REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME II.

BY WILLIAM MUNFORD.

NEWYORK:

PUBLISHED BY I. RILEY, No. 4. CITY-HOTEL.

C. Wiley, Printer.

1814.

Hadfield *against* Jameson.

April & May, 1809.

UPON an appeal from a decree of the late judge of the superior court of chancery for the *Richmond* district, affirming a decree of the county court of *Fairfax.*

1. What is sufficient evidence to authenticate, in the courts of this country, the sentence, or act, of a foreign tribunal, or government; after a destruction of such government by revolution or conquest.

2. *Freight* (though, by the terms of a charter-party, payable *monthly if required*) is not to be recovered, where the voyage was never completed, but the vessel condemned, by a foreign tribunal, in consequence of a *fraud* attempted by *one* of the owners intrusted by the rest with the care of the vessel, though no proof appear of their assenting to such fraudulent act.

3. In such case, the copartners are not entitled to compensation for the *loss*; except against the fraudulent partner.

4. *It seems*, too, that moreover, the copartners collectively (as well as the fraudulent partner individually) are responsible *to a third person* for a loss occasioned by the fraud.

5. *Quære, how far* is the sentence of a foreign court of admiralty, or other foreign tribunal, to be regarded as evidence by the courts of *Virginia*? (1)

6. *Quære*, whether an endorsement on a subpœna in chancery, without any previous order of court, and not by the *clerk*, but the *plaintiff's attorney*, can operate as an *attachment* to stay the effects of one defendant in the hands of another?

(1) For the *British* doctrines, on this subject, see *Hughes* v. *Cornelius*, 2 *Show.* 232. *Bernardi* v. *Motteux*, *Doug.* 575. *Mayne* v. *Walter*, *Park*, 363. *Barzillai* v. *Lewis*, *Park*, 359. *Saloucci* v. *Woodmas*, *Park*, 362. *Saloucci* v. *Johnson*, *Park*, 364. *De Souza* v. *Ewer*, *Park*, 361. *Calvert* v. *Boville*, 7 *T. R.* 523. *Geyer* v. *Aguilar*, 7 *T. R.* 681. *Rich* v. *Parker*, 7 *T. R.* 705. *Christie* v. *Secretan*, 8 *T. R.* 192. *Garrels* v. *Kingston*, 8 *T. R.* 230. *Pollard* v. *Bell*, 8 *T. R.* 434. *Helstrom* v. *Rhodes*, 8 *T. R.* 444. *Bird* v. *Appleton*, 8 *T. R.* 562. *Price* v. *Bell*, 1 *East*, 663. *Kindersley* v. *Chase*, *Park*, (*5th edit.*) 363. o. *Oddy* v. *Boville*, 2 *East*, 473. *Baring* v. *Claggett*, 3 *Bos. & Pull.* 201. *Lothian* v. *Henderson*, 3 *Bos. & Pull.* 499. *Baring* v. *The Royal Exchange Assurance Company*, 5 *East*, 99. *Bolton* v. *Gladstone*, 5 *East*, 155. *Fisher* v. *Ogle*, 1 *Campb.* 418. and *Donaldson* v. *Thompson*, 1 *Campb.* 429.

For the doctrine in the *federal courts*, see *Croudson and others* v. *Leonard*, 4 *Cranch*, 434. For that in *New-York*, see *Vandenheuvel* v. *The United Insurance Company*, 2 *Johns. Cas. in error*, 217. For the *law* of *Pennsylvania*, see the act of *March* 29, 1809. *Laws Penn.* vol. 9. p. 132. *Quære*, ought not *congress* and the other states in the union to pass similar laws?

The general result of the above cases is, that, in *Great Britain*, the sentence of a foreign court of admiralty *seems* to be regarded as *conclusive to all purposes*. The decision in the supreme court of the *United States* is to the same effect. In *New-York* and *Pennsylvania*, the law is now established, that such a sentence (though it *binds the property*) is not *conclusive* evidence in any other respect, "except of acts and doings" of the tribunal by which it is pronounced.

MARCH, 1811.

Hadfield v. Jameson.

The suit was an attachment in chancery, on behalf of *Robert Brown Jameson* and *Samuel Montgomery Brown*, styling themselves merchants and traders under the firm of *Robert Brown Jameson & Co.* against *Joseph Hadfield*, a defendant residing out of this state, and certain debtors of his garnishees. The claim of the plaintiffs was for a balance appearing on accounts, exhibited and stated by them; which, by an answer, in the name of *Hadfield*, by *James Barry*, his agent and attorney, were admitted to be correct, except in two items, of charges, against the said defendant, for the freight and insurance of a ship called the *Favourite*, chartered by him, on the 10th of *March*, 1793, of *Samuel M. Brown*, (one of the plaintiffs,) acting for the owners. To these items the defendant objected; alleging that the ship and cargo were confiscated at *Port-au-Prince*, in *St. Domingo*, for a fraud on the revenue laws of that island, attempted by the said *Brown*, who commanded the ship when chartered, and had charge of her when confiscated.

A farther statement by the reporter seems unnecessary; the steps taken in both the courts below, with the merits of the case as presented by the record, being fully set forth in the following opinions.

The cause was argued, at great length, by *Call*, *Warden* and *Wirt*, for the appellant, and *Wickham* and *Randolph*, for *Jameson*, the only appellee; (*S. M. Brown* having departed this life before the decree of the superior court of chancery;) but from the views taken of the case by the judges, the numerous arguments of counsel are pretermitted; many of the points made at the bar being not determined by the court, and such as were determined being sufficiently discussed in the opinions delivered.

Tuesday, *March* 12, 1811. The judges pronounced their opinions.

MARCH, 1811.

Hadfield v. Jameson.

Judge TUCKER. In this case, which has occupied six days of a former term in the argument, a great variety of points have been discussed.

Robert Brown Jameson, and *Samuel Montgomery Brown*, in *April*, 1795, sued out a subpœna in chancery from the county court of *Fairfax*, against the appellant *Hadfield*, *Josiah Watson*, and *Jonah Thompson*, on which the following endorsement appears to have been made by the complainants' attorney: "Memorandum, to stay the effects and debts in the hands of the defendants, *Josiah* and *Jonah*, belonging and due to the defendant *Joseph*, to satisfy a debt due from him to the complainants." And it has been objected, (and I think on good grounds,) that this endorsement, not made by order of court, or by an officer thereof, but by the complainants' attorney, could not operate as an attachment, under the act of assembly,(*a*) to stay the effects of one of the defendants in the hands of any other.(1) The case of *Williams* v. *Williams*(*b*) furnishes the principle upon which I found my opinion. In that case the bank of *England* was made a party defendant; and the counsel for the plaintiff said that, in practice, the subpœna being served, operated upon the bank as an injunction, and prevented a transfer; which they never would permit after service of the subpœna. But the master of the rolls replied, that although this was so in practice, it was not so in law; as a subpœna served would not be an answer to an action for not permitting a transfer, though an injunction would. The reason appears to me to be the same in the case of an attachment against the effects of a defendant in foreign parts. I mention this for the sake

(*a*) *Laws of Virginia, edit.* 1794, c. 78.

(*b*) 2 *Bro. Ch. Cas.* 87, 88.

(1) Note by the Reporter. See the case of *Smith* v. *Jenny et al.*, 4 *H. & M.* 441. referring to that of *M'Kim* v. *Fulton and others*, (MS.) in which it was decided that an endorsement on the subpœna, by the *clerk* of the court, (though without any previous *order*,) operated as sufficient *notice*, binding the home defendants not to part with the debts or effects, of the absent defendants, in their hands, without leave of the court. See also *ibid.* 261.

MARCH, 1811.

Hadfield v. Jameson.

of the practice; for in the present case the defendants appeared and answered; which removes any objection to the process, on their parts. Mr. *Warden* contended that none but citizens of *Virginia* were entitled to the benefit of this course of proceeding against absent debtors, or defendants. The fourth article of the constitution of the *United States*, providing that the citizens of each state shall be entitled to all the privileges of citizens of the several states, furnishes a complete answer, so far as relates to citizens of the *United States*.

The subpœna having been returned executed on *Josiah Watson* and *Jonah Thompson*, at a court held for the same county on the 18th of *June*, 1795, "came the complainants, by their attorney; and thereupon *Jonah Thompson* in open court became security that the defendant, *Joseph Hadfield*, shall perform the decree of the court, if against him; and, on the motion of the said defendant, *Joseph Hadfield*, by his attorney, the attachment is discharged, as to the effects in the hands of the other defendants." At this time there was no bill filed, the bill appearing to be filed at the *September* rules thereafter. And, on the same day of filing the bill, an attachment for failing to answer the complainants' bill was ordered against all the defendants, which issued and bears date the 29th of the same month. Here let it be observed that the county court act(*a*) allows a defendant until the next rules, after his appearance, and bill filed, to put in his answer. The attachment was therefore prematurely awarded. The attachment being returned not executed on *Hadfield;* on the 22d of *March*, 1796, at a court held for the same county, came the complainants, by their attorney, when the following suggestion appears upon the record. "The defendant, *Joseph Hadfield*, not having entered his appearance, and given security according to the act of assembly, and the rules of this court, and it appearing to the satisfaction of the court that he is not an inhabitant of this country, an order of publication is awarded against him, and an order to stay his effects in

(*a*) *Rev. Code*, vol. 1. c. 67. s. 44.

the hands of the other defendants" is made; as if nothing had been done at the former court, held in *June*. The record of which is thus expressly contradicted by this suggestion on the part of the complainants.

Here let it be observed, that after *Hadfield* had appeared and given security, as required by the act of assembly, the cause ought to have proceeded as if the subpœna against him had in the first instance been returned executed. Consequently, the order of publication against him as an absent defendant, and the order for staying *his* effects in the hands of the other defendants, (after he had given security to perform the decree,) was irregular and erroneous. The complainants, after the time allowed by law for him to put in his answer, might have taken out an attachment for want of answer, and if it had not been executed, an attachment with proclamations might have issued; upon the return of which, if no answer were put in, the bill might have been taken for confessed, and the matter thereof decreed.

At the *March* rules, 1796, which was, consequently, posterior to the last-mentioned order made in court, it was ordered that an attachment with proclamations be issued against *Hadfield*. But the clerk certifies that the said attachment does not appear among the papers in the cause. Neither does the order of publication appear to have been actually complied with. The cause was continued from time to time, at the rules, until the 18th of *July*, 1797, when, the defendants having failed to file their answer, it was ordered that the complainants' bill be taken for confessed.

The cause was set for hearing in *March*, 1799, and was heard in *June* following; when an interlocutory decree was entered, by the terms of which, the complainants, within a limited time, were to give bond and security for repayment of the money decreed them, in case the said *Joseph Hadfield* should, within seven years, put

MARCH, 1811.

Hadfield v. Jameson.

in his answer, and make it appear that he is entitled to restoration.

Thompson having appeared and put in his answer, on the 19th of *November*, 1799, a final decree (in which it is suggested "that it *having appeared* to the satisfaction of the court, that the complainants' bill hath been duly taken for confessed") was entered. How, or when it had been made so to appear to the court, is not to be discovered from the face of the record.

From this abstract of the proceedings in the county court, the first question which presents itself is, whether the cause was ripe for a hearing and decree against the defendant *Hadfield*.

Hadfield having appeared in court by his attorney, and given the security required by law, the proceedings against him as an absent defendant were wholly at an end: every thing done against him thereafter in that character was erroneous: if the order of publication had been duly published and returned, (that not being the proper course which the law prescribes in such a case,) it would not have justified a decree. But if it had been the proper course, not having been actually published, the court ought not to have proceeded to pronounce a decree, as was decided in the case of *Hunter* v. *Spottswood*.(a)

(a) 1 *Wash.* 149.

On the other hand, the attachment (for want of an answer) ordered on the very day the bill was filed, was an irregularity which, possibly, runs through the subsequent proceedings; but, whether it doth or not, the attachment with proclamations, afterwards awarded, having never issued or been executed, (as far as appears from the record,) the bill against *Hadfield* ought not to have been taken for confessed upon that ground.

Independent of these objections, the decree appears to be erroneous in another respect. *Hadfield* having appeared and given security to perform the decree, the attachment was discharged (as already noticed) as to his

effects in the hands of *Watson* and *Thompson;* notwithstanding which, the sum of 498*l.* 15*s.* 3*d.* sterling, alleged to be due from *Thompson* to him, is decreed to be paid by *Thompson* as his debtor; whereas, no decree (after security given, and the attachment discharged) ought to have been made as to any money he might have in *Thompson's* hands; the decree ought to have been against *Hadfield* alone: if he did not perform it, then the complainant, and not till then, was entitled to call upon the security for the performance of it, or damages for non-performance.

The decree of the *county court* was, therefore, clearly erroneous, and ought to have been reversed by the chancellor.

I shall now proceed to examine the proceedings in the *superior court of chancery;* first, with a view to the regularity and correctness of the same.

On a petition of appeal being presented to the chancellor of the *Richmond* district, the same was allowed, *December* 19, 1802, upon terms (as I understand the record) that the petitioner *Hadfield* should consent to answer the bill within four months, and also consent, at the term approaching, to a reference of the accounts between the parties. In *June*, 1803, the order of reference was made in court, by consent of parties. In page 74. of the record we find the answer of *Joseph Hadfield*, by *James Barry*, his agent, to a bill exhibited against him and others, in the county court of *Fairfax*, which appears to have been sworn to by *Barry*, *September* 15, 1802; not only after the final decree in the county court, but after the petition of appeal, which was first conditionally allowed by the chancellor on the 12th of *April*, 1802. And the very next entry in the record is, that at rules held in the office of the said court, (the superior court of chancery, I presume, as the cause was then removed thither,) in the month of *March*, 1803, *Robert Brown Jameson & Co.* by counsel, replied, generally, to the foregoing answer

MARCH, 1811.

Hadfield v. Jameson.

of *Joseph Hadfield*, by *James Barry*, his agent; and commissions were awarded the parties to take depositions; and, at rules held in *February*, 1804, the cause was set for hearing, on the motion of *Hadfield* by counsel. "And at a superior court of chancery held at the capitol, *March* 7, 1804, this cause, on appeal from a decree of the county court of *Fairfax*, was heard last term, on the transcript of the record of the county court, and on master commissioner *Keith's* report, in pursuance of this court's order, with the objections stated, and documents and exhibits mentioned therein, &c. On consideration whereof, the court pronounced the decree of the county court to be correct, and affirmed the same, with costs against the appellant."

I conceive it to be an undeniable principle, that whenever a cause is brought before a superior court by an appeal, that court is to proceed to consider the cause as the record of the court (whose judgment or decree is sought to be reversed) presents the same for consideration; and to affirm or reverse the same accordingly, previous to any steps whatsoever to be taken in the appellate court, as if the suit had been originally commenced therein. That the chancellor, after reversing the decree of an inferior court, has a right to retain the cause, and thereafter proceed therein as if it were an original suit, is unquestionable from the authority of this court in *Ambler* v. *Wyld.*(a) But it would lead to the most mischievous consequences, if an appellate court at common law, or in chancery, antecedent to pronouncing a judgment or decree of affirmance, in cases of appeal, were to admit proceedings to be had, which might cure the errors of the inferior court, committed at the time of pronouncing the original decree. In the present case, according to my view of it, the proceedings and decree of the county court were palpably erroneous, upon whatever ground the same may be examined, according to the record in that court. The party grieved by that de-

(a) 2 *Wash.* 42.

cree was compelled to give security in 15,000 dollars before he could obtain his petition of appeal to be allowed. His security probably consulted counsel whether he could be brought in danger of losing so large a sum, by the affirmance of the decree, upon the proceedings had in the county court. He might have been advised (and well advised) that there could be no danger that the decree would be affirmed. What, then, is his situation, if other evidence and other proceedings be had in the appellate court, to cure the errors below, and furnish a ground for an affirmance? The case speaks too plainly for itself to require any further comment. I have therefore no doubt, upon this point, that the chancellor's decree, *affirming* the decree of the county court, is erroneous, and ought to be so far reversed.

We are now to consider the cause upon the merits, so far as the evidence before us will permit us to decide upon them.

Samuel Montgomery Brown, one of the original complainants in this suit, a partner in a mercantile house, with the other complainant, (now survivor,) *Robert Brown Jameson*, and, with that partner, a part owner of the ship *Favourite*, an *American* ship, and master of the ship, and agent for the owners of the ship generally, entered into a charter-party for the ship, in *England*, with the defendant *Hadfield*, in behalf of two *French* gentlemen, to proceed from *England* to *Philadelphia*, to take in a cargo of flour on account of *Hadfield;* from thence to *Port-au-Prince* to take in a cargo of sugar, and from thence to proceed to *Falmouth*, where she is to be subject to the order of *Hadfield*, and proceed to a market, provided it be without the straits and the *Baltic*, and to a port where there is a sufficiency of water for the ship to lay in safety; with the usual covenants as to seaworthiness, &c.: and, in consideration of the aforesaid agreement, "on the part of *Samuel Montgomery Brown*, in behalf of the owners, *Hadfield*, in behalf of the other parties, covenanted to deliver the cargoes alongside the

MARCH, 1811.

Hadfield v. Jameson.

ship," and "to pay or cause to be paid to the order of *Samuel M. Brown*, in behalf of the owners, monthly, if required, and for every month during the time the ship shall be employed in the prosecution of the voyage therein before mentioned, and until she is finally discharged at the port of discharge, freight at a certain rate: and that, although the ship may be detained by embargo, or restraint of princes or states, the freight shall be paid, as if no such detention had happened. And the parties bind themselves to the performance of the preceding covenants, their executors, administrators and assigns;" "that is to say, the said *Samuel M. Brown*, in behalf of the owners of the ship and her apparel, to the affreighter; and *Joseph Hadfield*, in behalf of the *French* gentlemen, and the respective cargoes, to the owners." The ship proceeded to *Philadelphia;* and from thence, with a cargo of flour, to *Port-au-Prince*. An insurance having been ordered by the owners, *Hadfield*, on the 2d of *August*, 1793, writes *S. M. Brown* thus: "I have insured the *Favourite*, and cargo, to all ports and places for one year, at 15 guineas *per cent.* therefore make yourself easy."

In a succeeding letter to *S. M. Brown*, *October* 2, 1793, he says, "I trust you will have sent the proceeds of the *Favourite's* adventure to *New-York* or *Baltimore*, or perhaps to *Europe;* in any case rather than to the house of *Clough & Co.*" From this letter it would appear that the proceeds of the flour were not to be applied to the purchase of the sugars, which were to constitute the return cargo of the *Favourite* from *Port-au-Prince* to *Falmouth*.

Several other extracts of letters from *Hadfield* to *S. M. Brown*, in the record of the county court mentioned as exhibits annexed to the bill, show an unlimited confidence to have been placed by *Hadfield* in *Brown*. In a letter, annexed to commissioner *Keith's* report, *March* 11, 1793, he says, "I wish you would buy Mr. *Watson's*

share, and hold it for my account, by which you will have the disposal of the ship *Favourite* entirely." And the remaining letters annexed to that report, (none of which are later than the 2d of *October*, 1793,) express the same sentiments of unlimited confidence in *Brown*. An extract of a letter dated *London*, *November* 15, 1793, in which *Hadfield* mentions that he had heard of *Brown's* arrival at *Port-au-Prince*, " and of his unfortunate prospects," with a trust in his friendship and exertions, appears to conclude the correspondence between them.

The bill which was filed in the county court, and to which no subsequent amendment was made, charges, as the ground of the complainants' demand against *Hadfield*, " that he stands justly indebted to them in the sum of 860*l.* 12*s.* 1*d.* sterling, as will appear by the accounts thereto annexed," (accounts not rendered to them by *Hodfield*, but stated by themselves against him, and, therefore, requiring proof in support of every article,) " and also by the charter-party, and letters above noticed, which are particularly referred to, and prayed to be made a part of the bill." By what evidence the items of freight, amounting to 2,843*l.* 1*s.* 1*d.* and insurance, to 2,200*l.* sterling, were proved, or established before the county court, nowhere appears from the record. The deposition of *Josiah Watson*, taken before the commissioner, states that, to the best of his recollection, the ship was directed to be insured at 2,200*l.* sterling: and *James Lawrason* swears that he knew the ship, and that he considers her to have been worth 3,000*l.* *Virginia* currency. *Watson* likewise deposes, that the *Favourite* did proceed upon her voyage, pursuant to the charter-party, and arrived at *Port-au-Prince*, where she was seized by the government and *condemned*, about the 17th of *July*, 1794; that he was a part owner of the ship, and, in the settlement of accounts between himself and *Hadfield*, " with his agent in this country, his part of the freight from *London* to *Port-au-Prince* was never con-

MARCH, 1811.

Hadfield v. Jameson.

troverted, but was agreed to be allowed;" that *Benjamin Moody* was captain of the *Favourite* at *Port-au-Prince;* and, he believes, that he went out as such from *Philadelphia.* A certificate from an insurance broker at *Baltimore*, states, that policies to the amount of 2,812*l.* 10*s.* *Maryland* currency, made on the ship *Favourite* for six months, and another for 937*l.* 10*s.* like money, for the like period, from *June* 21, 1793, had been cancelled, on satisfactory proof that an insurance had been effected in *England.*

If the chancellor, disregarding the answer of *Hadfield*, which I shall notice hereafter, proceeded to pronounce his decree from the evidence arising out of these depositions, which must be regarded as the basis of the commissioner's report, predicated upon the liability of *Hadfield*, both for freight, *pro rata*, and insurance, I think the evidence insufficient; because the *Favourite* being an *American* ship, and in the port of a friend and (at that time) an ally of the government, under whose authority it is stated that she was *seized* and *condemned*, the presumption was, that she was *lawfully seized* and *lawfully condemned.* At least no presumption to the contrary could be admitted under such circumstances. The chancellor, therefore, ought to have suspended pronouncing any decree until further proof, as to this point. It mattered not whether *Brown*, or *Moody*, or any other person, was master of the ship at the time of the seizure and condemnation. If the master be not a part owner of the ship, he is the confidential servant and agent of the owners at large; if a part owner, he is so of his co-partners.(*a*) There is no case in law, in which the maxim *respondeat superior* more generally holds, than between the freighters and the owners of ships, in respect to the conduct of the master. For if any injury or loss happen to the ship or cargo, by reason of his negligence, or misconduct, the merchant may elect to sue him, or the owners, to make good the damages.(*b*) If the naked

(*a*) *Abbott on Shipping*, 83. (*marg.*)

(*b*) *Ibid.* 123. (*marg.*)

fact of a seizure and condemnation of a ship, by the government, in the port of a friend and ally, could furnish any ground for a presumption, it was a presumption unfavourable to the master and his employers. And if *Brown* be presumed to have been the cause of the seizure, as the agent of *Hadfield*, his delinquency must have been at least equal in his character of part owner of the ship. And it would be a new doctrine to me for a court of equity to establish, that he who hath occasioned a loss, both to another and himself, shall be recompensed by the other, for the loss to himself, occasioned by his own default or misconduct.

But if the case be considered as standing in any way connected with *Hadfield's* answer; (which, I have already noticed, was filed at the rules, in the superior court of chancery, without any exception taken thereto, and replied to generally; which put the matter contained in the answer in issue between the parties; commissions to take depositions being at the same time awarded, though none were taken;) the matter contained in the answer, if true, amounted, in my apprehension, to a full and complete defence; for it charges the loss of the ship, and of the defendant's property on board the same, to the misconduct of *Samuel M. Brown*, one of the complainants in the bill, and one of the part owners of the ship, then upon the spot. The documents annexed to the answer, if they did not amount to full and complete proof of the matters therein alleged, for want of due solemnities in the authentication thereof, at least furnished strong presumption in favour of the verity of the answer. The deposition of *Josiah Watson*, the complainants' own witness, went to corroborate this presumption; and the silence of *Samuel M. Brown*, to whose fraud and misconduct the loss of the ship, and cargo, are positively and expressly imputed, gives to these presumptions a strength little short of what is

MARCH, 1811.

Hadfield v. Jameson.

deemed in law full proof. If, under this view of the proceedings in the cause, and the evidence and presumptions, authorized by these circumstances, united, the cause was ripe for a decree, I should draw a conclusion very different from that of the chancellor, in his decree. *Robert B. Jameson*, and *Samuel M. Brown*, the original complainants in this suit, were general partners in trade, a consequence of which is, that they are to take share in the profits, and bear a proportion of the loss, sustained by them in the course of their partnership dealings. Where an individual deals with partners in trade, he goes upon the credit of the whole, considering the act of one, in a joint concern, as the act of the wole copartnership firm, throughout the ordinary course of general trade.(a) And the law is positive with respect even to secret partners, that, when discovered, they shall be liable to the whole extent.(b) If one partner be guilty of trading on the joint account in contraband goods, or in any manner prohibited by law, the rest of the partners must be considered, more or less, implicated in the transaction.(c) And a secret partner, (though a clergyman, who is prohibited from trading, by act of parliament, under a penalty,) has been held liable to become a bankrupt, in respect to the partnership concern.(d) And where there are joint partners in any trade or business, (the books are kept in the name of the whole, and the stock being joint,) it is understood by merchants, that, in every occurrence between the partnership and third persons, the company is considered as a single person; therefore the mode of traffic must in all respects be considered the same between partners and third persons, as with an individual merchant and the world.(e) The complainants, *R. B. Jameson* and *S. M. Brown*, in respect to their joint share in this ship, are to be considered as one and the same person, and, therefore, whatever act, lawful, or unlawful, hath been done by *S. M. Brown*, in respect to the ship, is to be considered as if he

(a) *Watson on Partn.* 45. 62. 95.

(b) 1 *Hen. Bl.* 48. 2 *W. Bl.* 1000, 1001. *Doug.* 371.

(c) *Watson*, 154. 3 *T. R.* 454. *Biggs* v. *Lawrence.* *Watson*, 174, 175.

(d) 1 *Atk.* 198, 199. *Meymot's Case.*

(e) *Watson*, 229.

were the sole owner of the share held by *Jameson* and himself in partnership. And if, by his fraud or misconduct, or that of the master, who was subject to and must be presumed to have acted under his immediate orders, as being present, and superintending the business of the ship, at *Port-au-Prince*, the ship with her cargo became forfeited and lost, under the laws of the country where she then was; the partnership of *Jameson* and *Brown* became equally liable to *Hadfield*, for the loss of the cargo on board, as *Brown* himself, if sole owner of their part, could have been. And, upon the same principle, both freighters and underwriters would be discharged from all obligation to pay the freight that might otherwise have accrued, upon the completion of the voyage, and the insurance which would have been demandable if the ship had been lost by any of the risks contemplated in the policy. On the other hand, *Brown* is not only answerable to his partner *Jameson*, but to the other part owners of the ship, both for the freight and insurance, thus lost by his fraud and misconduct, if such be the fact.(*a*) And this upon the general principle in law, that, if one tenant in common of a personal chattel destroy the common property, he is liable to be sued by his companion for the loss.(*b*) Thus, where one part owner of a ship had forcibly taken it out of the possession of another, secreted it, and changed its name; and the ship afterwards came into possession of a third person, who sent it to *Antigua*, where it was sunk and lost, the chief justice, Lord KING, left it to the jury to say, under all the circumstances of the case, whether this was not a destruction of the ship, by means of the defendant; and they finding it to be so, the plaintiff recovered; and the court of common pleas, afterwards, approved of the direction.(*c*) But, if the loss of the ship were in fact owing to the misconduct of *Moody* alone, (the master spoken of by *Watson*,) the only difference would be, that, unless such misconduct should amount to barratry, he would be

(*a*) *Watson*, 105.

(*b*) *Co. Litt.* 200.

(*c*) *Watson*, 61, 62.

MARCH, 1811.

Hadfield v. Jameson.

the person liable to repair the owners their damages sustained in the loss of freight and insurance by his misconduct.(*a*) On these grounds, I differ from the hypothetical reasoning of the chancellor in his decree, wherein he says, " That if *Brown* were responsible for the loss of the ship, and the product of its cargo, he was *privately* responsible, so that the surviving partner was not bound to make reparation, unless he appear to be a debtor to *Brown* upon a settlement of their private accounts."

(*a*) *Abbott*, 105. 123. 1 *T. R.* 252. *Park on Ins.* 84.

Neither can I assent to his proposition, that, from the length of time without any tidings of the ship, legally attested, the presumption is sufficient evidence of the loss. There was not the smallest particle of foundation for presumption in this case. The complainant, *Brown*, was himself with the ship when she was lost. If he were not the cause of that loss, as the defendant alleges, why did he not produce such proof of the loss (as undoubtedly was in his power) as might remove all doubts and conjectures on the subject? Without proof of the loss he could not be entitled to recover the insurance; and without proof that the loss was occasioned by some event insured against, and within the scope of the policy, his right to recover would be precisely the same as without proof of the actual loss. Presumption of loss is only admitted on the ground of shipwreck, or other danger of seas; but never where the last tidings of the ship point to a more immediate cause of loss.(*b*) Equally unsound, in my opinion, is that part of the decree, which pronounces that freight was due when the ship arrived at *Port-au-Prince*, if thereby the chancellor meant (as he appears to have done) that, being payable monthly, if required, it could not be refused, if the voyage were afterwards defeated; or reclaimed, if paid monthly, according to stipulation. From the best consideration I have been able to give to the charter-party, it appears to me to be for one entire voyage: the proceeds of the cargo of flour, taken in at *Philadelphia*, were invested in

(*b*) 2 *Marsh.* 418.

coffee at *Port-au-Prince:* what benefit could accrue, to the owner of the cargo, by the delivery of the flour at *Port-au-Prince*, if the proceeds thereof should be lost before the ship arrived at her final port of discharge? None whatever. The profits, both of the shipowners and the owners of the cargo, were to depend upon the safe arrival of the ship at her port of discharge. And, although the freighter should have advanced the whole freight, for a year, or more, before the ship sailed from *England*, yet, if she were lost, I am of opinion that, upon this charter-party, it might be recovered back. Had I any doubt of this, upon principle, (which I have not,) the decision of Lord ELLENBOROUGH, in *Mashiter* v. *Buller*,(*a*) would remove it.(*b*)

(*a*) 1 *Camph. Rep.* 84.

(*b*) *Abbott*, 179. 203. 211. 265. 270. (*marg.*) S. P.

With respect to the *insurance;* the law appears to be settled that in all cases of actual fraud, on the part of the assured, or his agent, the underwriter is not only not liable, but may retain the premium he has received;(*c*) nor can the insured recover any loss, which is not a direct and immediate consequence of the peril insured against;(*d*) and, therefore, although an underwriter is liable for all damage arising to the owner of the ship, or goods, from the restraint or detention of princes, &c. (which are ordinarily acts of power or force,) yet that rule shall not be extended to cases, where the insured shall navigate against the laws of the country, in the ports of which he may chance to be detained, or to cases where there shall be a seizure for non-payment of customs.(*e*) Neither is the loss (according to the defence set up by the answer) attributable to the *barratry* of the master. For though *barratry* may be committed by the master of a ship smuggling on his own account, without the privity of the owners;(*f*) yet it appears, that if the act of the master be done with a view to the benefit of his owners, or with their privity or consent, and not to advance his own private interest, it is not *barratry;* and, therefore, not within the terms of the policy, upon

(*c*) *Park on Ins.* 218.

(*d*) *Ibid.* 56.

(*e*) 2 *Vern.* 176. *Park*, 80.

(*f*) *Lockyer* v. *Offley*, 1 *T. R.* 252. *Park on Ins.* 31.

MARCH, 1811.

Hadfield v. Jameson.

that ground ;(a) and, according to the words of Lord MANSFIELD, in the case of *Vallejo* v. *Wheeler*,(b) nothing is so clear as that, if the owner of a ship insure, and bring an action on the policy, he can never set up, as a crime, a thing done by his own direction and consent. The same doctrine was recognised, and repeated, by the same judge, in *Nutt* v. *Bourdieu*,(c) who said, "Barratry is something contrary to the duty of the master and mariners, the very terms of which imply that it must be in the relation in which they stand to the owners of the ship. An owner of a ship cannot commit *barratry*. He may make himself liable by his fraudulent conduct to the owners of the goods, but not as for *barratry*. And besides, *barratry* cannot be committed against the owner with his consent; for though the owner may become liable for a civil loss, by the misbehaviour of the captain, if he consents, yet that is not *barratry*. *Barratry* must partake of something criminal, and must be committed against the owner, by the master, or mariners." And it seems also clear, that if the owner be also the master of the ship, any act which in another master would be construed *barratry*, cannot be so in him ; because such doctrine would militate against an acknowledged rule in criminal law, that no man shall be allowed to derive a benefit from his own crime, which he would do, were he to recover against the insurer for a loss occasioned by his own act.(d)

(a) *Park*, 84. *Cowp.* 154. 2 *Stra.* 1173. 1264.

(b) *Cowp.* 143.

(c) 1 *T. R.* 350.

(d) *Park*, 94. c. 5.

The evidence of the seizure and condemnation of the ship, for a fraud on the revenue laws of *St. Domingo*, as annexed to the answer of the defendant, remains to be considered.

In the case of *Young* v. *Gregory*,(e) in which the district court reversed the judgment of the county court, because the latter admitted letters and depositions to go in evidence to the jury to prove that an attachment had been levied on the plaintiff's property in a foreign country ; and because the attachment in the proceedings men-

(e) 3 *Call*, 446.

tioned, or an authenticated copy thereof, was the best evidence, and ought to have been produced; three of the judges of this court concurred in the opinion that the evidence was admissible, as it related to proceedings in a foreign country, which oftentimes can be proved in no other way than by depositions, and testimony *dehors* the proceedings; of which it is not always in the power of the party to procure copies. The actual situation of the island of *St. Domingo*, during the last sixteen or seventeen years, is too generally known, to create much doubt of the applicability of the reasons, just mentioned, to the proceedings in that country. The history produced by Mr. *Wirt* cannot be doubted;(*a*) and the evidence arising from the certificate of attestation by Sir *Adam Williamson*, governor and commander in chief of the *British* possessions in *Hispaniola*, shows that the possession of the place, and the government thereof, had passed from the dominion of *France* to that of *England*, in the short period of eighteen months from the time of the alleged seizure and condemnation of the *Favourite*, at that place. The certificate is probably in the usual form adopted by the *British* governor, at that period; and it would be too much to say, it is not duly authenticated, or worthy of credit, because, under such circumstances, it is certified only under the governor's seal at arms, instead of a colonial, or public seal. The revolutionary history of our own country shows, that, at a particular period, commissions of every kind, though by the constitution required to be made with the seal of the commonwealth annexed, were, of necessity, authorized to be granted, and declared efficacious and valid to all intents and purposes, without that symbol of the public authority.(*b*) I think, therefore, the certificate sufficiently authentic. *Brown*, being on the spot when the seizure and condemnation took place, might, if so disposed, have obtained, I presume, a copy of the proceed-

(*a*) *Edwards's History of the West Indies.*

(*b*) *Laws of Virginia, October*, 1776, c. 18. See *Ch. Rev.* p. 43.

MARCH, 1811.

Hadfield v. Jameson.

ings, authenticated according to the ordinary forms of the *French* colonies. He having neglected to do so; or not choosing to produce it, if he had one, I think the court well warranted in considering this as the best evidence to be had in the cause.

The first document, in point of time, relative to the seizure of the ship, is contained in the copy of a letter addressed by *S. M. Brown*, calling himself owner of the ship, to the civil *ordonnateur* of *St. Domingo*, (an officer whose particular functions I am unacquainted with,) dated *December* 30, 1783; in which he endeavours to exculpate himself from any intention to commit a fraud. The condemnation of the ship does not appear to have taken place until the 16th of *January* following. Of the ordinary course of proceedings in such cases, we have no information, and cannot possibly form either a judgment, or conjecture.

The sentence of confiscation and condemnation was pronounced by commissioners, calling themselves "The intermediary commission, exercising, provisionally, all the functions appertaining to colonial assemblies," (of whose functions we have no information,) "being moreover the only administrative body of the colony, in virtue of *legal powers* granted to them by the delegates of the republic, having consequently the *right* of *investigating frauds* or infractions of law of any sort, and esteeming it their first duty to administer impartial justice, without respect of persons;" it proceeds to state the allegations of fraud, the evidence, and the penalty prescribed by law; and concludes with declaring the confiscation of the ship, together with all the merchandise on board; condemns the captain to the fine provided by a certain *arrêt;* and directs the immediate execution of that sentence.

Were there nothing more in the record, it would be difficult to refuse to this intermediary commission, as it styles itself, the character of a judicial tribunal; or to

disapprove of the sentence pronounced, upon the evidence therein stated. And yet, on the very same day that this sentence was ratified, after being read over and signed on the succeeding day to that on which it was first pronounced, we find the commission, after due deliberation, resolve to address a letter immediately to the civil commissary of the *French* republic, in which, speaking of their body, they say, " The commission, *not being a judiciary tribunal*, where parties may plead their causes *pro* and *con*, but an administrative tribunal, which pronounces on the representation of the *ordonnateur*, and a review of the documents, expect your orders, directing them how to act in this occurrence," &c. After this, I find myself utterly at a loss in what light to consider this tribunal, and its proceedings. The reply of the civil commissioner leaves no room for any favourable construction either of the power and functions of the intermediary commission, or of its course of proceeding, as the means of administering impartial justice.

How, then, are this court to decide upon the question, as between the owners of the ship, and the affreighters, who are involved in the same common loss, and, apparently, upon the same common ground; or, as between the assured and the underwriters? I can only answer, that both were questions properly cognisable in a court of law, and not in a court of equity. The liability of the freighters, to recover freight *pro rata itineris*, or of the shipowners, to compensate them in damages for the loss of the cargo, through the fraud or misconduct of a part owner, or of the master, were questions exclusively proper for a court of law; as was the liability of the underwriters to pay, or not to pay, the insurance; and retain, or demand, the premium; according to circumstances. Why did the owners of the ship withdraw their insurance made in *Baltimore*, and direct an insurance to be made in *England?* Certainly for some cogent

MARCH, 1811.

Hadfield v. Jameson.

reasons. Were they not bound, according to the principles of universal law, to follow the person of the defendant, if still residing where the contract was made? Why did they not? Perhaps, because, according to the laws of the country, where both the charter-party and the insurance were made, there was something in the one or the other, which avoided the contract from the beginning. Be that as it may, I think the plaintiffs were bound to establish their right, both to the freight and the insurance, before they could be entitled to a decree for either, in a court of equity here. Let it be remembered that, if *Hadfield* actually caused an insurance to be made, (as he alleges in his letter of the 2d *August*, 1793,) he could not be made liable to the owners of the ship for it, until a recovery against the underwriters; and in an action against them, the owners would never have recovered, if the ship was lost by their own misconduct, or that of their agent. This was a question purely legal. If they seek to charge *Hadfield*, as an underwriter, for having, in fact, neglected to make an insurance, notwithstanding his assertion to the contrary, the question whether he was guilty of such neglect, is also purely legal, and the recompense for it is wholly in damages; besides, in such an action, *Hadfield* would be entitled to the benefit of every defence which the underwriters, if the suit had been brought against them, could have made. So that his defence was doubly proper in a court of law. The law, which gives to a party a right to attach the property of another in the hands of his debtor in *Virginia*, certainly was not meant to draw the decision of all litigated questions, proper for the courts of law, in the country where the defendant resides, exclusively to decide, to the final and exclusive decision of our courts of equity. This very case furnishes the strongest reason against such a construction; for the bill contains not any proper allegation, and the

whole course of proceedings no evidence, sufficient for a court of equity to decide between the parties.

My opinion, therefore, is, that if the cause had been ripe for a decree in the county court, that court ought only to have retained it for a year, or such further period as might have been necessary, to give the plaintiffs an opportunity of prosecuting their action at law upon the charter-party, and policy of insurance, respectively; and, in case they should establish their claim, against the defendant *Hadfield*, to both, or either, and it should be made appear that the claim so established remained unsatisfied, then the court ought to have pronounced a decree for the amount of the same; to be levied upon the effects attached in the hands of the other defendants, or paid by the security for performing the decree, as either course might be adapted to the nature of the case. And I am of opinion, that both decrees be reversed with costs; and that the cause ought now to be remanded to the superior court of chancery, with directions to retain the same for a year, or such further period as may be necessary for the same course to be now pursued by the parties, if they think proper. But, should this course not be approved of, I think the court of chancery ought to direct an issue or issues to be made up, with respect to all the material facts in the cause, and direct a trial thereof to be had by a jury of merchants; and, if such jury shall be of opinion that the plaintiffs are entitled to recover any damages, that they assess the same, and that the verdict be returned, &c.; or, (if the majority of the court are of a different opinion,) that the plaintiffs' bill be dismissed without prejudice to any future action that he may be advised to bring upon the charter-party or policy of insurance.(1) In the view I have taken of this

(1) *May* 25, 1809. Judge TUCKER submitted the following question to the court, as proper to be argued by counsel, and considered by the court, in the discussion of this cause: "Whether, in cases of attachment against the

MARCH, 1811.

Hadfield v. Jameson.

cause, I have unavoidably pretermitted several important points, which would require much time to consider, and which I pass over only for that reason.

Judge ROANE. Upon the merits of this case, I concur in reversing the decree in question; upon the ground that the sentence in *St. Domingo*, stated in the record, was authentic and admissible evidence, for the reasons which have been assigned; and because it appears that the loss of the vessel and cargo was produced by the act of *S. M. Brown*, who was, at the time, a part owner of the ship, and a partner of the present appellee. As that act, if it had succeeded, would have produced a profit to the company of which he was a partner, so, in the event which has happened, they should abide by the loss. This is especially the case, as the present appellee asks the aid of a court of equity. It would be highly unjust to add to the calamity brought upon the appellant by the act of the appellee by his partner, in the loss of his cargo, by decreeing him to pay the freight and insurance of the vessel. If those items are stricken out of the appellee's account, or even *S. M. Brown's* proportion thereof, the balance will be in favour of the appel-

effects of absent defendants, if a question purely *legal* arise, upon a contract of charter-party, or policy of insurance, entered into in a foreign country, where the defendant still resides, and where the proper remedy is by an action sounding altogether in damages, it be proper for the court (in which the attachment is levied, or security is given to perform the decree) only to *retain* the cause, until the complainant shall have liquidated his demand by a settlement, or established the same by a judgment against the defendant in the country where he resides; or whether it be competent to the court, in which the attachment is levied, to proceed to the trial and determination of every such question, whether of law, or fact, and to ascertain the plaintiff's damages, if entitled to any? And, in the latter case, whether the trial ought to be had, according to the course of proceeding in courts of *equity*; or whether the court ought to direct an *issue* to be made up *at law*, and a trial thereof to be had by a *jury* for that purpose to be empannelled?"

Judges ROANE and FLEMING took time to consider this proposition; but gave no opinion upon it.

lant: the consequence of which is, that, in my opinion, both decrees ought to be reversed, and the bill dismissed.

Judge FLEMING. Without a critical examination of the irregularity of the proceedings in this case, (as they have been particularly noticed by Judge TUCKER; and as the appellant, in his answer, by his agent *James Barry*, took only a slight exception to them, but admitted the accounts filed by the plaintiffs to be correctly stated, except as to two items, to wit, the charge for the freight of the ship *Favourite*, from the 10th of *March*, 1793, until the 4th of *January*, 1794, and the charge for the insurance of the said ship,) I proceed to consider the cause on its merits, which seem to place the appellant on still firmer ground. And the first and principal question is, whether a copy of the proceedings, against the ship *Favourite*, in the island of *St. Domingo*, and referred to in the appellant's answer, be authentic and admissible evidence? and, if so, 2dly, what effect it ought to have on the cause.

With respect to the first point; the late Chancellor *Wythe*, in his decree, the 7th of *March*, 1804, declared that evidence not authentic: but, notwithstanding the great respect I have, and ever had, for the opinions of that venerable, learned and upright judge, I cannot but differ with him on the present occasion; 1st. Because the admission of them is agreeable to the spirit and principles of our act of assembly of 1792, c. 91.(*a*) Although they may not be attended, precisely, with all the formalities required by the said act, they are certified under the hand and seal of *Adam Williamson*, then governor, &c. of that part of the island of *St. Domingo*, where those transactions had taken place under the *French* government, (and which had fallen into the hands of the *British* by conquest,) and are attested by *William Shaw*, the said *British* governor's secretary;

(*a*) *Rev. Code*, vol. i. p. 160.

MARCH, 1811.

Hadfield v. Jameson.

which to me appears the best evidence of their authenticity, that the nature and circumstances of the case would admit of.

2. Because we have a precedent of this court, in the case of *Young* v. *Gregory*, 3 *Call*, 446. where the proceedings on an attachment in a foreign country, were adjudged by the whole court to be legal evidence, although no copy of them was produced; and the only proof of their existence was by depositions and letters; which was very far short of the proofs in the case before us, where well attested copies of the proceedings, in both the *French* and *English* languages, appear in the record.

And, 3dly, because there is no other evidence of the loss of the ship *Favourite;* without proof of which the plaintiffs have not a shadow of right to demand the insurance, which constitutes a very important charge in their account against the appellant.

The authenticity of those papers, then, being established to my satisfaction, I proceed to consider the effect which, as I conceive, they ought to have on the cause. They support every material allegation in the appellant's answer; and it appears on the face of the whole record, that *Samuel M. Brown* was part owner, and captain, or commander of the ship *Favourite*, and on the 10th day of *March*, 1793, as agent, and in behalf of the owners, was party to, and signed, the charter-party under which she sailed from a place called *The Mother Bank*, (where she then lay,) to *Philadelphia*, there took in a cargo of flour, and from thence sailed to *Port-au-Prince* in the island of *St. Domingo*, (then under the government of *France*,) where she safely arrived in autumn, 1793; *S. M. Brown*, one of the plaintiffs in the cause, (though he had employed another captain,) being still on board, and, by his own acknowledgment, having the sole direction and management of the ship, both with respect to the disposal of the cargo of flour taken on board at *Philadelphia*,

and the reloading her for the further prosecution of her voyage under the charter-party. And here commenced his extraordinary, illegal, and fraudulent conduct, by means of which the ship and cargo were forfeited, condemned and lost to the owners, of whom he himself was one; and, also, as before observed, the agent of the whole. His misconduct, by which the ship and cargo were lost, was briefly this: having a very considerable interest in the cargo taken on board at *Port-au-Prince*, (whether solely for himself, or, which is more probable, for himself and *Jameson*, who, at the commencement of this suit, about fifteen months after the loss of the ship and cargo, styled themselves "*Robert Brown Jameson* and *Samuel Montgomery Brown*, merchants, trading under the firm of *Robert Brown Jameson & Co.*" seems not very material,) *he*, *Brown*, in order to defraud the *French* government of their export duties to a considerable amount, and thereby save so much to the company, attempted to smuggle 63,776 pounds of coffee, by taking on board so much more than was entered at the custom-house of *Port-au-Prince*. The fraud, however, having been detected, the catastrophe above mentioned consequently followed.

Brown, in order to exculpate himself from misconduct, preferred a petition to the officers of the government, and stated that, being a stranger, and ignorant himself of the commercial laws of the colony, he chose an obscure merchant (one *Forbes*) to direct him in his operations; and, when it was necessary to make his declaration of the cargo on board, *Forbes* was in gaol; and one of his representatives (not named) charged himself with fulfilling the customary formalities, and led him into the error, by telling him that the declaration was conformable to the *tarifs* which regulate coffee hogsheads at 9 quintals, sugar hogsheads at 16, &c. But his apology was thought too futile to have any operation in his favour; as it appeared the entry was short of the quantity

MARCH, 1811.

Hadfield v. Jameson.

actually on board, not only 63,776 pounds in weight, but also 36 packages in number; to wit, 24 hogsheads, 1 tierce, and 11 barrels.

But, admitting that he was misled by the *unnamed* representative of *Forbes;* he was inexcusable for applying to him for advice; for it appears, from a document exhibited by the plaintiffs themselves, that, on the 11th of *March*, 1793, (the day after the date of the charter-party,) *Brown* was instructed to apply, on his arrival at *Port-au-Prince*, to *Monsieur Goursas de Bellevue*, (a particular friend of the *Marquis de Feronays*, on whose behalf the charter-party was made,) as qualified to give him the first information of the state of the commerce of *St. Domingo;* and to collect from that gentleman the most essential details of what might be necessary to prosecute their plan with success; and further to consult him (as a correspondent of the *Marquis de Feronays*) on the local circumstances of the island. But, instead of following this prudent and salutary instruction, he applied, by his own confession, to an imprisoned merchant, by whose advice his conduct in that important business was to have been governed; and who being in gaol at the time of reporting and entering the cargo, "one of his representatives" (without a name) "charged himself with fulfilling the customary formalities, and led him into an error," the fatal consequences of which have already been noticed.

It being manifest that the loss of the ship and cargo was occasioned by the unjustifiable conduct of *Brown*, I have no hesitation in saying that retribution ought to be made to the sufferers; and, particularly, to the appellant, and those concerned with him in interest, for the loss of the proceeds of the cargo of flour shipped on their account at *Philadelphia*. But a question may arise, by whom, and in what manner, ought the retribution to be made? I answer, by the owners of the ship *Favourite*, the misconduct of whose agent, and part

owner, caused the loss; and by a forfeiture of the freight, and of the insurance made on the ship. Besides, there is no evidence that the appellant ever received a shilling on account of insurance, though charged to him in the plaintiff's account.

But the chancellor, in his decree affirming that of the county court, observed that "if *S. M. Brown* was responsible for the loss of the ship, and the product of the cargo," (which he seemed much to doubt, keeping in view the idea that the proceedings against the ship at *Port-au-Prince* were inadmissible evidence,) "he was privately responsible, and that the surviving copartner is not bound to make reparation, unless he appear to be so much the debtor of *Brown*, on the settlement of their private accounts." But the transaction makes a very different impression on my mind. *Brown* was not acting as an individual in a private capacity, but as the avowed agent of the owners of the ship; which clearly appears by the charter-party, and by his subsequent conduct; and, in my conception, they are as much bound by, and as responsible for, the acts of their agent, as if they had all been on board, and personally assenting to the transactions which occasioned the loss of the ship and cargo. And, admitting that *Jameson* is not bound, as the surviving copartner of *Brown*, in a distinct mercantile trade, he is responsible as part owner of the ship, and must forfeit his proportion of the freight and insurance. And it appears that, if those two items be stricken out of the account, or even *S. M. Brown's* moiety of them, the balance will be in favour of the appellant. And I know not a case where the maxim that "*whoever asks equity must appear with pure hands and do equity*," more forcibly applies than in the one now before us. I am, therefore, of opinion, that both decrees are erroneous, and ought to be reversed, and the bill dismissed with costs; though without prejudice to any suit or action

MARCH, 1811.

Hadfield v. Jameson.

which the plaintiff may be advised to bring hereafter, for the same subject.

BY THE COURT; both decrees reversed, and bill dismissed, "without prejudice to any suit or action which the appellee may hereafter be advised to institute relative to the subject matter of controversy."

On motion of Mr. *Wickham*, suggesting that the documents from *St. Domingo* had not been faithfully translated, the court agreed that another translation might be made, and used in support of a motion for a rehearing of the cause.

Accordingly, on *Tuesday*, the 19th of *March*, he laid before the court the new translation, which, he contended, proved (more completely than the former) that the body of men by whom the ship was condemned were not a judicial tribunal, and their decision not a legal sentence, but a mere act of plunder; since *Brown* was arbitrarily condemned, without being heard in his defence. He relied also on the reasoning, and authorities cited, in the opinion of Judge COOPER, of *Pennsylvania*, upon the effect of a sentence of a foreign court of admiralty.(*a*)

(*a*) In the case of *Dempsey, Assignee of Brown*, v. *The Ins. Co. of Pennsylvania*. See the report of that case by Mr. *Dallas*, in 1810.

Wirt observed that all these matters were explained to the court, and commented upon at the former argument. If this course be pursued, when shall we ever get to the end of a cause?

Judge COOPER stood alone, against all the other judges of *Pennsylvania*. The case of *Hooe and Harrison* v. *Pierce's Administrator*(*b*) is also against him.(1) But what have we to do, in this case, with the conclusiveness or inconclusiveness of the sentence of a foreign court of admiralty? Judge COOPER contends for no

(*b*) 1 *Wash.* 212.

(1) Note by the Reporter. In that case, the *effect* of the sentence of a *foreign* court of admiralty did not come *in question*. The president, in pronouncing the opinion of the court, mentions *incidentally*, that such a sentence would have been *regarded*; but to what extent does not appear.

more than that it is not conclusive, but may be rebutted by evidence. This is enough for our purpose; there being no evidence to rebut the sentence.

It is true, there was no court of admiralty in the island. The intermediary commission was the only power to decide on the subject; but their authority was complete, and their decision equally obligatory with that of a court. Their being possessed of arbitrary powers, is no objection; for such was the nature of the government in the *West Indies* under the old *regime*, as well as since the revolution.(*a*)

(*a*) 4 *Edwards's History*, p. 2, 3. 110, 111.

Under the old government, mandatory letters from the king's minister were *laws*, from which no appeal could be taken. *Samuel M. Brown* might have been tried, by the governor and five judges appointed by him, and hung on the spot. The governor was an absolute prince, and had power to stop judicial proceedings.

Wickham. Mr. *Wirt's* quotations, proving that the commissioners possessed arbitrary powers, show plainly (as well as their own confession) that their sentence was not one of a judicial tribunal. The loss by their act is, therefore, such as comes within the insurance "against detention by kings and princes." But, even if the commissioners had been a court of justice, it is a rule that, if it appear on the face of the proceedings, that a court acted unjustly, its sentence is not to be regarded. They refused to hear *Brown* in his defence. The assertion of those who proceeded illegally against him is not evidence of his guilt. Their sentence is not even *prima facie* evidence; being rebutted by the circumstance that they refused to hear him.

Wednesday, *March* 27th, the judges declared their adherence to their former opinions.

Judge TUCKER only said, he had considered the subject, and saw no cause for changing his opinion formerly delivered.

MARCH, 1811.

Hadfield v. Jameson.

Judge ROANE. In the few remarks I made, in delivering my opinion in this case, on the former occasion, I stated that I considered the record of condemnation in *St. Domingo*, (referred to in the proceedings,) as authentic and admissible evidence, to prove as well the ground as the fact of that condemnation. In saying it was authentic, I meant that it was as well verified as (all circumstances considered) could be expected; and, in expressly allowing it to be admissible evidence, I certainly did not decide that it was conclusive. *That* was not necessary; for no evidence exhibited on the part of the appellee conflicted with the ground of that condemnation: on the contrary, that ground was corroborated and supported by the conduct of *Brown*, from his own admission; which admission was one of the principal grounds of my opinion.

On the subject of the conclusiveness of sentences of foreign courts of admiralty, however the doctrine seems to have been affirmatively settled, in relation to ordinary times and circumstances, I am inclined to think that that doctrine cannot be transplanted into our code, at this time, without producing the greatest injustice. An æra has arrived, when neither the ordinary laws of nations, nor those laws as founded upon treaties and conventions between nations, give the rule; but the arbitrary edicts, and orders, of the king and emperor, with whom we have the most extensive relations; and their judges are servile enough to carry them into rigid execution. I should not, therefore, as at present advised, incline to extend to those courts a comity or courtesy to which they are, at the present day, by no means entitled. But here I must pause! The question is important, and I mean not to prejudge it, as it neither actually occurs in the case before us, nor is it probable that questions of this character will often again occur in this court.

Upon the whole, I see no cause to depart from the opinion I formerly delivered.

Judge FLEMING. I have perused, and considered with great attention, the translation of the documents lately presented to the court; and also the reasoning of Judge COOPER, in the case of *Dempsey* v. *The Insurance Company of Pennsylvania;* in which I can discover no ground for changing my former opinion; but, out of respect to the ingenious remarks made by Mr. *Wickham* on the subject of them, I am induced to take a brief notice of some of those remarks.

With respect to the documents, they throw no new light, to my conception, on the merits of the cause; they only show the great avidity of those in power at *Port-au-Prince*, to have the case of the ship *Favourite* (libelled for a breach of their revenue laws) brought to a speedy decision: and this may be readily accounted for, from the critical situation of the country; in which a civil war was then carried on with great virulence; and, at the same time, it was threatened with an invasion by a powerful enemy, who, soon after, made a conquest of that part of the island.

With regard to the reasoning of Judge COOPER, in the case of *Dempsey* v. *The Insurance Company of Pennsylvania*, where the principal question was, how far the proceedings, and sentence, of a foreign court of admiralty is proper, or conclusive evidence in our courts, in cases between insurers and insured, where vessels are captured at sea; his reasoning shows him to be a judge of distinguished talents, and of extensive legal research: but it is worthy of remark, that his opinion was in opposition to five other judges, of whom the court was composed,(1) and with whose reasoning, or the grounds of

(1) Note by the Reporter. The legislature of *Pennsylvania*, by their act passed *March* 29, 1809 (*Penn Laws*, vol 9. p. 132.) have settled the law of *that state* in conformity with Judge COOPER'S opinion. See also *Cal-*

MARCH, 1811.

Hadfield v. Jameson.

whose opinion, we have not been favoured. And, to me, there appears a clear and important distinction between cases of capture of neutral vessels at sea, and condemning them as lawful prize, either under the *French* decrees, or the *British* orders in council, and the case now under consideration. The former cases have emanated from the exercise of power, rather than of right; and are in violation of the general, and long established law of nations, which the courts in all civilized countries are presumed to understand; and in which cases, neither the owners, nor commanders, of the captured vessels are supposed to be in fault; and must be held blameless, unless some pointed evidence should appear to the contrary. But, in the case before us, the law of nations seems out of the question. The ship and cargo were seized and condemned for a manifest infraction of the revenue laws of a power with which we were at peace, and in habits of friendly intercourse; and in one of whose ports she was trading, and taking in a cargo of merchandise, to complete her voyage. And this breach or infringement of the law, which occasioned the loss of the ship and cargo, was committed by one of the owners, and agent of the whole; who was on board, and had the sole, exclusive direction and management of the ship, from the commencement of her voyage to the time of her seizure, or condemnation. In effecting the latter, it is probable that great rigour or strictness, and, perhaps, injustice, might have been practised by the officers of police at *Port-au-Prince*, where the event took place; but of this we can form no correct judgment, for want of a competent knowledge of the municipal laws of foreign countries in general, and of that country in particular, which, at the time of those transactions, was very probably in a state of revolutionary tumult, and con-

braith v. *Gracie*, 1 *Binney's Rep.* 296. and *Calhoun* v. *The Insurance Company of Pennsylvania*, *ibid.* 293.

vulsion. But however that may have been, it is evident that the loss of the ship and cargo was occasioned by the imprudent, and, I may add, the unwarrantable conduct of *Samuel Montgomery Brown*, one of the original plaintiffs in this suit, who, (instead of bringing their action or actions in *London*, where the defendant lived, where the charter-party under which they claim the freight was executed, and where the insurance was made on the ship,) having discovered some property of the defendant in the hands of a correspondent in the town of *Alexandria*, made their election, and there exhibited their bill in equity, by way of foreign attachment, against the effects of the defendant; a thousand leagues from the place of his residence, and from where the contracts were made; leaving him to be defended (if defended at all) by a garnishee, unacquainted, probably, with the transactions between the parties; and uninterested in the event of the suit; in the prosecution of which, the irregular, and illegal proceedings have been sufficiently commented upon by a member of this court, on a former occasion. And I shall only add, that, after a mature reconsideration of the case, I am clearly of opinion that the decree, (now sought to be revised and altered,) in favour of the appellee, is correct, and ought not to be disturbed.