

case there was no opportunity, and on that ground the protest was incompetent. It is true that in some few cases similar protests have been read in evidence, but it has been to impeach the testimony of the protesters, and not to dispense with their parol testimony, or that of others, or of other proof.

This protest is not to be considered as a deposition *de bene esse*. It differs in two essential particulars; for first, depositions *de bene esse* are taken by some court, or by an express authority derived therefrom, or under our acts of assembly to perpetuate evidence; and secondly, they are always taken upon notice given to the adverse party, if practicable.

By the law of merchants, the captain must protest, on arriving at a port, against damages happening in a voyage thereto, but such protest is not evidence to charge the underwriters upon their policy. It is to protect the captain from his liability, and in such cases some others of the crew must join in the protest; and the reason is, that the captain may thus perpetuate that evidence which may be necessary to exonerate him from personal responsibility, as the crew, being persons of no fixed residence, and liable to more than ordinary casualties, their testimony is therefore more necessary to be taken, and is more liable to be lost.

As to using this protest as *prima facie* evidence only, it is equally as objectionable as if used as positive proof. For the purpose for which it was produced in this case, as in all others, throws the *onus probandi* upon the adverse person, and therefore, if allowed as evidence on that score, it established the cause of action unless contradicted. For *prima facie* evidence is sufficient, if not destroyed by other proof, as a note is *prima facie* evidence of a consideration, and throws the *onus probandi* on the opposite party.

The court affirm the judgment of the court below, with costs to the appellees.

CHASE, Ch. J. dissenting from the opinion of the court delivered the following opinion: The copy of a protest is not evidence *per se*; but under certain limitations and restrictions is admissible. It is evidence, if the captain, and those who signed it, and whose depositions are offered to be read, are dead, or out of the reach of the process of the

1810.

Patterson
vs
Maryland Insur
ance Company