

**Case No. 8,270.** LE ROY ET AL. V. DELAWARE INS. CO.  
[2 Wash. C. C. 223.]<sup>1</sup>

Circuit Court, D. Pennsylvania.

Oct. Term, 1808.

PRACTICE AT LAW—NEW COUNT IN DECLARATION—CONTINUANCE—AFTER  
COMMISSION TO TAKE TESTIMONY, NEW WITNESS FOUND—SURPRISE.

1. Where the plaintiffs had filed a new count to their declaration, to which no plea had been entered, the court granted a continuance of the cause.
2. The plaintiffs issued a commission to take testimony abroad, and the defendant joined in the

same, by filing cross-interrogatories; but the plaintiffs afterwards found a witness to prove the facts they desired to establish by the commission, and abandoned it. The court said, a trial under these circumstances, would be a surprise on the defendant.

Motion by defendant to continue the cause, upon the ground, that the plaintiffs had taken out a commission in this cause, and in another of *Gernport v. Union Ins. Co.* [unreported], on the same risk; which latter depositions, it had been agreed on record, should be read in this action. Those commissions had not been returned, and were in fact abandoned by the plaintiffs, in consequence of their having, accidentally and lately, discovered, in this place, a witness to serve their purpose. But the defendants, who had joined in putting interrogatories under the above commission, depended upon the evidence to be received under them; and were taken entirely by surprise. Another reason was, that about twelve or eighteen months ago, the plaintiffs, after the plea of non in frigit, &c. pleaded, obtained leave to add a new one of barratry, to which amended declaration, no new plea had been put in; of course, the cause was not ready for trial.

BY THE COURT. The defendants would certainly be taken by surprise, if the cause were now to be brought on. But the other reason cannot be got over. The defendants should have pleaded anew, after the declaration was amended. Let the cause be continued, and an eight day rule to plead be given.

<sup>1</sup> [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]