the owner or consignee, they would have continued it, till the goods should be landed in safety, and should perform their quarantine.

The court is of opinion, that under this policy, the goods in the Lazaretto were not at the risk of the underwriters, and consequently, that there is no error in the judgment of the circuit court. It is affirmed, with costs.

Judgment affirmed.

GRACIE *v.* MARYLAND INSURANCE COMPANY.

MARSHALL, Ch. J.—This case differs from that against the Marine Insurance Company of Baltimore only in one particular. A part of the cargo remained on board the ship, until the arrival of the French troops, when the departure of the vessel was prohibited by the general, and the ransom made. This circumstance does not, in the opinion of the court, vary the case; because, omitting all other considerations, the loss, within the risk, being on only a part of the cargo, is a partial loss, and is affected by the warranty against particular average loss. This judgment is also to be affirmed, with costs.

Judgment affirmed.

RICHARDS and others, assignees of MCKEAN, a bankrupt, *v.* MARYLAND INSURANCE COMPANY. (*a*)

Bankruptcy.—Statute of limitations.

Upon the death of an assignee under the bankrupt law of the United States, the right of action, for a debt due to the bankrupt, vested in the executor of the assignee.

If an executor do not cause himself to be made party to a suit, brought in the lifetime, and in the name, of the testator, and pending at his death, it is to be considered as a voluntary abandonment of the action, so as to exclude the executor from the equity of the exceptions to the statute of limitations.

Quære? Whether the commissioners of bankrupt had a right to appoint a second assignee, in case of the death of the first?

At common law, no action could be renewed by journey's accounts, in a case of voluntary abandonment.

ERROR to the Circuit Court for the district of Maryland, in an action of
*85] covenant, on a policy of insurance *under seal. The defendants pleaded the Maryland statute of limitation of twelve years (1715, ch. 23, § 6), which enacts, "that no specialty whatsoever, shall be good and pleadable, or admitted in evidence against any person or persons of this province, after the principal debtor or creditor have been both dead twelve years, or the debt or thing in action above twelve years standing," with a saving of five years in cases of infancy, &c.

The replication to this plea stated, in substance, the following facts: That the cause of action accrued on the 1st of May 1797; that McKean was declared a bankrupt, on the 19th of March 1801, his estate was duly assigned to Thomas Allibone, who, on the 6th of October 1806, instituted a suit on the policy, and died on the 1st of August 1809, whereby the suit was abated. That on the 11th of January 1810, the plaintiffs were, by the commis-

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(*a*) February 11th, 1814. Absent, WASHINGTON, Justice.

sioners, appointed assignees, in pursuance of the choice of the creditors regularly convened for that purpose, and brought the present action, at the next term after the death of Allibone, the former assignee. To this replication, there was a general demurrer.

The judgment of the court below, upon the demurrer, was in favor of the defendants; and the plaintiffs brought their writ of error.

Harper, for the plaintiffs in error, made four points. 1. That an assignee, under the commission of bankruptcy, had no interest in the effects of the bankrupt, which could vest in his executors or administrators, but was a mere trustee or agent of the commissioners. 2. That the commissioners had power, upon the death of an assignee, to appoint another in his stead, and so *toties quoties*. 3. That under the equity of the statute of limitations, the plaintiffs had a right to bring a fresh suit, upon the abatement of the first. 4. That there was a good continuance of the suit by journey's accounts.

*1. The bankrupt law gave no *estate* to the assignee. He had no interest in the effects of the bankrupt; the object of the law was merely to appoint a curator of the estate, with an authority like that of an administrator. It was a mere personal agency, which terminated by the death of the assignee. It was the intention of the law, that this agent should have the confidence of the creditors; but that intention would be defeated, if the executor or administrator of the assignee should become the agent. See Bankrupt Law of the United States, § 6, 7, 8 (2 U. S. Stat. 23–4). [*86

2. The commissioners, under the equity of the 6th and 8th sections, had power to appoint a new assignee or assignees, in case of the death of the assignee for the time being. Their power was like that of the ordinary in granting letters of administration. No express authority is given to the ordinary to grant letters *de bonis non*, yet his authority to do it was never disputed. The intention of the bankrupt law was, that there should always be an assignee, until the estate should be settled. The general power to appoint, implies an authority to keep the office always full. The plaintiffs, therefore, had power to maintain this action.

3. The act of limitations does not apply to this case. *Cary* v. *Stephenson*, 2 Salk. 421. The principle of that case was, that the plaintiffs had done all in their power, and therefore, the statute of limitation was not a bar. To make the statute apply, there must be negligence on the part of the plaintiff, and injury to the defendant by the delay. If an administrator commence the action, within a year after the granting of letters of administration, the statute is no bar, unless it began to run in the life of the intestate. So, in the case of an executor of an executor. Buller N. P. 150; Esp. N. P. 150. These cases all depend on the same general principle—the equity of the statute. If there be no negligence on the part of the plaintiff, and no injury to the defendant, the case is within that equity.

4. This new action is a good continuation of the old suit, by journey's accounts. *Spencer's Case*, 6 Co. 10. A new action by journey's accounts may be had, where the former action abates by the fault of the clerk, &c., but *not if it be abated by his own default. The doctrine applies as well to personal as to real actions. *Elstob* v. *Thorowgood*, 1 Ld. Raym. 283. The principle of that case is, that where the second plaintiff derives his [*87

authority from the same source as the first, he may have the action by journey's account.

Pinkney, contrà.—The argument divides itself into two parts. 1. The construction of the act of congress. 2. The effect of the act of limitations.

1. Under the bankrupt law, the commissioners had no power to appoint a new assignee, in case of the death of the first assignee. Their power in this respect was limited to the case of a removal of the assignee by the creditors. Much is said about the equity of the statute, but this court is authorized *jus dicere, non jus dare.* The 6th section provides for the appointment of an assignee; the 7th authorizes the commissioners to appoint a temporary assignee, without the consent of the creditors; and the 8th section provides for the removal of an assignee, and the appointment of another in his place. If the court can extend the equity of the statute to the case of the death of an assignee, it must be by a very liberal construction.

By the 18th section, the estate and effects of the bankrupt are to be conveyed to the assignee, his heirs, executors, administrators and assigns for ever: the 50th section conveys the same idea. The estate descends to the heir of the assignee, clothed with the trust, and he has all the rights, and is subject to all the responsibilities and duties of the original assignee. But if the court can, by equity, extend the power of the commissioners to the appointment of a new assignee, in case of death, then, under the 9th section of the act, the new assignee might have been substituted for the old, and the action would not have abated by the death, but might have been prosecuted to judgment by the new assignee. So that if the suit was abated, it
*88] was through *his negligence, or voluntary act; and no plaintiff, who is in default, can have the benefit of the equity of the statute, by journey's accounts.

2. As to the Maryland statute of limitations. It differs from the English statute of 21 Jac. I., which contains no limitation of actions upon specialties, judgments or recognisances. The same rule of equitable construction, therefore, cannot apply to both. But even if the same rule of construction could be applied to the Maryland statute, yet it does not contain the same clause upon which the equity arises in England. The object of the statute was to prevent injury to defendants by the loss of evidence. If the statute once begins to run, nothing will stop its course but an effectual suit. If a promise be made to a *feme sole*, and the day after the cause of action accrues, she marry, the statute continues to run, notwithstanding the coverture, so in case of *non compos*, absence, &c. 4 Bac. Abr. 479, note; 1 Ibid. 413.

But it is only the equity of the 4th section of the English statute that could have aided the plaintiffs. That section allows a new action to be brought within a year, in three cases: 1. Where judgment has been reversed by writ of error: 2. Where judgment has been arrested: and 3. Where an outlawry has been reversed. 4 Bac. Abr. 471 (Gwillim's edition), § 4. The courts have said, that abatement is within the same reason, but they have not said, that other representatives than those mentioned in the 4th section may bring a new action, except in the case in Lord Raymond, which has been overruled in that respect. 1 Ld. Raym. 284. The Maryland statute does not contain a section similar to the 4th section of the 21st James.

Harper.—But that section of the English statute has been always in use

in Maryland, in that respect, and is in daily practice in their courts; and therefore, and by force of the bill of rights and constitution of Maryland, has been adopted as part of the law of the land.

**Pinkney.*—The statute of James is not in force in Maryland, in respect to those cases for which the statute of Maryland provides. [*89 This statute professes to provide a limitation for all actions, and to enumerate all cases in which exceptions should be made. With the English statute before them, and while exercised in selecting such parts of it as they thought proper, the legislature cannot be presumed to have been so negligent as to omit the 4th section, if they intended to adopt it.

But if it be in force in Maryland, this court will not push the equity of it farther than has been done in the courts in England. They have never permitted such a representative, as these plaintiffs are, to bring a new action, nor any one to bring a new action, where the benefit of the former one has been lost by negligence or voluntary abandonment; which we say was the case here, for the action might certainly have been continued and maintained either by the executor of Allibone, or by the new assignees. In the case cited from 2 Salk. 421, *Cary* v. *Stephenson*, the cause of action arose after the death of the intestate, and before the letters of administration were granted. For if the statute had begun to run, in the life of the intestate, it would have continued to run, although no administration had been granted.

The next case is *Cawer* v. *James*, or *Carver* v. *James*, or *Karver* v. *James*, as it is differently called in several books. Buller N. P. 150; Esp. N. P. 150; Willes 255. In that case, the action was brought by the executor, and the equity of the 4th section of 21 Jac. I. extends only to the party himself, his heirs, executors and administrators, and not to any other representative. The case cited from 1 Ld. Raym. 283, supports the same doctrine. Both plaintiffs were executors of the original creditor. The court decided the case upon the doctrine of journey's accounts, and the equity of the 4th section of the statute of James. The case put by the court, by way of illustration, is precisely in point. If the first plaintiff had been administrator (instead of executor) *durante minoritate*, the executor, when of age, could not have continued the suit by journey's accounts, nor would he have been aided by the equity of the statute, because he was not the legal representative of the *former plaintiff. There is no case in which an assignee [*90 has been decided to be within the equity of that section of the statute. Although both assignees may derive their authority from the same source, yet the one is not the legal representative of the other. The opinion in the case of *Elstob* v. *Thorowgood* (1 Ld. Raym. 283) is expressly retracted, in the case of *Kinsey* v. *Heyward*, Ibid. 432, where the same court say, "that in no case can a writ of journey's accounts be, but by the same plaintiffs, or some of them, who were plaintiffs in the former writ; and that to say that the general executor, and the executor *durante minoritate*, were as one person in the office, is to strain the point too far; for it must be the same plaintiff, not only by representation, but by name; for the second writ is a continuance of the first, which cannot be but by the same person, not in representation only, or in respect of their office, but strictly and truly the same person."

Jones, on the same side.—Even if the doctrine of journey's accounts could apply, the plaintiffs were too late. In journey's accounts, the writ is said to be granted *per dietas computatas*, which originally meant as many days journeys as the plaintiff was distant from the court of chancery, where he was obliged to go to get a new writ, accounting twenty miles for a day's journey, and it was originally necessary to show the number of days in the replication, that by computation it might appear that he was within the time allowed. This was afterwards settled by a general rule, to be thirty days. In this replication, the plaintiff has replied simply the facts, and says nothing of the *dietas computatas*. The new writ, by journey's accounts, operates a continuance of the old suit, and in the judgment, the plaintiff recovers the costs of both writs, and therefore, it must be brought by the same plaintiff. *Spencer's Case*, 8 Co. 10 ; 2 Inst. 288 ; 2 Com. Dig. 433, tit. Costs. In none of the cases decided upon the equity of the statute of James, has the plaintiff prevailed upon appeal. They are little better than *obiter dicta*.

Harper, in reply.—The opposite counsel almost admit our construction
*91] *of the bankrupt law. The authority of the assignee is like that of an administrator. The power of the commissioners is like that of the ordinary.

Although the writ was abated, yet the plaintiffs might renew the suit. They were not in default, by not continuing the old writ, for if they might have continued it, they were not obliged so to do. Thus, in Maryland, an executor may be made a party, in the place of his testator ; but if he does not come in, and the suit is thereby abated, he may bring a new suit. The right of the plaintiffs to continue the old suit, under the 9th section of the bankrupt law, was doubtful. They preferred a safe, plain, clear, undeniable remedy. Their having done so, ought not to exclude them from the equity of the statute of limitations. It is well known to every lawyer in Maryland, that the 4th section of the statute of James had been used and practised in the courts of that state, and it has, therefore, become the law of the land, by force of the bill of rights.

The case of *Kinsey* v. *Heyward* was not reversed on its merits, the doctrine of the court of common pleas, that the plaintiff was within the equity of the 4th section of the statute of James, was not denied by the king's bench. Nor was the case of *Carver* v. *James* reversed upon the merits. The doctrine, therefore, was in effect affirmed by implication ; because they would not have assigned other causes of reversal, if the principle of the case itself was erroneous.

February 25th, 1814. Johnson, J., delivered the opinion of the court, as follows :—This is an action of covenant, brought on a policy of insurance under seal. The facts as made out in the pleadings are these : The cause of action accrued on the 1st May 1797 ; McKean was declared a bankrupt, and on the 19th March 1801, his estate was assigned to Thomas Allibone ; on the sixth of October 1806, the assignee instituted a suit on this policy, and died on the 1st of August 1809. On the 11th of January 1810, the
*92] plaintiffs were *appointed assignees, in pursuance of the choice of the creditors regularly convened for that purpose, and brought the present action to the term next after the death of the assignee.

The plea is the statute of limitations. To this is filed a special replication setting forth the above facts, with a view to sustain an exception from the operation of the statute. The case comes up on a demurrer to the replication, and for the defendant there were two points made at bar. 1st. That the action is not maintainable at all, by the present plaintiffs, because the bankrupt act makes no provision for the appointment of a new assignee, upon the demise of the first. 2. That the right of action vests in his personal representative and could be maintained by him; that the abatement by the death of the first assignee, was a voluntary abandonment of the suit, and put the case of the plaintiffs out of the reason of the exceptions from the operation of the statute. In support of the action, it was contended, that the former suit abated by the death of the first assignee; that the right did not vest in his executors, because it was a mere trust or agency; that the right of substituting the new assignees in the action is secured only in the case of removal by the creditors; that this case is without the statute of limitations, upon an equitable construction of that statute; and lastly, that this action is a good continuance of the former, by journey's account.

We are of opinion, that the plea of the statute of limitations must be sustained. On the first point made by the defendant, the court would be understood to give no opinion. Being satisfied that the plaintiff has not brought himself within any one of the exceptions which have been admitted to the statute of limitations, and feeling no inclination to multiply those exceptions, they dispose of the case upon the second ground alone. The cases which, though literally within the words of the statute, have been held to be without its spirit, are those only in which circumstances intervened, which rendered it impossible or inconsistent with known and established principles, that a cause of action could be revived by the renewal of the contract, or enforced by a suit at law within the time prescribed. The object *of the law is, to secure the individual from the machinations of dishonesty, when attempted under the advantages attendant upon [*93 lapse of time, loss of papers, and death of witnessses. But when cases present themselves, in which no *laches* can be imputed to the plaintiffs, but great injustice would be done, by applying to such cases the effect of the statute, the conclusion of reason and of the law is, that such cases were not in the mind of the legislature, when enacting that law. Such are the cases of a want of parties, plaintiff or defendant, whereby a temporary suspension of legal remedy takes place.

But in no case of a voluntary abandonment of an action, has an exception to the statute of limitations been supported; and such we are of opinion, is the case before us. Whether it was, or was not, a case in which the bankrupt law authorizes the appointment of the present assignee, we deem immaterial. The case is certainly not within the express letter of the statute, and it is only under its equitable, and perhaps, its proper construction, that the appointment of the new assignees (the present plaintiffs) can be supported. But the same equity which would support this appointment, would support the substitution of the new assignees for the former, in the existing action.

We are, however, of opinion, that the first assignee was not a mere naked agent or attorney for the creditors. The words of the bankrupt act, § 13, are, that the debts assigned to him shall be vested in him, as if they had

been contracts made with himself originally. Now, one necessary incident to such a contract would be, that the right of action would vest in his personal representative, and the act of congress saves the suit from abatement, by authorizing the substitution of the executor or administrator, instead of the deceased plaintiff. The same answer applies to the antiquated doctrine of continuance by journey's account. The fact is, that the mode of continuing a suit in the name of the executor or administrator, provided for by statute, is a complete substitute for the continuance by journey's account. But even at common law, such a continuance or connection of suit was allowed in no case of voluntary abandonment, and if the benefit of it was intended to be asserted, it was necessary to claim it, in the form of renewing the action.

Judgment affirmed, with costs.

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*94] *Crowell and others *v.* McFadon. (*a*)

Seizure—Embargo.

Under the 11th section of the embargo act of 25th April 1808, the collector was justified in detaining a vessel, by his honest opinion, that there was an intention to violate or evade the provisions of the embargo laws. It was not necessary for him to show that his suspicion was reasonable.

Error to the Supreme Judicial Court of the Commonwealth of Massachusetts. The case, as stated by Duvall, J., in delivering the opinion of the court, was as follows:

An action of trover for 650 barrels of flour, of the cargo of the schooner Union, was brought by John McFadon against Joseph Otis and the appellants, in the court of common pleas for Suffolk county, in the commonwealth of Massachusetts, where a trial was had and judgment rendered in favor of the defendants. From this decision there was an appeal to the supreme judicial court of that state, in which the cause was again tried and a verdict and judgment rendered for the plaintiff for $3716.30 and costs. Joseph Otis died, whilst the suit was depending in the supreme judicial court.

The following are the principal facts appearing on the record in this case: The schooner Union, Benjamin Hawes, commander, with a cargo of 650 barrels of flour, and five tons of logwood, shipped by John McFadon, of Baltimore, was cleared at that port for Machias, in Massachusetts, late in the month of April, in the year 1808. She had originally cleared for Passamaquoddy, on the 16th of April, before the collector had received notice of the act of the 25th of the same month, which authorised him to detain the vessel: the destination was changed to Machias, and a clearance obtained accordingly. But the original destination of the flour on board, for Eastport, remained on the face of the manifest. The flour was shipped for account and risk of Josiah Dana, of Machias, and in his absence, Jonathan Bartlett, of Eastport, or his assigns.

The Union sailed from Baltimore, the last of April, and meeting with head winds, the commander put into Hyannis, in the district of Barnstable. She was soon afterwards boarded by Joseph Crowell, one of the inspectors

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(*a*) February 16th, 1814. Absent, Washington, Justice.