to the defendant on another account, which included the settled account, and upon which a larger amount was due than that claimed, which the intestate promised to pay. The Court allowed the evidence to be given; as it was not offered to affect the settled account, but to establish a claim independent of it, and which the plaintiff's intestate promised to pay.

What will be deemed sufficient evidence to prove the loss of a promissory note, so as to permit evidence of its contents to be given. (*a*)

THE jury were sworn, by consent of the parties, to try two actions; one for the recovery of a balance, agreed to be due on the 24th June 1792, by a stated account; and the other, for the amount of certain bills of exchange drawn by the defendant, accepted and paid by the intestate of plaintiff. The plea chiefly relied on was, that of a set-off, of 100,000 livres, which greatly exceeded the plaintiff's demand. In support of this plea the defendant offered to prove, that at the time these transactions took place between the parties, who were citizens of, and residents in St. Domingo, and at the time of the settlement in June 1792, the intestate acknowledged himself to be indebted to the said defendant in 100,000 livres, on account of a purchase of land

(*a*) In this case, the following points were decided, which are not stated in the report:—

If the defendant has put in several pleas, he may withdraw one of them, without leave, at any time.

If there be a negative and affirmative plea, the plaintiff's counsel must begin and conclude on the negative issue; and the counsel for the defendant, in the affirmative: but both must, in the argument, confine themselves strictly to the issue they are discussing, &c.

in St. Domingo, from a Mr. Cardonnier, who had assigned this debt to the defendant. That the intestate agreed to pay that sum as soon as he could, after deducting therefrom the balance of their mercantile accounts, admitted to be due by the stated account.

This was objected to by Dallas and Levy, for the plaintiff, as no evidence to explain, or alter the settled account, could be received, unless upon the ground of fraud, or mistake, and not in those cases, elsewhere than in equity.

By the Court. The stated account relates only to the unsettled mercantile transactions between the parties, and as to that, evidence to explain or contradict it would be improper. But the defendant offers, by way of set-off, an independent claim for a debt assigned to him, which was not included in the stated account, but which, the intestate promised to pay, claiming only to deduct from it, the balance found due by the settled account. Evidence to establish this fact, does not violate the rule above laid down, and is clearly proper.

The defendant then offered to prove, that after the massacre at the Cape and at Jeremie, in 1793, the intestate and the defendant fled, and arrived at Baltimore, where another settlement took place, and the intestate gave his note to the defendant, to pay the 100,000 livres, with interest, after deducting 48,000 livres, then found due to the plaintiff. That this note was, in 1795, sent by the defendant, with a power of attorney, to a Mr. Berthier of Jeremie, to recover.

This evidence was objected to, unless the defendant should first prove the loss, or destruction of the note. This promise, if made, was at Baltimore, and is therefore barred by the Act of Limitations, and if so, the plaintiff may avail himself of it at the trial.

The defendant, to prove the loss of the note given at Baltimore, produced witnesses who stated, that most of the town of Jeremie and the Cape were burnt. The deposition of Berthier stated, that he had received sundry documents from the defend-

ant to recover debts, and amongst others, the promise of the intestate to pay 100,000 livres; that when he left St. Domingo, he delivered over these papers to Legros, an attorney, to pursue the claim, and that Legros had been assassinated.

By the Court. This evidence does not sufficiently establish the loss of the paper. The defendant might have procured better evidence of it. He might, by a commission, have proved what became of Legros' papers; whether they were burnt, or destroyed. Evidence has been given, that when the negroes assassinated an individual, they generally destroyed his papers, and further, that it was not safe, for any white person, to apply for papers belonging to any of the emigrant planters. But, certainly, the fate of Legros or his successor, and of the papers, might have been proved by a commission. Was his or their house burnt? Evidence of this might suffice, with the other facts in the cause.

Upon signifying this opinion, the defendant produced witnesses, who proved, that the papers of Legros, after his death, passed into the hands of Mr. Dallet an attorney, who was massacred at the Cape, and that his papers were destroyed.

By the Court. This is sufficient. The defendant may now prove the contents of the note.

Upon the evidence given of the note, the plaintiffs suffered nonsuits in both cases.

Lessee of Philips vs. Wilson.

Ejectment for lands lying north and west of the Alleghany and Conewango.

If the warrant for lands be uncertain, or if it be certain, and is laid in another place, and before the survey is made, no third person has acquired a title to the land on which the warrant is laid; every objection to a title so derived is done away.

The survey gives notice to all subsequent purchasers, and it is only such who can complain. Such a survey could not affect the title of a person, who in the meantime had acquired an incipient title to the land, either by warrant or settlement.

If the surveyor has warrants to the amount of the lands surveyed, and he includes the whole in one survey, marking the boundaries of the different surveys, it is nothing to third persons how the warrants are appropriated, before the map of the survey is returned to the Surveyor General.

Quere.—What would be the effect of a settlement upon the title to lands comprehended in another and adjoining survey, where the lines of the land claimed by the settlement, had not been run out, so as to take part of the lands so adjoining the settlement?

THIS ejectment is to recover 400 acres of land, lying north and west of the Ohio, Alleghany and Conewango. The plaintiff's title was founded on an application for this land, on the 25th of April, 1793, by one Megee (in the name of R. Thompson,) who sold to Wells and Morris: a warrant in the name of Richard Wells, for 400 acres, lying between Big and Little Beaver creeks, to include his improvement: and a survey dated in March 1795. The purchase money was paid the 12th June, 1794, and the warrant was entered, with the deputy surveyor of the district, in August 1794. In 1800, a small additional sum was paid. In May 1795, a connected plat of this, together with a number of other adjoining tracts, surveyed at the same time, on other warrants, for Wells and Morris and the Population Company; was returned by the surveyor, according to law,

to the Surveyor General's office. It appeared in evidence, that at the time when these several warrants, all for 400 acres each, were surveyed, the deputy did not appropriate the several tracts to the respective warrants; but after surveying and plotting them in a general map, the Surveyor General made the appropriation, and allotted the warrant of Richard Wells to the land in question, which was proved to be in possession of the defendant. It was proven, that Megee had made improvements at a considerable distance from the land in dispute; but that none were made on this land, either by him or Wells, at the time the warrant issued, or for a long time afterwards. The plaintiff deduced a title regularly derived from Wells. It appeared in evidence, that according to common usage in this State, and the practice of the land office, the name of the person appearing on the list of applications, is always considered at the land office, as merely nominal, and is struck out at the instance of the real applicant, whenever he sells to a third person; and the name of such third person is inserted in his stead. This was done in the present instance. That it is also the general and uniform custom, that when the purchase money is paid, the warrant issues, and bears date as of the day of the application. The danger of making settlements on this part of the country, from 1793 to 1796, was admitted by the defendant's counsel, as proved in the cases of Huideköper *vs.* Burrus, and others; (*a*) evidence was also given by the plaintiff, that during that period, there were no settlements in this country, except in the neighbourhood of forts; and that no prudent man would have attempted it.

The defendant claimed by virtue of a settlement right in one Guy, from whom he deduced a title; and he relied upon a number of depositions to prove, that in 1793, 1794, 1795, and 1796, he was seen upon the land, or about thirty or forty rods from it, on a tract claimed by, and surveyed for the Population Company; (for on this point there was some contrariety in the

(*a*) See *ante*, page 109.

evidence, the weight of it being in favour of his improvement being on the adjoining tract;) that he raised and covered in a cabin, girdled trees, had his bed clothes there, &c. Some of the witnesses stated, that he resided there, and seemed to be keeping possession. It was proved, however, by other witnesses, that he lived with his family on the south side of the Ohio, during all this time, where he built a mill. No satisfactory evidence was given of any thing like a permanent settlement, until 1796, if so soon.

The objections to the plaintiff's title were: 1st, that the purchase money not having been fully paid up, till 1800, the warrant could not legally issue till then, and of course the survey was unauthorized. But if the subsequent payment could legalize it, it could only do so from the time the money was paid; before which, it is admitted, an actual settlement had been made by the defendant. The 3d section of the Act of 3d April, 1792, declares, that the warrant may be granted to the applicant, he paying the purchase money and fees of office, which implies a condition; besides which, the 10th section declares that no warrant shall issue till the purchase money is paid.

2d. That the warrant is too uncertain; or, if not so, that, by calling for Megee's improvement, it called for a tract far removed from the one in dispute; and, therefore, could not be surveyed on the land in controversy: and, further, that the tract should, on the survey, have been appropriated to the warrant, and not left to the chamber operation of the surveyor.

3d. That *improvement* rights, though unaccompanied with *actual settlement*, are protected aganist warrants, in which the land is not particularly described, by the Act of the 22d April, 1794.

It was contended, that it appeared upon the evidence, that Guy had made an actual settlement, within the meaning of the Act of 1792, before this land was surveyed: that all objection to Guy's not having surveyed his settlement right, was answered by the evidence, which proved, that, at the time the surveyor was surveying the warrants of Wells and Morris, Guy

applied to him to survey his settlement right, and that he refused to do it.

For the plaintiff, it was contended, first; that not even an improvement of any sort was made by Guy on this land, till 1796, but, on an adjoining tract; and that after the survey for Wells, he could not extend his right, even if it had been accompanied with an actual settlement upon this land. Secondly, it is plain, from the evidence, that an actual settlement, within the principles laid down in the case of Balfour's Lessee *vs.* Mead, (*a*) was not made, either upon this or the adjoining tract, till long after the survey of the warrant, and the return of the connected plat of the lands, surveyed in March 1795.

WASHINGTON, J., charged the jury, and after stating the plaintiff's title, as above, proceeded: The first objection to the plaintiff's title, is, that the warrant issued before the payment of the purchase money. Without giving any opinion how the law would be, if such were the case, it is sufficient to state, that though the warrant bears date when the application was filed, agreeable to the uniform custom of the land office, in fact it issued on the day when the purchase money was paid; and the small sum paid in 1800, was only the interest which accrued between the date of the application and the issuing of the warrant; and, consequently, the case does not come within the provisions of either of the sections of the Act of 1792, which were relied upon.

2d. The uncertainty, the mislocation, and the improper appropriation of the tract to the warrant, are objected. All of these may be considered at once, for all have been determined in the case of Huideköper *vs.* Burrus. If the warrant be uncertain; or, if it be certain, and is laid in another place, and before the survey is made, no third person has acquired a title to the land on which the warrant is laid; every objection is done

(*a*) *Ante*, page 78.

away. The survey gives notice to all subsequent purchasers, and it is such only who can complain. As to the State, it is perfectly immaterial where the warrant is surveyed; but, such survey could not oust out a person, who, in the meantime, had acquired an incipient title to the land surveyed, either by warrant or settlement. As to the not surveying each separate warrant on the land to which it is to attach, at the time of the survey, if the surveyor has warrants to the amount of the land surveyed, and he comprehends the whole in one inclusive survey, marking the boundaries of the different surveys; it is nothing to third persons, how the owner of the several warrants may appropriate, on the connected map, each warrant to its respective tract, before the map is returned to the Surveyor General. Whether these objections are to be considered as cured from the day of the survey, which, in this case, was in March 1795, or on the day when the connected plat was returned, two months after, it is not, in this case, material to decide; because, if an actual settlement was not made, on or before the first period, it is not pretended that it was made between the first and the latter period. But we do not mean to intimate an opinion, that the latter is the true time.

3d. The only observation necessary to make upon this objection is, that the law of April 1794, does not apply to this case. This law applies to cases where the purchase money was not paid before the *15th of June* 1794; and the indescriptive warrants, which it is said shall not, by virtue of this Act, affect the title of those who have made improvements, are such warrants as are permitted to be surveyed under this Act. The warrant in question is not of this description, because it was paid for on the *12th of June* 1794.

The great question, then, depends upon the defendant's title; and it is to be considered, whether the defendant, or the person under whom he claims, made an actual settlement within the meaning of the Act of April 1792, or at any time before March or May 1795. What constitutes such a settlement, is a point

of law, and was fully laid down in the case of Balfour's Lessee *vs.* Mead, which has been read to the jury. Whether such a settlement was made, is a matter of fact for the jury to decide. To disprove such a settlement, the plaintiff relies upon the state of the country, which, from 1793 to 1796, forbad any person to make such a settlement, and the general evidence given, that no such settlements were made within that time. That Guy was a resident with his family, during that period, on the south of the Ohio, and that he only ventured out at times to the cabin he had raised, for temporary purposes to make sugar; or under a false, but common opinion, that improvements, without an intention to settle, would give a right.

The plaintiff's counsel have also insisted, that, even if an actual settlement was made, it was not on this land; and that, therefore, the defendant cannot now run into this land, which was surveyed in March 1795. There is some contradiction in the evidence, as to this fact; but, if proved, as contended for by the plaintiff, it would become an important question, whether the settler can extend the limits of his 400 acre settlement right, into an adjoining survey, if he has failed to lay off his lands before such survey is made. Without deciding the point, it may be sufficient to observe, by the way, that, if he may do so, he has it in his power to make his settlement protect not merely 400 acres, but three or four times as much, from appropriation; by extending his limits north, south, west, or east, as his fancy or caprice may lead him; and thus either prevent others from surveying in his neighbourhood, or afterwards disturb their possessions. This would seem a very unreasonable thing; but this case seems to keep clear of this objection, as he applied to the surveyor to mark the bounds of his settlement right, at the time he was surveying these warrants. I know not what more he could do; and, I am inclined to think, it would be unreasonable to make him suffer, because the surveyor refused to comply with the request, provided he was such a settler, as was entitled to call upon the surveyor to per-

form this duty; for, if he was not, then there was an end of the controversy: and this brings us to the important part of the cause. Was he such a settler, in March 1795? If, upon the evidence, you are of opinion he was not, then your verdict must be for the plaintiff; if he was, then it must be for the defendant.

The jury found for the plaintiff.

Ingersoll and Tilghman, for plaintiff.
Levy and Rodney, for defendant.

WADE *vs.* THE ADMINISTRATORS OF WADE.

Interest on money in the hands of the administrator, is not chargeable, when the same is retained in the hands of the administrator, until a suit shall determine the right of the claimant thereto.

THIS action was brought to recover one-sixth part of the personal estate, of which the intestate died possessed; and many depositions were read, to prove the plaintiff, and five others, his brothers and sisters, being in England, to be the brothers and sisters of the intestate, of the half blood, and his next of kin. The estate consisted of two bond debts, due to the intestate at his death, one of which had been paid, and part of the other. The defendant had resisted the payment, doubting the relationship of the plaintiff, and preferring to have that point judicially ascertained; but he promised to pay, if that should be done. The plaintiff claimed one-sixth of the principal, and interest of the bonds, which constituted the estate, from their date to the present time; except upon such parts as had been paid, upon which he did not claim interest from the time of payment, as the money was retained by the defendant, only with a view to ascertain the plaintiff's right to it. It was objected, that the verdict ought not to be for the uncollected part of the bond.

WASHINGTON, J. stated to the jury; that if they were satisfied that the plaintiff is one of the brothers of the intestate, he is entitled to recover one-sixth of the principal and interest of these debts; but as the plaintiff waived interest on the sums collected, from the time they came into the defendant's hands, in consequence of the doubts he entertained of the relationship,

they might deduct the interest on those sums. It does not appear from the evidence, that the uncollected bond had ever been put in suit, nor does it appear that the obligor was at any time, or is now, unable to pay. The defendant has been administrator for some years, and told the witness, that if the plaintiff established his title, he, the defendant, must make the obligor pay-up.

Verdict for plaintiff, for one-sixth, principal and interest, according to the charge of the Court.

MERRICK *vs.* BERNARD.

If a party knows that A is an agent for several shippers, who had separate interests in the cargo, he cannot take the property of the principal to pay his debt; although he would be perfectly justified in paying over the money, for the use of the principal, to the agent.

A consignee, who receives merchandise from the supra-cargo for sale, and who knows that the supra-cargo is the agent of others, contracts a debt with such shipper for the proceeds of his portion of the cargo; and the supra-cargo has no right to appropriate the same to the payment of his private debt.

THIS action was brought, to recover the amount of sales of certain goods of the plaintiff, which were put into possession of the defendant, a merchant of Bordeaux, by Randell the agent of the plaintiff, and supra-cargo of the Ploughboy. It appeared by the evidence of Randell, that the Ploughboy was the property of Jones & Clark, of Philadelphia, who put on board the principal part of the cargo; but the plaintiff, with some other merchants, also shipped separate cargoes for Bordeaux, consigned to Randell, the supra-cargo, who received his separate instructions from each shipper. The plaintiff's instructions rather limited the general authority of the supra-cargo, but it did not appear that they were communicated to the defendant. On arriving at Bordeaux, Randell placed the business in the hands of the defendant, to whom the whole cargo was delivered; and a freight list, which did not distinguish otherwise than by numbers, the separate interest of the shippers. But the defendant was distinctly informed, that such separate interests did exist, and to what extent. Some time after the sales had begun, but before the whole was completed, Randell drafted a plan for a voyage, for the ship, with a cargo from Bordeaux to Guadaloupe, and thence back to Bordeaux, with

a cargo of colonial produce; and having received considerable advances from the defendant, to enable him to place funds in England, for the use of Jones & Clark, he stipulated with the defendant, to return to Bordeaux, to the defendant's address; and to secure the defendant, he gave him a general invoice of the whole cargo, to enable him to insure. He took in a cargo at Guadaloupe, and returned to Bordeaux; but before he got into the town, having heard that the government during his absence had laid such high duties on colonial produce imported otherwise than in French bottoms, as to render the voyage a losing one; he wrote to the defendant to know how this fact was, and suggesting the propriety of his going to Amsterdam, or elsewhere, to sell the cargo, promising to allow the defendant the same commissions, as if he had sold it. The defendant wrote him, that he was misinformed as to the new law; that he would be admitted to an entry, if he was furnished with all proper certificates and documents. He went up, and delivered the cargo to the defendant, with a freight list, from which, or from other papers, the separate interests of the shippers were distinguished. About this time, the defendant received information of certain bills, drawn on him by Jones & Clark, payable in Amsterdam: and finding that the part of the cargo belonging to Jones & Clark, would, in consequence of the new duties, not form a sufficient fund to enable him to take up those bills, he hesitated about accepting them. To induce him to do so, Randell agreed to place in his hands the whole cargo; observing, that he could draw upon Jones & Clark to reimburse the other shippers. This was agreed to. The whole cargo was so appropriated; the bills were drawn on Jones & Clark, who refused to pay them.

The defendant being found in Philadelphia, this action, for money had and received was brought to recover the full amount of the plaintiff's part of the cargo, deducting therefrom the old, and not the new duties; which, it was contended, ought

not to be charged to the plaintiff, as it was by the defendant's misinformation to Randell, that he went up to Bordeaux.

Duponceau and Dallas, for the defendant, contended; first, that Randell, from his general power as agent, had a right to make this appropriation of the plaintiff's funds, and to reimburse him by bills on Jones & Clark, for the payment of which the defendant was not answerable; that if this was his general power, the defendant was not to be affected by any private limitations of it, from particular instructions; unless such communication was communicated to the defendant. That though a factor cannot pledge the goods of his principal, for a debt of his own, whether with or without notice, (6 East. 17) yet he may sell, if *bona fide*, and without notice. 4 Burr. 2051. That the power of a foreign agent is more extensive than a domestic one; Bull. Nis. P. 130. That it was not sufficient, that the defendant should have notice of the separate interests of the shippers; but that he should have had notice, that the agent had limited powers. Randell might have received from the defendant, the amount of the plaintiff's interest, and then have lent or given it to defendant, if he pleased; in which case, he alone would be answerable.

2d. As to the extra duties; Randell was bound by a contract, which was certainly within the scope of his authority, to go to Bordeaux, that the defendant might not lose the security for his advances, or the commissions; and that the increase of duties did not discharge him from this obligation; if he did wrong, he alone is liable. Cases cited, Abbot, 78. 3 Bos. & Pull. 490. On the plaintiff's side was cited, 6 East. 17. 3 T. Rep. 757. 2 Strang. 1178, as to the powers of factors.

The Court informed the plaintiff's counsel, when about to reply, that they wished him to confine his observations to the facts in the cause; since, upon the law of the case, it was impossible there could be two opinions. If the defendant knew, that Randell acted as agent for the several shippers, and that they had several interests in the cargo; then the defendant, by the sale

of the plaintiff's part of the cargo, contracted a debt with him, though he would have been fully justified in paying the money to the agent, unless prohibited to do so by the principal. But this very power in the principal, to forbid that payment, proves that there subsisted a contract also between the defendant and the principal. If this be the case, the question is, has this debt been legally *discharged?* That it has been paid either to the plaintiff or to Randell, is not pretended; but has the defendant, by any act of Randell, been exonerated from the payment? This brings us to the question, what acts the agent could do, to discharge the defendant within the general scope of his authority; for if that was restrained by any private instructions, it does not appear that such instructions were communicated to the defendant. He had a power to sell the plaintiff's property to the defendant, or to authorize him to sell it, and he might have received payment in money or in bills, and possibly in other ways. But most clearly he had no right to permit the defendant to retain the money, to satisfy the debt due from the agent himself, or from any third person, with notice to defendant of the plaintiff's interest. If the defendant had paid the money to the agent, he, the agent, might, without such notice, have paid the money again to the defendant, to enable him to take up the bills of Jones & Clark; because, in that case, having once received the money, and mixed it with the general mass of his own money, there could be no means to identify it, as belonging to the plaintiff; and in that case, the agent alone would have been responsible. (*a*) But suppose, when the defendant paid the money, in the supposed case, he had received it back, with perfect knowledge that it belonged to the plaintiff; the payment and repayment being merely an operation to enable the agent to convert the plaintiff's money to the use of Jones & Clark, there would have been *mala fides* in the transaction; and the defendant, receiving the money as the money of the plaintiff, would be answerable to him for it; no matter how

(*a*) See Salk. 160.

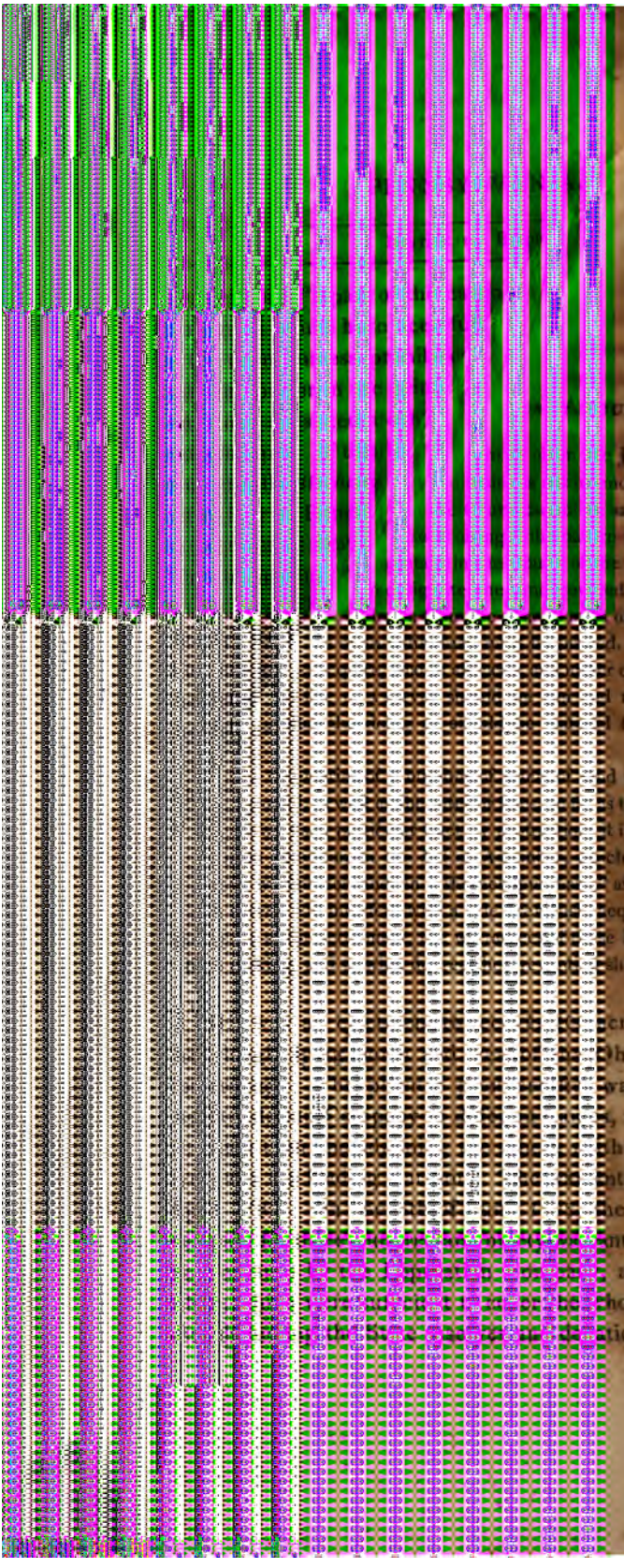
the transaction was sanctioned by the agent, the defendant could not say, that he had discharged the debt once due to the plaintiff. The whole question then is, whether this transaction was *bona fide* or not: and whether so or not, must depend on the question, whether the defendant knew that Randell was the agent of distinct shippers, and that the cargo thus assigned over to him, for the payment of the bills, was the property of different persons. If he did know these facts, the cause is clearly with the plaintiff.

Upon the second point, the facts appearing to be as stated by the defendant's counsel, that Randell was bound, by an agreement with the defendant, to return from Guadaloupe to Bordeaux; the counsel for the plaintiff, upon an intimation from the Court, of their opinion on that point, gave up the claim of difference between the old and new duties.

Verdict for plaintiff.

Ingersoll and Gibson, for plaintiff.

Dallas and Duponceau, for defendant.



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and parallel thereto; then west two miles as before, and so on throughout. After completing the field work in this manner the whole was protracted, and the different tracts laid down by protraction in one connected map; which was returned with each survey early in 1795. The plaintiff produced evidence, as on the former trials of the Holland and Population Company's suits, to prove prevention and persistance, from 1792 to 1796.

The defendant set up no title in himself, but endeavoured to impeach that of the plaintiff, by evidence showing that on a late survey by order of the Court, the lines as laid down in the connected plot, were not to be found; from whence it was concluded, that no actual survey had been made of these warrants: and the Act of 8th April 1785, section 9th, was read, which declares that every survey thereafter to be returned into the land office, upon any warrant which shall be issued after the passage of the Act, shall be made by actual going on and measuring the lands, and marking the lines to be returned upon such warrant.

The counsel for the defendants, therefore, contended; 1st. That a legal survey was not made, even though it appeared to have been made in the manner stated by the plaintiff; since none of the interior lines, between the two mile north and south parallel lines, were measured or marked on the ground. 2d. That the title of the warrant holders became void, the survey not having been made in two years after their dates. 3d. That the settlement ought to have been made in two years from the

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it changes the nature of the suit, which the plaintiff has a right to maintain in this Court.

The first objection to the plaintiff's title is, that the warrant was not legally surveyed; because all the lines of each tract were not run and marked on the ground.

An actual survey on the ground, so as to enable the surveyor to make a specific location of the warrant, is clearly proper; because, otherwise, the grantee in the warrant, cannot fix with certainty, the spot on which his warrant is located. But, neither law nor reason requires, that, in all cases, and under every possible circumstance, every line of a survey should be run and marked on the land, much less that the doing so should be material to the validity of the survey. For instance, the closing line of a survey need not be run, and so we have determined; because it can be laid down by protraction, with as much certainty as by running it. Every thing necessary to designate the land covered by the warrant, so as to prove it to be withdrawn from the general mass of property, and appropriated to the use of an individual, should be done on the ground; but, if this can be effected without running every line, every line need not be run. Now, in this case, the Population Company were substantially the owners of 390 tracts of land, adjoining each other, and, of course, in one body, though nominally there were 390 owners.

The boundaries of these tracts were run and marked on the ground, as well as the interior lines, so far as to enable the surveyor to lay down each particular tract by protraction, with as much accuracy as if every line of each tract had been measured on the ground. Each tract was thus laid down in one connected plat, and returned to the Surveyor General and the land office, as directed by law. (a) This, therefore, gives notice

(a) I am strongly inclined to the opinion, that the Act of 1785, is merely directory, from the very clause which directs an actual survey to be made; the survey is declared to be void, if made without a warrant, but not so, if not actually made on the ground. W.

to the whole world, that the whole of the triangle was appropriated by the Population Company, and it shows the boundaries of each particular tract. What then has any third person, or even the State, to do with the particular mode in which this is effected, if no third person has, in the meantime, acquired a title to the land, or some part of it; and no such right is pretended in this cause? This point we have decided on a former occasion.

The second objection is, that the title of the warrant holder became void, because it was not surveyed in two years after its date. The first answer, which seems conclusive, is, that there is no law which declares it void, if not surveyed in two years. Generally speaking, the only penalty to which the grantee in an uncertain warrant is exposed, by not having it surveyed, is, that he cannot locate it, so as to overreach the title of an intermediate settler or warrant holder; who has acquired a title to the land by a special location of the warrant, or by a survey. There are no expressions in the Act of 1792, which declare it void; and the reason assigned, that if it be not surveyed in two years, no vacating warrant can issue under the ninth section, will not be found to be sufficient. If pursued, it will lead to this, that an uncertain warrant, not surveyed, is void; because no vacating warrant can issue, and a vacating warrant cannot issue, because the warrant is uncertain, and has not been surveyed. If such a warrant cannot issue, because of the uncertainty of the location, it seems useless to declare it void for that, reason; but, if a vacating warrant cannot issue in such a case, and this would be probably necessarily the case, since it could not be said, that the original grantee had failed to settle what had, in truth, no locality. Still, any person might acquire a title by settlement on the land, or by an original warrant; which, as before mentioned, would cut out the first warrant holder as completely as if he had located it, and then neglected to settle it, according to the terms of the ninth section.

The third objection is, that the settlement should have been

made within two years from the date of the *survey*. This is directly in the face of the decision of the Supreme Court, in Huidekoper *vs.* M'Lean, which fixed the time of settlement to be two years from the date of the *warrant*. The relative words, "next after the date of the same," in the first sentence of the ninth section of the law, clearly refer to the words, "the date of such warrant," as their antecedent. If a contrary construction be admitted, then it must go throughout, and apply to the case of a special, as well as to that of a general warrant; and, in both cases, it might give the warrant holder near four, instead of two years, to make his settlement in. The words, "the same," if they do not relate to "warrant," their immediate antecedent, refer to *warrant or survey*, or to *warrant and survey*, neither of which would answer, since they could bear different dates; it would afford no rule whatever.

The fourth objection is, that at the expiration of two years from the date of the warrant, it was perfectly uncertain where the warrants might be located; it is impossible for the plaintiff to prove, that the Population Company was prevented from making their settlements, by the enemies of the United States, on the land in question. To meet this argument, the plaintiff relies upon the testimony of the deputy surveyor, who states, that when the 390 warrants were entered, he was directed to survey them on the triangle upon the connected plat; by which, it appears, that they covered the whole triangle; and upon that paper, and the receipts for the purchase money, from which they argue that you may infer, that there was one leading warrant, to which all the rest were adjoining; and if you are satisfied, upon the evidence, that this was the fact, then the only question remaining is, whether the Population Company were, for two years after the dates of the warrants, prevented from settling on the lands in the triangle; and whether they persisted to make their settlements during that period. What kind of a settlement they were to be prevented from making, and to

what degree the prevention should have existed, were stated in the charge of Huideköper *vs.* M'Lean, which has been read.

Verdict for plaintiff.

Ingersoll and Gibson, for plaintiff.
Rawle and M. Levy, for defendant.

Felichy *vs.* Hamilton.

To constitute a partnership, there must be a community of interests—a participation in profit and loss; and this joint interest must continue to the time of the sale of the articles in which the parties are thus interested.

It is the joint interest in the whole, which constitutes the joint liability of all, for the contracts of one; and not the credit which is given to all, as in the instance of a dormant partner.

If A & B purchase an article on joint account, and ship it; they are jointly liable for advances made by the consignee on account of this joint concern.

THE two Mackeys, and the defendant, in 1795, shipped a quantity of snuff to the plaintiff, at Leghorn, and the invoice and bill of lading, stated it to be on their account and risk, and consigned to the plaintiff to sell. In pursuance of a general permission, given by the plaintiff to the Mackeys, who had before done business with them, to draw on London for two-thirds of the invoice price of all goods consigned to the plaintiff, the Mackeys drew upon Robert Hunter, the friend and agent of the plaintiff in London, for two-thirds of the amount of this shipment; and although the plaintiff found the snuff to be altogether unsaleable and worthless, he nevertheless directed Hunter to take care of the bills. Some of them were paid and some protested, in consequence of the plaintiff's not providing, at the time, funds for the reimbursement of Hunter, from which he was prevented, the French having taken possession of Leghorn. The plaintiff corresponded with the Mackeys alone, upon the subject of this shipment, without once mentioning the name of Hamilton. They charge the advances, made on account of it, to them, in sundry accounts; and in one, they credit that account with a sum previously due from them, to the Mackeys, on their separate account; no objection was ever made to the

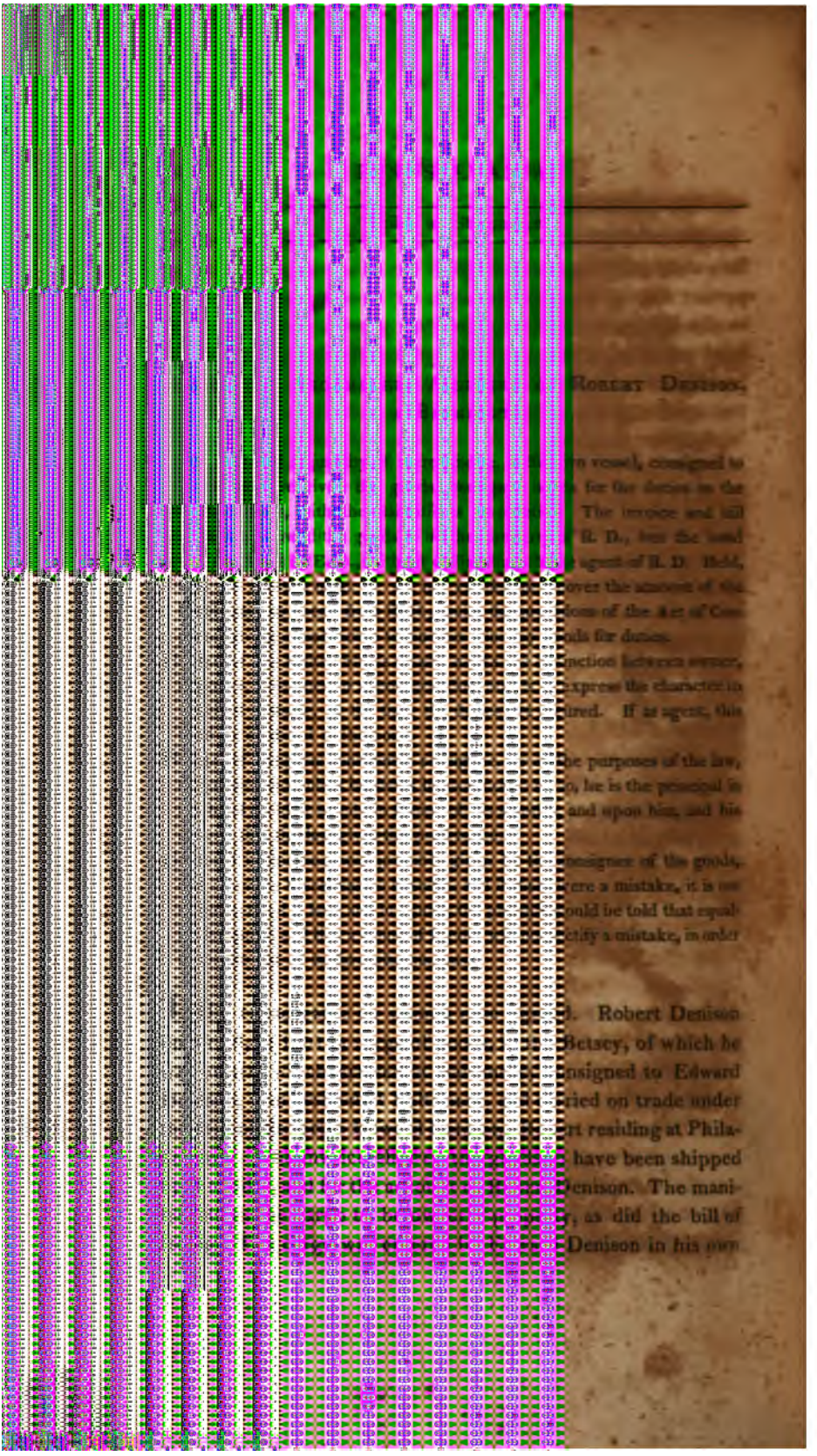
mode of stating the account by the Mackeys, during their solvency. They afterwards became bankrupts, and this action is brought to recover the whole advances made on the snuff account, against Hamilton.

The only question of law argued before the jury, was, whether Hamilton was liable, as a partner with the Mackeys. It was contended that he was not; because, it being agreed between the Mackeys and Hamilton, that the former was to transact the whole business of the sale in Europe, Hamilton was deprived of one of those powers, or of the whole, which is essential to a co-partnery. 2d. That all was done in the names, and on the credit of the Mackeys. 3d. The plaintiff claimed of Hamilton only one-half of the advances. Cases cited, 1 Dall. 129. Cowp. 636. 448. 1 Dall. 151. 269. Watson on Part. 253. 80. 1 Ld. Ray. 666. 2 Id. 1484. Salk. 126. 292. Wats. 58, 59.

WASHINGTON, J. To constitute a partnership, there must be a community of interest; a participation in profit and loss; and this joint interest must continue to the time of the sale, as well as to the purchase. This joint interest in the whole, is what constitutes the liability of all for the contracts of one. If the Mackeys and Hamilton purchased on joint account, and shipped the snuff to be sold on joint account, then they are liable jointly for the advances made by the plaintiffs, on account of this joint concern. The measure of their interest in the snuff, will be the measure of their liability for the advances. If they were not jointly concerned in the sale, the conduct of the Mackeys, in making the shipment on joint account, if not done with the knowledge of Hamilton, cannot make it a partnership transaction. But, if they were jointly concerned in the sale, then the plaintiff, corresponding only with the Mackeys, did not discharge Hamilton. The responsibility of one partner, for the contracts of another, is not solely on the ground of the credit being given to all, which it is not in the case of a dormant partner; but because, that being to share the profits,

they must share the loss. Neither would the agreement of one partner with another, not to act in the business; whatever may be the effect of this as between the parties, it is nothing to third persons; neither ought the plaintiff to be affected by his having claimed only a moiety from Hamilton. For, if there was really a partnership, it was no more than a mistake of his legal rights.

Verdict for plaintiff.



name, and a bond was given by him in his own name, without mentioning Robert Denison, for payment of the duties, with the plaintiff and Brown as his sureties. Childs having been compelled to discharge the bond, and Edward & Robert Denison being bankrupts, this action was brought; and the question was, whether the plaintiff is entitled to a preference of the other creditors, or must come in equally with them.

It was contended, by Mr. Dallas, for the plaintiff, that though it does not appear, on the face of the bond, that Edward Denison subscribed the same, as agent for the real owner, yet, that this being made out in evidence, *dehors* the bond, the effect will be the same; and therefore, that under the 65th section of the Impost Law, Act of 18 the plaintiff, the surety, is entitled to a preference of the other creditors of the owner. The agent need not sign as agent in this case, any more than in the case of an insurance made by him in England, under the statute. See Park, 15, 16. 1 T. Rep. 313. 1 Bos. & Pull. 345.

Rawle and Ingersoll, for the defendant, insisted: 1st. That the law which gave this preference, was unconstitutional; though under the 8th section of the first article of the Constitution, Congress might, as a consequence of the direct power to lay and collect impost and duties, give a preference to the United States, yet they could not transfer it to a surety, since the collection is complete by the payment of the surety; and therefore, all the power on this subject, is thereby expended.

2d. The preference is against the principal in the bond, not the owner of the goods. Edward Denison is the principal. The distinction between owner, consignee, and agent, is clearly marked out in the law. Even the United States could not sue the owner, if not principal in the bond, much less the surety, whose right is derivative.

3d. The preference given by the law which was read, was done away by the Bankrupt Law, which puts all creditors on an equality, except the United States; and sureties being not

included within the exception, are left on the ground of other private creditors.

Dallas and M'Kean, for the plaintiff, upon the third point, contended, that the law which gives the preference, and the section of the Bankrupt Law, which is relied upon, are affirmative statutes; and the latter does not repeal the former, as to priority given to the surety.

WASHINGTON, J. The question upon the case agreed, is, whether the plaintiff, Childs, is entitled to the like advantage, priority, and preference, for the recovery of the money, paid by him as above mentioned, out of the estate of Robert Denison, as are reserved and secured to the United States, by the Act of the 2d of March 1799. If in the affirmative, judgment must be for the plaintiff; otherwise, for defendant. Throughout the law imposing duties on imports, the distinction between owner, importer, consignee, and agent, is carefully marked, and uniformly adhered to. The entry of the goods is to be made in the name of the owner or consignee, who, for all the purposes of the law, is considered, by the 62d section, as owner; or, in cases of the absence, or sickness of those persons, by their agent or factor, in the name of the owner or consignee; and is to be verified by the oath of the person making the entry; in a way to point out distinctly the character in which he acts, whether as owner, consignee, or agent. If the entry be made by an agent, or factor, where the particulars of the merchandise are unknown, it is, by the 36th section, to be in writing, and subscribed by him in his name, as agent or factor for the owner or consignee. The bond for securing the duties, is, by the 62d section, to be in the name of the importer or consignee; or, if it be given by an agent, then in the name of such agent, and of the importer or consignee, and the sureties, with condition for payment of the duties by the principal or his agent, and the sureties. In addition to this bond, the agent, if the entry be made by him,

is to give a bond in the penalty of 1000 dollars, to produce an account of the goods, verified by the owner or consignee, within a stipulated time. By the 65th section of this law, a priority of satisfaction is given to the United States, against all the obligors in the bond, in case of insolvency; and, if the *principal in such bond, given either by himself, or by his agent, factor, or other person for him*, should be insolvent, or if his estate in the hands of his executors or assignees, be insufficient for the payment of his debts, and the bond should be discharged by his surety; such surety is entitled to the like advantage, priority, or preference, as are reserved and secured to the United States; and he may maintain a suit upon the aforesaid bond, in his name, in law or equity, for recovering all moneys paid thereon.

Here, then, we find that the distinction between owner and importer, consignee and agent, which runs through the various sections of the law, prior to the 65th, is dropped, when the remedy for the surety in the bond is provided for. The preference given to him is not against the owner, importer, consignee, or agent, but against the *principal in the bond*. Who is the principal in the bond? He is marked in the condition. The person who entered the goods, viz. the owner or importer, if the entry were made by him; or the consignee, if made by him; or either of those persons, if the entry were made by an agent, or other person, in their names, and who is an obligor in the bond, either by his own signature, or that of his agent, or other person authorized to bind him. No person can be a principal in a bond, who has not sealed it, either by himself, or by some person authorized to do it for him. If the bond be executed by a third person, in the character of owner or consignee, he is the principal, though he be not in truth the owner or consignee. If the factor make the entry in his own name, the bond will, of course, be in his own name, and he will be the principal; if made in the name of the owner or consignee, he, in whose name it is made, will be the principal, if the bond

be executed by or for him. But if he be not the obligor, he cannot be principal.

This is an action of debt; and the first count in the declaration states, that Robert Denison executed the bond by Edward Denison, his agent or factor. Now, in point of fact, the bond was not given by Robert Denison; because it was neither signed and sealed by him, nor by his agent or attorney for him.

The second count states, that the bond was given by Edward Denison and the sureties, for and at the instance of Robert Denison. If so, it is not the bond of Robert Denison, but of those who executed it. But a complete answer to both counts is, that the bond was executed, not by an agent or factor, but by the *consignee* of the goods; who, as to all the purposes of the Act, is to be considered as the owner; no parallel can be drawn between this case and that of an insurance effected in England by an agent. The statute directs, that the name of the agent shall be stated in the policy; but, it is not necessary that his character of agent should also be stated. But, in this case the preference is given against the principal in the bond, and the only inquiry is, who is principal.

It is contended, that the not entering the name of Robert Denison, was a mistake of the public officer. In the first place, I do not agree that it was a mistake; because, Edward Denison being the consignee, he was properly the principal in the bond. But, if it were a mistake, it cannot be rectified on this side of the Court; and, if the plaintiff were to seek relief on the other side, he would be told that equality is equity; and chancery will not cure a defect at law, in order to violate one of its favourite maxims.

The decision of this point, renders it unnecessary to consider the other points made by the defendant's counsel.

Judgment for defendant.

P. BUTLER, ESQUIRE, *vs.* HOPPER.

Special verdict.—The plaintiff formerly lived in South Carolina, where he had a plantation which he cultivated, and still continues to do so, by his manager and slaves, and upon which he has a furnished house, and servants. From 1794 to this time, with the exception of an annual visit to his estate in Carolina, he has kept a dwelling house in the city of Philadelphia, and has resided in it with his family and servants, and amongst them *Ben*; who was his *slave* before he came to Philadelphia, and who continued with him, claimed as such, until September 1805, when claiming his freedom, he was discharged from his service, by *habeas corpus* issued by the Court of Common Pleas of Philadelphia county. Whilst on his estate in South Carolina, Mr. B. always kept house, having *Ben* with him. From 1794 to 1805, Mr. B. represented the State of South Carolina in Congress, with the exception of two years, during which, he was a member of the Legislature of that State.

The Act of Assembly of March 1st 1780, is not contrary to the 1st article of the Constitution of the United States; as the 9th section of the 1st article thereof, does not apply to State governments; nor does the 2d section of the 4th article extend to the case of a slave, *voluntarily carried* by his master into another State, and there leaving him under the protection of some law declaring him free; but to slaves escaping from one State into another.

The plaintiff cannot claim an exemption from the operation of the Act of Assembly of Pennsylvania; because, for two years he ceased to be a member of Congress, and during that time, he lost the privilege which the exception gave him. He cannot be considered a *sojourner* in the State. If a man remove from one State to another, with an intention of making the latter the place of his permanent abode, he is domiciled there; although he leave behind him another estate which he cultivates, and is even elected a member of the Legislature of the State, where the same is situated.

If the jury, in a special verdict, find facts only, the Court must draw the legal conclusion from them; and if they draw conclusions against the law upon the facts of them, the Court will reject the conclusion, and judge upon the facts.

Where the jury find only such facts as leave the question of law equivocal, and then draw a conclusion which the facts not found might have warranted; the Court will say their conclusion is against law.

Butler vs. Hopper.

THIS case comes before the Court on a special verdict, the material parts of which find; that the plaintiff formerly lived in the State of South Carolina, where, as well as in Georgia, he had a valuable plantation, which he cultivated, and still cultivates, by his overseers and slaves, and on which he had, and still has, a furnished house and servants. That from the year 1794 to the present time, with the exception of an annual visit to his plantations at the southward, continuing from October in each year, till May or June following; he has kept a dwelling house in the city of Philadelphia, and has *resided* in it, with his family, consisting of several children, and domestic servants, and amongst the latter, Ben, the subject of the present suit; who was his property, as a slave, at the time of his coming into this city, and who continued with him, claimed as such, until September 1805, when he was discharged from his service, under a *habeas corpus* issued from the Court of Common Pleas of this State. Whilst on his plantation in South Carolina, during these annual visits, the plaintiff kept house, always having Ben with him. From the year 1794, until the 4th of January 1805, the plaintiff represented the State of South Carolina in Congress, except for two years, between 1796 and 1800, when he was a member of the Legislature of that State.

WASHINGTON, J., After stating the case as above, proceeded. Upon these facts, the question is, whether Ben became free by virtue of a law of this State, passed on the 1st of March 1780; which declares, that no person of any nation or colour, except negroes registered according to the Act, shall thereafter be holden as slaves within this State, but as free, except the domestic slaves attending upon delegates in Congress from the other states, foreign ministers, and consuls, and persons passing through, or sojourning in this State, and not becoming resident therein.

To dispose at once of an objection to the validity of this law, which was slightly glanced at, I observe, that the 9th section of

the 1st article of the Constitution of the United States, which restrains Congress from prohibiting the importation of slaves prior to the year 1808, does not, in its words or meaning, apply to the State governments. Neither does the 2d section of the 4th article; which declares, that "no person, held to labour or service in one State, under the laws thereof, escaping into another, shall, in consequence of any law therein, be discharged from such service;" extend to the case of a slave voluntarily carried by his master into another State, and there leaving him under the protection of some law declaring him free.

The exercise of this right, of restraining the importation of slaves from the other States, under different limitations, is not peculiar to Pennsylvania. Laws of this nature, but less rigid, exist in most of the States where slavery is tolerated.

We come then to the consideration of this law, and of the facts found in the special verdict. The plaintiff claims an exemption from the enacting part of the section above stated, upon two grounds: 1st, as a member of Congress; and secondly, as a sojourner. The first will not answer his purpose, because for two years he ceased to be a member of Congress, and therefore lost the privilege which that character might otherwise have conferred upon him, under the exception in the law. This fact dispenses with the necessity of examining the *wiredrawn* distinction, which has been contended for, between "a representative *in* Congress," and "a member *of* Congress;" both of which expressions describe the same character, and are varied in different parts of the section, with a view to the sense of the phrase, as well as to the grammatical accuracy.

The next question then is, can the plaintiff be considered as within the other exception of the law, a sojourner during the period when he ceased to be a member of Congress? But the verdict precludes all inquiry into this point, by finding, that the plaintiff, from the year 1794, to the present time, has *resided* with his family in Philadelphia, except at those times when he visited his plantations in the southern States. No person is

entitled to the protection of the exception, who is a resident in the State, unless he be a member of Congress, a minister, or consul. But the jury find that the plaintiff was a *resident*, and was not either a member of Congress, a minister, or consul. The conclusion is inevitable. In answer to this, it is said by the counsel for the plaintiff, that the jury have found facts enough to show that the plaintiff was not a resident of this State. What these facts are has already been stated. But, will it be contended, that if a man removes from one State to another, with an intention of making the latter his permanent abode, he is not domiciliated there; because he has left behind him an estate which he cultivates, sometimes visits, (no matter how often, or how long in each year,) and whilst there, keeps house, and is even elected into the Legislature of the State he has left? These circumstances are of prodigious weight, I admit, to repel the idea of a change of domicile; but strong as they are, evidence might have been given to the jury, sufficient to warrant them in the conclusion they have drawn; and by finding the plaintiff to be *a resident* in this State, they find, in effect, every thing necessary to constitute him a resident. If the jury find facts only, the Court must draw the legal conclusion from them; or if, having found the facts, they draw a conclusion against the law, upon the face of them, the Court will judge upon the facts, and reject the conclusion. But, when they find only such facts as leave the question of law equivocal, and then draw a conclusion which the facts not found might have warranted, the Court cannot say that their conclusion is against law. I am therefore of opinion, that, upon this verdict, the law is with the defendant.

Ingersoll, for plaintiff.
Lewis, for defendant.

LESSEE OF WALLACE *vs.* LAWRENCE.

The title under a sheriff's deed, although the deed was not recorded until after ejectment brought, is good; because, although such deeds do not convey a title until recorded, yet the title relates back to the time when the deed was made.

THE lessor of the plaintiff, claimed under a deed from the sheriff, who sold the land in question to him, as the highest bidder, under a *levari facias*. The deed was executed before the ejectment was brought, but was recorded some time after.

Lewis, for the defendant, stated, that these deeds were not considered as conveying a title, till they are recorded.

By the Court. If this doctrine be as stated, still the title is good, by relation to the time when the deed was made.

Verdict for plaintiff.

Binney, for plaintiff.
Lewis, for defendant.

De Taslet & Co. vs. Crousellat.

The defendant, in an action on a bill of exchange, may set off a claim he has upon the plaintiff, for not having insured a particular sum on a vessel, and which he was ordered and bound to do, the vessel having been lost, and no insurance having been made by the plaintiff.

Damages on bills of exchange, paid by the defendant upon bills drawn by him on the plaintiff, and which the plaintiff was bound to pay, may be set off.

THE questions in this cause were, whether the defendant could set-off against the plaintiff's demand, which was on a protested bill of exchange for the sum of £7,000 sterling, which the defendant had ordered the plaintiff to insure on a vessel, the plaintiff being under a legal obligation to make the insurance as directed; but which he had failed to do, and the vessel was lost.

Secondly. If he could set-off about £1,800, which the defendant had paid for the damages on bills of exchange, drawn upon the plaintiff, and which he had protested, though he was bound to accept and pay them.

Levy, for the defendant, contended, that under the law of this State, passed in 1705, which declares, that on the plea of payment, the defendant may give in evidence any bond, bill, account, bargain, or agreement; greater latitude was allowed to offsets than in England. That in the case of a merchant who has funds of another in his hands; or who has been in the habit of insuring for him; or who accepts a bill of lading from him, and yet refuses or neglects to make insurance when ordered; that he stands himself the insurer, is liable to pay exactly what the insurers would have been bound to pay, and is entitled to

make the same defence. He cited 1 Marshall on Insurance, 205, 206, 207, 208, 209. 6 T. Rep. 488. Park. 303, 304.

Rawle, for plaintiff, insisted, that the action against the merchant thus neglecting to insure, is founded in *maleficio*; that the damages are unliquidated, and cannot be set off.

By the Court. The foundation of this offset is a breach of contract, which makes the merchant who thus neglects to insure, the insurer, and he is liable as the insurer, and is entitled to make the defence which the insurer could make. This, therefore, is not a case of unliquidated damages. As to the second point, that was settled in the case of Armstrong *vs.* Brown.

The parties then agreed to withdraw a juror, the plaintiff not being prepared to meet the first offset.

BIAYS *vs.* THE UNION INSURANCE COMPANY.

It is the duty of the assured to represent truly to the underwriter every fact within his knowledge or power, material to the risk; and if he omit to do so, the policy is void.

If he communicates all the information he has honestly obtained, he cannot be charged with misrepresentation or concealment, if it should, afterwards, turn out that his informant knew more than he had disclosed, or had not stated it truly.

If, for fraudulent purposes, he avoided obtaining a full and true disclosure, the consequences would be the same, as if he had misrepresented the information given to him.

THIS was a policy on the Mary Ann, at and from Cape François to Baltimore. It appeared in evidence by the testimony of captain West, that he commanded the Mary, and that he left the Cape in company with the Mary Ann, and that they continued together until the afternoon of the 8th of September 1804, when the Mary Ann hove to, in consequence of which, the Mary did so too, the wind blowing fresh. The night was dark; and in the morning the weather continued so thick, that he could not discover the Mary Ann. He continued drifting under reefed sails, till about twelve of the 9th; when supposing that the Mary Ann had shot ahead, he put on more sail, and arrived in six days at Baltimore. The wind blew fresh during the 6th, 7th, and 8th of September.

When he arrived at Baltimore, he informed Hannah, the clerk of the plaintiff, that he had left the Mary Ann on the night of the 8th, the wind blowing fresh, which information was put into writing, and shown to captain West, to say if that contained a true statement of the information he had given. Being approved by West, as containing the information he had given, it was in three days after the arrival of West forwarded to the

agent of the plaintiff, with orders to make this insurance. This statement was shown to the defendant, when the insurance was made. West also proved, that when he last saw the Mary Ann, there was no appearance of any thing being amiss with her. The conformity of the statement shown to the defendant, with the information received from West, was proved by the testimony of Hannah.

In December 1804, some time after the arrival of West, his deposition was taken on the part of the defendant; when he swore, that he and the Mary Ann kept company, till the 8th at night, when he left her in a heavy gale, which had blown for the two preceding days; and in July 1805, when his deposition was taken again, he swore that he gave this information to the plaintiff on his arrival. The Mary Ann has not since been heard of. The ground of defence was, that the representation made to the defendant, was materially variant from the information given to the plaintiff's clerk by captain West.

WASHINGTON, J., charged the jury. It is the duty of the assured to represent truly to the underwriter every fact within his knowledge or power, material to the risk; and if he omit to do so, the policy is void. If he communicates all the information which he has *honestly obtained*, he cannot be charged with misrepresentation or concealment, if it should afterwards turn out that his informant knew more than he had disclosed, or had stated it untruly. I say *honestly obtained*; because, certainly, if for fraudulent purposes, he avoided obtaining a full and true disclosure, the consequence would be the same, as if he had himself misrepresented the information given to him.

Proceeding upon these principles, I think, that without going farther than I am authorized to do, I may safely say, that if Hannah is believed, there is no ground for the charge of misrepresentation. The difference between the information given to the plaintiff, as stated by West on his examination in

Court, and that stated in his deposition in July, is material, or not. If not material, then the representation given to the office was substantially true; if material, then the witness, having contradicted himself, if his testimony in Court is not more to be believed than that given out of Court, he is not to be credited at all as to this point; and of course there is no proof of misrepresentation. But, on the contrary, Hannah proves, that the information given by West was committed to writing examined and approved by him, and this paper was shown to the defendant.

Verdict for plaintiff.

SNELL, STAGG, & COMPANY, *vs.* THE DELAWARE INSURANCE COMPANY.

The foundation of all insurances, unless of the wager kind, is *the real value* of the thing insured. In a valued policy, the parties agree upon the value; in an open policy, the assured is bound to prove it. The prime or invoice cost, may, in most cases, be, *prima facie*, a very proper criterion of value, but it is not conclusive. The actual value should be ascertained and determined, and this may vary from the invoice, or prime cost; and, whatever the same may be, the assurers are bound to pay it in an open policy.

THIS was an open policy on the brig Hound, from Kingston in Jamaica to New-York, on which 2500 dollars were underwritten by this office. Proof of property, that she sailed on the voyage insured, and was lost as stated, was given.

It appeared in evidence, that the Hound, being the property of the plaintiffs, was captured on her outward voyage, was carried into Kingston, condemned and sold, and purchased, at the instance of the captain, by Campbell & O'Harrow, for the plaintiffs, for about 3060 dollars; who also paid about 1100 dollars for her outfits to New-York, and about the same sum for the expenses of defending the claim. Campbell & O'Harrow took a bottomry bond on the vessel, to secure the above sums, and wrote to their correspondent in Philadelphia, mentioning that they had bought the vessel for the plaintiffs, much below her value, and had advanced as above; and ordering 5000 dollars to be insured on her, which was effected in the Phœnix Company. This loss has been paid by them. Evidence was given to prove that the vessel, when she left New-York, was worth about 7000 dollars.

The only question was, whether the value of the vessel exceeded the 5000 dollars paid by the Phœnix Company; be-

cause; if it did not, it was agreed that the plaintiffs could not recover any thing in this suit, for the value of their resulting interest.

Condy and Rawle for the defendants, contended, that the price at which the vessel sold at Kingston, is the only criterion of her value, which, after adding the outfits, amounted to only 4122 dollars. The costs of defending the claim, though properly insurable by Campbell & O'Harrow, could add nothing to the value of the vessel. To prove that the prime cost or invoice furnishes the criterion of value, as to the cargo, they read Park, 98. 104.

Dallas, for the plaintiff, insisted, that, though the rule mentioned was applicable to goods, it was not so to the vessel; if it were, it would operate, in general, more against the underwriter than the assured. He cited 2 Marsh. 535. Millar, 247. 251. 264. 2 N. York Rep. 23.

WASHINGTON, J., charged the jury. The foundation of all insurances, unless of the wager kind, is *the real value* of the thing insured; and the only difference between a valued and an open policy, is, that, in the first, the parties agree upon the value; and in the latter, the assured is bound to prove it. But, a new principle is now attempted to be introduced; namely, that the prime cost, instead of the real value, is to be the measure of the indemnity.

The prime cost, or invoice price, may, in most cases, be *prima facie* a very proper criterion; and, in the case of goods, the latter is the proper measure of the value. The assured cannot object to it, because the invoice is tantamount to an agreement on his part, that that is the value; and it must, in all cases, be so near to the value, that it is very properly considered as the criterion. But, as to the prime cost, this may often vary very considerably from the invoice price; for instance, a cargo of flour may, when shipped and invoiced, be worth double as much as it cost; and, can it be contended, in such a case, that

the prime cost would furnish the rule? Equally unjust, and repugnant to the principle of insurance, would it be to say, that, if a vessel be really worth twice as much as the owner gave for her, that the latter should be the criterion of value. If the prime cost is to furnish the rule, then, when the builder of a vessel insures, he must prove not what was her value, but what she cost him.

The prime cost is a good rule, where no better is furnished; and, as in this case there is no proof of her real value in Jamaica, the jury may probably adopt the sum at which she sold, as the value of her. But, if they, from the evidence, are satisfied that she was worth more, they are not bound by what was given for her. I will add farther, that the rule contended for by these defendants, would, in many cases, operate most injuriously against underwriters.

The jury found for the plaintiffs upwards of 2300 *dollars.*

BROWN *vs.* JOHN JACKSON.

The defendant being indebted to the plaintiff in London, for goods, remitted a bill of exchange, drawn upon London, in his favour, which he endorsed "pay the amount to order *for my use.*" The bill was not accepted nor paid, and was returned to the plaintiff's agent, who demanded payment of the defendant, as endorser.

Such a special endorsement releases the endorser from the payment of damages, and prevents the negotiability of the bill. The amount of the bill is to be received by the endorsee, for the use of the endorser.

If the endorsee be not a creditor of the endorser, then he is to receive the money, and remit it; or if the bill is dishonoured, he is to return it.

In this case, the plaintiff having received the bill in payment of a debt due to him, was entitled to look to every person responsible on the bill, in like manner as if he had bought the bill, with exception of a claim for damages on the endorser.

Quere, whether the neglect of the plaintiff to give notice of non-acceptance did not release the endorser.

INDEBITATUS ASSUMPSIT for goods &c. and another count upon a bill of exchange. The defendant being indebted to the plaintiff, a merchant in London, for two separate shipments of goods, remitted to him in December 1804, a bill of exchange drawn by Mr. Crawford, on Barclay & Salkield, at Manchester, at sixty days, for the amount of the last shipment of goods, and endorsed by the defendant in the following terms, viz. "pay the amount to Brown, or order, *for my use.*" The bill was endorsed by the plaintiff, to Fox & Company of Manchester, who presented the bill to the drawees; who, refusing to accept the same, it was noted on the 12th of February 1805, and was protested for non-payment on the 16th April. The bill was accordingly returned to the plaintiff, who sent it forward immediately to Gardner of Philadelphia, to receive the amount of it, with

damages and costs, from the drawer and endorser. The bill was received on the 10th of June, and on the same day notice was given to the drawer, and payment of principal, damages, &c. demanded. On the next day, notice was given to the defendant, and the same demand made, and that the defendant would be held responsible for the bill. On the 19th, the agent of the defendant, James Jackson, (he as well as the agent and drawer all living in Philadelphia,) wrote to Gardner, that he would not pay the damages; and that unless the bill was given up on that day, he should consider his principal discharged. Gardner immediately requested to know the ground on which the defendant refused to pay the damages, and receiving no answer, he called on James Jackson, and being satisfied, from the nature of the transaction between the plaintiff and defendant, that the damages could not be demanded, he waived them, and agreed to receive the principal and interest; but James Jackson saying that he was not prepared to pay the bill, offered a note, with an endorser, for the amount at ninety days, which was refused. It was proved by the drawer of the bill, that he stopped payment about three in the afternoon of the 11th, but he said that he did not doubt but that he paid on the 10th.

The count on the bill states, that notice of non-acceptance was given to drawer and endorser, but this was not proved.

Witnesses were offered to prove the custom in Philadelphia, that in cases like the present, the endorser is considered as discharged; but the Court refused to hear such testimony.

Ingersoll and Read, for the defendant, admitted, that the plaintiff was entitled to recover for the amount of the first shipment of goods, but that he was discharged as to the other; and that the plaintiff could not recover either on the original ground of the debt, or on the bill. That the creditor, receiving a bill with a special endorsement, like the present, was to be considered merely as the agent of the endorser, and upon the protest, ought immediately to have returned the bill; but by retaining it, he had made the debt his own, and could not recover on the

bill against the endorser. They cited 1 Dall. 261. 2 Dall. 100. 4 Dall. 155.

Washington J., asked the counsel for the defendant, if the plaintiff could, in a separate action, recover on this bill, against the defendant, could he recover in this action?

Mr. Ingersoll admitted that he could; except that in this action the declaration averred notice of non-acceptance, which was not proved. The plaintiff therefore could not recover, in consequence of his negligence in not giving notice of non-acceptance. It is necessary to protest for non-acceptance, and to give notice, 2 T. Rep. 717, 718. If the agent retains the bill, it is so much money in his hands, and is a payment of so much.

Washington J. What circumstance is it, which constitutes this so much money in the hands of the agent? And is he further or otherwise liable, than for neglect in not returning the bill?

Ingersoll. The negotiating the bill produces this effect.

Levy and Dallas, for plaintiff, insisted, that the plaintiff was not an agent of the defendant, but had an interest in the bill, and was entitled to claim against the drawer and endorser. That nothing done by him, made this bill a payment of the original debt; but that if it did, still the plaintiff might recover on the count on the bill. That notice of non-acceptance was not necessary, Barry and Brown, 3 Dall. And as to the notice laid in the declaration, it was mere surplusage, and need not be proved.

WASHINGTON, J., charged the jury. It is difficult to perceive, upon what principle of law or justice, it can be contended, that the defendant is neither liable on the ground of the original debt, nor on the bill. The defendant was once indebted in this sum to the plaintiff, and remitted this bill for the purpose of paying it when collected. The bill has been duly presented, protested, and a demand of payment made in proper time. Neither the original debt nor the bill has been paid by the de-

fendant, and it seems strange to say, that the defendant is altogether discharged. Independent of the glaring injustice, at first view, of this doctrine, it would be mischievous in the highest degree, if it be founded; since no creditor would accept a bill of this kind from his debtor, but would either demand payment at once, or insist upon a bill which should entitle him, in case it was dishonoured, to claim as well damages as the principal.

What is the nature of such a special endorsement as the present? It prevents the negotiability of the bill, and amounts to a declaration, that in case the bill is protested, no damages are to be recovered. The money is to be received *for the use of the endorser*; but how it is to be applied, is a matter between the endorser and the endorsee. If the endorsee be not a creditor, then he is to receive the money and remit it; or if the bill be dishonoured, he is to return it. If he be a creditor, then of course he is to apply the money to the credit of the endorser. The latter was this case, and is proved, not only by the letter which accompanied the bill, but from the conduct of James Jackson, who never objected to the liability of the endorser to pay the bill; refusing only to pay the damages.

But suppose the plaintiff was a mere agent. If he negotiated the bill, supposing it had been endorsed generally, then I admit he was a receiver of so much money to the use of the endorser. But on the protest of the bill, he was obliged to repay the money, and consequently, was placed exactly in his original situation; and though he might be responsible for neglect, in not returning the bill in time, yet he could not be said to be a receiver of so much money, to the use of the defendant. But this bill not being negotiable, his endorsee can only be considered as his agent to receive the money from the drawee. If he is to be considered as having made the bill his own, then he has all the rights of an endorsee, unless he has forfeited all recourse against the drawer and endorser, by neglecting to give notice of the non-acceptance; and he is entitled to recover on the bill.

But the fact is, the bill was remitted by a debtor to his creditor, and so as to be considered as a payment when it was paid. If not paid, he was entitled to look to every person liable on the bill, as drawer and endorser, in the same manner as if he had paid so much money for it. If he takes the bill as payment, or by his conduct is considered as having so taken it, as if he retains it an unreasonable time, or negotiates it and receives the amount of it, as in Johnson and Harris, in the Supreme Court; then he cannot sue for the original debt, but he may sue the drawer, and all the endorsers on the bill. His authority is to receive payment of the bill. From whom? From all who are liable to pay it. Who are they? The drawee if he accepts, or the drawer or endorsers, who impliedly agree to pay if the drawee do not. The conduct, therefore, of the plaintiff, in demanding the amount of this bill from the drawer, and from the defendant, was within his authority; and consequently, it did not compel him to take the bill as payment. The bill was merely a collateral security, and so would have been a promissory note, if, on demanding payment from the plaintiff, he had given one. Neither would have been considered as a payment. But it is immaterial to consider, whether the bill was a payment or not. If a payment, then the plaintiff may recover on the count on the bill; if not a payment, then he may recover on the count for goods sold and delivered.

But, as it is made a point, that the defendant is discharged, by the neglect of the plaintiff to give notice of the non-acceptance, which may be an important question; and also, that notice being averred and not proved, a recovery cannot be had on the count on the bill; the jury must find for the plaintiff on the first count, the amount of the first shipment, which is not disputed; and on the second, the amount of the bill, subject to the opinion of the Court on these points.

The jury found for the plaintiff, who, supposing he could prove notice, consented to a new trial, as to the amount of the bill, the defendant agreeing he might aver his declaration.

JOY ET AL. *vs.* WIRTZ ET AL.

A bill, on the equity side of the Court, was filed by all the parties to a release of the defendants, except one, who was a citizen of Pennsylvania. The complainants in the bill were all citizens of another State. To this bill, there was a plea to the jurisdiction of the Court, alleging the want of jurisdiction, because one creditor was not joined in the bill. Held, that the Court had jurisdiction of the case.

In chancery, there is a distinction between *active* and *passive* parties; the former being such as are so involved in the subject in controversy, as that no decree can be made without their being in Court; the latter are such, as that complete relief can be given to those who ask it, without affecting the interests of the passive parties.

If a decree can be made, without affecting the rights of a person not made a party, or without his having any thing to perform, necessary to the perfection of the decree; the Court will proceed without him, if he be not amenable to the process of the Court, or no beneficial purpose is to be effected by making him a party.

There is no difference between a person, who, on account of his residence beyond seas, cannot be made answerable to the process of the Court, and one who, by the laws of the United States, cannot be brought into Court; and wherever, in the former case, a person, so circumstanced, need not be made a party, he need not be made a party in the latter case.

Care will be taken not to make a decree, which will affect the person who is not party to the suit.

THIS case was tried at the last term, on a demurrer, for want of parties. (*a*) The complainants amended their bill, by making all the relators complainants, except A. Dubois, a citizen of Pennsylvania. A plea was put in, stating this in bar, to which there was a demurrer.

It was argued by Lewis and Tilghman for the plaintiff, that, though all the creditors joined in the release, yet, they ex-

(*a*) 2 Dall. page 417.

pressly released each for himself, and not for the others. Of course they were not connected in interest; there was no privity; and each might be released without the others. But, at any rate, Dubois not being permitted to sue in this Court, being a citizen of Pennsylvania, there is no necessity to make him a party, any more than if he was beyond the reach of the process of the Court; and that, whenever a person is not amenable to the process of the Court, he need not be made a party. So in many other cases. 1 Eq. Ca. Ab. 72, 73, 74. 2 Idem, 166. 2 Atk. 510. Finch, 112. Prec. in Ch. 99. Mitf. 52, 3. Prec. in Ch. 592. 1 Ch. Cas. 35. 1 Atk. 282. P. Wms. 33. Hinds. Prac. 151.

WASHINGTON, J., delivered the opinion of the Court. When this cause was heard at the last term, on demurrer for want of parties, the Court did no more than sustain the demurrer, and direct proper parties to be made. All those who executed the release, have since been made complainants, except Abraham Dubois, a citizen of Pennsylvania; and his not being made a party, is the subject of a plea, which is now to be decided upon. In support of the plea, it is contended, that the Court cannot make a decree, without having all the parties, who united themselves together by the release, before them; and that to proceed, without making all releasors parties, would be to violate one of the fixed principles of a Court of equity, which professes to prevent multiplicity of suits. It is admitted, that Dubois cannot be made a party; but this is urged as a reason, why the suit is improperly brought in this Court.

In deciding who ought to be parties, it is necessary to distinguish between *active* and *passive* parties; between those who are so necessarily involved in the subject in controversy, and the relief sought for, that no decree can be made without their being before the Court; and such as are formal, or so far passive, that complete relief can be afforded to those who seek

it, without affecting the rights of those who are omitted. The case of Fell and Brown, 2 Brown's Ch. Rep. 276, presents us with the rule, and with a strong illustration of it. A second mortgagee brought a bill against the first, to redeem, without making the heir of the mortgagor a party, who was stated to be resident in another country. An objection for want of parties being made, the Chancellor observed, that there was a distinction as to proceeding in the absence of parties abroad, between their being active and passive: that the mortgagor, or his heir, cannot be considered as a passive party; because, the decree is, that the second mortgagee shall redeem the first, and that the mortgagor redeem him, or stand foreclosed on this account; the mortgagor or his heir, being an active party, the Court cannot proceed without him; and he being a party cannot be dispensed with, though he is not amenable to the process of the Court. Many other cases might be mentioned, equally strong with that just cited; and, in all of them, the rule is so stubborn, that I doubt, if, under any circumstances, it can be made to bend to the plea of necessity. But, if a decree can be made without affecting the rights of a person not made a party, or without his having any thing to perform necessary to the perfection of the decree; reason, as well as adjudged cases, will warrant the Court in proceeding without him, if he be not amenable to the process of the Court, or no beneficial purpose is to be effected by making him a party.

The object of a Court of equity is to prevent a multiplicity of suits, to do complete justice, and to make the performance of its decrees safe to those who must obey them. Hence results the rule, that all persons concerned in the demand in the question in dispute, must be made parties. But this rule is not so inflexible, that, to preserve it, the Court will not deny relief to those entitled to seek it, because there are others, who cannot be made parties, and who need not be so, otherwise than for the sake of principle, on which the rule is founded. This would be to make the great and primary objects of this Court,

subservient to those which are merely secondary. I admit, that the cases cited, apply to defendants. But, no case like the present could occur in England; and the reason of those cases, as applicable to defendants, is equally strong when applied to those who are complainants.

I shall only add, that there is, in reason, no difference between a person, who, on account of his residence beyond seas, cannot be made answerable to the process of the Court, and one who, by the laws of the United States, cannot be brought into this Court; and that wherever, in the former case, a person so circumstanced need not be made a party, he need not be made a party in the latter case.

The Court will take care to make no decree to affect Mr. Dubois; and a complete decree may be made, without his being a party. At the same time, to prevent multiplicity of suits, it would be proper to make him a party, if the Court could make a decree for or against him.

Plea overruled.

COWQUA *vs.* LAUDERBRUN.

The Court allowed the interest customary at Canton, upon a note executed there.

THIS action was brought on a promissory note, given in Canton, payable eighteen months after date, without stipulating any thing about interest.

The defendant took out a commission, eighteen months ago, to examine the books of the plaintiff. When the commissioners opened the commission, about twelve months ago, the plaintiff was absent from Canton, so that the commission not being returned to the last Court, the cause was continued. A motion was again made to this Court, to continue the cause; but as no reason was given, why the commission was not executed, the Court thought there was no sufficient reason assigned for the continuance; but upon the offer of the plaintiff, made before the opinion of the Court was known, to continue, on receiving a judgment and security for the debt; the Court directed, accordingly, execution to be stayed, and gave leave to move, next term, to set aside the judgment, if the commission being returned should afford a reason for doing so. A question then arose, what interest should be allowed? After examining a number of witnesses, the Court was of opinion, that twelve per cent. per annum should be allowed, from the expiration of the eighteen months; no proof being given what is the legal interest at Canton, or whether any is fixed by law. But it appears, that the customary interest of the country, where no special agreement is made to vary it, is one per cent. a month, from the expiration of the credit. Many instances have been proved, where more and less has been stipulated in the notes executed in Canton; but all those cases seem to be departures from the regular and established rate of interest, founded on special agreements.

Brig Tryphenia *vs.* Harrison.

Libel in the nature of an information, for a violation of the Act of Congress, prohibiting the slave trade.

The vessel, the property of a citizen of the United States, being at St. Thomas; took on board, as passengers, two ladies, with some slaves, their domestic servants, for all of whom the price of their passage was paid at Havana; where the ladies and their slaves were landed. The slaves were not carried for sale, nor in any other manner than as the property of the ladies, and as their attendants.

Held, that the law of the United States, passed 22d March 1794, was intended to prohibit any citizen or resident of the United States *from equipping vessels within the United States*, to carry on trade or traffic in slaves to any foreign country.

The law of 10th May 1800, extends the prohibitions to citizens of the United States, *in any manner* concerned in this kind of traffic, either by personal service on board of American or foreign vessels, wherever equipped; and to the owners of such vessels, citizens of the United States.

The provisions of those laws, were not intended to apply to a case, where slaves are carried from one foreign port to another as passengers, and not for sale.

THIS was an appeal, *pro forma*, from the District Court. It was a libel, in the nature of an information, against the brig, for a violation of the Act of Congress of the 22d of March 1794, prohibiting the slave trade from the United States to foreign countries. The answer and claim of Crousillat, the owner of the brig, denied that the brig had been engaged in carrying on trade or traffic in slaves; and in opposition to the particular charge laid in the libel, of transporting slaves from St. Thomas to the Havana, stated; that the slaves were the property of two French ladies, taken on board the brig at St. Thomas, and carried to the Havana, who paid the price of passage for themselves and their slaves; and that they were not carried for sale

or traffic, but as the servants, or attendants of those passengers. The answer was fully supported, by the evidence of the two lady passengers, the supra-cargo, and another witness.

Lewis and Rawle, for the appellee, insisted, that whatever might be the construction of the Act of 1794, the Act of 10th May 1800, prohibits the *transportation of slaves* from one foreign country to another; and that in this case it is admitted, that the slaves in question, were carried from St. Thomas to the Havana. That the last law was intended to go much farther than the first, in order to render a violation of its provisions more difficult to be effected.

Ingersoll and Duponceau, for the appellants, contended; that the two laws were to be construed together, and that the obvious intention of both was, to interdict the carrying slaves from one country to another, with a view to traffic; and that no such trading was proved in this case, but the contrary.

WASHINGTON, J. No person can doubt, but that the Act of 1794 was intended to prohibit any citizen of, or resident in the United States, from equipping vessels within the United States, with a view to carrying on the trade or traffic in slaves, to any foreign country. But, as this law was confined to vessels equipped in the United States for this purpose, and it might be difficult to prove that such was the intention of the equipment, and indeed the provisions of this law did not reach the mischief, since citizens of the United States might, without such equipments, contribute in other ways to carrying on this inhuman and unjustifiable traffic; the Act of 1800 was passed in addition to the former Acts, and extends the prohibition to citizens of the United States, in any manner concerned in this kind of traffic, either by personal service on board of American, or foreign vessels, wherever equipped; and also, to the owners of such vessels. The words of this last law, I admit, are so general as to extend to the case of transporting slaves from one foreign country to another; but this law must be construed in

connection with the former, which was not intended to embrace a new subject, but to render the former law more effectual, for prohibiting the slave trade. If a doubt could exist on this subject, it is cleared up by the latter law; which, differing from the second only as to the vessel on board of which the citizen has served, immediately varies the expression, and speaks not of a vessel employed, in carrying slaves from one country to another, but of one employed in the *slave trade*.

Whatever may be the true construction of these laws, as to the *carrying slaves* from one country to another, even for sale; I very much question, if it was in the contemplation of Congress, to go farther than to prohibit American citizens from carrying on this trade from Africa, or other countries, so as to consign to slavery, those who were free in their own country. This was laudable. But why should Congress prohibit the carrying persons, already slaves in one of the West India islands, to be sold in another? The situation of these unfortunate persons, cannot be rendered worse by this change of situation and masters. This, however, is a mere suggestion as to the probable intention of the Legislature. The construction of the two laws may possibly force us to a different conclusion. At any rate, neither of the laws extend to the present case; it being clearly proved, that the negroes in question, were not carried to the Havana for sale.

Sentence reversed, and claim sustained.

DELANCEY, LESSEE, vs. M'KEEN.

According to the true construction of the law of Pennsylvania of 1715, relative to the recording of deeds, the deed should be recorded in the county where the land lies. But if a deed conveys lands lying in different counties, the law does not require that it shall be recorded in each county. It is sufficient if it be recorded in one of the counties, and then the exemplification of it will be evidence as to any of the lands conveyed. And this construction of the law is supported by the practice and tacit approbation of the bench and bar, as clearly proved to the Court.

Until the Act of 1778, there was no absolute necessity to record deeds at all, except mortgages; and this law was passed for the protection of creditors and subsequent purchasers.

The provisions of the Act of 1715, were merely intended for the preservation and safe keeping of deeds.

Quere, whether if, against subsequent purchasers, without notice, the exemplification of a deed for lands in more than one county, and which had not been recorded in the county where the lands were situated, would be evidence.

THIS case came on, upon a point reserved at the last Court, whether the exemplification of the deed, from Allen to Delancey, executed in 1771, proved before a justice of the Supreme Court in 1772, and recorded in the county of Philadelphia in 1773, could be offered in evidence.

Myers Fisher Esq., was examined; who proved, that he had been, for many years before the revolutionary war, a practitioner at the bar; had since acted as a scrivener and counsel; and that it was always common, where deeds contained lands in Philadelphia county, and in other parts of the State, to record them in Philadelphia county; and that the exemplification of them, was always considered and read as evidence, on trials for lands in other counties. That it was always considered as good

evidence, and admitted without objection. That he never knew or heard a doubt suggested upon the subject. Mr. Lewis, an old practitioner, produced many deeds of this sort, recorded in the same way; and mentioned from his briefs a great variety of cases, where exemplifications, similar to the present, were read in evidence, without objection. Judge Peters fully confirmed this practice; and they all concurred in stating, that, to their knowledge, the propriety of admitting such evidence had never been questioned. They all concurred likewise in stating, that these deeds were sometimes proved before a justice of the Supreme Court, and sometimes before a justice of the Common Pleas; and either was considered equally valid. In a suit brought by the husband of the plaintiff, for this very land, shortly after the peace, in the State Court, before Chief Justice M'Kean, this very exemplification was read in evidence, without objection. Governor M'Kean gave a certificate, that he had always considered that it was necessary to record the deed in the county where the land lay, and that this was the general opinion; but he never knew the point made, nor does he state how the case would be, if part of the lands lay in the county where the deed was recorded.

M'Kean and Dallas, for defendant, argued, that the clear exposition of the Act of 1715, was, that the deed should be recorded where the land lies; and that if any doubts on this point could exist, the 8th section is conclusive. That if not proved before a justice of peace, *in the county where the land lies*, (whereas this was proved before a judge of the Supreme Court, who is not a justice in the county,) it could not be recorded any where; and if not recorded in the county where the land lies, the officer is not authorized to record it, and of course his exemplification is not evidence; but the original deed should have been proved in the common form; or a copy, proved to have been examined, might have answered. Gilb. Evd. 24. to 26. Peake's Evd. 24. 1 Burr. 445. 6 Bac. 382.

Tilghman and Lewis, for the plaintiff, relied upon the gene-

ral practice, as to proving and recording deeds; and the unvarying opinion respecting the exemplification of them. They read, 1 Dall. 11. 17, to show, where a common error, as to the conveyance, by a *feme covert*, of her real estate, had been sanctioned. They contended, that the deed being proved in one of the counties where some of the lands lay, the exemplification is evidence, by the fourth section of the law; whatever might be the construction of the law, if none of the lands, conveyed by the deed, had been situated in the county of Philadelphia.

WASHINGTON, J. I have no doubt, but that, according to the true construction of the Act of 1715, the deed should be recorded in the county where the land lies; but, if the deed conveyed lands lying in different counties, the law does not require the deed to be recorded in each county, either by the words or the intention of it, so far as this intention can be discovered. Until the Act of 1775, there was no absolute necessity to record any deeds, mortgages excepted; and the provision made by the law of 1715, for recording them, was merely made with a view to their preservation. This is manifest from the Act of 1775; which was passed, with a view to protect the rights of subsequent purchasers against secret deeds, which the grantees might have kept in their pockets for years; without the possibility of subsequent purchasers, and creditors, knowing of their existence. If this were the case, then there was no absolute necessity, at that time, to require that a deed, if recorded, should be recorded in every county in which there were lands conveyed by the deed; because, the recording the deed in any one county, was bettering the situation of subsequent purchasers; and the law had no view to them at all, that I can perceive.

It is, however, perfectly clear, that the deed might legally be recorded in the office of the county where part of the lands lay; and that *quoad* that law, the exemplification was evidence. The public officer was instructed and commanded to record

and to exemplify it. If, from being the exemplification of a sworn public officer, it was evidence as to the lands lying in his county, upon what principle should it not be evidence as to lands conveyed by the same deed, lying in other counties, proved in the same way, and recorded by the same officer? I can see no reason why his exemplification should give credit and authenticity to his copy in one case, and not in the other. But, as soon as the attention of the Legislature was drawn to the frauds, practised by secret conveyances upon subsequent purchasers and creditors, and the necessity was perceived of giving notoriety to all conveyances; it naturally followed, that such deeds should be recorded, as a matter of compulsion, or that the grantee should be postponed to fair, *bona fide*, and subsequent purchasers. But, what influences my opinion more than any thing else, is, that Courts, lawyers, conveyancers, and all others, seemed to have concurred in the opinion, that the exemplifications of deeds, like the present, recorded as this was, were evidence. If one solitary decision, affirming this practice, had taken place, all would have agreed, that it would bind us; and yet the uniformity of practice and of conduct, respecting such deeds, operates more powerfully with me; because they amount to a contemporaneous exposition of the Act of 1715, fortified by a subsequent, unvarying usage. The practice is incorporated with the land titles of this State; and, if it be an error, it is common and uniform; and a decision now against the practice, would be mischievous in the extreme. I am therefore of opinion, that the exemplification of this deed was properly admitted, and that judgment should be for plaintiff.

Peters, J., concurred. (*a*)

(*a*) This case was carried by writ of error to the Supreme Court, and the following points were decided by that Court:

1st. Under the Act of Pennsylvania, of 1775, which requires a deed to be acknowledged before *a Justice of the Peace*, of the county where the lands lie, it having been the long established practice, before the year 1775, to acknowledge deeds before *a Justice of the Supreme Court* of the province of

Mr. Dallas asked if the Court meant to say, that if a deed for lands lying in different counties, made and recorded since 1775, in one county, would be good as to lands lying in other counties; and, that an exemplification would be evidence, as to such lands; because the Act of 1775 does not in terms require such deed to be recorded in each county.

By the Court. We give no opinion on this point; it is not before us. There might, in the case supposed, be a distinction between the validity of such a deed against subsequent purchasers of lands lying in a county, where the deed was not recorded, and the exemplification of the deed. But we give no opinion on the point.

Judgment for plaintiff.

Pennsylvania, and, although the Act of 1715 does not authorize such a practice, yet, as it has prevailed, it is to be considered as a correct construction of the statute.

2d. In construing the statutes of a State, on which land titles depend, infinite mischief would ensue, should this Court observe a different rule from that which has been long established in the State; and, in this case, the Court could not doubt, that the Courts of Pennsylvania consider a Justice of the Supreme Court, within the description of the Act.

3d. Under the same Act, when a single tract of land is conveyed, the law requires the deed to be recorded in the office of the county in which the land lies; but, if several tracts be conveyed, neither the letter nor the spirit of the Act, requires that the deed shall be recorded in each county. If the deed was recorded in the county where a part of the lands lie, an exemplification is good evidence, as to the lands in the other counties.

Under the Act of 1715, the validity of the deed is not affected by omitting to record it. Though not recorded, it is still binding, to every intent and purpose whatsoever. The only legal effect, produced by recording it, is its preservation, by making a copy equal to the original. 5 Cranch, 22. 31. Wharton's Digest, 246.

Hurtin *vs.* The Union Insurance Company.

If the cargo shipped, is not carried to the place of its destination, no freight can be demanded; if *voluntarily* accepted by the owner or his agent at any other port, freight *pro rata* is due; but if it is received by compulsion, and the supra-cargo or captain, acting for the benefit of all, receives the proceeds thereof, no freight is earned or due.

THIS was a case agreed. The insurance was made on the freight of the same vessel, the Monongahela Farmer, (valued at 3,000 dollars;) on which a policy was effected, and the case tried last term. (*a*) The evidence was the same. It appeared in this case, as in that, that the supra-cargo was prevented from carrying the cargo from Algesiras, without security not to carry it to a British port; which security he could not give. The cargo was sold under the superintendence of the judge, on the petition of the supra-cargo; and the vessel and cargo remained in custody of the king's guards till the sale of the cargo. The supra-cargo acted throughout for the benefit of all concerned, as he found that he could not carry away the cargo, and that the proceeds were realized under this restriction. As soon as he discovered his situation, he wrote to the plaintiff to abandon the cargo and freight, in consequence of the compulsion to which he was subjected.

Hopkinson and Ingersoll for plaintiff. The cargo not being carried to the *port of its destination*, *nor* accepted voluntarily at any other port, no freight was earned, and consequently a total loss was sustained. 7 T. Rep. 381.

Dallas for defendant. If the goods be received at all, at any other than the port of destination, freight *pro rata* is due. If the freighter does not choose to pay freight, he has nothing to do but to abandon the cargo to the owners of the vessel.

(*a*) See *ante*, page 400.

But if he receives the goods or even the price of them, where they have been sold upon a capture, and restitution awarded; he cannot get clear of paying freight *pro rata*. Abbott. 245. 247, 248, 249. 257, 258. 2 Burr. 282. 2 N. York Rep. 13. 3 Idem, 16. The case from 7 T. Rep. was on a charter party to pay freight, on the arrival of the goods at a certain place. The cases from N. York Rep. prove that the underwriters on the cargo are not liable for the freight.

WASHINGTON, J. If the cargo is not conveyed to the place of its destination, no freight can be demanded. If *voluntarily* accepted at any other port, by the owner or his supra-cargo, freight, *pro rata itineris*, is due. But if it is received by compulsion, and the supra-cargo or captain is acting for the best, for the benefit of all concerned, with a view to preserve it for the person entitled to receive the proceeds, no freight is earned; and a contradictory doctrine would make it the interest of the owner of the cargo or his agent, to sacrifice the cargo, or leave it to perish where the proceeds of it might fall short of paying the freight. The receiving the proceeds under a compulsion, as in this case, must always be taken as done without prejudice. This is rather a stronger case than that of Simond *vs.* Union Insurance Company last term; (*a*) but in both the cases sale was compulsory; in both, the owner of the freight abandoned, and the agent acted for the benefit of all concerned; decidedly so in this case, and in that to the same purpose.

Judgment for plaintiff for a total loss.

(*a*) See *ante*, page 443.

FINIS.

CONTENTS

OF

THE INDEX.

Abandonment under a Policy of Insurance
Acknowledgment of Deed
Actions
Admiralty
Agent
Arrest
Arrest of Judgment
Attachment
Attainder
Average
Award

Bankrupt and Bankruptcy
Bills of Exchange
Board of Property
Bottomry Bonds

Carrier
Challenges of Jurors
Chancery Practice
Choses in Action
Commission
Concealment
Consideration
Construction of Statutes
Contracts
Conversion
Corporation
Costs
Courts
Courts of Foreign Countries
Covenant
Crimes
Custom

Damages
Debt
Deeds
Depositions
Domicil
Duties on Merchandise

Ejectment
Evidence
Evidence. (Written)
Executions

Feme Covert
Foreign Attachment
Foreign Laws
Forfeiture
Freight

Habeas Corpus
Hypothecation

Impost and Tonnage
Indictment
Insurable Interest
Insurance
Interest

Jurisdiction
Jury

Lands
Laws of the United States
Length of Time
Lex Loci
Lien
Limitation

Master of a Vessel
Misnomer

Negligence
Negotiable Note
New Purchase
New trial

Partner and Partnership
Patent Rights
Payment
Perjury
Pleas and Pleading
Possession
Practise
Preference
Priority of Payment
Principal and Agent
Promissory Note
Proprietaries of Pennsylvania
Probable Cause
Protest of the Captain of a Vessel
Public Ministers

Receipt
Recording of Deeds

Referees
Register of Vessels
Repairs of a Vessel
Residence
Respondentia

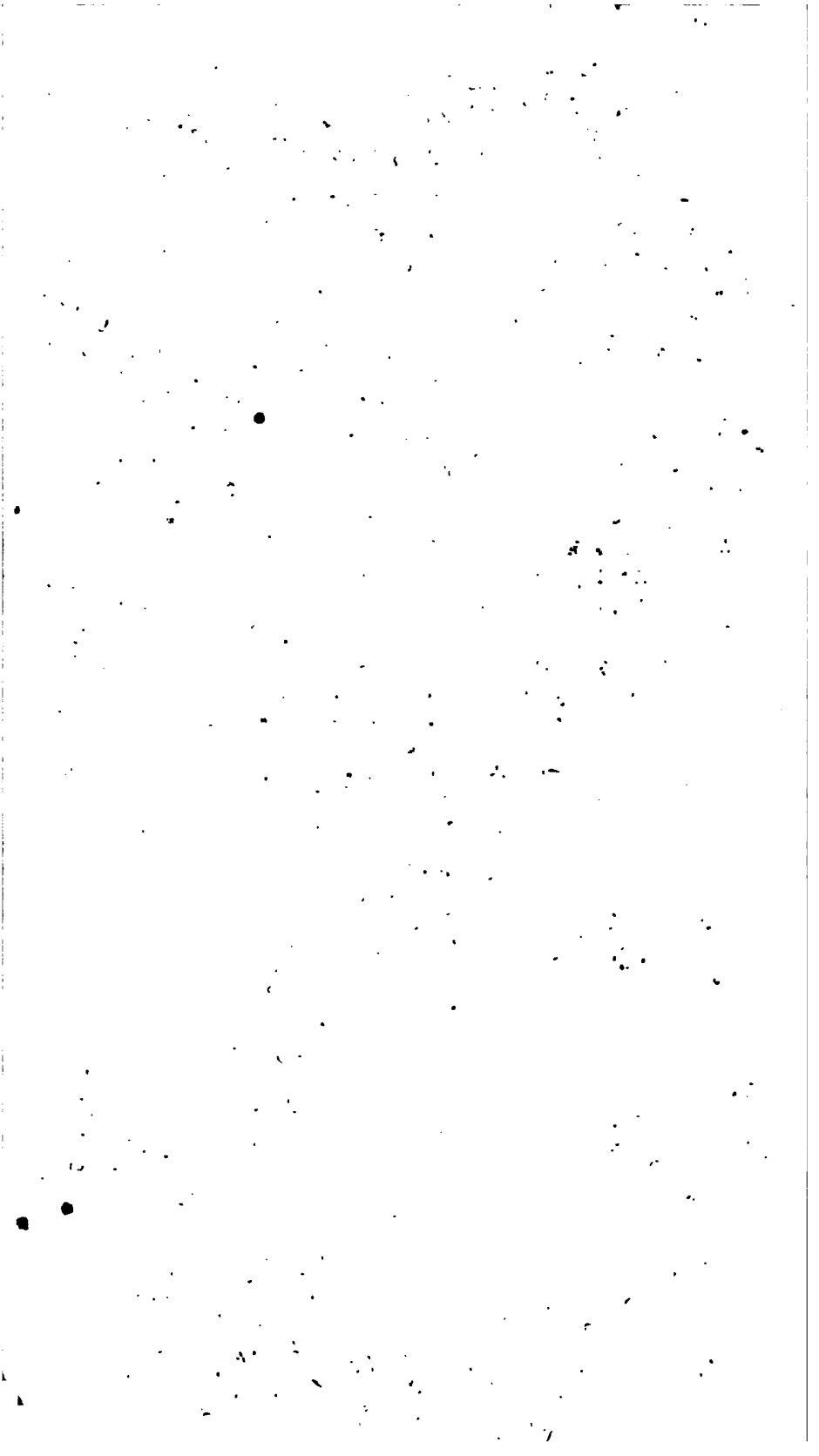
Seamen
Seamen's wages
Set-Off
Settlement
Ships and Vessels
Sheriff's Deed
Slaves
Slave Trade
Springettsbury Manor
State Laws
Statutes
Sureties
Survey

Title
Treaty
Trial
Trover
Trust and Trustee

United States
Uses. (Statute of)

Verdict
Vessels
Virginia

Warrant and Survey
Warrants for Lands
Warranty in a Policy of Insurance
Written Instruments



INDEX

OF THE

PRINCIPAL MATTERS.

ABANDONMENT UNDER A POLICY OF INSURANCE.

1. See note to the case of *Beale* vs. *Pettit & Bayard*, 242. *Hurtins* vs. *The Phœnix Insurance Company*, 409.
2. The assured not having abandoned the vessel at the time he abandoned the cargo, and having at that time refused to do so; his right to make the same is gone, and cannot be regained.
3. In case of abandonment, the underwriter is entitled to all the proceeds of the thing abandoned, and to all the profits arising from the investment thereof. *Ibid.* 400.
4. The insured must, within a reasonable time after notice of the loss, make his election, and give notice of his intention to abandon; but he may take a reasonable time to decide upon the subject. *Ibid.* 400.

ACKNOWLEDGMENT OF DEED.

1. Deeds, 3.

ACTIONS.

1. Debt, 1.
2. Damages, 6.

ADMIRALTY.

1. The District Court of Pennsylvania, exercising admiralty jurisdiction, cannot proceed against a captor, into whose hands the proceeds of the capture have never arrived; the same being in the hands of the officer of another Court, in another State. *Carson's Executors* vs. *Jennings*, 129.

ADMIRALTY.

2. A Court of Admiralty can only proceed *in rem*, against the thing itself; or *quasi in rem*, against the proceeds thereof. *Ibid.* 129.
3. The execution of the sentence of a superior Court, can only be by a Court of Admiralty having the thing, which is ordered to be restored, within its power. *Ibid.* 129.
4. A bond executed as an hypothecation, but not upon the principles which govern such securities, cannot be enforced in a Court of Admiralty; but must be proceeded upon in a Court of common law. *Hurry* vs. *The Ship John & Mine*, 293.

AGENT.

1. The owner of a vessel is answerable for the carelessness, or unskilfulness of his master; and by common law, nothing can excuse, but the act of God, of the enemy, or of the party complaining. *Dusar* vs. *Murgatroyd*, 13.
2. No man can compel another to render him acts of friendship, or service, of any kind whatsoever, gratuitously, or with a view to compensation. But if the person applied to consents to render the service, and undertakes the business, he is bound to act in conformity to the terms on which the request was made. *Walker et al.* vs. *Robert Smith*, 152.
3. In Commercial agencies, this rule should be strictly enforced. *Ibid.* 152.
4. The relinquishment of commission on an agency, does not release from the effects of negligence. *Ibid.* 152.
5. An agent who does not comply with his instructions, is liable for the loss occasioned thereby, although the services were gratuitously rendered. *Ibid.* 152.
6. Where a power to an agent is general, he may do any thing to bind his principal, which is within the scope of his authority. *Allen* vs. *Ogden*, 174.
7. If the agency be special, every thing is void which may be done, unless in strict conformity with the authority. *Ibid.* 174.
8. An agent or factor, who is ordered by his principal to ship goods in his possession, has no right to retain more than enough to secure any lien he may have upon the goods. *Jolly* vs. *Blanchard*, 252.
9. He may do this, and obey the order to ship the balance; or, he may ship the whole of the goods, consigning them to a third person, with orders to deliver them to the owner, on payment of the sum due to him. *Ibid.* 252.

AGENT.

10. If he retains the whole, because of a lien for a small sum, and any loss follows his breach of orders, he will be liable for the same. *Ibid.* 252.
11. An attorney, authorized to collect a debt for his principal, cannot commute that debt for one due by himself to the debtor, by the mere operation of exchanging one for the other. The debtor cannot say he has paid his debt to the attorney, by shewing an agreement made by the attorney to credit the debtor, and debit himself, with the amount which he, the attorney, owes. *Kingston* vs. *Kincaid*, 453.
12. An agent, if a discretion is given to him, is bound to act, to the best of his judgment, for the benefit of his employer. If his orders be positive, he must either refuse to act, or he is bound to a strict observance of them. He cannot exercise his own judgment, but as to the best mode of executing the orders according to their terms. If the orders are ambiguous, the construction must be taken most strongly against him who gave them. *Ibid.* 453.
13. If a party knows that A is an agent for several shippers, who had separate interests in the cargo, he cannot take the property of the principal to pay his debt; although he would be perfectly justified in paying over the money, for the use of the principal, to the agent. *Merrick* vs. *Bernard*, 479.
14. A consignee, who receives merchandise from the supra-cargo for sale, and who knows that the supra-cargo is the agent of others, contracts a debt with such shipper for the proceeds of his portion of the cargo; and the supra-cargo has no right to appropriate the same to the payment of his private debt. *Ibid.* 479.

ARREST.

1. A party to a cause, depending for trial, is privileged from arrest, during the continuance of the Court, at which the trial will take place. *Ex parte Hurst*, 186.
2. This privilege extends, not only to prevent his arrest, when attending the Court, and when coming to, and returning from it, but while he is at his lodgings. *Ibid.* 186.

ARREST OF JUDGMENT.

1. Where the declaration in ejectment was right, and that which had been served on the casual ejector was wrongly entitled, the defendant having entered a plea to the declaration against him, the Court refused to arrest the judgment. *Huidekoper* vs. *Burrus*, 257.

ATTACHMENT.

A, having funds in the hands of B, drew a bill of exchange in favour of C, who endorsed it to D and E, to whom he was indebted, and the bill being protested for non-acceptance, D and E brought a suit against B, the *drawee*, in the name of C, *the endorser*; and, before judgment, an attachment was laid upon the funds in hands of B, as the *property of C*, and judgment obtained against B, as the garnishee. Held, that the attachment will not affect the right of D and E, to recover the amount of the bill from the drawer; the right to the funds in the hands of the drawee, being completely vested in D and E, by the endorsement of the bill. *Corser* vs. *Craig*, 424.

ATTAINDER.

1. The operation and effect of the attainder laws of Pennsylvania. *Hylton* vs. *Brown*, 298.
2. The attainder laws of Pennsylvania, and the authority of the Legislature over cases which arose under them, in consequence of the stipulation in the treaty of peace with Great Britain, and the recommendation of Congress, in conformity therewith, that the States should revise their confiscation laws. *Lessee of Harry Gordon* vs. *Kerr et al.* 322.
3. A party who claims lands against an attainder, the correctness of which he denies, could not, upon the principles of the common law, controvert the title of the purchaser under the attainder, in a collateral action; but would be compelled to reverse the attainder, and thus obtain a judgment of restitution. *Hylton's Lessee* vs. *Brown*, 344.
4. The principles and provisions of the laws of Pennsylvania, in relation to attainders, examined. *Ibid.* 344.

AVERAGE.

The expenses incurred by the detention of a vessel at Algesiras, are subjects of general average; but her repairs are entirely chargeable to the vessel, the cargo having been previously landed. All repairs made necessary by any of the risks insured against, must be paid by the underwriters. *Hurtin* vs. *The Phœnix Insurance Company*, 400.

AWARD.

1. In what cases Courts will interfere, and set aside an award of referees. *Hurst* vs. *Hurst*, 56.
2. In Pennsylvania, it is not necessary that a mistake by the referees in

AWARD.

point of law, should appear on the face of the award, to induce the Court to set it aside; they will re-examine the documents on which the referees decided. *Ibid.* 56.

3. In such an examination into an award, no new evidence can be admitted. *Ibid.* 56.
4. It is a general rule, according to the law and practice of Pennsylvania, that awards shall be so plainly expressed, that, by a fair construction of the whole instrument, or by reference to something connected with it, the parties may know precisely what they are to do. If certainty can be obtained, by a reference to something *dehors* the award, the party may, by an averment, cure an objection, otherwise fatal. *Kington* vs. *Kincaid et al.* 448.
5. In the case of common awards, not under the laws of this State, the arbitrators cannot be called upon, either at law or in equity, to discover the grounds upon which they made their award. *Ibid.* 448.
6. When, after sundry meetings, and after every effort to obtain a coincidence of opinion among them, the third referee, who would not sign the award, withdrew, and declared that it would be unnecessary to call upon him, to meet on the subject of the reference again; the remaining two referees had a right to proceed, and make an award. *Ibid.* 448.

BANKRUPT AND BANKRUPTCY.

1. Priority of payments, 1.
2. The true rule, in cases of bankruptcy, is, that if the *original* ground of action is founded in contract, but the immediate cause arises *ex delicto*, and the claim is for damages unliquidated by express agreement, or such as will not be implied; the certificate is not a bar; as such a claim could not have been set up under the commission. *Dusar* vs. *Murgatroyd*, 13.
3. If the defendant had agreed to pay a certain sum on failure to perform his agreement; or if the plaintiff could bring either trespass, or money had and received, and waives the former by bringing the latter; the damages are due, which the law implied a promise to pay, and may be proved under the commission. *Ibid.* 16.
4. A debtor concealing himself from, and being denied to his creditors, does not constitute an act of bankruptcy under the laws of the United States, unless the service of process is thereby prevented. *Harris et al.* vs. *Billington*, 29.
5. If the debtor order himself to be denied to creditors and others, and is in consequence thereof denied to an officer who comes to serve

BANKRUPT AND BANKRUPTCY.

process, it is an act of bankruptcy; provided the officer comes to serve the process, and not on other business, and the denial has taken place within six months of the issuing of the commission. *Ibid.* 29.

6. Giving a bond with warrant to confess judgment, to one creditor, upon the eve and in contemplation of bankruptcy, does not constitute an act of bankruptcy; unless the judgment entered on the bond, and the issuing of the execution was at the instance or by the procurement of the debtor. Such a bond would be a fraud on the general creditors. *Ibid.* 29.
7. Denial to an officer, whereby he is prevented serving process, must be *really adversary*, and not by concert between the creditor and the debtor to bring about an act of bankruptcy. *Ibid.* 29.
8. No debt, but *such as is due and owing at the time of the bankruptcy*, can be proved under the commission; and, consequently, an endorser or acceptor of a bill of exchange, drawn by the bankrupt, who has not paid it before the bankruptcy; cannot prove the debt. *Marks et al. assignees* vs. *Barker et al.* 178.
9. The acceptor or endorser of a bill of exchange, who pays the bill, after the bankruptcy of the drawer, may offset the same against the bankrupt's assignees; but, he must show the debt to be a subsisting one in him, at the time the action was brought; for this is a case of *mutual* credit, given before the bankruptcy, although the money was not paid until after. *Ibid.* 178.
10. Set-off. Where it will be allowed, in relation to claims upon the bankrupt's estate, arising from transactions not completed, before the bankruptcy. *Ibid.* 178.
11. The holder of the negotiable paper, payable "without defalcation," under the laws of Pennsylvania, assigned after a commission of bankruptcy has issued, may come in under the commission, allowing all just offsets, existing at the time of the bankruptcy; and which would have been admitted, if the assignment had not been made. *Humphreys* vs. *Blight's Assignees.* 44.
12. The purchaser of a negotiable note, who becomes so after a commission of bankruptcy has issued, may prove under the commission; and he holds the note, subject to all legal offsets. *Ibid.* 44.
13. Perjury.—1. 3, 4, 5, 6.

BILLS OF EXCHANGE.

1. The drawer of a bill of exchange protested after acceptance, having paid the damages, cannot set off the same in an action against him by the acceptor, on another account; although the acceptor had

funds in his hands to pay the bill, the damages being unliquidated. *Armstrong* vs. *Brown*, 43.

2. When an accommodation bill goes into the hands of a *bona fide* holder, even with notice of its particular character, he is entitled to recover the amount thereof from the drawer. *Perry et al.* vs. *Crammond et al.* 100.

3. Bills, drawn for an illegal consideration, or for one which happens to fail; cannot be enforced, by one having notice of their character. *Ibid.* 100.

4. Bills, delivered after the death of the drawer, to a person who had made advances upon their faith to the drawer, who had them in his possession, for the purpose of raising money for the drawer, may be enforced against the representatives of the drawer. *Ibid.* 100.

5. Negligence, 1, 2.

6. When the drawer of a bill of exchange has no funds in the hands of the drawee, neither protest nor notice of non-acceptance or non-payment to the drawer, are necessary to enable the payee to recover. *Baker* vs. *Gallagher*, 461.

7. The payee must either state that the bill was protested, or show that it was not incumbent on him to protest it, because the drawer had no funds in hands to pay the bill; but this omission can only be taken advantage of by special demurrer. *Ibid.* 461.

8. Where the drawer had no funds in the hands of the drawee, an action may be brought by the holder, upon the bill, before the time it would be payable, if it had been accepted. It may be brought immediately on non-acceptance. *Ibid.* 461.

9. The defendant being indebted to the plaintiff in London, for goods, remitted a bill of exchange, drawn upon London, in his favour, which he endorsed "pay the amount to order *for my use.*" The bill was not accepted nor paid, and was returned to the plaintiff's agent, who demanded payment of the defendant as endorser. Held that such special endorsement releases the endorser from the payment of damages, and prevents the negotiability of the bill. The amount of the bill is to be received by the endorsee, for the use of the endorser. *Brown* vs. *John Jackson*, 512.

10. If the endorsee be not a creditor of the endorser, then he is to receive the money, and remit it; or if the bill is dishonoured, he is to return it. *Ibid.* 512.

11. In this case the plaintiff having received the bill in payment of a debt due to him, was entitled to look to every person responsible on the bill, in like manner as if he had bought the bill, with exception of a claim for damages on the endorser. *Ibid.* 512.

BOARD OF PROPERTY.

If a caveat is dismissed by the Board of Property, the party claiming may still institute an ejectment for the land, provided he does it within six months. *Balfour's Lessee* vs. *Meade*, 28.

BOTTOMRY BONDS.

Hypothecation.

CARRIER.

Agent, 1.

CHALLENGES OF JURORS.

1. Trial, 1.

CHANCERY PRACTICE.

1. If the answer to a bill, contain a denial of the allegations in it, the plaintiff must support the statements in the bill, by testimony, and corroborating circumstances. *Higbie* vs. *Hopkins*, 230.
2. If the plea be set down for argument by the complainant, without replying to it, the matter contained in it must be considered as true. *Executors of Gallagher* vs. *Roberts*, 330.
3. A verdict and judgment at law, is no bar to relief in equity, if an equitable ground of relief be laid, which is not denied by the plea. If it be denied, the plaintiff may reply generally, and go into proofs to support the bill; and if he fail to make his proof, the plea will be a good bar, as if no replication had been put in. *Ibid.* 330.
4. If a bill in equity contain no ground for relief, the defendant ought to demur. *Ibid.* 330.
5. A & B were indebted to the plaintiff and others, and A having become insolvent, and a commission of bankruptcy having issued against him, the creditors of A & B joined in releasing A from all the debts due to them from the firm of A & B. The commission of bankruptcy being superseded, the plaintiffs filed a bill on the equity side of the Circuit Court, to set aside the release. Held, that all the parties to the release of A should have joined in the bill; and the demurrer, for want of such parties, was sustained. *Joy et al.* vs. *Wirtz et al.* 417.
6. Where creditors are to be paid out of a particular fund, or are all united in the same transaction, so as to produce privity between

CHANCERY PRACTICE.

them; all should join in a bill, which may bring their proceedings into the consideration of a Court of Chancery. *Ibid.* 417.

7. To set aside a release, in such a case, all the parties to it must apply by name to the Court; and one cannot act for the whole. *Ibid.* 417.

8. A bill, on the equity side of the Court, was filed by all the parties to a release of the defendants, except one, who was a citizen of Pennsylvania. The complainants in the bill were all citizens of another State. To this bill, there was a plea to the jurisdiction of the Court, alleging the want of jurisdiction, because one creditor was not joined in the bill. Held, that the Court had jurisdiction of the case. *Ibid.* 517.

9. In chancery, there is a distinction between *active* and *passive* parties; the former being such as are so involved in the subject in controversy, as that no decree can be made without their being in Court; the latter, are such as that complete relief can be given to those who seek it, without affecting the interests of the passive parties. *Ibid.* 517.

10. If a decree can be made, without affecting the rights of a person not made a party, or without his having any thing to perform, necessary to the perfection of the decree, the Court will proceed without him; if he be not amenable to the process of the Court, or no beneficial purpose is to be effected by making him a party. *Ibid.* 517.

11. There is no difference between a person, who, on account of his residence beyond seas, cannot be made answerable to the process of the Court, and one who, by the laws of the United States, cannot be brought into Court; and wherever, in the former case, a person so circumstanced, need not be made a party, he need not be made a party in the latter case. *Ibid*, 517.

12. Care will be taken not to make a decree, which will affect the person who is not party to the suit. *Ibid.* 517.

CHOSES IN ACTION.

1. Courts of law, as well as equity, will take notice of assignments of choses in action; and to every substantial purpose, will protect the rights of the assignee. *Carver* vs. *Craig*, 424.

2. The beneficial interest of the assignee is so far regarded, that the defendant may set off a debt due from the assignee to him; in like manner as if the suit had been brought in his own name. *Ibid.* 424.

COMMISSION.

1. A commission directed to *five* persons, to be executed *by them*, must be executed by the whole five persons, although the commissioners nominated by the party objecting to the execution, were present, but did not act. *Armstrong* vs. *Brown*, 44.
2. Evidence, 4, 5.

CONCEALMENT.

1. Insurance.

CONSIDERATION.

Bills of exchange, 3.

CONSTRUCTION OF STATUTES.

1. Operation of the treaty of 1783, upon the exercise of legislative powers for the confiscation of the property of those who had been engaged in hostilities against the United States; or who neglected to surrender themselves, when called upon by law so to do.
2. Indictment, 4.

CONTRACTS.

1. The laws which, in any manner, affect a contract, whether in its construction, in the mode of discharging it, or which control the obligation which the contract imposes; are essentially incorporated in the contract. *Camfranque* vs. *Burnell*, 340.
2. *Lex loci*, 1.
3. Foreign laws.

CONVERSION.

1. If, upon demand, the defendant said he would retain the goods demanded, and that he knew a suit would be brought; this is evidence of a conversion. *Allen* vs. *Ogden*, 174.
2. Trover, 1.

CORPORATION.

1. *Quere.*—Whether a corporation is a *person*, within the meaning of the Act of Congress. *The United States* vs. *Johns*, 354.

COSTS.

1. If the Court had jurisdiction of the cause, when the action was commenced, the repeal of the law, which gave the jurisdiction, will not take away the plaintiff's right to costs. *Walker* vs. *Smith*, 202.
2. Where three members of the bar enter their appearance for the de-

COSTS.

fendant, to suits instituted against him, and all are equally called upon, and act as the attorneys of the defendant, no warrant of attorney having been given by the defendant to either; the attorney's fee, in the bill of costs, is to be equally divided among all who have acted in the case, and who have appeared to the suit. *Hurst* vs. *Durnell*, 438.

COURTS.

1. Admiralty, 1, 2, 3.
2. Damages, 3.
3. Jurisdiction, 4.

COURTS OF FOREIGN COUNTRIES.

1. Where a condemnation is by a foreign Court, it will be presumed to be a legal one, if the constitution of it be not known. *Snell et al.* vs. *Finassatt*, 271.
2. Where its constitution is known, it is proper for the Court to examine into it; and, if it has been constituted by a different authority, from what is usual in civilized nations, it becomes him, who would support its jurisdiction, to prove it was erected by proper authority. *Ibid.* 271.
3. The erection of Courts, is, in all civilized nations, the act of the sovereign; although he may delegate the authority to subordinate agents. *Ibid.* 271.
4. It is unusual for a military commander to exercise the right to erect Courts; and nothing will be presumed in favour of tribunals so established. *Ibid.* 271.
5. Notes to pages, 273. 275.

COVENANT.

1. What shall be considered a covenant running with the land. *Hurst* vs. *Rodney*, 375.

CRIMES.

1. Perjury.
2. Indictment.
3. The law of the United States declares, that murder committed on the high seas, shall be tried in the district where the offender is apprehended, or into which he is first brought; and therefore the Circuit Court has jurisdiction in a case, arising under the authority of the United States. *The United States* vs. *Magill*, 463.

CRIMES.

4. The Legislature, making use of a technical law term, its meaning must be ascertained by the common law; and, therefore, the definition of *murder* must be taken from that code. *Ibid.* 463.
5. To constitute the offence of *murder*, under the law of the United States, cognizable in the Circuit Court of the United States, not only the *stroke*, but the *death*, must happen on the high seas. *Ibid.* 463.

CUSTOM.

1. See insurance, 1.
2. The rules of law, in relation to the proof and the nature of customs. *M'Gregor* vs. *The Insurance Company of Pennsylvania*, 39.
3. Witnesses cannot be examined to prove a custom, that when insurance is made on goods, with a particular mark; those goods, so *marked*, must be on board, in order to entitle the assured to recover. *Ruan* vs. *Gardner*, 145.

DAMAGES.

1. Bankrupt and bankruptcy, 2, 3.
2. When goods are destroyed, or materially injured, on board a vessel in the port where they are shipped, the damages must be ascertained by the difference between the prime cost and charges, and the sales at the port of shipment; and not by the probable profits, if the goods had gone safe to the port of destination. *Dunar* vs. *Murgatroyd*, 13.
3. The captured, who has omitted to enforce a decree of a superior Court, reversing the decree of a Court of Admiralty; cannot claim, as damages, the loss he may have sustained, by a depreciation of the funds in which the proceeds of the capture may be invested. He should have applied to the Court below, to enforce the decree of the Court of Appeals; and, omitting so to do, the loss will fall upon him. *Carson's executors* vs. *Jennings*, 129.
4. Ships and vessels, 2, 3.
5. In suits for vindictive damages, the jury have the right to decide on the amount, without the control of the Court; but where they are extravagant, the Court will interfere. But in other cases, where a rule can be discovered, the jury are bound to follow it; and where a sum of money has been lost to the plaintiff by the negligence of the defendant, the amount of damages which a jury can give, is the sum the plaintiff has been thus deprived of, and no more. *Walker et al.* vs. *Robert Smith*, 152.

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trust. *Rodgers*

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the owner, such
ilver, which oc-
Held, that the
ustained by the
act. *Sparks* vs.

may bring debt for
over more or less

benefit, may be
he assent must be
M'Neil, 70.
preme Court, and
ecorded in every
supposed to be

ly different from
rt of Equity will
agreement; or if
explained by the
Company, 419.
nstruction can be
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to be regarded.

of possession of
according to the
s. *Browne*, 429.
Pennsylvania of
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DEEDS.

corded in the county where the land lies. But if a deed conveys lands lying in different counties, the law does not require that it shall be recorded in each county. It is sufficient if it be recorded in one of the counties, and then the exemplification of it will be evidence as to any of the lands conveyed. And this construction of the law is supported by the practice and tacit approbation of the bench and bar, as clearly proved to the Court. *Delancey's Lessee* vs. *M'Keen*, 525.

8. Until the Act of 1778, there was no absolute necessity to record deeds at all, except mortgages; and this law was passed for the protection of creditors and subsequent purchasers. *Ibid.* 525.
9. The provisions of the Act of 1715, were merely intended for the preservation and safe keeping of deeds. *Ibid.* 525.
10. *Quere*, whether, if, against subsequent purchasers, without notice, the exemplification of a deed for lands in more than one county, and which had not been recorded in the county where the lands were situated, would be evidence. *Ibid.* 525.

DEPOSITIONS.

Evidence, 4, 5.

DOMICIL.

1. Residence, 1.
2. If a man remove from one State to another, with an intention of making the latter the place of his permanent abode, he is domiciled there; although he leave behind him another estate which he cultivates, and is even elected a member of the Legislature of the State, where the same is situated. *Butler* vs. *Hopper*, 499.

DUTIES ON MERCHANDISE.

1. R. D. imported a quantity of merchandise, in his own vessel, consigned to E. D., who received the goods, and gave bonds for the duties to the United States, with the plaintiffs as his sureties. The invoice and bill of lading showed the goods to be the property of R. D., but the bond was executed by E. D., without calling himself the agent of R. D. Held, that the sureties of E. D. are not entitled to recover the amount of the bonds paid by them, from R. D., under the provisions of the Act of Congress, giving a preference to sureties who pay bonds for duties. *Childs* vs. *Shoemaker, Assignee*, 494.
2. The law of the United States clearly marks the distinction between owner, importer, consignee or agent; and the entry is to express

DUTIES ON MERCHANDISE.

the character in which it is made, at the time the duties are secured. If as agent, this must be so stated in the bond. *Ibid.* 494.

3. The Act of Congress considers a consignee, for all the purposes of the law, an owner; and unless he states himself not to be so, he is the principal in the bond; and it is only in favour of his sureties, and upon him, and his effects, that the law gives the preference. *Ibid.* 494.

4. The bond in this case was properly given by the consignee of the goods, and therefore there was no mistake; and if there were a mistake, it is not to be rectified at law; and in equity, the plaintiff would be told that equality is equity; and that a Court of Equity will not rectify a mistake, in order to violate one of its favourite maxims. *Ibid.* 494.

EJECTMENT.

1. Board of Property, 1.

2. Evidence, 3.

3. What will be a sufficient service of a declaration in ejectment. *Huidekoper* vs. *Stiles*, 135.

4. After the defendant in ejectment has appeared, and entered into the common rule, he may take a rule on the plaintiff for trial, or *non pros*; although the declaration has not been changed, so as to make it against the real defendant. This is the neglect of the plaintiff, and he cannot take advantage of it. *Lessee of Hurst* vs. *Kerr*, 189.

5. In an ejectment, the plaintiff must show, and it will be sufficient for him to show, a right of entry; or, in other words, a right of possession. *Hylton's Lessee* vs. *Brevart*, 284.

6. Title, 3, 4, 5. 8.

7. The lessor of the plaintiff, who has a regular paper title, cannot be displaced; unless the defendant in the ejectment has a better title, either legal, or such an equitable one as a Court of Equity would sustain. *Lessee of Harry Gordon* vs. *Kerr et al.*, 322.

8. The laches of the defendant, in not executing a special warrant, from 1755 to 1765—his entire silence and acquiescence, from that time until still later, when an unauthorized surveyor was called upon to do it, is sufficient to defeat every pretence of equity, against a legal title in a fair *bona fide* purchaser, without notice. *Ibid.* 322.

9. Feme Covert, 1, 2, 3.

10. If an equitable estate has been forfeited under the attainder laws, the legal estate will not be allowed to be set up, to bar a fair pur-

EJECTMENT.

chaser of the equitable interest. *Lessee of Delaney* vs. *M'Keen*, 354.

11. Mere possession of land, or offering to sell it, or even partial sales actually made, are not, alone, sufficient to authorize a presumption of ownership; for these may be the acts of a tortious possessor, or of an agent. *Ibid.* 354.
12. After a judgment in ejectment, and the plaintiff is put into possession, the Court will not in a summary manner restore the defendant to possession, although he pays the rent, for the non-payment of which the ejectment was brought. *Lessee of Camac* vs. *Bleyle*, 466.

EVIDENCE.

1. Where a certificated bankrupt, and who has released all future claims upon his estate, is a competent witness. *Barnes et al.* vs. *Billington et al.* 29.
2. Justices of the peace of the State of Pennsylvania, may receive proof of the service of process of ejectment, issuing out of the Circuit Court of the United States. *Huidekoper* vs. *Stiles*, 131.
3. The character of the defendant not being impeached, evidence to support it cannot be admitted. *Ketland* vs. *Bissett*, 144.
4. The agent, who makes the insurance, after purging himself on his *voir dire*, is a good witness for the assured, to prove matters respecting the policy. *Ruan* vs. *Gardner*, 145.
5. The protest of one of the sailors of the captured vessel, made after his return to the United States, at the first port, and left with the broker of the assurers, to fix the period from which the loss was to be paid; may be given in evidence for that purpose; but it is not evidence of any fact contained in it. *Ibid.* 145.
6. Evidence to prove a particular course of trade, or other matters in the nature of facts, is proper; but not to prove what, or how, the law is considered by merchants. *Ibid.* 145.
7. Custom, 3.
8. Under the clause introduced into policies of insurance, relative to the sentence of a foreign Court of Admiralty, the foreign sentence is not conclusive, in our Courts, to falsify the warranty, which the assured is still at liberty to vindicate. The underwriters may, nevertheless, read the proceedings of the foreign Court, as evidence; though not as conclusive evidence. *Calbreath* vs. *Gracy*, 219.
9. A certificate given by a supra-cargo, upon his return from the voyage injured, and who, at the time it is offered, is dead; is inadmis-

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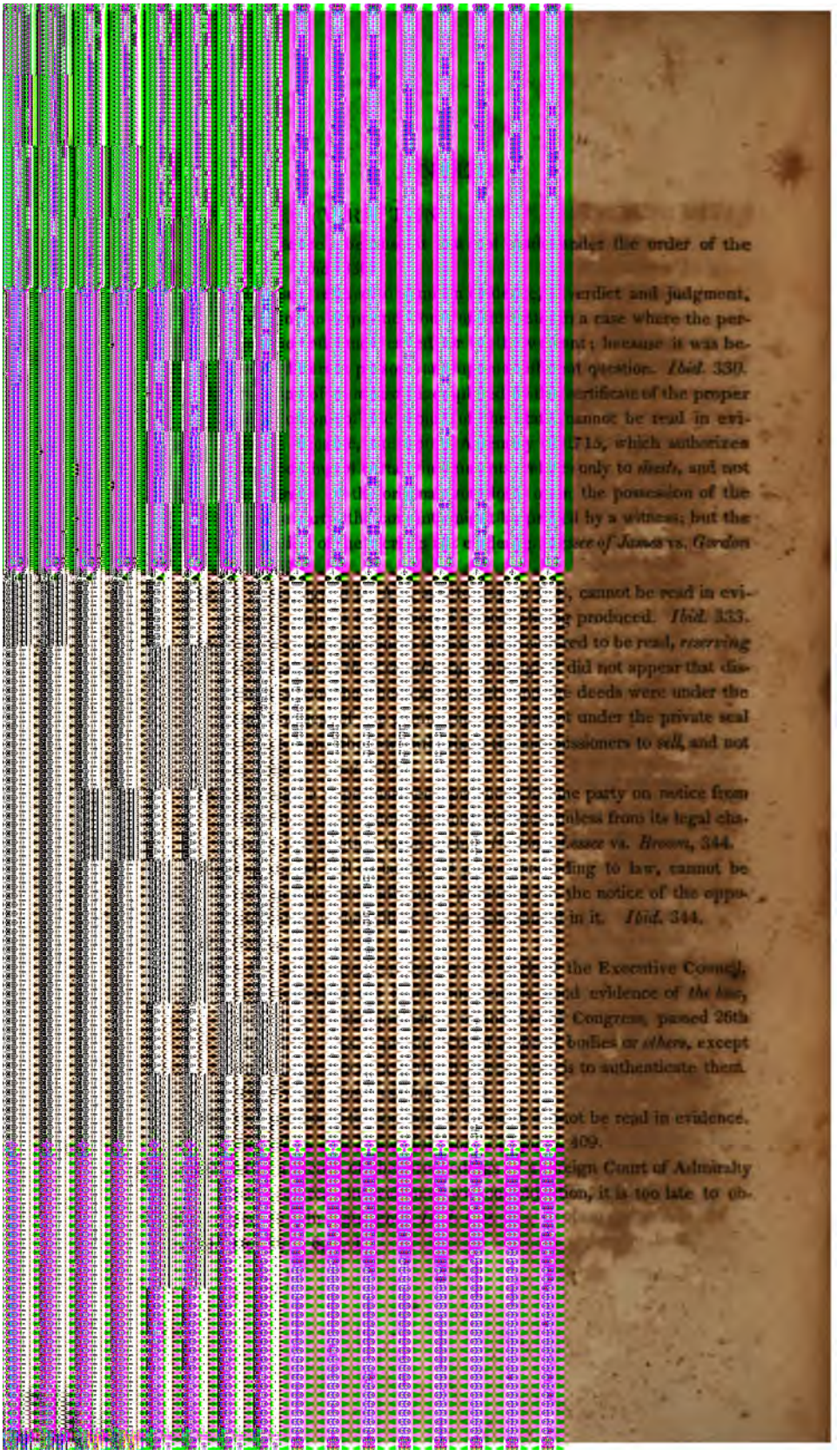

EXECUTIONS.

1. An execution is not levied, so as to give a lien against purchasers or creditors, if the property is permitted to remain with the debtor. The lien is lost, by suffering the property to remain with the debtor as his own, until a subsequent execution is levied, or a *bona fide* sale is made. *Barnes et al.* vs. *Billington et al.* 29.
2. To make a levy effectual, the property seized should be specially designated in the return of the execution, or by reference to a schedule accompanying it. *Ibid.* 29.
3. Lien.

FEME COVERT.

1. The payment of part of the purchase money of land, the property of a *feme covert*, in her presence, cannot prejudice her right to claim the land, after the termination of the coverture. *Lessee of Delaney* vs. *M'Keen*, 354.
2. The title of a *feme covert* to land, cannot be affected by acts of commission, short of those required by law to bind her; much less, by acts of omission. Even, if by any acts during coverture, other than those which by the provisions of the law may clearly bind her, a *feme covert* may have bound herself, they are proper for the decision of a Court of Equity, and not of Law. *Ibid.* 354.
3. In order to protect the rights of a *feme covert*, in property forfeited as belonging to her husband, on his attainder, it is not necessary that the husband should put in a claim to the same, for her; as, by the supplement to the attainder laws of Pennsylvania, passed 29th March, 1779; the rights of persons claiming paramount to the attainder, are saved. *Ibid.* 354.

FOREIGN ATTACHMENT.

1. Attachment, 1.

FOREIGN LAWS.

1. Whether the British regulations respecting the colonial trade be consistent with the laws of nations or not, the effect of them, and the decisions of their Courts upon them, are the same to neutrals, as if they were so. *Kolne* vs. *The Insurance Company of North America*, 93.
2. Courts of foreign countries, 1, 2, 3, 4.
3. A law of a foreign country, which protects the party to a contract from execution, will, in the Courts of the United States, protect the same individual from arrest upon the same contract. *Camfranque* vs. *Burnell*, 340.

FORFEITURE.

It is not the *sale* of an American vessel to an American citizen, which subjects the vessel to a forfeiture of her privileges; but *the neglect to obtain a new register*, when the circumstances of the case, and the provisions of the Act of Congress, will permit the same to be obtained. *Willing & Francis* vs. *The United States*, 125.

FREIGHT.

1. The alleged custom, in Philadelphia, to strike off *one-third* of the *gross* freight, for charges, and to pay *two-thirds* only to the assured, in a policy on freight, where a total loss has occurred; is *unreasonable*, and is in direct opposition to the terms of the policy. *M'Gregor* vs. *The Insurance Company of Pennsylvania*, 39.
2. Bottomry, 3.
3. Hypothecation, 9.
4. If the cargo shipped, is not carried to its place of destination, no freight can be demanded; if *voluntarily* accepted by the owner or his agent at any other port, freight *pro rata*, is due; but if it is received by compulsion, and the supra-cargo or captain, acting for the benefit of all, receive the proceeds thereof, no freight is earned or due. *Hurtin* vs. *The Union Insurance Company*, 530.

HABEAS CORPUS.

1. The Courts of the United States, and the justices thereof, are only authorized to issue writs of *habeas corpus* to prisoners in jail, under, or by colour of the authority of the United States; or committed by some Court of the United States; or required to testify, in a cause depending in a Court of the United States. *Ex parte Cabrera*, 232.

HYPOTHECATION.

1. To make an hypothecation bond, executed by the master of a vessel, valid, the necessity of raising the funds advanced upon it, by such means, must be shown. *Ship Lavinia* vs. *Barclay*, 40.
2. If one of the owners of the vessel reside at the port where the bond is given, it is not good. *Ibid.* 40.
3. The consignee of a vessel is bound to advance the freight, for the supply of the necessities of the voyage, to be so applied by the master. *Ibid.* 40.
4. While the freight is in the hands of the consignee, he cannot advance money to the master on marine interest, unless he has been directed by the consignor to appropriate the freight to another purpose. *Ibid.* 40.

HYPOTHECATION.

5. The master of a vessel, from the necessity of the case, may bind his owners for repairs; unless it appears that some other person has authority to manage the concern, in the particular instance; and that this was known to the creditor. *Philips* vs. *Ledley*, 226.
6. The mortgagee of a vessel, before possession delivered, is not responsible for repairs made by the mortgagor; nor is he entitled to the earnings of the vessel. *Ibid.* 226.
7. An instrument, claimed to be an hypothecation of a vessel, is not such, if it was given to the consignee, when he had funds in his hands to secure the advances made by him for the vessel. *Harry* vs. *The ship John & Alice et al.* 293.
8. A consignee, under such circumstances, cannot enter into a maritime contract with the master of the vessel, so as to bind him to pay marine interest. *Ibid.* 293.
9. The cargo and freight is subject to the payment of extraordinary demands, for completing the voyage; and the consignee takes these funds *cum onere*, and under an implied engagement to make the necessary advances. *Ibid.* 293.
10. The master, being also owner of the vessel, may give a specific lien on her, for securing advances made for any purpose; but if this is not given by virtue of his authority as master, it will not be a marine hypothecation. *Ibid.* 293.
11. The master cannot hypothecate for a pre-existing debt; but only for advances for a purpose necessary to enable him to complete his voyage, *made at the time the necessity existed.* *Ibid.* 293.

IMPOST AND TONNAGE.

1. The laws of the United States, relative to the importation of merchandise, require that the goods imported shall be *landed.* It is not a compliance with those laws, to bond, or pay the duties on importation, and permit the goods to be re-exported, *without being landed.* *Kohne* vs. *The Insurance Company of North America*, 158.

INDICTMENT.

1. In an indictment for casting away and destroying a vessel, of which the defendant was owner, on the high seas, with intent to prejudice the underwriters, the law not making it an offence in the *owner* to destroy his *vessel*, to the prejudice of the underwriters *on the cargo*, no evidence can be given to establish a charge against the defendant, for such destruction, to the prejudice of the under-

INSURANCE.

14. Evidence, 8.

15. Whether it was the course of trade, to put on board a Spanish supra-cargo, with Spanish papers, and colours, is a question of fact for the jury; and if this is proved to their satisfaction, the underwriters, who are bound to know the course of the trade, cannot object that such circumstances were concealed from them. *Calbreath* vs. *Gracy*, 219.

16. Warranty in a policy of insurance, 1, 2.

17. In an open policy, the plaintiff must prove his interest, and the value of his property; or he cannot recover. The bill of lading of the outward cargo, is no proof of the interest of the plaintiff in the homeward cargo. *Quere*, whether, when at the time of an offer to abandon, the property was restored, the assured can recover for a total loss? *Beale* vs. *Petit et al.* 241.

18. In an action to recover the amount of three bags of Spanish dollars, which had been taken from the vessel on the voyage, during which she was boarded by the crew of a privateer. The plaintiff must prove the loss to have occurred, by some one of the perils insured against; but, a loss by embezzlement of the crew, is not included in the policy. *Hicks* vs. *Fitzsimmons*, 279.

19. In contracts of insurance, good faith; a fair, open, and candid conduct in both parties; are essential. Every material circumstance of the risk, should be communicated to the underwriter. *Vale* vs. *The Phœnix Insurance Company*, 283.

20. A concealment of facts, material to the risk, and within the knowledge of the insured, and which the insurer is not bound to know, vitiates the policy. *Ibid.* 283.

21. It is the custom in Philadelphia, that if an order be given to insure $12,000, the agent should insure a greater sum, in order to cover the amount to be insured. By the custom, he cannot insure to cover premium, in the same policy with that to cover the value. *Barton* vs. *Anthony*, 317.

22. It may be a material concealment from the underwriters, if a letter communicating the period when the voyage insured commenced, was not exhibited at the time the contract of assurance was entered into. This would certainly be so, if the vessel was out of time when the insurance was ordered. *Johnson* vs. *The Phœnix Insurance Company*, 378.

23. Where an insurance is made upon goods and freight from New-York to Cape Francois, and, if prevented entering that port, to some other port mentioned in the policy; and the vessel is pre-

INSURANCE.

vented by a blockading squadron from entering any one of the designated ports, and is obliged to end her voyage; it is a loss within one of the perils insured against, the voyage being completely broken up; and the insured has a right to abandon. And the same principles apply to an insurance on freight, although the owner of the vessel was also owner of the cargo. *Sidmonds* vs. *The Union Insurance Company*, 382.

24. Insurance on goods, on board the Liberty, from Philadelphia to Charleston, lost or not lost. It was the duty of the assured, to communicate to the underwriters, a letter received by him, containing particulars of a hurricane which had occurred at Charleston after the vessel sailed; although the fact of there having been severe gales on the coast of Carolina, was known to the defendants. The knowledge of the plaintiff was particular, that of the defendants was general. *Myers Moses* vs. *The Delaware Insurance Company*, 385.

25. In an action on two policies of insurance; one a valued policy on the vessel, the other an open policy on the cargo; on a voyage from New-York to Gibraltar, the vessel was captured, and carried into Algesiras, and there, although the cargo was not condemned, as it was not permitted to the vessel to sail with it, unless security was given that it would not be carried to a British port in the Mediterranean, it was sold by the supra-cargo, and the vessel, which had not been detained with a view to her condemnation, sailed for New-York, with a cargo on freight, and was lost: it is not necessary to disclose to the underwriters on the cargo, the particular language of the bills of lading; and if they are general, so as to comprehend the port to which insurance is made, it is sufficient. *Hurtin* vs. *The Phœnix Insurance Company*, 400.

26. A seizure and carrying into Algesiras, and the prohibition to carry the cargo away without security, is a complete destruction of the voyage, and authorized an abandonment of the cargo. *Ibid.* 400.

27. The sale of the cargo by the supra-cargo, if he acted for the interests of all concerned, was proper; and he had a right thereby to convert a partial into a total loss. *Ibid.* 400.

28. The refusal to give a deed of cession of the cargo, unless the defendants would accept the abandonment of the vessel, insured in another policy, did not vacate the abandonment of the cargo. A deed of cession is not necessary to transfer to the insurers the right to the property, the same being completely transferred by the abandonment. *Ibid.* 400.

INSURANCE.

29. The vessel not having been detained with a view to condemnation, and the inhibition of exportation of the cargo, but upon security, not affecting her; the assured had no right to recover for a total loss. *Ibid.* 400.
30. Abandonment, 1, 2, 3.
31. Average, 1.
32. Effect of the memorandum at the foot of a policy of insurance. *Hogan* vs. *The Delaware Insurance Company*, 419.
33. Where the supra-cargo of a vessel which had been captured, the voyage broken up, and the cargo abandoned to the underwriters, has invested the proceeds of the outward shipment in another cargo, upon the sales of which a freight has been made; the underwriters are entitled to the profit. *Simonds* vs. *The Union Insurance Company*, 443.
34. When the outward voyage of a vessel is broken up, and the vessel insured earns freight on her return voyage; the underwriters upon her, on her outward voyage, have no claim to the freight earned after the voyage insured has been broken up. *Ibid.* 443.
35. It is the duty of the assured to represent truly to the underwriter, every fact within his knowledge or power, material to the risk; and if he omit to do so, the policy is void. *Biays* vs. *The Union Insurance Company*, 506.
36. If he communicates all the information he has honestly obtained, he cannot be charged with misrepresentation or concealment, if it should, afterwards, turn out that his informant knew more than he had disclosed, or had not stated it truly. *Ibid.* 506.
37. If, for fraudulent purposes, he avoided obtaining a full and true disclosure, the consequences would be the same, as if he had misrepresented the information given to him. *Ibid.* 506.
38. The foundation of all insurances, unless of the wager kind, is *the real value* of the thing insured. In a valued policy, the parties agree upon the value; in an open policy, the assured is bound to prove it. The prime or invoice cost, may, in most cases, be, *prima facie*, a very proper criterion of value, but it is not conclusive. The actual value should be ascertained and determined, and this may vary from the invoice, or prime cost; and, whatever the same may be, the assurers are bound to pay it in an open policy. *Snell et al.* vs. *The Delaware Insurance Company*, 509.

INTEREST.

1. Interest on money in the hands of the administrator, is not chargeable, when the same is retained in the hands of the administrator.

INTEREST.

until a suit shall determine the right of the claimant thereto. *Wade* vs. *The Administrators of Wade*, 477.

2. The Court allowed the interest customary at Canton, upon a note executed there. *Cowqua* vs. *Lauderbrum*, 521.

JURISDICTION.

1. In an action of covenant upon an agreement under seal, containing a penalty of five hundred dollars, the Circuit Court has jurisdiction, the action being for damages exceeding five hundred dollars, as laid in the declaration. *Martin* vs. *Taylor*, 1.

2. A deed executed for the purpose of giving jurisdiction to the Federal Court, will not be countenanced so as to sustain the jurisdiction. *Hurst* vs. *M'Neil*, 70.

3. A suit, on a policy of insurance, is properly brought, if instituted in the name of the owner of the property intended to be insured; and, if the assured is a citizen of another State, the Circuit Court has jurisdiction; although the agent, whose name only appears in the policy, is a citizen of the State of Pennsylvania. *Buan* vs. *Gardner*, 145.

4. The jurisdiction of the Courts of the United States, is limited; and, the inferior Courts can exercise it only in cases in which it is conferred by an Act of Congress. *Ex parte Cabrera*, 231.

5. The lessor of the plaintiff, a resident in New-York, as a member of the Population Company, was entitled to 165 out of 2500 shares of a large body of lands in Pennsylvania; the legal title to which, was originally in three trustees, who, before the institution of this suit, conveyed the land, the object of this suit, to him, with other tracts, by lease, for six years, subject to an annual rent, and to a covenant, by the lessor, to bring suits to recover the land, and, at the end of the term, to deliver it up to the trustees. Held, that the title of the lessor of the plaintiff, was sufficient to give the Circuit Court jurisdiction of the case. *Browne's Lessee* vs. *Browne*, 429.

6. The lessor of the plaintiff had an equitable estate in the land, before the conveyance by the trustees; and the Court could have compelled them to convey the legal estate to him, in which case, he could have maintained a suit in the Circuit Court. The conveyance of the trustees, having been voluntary, does not impair the jurisdiction. *Ibid.* 429.

7. A tenant in common, who is a citizen of another State, may sue in the Circuit Court for his portion, although his co-tenants, who are

JURISDICTION.

citizens of the State where the lands are, cannot maintain such a suit. *Ibid.* 429.

8. Crimes, 3, 4, 5.
9. If the plaintiff has a right to claim the jurisdiction of the Circuit Court under the law, a deed which is not intended to give, and which does not give jurisdiction to the Court, cannot be said to be given in fraud of the law, merely because it changes the nature of the suit, which the plaintiff has a right to maintain in the Courts of the United States. *Lessee of Browne* vs. *Arbuckle*, 484.

JURY.

See Challenges.

LANDS.

1. Laws of Virginia, relative to the registry of a patent. *Lessee of Ritchie* vs. *Woods*, 11.
2. Settlement, 1.
3. Warrant and survey.
4. Ejectment.
5. New purchase.
6. Covenant.

LAWS OF THE UNITED STATES.

1. Whether, under the provisions of the Act of Congress of 5th June 1794, sugars, remaining in the place in which they were refined when the law was repealed, were liable to pay the duties. *Carr* vs. *Pennington*, 65.
2. Forfeiture, 1.
3. Impost and tonnage, 1,

LENGTH OF TIME.

1. Length of time cannot be presumed by a jury, but must be proved. *Hurst's Lessee* vs. *M'Neil*, 70.
2. Length of time may properly induce a jury to presume a grant in support of such possession; which presumption may be repelled, or accounted for. *Ibid.* 70.
3. Where a party has been absent from the country during a war, the period of the war should not be construed against him, in computing the length of time in which an ejectment can be brought. *Lessee of Delancey* vs. *M'Keen*, 354.

LEX LOCI.

1. A contract is governed by the law of the country where it is made, and may be enforced, in foreign countries, according to their own form of proceeding; but, in such a manner, as to give effect to the contract, according to the law which gave it validity. *Camfranque* vs. *Burnell*, 340.
2. Foreign laws, 3.
3. The law of the country, where the contract is made, must govern it; but, as in the Courts of the United States a judgment can only be given in money, no other recovery can be had upon a note for a certain sum of money to be paid in sugar, than for the sum of money mentioned in the note. *Courtois* vs. *Carpentier*, 376.
4. When, by the law or custom of the country where sugar notes are given, no interest is payable upon them until judgment is obtained upon them; in the Courts of the United States, interest before judgment, will not be allowed. *Ibid.* 376.

LIEN.

1. An execution *executed*, previous to an act of bankruptcy, upon the estate of the debtor, gives a lien to the execution creditor, provided the levy be real and *bona fide*. *Barnes et al.* vs. *Billington*, 29.
2. Liens depend upon contracts, express or implied; and none can be implied, where the defendant acts adversely to the rights of the person for whom he has paid the money. *Allen* vs. *Ogden*, 174.
3. Whatever *lien* might have existed upon goods *unsold*, in the hands of a consignee, shipped to him upon a particular account, and under an agreement, which he has not kept; when these goods have been *sold*, the lien is at an end; and the proceeds of the goods will become the subject of mutual accounts, and of set-off between the parties. *Marks et al.* vs. *Barker et al.* 178.
4. Agent, 10.

LIMITATION.

1. Length of time, 1, 2.

MASTER OF A VESSEL.

1. Ship, and vessels, 1, 2, 3.
2. Hypothecation, 5, 6. 9.
3. Seamen, 1.

MISNOMER.

1. Where two names have the same original derivation, or where one is an abbreviation or corruption of the other, but both are taken

MISNOMER.

promiscuously, and according to common use, to be the same, though differing in sound; the use of one for the other, is not a material misnomer. *Lessee of Gordon* vs. *Holliday*, 285.

2. If the name be wholly mistaken, and repugnant to truth, the misnomer is fatal. *Ibid.* 285.
3. *Query*, if *Henry*, for *Harry*, is a misnomer. *Ibid.* 285.

NEGLIGENCE.

1. A bill of exchange remitted in payment of a debt due to the person to whom it is sent, where the amount of the bill is lost by the negligence of the person to whom it was transmitted, is to be considered as payment of the debt. *Roberts* vs. *Gallagher*, 156.
2. If a bill of exchange, or a promissory note, is given and received in satisfaction of a precedent debt, the laches of the holder, by which the amount due upon the bill is lost, will prevent a claim upon the person from whom it was received in payment. *Ibid.* 156.
3. If A loan the note of a third person to B, B must use due diligence to recover the amount due by it; and if the debt is lost, by the insolvency of the maker, and by B's want of diligence, B must pay the amount of the note to A. *Higbie* vs. *Hopkins*, 239.

NEGOTIABLE NOTE.

1. Bankrupt and bankruptcy, 8, 9.

NEW PURCHASE.

1. The inceptive title of a warrant-holder for lands in "the new purchase," is a mere right of possession, to be consummated by a compliance with the requisites of the law; and unless they were performed, no estate vested in him, and he lost his right of possession. *Huideköper* vs. *M'Clean*, 136.
2. Upon a forfeiture being incurred, by a non-compliance with the terms of the warrant, no third person could enter on the land; no vacating warrant could issue, as it is provided by the law, that it can only issue to an actual settler. *Ibid.* 136.
3. What was *prevention* from making a settlement on lands within "the new purchase?" *Lessee of Huidekoper* vs. *Douglass*, 258.
4. What was the *persistance* required by the law of Pennsylvania, under which those lands were sold? *Ibid.* 258.
5. If the warrant for lands be uncertain, or if it be certain, and is laid in another place, and before the survey is made, no third person has acquired a title to the land on which the warrant is laid; every

NEW PURCHASE.

objection to a title so derived is done away. *Lessee of Philips* vs. *Wilson*, 470.

6. There is no provision in the Act of Assembly, which prevents the survey under a warrant for lands in "the new purchase," after two years; unless such survey will interfere with a title previously acquired. *Lessee of Browne* vs. *Ambuhle*, 484.

7. The nature of the settlement, the warrantees of these lands were prevented from making, and to what degree the prevention should have existed. *Ibid.* 484.

8. The survey gives notice to all subsequent purchasers, and it is only such who can complain. Such a survey could not affect the title of a person, who in the meantime had acquired an incipient title to the land, either by warrant or settlement. *Lessee of Philips* vs. *Wilson*, 470.

9. If the surveyor has warrants to the amount of the lands surveyed, and he includes the whole in one survey, marking the boundaries of the different surveys, it is nothing to third persons how the warrants are appropriated, before the map of the survey is returned to the Surveyor General. *Ibid.* 470.

10. *Quere.*—What would be the effect of a settlement upon the title to lands comprehended in another and adjoining survey, where the lines of the land claimed by the settlement, had not been run out, so as to take part of the lands so adjoining the settlement? *Ibid.* 470.

NEW TRIAL.

1. The Court will leave the question of fact to the jury; yet they will exercise a discretion; and if they think the verdict was against evidence, they will grant a new trial. *Kohne* vs. *The Insurance Company of North America*, 123.

2. Damages, 5.

3. Although the omission of the Court to charge the jury on important questions of law, involved in the case, is not in itself a reason for granting a new trial; yet the Court will exercise a discretion; and, if they think the justice of the case will be promoted, they will grant it. *Calbreath* vs. *Gracy*, 198.

4. Motion for a new trial.—In an action to recover damages, although the jury, by their verdict, gave the plaintiff less than the Court thought him entitled to, a new trial was refused. *Walker* vs. *Smith*, 202.

NEW TRIAL.

5. The Court will always set aside a verdict, when it is against law: it will always respect the right of the jury to decide upon facts. *Ibid.* 202.

6. Motion for a new trial, on the ground that the Court had allowed a record of a foreign Court of Admiralty, to go to the jury as evidence; the same not having been legal testimony; the record had been read on the trial, without objections. The Court refused to grant a new trial, as the application is too late. *Russel* vs. *The Union Insurance Company*, 440.

PARTNER AND PARTNERSHIP.

1. Set-off, 2.

2. The plaintiff and the defendant were partners in a particular shipment, made by the former to the latter; and the proceeds thereof were to be remitted to the plaintiff, to be invested in another shipment on the same account. No second shipment having been made, the plaintiff claimed half the proceeds of the first joint transaction, and instituted a suit for the recovery thereof. It was held, that although the defendant alleged he had shipped a sum of money to the plaintiff, amounting, as he stated, to more than his portion of the proceeds, the action of *indebitatus assumpsit* could not be sustained, as the accounts between the partners could not be considered as settled. *Lamalere* vs. *Caze*, 435.

3. To constitute a settlement of accounts between partners, all must consent to and be bound by it, or none can be; and this consent must be express, or to be implied from circumstances. *Ibid.* 435.

4. Until a partnership is dissolved, the accounts of the partners liquidated, and a balance struck, one partner cannot sue another in an action of *indebitatus assumpsit*. *Ibid.* 435.

5. To constitute a partnership, there must be a community of interests —a participation in profit and loss; and this joint interest must continue to the time of the sale of the articles in which the parties are thus interested. *Felichy* vs. *Hamilton*, 491.

6. It is the joint interest in the whole, which constitutes the joint liability of all, for the contracts of one; and not the credit which is given to all, as in the instance of a dormant partner. *Ibid.* 491.

7. If A & B purchase an article on joint account, and ship it; they are jointly liable for advances made by the consignee on account of this joint concern. *Ibid.* 491.

PATENT RIGHTS.

1. Whether the plaintiff was the first inventor of the machine, for which he had obtained a patent, is a question for the decision of the jury; but they must be satisfied, that he is so in reference to all the world. *Aliter*, in England, the statute of James I. speaking only of new manufactures, *within the realm*. *Reutgen* vs. *Kanouse & Granni*, 168.

2. Whether the improvement made by the defendant in the machine invented by the plaintiff, is in *principle*, or in *form* and *proportion*; is a question for the decision of the jury. If the improvement is in the principle, the inventor of the improvement has as much right to use the original invention, as the inventor has to use the improvement. An improvement in *form*, or *proportions*, gives no right. *Ibid.* 168.

3. Whether the specification has disclosed the whole truth, relative to the invention, or discovery? Whether there has been a concealment, with a view to deceive? Is the concealment material? Could *an artist*, after the patent right has expired, construct such a machine, by reference to the specification? These are questions, for the decision of the jury. *Ibid.* 168.

4. After an agreement between an original inventor of a machine, and the inventor of an improvement upon the machine, that they would mutually use the same; the patent should have issued in the names of both inventors; and the plaintiff, by taking out a patent in his own name, committed a fraud, and is to be considered as a trustee for the defendant. Such conduct may not entitle the defendant to a *nonsuit*, but the jury may give the plaintiff no more than nominal damages. *Ibid.* 168.

5. What will be considered as a license to use the invention, for which a patent has been obtained. *Ibid.* 168.

6. Damages.

PAYMENT.

1. A receipt for so much money, is only evidence of a payment, which may be explained by parol, or other proof. *Maze* vs. *Miller*, 328.

2. If the payment acknowledged in the receipt, turn out to be a note, bill, or the like; and, if the same were not paid or received in satisfaction, and turn out unproductive, it is no payment. *Ibid.* 328.

3. In order to make such bill or note a payment, it is necessary that it be received in satisfaction, and the receiver to run all risks; or, where the receiver has made it his own, by neglecting to give notice. *Ibid.* 328.

PERJURY.

1. When a bill of sale is made fraudulently and colourably to the bankrupt, if he swears that the property mentioned in it belongs to him, it is perjury. But, if he swears to such ownership from mistake, resulting from a misconstruction of a paper, it would not be perjury. *Anonymous*, 84.
2. If an offence be created by law, and before prosecution the law be repealed, the offence cannot be punished, unless there is a reservation of jurisdiction over the offence, in the repealing law. *Ibid.* 84.
3. Under the Act of 19th December, 1803, repealing the Bankrupt Law, there is no reservation for such purposes; and it would only be for perjury committed after the repeal of the law, in cases, which, by authority of the repealing Act, may be completed, that an indictment could be sustained. *Ibid.* 84.
4. Perjury committed in proceedings under the Bankrupt Law, cannot be prosecuted under the general Criminal Law of the United States, the 18th section of which applies to perjuries committed in *judicial proceedings*, whether orally or by deposition. *Ibid.* 84.
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2. If the plaintiff shows a right of possession in himself, it is sufficient against every person, but the proprietary; or one claiming under him. *Ibid.* 204.

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2. Ejectment, 3, 4.

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See Priority of payment.

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Claim by the United States, of priority of payment out of the effects of an insolvent and bankrupt debtor. *The United States* vs. *Fisher et al.* 4.

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1. Agent, 2, 3, 4, 5.
2. Where a commission merchant takes a bond for a simple contract debt due to him for goods sold on commission, and includes in the same instrument a debt due to himself, he makes himself answerable to his principal for the amount of the goods; as he has deprived him of the means of pursuing his claim against his debtor, by extinguishing the debt due by simple contract. *Jackson* vs. *Baker*, 394.
3. A and B shipped a cargo of goods for C, but consigned them to D, the partner of E. Before the arrival of the goods, D died, C became bankrupt, and the defendant, under a power of attorney from E, took possession of them, sold them, and remitted part of the proceeds to E, at the same time informing A and B of his having taken possession of the goods; and when he remitted in part their proceeds to E, he advised A and B of such remittances, who approved of the whole of his proceedings. Held, that the defendant did not become the agent of the shippers, but was the agent of E; and that any remittances made to E, of which advice was not given by the defendant to A and B, that they were for the proceeds of the goods, were not a payment to A and B. *Holt et al.* vs. *Dorsey*, 396.

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1. What will be deemed sufficient evidence to prove the loss of a promissory note, so as to permit evidence of its contents to be given. *Vaughton, Adm.* vs. *Brenell*, 467.

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2. The proprietaries of Pennsylvania were the sole owners of the soil of the province, as well as of the sovereignty, in absolute fee simple; and were no otherwise trustees for the people, in respect to the soil, but as they rendered themselves so, by "the rules and concessions," which they made. *Lessee of Penns* vs. *Klyne*, 207.
3. By these rules and concessions, they reserved to themselves the right to appropriate *one-tenth* of the lands in the then province of Pennsylvania, to their own private use; and this appropriation was made by a particular warrant of appropriation, which was followed by a survey. *Ibid.* 207.
4. The land thus appropriated, could not be, afterwards, taken up by others, without a *special agreement* with the proprietaries; which might be on the "*common terms*," on which lands were then sold; or on other terms, by agreement. The title of any one, acquired previous to such an appropriation, could not be affected by any act of the proprietaries. *Ibid.* 207.
5. The Divesting Law of 1779, confirmed to the proprietaries all their private lands, of which they were possessed, or entitled to, in 1779; and such as were known by the name of their *tenths*, or *manors*; and which had been *surveyed*, and *returned* into the land office, prior to July 4th, 1776. *Ibid.* 207.
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8. The proprietary was neither an agent, nor a trustee, for the first purchasers. *Ibid.* 262.
9. The proprietary of Pennsylvania, by his promise to first purchasers, did not deprive himself of the right to lay off the manor of Springettsbury, north of the city of Philadelphia. *Ibid.* 262.
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3. What will be deemed probable cause of seizure. *Ibid.* 245.

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PUBLIC MINISTERS.

1. The laws of the United States, which punish those who violate the privileges of a foreign minister, are equally obligatory on the State Courts, as upon those of the United States; and it is equally the duty of each, to quash proceedings against any one having such privileges. *Ex parte Cabrera*, 232.
2. The injured party may seek his redress, in either Court, against the aggressor; or, he may prosecute, under the 26th section of the law. *Ibid.* 232.
3. The Circuit Court cannot quash proceedings against a public minister, depending in a State Court; nor can the Court in any way interfere with the jurisdiction of the Courts of a State. *Ibid.* 232.
4. A secretary, attached to the Spanish legation, is entitled to the protection of the laws of nations, against any civil or criminal prosecution: but, the Circuit Court cannot discharge him from criminal process, issued under the authority of the State of Pennsylvania. *Ibid.* 232.

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1. Payment, 1, 2, 3.

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1. Deeds, 3.

REFEREES.

1. Award, 1, 2, 3.
2. The Court will not set aside the report of referees, merely because

SETTLEMENT.

3. The proviso of the 9th section of the Act, applies only to those who had an incipient title at some time by actual settlement, preceding the necessity which obliged them to require the benefit of the proviso; or by warrant; and such settlement, if so made, would be sufficient, although it were prevented, by the existence of hostilities, from being such a one as this section requires, by the occasion mentioned in the proviso. *Ibid.* 18.
4. Who is an *actual settler*, to whom a warrant may issue, under the law. *Ibid.* 18.
5. *Actual settlement*, under the 9th section, consists in clearing, fencing, and cultivating two acres of land, at least, on each 100 acres; erecting a house thereon, fit for the habitation of man, and a residence continued for five years, &c. *Ibid.* 18.

SHIPS AND VESSELS.

1. A master of a vessel, who at sea bears down on another vessel to leeward, which has hoisted her colours, is justified in bearing down upon her, if it is a custom to do so. *Stone et al.* vs. *Ketland*, 142.
2. The master of a vessel is bound to his owners, and he and they to every one who may be affected by his acts, for his skill and care in the management of the vessel under his command. *Ibid.* 142.
3. If from want of care or skill he injures another vessel, the owner of the vessel under his command is answerable. *Ibid.* 142.
4. Forfeiture, 1.

SHERIFF'S DEED.

1. Title, 9.

SLAVES.

Construction of the Act of Assembly, relative to the abolition of slavery in Pennsylvania. *Butler* vs. *Hopper*, 499.

SLAVE TRADE.

1. A vessel, the property of a citizen of the United States, being at St. Thomas, took on board, as passengers, two ladies, with some slaves, their domestic servants, for all of whom the price of their passage was paid at Havana; where the ladies and their slaves were landed. The slaves were not carried for sale, nor in any other manner than as the property of the ladies, and as their attendants. It was held, that the law of the United States, passed 22d March 1794, was intended to prohibit any citizen or resident of the United States *from equipping vessels within the United*

SLAVE TRADE.

—*States*, to carry on trade or traffic in slaves to any foreign country. *The Brig Tryphenia* vs. *Harrison*, 522.

2. The law of 10th May 1800, extends the prohibition to citizens of the United States, *in any manner* concerned in this kind of traffic, either by personal service on board of American or foreign vessels, wherever equipped; and to the owners of such vessels, citizens of the United States. *Ibid.* 522.

3. The provisions of those laws were not intended to apply to a case, where slaves are carried from one foreign port to another as passengers, and not for sale. *Ibid.* 522.

SPRINGETTSBURY MANOR.

1. The manor of Springettsbury, was known as a manor, prior to 1776; and it was duly surveyed, and returned into the land office, before 4th July, 1776. *Lessee of Penns* vs. *Klyne*, 207.

2. Proprietaries of Pennsylvania, 1, 2, 3, 4.

3. The proprietaries of Pennsylvania, by authorizing their agent, in 1733, to adjust the claims of settlers, on the west side of the Susquehannah, within the boundaries of a body of lands, which was afterwards resurveyed as the manor of Springettsbury, and to allow to those persons common terms for the same; did not, thereby, deprive themselves of the legal right to appropriate all the residue of these lands, as part of the proprietary tenths, and to claim the said residue as part of their said manor. *Lessee of Penns* vs. *Groff et al.* 390.

STATE LAWS.

Under the laws of Virginia, the certificate of registry of a patent, which is required to be given, is not necessary to the title of the lands under it. The law, as to this matter, is merely directory. *Lessee of Ritchie* vs. *Woods*, 11.

STATUTES.

1. The nature of a proviso in a statute. *Huidekoper* vs. *Burrus*, 109.

2. Construction of the laws of the United States, prohibiting the slave trade. *Brig Tryphenia* vs. *Harrison*, 522.

SURETIES.

1. One who has become surety for another, cannot recover the amount of his responsibility, without showing that he had paid it, before action brought. *Pigou* vs. *French*, 278.

2. Insurable interest.

3. Duties on merchandise, 1, 2, 3, 4.

SURVEY.

1. What will be deemed an insufficient and imperfect survey. *Balfour's Lessee* vs. *Meade*, 18.
2. A survey made and returned, and having every appearance of regularity, must be taken as regular, until the contrary is shown. *Lessee of David Harris* vs. *Burchan et al.* 191.
3. After a survey has been once regularly made under a warrant, under the directions of the warrantee, although not in conformity with the terms of the warrant, the warrant is *functus officio*; and cannot afterwards be revived, and a survey made under it. *Ibid.* 191.
4. A right by settlement and improvement, if a survey of the land included in it shall be made, under a warrant, by the owner of the settlement and improvement, will be merged in the higher title. But, if the surveyor, without the knowledge of the warrantee, makes such use of the warrant, the rights of the warrantee are not thereby affected. *Ibid.* 191.
5. Evidence, (written,) 8.
6. Surveys of lands in Pennsylvania, made by order of the Commissioners of Property, have been supported in Pennsylvania. *Lessee of James* vs. *Stookey*, 330.

TITLE.

1. The doctrine of a *purchaser without* notice, applies only to equitable rights, where a *legal title* is obtained, without notice of a prior equitable *title*, when the former will prevail in equity, *if fairly acquired*. *Hurst's Lessee* vs. *M'Neil*, 71.
2. *In the case* of legal titles, the rule is *caveat emptor*. *Ibid.* 71.
3. *Evidence*, 3.
4. *In* an ejectment, the plaintiff, who has shown title in himself, is not bound to show the title to the same land, to be out of the proprietary. *Hyllon's Lessee* vs. *Brown*, 204.
5. If a defendant rely upon the original title of the proprietary, he must show it to be a subsisting title, either in the proprietary, or in himself, claiming under the proprietary. *Ibid.* 204.
6. Note to page 205.
7. Warrant and survey, 11.
8. A warrant without a survey, made under a legally authorized surveyor, does not, by the practice of Pennsylvania, give a right of entry to support an ejectment. *Lessee of Hurst* vs. *Durnell*, 262.
9. Feme covert, 1, 2, 3.
10. The title under a sheriff's deed, although the deed was not recorded until after ejectment brought, is good; because, although such deeds do not convey a title until recorded, yet the title relates

TITLE.

back to the time when the deed was made. *Lessee of Wallace* vs. *Lawrence*, 505.

TREATY.

1. The stipulations in a treaty between the United States and a foreign nation, are paramount to the provisions of the Constitution of a particular State, of the confederacy. *Lessee of Harry Gordon* vs. *Kerr et al.* 322.
2. The operation of a treaty, before ratification by the governing powers of the State, by whose agents it has been signed. *Hylton's Lessee* vs. *Brown*, 344.

TRIAL.

1. In an indictment for destroying a vessel at sea, of which the defendant was master, thirty-five jurors may be challenged by the defendant. *The United States* vs. *Johns*, 363.

TROVER.

1. Conversion, 1.
2. When a party, holding goods in his possession adversely, has paid rent for the premises in which they are stored, it is not necessary to tender the rent, in order to enable the owner of the goods to recover them in an action of trover. *Allen* vs. *Ogden*, 174.
3. See note, page 177.

TRUST AND TRUSTEE.

1. The mere calling a deed of trust, mentioned in the recitals of other deeds, a *deed of trust*, does not render it so. *Hurst's Lessee* vs. *M'Neil*, 70.

UNITED STATES.

See priority of payment, 1.

USES. (STATUTE OF.)

The freehold estate which vests in a re-lessee, under deed of lease and re-lease, by enlargement, is an estate at common law, which did not require the aid of the statute of uses to execute the possession to the use. *Hurst's Lessee* vs. *M'Neil*, 70.

VERDICT.

New Trial.

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Liability of owner for acts of master. *Dusar* vs. *Murgatroyd*, 13.

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Construction of the Act of Assembly, relative to the abolition of slavery in Pennsylvania. *Butler* vs. *Hopper*, 499.

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1. A vessel, the property of a citizen of the United States, being at St. Thomas, took on board, as passengers, two ladies, with some slaves, their domestic servants, for all of whom the price of their passage was paid at Havana; where the ladies and their slaves were landed. The slaves were not carried for sale, nor in any other manner than as the property of the ladies, and as their attendants. It was held, that the law of the United States, passed 22d March 1794, was intended to prohibit any citizen or resident of the United States *from equipping vessels within the United*

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3. After a survey has been once regularly made under a warrant, under the directions of the warrantee, although not in conformity with the terms of the warrant, the warrant is *functus officio*; and cannot afterwards be revived, and a survey made under it. *Ibid.* 191.
4. A right by settlement and improvement, if a survey of the land included in it shall be made, under a warrant, by the owner of the settlement and improvement, will be merged in the higher title. But, if the surveyor, without the knowledge of the warrantee, makes such use of the warrant, the rights of the warrantee are not thereby affected. *Ibid.* 191.
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1. The doctrine of a purchaser without notice, applies only to equitable rights, where a legal title is obtained, without notice of a prior equitable title, when the former will prevail in equity, if fairly acquired. *Hurst's Lessee* vs. *M'Neil*, 71.
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1. The mere calling a deed of trust, mentioned in the recitals of other deeds, a *deed of trust*, does not render it so. *Hurst's Lessee* vs. *M'Neil*, 70.

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PERJURY.

1. When a bill of sale is made fraudulently and colourably to the bankrupt; if he swears that the property mentioned in it belongs to him, it is perjury. But, if he swears to such ownership from mistake, resulting from a misconstruction of a paper, it would not be perjury. *Anonymous*, 84.
2. If an offence be created by law, and before prosecution the law be repealed, the offence cannot be punished, unless there is a reservation of jurisdiction over the offence, in the repealing law. *Ibid.* 84.
3. Under the Act of 19th December, 1803, repealing the Bankrupt Law, there is no reservation for such purposes; and it would only be for perjury committed after the repeal of the law, in cases, which, by authority of the repealing Act, may be completed, that an indictment could be sustained. *Ibid.* 84.
4. Perjury committed in proceedings under the Bankrupt Law, cannot be prosecuted under the general Criminal Law of the United States, the 18th section of which applies to perjuries committed in *judicial proceedings*, whether orally or by deposition. *Ibid.* 84.
5. For a perjury under the Bankrupt Laws, an indictment will not be supported at common law; because, there must not only be a false oath, but it must be taken in *some judicial proceedings*, in a matter material to the issue. *Ibid.* 84.

PLEAS AND PLEADING.

1. Double pleading.—Action on a bond, for the payment of certain sums of money at Amsterdam. Plea, that the money was paid. Replication, that the sum paid was not accepted in satisfaction by the agents of the plaintiffs; that the sum was not paid on the day appointed; and that damages and interest, due for non-payment, were not paid. Adjudged, that these pleas were bad, for duplicity. *The United States* vs. *Gurney et al.* 446.
2. If the defendant has put in several pleas, he may withdraw one of them, without leave, at any time. *Vuyton* vs. *Brenell*, 467.
3. If there be a negative and affirmative plea, the plaintiff's counsel must begin and conclude on the negative issue; and the counsel for the defendant, in the affirmative: but both must, in the argument, confine themselves strictly to the issue they are discussing. *Ibid.* 467.

POSSESSION.

1. If plaintiff proves twenty years' possession, or the seisin of his ancestor, and a descent cast, it is a sufficient *prima facie* title; and

POSSESSION.

the defendant can only succeed, by showing a better right in himself, or out of the plaintiff. *Hylton's Lessee* vs. *Brown*, 204.

2. If the plaintiff shows a right of possession in himself, it is sufficient against every person, but the proprietary; or one claiming under him. *Ibid.* 204.

PRACTICE.

1. Damages, 3.
2. Ejectment, 3, 4.

PREFERENCE.

See Priority of payment.

PRIORITY OF PAYMENT.

Claim by the United States, of priority of payment out of the effects of an insolvent and bankrupt debtor. *The United States* vs. *Fisher et al.* 4.

PRINCIPAL AND AGENT.

1. Agent, 2, 3, 4, 5.
2. Where a commission merchant takes a bond for a simple contract debt due to him for goods sold on commission, and includes in the same instrument a debt due to himself, he makes himself answerable to his principal for the amount of the goods; as he has deprived him of the means of pursuing his claim against his debtor, by extinguishing the debt due by simple contract. *Jackson* vs. *Baker*, 394.
3. A and B shipped a cargo of goods for C, but consigned them to D, the partner of E. Before the arrival of the goods, D died, C became bankrupt, and the defendant, under a power of attorney from E, took possession of them, sold them, and remitted part of the proceeds to E, at the same time informing A and B of his having taken possession of the goods; and when he remitted in part their proceeds to E, he advised A and B of such remittances, who approved of the whole of his proceedings. Held, that the defendant did not become the agent of the shippers, but was the agent of E; and that any remittances made to E, of which advice was not given by the defendant to A and B, that they were for the proceeds of the goods, were not a payment to A and B. *Holt et al.* vs. *Dorsey*, 396.

PROMISSORY NOTE.

1. What will be deemed sufficient evidence to prove the loss of a promissory note, so as to permit evidence of its contents to be given. *Vuyton, Adm.* vs. *Brenell*, 467.

PROPRIETARIES OF PENNSYLVANIA.

1. Title, 5.
2. The proprietaries of Pennsylvania were the sole owners of the soil of the province, as well as of the sovereignty, in absolute fee simple; and were no otherwise trustees for the people, in respect to the soil, but as they rendered themselves so, by "the rules and concessions," which they made. *Lessee of Penns* vs. *Klyne*, 207.
3. By these rules and concessions, they reserved to themselves the right to appropriate *one-tenth* of the lands in the then province of Pennsylvania, to their own private use; and this appropriation was made by a particular warrant of appropriation, which was followed by a survey. *Ibid.* 207.
4. The land thus appropriated, could not be, afterwards, taken up by others, without a *special agreement* with the proprietaries; which might be on the "*common terms*," on which lands were then sold; or on other terms, by agreement. The title of any one, acquired previous to such an appropriation, could not be affected by any act of the proprietaries. *Ibid.* 207.
5. The Divesting Law of 1779, confirmed to the proprietaries all their private lands, of which they were possessed, or entitled to, in 1779; and such as were known by the name of their *tenths*, or *manors*; and which had been *surveyed*, and *returned* into the land office, prior to July 4th, 1776. *Ibid.* 207.
6. The contract for Liberty land, between the proprietary and those who entitled themselves to it, by taking up lands in the country, operated severally with each purchaser, and not with the whole, so as to constitute them tenants in common. *Hurst* vs. *Durnell*, 262.
7. Those who were entitled to Liberty lands, were bound to have them laid off, by surveyors regularly appointed, as in other parts of the then province; the law being the same, as to those lands, as to other lands in Pennsylvania. *Ibid.* 262.
8. The proprietary was neither an agent, nor a trustee, for the first purchasers. *Ibid.* 262.
9. The proprietary of Pennsylvania, by his promise to first purchasers, did not deprive himself of the right to lay off the manor of Springettsbury, north of the city of Philadelphia. *Ibid.* 262.
10. Springettsbury manor, 3.

PROBABLE CAUSE.

1. An officer of a public armed vessel of the United States, who made a seizure of a neutral vessel on the high seas, may excuse himself, by showing probable cause for having made it; but the ground of excuse should be very strong—stronger than in case of a capture of a neutral, by a belligerant. *Shattuck* vs. *Maley*, 245.
2. If such an excuse is made out, he is not liable for consequential damages; but otherwise, he is liable for all damages which have followed the seizure. *Ibid.* 245.
3. What will be deemed probable cause of seizure. *Ibid.* 245.

PROTEST OF THE CAPTAIN OF A VESSEL.

NOTE.—*Scriba* vs. *The Insurance Company of North America.*—The Court determined, that the protest of the captain could not be read in evidence by either party. *Hurtin* vs. *The Phœnix Insurance Company*, 406.

PUBLIC MINISTERS.

1. The laws of the United States, which punish those who violate the privileges of a foreign minister, are equally obligatory on the State Courts, as upon those of the United States; and it is equally the duty of each, to quash proceedings against any one having such privileges. *Ex parte Cabrera*, 232.
2. The injured party may seek his redress, in either Court, against the aggressor; or, he may prosecute, under the 26th section of the law. *Ibid.* 232.
3. The Circuit Court cannot quash proceedings against a public minister, depending in a State Court; nor can the Court in any way interfere with the jurisdiction of the Courts of a State. *Ibid.* 232.
4. A secretary, attached to the Spanish legation, is entitled to the protection of the laws of nations, against any civil or criminal prosecution: but, the Circuit Court cannot discharge him from criminal process, issued under the authority of the State of Pennsylvania. *Ibid.* 232.

RECEIPT.

1. Payment, 1, 2, 3.

RECORDING OF DEEDS.

1. Deeds, 3.

REFEREES.

1. Award, 1, 2, 3.
2. The Court will not set aside the report of referees, merely because

REFEREES.

they might not have drawn the same conclusions from the evidence, which the referees have deduced. *Jolly* vs. *Blanchard*, 252.

3. Evidence not laid before referees, cannot be exhibited to the Court on exceptions to the report. *Seth Barton* vs. *Anthony*, 317.
4. Where facts to sustain an additional exception to the report of referees, have been discovered since the period for filing exceptions has passed, the Court will allow the additional exceptions to be filed; although, if the exceptions had been filed in time, the discovery of such circumstances would not induce the Court to allow them to be filed. *Thelusson* vs. *Crammond*, 319.

REGISTER OF VESSELS.

1. Forfeiture, 1.
2. By the law of the United States, relating to the registering and enrolment of vessels, the inaccurate recital of the certificate of registry, in a bill of sale, does not, as in England, avoid the sale; but merely deprives the vessel of her American character. *Philips* vs. *Ledley*, 226.
3. If a *registered* vessel is assigned to a foreigner, she is only deprived of her American character. *Ibid.* 226.
4. The sale of a *licensed* vessel to a foreigner, is not void; but the vessel is liable to forfeiture. *Ibid.* 226.

REPAIRS OF A VESSEL.

1. Hypothecation, 6.

RESIDENCE.

What will constitute a residence, in contradistinction to temporary domicil. *Hylton's Lessee* vs. *Browne*, 298.

RESPONDENTIA.

Bottomry, 1, 2, 3, 4.

SEAMEN.

1. The master of a vessel, while at sea, has a right to give a seaman moderate correction; and in case of mutinous conduct, he may suppress it in the best mode he can; and therefore he may use a greater degree of violence on such occasions, than when there is misbehaviour only. *The United States* vs. *Wickham*, 310.

SEAMEN'S WAGES.

1. To entitle the owner of a vessel to the forfeiture of the wages of a seaman, absenting himself from the vessel more than forty-eight

SEAMEN'S WAGES.

hours, the entry of the absence of the seaman must be made on the log-book, *on the day* on which the seaman so absented himself. *The Schooner Phœbe* vs. *Dignum*, 48.

2. A mariner, who shipped to perform a voyage from Philadelphia to Batavia, and back to Philadelphia, at a certain rate of wages per month, having performed the voyage to Batavia, died there, and the vessel returned to the port from which she sailed. It was held, that the voyage was entire from Philadelphia to Batavia, and back; and that the monthly rate was no more than a rule to adjust the quantum for the voyage. *Sims* vs. *Jackson*, 414.
3. The expression, "full wages," in the seventh article of the Laws of Oleron, means, the same wages which the mariner would have been entitled to, had he lived, and served out the whole voyage of the vessel to Batavia, and back to Philadelphia. It is the aggregate amount of the wages for the voyage; and, in this case, the administratrix of the deceased mariner, is entitled to the same wages the intestate would have received, had he lived, and returned in the vessel to the port from which he sailed. *Ibid.* 414.

SET-OFF.

1. The drawer of a bill of exchange, protested after acceptance, having paid the damages, cannot set off the same, in an action against him by the acceptor on another account, although the acceptor had funds in his hands to pay the bill, the damages being unliquidated. *Armstrong* vs. *Brown*, 43.
2. Whether the debt of one partner, in a joint concern with others, not yet closed, can be set off in an action by one partner against the other? *Hurst* vs. *Hurst*, 56.
3. The nature of set-off. *Ibid.* 56.
4. Bankrupt and bankruptcy, 8.

SETTLEMENT.

1. By the decisions of the Courts of Virginia, a right of settlement cannot prevail against a right under a patent. *Lessee of Ritchie* vs. *Woods*, 11.
2. To constitute a *settlement* upon lands in "the new purchase," under the provisions of the 9th section of the Act of the Legislature of Pennsylvania, passed April 3d, 1792, there must be an *occupancy*, accompanied by a *bona fide* intention immediately to reside upon the land, either personally or by a tenant; and without this, the mere improvement of the land is of no importance, except as evidence of an intention to settle. *Balfour's Lessee* vs. *Meade*, 18.

SETTLEMENT.

3. The proviso of the 9th section of the Act, applies only to those who had an incipient title at some time by actual settlement, preceding the necessity which obliged them to require the benefit of the proviso; or by warrant; and such settlement, if so made, would be sufficient, although it were prevented, by the existence of hostilities, from being such a one as this section requires, by the occasion mentioned in the proviso. *Ibid.* 18.
4. Who is an *actual settler*, to whom a warrant may issue, under the law. *Ibid.* 18.
5. *Actual settlement*, under the 9th section, consists in clearing, fencing, and cultivating two acres of land, at least, on each 100 acres; erecting a house thereon, fit for the habitation of man, and a residence continued for five years, &c. *Ibid.* 18.

SHIPS AND VESSELS.

1. A master of a vessel, who at sea bears down on another vessel to leeward, which has hoisted her colours, is justified in bearing down upon her, if it is a custom to do so. *Stone et al.* vs. *Ketland*, 142.
2. The master of a vessel is bound to his owners, and he and they to every one who may be affected by his acts, for his skill and care in the management of the vessel under his command. *Ibid.* 142.
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VIRGINIA.

1. The certificate of the commissioners of Virginia, appointed under the law of that State, to adjust the claims for settlement and pre-emption rights to lands, which were afterwards found to be within the limits of Pennsylvania, being *ex parte*, is not evidence of a settlement on the lands in dispute. The holder of the certificate must prove, by other testimony, his settlement to be prior to that, under which the defendant claims. *Lessee of Swan* vs. *Hughes*, 216.

WARRANT AND SURVEY.

1. Although the law of Pennsylvania permits only one warrant to issue to one person, the universal practice of the State, upon which land titles rest, has been different; and one person may take out any number of warrants, in the names of different persons, who are considered as merely nominal, and trustees for the person who pays for the warrants, and their execution. *Lessee of Huideköper* vs. *Burrus*, 109.

2. The practice in Pennsylvania has been, where one person takes out a number of warrants to cover a large tract of land, to describe particularly, in the leading warrant, the tract it is intended to cover; and the other warrants are generally made out as adjoining this, and each other. *Ibid.* 109.

3. The uncertainty of the description in the adjoining warrants, is supplied by the survey; and if this act be performed, before any adverse title to the land accrues in a third person, the uncertainty of the warrant forms no objection. *Ibid.* 109.

4. *Aliter*, if in the meantime another person obtains a special warr and survey, or settles the tract, thus uncertainly described; for in this case, the subsequent survey of the first warrant holder, woul not relate back to the date of the warrant, so as to overreach the intermediate title thus acquired. *Ibid.* 109.

5. If the outlines of a large tract of land be legally surveyed, no third person has a right to impeach the internal structure, or to object, that any one of the warrants, within the outlines, was not properly surveyed. *Ibid.* 109.

6. If a warrant be located on one tract, and it is afterwards lifted, and located on another tract, to which no person has in the meantime acquired a title; this is valid to vest a title in the first locator, to the tract to which the warrant is removed. *Ibid.* 109.

7. *Aliter*, if an intermediate title has been acquired. *Ibid.* 109.

8. To make a survey complete, the lines ought to be run and mar on the ground, where necessary; and if not done, the surve

WARRANT AND SURVEY.

may afterwards go on the ground to complete the same. *Quere*, whether the not running and marking the lines on the ground, invalidates the survey. *Ibid.* 109.

9. By the practice of Pennsylvania relative to lands, if a warrant be taken out for land adjoining A B, and it is found that the land adjoining A B, has been previously taken up; it may be laid upon land adjoining that so held by a previous title. *Huidekoper* vs. *M'Clean*, 136.

10. If a warrant be issued, to *re-survey* land, which was not legally *surveyed*, it will stand as an original warrant of survey. *Lessee of Penns* vs. *Klyne*, 207.

11. A warrant and survey, and consideration paid, gives a title to land in Pennsylvania, sufficient to maintain an ejectment. *Ibid.* 207.

12. But, if the consideration be not paid, the warrant holder has only an equitable title, to compel a conveyance, on payment of the purchase money; and he cannot recover in ejectment, in this Court, against the proprietaries, or those who hold under them; nor can he defend himself, in an action of ejectment brought against him by them. *Ibid.* 207.

13. The rule in Pennsylvania is, that if A, who has a warrant, do not use due diligence to have it surveyed, he loses his priority against another warrant holder, who has more vigilance, and who without notice obtains the first survey. *Lessee of Harry Gordon* vs. *Kerr et al.* 322.

14. The prevalence of the Indian war, before the Revolution, is no excuse for a neglect by the holder to have a warrant executed, beyond the period when the war terminated. *Ibid.* 322.

15. By the common practice in Pennsylvania, where more than one warrant issues to one person, he uses the name of a third person, who is considered merely as a nominal person; the title being in him who pays the money to the office, and obtains the warrant. *Lessee of James* vs. *Gordon et al.* 333.

16. Every thing necessary to designate the land covered by the warrant, so as to prove it to be withdrawn from the general mass of property, and appropriated to the use of an individual, must be proved. *Lessee of Browne* vs. *Arbuckle*, 484.

17. The law does not require, that in all cases, and under every possible circumstance, every line of a survey should be run and marked on the land; much less, that the doing so should be material to the validity of the survey. *Ibid.* 484.

18. Where the boundaries of a number of tracts of land were run and

WARRANT AND SURVEY.

marked on the ground, as well as the interior lines, so far as to enable the surveyor to lay down each particular tract by protraction, it is sufficient. *Ibid.* 484.

WARRANTS FOR LANDS.

A warrant of acceptance gives no title, under the law of Pennsylvania, relative to lands in "the new purchase;" it not being founded on a settlement. *Balfour's Lessee* vs. *Meade*, 18.

WARRANTY IN A POLICY OF INSURANCE.

1. It is a breach of warranty of neutrality, that a vessel and cargo, warranted American property, shall be navigated and claimed as Spanish property; and that all the evidence to prove the neutrality of the vessel and cargo, is concealed from the captors. *Calbreath* vs. *Gracy*, 219.
2. In case of such warranty, it is not only necessary that the cargo should be in truth neutral, but also that no act of commission or of omission should be performed, to jeopardize the claim to a neutral character, whether by the owner, or by his agents. *Ibid.* 219.

WRITTEN INSTRUMENTS.

1. The defendant, against an express acknowledgment under seal, cannot deny the effect of such obligation from expressions in the instrument, which amount only to an implication to the contrary. *Martin* vs. *Taylor*, 1.
2. Evidence.

END OF VOLUME FIRST.