1786. As to the forms of their proceeding, both parties ſhould have an opportunity of being heard, and that in the preſence of each other, that they may be enabled to apply their teſtimony to the allegations. The witneſſes, on both ſides, are likewiſe, to give their evidence in the preſence of the parties, that they may have an opportunity of croſs examining them. No ſurpriſe is permitted, ſuch as refuſing the parties a reaſonable time to bring forward their witneſſes, or refuſing to hear them when they are brought. Theſe rules, or ſimilar ones, are founded in natural juſtice, and are abſolutely neceſſary for the due adminiſtration of juſtice in every form whatever.

As to the kind of evidence which the referrees may hear, there always has been, and muſt neceſſarily be, in this kind of tribunal, a very great latitude. The parties, generally unaſſiſted by counſel, are permitted to relate their own ſtories, and confront each other; their witneſſes are heard even without an oath, unleſs the contrary is ſtipulated, or the referrees require it. Books and papers are inſpected and examined by them, without regard to their being ſuch as would be ſtrictly evidence in a Court of law. And this practice being known to both parties before they agree to the reference, and the advantages ariſing from it being mutual, there ſeems no juſt reaſon to complain of it.

In public trials in Courts of law, the judges ſit to ſuperintend the evidence, and no intereſted witneſſes are, in general, permitted to give evidence to the jury; but referrees occupy the office both of judge and jurymen; their diſcretion, therefore, muſt neceſſarily be much relied on, and as they are generally unacquainted with the artificial rules of law, they muſt be guided principally by their own reaſon. If we were once to ſet aſide a report, becauſe the referrees had heard an intereſted witneſs, we ſhould open a door for ſuch a variety of objections, that ſcarcely a ſingle report would ſtand the teſt. Papers not formally or legally proved, or hearſay evidence admitted, would be as fatal to reports, as the admiſſion of intereſted witneſſes, being equal violations of the rules of evidence.

Rule diſcharged.

OGDEN *verſus* ASH.

THIS was an action upon a policy of inſurance on the Ship *Brothers*, which came before the Court upon a caſe ſtated, wherein the ſingle queſtion was, whether a warrant inſerted in the policy, had been complied with on the part of the inſured, or not? After argument, THE PRESIDENT ſtated the point, and delivered the opinion of the Court.

SHIPPEN, *Preſident*.—The policy in this caſe, is on the outward bound voyage, wherein it is warranted "*that orders will be given*

" *given that the Ship ſhall not cruiſe.*" Whether ſuch orders have, or have not, been given, is the queſtion before the Court. 1786

The orders *which were* given, are produced. They conſiſt of inſtructions which, in the former part, relate to the outward bound voyage, and, in the latter, to an intended cruiſe for two or three months, after the outward bound voyage, which was the ſole object of the inſurance, ſhould be completed.

The inſtructions with regard to the outward bound voyage, begin with an account of the cargo, to whom it is conſigned, and give the uſual directions in mercantile voyages, how it is to be diſpoſed of, and how the proceeds ſhall be applied. The captain is expreſsly directed not to touch at any port to the ſouthward of *Philadelphia, leſt the inſurance ſhould be endangered,* but no mention is made of *a cruiſe,* except that the goods are to be ſold for the purpoſe of fitting her out afterwards *for a cruiſe.*

It is, however, contended, that ſufficient appears on the face of the inſtructions, conſidering the unwarlike condition of the Veſſel, and the intent of the voyage, to ſhew, that, though no expreſs direction is given *not to cruiſe,* yet ſuch an implied direction *is* given, as will ſatisfy the words of the warranty.

The general intention of the owners, to be collected from the inſtructions, is ſufficiently clear, that they did not mean to give the captain a *power to cruiſe.* But what was the intention of the parties in making the *warranty?* Was it, that ſuch orders ſhould be given as by conſtruction or inference, ſhould ſhew *that* to be the intention of the owners? or, was it not, that the captain ſhould be directed in expreſs terms *not to cruiſe?*

If the warranty had been that *no orders ſhould be given to cruiſe,* or *that he ſhould not be impowered by his orders to cruiſe,* theſe inſtructions would certainly have been a compliance with the warranty; but the warranty is not *negative,* that he ſhould *not* have orders to cruiſe, but *poſitive* that he ſhould *have orders not to cruiſe.* And in which ever way the warranty had been expreſſed, if the captain *had cruiſed,* and the veſſel by that means had been loſt, *he* would have been anſwerable—So that the reſponſibility of the captain, is not any rule to govern the conſtruction of the *policy,* becauſe if he had cruiſed *without orders,* he would have been equally liable, as if he had cruiſed *contrary to expreſs orders.* The underwriters have ſtipulated that *more* ſhould be done, than would barely make the captain anſwerable for cruiſing. What their reaſons were, we can only conjecture; it might be ſuppoſed, that if the orders were ſilent as to his cruiſing, he might be tempted, by an apparent proſpect of gain, to do that, which he would not dare to do in the face of expreſs orders. It is well known, that there have been many captains who have not ſcrupled to break orders which were plain and expreſs; but there are many more, who, when their orders are looſe or ſilent, or diſcretionary, have run the riſk of violating the ſpirit of them, and relied upon the generality or ſilence of their orders, to juſtify them to their owners.

1786. In the preſent caſe, the condition of the Veſſel did not preclude the poſſibility of cruiſing. She mounted 16 guns, ſhe had leave, by the terms of the policy, to call at *Beaufort for men*, ſhe was intended to be a cruiſing veſſel after the outward bound voyage was completed, and it might not be an unreaſonable ſuſpicion in the underwriters, that the captain, unleſs expreſsly reſtrained, might be tempted to cruiſe in the outward bound voyage. Whatever their reaſons were, the underwriters had certainly a right to make it a part of their contract; without it, they might have refuſed to inſure at all, or they would perhaps, have demanded a higher premium; and therefore being ſtipulated, the owners ſhould have complied with it.

Theſe warranties in policies of inſurance are required by law, and by the conſtant uſage of merchants to be ſtrictly complied with; they are generally expreſſed in a few words, but where they are plain and clear, it would be of dangerous conſequence to this uſeful branch of mercantile buſineſs, to introduce a looſe conſtruction of them.

We are of opinion, upon the caſe ſtated, and a view of the policy and orders, that the warranty has not been complied with, and that judgment ſhould be given for the defendant.

Judgment for the defendant.

MARRIOT *et ux*, *verſus* DAVEY *et al.* Executors.

THIS was an action brought by a reſiduary legatee under the act of the 12 *Geo.* 3. *c.* 16. 1 *St. L.* 449. to which the defendant pleaded *fully adminiſtered.* The plaintiff thereupon moved for the appointment of auditors; but the defendant objected, becauſe his accounts had already been left by conſent to referrees, on a former citation before the regiſter of wills, &c.

THE COURT, however, determined, that the former ſettlement was not concluſive; and that, by the words of the act, it was intended, new auditors ſhould be appointed, *ex tempore*, upon the plea of want of aſſets.

Rawle, for the plaintiff, *Sergeant*, for the defendant.

STOTESBURY *verſus* COVENHOVEN.

ON an affidavit that the defendant was in confinement, and that material witneſſes in his favour were about to leave the ſtate, THE COURT granted a rule to take their depoſitions, although the writ was not returnable 'till the next term.

SOMERS *verſus* BALABREGA.

IT was ruled in this caſe, that an Attorney's agreement to refer, binds his Client.

SUPREME