

1810.  
 Patterson  
 vs  
 Maryland Insu-  
 rance Company.

it is not evidence *per se*. He cited *Peake's Evid.* 74. *Senat vs. Porter*, 5 *T. R.* 158. *Christian vs. Coombe*, 2 *Esp. Rep.* 489. *Ritchette vs. Stewart*, 1 *Dall. Rep.* 317. *Boyce vs. Moore*, 2 *Dall. Rep.* 196; and *Walsh vs. Gilmor*, (on appeal in this court.)

*Curia adv. vult.*

At the present term the opinion of the court was delivered by

EARLE, J. A voluntary affidavit ranks in equal grade with hearsay testimony in the scale of evidence, and in no case is received where better testimony can, from the nature of the case, be had.

The protest of the captain was merely a voluntary affidavit, and a notary public, except in those cases where a protest by the *lex mercatoria*, as in cases of foreign bills, or by statute, as the act of 1785, *ch.* 38, statute 9 & 10 *William III*, *ch.* 17, 3 & 4 *Ann*, *ch.* 9, in case of damages on inland bills and notes, has no authority to take a protest. The point of view in which the authority of this officer is to be considered *generally*, relates to those commercial transactions occurring in one country which are to be proved in another, or in which foreigners are interested; and the office derives its existence from the courtesy of one nation to another; and where he is to do certain acts by statute, the authority is limited to its designated object.

At common law, the best evidence must be had the nature of the transaction admits of. This claim is founded on a loss at sea, in a trading voyage. The captain's protest, before a notary, is produced as evidence of the loss, and the transaction is of late occurrence. Part of the crew are stated to have been residents of the eastern shore, to have returned in the vessel, and to have remained for some time after in *Baltimore*. Those persons were not searched for, and it does not appear that they had left the state, and could not be found. Therefore, as those persons cannot be presumed to be out of the reach of the process of the court, the plaintiff should have produced them, for they must be supposed to be equally cognizant of facts happening on board the vessel on her voyage.

Besides, a party is entitled to cross examine a witness, and it is a general rule, that without giving him an opportunity to do so, his deposition shall not be evidence. *In this*