1800. experiment shall enable him to make his election with certainty of profit one way, and without loss any way. This mode of procedure is unfair; contrary to natural justice, and in exclusion of mutuality.

There is a strange mixture of legal and equitable powers, in the Courts of law of this state. This arises from the want of a distinct forum to exercise chancery jurisdiction; and, therefore, the common law Courts equitise as far as possible. Whether, if relief be proper, the Supreme Court of this state could have extended it to the complainant, it is unnecessary to determine. Thus much, however, might and ought to have been done, on the part of the complainant; he ought, when notice was given for him to show cause why judgment should not be entered, to have laid the equity of the case before the judges of that Court, who, if they thought proper, might have deferred the entering of judgment, or ordered it to be entered on terms, to wit, to be vacated on payment of the awarded sum, by a limited period. But the complainant, although he had previous notice, did not avail himself of an appeal to the discretion of the Court; but suffered judgment to pass against him, without making any objection.

There being no equity in the complainant's case, his bill must be dismissed, with costs.

Thurston *versus* Koch.

THIS cause came before the Court on the following case, stated by the counsel, *Condy*, for the plaintiff, and *Ingersoll*, for the defendant.

" On the 13th of *October* 1796, *William I. Vredenburgh*, of the " city of *New-York*, merchant, caused himself to be insured, at " the city of *New-York*, in a certain policy of insurance, which " was subscribed by the plaintiff, in the sum of 14,500 dollars, " upon any kind of goods and merchandise, laden, or to be " laden, on board the brigantine *Nancy*, captain *King*, master, " lost, or not lost, at and from any port and ports in the *West-* " *Indies*, and at and from thence to *New-York*, and there safely " landed, beginning the adventure upon the said goods and mer- " chandises, from the lading thereof on board the said vessel, at " the *West-Indies*.

" On the 17th of *October* 1796, the said *William I. Vreden-* " *burgh*, by *Jacob Sperry* and Co. his agents, caused himself to " be insured, at the city of *Philadelphia*, in a certain other policy " of insurance, which was subscribed by the defendant, in the " sum of 1300 dollars, with other underwriters, in the whole " amounting to 12,000 dollars, upon all kinds of lawful goods, " and merchandises, lost, or not lost, laden, or to be laden, on

" board

" board the said brigantine *Nancy*, at and from *Cape Nichola* 1800.
" *Mole*, to any ports and places in the *West-Indies*, to trade, and
" at and from either of them to *New-York*, beginning the adven-
" ture from and immediately following the loading thereof on
" board the said brigantine at *Cape Nichola Mole*, and so to con-
" tinue until safely landed at any ports and places in the *West-*
" *Indies*, and at *New-York* aforesaid. The premium demanded
" upon this policy, was ten per cent. and was duly paid by the
" said *Jacob Sperry* and Co. on behalf of the said *William I.*
" *Vredenburgh*, to the defendant and the other underwriters
" upon this policy.

" On the 20th of *October* 1796, the said *William I. Vreden-*
" *burgh*, caused himself to be insured, at the city of *New-York*,
" in a certain other policy of insurance, which was subscribed by
" the *New-York* insurance company, for the sum of 2,200 dol-
" lars, upon all kinds of lawful goods and merchandises, lost, or
" not lost, laden, or to be laden, on board the said brigantine
" *Nancy*, at and from any port or ports in the *West-Indies*, to
" *New-York*, beginning the adventure from the loading thereof
" on board the said brigantine, at any port or ports in the *West-*
" *Indies*, and so to continue until safely landed at *New-York*, &c.

" On the 12th day of *September* 1796, the said brigantine
" *Nancy*, with the said goods and merchandises, so laden on
" board, and insured and covered by the said policies as afore-
" said, sailed from *Cape Nichola Mole*, in the *West-Indies*, for *St.*
" *Marks*, likewise in the *West-Indies*, and in the prosecution of
" the said voyage, from *Cape Nichola Mole* to *St. Marks* afore-
" said, with her cargo, including the said goods and merchan-
" dises, so insured as aforesaid, was captured by a *French* pri-
" vateer, and condemned; by which capture, the said goods and
" merchandises were wholly lost to the insured. Upon this,
" suits were brought into the Supreme Court of the state of
" *New-York*, against the plaintiff, upon the policy by him sub-
" scribed, and against the *New-York* insurance company, on the
" policy by them subscribed; in which suits, the insured, the said
" *William I. Vredenburgh*, recovered as for a total loss.

" The amount paid by the plaintiff (after the usual deductions)
" for the loss, was 12,740 dollars, with 1783 dollars and 60 cents
" interest, and 418 dollars and 32 cents costs. He has, likewise,
" paid, to the said assured, 1083 dollars and 60 cents, being the
" amount of the premium upon the policy subscribed by the de-
" fendants (after the deductions allowed in the case of a returned
" premium) as a consideration for the assignment of the said
" policy to the plaintiff. The *New-York* insurance company have
" paid to the assured 2156 dollars, being the amount of their
" policy (after the usual deduction in case of loss) with 301 dol-
" lars 84 cents interest. The several sums so paid, have com-
" pletely satisfied the loss, with all the interest and costs.

" Question

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" Question for the opinion of the Court. Is the defendant " (one of the underwriters, on the *Philadelphia* policy, of the 17th " of *October* 1796) liable to make any, and, if any, what contribu- " tion to the plaintiff, upon the loss so paid as aforesaid by him? " Or, in other words, Is the defendant liable to pay more than the " amount of the loss, beyond the sum previously insured?

" If the Court shall be of opinion in the affirmative, then judg- " ment shall be entered for the plaintiff, in such sum as, upon the " principles established by the Court, shall be found due. But, " if the Court shall be of opinion in the negative, then judgment " shall be entered for the defendant."

After argument, the opinion of the COURT was delivered by the presiding Judge, in the following terms:

PATERSON, *Justice.* The case before the Court is that of a double insurance; and the question is, whether the insurers shall contribute rateably, or shall pay according to priority of contract, until the insured be satisfied to the amount of his loss. The law on this subject, is different in different nations of *Europe*, owing to the diversity of local ordinances, which have been made to regulate commercial transactions. By the ordinance of one country, the contract is declared to be void, and a forfeiture superadded; whereas, by the ordinances of other countries, the contract is merely void, without any forfeiture. By the ordinance of *Spain*, if a policy be signed on the same day by several persons, the first signer becomes first responsible, and so on till the insured receive full satisfaction to the value of his loss; the posterior insurers being liable only for the deficiency, and that, too, according to the order of priority. But, in such case, by the ordinance of *France*, the several insurers, on the same day, shall contribute rateably to make up the loss; whereas, by the same ordinance, if the policies bear date on different days, the rate of contribution is rejected, and that of priority established; or, in other words, if the first policy absorb the loss, or amount to the value of the goods insured, the posterior insurers are not liable, but shall withdraw their insurances, after retaining a certain per centage. The solvency of the first insurer to the full value being assumed, the ordinance is predicated on the principle, that there remains no property to be insured, and, of course, no risk to be run. But suppose the solvency of the first insurer should become doubtful, what course is to be pursued? As this is a risk, it ought to be provided against; and, accordingly, we find, that some of these ordinances have declared, that such insurer's solvability may be insured. It is obvious, that this is a point of great delicacy; for, by questioning the solvency of a merchant, you wound his credit, and, perhaps, cast him into a state of bankruptcy. Most, if not all, of these ordinances, are of ancient date, and were calculated for the then existing state of commerce in the

the several countries, which formed them. It is, however, evident, 1800.
that the law merchant varies in different nations, and even in
the same nation at different times. The course of trade, local circumstances, commercial interests, and national policy, induce to some variation of the rule. The law in this particular, as it was understood and practised in *England*, prior to, and at the commencement of, our revolution, was different from the rule, which prevailed in *France*, *Spain*, and other countries, under their local ordinances. A double insurance is, where the same man is to receive two sums instead of one, or the same sum twice over for the same loss, by reason of his having made two insurances upon the same ship, or goods. In such case the risk must be the same. This kind of insurance is agreeable to the practice and law of *England*, and is considered as being founded in utility, convenience, and policy. In the case of *Godin* and others v. *The London Assurance Company*, in *February* 1758, Lord *Mansfield*, in delivering the opinion of the Court, expressed himself as follows:

" *As* between *them*, and upon the foot of commutative justice " merely, there is no colour why the insurers should not pay the " insured the *whole:* for they have received a *premium* for the " *whole* risk.

" Before the introduction of *wagering* policies, it was, upon " principles of convenience, very wisely established, ' that a man " should *not* recover *more* than he had lost.' Insurance was con- " sidered as an *indemnity only*, in case of a loss: and, therefore, " the satisfaction *ought not to exceed* the loss. This rule was cal- " culated to prevent fraud; lest the temptation of gain, should " occasion unfair and wilful losses.

" If the insured is to receive *but one* satisfaction, natural jus- " tice says, that the several insurers shall all of them *contribute* " *pro rata*, to satisfy that loss against which they have *all* insured.

" No particular cases are to be found, upon this head; or, at " least, none have been cited by the counsel on either side.

" Where a man makes a *double* insurance for the *same* thing, " in such a manner that he can clearly recover against several " insurers, in distinct policies, a *double* satisfaction, the law cer- " tainly says, ' that he *ought not* to recover doubly for the *same* " *loss*, but be content with *one single satisfaction* for it.' And if " the same man really, and for his own proper account, insures " the same goods doubly, though both insurances be not made " in his own name, but one or both of them in the *name* of *an-* " *other person*, yet that is just the same thing; for the *same per-* " *son* is to have the *benefit of both* policies. And if *the whole* " should be recovered from *one*, he ought to stand in the place of " the insured, to receive *contribution* from the other, who was " equally liable to pay the whole." 1 *Burr.* 492.

In

1800. In the case of *Newby* v. *Reed*, at sittings after term, in 1763, 2 *Bl. Rep.* 416. the same doctrine is laid down, agreed to, and confirmed. For "it was ruled by Lord *Mansfield*, Chief Justice, and agreed to "be the course of practice, that upon a double insurance, though "the insured is not entitled to two satisfactions; yet, upon the "first action, he may recover the whole sum insured, and may "leave the defendant therein, to recover a rateable satisfaction, "from the insurers."

These cases have never been contradicted, and must be decisive on the subject. The law, as stated in the above adjudications, is recognized by *Park* and *Miller*, two recent and respectable writers on marine insurances. Such being the law of *England*, as to double insurances, before and at the commencement of our revolution, it was also the law of this country, and is so now. It is of authoritative force, and must govern the present case. Besides, if the Court were at liberty to elect a rule, I should adopt the *English* regulation, which divides the loss rateably among the insurers. It is the most convenient, equal, and consonant to natural justice, and has been practised upon, nearly half a century, by the first commercial nation in the world. I am not clear, that the practice of *France* is not in conformity with this rule; for it is probable, that they open but one policy, bearing the same date, though signed at different times, or different policies of the same date; in either of which cases, by the *French* ordinance, the insurers contribute rateably to satisfy the loss sustained by the insured. If so, it is precisely the *English* and *American* rule. Equality is equity. This maxim is particularly applicable to commercial transactions; and, therefore, the rule of contribution ought to be favoured. The pressure, instead of crushing an individual, will be sustained by several, and be light. The result is, that the defendant must contribute rateably to make up the loss of the insured.

Judgment for plaintiff.