ceeds of the tobacco shipped by the brig Struggle, as will enable the plaintiff to support this action in his own name; and in instructing the jury that such an assignment, connected with the character of the consignment of the cargo of the Struggle to the defendants, was sufficient to enable the plaintiff to support this action in his own name. And there was error also in the circuit court, in refusing to instruct the jury, that the invoice, letter of advice, and bill of leading, taken together, do *not constitute such a special appropriation of the cargo of the brig Struggle, or of the proceeds thereof, to the order of Thomas H. Fletcher, as will enable his assignee in this case to maintain this action in his own name upon the assignment on May 21st, 1819. It is, therefore, considered by the court here, that for the errors aforesaid, the judgment of the circuit court be and the same is hereby reversed; and that the cause be and the same is hereby remanded to the circuit court, with directions to award a *venire facias de novo*. [*603

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*Patapsco Insurance Company, Plaintiffs in error, *v.* John Southgate and Wright Southgate, Defendants in error. [*604

Depositions de bene esse.—Subpœna.—Marine insurance.—Total loss. Sale by master.—Abandonment.

In the caption of a deposition, taken before the mayor of Norfolk, to be used in a cause depending, and afterwards tried, in the circuit court of the United States, held in Baltimore, the mayor stated the witness "to be a resident in Norfolk;" and in his certificate, he stated, that the reason for taking the deposition was, "that the witness lives at a greater distance than one hundred miles from the place of trial, to wit, in the borough of Norfolk." It was sufficiently shown by the certificate, at least, *primâ facie*, that the witness lived at a greater distance than one hundred miles from the place of trial.[1]

The provisions of the 13th section of the act of congress, entitled, "an act to establish the judicial courts of the United States," which relate to the taking of depositions of witnesses, whose testimony shall be necessary in any civil cause depending in any district in the courts of the United States, who reside at a greater distance than one hundred miles from the place of trial, are not confined to depositions taken within the district where the court is held.

In all cases where, under the authority of the act of congress, a deposition of a witness is taken *de bene esse*, except where the witness lives at a greater distance from the place of trial than one hundred miles, it is incumbent on the party for whom the deposition is taken, to show that the disability of the witness to attend continues; the disability being supposed temporary, and the only impediment to a compulsory attendance. The act declares expressly, that unless this disability shall be made to appear on the trial, such deposition shall not be admitted, or used on the trial; this inhibition does not extend to the deposition of a witness living at a greater distance from the place of trial than one hundred miles; he being considered beyond a compulsory attendance.

The deposition of a witness living beyond one hundred miles from the place of trial, may not always be absolute; for the party against whom it is to be used, may prove the witness has removed within the reach of a *subpœna*, after the deposition was taken; and if that fact was known to the party, he would be bound to procure his personal attendance. The *onus probandi* thus would rest upon the party opposing the admission of the deposition in evidence; for a witness whose deposition is taken under such circumstances, it is not necessary to issue a *subpœna;* it would be a useless act; the witness could not be compelled to attend personally.[2]

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[1] Rules for taking a deposition *de bene esse*, and when it may be read in evidence. Harris *v.* Wall, 7 How. 693. The magistrate must state in his certificate the reason for taking the deposition; that the witness is about to "depart the state," is not sufficient. Id.

[2] This overrules Brown *v.* Galloway, Pet. C. C. 291; Penn *v.* Ingraham, 2 W. C. C. 487; Banert *v.* Day, 3 Id. 243; Pettibone *v.* Derringer, 4 Id. 215.

By the act of 2d March 1793, *subpœnas* for witnesses may run into districts other than where the court is sitting; provided, the witness does not live at a greater distance than one hundred miles from the place of holding the court.

Damages to a vessel, by any of the perils of the sea, on the voyage insured, which could not be repaired at the port to which such vessel proceeded after the injury, without an expenditure of money to an amount exceeding half the value of the vessel at that port, after such repairs, constitute a total loss.[1]

The rule laid down in the books is general, that the value of the vessel, at the time of the accident, is the true basis of calculation; and if so, it necessarily follows, that it must be the value at the *605] place where the accident occurs. The *sale is not conclusive with respect to such value the question is open for other evidence, if any suspicion of fraud or misconduct rest upon the transaction.[2]

As a general proposition, there can be no doubt, that the injury to the vessel may be so great as to justify a sale by the master; there must be this implied authority in the master, from the nature of the case; he, from necessity, becomes the agent of both parties, and is bound in good faith to act for the benefit of all concerned; and the underwriter must answer for the consequences, because it is within his contract of indemnity.

There must be a necessity for a sale of the vessel, and good faith in the master in making it and the necessity is not to be inferred, from the fact of the sale in good faith; but must be determined from the circumstances. The professional skill, the due and proper diligence of the master, his opinion of the necessity, and the benefit that would result from the sale to all concerned, would not justify it; unless the circumstances under which the vessel was placed, rendered the sale necessary, in the opinion of the jury.[3]

There is some diversity of opinion among the elementary writers, and in the adjudged cases, as to what will constitute a valid abandonment; it seems, however, agreed, that no particular form is necessary; nor is it indispensable that it should be in writing. But in whatever form it is made, it ought to be explicit; and not left open as matter of inference, from some equivocal acts; the assured must yield up to the underwriter all his right, title and interest in the subject insured; for the abandonment, when properly made, operates as a transfer of the property to the underwriter, and gives him a title to it, or what remains of it, as far as it was covered by the policy.

The consul of the United States, at the port where a vessel was sold, in consequence of her having, in the opinion of the master, sustained damages, the repairs of which would have cost more than half her value at that port, declared in the protest of the master, made at his request, that the master abandoned the vessel, &c., to the underwriters; this protest, as soon as it was received by the assured, the owners of the vessel, was sent to the underwriters; and the owners wrote, at the same time, that they would forward a statement of the loss, with the necessary vouchers, and they soon afterwards did forward the further proofs, and a statement of the loss to them; this constituted a valid abandonment.

Error to the Circuit Court of Maryland. The defendants in error instituted an action against the Patapsco Insurance Company, in the circuit court of Maryland, on a policy of insurance on the schooner Frances, Seaward, master, from Curaçoa or a port of departure in the West Indies, or on the main, to a port in the United States.

On her voyage from Carthagena to Norfolk, the Frances encountered a severe gale, and sustained such injuries as made it necessary for her, after two days, to put back to Carthagena; on entering that port, she struck several times on a sand bar; and on examination, it was found that she required considerable repairs in her hull and rigging. She was placed, by

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[1] It is the state of facts existing at the time of the abandonment for a total loss, which constitutes the criterion of its validity; if valid, when made, the rights of the parties are definitively fixed, and cannot be changed by subsequent events. Bradlie *v.* Maryland Ins. Co., 12 Pet. 398.

[2] See The Star of Hope, 9 Wall. 203, 235.

[3] S. P. The Amelie, 6 Wall. 18.

the *master under the care of the American consul, at Carthagena; and was sold by him, at private sale, to Evans, for $140, with the consent of the master. Evans afterwards sold the Frances to Palmer for $200. She was repaired by Palmer, and returned to the United States. The plaintiffs claimed a total loss from the underwriters.

On the trial in the circuit court, the defendants took exceptions to the opinions of the court, on points submitted by the plaintiffs and by the defendants, for instructions to the jury; which, with the facts of the case, are fully stated in the opinion of the court.

The deposition of Thomas Evans was offered in evidence by the plaintiffs below; and after exceptions to its legality by the defendants, was admitted by the court. The deposition was taken, *ex parte*, at Norfolk, before the mayor of that place. In the caption, the mayor stated the witness to be a resident in Norfolk; and in his certificate, declared the reason for taking it to be, that the witness "lives at a greater distance than one hundred miles from the place of trial, to wit, at the borough Norfolk." No *subpœna* was issued for Evans, and no other evidence was offered of the place of his residence, than the caption of the deposition, in the handwriting of the mayor of Norfolk.

The jury having found a verdict for the plaintiff in the circuit court, the defendants prosecuted this writ of error.

The case was argued by *Mayer* and *Wirt*, for the plaintiffs in error; and by *Stewart* and *Taney*, for the defendants.

For the *plaintiffs* in error, it was contended:—The deposition, *ex parte*, of Evans, ought not to have been admitted in evidence; because the act of congress allowing depositions of this kind is not to be construed to extend to depositions taken at a place, to which a *subpœna* from the court of trial will not reach. Only depositions *de bene esse* may be taken under the act; and *de bene esse*, *ex vi termini*, imports a power, by ordinary common-law process, to obtain the evidence; and a *subpœna* is that ordinary means. 3 W. C. C. 415, 529. At least, no such deposition can be read, unless due diligence be first used to obtain the attendance of the *witness at the [*607 trial, or his evidence under commission, according to the rules of the court. 2 W. C. C. 487; 4 Ibid. 215; Pet. C. C. 291. Nothing to this effect was in proof at the trial.

No evidence was offered to show that the vessel was injured by any of the accidents insured against injury, beyond one-half of her value. The underwriters do not insure the goodness of the ship; and the deficiencies which form the ground of the claim, must be traced to the disaster which has befallen the vessel, within the perils of the policy, and must be proved and measured by regular details and estimates. *Cazalet* v. *St. Barbe*, 1 T. R. 190; 1 Johns. 336; *Fontaine* v. *Phœnix Insurance Company*, 11 Ibid. 295.

It may also be questioned, whether, in the estimating of the injury to be beyond one-half, the customary rule must not be observed, of deducting from the repairs one-third on account of the new work. 3 Mason 75; 2 Caines Cas. 157. It is true, the insurer, if the abandonment be valid, will have the vessel, and consequently, the benefit of the new work; but the very inquiry here is, whether the abandonment be well grounded; and that is to be learnt only by seeing what injury is really sustained. That necessarily

refers us to the value of the old work, in its competent condition, at the commencement of the risk; nothing more being incumbent on the insurer, by his contract, than to replace the insured property in its original state, either specifically or by a pecuniary equivalent.

It is not settled, to what place the estimate of the vessel's worth, when supposed to be repaired, is to be referred; when the ascertainment is making, whether she will be worth repairing. It is to be presumed, her value, in her improved condition at her home port, is most just; because, there the vessel is to be available to the owners, for sale or enterprise; and the natural occupation of a vessel, to carry merchandise, will be supposed to be the object of the owners in having her at a foreign port, and not the sale of the vessel. 11 Johns. 295; 2 Caines Cas. 157; 2 Mason 71. All analogy from the settlement of the contribution, in general averages, authorizes the present construction. Marsh. Ins. 621, 628.

But an abandonment was necessary, for sustaining a claim of total loss admitting the vessel to have been deteriorated by *the disasters, *608] beyond one-half of her value. Phil. Ins. 383; 1 T. R. 611. There was neither an actual nor constructive abandonment here. An abandonment must be explicit and absolute, and must use terms of cession, that, by clear intent, transfer the property in the thing insured. A mere claim for total loss will not avail as an abandonment. *Parmeter* v. *Toddhunter*, 1 Camp. 541; *Turner* v. *Edwards*, 12 East 488; Phil. Ins. 447; Marsh. Ins. 600. The protest does not amount to an abandonment in this case, though transmitted by the assured, and containing words of abandonment in the close of it; because not made by the persons having the property in the thing insured, and because the assured transmitted it to the underwriters only as a protest, or detail of the circumstances of the loss. If there be evidence of abandonment, it is, nevertheless, necessary, under the policy in this cause, to show notice of an intention to abandon. The abandonment and the notice, it has been decided in the *Columbian Insurance Company* v. *Catlett*, 12 Wheat. 393, may operate by one instrument. But the instrument should contain words of a prospective import. That is not the case in any of the written acts of the parties here.

If there was an abandonment, yet the state of the vessel must be regarded, as the vessel was at the time of the abandonment. She had then been repaired, at a trivial expense; and, the sale being a nullity, she was in the hands of the insurers, in point of law. Though supposed once to be irretrievably injured, she was not so then; and her repairs having proved to be practicable, at so small a sum, demonstrated that she never was actually thus injured. In reference to this point, on the time of abandoning, the case must be treated in analogy to that of a capture and re-capture.

Only extreme necessity will justify a sale by the master; and that necessity must be found by the jury to have existed; and the jury, and not the master, is the arbiter on that issue of necessity, upon a view of all the circumstances of the case. The honest discretion of the master is not the sanction here; however that discretion may be conclusive as to all proceedings within the sphere of his ordinary business as master. A sale is, however, without those limits; and must be justified by a *superadded *609] agency, which only the force of circumstances can confer upon him. It is not enough, therefore, that the master shall appear to the jury to have

had an honest view to his owner's interest, in a sale of the ship; but the jury must find, that, according to the aspect and state of things, the sale was, in fact, for the owner's interest, because of the necessity to resort to that measure. It must be an interest created by the exigency, and not produced by any collateral circumstances beyond those connected with the restoration of the vessel. All the authorities may, in this view, be easily explained and reconciled, where on this head they use the terms, "for the best of all concerned;" "for the benefit of the concerned;" "as a prudent man, uninsured, would do;" as applied to the master's discretionary sale of the vessel. All these rules come round to the principle of the necessity, within which, strictly, the question of the owner's interest on the emergency lies. What is a case of necessity depends on the circumstances and many varieties of accident; but a necessity, in reference to a sale, may be said to be the state of things which, from actual ascertainment, where practicable, or from appearances, where they can alone be consulted, requires instant action; and where there is a choice only between the certain or probable loss of the vessel, and the saving of so much of her as the proceeds of a sale may yield.

Every case of necessity must exhibit a prospective destruction, or an injury already sustained, to a degree irreparable, or demonstrating, in connection with the expense, that repairs would be an idle waste of money. The first instance is an example of mere jeopardy; the latter is the case that should now be before the court to entitle the assured to succeed. The case of jeopardy is to be found by the jury, from the threatening perils of the ship; the case of sustained injury, from the fact of her actual condition, and the well-ascertained expense of repairs, and the value of the vessel, after repairs, determined upon some sure *data*. *Hayman* v. *Molton*, 5 Esp. 67; *Reid* v. *Darby*, 19 East 343; *Milles* v. *Fletcher*, 1 Doug. 231; *Read* v. *Bonham*, 3 Brod. & Bing. 147; *Scull* v. *Briddle*, 2 W. C. C. 150; *Queen* v. *Union Insurance Company*, 2 Ibid. 331; *Church* v. *Marine Insurance Company*, 1 Mason 341; *Roberson* v. *Clarke*, 1 Bing. 445; *Ludlow* v. *Columbian Insurance Company*, 1 *Johns. 336; Phil. Ins. 395, 408, 409, 412; Marsh. Ins. 580; *Fontaine* v. *Phœnix Insurance Company*, [*610 11 Johns. 295; *Idle* v. *Royal Exch. Ass. Company*, 3 Moore 115, and note of this case in 7 Eng. C. L. 386; *Green* v. *Royal Exch. Ass. Company*, 6 Taunt. 71; 3 Kent's Com. 134; *Plantamour* v. *Staples*, 1 T. R. 611, note; as to which case, J. BULLER'S words are misquoted in Marsh. Ins 582, and in *Idle* v. *Royal Exch. Ass. Company*, 3 Moore 115.

After an abandonment once effectually made, the master becomes the agent of the insurers. For the purposes of this case, it may be admitted, that in that event he is exclusively their agent. And the books must be understood to refer to their master's agency, after a valid abandonment, where sometimes they speak of his discretion as agent. Phil. Ins. 468, 471; Marsh. Ins. 615, a; 2 W. C. C. 61; 6 Cranch 272. And the clause in the policies which authorized the insurer and his agents to "labor, travail, &c., without prejudice to the insurance," refers only to the conduct of the master, after a complete ground for abandonment has occurred. 1 T. R. 613; Marsh. Ins. 334, 615; 2 W. C. C. 61. No necessity for a sale is shown here. 1 T. R. 190.

Well settled principles of insurance law are opposed to making the sale

of the master the measure, or ground, of the claim. It is settled, that an insurer is never to be involved by the fluctuation of the market. Marsh. Ins. 628. So, the adventure of the ship is never considered as insured in connection with the ship. An insurance on the ship is upon the ship for the voyage, not on the ship and voyage; showing that the thing itself, and not its speculative or fluctuating value, is always regarded in the determination of the insurer's liability. Phil. Ins. 283; 4 Cranch 370, 373. So, it is settled, that the goodness of the ship is not insured; but the contract only is, that she shall not be rendered defective by certain accidents: a principle that would be overthrown, if the insurer were to be made liable according to the state of the market for ships, at any casual port of distress. 1 T. R. 190. So, it is said to be repugnant to the contract of indemnity, which a policy of insurance is, that one shall recover for a total loss, where the event shows *there was, in fact and intrinsically, only a partial loss. Marsh. Ins. 575; *Hamilton* v. *Mendes*, 2 Burr. 1198; Phil. Ins. 395, 326.

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The insurer ought not to pay less, nor the assured to receive more, than the amount of actual loss; that is, an amount commensurate with the physical injury, and required to repair that injury. Marsh. Ins. 577; *Fontaine* v. *Phœnix Insurance Company*, 11 Johns. 295. There is no right to abandon, on the supposition of events which turn out to have been misconceived. *Bainbridge* v. *Neilson*, 10 East 343.

The sale in this case was void; the mate and the master being interested in the purchase, having no right to make the purchase at the first sale: nor Palmer, at the final disposition of her, because Palmer was one of the surveyors: by the survey, he promoted the sale, and stood, therefore, in a fiduciary relation with the owners of the vessel, which disabled him from being a purchaser. The assured had a right to vacate the sale, and the sale being, in point of law, null at the election of the assured, will be regarded as absolutely so, as to the insurers, whether the assured actually make an election or not. 5 Esp. 67; *Church* v. *Marine Insurance Company*, 1 Mason 341; *Baker* v. *Marine Insurance Company*, 2 Ibid. 370; 6 Pick. 198; 1 Esp. 237; 4 Binn. 386; Phil. Ins. 423.

This being then a case where there has been no abandonment, and the act of the master, by a sale, not being, in law, competent to make the loss actually total, and the ship, in consequence of the absolute nullity of the sale, being deemed to be specifically in the hands of the assured; the claim here can only be for a partial loss, to the extent of the sum required to repair, at Carthagena, the real injury sustained by the vessel.

Stewart and *Taney*, for the defendants, contended:—The deposition of Evans, taken before the mayor of Norfolk, was admissible in evidence. It was objected to, on the grounds, "that no *subpœna* had been issued for him, and no evidence, out of the deposition, produced, as to his residence, or any inability on his part to attend the trial." It was not denied, that the provisions of the act of congress had been strictly pursued. The officer, by whom the deposition was taken, had the power, and he was under no *disqualification to exercise it; the oath was administered in due form, and a due return made of the deposition, with a certificate of the reasons for taking it. But it was said, that the deposition was only *de bene esse*, and that until, by the return of a *subpœna*, or by some other mode of

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proof, to the court, it was shown, that his attendance could not be had, the deposition could not be read. It was insisted, that the act of September 24th, 1789, was passed to facilitate the administration of justice, to render it more convenient and less expensive, and that every caution and check had been employed, in the requisitions of that act, to prevent the dangers likely to attend *ex parte* examinations. That the ceremony of issuing a *subpœna* was not in the contemplation of that act, because, where the place of trial was in one of the United States, and the residence of the witness in another state, at a greater distance than one hundred miles from the place of trial, the *subpœna* would be unavailing. The act intended to reach all cases, where the witness resided at a greater distance than one hundred miles from the place of the trial; the whole object of that law being the procurement of testimony, under suitable sanctions, and in the manner least burdensome to the suitors and witnesses. Depositions taken at that distance were *de bene esse*, only in case the witness was within the reach of the process of the court at the time of the trial, with the knowledge of the party seeking to use the deposition.

In providing for this contingent arrival of the witness within the process of the court, the depositions were styled *de bene esse*. Under the opposite construction, a commission would be the only mode to take the testimony of witnesses residing out of the district, at a greater distance than one hundred miles: upon what principle can we so limit the operation of a law, whose words are general and comprehensive? In all the cases in the enacting clause, the depositions are absolute, unless the witnesses are afterwards shown to be within the reach of the process of the court. In the case of the *Lessee of Banert et ux.* v. *Day*, 3 W. C. C. 244, a *subpœna* was dispensed with, because the witness was shown to be so advanced in age as to be unable to attend. *In the case of *Beale* v. *Thompson and Maris*, reported in 8 Cranch 71, a deposition, taken under the act of congress, in New Hampshire, was offered in evidence in the circuit court for the district of Columbia, and rejected, because opened out of court. No objection was there made upon the ground taken in the case in 3 W. C. C. 414. The counsel for the defendant in error referred to the case of *Bell* v. *Morrison et al.*, 1 Pet. 356, to show, that the certificate of the magistrate taking the deposition is good evidence of the facts therein stated. [*613

If the damage done to the vessel by the peril of the sea, on the voyage insured, could not be repaired, without an expenditure of money, to an amount exceeding half her value at the port of Carthagena, after such repairs, the plaintiffs had a right to abandon and recover for a total loss. It was contended, that this rule was a positive one, originating in the convenience of having a precise test in all cases. *Smith* v. *Bell*, 2 Caines Cas. 153; *Centre* v. *American Insurance Company*, 7 Cow. 564; *Peele* v. *Merchants' Insurance Company*, 3 Mason 28, 69, 72; 3 Kent's Com. 276.

If, upon the information obtained, and the circumstances known to the master, at the time of the sale in question, after due and diligent inquiry, it was absolutely necessary, and for the interest of the concerned, that the vessel should be sold; and if a prudent and discreet owner, placed in the like circumstance, would have come to the same conclusion, and sold the vessel in like manner; then the sale made by the master was justifiable, and the plaintiffs had a right to abandon: whether such a necessity existed at the

time of the sale, was a question proper for the jury to decide, according to the rule stated in the opinion of the court.

It was contended, that the master of a vessel has a right to sell the vessel, in a case of extreme necessity; that upon the happening of any unforeseen emergency, which requires prompt and decisive action by the master, he becomes the agent of all parties, and is competent to bind them by acts done within the scope of the agency, and done with good faith, and for the benefit of all concerned; that the sale described in the testimony
*614] was so made in the prosecution of such *an agency, arising from a condition of extreme necessity; was made honestly, without knowledge of the insurance, and for the advantage of all concerned in the adventure. All the transactions at Carthagena, after the return of the schooner Frances to port, in a most disabled and unseaworthy condition, took place under the auspices and sanction of the United States consul, whose official station invited confidence, and was to be deemed a sure guarantee of the diligence and fidelity of the master, in the absence of all proof to the contrary. *Hayman* v. *Molton*, 5 Esp. 65; *Mills* v. *Fletcher*, 1 Doug. 231; *Plantamour* v. *Staples*, 1 T. R. 611, note; *Robertson* v. *Caruthers*, 2 Stark. 571; *Idle* v. *Royal Exch. Ass. Company*, 3 Moore 115; *Read* v. *Bonham*, 3 Br. & Bing. 147; *Robertson* v. *Clarke*, 1 Bing. 445; *Scull* v. *Briddle*, 2 W. C. C. 151; *Fontaine* v. *Phœnix Insurance Company*, 11 Johns. 293; *Centre* v. *American Insurance Company*, 7 Cow. 564, 582; *Gordon* v. *Mass. Fire and Mar. Ins. Comp.*, 2 Pick. 249; Phillips on Ins. 408.

The letters of the plaintiffs, dated May 1st and May 5th, 1824, together with the documents and accounts transmitted with them, were a sufficient abandonment. It was contended, that there is no prescribed form in which an abandonment is to be made: that any act manifesting the intention of the assured to look to the insurer for the stipulated indemnity, constitutes a sufficient abandonment, upon which to base a claim for a total loss; and that the correspondence between the parties demonstrated, that they treated the claim as a claim for a total loss, in connection with an implied surrender of all the property to the insurers. 8 T. R. 273; 3 Yeates 378; Condy's Marshall, 599 b.; 1 Binn. 47; 7 Eng. C. L. 384; 4 Ibid. 272. It was also contended, that inasmuch as the protest (one of the transmitted documents) contained a formal abandonment, in terms of cession, and claimed for a total loss, it became, by the transmission of it, the abandonment of the assured. It was the act of an agent, adopted, as soon as it was known, by the principal; and was, therefore, a valid and formal cession of the plaintiff's property.

The sale by the master being justified by the circumstances of necessity
*615] under which it was made, divested the defendants *in error of their legal title to the vessel, and therefore, left nothing to abandon. *Storer* v. *Gray*, 2 Mass. 565; *Gordon* v. *Mass. Fire and Marine Insurance Company*, 2 Pick. 249. It was further insisted, that in such a case an abandonment would be an idle ceremony. The object of an abandonment is, to subrogate the insurer to all the rights and property of the assured; but if these rights and property were divested by a legal and justifiable sale, an abandonment was useless as well as inoperative.

THOMPSON, Justice, delivered the opinion of the court.—This case is brought here on a writ of error to the circuit court of the United States for the Maryland district. The action is on a policy of insurance, dated the 20th March 1824, upon the schooner Frances, Seaward, master, valued at $2500, lost or not lost, on a voyage from Curaçoa, or a port of departure in the West Indies, or on the main, to a port in the United States. The schooner sailed from Norfolk, on the outward voyage, in January 1824, and arrived and remained at Curraçoa six or seven days, and proceeded thence to Carthagena, where she arrived on the 15th of February following; and having taken in a return-cargo, proceeded on her return-voyage to Norfolk; and after being at sea about twenty hours, she encountered a very heavy gale of wind, and received such injury that it was deemed necessary to return to Carthagena. The master reported the vessel to the American consul, who ordered a survey to be held upon her; and she was afterwards sold by the consul to Thomas Evans for $140, who purchased the schooner in his own name; but it was understood that Captain Seaward was to be concerned with him; and he furnished the money to buy her; and Seaward afterwards sold her to Palmer, for upwards of $200, who repaired her and returned with her to the United States.

Upon the trial, several bills of exception were taken on the part of the defendants in the court below, and who are the plaintiffs here; upon which bills of exception, are presented the questions brought into this court for review. The first question relates to the admissibility, as evidence, of the *deposition of Thomas Evans, taken, *ex parte*, before the mayor of Norfolk. In the caption of the deposition, the witness is stated to [*616 be a resident of the borough of Norfork. And the mayor, in his certificate, states, that the reason for taking his deposition is, that the witness lives at a greater distance than one hundred miles from the place of trial, to wit, "in the said borough of Norfolk." It was admitted, that the borough of Norfolk is more than one hundred miles from the place of trial; but the objection was, that no *subpœna* for this witness had been issued, nor any evidence, out of the deposition, produced at the trial, to show his residence, or inability personally to attend the trial. These were the particular objections taken at the trial; but on the argument here, a broader ground has been assumed: that no *ex parte* deposition, taken out of the district where the trial is had, is admissible; but that the testimony should be taken on a commission issued for that purpose. We think neither of these exceptions sufficient to exclude the deposition. In support of the latter objection, the case of *Evans* v. *Hettick*, 3 Wash. C. C. 417, has been relied on, and which would seem to sustain the objection. Mr. Justice WASHINGTON does there say, that the act of congress must be so construed as to confine its operations to depositions taken within the district, when the witness lives more than one hundred miles from the place of trial; but when a witness lives out of the district, and more than one hundred miles from the place of trial, his deposition, if taken, must be under a commission.

We think, however, that this is not the true construction of the act of congress. (1 U. S. Stat. 89.)[1] It declares, that when the testimony of any

[1] See Allen *v.* Blunt, 2 W. & M. 136, where Judge WOODBURY says, the opinion of Judge WASHINGTON is founded on the soundest reasons, though the decision of the supreme court was the other way.

person shall be necessary in any civil cause depending in any district, in any court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, &c., the deposition of such person may be taken *de bene esse*, &c. The language here used is general, and is not certainly, in terms, confined to depositions taken within the district where the court is held. And if the provision was intended for the convenience of parties, it applies equally to depositions of witnesses living without, as to those living within the district, at a greater distance that one hundred miles from the place of trial; and all the *dangers supposed *617] to arise from the taking of *ex parte* evidence, apply with equal force to the one case as to the other. It is said, however, that the act declares the deposition may be taken *de bene esse*, and if allowed in cases where the witness lives out of the district, it necessarily becomes absolute, as the law stood in the year 1789; because a *subpœna* could not be issued in a district other than where the court was sitting. But no such consequence is perceived by the court to follow. The permission to take the deposition of a witness, on account of his distant residence, is connected with a number of other cases where the deposition may be taken: as when the witness is bound on a voyage to sea; or about to go out of the United States; or out of such district; and to a greater distance from the place of trial than as aforesaid, before the time of trial; or is ancient or very infirm; the deposition may be taken *de bene esse*. In all these cases, except where the witness lives at a greater distance than one hundred miles, it will be incumbent on the party for whom the deposition is taken, to show at the trial, that the disability of the witness to attend personally continues; the disability being supposed temporary, and the only impediment to a compulsory attendance. The act declares, expressly, that unless the same (that is, the disability) shall be made to appear on the trial, such deposition shall not be admitted or used in the cause. This inhibition does not extend to the deposition of a witness living at a greater distance from the place of trial than one hundred miles; he being considered permanently beyond a compulsory attendance. The deposition is such case may not always be absolute for the party against whom it is to be used may prove the witness has removed within the reach of a *subpœna*, after the deposition was taken; and if that fact was known to the party, he would be bound to procure his personal attendance. The *onus*, however, of proving this would rest upon the party opposing the admission of the deposition in evidence. It is, therefore, a deposition taken *de bene esse*.

It was sufficiently shown, at least, *primâ facie*, that the witness lived at a greater distance than one hundred miles from the place of trial. This was a fact proper for the inquiry by the officer who took the deposition, and he has certified that such is the residence of the witness. In the case of *Bell* v. **Morrison*, 1 Pet. 356, it is decided, that the certificate of the *618] magistrate is good evidence of the facts therein stated, so as to entitle the deposition to be read to the jury. It was not necessary to issue a *subpœna*. It would have been a useless act. The witness could not have been compelled to attend personally. By the act of March 2d, 1793 (U. S. Stat. 335), *subpœnas* for witnesses may run into districts other than where the court is sitting, provided the witness does not live at a greater distance than one hundred miles from the place of holding the court.

The other exceptions arise upon the instructions given by the court, upon the prayers of the parties, respectively. After the testimony had been closed, each party submitted to the court several prayers, upon which the instruction of the court was requested, and the record then states as follows: "Upon which prayers of the plaintiffs and defendants, respectively, the court gave the opinions, and instructions and directions, to the jury, following:

"1. That if the jury find from the evidence, that the damage done to the schooner Frances, by any perils of the sea, on the voyage insured, could not be repaired, without an expenditure of money to an amount exceeding half her value at the port of Carthagena, after such repairs, then such damage constitutes a total loss, and the plaintiffs are entitled to recover.

"2. That if the jury find from the evidence, that Captain Seaward was a man of competent skill in his profession, and that before he sold the schooner Frances to Palmer, in the manner stated in the testimony, he used due and proper diligence to ascertain whether a sale was necessary, and for the interest of the concerned; and if upon the information so obtained, and the circumstances known to him at the time, after due and diligent inquiry, it was absolutely necessary, and for the interest of the concerned, that the vessel should be sold; and that a prudent and discreet owner, placed in like circumstances, would have come to the same conclusion, and sold the vessel in like manner; and if from all the circumstances of the case, the jury should be of the opinion, that the sale was justifiable; that then the plaintiffs are entitled to recover.

"On the prayers of the defendants, the court's directions were as follows: 1. *That the plaintiffs are not entitled to recover for a total loss, unless the sale at Carthagena was in consequence of urgent and inevi- [*619 table necessity; that no necessity will justify a sale by the master, unless it be urgent and inevitable; in other words, justifiable. 2. That in weighing this necessity, the fact of the sale having been made, as disclosed by the testimony, is not to be conclusive, but the necessity is to be tested by a consideration of all the circumstances. 3. That if the jury shall find from the evidence, that the damage which had been sustained by the vessel, at the time she put back to Cathagena, was of trivial amount; that this damage could have been repaired at Cathagena, for a small sum, and the vessel thus enabled, after a short delay, to proceed on the voyage insured, and that the master had the funds to make the necessary repairs; and if they shall be of opinion, that it was not such a case of urgent necessity as to justify the sale; then the plaintiffs are not entitled to recover for a total loss, but can recover only for a partial loss, according to the circumstances of the case. 4. The court are of opinion, that the abandonment was sufficiently made in this case."

In considering the exceptions taken to the opinion and direction of the court, we think, from the manner in which the prayers were presented, and the instructions given, they may well be considered together, as one entire direction to the jury, and not as a separate instruction upon each prayer; and this is the manner in which they have been treated on the argument at the bar.

The question arising upon the first instruction relates to the place where the value of the vessel was to be ascertained, in order to determine whether

there was a total loss. The court instructed the jury, that if the vessel could not have been repaired, without an expenditure exceeding half her value at the port of Cathagena, after such repairs, it constituted a total loss. This direction we think entirely correct. It was not denied, but that the cost of repairs must be ascertained at that place. But it is said, the value of the vessel, after such repairs, should be determined by the value in the home port, or in the general market; as the injury might occur in a place *620] *where the vessel would not be salable, and the property might be sacrificed. It is true, this may occur; but it is a circumstance incident to the risk assumed by the underwriter; and any other rule would be in many cases impracticable. The purpose for which the value is to be ascertained is, to determine the right to abandon; and a delay in doing this might be considered as waiving the abandonment; and the value at the time the injury happens must necessarily be the rule by which that right is to be decided. No case has been referred to, or has fallen under the notice of the court, intimating the distinction here set up; and we do not think it warranted by the general principles of insurance law. The rule laid down in the books is general, that the value of the vessel at the time of the accident, is the true basis of calculation. 3 Kent's Com. 277. And if so, it necessarily follows, that it must be the value at the place where the accident occurs. The sale is not conclusive with respect to such value. The question is open for other evidence, if any suspicion of fraud or misconduct rests upon the transaction.

The other questions arising upon the instructions relate to the sale of the vessel, and the sufficiency of the abandonment. As a general proposition, there can be no doubt, that the injury to the vessel may be so great, and the necessity so urgent, as to justify a sale. There must be this implied authority in the master, from the nature of the case. He, from necessity, becomes the agent of both parties; and is bound, in good faith, to act for the benefit of all concerned; and the underwriter must answer for the consequences, because it is within his contract of indemnity. This was the doctrine in the case of *Mills* v. *Fletcher*, 1 Doug. 231; and which has been repeatedly sanctioned by the later decisions, both in England and in this country. It is a power, however, that is to be exercised with great caution, and only in extreme cases. It is liable to great abuse; and must, therefore, in the language of some of the cases, be carefully watched. The difficulty in all these cases consists principally in the application of a rule to a given case, and not in determining what the rule is. It was not denied by the counsel for the plaintiffs in error, that in cases of extreme and urgent necessity, the master has the power to sell, if he acts in good faith, and the circumstances *621] *are such that a jury will find the necessity existed. All the circumstances must be submitted to the jury, and they must find both the necessity and good faith of the master, in order to justify the sale. Necessity and good faith must concur; and the necessity is not to be inferred from the fact of sale in good faith, but must be determined from other circumstances. 4 Eng. C. L. 275; 7 Ibid. 386; 1 Ibid. 375; 2 Pick. 261; 5 Esp. 67.

The complaint on the part of the plaintiffs in this case is, that the court placed the right to sell upon the good faith of the master, and the existence of the necessity, according to his opinion. And the second instruction on

the prayer of the plaintiffs below, if standing alone, would be open to this interpretation; and if so, would be erroneous. The professional skill, the due and proper diligence of the master, his opinion of the necessity, and the benefit that would result from the sale, to all concerned, would not justify it; unless the circumstances under which the vessel was placed rendered the sale necessary, in the opinion of the jury.

But whatever ambiguity may appear in this instruction, standing by itself, it is entirely removed, when taken in connection with those given upon the defendant's prayers. The jury were explicitly told, that the plaintiffs were not entitled to recover for a total loss, unless the sale was in consequence of urgent and inevitable necessity, and that the fact of sale was not conclusive; but that the necessity must be tested by a consideration of all the facts, as they existed at the time; that if the damage sustained was of trivial amount, and could have been repaired at Carthagena for a small sum, and with little delay; and that if, in their opinion, it was not such a case of urgent necessity as to justify the sale; then the plaintiff was not entitled to recover for a total loss. This instruction is according to the defendant's prayer; except that the court was requested to instruct the jury, that the fact of sale was to have no influence, but that the necessity was to be tested solely by the facts, as they existed anterior to the sale. We think, the instruction, although not in the terms of the prayer, yet, when connected with the other instructions, is substantially according to the prayer. For the jury were told, in terms, that the plaintiffs were not entitled to recover for a total loss, unless the sale was the consequence of urgent and inevitable necessity. *Whether the evidence was sufficient to warrant the finding of the jury, is a question that cannot arise here, upon this bill of exceptions. [*622

The only remaining inquiry is, whether there was a sufficient abandonment proved? There is some diversity of opinion among the elementary writers, and in the adjudged cases, as to what will constitute a valid abandonment. It seems, however, agreed, that no particular form is necessary, nor is it indispensable that it should be in writing. But in whatever mode or form it is made, it ought to be explicit, and not left open as matter of inference from some equivocal acts. The assured must yield up to the underwriter all his right, title, and interest in the subject insured. For the abandonment, when properly made, operates as a transfer of the property to the underwriter, and gives him a title to it, or what remains of it, so far as it was covered by the policy. 3 Marsh. Ins. 599; Phil. Ins. 447, and cases there cited.

The evidence in this case to support the abandonment consists of the correspondence between the parties, and the documents accompanying the same. On the 1st of May 1824, the plaintiffs wrote to the defendants as follows: "We are sorry to have to forward to you protest and surveys of the schooner Frances, insured with her cargo in your office. Captain Seaward arrived yesterday in the schooner Enterprise. We had before seen, by an arrival at Charleston, from Carthagena, that the Frances had been condemned, but were ignorant, until now, of the cause. By the next steamboat, we shall forward you a statement of the loss, with the necessary vouchers." The protest inclosed to the underwriters contained the following clause: "I, the said consul, at the request of the said master, Joseph Sea-

ward, do hereby intimate, declare and make known to the underwriters of the said schooner Frances, and to the underwriters upon her cargo, that the said master, for himself, and in behalf of the owners of the said schooner Frances, and her cargo, doth abandon, cede and leave to them, the said underwriters, and to each and every of them, all his the said master's, and theirs, the said owners', right, title, interest, profit, property, claim, demand and produce of and in the said schooner Frances, and her cargo, and to the
*623] tackle, apparel and furniture of the said schooner; and *that the aforesaid master doth claim, on behalf as aforesaid, reimbursement for the same as a total loss, &c." The receipt of this was acknowledged by letter of the 4th of May; and saying, that the further proofs of loss, on arrival, should receive immediate attention. On the 5th of May, the further proofs, and a statement of the loss, were forwarded to the underwriters: the receipt of which was acknowledged by letter of the 7th of May; in which the underwriters say, they have resolved to take time to consider about the adjustment of the loss.

This correspondence, independent of the protest, leaves no doubt as to the intention and understanding of the parties with respect to the abandonment. This would, however, be matter of inference only. But the protest is direct and explicit, both in form and in substance. It is said, however, that this was an unauthorized act. It is true, no authority is shown from the assured to the master to make the abandonment; and had it been communicated direct from the master to the underwriters, the objection would apply with full force. But this protest, containing the abandonment, was communicated to the underwriters, by the plaintiffs. It became thereby their act, adopted and ratified by them, and must have the same legal effect and operation, as if it had originated with the assured themselves, and constituted a valid abandonment.

This renders it unnecessary for the court to express any opinion upon the question made at the bar, whether any abandonment was necessary in this case. It may not, however, be amiss, to observe, that there is very respectable authority, and that, too, founded upon pretty substantial reasons, for saying, that no abandonment is necessary, where the property has been legally transferred by a necessary and justifiable sale. 2 Pick. 261, 265. The judgment of the circuit court is affirmed, with six per cent. damages, and costs.

Judgment affirmed.

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*624] *Charles Edmondston, Plaintiff in error, *v.* Drake & Mitchel, Defendants in error.

Guarantee.

A letter of credit was written by Edmondston, of Charleston, South Carolina, to a commercial house at Havana, in favor of J. & T. Robson, for $50,000, "which sum they may invest, through you, in the produce of your island;" on the arrival of Thomas Robson in Havana, the house to whom the letter of Edmondston was addressed, was unable to undertake the business, and introduced Thomas Robson to Drake & Mitchel, merchants of that place; exhibiting to them the letter of credit from Edmondston; Drake & Mitchel, on the faith of the letter of credit, and at the request of Thomas Robson, made large shipments of coffee to Charleston, for which they were, by agreement with Thomas Robson, to draw upon Goodhue & Co. of New York, at sixty days, where insurance was to be made; of this agreement, Edmondston was informed, and he confirmed it in writing. For a part of the cost of the coffee so shipped, Drake &