the questions to which such wrongs give birth, are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention. But the argument has already been drawn to a length, which forbids a particular examination of these points.

The principles which have been stated, will now be applied to the case at bar. In the present state of the evidence and proceedings, the Exchange must be considered as a vessel, which was the property of the libellants, whose claim is repelled by the fact, that she is now a national armed vessel, commissioned by, and in the service of the Emperor of France. The evidence of this fact is not controverted. But it is contended, that it constitutes no bar to an inquiry into the validity of the title by which the Emperor holds this vessel. Every person, it is alleged, who is entitled to property
*147] brought within the jurisdiction of our courts, has a *right to assert his title in those courts, unless there be some law taking his case out of the general rule. It is, therefore, said to be the right, and if it be the right, it is the duty of the court, to inquire whether this title has been extinguished by an act, the validity of which is recognised by national or municipal law.

If the preceding reasoning be correct, the Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port, open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country. If this opinion be correct, there seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States.

I am directed to deliver it, as the opinion of the court, that the sentence of the circuit court, reversing the sentence of the district court, in the case of the Exchange be reversed, and that of the district court, dismissing the libel, be affirmed.

Archibald Freeland *v.* Heron, Lenox & Company.

Account stated.

An account-current, sent by a foreign merchant to a merchant in this country, and not objected to for two years, is deemed an account stated, and casts the burden of proof upon him who received and kept it without objection.[1]

This cause having been argued by *Winder*, for the appellant, and *P. B. Key*, for the appellees—

All the judges being present, Duval, Justice, delivered the opinion of
*148] the court as follows:—*This case comes up by appeal from the decree of the Circuit Court for the District of Virginia. The record presents the following state of facts:

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[1] Toland *v.* Sprague, 12 Pet. 300; Wiggins *v.* Barkham, 10 Wall. 129; Lockwood *v.* Thorne, 11 N. Y. 170; Sergeant *v.* Ewing, 30 Penn. St. 75; s. c. 36 Id. 156.

Freeland v. Heron.

A bill in equity was filed by Heron, Lenox & Company against Archibald Freeland, the appellant, in the circuit court, in the month of December 1798. It stated, that the company consisted of Nathaniel Heron, a subject of Great Britain, Samuel Lenox, also a subject of Great Britain, and James Freeland and William Gillin. That articles of copartnership between the said company and Archibald Freeland, of Virginia, were entered into, on the 15th of February 1789, to commence on the first day of April following, and to continue for five years, unless sooner dissolved by mutual consent. It was stipulated by the articles, that the business of the copartnership should be managed and carried on, in the town of Manchester, in Virginia, by Archibald Freeland, under the firm of James Freeland. That there should be no advance put on the goods furnished, but the charges and commission in Britain, and that all bounties, discounts and abatements which might be received, should be credited. The complainants, in their bill, further stated, that Archibald Freeland had the sole management of the affairs of the company, and the care and custody of the books and funds. That during the existence of the copartnership, Heron, Lenox & Company remitted to James & A. Freeland goods, wares and merchandise, to the amount of several thousand pounds sterling, and had received some payments, but that a considerable balance remained due to them on account of those remittances: that J. & A. Freeland had been frequently called on to account and pay the balance due. That the firm of J. & A. Freeland had been long since dissolved, by mutual consent; and that A. Freeland, retaining all the books and effects of the company, had refused to account and pay the balance due; and they prayed relief.

To this bill, A. Freeland filed his answer, admitting the copartnership as stated, and that the business of the concern had been conducted by him, at Manchester, until the 10th day of April 1795, when, by contract, the whole of the property of the copartnery was vested in *him, for his own use and benefit, upon the conditions therein expressed: and he insisted that upon a fair settlement of the accounts between the complainants and him, agreeable to the custom of merchants in London, as stipulated by the said contract, he owed nothing. [*149

It further appeared, that shipments of merchandise by Heron, Lenox & Company were made, from time to time, during the first four years of the concern, amounting in the whole to more than 19,000*l.* sterling, and that remittances were made by A. Freeland, in bills of exchange and country produce, during the same period, to a large amount; and that in the year 1793, the partnership was dissolved by mutual consent. A. Freeland continued to settle and liquidate the accounts of the firm, at Manchester; and in September 1796, wrote a letter to Freeland and Gillin, of which the following is an extract: "Your claim will be among the first of my debts that is paid—for the indulgence I have met with, I have to thank you, and mean to exert myself in order to pay off the whole as early as possible."

During the pendency of this suit in the circuit court, a cross-bill was filed by A. Freeland against Heron, Lenox & Company for discovery, which they answered, by denying the allegations in the bill, without disclosing the evidence sought for. No exception, however was taken to the answer.

An order passed, directing an account to be stated by a commissioner

appointed for the purpose, who reported that there was due from A. Freeland to Heron, Lenox & Company a balance of 1160*l.* 17*s.* 10*d.* sterling; to which report, various exceptions were taken by the defendant. On the 14th of December 1809, the cause came on to be heard in the circuit court, upon the bill, answer and exhibits, and the report of the commissioner, when it was adjudged, ordered and decreed, that the defendant, A. Freeland, pay to the plaintiffs, Heron, Lenox & Co., the sum reported to be due by the commissioner, at certain specified periods, with interest from the first day of
*150] June 1798, and costs: and the cross-bill was *dismissed, with costs. From which decree, the defendant appealed.

The exceptions taken to the report of the commissioner, in the court below, have been urged on the part of the appellant in this court, and may be comprised under the following heads:

1. That he has not given the defendant credit for all the bounties, drawbacks and duties which were allowed to the complainants on the purchase and shipment of the goods in England, which he ought to have allowed, agreeable to the contract of copartnership.

2. That the commissioner adopted a mode of calculating interest contrary to the agreement of the parties in April 1795, and prejudicial to the defendant.

3. That he allowed the complainants a commission on the sales of produce shipped directly to Cadiz, Lisbon and other places, where the property was consigned directly to persons residing in those several places; by them sold, and who charged the ordinary commission, and who remitted the proceeds to the complainants, in London.

4. That he has not given credit to the defendant for twenty-five hogsheads of tobacco. There was another exception, but as it was abandoned in the argument by the counsel, it will not be noticed.

The appellant claims a credit of 764*l.* 10*s.* 5*d.* sterling, on account of bounties, drawbacks and discounts: he has been allowed upwards of £300 sterling, and the appellees deny that he is entitled to more credit than is
*151] given, averring that more has not been received by *them. Each insists that the *onus probandi* ought to be thrown on his adversary.

It is proper to observe, that it appears by the record, that Heron, Lenox & Company furnished A. Freeland with an account-current, annually, for the first four years of their transactions, and that no objection was made to them. This circumstance, combined with the promise contained in A. Freeland's letter of September 1796, to pay the whole balance due, affords room for the application of a rule of the chancery court, and of merchants, to decide the controversy: it is this—When one merchant sends an account-current to another, residing in a different country, between whom there are mutual dealings, and he keeps it two years, without making any objections, it shall be deemed a stated account, and his silence and acquiescence shall bind him, at least, so far as to cast the *onus probandi* on him.

With respect to the first, third and fourth exceptions, the record does not furnish the evidence necessary to enable the court to form a correct decision from the facts. The positive assertions of the appellant are denied by the appellees; and in proof, both are equally defective. The same rule is applicable to the third exception. After an acquiescence of several years, the account is considered as binding upon him, as he has failed to falsify

the allegations of the appellees, that the shipments of produce to Cadiz, Lisbon and Bordeaux were made pursuant to their orders and under their superintendence.

He has failed also to prove that he is entitled to the credit insisted on in his fourth exception. To be entitled to the credit, it is incumbent on him to prove that the twenty-five hogsheads are exclusive of the eighty hogsheads of tobacco shipped in the Mercury. The record affords no testimony whatever.

With respect to the second exception, it is considered by this court, that the circuit court erred in sustaining the report of the commissioner as to the manner of stating the account between the parties. The commissioner adoped the mode established in Virginia, and which it is believed prevails generally throughout the United States: but by the written agreement of the parties, in April 1795, it is stipulated, that the interest shall be charged agreeably to the custom and manner of settling accounts in London. In all other respects, the opinion of the circuit court is affirmed.

*It is, therefore, the opinion of this court, that the decree of the circuit court with respect to the second exception be reversed, [*152 and that the cause be remanded to the circuit court, in order that an account may be taken pursuant to the written agreement of the parties, agreeable to the custom and manner of settling accounts in London.

Welch *v.* Mandeville. (*a*)

Error.—Discontinuance.—Dominus litis.

The refusal of the court below to reinstate a cause, which has been legally dismissed, is no ground for a writ of error.

The nominal plaintiff may dismiss a suit, brought in his name, by a creditor, who has not an assignment of the cause of action.

Welch *v.* Mandeville, 1 Cr. C. C. 489, affirmed.

Error to the Circuit Court for the district of Columbia, sitting at Alexandria.

An action of covenant was brought in that court, in the name of James Welsh, the plaintiff, but really for the use and by the sole order of Allen Prior, against Mandeville & Jameson, upon a contract for the sale of land to them by Welch. At the second term after an office-judgment had been entered against Welch, at the rules, the defendant Mandeville, who alone had been taken, produced to the clerk a release, under the seal of Welch, and an order from him to dismiss the suit; whereupon, the clerk made an entry on the minutes of the court, that the action was dismissed by agreement of the parties.

Afterwards, at the same term, the attorney who brought the suit in the name of Welch, moved the court to reinstate it, and grounded his motion upon his own affidavit, and the papers mentioned therein. The affidavit stated, that in the autumn of 1789, Prior brought to the attorney three bills of exchange, drawn by Welch upon Mandeville & Jameson, for $2500 each, and an account, in the handwriting of Mandeville, acknowledging a balance

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(*a*) March 2d, 1812. Present, all the judges.