have no knowledge or control of the shipment, unless by the consent of the consignees, under future arrangements to be dictated by them. In this view, this case cannot be distinguished from that of *Messrs. Kimmell & Alvers;* and it steers wide of the distinction upon which *Messrs. Wilkins'* claim was sustained. (*The Merrimack*, 8 Cr. 317.)

The authorities also cited at the argument, by the captors, are exceedingly strong to the same effect. *The Aurora*, 4 Rob. 218, approaches very near to the present case. There, the shipment, by the express agreement of the parties, was, in reality, going for the use, and by the order, of the purchaser, but consigned to other persons, who were to deliver them, if they were satisfied for the payment. And Sir William Scott there quotes a case as having been lately decided, where goods, sent by a merchant in Holland, to A., a person in America, by order, and for account, of B., with directions not to deliver them, unless satisfaction should be given for the payment, were condemned as the property of the Dutch shippers.

*On the whole, the court are unanimously of opinion, that the goods included in this shipment were, during their transit, the property, and at the risk, of the shippers, and therefore, subject to condemnation. The claim of Mr. Lizaur must, therefore, be rejected. [*215

Sentence affirmed, with costs.

Renner & Bussard *v.* Marshall.

Abatement.—Lis pendens.—Assessment of damages.

The commencement of another suit, for the same cause of action, in the court of another state since the last continuance, cannot be pleaded in abatement of the original action.

If matter in abatement be pleaded *puis darrein continuance*, the judgment, if against the defendant, is peremptory.[1]

Where the action is brought for a sum certain, or which may be rendered certain by computation, judgment for the damages may be entered by the court, without a writ of inquiry.

Error to the Circuit Court for the district of Columbia, for Washington county. The defendant in error, at June term 1813, declared against the plaintiffs in error, in *assumpsit*, upon an inland bill of exchange, drawn by one Rootes, on Renner & Bussard, and accepted by them, to which declaration they pleaded *non assumpsit*, and issue was thereupon joined, and the cause was continued to December term 1813.

At that term, the plaintiffs in error appeared, and *pleaded, "that, after the last continuance of the plea aforesaid, to wit, the first Monday of June, in the year 1814, from which day the plea aforesaid was further continued here until this day, to wit, the fourth Monday of December, in the year last aforesaid, and before this day, to wit, on the 19th day of October, in the year last aforesaid, before the superior court of chancery of the commonwealth of Virginia, &c., the plaintiff exhibited his certain bill of complaint against the defendants, &c.; and also against one Anthony Buck and one Miles Dowson, complaining and alleging in his said bill, that on the 12th day of October, in the year 1812, Thomas R. Rootes drew his bill of exchange upon the defendants, &c. And the said defendants further [*216

[1] Harkness *v.* Harkness, 5 Hill 213.

say, that the plea aforesaid, for which the said defendants, by the said plaintiff, in the said bill of complaint mentioned, are impleaded in the said superior court of chancery as aforesaid, is for the same identical matter and cause of action, of and for which the said plaintiff hath now impleaded the said defendants, Renner & Bussard," &c.

To which the plaintiff replied the prior pendency of the suit in the circuit court; and the defendants rejoined, in substance, the same matters as contained in their plea; whereupon, the plaintiff demurred specially. Upon which, the court rendered judgment, "that the plea of the said Daniel Renner and Daniel Bussard, by them above pleaded to the writ and declaration of the said Horace Marshall, and the plea of the said Daniel Renner and
*217] Daniel Bussard, by way *of rejoinder to the said replication of the said Horace Marshall, and the matters therein contained, are not sufficient in law to preclude him, the said Horace Marshall, from maintaining his action aforesaid; therefore, it is considered by the court here, that the aforesaid Horace Marshall recover against the said Daniel Renner and Daniel Bussard, as well the sum of, &c., his damages," &c.

The cause was argued by *Jones* and *Key*, for the plaintiff in error, and by *Lee*, for the defendant in error.

March 11th, 1816. Story, J., delivered the opinion of the court.—The first question in this case is, whether the commencement of another suit, for the same cause of action, in the court of another state, since the last continuance, can be pleaded in abatement of the original suit? It is very clear, that it cannot. A subsequent suit may be abated, by an allegation of the pendency of a prior suit; but the converse of the proposition is, in personal actions, never true. The decision of the circuit court of the district of Columbia overruling the plea was, therefore, correct.(*a*)

*218] *The next question is, whether the judgment rendered on the overruling of the plea ought to have been peremptory, or an award of *respondeas ouster*. This point is completely settled by authority. If matter in abatement be pleaded *puis darrein continuance*, the judgment, if against the defendant, is peremptory, as well on demurrer, as on trial.(*b*)

The last question is, whether judgment could be entered up for the plaintiff for the amount of his damages, by the court, without a writ of inquiry? This also is completely settled by authority, in all cases whether the action is brought for a sum certain, or which may be made certain, by computation.(*c*)

Judgment affirmed, with costs.

(*a*) The exception *rei judicatæ* applies only to final or definitive sentences, in another state, or in a foreign court, upon the merits of the case; and the rule has even been applied to the pendency of a cause in an inferior court in the same state. Bowne *v.* Joy, 9 Johns. 221, and the authorities there cited. *Sed quære?* if it were alleged that the inferior court had jurisdiction? Fitzg. 314. But whether the suit be pending in a foreign or a domestic court, a prior suit cannot be abated by the allegation of the pendency of a suit subsequently brought.

(*b*) See Chitty on Plead. 636.

(*c*) See Holdipp *v.* Otway, 2 Wms. Saund. 107, note 2; Maunsell *v.* Lord Massareene, 5 T. R. 87; Buthen *v.* Street, 8 Ibid. 326; Nelson *v.* Sheridan, Ibid. 395; Byron

*Morean *v.* United States Insurance Company.

Marine insurance.—Memorandum articles.

The insurer on memorandum articles, is only liable for a total loss, which can never happen where the cargo, or a part of it, has been sent on by the assured, and reaches the original port of its destination.[1]

Where the ship, being cast on shore, near the port of destinatiou, the agent of the assured employed persons to unlade as much of the cargo (of corn) as could be saved, and nearly one-half was landed, dried and sent on to the port of destination, and sold by the consignees, at about one-quarter the price of sound corn; this was held not to be a total loss, and the insurer not to be liable.

Morean *v.* United States Ins. Co., 3 W. C. C. 256, affirmed.

Error to the Circuit Court for the district of Pennsylvania. This was an action commenced by the plaintiff in error, upon a policy of insurance, dated the 14th of December 1812, on goods on board the brig Betsey, at and from Cape Henry to Lisbon, at a premium of six per cent., on which $5000 were underwritten by the defendants, and valued at that sum, declared to be against all risks, except British capture, warranted American property. The jury found a verdict for the plaintiff, subject to the opinion of the court upon the following facts, agreed by the parties:

The cargo consisted of 4406 bushels of Indian corn, 100 barrels of navy bread, and 20 barrels of corn-meal. The brig sailed from Baltimore, on the 11th of November 1812 and from Cape Henry, on the 13th of the same month. She experienced, on the voyage, many and severe gales of *wind. On the 18th of December, she passed the rock of Lisbon, [*220 and came to anchor about four miles below Belem Castle. She leaked considerably, in consequence of the injury she had sustained from the severe gales to which she had been exposed. After passing the rock, the wind died away, and the current being adverse, she came to anchor. The master and supercargo landed, went through the customary forms, at Belem, to obtain a permit to pass the castle, and then proceeded to Lisbon. The health-boat visited the brig, and ordered her to get above the castle, as soon as possible. On the 19th, she was again exposed to a heavy and fatal gale, and drove ashore near to Belem Castle, the sea breaking over her, and the crew hanging by the rigging to preserve their lives. The supercargo considered both vessel and cargo as totally lost. By directions of the custom-house, as much of the cargo as could be got out, was unladen by a number of French prisoners, who were employed for that purpose. The cargo was all wet, and the part of it which was then taken out was carried to the fort, where it was spread and dried. From thence, it was carried to Lisbon in lighters, and was sold in the corn-market, by the consignee of the cargo. The quantity so saved and sold amounted to about 1988 bushels, which was sold at 50 cents a bushel, whereas, the price of sound corn was $2.25 a bushel. The supercargo petitioned for liberty to sell the corn at the place where it

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v. Johnson, Ibid. 410; Thellusson *v.* Fletcher, 1 Doug. 302; Rashleigh *v.* Salmon, 1 H. Bl. 352; Andrews *v.* Blake, Ibid. 529; Longman *v.* Fenn, Ibid. 541; Brown *v.* Van Braam, 3 Dall. 355; Graham *v.* Bickham, 1 Ibid. 185; Graham *v.* Bickham, 4 Ibid. 149.

[1] S. P. Humphreys *v.* Union Ins. Co., 3 Mason 429; Robinson *v.* Commonwealth Ins. Co., 3 Sumn. 220. And see Insurance Co. *v.* Fogarty, 19 Wall. 640.