Smith and others *v.* Carrington and others.

Competency of witness.—Letters.—Exception.—Charge.

A witness interested to diminish certain admitted items in the plaintiff's account, is still a competent witness to disprove other items.

The defendant having read a letter from the plaintiff's agent, in answer to a letter from himself, cannot give in evidence a copy of his own letter, without proving it to be a true copy, by a witness.[1]

An exception may be taken to the opinion of the judge in his charge to the jury.

The court is bound to give an opinion to the jury, on a question of law, upon request, if it be pertinent to the issue; but not, if it involve a question of fact.

Error to the Circuit Court for the district of Rhode Island.

This was an action of *assumpsit*, brought by the plaintiffs in error, subjects of Hamburg, to recover the balance due upon an account-current, the debit side of which consisted principally of the following charges, viz., insurance made in Hamburg on the defendants' ship Abigail, from the United States to Hamburg, and on the ship and cargo from Hamburg to the Havana, and on an intended voyage back from the Havana to Hamburg; advances made to the defendants to make up a cargo to the Havana; bills of exchange accepted and paid; cash advanced, and commissions, charges and interest.

*The credit side consisted chiefly of the proceeds of the freight of the ship, and of sundry articles of merchandise; remittances by bills of exchange; the sales of the ship (she having been condemned and sold in London by virtue of a bottomry bond given by the defendants to the plaintiffs), and of five per cent. of the premium of insurance on the intended return-voyage from the Havana to Hamburg, the same having been returned by the underwriters to the plaintiffs, in consequence of the ship having finished her voyage in the United States, instead of returning to Hamburg. [*63

At the trial below, the plaintiffs took a bill of exceptions, which stated, 1st. That the defendants offered as a witness one Peleg Remington, who had become jointly and severally bound with the defendant, Carrington, in a bottomry or *respondentia* bond to the plaintiffs, in the sum of $31,950, conditioned to pay to the plaintiffs that sum, on the return of the ship to Hamburg, the same being the amount advanced by the plaintiffs to the defendants in Hamburg; and that the ship should so return; for which advance, with other demands, this action was brought. To the admission of which witness, the plaintiffs objected, contending, that he was interested to diminish the balance due from the defendants to the plaintiffs. But the defendants insisted, he was a competent witness as to all the items of the account, except the advances for which he was bound, particularly with respect to a charge of $13,718.56, for premium of insurance on the intended return-voyage from the Havana to Hamburg, and which voyage, the defendants contended, was never begun, and therefore, they ought not to be charged with that premium; and especially, as the defendants had expressly waived all objections to every other part of the plaintiffs' account. Whereupon, the said witness was suffered by the court to testify as to the charge

[1] Weeks *v.* Lyon, 18 Barb. 530; Eilbert *v.* Finkbeiner, 68 Penn. St. 243. But see Hubbard *v.* Russell, 24 Barb. 404; Foot *v.* Bartley, 44 N. Y. 166; Stevenson *v.* Hoy, 43 Penn. St. 191.

of that premium only. The bill of exceptions stated it as admitted, that by the law of Hamburg, the underwriters are not bound to return the premium, upon a change of the voyage, unless that change be notified before the vessel sails.

*64] *2d. That the defendants offered in evidence a paper, purporting to be a copy of a letter from the defendant, Carrington, to Smith & Ridgeway, of Philadelphia, the correspondents of the plaintiffs; and a letter from Smith & Ridgeway to Carrington, purporting to be an answer thereunto; but gave no proof that the said copy of Carrington's letter was a true copy of the original; but it was not denied to be in his handwriting, and it was proved, that he was in Canton, and not in the United States, at the time of trial, and had been in Canton for two years before, but had been corresponded with, on the subject of this action, since its commencement. Whereupon, the court permitted the copy and the letter to go in evidence to the jury.

3d. The plaintiffs, after stating in the bill of exceptions, and referring to all the testimony and other evidence in the case, but not stating distinctly the material facts which they supposed to be the result of that testimony and evidence, and on which their prayer was founded, prayed the court to declare their opinion to the jury, whether, if the plaintiffs had actually paid the premium to the underwriters, before notice of the change of the destination of the ship, they had a right, "under the circumstances of the case," to recover the same of the defendants. But the court refused to deliver an opinion particularly thereupon.

4th. The bill of exceptions further stated, that the court, prior to the request last mentioned, declared to the jury, that "the case wholly turned upon the point, whether or not the defendants had given due and reasonable notice of the change of the destination of said ship. That it was a question proper for the jury to decide, whether such due and seasonable notice had been given, and that if they were of opinion, that it had been so given, on considering the whole of the evidence, they ought not to allow the plaintiffs' said charge for the said premium; and with that direction, left the same to the jury; and the jury aforesaid, then and there, gave their verdict for the plaintiffs for the sum of $13,677.08 only, and disallowed the said

*65] charge and demand of the plaintiffs for the said premium *of insurance, except one-half per cent, which the jury allowed."

The errors assigned by the plaintiffs in error were—

1st. That the court admitted Remington to testify to the point, and under the circumstances, mentioned in the bill of exceptions.

2d. That the court admitted the writing purporting to be a copy of a letter from the defendant, Carrington, to Smith & Ridgeway, and a writing purporting to be a letter from Smith & Ridgeway to the said Carrington, to be read in evidence, as stated in the bill of exceptions.

3d. That the court directed the jury that the case turned wholly upon the point, whether due and seasonable notice had been given by the defendants of the change of the voyage, as stated in the bill of exceptions; and that this was wholly a question of fact, which it was their exclusive province to determine.

4th. That the court refused to direct the jury, in case it was fully proved to their satisfaction, that the plaintiffs had paid the premium in question,

previous to any notice or information whatever of the change of the voyage, as stated in the bill of exceptions, that they were entitled to recover of the defendants.

Robbins, for the plaintiffs in error, contended, 1st. That the underwriters, under the law of Hamburg, had a right to retain the premium; and 2d. That whether they had or not, the plaintiffs having received the defendants' orders to insure, and having actually done it, and paid the premium, before those orders were countermanded, had a right to recover it back from the defendants.

1. That the underwriters had a right to retain the premium, even under the English law, because the risk had commenced. It was to begin from the shore. But *the Hamburg law being admitted, and no evidence being given that the change of voyage was notified to the underwriters, before the ship sailed, the question is too plain to require argument. [*66

2. But whether the underwriters were liable to refund or not, the plaintiffs have a right to recover from the defendants what they paid for premium, under the existing orders of the defendants. If the underwriters are liable to refund, the plaintiffs are not bound to resort to them. That is the duty of the defendants. The money being paid by the plaintiffs before the orders for insurance were countermanded, there can be no pretence that the plaintiffs are not entitled to recover.

3. Remington was not a competent witness, because in a suit against him upon the bond, he might show that the whole amount for which he was liable had been paid; which he could not do, if the plaintiffs had a right to apply the credit side of the account to discharge the money by them advanced for the premium. He was, therefore, directly interested in the event of the suit.

4. There was no proof that the paper offered as a copy of the defendant Carrington's letter to Smith & Ridgeway, was a copy of the original, and therefore, it ought not to have been received, nor was there any evidence offered of the handwriting of Smith & Ridgeway to the paper purporting to be a letter from them.

5. The opinion of the court that reasonable notice was wholly a question of fact, was erroneous. We contend, that in all mercantile cases, reasonable notice is a question of law. *Tindall* v. *Brown*, 1 T. R. 167. The court did not say, of what, or to whom, notice was to be given. But the underwriters were not bound to refund, without proof, as well as notice.

**Ingersoll*, contrà.—1. As to the competency of Remington. A witness cannot be excluded, if he is competent to answer any question. *Bent* v. *Baker*, 3 T. R. 27. If the suit had been brought only for the premium of insurance, his competency would have been unquestionable. Shall it be in the power of the plaintiffs to deprive the defendant of their witness, by blending other matters of account in their action? Surely not. But here all the other items of the plaintiffs' account were expressly admitted by the defendants, before they offered Remington as a witness; and he was offered as a witness to that one item only. [*67

2. As to the copy of Carrington's letter, it is connected with that from Smith & Ridgeway, which the bill of exceptions states to be a letter from them to Carrington, purporting to be in answer to Carrington's letter to

them. There was evidence that it was in his handwriting, and that he had been absent in China for two years, so that he could not have fabricated it for the occasion. Where there is a connected correspondence, the whole ought to go to the jury. In mercantile cases, the rules of evidence are not so strict as in other cases. *Riche* v. *Broadfield*, 1 Dall. 16, 17; Park 406; *Russel* v. *Boehme*, 2 Str. 1127; *Bingham* v. *Cabot*, 3 Dall. 19; 2 Ibid. 384.

3. As to the opinion given and the opinion refused. The question is not yet settled, whether a bill of exceptions will lie to an erroneous opinion given by the judge, in his charge to the jury, at the trial; or to a proper opinion prayed and refused. 3 Bl. Com. 372.

MARSHALL, Ch. J.—Is not the reason why the English books do not show such a case, because, upon a doubt as to the correctness of the opinion of the judge in his charge to the jury, a case is always made, and a new trial moved for, on the ground of misdirection?

Ingersoll.—If the court had given an opinion upon the reasonableness of
*68] the notice, it would have been *error, because it is a matter of fact. But here, the prayer was, that the court should give an opinion as to the fact of notice, as well as to the reasonableness of notice. The expression "under the circumstances of the case," refers the matter of fact to the court. It calls upon the court to say, what are the circumstances of the case, and consequently, to decide the weight of evidence, and to infer one fact from others, which is the peculiar province of the jury. The jury is certainly to decide the facts; whether upon those facts the notice is reasonable, may be matter of law; but in Pennsylvania, and perhaps, in other states, it is usual to submit the whole question to the jury, the court giving them information as to such points of law as have been decided. If the facts are settled, the court may give instruction as to the law; but if the question of law cannot be abstracted from the question of fact, the whole must be submitted to the jury. *Robertson* v. *Vogle*, 1 Dall. 255; *Bank* v. *McKnight*, 2 Ibid. 158; *Mallory* v. *Kirwan*, Ibid. 195.

P. B. Key, in reply, 1. Abandoned the objection to the admissibility of Remington as a witness.

2. As to the copy of the defendant Carrington's letter. No man can make evidence for himself. 2 Ves. 42. A copy cannot be given in evidence, until you have proved that the original existed, and is lost or destroyed, or not in the power of the party to produce; and then the copy must be proved by a witness who compared it with the original. It does not appear, that the plaintiff admitted the paper supposed to be a letter from Smith & Ridgeway, to be genuine, and simply not denying, is not admitting. But the plaintiff objected to both the copy and the letter, as appears by the whole tenor of the bill of exceptions.

*69] *3. As to the opinion prayed. The expression "all the circumstances of the case," means all the circumstances of the case stated in the bill of exceptions, and the evidence to which it refers. This was certainly proper. It was not praying the court to decide the facts, but only the law arising upon those facts. The court has a right to say, that under the circumstances of the case, the law is so.

MARSHALL, Ch. J.—Does not that involve the verity of the facts?

Key.—The court can say that there was no evidence whatever of notice, and if so, that the plaintiffs had a right to recover. The question what is evidence, is matter of law. But the court erred in submitting the whole question of reasonable notice to the jury. The reasonableness is matter of law. 2 Inst. 222; Co. Litt. 56 *b*; *Tindal* v. *Brown*, 1 T. R. 167; s. c. 2 Ibid. 186.

February 16th, 1807. MARSHALL, Ch. J., delivered the opinion of the court.—This case comes up on exceptions to certain opinions given by the judges of the circuit court of Rhode Island, at the trial of the cause before them.

The first exception is to the admission of Peleg Remington as a witness. This exception appeared to be abandoned by the counsel in reply, and is, indeed, so perfectly untenable, that the court will only observe, that Peleg Remington does not appear to have been interested in the event of the cause in which he deposed, but certainly was not interested in the particular fact to which he was required to depose, and was, therefore, clearly a competent witness.

*The second exception is taken to the opinion of the court admitting as evidence a paper purporting to be the copy of a letter written [*70 by the defendant, Carrington, to Smith & Ridgeway, of Philadelphia, the correspondents of the plaintiffs, and also a letter from Smith & Ridgeway to the defendant, Carrington, purporting to be an answer to the said letter. To the admission of the letter of Smith & Ridgeway, no just objection appears. The verity of that letter is acknowledged on the face of the bill of exceptions, and no cause is stated, why it should not have been read to the jury. But the admission of the copy of a letter written by one of the defendants stands upon totally different ground. To introduce into a cause the copy of any paper, the truth of that copy must be established, and sufficient reasons for the non-production of the original must be shown. If, in this case, the answer of Smith & Ridgeway had authenticated the whole letter of Carrington, the copy of that letter need not have been offered, since its whole contents would have been proved by the answer to it. If its whole contents were not proved by the answer, then the part not so proved was totally unauthenticated, and may have formed no part of the original letter. In this case, the answer cannot have authenticated the copy, because the bill states that the defendants gave no proof of its being true. This copy, therefore, not being proved to be a true copy, ought not to have gone before the jury. Into its importance or operation, this court cannot inquire. It was improper testimony, and a verdict founded on improper testimony cannot stand. For this error, the judgment must be reversed, and the cause remanded to the circuit court of Rhode Island to be again tried.

The third exception is taken to the refusual of the court to give an opinion on a question stated by the counsel for the plaintiffs. The difficulty of deciding on this exception does not arise from any doubt which *ought [*71 to have been produced by the facts in the cause, but from the manner in which the question was propounded to the court. After a long and complex statement of the testimony, the counsel for the plaintiffs requested

the court to declare whether, "if the plaintiffs had actually paid the said premium to the underwriters, before any notice of the change of the destination of the ship, they had a right, under the circumstances of the case, to recover the same of the defendants." To this question, the court refused to give an answer.

There can be no doubt of the right of a party to require the opinion of the court on any point of law which is pertinent to the issue, nor that the refusal of the court to give such opinion furnishes cause for an exception; but it is equally clear, that the court cannot be required to give to the jury an opinion on the truth of testimony, in any case. Had the plaintiffs' counsel been content with the answer of the court to the question of law, he would have been entitled to that answer; but when he involved facts with law, and demanded the opinion of the court on the force and truth of the testimony, by adding the words "under the circumstances of the case," the question is so qualified, as to be essentially changed; and although the court might, with propriety, have separated the law from the fact, and have stated the legal principle, leaving the fact to the jury, there was no obligation to make this discrimination, and consequently, no error was committed, in refusing to answer the question propounded.

The record also exhibits a part of the charge given to the jury, on which the counsel for the plaintiffs have argued, as if it composed a part of the bill of exceptions. It is in these words: "And the said court, prior to the request last mentioned, did declare and give their opinion to said jury, that the case wholly turned upon the point, whether or not the said defendants
*72] *had given due and seasonable notice of the change of the destination of said ship. That it was a question proper for the said jury to decide, whether such due and seasonable notice had been given; and that if they were of opinion, it had been so given, on considering the whole of the evidence, they ought not to allow the plaintiffs' said charge for said premium."

That a party has a right to except to a misdirection of the jury contained in the carge of the judge who tries the cause, is settled in this court. (*Church* v. *Hubbart*, 2 Cr. 239.) That the opinion which the record ascribes to the judge in this case is incorrect, unless some other part of the charge shall have so explained it as to give to the words a meaning different from that which is affixed to them, taken by themselves, is the opinion of this court. The judges instructed the jury, "that the case wholly turned upon the point, whether or not the defendants had given due and seasonable notice of the change of the destination of the said ship," and that if they were of opinion, that due and seasonable notice had been given, they ought to find against the plaintiffs, on the question of their right to recover the premium advanced by them for the defendants.

Due and seasonable notice must have been given, as soon after the destination of the vessel was changed as it could have been given, whether the premium had or had not been advanced by the plaintiffs before they received it; or this direction must have left it to the jury to determine, whether notice was or was not due and seasonable, although it might not have been received by the plaintiffs, before they had actually advanced for the defendants the sum in contest. On the first exposition, these words would amount to a clear misdirection of the jury; because, if the plaintiffs

had paid to the underwriters, at the request of the defendants, the premium of assurance, before they received notice countermanding the directions to make such payment, the right given by subsequent circumstances *to [*73 the assured to demand its return from the underwriters, could not affect the claim of the plaintiffs on the defendants, for money fairly advanced by them for the use of the defendants. If the latter construction be adopted, there was still a misdirection on the part of the court. The judge ought not to have left it expressly to the jury to decide, whether notice given immediately after the change of the destination of the vessel, could be due and seasonable notice, unless it was received before the premium was advanced.

It is, however, not material to the present cause to determine whether this exception does or does not exhibit a misdirection to the jury, since we are unanimously of opinion, that for admitting a paper purporting to be the copy of a letter from Edward Carrington to Smith & Ridgeway, to go to the jury, which was not proved to be a copy, the judgment must be reversed.

Judgment reversed.

Pendleton & Webb *v.* Wambersie *et al.*

Equity jurisdiction.— Parties.

An assignee of an assignee of a copartner in a joint purchase and sale of lands, may sustain a bill in equity against the other copartners and the agent of the concern, to compel a discovery of the quantity purchased and sold, and for an account and distribution of the proceeds.

Error to the Circuit Court for the district of Georgia, in a suit in equity in which Pendleton & Webb were complainants, and Emanuel Wambersie, James Seagrove, and the representative of James Armstrong, Jacob Weed and Henry Osborne, were defendants.

The bill stated that Henry Osborne, Jacob Weed, James Armstrong, James Seagrove, and the complainant, John Webb, on the 22d of December 1786, entered into an agreement with each other, under seal, to procure lands on their joint account, in the state of Georgia, to an amount not exceeding 200,000 acres, at *their joint expense, and for their joint benefit. [*74 That grants were obtained for about 165,000 acres. That Webb, by deed, transferred all his right to the lands and contract to John McQueen, in consideration of 400*l.* sterling, to be paid in four equal annual instalments. That McQueen, not having paid Webb, assigned his right to Pendleton, the complainant, who undertook to indemnify McQueen against Webb's demand. That Webb had never received the money due from McQueen. That Wambersie, as agent for the company, had sold 60,000 acres of the land, in Holland, at $1.56 per acre, had received in cash $51,000, and had made himself liable for the balance. That he had refused to pay to the complainant, Pendleton, the one-fifth of the purchase-money. That the other defendants refused to divide the residue of the lands, and to account for the profits, &c. That the lands were liable, in the hands of the purchasers, for the balance of the purchase-money, both to the complainant Webb, for the purchase-money due to him, and the complainant Pendleton, for his one-fifth of the amount of the sales. The bill sought a discovery of the amount of lands