the part of the defendant in error. It considers the point as settled by the opinion given in the case of the *Charming Betsy*, with which opinion the court is well satisfied. The law did not intend to affect the sale of vessels of the United States, or to impose any disability on the vessel, after a *bonâ fide* sale and transfer to a foreigner.

Judgment affirmed.

Randolph *v.* Ware.

Principal and agent.

A promise by a merchant's factor, that he would write to his principal to get insurance done, does not bind the principal to insure.

This was an appeal from a decree of the Circuit Court for the district of Virginia, which dismissed the complainant's bill in equity.

Ware, the executor of Jones, surviving partner of the house of Farrell & Jones, British merchants, had, in the same court, at June term 1800, obtained a decree against William Randolph, administrator *de bonis non*, with
*504] the will annexed, of Peyton Randolph, for a large *sum of money, with liberty to William Randolph to file this bill against Ware, for relief in regard to fifty hogsheads of tobacco, shipped, in September 1771, in the ship Planter, Captain Cawsey, and consigned to Farrell & Jones ; a credit for which had been claimed, but was by the decree disallowed. The tobacco never came to the hands of Farrell & Jones, having been lost at sea without being insured.

The appellant contended, that he was entitled to a credit for the customary insurance price of the tobacco, viz., 10*l.* per hogshead, with interest.

1. Because, from the usage of the trade between the Virginia planter and the British merchant, it was the duty of the latter to have insured the tobacco, and that having failed so to do, he is responsible as insurer.

2. Because Thomas Evans, the appellee's agent for soliciting consignments and managing this business, having promised to get the insurance done, it is equivalent to the promise of his principals, Farrell & Jones, and they are responsible for the consequences.

3. It was contended, that the claim, under all circumstances disclosed in the record, if not fit to be decreed, according to the prayer of the bill, appears to be of a nature proper to be decided in a court of law, in pursuance of an order of the court of equity, and therefore, that the decree should be reversed, and an order made, directing a trial at law, to ascertain whether the appellee is not liable to the appellant for the value of the tobacco, and the interest from the month of September 1772, as standing in the place of insurer thereof.

C. Lee, for the appellant.—1. The common course of the trade was, for the British merchant to cause insurance to be made, upon notice of the shipment of tobacco ; and it appears by the letters exhibited in this record, that Farrell & Jones did, without any special orders, cause insurance to be made
*505] on some of the tobacco shipped by Randolph's executors. *Thus, in their letter of August 1st, 1769, to Richard Randolph, they say, "We have made the following insurance on the True Patriot, for the two estates,

viz., 480*l.* on 40 hogsheads, W. Randolph's estate ; 816*l.* on 68 hogsheads, P. Randolph's," but say nothing of having received orders therefor. And again, August 10th, 1769, "We have made 816*l.* insurance on the True Patriot, on 68 hogsheads which Captain Cawsey informs us he is to have." It is true, that on the 15th of August 1771, they say, "Captain Cawsey writes us, that he is promised 67 hogsheads of the estate's tobacco, but we have received no orders for insurance." But they had received no orders for the insurance they made in August 1769, on the 68 hogsheads which Captain Cawsey informed them he was to have. The executors had a right to expect, that as Farrell & Jones had made insurance without orders, on the 68 hogsheads, by the True Patriot, they would also have insurance made on the 50 hogsheads by the Planter.

The appellee's amended answer, put in after this point was known, does not pretend that any orders were given for the insurance, made in 1769, on the 68 hogsheads. And in the accounts of Farrell & Jones, there are many charges of premiums on insurances, for which no orders appear to have been given.

2. But the deposition of P. L. Grymes goes to establish an agreement, on the part of Evans, the agent of Farrell & Jones, to get insurance done upon the 50 hogsheads in question. This deposition is corroborated by the fact, that in the correspondence produced, there is no letter of the executors, respecting the shipment of that parcel of tobacco. They relied altogether upon the promise of Evans.

No argument against the claim can arise from the length of time which elapsed before it was made. The estate of Randolph was acknowledged to be indebted ; the executors, therefore, would not bring a suit. It was time enough to exhibit their claim when suit was brought *against them. Besides from 1774 to 1783, the war interposed ; after that time, until the suit was brought, the courts of justice were absolutely shut, or legal impediments existed to the recovery of British debts. The executors also might have been ignorant of their right. This suit, therefore, ought to be considered as if it had been instituted in 1775. *506

3. This is a claim proper to be settled in a court of law. There is a difference between a case where the chancellor will order an issue at law to be tried, to satisfy or inform his conscience, and where the whole claim is a matter properly cognisable at law.

P. B. Key, contrà.—1. There is no evidence in the record of such a general usage of the trade, as is contended for by the appellant. And if there had been, the voluminous correspondence, exhibited in the cause, shows most clearly, that it did not exist in the negotiations between the present parties. For it proves, that in almost every instance, where the Randolphs shipped tobacco, they ordered insurance to be made, at the time they gave notice of the shipment.

Farrell & Jones, in their letter of August 6th, 1770 (stated in the appellee's answer), say, "We made no insurance on the Virginian, though we were a little uneasy that so large a quantity as 66 hogsheads were ventured home without it, for it is our rule, not to make any insurance, without orders, upon tobacco ; which you will please to remember."

On the 15th of August 1771, they say, "Captain Cawsey writes us that

he is promised 67 hogsheads of the estate's tobacco, but we have received no orders for insurance."

On the 17th of September 1771, the tobacco in question was shipped. On the 10th of December 1771, Farrell & Jones write to the Randolphs, as follows: "We wrote you the 15th of August, by the True Patriot, Captain Aselby, to which we refer. We observe, by our agent Mr. Evans's letter, that you have shipped 50 hogsheads of the estate's tobacco on board Captain
*507] Cawsey, and it gives us great concern to find you ordered no *insurance on them, though we wrote you in August 1770, that we never made any insurance on tobacco, without orders; as we are much afraid some accident has happened to him. He has now been sailed from Virginia, twelve weeks, and by accounts we have from captains who sailed from America about that time, he must have had dreadful weather, in a few days after he came out. We think, there is no other chance for him, but that he has lost his masts, and obliged to bear away for the West Indies."

In their letter to the Randolphs of 4th April 1772, they say, "You have also, inclosed, the estate's account current to the 31st December, balance in our favor ———*l.*, if any error, you will please to advise us."

And in August 15th, 1772, they say, "As yet we have received no orders for insurance on the Elizabeth, on account of the estate. If any tobacco is shipped in her, we hope to receive directions, in time to prevent the like accident as happened last year."

On the 23d of April 1773, they say, "Having settled the account-current agreeable to what Mr. Evans wrote us, we send it to you inclosed. Balance in our favor ———*l.*, if any error, please to advise."

On the 10th of August 1774, they write, "You have also, inclosed, the estate's account-current to 31st December last; balance in our favor ———*l.*, if any error, please to advise."

And on the 10th of March 1773, they sent the estate's account-current to 31st of December, with the same request, "if any error, please to advise."

Here the correspondence was closed by the war; after which, in 1783, the house of Farrell & Jones sent out an agent, Mr. Hanson, who was known as such to the Randolphs, and who, in that capacity, transacted business with
*508] them, and who continued in Virginia until the year 1800. *During the whole of this period, of nearly 30 years, not a syllable was said of any claim against Farrell & Jones, on account of the 50 hogsheads of tobacco lost in the Planter. In addition to all this, it appeared, by the exhibits in this cause, that some time in June 1772, after the loss of the tobacco was known to the Randolphs, they gave their bond, ante-dated on the 1st of January 1772, for the balance then due, without any credit being given for the lost tobacco.

2. But it is contended, that Farrell & Jones had, in some instances, made insurance, without orders, and therefore, they were bound to do it in this instance. We deny the fact. Although, in one or two instances, Farrell & Jones have in their letters mentioned having made insurance, without stating it to be by order, yet it does not follow, that no orders were given. And the whole general tenor of the correspondence shows, that it was not their usual practice to insure without orders.

3. The appellant relies upon the affidavit of Grymes, to show that Evans,

the agent of Farrell & Jones, promised to have insurance done. This affidavit appears in the transcript of the record, without date, place or circumstance. It does not appear to have been sworn before any magistrate, competent to administer an oath, and no cross-examination, nor anything to show upon what occasion it was made. It is uncertain in itself, uncorroborated by any other part of the testimony, and inconsistent with the general tenor of it. He says, the conversation happened early in the year; but the tobacco was shipped in September. His words are, "he the said Evans informed the aforesaid Peyton and Richard Randolph, that he was writing to the aforesaid house of Farrell & Jones, that he would direct insurance to be made," "and that they need give themselves no further trouble in the business."

*The long time which had elapsed before this deposition was made [*509
(probably 30 years), renders its contents of very little weight, especially, as there were a number of shipments of tobacco made at different times in the same ship, and he swears the conversation happened early in the year. It appears from the correspondence, that early in the year preceding, viz., 1770, the same ship had been loaded with tobacco at the same place; and this renders it probable that Mr. Grymes had mistaken the year. But admitting that it proves all that is contended, yet Evans was not competent to bind his principal to insure; it was not a matter within his agency.

Johnson, J.—I found my opinion in this case upon a single consideration. It was incumbent on the appellant, to show that Evans's neglecting to comply with his promise to insure, made Farrell & Jones liable. I think it did not, because it appears that Farrell & Jones did not generally hold themselves bound to insure shipments of tobacco, without receiving express instructions to do so. It was, therefore, incumbent upon the executors of Randolph, to communicate such instructions to Farrell & Jones. If they confided in the promise of Evans to give these instructions, it was to their own prejudice. And although the failure of Evans to do so, certainly made him personally liable to them, yet it could not produce a liability in Farrell & Jones. So far as Evans was intrusted to do an act incumbent on the appellant's testator himself to do, he was the agent of the executors of Randolph, and not of Farrell & Jones.

Washington, J.—In this case, it appears, that a letter was written by Farrell & Jones, in August 1770, notifying the executors of Randolph, that they would not make insurance without orders. And it is shown also, that the Randolphs were accustomed to give orders for insurance, whenever they wished to have it made. Whatever, then, may be the general usage of the trade, it will not apply to the present case.

*The deposition of Grymes comes in a very questionable shape. [*510
It speaks of things thirty years ago, and in very uncertain language. But admitting for a moment that it applies to this shipment, Evans had not authority to bind his principal, by a promise to insure. He did not promise for them, but promised for himself, that he would write to them to make insurance. This, it is admitted, he did not do. Are Farrell & Jones liable for his personal engagement?

But the deposition of Grymes is not only uncorroborated, but opposed,

by the other evidence in the cause. If the Randolphs relied upon this supposed engagement of Evans, why did they give their bond in 1772, nine months after the loss, and long after they had notice of the loss, for the balance of the account, without demanding a credit for the lost tobacco? Three accounts-current were sent them for the years 1772, 1773 and 1774, at several times, and they were requested at each time to examine them, and if they contained any error, to advise Farrell & Jones of it. By not doing this, they have given strong evidence that there was no such agreement with Evans, that there was no error in the accounts, and that Mr. Grymes must have been mistaken, or that his deposition refers to some other transaction.

Paterson, J.—The complainant filed a cross-bill to obtain credit for 50 hogsheads of tobacco, which were shipped on board the Planter, the 17th September 1771, by Richard and Peyton Randolph, executors of William Randolph, and consigned to Farrell & Jones, merchants, at Bristol, in England. The tobacco was not insured. The Planter foundered at sea, and the tobacco was lost. The question is, who shall sustain the loss? It is contended, on the part of the representatives of the Randolphs, that Farrell & Jones ought to have insured the tobacco, and, not having done so, they have made themselves liable to the amount, as if it had been insured. To establish this position, the counsel for the complainant has taken the following grounds.

1st. From the nature and usage of the trade between the Virginia planter and the English merchant, it was *the duty of the latter to have insured the tobacco, and failing so to do, he is responsible as the insurer. *511]

2d. That Thomas Evans, the agent of Farrell & Jones, having promised to have insurance made, it is equivalent to the promise of his principals, Farrell & Jones, and they were responsible for the consequences.

As to the first point, no usage has been proved. And if a usage did exist, this case was taken out of it; as it appears by the whole course of correspondence, between the parties, that Farrell & Jones never did insure tobacco, without orders; and that the Randolphs gave them orders to effect insurances on tobacco, whenever they thought it expedient or necessary.

Great stress is laid on the contract which, it is stated, was entered into between the Randolphs and Thomas Evans, the agent of Farrell & Jones. The contract is founded on the deposition of Philip Grymes. This deposition is certainly open to the strictures which have been made upon it by the counsel on the part of the defendant. It does not appear when, and before whom, the deposition was taken. The deposition is *ex parte*, for neither the defendant nor his attorney had an opportunity to cross-examine the witness. If it was taken at or about the time that the bill was filed, then it is liable to the objections resulting from the frailty and uncertainty of memory, and the misconception or misconstruction of words used in a general conversation, after a long period of time, exceeding twenty years. Besides, the quantity of tobacco to be insured was not mentioned in the course of the conversation, nor does it appear, that it was at any time afterwards communicated to the agent; and unless the quantity was ascertained, an insurance could not be effected. How this paper, purporting to be a deposition, became annexed to the bill, I have not been able to discover from the pro-

ceedings ; and if it be admitted as a piece of evidence in the cause, its credit is much impaired in consequence of the observations already made.

The acts of the agent bind the principal ; and supposing Evans to have been the general agent of Farrell *& Jones, it may well be questioned, whether his undertaking to insure, is obligatory upon them ; as it is [*512 manifest, from the correspondence between the Randolphs and Farrell & Jones, that the latter did not insure tobacco, without express orders for the purpose ; that the Randolphs wrote to them to insure, when they deemed an insurance proper. The fair inference is, that if Evans engaged to have an insurance made in this instance by Farrell & Jones, it was a personal contract on his part, which bound himself and no other, and for the performance of which he was responsible in his private character. Orders for insurance were invariably transmitted by the Randolphs to Farrell & Jones, and not communicated to them, through the medium of Evans, unless the present should be considered as an exception. Under such circumstances, the Randolphs, if they relied on the promise of Evans, must look to him individually, and not through to him to Farrell & Jones. By this promise, Evans bound himself, and not the firm.

The house of Farrell & Jones transmitted, annually, their accounts to the Randolphs ; they did so for the year 1771, after the loss of the tobacco, which it is admitted was not passed to the credit of the Randolphs. The bond given for the balance is dated the 1st January 1772, though, from the letter of the 4th April 1772, it was not, probably, executed until some months after its date. It was made to bear date the 1st January 1772, that it might correspond with the accounts rendered, and carry interest from that period. Farrell & Jones annually rendered regular and stated accounts to the Randolphs of their mutual dealings in the years 1772, 1773 and 1774; and in a letter of the former to the latter, Farrell & Jones particularly requested that errors, if any occurred, should be pointed out, that they might be rectified. But the Randolphs made no objections ; they made no mention of the tobacco which was lost, nor did they ever intimate an opinion that Farrell & Jones were liable for its amount. Why this silence, this acquiescence? The period of the war, we will let pass, without animadversion, as no dealings or communication took place between the parties. Evans died in 1778. In 1780, Hanson was appointed the agent of Farrell & Jones. It was never suggested to Hanson, that the Randolphs, *or their [*513 representatives, claimed an allowance for the tobacco ; no intention was manifested to charge Farrell & Jones with it, until an action was commenced on the bond, in 1793 or 1794, when, for the first time, a claim was set up for the tobacco. Mr. Lee has endeavored to account for this silence and acquiescence, but not in a satisfactory manner ; and it is probable, that the Randolphs never thought of making any demand, because they were convinced that they had no right to do so, and that they must sustain the loss themselves, as they had neglected to order Farrell & Jones to make the insurance. It was a loss justly imputable to their own neglect or imprudence ; or if not, then they intended to stand their own insurers.

Farrell & Jones expressed regret, whenever they received no orders to insure ; and this flowed from the nature and situation of their accounts and dealings : for as the Randolphs were indebted to the firm, in a large amount,

it became the interest of Farrell & Jones that the tobacco should be insured, as it was property intended to be appropriated towards the payment of the debt due to them. The loss rendered the Randolphs the less able to pay, and increased the risk of Farrell & Jones, by diminishing their security. An insurance, therefore, of the property of the debtor, must have been beneficial and satisfactory to the creditor. But this insurance, it seems, the house of Farrell & Jones never thought themselves authorized to make, unless they received immediately from the Randolphs explicit directions for the purpose.

The charge is stale. The claim comes too late; it is brought forward after a sleep of near 30 years, during which period the original parties and their agents have disappeared and are no more. An acquiescence for such a length of time, and under such circumstances, is too stubborn and inveterate to be surmounted. The claim was put into oblivion; and there it ought to have remained. A court of equity should not interpose in a case of this kind; and therefore, the decree pronounced by the circuit court ought to be affirmed.

Cushing, J., concurred.

Judgment affirmed.(*a*)

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*514] *Field *v.* Milton.

Certiorari.

A *certiorari* will be awarded, upon a suggestion that the citation has been served, but not sent up with the transcript of the record.

W. Pinckney, for plaintiff in error, suggested that the citation had been served, but was not returned by the clerk below, with the writ of error, and prayed a *certiorari.*

The Court said it was a new case.

Certiorari granted.

Winchester *v.* Jackson and others.

Costs in error.

Costs will be allowed upon a dismissal of a writ of error, for want of jurisdiction, if the original defendant be also defendant in error.

The writ of error was dismissed for want of jurisdiction, the parties not appearing upon the record to be citizens of different states.

Campbell, for the defendants in error, prayed that the dismissal might be with costs, the original defendants being also defendants in error.

The clerk stated that the practice had heretofore been to dismiss, without costs, where the dismission was for want of jurisdiction.

The Court directed it to be dismissed, with costs.

(*a*) Marshall, Ch. J., did not sit in the cause, having decided it in the court below.