

CIRCUIT COURT OF THE UNITED STATES,
PENNSYLVANIA DISTRICT.

APRIL TERM, 1799.

Present—IREDELL and PETERS, Justices.

POLLOCK *et al.* v. DONALDSON.

Premium of insurance.

Where insurance is effected on the cargo of a vessel, in port and at sea, for a certain term, *as interest shall appear*, the amount of the premium is to be regulated by the actual value of the cargo on board, from time to time, during the term insured.

THIS was an action brought by the underwriters, to recover a premium of fifteen per cent. on a policy of insurance, upon the cargo of the brig Pilgrim.

The policy was dated the 17th of November 1794, and contained the following clauses, to wit, "lost or not lost, in port and at sea, and at all times and places, for the space of six calendar months, from the 8th day of September 1794, to the 8th day of March 1795, &c."—"beginning the adventure upon the said goods and merchandises from the loading thereof on board the said vessel, the 8th of September 1794, and so shall continue and endure until the 8th of March 1795, and continue at the same rate of premium, until her next arrival at Philadelphia, &c."—"The said goods and merchandises for so much as concerns the assured and assurers in this policy, are and shall be valued *as interest shall appear*."—"The vessel and cargo warranted American property."

The facts were these: The brig was loaded at Hamburg, on the 8th of September 1794, with a cargo valued at \$5333, and sailed for the port of Philadelphia. On her passage, *about the 14th of September, she was stopped by a French privateer and carried into Dunkirk, where ^[*511] the supercargo was permitted to sell the cargo, and to receive the proceeds on account of the owner. She then took on board a small cargo, valued at about \$1500, and in the beginning of October, sailed from Dunkirk, bound to Hamburg, but was taken on the passage by a British privateer, and carried into Falmouth, where an average loss was suffered, to the amount of 90*l.* sterling. After a few days' detention and examination, the brig was discharged, pursued her course to Hamburg, and arrived there towards the

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end of October. Having discharged her lading at Hamburg, she took on board another cargo to the amount of \$2500; and sailed from that port, in December, bound to Philadelphia; and arrived here in February 1795.

The cause was tried by a special jury; when the plaintiffs contended, that they were entitled to the premium of fifteen per cent., on the first cargo shipped at Hamburg, valued at \$5333, under the words of the policy, insuring "in port and at sea, and at all times and places, for the space of six calendar months, &c.," without regard to any change or diminution of the value of the cargo, during the term of the insurance. But the defendant insisted, that those words were controlled by the provision, that the cargo should be valued "*as interest shall appear*," and as he, in case of a loss, would only have been entitled to recover an indemnity co-extensive with the value of the cargo actually lost, the underwriters could not recover a premium for more than the amount of their risk.

The testimony of Mr. Isaac Wharton, an experienced insurance-broker, proved, that the defendant's construction of the policy was conformable to the general sense and usage of merchants: And it was accordingly adopted by THE COURT and jury—the verdict allowing the premium of fifteen per cent. upon the value of the different carges, for the time that they were respectively on board the brig; and deducting the amount of the average loss.

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Continuance.

A cause will be continued, where the plaintiff has not answered a bill of discovery, filed against him by the defendant.

THIS cause being marked for trial, *Ingersoll* moved for a continuance, on the ground, that a bill in equity had been filed by his client, the defendant, in the circuit court for the New York district, calling for a discovery and account, in relation to the matters in controversy in the present suit; but that the plaintiff here had refused to file an answer to the bill, in consequence of which, an attachment had issued against him. After some remarks by *Rawle*, in opposition to the continuance—

IREDELL, Justice.—Though, on general grounds, I should be very reluctant to agree to the continuance of a cause of this description, which, in a variety of shapes, has been long depending, I think, the particular circumstances that have been stated, call for the interposition of the court. The disclosure of certain facts that depend on the knowledge of the plaintiff, is deemed essential to a fair decision; if the disclosure will not injure him, he can have no reason for refusing to make it; while his refusal to answer the bill in equity filed in New York, at the same time that he presses for a trial of the common-law suit here, raises a strong presumption against him. Under this impression, therefore, the continuance is now allowed; and we shall be disposed to hear favorably every future application to postpone a trial, until the plaintiff has filed a satisfactory answer to the bill in equity.