

IMPORTANT DECISION.

We have obtained for publication the following opinion of the Supreme court delivered by chief justice Tilghman, on Saturday the 17th inst. which settles the law in Pennsylvania, on two very important points, relative to the right of abandonment in cases of insurance.

STEPHEN DUTILLI } In the Supreme Court of the state of Pennsylvania, Philadelphia, January 17, 1807. SAMUEL GATLIF } as agent for the opinion of the court.

On the 24th September, 1799 the defendant, Samuel Gatlif, underwrote seven hundred and fifty dollars up on a policy of insurance on the schooner Little Will belonging to John Dutilli and Thomas Lillibridge, for whom the plaintiff was agent, on a voyage at and from Philadelphia to Havana. (Prout policy.)

On the 26th of September, 1799, the Little Will sailed on her voyage from Philadelphia for Havana, and on the eighth day of October following she was captured by three British privateers and carried into the port of Nassau, New-Province, where she arrived on the thirteenth of same month.

Upon her arrival in Nassau the said schooner was libelled in the admiralty court, and on the ninth day of November following was regularly acquitted; and in the whole she remained thirty seven days at Nassau, during thirty five of which she was in custody of the captors; but the fact of her acquittal was not known to the plaintiff until after the abandonment hereafter mentioned: although it was known to John Dutilli, one of the owners and supercargo, who was with her at Nassau.

On the thirteenth day of November, the plaintiff wrote the letter of abandonment enclosing the papers therein referred to, (prout letter) which was received by the defendant the same day.

On the 26th November the said schooner sailed from Nassau for Havana, where she arrived on the 21st of the same month, and sold her cargo, except three boxes plundered at New-Province. Afterwards the said schooner sailed from Havana for Philadelphia, where she arrived on the 26th or 27th of February in the year 1800, with a cargo of sugars, on which freight became due and was received by Stephen Dutilli for the benefit of those who were entitled to it, each party refusing to accept her, she was sold for wharfrage, and the whole proceeds of sale applied to the payment thereof.

The schooner Little Will was American property as warranted.

The question for the court is, whether the plaintiff is entitled to recover as for a total loss.

If the court shall be of opinion that the loss was total then it shall be referred in the usual form to three persons to be appointed by the court to ascertain what is due after the legal and just deductions.

If the court shall be of opinion it was not a total loss, it shall in like manner be referred to three referees or any two of them to be appointed by the court to ascertain the partial loss to which the defendant is liable.

J. INGERSOLL, for the Plaintiff, W. LEWIS, for the Defendants.

July 3d, 1806.

Opinion of the court delivered by W. Tilghman, C. J.

On the case thus stated, the question submitted to the court is, whether the plaintiff is entitled to recover for a total loss.

In resolving this question I shall divide it into two points.

- 1. Did there ever exist a total loss? 2. Supposing that there once existed a total loss, has any circumstance occurred which excludes the plaintiff from recovering for more than a partial loss?

1. The case before us includes one of the risks expressly mentioned in the policy, a taking at sea. But it has been objected that this taking was not by an enemy, and that when a belligerent takes a neutral, it is to be presumed that the taking is only for the purpose of searching for the property of his enemy, or goods contraband of war, and that in the end, justice will be done to the neutral. To a certain extent there is weight in this distinction; but it must not be carried too far. At the time when the capture in question was made, the U. States acknowledged the right of the British to detain their vessels for the purpose of a reasonable search. The bare taking of the vessel, therefore, could by no means constitute a loss; and if under suspicious circumstances, she should be carried into port to afford an opportunity for a complete investigation, perhaps even that ought not of itself to be considered as a total loss. On this, however, I give no opinion. But when the captor, having carried the vessel into port, and completed the examination of the cargo and papers, instead of discharging her, proceeds to libel her as prize, I think the loss is complete. The property is no longer subject to the command of the owner, and it is unreasonable that he should wait the event of judicial proceedings, which may continue for years. The case of an embargo is less strong—because there the confiscation of the property is not intended, and a temporary interdiction of the voyage is all that in general is to be apprehended. Yet the assured is not obliged to wait the result, but may abandon immediately on receipt of intelligence of the embargo. Not many judicial decisions have been produced on the point in question. Where prin-

have been no decisions to the contrary. It appears, however, that in the state of New-York, the precise point has been determined. In the case of Mumford vs. Church, decided in the supreme court of N. York, July term, 1799, the assured recovered for a total loss where there was a captor, carrying into port, and libelling by a British captor, although after the abandonment the property was restored. It is necessary that some general rule should be established; some line drawn, by which the assured may know at what time he has a right to abandon. In most cases the voyage is extremely injured by proceedings in the court of admiralty, and the event is doubtful. For it cannot be denied, that of late years such extraordinary occurrences have taken place in war and politics as have very much affected the principles and practice of foreign courts of admiralty. Whatever may be said of the law of nature and nations and the immutable principles of justice, we see very plainly that the courts obey the will of the sovereign power of their country; and this will fluctuates with the circumstances of the times. I am therefore of opinion, that both by the words and spirit of a policy of insurance, the assured may abandon when he receives intelligence of the libelling of his vessel.

2. This brings me to the consideration of the second point. Has any circumstance occurred which limits the plaintiff to a recovery for only a partial loss? It is contended, that such an event has occurred: that the vessel was acquitted by decree of the court of admiralty; that after acquittal she proceeded on her voyage, and that one of the owners was on the spot and knew of the acquittal. I do not think there is much weight in the circumstance of one of the owners being on the spot; because the general agent of all the owners was in Philadelphia. This general agent effected the insurance, & conducted all the business with the underwriters, and the owner who was in New-Province, gave him intelligence of what occurred from time to time, and by no means intended, from any thing that appears, to restrain him from making an abandonment. It is true that the vessel proceeded on her voyage after she was restored; but it is not stated, nor can the court presume, that any of the owners acted in a manner inconsistent with the abandonment made by their agent. It was proper, at all events, to pursue the voyage for the benefit of whoever might be interested in it. This is the usual practice, and a practice authorized by the policy, and very much for the advantage of the underwriters.

The only difficulty in the case before the court arises from this circumstance; that before the action was brought, the vessel was restored, and even at the time of the abandonment, there was a decree of acquittal, although restitution does not appear to have been actually made till some days after. The counsel for the defendant have relied much on the opinion of lord Mansfield in the case of Hamilton v. Mendez, to establish this principle, that a policy of insurance, being in its nature a contract of indemnity, the plaintiff can recover no more than the amount of his actual loss at the commencement of the action. There is no doubt of the soundness of the principle: I mean that a policy is a contract of indemnity. The only question is, at what period the rights of the parties are to be tested by this principle, or of the commencement of the action. I have considered attentively the case of Hamilton v. Mendez. It must be obvious to every one that the decision in that case was perfectly right. It was simply this; that a man shall not be permitted to abandon, and recover for a total loss, when he knew at the time of his offer to abandon, that his property which had been lost, was restored, and the voyage very little injured. But in reading the opinion of lord Mansfield we find a want of accuracy with which that great man was seldom chargeable. Sometimes it appears as if he thought the period for fixing the rights of the insurers and insured was the commencement of the suit; sometimes the time of abandonment; and sometimes he even seems to extend his ideas so far as the time of the verdict. But finally, he explicitly declares, that he decides nothing but the point before him. He seems to have felt a little sore at the improper application of some general expressions used by him in the case of Goss vs. Withers. Anxious to cut off all pretence for doing the same in Hamilton vs. Mendez, he has taken too much pains to avoid the possibility of misrepresentation. Hence his argument considered in the whole is not altogether clear and consistent. Upon the whole of this case of Hamilton vs. Mendez, I think it most safe to confine its authority to the point actually decided, which was very different from that we are now considering. Some period must be fixed for determining the right of the parties. To limit it to the time of commencing the action would be of little service to the insurers; for the law being once established, an action would be brought in every instance on the first default of payment. The time of abandonment seems the most natural and convenient period; because the assured must make his election to abandon or not, in a reasonable and short time after he hears of the loss, and the property, being transferred by the abandonment, can never after be reclaimed by the assured. Want of mutuality is want of justice. There is no reason why the assured should be bound, but the assurer free to take advantage of events subsequent to the abandonment.

It has been contended by the plaintiff's counsel, that the right to abandon would not have been affected, even if the property had been restored at the time of abandonment, because the restitution was unknown to the plaintiff. As to this, I give no opinion. It is unnecessary; because it is stated that the vessel remained in the custody of the captors, at the time of the abandonment. The defendant's counsel have urged that this was the fault of the captain, or of one of the owners who was then at New-Province; because after a decree of acquittal, a writ of restitution might have been sued out. But it is not being stated that there was any fault or negligence in the captain or owner, I do not think that the

vessel remained in the custody of the captors, we must presume that the custody was legal.—Whether for the purpose of giving the captors an opportunity of entering an appeal, or for what purpose it was the restitution was delayed, we are at a loss to determine. But, as restitution was not actually made, and as the plaintiff was ignorant, even of the decree of acquittal, his right to abandon remained unimpaired. Upon the whole, I am of opinion that the plaintiff is entitled to recover for a total loss.

From the (N. Y.) Evening Post.

MR. EDITOR,

I observed in your paper of Saturday evening, an account of a telegraph lately invented by Mr. Edward Pierce, of Charleston, which is much commended for its simplicity. It appears to me, however, that his machine is more complicated than is necessary; and that a plan for the construction of a telegraph which has suggested itself to me on reading the communication from Mr. Pierce, will be more simple and useful than his invention.

My telegraph should consist of five boards painted black, set on a line with their faces towards the quarter to which I would communicate intelligence. Two of them should be a little separated from the others. The first of these boards, that is, the one on the left hand as I looked towards them, should have two holes or spaces cut out about the size of a common pain of glass. And each of the other boards should have nine like spaces. The spaces should have little doors that might be quickly opened and shut by simple machinery. The last board to the right hand should be a board of units, the next of tens. The next board should again be a board of units, the next of tens, and the next of hundreds. And the number of spaces open in each board, should express respectively so many units, tens and hundreds. So if one space in each board was open, the Telegraph would express the two numbers or sums 11 and 11; if all the spaces were open, 999 and 97 would be expressed. I should never want to use higher numbers than these. And I would make these numbers and the inferior ones subservient to every purpose in this way.

I would have a dictionary page and each word in every page numbered. The person with whom I would communicate should have a dictionary page and numbered so as to correspond exactly with mine. So that when the Telegraph expressed certain numbers, they would refer to the same word in both dictionaries.

The first three boards would designate the page, the two last the number of the word. I have now before me a small pocket dictionary, which I find contains 232 pages, and 99 words to a page. Now suppose I wished to communicate the word "abandonment," which I find to be the 9th word in the first page of the dictionary, my Telegraph would stand thus: the last or right hand board would have all the spaces open, and thus would be expressed the first page and ninth word.

The advantages that my Telegraph would have over the proposed one by Mr. Pierce, is that the signals or signs could be observed at a much greater distance than his letters and figures and balls could be. I have seen a common venetian window blind, which happened to be so placed as that there was nothing to interrupt the light on either side; and it is inconceivable at what a distance you could tell whether the blind was turned so as to abstract the light, or left as open as possible.—Again, such a Telegraph as I propose might be worked with much more facility and expedition than one on the other construction. If made to move according to a plan I have had in my mind, whether one or nine, or more or less spaces were to be opened in each board, it could be done with a single motion. And my telegraph would have this decided advantage, that with the addition of lamps behind the open spaces, it would answer better by night than by day.

But there is no saying how simple a contrivance may be the means of communicating intelligence with the assistance of numbers and dictionaries. Since I have commenced writing this communication another plan has occurred to me which I think would be still more simple and useful. With only two poles, such as our signal poles on Staten Island, and one small cross piece to each, to be moved with the hand without any rope or pulley or other machinery, I think intelligence might be communicated nearly as fast as it could be printed.

If I find that this subject excites any curiosity, and if I should not on reflection discover objections to the last plan I have mentioned, which are now unforeseen, it shall be communicated for your paper, by your humble servant, NEDLOE.

BOULOGNE, October 14.

An English division, of 31 sail, drew near Boulogne, the 9th of this month, to repeat its incendiary attempts.

During the night, the division threw about a hundred incendiary rockets into the port and town, a new invented means, which has not proved more successful than all those which the enemy had tried against the flotilla.

These rockets are made of an iron cylinder, about four inches diameter (two feet and a half long) terminating by a very sharp cone, 8 inches long.

The hollow is filled with combustible matter, the flame of which issues through the upper orifice and through holes in the body of the cylinder and the cone at the bottom.

The interior extremity of the cone appears intended to fix the machine upon the object it strikes.

Be it as it may, the greater number of these rockets proved ineffectual. Two fell upon ships, and were extinguished without difficulty, and without the ships receiving the slightest damage.

A house which served as a store for faggots, was set on fire, because, nobody being in it, assistance could not be had time enough to stop the effect of a rocket which had fallen among the faggots.

The next day a great many of these machines, which had not been made use of, were found upon the strand, at low water.

it is probable that the boat laden with them, was sunk by the fire of the batteries.

In the night of the 10th, the enemy recommenced a fresh bombardment, which had no other effect than to wound, by a splinter a young man of 14 years of age.

Every measure had been previously taken to remedy any accident that might happen.

The batteries kept up a fire upon the enemy, which soon obliged them to sheer off.

It was the same case at Calais, in the night of the 13th. Several bombs were thrown against the town, without causing the least damage, and the batteries in less than two hours forced the enemy to quit the coast.

Thus the incendiary rockets have miscarried this year, in the same manner as did last year the bombs, globes with three orifices, submerged fire-ships, trigger machines, and all the other infernal contrivances which England has adopted the use of.

But what has been singular upon this last occasion, is that the enemy should have chosen for a new trial to burn the ports of Boulogne and Calais, the very moment when lord Lauderdale was to be in one or other of them.

In fact, he arrived the 11th at Boulogne, a few hours before the end of the last bombardment. Every measure was taken to spare him the pain of perceiving the exasperation of an indignant people. That minister, having desired to rest himself in the town, slept at the house of the commandant of the flotilla, and the 12th, in the morning was conveyed on board of an English frigate.

England will doubtless learn from lord Lauderdale how much the behavior he experienced at Boulogne, contrasts with the animosity of which this town had again just experienced the effects, ever incendiary, but ever impotent. [Monteur]

BY THIS DAY'S MAILS.

FIFTEENTH BULLETIN.

Wittenberg, 23d October, 1806.

The following is the information we have been able to collect on the causes of this strange war. General Schmettau (died a prisoner at Weimar) drew up a memorial, written with much energy, in which he proved, that the Prussian army in its inactive situation ought to look upon itself as dishonored; that it was nevertheless in a situation to beat the French, and that war ought to be declared. The generals Rachel (dead) and Blucher (who only saved himself by a subterfuge in abusing the good faith of the French) subscribed this memorial, which was drawn up in the form of a petition to the king. Prince Louis of Prussia (killed) supported it with all kind of sarcasms; the rage took possession of all heads; the duke of Brunswick (severely wounded) a man known to be without a will of his own, and without character, was enrolled in the war faction; in a word, the memorial thus supported, was presented to the king. The queen took upon herself to dispose the mind of this prince, and to let him know what was thought of him; she told him that it was said he was not brave, and that he did not make war because he was afraid to put himself at the head of his army. The king, who is as really brave as any Prussian prince, has suffered himself to be drawn into the vortex without ceasing to preserve the opinion that he was committing a great fault. We must now point out the men who did not partake of the illusions of the partisans of war; these are the respectable field-marshal Mollendorf, and general Kalkreuth.

We are assured, that after the handsome charge made by the 9th and 10th regiments of hussars at Saalfeld, the King said, "you pretend that the French cavalry is of no value; see, nevertheless, what the light cavalry has done, and judge what the cuirassiers will do." These troops have acquired their superiority by fifteen years of combats; it will require as long a time to equal them; but who of us is so equal an enemy to Prussia as to desire this terrible proof?

The emperor, already master of all the communications and magazines of the enemy, wrote on the 12th of this month, the letter here joined, which he sent to the king of Prussia, by the officer of ordnance, Montesquieu. This officer arrived the 13th at 4 o'clock in the afternoon, at the head quarters of Hohenlohe, who retained him with him, and took the letter of which he was the bearer. The camp of the king of Prussia was two leagues in rear. This prince ought then to have received the letter of the emperor at the latest at 6 o'clock; we are assured, nevertheless, that he did not receive it until nine o'clock in the morning of the 14th, that is to say, after the fighting was begun. It is reported also, that the king of Prussia said then, "If this letter had arrived sooner, perhaps there would have been no occasion for a battle; but these young people have their heads so high, that if their had been a question yesterday of peace, I should not have been able to take back one third of my army to Berlin." The king of Prussia had two horses killed under him, and received a wound from a musket in the arm.

All the mistakes of of this war are due to the duke of Brunswick; he misconceived and badly directed the movements of the army; he believed that the emperor was at Paris, when he found him in his flanks; he thought he possessed a knowledge of all the movements, and he was already turned. On the evening before the battle, consternation had taken place amongst the chiefs. They discovered that they were badly posted, and their play was to be for the whole of the monarchy. They all said, "ah! well, we shall pay for it with our persons;" which is, commonly the sentiment of men who retain little hope. The queen remained constantly at head-quarters at Weymar; it became necessary to tell her at last, that

circumstances became serious, and that in the next day great events might take place for the Prussian monarchy;—she wished that the king should tell her to depart; she was shortly after prepared for setting out.

Lord Morpeth sent by the court of L.ondon to merchandise for Prussian blood, mission truly unworthy of a man like him, arrived on the 11th at Weymar, charged to make seducing offers and to propose considerable subsidies. The horizon was already sufficient obscured; the cabinet would not see this envoy, but made known that perhaps there was little safety for his person, and advised him to return to Hamburg, and there wait events. What would the dutchess of Devonshire have said if she had seen her relative charged with the business of blowing up the flame of war, with having come to offer poisoned gold and be obliged to return disconsolate on his steps and in great haste? We cannot but be indignant at seeing England compromise the fate of estimable agents and play so odious a part.

We have no accounts yet of the conclusion of a treaty between Prussia and Russia, and it is certain that not a single Russian to this day has appeared on the Prussian territory; however, the army is very anxious to see them—they will find an Austerlitz in Prussia.

Prince Louis Ferdinand, of Prussia, and the other generals who have fallen under the first blows of the French, are at this day pointed out as the principal movers of this incredible frenzy. The king, who runs all risks, and supports all the misfortunes which have resulted, is of all the men who have been drawn into it, he who was most a stranger to it.

There is at Leipzig such a quantity of English merchandise, that they have already offered sixty millions to redeem it. We will ask what will England gain by all this? She might have recovered Hanover, kept the Cape of Good Hope, preserved Malta, made an honorable peace, and restored tranquility to the world. But she chose to excite Prussia against France, and wished to circumscribe the emperor and France.

Ah well! she has led Prussia to ruin; procured greater glory for the emperor, to France greater power, and the time approaches when they will declare England in a state of continental blockade. Is it then with blood that the English have hoped to aliment their commerce and re-animate their industry? Great misfortunes may fall upon England, and Europe will attribute them to the loss of that honest minister who wished to govern by great and liberal ideas, and whom the English people will weep over one day with tears of blood.

The French columns march already on Potsdam and Berlin, deputies from Potsdam have arrived to ask for a safe guard.

The imperial quarters are this day at Wittenberg.

NEW-YORK, Jan. 21.

The paragraphs which have appeared in this Gazette relative to a duel were founded on common report. We are now convinced, from a more correct source, that what we have gazetted on this subject, was erroneous.

Arrived, the brig Rockland, Kitchen, 19 days from Charleston. January 16, spoke the brig Louisa, from Charleston, for Rhode-Island. Same day, the brig George, Low, of Boston, 60 days from Surinam, having on board a Virginia pilot, blown off the Capes, sails in bad condition—captain K. gave a supply of beef, candles, &c.

The brig Olive Branch, Lumsden, 23 days from St. Pierre, (Mart.) Left standing off and on, the brig Julia Ann, 16 days from New-York; brig ——— Allen, just arrived from New-England, and others before reported. January 13, lat. 26, long 74, spoke a ship 75 days from Bordeaux for Philadelphia.

The brig Merchant, Carson, from Bonavista, and 29 days from Barbados. Left at Bonavista, ship Magnet, of New-York; schr. Ann-Gardner, Murray, of Hudson, with salt from Bonavista, and others. J n. 10, lat. 34, long. 74, spoke brig Mary, 4 days from Philadelphia, for New-Orleans.

The schr. Traveller, Reading, 22 days from St. Pierre, (Mart.) Left brig Clothier, Coffin, for New-York, waiting for freight; brig Virginia, discharging. December 27, off Dominique was boarded by a British frigate and strictly examined—another frigate in company.

The schr. Mariner, Gale, 49 days from Curacao.

Cleared, ship Susan, Howard, jun. Charleston; General Clarkson, Conklin, Amsterdam; Louisiana, Pelor, Savannah; brig Aurora, Miller, Havana; Bedford, Dunbar, Liverpool; Sea-Island, Burnham, Savannah; schr. Lovely Lass, Rogers, Jamaica; Active, Bass, Liverpool.

We are informed, that by an accident which took place during the representation of Mr. Martin's Phantasmagoria, the Museum at Boston was burnt down on Friday evening, and several lives were lost. We do not learn that any of the contiguous buildings were injured.

The brig Venus, Hildreth, from Charleston, was driven ashore by the ice on Monday night upon Long-Island, opposite Conlaer's Hook. Part of her cargo is discharged.

Monday afternoon the brig Eliza, lying at the end of Jones's wharf, coffee-house slip, had a hole cut in her side by the floating ice, which the severe cold has filled our rivers with, and sunk.

CHARLESTON, Jan. 9.

Arrived, brig Mount Vernon, Williams, Cadiz 40, days; brig Flora, Shaw, Nassau 10; schr. Regulator, Crowell, Boston 15.

Cleared, ship Susan, Stevens, Liverpool; brig Bellona, LaRou, Havana; schr.