

Purviance Vs. Angus

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Decided On : 1786

Appeal No. : 1 U.S. 180

Appellant : Purviance

Respondent : Angus

Judgement :

PURVIANCE v. ANGUS - 1 U.S. 180 (1786)

U.S. Supreme Court PURVIANCE v. ANGUS, 1 U.S. 180 (1786)

1 U.S. 180 (Dall.)

Purviance et al.

v.

Angus

High Court of Errors And Appeals of Pennsylvania

September Sessions, 1786

This was an Appeal from the Court of Admiralty. It was argued on the 7th and 8th of July by Lewis, Wilcocks, and Sergeant for the Appellants; and by Bradford, Ingersol, and Wilson for the Respondent . The Court held the matter for sometime under advisement, in hopes that a compromise would have taken place between

the parties; but on the 27th of September THE CHIEF JUSTICE, delivered the following judgment.

M'KEAN, CHIEF JUSTICE.

I will state the case as it appears before the Court from the proceedings, and the evidence, which are not controverted on either side; and shall then taken notice of those points which have been disputed.

The Appellants on the 28th day of August 1779, were owners of a Brigantine, called the Hibernia, then riding at anchor in the port of Philadelphia, and appointed the Respondent master and commander, on a voyage from thence to Oratavia in the island of Teneriffe, having a commission as a Letter of Mart and Reprisal. The owners, in the sailing orders then delivered to the Respondent, (among other things) 'advised him to keep company with the armed vessels bound to the Eastward as far as he should think it prudent; and that should they agree to cruize two or three weeks on the coast, he had their approbation in joining with them.' The Respondent sailed on his intended voyage, and in the river Delaware joined

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the Brigantine Achilles, whereof George Thompson was master, and the Patty, whereof John Prole was master, each having a commission of Letter of Mart; and about the 1st of September following they proceeded to sea in company, standing to the Eastward.

On the 6th of September in the forenoon a firing of cannon was heard by people on board the Achilles and Patty, and in the afternoon the Achilles and Patty had altered their course, and, being swifter sailors than the Hibernia, left her at some distance; they then waited for her, and when she came up, she inquired the reason of their altering their course, and was informed, that they had seen two sail and given them chase. At this time the two vessels were not in fight, the Achilles and Patty having waited for the Hibernia until they were lost: They all three then continued the same course until the morning, when at day light two vessels were

descried, lying close together, by each of the masters of the three Brigantines, who forthwith made towards them; and the Achilles and Patty, after firing a few guns, took possession of a Brigantine, called the Betsey, which had been a British vessel, bound from Montserrat for New York, (which places were then possessed by the Enemy) and was captured the day before by the Argo sloop of war, belonging to the United States, Silas Talbot, Esquire, Commander. At this juncture the Hibernia was a few miles astern of the other Brigantines, and when she came up, the Respondent asked, 'what vessel they had brought too?' and was answered, 'a Brig from Montserrat bound for New York; a good prize.' In consequence of some conversation with the Captains of the two other vessels, the Respondent sailed in pursuit of the Argo, then in sight, and did not rejoin them, until near sun set, when a boat came along side from the Patty, and asked for men to assist in navigating the Betsey into some port: The Respondent immediately put two men into the boat, and signed Orders for William M'Neil, who had been appointed Prize-master, which contained these words, 'to get her if possible into Delaware, Egg harbour, or Chesepeak, for fear of the Sloop Argo falling in with you, if you go to New England;' and 'beg of M'Neil to stand to the Southward this night and strive hard for Philadelphia.' These orders are dated 'the 7th September 1779, at sea on board the Brigantine Patty,' and were signed first by John Prole and George Thompson. So far the facts are agreed.

Mr. William Davis, who was a passenger on board the Patty, swears, 'that he verily believes, the firing of cannon on the 6th about ten o'clock in the forenoon, was heard on board the Hibernia, and that the people on board each of the three brigs saw two vessels engaged in fight, for that he heard and saw them distinctly; that the three lay becalmed within hale of each other, that the Argo and Betsey were then about three leagues distant from the three Brigs, and that the firing continued more than an hour.' He further is positive, that the Respondent and Prole and Thompson had a consultation in his presence, about the brig Betsey, whether she was prize

or not; and that they concluded to secure her as a prize, as they disbelieved what had been said by West and Church about her being prize to the Argo, or if she was, yet, as they had been in sight at the time of the capture, they were intitled to a share. These facts are also confirmed by the deposition of John Groves.

On behalf of the Respondent, the depositions of John Brice, first Mate of the Hibernia, John Magill, George Stout, George Eldridge and Aaron Ashbridge, mariners on board, and of Doctor Wilson Waters, Surgeon of the Hibernia, prove, that they did not see the Argo and Betsey, nor hear any firing of cannon, on the 6th of September, and that neither Captains Prole nor Thompson were on board the Hibernia on the 7th, nor was the Respondent on board of either of their vessels. In which last particular Davis and Groves concur. These witnesses also differ with Davis and Groves, about the hour that the Hibernia sailed in pursuit of the Argo, the duration of the chase, and the time of her return and rejoining the other Brigs.

It has also been given in evidence, that a suit had been instituted in the Admiralty by Captain Silas Talbot quitam &c.; against the owners of the three Brigantines, for the spoliation of the Betsey and her cargo, who, upon an Appeal to this Court were decreed to pay L.11,141. 5. 4. damages to the Libellant, besides the costs, of which sum the present Appellants, as owners of the Hibernia, paid L.3,795. 3. 6. and towards costs on the 22nd January 1785. [*](#)

Upon this state of the case, two Questions arise: The first of fact; the 2nd of Law.

1. With respect to the fact, there are two points, 1st. Whether the Respondent did willingly join the two other Captains Prole and Thompson, in the tortious capture of the Betsey from the Argo, knowing her to have been a prize to the Argo, and that the Argo was a friend? This would undoubtedly have been a *lata culpa*, an evident trespass, to call it by no harsher name. [182-Continued.]

If he did not, then 2ndly, Whether he was guilty of such gross negligence (*crassa negligentia*) as by law will make him responsible to the Appellants, considering the relation between them as owners and master of a vessel?

As to the 1st point, the evidence is not so satisfactory as might be wished in a case of such consequence to the parties. Had there been evidence given respecting the credit of the several witnesses, the matter would have been clearer. If Davis and Groves are to be credited, in addition to the other evidence, there is a very strong presumption indeed, that the Respondent is guilty of a great wrong, of a clear trespass; for if he saw the fight on the 6th, as he next day found that the Betsey, which had been captured, was an enemy, he must have concluded, that the Argo was a friend. And if all that the other witnesses swear in behalf of the Respondent, is true, yet I do not think, that the evidence of Davis and Groves is thereby invalidated. With respect to hours or times, in which particular occurrences or transactions happened, witnesses of the greatest integrity

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may and often do differ: This has happened in the cause before us. But as to other matters, the witnesses on board the Hibernia only swear, 'that they did not see nor hear, what the others say, they did.' The rule in such a case is, 'that one affirmative witness countervails the proof of many negative, because both may swear true,' and such interpretation should be put on the whole testimony, as to reconcile it; for, one may see and hear what another does not. Gilb. Law of Evidence 157. However, it does not appear necessary to determine this first point, as the second question admits of little difficulty, viz. Whether the Respondent has been guilty of such gross negligence as should make him responsible?

The Respondent was near to the Betsey, as well as the two other Letters of Marque; he might have gone on board her, and made every necessary and proper inquiry; he sent two of his crew on board her, to get her if possible into Delaware &c.; he signed the order to M'Neil, the Prize master, which must have shewn, to perfect conviction, that the Betsey had been captured by the Argo, and that she was a friend. But it is said, that he confided in Prole, whom they had made Commodore, and in Thompson; that they deceived him; and that he signed the orders to the Prize master without reading them; and, in short, that he implicitly obeyed, and did whatever he was told to do. The Respondent should have reflected, that the seizing a valuable vessel and cargo was a serious piece of

business, if belonging to a friend; he should therefore have weighed the consequences of his credulity in others; he could have inquired for himself, and had the same evidence with Prole and Thompson; he should have considered, that his owners placed their confidence in him, and in no other; he should have acted for himself, and taken care that he did no injury to any one. But he does not appear, by the defence made for him, to have exercised his own judgment at all. Was this using proper care and diligence, or was it inexcusable conduct, and gross negligence?

Let us now consider the law upon this evidence; for, *ex facto oritur lex*. It is agreed, that every one of the parties to a trespass, who participates in it, is a trespasser, and an action will lie against him as a principal; for, there can be no accessory to a trespass: Bro. trespass, pl. 113. 1 Lev. 124. that a trespass was committed in taking and carrying away the Betsey from the Commander of the Argo; that the Respondent was present, aiding and assisting in the taking and carrying her away: and that Captain Silas Talbot could have maintained his suit against the Respondent, as well as against his owners, for the wrong and injury they have done to him. But, it is contended, that though he might be responsible to Captain Talbot, he is not so to his owners, for that his relation with them was by contract, and the contract between a servant and his master, or between a Captain of a ship and his Owners, points out the measure of the Servant's or Captain's responsibility; that he ought not to be accountable in damages for an error in judgment, but only for the fault of the heart, and that he acted according to the

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best of his judgment; and his error in this business arose from the misinformation and deception of Prole and Thompson. In support of this doctrine were cited 1 Blackst. Com. 422. 389. 3 Bl. Com. 163. 3 Bac. Abr. 544. 564. 4 Co. 83. 84. 10 Mod. 109 4 Burr. 2060. 11 Mod. 135. In reply to this, it has been agreed, that the master or commander of a Privateer or Letter of Marque may lawfully stop the ship of a friend, examine her papers, the people on board, the cargo &c.; in order to discover, whether she belongs to a Friend, or an Enemy; and if upon the whole it

should be doubtful, to bring her into port, for further inspection and trial, without breaking bulk, or imbezzlement of the lading. But if the captor imbezzled the cargo, disposed of or used any part of it, sent away the captured mariners, or did any other acts, which shew he could have no reasonable doubt, in such case he is liable for damages and costs. Lee on Captures 202. 240. Beawes L. M. 207. I Rolls Abr. 530. It is insisted upon, that a master of a ship is one, who for his knowledge in navigation, fidelity and discretion, hath the government of the ship committed to his care and management; that he must give an account for the whole charge, and, upon failure, render satisfaction: And, therefore, if misfortunes happen, if they are either through the negligence, wilfulness or ignorance of himself, or mariners, he must be responsible; and his owners may sue him for reparation of damages, jointly or separately, both according to the common law, and marine law. See I Vol. Laws of Admiralty 186. Beawes L. M. 49. Bath. Nisi Prius 24. 3 Keeble 444. 3 Bac. Abr. 564 . 3 Black. 163. A great loss then has been sustained by the injury done in the seizure of the Betsey; it will be heavy, and must finally fall upon the owners or master. If the bringing the Betsey too, for the purpose of enquiring whether she belonged to a friend or an enemy, was lawful, the subsequent conduct was unlawful, and the seizors became thereby trespassers ab initio. This was a *lata culpa* in Prole and Thompson at least, the Respondent was present aiding and assisting in carrying her away from the Argo. If one does a trespass, and others do nothing but come in aid, yet all are principal trespassers. Bro. trespass. pl. 232. 20. Vin. Abr. 460. title trespass. pl. 3. and fo. 466. Letter U. If A comes in aid of B, who beats me, yet he is a trespasser as well as B. 22 Aff. 43. If the conduct of the Respondent was not wilful and with full knowledge, yet it appears to us to have been a *crassa negligentia*, and that any reasonable man, upon inquiry, and the least reflection, upon reading the orders given to the Prize master M'Neil, (and he ought to have read them) or upon the circumstances attending the whole transaction, must have been satisfied, that the Betsy was a prize to the Argo. It is a wrong position, that a master of a ship is not answerable for an error in judgment, but only for the fault of the heart, in civil matters. In criminal cases, as well in others as in a master of a ship, it is true. One *non compus mentis* is answerable civilly for

a wrong done to another. Reasonable care, attention, prudence, and fidelity, are expected from the master of a ship, and if any misfortune or mischief ensues from the want of them, either in himself or his mariners, he is responsible in a civil action. And it must appear very strange to any understanding, that the owners of a vessel should be answerable in damages for the misconduct of the master, merely because they appointed him master, and that the master, the actual malfeazor, should not be accountable over to them; that the innocent should suffer, and the guilty person go scot-free. We know of no such law.

Upon the whole, THE COURT are of opinion, that the sentence of the Court of Admiralty be reversed;* and this Court do decree and adjudge, that the respondent do pay to the Appellants the Sum of L.3,795. 3. 6. and the interest thereof from the 22nd day of January 1785, together with the costs by them paid in the former cause by Silas Talbot qui tam, against them and others, and also the costs of this suit in the Inferior Court, and that each party shall pay their own costs in this Court, the same to be taxed by the Register, or this Court.

Rush, Justice.

As my opinion differs from that of the Court just delivered by the Chief Justice, I will give the reasons of my dissent somewhat at large.

A libel has been filed in the Court of Admiralty for the State of Pennsylvania, on behalf of John Purviance, Joseph Dean, and Benjamin Harbeson, against John Angus, setting forth and charging, that the said John Angus was duly appointed Master and Commander of the brig Hibernia, the property of the Libellants, bound on a voyage from Philadelphia to the port of Oratavo in the island of Teneriff; that on his voyage aforesaid, the said Angus, without any probable cause of capture, and with a view to his own private interest and emolument, did combine with certain malefactors, and take the brig Betsey out of the possession of Silas Talbot, the said brig being at that time a prize to the said Talbot, and that Angus knew she was prize to him. The Libel further charges, that Talbot hath recovered L4000

against the Libellants for the trespass and injury aforesaid; and concludes with praying, that, as the Libellants have been compelled to pay that sum of money, through the misconduct of Angus, their Captain, they may be enabled to recover from him a full equivalent. [185-Continued.]

To this libel an answer hath been filed on the part of Angus, in which he explicitly denies his taking the Betsey on the high seas without authority from his owners, and without probable cause. He also utterly denies, that he knew the brig Betsey had been taken by Talbot, and that he had any intention to defraud him, or his (Angus's) owners.

A variety of depositions and exhibits have been produced in the cause, and the Judge of the Admiralty hath pronounced a decree in favour of Angus, the Respondent.

From this sentence an appeal hath been brought by the Libellants to this Court, the highest in the State, having the ultimate and superintending power to correct the errors of all inferior tribunals .

It is right and proper before we examine the evidence, accurately to state the question in controversy.

We are not now to decide, generally, whether Captains of vessels are not responsible to their owners for neglect of duty, or breach of trust; it being admitted on all hands, that the matter may sue his servant for any breach of trust or confidence. If a shepherd, by his negligence, suffer my sheep to be drowned; or should my cattle, through the negligence of my servant, commit a trespass upon my neighbour; the shepherd and servant are both liable in these cases. And, in the latter case, I am responsible over to my neighbor for the injury he receives through the neglect of my servant. Doctor & Student 37. Noy. 109. 5 Co. 13, 14.

Nor are we now to enquire, whether Angus be responsible to Silas Talbot for a trespass. I admit that he is clearly so; and that no defence he could make, founded on ignorance, accident, or mistake, could avail him on such suit by Talbot. If Angus joined in the trespass, it is immaterial to Talbot what were his views, or

whether he did it intentionally, or not. If I hurt a person through negligence, it is no justification in an action of assault and battery. Buller 16. And there is a case in one of the books, where a gun went off by accident, and wounded a person, and it was held that trespass lies. It is to no purpose, therefore, and wide of the present question, to cite authorities to prove that in trespass all are answerable. Whether Angus showed more or less zeal; whether he did all he could, or not; are useless enquiries at this time. In trespass all are liable; and this rule would apply on a suit by Talbot against Angus, even though the trespass might appear, on the part of Angus, to have been incautiously, or unintentionally, committed. [185-Continued.]

The question before the Court is a special one, resting on its own peculiar circumstances, and not involving in it the examination or adjustment of any general principles of law. But before I proceed to state what I take to be the question, I will make a few previous observations, on the doctrine of responsibility, so far as the same is applicable, or necessary, at present.

The owners, as well as the captains of vessels, are, by the civil law, liable for trespasses committed on the sea. The owners are liable on the principle, that the captain is their servant, bound to obey their orders, and to pursue their instructions: a confidence or trust is reposed in him, that he will conduct himself agreeably to the principles of integrity and good faith; and that he will be guilty of no outrage upon others, or of any criminal neglect whatever. By rendering the owners responsible for the captains, the law hath laid them under the strongest obligations to employ none but men of skill, capacity and integrity, to navigate their vessels. Perhaps, too, the principle in part received its establishment, from an apprehension, that the commander of the vessel might not be of sufficient ability to compensate for the injury committed by him. In all cases of spoliation, both captain and owners are equally liable to the party wronged.

But what is the nature of the contract between the owners and the captain? It is either general, or special. It is either created by the law, or by the parties themselves. A commander of a vessel, on going to sea without any instructions, is bound to govern himself by law: and, in such case, if his owners are injured through his misconduct, he is certainly responsible again to them. This duty,

however, which the law imposes upon the commander of a vessel, may be altered by his owners. They may, for example, order him to take and seize the vessel of a friend; and, in case of his compliance, both he and his owners will be responsible to that friend: but the captain, in this instance, will not be liable to his employers, because he acted according to instructions. The rules of responsibility, therefore, are not reciprocal. The owners may be liable to a person injured, and it will not thence follow, that the captain is answerable again to his owners. These observations are made to refute a very improper inference, that because a captain has injured a third person, for which the owners are liable, that, therefore, the captain is again responsible to the owners. [185-Continued.]

The question then before the Court is this: Is Angus, (who actually committed a trespass on the property of Silas Talbot, in conjunction with captains Prole and Thompson, and whose owners, the present libellants, have since been compelled to make compensation to Talbot for the trespass of Angus,) responsible to his owners, for the monies paid by them on account of the said trespass, under all the circumstances of the case?

This I take to be a fair state of the question; and the answer must depend, first upon the evidence, and secondly, upon the law.

I have stated in the question, that Angus committed a trespass. This appears evident from his signing the orders, and from his putting two sailors on board the Betsey, to assist in navigating her into port:

Unless, therefore, it can be shown, that Angus was imposed upon by his comrades, Prole and Thompson, to act in this manner; and that he was authorised to place a reasonable confidence in them, the decree of this Court ought to be against him. In other words, unless he can show some authority, either express, or implied, for what he did, he ought to be considered in the same criminal point of view with the two other captains.

In the beginning of September, 1779, the Hibernia, commanded by Angus, left the Capes of Delaware, in company with Captain Thompson, who commanded the

Achilles, and with Captain Prole, who commanded the Patty. They were all armed, and had Letters of Marque. Upon the 6th and 7th of the same month, the transaction happened which gave rise to the present dispute. William Davis, a passenger on board the Patty, says, that on the 7th, about ten o'clock, A.M. he heard a firing, and saw two vessels engaged in battle, and that at that time, the three brigs, the Patty, Achilles, and Hibernia, were within hail of each other. This firing, if ever heard on board the Patty, or the battle seen, must have been on the sixth, and not on the seventh. He adds, that he verily believes that the two other brigs heard the firing also. [185-Continued.]

In opposition to this evidence, let us contrast the testimony of James Leach, the captain, and John Russel, the mate, on board the Betsey. They both swore, that, at the time the Betsey was captured, there was no other vessel in fight but the Argo; and they add, that they verily believe, no person did see any other vessel. If they were in sight of Davis, Davis must also have been in sight of them; and the firm belief of Leach and Russel, that no vessel was in sight, is at least equal in point of proof, to the firm belief of Davis, that the Hibernia and Achilles saw the engagement. It is remarkable too, that Davis says, that Angus had his boat hoisted out, in which he is contradicted by all the other witnesses, and appears to be under a great mistake.

But I shall wave any further observations on this point; for, though it should be admitted that Davis, and those on board the Patty, heard the firing and saw the chase, it cannot thence be inferred, that those on board the Hibernia did, especially as they swore that they did not. Inattention, noise, and a variety of other causes, might prevent the people on board one vessel, from seeing or hearing what those on board another vessel, did see and hear.

It appears to me, therefore, highly probable, from the evidence before the Court, that Angus did not on the 6th, see the taking of the Betsey. His conduct on the 7th, when he came up to the other captains, strongly confirms this idea. For no less than six witnesses out of the seven, who were present when Angus came up (that is, every witness except Davis) expressly mentions, that Angus enquired what they had got; and upon being told she was a good prize, he replied, if she is a good

prize, so must the sloop be: and that he further asked, why one of their fast- sailing vessels did not chase her; upon which they ordered him to pursue her, which he immediately did.

Now, it is in full proof, from the evidence of Captain Talbot, that the two other brigs had been up with the Betsey about an hour before Angus came up, and that their boats had frequently passed to and from the Betsey. They, therefore, had full information; but Angus had not the least knowledge, except what he received from their declaration, that she was a good prize. If then she had been a good prize, of which he had not, at that time, the least reason to doubt, well might he reply, that the other vessel, meaning the Argo, was also a good prize. This observation, made at this period of the business, unanswerably shows, that he could not have seen the Betsey and Argo engaged; for, it is not conceivable that he could be so grossly ignorant and stupid, as to see two vessels engaged in battle, and, at the same time, suppose them to be both enemies. [185-Continued.]

With respect to the idea of the three captains having consulted what to do with the prize, it scarcely merits consideration. Grove, says, that he does not know on board which vessel the consultation took place;

in which he is contradicted by Davis, who says it was not on board any particular vessel, but that each captain continued on board his own. The truth, however, is, that there never was any consultation, and, in this, all the other witnesses agree.

The orders from the three captains to the prize master, and which are signed by Angus, contain a direction to him to get, if possible, into Delaware, Egg-Harbour, or Chesapeake; 'for fear of the sloop Argo's falling in with you, if you go to New-England.' From these expressions, it has been contended, that Angus was privy to the whole transaction; but I do not see the thing in that point of view. It is possible that he signed the orders without considering attentively the meaning of the words, believing, at the same time, that his comrades, who had made the necessary enquiries on board the Betsey, had their reasons for inserting them. It is certain, that he thought the Argo an enemy, and as such pursued her. He might, therefore, very naturally have supposed the other captains had reason to believe the Argo

was bound to New-England; and that on this account they had inserted those words in the orders.

What, then, is the nature and history of the present transaction? Three vessels, commissioned as Letters of Marque and Reprisal, being about to sail at the same time from the port of Philadelphia, the owners of the Hibernia, give their captain orders to cruise with the other two. He does so; and, in the course of their united operations, he is deceived and misled by them in such manner, as to concur with them in committing a trespass. Had Angus been directed, generally, to cruise, the case might have been different; for, then every degree of confidence reposed in his associates, must have been at his own risque. But Angus, [185-Continued.]

being expressly authorized to cruise with the two other vessels then sailing to the east, any act, or event, which was likely to happen on a joint cruise by the three vessels, or which might have been rationally expected in the usual course of things, was as much authorised, as the cruising itself was . Every thing usually done by persons jointly cruising, is implied in the authority to Angus to cruise with the others. The owners themselves; have laid the foundation of the trust, or confidence, that he reposed in Prole and Thompson, and should therefore alone suffer. The conduct of Angus seems to be clearly warranted by the rules and maxims that invariably govern the commanders of vessels, when they act in conjunction with others on a cruising voyage. I perceive neither *crassa negligentia*, nor *lata culpa* in his behaviour; and I take the law to be, as stated in 4 Burr. 2060, that he is not answerable unless in those two cases. It is preposterous to say, that he ought not to have credited Prole and Thompson, when he was ordered to join with them on a cruise. Hard is the doctrine, that a servant, who apparently acts in the best manner for the interests of his master, should be liable for unavoidable failures, especially when they originate, not in himself, but in others: It is sufficient to deter all men from accepting a trust.

This authority to cruise with Prole and Thompson, certainly means something: but, if it will not justify Angus's conduct on this occasion, it is totally insignificant and void; and an authority to cruise with others, is an authority to do nothing; that is, no authority at all.

However disposed to concur with my Brethren in this cause, I have not been able to do it. Unanimity in Courts of Justice, though a very desireable object, ought never to be attained at the expense of sacrificing the judgment.

Upon the whole, as it appears to me, that Angus did not combine with the other Captains to take the Betsey out of the possession of the Argo; and that he acted such a part, as he thought would promote the interests of his owners; my opinion is, that the decree of the lower Court should be affirmed: But a majority of this Court entertaining different sentiments, it must nevertheless be reversed. [185-Continued.]

The Counsel for the Respondent afterwards moved the Court for a re- hearing upon a suggestion of new evidence &c.; and upon that occasion,

Judge SHIPPEN made the following observations:

SHIPPEN, JUSTICE:

When this Court delivered their decree that the Respondent should pay to the Appellants the Sum of L.3,795. 3. 6. they estimated the damages by what they conceived to be the value of the Vessel and Cargo, having then, I believe, no doubt but that the loss sustained was the proper measure of damages. The conduct of the Respondent, though certainly unjustifiable, appeared from the evidence to be attended with such favorable circumstances, that if the idea had been entertained that the damages were discretionary, and could have been legally diminished, I, as one of the Court, should certainly have given my voice for a much less sum. Whether the Court had, or had not, such a discretionary power, was not made a question on the hearing, but has since occurred to me; and having met with a case which goes a great way towards establishing the principle, I should be willing to have the case re-heard as to this point. The case I allude to, is that of Russel v. Palmer in 2 Wils. 325. which was a special action on the case against an Attorney for negligence, in not charging the Defendant in execution within two terms after the judgment, whereby the Plaintiff lost his debt, the Defendant having obtained a Supersedeas, agreeably to a rule of the Court of

Kings Bench, and had been discharged out of custody. On the trial of the cause before Lord Cambden, a verdict was given for the plaintiff for L.3000. the whole debt, by the Chief Justice's direction. But, afterwards, on a motion for a new trial, the Chief Justice himself and the rest of the Court were of opinion, that he had misdirected the Jury in telling them, that they ought to find a verdict for the

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whole debt, whereas the action, sounding merely in damages, the Jury ought to have been left at liberty to find what damages they thought fit. Accordingly a new trial was ordered, and on the second trial the Jury were told, that they might find what damages they pleased, and, on some favorable circumstances appearing for the Defendant, they found only L.500. in damages.

The similarity of this case with that before the Court, inclines me strongly to admit a re hearing of the cause as to this point, whether, if the Court should be of opinion that the Respondent is answerable on the point of gross negligence, they are bound to estimate the damages by the real loss, or whether they may not mitigate them, according to the circumstances and degree of negligence in the Respondent.

THE COURT, on consideration, directed a re-hearing as to this point only; and, after argument, reducing the damages, they gave the following judgment:

The court do award, that the Respondent do pay to the Appellants the sum of L.948. 15. 10. 1-2. and the interest thereof from the 22nd day of January 1785, together with the fourth part of the costs by them paid in the former cause by Silas Talbot qui tam against them and others; and also the costs of this suit in the Inferior Court; and that each party pay their own costs in this court; the whole of the aforesaid interest and costs to be taxed by the Register, or this Court.

Footnotes

[[Footnote *](#)] See Ant. 95.

[[Footnote *](#)] See the evidence, and the sentence of the Admiralty, reported by the Honorable Judge of that Court, in the volume referred to ant. p. 95.

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