*James J. McLanahan, Wilhelmus Bogart and John Joseph Coiron, Plaintiffs in error, *v.* The Universal Insurance Company, Defendants in error.

Marine insurance.—Seaworthiness.—Fraud.—Concealment.—Charge of the court.—Binding instruction.

It is, doubtless, within the province of a court, in the exercise of its discretion, to sum up the facts in the case to the jury, and submit them, with the inferences of law deducible therefrom, to the free judgment of the jury; but care must be taken, in all such cases, to separate the law from the facts, and to leave the latter, in unequivocal terms, to the jury, as their true and peculiar province. p. 182.

An application for a new trial, on motion, after verdict, addresses itself to the sound discretion of the court; and if, upon the whole case, the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed on the trial; the application is not a matter of absolute right, but rests in the judgment of the court, and is to be granted only in furtherance of justice. On a writ of error, bringing the proceedings on a trial, by bill of exceptions, to the cognisance of the appellate court, the directions of the court below, must then stand or fall, upon their own intrinsic propriety, as matters of law. p. 183.

Every ship must, at the commencement of the voyage insured, possess all the qualities of seaworthiness, and be navigated by a competent master and crew.[1] p. 183.

Seaworthiness in port, or lying in the offing, may be one thing; and seaworthiness for a whole voyage, quite another. p. 184.

A policy on a ship, "at and from a port," will attach, although, the ship be, at the time, undergoing extensive repairs, in port; so as, in a general sense, for the purposes of the whole voyage, to be utterly unseaworthy.[2] p. 184.

What is a competent crew for the voyage? at what time such crew should be on board? what is proper pilot ground? what is the course and usage of trade, in relation to the master and crew being on board, when a ship breaks ground for the voyage? are questions of fact dependent upon nautical testimony, and exclusively within the province of the jury. p. 184.

The contract of insurance is one of mutual good faith, and the principles which govern it, are those of an enlightened moral policy; the underwriter must be presumed to act upon the belief, that the party procuring insurance, is not, at the time, in possession of any fact material to the risk, which he does not disclose; and that no known loss had occurred, which, by reasonable diligence, might have been communicated to him. p. 185.

If a party, knowing that his agent is about to procure insurance for him, withholds information, for the purposes of misleading the underwriter, it is a fraud, and vitiates the insurance. p. 185.

Where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent, by due and reasonable diligence, to be judged under all the circumstances of each particular case, if it can be communicated; for the purpose of countermanding the order, or laying the circumstances before the underwriter.[3] p. 185.

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[1] There is an implied warranty, in every contract of insurance, that the vessel is seaworthy, and competent to perform the voyage. Warren *v.* United Ins. Co., 2 Johns. Cas. 231; Myers *v.* Girard Ins. Co., 26 Penn. St. 192. To render her seaworthy, she must be manned by a competent master and crew. The Vincennes, 3 Ware 171; The Ethel, 5 Ben. 154; Silou *v.* Low, 1 Johns. Cas. 184; Dow *v.* Smith, 1 Caines 32. If a vessel have, in fact, a competent sailing-master, she is not unseaworthy, though the registered master have no nautical skill, and act merely as supercargo. Draper *v.* Commercial Ins. Co., 21 N. Y. 378. Seaworthiness of the hull is such a state, as is competent to resist the ordinary action of the winds and waves, in the particular voyage insured. Bullard *v.* Roger Williams Ins. Co., 1 Curt. 148; Watson *v.* Ins. Co. of N. America, 2 W. C. C. 480.

[2] See Garrigues *v.* Coxe, 1 Binn. 592.

[3] S. P. Watson *v.* Delafield, 2 Caines 224; S. C. 1 Johns. 150; 2 Id. 526.

What constitutes due and reasonable diligence, is a question of fact for the jury. p. 186.

*171] *The accidental concealment of the time of the sailing of a vessel, would not prejudice the insurance, unless material to the risk; if fraudulently intended, it might not mislead; and whether fraudulent or not, is matter of fact for the jury. p. 188.

The material ingredients of a question of the importance of concealing the time of a vessel's sailing, are mixed up of nautical skill, information and experience; and are, in no sense, judicially cognisable, as matters of law. It seems, that this question does not cease to be a question of fact, when the vessel is to sail from a port abroad. p. 188.

Little stress ought to be laid upon general expressions falling from judges, in the course of trials; where the facts are not disputed, the judge often suggests, in a strong and pointed manner, his opinion as to their materiality and importance, and his leading opinion of the conclusion to which the facts ought to conduct the jury; this ought not to be deemed an intentional withdrawal of the facts, or the inferences deductible therefrom, from the cognisance of the jury, but rather as an expression of opinion, addressed to the discretion of counsel, whether it would be worth while to proceed further in the cause. And the like expression, in summing up any cause to the jury, must be understood by them, merely as a strong exposition of the facts, not designated to overrule their verdict, but to assist them in forming it. And there is the less objection to this course, in the English practice; because, if the summing up has had an undue influence, the mistake is put right by a new trial, upon an application to the discretion of the whole court; this is so familiarly known, that it needs only be stated, to be at once admitted. p. 190.

The question of materiality of the time of the sailing of the ship to the risk, is one for the jury, under the direction of the court, as in other cases. The court may aid their judgment by an exposition of the nature, bearing and pressure of the facts; but it has no right to supersede the exercise of that judgment, and to direct an absolute verdict as upon contested matter of fact, resolving itself into a mere point of law. p. 191.

ERROR to the Circuit Court of Maryland. The action, in the circuit court for the district of Maryland, was instituted by the plaintiffs in error, on a policy of insurance, in the usual form; and a verdict was rendered for the defendants, under the opinion of the court, upon the first of nine exceptions taken by the plaintiffs.

The material facts in the case were: Insurance was effected in Baltimore, in the name of Thomas Tenant, to the amount of $10,000, on the brig Creole, for a voyage from Havre de Grace to New Orleans, with liberty to touch and trade at Havana. The policy was dated upon the 22d day of December 1823. The insurance was made for the plaintiffs, the sole owners of the vessel, under the following circumstances: John Joseph Coiron, one of the plaintiffs, while at Havre de Grace, on the 19th of October 1823, addressed to Mr. John Stoney, of Charleston, the following letter:—

Havre, October 19th, 1823.

Mr. JOHN STONEY, Charleston:

*172] Dear Sir:—Please to have insured, for my account, for the *account and risk of whom it may concern, ten thousand dollars, on the brig Creole, of New Orleans, Captain Jacob Goodrich, for New Orleans, touching at the Havana. The brig and boats in the best order, having a round-house on deck, containing fourteen berths; the crew are seventeen in all. We intend sailing to-morrow. I have with me my family, consisting of two children and two nephews. The wind having shipped round suddenly, I write this in haste; my first will be more satisfactory to you, for particulars. The new Georgia upland cotton, twenty sous; rice, thirty francs. Your devoted servant and friend,

JOHN JOSEPH COIRON.

And also another letter, as follows :—

Duplicate.

Havre, October 20th, 1823.

Mr. John Stoney, Charleston :

Dear Sir :—I have yesterday requested you to have insured, on my account, for the account of whom it may concern, ten thousand dollars, on the brig Creole, of New Orleans, Captain Jacob Goodrich, from this port back to New Orleans, touching at the Havana, the vessel and boats in the best order, having a roof on deck, containing fourteen berths ; manned by seventeen hands. You know the vessel. I have only to add, that I have made a thousand dollars' worth more of repairs and improvement on her. She is now a very convenient packet. I will feel gratified to hear from you, at the Havana. I intend but making a very short stay there, having two children and two nephews with me, and being anxious to meet Mrs. C. I cannot give you any favorable information respecting business in this part of Europe. With the pleasing expectation of being soon near you, I remain, respectfully, dear Sir, your devoted servant and friend,

John Joseph Coiron.

This letter was inclosed in another, addressed by Quartier & Drogy, of Havre, to Mr. Stoney, dated 23d of October 1823, and stamped with the post-mark of Savannah, December 10th ; which, with the indorsements thereon, were as follows :—

P. Hesperus.

Havre, October 23d, 1823.

John Stoney, Esq., Charleston :

Sir:—We are indebted to our mutual friend, Mr. J. J. Coiron, from whom we beg leave to hand you the inclosed letter, for an introduction to your *173] respectable firm, and should feel *particularly happy, if it became the means of an active correspondence between us ; the produce of your country, and particularly cotton, being always of an easy and frequently advantageous sale in this part of France, on account of the vicinity of the metropolis, and the principal manufacturing towns, which gives Havre a decided preference over the other commercial ports of France. Georgia short staple, sells at 27 @ 29, and the stock on hand not considerable, few arrivals being expected, until the new crop, which can hardly reach our market before the month of December. It would, however, not be prudent, to speculate on the present prices, as they will be likely to give way, on arrival of the new crop, and occcasion considerable losses. Our opinion is, that purchases ought to be made at from 11 to 13*d.*, and not to exceed 14*d.*, to offer a benefit here.

Should you feel disposed to enter into a connection of business with us, and honor us with an answer, we could, if you are so inclined, commence with an adventure of a hundred bales of cotton, for mutual account, and successively enlarge the speculation, if the result prove satisfactory. As to the reimbursement for our share, we authorize you to draw on us, at Paris, at sixty or ninety days sight, if the exchange be advantageous; else we may either make you remittance, or open you a credit at New York. In case it

should suit you to speculate for your own account, we beg to offer you the facility of an anticipation of half the amount of the consignments you may please to instruct to our care, on receipt of the bills of lading and order for insurance. We are also ready to offer the same facilities on shipments which you may sway to us, for account of other houses, and to grant you a share in the commission on the same. Would oblige us, to render us the following service, viz: to procure acceptance of the inclosed bill of 420 dollars, sixty days sight, on Barbet & Esnard, of your city; and when accepted, to hand the same to Mr. Sam. Simon, at Augusta, &c. Believe us, with due regard, Sir, your most obedient servants,

A. Quartier & Drogy.

John Stoney, Esq., Charleston, S. C.

No. 9, 1823.—Quartier & Drogy, Havre, Oct. 23.—Received 13th December.

Hesperus.

The letter of the 19th October was dispatched, in a single form, from Havre, on the 20th, by a vessel sailing on that day, for Philadelphia; and was received by Mr. Stoney, on the 15th December; a duplicate of the letter of the 20th was dispatched on the 23d of October, by the Hesperus, *via* Savannah.

*174] *On the 12th of December 1823, Mr. Stoney applied to the Fire and Marine Insurance Company, and to the Union Insurance Company, in Charleston, for insurance on the Creole, and both offices refused the risk, upon the ground, that they ought to have received account of the arrival of the brig, before that time. The offers were withdrawn, and upon the 13th of December, he wrote to Thomas Tenant, Esq., at Baltimore, the following letter. The letter was post-marked at Charleston, on the day of its date; and was received in Baltimore, by Mr. Tenant, on Saturday, the 20th December, in due course of mail.

Charleston, 13th December 1823.

Thomas Tenant, Esq., Baltimore:

Dear Sir:—I received, the day before yesterday, a letter from John Joseph Coiron, *via* Savannah (extract annexed), in which he requests me to have insurance effected on the Creole, on his account, and others, valued at ten thousand dollars, $10,000. The two offices here are afraid of their own shadow, and will not underwrite her. I must, therefore, request the favor of your having the insurance done, agreeable to his order annexed, and I will be answerable to you for the premium, &c. Good upland cotton, 14 cents, and declining. I have only to confirm my respects of the 3d inst. which I hope you have received before this. If the insurance cannot be done with you, please write to New York, to have the same effected. Expecting the pleasure of hearing from you soon, I am, very respectfully, your most obedient servant, John Stoney.

Duplicate. (Inclosed.)

Havre, 20th of October 1823.

Mr. John Stoney, Charleston:

Dear Sir:—I have yesterday requested you to have insured, on my

account, for the account of whom it may concern, ten thousand dollars on the brig Creole, of New Orleans, Captain Jacob Goodrich, from this port, back to New Orleans, touching at the Havana. The vessel and boats in the best order, having a roof on deck, round-house containing 14 berths, manned by 17 hands. You know the vessel. I have only to add, that I have made one thousand dollars' worth more of repairs and improvements on her. She is, now, a very convenient packet.

Extract—Thomas Tenant, Esq., of Baltimore, Maryland.

No. 1. John Stoney, Charleston, 13th Dec. 1823, and 20th Dec. (mail), order for insurance.

*On the 22d of December 1823, Mr. Tenant applied to the defendants, the Universal Insurance Company, for insurance, by the following written order for the same; and upon the contract thus made, the policy was, on the same day, filled up and executed. "I want insurance, for account of whom it may concern, on the brig Creole, Jacob Goodrich, master, at and from Havre de Grace to New Orleans, with liberty to touch and trade at Havana, against all risks; and in case of loss, the same to be paid to me. The vessel valued, independent of freight, to this sum, 10,000 dollars. The Creole was completely rebuilt and coppered at Charleston, S. C., in last summer, at great expense, and is now considered a remarkably fine vessel. She was, and I presume still is, owned by McLanahan & Bogart, and J. J. Coiron. The latter gentleman was on board her, and I presume is returning in her to New Orleans. He writes from Havre, under date of 20th October, but does not say when the brig would sail. She sails under a certificate of ownership. What will be the premium on the above risk? [*175

Baltimore, 22d Dec'r 1823. THOMAS TENANT.
8 per cent. by Richard G. Cox.
Accepted.—T. Tenant.

On the day of insurance was so made, Mr. Tenant had made application, in the same terms, to the Maryland, Chesapeake and Baltimore Insurance Companies, all of which declined the risk. The Phœnix Insurance Company, upon application, declined, on the ground, that the time of sailing was not ascertained; and the Patapsco Company were willing to take $5000, at five per cent. premium. The insurance effected by Mr. Tenant, was the only one made upon the Creole. No information relative to the loss of the Creole was received in Charleston, nor was her loss known there, until the 15th of December; on which day, the brig Panther arrived at Charleston, and about 2 o'clock, Mr. Stoney was informed thereof.

On the 19th of October 1823, by entries in the log-book of the Creole, at Havre, it was shown, that "the brig was getting ready for sea on the 20th; at 9 A. M., the pilot came on board, and warped out into the basin, made sail, hove to in the offing, for the captain, owner, and passengers and crew." At 10 A. M., they came off, and the pilot left the vessel. Tuesday, the 21st October 1823, following entry was made in the log-book:

*Tuesday, October 21st, 1823.

H.	K.	COURSES.	WINDS.	
1	7			Commences with fine breezes and pleasant weather. This day contains 12 hours, ending at noon, at the commencement of the naval account. That at midnight, Cape De Here bore, per compass, S. S. E., distant five leagues.
2	7			
3	7			
4	7			
5	7			
6	7			The detention of captain on shore, being in want of the national certificate of the owners of this brig, having been carried off by the former captain, Leonard Fash, who was dismissed. It was, therefore, necessary for the present captain to go through the requisite formalities, before the American consul, to prove the want of this important document.
7	7			
8	7			
9	7			
10	7			
11	7			
12	7			

The protest of Captain Goodrich, master of the Creole, stated, that the Creole sailed from the port of Havre de Grace, on the 21st of October 1823, bound for Havana, in Cuba; that on the 29th of December, the brig was wrecked, and lost on Sugar Key, while on the voyage; and himself, the passengers and crew, were picked up, and some of them carried to New Orleans, by the ship Trumbull, which ship arrived on the 17th of December 1823. The second mate of the Creole, and five passengers, among whom were Mr. Coiron and his family, left the ship Trumbull, off the Havana, in the small boat of the Creole, and were landed there, upon the same day. It also appeared, from the evidence on the part of the defendants, that the schooner Chase, Captain Richard S. Pinckney, master, sailed from Havana, for Charleston, from the 1st to the 3d of December 1823, and arrived at Charleston, on the 12th of the same month. Captain Pinckney stated, that he did not hear, in Havana, any report of the loss of the Creole. The schooner Eliza and Polly sailed from Havana, for Charleston, three hours before the Chase, and Captain Pinckney left Havana, to go on board the Chase, three hours after the sailing of the Eliza and Polly.

The following letter from Lemuel Taylor to Mr. Tenant, was also admitted as evidence:

Havre, June 28th, 1824.

My dear Sir:—Your favor of the 5th instant was received yesterday; and in reply, I have only to say, that I left Havana on the 3d of December last, in the schooner Chase, *Captain Pinckney, for Charleston; and
*177] that, some days previous to my departure from Havana, I see a person land on the wharf, a crowd seemed to get round him, and I see several taking him by the hand; I asked who he was; his name was mentioned, but I do not now recollect it, and that he was passenger in the brig Creole, from Havre, for Havana, and lost on some of the Keys; and that he was an old trader to Havana, from France, and had a large adventure on board. His name, and time of landing, can be ascertained at Havana, if wanted. I never heard the case mentioned on the passage, or in Charleston; and I am sure, I never thought or heard of it, after leaving Havana, till one day, while in Baltimore, Mr. Parker, speaking of losses, mentioned the Creole; and I observed, I heard of her loss, while in Havana; he then observed, they

should have to refuse to pay the loss, and that it would be one of the most painful disputes he ever had, as president, on account of the great respectability of yourself and Mr. Stoney, and mentioned something about dates. From that time, until I received your letter yesterday, I never heard or thought of the case. And I again repeat, that I am sure I did not hear the loss mentioned on the passage, or in Charleston, and that I see the passenger land as mentioned; and that his name and date can be furnished from Havana, if wanted. I am, dear Sir, very sincerely, your friend and servant,

LEMUEL TAYLOR.

It was also proved, that the northern mail closed, in Charleston, at ten o'clock in the morning, and generally arrived in Baltimore, in seven days, exclusive of the day the letter was mailed, but never at an earlier day; though sometimes in eight or nine days; that it generally arrived from half past one to two o'clock, and the letters of Mr. Tenant were never delivered by the penny-post to him, until after three o'clock, on the day of the arrival of the mail. The hours of business of the insurance companies in Baltimore, terminated, daily, at two o'clock. The fullest testimony was given of the high character of Mr. Stoney and Col. Tenant, to negative the possibility of a presumption of intentional fraud or concealment, on the part of either of those gentlemen, relative to the loss of the Creole.

The plaintiff, on the trial, tendered nine exceptions to the opinions of the circuit court, all of which are stated on the record; but as, in the opinion of this court, no notice is taken any other than the first exception; and the court justified the refusal of the judges of the circuit court to sign the bill of exceptions to any other than the first, it is deemed necessary to insert the first exception only. That exception is as follows:—

"The defendants, by their counsel, prayed the court to *instruct the jury, that, upon the whole evidence in the case, the plaintiffs are [*178 not entitled to recover, and the verdict of the jury ought to be for the defendants; which instruction and opinion the court accordingly gave; and thereupon, the plaintiffs, by their counsel, prayed leave to except, and that the court would sign and seal this, their bill of exceptions, which is accordingly done, this 10th day of January 1826.

G. DUVALL, (Seal.)
ELIAS GLENN," (Seal.)

The cause was brought by writ of error to this court; and was argued by *Taney* and *Jonathan Meredith*, for the plaintiffs in error; and by the *Attorney-General* of the United States, and *Ogden*, for the defendants.

For the *plaintiffs*.—Two general grounds of defence were taken at the trial below.—1. A concealment of material circumstances in effecting the insurance. 2. Want of proper diligence, in not countermanding the order for insurance, after the loss had occurred.

As to concealment. Four instances of concealment were charged.—1. The time of the sailing of the brig from Havre. 2. An offer for insurance was made at Charleston, and its rejection. 3. The arrival of the two vessels from Havana at Charleston. 4. The description of the brig in Coiron's letter of 20th October, "she is now a very convenient packet."

As to negligence. The want of due diligence, in not countermanding the

insurance, was charged.—1. By Coiron, in not communicating the loss to Stoney, while off Havana. 2. By Stoney, in not revoking the order to Tenant, on hearing of the loss on the 15th of December.

The general principle as to the doctrine of concealment is, that the assured is bound to make a full disclosure. The exceptions are: 1. As to facts which the insurer ought to know: 2. What he takes on himself the knowledge of: 3. Which he waives being informed of: 4. Which are not material, as not varying the contract. *Carter* v. *Boehme*, 3 Burr. 1905.

1. As to the charge of concealment of the time of sailing; Coiron could only state his expectation on this subject. Coiron was not bound to state a mere expectation of the *time of sailing; because, if he had, it would *179] not have bound him as a representation. Phil. on Ins. 83, and cases cited. There is no general rule on the subject. It depends, like every other species of concealment, on its materiality to the risk, and it was not material here. *Foley* v. *Moline*, 5 Taunt. 430; 1 Camp. 116; *Fort* v. *Lee*, 3 Taunt. 381; 1 Marsh. 483, 484; *Mackay* v. *Rhinelander*, 1 Johns. Cas. 408; 1 Eng. C. L. 144. The usage in Baltimore, is, to calculate the sailing on the day of the last advices in port; which the order in this case stated to be 20th of October. The duty of disclosure is confined to facts, not to the conclusion of other men from the same facts. Phil. 100; *Bell* v. *Bell*, 2 Camp. 479; 1 Park (7th ed.) 292; 2 Dane's Abr. 121. The usage in Baltimore corresponds with the legal principle; and that usage may be applied to this case. But if the laws were otherwise, still the question would be, was the alleged concealment material, or was it not, in this case?

2. Concealment, as to arrival of vessels from Havana. The answers are: 1. There is no proof that Mr. Stoney knew of their arrival: 2. Immaterial, because when they left Havana, the Creole could not be considered missing. *Littledale* v. *Dixon*, 4 Bos. & Pul. 151.

3. Concealment, as to the Creole's being a packet: 1st. It is not necessary to describe the particular construction of the vessel offered for insurance. *Hayward* v. *Rogers*, 1 East 590. 2d. General ground—not countermanding the insurance. The rule of law is, that if, after an order for insurance, a loss happens, it is the duty of the assured to countermand the order, where there is probable ground to believe, that, by the exercise of reasonable diligence, it will arrive in time. See *Fitzherbert* v. *Mather*, 1 T. R. 12; *Watson* v. *Delafield*, 2 Caines 224. Coiron might fairly have presumed, that one of the three letters, ordering insurance, might have reached Mr. Stoney, long before the loss, particularly the one *via* Savannah.

The questions in this cause are all unmixed questions of fact, and they were improperly decided by the court below. The language of the instruction is peremptory, not by way of advice as to the facts, and was considered as binding on the jury. The question of materiality as to concealment, is always a question exclusively for the jury. 1 Park (7th ed.) 289, 301, 314, 317; *Hull* v. *Cooper*, 14 East 479; 1 Maule & Selw. 16; *Littledale* v. *Dixon*, 4 Bos. & Pal. 151; *Mackay* v. *Rhinelander*, 1 Johns. Cas. 408; *Williams* v. *Delafield*, 2 *Caines 329; *New York Firemen Insurance *180] Company* v. *Walden*, 12 Johns. 513, and the cases cited in the opinion of Ch. J. KENT. A question of due diligence is also a question of fact. 1 Stark. Ev. 412, &c.; and see notes in *Moore* v. *Mourgue*, Cowp.

479; *Wake* v. *Atty*, 4 Taunt. 493; *Bateman* v. *Joseph*, 2 Camp. 461; *Reece* v. *Rigby*, 4 Barn. & Ald. 202; *Watson* v. *Delafield*, 2 Caines 224.

In reply to the argument of the counsel of the defendants, it was said; the question of seaworthiness is one of fact, and should have been submitted to the jury. As to the casual absence of the captain: Phil. 118. The brief delay occasioned by the want of a paper, was not material; and was not a deviation to avoid the policy. Phil. on Ins. 191, and cases cited. The court have the right to decide upon the law of the case, but the facts are exclusively for the jury. Nor is it admitted, that the court may advise upon matters of fact, in this case. The court assumed to determine the facts, and took them entirely from the jury. The practice under the laws of Maryland, is in conformity to the principles, claimed by the plaintiffs, and the court are prohibited by law from advising upon the facts. This course of proceeding has not been found inconvenient, nor has it been disapproved of by the people; and it may, therefore, be considered judicious.

Wirt and *Ogden*, for the defendants.—The facts of the case justified the opinion of the court, which is the subject of the first exception: the whole of the case rests upon that exception. Was the vessel seaworthy, at the time of her departure from Havre? The log-book shows, that she got under weigh, before the master and crew were on board. At the time of the sailing of the vessel insured, she must be properly manned for the voyage; she must be seaworthy, when the voyage commences. Phil. on Ins. 117; 3 Burr. 1419; 7 T. R. 705; 1 Ibid. 343, 186. 2d. There was such a deviation as to discharge the underwriters. Delay for documents a deviation. 1 Phil. 181; 1 Marsh. 499.

Upon the first exception, two questions present themselves.—1. Did the court err in giving the instruction? 2. Did the court invade the privileges of the jury?

The time of the sailing of the Creole, was not communicated by Coiron, nor did he write, as he ought, and could have done, on his arrival at Havana, after the loss of the brig; and his omission to do this, avoided the policy. Phil. 96; 2 Caines 224; 1 Johns. 150; 2 Ibid. 526; 9 Ibid. 32. Mr. Stoney *should have inquired, at Charleston, of those who arrived from Havana, for information about the Creole. [*181

The courts of the United States are not bound by the recent law of Maryland, in reference to the power of courts to advise or instruct the jury upon facts; the law continues unaffected by the statute. What is concealment, is now become a question of law. Marsh. 467. In all cases, when a vessel insured is to sail from abroad, the time of sailing is material. Upon authority, this was a case in which the court had a right to say the insured could not recover. Phil. on Ins. 468; 4 Bos. & Pul. 4; Marsh. 470; *McAndrews* v. *Bell*, 1 Esp. 373, 407; Phil. 104.

It is objected, that the court took upon themselves to decide the materiality of the fact; and that this, by the law of insurance, is exclusively for the jury. This is to say, the court can give no opinion or instruction on the materiality of the facts. This authority is frequently exercised. 6 Cranch 274, 339; 13 Johns. 334; 8 Mass. 336. Questions of fact, on which the law was to be settled, have been taken from the jury. What is notice of nonpayment of a bill of exchange, is no longer a question of fact. So, questions

of abandonment. 6 Cranch 338. Breaking up of a voyage, has become a question of law, "or it may be considered in the chrysalis state, part grub and part butterfly." Ibid. 71.

The point now to be settled by this court, is a question of political jurisprudence; and the court is called upon, first, to decide and establish a rule for the proceedings of the courts of the United States; and to say how far these courts can interfere in questions of fact. Is the inquiry one which cannot be touched, because the barrier is established, "that the law is for the court, and the fact is for the jury?" In England, the same principles prevail, and yet the courts have broken down this barrier. It is expedient, that courts should thus interfere. While it is entirely conceded, that the preservation of the trial by jury, in criminal cases, is essential; in civil cases, what would be the trial by jury, without the interference of courts, and "if the law was left to the shifting sands of jury jurisprudence?" It would be "a world without a sun"—like chaos, before the command, "Let there be light!"

Story, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Maryland. The original action was brought by the plaintiffs in error, against the defendants, upon a policy of insurance, *underwritten by the defendants, whereby "they caused Thomas Tenant, for whom it may concern, to be insured, lost or not lost, at and from Havre de Grace to New Orleans, with liberty to touch and trade at Havana," ten thousand dollars, upon brig Creole and appurtenances. The declaration averred the interest in the plaintiffs, and a total loss by the perils of the seas. The defendants pleaded the general issue; and upon the trial, after the whole evidence on both sides had been given in, the court, upon the prayer of the defendants' counsel, instructed the jury, "that upon the whole evidence in the case," as stated, the plaintiffs are not entitled to recover, and the verdict of the jury, "ought to be for the defendants." Nine different instructions were then prayed for on behalf of the plaintiffs, which were all refused by the court, upon the ground, that the opinion already given, disposed of the whole cause, upon its merits. If that opinion was correct, this refusal was entirely justifiable; for the court was under no obligation to discuss or decide other points, when the plaintiffs' case was already shown to possess a fatal defect.

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The general question, then, before this court, is upon the propriety of the instruction so given to the jury. A suggestion has been thrown out at the bar, that this instruction was not intended to be positive and absolute, but merely advisory to the jury; that it was not meant to take away the right of the jury to decide freely on the facts; but merely to offer for their consideration those views which the court had arrived at, and which it might at all times properly suggest to the jury. It is, doubtless, within the province of a court, in the exercise of its discretion, to sum up the facts in the case to the jury, and submit them, with the inferences of law deducible therefrom, to the free judgment of the jury. But care should be taken, in all such cases, to separate the law from the facts, and to leave the latter, in unequivocal terms, to the jury, as their true and peculiar province. We do not, however, understand, that the present instruction was, in fact, or was intended to be, merely in the nature of advice to the jury. It is couched in

the most absolute terms, and imposed an obligation upon the jury to find a verdict for the defendants. It assumed, there were no disputable facts or inferences, proper for the consideration of the jury upon the merits; and that upon the unquestioned facts, the plaintiffs had no legal right of recovery. It is in this view, that is open for the consideration of this court; and in this view, it will now be discussed, so it was discussed in the argument at the bar.

Four grounds have been presented to justify the opinion of the circuit court, which, it is said, are apparent from the record itself, and each of them is decisive upon the case. The first is, *the unseaworthiness of the ship, at the time when she broke ground at Havre, and commenced [*183 the homeward voyage, by reason of the master and a sufficient crew not being then on board. The second is, the laying off and on, near the port of Havre, after departure on the voyage, for several hours, waiting for the master to come on board; which, it is said, was an improper detention, and amounted to a deviation. The third is, the omission of Coiron to communicate to his agent, or other persons in America, the knowledge of his loss, by way of Havana; so as to countermand the order of insurance, which, it is contended, was a fatal omission of duty. The fourth is, the omission to mention the time of the vessel's sailing from Havre, in the letter of the 20th October, ordering the insurance; which, whether fraudulent or not, was a material concealment, and misled the underwriters, in the same manner, as if there had been a representation that the time of the sailing was uncertain.

It is to be considered, that these points do not come before this court, upon a motion for a new trial, after verdict, addressing itself to the sound discretion of the court. In such cases, the whole evidence is examined with minute care, and the inferences which a jury might properly draw from it, are adopted by the court itself. If, therefore, upon the whole case, justice has been done between the parties, and the verdict is substantially right, no new trial will be granted, although there may have been some mistake committed at the trial. The reason is, that the application is not matter of absolute right in the party, but rests in the judgment of the court, and is to be granted only when it is in furtherance of substantial justice. The case is far different, upon a writ of error, bringing the proceedings at the trial, by a bill of exceptions, to the cognisance of the appellate court. The directions of the court must then stand or fall, upon their own intrinsic propriety, as matters of law.

The first and second points appear to us, in the present case, to resolve themselves into matters of fact; and the facts are too imperfect and too general, to enable the court to draw any legal conclusion from them, either as to the seaworthiness or deviation. There is no doubt, that every ship must, at the commencement of the voyage insured, possess all the qualities of seaworthiness, and be navigated by a competent master and crew. But how is this court to arrive at the conclusion, that the brig Creole was not in that predicament, at the commencement of the present voyage? The argument assumes, that the ship ought not to have got under weigh, or proceeded into the offing, until the master, and all the crew necessary, not for that act, but for the entire voyage, were on board. If the law were so, we have no means of ascertaining what crew was *actually on board at the time; [*184 nor whether the voyage was absolutely intended to be commenced

on that day ; nor whether the departure was merely contingent and dependent upon the master's procuring the proper ship's papers, and the breaking ground, and standing off and on in the offing, were preparatory steps only for this purpose ; nor whether, for such purposes, the pilot and crew on board were not amply sufficient. But we are far from being satisfied, that the law has interposed any such positive rule, as the argument supposes. Seaworthiness in port, or for temporary purposes, such as mere change of position in harbor, or proceeding out of port, or lying in the offing, may be one thing ; and seaworthiness for a whole voyage, quite another. A policy on a ship, at and from a port, will attach, although the ship be, at the time, undergoing extensive repairs in port, so as, in a general sense, for the purposes of the whole voyage, to be utterly unseaworthy. What is a competent crew for the voyage ? at what time such crew should be on board ? what is proper pilot ground ? what is the course and usage of trade in relation to the master and crew being on board, when the ship breaks ground for the voyage ? are questions of fact, dependent upon nautical testimony ; and are incapable of being solved by a court, without assuming to itself the province of a jury, and judicially relying on its own skill in maritime affairs. In this view of the point, it is not necessary to rely on the doctrine of Lord Chief Justice Abbott, in *Weir* v. *Aberdeen*, 2 Barn. & Ald. 320, which goes the length of asserting, that if there be unseaworthiness, at the commencement of the voyage, and the defect is cured, before loss, a subsequent loss is recoverable under the policy. This is an important doctrine, and well worthy of discussion, whenever it comes directly in judgment.

The like answer may be given to the point of deviation. This court cannot intend, that here there was any unnecessary delay in the commencement or course of the voyage. The delay, for the want of papers, may have been entirely justifiable ; and indeed, may have conduced to an earlier inception of the voyage, by putting the ship in a situation to depart at a moment's warning. The usage of trade may be, generally, or, at least, in that particular port, to get the ship under weigh, as in this case, and wait in the offing, until the master is ready to come on board ; and that usage may be not only convenient and beneficial to all parties, but absolutely necessary, in given cases, from the nature of the port, and the winds and seasons. How then can this court undertake to decide, as matter of law, apparent upon the record, that any delay, admitting of such explanations, amounts to a deviation ?

*185] The next point is the omission of Coiron to communicate *information of the loss, to his agent, so as to countermand the order for insurance. The contract of insurance has been said to be a contract *uberrimæ fidei*, and the principles which govern it, are those of an enlightened moral policy. The underwriter must be presumed to act upon the belief, that the party procuring insurance, is not, at the time, in possession of any facts, material to the risk, which he does not disclose ; and that no known loss had occurred, which, by reasonable diligence, might have been communicated to him. If a party, having secret information of a loss, procures insurance, without disclosing it, it is a manifest fraud, which avoids the policy. If, knowing that his agent is about to procure insurance, he withholds the same information, for the purpose of misleading the underwriter, it is no less a fraud ; for, under such circumstances, the maxim

applies, *qui facit per alium, facit per se.* His own knowledge, in such a case, infects the act of his agent, in the same manner, and to the same extent, which the knowledge of the agent himself would do. And even if there be no intentional fraud, still, the underwriter has a right to a disclosure of all material facts, which it was in the power of the party to communicate, by ordinary means; and the omission is fatal to the insurance. The true principle deducible from the authorities on this subject is, that where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss; he ought to communicate it to the agent, as soon as, with due and reasonable diligence, it can be communicated, for the purpose of countermanding the order, or laying the circumstances before the underwriter. If he omits so to do, and by due and reasonable diligence, the information might have been communicated, so as to have countermanded the insurance, the policy is void. This doctrine is supported by the English as well as the American authorities, and particularly by *Watson* v. *Delafield* (1 Johns. 152; 2 Caines 224; 2 Johns. 526), where most of the early cases are collected, and commented upon, and it is well summed up by Mr. Phillips, in his treatise on insurance (p. 96). We do not go over the cases at large, because there is no controversy as to the general result. The only matter for observation is, whether the rule as to diligence, may not, in certain cases, be somewhat more strict, so as to require what, in *Andrew* v. *Marine Insurance Co.*, 9 Johns. 32, is called "extreme diligence;" or what, in *Watson* v. *Delafield*, is left open for discussion, as extreme diligence; the duty of communication, where the countermand may not only probably, but possibly, arrive in season. We think, however, that the principle of the rule requires only due and reasonable diligence, to be judged of under all the circumstances of *each particular case; and [*186
that the expressions thrown out in the cases above mentioned, were, not so much intended to point out a stricter rule, as to intimate, that there might be cases, in which a very prompt effort for communication might be fairly deemed not due and reasonable diligence, as where the loss takes place very near the port, at which the insurance is to be made, and the means of communication, by mail or otherwise, are regular or numerous; or where, from the lapse of time, and the date of the order for insurance, the party cannot but feel, that every moment's delay adds many chances in favor of the insurance being made before knowledge of the loss. Under such circumstances, in proportion as the delay would properly give rise to stronger suspicion of intentional concealment, the duty of prompt communication would naturally seem to press upon the party a more vigilant diligence. The case of *Wake* v. *Atty*, 4 Taunt. 494, lays down no new rule; but merely applies the old one to circumstances somewhat nice and peculiar in their presentation.

What constitutes due and reasonable diligence, in cases of this nature, is principally matter of fact for the consideration of a jury. When, indeed, all the facts are given, and the inference deducible therefrom, the question may resolve itself into a mere question of law. But it is, in general, impossible to lay down a fixed rule rule on the subject, from the almost infinite variety of circumstances which may affect its application; much must depend upon the means of communication, the situation of the parties, the knowledge of conveyances, the fair exercise of discretion, as to time, mode

and place of conveyance, the course of trade, and nature of the voyage, and the probable chances of the countermand being effectual. All these are matters of fit inquiry before the jury, and must, from their very nature, apply with very different force to different cases.

To bring these remarks home to the present case, there are certainly circumstances, which deserve the most careful consideration of a jury upon the point of due diligence. The loss occured at no great distance from the port of Havana; and if letters had been sent ashore at that port, there is strong reason to believe, that they could have reached Mr. Stoney, in time for a countermand, and at all events, if the loss had been made generally public at the Havana, the news might have reached Baltimore, before the insurance. But the record does not contain facts enough to establish a want of reasonable diligence on the part of Mr. Coiron. It is nowhere stated, that he was in a situation to make such a communication, or that he knew of the mate and crew being landed, or that vessels were about to depart for the United States from Havana. Nor is it shown, what were the means and facilities of communication, *in the course of trade and voyages, between that port and the United States, regular or irregular, from which we might deduce his knowledge of these means and facilities. Nor is it shown, that the parties contemplated a stoppage off the Havana, so as to put him upon diligence in writing; nor that this mode of conveyance of news was more certain, or quicker than others, which might have been resorted to, in the ordinary course of the voyage of the ship Trumbull to New Orleans. We may, indeed, conjecture, how these matters were, by general surmise or personal information; but judicially we can know nothing beyond what the record presents of the facts. Yet, all these circumstances must or may be material to the point of due diligence. In their very essence, they are matters of fact, and not conclusions of law.

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The opinion, therefore, to which the learned counsel wish to conduct us, that the policy is void, because there has been gross negligence, in not countermanding the order for insurance, is one, to which, upon this record, we cannot judicially arrive. It would be assuming the rights and exercising the functions of the jury, upon matters not proved, or wholly indeterminate in their own nature. This ground for maintaining the instruction of the circuit court, must then be abandoned.

The next point is the omission, in the letter of the 20th October, of any mention of the time of the vessel's sailing. This is put to the court in a double aspect; first, as the concealment of a material fact, and secondly, connecting the language of the letter with the accompanying circumstances, as a virtual representation that the vessel was not then ready or about to sail on the voyage. Whether this omission in the letter was merely accidental, or with design to mislead the underwriters, and whether, if so designed, it had the effect (which upon the testimony in the case, would be a matter of serious doubt), it is now necessary to inquire. If accidental, it would not prejudice the insurance, unless material to the risk; if fraudulently intended, it might not, in fact, mislead; and whether fraudulent or not, was matter of fact for the jury. That there was no virtual representation as to the time of sailing, seems to us conclusively established, by the language of the letter of Colonel Tenant, requesting insurance. He there says, "he (Coiron) writes from Havre, under date of the 20th October; but

does not say, when the brig would sail." Now, this letter, in direct terms, negatives any intention to represent any particular time of sailing. It leaves the question freely open to the underwriters, either for further inquiry, or for any presumptions most unfavorable to the assured. The natural result ought to be, that the underwriters should calculate the time of sailing as very *near the date of the letter, so as to ask a premium equal to the widest range of risk, from the intermediate lapse of time. [*188 The underwriters had no right to presume, that the ship would sail at some future indefinite period, and to bind the assured to that presumption. The letter told them, in effect, that the assured would bind themselves to no representation as to the time of sailing; but asked for insurance, whenever the ship might sail, be it on that day, or any future day. In this view, the point as to representation vanishes; and the like consideration would, in a great measure, dispose of that of concealment.

But the question, as to this latter point, has been argued at the bar, upon much more broad and comprehensive principles; upon which it seems proper for this court to express an opinion, especially, as this case may again undergo the consideration of a jury. It is admitted, that a concealment, to be fatal to the insurance, must be of facts material to the risk: and, certainly, of this doctrine, there cannot, at this time, be any legal doubt. It is further admitted (and so is the unequivocal language of the authorities), that generally, the materiality of the concealment is a question of fact for the jury. But it is said, that there are exceptions from the rule; and that concealment of the time of sailing belongs to the class of exceptions, and is a question of law for the exclusive decision of the court. It is necessary to maintain this position in its full extent, to extricate the present case from its pressing difficulties; and if this shall be successfully made out, it will still remain to be decided, whether the facts stated in the record, are sufficient to enable the court to pronounce the conclusion of law.

That the time of sailing is often very material to the risk, cannot be denied; that it is always so, is a proposition that will scarcely be asserted, and certainly, has never yet been successfully maintained. How far it is so, must essentially depend upon the nature and length of the voyage, the season of the year, the prevalence of the winds, the conformation of the coasts, the usages of trade, as to navigation, and touching and staying at port, the objects of the enterprise and other circumstances, political and otherwise, which may retard or advance the general progress of the voyage. The material ingredients of all such inquiries, are mixed up with nautical skill, information and experience; and are to be ascertained in part, upon the testimony of maritime persons, and are in no sense judicially cognisable as matter of law. The ultimate fact itself, which is the test of materiality, that is, whether the risk be increased, so as to enhance the premium, is, in many cases, an inquiry dependent upon the judgment of underwriters, and others who are conversant with the subject of insurance. In this very case, *the introduction of testimony was indispensable, to show the usual length of the voyage; and it was quite questionable, whether, in a [*189 just sense, the vessel could be deemed a missing vessel, at the time of the insurance. Upon such a point, it would not be a matter of surprise, if different underwriters should arrive at different results. In the nature of the inquiry, then, there is nothing to distinguish the time of sailing of the

ship from any other fact, the representation of concealment of which is supposed to be material to the risk. It must still be resolved into the same elements.

It has been said, that there is no case in which the materiality of the time of sailing has been doubted, where the ship was abroad at the time. Whether this be so or not, it is not important to ascertain, unless it could be universally affirmed (which we think it cannot), that the time of sailing abroad, must always be material to the risk. If it may not always be material, the question, whether it be so in the particular case, is to be decided upon its own circumstances. Indeed, we cannot perceive, how the place of sailing, whether from a home or foreign port, can make any difference in the principle. The time of sailing from a home port, may be material to the risk; and if so, the concealment of it will vitiate the policy; but whether material or not, opens the same inquisition into facts, as governs in cases of foreign ports. There may be less intricacy in conducting it, or less difficulty in arriving at a proper conclusion; but it is essentially the same process. The case of *Fort* v. *Lee*, 3 Taunt. 381, did not proceed upon the ground, that the time of sailing from a home port was never material to be communicated; but that, under the circumstances of that case, the underwriter, if he wished to know whether the ship had sailed, ought to have made inquiry. It was a mere application to the discretion of the court to grant a new trial, where the plaintiff had obtained a verdict, and there was no pretence of any misdirection at the trial. In *Foley* v. *Moline*, 5 Taunt. 430, the court said, that there was no pretence for the proposition, as a general rule, that it was necessary to communicate to the underwriters, whether the vessels on which an insurance was proposed, had sailed or not. There might be circumstances, that would render that fact highly material; as if the ship were a missing ship, or out of time. So that here, a denial of the proposition now asserted before us was, in the most explicit terms, avowed and acted on.

Two *nisi prius* cases before Lord Mansfield have been relied on, to establish the supposed exception to the general rule of cases, relative to the time of the sailing of the ship, in which it is argued, that his lordship undertook to decide the point of materiality, as matter of law, and to give it as a rule to the *jury. It is proper to remark, that little stress ought to be laid upon general expressions of this sort by judges, in the course of trials. Where the facts are not disputed, the judge often suggests, in a strong and pointed manner, his opinion as to the materiality of the concealment, and his leading opinion of the conclusion to which facts ought to conduct the jury. This ought not to be deemed an intentional withdrawal of the facts, or the inferences deducible therefrom, from the cognisance of the jury; but rather as an expression of opinion, addressed to the discretion of counsel, whether it would be worth while to proceed further in the cause. And the like expression, in summing up any cause to the jury, must be understood by them merely as a strong exposition of the facts, not designed to overrule their verdict, but to assist them in forming it. And there is the less objection to this course, in the English practice; because, if the summing up has had an undue influence, the mistake is put right, by a new trial, upon an application to the discretion of the whole court. This is so familiarly known, that it needs only to be stated, to be at once admitted. It

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is with reference to these considerations, that the cases above alluded to should be examined.

The first is *Ratcliffe* v. *Shoolbred*, cited from Marsh. on Ins. p. 349. It would certainly seem, at the first view, that Lord MANSFIELD did decide that concealment was material. But even by Mr. Marshall's report, brief as it is, it by no means appears that the materiality was in question at the trial, but only the effect of the concealment, in avoiding the policy. The same case is reported more fully and more accurately by Mr. Park, on Insurance, p. 290, where it is perfectly clear, that the point of materiality was left to the jury. "The question is (said his lordship), whether this be one of those cases which is affected by misrepresentation or concealment. If the plaintiffs concealed any material part of the information they received, it is a fraud, and the insurers are not liable;" and the jury found a verdict for the defendant, under this direction. So that the point was left fully open to them.

The next case is *Fillis* v. *Brutton*, cited in Marsh. on Ins. 348, and reported also in Park on Ins. 292. The insurance was on a ship from Plymouth to Bristol; and it appeared, that the broker's instructions stated, that the ship was ready to sail on the 24th of December, when, in fact, she had sailed on the 23d. Mr. Marshall states, that Lord MANSFIELD ruled, that this was material concealment and misrepresentation; but Mr. Park, from whose work the report is professedly taken, uses no such expression. His words are, Lord MANSFIELD said, this was a material concealment and misrepresentation; and the jury hesitating, he proceeded to expound to *them the general principles of law on the subject of misrepresentation and concealment; and he seems to have taken it for granted, [*191 that the misrepresentation was material (as from the short duration of such a voyage might naturally be inferred), and that the only point was, whether the ship had sailed or not. The same explanation disposes of the case of *McAndrews* v. *Bell*. (1 Esp. 373.) Indeed, in any other view, it would be impossible to reconcile these decisions with the judgment pronounced by Lord MANSFIELD, and other judges, upon more mature deliberation, when causes have been brought before them in bank. Take, for instance, what fell from the court upon the motion for a new trial, in *Macdowall* v. *Fraser*, 1 Doug. 247, 260; *Shirley* v. *Wilkinson*, Ibid. 293; *Hodgson* v. *Richardson*, 1 W. Bl. 289; *Littledale* v. *Dixon*, 4 Bos. & Pul. 151; and *Hull* v. *Cooper*, 14 East 479. In the case of the *Maryland Insurance Company* v. *Ruden's Administrators*, 6 Cranch 338, this court expressed the opinion, that "it was well established, that the operation of any concealment on the policy depends on its materiality to the risk, and that this materiality is a subject for the consideration of a jury." That opinion was acted upon by the court of errors of New York, in the case of the *New York Fireman Insurance Company* v. *Walden*, 12 Johns. 513, where Mr. Chancellor KENT, in a very elaborate judgment, reviewed the authorities, and laid down the doctrine in a manner that merits our entire approbation.

We think, then, that the exception insisted upon at the bar, cannot, upon principle or authority, be supported; and that the question of materiality of the time of the sailing of the ship to the risk, is a question for the jury, under the direction of the court, as in other cases. The court may aid the judgment of the jury, by an exposition of the nature, bearing and pressure

of the facts; but it has no right to supersede the exercise of that judgment, and to direct an absolute verdict, as upon a contested matter of fact, resolving itself into a mere point of law. If, indeed, the rule were otherwise, the facts in the record are not so full as to enable the court to reach the desired conclusion. There is not sufficient matter upon which we could positively say, that the time of sailing was, in this case, necessarily material to the risk.

For these reasons, the judgment of the circuit court must be reversed, and the cause remanded, with directions to award a *venire facias de novo.*

THIS case came on, &c.: On consideration whereof, it is considered by this court, that there is error in the opinion of the circuit court, given to the *192] jury upon the prayer of the *defendants' counsel—that upon the whole evidence in the case, as stated in the record, the plaintiffs are not entitled to recover, and that the verdict of the jury ought to be for the defendant; that opinion having withdrawn from the proper consideration of the jury, matters of fact in controversy between the parties. It is, therefore, further considered and adjudged, that the judgment of the said circuit court, in this case, be and the same is hereby reversed; and that the cause be remanded to the said circuit court, with directions to award a *venire facias de novo.*

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*193] *CORNELIUS COMEGYS and ANDREW PETTIT, Plaintiffs in error, *v.* AMBROSE VASSE, Defendant in error.

Spanish treaty.—Assignable claims.—Effect of abandonment to underwriters.

The object of the treaty with Spain, which ceded Florida to the United States, dated 22d May 1819, was to invest the commissioners with full power and authority to receive, examine and decide upon the amount and validity of asserted claims upon Spain for damages and injuries. Their decision, within the scope of this authority, is conclusive and final; and is not re-examinable; the parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction; a rejected claim cannot be brought again under review, in any judicial tribunal. But it does not naturally follow, that this authority extends to adjust all conflicting rights, of different citizens, to the the fund so awarded. The commissioners are to look to the original claim for damages and injuries against Spain itself; and it is wholly immaterial, who is the legal or equitable owner of the claim, provided he be an American citizen. p. 212.

After the validity and amount of the claim has been ascertained by the award of the commissioners, the rights of the claimant to the fund, which has passed into his hands, and those of others, are left to the ordinary course of judicial proceedings, in the established courts of justice. p. 212.

In general, it may be affirmed, that mere personal torts, which die with the party, and do not survive to his personal representatives, are incapable of passing by assignment; and that vested rights, *ad rem* and *in re*—possibilities, coupled with an interest and claim, growing out of, and adhering to property—may pass by assignment.[1] p. 213.

The law gives to the act of abandonment to underwriters, when accepted, all the effects which the most accurately drawn assignment would accomplish; the underwriter then stands in the place of the assured, and becomes legally entitled to all that can be recovered from destruction. p. 214.

It is clear, that the right to compensation for damages and injuries, to which citizens of the

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[1] Erwin *v.* United States, 97 U. S. 396. A right of action for a tort is not assignable, by operation of law, or otherwise. Ware *v.* Brown, 2 Bond 267.