Reports of cases ... 1754-1845

Pennsylvania. Supreme Court
ports of cases ...
1754-1845
WE all knowing the learning, integrity and abilities of Alexander James Dallas, Esquire, Counsellor at law, do, for the common good, approve and recommend the printing and publishing his book, entitled, "Reports of Cases ruled and adjudged in the Courts of Pennsylvania, before and since the Revolution."

Thomas McKean,
William A. Atlee.
Jacob Rush.
George Bryan.
Edward Shippen.

Philadelphia, 29th April 1790.

149522
TO THE HONORABLE

THOMAS McKEAN, ESQUIRE, LL.D.

CHIEF JUSTICE OF THE STATE OF PENNSYLVANIA.

&c. &c.

SIR,

IN addressing this volume to you, the public will readily acknowledge the justice and propriety of the tribute; since a work of this nature is only to be esteemed, like a mirror, for the truth and accuracy with which its object is reflected; and I do nothing more on the occasion, than present you with your own portrait, in which all the praise I covet or deserve, is that of having preserved some resemblance to the original.

But independent of this consideration, the opportunity of making the present offering, yields a high gratification to my feelings and my pride. By the uniform courtesy and cordiality of your attentions, I have naturally been inspired with sentiments of esteem and attachment; and it would betray great insensibility, were I not aware of the advantage of delivering these reports to the world, under the sanction of your avowed approbation and patronage. Hence, Sir, I consider the enjoyment of your good opinion as an honorable source of self-gratulation, and the testimony of your judgment as a sure recommendation to the public.

Were I here inclined to pursue the beaten track of dedications, permit me, Sir, to observe, that an occasion, or a subject, more favorable, seldom can occur. It is my intention, however, that this address should be viewed, not as the eulogy of a patron, but as an instrument of thanks, and a token of regard: For, history, which may applaud without the suspicion of flattery, must hereafter do justice to your merits; but it is by this opportunity alone, that I could enjoy the satisfaction of publicly declaring the respect and esteem with which,

I am, Sir,
Your obliged and
Most obedient Servant,

A. J. DALLAS.

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OF PENNSYLVANIA

Asheton v. Asheton.

to be paid to P. could be ascertained; but, as to P.'s interest in it, the case was the same. Therefore, judgment, by the whole Court, was given for the defendant. (a)

Chew and Moland, pro Quer. Galloway and Dickenson, pro Def.

The Lessee of Asheton v. Asheton.

Present, Lawrence Growden and William Coleman, Justices.

Devise to the first heir male of I. S., when he shall arrive to the age of twenty-one years, he paying to A. & B., daughters of I. S., 40l. each; after the testator's death, I. S. had a son: Held, that he was entitled to recover, it being the intent of the testator, that the first son of I. S. should take.

On special verdict. Devise to the first heir male of I. S., when he shall arrive at the age of twenty-one years, he paying to A. and B., the daughters of I. S., 40l. each: after devisor's death, I. S. had a son, who attained the age of twenty-one years, and paid his sisters the 40l. each.

The question was, whether the son of I. S. could take by executory devise? It was objected for the defendant—1st. That this being a present devise, it could not take effect, because to a person not in esse. 2d. That though it might be construed a future devise, yet it was too remote; for an executory devise must take effect within the compass of a life or lives in esse, or, at farthest, within nine months after: And in this case, I. S. might have had no son, but a daughter, who might have had a daughter, who might have had a son, who would have been the first heir male of I. S., which would have been too remote a contingency, and would have tended to a perpetuity. And the case must be considered as at the time of making the devise, that is, how it might be; and not how it has actually happened. 3d. That the son of I. S. could not take; because the limitation was to the first heir male, and nemo est hares viventis.

For the plaintiff, it was answered: 1st. That this was no present devise, the testator taking notice that I. S. had no son born, by the word first heir male, and using the words when and paying. 2d. That this contingency was not too remote; because the testator by the words first heir male, must have meant first son; and that such a construction must be made as to carry the intent of the testator into execution. 3d. First heir male are words of purchase and designatio persona, and the law will supply the words, of the body, in a will.

By the Court.—The intent of the testator is clear, that the first son of I. S. should take: therefore, judgment, By the Court.

Cases cited; 1 Lord Raym. 207; 1 Salk. 229; Talbot's Cases 44, 50, 145; 1 Vern. 729; Vin., Dev. 315; 2 Vent. 311; 1 P. Wms. 229; 3 Co. 20; 2 P. Wms. 196; 2 Salk. 621.

Chew, pro Quer. Moland and Dickenson, pro Def. (b)

(a) See United States v. Vaughan, 3 Binn. 394; Corsor v. Craig, 1 W. C. C. 424; Sharpless v. Welsh, 4 Dall. 279; Moore v. Spackman, 12 S. & R. 291.
(b) See Scattergood v. Edges, 12 Mod. 279, 287; Co. Litt. 24.
are, the prosecutor. And as no person in the present case is proved to be active in carrying on the prosecution, the defendant must plead to the indictment, without any indorsement.

It was then moved, that the defendant himself might be sworn to prove the person prosecuting; but denied by the Court, who said, it must be proved by indifferent witnesses.(a)

SEPTEMBER TERM, 1762.

NIXON and HARPER v. LONG and PLUMSTEAD.

Evidence.

The protest of a master of a ship, allowed to be given in evidence.(b)

(a) There are many cases, however, in which a party to a suit has been admitted to prove facts not immediately connected with the issue. Thus, the service of notice to produce papers, may be proved by a party. (Jordan v. Cooper, 3 S. & R. 575.) So, the loss of a bill of exchange may be proved by the plaintiff, in an action against the acceptor, its previous existence having been proved. (Meeker v. Jackson, 3 Yeates 442.) So of a lottery ticket. (Snyder v. Woffley, 8 S. & R. 328.) So, in Dehaven v. Henderson, post, p. 424, a plaintiff was admitted to prove the loss of an order given to him by the adjutant-general, for the restoration of property seized by the defendant, to let in evidence of its contents. So, a plaintiff has been admitted to prove the death of a subscribing witness to a deed, in order to let in evidence of his handwriting. (Douglass v. Sanderson, 2 Dall. 116, s. c. 1 Yeates 15.) But he is not competent to prove the handwriting of a witness to a deed (Peters v. Condron, 2 S. & R. 80); nor to prove the handwriting of a person (since dead) by whom the entries in his book were made. (Kearsper v. Smith, 1 Bro. app. liii.)

And see Sneider v. Geiss, 1 Yeates 34; Miller v. McClenachan, Id. 144; Davis v. Houston, 2 Id. 289; Coxe v. Ewing, 4 Id. 429; Lodge v. Phipher, 11 S. & R. 333.

(b) In Cheriot v. Foussat, 3 Binn. 228 (in note), it is said, that upon searching the record of Nixon v. Long, it appeared, that the action was covenant, by the owners of a vessel against the charterers, to recover freight according to a charter-party, the plea, that the vessel returned empty and no freight was due, the replication, that it was by the default of defendants; and the master's protest, which was admitted in evidence, was made by himself alone. This decision has governed the practice of many subsequent cases in the state courts (see Story v. Strettel, post, p. 10; Brown v. Girard, 4 Yeates 115, s. c. 1 Binn. 40; Cheriot v. Foussat, 3 Binn. 227); though it has been followed with evident reluctance; and in the last reported case upon the subject (Gordon v. Little, 8 S. & R. 533), C. J. Tilghman remarked, "There are many objections to this kind of evidence. I never approved of it, and have been induced to consent to its admission, solely in compliance with the practice which had been established before I had a seat on this bench, and which I did not think myself at liberty to contradict. But as this practice is peculiar to Pennsylvania, and, in my opinion, productive of more harm than good, I cannot consent to its extension beyond its ancient bounds." In the circuit court of the United States for this district, although some doubt was expressed upon the subject in an early case (Ruan v. Gardner, 1 W. C. C. 145), it is now settled, that the protest is not admissible. Scriba v. Ins. Co. of North America, 1 W. C. C. 408, in note.1

1 Of the case of Nixon v. Long, Chief Justice GIBSON remarks, in Fleming v. Marine Ins. Co., 1 W. & S. 151: "That a mariner's protest is competent evidence of the facts set forth in it, on the trial of an insurance case, is an anomaly peculiar to the laws of our own state; for it is elsewhere only one of the preliminary proofs of loss, which the assured is bound, by custom, or the terms of the contract, to furnish the insurer, before compensation can be demanded. And it is one which had its root in an imperfect note of an erroneous decision of this court, as a
amounting to an improperation, and the land-office appearing to have been shut between the years 1718 and 1732.

N. B. On an appeal to the King and Council, the judgment of the supreme court was affirmed. (a)

THOMAS WALLACE v. CHILD AND STYLES.

Competency of witness.

In an action on a policy of insurance, the master of a ship, owning part of the cargo, insured by other underwriters, who refused to pay until the determination of this suit, was admitted a witness, swearing himself to be disinterested.

Suits on a policy of insurance. It was set forth in the declaration, that the vessel sprung a leak at sea, and put into Providence through necessity. The master of the ship was produced by the plaintiff as a witness, to prove the bill of lading, and to give a general account of the transactions on board the vessel and at Providence. His admission was opposed, because the captain himself had goods on board, which were insured, and the money was refused to be paid by the underwriters on his policy, until this suit was determined, and therefore he was interested. But it was answered, that the master of the ship was the only person who can be supposed capable of giving a full account of the matter: and part of the defense in this case being, that the goods insured were enumerated commodities, and therefore not lawful to be shipped from Carolina to Madeira; and the master’s goods insured were not to be landed at Madeira, but at London; therefore, the master’s insurance could not be affected by any determination in this case.

The Court ruled, that he should be examined on the voir dire, and if he said he was disinterested, he should be sworn in chief; which was done, and he was admitted a witness.

*PRICE v. WATKINS. [*8

Vested legacy.

Devise of land, after the decease of the wife of testator, to trustees, to sell, and to divide the proceeds among his children, afterwards named, when they attained severally the age of twenty-one, or married; A., one of the children, attained the age of twenty-one, and died in the lifetime of the widow, and before sale: Held, that the legacy was vested.

Special verdict. The question arose on these words of a will. “Item—My will is, that after my wife Ruth Price’s decease, or if she shall alter her condition and marry, then, in such case, I devise and bequeath unto my loving friends, I. W. and M. K., or to any one of them, in case the other should die, in trust, and for the intent to sell and convey, all that messuage, &c., to any person or persons that shall purchase the same, and the money arising from the sale of the premises shall be divided between my children bereinafter named, when they attain severally to the age of twenty-one years, or be married, which shall first happen.” Samuel Price, one of the children, attained the age of twenty-one years and married, and afterwards died in-

(a) See McCurdy v. Potts, 2 Dall. 98; Sims v. Irvine, 3 Id. 425; Bond v. Seabold, 6 S. & R. 137; Miller v. Carothers, Id. 221; Farley v. Lenox, 8 Id. 892.
time immemorial, and was unreasonable, because it had no lawful commencement, a *feme* being supposed by the law to be under the coercion of her husband: and for this purpose Godb. 143, was cited. That supposing the custom good, the deed in the present case was variant from the custom as found in the special verdict; for that the usage ratified this kind of conveyance only in such cases, where the *feme* was willing and desirous to convey, and where she declared she became a party to the deed freely: and that it is not found the *feme* in this case was willing and desirous, and had declared she became a party thereto; for though it is set forth, that she declared she executed the deed freely, yet it does not appear the deed was read, or the contents made known unto her,* without which she could not be said to become a party. Another variance insisted on was, that the examination required by the custom must be by a justice of the peace, and in this case W. P. is not said to be a justice of the peace, but a justice of the court of common pleas. It was further urged, that the deed in this case was void, for two reasons: 1st. Because, though the conveyance is to trustees, yet the use is to the *baron* and his heirs, which, by the statute of uses, vests the legal estate immediately in the *baron*, and so is no other than a conveyance from the *feme* to the *baron*, which is void. The second reason was, that the deed wanted a consideration, there being none mentioned but marriage and five shillings. That the marriage was past, and a past consideration is no consideration, and the five shillings said to be paid to the *feme* was in fact the property of the husband, so no consideration to her.

On the part of the defendant, it was answered, that, though by the law of England, a *feme covert* cannot convey her estate, without an examination by writ, yet in this country a different manner of examination has obtained from the first settlement of the province, in substance, the same as an examination on a fine, which probably, in early days, could not be levied here for want of skill in the professors of the law; and that now the greater part of the titles in the province depend, in some link of the chain, upon this kind of deeds, it would be highly inconvenient, and would introduce the utmost confusion, to overset them. That common recoveries have their validity from usage, and that if this be an error, it is within the maxim, *communis error facit jus*. As to the reasonableness of the usage, Brooke, tit. *faits*, § 14, 15, was cited, to show that an examination of a *feme covert* before the Lord Mayor in London was good, without a fine. And to show the force and extension of the maxim, *communis error facit jus*, many authorities were cited. Carth. 283; 4 Sid. 190; 2 Mod. 238; Jenk. 162, 250; Anderson 49; 2 Abr. Eq. Ca. 200; Hob. 83; Salk. 33; Co. Litt. 112; Shepherd's Touchstone 510; Comb. 320, 342; Stiles 320. As to the variance between this case and the usage, it was said, the *feme* had declared she executed the deed with her free consent, and that it must be taken, the magistrate did his duty in making her acquainted with the contents. As to the other variance, it is notorious, that a justice of the common pleas is a justice of the peace, in this province, being appointed to both offices in one commission, and the court will *ex officio* take notice of so general a practice. As to the objections against the validity of the deed, it was answered, that though a deed would be void immediately from *baron* to *feme*, yet it would be good, when made to trustees to the use of the *feme*: Co. Litt. 112. And the considera-
the defendant's evidence. This was opposed by the defendant's counsel, who insisted, they had a right to go through their evidence, before the demurrer was allowed. Of which opinion the Court also was; and the defendant proceeded with his evidence, among which was a letter from William Penn, the first, acknowledging this sale and grant.

The plaintiff afterwards offered a subsequent letter of William Penn's, declaring the grant to be conditional; and, as this condition was not performed, the grantees should not have the land. This the defendant's counsel opposed, on the principle that no man could create evidence for himself.

* Tilghman.—Letters are like conversation, when the whole must be given.

* Dickenson, on the same side, offered these authorities: 12 Vin. 101. An old manuscript, evidence. Id. 247. The declaration of a woman present at the birth of a child, in proof of pedigree, 3 Mod. 36; to show [*19 that the defendant's rule of evidence is too strict.

Upon full argument, the Court overruled the evidence, upon the principle contended for by the defendant's counsel.

Some of the defendant's counsel, the next day, offered some of Doctor Coxe's letters to David Lloyd, showing that the condition had been complied with.

But the Court adhered to their opinion, and overruled these letters also. A verdict passed for the plaintiff (defendant), by which the sense of the jury was, that the non-performance of conditions of settlement did not avoid the grant.

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APRIL TERM, 1773.

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The Lessee of BIDDLE v. SKIPPE.

Evidence.—Limitation.

A map of the town of Germantown, made about thirty years back, ruled not to be good evidence. The stat. 21 Jac. I., c. 16, ruled to extend to Pennsylvania.

The plaintiff, among other evidence, offered a map, made by one Zimmerman, about thirty years ago. One John Knorr, Zimmerman's nephew, proved that said map was the work of his uncle, at the request of the people of Germantown; that his uncle dying, before he was paid for it, it remained in the family; that it contains the lines of the Germantown lots, and the adjacent out-lands; that, upon any difficulty, they apply to him, and this map generally determines any dispute they may have about their lines.

Mr. Chew opposed this map, at first, but afterwards agreed that the lands in controversy were as laid down in it, and admitted it with a salvo of its being no precedent. Upon the plaintiff's offering it to the jury to take out with them, Mr. Chew opposed it, and some difference arising, the Court declared it was not proper evidence, that they should not have al-
to which plaintiff objected, and made affidavit of the absence of a material witness, and service of a subpoena, on which the motion dropped.

Here terminate all the decisions, previously to the Revolution, which I have been able to collect. For the cases, from the first page to the close of the seventeenth, I am indebted to the Hon. Edward Shippen, Esquire; who obligingly permitted me to publish them from his manuscript, in the possession of Mr. Burd. The rest of the cases, through the kindness of the Attorney-General, I have had an opportunity of extracting from the notebook of the deceased Joseph Reed, Esquire, formerly President of this state.
REPORTS OF CASES

SINCE

THE REVOLUTION.

On the organization of the Courts of Justice under the Constitution established by the General Convention, elected for that purpose, and held at Philadelphia, July 15th, 1776, and continued by adjournments to September 28th, 1776, the following appointments took place:

The Hon. Thomas McKean, Esquire, LL.D., was appointed Chief Justice of the Supreme Court, on the 28th day of July 1777.

The Hon. William Augustus Atlee, Esquire, was appointed a Judge of the Supreme Court, on the 15th day of August 1777.

The Hon. John Evans, Esquire, was appointed a Judge of the Supreme Court, on the 15th day of August 1777.

Jonathan Dickinson Sergeant, Esquire, was appointed Attorney-General on the 28th day of July 1777.

Edward Burd, Esquire, was appointed Prothonotary of the Supreme Court, on the 12th day of August 1778.

COURT OF OYER AND TERMINER,

AT PHILADELPHIA.

SEPTEMBER SESSIONS, 1778.

Before McKean, Chief Justice, Atlee and Evans, Justices.

Respublica v. Molder et al.

Trials for treason.

After full argument by Wilson, Ross and Lewis, counsel for Joshua Molder and John Taylor, indicted for treason, and by the Attorney-General and Reed, in behalf of this Commonwealth—

1 Dall.—3
government and independency thereof, as by law established, to subvert, and to raise again and restore the government and tyranny of the king of Great Britain within the same commonwealth: On the first day of January, in the year of our Lord one thousand seven hundred and seventy-eight, and at divers days and times, as well before as after, at the city of Philadelphia, in the county aforesaid, with force and arms, did falsely and traitorously take a commission or commissions from the king of Great Britain, and then and there, with force and arms did falsely and traitorously also take a commission or commissions from Gen. Sir William Howe, then and there acting under the said king of Great Britain, and under the authority of the same king, to wit, a commission to watch over and guard the gates of the city of Philadelphia, by the said Sir William Howe, erected and set up for the purpose of keeping and maintaining the possession of the said city, and of shutting and excluding the faithful and liege inhabitants and subjects of this state and of the United States from the said city. And then and there also maliciously and traitorously, with a great multitude of traitors and rebels, against the said commonwealth (whose names are yet unknown to the jurors), being armed and arrayed in a hostile manner, with force and arms did falsely and traitorously, assemble and join himself against this commonwealth, and then and there, with force and arms, did falsely and traitorously, and in a warlike and hostile manner, array and dispose himself against this commonwealth; and then and there, in pursuance and execution of such his wicked and traitorous intentions and purposes aforesaid, did falsely and traitorously prepare, order, wage and levy a public and cruel war against this commonwealth; then and there committing and perpetrating a miserable and cruel slaughter of and amongst the faithful and liege inhabitants thereof; and then and there did, with force and arms, falsely and traitorously aid and assist the king of Great Britain, being an enemy at open war against this state, by joining his armies, to wit, his army under the command of Gen. Sir William Howe, then actually invading this state; and then and there maliciously and traitorously (with divers other traitors to the jurors aforesaid unknown), with force and arms, did combine, plot and conspire to betray this state, and the United States of America, into the hands and power of the king of Great Britain, being a foreign enemy to this state, and to the United States of America, at open war against the same; and then and there did, with force and arms, maliciously and traitorously give and send intelligence to the same enemies for that purpose, against the duty of his allegiance, against the form of the act of assembly in such case made and provided, and against the peace and dignity of the commonwealth of Pennsylvania."

The Attorney-General offering a witness to prove, that the defendant had taken a quantity of salt from persons whom he termed rebels, as they were passing out of the city of Philadelphia; and that he had a power of granting passes; his counsel objected, that this was impertinent to the overt act laid in the indictment, and therefore not admissible. 2 Wils. 148–9. It was urged, that at common law, no evidence could be given of a fact, which was not stated in the declaration. L. N. P. 21, 192–3. And that this caution, with respect to the allegata et probata, in a civil cause, ought, à fortiori, to be exercised in a capital prosecution. The overt act must be particularly
laid, and strictly proved. 1 Hale H. P. C. 121. For, justice requires that the defendant should be fully apprised of the charge, so that he may have an opportunity of encountering it with his evidence. When, indeed, one overt act is established, evidence may be given of another overt act, relative to the same treason, but not before. The only overt act laid in the present indictment, is taking a commission; and it is no proof of the defendant's taking a commission, that he seized the salt in question, or possessed a power or authority to let people out of the city. Merely to say, likewise, that he was aiding and assisting the enemy, without laying something more, is no offence; to ascertain the crime, it must be by joining the armies of the enemy; by furnishing them with provisions; by enlisting, or procuring others to enlist in their troops, or by carrying on a traitorous correspondence with them. The aiding and assisting is the treason, but these are the overt acts, which must be laid and proved, in order to convict the defendant of the charge.

The Attorney-General, in reply, observed, that by the pleadings in a civil action, the issue must be reduced to a single point; and he admitted that in all indictments for treason, an overt act must be laid* and proved. But, he contended, that it was unnecessary to fill the indictment with a detail of the whole evidence in support of the prosecution; for if the charge is reduced to a reasonable certainty, it is all that justice can require, and it is all that is to be found in any former precedent. Divers overt acts may, also, be laid in the same indictment; and, though some of them are faulty, if one be well proved, it is sufficient to entitle the commonwealth to a verdict. Where a person was charged with compassing the king's death, evidence was allowed to be given of the prisoner's assembling with forty men, though that overt act was not laid in the indictment. Fost. 245; Id. 9, 10, 22. As to what amounts to levying war, it is said, Id. 216, that the joining with rebels in an act of rebellion, or with enemies in an act of hostility, will make a man a traitor. So, likewise, shutting gates against the king or his troops, in confederacy with enemies, or rebels, comes within the same description of treason. Id. 218. And the same overt act may be applied to several distinct branches of treason, Id. 196, 7, 8, where, it appears that Lord Preston's taking boat at Surrey stairs, with the intention of carrying treasonable papers into France, for treasonable purposes, was a sufficient overt act in Middlesex, to maintain the indictment there. Id. 217, 218. The form of the present indictment is similar to that against Encas McDonald. Id. 5. The charge of levying war is made in the same manner, as in the proceedings against the rebels in the year 1746. And the arraying and marching are also laid agreeable to the terms of all the precedents.

The Chief Justice delivered the opinion of the court to the following effect:

McKean, Chief Justice.—There are three species of treason in Pennsylvania; (a) First. To take a commission or commissions from the king of Great

(a) An act of assembly, passed the 3d December 1782, has increased the number of treasons, by declaring that "erecting or endeavoring to erect a new and independent government, within this commonwealth"—and also "setting up any notice, written or printed, calling the people together for that purpose," are acts of high treason. See 2 Edm. L. 61. And see 1 Id. 435; 2 Id. 531; 3 Id. 188.
Evidence in treason.

Under the act of 1777, there must be an actual enlistment of the person persuaded, to constitute the offence of treason.

Although the defendant's confession, proved by two witnesses, is not sufficient to convict him, substantively, yet, where an overt act is proved, the confession may be given in evidence to substantiate it, although of another species of treason.

INDICTMENT for High Treason.—A witness was called to prove, that the defendant had attempted to prevail upon him to enlist with the British army; but that he did not succeed. This gave rise to a question on these words of the act of assembly: "That if any person or persons knowingly and willingly shall aid or assist any enemies at open war with this state, &c., by persuading others to enlist for that purpose, &c., he shall be adjudged guilty of high treason." (1 Sm. L. 435.)

In support of the prosecution, it was urged, that the attempt to prevail constituted the crime; and that it was like the case of a man's sending intelligence to the enemy, which was an act equally criminal in the sender, whether the intelligence was received, or not.

For the defendant, it was argued, that persuading implies success;—suadeo signifying to advise, and persuadeo to advise through, or successfully: and therefore, it cannot properly be said of any person, that he was persuaded, unless he has done some act in consequence of his persuasion.

BY THE COURT.—There is proof of an overt act, that the prisoner did enlist, and evidence is now offered to show, that he also endeavored to persuade others to enlist, in the armies of the enemy. But we are of opinion, that the word persuading, used by the legislature, means to succeed; and that there must be an actual enlistment of the person persuaded, in order to bring the defendant within the intention of the clause. 2 Lord Raym. 889.

The evidence offered, however, is proper to show quo animo the prisoner himself joined the British forces.

The counsel for the commonwealth then offered to give in evidence, the confession of the defendant, that he was going to the Head of Elk, in order to communicate some information to Mr. Galloway, who had, at that time, gone over to the enemy.

But it was opposed by the adverse counsel, who contended, that a confession, unless in open court, had never been evidence to convict. That though under the 1 Edw. VI., it is said, a man might be convicted of treason, by the testimony of two witnesses, or his voluntary confession; 2 Hawk. 256; yet, that statute does not extend to Pennsylvania, and by the 7 Wm. III., c. 3, it is expressly declared, that no man can be indicted, arraigned, or tried, in a case of treason, but by the testimony of two witnesses, or the confession of the party made, without violence, in open court. Fost. 10, 241–8. But the act of assembly of Pennsylvania totally excludes a conviction by confession. See Prin. Penal Law, 140. A confession may, indeed, be given in evidence to corroborate a treason that has al-
ready been established by two witnesses; but not to prove the treason itself.

*40* By the Court.—To prove the defendant's confession by two witnesses, is certainly not sufficient, under the statute, to convict him. But a confession after the fact, is a proof of the fact itself; and though not competent alone to supply the want of two witnesses, yet it is good by way of corroboration: and therefore, if an overt act has been proved in the county of Chester, by two witnesses, the evidence now offered will be proper, in confirmation of their testimony.

One of the overt acts, then, laid in the indictment, is aiding and assisting the enemy, by joining their armies, and this has been legally and satisfactorily proved. Notwithstanding, therefore, the other overt act of giving intelligence to the enemy, is not supported by any evidence, but the defendant's own confession now offered, and which is in that respect insufficient; yet, it may be produced to substantiate another species of treason and on that ground we now admit it to be proved. See Foster 10, 244; 5 Bacon's Abr. 145; Gregg's Case (Fost. 217); 2 Hawk. 442.(a)

The Attorney-General, Sergeant and Reed, for the commonwealth. Ross and Wilson, for the defendant.

The prisoner being convicted by the jury, his counsel moved the court to set aside the verdict, and grant a new trial, because he was advised, "that the evidence given respecting his declarations, or confessions, was altogether illegal, and ought not to have been allowed."

After argument, by the same counsel, on both sides, the motion was refused by the Court, who gave judgment for the commonwealth; and the defendant, a short time afterwards, was accordingly executed.

(a) See Republica v. McCarty, 2 Dall. 86; United States v. Mitchell, Id. 848.
the United States of America, and entrusted and employed by Colonel Benjamin Flowers, the commissary-general of military stores in the armies aforesaid, and by the honorable Continental Congress, to make payments and take receipts, bills of parcels, and other vouchers for military stores, and for divers articles, necessary and fitting in the preparation of military stores, purchased for the use of the armies aforesaid, and to keep the accounts thereof: And the jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that the same Cornelius Sweers, on the same day and year aforesaid, at the city of Philadelphia, in the county aforesaid, contriving and intending falsely and fraudulently, to deceive and defraud the United States aforesaid, with force and arms, falsely, wickedly and unlawfully, did make, forge and counterfeit, and cause to be made, forged and counterfeited, a certain writing, purporting to be a receipt for one thousand and twenty pounds and fifteen shillings, and purporting to be signed in the name of one Adam Foulk, in the words and figures following, to wit, '3 Rec'd, 1st July 1777, of Col. B. Flower, C. G. M. S., one thousand and twenty pounds 15s. for 820 bayonet belts, and 920 cartouch boxes for the use of the army. £1020 15

ADAM FOULK.'

To the evil example of all others in like case offending, to the great damage of the United States, and against the peace and dignity of the commonwealth of Pennsylvania.

And the jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said Cornelius Sweers, contriving and intending the said United States, falsely and fraudulently, to deceive and defraud, then and there, with force and arms, the said writing, so as aforesaid falsely made and counterfeited, purporting to be a receipt for the sum of one thousand and twenty pounds and fifteen shillings, and purporting to be signed in the name of the said Adam Foulk, wickedly, unlawfully and fraudulently, did publish, and cause to be published, as and for a true writing and receipt of the said Adam Foulk; which said falsely forged and counterfeited writing is in the words and figures following, to wit: '3 Rec'd, 1st July 1777, of Col. B. Flower, C. G. M. S. one thousand and twenty pounds 15s. for 820 bayonet belts and 920 cartouch boxes for the use of the army. £1020 15

ADAM FOULK.'

(He the said Cornelius Sweers, at the time of publishing the said false and counterfeit writing there, by him, in form aforesaid, well knowing the said writing to have been falsely forged and counterfeited as aforesaid); to the evil example of all others in like case offending, to the great damage of the said United States, and against the peace and dignity of the commonwealth of Pennsylvania.'

The prisoner being brought before the court to receive sentence, McKeean, Chief Justice, addressed him to the following effect:

Cornelius Sweers,—After a fair and full trial, you have been convicted of the crime of forgery, upon two indictments, by a special jury of your country. The offence stated in the first indictment, is that of altering a receipt given by Margaret Duncan; and the charge contained in the second indictment, is that of forging a receipt, purporting to be the receipt of Adam
be dismissed at any time, without cause assigned; but that where there is a charter-party, bills of landing, and a particular voyage agreed upon, though the owners may dismiss the master, yet they would be liable in a common-law court. Suspicions might probably be sufficient to discharge, without proofs; but, if the dismissal should appear to have been a wanton abuse, the jury would give great damages, otherwise little; or, as the circumstances might be—nothing. (a)

We therefore affirm the decree with costs. (b)

(a) See Respublica v. Lacaze, 2 Dall. 118.

(b) The decree of the court of admiralty in this case is reported in the volume of Admiralty Judgments by Judge Hopkinson, page 24, and in 2 Peters' Admiralty Decisions, p. 397. Upon the subject of admiralty jurisdiction, see Jennings v. Carson, 1 Pet. Ad. 8; Gardner v. The N. Jersey, Id. 281; Brevoor v. The Fair American, Id. 92; Moxon v. The Fanny, 2 Id. 325, &c.
SUPREME COURT OF PENNSYLVANIA.

APRIL TERM, 1781.


Interest.

Interest is not recoverable, where money has been received and paid in a mistake, and neither fraud nor surprise is imputed to either party.

This case had been argued, on the 3d of July, by Lewis, for the claimant, and Bradford for the estate of Adams. The former cited 2 P. Wms. 157, 154; Pract. Reg.; Barn. 151; 3 Wils. 206; 2 Burr. 1083. The latter cited 10 Mod. 277; 6 Id. 167.

And now, the 8th of July, the Chief Justice stated the question, and delivered the opinion of the court, to the following effect:

McKean, C. J.—The testator, Flowers, and Jacobs, entered into an agreement for the sale of certain lands; soon after which, Flowers died, and Jacobs paid the purchase-money to his executors. The will, however, which appointed these executors, was afterwards set aside, having been obtained by undue influence; and Jacobs filed the present claim to recover the money that he had thus improperly paid.

The only question submitted to the consideration of the court, is, whether, under these circumstances, interest should be allowed?

If there appeared, on the part of the executors, anything like a suppressio veri, or suggestio falsi, our decision would, perhaps, be different from that which we have formed. But on the present complexion of the transaction, we think no interest ought to be allowed.

In Ventris, it is said, that no interest is lawful, and, in many other cases, that it cannot be recovered, unless given by a positive statute. When the Stat. of Hen. VII. was passed, a question arose, whether interest might be allowed, pending a writ of error; and it was refused. In the case of promissory notes, however, where a day certain is fixed for payment, interest is allowed from the day of payment: and, where no day is fixed, it is payable from the time of demand. But in the instance before us, the money was received as well as paid, in a mistake, and neither fraud or surprise can be imputed to either party. Therefore, let the claim be allowed for the principal sum which Jacobs had paid, without interest.(a)

(a) This case, stated somewhat differently, is cited in Henry v. Risk, post, p. 265. And the principle upon which it was decided was adopted in Brown v. Campbell, 1 S. & R. 176, and King v. Diehl, 9 Id. 409. See also Eckert v. Wilson, 12 Id. 393.
* RESPUBLICA v. SAMUEL CHAPMAN.

Treason.

High treason might have been committed against the commonwealth of Pennsylvania, previous to the meeting of the supreme executive council, in March 1777; but under the act of 28th of January 1777, it seems, that an inhabitant of Pennsylvania had the privilege of choosing his side in the political contest, until the 11th of February 1777.

By a proclamation, dated the 15th June 1778, issued by the Supreme Executive Council, in pursuance of the act of assembly, passed the 6th of March preceding, for the attaintment of divers traitors, &c. (1 Sm. L. 449), the prisoner had been required to surrender himself on the 1st of August following, &c., or to be attainted of high treason agreeably to that act. The time allowed for his surrender being elapsed; the attorney-general filed a suggestion, in the usual form, stating that Samuel Chapman the prisoner was the person required by the proclamation to surrender himself, &c.; that he had not surrendered himself, &c.; that he was therefore attainted; and this he was ready to verify, &c. The Chief Justice then asked the prisoner, what he had to say, why execution should not be awarded against him.

Upon which, the said Samuel Chapman, the prisoner, saith, ore tenus, that he was born, and hath ever remained and continued a subject of the king of Great Britain, and is now a prisoner of war; and that he is not, nor hath ever been a subject or inhabitant of this commonwealth; nor hath he, nor he never had, any real estate in this commonwealth; neither hath he at any time owed allegiance thereto: Wherefore, he prays that execution may not be awarded against him, &c.

The attorney-general replied, that the said Samuel Chapman, the prisoner, was an inhabitant and subject of this commonwealth, &c., and that he did owe allegiance thereto, &c. Whereupon, issue was joined.

The evidence upon the trial of this issue was, that the prisoner was born in Bucks county, in this state, and that he had resided there until the 26th day of December 1776, at which time, he departed and joined the enemy. Whether, upon these facts he was to be considered as an inhabitant and subject of the commonwealth of Pennsylvania, at the time of his departure, was the great question to be decided.

His counsel argued, that on the 26th December, 1776, there was no government established in Pennsylvania, from which he could receive protection; and, consequently, there was none to which he could owe allegiance—protection and allegiance being political obligations of a reciprocal nature. The doctrine of perpetual allegiance, to be found in the books, applies only to established and settled governments; not to the case of withdrawing from an old government, and erecting a distinct one. Then, every member of the community has a right of election, or resort to which he pleases; and even after the new system is formed, he is entitled to express his dissent; and dissenting from a majority, to retire with impunity into another country. Upon this principle, it was asserted, that the prisoner never was a subject of the state of Pennsylvania; and the following narrative of the measures pursued in organizing the constitution, was delivered in support of the assertion.

The first act of legislation, under the constitution, was passed on the
ning of March 1777; but its members were chosen at the same time with the members of the legislature.

From this recapitulation, it appears, that, even before the establishment of the constitution, a government under the authority of the people was administered by councils, committees and conventions. After the establishment of the constitution, however, the legislative (which is the sovereign) body, assembled and proceeded to discharge its duties; and it was not necessary to the existence of the government, either that they should have enacted a law, or that the Supreme Executive Council should have been convened.

Under every change of the government, Samuel Chapman remained here until the 26th day of December 1776; and, at that time, he was certainly a subject of the state of Pennsylvania, under the constitution agreed to on the 28th day of September preceding, whatever doubts may be entertained with respect to the former establishments. That this was, likewise, the sense of the legislature, is abundantly evident from the act on which the proclamation is founded; for Mr. Galloway and others, who joined the enemy in the fall of 1776, are there considered as subjects of Pennsylvania; and all the states are clearly deemed to have been free and independent from the declaration published by congress on the 4th of July in that year.

The Attorney-General, to show the definition of a nation, the relation which a citizen bears to the state, and the natural connection between a state of society and the institution of a government, cited the following authors: Vatt. 92; Id. B. 1, c. 19, § 212; Id. § 1, p. 9; Id. § 4. Burlem. 25; 1 Black. Com. 46, 47, 48, 213; Vatt. p. 15, § 26; Id. 19, § 38.

The Chief Justice delivered a learned and circumstantial charge to the jury. After stating the proclamation, the issue, and the evidence, he proceeded as follows:

McKean, Chief Justice.—The question that is to be decided on the facts before us, is, whether Samuel Chapman, the prisoner at the bar, ever was a subject of this commonwealth? The reason which has been principally urged to take him out of that description, is that on the 26th day of December, in the year 1776, when he withdrew from Pennsylvania, no government existed to which he could owe allegiance as a subject. I shall, in the first place, consider how far this defence, under the circumstances of the case, would avail the prisoner upon an indictment for high treason.

The Attorney-General has referred to the declaration of Independence, on the 4th of July 1776, when the freedom and sovereignty of the several states were announced to the world; and also, to a resolution of congress recommending the formation of such governments, as were adequate to the exigency of the public affairs. The sister states pursued different modes of complying with this recommendation. The citizens of Connecticut, New Hampshire and Rhode Island, considered themselves in a situation similar to that which occurred in England, on the abdication of James the second; and, wanting only the form of a royal governor, their respective systems of government have still been continued; while the other states adopted temporary expedients, until regular constitutions could be formed, matured and organized.
nullity, unless there is a power to execute them. But that is not the case at present in agitation; for before the meeting of council in March 1777, all its members were chosen, and the legislature was completely organized: so that there did antecedently exist a power competent to redress grievances, to afford protection, and generally, to execute the laws; and allegiance being naturally due to such a power, we are of opinion, that from the moment it was created, the crime of high treason might have been committed by any person, who was then a subject of the commonwealth. The act of the 11th of February 1777, expressly authorizes this opinion; for, we find it there said, "That all and every person and persons (except prisoners at war) now inhabiting, &c., within the limits of this state; or that shall voluntarily come into the same hereafter to inhabit, &c., do owe, and shall pay allegiance, &c." This, therefore, contradicts the idea, suggested by the advocates for the prisoner, that allegiance was not due until the meeting of the executive council, on the 4th of March ensuing; and, although he cannot be convicted upon that act, yet allegiance being due from the 28th of November 1776, when, as I have already observed the legislature was convened, and the members of council were appointed, treason, which is nothing more than a criminal attempt to destroy the existence of the government, might certainly have been committed, before the different qualities of the crime were defined, and its punishment declared by a positive law. 1 Bl. Com. 48.

Having thus dismissed the preliminary question, whether the prisoner's defence would avail him upon an indictment for high treason, I shall proceed to inquire, if there are any circumstances that take his case out of the general opinion expressed by the court upon that point.

The act for the revival of the laws, passed the 28th of January 1777, was intended, I think, merely to declare, that those laws which were originally enacted under the authority of George the Third, ceased any longer to derive their virtue and validity from that source. But there is great inaccuracy in penning the act; for, though it would seem, by the former part of the second section, to be the sense of the legislature, that from the 14th of May 1776, to the 10th of February 1777, the operation of all the acts of assembly should be suspended; yet, in the close of the same section, obedience to those acts, to the common law, and to so much of the statute law of England, as have heretofore been in force in Pennsylvania, is, with some exceptions in point of style and form, expressly enjoined. We may, however, fairly infer from the general tenor of the act, that those who framed it, thought the separation from Great Britain worked a dissolution of all government, and that the force, not only of the acts of assembly, but of the common law and statute law of England, was actually extinguished by that event.

This, therefore, necessarily leads to the consideration of a very important subject. In civil wars, every man chooses his party; but generally that side which prevails, arrogates the right of treating those who are vanquished as rebels. The cases which have been produced upon the present controversy, are of an old government being dissolved, and the people assembling in order to form a new one. When such instances occur, the voice of the majority must be conclusive, as to the adoption of the new system; but all the writers agree, that the minority have, individually, an unrestrainable right to remove with their property into another country; that a reasonable time for that purpose ought to be allowed; and, in short, that none are subjects of the
proclamation, stand and be attainted of high treason to all intents and purposes, &c.” Under the authority of this clause, the prisoner was duly required by proclamation to surrender himself; and therefore, his case seems to come properly within the act.

Generally speaking, *ex post facto* laws are unjust and improper; but there may certainly be occasions, when they become necessary for the safety and preservation of the commonwealth; and although no legislature had previously met, yet the assembly that passed this law, if they were impressed with the necessity of the case, had, incontrovertibly, a right to declare any person a traitor who had gone over to the enemy, and still adhered to them. The validity *and* operation of the law, however, before the date of the proclamation, he was a subject of the state of Pennsylvania.

Here, then, the matter rests. Had the issue been in the *disjunctive*, the prisoner would clearly have come within the description of an inhabitant of Pennsylvania; but when the word *subject* is annexed, it means a subjection to some sovereign power, and is not barely connected with the idea of territory—it refers to one who owes obedience to the laws, and is entitled to partake of the elections into public office. On this point, therefore, we must again advert to the act of assembly, declaring what shall be treason, which has no retrospect, and to the act for the revival of the laws, which implies a suspension of all the laws from the 14th of May 1776, to the 11th of February 1777. If there were no laws to be obeyed, during that period, the prisoner could not be deemed a subject of the state of Pennsylvania, on the 26th day of September 1776. Whether the legislature meant to include this case, we will not positively determine—it is a new one, and we ought to tread cautiously and securely. But, at all events, it is better to err on the side of mercy, than of strict justice.

The jury found a verdict of *Not guilty.*

SEPTEMBER TERM, 1781.

**Respublica v. Joshua Buffington.**

*Outlawry.*

Where A. B., of West Bradford, was required to surrender himself by the name of A. B. of *East Bradford,* &c., the variance was held to be fatal.

The Attorney-General filed a suggestion, stating, that Joshua Buffington of the county of Chester, yeoman, being a subject or inhabitant of the state, was by proclamation of the Supreme Executive Council, dated the 2d of October 1780, required, in pursuance of the attainder law, to surrender himself to a justice of the supreme court, &c., on or before the 13th of November 1780, to abide his legal trial for the treasons in the proclamation mentioned, &c. That the said Joshua Buffington did not surrender him-
SUPREME COURT

*Rapp v. Le Blanc et al.*

Evidence.—Costs.

On an information for goods seized as British goods, and imported into the state of Pennsylvania, the following points were resolved:

1. That the informer cannot be a witness.
2. That, although the informer releases his right to a moiety of the goods, he cannot be a witness; because he is interested in that event; he being liable to pay the costs of the claimants, in case a verdict is found for them.
3. That by the act of assembly, the judge who tries the cause, not being authorized to certify, so as to exempt the informer from the payment of costs to the claimants, he cannot certify.
4. That where the informer called a witness, who was contradicted by another witness of his own, he cannot call his first witness to disprove what the second has said. (a)

Lewis, for the claimants. Blair, for the informer.

(a) See De Lisle v. Priestman, 1 Bro. 170, 182; Cowden v. Reynolds, 12 S. & R. 281.
A deed with an ink seal, attested by one witness only, and proved by him before a justice, without having been recorded, admitted in evidence.

A Deed executed by two persons, with one wax, and another ink seal, attested by one witness only, and merely proved by him before a justice, without being recorded, was offered in evidence.

It was objected, that by the act of assembly (1 Sm. Laws, 94), a deed must be executed before, and be proved by, two witnesses; and that even that kind of proof was not to be received, unless the party was dead, or otherwise unable to appear and acknowledge the *execution; which was not the case of the lessor of the plaintiff, when the deed was actually proved before the justice.

To this, it was answered, that the act of assembly only related to the proof which entitled a deed to be recorded, &c.; that many deeds might be given in evidence, which were not so entitled; as in the case of a long possession under an old deed. Another act declares that one or more subscribing witnesses is sufficient (1 Sm. Laws, 422), and it is established, that the attestation of witnesses is not of the essence of the deed. Before the statute of frauds, the necessity of subscribing witnesses to any instrument, did not exist in England; and there is no instance in which the legislature of Pennsylvania has expressly called for the attestation of two witnesses, but in that of the assignment of a bond.

By the Court.—The signing of a deed is now the material part of the execution; the seal has become a mere form, and a written or ink seal, as it is called, is good. Any deed under seal, when proved, is proper to be given in evidence (Ford v. Ed. Gray), 6 Mod. 45. And, we are of opinion, that a deed, the execution of which is sworn to by one witness be-

(a) This cause was tried at Lancaster N. P., on the 18th May 1781, before McKean, C. J., Atlee and Evans, Justices.

(b) s. P. Long v. Ramsay, 1 S. & R., 72.

(c) In Shrider v. Nargan, post, p. 68, the court again adopted this broad principle, C. J. McKean saying, “we cannot hinder the reading of a deed under seal, but what use will be made of it is another thing.” And in Bioren’s Lessee v. Keep, 1 Yeates 442, the same doctrine prevailed, against the opinion of Smith, J. These decisions, however, have been disapproved of in subsequent cases. In Faulkner v. Eddy, 1 Binn. 190, C. J. Tilghman, referring to McDill v. McDill, said, “It has been generally conceived, that in that case the law was carried too far.” And on the question immediately before him, he remarked, “the case (Faulkner v. Eddy) stands nakedly as of one who, having no kind of title, makes a deed conveying his right to another. It has been the practice at Nisi Prius to reject the deed in such cases; and I see no reason why it should be altered.” So, in Peters v. Condron, 2 S. & R. 82, it was observed by the same learned judge, “This decision (McDill v. McDill) has been considered a slip in the hurry of business, for if it were law, the administration of justice might be obstructed at the pleasure of any party, by reading papers no way pertinent to the cause.” And in the recent case of Hoak v. Long, 10 S. & R. 1, it was declared to be a well-established rule, that a deed is not evidence, without some proof of title in the grantor.
fore a magistrate, who certifies the same, is within the rule. Besides, the last act of assembly certainly allows the proof of one witness to be sufficient. *(a)*

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**Morris’s Lessee v. Vanderen.**

**British statutes.—Limitation.—Deed.—Evidence.**

The common law has always been in force in Pennsylvania; but statutes made before the settlement of the province have no force here, unless convenient and adapted to the circumstances of the country; and statutes made since the settlement of the province, do not extend to it, unless the colonies are particularly named.

The statute of limitations of 32 Hen. VIII., c. 2, extends to this state; otherwise of the statute of 21 Jac. I., c. 16.

A bare perception of the profits, will not oust a tenant in common; for the statute of limitations to operate as a bar, the possession must be adverse.

An interlineation, made after the execution of a deed, will avoid it, though in an immaterial point; and the presumption is, that it was made after execution, unless the contrary be shown.

A recital in a deed is not evidence, except against a party claiming under it; but the recitals in an ancient deed are evidence, to prove pedigree.

The "list of first purchasers," is evidence, to show title to lands.

A deed, executed in England, and recorded here, is evidence; so is one, executed in England and acknowledged here, but not recorded. So is the probate of a will, made in England.

A copy of a copy is not evidence.

In ejectment, letters written by a person in no way connected with the title are not evidence, to prove an independent fact.

The plaintiff in ejectment may give in evidence, letters written by the ancestor of the defendant's lessees; and show that the latter have possession of the deeds necessary to establish the title.

The admissions of a party are evidence against him, though made after suit brought.

Several points of evidence were determined in this cause; which was an Ejectment, brought for the recovery of a lot on the west side of Second street, in Philadelphia.

1. The plaintiff, in order to show that the persons under whom he claimed were original purchasers from William Penn, the proprietary, offered in evidence a paper from the proprietary's (or rather surveyor-general's) office, containing the list of names of such persons as were original purchasers; and therein were the names of those from whom the plaintiff derived his title. It was objected to, because the deeds themselves ought to be produced, as it did not appear that they had been destroyed. But it was answered, that the lot in question is appurtenant to a large tract of land, and that the deeds are in the possession of the owners of that large tract; for, on the settlement of the province of Pennsylvania, every one who bought 5000 acres of land in the country, was entitled to certain lots within the city, which became afterwards separated. And—

**By the Court.—**The objection is overruled, and the paper allowed to be given in evidence. *(b)*

*2. The plaintiff produced the proprietary's warrants to make a survey of the lands in question, for a person under whom he now*

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*(b)* See Hurst v. Dippo, *ante*, p. 20, and the note to that case.¹

claimed, without showing any actual survey, but only a paper in the nature of a certificate from a former surveyor-general, stating that such survey had been made. It was opposed, because the present surveyor-general (Lukens) swore that there was no such survey in the office; that surveys of other lots were wanting, and that this paper was copied from a book in the office.

The Court ruled, that the paper should not be given in evidence, being only the copy of a copy: but that the book from which it was taken might be read to the jury: and it was said by McKean, C. J., that the court has a discretionary power to admit circumstantial evidence of the existence of a record. (a) Aley n 18.

3. The plaintiff offered to prove that certain deeds, necessary to make out his title, were in the hands of, and detained by, the heirs of Israel Pemberton, under whom, the plaintiff insisted, that the defendant was only a lessee; and also to give in evidence sundry letters written by the said Pemberton. It was objected, that the defendant is not to be affected by the conduct of a third person. To which, the plaintiff's counsel answered, that they undertook to prove, that the defendant is no more than a lessee from the heirs of Pemberton; and the possession of the lessee, is the possession of the person entitled to the reversion. But, for the defendant, it was still urged, that his title is not to be made out by the plaintiff; that he rests upon his possession; and that until the plaintiff can make out a good title of his own, the defendant's possession is good against him; for the plaintiff must recover upon the strength of his own, and not upon the weakness of the defendant's title.

But by McKean, C. J.—The plaintiff does not mean to show the defendant's title, but only his possession, which is admitted by the record: if Israel Pemberton was defendant, it would be good evidence against him, and, if the plaintiff proves that the defendant is in under Israel Pemberton, or his heirs, he may give the detention of the deeds in evidence, and also the letters, unless the defendant shows another title. 1 Ld. Raym. 311. (b)

A bill of exceptions to this opinion was tendered and allowed; but, I believe, it has never been prosecuted.

4. The plaintiff proceeded to call a witness to prove that the defendant was only lessee; and it was sworn, that since the commencement of the suit (to wit, two days before the trial), the defendant told the witness, that he held under the heirs of Pemberton. This testimony was objected to, because it is a general principle not to receive evidence of anything that happens after the suit. But it was answered, that this is only proof of an acknowledgment of a fact previous to the suit.

And by McKean, C. J.—I recollect one case in the books upon this point;


(b) See Andrews v. Fleming, 2 Dall. 93; Bassler v. Niesly, 2 S. & R. 354; Weidman v. Kohr. 4 Id. 174; Johnson v. Kerr 1 Id. 25; Reigart v. Ellmaker, 16 Id. 27.
When the British army evacuated Philadelphia, there was a debate in Congress, whether all the property found in the city, and belonging to the king of Great Britain, or any of his subjects, should appertain to the United States, or to the state of Pennsylvania only. It was at length agreed, however, that all public property, such as cannon, artillery, &c., should belong to the United States, and the private property of individuals should belong to the state of Pennsylvania.

An alien enemy has no right of action whatever during the war; (a) but by the law of nations, confirmed by universal usage, at the end of the war, all the rights and credits, which the subjects of either power had against the other, are revived; for, during the war, they are not extinguished, but merely suspended. If, also, a conquered country is ceded, the old possessors are entitled to their estates; and when any country is conquered, the possessors are not deprived of their estates, but only change their masters. This is clearly the case between two independent powers, but how will the case be between this country and Great Britain, at the close of the war? Why, had we been conquered, our lives and all our property would have been the forfeit; but even as the business now stands, the subjects of Great Britain may, perhaps, claim a revival of the debts due to them from the citizens of America, whilst we, by their acts of parliament, are debarr’d of the like privilege. It is hard, that the people of America should, during the war, receive [72] continental money for specie, and, at the end of it, be deprived of the debts due to them from abroad, whilst they are obliged to pay the debts due from them to British subjects. Unless some care is taken, this may be the case. I would hope, therefore, that the assemblies of the different states will think seriously of it, and, with a view it may be attended to, I have given this hint upon the present public occasion.

With respect to the case before the court, the Chief Justice seemed strongly with the plaintiffs, and the jury found a verdict for them accordingly.

Lewis and Wilson, for the plaintiffs. Bradford and Ingersoll, for the defendant.

APRIL TERM, 1783.

KENNEDY v. FURY.

Equitable ejectment.

Cestui que trust may maintain ejectment in his own name, in this state.

A conveyance was made to A., in trust for B., and B. brought an ejectment on his own demise. Blair contended that the demise ought to have been laid in the name of A., inasmuch as the legal estate was in him.

(a) See Russel v. Skipwith, 6 Binn. 347; s. c. 1 S. & R. 310; Crawford v. The William Penn, 1 Peters C. C. 107; s. c., 3 W. C. C. 494.
But by Atlee, Justice (McKean, C. J., being absent), the demise by B. is well enough. We have no court of equity here; and, therefore, unless the \textit{custui que trust} could bring an \textit{ejectment} in his own name, he would be without remedy, in the case of an obstinate \textit{trustee}.\footnote{This case is frequently referred to as establishing what is now a well-settled principle. See Crunkelton v. Evert, 3 Yeates 570; Simpson v. Ammons, 1 Binn. 177.}

\footnote{Presbyterian Congregation v. Johnston, 6 W. & S. 9; Caldwell v. Lowden, 3 Brewst. 68.}
COURT OF OYER AND TERMINER,
AT PHILADELPHIA.

SEPTEMBER SESSIONS, 1788.

REPUBLICA v. MESOA et al.

A foreigner, indicted for a criminal offence, is entitled to a jury de mediatate linguae; the statute of 23 Edw. III., c. 13, extends to this state.

This was an indictment against four Italians for the murder of Captain Pickles; and, upon the arraignment of the prisoners, the court assigned Ingersoll and Swift as counsel for them. These gentlemen then challenged the array, and moved for an award of a tales de mediatate linguae; but the Attorney-General controverted the propriety of the motion, and it was twice argued, on the 25th and 29th of September.

The counsel for the prisoners urged, that the Stat. of 3 Edw. III., c. 13, was a beneficial law, encouraging foreigners to come into the country; that, in practice, it had been extended to Pennsylvania, before the revolution, and sound policy justified its continuance. In the course of their argument, the following authorities were cited: 1 Penn. Laws 89; 28 Edw. III., c. 13; 4 Bl. Com. 352; 2 Hale H. P. C. 271, 272; Dyer 304; Chart. of Ch. II. to Penn; 2 Wils. 75; Salk. 411.

To prove the practice, Thomas Clifford, upon his solemn affirmation, stated, that in February 1764, a burglary was committed in his dwelling-house in Philadelphia; that one Brinkloe, being apprehended upon suspicion, accused William Frederick Ottenreed; whereupon, they were both imprisoned and tried; and to the best of *the witness's recollection, Ottenreed was allowed to have a moiety of foreigners on his jury.

The Attorney-General observed, that the question turned upon this point—how far the English statutes were extended to Pennsylvania? and by what authority they could be extended, whether exclusively by an act of the legislature, or, likewise, by the adjudications of the supreme court? The sentiments of the foreign jurists seemed, he said, to be crude and undigested upon this subject; but certain principles, which had obtained the authority of a general assent, might serve as a directory to form an accurate judgment. He then adverted to several acts of parliament which did not extend, as the act of limitations, 21 Jac. I., c. 16; (a) the 28 Hen. VIII., respecting pirates, &c.; and urged, that, by the royal charter, the common law, and

(a) See the note to Biddle v. Shippen, ante, p. 19.

1 Act 81 May 1718; 1 Sm. Laws, 105.
statute law; relating to felonies were extended; but that statutes merely relating to the mode of trial did not extend; on which account, laws were passed in that respect, soon after the settlement of the province.

With respect to the statute immediately in question, he contended, that it had never been extended by the legislature, because it was thought unnecessary, and might often be greatly inconvenient; for in every case where foreigners were tried, the humane provision of our laws, which allows them counsel, would then be defeated. A trial per mediataem lingue was never granted to Indians, or Negroes; nor is it, indeed, pretended to have taken place in any more than one instance; and that too rests entirely on the recollection of a single witness.


The Chief Justice delivered the opinion of the court as follows:

McKEAN, C. J.—The point before the court has been well argued; and on a full consideration of the subject, we now find little difficulty in pronouncing our decision. The first legislature under the commonwealth, has clearly fixed the rule, respecting the extension of British statutes, by enacting that "such of the statutes as have been in force in the late province of Pennsylvania, should remain in force, till altered by the legislature;" and it appears in evidence, that the 28 Edw. III., c. 13, has been in force in the late province, since a trial per mediataem lingue was allowed in the case of a burglary committed by one Ottenreed, in the mansion-house of Mr. Clifford.

Whether it was intended, by the act to which I have referred, to include only such statutes as were in force by an express extension of the legislature; or to comprehend, likewise, such statutes, as have been extended by the judgment of the supreme court, or received there in usage, seems to be, in some degree, uncertain. We * know, however, that many statutes, for near a century, have been practiced under, in the late province, which were [*75] never adopted by the legislature; and that they might be admitted by usage, and so become in force, was the opinion of the British parliament, declared in a statute passed in the year 1754, enabling legatees to be witnesses to wills and testaments. If, therefore, the statute in question has been, by any means, legally in force, a necessity is, seemingly imposed upon us, to grant the challenge to the array, which has been made on the behalf of the prisoners.

But if this was a new case, the judgment of the court would be different; for, the reasons which gave rise to the 28 Edw. III. do not apply to the present government, nor to the general circumstances of the country. Prisoners have here a right to the testimony of their witnesses, upon oath, and to the assistance of counsel, as well in matters of fact as of law; which was not the case in England, in the year 1353, when that statute was enacted. We do not think, indeed, that granting a mediataes lingue, will, at all, contribute to the advancement of justice; and we know it is a privilege which the citizens of Pennsylvania cannot reciprocally enjoy, as, at this day, there are no juries in any part of Europe, except in the British dominions.
special court, under the new act, for granting special courts to plaintiffs (2 Sm. L. 17).


was not compelled to return writs issued against ambassadors or their retinue, depended upon the stat. 7 Ann., c. 12, which did not extend to this state.

The *Attorney-General*, on the part of the sheriff, and by direction of the Supreme Executive Council, showed cause, and prayed that the rule might be discharged. He premised, that though the several states which form our federal republic, had, by the confederation, ceded many of the prerogatives of sovereignty to the United States, yet these voluntary engagements did not injure their independence on each other; but that each was a sovereign, "with every power, jurisdiction and right, not expressly given up." He then laid down two positions. 1. That every kind of process issued against a sovereign, is a violation of the laws of nations; and is, in itself, null and void. 2. That a sheriff cannot be compelled to serve or return a void writ.

I. The first point he endeavors to prove, by considering, first, the nature of sovereignty; and, secondly, the rules of law, relative to process issued against ambassadors, the representatives of sovereigns. He said, that all sovereigns are in a state of equality and independence, exempt from each other's jurisdiction, and accountable to no power on earth, unless with their own consent. That sovereigns, with regard to each other, were always considered as individuals in a state of nature, where all enjoy the same prerogatives, where there could be no subordination to a supreme authority, nor any judge to define their rights or redress their wrongs. That all jurisdiction implies superiority over the party, and authority in the judge to execute his decrees; but there could be no superiority, where there was a perfect equality—no authority, where there was an entire independence. That the king of England, as sovereign of the nation, is said to be independent of all, and subject to no one but God; and his crown is styled imperial, on purpose to assert that he owes no kind of subjection to any potentate on earth. No compulsory action can be brought against him, even in his own courts. That a sovereign, when in a foreign country, is always considered by civilized nations, as exempt from its jurisdiction, privileged from arrest, and not subject to its laws. Hence, this inference was drawn, that the court having no jurisdiction over Virginia, all its process against that State must be *coram non judice*, and consequently void. 1 Vatt. p. 2, 138.

It was then observed, that there being no instance in our law books of any process against a sovereign, it was proper to consider the rules of law relative to process against their representatives. The statute of Ann. was read, with the history of the outrage that gave birth to it; which act declares that all process against the person, or goods, or domestics of an ambassador shall be null and void, and all concerned in issuing or serving it should be punished as infractors of the laws of nations. That this statute was not introductory of any rule, but barely declaratory of the laws of nations. That there was nothing new in it, except the clause prescribing a summary mode of punishment. That it was a part of the common law of the land before, and consequently extended to Pennsylvania. 4 Bl. Com. 67. 3 Burr. 1480. 4 Id. 2016.

*79] *Hence, it was concluded, that if process against an ambassador be null and void, *a fortiori*, shall it be void, if issued against a sovereign?

That the true reason of the minister's exemption from process is the independence and sovereignty of the person he represents. And although by engaging in trade, he may so far divest himself of his public character as to subject his goods to attachment; yet in every case where he represents his master, his property is sacred. But a sovereign cannot subject himself by implication; he must do it expressly. That though the goods of a sovereign, as well as of an individual, might be liable for freight, or duties, or subject to forfeiture; yet, in those cases, there was a lien on the goods, they were answerable, and the process was *in rem*; in this case, it was *in personam*; and the goods were attached merely to compel the party's appearance to answer the plaintiff's demand.
OF PHILADELPHIA COUNTY.


The Court denied the motion, the defendant not being in court, nor the action depending for this purpose, until bail filed, or an appearance entered.

Ingersoll, in arguing on the expression in the last act, "action depend-

And no sovereign would submit to the indignity of doing this. Hence, it was inferred; that the writ was a mere nullity.

II. Upon the second point, authorities were read, to explain the case produced by the plaintiff's counsel, and to show a distinction between an erroneous and a void writ. That the sheriff was bound to execute and return the writ, although erroneous, if the court had jurisdiction. But when the court had no jurisdiction, the writ was void, and the sheriff was a trespasser, if he dared to obey it; a void authority being the same as none. That in England, the sheriffs were never obliged to return a writ, if upon showing cause, it appeared that the defendant was a public minister, or one of his domestics. 5 Bac. 431; Salk. 700; 2 Barnes; 1 Wils. 20. That suppressing the writ was not making the sheriff judge, because he was obliged to assign a reason for so doing; and upon the legality of that reason, the court was now to determine.

He added, that if the sheriff had attached the goods, he was liable to punishment, and to compel him to return his proceedings, was to oblige him to put his offence upon record, and to furnish testimony against himself. He finally observed, that the writ was void, or it was not. If void, the sheriff need pay no attention to it; if not void, he was obliged to execute it, at all events; and, if so, these inconveniences would follow. That any disaffected person, who happened to be a creditor of the United States, might injure our public defence, and retard or ruin the operations of a campaign; that he might issue an attachment against the cannon of General Washington, or seize the public money designed for the payment of his army. That the states, united or several, would never submit to put in special bail (which must be done, to prevent judgment), and to answer before the tribunal of a sister state.

That the plaintiff was under no peculiar inconvenience. Every creditor of this state or of the United States lay under the same. If his demand was just, Virginia would, upon application, do what was right; if not, and flagrant injustice was done him, he might (if a subject of this state, and entitled to its protection) complain to the executive power of Pennsylvania. He concluded, with observing on the importance of suppressing such measures as the present, at their first appearance, and of preserving the rights of sovereign states inviolate—and prayed that the rule might be discharged.

The counsel for the plaintiff insisted, that though Virginia was a sovereign state, yet this ought not to exempt her property in every case from the laws and jurisdiction of another state. That sovereignty should never be made a plea in bar of justice; and that the true idea of prerogative, was the power of doing good, and, not, as it had sometimes been expressed, "the divine right of doing ill." That every person, and all property within this state, was subject to its jurisdiction, by so being within it, except a sovereign power, and the representative of a sovereign power, with his domestics and effects, which he holds as representative. That if an ambassador engages in trade, his property so engaged is liable to attachment, Vatt. b. IV., § 114, and if a sovereign state turns merchant, and draws or accepts bills of exchange, its property ought in like manner to be subject *to the law-merchant, and answerable in the state where it happens to be imported. That sovereignty is better represented by persons than things; and as any or all the citizens of Virginia would be amenable to the jurisdiction of this state, if they were to come within its bounds, so there is no reason why property brought here should not be attached, as well as the citizen arrested.

That one sovereign may lay duties upon the goods of another; and this appears to have been the sense of congress, by their expressly stipulating, in the articles of confederation, that no duties should be laid by one state on the property of another. That the goods which were attached, were certainly liable for their freight; so, if they had been imported contrary to law, they were subject to forfeiture; process against them might
*Hunter's Lessee v. Kennedy.*

**Practice.—Continuance.**

On motion to put off the trial of this cause, Sergeant tendered the affidavit of John Adams (who called himself the landlord of the defendant, and declared himself interested in the suit) to prove the absence of a material witness.

Lewis and Coxe objected, for the plaintiff, that the affidavit should be made by the defendant himself.

**But the Court** received the affidavit, and ordered the trial off. (a)

**Rivers v. Walker.**

**Reference.—Practice.**

It was ruled in this cause, that notice of the time and place of the meeting of referees, must be served on the party himself, and not on his attorney; unless it be otherwise specified in the rule of reference.

For a contrary practice, the report, in the present instance, was set aside, on motion of Lewis, in behalf of the defendant, opposed by Ingersoll for the plaintiff. (b)

**Carlisle et ux. v. Cunningham.**

**Liberari facias.—Practice.**

Levy obtained a rule to show cause, why a house which had been delivered to the plaintiffs on a liberari facias, that issued in this cause, should not now be surrendered to the vendee of the defendant, upon his bringing into court, the principal, interest and costs.


(b) In Dunkin v. Galbraith, 1 Bro. 15, it is laid down as a general rule, that where there is a known attorney, notice must be given to that attorney, and not to the party himself; and it was held, in that case, that notice of filing a report of referees might be given to the attorney. But where a rule of court requires notice given to the party, notice to the attorney is not sufficient. Nash v. Gilkeson, 5 S. & R. 352. Even in such case, however, notice to the attorney will be considered good, if he did not expressly object at the time of service. Newlin v. Newlin, 8 S. & R. 41. And see Geyger v. Geyger, 2 Dall. 332. Hutcheson v. Johnson, 1 Binn. 59. Hitner v. Suckley, 2 W. C. C. 465. 1

attachment is but a mode of compelling an appearance. Whilst the states have surrendered certain powers to the general government, they have not divested themselves of the attribute of state sovereignty. If they were but foreign corporations with respect to each other, such writs would, undoubtedly, lie; for, in ancient times, the mode of commencing a personal action was by summons, attachment and *distringas*; and as, in practice, there was no personal service of the summons, the first process by which a defendant was notified of the pendency of the suit against him, was by an attachment of his goods. 3 Bl. Com. 279–80; Gilb. C. P. 7; 1 Reeves, 452; see Cooley Const. Lim. 2; Allen v. Bareda, 7 Bosw. 204.

1 See act 23 March 1877 (P. L. 28), which authorizes a service upon the attorney of a resident defendant. Wilcox v. Payne, 88 Penn. St. 164.
insisted that the court could not travel into a consideration of the transactions for which the bond was given.

By the Court.—It would occasion infinite trouble and confusion, were the defendant's doctrine to be admitted, and it is impossible to say where the mischief would end. It is true, that before a jury, proof may be made of the consideration, and of the time of delivering a bond; but this act of assembly, which, in particular cases, grants a delay of execution to the defendant, upon the tender of the interest and costs, must, surely, at the same time, recognise the written instrument as conclusive evidence of the contract; and we can inquire no further. (a)

Wilcocks took nothing by his motion.

(a) See Field v. Biddle, 3 Dall. 171.
termine, on the face of it, whether it was an original or a transcript; and directing them, in the latter case, to pay no regard to it.\(^{(a)}\)

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\[RESPOBLICA v. DOAN.\]

\[Outlawry.\]

Where a party is outlawed by judicial proceedings, on his being brought into court, the practice is, to direct execution, by an award upon the roll.

Aaron Doan, being attainted of a robbery in the county of Bucks, by process of outlawry, was brought before the court, on the 24th day of September 1784; and, after hearing his counsel upon several exceptions to the outlawry (which were all overruled), execution was awarded against him, on the 9th day of October. The following correspondence then took place between the Honorable the Supreme Executive Council, and the judges; in the course of which several important points of law were stated and considered.\(^{(b)}\)

On the 22d of November 1784, the President and Supreme Executive Council addressed the following letter to the judges:

Gentlemen:—We have perused, and attentively considered, the transcript of the record transmitted by you, of the attainder of Aaron Doan; and as it appears to us a case of a novel and extraordinary nature, which, being once established as a precedent, may greatly affect the lives, liberties and fortunes of the freemen of this commonwealth, we cannot, consistently with our ideas of duty, issue a warrant for his execution, until the doubts and difficulties that present themselves to our view are removed.

To take away the life of a man, without a fair and open trial, upon an implication of guilt, has ever been regarded as so dangerous a practice, that the law requires all the proceedings in such a mode of putting to death, to be "exceedingly nice and circumstantial," as Blackstone says; and "any single minute point omitted, or misconducted, renders the whole outlawry illegal, and it may be reversed; upon which reversal, the party accused is admitted to plead to, and defend himself against the indictment." 4 Black. Cq. 315.

This liberality of spirit seems to have advanced with the improvement of the human mind, and of those laws from which our own are composed: for, by the statute of 4 & 5 Win. & M., c. 22, wisely and benevolently reciting, that, "it is agreeable to justice, that proceedings in outlawries in criminal cases,

\(^{(a)}\) In Curren v. Crawford, 4 S. & R. 5, Duncan, J., said, the book "must be an account of the daily transactions of the party . . . and the entries made about the time of the transaction. It is not to be a register of past transactions, but a memorandum of transactions as they occur. If the book appear, on investigation, or examination of the party by the court, not to be such an one, the court may reject it as incompetent. If this does not clearly appear, it is to be submitted to the jury to decide on." See further on the admissibility of books of original entries, the note to Poulteny v. Ross, post, p. 238.

\(^{(b)}\) As the opinions given upon this occasion have governed several subsequent cases, I am persuaded, it will not be thought improper to insert them here, though they do not come within the strict letter of judicial decisions.
should be as public and notorious, as in civil causes, because the consequences to persons outlawed in criminal cases are more fatal, and dangerous to them, and their posterity, than in any other causes;" it was enacted, that, "upon issuing an exigent, in a criminal case, there should issue a proclamation according to the form of the statute made in the one and thirtieth year of Queen Elizabeth," &c. And the first mentioned statute was made perpetual by the 7 & 8 Wm. III., c. 36.

It is our desire to regulate our conduct by the just maxim, and generous principles, that have been established, for keeping under proper directions, and restraining within proper limitations, this menacing part of jurisprudence. We shall, therefore, be obliged, if you will be pleased to take the questions now proposed into your consideration, and to favor us with your answers.

I. Whether the proceedings in this case are founded on common law, the act for the advancement of justice, or on any other, and what acts of assembly or of parliament?

II. Whether there have been any, and what modern instances, in England, prior to our Declaration of Independence, of persons being executed upon outlawry by judicial proceedings alone?

III. Whether there has ever been any, and what, instance in Pennsylvania, of a person being executed upon outlawry by judicial proceedings alone?

IV. Is such a mode of attainder compatible with the letter and spirit of the constitution of this state, which establishes, with such strong sanctions, the right of trial by jury? See section the ninth of the Declaration of Rights—section the twenty-fifth of the Frame of Government, &c.

V. What authorities and precedents are considered as most applicable to the present case?

VI. If this outlawry is principally founded on the act for the advancement of justice, do not these words, "attainted of the crime whereof he is so indicted or appealed as aforesaid, and from that time shall forfeit and lose all his lands and tenements, goods and chattels;" imply, by force of the copulative "and," that this forfeiture was the penalty designed to be incurred by such an outlawry; and may not the word "execution" in the following part of the clause, as it is connected with the word "trial," be reasonably applied to the other criminals there mentioned, so as to render it consistent with the preceding penal expressions? And is not this construction, in favor of life, strengthened, by the improbability, that the legislature of Pennsylvania intended to make the law in this case more sanguinary here, than the law of England at that period, which, it is apprehended, required one or more writs of capias, an exigent, five exactions, at five different county courts, a proclamation at the door of a place for divine worship, &c., before an outlawry could be incurred? Tremaine's P. C. 281, &c.; Statutes before mentioned; Hale; Hawkins; Bacon; Blackstone.

VII. As the person was brought into the supreme court by habeas corpus, ought not judgment to have been expressly pronounced; as the reason assigned for judgment not being pronounced "afresh," in Ratcliff's case, who was brought into the king's bench by habeas corpus is, "it having been pronounced before:" And in the cases of Stafford, Bartstead, Okey, and Cobret, who were attainted by act of parliament (cases nearly resembling this), "the Chief Justice pronounced the usual judgment as in cases of high treason." Foster 44.
entitled, "An act for the advancement of justice, and more certain administration thereof."

II. Our law-books do not inform us, except very rarely, of the executions of capital offenders; they are generally to be found in the histories of the times, or in the periodical publications; and therefore, we cannot mention, with certainty, any modern instances in England, prior to our Declaration of Independence, of persons being executed upon outlawry by judicial proceedings alone; but Lord Chief Justice Mansfield, in *Wilkes's case, expresses himself thus: "flight, in criminal cases, is itself a crime. If an innocent man flies for treason or felony, he forfeits all his goods and chattels. Outlawry, in a capital case, is as a conviction for the crime; and many men, who never were tried, have been executed upon the outlawry." 4 Burr. 2549.

III. We do not know of any instance in Pennsylvania, of a person being executed, upon outlawry by judicial proceedings alone; but a certain David Dawson was executed, since the Declaration of Independence, in consequence of an attainder, by virtue of a proclamation of the Supreme Executive Council, and judicial proceedings thereupon. In that case, the court awarded execution, by pronouncing the usual sentence of death: no judgment having been given before.

IV. We conceive such a mode of attainder compatible with the letter and spirit of the constitution of this state, and that it is no infringement of the right of trial by jury; for, that the party had not that trial, was owing to *91] himself; he was not deprived of *the right. As well, indeed, might an offender, who confessed the fact in court, by pleading guilty to the indictment, after sentence, complain that he had not a trial by jury. By refusing to take his trial, he tacitly seems to have admitted himself guilty. 2 Hawk. fo. 170, ch. 23, § 53; 2 Hale 208.

V. We conceive all the authorities and precedents of outlawries in capital cases at common law, in England, as applicable to the present case; there being no difference, but in the form and manner of proceeding to the outlawry, which is made by the before-mentioned act of assembly. In particular, we would refer council to 4 Burr. 2527, and to 2577, where almost all the authorities are collected together and fully considered.

VI. In the act for the advancement of justice, &c., § 17, the legislature have declared, "That the party indicted of a capital offence, not yielding his body to the sheriff, at the return of the capias, shall be, by the justices of the supreme court, pronounced outlawed, and attainted of the crime whereof he is so indicted. And, from that time, shall forfeit all his lands and tenements, goods and chattels: which forfeiture, &c., after debts paid, shall go, one-half to the governor for the time being, &c., and for defraying the charges of prosecution, trial and execution of such criminals." Had the clause ceased at the end of the words "attainted of the crime whereof he is so indicted," no doubt remains with us, but that the party was liable to suffer all the pains of death prescribed by law for the offence specified in the indictment; and the words following, so far from altering this construction, in our opinion, show, by the most necessary, evident, and strong implication, that the party was liable also to be executed; for the expenses of the execution are to be defrayed out of his forfeited estate. We, therefore, have
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no doubt, that Aaron Doan, besides the forfeiture of his estate, has forfeited his life.

VII. We conceive, that, where a person is attainted by an act of parliament or assembly, and is brought before the court, and execution awarded, the practice most generally has been, to do so, by pronouncing the express sentence; and the reason given for it, is, because no judicial sentence had been pronounced before; but in case of an outlawry by judicial proceedings only, no express sentence, is given upon the party's being brought before the court, but merely an award on the roll, that the sheriff do execution at his peril, or execution awarded by the court; because a judgment had been given before. Judgments in criminal cases are divided into two kinds: 1. By express sentence, to the punishment proper for the crime. 2. Judgments without any such sentence. Of the latter, there are two kinds: 1. Outlawry. 2. Abjuration. Judgment of outlawry, in England, is given by the coroner, and is in these words, "Therefore, the said A. B., by the judgment of the coroner of our Lord the King, of the county aforesaid, is outlawed." The party is thereby as much attainted, [*92 and shall forfeit and lose as *much, as if sentence had been given against him upon a verdict or confession. Finch of Law, 467; 3 Inst. 52, 212; Cro. Car. 266. &c. And after such outlawry, if the party is brought before the court of king's bench, "execution shall be awarded against him, but no sentence pronounced, because the outlaw is a judgment, and no man shall have two judgments for one offence." 2 Hawk. ch. 48, § 23, fo. 447, and the cases there cited. But in the present case, the judgment was pronounced before by this same supreme court, that Aaron Doan is outlawed and attainted of the crime whereof he is indicted, and we do not think, that it would have been formal to have given a second express judgment. This matter was mentioned, and well considered by the judges, at the time they awarded execution in the present case of Aaron Doan.

VIII. The judgment against Aaron Doan is, that he is outlawed and attainted of the crime whereof he is indicted. The record shows that he was indicted of a robbery; in which case, the express judgment is, "that he shall be taken back to the place from whence he came, and from thence to the place of execution, and there be hanged by the neck, until he is dead." The judgment of outlawry implies all this. We, therefore, think, that a warrant for the execution may properly issue, giving these special directions to the sheriff. We find, that executions have been commanded to be done by the court, without writ, sometimes by writ; and that the king, in England, has, by special warrants, frequently remitted part of the punishment and directed the rest, and changed hanging for beheading, though some have doubted of his authority to do so, in the latter instance. 2 Hawk. ch. 51, §§ 4, 5, fo. 463; Finch of Law, 478; Halloway's Case, 3 Mod. 42; Cro. Jac. 496.

IX. We do not think, that the outlawry, in the present case, can, at this stage of the business, be legally reversed. The several critical and verbal objections now stated by council, as well as most of those preceding, were made at the bar, in behalf of the prisoner, by his counsel learned in the law, answered by the prosecutor for the commonwealth, and overruled by the court, upon full discussion and mature consideration. The court cannot make errors, nor reverse for errors which do not exist, or which they cannot
see; they must be satisfied that there are errors. There may, perhaps, be some small mistakes in the transcript of the record by the prothonotary, as we have not seen it, but there is no error in the record itself, that we have been able to discover. There has never been a question seriously litigated in Westminster Hall, upon a writ of error to reverse an outlawry in a capital case. Such a writ was never granted, but from justice, where there really was error, or from favor, where the king was willing the outlawry should be reversed. They are grantable merely ex gratia regis, and when granted, there never was any opposition made, and the courts reversed them upon slight and trivial objections, which could not have prevailed, if opposed, or the precedent had been of any consequence; which could not be, as the king had the power to refuse the writ. All was by consent of the king, and the reversal took place, though there was really no error at all.

It is as much a breach of duty, to reverse a good, as it would be to affirm a bad outlawry. The mischief goes farther than an unrighteous sentence in the particular case; for, to reverse without an error, is to abolish that part of the law.

Your Excellency further informs us, that the offender has alleged in his petition to council, that he was in the city of New York at the time the outlawry was sued forth against him. In answer to this, we can only say with certainty, that if he had put any material fact in issue, it would have been tried.

Upon the whole, three indictments for robbery have been found against him in Bucks county; by the examinations of Jesse Vickers, Solomon Vickers, John Tomlinson, Israel Doan, Joseph Doan, &c., he was a principal in them, and eight or nine others in that county, and the counties of Philadelphia, Chester and Lancaster; he has been duly outlawed for one of them, and execution legally awarded, according to our judgments.

We have the honor to be, with the greatest respect,
Sir, your Excellency’s and the Council’s,
Most obedient humble servants,

THOMAS McKean,
GEORGE BRYAN,
JACOB RUSH.(a)

(a) Since the publication of these reports, the reporter has been favored with the reasons offered to the Supreme Executive Council, in reply to the opinion of the judges, by Mr. Dickinson, the President. A duty to the public would sufficiently justify the insertion of this important document, that the subject might appear entire; but, I confess, that I am actuated by the additional motive of paying a tribute of respect to the wish of one who has done honor to his country, to his profession, and to his species. The document will be found in the Appendix. (In the present edition, it has been thought most convenient to introduce it in this place.)
returns, that the party was called upon by proclamation "to appear at the
supreme court."

II. The sheriff returns on the capias, that the party was called upon "to
appear at the day and time within specified," which might be done by refer-
ence only in the proclamation to the writ, without expressly mentioning the
day and year when the party ought to appear. The return ought expressly
to mention the day and year; and no intendment, however strong, is sufficient
to supply the defect. (a) Where life depends on proclamations, there cannot
be too much exactness required, in order that the party may have due
notice.

III. The sheriff returns, that "he caused public proclamation to be made,
at two several courts of general quarter sessions of the peace, held at New-
town, for the county of Bucks, &c." But it was solemnly determined, on
repeated argument, and the most serious consideration, by all the judges in
Wilkes's case, to which the honorable judges of the supreme court refer—
that, from the precedents, it appears, that a series of judgments have required
a technical form of words, in the description of the county court, at which
an outlaw is exacted; that after the words "at my county court" should be
added the name of the county; (b) and after the word "held," should be
added, "for the county of ———" (naming it again). In the return in the
present case, the name of the county is not mentioned, before the word
"held."

Upon the authority of these precedents, the outlawry in Wilkes's case was

(a) 2 Hale's P. C. 203, p. 4; 8 Bac. 767, 772; 4 Burr. 2559. The return says, "I have
caused public proclamation to be made, in manner and form as within I am commanded."
"This is certainly too loose; the proclamations are not sufficiently set out for the court
to judge, whether they were properly made or not. I thought this error fatal." Lord
Mansfield, in Wilkes's case; and the error would have been "fatal" if proclamations had
been necessary in that case; but from peculiar circumstances they were not necessary.
In Aaron Doan's case they are acknowledged to have been necessary. They are the most
essential parts of the whole proceedings. Indeed, by the act of assembly on which this
outlawry is founded, the exigu fucias and the writ of proclamation are combined. The
distinct nature of them is stated in 3 Bl. Com. 283, 284, &c., and in the Appendix, 16,
17, &c. "I beg to be understood that I ground my opinion singly upon the authority of
the cases adjudged; which as they are on the favorable side, in a criminal case highly
penal, I think, ought not to be departed from; and therefore, I am bound to say, that
for want of these technical words, the outlawry ought to be reversed." Lord Mansfield,
in Wilkes's case. The other three judges spoke seriatim; and concurred with the chief
justice. A multo fortiori, the positivus terms of a law, in a case vastly more penal,
"ought not to be departed from."

(b) Alder was outlawed for murder. The sheriff returned—"at my county court
held at D., in the county of Northumberland," and did not say, "at my county court of
Northumberland, held, &c.," and this was held to be error; 2 Roll. Rep. 52, cited by
Lord Mansfield, with several other cases of the like purport, in Wilkes's case.

"If an outlawry be returned, that the party was exacted (called!) at three several
times, in the tenth year of James, and that he was a fourth time exacted the fifth day of
February, and did not appear, without mentioning any year, and was a fifth time
exacted such a day in March, in the tenth year of James, although it may be intended
that he was the fourth time exacted in the tenth year of James, yet the outlawry shall
not be good by intendment." 2 Roll. Abr. 803; 2 Hale P. C. 203. If any intendment
or implication could support an outlawry, this seems to have been sufficient.
reversed; and they, together with the remarkable judgment in his case, demonstrate the present outlawry to be erroneous; for certainly, it cannot be easier to take away the life of a citizen, by an outlawry, in this state, than to inflict a slighter punishment, by outlawry, on a subject, in England. (a)

If bare precedents establish a mere form of words with so much weight, though the judges were clearly of opinion, that "they began against law, reason, and common sense," and that "there was not a color, originally, to hold these words to be necessary," and where the penalty is so far inferior—how much more ought they to be regarded, and how religiously ought the express injunctions of a law, wisely and benevolently intended to guard against loose proceedings, to be revered, when those proceedings are to consign a fellow-citizen to death? (b)

So "critical" have the judges in England been with respect to outlawries, those vindictive supplements to a severe code of criminal jurisprudence, (b) that the use of figures to denote time, as in the return in the present case, or the addition or omission of a single letter, as in this return the writing "Doane" for "Doan," has been held a good objection for reversal. (c)

IV. It appears very doubtful also, whether the issuing a warrant for the execution of Aaron Doan, would be a regular procedure, for the following considerations: 1st, Because, there never has been "an instance in Pennsylvania of a person being executed upon outlawry, by judicial proceedings alone," though the "Act for the advancement of justice," &c., was passed near seventy years ago. 2d, Because, not only would such a prosecution to death be more sanguinary, than the law then was in England, but would also oppose that mild system, which the constitution of this commonwealth has adopted. 3d, Because, it would weaken that security, which the constitution appears to have intended for its citizens; it being a dangerous mode of proceeding, that if admitted, ought to be regulated by the exactest cautions; as a precedent of this kind, established in times of tranquillity, may become a very destructive engine of policy, in times less peaceable. 4th, Because, it seems to be unnecessary, the penalty—"forfeiture of lands and tenements, goods and chattels," expressed in the act, appearing to be a sufficient punishment, where guilt is not proved in the usual manner. 5th, Because, the "Act for the advancement of justice," &c., is too obscurely worded. That act, in preceding parts, enumerates many capital offences, and some not capital, though very heinous, in every case of both kinds mentioning the punishments to be respectively inflicted on the criminals, the modes of trial, and the judgments to be given.

It then goes on, in the 17th section, to proceedings of outlawry, with much inaccuracy of expression and confusion of meaning. The words are not, as the honorable judges have stated, that "the party indicted of a

(a) 4 Burr. 2563, &c.
(b) "Either from a want of attention to these principles (of truth and justice, the feelings of humanity, and the indelible rights of mankind, in the first conception of the laws, and adopting in their stead the impetuous dictates of avarice, ambition and revenge; from retaining discordant political regulation, which successive conquerors or factions have established in the various revolutions of government," &c. 4 Bl. Com. 3.
(c) Style, 182, 334; Cro. Eliz. 204; Cro. Jac. 570; 3 Bac. 767.

Execution of will.

A will of real estate need not be under seal; nor subscribed by the witnesses to its execution.
A will may be proved by other than the attesting witnesses; and if proved by them, they need not all be called.

This was a feigned issue to try the validity of a will, against the probate of which, a caveat had been entered in the register's office. The plea was insanity in the testator; and evidence was given of habitual drunkenness, old age, weakness of body, shortness of memory, and a few incoherent expressions. The jury, however, in a very short time, gave a verdict for the plaintiff in the issue, who was the devisee in the will.

The Chief Justice, in his charge to the jury, informed them, 1st. That it was not necessary that a will, devising real estate in this commonwealth, should be sealed. 2d. Nor that all the subscribing witnesses should prove the execution. 3d. Nor that the proof of the will should be made by those who subscribed as witnesses. 4th. Nor that the will should be subscribed by the witnesses. (a)

Veaux, 2 Yeates 88; Hartshorne v. Wright, Peters C. C. 64; Weyand v. Tipton, 5 S. & R. 332; Hampton v. Speckenagle, 9 Id. 212. And the rule is the same with respect to a deed of land, sold under an order of the orphan's court, which cannot be read, without producing the record. Hartshorne v. Wright, Hampton v. Speckenagle, ut supra.

(a) See Lewis v. Maris, post, 278. See also Ilcock v. Ilcock, 6 S. & R. 47; Eyster v. Young, 3 Yeates 511; Harrison v. Rowan, 3 W. C. C. 580; Rossetter v. Simmons, 6 S. & R. 452; Walmsley v. Read, 1 Yeates 87; Arndt v. Arndt, 1 S. & R. 256.

service of these states, duly commissioned, sailed from New London, in the state of Connecticut, the 29th of August 1779, on a cruise. On the 6th of September, after an engagement of three hours, he took as prize upon the high seas, an armed letter of marque vessel, called the Betsey, of two hundred tons burden, with a valuable cargo, belonging to subjects of Great Britain, not being inhabitants of Bermudas, and bound for New York, then in possession of the British naval and land forces. He took the commander and eleven of the people out of the prize, leaving three in her, and put on board a prize-master and eleven other hands, with instructions to proceed to New London. The firing was heard, and the engagement, for more than an hour, seen by persons on board three letter of marque brigs that had lately sailed from Philadelphia. During the engagement, the Betsey was perceived from the three brigs, bearing towards them. Her surrender was also seen from on board them. The prize-master, in obedience to his instructions, proceeded on his voyage, in company with the Argo, for New London.

Some time after, the three brigs were discerned from on board the Betsey. Towards evening, they chased the Argo and Betsey. The next day, early in the morning, the three brigs were seen from on board the prize and the Argo, chasing them. The brigs approached fast under British colors. Captain Talbot, finding it impracticable for the prize to escape, with a trumpet, hailed her, directing the prize-master to throw off the rope, and lie too with the prize, until the three brigs should come up with her, adding, that he with the Argo would run a little to leeward and lie too also—and that if the brigs should prove to be American, the prize-master should endeavor to obtain permission for the prize to come down by herself and inform him of the brigs being friends. In a short time, the brigs came up, and from one or two of them, under British colors, the Betsey was fired at twice, she then bearing British colors reversed, according to the custom of prizes, and being in the latitude of 39 degrees 4 minutes, and the longitude of 71 degrees 24 minutes. When first hailed, the people on board the Betsey answered, she was from Montserrat. Persons from two of the brigs, one of which had fired at the Betsey, boarded her. Among these was W. D. from the last-mentioned brig. The commander of this brig was informed by the prize-master on board the Betsey, that she was a prize to the Argo, commanded by Captain Talbot; that the vessel then in sight was the Argo; that he was put on board the Betsey as prize-master, by Captain Talbot; he showed him his written instructions as such; but said the Betsey had been taken three days before. W. D., from on board the Betsey, told the said commander, that the prize-master denied having seen the brigs the day before, or that she was then captured; but from every circumstance, and from the report of one of her English sailors, he was convinced, she was the same vessel seen engaged the day before. On board the brig, to the commander of which this information was given, were a boatswain and sailmaker, who had been taken by Captain Talbot, about ten days before, in a vessel from London, and sent by him prisoners to Philadelphia, and shipped there. One of the persons put into the Betsey by Captain Talbot, knowing them, mentioned this fact in conversation on board the said brig, to W. D. The person thus put on board by Captain Talbot also said, that the Betsey had been taken three days before. The papers on board the Betsey were examined by W. D., in behalf of the three brigs, and the number of names
specified in the English papers, was found to correspond with the number of persons then on board. From these papers, it appeared, that she was a British vessel bound from Montserrat to New York. W. D. made several other examinations on board the Betsey, on behalf of the three brigs, and in the course of them, was informed by a seaman who belonged to her, while possessed by the British, that she was taken the day before. This sailor also said, she sailed from Montserrat. Before W. D. left Philadelphia, he had heard in the coffee-house there, a few days before he sailed, that the Argo, a New England privateer had taken *the Dublin cutter, fitted out full of men-of-war's men. While these examinations were made, the two other brigs chased the Argo, under all sail, upon which Captain Talbot, concluding they must have been British cruisers, made sail before the wind, and soon left them. The commanders of the three brigs took the prize-master and hands out of the Betsey, who were carried to Spain, except one or two of the least considerable, and also took out of her two cannon, small arms, powder, ball, two coils of cordage, and some other articles. They then put a person on board her as a prize-master, and men from each of the brigs, with written orders, dated the 7th of September 1779, and signed by them all, directing him to "take charge of her as prize to the brigs Achilles, Patty and Hibernia; carry her into Delaware, Chesapeake, Egg Harbor or Boston, but to get her, if possible, into Delaware, Chesapeake or Egg Harbor, for fear of the sloop Argo's falling in with her, begging him to stand to the southward that night, and strive hard for Philadelphia." These orders were signed on board the brig, the commander of which had directed the examinations before mentioned, on board the Betsey. The Betsey sailed off, close by the wind, to the southward, was afterwards retaken, carried into New York, and restored to the former owners. On the 17th of September 1779, congress resolved, "that in consideration of the distinguished merit of Colonel Silas Talbot, a commission of captain in the navy be given him, and that the marine committee be directed to provide a proper vessel for him, as soon as possible." On the first of March 1780, congress resolved "that any interest the United States may have in the capture of the Betsey, by the sloop Argo, Captain Silas Talbot, be relinquished to the said captain, and the officers, seamen and marines, under his command, at the time of the capture." On the 13th of March 1780, Captain Talbot, qui tam, &c., filed his bill in the court of admiralty for this state, against the three brigs, their owners and commanders. Process issued accordingly. On the 27th, the owners came severally before the court, and entered into stipulations for the performance of the decree. August 29th, a plea to the jurisdiction filed, "for that in cases of damages to be assessed or recovered to make satisfaction for a wrong or trespass to person or property, the prosecutions ought to be in courts of common law." Replication, "that the cause of action was within the jurisdiction of the admiralty." Plea dismissed, respondeant ouster awarded, and plea of not guilty filed. July 19th, 1783, decree, that the libellants have and recover of the respondents 12,791£. 5s. 0d., with costs, and on the 22d, the respondents appeal.

The cause was ably argued on several days, and now, at an adjourned session, held the 14th of January 1785, the President delivered the resolution of the court.
or by commission in the admiral. It is a letter from Edward III. to the
King of Portugal." And "that since the reign of Queen Elizabeth, the
judge of the admiralty, either by virtue of an inherent power, or the king's
commission, *or both, has solely exercised the jurisdiction of prize—
and that so far back as particular cases can be traced, which is for a
century, the admiralty has judged of, and condemned goods taken on land,
as prize, as well as goods taken on sea." Lord Mansfield, delivering the
resolution of the court, in the case of Lindo v. Rodney and another.(a)

What do treaties, ancient and modern, stipulate for, in order to guard
against violences on the seas? A trial in the court of admiralty, as soon as
possible, before the effects taken are in any manner to be disposed of. Why?
because, by the maritime law of nations, that court judges by the law
of nations and treaties. Sir George Lee, Doctor Paul, Sir Dudley Ryder and
Mr. Murray, now Lord Mansfield, in their report, which forms the principal
part of the answer of the British court, and is so celebrated, by Messrs. Mon-
tesquieu and Vattel,(b) say, "By the maritime law of nations, universally
and immemorially received, there is an established method of determination,
whether the capture be, or be not, lawful prize. Before the ship or goods
can be disposed of by the captor, there must be a regular judicial proceed-
ing, wherein both parties may be heard, and condemnation thereupon, as
prize, in a court of admiralty, judging by the law of nations and treaties.
The proper and regular court for these condemnations, is the court of that
state to whom the captor belongs."

Are we, then, because in England they call the admiralty court a prize
court, when it acts in a cause of prize, and it then proceeds in a different
manner, with an appeal to commissioners of the privy council, to reject
the "universal and immemorial" compact of mankind? There was a time,
when we listened to the language of her senates and her courts, with a par-
tiality of veneration, as to oracles. It is past—we have assumed our station
among the powers of the earth, and must attend to the voice of nations—
the sentiments of the society into which we have entered.

Lord Mansfield, in the cause of Lindo v. Rodney and another, said,
"The end of a prize court is to suspend the property till condemnation; to
punish every sort of misbehavior in the captors; to restore instantly, velit
levatis, if, upon the most summary examination, there does not appear a
sufficient ground; to condemn finally (if the goods really are prize) against
everybody, giving everybody a fair opportunity of being heard: A captor
may, and must force every person interested, to defend; and every person
interested, may force him to proceed to condemn without delay. These
views cannot be answered in any court of Westminster Hall, and therefore,
the courts of Westminster Hall never have attempted to take cognis-
ance of the question—prize or no prize; not from the locality of being [*107
done at sea, but from their incompetence to embrace the whole of the subject.”

(a) The very great antiquity of the Court of Admiralty in England, and the extent
of its jurisdiction, may be known from the learned Selden's notes on Fortescue de Laudi-
bur: p. 67; Zouch 44, &c.; Godolph. p. 22, &c. Though the authority of this court, with
respect to matters in which foreign nations may be concerned, and particularly to cap-
tures jure belli, is treated of, yet no distinction is made by these authors as to the
Court of Admiralty and the Court of Prize.

(b) Montesquieu's Letters, 5 March 1753; Vattel, b. 2, ch. 7, § 84; 3 Bl. Com. 70.
of the said vessel, so taken and brought into port, the name and surname of the master, the place she last sailed from, the port for which destined, and in case of a re-capture, by what ship or vessel taken, to the end that all persons concerned may appear and show cause, if any there be, wherefore such capture, or re-capture, goods, merchandise, or other property, should not be condemned and adjudged to the libellants."

Does the present case in any manner resemble the "cases of prize" described in this law? Where are "claimants interested or pretending to be interested?" Claimants are voluntary applicants for justice. Shall trespassers, compelled to answer for their wrong, cover themselves with that character? Can there be "claimants," but in a proceeding in rem? How would the publication before mentioned suit such claimants as the appellants? Were the proceedings of the judge in this case, such as he constantly has observed in cases of prize? They were not. Application was made to him for damages. He proceeded in that line. Here is neither libel nor process against the capture—no monition—"no notice" under the act of assembly.

What could give the judge of the admiralty for this state, jurisdiction to proceed as a court of prize, upon a capture contested between citizens of different states, which is the case here, rather than any court of admiralty in any other state, when the property captured was not within the power of his jurisdiction? Because, it is said, some of the offending captains and their vessels came into this port. Does the jurisdiction of a court of prize depends on certain offenders, with respect to the capture coming into a port? Where are the authorities of law, to show that this circumstance can give such jurisdiction, or, that there can be an institution of a cause of prize, according to the maritime law of nations, for damages only? The authorities cited, that were thought most apposite, and were most relied on by the counsel for the respondent, were those of Brown and Burton against Franklin, the King's Proctor (Carth. 474); and of the King v. Broom. But they are not in any manner applicable. In the first, the plaintiffs, masters of two vessels, but having no regular letters of marque, took a French ship, cargo and money, upon land, in the East Indies—they being English subjects—it was held, that they acquired no right by this capture, but that it was a perquisite of the admiralty. The King's Proctor, upon the usual monition, got a sentence of condemnation for the whole, [*109 in order to make them account. In brief, they had effects in their hands, which by the maritime law of England, belonged to the king or his admiralty, and they were obliged to account for them, according to that law. 12 Mod. 125. Lord Mansfield calls it a proceeding in rem; Le Caux v. Eden, in the notes. The second case was of the same kind, and was decided on the same principles. It was further said by the counsel for the respondent, that the court of admiralty, that first proceeds in such a case as the present, acquires an exclusive right of deciding upon it, in the same manner as the nation that first commences a judicial process against pirates, may pronounce sentence against them. To say no more on this comparison, it is sufficient to observe, that such a right may be attributed to the atrocity of the guilt, as the offenders are hostes humani generis.

If the coming of trespassers, or of the vessels in which they trespassed upon the high seas, within the power of a judge's jurisdiction, authorizes
the first process is against the person of the defendant, to compel an appearance, in a cause civil and maritime, in the same way that a common-law process issues. But if the person cannot be arrested, then follows another mode of proceeding, against the property of the defendant, his ship or goods, which, when attached by the marshal, are to remain in the power of the court, to answer the judgment of the court. This proceeding against the effects, however, is justified only where the defendant is out of the kingdom, or so absconds that he cannot be arrested—except in such cases where the ship itself is made answerable by law.

What is the precedent in the prize court? Lord Mansfield says "it is peculiar to itself, and no more like that of the instance court of admiralty than it is to any court in Westminster Hall." It will be found invariably to be a proceeding in rem, against the captured ship and goods.

"The end of the prize court (says he) is to suspend the property till condemnation, to punish every sort of misbehavior in the captors; to restore instantly, velit levatis, if, upon the most summary examination, there does not appear a sufficient ground; to condemn finally, if the goods are really prize, against everybody, giving every person a fair opportunity of being heard." All this speaks the language of a proceeding solely in rem. And it will be found, that there is no instance of a suit being commenced in the prize court, but what had the condemnation or acquittal of the ship as its object, or was a suit, by way of supplemental libel, founded upon the previous proceeding had against the captured ship or goods, as prize.

Look at the case of the King v. Broom, and that of the King's Proctor v. Brown and Burton. In both cases, the suits were to oblige the defendants to account for the value of the ship and goods taken as prize. How was the proceeding in the prize court? first, to exhibit libels against the vessel and goods captured, and condemn them as lawful prize to the king, then to file supplemental libels against the defendants, to bring them to account for the value. In both cases, the vessel and goods themselves were out of the power of the court who condemned, one having been sold in Barbadoes, and the money converted to the defendant's use, in the other, the ship was stranded in the East Indies. Yet, to give the prize court jurisdiction, so as to enable them to enforce their decrees against the defendants, it appeared necessary to proceed in the first instance to condemn as prize.

Look at all the cases cited in Douglas, in the cause of Le Caux v. Eden, it will be found that in every one of them (except one, which was a case of piracy and not prize), proceedings had been previously had against the captured vessels, which gave the prize court full and exclusive jurisdiction, as to all the consequences.

In what manner was the present suit commenced and carried on in the court of admiralty? Not by libelling the brig Betsey as prize, and then calling the defendants to account for wresting her out of the hands of the captors, which would have been the mode of proceeding in the prize court, but by issuing process against the defendants and two of their vessels, in the usual and ordinary mode of proceeding in the instance court of admiralty. It is not material to the present purpose, to consider whether the former mode was practicable or convenient; suffice it to say, it has not been adopted, and therefore, the suit was not instituted in the prize court.

It must be acknowledged, that this cause carries strong marks of being a
prize cause. But it should be observed, that in the case cited by the counsel, the prize court of admiralty had possession of the original cause, and were competent to give redress as to all the consequences. But if we will suppose a case, where the prize court cannot, consistently with its institution or forms, take possession of a cause, and it is brought in the ordinary court of admiralty or in a common-law court, if they cannot decide upon it, because a matter of prize arises incidentally in it, there may be a manifest defect of justice, and perhaps in the present case, Captain Talbot would have no redress for the injury he has sustained.
ment of this state), in a most wanton and unprovoked manner: and it is now the interest as well as duty of the government, to animadvert upon your conduct with a becoming severity—such a severity as may tend to reform yourself, to deter others from the commission of the like crime, preserve the honor of the state, and maintain peace with our great and good ally, and the whole world.

A wrong opinion has been entertained concerning the conduct of Lord Chief Justice Holt and the court of king's bench, in England, in the noted case of the Russian ambassador. They detained the offenders, after conviction, in prison, from term to term, until the Czar Peter was satisfied, without ever proceeding to judgment; and from this, it has been inferred, that the court doubted, whether they could inflict any punishment for an infraction of the law of nations. But this was not the reason. The court never doubted, that the law of nations formed a part of the law of England, and that a violation of this general law could be punished by them; but no punishment less than death would have been thought by the Czar an adequate reparation for the arrest of his ambassador. This punishment they could not inflict, and such a sentence as they could have given, he might have thought a fresh insult. Another expedient was, therefore, fallen upon. However, the princes of the world, at this day, are more enlightened, and do not require impracticable nor unreasonable reparations for injuries of this kind.

The second offense charged in the indictment, namely, the assault and battery, need no observations.

Upon the whole, the Court, after a most attentive consideration of every circumstance in this case, do award, and direct me to pronounce the following sentence:—

*That you pay a fine of one hundred French crowns to the commonwealth; that you be imprisoned until the 4th day of July 1786, which will make a little more than two years' imprisonment in the whole; that you then give good security to keep the peace, and be of good behavior to all public ministers, secretaries to embassies and consuls, as well as to all the liege people of Pennsylvania, for the space of seven years, by entering into a recognizance, yourself in a thousand pounds, and two securities in five hundred pounds each; that you pay the costs of this prosecution, and remain committed until this sentence be complied with.

(a) See Ex parte Cabrera, 1 W. C. C. 232; United States v. Little, 2 Id. 205; United States v. Hand, Id. 485; United States v. Ortega, 4 Id. 581.
COURT OF COMMON PLEAS

OF PHILADELPHIA COUNTY.

DECEMBER TERM, 1784.

YOUNG v. REUBEN.

Award.

An award of a sum of money, due at a prior date, with interest, is void for uncertainty.¹

Under a rule of this court, referees reported, "that the sum of 75L was due the 3d of March last, with interest on the same." The time mentioned was several months before the meeting of the referees; and, on motion, the court set aside the report for the uncertainty; as there might have been a sum due on the 3d of March, and nothing due at the time of making the report. (a)

GERARD v. BASSE ET AL.

Partnership.

A judgment entered on a bond executed by one partner, with one seal, in the name and behalf of both, was set aside as to the partner who did not sign, but held valid as to the other.²

The defendants declining in their circumstances, and being much pressed by their creditors, Basse fled, and Soyer was imprisoned at the suit of the plaintiff. During his confinement, he executed a bond and warrant to confess judgment, to which there was one seal, and the signature was in this form, "John Abraham Soyer, for Basse & Soyer."

And now, a motion was made to set aside the judgment, at the instance of the creditors in general, in order that an equal distribution might be

(a) See Barnet v. Gilson, 3 S. & R. 349; Burkholder v. McFerran, Id. 422; Zerger v. Sailor, 6 Binn. 24; White v. Jones, 8 S. & R. 349.

¹ Overruled in Wood v. Earl, 5 Rawle 45.
² Re-affirmed, in Haskinson v. Eliot, 62 Penn. St. 393; Quillan v. Lawrence, 4 W. N. C. 239; Bitzer v. Shunk, 1 W. & S. 340. But where one partner confesses judgment against the firm, for a partnership debt, the interest of all the copartners in the firm property may be taken in execution under it, and sold. Ross v. Howell, 84 Penn. St. 139; Vandegrift v. Redheffer, 10 W. N. C. 464; Carson v. Beams, 3 Phila. 493.
OF PHILADELPHIA COUNTY.

Gerard v. Basse.

states no difference, for the *causa contractu* is the sole criterion. Seals are of the same effect in *lex mercatoria* as at common law; and there is no authority to maintain the opposite doctrine; for Shep. 69, is not the case of joint contractors. The books, in general, where they speak of the obligation imposed on one partner by the contract of another, mention only notes, and whether under seal or not, is not distinguished. When we declare, upon them, we allege the subscription of both partners, though in fact, only subscribes. Therefore, and because delivery is no further necessary than as evidence of passing the interest, the first point seems determined in the negative.

2d Point. He observed, that the several authorities quoted on the other side, were drawn from writs of error; and, as this record could not appear in its present form, if carried into a superior court, he inferred, that either the authorities were not applicable, or the record was to be considered upon the ground of a removal by a writ of error: and in that case, for error *dans le record*, the judgment must be wholly reversed; but when the error is *dehors*, the judgment may be reversed in part, and confirmed in part. 1 Leon. 317; Cro. Eliz. 115; 3 Lev. 36; Moore 564. Besides, he contended, that the release of errors, contained in the warrant of attorney, purges and protects whatever might be deemed irregular with respect to Soyer; although it may not be sufficient to set up a void proceeding against Basse. 2 Str. 1215; 3 Mod. 109; 6 Co. 25.

*Sergeant*, in reply, made three points: 1st. That the bill of one binds both, from the necessity of trade; but that the necessity does not extend, nor does the rule exist, in the case of deeds and other specialties. 2d. That a judgment cannot be set aside in part, or against one only of the defendants. Where, indeed, the different parts of the judgment are, in their nature separable, as in fines and common recoveries, mere modes of assurance, it may be done; and to those cases only, the adverse authorities are confined. 2 Bac. Abr. 509, explains the mode of reversing judgments; and 2 Bac. Abr. 227, is so full upon the impartibility of judgments, that it cannot be too often insisted upon, in the present case. 2 W. Black. 1131, contains the same doctrine. 3d. The release of errors must be considered under the distinction in 3 Mod. 109, which shows that where divers are to recover in the personalty, the release of one is a bar to all, but it is not so in point of discharge. 6 Co. 25, is explicit, that, where two or more are charged jointly, if they bring a writ of error to discharge themselves, the release of one cannot bar the other; for, they have not any interest or benefit, but a joint charge and burden, which cannot be discharged or released, unless by the plaintiff who has the interest and benefit of it. If, therefore, Soyer's release does not discharge the error, he concluded, that for the other reasons, the judgment must be set aside.

The President delivered the unanimous opinion of the court, as follows:

**Shippen**, President.—This is a motion to set aside a judgment entered

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*(a) The opinion here inserted is copied from President Shippen's MS., and gives the sentiments of the court, as delivered by him at length, of which Mr. Dallas's original report furnished only an abstract.*
upon a warrant of attorney, against the defendants. The cause assigned is that the warrant of attorney was not executed by both the partners, but by Soyer alone. That being a deed, it is not the act of those who do not seal and deliver it; to this, it is answered, that being the act of one partner in trade, in the name of him and his partner, it should be deemed the act of both, although under seal.

*122* As to this point, we are of opinion, that in all mercantile transactions, the act of one joint partner, in matters relating to their joint trade, should be deemed the act of both, although it be the signing bills of exchange, receipts, &c. But this seems to us to be confined to such acts and to such writings as are of a mercantile nature, such as are usually and necessarily done in a course of trade, and without which the business of the partnership could not be conveniently carried on. But as to deeds, they are matters of a different nature, and not necessarily connected with trade, but subject to the rules of law independent of trade and commerce. We find no instance where they are distinguished in the case of merchants from other cases. We, therefore, are of opinion, that the warrant of attorney in the present case executed by Soyer alone, in the name of Basse & Soyer, is not the act of Basse, and therefore, the authority for confessing judgment against him is wanting.

But the motion goes further, it is to set aside the judgment entered against Soyer himself, on the warrant of attorney actually executed by him, on the ground of its being a joint proceeding against them both, and that if the judgment is set aside at all, it must be set aside in toto.

It is not disputed, that there was a real bond fide debt due from Basse & Soyer to the plaintiff, that Soyer executed the bond and warrant of attorney, freely and without compulsion, and that there is no ground for setting it aside, from any unfairness in the transaction. It is likewise not disputed, but that if two persons are named as grantors or obligors in a deed, and one only execute it, it is a good deed as to him who seals it, and void as to the other. Consequently, that in the present case, this is a good bond and warrant of attorney as to Soyer; and it is not disputed, that if the judgment had been entered up against Soyer alone, it would have been good.

The question is, then, whether, under these circumstances of the case, we shall take up this matter of error, if it is one, in a summary way, and decide upon it, as if before us on a writ or error, or not.

Judges are bound to decide according to the rules of law, but when they see a fair creditor in danger of losing his debt by a misapprehension or slip of his attorney, they will be attentive to prevent it. I acknowledge, my conscience would revolt at the idea of permitting it, if, by any law authority, I can be supported in preventing it.

The law in 2 W. Bl. 1133, has set us the example; we there see the judges, on an application of this sort, set aside a warrant of attorney as to one, and let the other shift for himself. We may, with equal reason, set aside the judgment as to the man who gave no authority for entering it, and let the other who did really execute it shift for himself.

We are disposed to go further, if it shall be asked of us. We see no reason why, in this case, we may not give leave to the plaintiff to strike the name of Basse out of the proceedings, as a mere nullity, as well as the
judges in that case, struck the name of the defendant out of the warrant of attorney.

As to favoring these warrants of attorney. However we might wish to see something like an act of bankruptcy take place here, whereby all creditors would come in equally, yet as the law stands, preferences are allowed, if obtained fairly, and the law favors the vigilant.

Accordingly, judgment set aside as to Basse, and confirmed as to Soyer. (r)

(a) The principle upon which the case of Gerard v. Basse and Soyer was decided has governed the courts in subsequent decisions. In the United States v. Astley (3 W. C. C. 508), and Taylor v. Coryell (12 S. & R. 249), the general rule was distinctly recognised, that in the case of a sealed instrument, the act of one partner is not sufficient to bind the other. In the first of these cases, however, Judge Washington admitted the exception, that the deed will be valid, if executed in the presence, or by the authority of the other partner; and in Taylor v. Coryell, Judge Duncan seemed to think it clear, that a subsequent acknowledgment by the other partner would ratify the deed. The principal point decided in the latter case was, that one partner might bind the firm by an agreement, not under seal, to refer to arbitration any partnership matter, except, perhaps, where the other party openly dissented. How far an assignment of the partnership effects made by one partner for the benefit of creditors will be valid, see Pearpoint v. Graham, 4 W. C. C. 252. See also the remarks of President Shippen upon this case, in Pleasants v. Meng, post, 280.
SUPREME COURT OF PENNSYLVANIA

APRIL TERM, 1785.

Davison's Lessee v. Bloomer.

Evidence.

Where there are two subscribing witnesses to a deed, one of whom becomes afterwards interested, his handwriting cannot be proved, if the other witness resides within the county.

A Deed, attested by two witnesses, one of whom had married the lessor of the plaintiff, the other residing within the county and not produced, was offered in evidence, upon proof of the handwriting of the witnesses.

Hartly objected, that it would be better evidence to prove the execution of the deed by the absent witness, not interested; and therefore, this ought not to be allowed.

Yeates contended, that if a witness is incapacitated, either by his own act, or by the act of God, proof of the handwriting is sufficient; as, where a witness has been convicted of perjury.

By the Court.—There is a case in Strange where a party who was a witness to a bond afterwards became interested, and, although the proof of his handwriting was admitted, yet there must, likewise, have been proof that the other witness could not be found. (a) The best evidence of which the case reasonably admits has not been offered; and therefore, we cannot allow the deed to be read on this occasion. (b)

(a) The case alluded to is, probably, Godfrey v. Norris, 1 Str. 34, where the plaintiff, who was administrator of the obligee, was the only subscribing witness to the bond, and the court permitted his handwriting to be proved.

(b) Proof of the handwriting of a witness, who has become interested since the subscription, will be admitted, although the interest has arisen by his voluntary act. Hamilton v. Marsden, 6 Binn. 45; Lautermilch v. Kneagy, 3 S. & R. 202.
the sale, with interest; but this was refused by the plaintiffs; and no payment or tender being made upon the 30th of September 1782, they brought the present action upon the bond.

The evidence was brief, consisting only of the articles of agreement, the bond, a deposition of the offer made by Inglis, and testimony that the usual price of tobacco, during many years preceding the war, was about 20s. per cwt.

Wilcock, Sergeant and Lewis, for the plaintiffs, contended, that this transaction was a fair and lawful wager on the part of Wharton & Co., in confidence that the continental money would recover its original value; and that, on the other hand, they ran a considerable risk; as, if it depreciated, they would have been bound to take it, provided it continued a legal currency. But the act which repealed the tender-law destroyed its currency; so that, on the 30th of September 1782, when the bond became due and payable, the only lawful current money of Pennsylvania was coin, of gold or silver; and that, by the terms of the bond, ought to be paid.

Goveurnor Morris, Wilson and Ingersoll, for the defendants, denied that the transaction was founded in a wager; and contended, that the plaintiffs had set up a hard and unconscionable demand; for, they insisted, that the lawful current money, expressed in the bond, meant what was current at the time of its execution; and they declared the readiness of the defendants either to pay at the rate established by the scale of depreciation, or according to the real value of the tobacco, with interest from the date of the sale.

McKeen, Chief Justice, delivered a circumstantial and learned charge to the jury. He said, that the want of a court with equitable powers, like those of the chancery in England, had long been felt in Pennsylvania. The institution of such a court, he observed, had once been agitated here, but the houses of assembly, antecedent to the revolution, successfully opposed it; because they were apprehensive of increasing, by that means, the power and influence of the governor, who claimed it as a right to be chancellor.(a) For this reason, many inconveniences have been suffered. No adequate remedy is provided for a breach of trust; no relief can be obtained in cases of covenants with a penalty, &c. This defect of jurisdiction has necessarily obliged the court, upon such occasions, to refer the question

(a) A court of chancery was actually established in Pennsylvania, in the year 1720, during the administration of Sir William Keith, and exercised jurisdiction for several years. Some of its proceedings are extant, and a few titles to real estate are derived from its decrees. The history of the attempt to establish a court of equity in this state is set forth in a case stated for the opinion of the attorney and solicitor-general of England, in 1736, which, with their answers, is in possession of the present editor. As they have never been published, and will serve to illustrate the legal history of Pennsylvania, it is supposed that, by subjoining them as an appendix to this volume, the editor will render an acceptable service to the profession.

1 The Registrar's Book of Governor Keith's court of chancery, long preserved in the secretary's office in Harrisburg, has since been published as an appendix to William Henry Rawle's Lecture on Equity in Pennsylvania, where much interesting information on this subject, will be found by the inquiring student of the History of Pennsylvania Law.
This was opposed by Bradford, who contended, that the defendant having taken general defence, when he first pleaded, and entered into the common rule, he must now confess lease, entry and ouster as to the whole; but the plaintiff can recover no more than he proves the defendant to be in possession of. 1 Att. Prac. 317.

By the Court.—The defendant must, in this case, confess lease, entry and ouster for the whole tenements laid in the declaration. (a)

(a) This case was determined at Carlisle N. P., on the 16th May 1786, before McKean, Chief Justice, &c.
although the consideration of the bond was originally usurious, the act of assembly did not make it void; but only worked a forfeiture to the value of the thing or money lent; and that, therefore, without going further, if the defendant's cross-action did not appear, from his own stating, well founded, it should not be made the instrument of delaying the plaintiff's satisfaction.

_Dallas_ asserted, that he was prepared to prove Gibbs had received a part of the money, and that, therefore, the usury was complete. He argued, that if the original agreement be corrupt between all the parties, and so within the act, no color would exempt it from the dangers of usury. 1 Brownl. 73; 2 And. 428; 4 Shep. Abr. 170. That it is not material whether the payment of the principal and the usurious interest be secured by the same or different conveyances, for all writings whatsoever for the strengthening such a contract are void. 1 Hawk. 248; Cro. Jac. 252, 508. That a second bond, made after the forfeiture of a former, and conditioned for the receipt of interest, according to the penalty of the forfeited bond, is within the statute. 1 Hawk. 248; 3 Keb. 142. That if a bond depends on some other deed, and that deed becomes void, the bond is void also. 2 Wils. 341. And that a fine levied, or a judgment suffered for the security of money, in pursuance of an usurious contract, may be avoided, by an averment of the corrupt agreement, as well as any parol contract. 1 Hawk. 248; 3 Rol. 509. He said, that the defendant did not wish to diminish the plaintiff's security; but only to obtain a cessation of proceedings until the illegal consideration of the bond was ascertained by the event of the cross-action; that if the consideration was illegal by statute, it was void by the common law; and, consequently, that the defendant would then be entitled to recover from the plaintiff as much as was now taken in execution. 2 Wils. 341; Carth. 225. But—

By the Court.—We cannot in this way enter into a consideration of the merits of another action. Nor ought we, upon so slight a foundation, to grant a rule to show cause; for such rules, by the delay which they occasion, are frequently as prejudicial to the plaintiff, as if they were made absolute.

_Dallas_ took nothing by his motion.

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*SCOTTIN v. STANLEY et al.*

Owners of vessels.

Part-owners of a vessel are liable to tradesmen, for articles furnished, or work done to the ship, after they became owners, if they are charged to the ship, although the contract was made before.

John M. Taylor had put a vessel on the stocks, and contracted with the different tradesmen. When the ship was a little advanced, he sold one-half to Stanley, and one-quarter to Joseph Carson, or rather interested them each so much in the concern. Taylor continued to be ship's husband, fitted out the ship, received the bills of disbursements, and was paid by the other partners their respective proportions of the building and outfits. While the ship was on her first voyage, Taylor failed. The plaintiff, who
Graves, Barnes’s Notes 74; Otvoy v. Cockayne, Ibid. 35; Seaber v. Powell, Ibid. 91; Morley v. Carr, Ibid. 112.

On the 13th of August, Sergeant, for the plaintiff, showed cause; but, after argument, the rule was made absolute.(a)

CAMPBELL v. RICHARDSON.

Lien of recognisance of bail.

A recognisance of bail binds lands, only from the date of the judgment on the seire facias.

The defendant had been bail for his brother, who suffered judgment to go against him, a seire facias was issued against the defendant, and in due course, judgment thereupon. In the interim, between the recognisance of bail and judgment on the seire facias, several judgments were obtained against the defendant by his proper creditors, executions issued, and his real estate was seized and sold. But the proceeds not being sufficient to satisfy all the judgments, the sheriff brought the money into court, to be disposed of as the court should direct.

Sergeant, for the plaintiff, Campbell, insisted, that a recognisance of bail is a lien upon the land, from the date of the recognisance, and therefore, claimed a preference to all judgments afterwards obtained, although they might be previous to the judgment on the seire facias. He cited to this purpose, Stat. 29 Car. II., c. 3; 2 Bac. Abr. 363, 365; 10 Vin. 559, 563; 2 Salk. 564; Cro. Eliz. 561; Hob. 95.

Ingersoll and Lewis, on the contrary, contended, that Campbell should only have preference from the date of the judgment on the seire facias; and argued from the statute of frauds and our act of assembly ascertaining the mode of paying the debts of decedents, and cited 1 Peere Wms. 333; Cro. Jac. 449; 2 Lill. 69; 4 Co. 59, 60; 5 Co. 28, 29; 6 Co. 45; 11 Mod. 223; 1 Roll. Ab. 926; Sayer 121; Ld. Raym. 157.

After consideration, the President delivered the opinion of the court, on the 28th of August.

Shippen, President.—This is a question concerning the binding nature of a recognisance of bail, as to the lands of the bail; and whether, in Pennsylvania, a prior recognisance creditor, or subsequent judgment-creditors, shall have the preference.

From the cases cited, it appears, that, although lands in England are bound by recognisance, yet there is some uncertainty as to the time from which they are bound: whether from the caption, or from the enrolment of the recognisance; or from the judgment against the principal; or from a non est inventus returned upon the ca. sa. And several of the cases which mention that lands are bound upon the *caption, are since the statute of frauds, which says that the lien shall be from the enrol-ment.

(a) Priestman v. Keyser, 4 Binn. 344; Union Bank v. Kraft, 2 S. & R. 284; McFarland v. Holmes, 5 Id. 50; Kinsey v. Kraft, 1 Bro. 250; Fitter v. Probasco, Id. 238; Bank v. Lassel, 2 Yorks 387. And see Bobyshall v. Openheimer, 4 W. C. C. 388.
SUPREME COURT OF PENNSYLVANIA.

SEPTEMBER TERM, 1785.

GEYGER v. STOY.

Habeas corpus.

One who had been committed under an execution by a justice of the peace, for a sum beyond his jurisdiction, was discharged by the court on habeas corpus.

The defendant was brought before the court on a habeas corpus, and the return stated, that he was committed in execution, by the warrant of a justice of the peace, for a debt of 10l. 8s. 3d.

Sergeant moved, that he should be discharged, on this principle, that although the errors of a justice, while he keeps within his jurisdiction, are binding, until his judgment is reversed; yet, where he exceeds his jurisdiction, all his acts are, in themselves, merely null and void.

BY THE COURT.—It appearing upon the face of the record, that the justice has exceeded his jurisdiction, by giving judgment, and issuing an execution, for a greater sum than ten pounds, we cannot but consider the whole as a nullity; and, for that reason alone, discharge the defendant. (a)

JACKSON v. MASON. JACKSON v. KEELY.

Practice.—Continuance.

These causes were marked for trial this day. Lewis, for the defendant, tendered the affidavit of Mason, the defendant in the first action, of the absence of a material witness. Bradford, for the plaintiff, desired, on the authority of the Chev. D'Eon's Case, *3 Burr. 1514, that the court would inquire what would be the testimony of the absent witness, in order that it might appear whether he was really material.

But this the Court refused, and ordered the cause to be continued. (b)

Bradford then moved, that the action against Keely should be tried;

(a) Where a justice keeps within his jurisdiction, however, his judgment is conclusive upon the parties, unless reversed on certiorari or appeal. Emery v. Nelson, 9 S. & R. 12.

(b) See Hollingsworth v. Duane, Wall. C. C. 46.
stone of Assurances, fo. 101 (97 of new edition); Co. Lit. 9. 2d. From a variety of express and positive authorities. 3 Black. Com. 370; 1 Co. 57 b; Co. Lit. 10 a; Shepherd’s Touchst. 102, 106; 1 Comyn’s Digest 543; 1 Co. Rep. 100 b; Gilbert’s Uses and Trusts 75, 76. And 3d, that words, essential to convey a fee in a deed at common law, are necessary since the statute of uscs, 27 Hen. VIII., c. 10, in a covenant to stand seised to uses. To prove which he cited 5 Bacon 357; 1 Rol. Abr. 837; Cro. Eliz. 478; 2 Lill. Reg. 112; Sir Thomas Raym. 317; 2 Ld. Raym. 1151, 2, 4, &c.

We have since heard the counsel for the defendant, in answer, who chiefly dwelt upon the deed of 1743 having a relation to the estate which the covenantor had, that he having a fee, had by relative words conveyed that fee to his son; and they relied upon 2 Comyns 215; Shep. Touchst. 101; Co. Lit. 9 b.

Upon the whole, The Court have, unanimously, formed the same opinion as the plaintiff’s counsel, after the most mature consideration.

1. This deed is a covenant to stand seised to uses.

2. Before the statute of uses, viz., 27 Hen. VIII., c. 10, this deed would have passed a fee, 1 Co. 100 b, Shelley’s case, though the word heirs is not in it. But since that statute, the limitation of uses is, in many cases, governed by the rules of common law; and no inheritance, in a covenant to stand seised to uses, or other deed to uses, can be raised, or new estate created, without the word heirs; because the uses are now transferred into possession, and therefore, must be governed by the rules of possession at common law. 5 Bacon’s Abr. 350, 356, and the cases there cited.

And at common law, though the intent of the parties be ever so fully expressed and manifested in a grant or other deed, without the word heirs, a fee shall not pass. 6 Mod. 109; 2 Vesey 252; 1 Wilson 351; 2 W. Black.

3. There are no words in this deed, either technical or relative, that can raise a fee, and consequently, Abraham Vandegrift had thereby only an estate for life in the premises.

Let judgment be entered for the plaintiff.

McCullum v. Coxe.

Discontinuance.

A plaintiff cannot discontinue, after a bonâ fide assignment of the debt, for a valuable consideration, to a third person.

The jury were at the bar to try the issue in this case, when Levy moved to discontinue, in consequence of a power of attorney granted by the plaintiff for that purpose. But it was opposed by Ingersoll, in behalf of General Forman, to whom, for a valuable consideration, the plaintiff had assigned the debt, and the defendant had undertaken to pay it to him accordingly.

These facts being made to appear, The Court said they would not allow any collusive settlement between the original parties, to affect General Forman’s bonâ fide assignment, and ordered the jury to be sworn. And McKean, Chief Justice, observed, that where an action was brought under

Mortgage.—Tacking.

In Pennsylvania, a simple-contract debt cannot be tacked to a mortgage.

This came before the court on a case stated; in substance, as follows: On the 5th of March 1782, a mortgage was executed by Abel Kelly to Thomas Groome and his assigns, for securing the payment of $47. 4s. with interest, on the 5th of March 1783. On the 9th of August 1782, the mortgage was assigned, for a valuable consideration, to John Dorrow; who sued out a scire facias to June term 1784, the day of payment being past. After the assignment, and before the scire facias sued, Kelly became indebted to the said Dorrow by notes and book-accounts, in divers sums, which still remain unpaid and payable.

Ingersoll, for the defendant, had obtained a rule to show cause why the proceedings on the scire facias should not be stayed, upon payment of the principal mortgage-money, interests and costs only; without payment of the subsequent simple-contract debts.

Lewis, for the plaintiff, showed cause, and stated from the books the law on the subject in England:—That it is presumed the subsequent simple-contract debts were contracted on the faith of the first security, though no special agreement for the purpose; that after the day of payment, the mortgaged premises are forfeited, in strict law; the privilege of redemption afterwards is a matter of equity, which shall be withheld, until the mortgagor does equity, by payment of all debts; that it prevents a multiplicity of suits, and effectuates substantial justice. And he contended, that in Pennsylvania, the chancery jurisdiction for redemption of mortgages, is transferred by the act of assembly to the common-law courts, which will also take care that he who claims equity shall do it. He cited a great number of cases, both as to the reasons and conclusions of the law. 3 P. Wm. 334; 3 Atk. 556, 630; 1 Chan. Cases, 97; 2 Vern. 286; 2 Chan. Cases, 98; 2 Vern. 177; Prec. Ch. 18; Gilb. Rep. in Eq. 104; Prec. Ch. 419; 16 Vin. 284—5; 1 P. Wms. 775—6; 1 Vern. 244; 1 Sak. 240; 1 Eq. Cas. Abr. 325; 2 Id. 594; Gilb. Rep. in Eq. 96; Max. of Eq. 1; Treatise of Eq. 89, 90.

Ingersoll read some authorities to show, that even in England, the law on the subject is not thoroughly settled. 2 Str. 1107; Eq. Cas. 359; 3 Bac. Abr. 651; Prec. Ch. 407, 419. But, conceding it to be as stated by the opposite counsel, yet, he contended, that it is very different in Penn-sylvania. Our act of assembly (1 Sm. Laws 59) puts mortgages on quite another footing:—For, 1st, Mortgagee cannot proceed on the mortgage, until one year expires after day of payment elapsed. 2d. Even then, a process is directed by the act, altogether different from that which is practised in England, and which does not go to vest the legal estate in the mortgagor. 3d. In fact, the mortgagee cannot, by any default of the mortgagor, however long, or reiterated, acquire a right to more than principal, interest and costs, for the amount of which he has an absolute and special lien on the mortgaged land, and for the payment of which the said lands are to be sold on execution (after judgment on the scire facias) in the usual way. And the act for acknowledging and recording of deeds, § 9, 10 (1 Sm. Laws 95),
directs, under a heavy penalty, that upon payment made as aforesaid, the mortgagee, at the request of the mortgagor, shall acknowledge satisfaction on the margin of the record of the mortgage, which acknowledgment shall be a bar to all actions brought or to be brought on the mortgage, and shall for ever discharge, defeat and release the same. He then read the law of mortgages in England, from 2 Bl. Com. 157, and contrasted it with our act of assembly. In England, after day of payment past and foreclosure, the land is absolutely in the mortgagee, without any possibility of recall; it ceases to be a pledge, and becomes to all intents and purposes, the absolute property of the mortgagee. In Pennsylvania, there is no such thing as foreclosure, the land mortgaged never ceases to be a pledge; a legal estate never vests in the mortgagee, nor can he, by any possibility, become owner of the land, unless he purchases under the execution. Hence, it must appear, that the reason of the English cases cannot apply in Pennsylvania. Relief is given to the mortgagor, in chancery, expressly because he is remediless at law; and therefore, they will grant the equity upon what terms they please. In Pennsylvania, the act of assembly precludes all necessity for such an interference. The privilege of redemption after the day of payment past is not properly speaking an equity, and therefore, the principle of the chancery cases cannot exist. Another reason why the English cases do not apply is, that, in England, real estate is not answerable for simple-contract debts; and therefore, chancery, in favor of such creditors, will cover them, where they have it in their power; but here, the simple-contract creditor can come on the land, even in the hands of the heir. If the rule should be extended to Pennsylvania, the most mischievous consequences would ensue to purchasers. It would be in vain for them to search the offices, to see to what amount a tract of land may be incumbered by mortgages; because, however accurate he may be in his calculation and comparison of the value of the land, with the amount of the mortgage-debts, an infinity of intermediate simple-contract debts may swallow up the whole difference.

Lewis observed, in reply, that the mischief suggested by his opponent need not be apprehended, because all the cases agree, that the alienee of the mortgaged premises shall not be liable for more than the mortgage-debt, though it is otherwise with the mortgagor himself. As to the idea, that, in Pennsylvania, a mortgage is in nature of a common pledge, we find that the authorities extend even so far; Demanbry v. Metcalf, Gillb. Rep. in Eq. 104; s. c. Prec. in Ch. 419; it is the case of jewels pawned, which were not permitted to be redeemed, without payment of the pawnor's subsequent note of hand. And, with respect to the present point, the act of assembly has no other effect, than to extend to our law-courts the power of redemption which chancery has in England; for, if there was no such power, upon default on the day of payment, the mortgagor would be without remedy.

After consideration, the President delivered the opinion of the court as follows:

Shippen, President.—The case comes before us on a rule to show cause why the proceedings on a sicre facias on an assigned mortgage, should not be stayed, on payment of the principal and interest due on the mortgage? It is contended, on the part of the plaintiff, that a subsequent debt having been
contracted with the assignee of the mortgage, the rule should not be granted, until such subsequent debt be first paid.

Being a court of law, we cannot take upon ourselves to act as a court of chancery. We have no power to foreclose the equity of redemption, or to impose terms upon a mortgagor applying to redeem. The courts of law in England have never done it, but under the act of parliament of 7 Geo. II., c. 20, made for the more easy redemption and foreclosure of mortgages. Under this act, when an ejectment is brought for the recovery of lands mortgaged, if the mortgagor shall become defendant in the ejectment, and shall, at any time pending the action, pay the principal and interest money due on the mortgage, or bring it into court, such money shall be taken in full discharge and satisfaction of the mortgage, and the court shall discharge the mortgagor, and compel the mortgagee to surrender and re-convey the mortgaged premises. There is a case under this act which has not been cited at the bar, and which is rather fuller to the point, than any that have been cited. It is in 2 Barn. Not. 147, where "a rule, on the statute of 7 Geo. II., to show cause why proceedings should not be stayed, on payment of the mortgage-money and costs, was made absolute; the lessors of the plaintiff, assignees of the mortgagor, insisted to be paid a bond and simple-contract debt due to themselves in their own right:—Per Curiam: a bond is no lien in equity, unless when the heir comes to redeem."

The courts of law, in this state, have, in some instances, adopted the chancery rules, to prevent the absolute failure of justice. But in this case, there is no necessity to usurp the powers of a court of chancery. We have a positive act of assembly, directing the mode of proceeding upon mortgages, entirely different from the *modes prescribed in England. This act expressly confines the remedy of the mortgagee to the recovery of the principal and interest due on the mortgage; and the proceedings under the law show the uniform construction of it. The seire facias is to show cause why the land should not be sold for payment of the principal and interest due on the mortgage: when judgment is obtained, the levati facias is to levy the principal and interest money only. There is no penalty, no judgment for a penalty, and we might as well refuse to stay proceedings in a suit on a single bill, until a subsequent debt was discharged, as in this case of a mortgage. Upon the execution in both cases, no more can be levied than the principal and interest. (a)

Rule made absolute.

(a) In Anderson v. Neff, 11 S. & R. 225, Judge Duncan said, "The law of England with respect to using satisfied incumbrances to protect purchasers, has no relation to mortgages in Pennsylvania. Redemption here is not a principle of equity, but a legal right. On the execution, no more can be levied than the principal and interest. These principles were settled in in Dorrow v. Kelly, 1 Dall. 144, and have prevailed invariably. There is no natural equity in tacking debts, and, where it interferes with the rights of others, it is most unjust."
Brown v. Scott et al.

Powers of referees.

Power of referees to consolidate several actions into one.

Rule to show cause why the report of referees should not be set aside. The facts were these: Four actions had been brought upon four promissory notes, and the parties, being willing to refer them, by a written agreement entered a fifth action on the docket, in order to take in another note, which had become due since the return of the preceding writs; and, accordingly, the whole were referred to persons nominated by the court; a rule for that purpose being taken out in each action. The parties were heard before the referees, and the report agreed upon, when a difficulty occurred, how to apportion the sum that was found due, or in what manner to make the report, if it was not apportioned. The referees, therefore, applied to a gentleman of the law, who advised them to connect the five rules, and make one general report, for the whole sum. Conformable to this advice, the following report was made: "We, the referees, appointed in the annexed five rules of court to hear and determine the matters in variance between plaintiff and defendants in the five several actions commenced by the former against the latter, do adjudge, that the defendants are indebted to the plaintiff 1301L 3s. 11d., and that the same ought to be paid accordingly." All the referees signed the report, and two of them attended in court, and gave testimony, that both parties were fully and patiently heard, and no objections were made on either side, to the mode of proceeding. Nor was there any suggestion, in the course of the argument, that the referees had acted with partiality, injustice, &c.

The motion was supported by Ingersoll, Coulthurst and Heatly, for the defendants, and they contended, that the report was neither certain, mutual nor final.

1st. For that the report says 1301L 3s. 11d. is to be paid "accordingly"—accordingly to what? the mode of payment was a chief part of the dispute; and this was left uncertain.

*146] 2d. For that the report contains no direction that these notes should be delivered up; and as defendant cannot apply to a court of chancery, as he might, in England, for an injunction, they may still be circulated, and in the hands of a bonâ fide indorsee, so that the defendant may be compelled to pay the money over again; consequently, the report is neither mutual nor final. Cro. Jac. 315; Cro. Car. 112; 1 B. M. 304; 2 Id. 1224; Doug. 362; 5 Bac. 280, 313.

3d. The reports of referees, under the act of assembly, are acknowledged to be different from awards at common law; but in fact there is little difference between them and verdicts. If, therefore, these actions had been tried by a jury, and a verdict given similar to this report, no judgment could be given on it. Co. Lit. 227; Hob. 49; Str. 1024. For on what action can the court award execution, or how can they apportion the sums?

Wilson, Sergeant and Sitgreaves, for the plaintiff, were desired by the court to confine themselves to the last objection, as the first was not supported by testimony, and with respect to the second, it would overset too
Morris v. Tarin.

Damages on protested bill.

Where a bill of exchange had been protested for non-acceptance, and one of the drawers voluntarily paid the principal, and twenty per cent. damages, without waiting for a protest for non-payment, which, however, was subsequently made, it was held, that the drawer could not recover back the money paid as damages.

A Case was made in this cause for the opinion of the court, stating, that the defendant bought a bill of exchange drawn by Benjamin Harrison & Co. upon a house in France, which was presented to the drawee, in February 1784, and protested for non-acceptance. Before it was presented, however, the drawee had become insolvent, and an arrest was issued by the French government, prohibiting the institution of suits against him for a certain time. When the bill became due (the arrest still continuing in force), it was again presented, and, on the 5th of June 1784, protested for non-payment. Without any knowledge of the second protest, and without any suit or compulsion of law, the plaintiff, who was one of the partners of the company that drew the bill, repaid the defendant the principal, interest and charges, with twenty per cent. damages. But, afterwards, conceiving that he had paid the twenty per cent. damages in his own wrong, he brought this action to recover back the amount.

*148] Sergeant, for the defendant, contended, generally, that, an action lay against the drawer of a bill of exchange upon a protest for non-acceptance only. Cun. B. of Ex. 77, 83, 85; Bull. N. P. 269; Doug. 55. But that, at any rate, after a voluntary and deliberate payment, the plaintiff, in an action for money had and received, ought not to recover what the defendant might fairly accept.

Wilson, for the plaintiff, denied that the cases from Cunningham were

(a) In Groff v. Musser, 3 S. & R. 264, C. J. Tilghman, speaking of Brown v. Scott, said, "President Shippen thought that he arbitrators had no right to consolidate; and although he was overruled by his associates (who were not lawyers), yet I have always understood that his opinion has been held for law." The case of Hart v. James, in the supreme court, post, p. 355, confirms the opinion of President Shippen; and in Groff v. Musser, the supreme court reversed a judgment of the common pleas, on the ground that arbitrators, under the act of 1810, had no right to consolidate, without the consent of the defendant. "Whether the common pleas had power to direct an amendment," said C. J. Tilghman, "is not so clear." Judge Duncan was decidedly of opinion that they could not.
in point; disputed the authority of the case in Buller; and asserted that the decision in Douglas, being posterior to the revolution, was not law here. He contended, that the contract of the drawer was not that his bill should be accepted, but that it should be paid; that there was no breach until after the day of payment; that the protest must then be made, or, at least, within the days of grace, to entitle the holder to recover from the drawer; 3d. Raym. 742; and that the act of 12 Wm. III., c. 70, which gives the holder twenty per cent. damages, mentions only bills returned unpaid, and not unaccepted. He urged strongly that the readiness of the plaintiff in taking up his bills, should operate in favor of the present action, which required only an equitable right to maintain it, and which it would, therefore, be incongruous to say, was more favorable for him, who put his creditor to the vexation and delay of a lawsuit, than to the man of honor and integrity, who, in his eagerness to do justice, had erroneously paid more than he was bound to pay. And he added, that the twenty per cent. damages, was imposed as a penalty, and no consideration paid for it by the purchaser of a bill, who, therefore, had no right in conscience to retain it.

The court held the case under advisement, until the 21st of November, when the President delivered their opinion as follows:

Shippen, President.—This is an action for money had and received to the plaintiff's use. The facts are, that a bill of exchange was drawn on a house in France, by Benjamin Harrison & Company, of which company the plaintiff was one, in favor of the defendant, or some other person who indorsed the bill to the defendant. The bill being presented to the drawer, he refused to accept it, and a protest was made for non-acceptance. The bill, with the protest, was sent back, and the plaintiff being applied to for payment, voluntarily paid the defendant both principal and damages. This action is brought on an implied assumpsit, to recover back part of the money, to wit, the damages, as paid by mistake; the plaintiff contending, that to compel him to the payment of damages, there ought not only to have been a protest for non-acceptance, but likewise a protest for non-payment; and that having paid those damages, when by law he was not obliged to pay them, he ought in justice to recover the money back.

This is a liberal kind of action, and will lie in all cases where by the ties of natural justice and equity the defendant ought to refund the money paid to him; but where the party might with a good conscience receive the money, and there was no deceit or unfair practice in obtaining it; [*149 although it was money which the party could not recover by law, this action has never been so far extended as to enable the party who paid the money voluntarily, to recover it back again. (a) The case of Lowrey v. Bourdieou, in Doug. 452, and that of Farmer v. Arundel, in 2 W. Black. 825, are full to this point.

In the present case, the defendant had presented the bill to the drawer for acceptance, and, on refusal, got it protested. Shortly after, and before the day of payment, an arrêt from the king of France prohibits the creditors of the drawer from suing him; upon which, the bill was immediately

COURT OF OYER AND TERMINER

AT PHILADELPHIA.

SEPTEMBER SESSIONS, 1785.

Respublica v. Caldwell.

Indictment for nuisance.

It is no defense to an indictment for nuisance, in erecting a wharf on the public property, that it would be beneficial to the public.

This was an indictment for a nuisance, in erecting a wharf on the public property. The defendant offered witnesses to prove that the erection of the wharf had been beneficial to the public, and therefore, not to be regarded as a nuisance. But—

McKean, Chief Justice, delivered the opinion of the court, that the evidence was inadmissible, for two reasons: First, Because it would only amount to matter of opinion, whereas, it is on facts the court must proceed; and the necessary facts are already in proof. Secondly, Because it would be no justification; for, on the same principle that the defendant might carry his wharf twelve feet, he could justify extending it farther; or any other man might excuse a similar intrusion. Suppose, for instance a street were 60 feet wide, 12 feet might be taken off it, without doing any material injury to the public property, or creating any great obstruction to passengers; yet surely this will not justify any man's actually building upon, and assuming the property of the twelve feet that could be spared.
1783, the deponent let his house in Second street, Philadelphia, to a certain Lazarus Barnet; that the said Lazarus Barnet had resided therein, and followed the business of a merchant or storekeeper, from that time until about two weeks ago, when the said Lazarus absconded from the city, or secreted himself therein, as this deponent is informed. And this deponent further saith, that the said Lazarus Barnet appeared to him to be a married man, and having a family and servants in his house.” Sworn the 11th of December 1784.

This case was argued on the 20th of January, by Sergeant and Levy, against the foreign attachments; and Wilson and Ingersoll, in support of them. On the 21st of the same month, the President delivered the unanimous opinion of the court.

Shippen, President.—The question before us is, whether the foreign attachments, or the domestic attachment, issued against Lazarus Barnet, shall be established? The arguments in support of the foreign attachments, are chiefly founded on the third clause in the first act of assembly, which says that “no writ of attachment shall be granted against any person’s effects, but such only as, at the time of granting such writs, are not resident, or residing, within this province;” and on that of the second act, which leaves non-residents to be proceeded against by foreign attachments, agreeable to the directions of the first act. And it is urged, that in the present case, it does not appear that Lazarus Barnet was resident or residing within the state, at the time of granting the domestic attachment, and, if he was not so resident, he is the object of the foreign attachment law.

Our opinion on this case, must be founded upon a connected view of the several acts of assembly relating to attachments; and these are the 4 Ann., c. 28, the 9 Geo. I., c. 3, and the 14 Geo. III., c. 5. (a)

The object in passing the first act was, to subject the effects of absent debtors to the payment of their debts; as it appears by the preamble, that before that time, they were not equally liable with the effects of those persons who resided on the spot. Within the provisions of that act, three sorts of debtors were included:—1st. Those who never resided here, or whose actual residence was abroad. 2d. Those who had resided here, and had absconded, or otherwise removed; both of which are comprised in the general description of non-residents in the third clause of the act. And 3d. Those who were still here, but were about to remove, without giving security to their creditors. In the second act, it is stated, “that divers irregularities and fraudulent practices had happened, to the injury of such creditors as were willing to accept an equal share of the effects of their debtors,” and from these general expressions we are left to consider, to which of the foregoing descriptions of debtors, the preamble refers. It could not be the first; they residing abroad, and their effects coming here only occasionally, there was no great danger of fraudulent practices; and so it appears by the subsequent law still continuing the same remedy against them. With respect, however, to the other two classes, it was possible for a creditor to seduce his debtor to leave the province, or to entrap him into the commission of some other act, which brought him within the construction of

(a) Acts of 1705 (1 Sm. Laws, 45), 1723 (Id. 158), and 1774 (repealed).
the law, and to seize upon all his effects. The act, therefore, makes an entire new provision, with respect to both the latter descriptions of persons, and consolidates the two cases. It mentions nothing of persons absenting themselves out of the province, nor of persons refusing to give security; but enacts, generally, that all persons who had absconded from their usual place of abode, for six days, with design to defraud their creditors, and not distinguishing whether in the province, or out of the province; if they absconded with that design, they were persons whose effects the legislature intended should be divided among their creditors. To say, that they must be still remaining in the province, would be needlessly restraining the generality of the words of the act, which suggests that sometimes they may have left the province, by the words, “and had not left a clear estate in fee simple, within the province, sufficient to pay their debts.”

The last clause of the second act provides, that “nothing in this act shall be construed to exempt the goods or effects of any person or persons, not inhabitants of this province, from being attached according to the directions of the former act.” Here appears a designed variation from the expression used in the first act: it does not say persons not residing in the province, at the time of issuing the attachment, but, generally, persons not inhabitants of the province, and seems expressly meant to take in only those persons first described in the former act, persons who never resided here, or whose actual residence was in another country. A contrary construction would defeat the general intention of the legislature, as in most cases, those debtors who escape from their creditors, go out of the state. Nor is it material as to the policy of the act, whether he remains in the state, or goes out of it; he has committed an act similar to an act of bankruptcy, by absconding with a fraudulent design; and in that case, and in that only, is he the object of the second act.

The word “inhabitant” has a plain meaning. A person coming hither occasionally, as a captain of a ship, in the course of trade, cannot be called an inhabitant; nor does a person going from his settled habitation here, on occasional business to Boston, or any other place, cease to be an inhabitant.

But a man who comes from another place to reside among us, introduces his family here, takes a house, engages in trade, contracts debts, and, after some time, runs away with design to defraud his creditors, he ought surely to be considered such an inhabitant as not to be an object of the foreign attachment, but of the domestic one, and as a person whose effects should be seized for the benefit of all his creditors, and not of the first creditor who shall take out a foreign attachment, otherwise, there would be few objects for this equitable law to operate upon.

Such has been the uniform construction of the law of attachments in Pennsylvania from the year 1724, to the passing of the act of the 14 Geo. III., c. 5, which last act gives a legislative sanction to the preceding practice. We have, therefore, no hesitation in declaring our unanimous opinion, that the foreign attachments against Lazarus Barnet be dissolved. (a)

The foreign attachments dissolved.

Case v. Hufty.

Practice.—Default.

In this case, it was ruled by The Court, that, to entitle the plaintiff to judgment by default, the service of a summons on the person of the defendant, as well as if left at his house, must be ten days before the return. (a)

Vienne v. McCarty, surviving Partner.

Foreign attachment.—Partnership.

The court will inquire into the cause of action, in the case of foreign attachments, and dissolve them if sufficient cause be not shown.

The separate creditor of a deceased partner cannot maintain an action against the surviving partner, for moneys which have come into his hands in that capacity.

After argument (by Coxe, Wilcocks and Wilson, for the plaintiff, and by Ingersoll and Lewis, for the defendant), the President delivered the opinion of the court in this cause.

Shippen, President.—The first point to be considered in this case, is, whether the court think themselves authorized to inquire into the cause of action in the case of attachments, as they do in cases of cupias, where the defendant's person is taken into custody? The reason of inquiring into the cause of action on writs issued against the person, is to prevent a vexatious plaintiff from imprisoning the body of the defendant without cause. In the case of attachments, though the reason may not perhaps be so forcible, as the personal liberty of the defendant is more precious than his property, yet the abuse of the process of law may be as great, and the necessity of providing against a wanton and groundless seizure of the defendant's effects, as obvious. In the case of specific articles attached, a stranger's ship, or other effects, may be taken out of his hands, and detained for such a length of time as to ruin his voyage, and embarrass his affairs beyond redress. So, in the case of debts attached, his property may be locked up, his remittances prevented, and the injury nearly as great in the other case. The bail marked by an attorney, or *a malicious plaintiff, may be out of all [*155] bounds disproportionate to the debt; and if there was no way of examining into the justice or extent of the demand, a defendant might be at the mercy of the plaintiff, to be ruined at his pleasure. All these mischiefs may be prevented, without injury to anyone, by an inquiry made by the court into the cause of action, in the same manner that it is every day done

(a) Whenever it appears, on the record, that the summons was not served ten days before the return, the supreme court will reverse the judgment. Fitzsimons v. Solomon, 2 Binn. 430; Morrison v. Wetherill, 5 S. & R. 504. But, it seems, from the last-mentioned case, that if the summons was returned, generally, "served," without stating the time of the service, the supreme court will presume that it was duly served, to entitle the plaintiff to judgment. The act of assembly requires that the declaration should be filed five days before the return of the writ; but in practice this is not attended to, and according to Duncan, J. in Morrison v. Wetherill, it is sufficient, if the declaration be filed at any time before judgment. As to the manner of serving the summons, see Bujacl v. Morgan, 3 Yeates 258.

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*Weaver v. Lawrence.*

Replevin.

Practice in the action of replevin, in Pennsylvania.

Replevin issues in this state, wherever a plaintiff claims goods in possession of another. Judicial writs, de proprietate probanda, do not issue here; but where defendant claims property in the goods, he gives security to deliver them, if, on trial, the property shall not be found in him.

**Replevin.** The defendant pleaded property and gave bond; upon which *levy*, for the plaintiff, moved for a writ *de proprietate probanda*; and after argument, on a rule to show cause why it should not issue, the President delivered the opinion of the court as follows:

**Shippen,** President.—In England, there are two kinds of replevin; *first,* by common law, when the writ issues out of the court of chancery: *secondly,* by the statute of Marlbridge, which enables the sheriff to make replevis, without writ, and then, having taken security, he proceeds on the complaint of the plaintiff, either by parol, or precept to his bailiff. In the latter case, the writ *de proprietate probanda* issues at once, upon claim of property; and being tried by an inquest, if it is found for the plaintiff, the sheriff goes on to make the replevin; but, if for the defendant, he forbears. This summary proceeding, with regard to the writ *de proprietate probanda,* is confined, however, to the case of a plaint in the sheriff’s court, under the statute; for when replevis are at common law, no writ *de proprietate probanda* issues, until after the return of the sheriff on a *pluries* replevin; the original writ, or the *alias,* being only directory to the sheriff to make replevin, and proceed in the county court, and are not returnable process, as the *pluries* is, by having in it the clause of “*vel nobis causam significes.*” If, therefore, the *pluries* is returned into the king’s bench or common pleas, with a claim of property by the defendant, a judicial writ, *de proprietate probanda,* may issue, returnable into either of those courts. But on this writ, if the sheriff’s inquest find property in the defendant, the plaintiff is not concluded, being only in inquest of office; and he may either bring a new replevin, or an action of trespass against the sheriff, in which the question of property shall be finally tried. But when the parties have appeared *in banc,* and the defendant claims *property* on plea, no writ *de proprietate probanda* can issue at all, but the claim must be tried in court.

Having thus stated the law in England, we must now inquire, on what footing replevis are in Pennsylvania, and under what law they issue.

It is clear, that in this state there can be no replevin under the statute of Marlbridge, since there is here no such county court to enter plaint, as in England, nor any sheriff empowered by his own authority to make replevin; and, consequently, there can be no summary proceeding, as to the writ *de proprietate probanda.* With respect to writs of replevin at common law, these, likewise, cannot be issued in Pennsylvania, for want of a court of chancery, from which they might issue as an original writ. Hence, it was nec-

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Weaver v. Lawrence.

essary to make a law for ourselves, and this was accordingly done, in the year 1705, by an act of assembly, which directs, that "it shall be lawful *157] for the justices of each county, to grant writs of replevin in all cases whatsoever, where replevins may be granted by the laws of England, taking security as the said law directs, and make them returnable to the respective courts of common pleas, in the proper county, there to be determined according to law." (1 Sm. Laws, 44.)

This act seems then to have made a very considerable alteration in the proceedings in replevin: for, 1st. It does not recognise two kinds of replevin, one by plaint, and the other by writ. 2d. Replevins are made always returnable writs, and the parties' appearance required on the return: and 3d. They are directed to be there determined, that is, in the court of common pleas. As the proceedings are different, so has been the practice under the law; and in writs of replevin here (as in other cases), a summons to the defendant to appear, is always inserted, and a precise day given for his appearance. Nor is the writ liable to be defeated, by a claim of property, as it is in England; where that claim, as I have already observed, puts an end to the suit on the replevin, so that, if it is afterwards revived, it must be by the writ de proprietate probanda. But in Pennsylvania, the practice on a claim of property has been agreeable to the act of assembly; the suit goes on, and although the claim prevents the delivery of the goods to the plaintiff in replevin, yet, the defendant gives security to deliver them, if, on trial, the property shall not be found in him. (a) This practice, therefore, clearly supposes that the trial of property was intended, by the act of assembly, to be in the court of common pleas, and not elsewhere.

No writs de proprietate probanda have hitherto issued in this state. The summary writ, under the statute of Marlbridge, seems indeed to be the only one, which can, in most cases, be of real use, by the immediate intervention of an inquest to decide the claim of property; but, for the reasons before assigned, that cannot issue here. The judicial writ too, if it could issue agreeable to our act of assembly, would rather occasion delay, than expedite the cause, and could, in very few instances, answer the ends expected from it. For, first, it cannot issue until after the return of the pluries writ of replevin, when the time would, perhaps, be elapsed, in which it would be of most importance to determine the question of property; and secondly, if it should issue and be executed, it would not be final, in case the property

(a) In Hocker v. Stricker, post, p. 225, it was ruled, that the sheriff ought to allow a reasonable time for the defendant to find security, and if he refused to give time, he could not justify in an action of trespass. The bail given by the defendant, it has been held (Miller v. Foutz, 2 Yeates 418), are liable to the full amount of the penalty of their bond, which is generally in double the value of the goods. On the issue under the plea of property, the defendant may show either a general or special property in himself. Murray v. Paisley, 1 Yeates 197. And the jury, if they find for the plaintiff, may assess damages for the detention, beyond the value of the property. Warner v. Aughenbaugh, 15 S & R. 1.

1 The giving of a property bond changes the title, and turns the plaintiff's right into a chose in action. Fisher v. Whoollery, 25 Penn. St. 197; Rockey v. Burkhalter, 68 Id. 221. Therefore, a clause providing for a return of the goods, if adjudged by law, is illegal; the judgment is only for damages and costs. Chaffee v. Sangston, 10 Watts 265; Moore v. Shenk, 3 Penn. St. 13; Fisher v. Whoollery, ut supra.
consequence of receiving intelligence of some misconduct of another partner named Cowan, who resided there, and had never been in America. That during his absence, and at the time of laying the attachments, the copartner, now garnishee, continued in possession of the house in Philadelphia, with much the same establishment of servants, &c., but after the attachments were laid, he broke up house-keeping. That David Knox was a single man, and it was not known, whether he had taken the oath of allegiance to this state, or not.

The plaintiffs, to show their cause of action, produced affidavits of accounts from their respective books, sworn to before the Lord Mayor of London.

The question being argued by Ingersoll and Rawle, in support of the motion, and by Lewis and Wilcocks against it, the President, at an adjourned sitting, on the 15th of February 1786, delivered the opinion of the court.

Shippen, President.—The first point to be decided is, whether the foreign attachments ought not to be dissolved, on the proofs given of Knox's being an inhabitant of Pennsylvania, at the time they issued?

We would avoid laying down any general rules as to what will, or will not, make a person an inhabitant, within the attachment law, lest cases should hereafter happen, which might come within those general rules, but were not in the contemplation of the court, in the particular case before them. We think, however, if any general rule was made, it would be reasonable, and very consonant to our laws and constitution, that the person's residence here, to make him an inhabitant, should be so long as to give him the rights of citizenship, to wit, for twelve months. And we should have no hesitation in laying this down as a rule, if it were not for those cases of dispute which may arise between creditors on a domestic attachment, and creditors on foreign attachments, where it may frequently happen, that the debtor's residence may be less than twelve months, and yet he may, and ought to be an object of the domestic attachment law, so as to have his effects divided among all his creditors, and not swept away by the first creditor who takes out a foreign attachment. (a) But in cases where a stranger comes among us, and remains here for a short time, and then goes away under such circumstances, as not to make him an object of the domestic attachment, it will always have considerable weight with us, that he has not resided here for twelve months.

In Knox's case, his residence was only eight or nine months; the family he left behind him, does not appear to be of a kind to denote an unequivocal continuation of his residence, being probably no more than was sufficient for his partner, Henderson's, own accommodation as a single man.

The second question is, whether there has been such proof of a debt due, as is sufficient to show a cause of action?

whence he sailed for England, having declared his intention to return the ensuing spring. The attachments were issued to September term, 1785.

(a) See Lazarus Barnet's case, ante, p. 152; and the note to that case.

1 See Fuller v. Bryan, 20 Penn. St. 144; peal, 71 Id. 378; Hartz v. Asahl, 1 W. N. C. Pfouts v. Crawford, 46 Id. 420; Reed's Ap- 282.

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and the advantages arising from it being mutual, there seems no just reason to complain of it.\footnote{Where the parties manage their own case, without the assistance of counsel, the court will not be nice in scanning the proceedings before the arbitrators. \textit{Fairchild v. Hart}, 1 Phila. 227.}

In public trials, in courts of law, the judges sit to superintend the evidence; no interested witnesses are, in general, permitted to give evidence to the jury; but referees 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 referees 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 \textit{v.} ASH.

\textit{Marine insurance.}

A policy of insurance warranted, that "orders will be given that the ship shall not cruise:"\footnote{Where the parties manage their own case, without the assistance of counsel, the court will not be nice in scanning the proceedings before the arbitrators. \textit{Fairchild v. Hart}, 1 Phila. 227.}

held, that it was necessary that \textit{express} orders should be given to this effect, and that it was not sufficient, that such directions might be \textit{implied} from the instructions to the master.

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 that the ship shall not cruise." Whether such orders have, or have not, been given, is the question before the court.

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 master 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 show, that, though no express direction is given not to
of the party, for he has now attained his full age; it can only be done by the record.

*Lewis* admitted, however, upon a question being put to him, that by the rejoinder in error, the infancy, which was assigned for error, was acknowledged; but he relied upon the impossibility of obtaining relief for a judicial act, done *diens estatem*, by a writ of error, *post plenam estatem*.

The Chief Justice delivered the opinion of the court, in substance as follows:

McKean, Chief Justice.—At the common law, there could be no appearance in any suit, real, personal or mixed, whether as plaintiff or defendant, but in proper person; except where the King, by virtue of his prerogative, granted his writ for an attorney; and where an infant appeared to defend a suit by his guardian. The statute of *West. II.*, c. 15, declares that if an infant is elioned, so that he cannot sue personally, his next friend shall be admitted to sue for him; and c. 10 of the same statute, enables all persons of full age to sue and defend suits by attorney.

But the appearance of an infant to a suit brought against him, is not a judicial act. The appointment of a guardian to defend the suit; and the taking his examination, when a fine is to be levied, a recovery to be suffered, or a statute staple, &c., to be acknowledged, are judicial acts. Most clearly, however, the appearance in this case, is error.

The authorities cited by the counsel for the defendant in error, to show, that after his full age, the party cannot take advantage of his previous infancy, appear to be restricted to real actions, and to fines and recoveries, which are, in their operation, mere modes of assurance. But we are, likewise, clearly of opinion, that in other cases, a judgment against an infant may be reversed after *full age*, and that the fact must be tried *per pais* and not by inspection. Moore 460; Hardwicke’s Cases 104; Hetly 65.(a)

Let the judgment below be reversed.

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*Pirate, alias Belt, v. Dalby.*

Slaves.

The civil law rule, *partus sequitur ventrem*, is the law of this country, in regard to domestic slavery.

Since the act for the gradual abolition of slavery, a number of persons have formed a society in Philadelphia, for the purpose of relieving those of their fellow-creatures, who are held in illegal slavery; and this action is owing to that institution.

The plaintiff, being the supposed issue of white and mulatto parents, attended the defendant to Philadelphia, in the autumn of 1784, and presented so pure a complexion, that the attention of the society was excited, and a writ of *habeas corpus* taken out, at their instance.

The boy’s right to freedom was first argued before Mr. Justice Bryan;

(a) The same points arose in Moore *v.* McEwen, 5 S. & R. 873, where it was determined, that the appearance of an infant, by attorney, was assignable for error, and that the plea, *in nullo est erratum*, admits the fact of infancy.
and the next day, before the same judge and the chief justice, at their chambers; when, the facts being disputed, the chief justice advised the counsel to throw the case into the form of an action de homine replegiando; and recognisances to appear being entered into on both sides, a declaration was filed of September term, 1784, stating that "the defendant Dalby had taken and kept captive the plaintiff, Francis Belt, whereby the said plaintiff is injured," &c. To this the defendant pleaded, that the plaintiff was his slave, and the plaintiff replied—that he was a free man, absque hoc, &c.; rejoinder and issue.

Upon the trial, which was by a struck jury, it was given in evidence, that the plaintiff was born in Maryland, of an unmarried mulatto woman; that the grandmother and the mother of the plaintiff are now, and always have been, slaves; that he was purchased by the defendant's agent, and that the sale was then in dispute in law in Maryland; that the plaintiff had not been six months in Pennsylvania, when the habeas corpus was brought; and the plaintiff himself was shown to the jury, that they might, from his appearance, draw some conclusion, that he was, at least, on one side, the issue of white parents.

Mifflin, for the defendant, having proved, by the laws of Maryland, that the boy was a slave in that state, contended, that the lex loci must determine this, as well as other personal and mixed actions; and for that doctrine, cited, among many other authorities, 1 P. Wms. 420; Prec. in Chan. 207. He said, that the rule partus sequitur ventrem, was founded on reason and the law of nature, and as applicable in other countries as in Maryland; 1 Puffend. 599. 693. Just. Inst. lib. 13, § 4; and he observed, that even in Pennsylvania, the legislature had taken notice of other than negroes and mulattoes, to wit, Indian slaves. 1 Dall. Laws, 62.(a)

The Attorney-General and Lewis, argued for the plaintiff. They said that, in Pennsylvania, there was no positive law for slavery; though as the acts of assembly took notice of three sorts of slaves, negroes, mulattoes, and Indians, they admitted, that, by a reasonable construction, this might be rendered tantamount to an express toleration. *But they contended, [*168 that even under this admission, the maxim which declares that expres-sio unius est exclusio alterius, must be applied to the plaintiff's case, and consequently, as he was neither an Indian, a mulatto, nor a negro, he cannot be enslaved by mere implication. With respect to the lex loci, they allowed its force in regulating contracts; but insisted, that it could never be extended to injure a third person, who was not a party to the contract; which the plaintiff had not been in the present instance; and having thus answered the adverse arguments, they laid down four propositions, on which they meant to rely.

1st. That, however the case may be at civil law, by the common law, the issue follows the condition of the father. 2 Black. Com. 390; Fortesc. de Laud. 98, 103; Litt. § 187, 188; 11 State Trials, 343.

2d. That a bastard, being nullius filius, is free; for, he who can gain

(a) Act of 1705, entitled, "An act to prevent the importation of Indian slaves," which may be found in the 1st vol. of Mr. Dallas's edition of the Laws, p. 62; but is said by Mr. Smith, to be "obsolete," and therefore omitted in his edition.
SUPREME COURT OF PENNSYLVANIA.

SEPTEMBER TERM, 1786.

GRIER et al. v. GRIER.

Award.

An award, that the defendant pay a certain sum to the executors of A., is sufficiently certain; as it may be averred that the plaintiffs are the executors.

After argument by Bradford and Sergeant, for the plaintiffs, and Wilcocks and Ingersoll, for the defendant, the Chief Justice delivered the judgment of the court in this cause.

McKean, Chief Justice.—This is an action of debt upon an arbitration bond; the defendant prayed oyer of the obligation and condition; the condition was to submit to the award of five persons, concerning "the exchange of a number of loan-office certificates, and of, upon and concerning an action of slander now depending between the said parties," and also of all other matters, differences and demands, &c. The defendant thereupon pleaded, that the arbitrators made no award. The plaintiffs replied, and set forth an award, whereby (among other things) the arbitrators did award and order, "that in consideration of the loss sustained by the exchange of certificates between John Grier, deceased, and the said Joseph Grier, senior, the said Joseph Grier pay to the executors of the said John Grier, the sum of one hundred and seventy-five pounds;" and then the plaintiffs aver, that they are the executors of the testament and last will of the said John Grier, deceased, in the said award mentioned and intended, and that to them the said sum of 175l. by the said writing of award was ordered to be paid by the said Joseph Grier, senior. To which the defendant demurred, and the plaintiffs joined in demurrer.

The exception taken to this award is, that the 175l. were ordered to be paid by the defendant to the executors of John Grier, deceased, who are strangers, and that an award cannot be holden by an averment, but must be expounded by itself and nothing dehors. In support of which, the defendant's counsel cited, 1 Bacon's Abr. 139; Hob. 49; Carth. 157; Godbolt 13; Dyer 242; 1 Ld. Raym. 123; 1 Bac. Abr. 141, and Law of Arbitrators 119.
that it may be averred, who they are by name, as has been done by the replication in the present case, were such averment necessary; for it is only explaining more particularly what was contained in the award itself.

Upon the whole, the court is of opinion, that the award in this case is good. Let judgment be entered for the plaintiffs.

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Lee v. Biddis.

Parol evidence.

Effect of the words "current lawful money."

Parol evidence to show what kind of money was meant, ruled to be inadmissible.

On the trial of this cause, Lewis, for the plaintiff, offered evidence to prove what was the money meant to be paid by the contract entered into between the plaintiff and defendant, under the words current lawful money; and cited Morris v. Wharton (ante, p. 125).

Sergeant, objected to the evidence, and cited 1 Atk. 447; 2 State Laws 494. Davies 48, 72.

By the Court.—Current lawful money, by the positive words of the act of assembly, means such money as is current at the time of entering into the contract; (a) and, perhaps, the evidence offered would not so much contradict the contract itself, as that act of assembly: it would be to substantiate an agreement in direct opposition to the law. The case in Davies, if we could be bound by it at all (which we do not think we can, first, because it is not a judicial determination; and, secondly, because it is before judges in Ireland), would be in favor of the plaintiff, if it had not been for this act of assembly. But, indeed, if this evidence were admitted, it would open a door to such a scene of litigation, that, independent of the act, the argument ab inconvenieniō never applied in greater force.

The evidence was accordingly overruled, and the plaintiff voluntarily suffered a nonsuit. (b)

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Kerlin's Lessee v. Bull et al.

Devises.

A testator devised as follows, "I give and bequeath unto my son A., when he arrives at the age of twenty-one years" (a certain tract of land), "to hold to him, his heirs and assigns for ever;" afterwards, he bequeathed to his wife the use and profits of all his lands, for the maintenance and education of his children, until his sons should attain the age of twenty-one. &c.; A. died after the testator, under age, intestate, and without issue, leaving a mother, brothers and sisters: Held, that this was a vested devise in A., and that the estate was to be divided equally among his brothers and sisters.

This cause now came before the court on a special verdict, returned

(a) See the note to Morris v. Wharton, ante, p. 125.

(b) The same point was determined in Bond v. Haas's Ex'r's, 2 Dall. 133. But in McMinn v. Owen, 2 Id. 173, which was an action on an agreement executed in 1779, for the payment of 500l. by instalments, the particular kind of money not being specified, it was held, that parol evidence was admissible, to show that the instalments were to be paid in whatever money was current at the time they became due.
SUPREME COURT.


doubtful a case, to prevent greater mischiefs which may arise by shaking a number of estates, and from the uncertainty of the law.

Let judgment be entered for the defendants.(a)

(a) The decision in this case was under the act of 1764, and the case of Larsh v. Larsh, Addis. 310, was determined upon this authority. In Shippen v. Izard, 1 S. & R. 222, it was held, under the act of 1794, that if an estate be devised to one, by his father, or paternal grandfather, and he die, leaving neither widow, nor issue, nor father, but leaving a mother, she is not entitled to enjoy the estate during her life.

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HIGH COURT OF ERRORS AND APPEALS,

OF PENNSYLVANIA.

SEPTEMBER SESSIONS, 1786.

Purviance et al. v. Angus.

Master of vessel.

The master of a vessel is liable to his owners in damages, where they have been compelled to pay damages to a third person, for injury sustained by him from the misconduct of the master whether the injury arose from error in judgment, or wilful trespass, on the part of the master. In the action against such master, the court of admiralty is not bound to decree the whole sum paid by the owners, but may reduce the damages, at discretion.

Dean v. Angus, Hopk. Adm. 91, reversed.

This was an appeal from the Court of Admiralty.\(^{(a)}\) It was argued, on the 7th and 8th of July, by Lewis, Wilcocks and Sergeant, for the appellants; and by Bradford, Ingersoll and Wilson, for the respondent. The court held the matter for some time under advisement, in hopes that a compromise would have taken place between the parties; but on the 27th of September, the Chief Justice delivered the following judgment.

McKeane, Chief Justice.—I will state the case as it appears before the court, from the proceedings and the evidence, which are not controverted on either side; and shall then take notice of those points which have been disputed.

The appellants, on the 28th day of August, 1779, were owners of a brigantine, called the Hibernia, then riding at anchor in the port of Philadelphia, and appointed the respondent master and commander, on a voyage from thence to Orotava, in the island of Teneriffe, having a commission as a letter of marque and reprisal. The owners, in the sailing orders then delivered to the respondent, (among other things) “advised him to keep company with the armed vessels bound to the eastward, as far as he should think it prudent; and that should they agree to cruise two or three weeks on the coast, he had their approbation in joining with them.” The respondent sailed on his intended voyage, and in the river Delaware joined the brigantine Achilles, whereof George Thompson was master, and the [\(^*181\)]

\(^{(a)}\) The decree of the court of admiralty, together with the evidence, will be found in Judge Hopkinson’s Admiralty Cases, p. 139, 152.
Patty, with the John Prole as master, each having a commission of letter of marque; and about the 1st of September following, they proceeded to sea in company, standing to the eastward.

On the 5th of September, in the forenoon, a firing of cannon was heard by the people on board the Achilles and Patty, and in the afternoon, the Achilles and Patty had altered their course, and being swifter sailors than the Hibernia, left her at some distance; they then waited for her, and when she came up, she inquired the reason of their altering their course, and was informed, that they had seen two sail and given them chase. At this time, the two vessels were not in sight, the Achilles and Patty having waited for the Hibernia, until they were lost: They all three then continued the same course, until the morning, when, at daylight, two vessels were descried, lying close together, by each of the masters of the three brigantines, who forthwith made towards them; and the Achilles and Patty, after firing a few guns, took possession of a brigantine, called the Betsey, which had been a British vessel, bound from Montserrat for New York (which places were then possessed by the enemy), and was captured, the day before, by the Argo sloop of war, belonging to the United States, Silas Talbot, Esquire, Commander. At this juncture, the Hibernia was a few miles astern of the other brigantines, and when she came up, the respondent asked, “What vessel they had brought too?” and was answered, “a brig from Montserrat, bound for New York; a good prize.” In consequence of some conversation with the captains of the two other vessels, the respondent sailed in pursuit of the Argo, then in sight, and did not rejoin them, until near sunset, when a boat came along side from the Patty, and asked for men to assist in navigating the Betsey into some port. The respondent immediately put two men into the boat, and signed orders for William McNeal, who had been appointed prize-master, which contained these words, “to get her, if possible, into Delaware, Egg Harbor, or Chesapeake, for fear of the Sloop Argo falling in with you, if you go to New England;” and “beg of McNeal to stand to the southward, this night and strive hard for Philadelphia.” These orders are dated “the 7th September 1779, at sea, on board the brigantine Patty,” and were signed, first by John Prole and George Thompson. So far the facts are agreed.

Mr. William Davis, who was a passenger on board the Patty, swears, “that he verily believes, the firing of cannon on the 6th, about ten o’clock in the forenoon, was heard on board the Hibernia, and that the people on board each of the three brigs saw two vessels engaged in fight, for that he heard and saw them distinctly; that the three lay becalmed within hail of each other, that the Argo and Betsey were then about three leagues distant from the three brigs, and that the firing continued more than an hour.” He further is positive, that the respondent, and Prole and Thompson, had a consultation, in his presence, about the brig Betsey, whether she was prize or not; and that they concluded to secure her as a prize, as they disbelieved what had been said by West and Church, about her being prize to the Argo, or if she was, yet, as they had been in sight at the time of the capture, they were entitled to a share. These facts are also confirmed by the deposition of John Groves.

On behalf of the respondent, the depositions of John Brice, first mate of the Hibernia, John Magill, George Stout, George Eldridge and Aaron Ash-
The respondent was near to the Betsey, as well as the two other letters of marque; he might have gone on board her, and made every necessary and proper inquiry; he sent two of his crew on board her, to get her, if possible, into Delaware, &c.; he signed the order to McNeil, the prize-master, which must have shown, to perfect conviction, that the Betsey had been captured by the Argo, and that she was a friend. But it is said, that he confined in Prole, whom they had made commodore, and in Thompson; that they deceived him; and that he signed the orders to the prize-master, without reading them; and, in short, that he implicitly obeyed, and did whatever he was told to do. The respondent should have reflected, that the seizing a valuable vessel and cargo, was a serious piece of business, if belonging to a friend; he should, therefore, have weighed the consequences of his credulity in others; he could have inquired for himself, and had the same evidence with Prole and Thompson; he should have considered, that his owners placed their confidence in him, and in no other; he should have acted for himself, and taken care that he did no injury to any one. But he does not appear, by the defence made for him, to have exercised his own judgment at all. Was this using proper care and diligence, or was it inexcusable conduct, and gross negligence?

2. Let us now consider the law upon this evidence; for, *ex facto oritur lex*. It is agreed, that every one of the parties to a trespass, who participates in it, is a trespasser, and an action will lie against him as a principal; for there can be no accessory to a trespass, Bro. trespass, pl. 113; 1 Lev. 124: that a trespass was committed in taking and carrying away the Betsey from the commander of the Argo; that the respondent was present, aiding and assisting in the taking and carrying her away: and that Captain Silas Talbot could have maintained his suit against the respondent, as well as against his owners, for the wrong and injury they have done to him. But it is contended, that though he might be responsible to Captain Talbot, he is not so to his owners, for that his relation with them was by contract, and the contract between a servant and his master, or between the master of a ship and his owners, points out the measure of the servant’s or master’s responsibility; that he ought not to be accountable in damages for an error in judgment, but only for the fault of the heart, and that he acted according to the *best of his judgment; and his error in this business arose from the misinformation and deception of Prole and Thompson. In support of this doctrine were cited 1 Black. Com. 422, 309; 3 Id. 163; 3 Bac. Abr. 544, 564; 4 Co. 83, 84; 10 Mod. 109; 4 Burr. 2060; 11 Mod. 135.

In reply to this, it has been argued, that the master or commander of a privateer or letter of marque, may lawfully stop the ship of a friend, examine her papers, the people on board, the cargo, &c., in order to discover, whether she belongs to a friend or an enemy; and if upon the whole it should be doubtful, to bring her into port, for further inspection and trial, without breaking bulk, or embezzlement of the lading. But if the captor embezzled the cargo, disposed of or used any part of it, sent away the captured mariners, or did any other acts, which show he could have no reasonable doubt, in such case, he is liable for damages and costs. Lee on Captures, 202, 240; Beawes L. M. 207; 1 Roll. Abr. 530.

It is insisted upon, that a master of a ship is one, who, for his knowledge in navigation, fidelity and discretion, hath the government of the ship
committed to his care and management; that he must give an account for
the whole charge, and, upon failure, render satisfaction: and therefore, if
misfortunes happen, if they are either through the negligence, wilfulness or
ignorance of himself or mariners, he must be responsible; and his owners
may sue him for reparation of damages, jointly or separately, both according
to the common law and marine law. See 1 Vol. Laws of Admiralty 186;
Beawes L. M. 49; Buller's Nisi Prius 24; 3 Keble 444; 3 Bac. Abr. 564;
3 Black. Com. 163.

A great loss, then, has been sustained by the injury done in the seizure
of the Betsey; it will be heavy, and must finally fall upon the owners or
master. If the bringing the Betsey too, for the purpose of inquiring
whether she belonged to a friend or an enemy, was lawful, the subsequent
conduct was unlawful, and the seizers came thereby trespassers ab initio.

This was a lata culpa in Prole and Thompson, at least, the respondent
was present aiding and assisting in carrying her away from the Argo. If
one does a trespass, and others do nothing but come in aid, yet all are
principal trespassers. Bro. Trespass, pl. 232, 20; Vin. Abr. 460, title Tres-
pass, pl. 3, and fo. 466, letter U. If A. comes in aid of B., who beats me,
yet he is a trespasser as well as B. 22 Ass. 43. If the conduct of the
respondent was not wilful and with full knowledge, yet it appears to us
have been a crassa negligentia, and that any reasonable man, upon in-
quiry, and the least reflection, upon reading the orders given to the prize-
master McNeil (and he ought to have read them), or upon the circumstances
attending the whole transaction, must have been satisfied, that the Betsey
was a prize to the Argo. It is a wrong position, that a master of a
ship is not answerable for an error in judgment, but only for the fault of the
heart, in civil matters. In criminal cases, as well in others, as in a master
of a ship, it is true. One non compos mentis is answerable civilly
for a wrong done to another. Reasonable care, attention, prudence
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and fidelity, are expected from the master of a ship, and if any mis-
fortune or mischief ensues from the want of them, either in himself or his
mariners, he is responsible in a civil action. And it must appear very
strange to any understanding, that the owners of a vessel should be answer-
able in damages for the misconduct of the master, merely because they ap-
pointed him master, and that the master, the actual malfessor, should not be
accountable over to them; that the innocent should suffer, and the guilty
person go scot-free. We know of no such law.

Upon the whole, the Court are of opinion, that the sentence of the
court of admiralty be reversed; and this court do decree and adjudge, that
the respondent do pay to the appellants the sum of 3795l. 3s. 6d., and the in-
terest thereof from the 22d day of January 1785, together with the costs by
them paid in the former cause by Silas Talbot, qui tam, against them and
others, and also the costs of this suit in the inferior court, and that each party
shall pay their own costs in this court, the same to be taxed by the register,
or this court.

Atlee and Rush, Justices, dissented from this opinion of the court, for
reasons which they assigned separately and at large. (a)

(a) The opinion of Judge Rush, which in the former editions was subjoined in the
appendix, is now introduced in the proper place.
inquiries at this time. In trespass, all are liable; and this rule would apply in a suit by Talbot against Angus, even though the trespass might appear, on the part of Angus, to have been incautiously, or unintentionally, committed.

The question before the court is a special one, resting on its own peculiar circumstances, and not involving in it the examination or adjustment of any general principles of law. But before I proceed to state what I take to be the question, I will make a few previous observations, on the doctrine of responsibility, so far as the same is applicable, or necessary, at present.

The owners, as well as the masters of vessels, are, by the civil law, liable for trespasses committed on the sea. The owners are liable, on the principle, that the master is their servant, bound to obey their orders, and to pursue their instructions: a confidence or trust is reposed in him, that he will conduct himself agreeable to the principles of integrity and good faith; and that he will be guilty of no outrage upon others, nor of any criminal negligence whatever. By rendering the owners responsible for the masters, the law hath laid them under the strongest obligations to employ none but men of skill, capacity and integrity, to navigate their vessels. Perhaps, too, the principle in part received its establishment, from an apprehension, that the commander of the vessel might not be of sufficient ability to compensate for the injury committed by him. In all cases of spoliation, both master and owners are equally liable to the party wronged.

But what is the nature of the contract between the owners and the master? It is either general or special. It is either created by the law, or by the parties themselves. A commander of a vessel, on going to sea without any instructions, is bound to govern himself by law; and, in such case, if his owners are injured through his misconduct, he is certainly responsible again to them. This duty, however, which the law imposes upon the commander of a vessel, may be altered by his owners. They may, for example, order him to take and seize the vessel of a friend; and in case of his compliance, both he and his owners will be responsible to that friend; but the master, in this instance, will not be liable to his employers, because he acted according to instructions. The rules of responsibility, therefore, are not reciprocal. The owners may be liable to a person injured, and it will not thence follow, that the master is answerable again to his owners. These observations are made to refute a very improper inference, that because a master has injured a third person, for which the owners are liable, that, therefore, the master is again responsible to the owners.

The question, then, before the court is this: Is Angus (who actually committed a trespass on the property of Silas Talbot, in conjunction with captains Prole and Thompson, and whose owners, the present libellants, have since been compelled to make compensation to Talbot for the trespass of Angus) responsible to his owners, for the moneys paid by them on account of the said trespass, under all the circumstances of the case?

This I take to be a fair state of the question; and the answer must depend, first, upon the evidence, and secondly, upon the law.

I have stated in the question, that Angus committed a trespass. This appears evident from his signing the orders, and from his putting two sailors on board the Betsy, to assist in navigating her into port: unless, therefore, it can be shown, that Angus was imposed upon by his comrades, Prole and
what damages they pleased, and on some favorable circumstances appearing for the defendant, they found only 500£ in damages.

The similarity of this case with that before the court, inclines me strongly to admit a rehearing of the cause as to this point, whether, if the court should be of opinion, that the respondent is answerable on the point of gross negligence, they are bound to estimate the damages by the real loss, or whether they may not mitigate them, according to the circumstances and degree of negligence in the respondent.

The Court, on consideration, directed a rehearing as to this point only; and, after argument, reducing the damages, they gave the following judgment:

The Court do award, that the respondent do pay to the appellants the sum of 948£ 15s. 10½d., and the interest thereof from the 22d day of January 1785, together with the fourth part of the costs by them paid in the former cause by Silas Talbot qui tam against them and others; and also the costs of this suit in the inferior court; and that each party pay their own costs in this court. the whole of the aforesaid interest and costs to be taxed by the register, or this court. (a)

(a) See the note to Talbot v. The Three Brigs, ante, p. 109.
COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY.

SEPTEMBER TERM, 1786.

CHAPLIN v. KIRWAN.

Arbitrators.

Referees have no right to examine a witness ex parte.

The referees in this case had allowed ex parte evidence to be given, of the current price of coachmakers' work, at the time when the cause of action accrued. For this reason, the defendant moved to set aside their report. And—

By the Court.—If referees make inquiries abroad, to ascertain for their own satisfaction, the price of work, or the truth of any other matter, which may be said, comparatively, to be of a public nature, this, so far from being irregular, would be highly commendable. But it is a very different case, when they proceed separately to examine a witness, who has been produced by one of the parties, although the evidence relates only to those general points. The adverse parties should have an opportunity of cross-examining the witness.(a)

The report set aside.

HOUTON v. WILL.

Relation of judgment.

It was ruled in this case, that a judgment shall not relate to the first day of a term, so as to cut out a domestic attachment.(b)

(a) See Hollingsworth v. Leiper, ante, p. 161, and the notes.

(b) It appears from the MSS. of President Shippen, that the questions raised in this case, were argued by Lewis, for the plaintiff, and Ingersoll, for the attaching-creditors, and the following note is given of the opinion of the court: "The court did not give any judgment in this case, but expressed their opinion clearly on the first point, that a judgment, subsequent to the attachment, should not relate to the first day of the term, so as to avoid the lien of the attachment. The second point, whether the great delay in the proceedings on the attachment, the discontinuing it on the docket, by entering a
arrest. That, upon the whole, it would be extremely hard, after the creditors on the spot who, having joined in the petition according to the directions of the act, had shared the spoils, an absent creditor, who never knew of the discharge, should be barred.

*191] *Shippen, President.—This is a motion, in effect, to discharge the defendant from execution, on the ground of his having been confined by a ca. sa. for the same debt, in the state of New Jersey, and there discharged as an insolvent debtor, by virtue of an act of assembly of that state: and the question is, whether the discharge of his person from imprisonment there, will entitle him to a like discharge here? It is contended, that the decisions of even foreign courts of justice, shall have a binding force here; and that in the situation in which we stand with regard to New Jersey, a sister state, we are under an additional obligation to pay respect to the decisions of the courts there, by the terms of the articles of confederation.

The judgment of a foreign court establishing a demand against a defendant, or discharging him from it, according to the laws of that country, would certainly have a binding force here; and not only the decisions of courts, but even the laws of foreign countries, where no suit have been instituted, would, in some cases, be taken notice of here; where such laws are explanatory of the contracts, and appear to have been in the contemplation of the parties, at the time of making them; as if the interest of money should be higher in a foreign country where the contract was made, than in that where the suit was brought, the foreign interest shall be recovered, as being understood to be part of the contract. But it does not follow, that every order of a foreign court with respect to the imprisonment of the defendant’s person, or any local laws of that country, with regard to his release from confinement, can have the effect of restraining us from proceeding according to our own laws here. The insolvent law of New Jersey relates not to the substance of the plaintiff’s demand, which had already been established, but merely authorizes the court to make an order, on certain terms, for the discharge of the defendant’s person from imprisonment; which order has no connection with the merits of the cause, and cannot with any propriety be called the judgment of the court in that action; and the law itself on which the order was founded, is a private act, made for that particular purpose; it is local in its nature, and local in its terms.

Insolvent laws subsist in every state in the Union, and are probably all different from each other; some of them require personal notice to be given to the creditors, others do not, as in the present case; and they have never been considered as binding out of the limits of the state that made them. Even the bankrupt laws of England, while we were the subjects of that country, were never supposed to extend here, so as to exempt the persons of the bankrupts from being arrested.

The articles of confederation, which direct that full faith and credit shall be given in one state to the records, acts and judicial proceedings of the others, will not admit of the construction contended for, otherwise, executions might issue in one state upon the judgments given in another; but seem chiefly intended to oblige each state to receive the records of another as full evidence of such acts and judicial proceedings.
James v. Allen.

Whatever might have been the effect of an order or judgment of the court of New Jersey, if it had actually discharged the defendant from the plaintiff's demand, the present order, as well as the act of assembly on which it is founded, is local in its terms, and goes no further than to discharge him from his imprisonment in the jail of Essex county, in the state of New Jersey; which, if the fullest obedience were paid to it, could not authorize a subsequent discharge from imprisonment, in another jail, in another state.

The motion is, therefore, not granted. (a)

(a) The case in the text has been repeatedly cited, on questions arising under the insolvent laws of other states; and some erroneous views appear to have been entertained by the profession, respecting its operation and tendency, in consequence of the imperfect statement of facts contained in the report, and in some measure, from a misapprehension of the meaning of the learned judge, by whom it was determined. I am glad, therefore, that the authentic materials contained among the MSS. of President Shippen, enable me to give a satisfactory explanation of the decision.

The proper title of the case is James & Carson v. Samuel Alling. The action in the state of New Jersey, was brought in the supreme court of that state, to May term 1782, and was founded upon a promissory note, drawn by the defendant in favor of the plaintiffs, and dated at Newark, in New Jersey, Nov. 16, 1780, for the sum of 858 l. payable "on or before the 16th of December," following. On the 18th of November 1782, judgment was entered for the plaintiffs, by nil dicit; and, the damages having been assessed at 858 l. 2s., judgment was entered accordingly, on the 15th of February 1783. A jfl. fa. then issued, and on the return of nulla bona, a ca. sa. was taken out, tested the 1st of April, and returnable the 2d Tuesday of May 1783; under which the defendant was committed.

The action in Pennsylvania, was brought in the common pleas of Philadelphia county, to June term 1783. The defendant was arrested on the 22d of April 1783, and gave special bail in due course. On the hearing of the motion to discharge him from the execution, the following copy of the record of New Jersey was produced.

State of New Jersey, ) Samuel Alling, Junior, an insolvent debtor, now confined in the jail of this county, having, pursuant to the act of assembly of this state, for that purpose made and provided, passed June 18th, 1783, presented to the inferior court of common pleas of said county of Essex, in the term of September 1783, a petition to said court, that he, the said Samuel Alling, Junior, might be discharged from his debts and confinement aforesaid, agreeably to said act, and the said Samuel Alling, Junior, having fully complied with the directions and requisitions contained in said act, in taking the oaths, advertising in the public newspapers, delivering in an account of his debts and credits, &c., and the majority in value of his creditors having appointed Col. John Noble Cumming, Captain Robert Nichols and Daniel Johnson, assignees of the estate of the said Samuel Alling, Junior, and a certificate having been produced, under the hand and seal of the said assignees, that he, the said Samuel Alling, Junior, had legally granted and conveyed, assigned and delivered up, for the use of his creditors, all his real and personal estate, both in law and equity, for the use of his creditors, as also all books and vouchers relative to the same, except the apparel, tools and implements of his trade or calling, and the bed or bedding adjudged to him by the court.

We, the subscribers, two of the judges of the inferior court of common pleas for said county, on this 23d day of October 1783, appointed for the purposes aforesaid, do hereby discharge the said Samuel Alling, Junior, from his imprisonment from the jail aforesaid; as witness our hands and seals, this 23d day of October, A. D. 1783.

William Burnet, (L. S.)
John Peck. (L. S.)

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the law was not considered, however, to be entirely settled in New Jersey, appears from the remarks of Chief Justice Kirkpatrick, in Vanuxem v. Hazlehurst, 1 South. 202, where he says: "The commonwealth of Pennsylvania might fairly discharge this defendant from the imprisonment of his person; for the imprisonment itself is but the mere mode of enforcing the contract, and no part of the contract itself. But then, this discharge of the person can have no force, but within the limits of the commonwealth," &c. And in the recent case of Wood v. Malin, 5 Halsted 208, the supreme court of that state, after full consideration, determined, in exact conformity with the principles of James v. Allen, that a discharge under the insolvent laws of another state did not entitle the party to be liberated on common bail in New Jersey, although the contract was made in the state where the discharge took place. This being now the general rule of New Jersey, it follows, that the practice of Pennsylvania must be changed, in order that the principle of reciprocity may have due operation. The dignity of the commonwealth, as well as the inconvenience, of the existing practice, seem to me to require that the rule of comity should be reconsidered, and some uniform and determinate principle adopted for questions of this kind, which are now of frequent occurrence.

The cases upon this subject are collected and reviewed in Mr. Ingraham's valuable Treatise on the Insolvent Laws of Pennsylvania (2d edition, p. 188-201); to which the reader is referred.

In a very recent case, with a note of which I have been favored by the chief justice, the supreme court of this state decided, that where a citizen of Maryland had made application in that state, for the benefit of their insolvent laws, in pursuance of which a provisional assignee had been appointed, a creditor, residing in that state, could not lay an attachment upon a debt due by a resident of Pennsylvania to the insolvent. The court holding that the attaching-creditor, was bound by the laws of Maryland, and consequently, estopped from gaining any preference inconsistent with those laws. Upon the question whether a creditor, not residing in Maryland, would have been concluded by these proceedings the court abstained from intimating an opinion. Mulliken v. Aughenbaugh, 1 P. & W. 117.
that may be sufficiently established by other evidence. 3d. That the possession of a bill of exchange is evidence of an authority to demand payment of its contents. (a)

(a) This was an action by the payee of a bill of exchange, against the drawer. The bill was drawn upon a person in England, and there was a particular agreement between the parties, respecting the damages in case of protest. The plaintiff remitted it to his correspondents, Clifford & Tyset, in England, to collect for him on his own account; but with this indorsement, "Pay to the order of Clifford & Tyset." The bill being protested, this action was brought; and the indorsement appearing on the bill and protest, the defendant moved for a nonsuit, insisting that the action must be brought in the name of the indorsor; but the court sustained the action, and determined the points stated in the text. This explanation of the case was made by Judge Bradford, in Gorgerat v. McCarty, 2 Dall. 147 (also reported in 1 Yeates 94), which was an action by the payee against the acceptor of a bill which had been specially indorsed, when it was held, that possession of the bill and protest, was not sufficient to entitle the plaintiff to recover, without proof of a subsequent indorsor having received the amount. To the same effect was the decision of the circuit court of the United States, in Craig v. Brown, Peters' C. C. 171. But in Lonsdale v. Brown, 3 W. C. C. 404, in an action by the payee against the drawer of a bill, specially indorsed, it was held, that possession of the bill by the plaintiff was _prima facie_ evidence of his right to recover. This decision was made on the authority of Clark v. The United States, 2 Wheaton 27. And see Zeigler v. Gray, 12 S. & R. 43.
COURT OF COMMON PLEAS

OF PHILADELPHIA COUNTY.

JUNE TERM, 1787.

GERARD v. LA COSTE et al.

Bills of exchange.

A bill of exchange payable to A., without the words "or order," or other words of negotiability, is not indorsable over, so as to enable the indorsee to maintain an action against the acceptors, in his own name.

This case came before the court on a special verdict, and after argument, the following judgment was pronounced by the President.

SHIPPEN, President.—This action is brought against the acceptors of an inland bill of exchange, made payable to Bass & Soyer, and indorsed by them, after the acceptance, to the plaintiff, for a valuable consideration. The bill is payable to Bass & Soyer, without the usual words "or order" "or assigns," or any other words of negotiability. The question is, whether this is a bill of exchange, which by the law-merchant, is indorsable over, so as to enable the indorsee to maintain an action on it against the acceptors, in his own name.

The court has taken some time to consider the case, not so much from their own doubts, as because it is said, eminent lawyers, as well as judges, in America, have entertained different opinions concerning it. There is certainly no precise form of words necessary to constitute a bill of exchange, yet, from the earliest time to the present, merchants have agreed upon nearly the same form, which contains few or no superfluous words, terms of negotiability usually appearing to make a part of it. It is indeed generally for the benefit of trade, that bills of exchange, especially foreign ones, should be assignable; but when they are so, it must appear to be a part of the contract, and the power to assign must be contained in the bill itself. *The drawer is the law-giver, and directs the payment as he pleases; the receiver knows the terms, acquiesces in them, and must conform.

There have doubtless been many drafts made payable to the party himself, without more, generally, perhaps, to prevent their negotiability. Whether these drafts can properly be called bills of exchange, even between the parties themselves, seems to have been left in some doubt by the modern
judges. Certainly, there are drafts in the nature of bills of exchange, which are not strictly such, as those issuing out of a contingent fund; these (say the judges in 2 W. Black. 1140) do not operate as bills of exchange, but when accepted, are binding between the parties. The question, however, here, is not, whether this would be a good bill of exchange between the drawer, payee and acceptor, but whether it is indorsable.

Marius's Advice is an old book of good authority; in page 141, he mentions expressly such a bill of exchange as the present, and the effect of it, and he says, that the bill not being payable to a man or his assignees, or order, an assignment of it will not avail, but the money must be paid to the man himself. In Hodges v. Stewart, 1 Salk. 125, it is said, that it is by force of the words, "or order," in the bill itself, that authority is given to the party to assign it by indorsement. In Jordan v. Barloe, 3 Salk. 67, it is ruled, that where a bill is drawn payable to a man, "or order," it is within the custom of merchants; and such a bill may be negotiated and assigned by custom and the contract of the parties. And in Hill v. Lewis, 1 Salk. 133, it is expressly said by the court, that the words, "or to his order," give the authority to assign the bill by indorsement, and that without those words the drawer was not answerable to the indorsee, although the indorser might.

An argument of plausibility is drawn in favor of the plaintiff, from the similarity of promissory notes to bills of exchange. The statute of 3 & 4 Anne appears to have two objects; one to enable the person to whom the note is made payable, to sue the drawer upon the note, as an instrument (which he could not do before that act), and the other to enable the indorsee to maintain an action in his own name against the drawer. The words in this act which describe the note on which an action will lie for the payee, are said to be the same as those on which the action will lie for the indorsee, namely, that it shall be a note payable to any person, or his order; and it appearing by adjudged cases, that an action will lie for the payee although the words "or order" are not in the note, it follows (it is contended), that an action will also lie for the indorsee, without those words. If the letter of the act was strictly adhered to, certainly, neither the payee nor indorsee could support an action on a note, which did not contain such words of negotiability as are mentioned in the act; yet the construction of the judges has been, that the original payee may support an action on a note not made assignable in terms. The foundation of this construction does not fully appear in the cases, but it was probably thought consonant to the spirit *of the act, as the words "or order" could have no effect, and might be supposed immaterial, in a suit brought by the payee himself against the maker of the note. But to extend this construction to the case of an indorsement, without any authority to make it, appearing on the face of the note, would have been to violate not only the letter but the spirit of the act. Consequently, no such case anywhere appears. On the contrary, wherever the judges speak of the effect of an indorsement, they always suppose the note itself to have been originally made indorsable. The case of Moore v. Manning, in Com. 311, was the case of a promissory note originally payable to one and his order; it was assigned, without the words "or order" in the indorsement; the question was, whether the assignee could assign it again; the chief justice, at first, inclined that he could not, but it was afterwards resolved by the whole court, that if the bill was originally assignable, "as it
Sergeant, the defendant's attorney on record, did not oppose the motion, but declared, that as his authority was determined by the judgment, his consent could not be obligatory on his client.

The Court, after some deliberation, granted leave to make the alteration moved for; resting, it seemed, upon the ground that the præcipe furnished something to amend by. (a)

Raele, for the plaintiff. Sergeant, for the defendant.

PHILE, qui tam, v. The Ship ANNA.

Forfeiture of vessel.

Under the act of assembly of 1787, a vessel was liable to forfeiture, in case goods were unladen from her, before due entry, whether the owners were privy to the transaction, or otherwise.

This was an information filed by the Naval Officer of the port of Philadelphia, against the ship Anna, lately arrived from Bristol, upon the discovery of Peter Cooper, that forty-two hampers of Porter, part of her cargo, had been landed, without being duly entered at the collector's office, conformable to a law of this state, passed the 15th day of March 1787 (P. L. 241), which enacts, among other things, "That every vessel or boat, from which any goods, wares or merchandise shall be unladen, before due entry thereof, at the office of the collector of the port of Philadelphia, and every carriage into which any such goods shall be first put or loaded, after removal from such vessel or boat, together with the horse, horses or cattle drawing the said carriage, at the time of seizure, shall be forfeited, and seized by the collector last aforesaid, or the naval officer, or any of his or their deputies, &c." It appeared in evidence to the jury, upon the part of the informants, that the master of the Anna, had only exhibited twenty hampers of porter in his official manifest, whereas, a much greater quantity was found on board the ship, besides forty-two hampers landed and deposited in the store of one Smith, and twenty-four hampers actually delivered on shore to the master himself, agreeable to his orders given for that purpose in the store of the claimants. It was proved, likewise, that a considerable number of hampers of porter, had, during the passage, been removed from the hold, and stowed away in the state-rooms, rising from the floor to the ceiling, so that any person who was in the least attentive, must have observed them, upon entering the cabin; and it appeared, that the owners and their agent had been several times on board before the seizure, and before the removal of the hampers from that situation. The customary privilege of a master in the Bristol trade was described to be limited to one ton, and the gross number of the hampers of porter discovered by the informants, was computed to amount to a little more than eighteen tons. The mate, who, the claimants alleged, was the delinquent on this occasion, had been retained in their service, on board the ship, for two or three weeks after the seizure; but he had lately absconded, under the apprehension of a prosecution for the penalty of 500£.

(a) Baker v. Smith, 4 Yeates 185; Berthon v. Keely, Id. 205; Black v. Wistar, 4 Dall. 207.
1st. It must be admitted, as a general rule, that the master is responsible for the agency of his servant, while acting in that capacity; but, on the other hand, the moment he steps aside from the line of his duty, this relative responsibility is at an end. Thus, if a drayman, in drawing a pipe of wine, staves it, his master must certainly indemnify the owner to the value of the wine that is lost; but if he leaves his dray, engages in a quarrel, and does an injury to his antagonist, neither law nor justice will transfer the damages to his master. So, likewise, if a farrier's journeyman lames a horse in shoeing it, an action lies against the master, not against the servant; but still, in this, and in every similar instance, the damage must be done, while he is actually employed in the master's service, otherwise, the servant answers for his own misbehavior. It is, therefore, readily agreed, by analogy to the principles thus established, that the claimants are responsible for the conduct of their officers, so far as it respects the business of navigation, and the cargo of the ship; but in no other view can the master be considered as their agent, and, consequently, on no other account, can they be affected by his transactions. What then is understood by the term cargo? The privileges allowed to the mariners are not surely to be comprehended in the description; and if a master or a mate clandestinely exceeds his privilege, this ought not in justice to be a ground for altering the case. The meaning of the word cargo must, therefore, be restricted to such goods, wares and merchandise as belong immediately to the owners of the ship, or such as yield them a profit upon freight. Now, it is in evidence, that the porter, landed from the Anna, did not belong to the owners, and that they were not to receive any profit upon the freight of that article; it was, consequently, no part of her cargo; it had not been intrusted by the claimants to the superintendency of the master or any other person on board; and therefore, it cannot be said, that the entry was neglected by “them, their agents, factors or consignees,” which is expressly required by an act of assembly (and all the laws upon the subject must be taken together), in order to work a forfeiture. If this discrimination is disregarded, what vigilance, what precaution, can protect the property of the most upright merchant from confiscation? The tobacco pouch of a sailor, or the secret till of a passenger's chest (for, according to the construction urged by the informants, the most trifling article is sufficient for their purpose), may contain the instrument of ruin, and it would be in vain to show, that the sufferer was ignorant of the fraud, and diligent to prevent it, while *ita lex scripta est* furnishes the ready, but harsh, answer to the sincerity of his plea. With respect to the cargo then, it is admitted, that, however improper the master's conduct may be, it will affect his owners, even without their knowledge or connivance; but for anything beyond the cargo, and such we allege is the commodity which gives rise to the present litigation, their knowledge is, at least, requisite, in reason, justice, and in law too, before they can be condemned to make atonement for his offences.

2d. It has been already said, that laws should be so construed as to prevent an injury being done to the innocent; and accordingly, a multitude of cases are to be found, in which the force of the expression has been rejected, when evidently contrary to reason and justice. There was a law, that those who in a storm forsook the ship, should forfeit all property therein; and the ship and lading should belong entirely to those who stayed in it. In a
dangerous tempest, all the mariners forsook the ship, except only one sick passenger, who, by reason of his disease, was unable to get out and escape. By chance, the ship came to port: the sick person kept possession and claimed the benefit of the law. Now, here, all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel; but this is a merit which he could never pretend to, who neither stayed in the ship upon that account, nor contributed anything to its preservation. Again, there was an edict which condemned any man to death, who should scale the walls of a certain city. One who had discovered the approach of an enemy, got over the wall at night, in order to give the alarm. He was afterwards tried under this law, and, though the case came manifestly within the words, his judges pronounced, that it could not be the intention of the legislature to punish an action that proceeded from such meritorious motives; and therefore, they acquitted him. But we have a memorable instance, of a more recent date, arising from an ordinance of congress, which declared, that any vessel conveying goods, &c., to the enemy, should be subject to capture and condemnation. A Dutch vessel, called "the Golden Rose," had been taken by a British cruiser, and [201] while her captors were carrying her into New York, she was retaken by an American privateer. It was seriously contended, upon that occasion, that the Dutch vessel was a lawful prize, according to the words of the ordinance; but the court would not allow so extravagant a claim, grafted upon the strict letter, to pervert the politic but equitable meaning of the act of congress. Let us then try whether the acts of assembly, on the subject in discussion, may not, by a liberal interpretation, operate so as to relieve the claimants from the injury with which they are threatened, and at the same time, promote the rational views of the legislature. In the section upon which the informants proceed, it is said, "that every vessel or boat, from which any goods, wares or merchandise shall be unloaded, before due entry thereof, &c., shall be forfeited." Here, then, if we understand the word "thereof" to refer to the entry of the vessel, though it may produce a slight deviation from the grammatical relation to the next immediate antecedent, we shall certainly give a more reasonable and benevolent explanation to the law, than by making the vessel liable to forfeiture, for the non-entry of the goods, wares and merchandise. By the first construction, a duty is imposed upon the owners, with which it is in their power to comply; by the second, they are exposed to loss and ruin, for the negligence or malversation of others, which they could not foresee, and cannot prevent. The ship, and its contents, are indeed distinct things, in their nature, and may thus be rendered (as they ought to be) distinctly responsible for the management of those to whom they are intrusted. If the ship is not entered, let the penalty fall there; and if the cargo is not entered, let that be deemed to confiscation; but the idea of making them reciprocally responsible, is contrary to natural justice, and must be incompatible with sound policy. No foreign merchant will trust his vessel in our ports, and no citizen of Pennsylvania will be hardy enough to engage in commerce, upon such precarious terms. But it is to be further observed, in this place, that the legislature having changed the expression, we may justly infer, that the object of the law was likewise changed. In the preceding act relative to the impost, the words "ship or
vessel" are employed, and not "vessel or boat," as in the section above cited; it is, therefore, to be presumed, that it was only in contemplation to destroy the petty fleets of smugglers which infest our creeks and rivers; and as it is a maxim in law, that "a statute treating of things or persons of an inferior rank, cannot, by any general words, be extended to those of a superior," a ship, which in maritime affairs is of the highest order, cannot be designated by the subordinate title of a vessel.

There is, however, an additional and very forcible argument, to show that the informants are not entitled to a verdict of condemnation against the Anna, which is drawn from the regularity of the entry that has been made. By the act of assembly, in which this *cause originates, no form of entry is prescribed; we must, therefore, apply for instruction to the preceding impost law, which directs "the master of any ship or other vessel to exhibit to the collector a true manifest, signed by him, of all the goods, wares and merchandise imported in such ship or vessel;" and after sundry other regulations, calls upon him to make oath, "that the manifest faithfully states the respective goods, wares and merchandise, therein mentioned, and that no other is laden or imported in his vessel, to the best of his knowledge or belief." Has any of the requisites to constitute a formal entry been neglected by the master of the Anna? It appears, that he has, in due season, exhibited an official manifest, and that he has sworn to the truth of its contents. This is surely all the law exacts, at least, for the discharge of the ship; and though the omission of any article may be a cause for forfeiting that article (as it has already happened with the porter upon this occasion), and may likewise be a proper foundation for a charge of perjury, it cannot be extended, to divest the property of an owner, who had not practised any deceit himself, and who could not derive any advantage from the deceit practised by another.

The counsel for the informants (Messrs. Ingersoll and Bradford), in reply to the preceding arguments, stated: That the determination of this cause would certainly produce consequences of an important nature, and either render the act of assembly upon which it is founded, a dead letter, or a productive instrument of public revenue. In governments differently constituted, where regal pageantry, or military force, can invite or compel respect and obedience to the law, little danger is to be apprehended from the occasional indulgence of learned men in their ingenious and novel commentaries upon the sense and expressions of the legislature; but under a democratical constitution such as ours, should the people acquire a habit of yielding to logical subtleties and specious declamation, there is no power to control the evil that must ensue; the principles of jurisprudence would become weak and fluctuating, and the virtue and dignity of the commonwealth would be contaminated and eventually destroyed. Instead, therefore, of considering how to escape from the strong expression of the act before us, it is our duty to give it the fullest operation that is necessary for suppressing the mischief to which the legislative attention was originally directed; and here we cordially embrace the position of our antagonists, that the meaning of those who framed the law, is the best guide to direct us in carrying it into execution. What then was the evil complained of, at the time that this act was made? The atrocious frauds committed upon the revenue. What was the remedy provided? It could not be merely the forfeiture of the smuggled
assistance from its members. If the end can be accomplished, without infringing the private rights of the subject, it is so much the better; but, at all events, the exigencies of government must be satisfied. It has been said, that, if the law is enforced, as the informants contend for, the merchants will not be safe, no foreign vessels will be sent to our ports, and, eventually, the revenue must fail. But, nevertheless, it is requisite that such laws should be strictly worded, though, undoubtedly, there are cases where the construction of the words must be such, as to prevent more injury being done than was intended. The navigation act of England says, that goods imported as merchandise shall be forfeited, if they do not pay a certain duty; and the case in 2 Strange 943 (Chapman v. Lamb), is a seizure of shirts, night-gowns and caps, under this law. It was there argued, that the word “goods,” would certainly include those articles, but the judges were of opinion, that it could not be the meaning of the legislature, to make wearing-apparel subject to forfeiture. The case in Bunbury is the single one that reaches the point before us. There, the question arises, whether goods put on board secretly, and unladen without the knowledge of the master, would occasion a confiscation; and the judges agreed, that if it was a small matter, and no part of the cargo, it would not. The claimants therefore, to have the benefit of this case, should show: 1st. That the subject of the present prosecution, is a small matter: 2d. That it was no part of the cargo: and 3d. That it was smuggled, without the knowledge of the master.

1st. Then a small matter is an indefinite phrase, not to be ascertained by mere words, but by the evident meaning of the judges who used it; and from that criterion, it should seem to be a trifling thing, easily concealed, and which might fairly escape the notice of the master; but it cannot be extended to large and weighty goods, deposited in the hold of the vessel and which then constituted a part of her cargo. (a) 2d. The counsel for the informants have suggested, that only such goods as belong to the owners, or yield them a profit upon freight, can be called a cargo; whereas, in truth, the cargo is the lading of the vessel, and, though by bribery or craft, some articles might be introduced into the hold, without the knowledge of the owners, or the master, yet everything which is put on board the vessel, is, in general, comprehended in that description. But 3d. The knowledge of the master is here proved by strong presumption. The quantity of porter that was put on board, the removal of it at sea, the evidence of the delivery of twenty-four hampers at his store, and by his order, are circumstances from which, we suppose, the claimants themselves did not think his ignorance of the transaction tenable.

Then, there remains only the great point upon which the counsel for the claimants seem chiefly to rely, to wit, their innocence and ignorance, with respect to the fraud that has been committed. There is no evidence, indeed, that tends to show, that the owners of the ship meant to do anything unfairly; but, on the contrary, that the mate brought the goods hither with the avowed intention to defraud them, as well as the state. The question then recurs, what difference does it make, whether they knew it or not?

(a) See Vasse v. Ball, 2 Dall. 273, 276.

Here is a positive law that directs a due entry of all goods, wares and merchandise imported into this state, under certain penalties, and one of them is the forfeiture of the vessel or boat from which they are unladen. It does not speak of the knowledge of any person, but seems to be studiously worded to avoid that construction. It is not a novel law, though perhaps it is stricter now than formerly: for, in England, it has long existed, and before the revolution, it was known in Pennsylvania. The legislature has thought that nothing else would answer, and the judges and the jurors are equally bound to obedience. If, indeed, the law was doubtful or latitudinal, admitting one interpretation, which would be just, and another which would be unjust, it would become us to prefer the former. But if the policy of the legislature seems to bear hard on the subject, we are not to judge, and determine upon its propriety (that is a matter for the deliberation of those who made the law), and however unjust it seems, we must acquiesce, or there must be a dissolution of society. It must certainly affect every humane man to see the innocent suffer; but in society this is not strange or uncommon; and the distinction may properly be taken between criminal and civil cases. The law never punishes any man criminally but for his own act, yet it frequently punishes him in his pocket, for the act of another. Thus, if a wife commits an offence, the husband is not liable to the penalties; but if she obtains the property of another, by any means, not felonious, he must make the payment and amends. There are a variety of other instances, in which men are responsible for one another, in consequence of their connection in society. The drayman, if he drives over and kills a child, must himself suffer the judgment of the law; but if he staves a pipe of wine, his master must make the compensation. Upon the whole, it is neither a hard nor a novel case, since men must occasionally employ others to act for them, and ought to answer for those in whom they confide. If the legislature has thought proper to subject the owners to this forfeiture, we must submit. With the jury, therefore, the power is happily lodged, which was formerly exercised by a single judge, and it is their duty finally to acquit or condemn the ship, as in their consciences they think ought to be done.

The jury, after a short adjournment, returned a verdict in favor of the informants. (a)

(a) See Vasse v. Ball, 2 Dall. 270; s. c. 2 Yeates 178; Perot v. United States, Peters C. C. 256; United States v. The Hunter, Id. 10; United States v. Cave, 3 Hall's Law Journal 170; Case of Le Tigre, 3 W. C. C. 567.

1 By the general maritime law, vessels are made responsible for the unlawful acts of their masters and crews; and this extends even to forfeitures by positive law. United States v. The Malak Adhel, 2 How. 210; Smith v. Maryland, 18 Id. 76-9; The Siren, 7 Wall. 153; Dobbins' Distillery v. United States, 96 U. S. 400.

Specialty.—Evidence.

An instrument, by which the defendant promised and obliged himself and his heirs to pay to the plaintiff and his assigns, concluding with the words, "as witness my hand and seal," and actually sealed, is a specialty, and cannot be given in evidence to support an action of assumpsit.

Where there are subscribing witnesses to an instrument, whether sealed or not, they must be produced or accounted for, before the handwriting of the maker can be proved.

The President, after argument and consideration, delivered the judgment of the court in this cause, upon a point reserved at the trial.

Shippen, P. J.—This is an action on the case, brought upon a writing said to be a promissory note, and declared upon as such. The form of it is not the usual form of a promissory note; it runs thus: "I promise and oblige myself and my heirs to pay to January and his assigns," it concludes with the words "as witness my hand and seal; and it is actually sealed. Two witnesses subscribe, under the words, "given in presence of us."

On the trial, the subscribing witnesses were not called, nor any evidence given of their death or absence; but evidence was offered of the handwriting of the defendant who subscribed the instrument, which was permitted to be given in evidence, on reserving the point.

In this case, two questions arise; one regards the nature of the instrument; the other, the sufficiency of the evidence.

1. If the instrument is a specialty, then it ought not to have been given in evidence, in an action of assumpsit on a promissory note. This general doctrine is not denied; but, it is said, it is not to be considered as a specialty or deed, unless proof be made of its having been sealed and delivered as a deed; and that no such proof appearing, the plaintiff had a right to consider it as a note of hand. That a deed cannot be regularly proved, but by proving the sealing and delivery; there can be no doubt; as if non est factum be pleaded to a bond, the plaintiff must prove the sealing and delivery—this proof lies upon him. But, in the present case, the proof of the execution of the instrument as a deed, is attempted to be put upon the person against whom it is produced. The plaintiff produces an obligation to support an action on a note—shall he say, against his own showing, that unless you, the defendant, prove this to have been sealed and delivered, it is no obligation, and I may consider it as a note? The plaintiff himself will not prove it, and the defendant cannot. The instrument produced has the formal words of an obligation; it binds the party and his heirs to pay to another and his assigns. The words, "as witness my hand and seal," show the intended nature of the instrument, and it actually appears with a seal; this denominates it a specialty. The definition of a specialty is thus given in 2 Black. Com. 465: "Debts by specialty are such whereby a sum of money becomes or is acknowledged to be due by an instrument under seal." That this is an instrument under *seal, acknowledging a debt to be due, appears by [*209 inspection. If it be objected, that this seal might be put to it by a stranger, the side who alleges that, ought to prove it, especially, if it be that side who has possession of the paper.
January v. Goodman.

Should this attempt succeed, all legal distinctions between specialties and other writings, would be confounded and destroyed, at the will of the person producing them; and the wise provisions of the law to guard debtors against being twice called upon for the same debt, would fall to the ground; especially, in the cases of assignable instruments.\(^{(a)}\)

2. If this were to be considered not as a specialty, but a note, then the second question would arise, whether being attested by subscribing witnesses, those witnesses ought not to be produced, or some account given of them. Promissory notes are not usually attested by subscribing witnesses, and therefore, the ordinary mode of proving them is by witnesses to the handwriting; but if the parties will have subscribing witnesses, in what respect, and upon what grounds, can the distinction be drawn between the proof necessary in the case of notes and bonds? The rule of law as to the best evidence which the law requires, is, that no such evidence shall be admitted, which, \textit{ex natura rei}, supposes still greater evidence behind, in the party's own possession or power. This rule applies equally to the withholding the best proof of the \textit{signature of a note}, as of the sealing and delivery of a bond. If a note is not witnessed, it does not appear that any third person saw it signed, in which case, the best evidence is the handwriting of the party; but, if it be witnessed, then it appears, on the face of the note, that there is better evidence behind; and the best evidence that the nature of the case admits of, the law requires.

As no solid distinction between the case of bonds and notes can be shown, upon principle, so none appears from the authorities. Instrumental witnesses appear, by the cases, to be always called upon, and are equally necessary to prove those writings which are not under seal, as those that are; and the case in 2 Str. 1149 (Bevis v. Lindset), which respects the proof of promissory notes before a jury of inquiry, is decisive.\(^{(b)}\)

On the whole, therefore, we are of opinion, that the law is with the defendant, upon both points, and there must be a new trial, or the plaintiff may take a nonsuit, at his election.

\(^{(a)}\) See Taylor v. Glaser, 2 S. & R. 504. In Charles v. Scott, 1 S. & R. 294, it was \textit{held}, that an agreement under seal, received as \textit{collateral security} for a simple contract debt, may be given in evidence, in \textit{assumpsit} on the original contract, to show the amount due.\(^{1}\)

\(^{(b)}\) s. r. Heckert v. Haine, 6 Binn. 16; Wishert v. Downey, 15 S. & R. 77. And

\(^{1}\) Where an instrument in the form of a promissory note is signed by three, and a seal is affixed to the signature of one of them, a joint action of \textit{assumpsit} will not lie against the three. Biery v. Haines, 5 Whart. 563. And \textit{assumpsit} cannot be maintained on an instrument under seal, signed by one only, but containing no agreement to bind the other. Norris v. Maidland, 9 Phila. 7. So, \textit{assumpsit} will not lie on a memorandum fixing the amount due on an agreement under seal; the plaintiff must sue on the contract. Harley v. Ferry, 18 Penn. St. 44. Where, however, a sealed instrument is executed by only one of the parties, the other may maintain \textit{assumpsit}, on proof of performance. McGunigal v. Mong, 5 Penn. St. 269. And \textit{assumpsit} lies upon a contract under seal, which has been so far modified by parol, as to amount to an abandonment of the original contract. McGrann v. North Lebanon Railroad Co., 29 Penn. St. 82; Lawall v. Ralier, 24 Ibid. 283; Spangler v. Spangler, 24 Ibid. 454; Carrier v. Dilworth, 59 Ibid. 406. But unless the original contract be expressly abandoned, or so altered by parol as to make it a new contract, covenant is the only remedy for a breach. Manus v. Cassidy, 66 Penn. St. 260; Shaefier v. Geisenberg, 47 Ibid. 500.
counsel with the plaintiff in this cause, before he took his seat upon the
bench.

McKean, Chief Justice.—Two questions were made in this cause: 1st. Whether the defendant, as assignee of the lease, is bound by the covenant to repair, as well as the lessee? And 2d. Whether the special matter pleaded, is sufficient in law to bar the plaintiff?

With respect to the first question, we are clear in our opinion, that the covenant to repair, and to deliver up the demised premises in good order and repair, runs with the land, being annexed and appurtenant to the thing demised, and shall bind the assignee as much as the lessee, even if the assignee were not named by express words, on account of the privity; but in the case at bar, the assignee is bound by express words, and à fortiori, is answerable as well as the lessee. This point has been fully settled in Spencer's case, 5 Co. 16 b; and Grescot v. Green, 1 Salk. 199; Harper v. Burgh, 2 Lev. 206; 1 Roll. Abr., tit. Covenant, M., pl. 1, and N., pl. 2, 6; Vin. Abr. 411, M., pl. 1, 2; 1 Bac. Abr. 534, c. 5; and the books cited in these abridgments. (a)

The second question is of great difficulty, and of very great importance in its consequence. We cannot find, that it has come directly before any court in England, or in Europe. We wish, that it had come before abler judges than we pretend to be. However, we must give our judgment; but we do it with more diffidence than has occurred in any case since we have had the honor to sit here.

As there is no positive law, no adjudged case, nor established rule or order, to direct the court in this point, we must be guided by the principles of the law; by conscience, that infallible monitor within every judge's breast, and the original and eternal rules of justice. For equity is part of the law of Pennsylvania. 1 Chan. Ca. 141; Grounds and Rudiments of Law and Equity, 74, ca. 104; Doct. and Stud. lib. 1, cap. 16.

It is agreed, that if a house be destroyed by lightning, floods, tempests or enemies, without any concurrence of the lessee, or possibility of his preventing the same, this is no waste in the lessee; for, it is not done by the lessee's negligence, or any wilful act of his; and he cannot be charged with using it improperly, and it would thus have perished, even in the reversioner's possession. 1 Inst. 53 b; Brook, Waste, 69; Herlakenden's case, 4 Co. 63 b; Landlord's Law, 1st edition, p. 158, 278, 286; Fitzherbert's Natura Brevium, Waste, 132; Keilw. 87.

(a) The assignee of a term is bound by a covenant to pay rent, so long as he retains possession, although he did not execute the deed under which he holds. Hurst v. Rodney, 1 W. C. C. 375; and see Sandwith v. Desilver, 1 Bro. 221.1

1 A covenant for the payment of ground-rent runs with the land, and binds the assignee. Roger v. Ake, 3 P. W. 461; Conrad v. Smith, 5 W. N. C. 402; s. c., 7 Id. 160. So does a covenant to pay the principal of a ground-rent, at the end of a fixed period. Springer v. Phillips, 71 Penn. St. 60. And see Sandwith v. De Silver, 1 Bro. 221; Herbaugh v. Zettlunger, 2 Rawle 169. So also, a building covenant in a ground-rent deed, runs with the land, and binds an alienee of the original covenantor. Fisher v. Lewis, 1 Clark 422. And a covenant not to underlet, runs with the land, and will be enforced in equity against an assignee of the term. Brolaskey v. Hood, 6 Phila. 193. So, of a covenant to renew. Barclay v. Steamship Co., Id. 558; Wilkinson v. Pettit, 47 Barb. 230; Piggot v. Mason, 1 Paige 412.
It is also agreed, that where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there he shall be excused. As, in the cases of waste against tenants in dower, by the curtesy, for life, or years, of common carriers, inn-keepers, &c., of lessees by parol, &c., or of a cesser during a war. Aley 27; Southcote's case, 4 Co. 84 b; 2 Leon. 180, and other books.

But it is contended for the plaintiff, that the defendant is obliged to pay the rent, and yield up the tenements in good order and repair, because of the express covenant; and in support of this doctrine have been cited, Doctor and Student, Dialogue 2, chap. 4, p. 124; Aley 27; Stiles 47; 4 c. 1 Roll. Abr. 939; 4 c. Comyn 631, 632; 2 Str. 703; 1 Vent. 185; Plowd. 290; Perkins 738; Brook. tit. Covenant, pl. 4; tit. Waste, pl. 19, 31; 2 Leon. 280; Dyer 33, pl. 10; Saunders 420; 2 Vern. 280.

On the part of the defendant, it is insisted, that the express covenant in this case does not bind against acts of God or enemies, but only against all other events; because such acts were not in the contemplation of either party, at the time of the lease executed. A risk known and insured ought to be complied with, agreeable to the bargain, but not otherwise. Every contract ought to be construed according to the intention of the parties; and, in the present case, the defendant had only covenanted to keep the premises in repair, &c., against ordinary accidents, and not against a case, which he could by no possibility prevent. That if the law were otherwise, yet, in England, relief would be had in a court of chancery; and that as no such action had ever been brought, in a case circumstanced as this is, an argument is furnished, that no such action will lie. In maintenance of this opinion were cited: Ld. Raym. 909; 4 Bae. Abr. 369, 370; 1 Roll. Abr. 236; Dyer 58, pl. 15; 1 Black. Com. 252, 263; 2 Id. 379; 3 Id. 153, 157; Cowper 0, 600; Douglass 190; 1 Comyns Digest. 150; Co. Litt. 206; 1 Brown's Parl. Cases 526, 528; 15 Vin. Abr. 474, pl. 1; 3 Chan. Rep. 44, 79; 3 Burr. 1240, 1637; Dyer 33, 10; Sir T. Raymond 464; Shelley's case, 1 Co. 98; 6 Vin. 407, ca. 1, 3; 1 Chan. Cas. 72, 83, 84, 190.

The books have been thoroughly searched on this head, and the question discussed with great ability on both sides. In short, little more could be done or said for either party, than what has been said and done.

In deciding this intricate and difficult case, it will be of use to state the different powers of the common-law courts, and the court of chancery, in England, at the time of the revolution.

The courts of law there are governed by general and established rules, from which they never deviate in any case, be the injustice arising from them ever so apparent; for, they are bound by their oaths to observe the strict rules of law. A court of chancery judges of every case according to the peculiar circumstances attending it, and is bound not to suffer an act of injustice to prevail; and in doing this, it conforms to the spirit and intent of the general rule of every positive law, which always admits of particular exceptions, tacitly understood. The jurisdiction and bounds of these two courts are fixed.

*In this state, the judges are sworn "to do equal right and justice to all men, to the best of their judgment and abilities, according to law." There is no court of chancery. The judges here are, therefore, to determine causes according to equity, as well as the positive law; equity
being a part of the law. Doctor and Student, lib. 1, ch. 10; 1 Chan. Cases 141; Grounds of Law and Equity, 74, ca. 104. Indeed, the common law is common right, common reason, or common justice. Wood's Inst. 4.

Were this point brought before a court of common law in England, at this day, I have doubts with respect to what would be the determination. For, it is laid down as law, “that if a lessee covenanteth to leave a wood in as good p:light as the wood was at the time of the lease, and afterwards the trees are overturned by tempest, he is discharged of his covenant, quia impotentia execuat legem.” 1 Co. 98 b. In that case, there was an express covenant; and although it was impossible to restore the trees in the same plight they were, yet he might plant new ones, or render damages in lieu of them. The same law in Brook, Covenant, pl. 4. Now, was it not equally impossible for the defendant to deliver the possession of the premises, in good repair, to the plaintiffs, on the 1st of March 1778, when they were held by a hostile army?

In Vaughan's reports, in the case of Hayes v. Bickerstaff, p. 122, it is held, “that a man's covenant shall not be strained so as to be unreasonable, or that it was improbable to be so intended, without necessary words to make it such; for it is unreasonable to suppose a man should covenant against the tortious acts of strangers, impossible for him to prevent, or probably to attempt preventing.” This was an action brought by the lessee against the lessor, on his covenant for quiet enjoyment. In p. 118, it is said, that if the lessor covenants that the lessee shall hold and enjoy his term, without entry or interruption of any, whether such entry or interruption be lawful or tortious, there the lessor should be charged, because no other meaning can be given to his covenant. In the case before the court, if the lessee had covenanted for himself and his assigns, to deliver up the tenements in good order and repair, notwithstanding they should be destroyed by act of God or of an enemy, then this action would certainly lie, because of the special express words; but when there are no such words, but only generally to repair, &c., would it be reasonable to construe these words so as to extend to the cases put? Cannot the covenant in this case have another meaning? Can it not be so construed, that the tenements should be kept in good repair, and in such order delivered up, at the end of the term, without any act or default in him, or act of any person, who could be prosecuted as a wrongdoer, to prevent it; and notwithstanding common and ordinary accidents might happen?

Perhaps, however, the common-law courts in England might think, that they were bound by the strict rules of law, on account of the general express covenant, to determine against the defendant, and *that his relief must be in chancery, if anywhere, because of the established rules and boundaries of the jurisdiction of these courts. We must then consider the equity of this case, and determine upon all the circumstances thereof; for although we have not the chancery forms or methods of carrying several equitable cases into execution, yet we are to determine, where we may, according to equity, as making a part of the law, to prevent a failure of justice. And here we have no precedents in chancery in point, but the case of the office, which was taken away by the usurpers in the civil war in England, reported in 1 Ch. Cas. 72; that of the rent of a house, which was seized by the parliament, during the said war, for an hospital for soldiers,
of another, is a good payment; as the acceptance of a horse in lieu of a sum of money, or of a bond by a third person, in discharge of a prior obligation. (a)

IV. The Court left it to the jury to determine whether, on certain facts, the defendant had loaned the money, or purchased the note in question: for, they resolved, that a fair purchase might be made of a bond or note, even at 20 or 30 per cent. discount, without incurring the dangers of usury; and if, upon the present occasion, the defendant had run the risk of a forgery, the presumption ought to operate in her favor, that, for this reason, she had bought the note at a depreciated price. (b)

Sergeant and Bradford, for the plaintiff. Lewis, Ingersoll and Dallas, for the defendant.


(b) In Wycoff v. Loughead, 2 Dall. 92, it was ruled "That a man may bond fide purchase any security for the payment of money, at the lowest rate he can, without incurring the penalties of usury." See the remarks of Judge Yeates, in Ritchie v. Summers, 3 Yeates 541, as to the right of the vendee to recur to the vendor, in the event of forgery. 1

1 The case of Ritch v. Summers was reversed by the High Court of Errors and Appeals, whose opinion will be found in a note to 30 Penn. St. 147.
COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY.

SEPTEMBER TERM, 1787.

DOANE'S ADMINISTRATORS V. PHENHALLOW ET AL.

Jurisdiction.—Prize.

Where a vessel had been captured by an American privateer, during the revolution, and condemned as prize, in the admiralty court of New Hampshire, and on appeal to the Federal court of Appeals, ordered to be restored, it was held, that an action could not be maintained, in a court of common law, to recover the value of the vessel.¹

This was a foreign attachment, in which, and in two others against the same defendants, for the same cause, a motion was made to quash the writs. After argument, the President recapitulated the grounds of the motion and delivered the opinion of the court as follows:—

Shippin, President.—On the hearing of this motion, the plaintiffs were called upon to show their cause of action: they show that on the 17th of September 1783, a certain cause, wherein Elisha Doane was claimant and appellant, against the brigantine Susannah and her cargo, and John Pehnallow and others, libellants and appellees, was tried in the court of appeals in cases of capture, established by congress, in the city of Philadelphia. And that it was there finally adjudged and decreed by the said court of appeals, that the sentence or decree, given by the inferior and superior courts of judicature in the state of New Hampshire, in the said cause, should be revoked and annulled, and the property specified in the said claim, should be restored to the claimant. The plaintiffs further show, by depositions, that notwithstanding this final decree of reversal, the defendants, although requested, had refused, and still refuse, to restore the property specified in the claim of the said Elisha Doane (the said defendants being owners and agents of the privateer McClary which captured the said brigantine Susannah and her cargo), but had converted and disposed of the same to their own use. Upon this ground, the action is brought, to recover the value of the said brig and cargo, against the defendants. Two other actions are brought by Isaiah Doane and James Shepherd against the same defendants, for the same cause.

The motion to dissolve these attachments is founded on a rule and prac-

¹ See the case of Penhallow v. Doane's Administrators, in the supreme court of the United States, 3 Dall. 54.

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point, in the famous case of *Le Caux v. Eden*, reported in Douglas 572. By this case, and the cases cited by the judges in support of their opinion, it appears clearly: 1st. That the question of prize or no prize, is solely and exclusively of admiralty jurisdiction, and not triable at common law. 2d. That not only the original taking, but all the consequences are solely appropriated to the admiralty. 3d. That although there may have been a definitive sentence of acquittal in the admiralty, and that sentence conclusive on the question, yet for any matter happening consequential to the taking as prize, no suit will lie at common law; and that in all those consequential cases, notwithstanding the sentence of acquittal, the question of prize or on prize must still arise, and the sentence is evidence of a thing which the common law cannot inquire into.

The application of these cases to the cause before us is evident and obvious. The original taking of the Susannah, and her cargo was by a commissioned privateer, as prize; the carrying her into port, the procuring her condemnation in the maritime court of New Hampshire, and the sale and distribution by order of that court, were all consequences of this taking as prize. And notwithstanding the sentence of reversal and acquittal, the question of prize or no prize will still occur.

The answer given by the plaintiff’s counsel to the cases cited in Douglas, is, that in all those cases, the facts on which the actions were founded, happened previous to the decision of the question of prize; but that in these actions, the facts which support them occurred after the final sentence of acquittal, when the cause was at rest, and it was no longer necessary to examine the question of prize; which facts were, that after the final sentence of reversal, the defendants were requested and refused to restore the property agreeable to the sentence, and converted it to their own use, which is the ground of the action. The distinction itself does not appear, from the cases, to be well founded, as it is not the time when the facts happened, but the connection they have with the original capture, and their being the necessary consequences of the capture, that gives the exclusive jurisdiction to the admiralty. In the case of *Radley v. Egglesfield*, in 2 Lev. 25, there had been a previous condemnation of the ship and goods as prize, in Scotland, and two subsequent sales on land, one in Scotland and the other in England: under which last sale, one of the parties claimed; yet the court say, that this does not alter the case, being matters consequential upon the original taking, *and dependent upon it. And it is observable, that in this very case, as it is reported in 2 Saund. 259, the court say that the validity of the sentence in the admiralty court in Scotland was determinable by the law of the admiralty of England, and not by the common law. If, however, the distinction made by the plaintiff’s counsel was even admitted to be well founded, do the facts on which these actions must be supported, appear to be subsequent to the final acquittal? It is true, there was a demand and refusal, subsequent to that decree, but a demand and refusal is only evidence of a conversion, and not the conversion itself. Are we to shut our eyes against the other evidence, and not see when the conversion was made? It appears to have originated on the taking the vessel as prize on the high seas, and it was completed, on the sale and distribution of the money, in pursuance of the decree of the superior court of New Hampshire, in consequence of the taking as prize—all this, long before the reversal of the decree.
rent money, made a legal tender by law, and could be answerable for no more than he had actually received.

The court left it to the jury to consider the justice and equity of the case, but hinted their opinion, that, considering the circumstances of the times, it might be most reasonable and just to settle the sum according to the scale of depreciation. At the same time, telling them that this action was in the nature of a bill in equity, and that they might give such a sum in damages as they thought just. The jury found a verdict for the plaintiff for the sum received, in hard money. A motion was then made for a new trial, on the ground of misdirection.

Having had time to deliberate and consider the law arising on this case, we are of opinion, that the court ought not to have left it to the jury to give in damages more than was actually received.

The action of assumpsit for money had and received, has been of late considered to be of so liberal a nature, that it is not to be wondered at, that, on a sudden, its extent should be mistaken. It is a very beneficial action, not only for the plaintiff, but the defendant; yet, it has its limits. It is beneficial to the plaintiff, because, when he has another remedy as well as this, he may elect this, and is under no necessity to state the special circumstances of his case, but may make it out by evidence on the trial. For the defendant, it is beneficial, because, as Lord Mansfield says, he can be liable no further than for the money he has received, and against that may go into every equitable defence, upon the general issue. It is, in fact, an action to oblige the defendant to refund what he has received; and the word refund, ex vi termini, precludes the idea of his being answerable for more than he has actually received. Interest, indeed, may be added as damages for the detention, but no more. In this kind of action, the plaintiff waives all torts and special damages; *and goes only for the money received; and so far confirms the defendant's act, as that he cannot gainsay his right [*224 to receive it.

As to the justice of the verdict, it is not so very apparent, as to make us anxious to support it, against the rules of law. Col. Hugg was the plaintiff's agent in this matter, without any reward. He was an officer in the American army, and probably thought the support of the war depended on the support of the credit of the continental money; it was the only money then in circulation; and though it had depreciated five or six for one, he might reasonably think it would not only be injurious to his own reputation, but to the common cause, to refuse it. All these circumstances must have been known to the plaintiff, and yet she suffers the bond and mortgage to remain in his hands. She might have taken the securities from him, and abided by the consequences of refusing it herself. The debtor, White, it is true, swore he did not mean to force the money upon Hugg; but it is as true, that when he brought the continental money to discharge the debt, he brought a witness with him, which he had not done before, when he paid the interest in hard money. This circumstance might reasonably induce a belief in Hugg, that he meant to make a legal tender of the money; and White, notwithstanding what he says, might possibly have availed himself of it as a legal tender, in case Hugg had refused the money.

For these reasons, I say, the justice of the verdict may be well questioned; yet, if the case had been before the jury in such a way as that they
unto belonging, to have and to hold unto the said Isaac Busby, his heirs and assigns for ever, he paying his brother ten pounds a year, during his natural life." The second devise is to his wife, of the land now in dispute, in these words: "I give, devise and bequeath, unto my wife Mary, a certain piece of land bounding on William Busby, &c. Also I give my said wife one-third of such movable estate as shall be remaining after the payment of my debts and funeral expenses, and such legacies as are herein after given, which shall be in lieu of her dower or thirds of my estate." He then gives several pecuniary legacies to his seven children, and bequeaths the remain two-thirds of his personal estate to his son Isaac and his five sisters, equally to be divided between them. And the third and his last disposition of his land is a direction, that his house and land by the mill should be sold by his executor.

The word "estate" in a will, connected with a devise, as where a man gives all the residue of his estate, or gives his estate in such a place, will pass a fee-simple, without words of inheritance; because it shall be intended, that he meant to give the whole estate which he himself had, both as to quantity and quality. The words, "as to all my worldly estate," in the beginning of the will, unconnected with any particular devise, show an intention to dispose of his whole estate, but will not carry an estate that is clearly omitted; but if it be dubious whether it be omitted or not, it will help the interpretation. There are many cases in the law-books of wills beginning with these words. I shall content myself with animadverting upon only two of them, cited one on one side of the question, and the other on the other side, as they appear to me to be the most similar to the present case as to this point.

The first is the case of Frognorton v. Holiday, in 1 W. Black. 535, and 3 Burr. 1618. The will in that case began, as here, "as to all her worldly affairs and estate;" it is similar to it likewise, in disposing of the residue of her personal estate, and not mentioning the realty, and also in containing a devise of another estate with words of inheritance. But there is an ingredient in that case, on which the greatest stress appears to have been laid by the judges; which was, that, in the devise, the trustee charged the house and garden with the payment of fifty pounds out of the yearly rents and profits; the annual rent was ten pounds a year; the devisee was about seven years old, at the death of his mother, and there was a direction that if the devisee should die in his minority, then the house and garden should go to the testatrix's three daughters share and share alike. Here, though the charge on the profits, unconnected with other circumstances, would not have passed a fee, yet the court said this was a middle case, and that the reason why this mode of payment was ordered, was apparently, because the devisee was a minor, and the limitation over, if he should die before the age of twenty-one, showed the testator meant the heir should not have it; for, if the devisee was barely to take an estate for life, the time of his death must be immaterial to the devise over; but limiting it over, only upon the contingency of his dying in his minority, showed that the testator intended to give him an absolute estate in fee, which he might dispose of, when he came of age. The implication was, therefore, thought by the court to be a necessary one, and the other parts of the will assisted the construction.
it seems, indeed, that the only reasonable justification of it, is to compel a debtor to surrender all his effects for the benefit of his creditors. When that is done, it is not only unreasonable and unjust, but by the express provision of the Const. of Penn. § 8, independent of the doctrines founded on the common law, it is illegal to restrain a man's personal freedom.

He then contended, that from general principles, from positive authorities, arising under the bankrupt laws of different countries, from the reason of the thing, and from the mischievous consequences of a contrary position, the discharge of the defendant in one state, ought to be sufficient to discharge him in every state; without this, perpetual imprisonment must be the lot of every man who fails; and all hope of retrieving his losses by honest and industrious pursuits, will be cut off from the unfortunate bankrupt.

But a debt paid according to the law of a foreign country, though in a depreciated medium, has been decreed to be a satisfaction: and a cessio honorum, in Holland, which is a discharge there, was decided to have the same effect in England. Co. Bank, Law, 60-2, 118, 347; Green Bank Law, 131, 200; 2 Str. 738; 1 Atk. 112; Brown Cases in Chan. 376. These authorities apply here, with additional force, under the the sanction of the articles of confederation, which declare, that “full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state.” And also, that the free inhabitants of each of these states shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state.” See Art. 4.

The Chief Justice, after consideration, delivered the opinion of the court.

McKean, Chief Justice.—This case comes before the court on a motion for leave to enter an exoneretur on the bail-piece, upon this principle, that the defendant has been discharged under an insolvent law of the state of Maryland, which is in the nature of a general bankrupt law. To this it has been objected, that the insolvent law by which the defendant has been discharged, was made pending the action, and therefore, ought not to operate in the present case, even "if the laws of any particular country could be extended beyond the jurisdiction of that country, which has likewise been denied; and it is said, that in order to give a binding force to laws, it is necessary that the person to be affected should have consented to them, either by himself or his representatives.

But having considered the principles of the law of nations, and the reciprocal obligation of the states under the articles of confederation, we are of opinion, that the act of assembly by which the defendant has been discharged, must be considered as a general bankrupt law, made for general purposes, and equally advantageous to all his creditors. To execute, therefore, upon his person, out of the state in which he has been discharged, would be giving a superiority to some creditors, and affording them a double satisfaction—to wit, a proportionable dividend of his property there, and the imprisonment of his person here. It is true, that the laws of a particular country, have in themselves no extra-territorial force, no coercive operation; but by the consent of nations, they acquire an influence and obligation, and
by the neglect of the plaintiffs, if those persons should, in the meantime, have become insolvent.

A new trial awarded. (a)

(a) This case was retried at the April term following, when the court declared their opinion, unanimously, that the delay had been unreasonable; in consequence of which, the plaintiff suffered a nonsuit. See the case reported, post, p. 270. The rule, that notice must be given in a reasonable time, is settled by numerous decisions in this state, from the case in the text down to Gurley v. Gettysburg Bank, 7 S. & R. 324. As to what notice must be given, and when it may be dispensed with, see Mallory v. Kirwan, 2 Dall. 193; Fisher v. Evans, 5 Binn. 542; Barton v. Baker, 1 S. & R. 334; Smith v. Bank of Washington, 5 Id. 822; Richter v. Selin, 8 Id. 438; Levy v. Peters, 9 Id. 125; Gibbs v. Cannon, 9 Id. 198; Juniata Bank v. Hale, 16 Id. 157; Gallaher v. Roberts, 2 W. C. C. 191; Read v. Wilkinson, Id. 514; McMurtie v. Jones, 3 Id. 206; Denniston v. Imbrie, Id. 396. See also the note to Robertson v. Vogle, post, p. 252.
man is not evidence of a debt, without the assistant oath of the clerk who made the entry; yet here, from the necessity of the case, as business is often carried on by the principal, and many of our tradesmen do not keep clerks, the book, proved by the oath of the plaintiff himself, has always been admitted. The practice in this respect, however, has been confined to charge the original debtor, to whom the goods were sold; for, the necessity of the case only required, that the plaintiff's oath should be allowed to prove the actual delivery; and it would be highly dangerous, if the evidence were extended to establish the assumption of a third person to pay the debt.

It is the duty of the jury, therefore, to consider, whether the defendant, on the present occasion, is the original debtor, or merely a person assuming to pay the debt of another. If, indeed, it appears, that he has sent a servant, or tradesman, for these goods, on his own account, he is clearly liable; for, when they come to his use, that makes him the original debtor. But if I go to a shop with a joiner, and say to the master, "I will see you paid for the articles with which you trust this man;" here, though I am liable, upon proof of this undertaking, yet it is not in the character of the original debtor, for the joiner who received the goods is the original debtor; but it is on account of, what the law terms, my collateral promise; which cannot be proved by the testimony of the party interested, but may by a note in writing, or by some indifferent witness to the transaction.

In the case before us, the evidence of the justice (Mr. Howell), is not certain as to the circumstances; for the goods were delivered in small parcels, from time to time; they were such as suited the joiner's business; and even, from the plaintiff's own account, they were applied to his use, though the defendant was considered to be liable for the payment. Whether these facts, therefore, and the defendant's previous purchase at the plaintiffs' store, will account for the acknowledgment of having received a part, the jury must determine. But if they are of opinion, that the defendant has only assumed to pay the debt of another person, the plaintiffs cannot be witnesses in the cause, and, consequently, there is no proof of the assumption. On the contrary, if they think the defendant is the original debtor, the plaintiffs are witnesses to prove the entry in their book, and they are entitled to recover the amount of their demand.

Verdict for the defendant. (a)

(a) In Sterrett v. Bull, 1 Binn. 237; C. J. Thieeman said, "In consideration of the mode of doing business in the infancy of the country, when many people kept their own books, it has been permitted, from the necessity of the case, to offer these books in evidence. But when no such necessity exists, when the fact is, that clerks have been employed, and the entries made by them, there is no cause for violating that wise principle, that no man shall be allowed to give testimony for himself." It was accordingly held in that case, that where the entries were made by a clerk, he must be produced, or proof made that he is dead, or out of the power of the court. In a more recent case (Thompson v. McKelvey, 13 S. & R. 127), the same learned judge, in reference to the admissibility of papers purporting to be a book of original entries kept by the plaintiff himself, remarked, "This kind of evidence was admitted in the early stages of the settlement of Pennsylvania, from necessity. Business was small, and people could not afford to keep clerks. But in the present state of society, a strict hand is to be kept over it. We must not extend it beyond its ancient limits." In Mifflin v. Bingham, post, 272; C. J. McKean seemed to think, that the books of a defendant were evidence to determine a
alleged in excuse or exoneration, is the criterion to judge from; and in the
case cited from Gilb. Law of Ev. 51, the improbability that so large a sum
should be given as a reward out of so small an estate, was perhaps the ground
of decision. But in the present case, the object (about 10l.) was trifling in
itself, and no circumstance of improbability attended the defendant's relation
of the fact.

Shippen, President.—This is the very case put in the books, and the rule
which is founded upon it, extends generally to all civil suits. When a con-
fession is given in evidence, all that was said must be stated, and the whole,
generally speaking, ought to be taken together, unless such circumstances of
improbability appear, as will render it necessary for the defendant to prove
what he asserts in avoidance of a conceded fact. (a) It is true, there are
some occasions when a jury will charge a man with what he acknowledges
against himself, and yet refuse to credit him for what he advances in his
own favor. As, if he should admit, that he purchased the goods, which the
plaintiff alleges were sold to him, but insists that he paid for them at a par-
ticular time and place, in the presence of certain persons; and those persons,
on being examined, declare that they were present at the time and place
mentioned, but that they did not see the defendant make any payment to
the plaintiff: here, undoubtedly, the rule ought not to operate.

In the present case also, the jury will not be influenced by the defend-
ant's saying he repaid the money, if they do not think it credible, or if
anything can be gathered from the evidence, to show that it was not paid,
when he says it was.

*241] *Verdict for the plaintiff: owing, I believe, to some slight testi-
mony, that seemed to repel the idea of the defendant's having repaid
the money.

When Howell offered himself as a witness, Levy objected that he was
interested, inasmuch as his judgment-fee depended on his success in the
cause. But the objection was overruled by the court. (b)

JACKSON et al., Executors, v. VANHORN.

Opening default.

Judgment opened, where defendant, by mistake of the attorney, had notice of trial on a wrong
day.

Judgment had been entered by non sum informatus, in this cause, as
the defendant did not appear on the day of trial. But Sergeant now moved

(a) S. P. Farrel v. McCrea, post, p. 392. In Blight v. Ashley, Peters C. C. 20, Judge
Washington said, "The whole of an entire conversation may be given in evidence, to
explain the meaning of the parties; the testimony cannot be garbled. But what a party
has said at one time, which makes against him, cannot be explained by declarations
made at another time, which, possibly, were made to get rid of the effect of former
declarations.

(b) It has been held, that an attorney or counsel, is competent to give evidence for
his client, although he expects to receive a larger fee, if his client recover. Miles v.
O'Hara, 1 S. & R. 82.
OF PHILADELPHIA COUNTY.

Penman v. Wayne.

to open the judgment, upon an affidavit that the defendant had notice of the trial for the 17th, instead of the 13th, and that there was a just and conscionable defence.

Lewis, for the plaintiff, said, that he did not mean to contest the matter, but he wished it to be settled, whether the mistake of an attorney was, in such cases, sufficient to set aside a judgment.

BY THE COURT.—On a mistake of this kind, evidently appearing, we cannot refuse the motion.

Penman et al. v. Wayne.

Arrest of freeholder.

Under the act of 1724–5, the court has a right to inquire into the circumstances of the arrest of a freeholder under a capias, and to relieve him, if they think he was intended by the act to be exempted, although the plaintiff may have made an affidavit, previous to issuing the writ, that the defendant had not been resident in the state for two years.

A rule had been obtained to show cause why the capias, which issued in this case, should not be quashed, the defendant being a freeholder in the county of Chester. It appeared, that, with the præcipue for the writ an affirmation of one Rumford Davis was filed in the prothonotary's office, setting forth, that “the defendant had not been resident in this state for two years before the date of the writ;” and it was contended, that this was sufficient, under the act of assembly, to repel the defendant's claim of privilege. (1 Sm. Laws, 164).

The question, therefore, was, whether the court could, notwithstanding the affirmation filed before the writ issued, inquire into the matter of residence, in order to determine, on all the circumstances of the case, whether the defendant was within the exceptions of the act? It was twice argued, on the 21st and 33d of May, by Sergeant, for the plaintiff, and Lewis, for the defendant; and the substance of both arguments was as follows.

For the plaintiff.—The act of assembly rests the proof exclusively on the affidavit of the party, or some person for him; requiring only that he should make the fact, which defeats a freeholder's privilege from arrest, appear to the justice who grants the writ. Nor will the section admit of the division for which the adverse counsel contend; because, though there is a clause providing that things shall not be proved by affidavit, which, in their nature establish a higher degree of proof; as judgments, mortgages, &c., yet, *even subsequent to that clause, it is said, as the deponent believes; an expression which manifestly relates to the first part of the section, and necessarily connects the whole. If, indeed, the court were to investigate the facts, both parties are entitled to a hearing, and a new and preliminary scene of litigation would be opened, involved in endless difficulties. The legislature, therefore, wisely made the filing the affidavit before the writ issued, the conclusive test for holding the defendant to bail; and from the circumstances under which the law was passed, we are authorized to assert, that without these easy exceptions, the privilege itself would never have been granted.
section were connected, it would amount to a condition precedent, and a positive affidavit would preclude the court from any inquiry into the facts; but, he continued, that the section was not only disjoined by the words of the act (in the first place admitting proofs by affidavit or affirmation, and in the second place, requiring proofs from records or otherwise), but also by the reason and propriety of the case, which will not permit a plaintiff, in his own favor, to determine what constitutes a legal residence.

Smith, the prothonotary, being asked as to the practice, said, that in some cases, the affidavits were filed before, but, more frequently, after the issuing of the writ. If the suggestion was, that the defendant intended to go abroad, the affidavit had always been filed, in the first instance; but with respect to the case of residence, he did not recollect any instance, before the present, where that was done.

The President now delivered the opinion of the court:

Shippen, President.—We have found some difficulty in obtaining a satisfactory idea of the meaning of the second section of this act. It would seem, by the former part, that the exception upon which the capias is grounded, ought to be made appear to the justice who grants the writ; but, in the latter part, when the disjunction of the clause occurs, the expression is general, if the plaintiff can make appear from records or otherwise, without saying to whom he shall make his allegation appear. At first, indeed, I thought, this might also relate to the justice who grants the writ; but on a further consideration of the subject, I am convinced, that unless the legislature intended something more, it would never have been provided by the third section, that the court shall stay all proceedings against the defendant, until they examine his circumstances; for, it would have been useless and nugatory to direct that examination, if they were, nevertheless, bound by the contents of the affidavit.

Besides, upon the principles of common justice, it is material, that the court should have the power of making an inquiry into the facts; for, though the plaintiff’s opinion is taken, in the first instance, to ascertain whether there is a sufficient estate left for the payment of his demand; yet it would be unreasonable, to deprive the defendant of his privilege, if he could afterwards show, that, independent of a trifling mortgage or judgment, an ample security was left for his adversary’s debt. Nor is the equity of the case less applicable upon the question of residence; for, an occasional absence of a month, or a week, might with safety be made the foundation of the affidavit required by the act; and, yet, who will say, that, in law or reason, this ought to work a disfranchisement of the defendant?

The law is explicit, that if the court find the defendant is such as by the act is intended to be exempted, the writ shall be abated; and this, surely, also implies something beyond a mere inquiry, whether an affidavit has been previously filed. If he is such “as by the act is intended to be exempted,” is a sentence materially to be regarded in the clause; for, otherwise, it would have been sufficient to say, that if no affidavit is filed, nor any mortgage or judgment is produced, the defendant shall be discharged from the action.

It is evident, upon the whole, that the legislature did not mean to subject a citizen of large estate to the process of a capias, on account of a short
BY THE COURT.—The words are so very general and comprehensive, that, if the spirit and intention of the law, expressed in the preamble and other sections, were not to be considered, they would include every case arising between the periods mentioned in the act. But it is inconsistent with the constitution, and with justice, that the trial by jury should be taken away in this manner; and therefore, the courts of justice have always determined, that auditors shall be appointed only where there is a dispute about the depreciation.

The rule discharged.

Hallowell, for the plaintiff. Sergeant, for the defendant.

WALLACE, surviving partner, v. Fitzsimmons, special bail.

Partnership.

Payment by the garnishee in a foreign attachment, of one-half of a debt attached for a partnership claim, to the executor of a deceased partner, is not sufficient to exonerate such garnishee, pro tanto, as against the surviving partner.

The case was this: Hoe & Harrison, of Virginia, being indebted to Wallace & Smith, Wallace, as surviving partner of Smith, issued a foreign attachment against them, and attached their effects in the hands of Fitzsimmons. Judgment was obtained on this attachment, at the third term; and, afterwards, Fitzsimmons entered special bail. The cause then proceeded, until judgment was finally obtained against Hoe & Harrison, and upon the return of a ca. sa., non sunt invenerunt, an amicable scire facias was entered against Fitzsimmons; judgment was thereupon obtained, and an execution issued for the whole sum recovered against the principals in the original suit. It appeared, that during these proceedings, the executor (who was also the brother) of Smith, the deceased partner, applied to Fitzsimmons, and forbade his paying more than one-half of the money to Wallace; offering an indemnification for the payment of the rest to him, and alleging that the partnership was considerably indebted to the estate of the deceased. Fitzsimmons, accordingly, gave notice of this application to Wallace, and afterwards, paid one-half of the money to the executor; although a letter from him to Wallace was produced, in which he had declared, that he would not pay it either to him or to Smith, but that the law should take its course, and determine the right between the executor and the partner.

A rule was obtained which, in the argument, the counsel consented to consider, either as a rule to show cause why, on paying to the plaintiff 715l. (being one-half of the sum recovered from Hoe & Harrison), the proceedings on the execution should not be stayed; or, as a rule to show cause why the execution should not be set aside, and the judgment opened, in order to let the defendant into a trial, on the plea of payment.

On this rule, two questions were brought before the court: 1st, In point of fact, whether Wallace had acquiesced in the payment of the executor? and 2d, In point of law, whether the payment to the executor did not discharge Fitzsimmons from the demand of the surviving partner?
not enough, that he says the maker has not paid, but he must declare that he does not mean to give credit; and therefore, when the circumstances are ascertained, what is reasonable notice, is a question of law, and not of fact. As to the giving time, the holder does it at his peril, for it has never been determined that the indorser is liable, where the holder has given credit to the maker; so that the want of notice is tantamount to payment. *712.

*Sergeant* and *Barton*, for the plaintiffs, argued: 1st. That the acceptance of a part shall not prejudice the holder of a bill or note; *Marius* *6*, *8*, *9*, *86*, *87*; and, as upon the authority of this book, the court had determined a former question,(*a*) they said it could not be shaken, in the present instance, by 1 *Wils.* *40*, which was not a decision in the principal case, but an *obiter dictum*, referring to a preceding determination for an argument *ad fortiori*; nor by 2 *Str.* *745*, which was a short *nisi prius* note. Besides, these reports give no reason for their decisions, but *Marius* assigns a very satisfactory one for his doctrine; to wit, that it is beneficial to the indorser that the *holder* should receive as much of the money as he can from the maker, since thereby so much is saved to him. There is a material difference, however, between the principles and usage in London and Amsterdam, and the custom of Philadelphia, upon this, as well as the point of notice; for long indulgence and the course of business, have not yet brought us to the precise and strict practice of those capitals.

2d. With respect to the second objection, they said, that the plaintiff's clerk went repeatedly in pursuit of the defendant; and proof of making inquiry after him is sufficient to excuse giving notice, unless he shows that he might have been found. *Bull. N. P.* *273*, *274*. But, at all events, they insisted, that what was reasonable notice was a matter of fact, and not of law; *1 Str.* *508*; *2 Id.* *829*, *1175*; *1 W. Black.* *1*. For, though it is true, that there are many facts, upon which, if the jury proceed contrary to the opinion of the court, a rehearing will be granted; yet they must, at last, be determined by a verdict. In trover, for instance, the conversion can only be found by a jury, it cannot be found by the court. That reasonable notice is a fact of the same kind, was conceded by very eminent counsel (*Dunning*), in opposition to the interest of his client. *Doug.* *406–7*. The propriety of the rule is abundantly more striking here than in England; and as a jury alone can decide upon the circumstances of the country, and the relative situation of the parties, it ought to be left to them to ascertain the reasonableness of the notice.

*Ingersoll*, in reply, said, that the case was of great importance to the mercantile interest; and that the mischief would be fatally extensive, if the adverse arguments prevailed. He contended, however, that in whatever form the plaintiffs choose to proceed, they must fail in their action. For, if they bring their suit at common law, then it cannot be maintained at all; since, at common law, a *chose in action* is not assignable; nor is an assignor responsible, unless he expressly warrants; and, if they bring it upon the custom of merchants, then, in order to recover, they must show that they have, on their part, complied with the custom, which required that reasonable notice of the non-payment should have been given to the defendant. But,

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(*a*) In *Gerard v. La Coste*, *ante*, p. 194.
as the common law is not applicable, and the act of assembly does not meddle with the case of indorsers and indorsees, the declaration must undoubtedly be founded upon the statute of Anne, and the custom of merchants; and if the plaintiffs are allowed to take advantage of these to maintain their action (waiving the question whether the statute extends to this country), the defendant cannot be precluded from taking advantage of them, likewise, to support his defence. Upon this ground, the usage must be universal; for, the statute of Anne places promissory notes on the same footing with inland bills of exchange, and inland bills of exchange, in the preceding reign of Wm. III., had been placed on the same footing, with foreign bills—so that any distinction between the cities of Amsterdam and London, and the city of Philadelphia, cannot be maintained; the usage is everywhere the same, and the construction of the statute will not be different, merely from a difference in the place.

It is settled, by the common law, as well as under the statute, that he who gives a new credit is bound; this is not contradicted by the doctrine laid down in Marius; and the case in Lord Raymond is corroborative. In Marius, the money is presumed to be received at the time the note becomes due, the protest is made at the same instant, and notice of the dishonoring is given as soon as possible—so that there, undoubtedly, the indorser is benefited by the indorseree's taking a part of the money, and runs no risk for the want of information respecting the fate of the bill or note; but in the present case, the money was received, at least, three months before any attempt to give notice, and in the meantime the maker became insolvent. The court argue in Wilson, as from a fixed principle, that the indorseree's receipt of a part from the maker is a discharge of the indorser for the whole; and Strange, though a nisi prius report, is in point in all its circumstances.

He contended, that the case cited in Bull. N. P. was in favor of the defendant, on the second point; for he had shown, that he might easily have been found; and where the parties reside in the same town, not a moment should elapse between the protest and the notice. 1 T. R. 167. The supreme court, in Steinmetz v. Currie, (a) said, that in all universal questions of a mercantile nature, the Term Reports were to be received as authority; this was resolved, in opposition to cases for 100 years back, showing a different practice with respect to notice; and in Donaldson v. Cooper, (b) the judges refused to hear the evidence of merchants as to usage, because the point had already been determined. As, therefore, it has been settled, that reasonable notice is a question of law, and not of fact, the plaintiff cannot now bring it into doubt and controversy.

Shippen, President, delivered the opinion of the court to the following effect.—

This is a motion for a nonsuit, upon two grounds: first, that the plaintiff, by an acceptance of part of the money from the maker of the note in question, has discharged the indorser; and secondly, that he is also discharged, because due notice of the non-payment of the note was not given to him. It is to be observed, that with regard to discharging the parties to

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(a) Post, p. 270.
(b) See also Henry v. Risk, post, p. 265.
SUPREME COURT

*CHAPMAN v. STEINMETZ.

Damages on protested bill.

The payer of a bill, which was neither paid nor received in satisfaction of a precedent debt, but upon the condition of its being honored, is not entitled to recover the twenty per cent. damages, on protest.

This was an action brought upon a bill of exchange, drawn by the defendant in favor of the plaintiff, and by him indorsed in blank; and a count for money had and received, &c., was added in the declaration. The bill being returned protested, a question arose, whether the plaintiff was entitled to recover twenty per centum damages?

The defendant contended, that the damages ought not to be allowed, because the bill was neither paid nor accepted, in satisfaction of the debt for which it was drawn; and to prove this, a receipt was produced from the plaintiff in the following words: "Received, 1st of Sept. 1784, of Mr. Jn. Steinmetz, a set of bills, dated the 30th August last, on John Bulkley & Co. of Lisbon, for 478l. 17s. 7d. sterling, which when paid will be in full for the balance of account due to the estate of the late Wm. Neale of London, deceased."

By the Court.—It is clear, that the bill was neither paid nor received in satisfaction of the precedent debt, but upon the condition of its being honored: it has not been honored; consequently, the parties are in the same situation, as if it had never been drawn; and the plaintiff (who was, in fact, agent for the drawer, and to receive the money as his servant) cannot be entitled to recover damages. See Dehers et al. v. Harriot, 1 Shaw. 163. The same point was determined in Watts v. Willing, tried the last term. (a)

Upon this opinion, judgment was entered, by agreement of the parties, for the principal of the original debt, and interest from the time that the account between them was liquidated.

Wilcocks, for the plaintiff. Ingersoll, for the defendant.

PHILPS et al. v. HOLKER et al.

Conclusiveness of judgment.

A judgment obtained in a court of another state, in a foreign attachment, is not conclusive evidence of the debt, in an action brought in this state, on the judgment.

A foreign attachment issued in Hampshire county, in the state of Massachusetts, against the defendants, to which the sheriff made return, that "he had attached one blanket, shown to him as the reputed property of the defendants;" and no appearance being entered, judgment was given for the plaintiff at the second term. An action of debt was afterwards brought here, upon this judgment, and a question stated for the opinion of the court, to wit, "whether the judgment was conclusive evidence of the debt."

(a) 2 Dall. 160; s. p. Keppele v. Carr, 4 Id. 155; and see Evans v. Smith, 4 Binn. 369; Brown v. Jackson, 1 W. C. C. 512; 2 Id. 24.

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*Walton v. Willis.*

**Security for distributive shares.**

The orphans' court ought to take recognizances, and not bonds, for payment of the distributive shares of an intestate's estate.

Where an heir-at-law took an intestate's lands at a valuation, it had been the practice of the orphans' courts throughout the state, only to require him to give bonds to those who were entitled, under the act of assembly, to a distributive share of the estate. *(a)*

The Chief Justice said, in the course of the argument in this cause, that the practice above mentioned was illegal and improper; for, the orphans' courts ought, instead of bonds, which are a mere personal security, to take recognizances, by which the lands themselves would be bound for the payment of the distributive shares. He added, that the court would not enter into a retrospect upon this subject; but that, for the future, they would expect a conformity to the opinion now given. *(b)*

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3 W. C. C. 17; Field v. Gibbs, Peters C. C. 155; Evans v. Tatem, 9 S. & R. 260; Benton v. Burget, 10 Id. 240. Therefore, the plea of *nil debet* to an action on such judgment is bad. Armstrong v. Carson's Ex'rs, 2 Dall. 302. But if the court had not competent jurisdiction (Evans v. Tatem, *ut supra*), or, it seems, if the proceedings were *ex parte*, and the defendant had no notice (Benton v. Burgot, Green v. Sarmiento, Field v. Gibbs, *ut supra*), the record would not be regarded as conclusive. In Benton v. Burgot, Judge Duncan said, "Whether a judgment has been by default, or on trial, makes no difference, provided the party has been notified, "and it was held, in that case, that a plea of fraud, imposition and mistake in obtaining the judgment, was bad on demurrer. See also Kean v. Rice, 12 S. & R. 203.1

*(a)* For the decision in the principal case, see *post*, p. 351.

*(b)* In Beatty v. Smith, 4 Yeates 102; which was an action on a recognizance for a distributive share, the court said that "a recognizance in the orphans' court is in the nature of a judgment," and they refused to admit evidence of circumstances which occurred previous to the recognizance, offered to reduce the amount for which it was given. How far the lien extended; whether, like a judgment, it bound all the lands of the heir by whom it was given and those also of the surety, where there was one, or affected only the particular land taken by the heir at the valuation, has long been disputed. In Taggart v. Cooper, 1 S. & R. 497; C. J. Tilghman declined giving an opinion upon the point. In Kean v. Franklin, 5 Id. 155, the same learned judge remarked "It is now thirty years since Chief Justice McKeen laid it down in Walton v. Willis, that a recognizance of this kind was a lien, and therefore, ought always to be taken by the orphans' court; and he censured those courts for sometimes taking bonds which were no lien. From that time, it may safely be asserted, that these recognizances have been generally understood to be a lien." It was decided also, in that case, that the recognizance bound the particular lands in the hands of a purchaser for a valuable consideration, without notice. The question of the extent of the lien was finally decided, in the late case of Allen v. Reesor, 16 S. & R. 10; where it was held, that the recognizance bound only the lands of the intestate, taken at the valuation. In the learned and elaborate opinion pronounced by C. J. Ginson, in that case, he examined the law of recognizance, both England and this state, and came to the conclusion, that in the case of distributive shares, the lien of a recognizance existed only by custom, and that the same custom had restricted it to the particular lands taken by the conveyee. Of the

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1 See Steele v. Smith, 7 W & S 447; Blyler v. Kline, 64 Penn. St. 139; Dohrer v. Miller, 2 Pears. 285.
and delivered, no interest shall be allowed. 1 Barnes Notes 157; 3 Wilson 206; Prac. Reg. Com. Pl. 357. In the king's bench, interest refused upon an inland bill of exchange, after acceptance, where no protest; and the court there said, that it had never been allowed barely for money lent, without a note. Harris v. Benson, 2 Str. 910. In the court of chancery, interest was not allowed on book and simple-contract debts, &c. Dolman v. Primen, 3 Rep. Chan. 64.

"Thus the concurrent practice of all the courts in England has, in these cases, disallowed the charge of interest; and the practice of Pennsylvania has been regulated by the same principles. It is not, indeed, more than four years, since, in this state, on the other side of the Susquehanna, the juries have been induced to allow interest, even upon notes of hand."(a)

**Williams v. Geheogan.**

**Practice.—Special courts.**

*Moylan,* in showing cause against a rule for a special court, at the instance of the plaintiff, contended, *first,* that Williams was not within the description of the persons for whom the act provides a summary relief; and, *secondly,* that the difficulty of obtaining the defendant's testimony at a short notice, was a sufficient reason to induce the court to discharge the rule.

On the first point, it was stated, that Williams was not in America, at the time when the debt was contracted, for which this action was brought; but that he came hither merely to collect the debts of a house in which he had formerly been a partner; that, therefore, he could not claim the benefit of the act, which, it was urged, extended only to foreigners, who came to this country in the way of trade, who resided here, while their merchandise was

(a) The doctrine laid down in this case was again asserted by C. J. McKean, in Williams v. Craig, post, p. 818, and appears to have been considered as the settled rule by Judge Yeates, in Christie v. Woods, 2 Yeates 215; and by President Shippen, in Rapelje v. Emory, post, p. 849. In Crawford v. Willing (4 Dall. 289 in note), however, Judge Smith declared that the authority of Henry v. Risk had been often overruled; and in his charge to the jury, said, "Even in the case of goods sold and delivered, I would think it right to allow interest as soon as the express or implied term of credit had elapsed, and a demand of payment was made." And this is believed now to be the established practice: See 6 Binn. 162, 165. Where there is no usage, no precise time of payment fixed, no account rendered, or demand made, it is said by Judge Duncan, in a recent case (Eckert v. Wilson, 12 S. & R. 398), to be usual for the court not to direct interest, *qua* interest, but to leave it the jury, under all the circumstances, to give or refuse damages for the detention. In a still later case (Graham v. Williams, 16 S. & R. 257), Judge Rogers, in delivering the opinion of the court, said, "It is more easy to determine what interest shall not, than what shall be allowed, in the case of a running account. It is usually to be left to a jury, under all the circumstances." It was held, in that case, that to balance books at the end of each year, and charge interest on the balance of a running account, was illegal. The decision was expressly restricted to the case of running accounts; and Judge Rogers declared, that it was not intended to interfere with the practice of dealing at six months' credit, which has generally obtained between the merchants of a seaport and those of the country. It was intimated, however, that the allowance of interest had already been extended quite far enough in Pennsylvania.
sold, and who were not punctually paid at the expiration of the credit which
they gave. 3 St. Laws, 31. Lewis v. Turner, in the Common Pleas of
Philadelphia, was cited. The plaintiff in that case was a resident of New
York, and came to Philadelphia merely to sue, and recover from the de-
fendant. The court determined that he was not entitled to a special court;
and Shippen, President, said, that a citizen of the United States was not a
foreigner in Pennsylvania.

On the second point, it was observed, that the defendant being sued as
supercargo, it would be incumbent on him to state all the accounts of the
vessel in question ; that he was at this time in Charleston, South Carolina,
having in his possession all the documents and vouchers necessary to his de-
fence; that he had always expressed a determination to attend the trial of
the cause, and that his absence could not be long protracted, as the
special bail had sent a bail-place and power of attorney to take
the defendant, and surrender him in this court.

Coulthurst, for the plaintiff, said, that the debt was contracted in Phila-
delphia, and was there due and payable from the defendant to the plaintiff;
that Williams came hither to pay the debts of the company, as well as to
collect their credits; that he was a foreigner, in the strongest meaning of
the word, and, consequently, could not be affected by the case of Lewis v.
Turner, which was decided on the ground of the party's being a citizen.

With respect to the accounts, he endeavored to show from the cause of
action, that they could not be material to the defence on this occasion; and
contended, that the defendant's absence was no reason to defeat the plaint-
iff's claim to the benefit of the act.

McKeen, Chief Justice.—The act seems to be intended for the benefit
of every man, whether an inhabitant or a foreigner, who is about to leave
the state; and the plaintiff is clearly within the description of persons en-
titled to a special court. But, we think, for the second reason which has
been urged by the defendant's counsel, that it would be doing manifest in-
justice to hurry the trial on, at this time: Therefore,

BY THE COURT: —Let the rule be discharged.


Parties.

The assignee of a simple-contract debt cannot maintain an action in his own name.

A certiorari was issued to John Culbertson, Esq., one of the justices for
the county of Chester, to remove the proceedings in this cause; and the
record being accordingly returned, it appeared, that one Irwin, having main-
tained the defendant's daughter for several weeks, made out an account
against him, and, after swearing to the truth and justice of its contents,
he assigned all his right, title and interest therein to the plaintiff. The
debt being under ten pounds, the plaintiff, in his own name, sued the
father, before the justice, upon this assignment, and obtained a judgment
and execution against him; although, as it was stated in the defendant's
deposition,(a) his daughter was of full age, at the time of contracting the debt, and no assumption, upon his part, had been proved or suggested.

Bradford moved to reverse the judgment: 1st, on account of the general irregularity of the proceedings; and 2d, because an action could not be maintained, by the assignee of a simple-contract debt, in his own name.

The Court considered the whole proceedings to have been irregular; but said, that there could be no doubt of the sufficiency of the second reason alone, as a ground for setting them aside.(b) And judgment was accordingly reversed.

*TILLIER v. WHITEHEAD.

Authority of partners.

This was a feigned issue, to try whether the defendant had a legal authority to use the plaintiff's name, in the acceptance, drawing and indorsement of bills of exchange, and promissory notes. The case was this: Rudolph Tillier and Clement Biddle entered into articles of agreement, on the 30th of January 1783, by which a special partnership was established between them. The defendant Whitehead was employed as a clerk by Biddle, in his general transactions; and a memorandum, written and subscribed by Biddle alone, under two firms, that is "Clement Biddle & Co.," and also "Clement Biddle & Co. & Rudolph Tillier," was lodged in the bank; declaring that Whitehead's acceptances, indorsements and drafts, under those firms, were good and binding on the parties. It appeared accordingly, that Whitehead, as well as Biddle, had used the firm of "Clement Biddle & Co. & Rudolph Tillier;" and an advertisement, subscribed and published by Tillier himself, was read, in which notice was given, that "he had no connection with any other mercantile house, except that known under the firm of 'Clement Biddle & Co. & Rudolph Tillier.'" There was not any proof, however, that Tillier knew of the authority which had been left by Biddle at the bank; but a clerk of the bank proved that he had presented notes drawn by Whitehead in the firm of "Clement Biddle & Co. & Rudolph Tillier," and that, on such occasions, Tillier referred him to Whitehead for payment. It appeared also, that Whitehead had received the proceeds of some damaged tea, which Tillier had sent to the city auction, giving a receipt in the name of "Clement Biddle & Co. & Rudolph Tillier;" that, in consequence of this, Tillier directed his clerk to forbid Whitehead's meddling with any more of his money; and that, sometime afterwards, Tillier desired Whitehead to quit his counting-house, declaring that he had nothing to do with him.

Two questions were stated for the plaintiff: 1st. Whether Clement Biddle and Rudolph Tillier were partners generally, or only for certain

(a) See Hindman v. Logan, Addis. 27.
(b) See Reed v. Ingraham, 2 Yeates 387; 3 Dall. 505; 4 Id. 169; United States v. Kennan, Peters C. C. 169.
specific purpose? and 2d. Whether one partner can devolve over the right of using the firm name, without the knowledge and concurrence of the other?

To the first question it was answered by the defendant’s counsel, and allowed by the Court, that the articles of copartnership, being res inter alios acta, the limitations could not be known, and therefore, ought not to affect the defendant, if he acted under a legal authority. (a)

With respect to the second question, it was unanimously resolved by the Court, that one of two partners may give an authority to a clerk, under the firm name of the house; and that the clerk may, in consequence thereof, accept bills, and sign or indorse notes, in the name of the company. And it was said by McKean, Chief Justice, that this case could not be properly compared with the case of an attorney, * without power of substitution: for the attorney cannot exceed the letter of his authority, being nothing more than an agent himself; but each partner is a principal; and it is implied in the very nature of their connection, that each has a right to depute and appoint a clerk to act for both, in matters relative to their joint interest. (b)

Verdict for the defendant.

Ingersoll, for the plaintiff. Bradford, for the defendant.

STEINMETZ et al. v. CURRIE.

Notice of non-payment.—Witness.

Notice of the dishonor of a bill of exchange must be given within a reasonable time. An indorser ruled not to be a competent witness, although the plaintiff offered to strike his name off the 1st and 2d bills of the set; the second not being produced.

This action, brought by the indorsees of a bill of exchange, against one of the indorsers, now came on for a second trial (ante, p. 234). It was very ably discussed by Ingersoll, for the plaintiff, and Sergeant and Bradford, for the defendant; but, as the circumstances and principles of the case are accurately preserved in the charge of the court, it is unnecessary to give any other statement of the facts or arguments, than that delivered by the Chief Justice.

McKean, Chief Justice.—This is an action of very considerable importance, not only as it affects the present parties, but as it affects every holder, drawer or indorser of a bill of exchange. The honor and justice of the state are, indeed, likewise interested, that the decision should be conformable to the general mercantile law of nations, lest a deviation should be imputed to our ignorance or disrespect of what is right and proper. It should be

(a) See Gill v. Kuhn, 6 S. & R. 333; Forrest v. Waln, 4 Yeates 337.

(b) See Gerard v. Bassie, ante, p. 119, and the note; and see also Baird v. Cochrane, 4 S. & R. 397; Salmon v. Davis, 4 Binn. 375; Hourquebie v. Girard, 2 W. C. C. 212.¹

¹ In Moldewell v. Keever, 8 W. & S. 65, Chief Justice Ginson, without directly pronouncing on the authority of Tillier v. Whitehead, as a precedent, says that each partner is, doubtless, a principal, so far as regards his personal interest in the concern; but an agent as regards the interests of his associates; he would scarce seem, therefore, to be warranted, by principles drawn from analogy, in committing the stewardship of their property to a stranger.
been a man of note, in extensive business, and dealt, at the very time, with Pringle, another indorser of the bill, who lived in Philadelphia, and from whom information might have been obtained. There is, perhaps, an honest and a reasonable ground for not giving notice until after the 20th of May 1780, lest the money should be paid in depreciated paper. But two years more elapsed, when that danger was over, by the extinguishment of continental money.

It has been said, likewise, that when the drawer has no effects in hand, no notice is necessary; but it has been determined otherwise, as between indorser and indorsee, upon the clearest principles. What is it to the indorsee, whether the drawer has effects or not? Every indorser is in law a new drawer, and he may be compelled to pay a bill, even where the name of the drawer has been forged. Every day's experience shows that bills are taken on the credit of the indorser alone—sometimes, when the drawer is *272] totally unknown. Nor can it be alleged, that no injury has been sustained, since, in the course of things, all the prior indorsers might have failed.

Upon the whole, we think, the strength of the evidence is against the plaintiffs; and if the jury are of the same opinion, they will find a verdict accordingly. But if, on the contrary, they are satisfied with the reasons given for not making an earlier demand, they will find for them.(a)

The opinion of the Court being so unfavorable to the plaintiffs, they voluntarily suffered a nonsuit, when the jury were at the bar ready to return their verdict.

In the course of the trial, the plaintiffs offered John Pringle (their immediate preceding indorser) as a witness; and, in order to do away his interest in the action, they proposed striking his name off the first and third bills of the set; which were the only bills in their possession, the second, on which the protest was made, being, as they alleged, lost in its passage from England to America.

It was objected by the defendant, that Pringle's name would still remain upon the second bill (which, for anything that appeared to the contrary, might be in the hands of a third person), and on the records of the notary, who made the protest; so that he could not be effectually discharged in the way proposed.

To this, the plaintiff's counsel replied, that where there are several securities for the same thing, a discharge of one is a discharge of the whole; and they instanced the case of a master of a ship, who usually signs three bills of lading, of the same tenor and date. But—

BY THE COURT.—In that case, if the master takes a receipt, he would certainly be discharged. In the instance before us, however, the second bill may be in the possession of a bonâ fide purchaser, who will be entitled to sue Pringle upon it, notwithstanding any act of the plaintiffs on this occasion.

(a) See Steinmetz v. Currie, ante, p. 284, and Robertson v. Vogle, p. 253, and the notes to those cases.

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We are of opinion, that Pringle is clearly interested in the cause, and therefore, inadmissible as a witness. (a)

It was suggested, that if the plaintiffs executed a release to Pringle, he might be made a witness; but Ingersoll, doubting whether a release to one indorser would not be a release to all, did not choose to adopt this measure. (b)

It was also ruled in this cause, that the case in Term Reports (Tindall v. Brown, 1 T. R. 68) being a determination upon general mercantile law, was of authority here; and that it would have been so, if it had been determined in France, Spain or Holland, as well as in England.

MIFFLIN ET AL. V. BINGHAM.

Deposition.—Witness.

A cross-examination of a witness, under a rule of court, does not preclude the party from taking any legal exceptions, at the trial, to the competency of the witness.

A deposition of a going witness, taken under a rule of court, cannot be read on the trial, unless a subpoena has been taken out, and, if possible, served on the witness.

What interest will exclude a witness.

The plaintiffs, being disappointed in their evidence, voluntarily suffered a nonsuit. The following points, however, were resolved in the course of the trial; to illustrate which, it is necessary to relate the leading circumstances of the case. The plaintiffs were owners of a privateer called the Rattlesnake, commanded by Captain McCullough. This privateer, having taken a valuable prize, during the late war with Great Britain, carried her into Martinique, where the defendant resided as agent for the United States. At the time of her arrival, the defendant was exceedingly embarrassed on account of certain pecuniary engagements which he had entered into for the public; and, in order to relieve himself, he applied to Captain McCullough for the use of the proceeds of the prize, offering to pay the amount, by bills of exchange drawn on his correspondents in Philadelphia. To this proposal, McCullough agreed; and, on delivering to the defendant the portion of the prize that belonged to the owners, the bills of exchange were drawn, and regularly accepted; but when they became due, they were paid in continental money, which, at that time, had depreciated to the rate of three paper dollars for one hard dollar. The plaintiffs, at first, believing this transaction between McCullough and the defendant, to have been on a public foundation, did not complain of the loss which it occasioned; but settled with the captain and crew for their respective shares of the prize, and allowed the bills of exchange, in McCullough’s accounts, as a specie charge. Afterwards, however, it was suggested to them, that the whole was a private speculation for the defendant’s emolument; and that no part of their funds, which had been thus transferred to him, was carried into his accounts with the United States. Under this persuasion, they brought the present action to recover the difference between the value of their effects put into the hands

(b) See McFadden v. Parker, 4 Dall. 275; 3 Yeates 496.
and the will set aside (1 P. Wms. 10, s. r., 267); and the necessity of two witnesses to a will, is an idea as ancient as the time of Glanvil. Glan. lib. 7, c. 5. Nor does a prohibition lie to the ecclesiastical court, for refusing, by one witness, to establish a testamentary writing. God. Orph. Leg. 66; 2 Burn. Ecc. Law, 243; 2 Salk. 547; Ld. Raym. 220. It is certain, that the statute of frauds has not made any alteration in respect to written testaments of goods and chattels; and one witness, by the civil law, being as no witness at all, the proof of such a testament can only be made by two sufficient witnesses. 2 Burn. Ecc. Law. 524.

It is true, that we have produced no adjudged case, under the 32 Hen. VIII., c. 1, showing that two witnesses are necessary to establish a will of real estate; but we have cited so many authorities of a date subsequent to the statute, which, in this point, make no discrimination between wills of lands and testaments of chattels, that it may be fairly inferred, that the rule of proof, founded upon the jus gentium and the general customs of England, is alike applicable to every species of testamentary writing. For the cause of the appellant, however, it is sufficient, that no doubt can remain of its strict and invariable application, in the case of testaments for the disposition of personal property; and, being thus incontrovertibly established in that country, from which we have, in general, copied the principles and practice of jurisprudence, it will appear by various acts of the legislature, antecedent to the passing of the law in question, and even by the original stipulations in England, that the necessity of two witnesses to the legal probate of a last will and testament, has been expressly recognised and adopted in Pennsylvania. Thus, among the laws agreed upon in England, it is provided, that "all wills and writings, attested by two witnesses, shall be of the same force as to lands, as other conveyances, &c." Prov. Laws, in app. p. 4, art. 15. From which, it seems to have been the intention of the Proprietary and first emigrants, to obviate every doubt, and, unequivocally, to place the proof of wills of lands, upon the same footing with the proof of testaments of chattels; and this stipulation was formally enacted into a law, soon after the meeting of the general assembly of the Province. Id. p. 7, c. 45. The law enabling foreigners to devise lands, likewise makes two witnesses necessary to the will. Prov. Laws, vol. 2, p. 109, old edit.(a) Nay, the *legislature, at that day, carried the matter so far as to require the testimony of two witnesses in all cases. Prov. Laws, in app. p. 3, c. 36. Is it not, therefore, unreasonable to suppose, that it was intended, by the act of 1705, to relax the rules of proof on a subject of so much solemnity and importance, as a last will and testament? And, more especially, when by the same law, § 6, it is declared, that no will in writing, concerning any goods and chattels, or personal estate, shall be repealed by word of mouth only, nor shall any nuncupative will be established, but upon the testimony of two or more witnesses? § 3.

This act then must have proceeded upon the well-known principles and decisions respecting probates; and the construction ought to be such, that no word should be rendered void, superfluous or insignificant. Hence, by the words, or other legal proof, the proof meant by the legislature, must be

(a) This act of assembly requires two or more subscribing witnesses.
as well as in England, to work an acquittal. This is, indeed, a penal statute; but there is nothing which the law regards more favorably than a last will, and judges have ever been solicitous to support the intention of the testator.

Is there not sufficient evidence, then, that the will in dispute, contains the intention of the testator? Every part of it, except that which relates to the legacy of $400\$, is directly proved by two witnesses, the scrivener who drew it, and the testator’s brother who carried the instructions; and, even with respect to the legacy, there is the positive testimony of one witness, corroborated with such circumstances as force conviction on the mind—such circumstances as ought, we say, to be received under the act of assembly. The testator, avowing that he did not mean to leave all his estate to his children, had for years before his death uniformly declared his intention of bequeathing a legacy for the benefit of a school; and, but a few days before he expired, he requested one of the witnesses to be a trustee for that use. When, therefore, we find the same intention expressed in the instrument produced, and the scrivener deposes that it is expressed conformable to the instructions he received, there cannot be a doubt of our being in full possession of the last will and mind of the testator. The will is, therefore, clearly established by legal proof, within the letter and spirit of the act; which, by thus using a comprehensive though plain and satisfactory mode of expression, intended to obviate the many misconceptions that had arisen, from the strict rules of proof required by the civil and ecclesiastical law.

Wicocks, in reply.—It is conceded, that, according to the law in England, a testament of chattels must be proved by two witnesses; but it is argued by the adverse counsel, that under the statute of 32 Hen. VIII., c. 1, a will of lands is sufficiently proved by one witness. In this, we cannot agree; for none of the cases, cited on the part of the appellee, relate to the solemnities of making a will, or the degree of proof that is required; the only point agitated or determined in any one of them, is, whether the instrument in question be a good will in writing, or not? and though there is no express adjudication upon the subject, we find it said, that two witnesses are necessary to a will, saving that, in case of land, the solemnity of writing is also necessary, Swimb. 6; which is a strong implication in favor of the appellant’s doctrine.

But the present controversy must be decided, after all, by the act of assembly, which was made with a full knowledge of the ideas and determinations in England, relative to the probate of testamentary writings; and there appears from the several acts of the legislature of Pennsylvania, a fixed intention to adopt the practice of that country. If, indeed, by the words, or other legal proof, less than two witnesses were meant, this absurdity will be obvious, that in the first part of the sentence, we are called upon to prove the will, by two, or more, credible witnesses, upon their solemn affirmation; and that in the close of it, we are allowed to make the proof by one, or less than one, witness, that is, by circumstances which satisfy the mind; so that the words, “two or more witnesses,” are, by such construction, satisfied by a proof of “two, or less than two, witnesses.” Thus, likewise, the testimony of two witnesses, or of less than two, under
Bolton v. Martin.

Privilege from service of process.

A member of the state convention, which assembled at Philadelphia to consider the constitution of the United States, was held to be privileged from the service of a summons or arrest, during the session, and for a reasonable period before and after it.

The defendant was one of the members from Bedford county, in the state convention, which assembled at Philadelphia, to take into consideration the adoption or rejection of the constitution proposed for the government of the United States, by the federal convention, on the 17th of September 1787. During his attendance upon this duty, he was served with a summons, at the suit of the plaintiff; and Sergeant obtained a rule to show cause why the process should not be quashed, upon a suggestion that the defendant, acting in this public capacity, was entitled to privilege.

The case was elaborately argued by Levy, for the plaintiff; and Sergeant and Bradford, for the defendant.

Levy represented the question to be, simply, whether a member of the state convention was protected, during the sessions of that body, from being served with a summons? He remarked, that there appeared to be a strong distinction between the privileges of a permanent legislature, and those which might be claimed by a convention called for a temporary purpose; but waiving any argument arising from that source, he contended, that there was no similitude between the deliberative bodies of England and Pennsylvania; and that, consequently, the privilege of parliament in that country, was not capable of a strict application in this. The English constitution, consisting of three branches, was so constructed as to prevent the encroachments of one branch upon another, and privilege, as allowed in England, was the necessary result of that principle. The privilege of the House of Lords might, perhaps, be founded on immemorial usage; but if the members of the House of Commons had not, likewise, been protected from arrests, it is easy to perceive, that their deliberations and decisions might, at any time, have been interrupted by the practices of the other branches of the government. But if we must still be referred to the privilege of parliament, he insisted, that the protection of a member of the house of parliament, extended only to the case of arrests, or personal restraint, and not to the service of a summons. Atk. Tracts 41, 42, 43; s. c. 1 Mod. 146. Nay, we find, that anciently the courts of justice only took cognizance of the privilege of parliament, to deliver the party out of custody, and not to abate the suit brought against him. 1 Black. Com. 166; Dyer 59, 56. With respect to the nature of privilege, he argued, that, in modern times, it is become an odious and unpalatable doctrine; and that if it were res nova, a very doubtful question might be made, whether the advantage which the public derives from the protection of its servants against vexatious and malicious arrests, compensates for the injury done by screening a man from the payment of his just debts. The policy of Queen Elizabeth's observation, that "he was no fit subject to be employed in her service, that was subject to other men's actions, lest she might be thought to delay justice,"(a) deserves to be well con-

(a) See Co. Litt. 131.
if we must argue from analogy, there can be no doubt, that we ought rather to apply to congress for the precedent, than to the parliament of Great Britain.

*Sergeant,* for the defendant. The exemption from arrest in the case of members of parliament, is totally unconnected with the political system of King, Lords and Commons. It is a privilege granted for this end, that the administration of the government may not be interrupted or damaged, by the circumstances arising from the private affairs of those who are called into the public service; and as a necessary consequence of this principle, it belongs to every national body, constitutionally assembled for legislative purposes. The members of the house of commons in England would, therefore, have been entitled to it, even if no king or house of lords had been known to their constitution; the congress of the United States must have enjoyed it, though the articles of confederation had been silent upon the subject; and the sovereigns of a free people, convened in a single house, are surely not less entitled to that distinction, than if they had only formed a third branch of the government. That the privilege is applicable to the legislature of Pennsylvania, must, then, be acknowledged, though it certainly is not conferred by any positive law; nor can it be denied to a convention acting under the immediate sanction and authority of the people, upon a question of the highest importance to the general interests of the community. Their power, though directed to a particular object, was derived from the same source which supplies the permanent legislature of the state; and their business equally required a protection from vexatious interruptions and intrusions. In short, there is a sanctity in the character of the representatives of an independent people, which is the true foundation of privilege; and it is recognised, not only for municipal purposes, but by the law of nations, for the protection of monarchs, their ambassadors and other public ministers; in which respect no positive statute will be found to mention it, until the reign of Queen Anne.\(^{(a)}\)

With respect to the distinction that is attempted, that the privilege is only from arrests, and not from being impleaded, it can neither be supported by law, nor the reason of the case. The service of a bill of Middlesex, which is no restraint upon the person, was held to be a breach of privilege, under circumstances infinitely less important than an attendance upon the state convention. 2 Str. 1094. In the case of *Col. Pitt,* the whole proceedings, upon mature consideration, were done away: 2 Str. 990, and 2 Ld. Raym. 1113, show, that, though an original might be sued out, and continued down, in order to avoid the statute of limitations, yet the sanctity of the person could not, in the smallest degree, be violated. Even the case which has been relied on from *Atk. Tracts,* declares that he shall neither be arrested nor impleaded. It would, indeed, be nugatory, if an exemption from the trouble of entering special bail was all the advantage privilege conferred; as the public service would still be left exposed to the interruptions of an anxious attendance upon a litigious suit, and all its concomitant circumstances of instructing lawyers and collecting witnesses.

\(^{(a)}\) See 7 Ann. c. 12, and the history of that statute, in 1 Bl. Com. 255.
might have been served in any county, at any time, with an exception, allowing, in the case of a member of assembly, a protection for the space of fourteen days after the sessions. Shall it then be said, that any individual might compel a judge of the supreme court to attend a private suit upon the Ohio, by serving him with a summons, while he is discharging his official duties on the western circuit? We contend, that the interest of the commonwealth requires that persons employed in such services, should not be incommodecd; there is no necessity, therefore, to derive the privilege by the analogy of other cases; it arises from the nature of the thing; and many authorities show, that the rule is as forcible to prevent their being impleaded, as to prevent their being arrested. 2 Str. 1094; Vin. tit. Priv. 519. A man, by the law of Pennsylvania, may be his own counsel; if he exercises this right, is he not as much drawn from the public service by a summons as by a capias? In Maltack's case, the court would not issue a subpoena to two members of the assembly (Delaney and Hill), who were witnesses in the cause; but a letter was written to the speaker, stating the necessity of their attendance, and a vote of the house was taken to allow it. (a) In Col. Pitt's case, he was entirely discharged from a capias, without common bail being ordered; from which it may be fairly inferred, that he ought not to have been sued at all; as the effect of common bail, and a summons are, in that respect, the same.

The case cited from Prym, in Atk. Tr. is not in the Year Books, and it could not have been within the knowledge of the writer, as it is said to have happened in the reign of Edw. III. For this reason, it bears a doubtful complexion; nor, do we know that the decision was on the case before the court; and, at all events, there is an essential difference in privilege, when it is extended to the servants (who have no public cares to claim their attention), and when it relates to the master.

Levy, in reply.—He said, that he had not asserted that a member, either of the assembly or convention, was liable to arrest during the sitting of those bodies; but that he had expressly narrowed the question to this point, whether he might be served with a summons? Nor had he insisted on the idea, that the convention was not entitled to the same privileges which a permanent legislature might claim; but merely suggested a distinction for the consideration of the court. He contended, however, that a member of the British house of lords, since the 10 Geo. III., c. 50, was not entitled to the privilege claimed by the defendant; and, he asked, whether such privileges ought to be introduced and established in Pennsylvania, as only ex-

(a) In the case of United States v. Cooper, 4 Dall. 341, the defendant applied to the court for a letter, to be addressed by them to certain members of congress, then in session, requesting their attendance as witnesses; and several cases arising in this state, were referred to, in support of the application; but Judge Chase said, "I do not know of any privilege, to exempt members of congress from the service or obligations of a subpoena. I will not sign any letter of the kind proposed. If upon service of a subpoena the members of congress do not attend, a different question may arise; and it will then be time enough to decide, whether an attachment ought, or ought not, to issue." Judge Perez, however confirmed the statement, as to the practice in Pennsylvania, and expressed his willingness to acquiesce in the defendant's application. See also United States v. Caldwell, 2 Dall. 333, in note.
or equal immunities with the members of General Assembly, met in their ordinary legislative capacity: and in this light, I shall consider them.

The Assembly of Pennsylvania being the legislative branch of our government, its members are legally and inherently possessed of all such privileges, as are necessary to enable them, with freedom and safety, to execute the great trust reposed in them by the body of the people who elected them. As this is a parliamentary trust, we must necessarily consider the law of Parliament, in that country from whence we have drawn our other laws. That part of the law of Parliament, which respects the privileges of its members, was principally established to protect them from being molested by their fellow-subjects, or oppressed by the power of the crown, and to prevent their being diverted from the public business. The parliament, in general, is the sole and exclusive judge and expeditor of its own privileges: but, in certain cases, it will happen, that they come necessarily and incidentally before the courts of law, and then they must likewise judge upon them.

The origin of these privileges is said by Selden to be as ancient as Edward the Confessor. For a long time, however, after the conquest, we find very little, either in the books of law, or history, upon this subject. If there were then any regular parliaments, their members held their privileges by a very precarious tenure. There appears, indeed, in the reigns of Henry IV. and Henry VI. to have been some provisions made by acts of Parliament, to protect the members from illegal and violent attacks upon their persons. In the reign of Edward IV., there has been a case cited to show, that the judges determined that a menial servant of a member of parliament, though privileged from actual arrest, might yet be impleaded. Although it were fairly to be inferred from the case, that the privilege of the servant was equal to the privilege of the member himself, yet a case determined at so early a period, when the rights and privileges of parliament were so little ascertained and defined, cannot have the same weight as more modern authorities.

Upon an attentive perusal of the statute of 12 & 13 Wm. III., c. 3; I think, no other authority will be wanting to show what the law was upon this subject, before the passing of that act. From the whole frame of that statute, it appears clearly to be the sense of the legislature, that, before that time, members of parliament were privileged from arrests, and from being served with any process out of the courts of law, not only during the sitting of parliament, but during the recess within the time of privilege; which was a reasonable time _eundo et redeundo_. The design of this act was not to meddle with the privileges which the members enjoyed during the sitting of parliament (those seem to have been held sacred), but it enacts, that after *304] the dissolution or prorogation of parliament, or after adjournment of both houses, for above the space of fourteen days, any person might commence and prosecute any action against a member of parliament, provided the person of the member be not arrested during the time of privilege. The manner of bringing the action against a member of the house of commons is directed to be by _summons_ and _distress infinite_, to compel a common appearance; but even this was not to be done, until after the dissolution, prorogation or adjournment. The act further directs, that where any plaintiff shall, by reason of privilege of parliament, be stayed from prosecuting
We cannot but consider our members of assembly, as they have always considered themselves, entitled by law, to the same privileges. They ought not to be diverted from the public business by law-suits, brought against them during the sitting of the house; which, though not attended with the arrest of their persons, might yet oblige them to attend to those law-suits, and to bring witnesses from a distant county, to a place whither they came, perhaps solely, on account of that public business. (a)

The defendant, therefore, must be discharged from the action. (b)

(a) In the case of the United States v. Edme, 10 S. & R. 147, Judge Duncan said, that the privilege of protection “has extended itself, in process of time, to every case where the attendance was a duty, in conducting any proceedings of a judicial nature;” and the case in the text shows that the privilege extends to protect all persons engaged in public business of a legislative character, from the service of a summons, as well as from arrest. To the same effect (in the case of suitors) is Miles v. McCullough, 1 Binn. 77; though the rule of the circuit court appears to be different in this respect. See Blight v. Fisher, Peters C. C. 41. In Geyer v. Irwin, 4 Dall. 106, the court recognised the principle, that a member of assembly is privileged “from arrest, summons, citation, or other civil process,” during his attendance on public business; and expressed their opinion, that his suits could not be forced upon trial, during the session. But the attorney of the defendant, in that case, having confessed a judgment, the court refused to open it on the ground of privilege, which had not been mentioned, when the cause was called for trial. See also Coxe v. McClennachan, 3 Dall. 478. 1

(b) Since these reports were committed to the press, I have been favored with a note of another case in this court, upon the question of privilege; and, I hope, I shall be excused for introducing it here.

Caldwell v. Barclay et al.

Foreign attachment.—Moylan obtained a rule to show cause why this attachment should not be quashed, on the ground, that one of the defendants, Barclay, being an American consul, and in that character actually residing abroad in the public service, was not within the description of persons, whose effects were made liable to a foreign attachment by the act of assembly.

The rule was opposed by Wilson, Bradford and Sergeant, who contended, that as a consul, Barclay was not entitled, by the laws of nations, to any privilege or exemption from legal process; that, even if he was privileged on account of his official character, he had lost that advantage, by his partnership with the other defendant, who was not entitled to it; and that the act of assembly makes no difference between persons serving their country abroad, and other non-residents.

After an able argument, the opinion of the court was delivered by Mr. President Shippen; agreeable to which—

The rule was discharged.

See Dupont v. Pichon, 4 Dall. 823; United States v. Ravara, 2 Id. 299; as to the privileges of a consul.

1 One who goes to Washington, duly commissioned to represent a state in Congress, is privileged from arrest, cundo, morando et redeando, though it be subsequently decided that he is not entitled to a seat. Dunton v. Halse stead, 2 Clark 450. And see that case, as to what are valid excuses, for failure to return home immediately after the decision. But the exemption only extends to civil process. Bul lard’s case, 4 W. N. C. 540.
of the money as reduced the sum really due to less than 10L. And the question stated for the opinion of the court, was, whether the plaintiff should be allowed costs?

*309] *Hallowell and S. Levy urged, that this was the case of a bond with a warrant of attorney, upon which they could not have confessed judgment before a justice; that a justice could not have taken cognisance of a set-off exceeding 10L; and that the penalty of a bond was intended to cover the interest and costs; so that, even for the surplus, it was necessary in England to seek for relief in a court of equity.

Sergeant, contrâ.—Where the sum is under 5L, the act of 1745, 1 State Laws 204, meant to give full jurisdiction to the justices, except in certain enumerated cases; and the same jurisdiction is afterwards extended to sums under 10L by reference to that act. The expressions of the legislature are, "that all actions for debt or other demand for the value of 40s. and upwards, and not exceeding 5L, &c., shall be cognisable before any justice, &c.," which word value must intend something more than a penalty; for the penalty of a bond, being generally double the sum due, would exceed 10L although the value of the debt might be less. In the present instance, judgment is taken only for 7L. Debt upon a bond for the payment of money is within the jurisdiction of the justices; but if the opposite construction were to prevail, the act, which was framed to save costs, might in almost every case of a bond be defeated. This is not like a set-off, which we might defalk or not, as we pleased; and, as to its being the case of a judgment confessed by warrant, that will be no recommendation to the favor of the court.

Shippen, President.—In the case of a set-off, this rule, with respect to costs, would be subject to great inconvenience, for, as it happened this term, in Coxe v. Bolton, a set-off of 60L might be given in evidence, though the plaintiff could never bring the matter to a trial before a justice; as it was not in his power to say, whether the defendant would resort to an action, or take advantage of the defalcation.

The opinion of the Court was afterwards delivered to the following effect:

Shippen, President.—We think this case comes within the express words of the act of assembly, declaring that costs shall not be recovered; and there is no evidence that the plaintiff has entitled himself to the benefit of the exception, by filing a previous affidavit of his belief that the debt exceeded 10L.

It is not our meaning, however, when an action is brought for a sum above 10L and the defendant reduces it to less by a set-off, which he might, or might not, have pleaded, that, in such a case, the plaintiff is not entitled to costs. The reason and justice of the thing would then be clearly in his favor.

Judgment for the plaintiff, but without costs. (a)

(a) The question of the right to costs in actions instituted in the common pleas, or district courts, where the plaintiff recovers less than the amount requisite to give those
said, "The demand of the defendant against the plaintiff in this case was not for any certain sum of money. It might be for more than $100; but whether he should recover more or less than $100, would depend on the opinion of those who should decide the cause. It does not seem to be a case, therefore, within the meaning of the seventh section of the act." As, therefore, the defendant might have refused to make the set-off before a justice, he thought the case fell within the reason of Bailey v. Miller, and that the plaintiff was entitled to costs. Judge Ginsin, concurred in this judgment, but on the ground, that "the provision in the seventh section of the act of 1810, is applicable only to cases of defalcation of a definite sum, and that the law in all cases of unliquidated cross-demands, remains as it was before." It is not easy to reconcile the determination in this case, upon the reasons of either of the judges, with some other decisions of the same court. That the demand of the defendant, when he retains in his possession the article which was the subject of the warranty, could not, in any supposable event, exceed the original price of the article itself, is shown by the reasoning of the court in the case of Steigleman v. Jeffries, 1 S. & R. 478. There, the action was on a promissory note for the price of goods sold, to which the defendant offered evidence to prove a warranty by the plaintiff, and a breach of the warranty. C. J. Tilghman was of opinion, that the evidence was admissible, on the ground, that our defalcation act was extensive in its operations; and although, in Kachlin v. Mulhallon (2 Dall. 237), it had been held, that the right of set-off, under this act, did not extend to cases of unliquidated damages for any matter in nature of a tort, because in such case there is no standard by which the damages can be estimated, yet, he said, "In the present case, the objection is not so strong; the amount of damages, to be sure, cannot be reduced to a certainty, but the price agreed to be paid for the article purchased, is some rule to assist in making the estimate; it is a boundary beyond which the damages cannot be reasonably suffered to pass." Judge Yeates also distinguished between a defence arising from a warranty, and one sounding merely in tort. In the latter case, he said, "Individual feelings determine the quantum of compensation, without any known standard. That objection does not occur here." In Kline v. Wood (9 S. & R. 294), the question of jurisdiction, in the case of a warranty, was expressly decided. It was an action in the District Court of Philadelphia, on the warranty of a horse sold by the defendant to the plaintiff for $80, though the declaration averred, that the plaintiff had been put to expense in feeding and keeping the horse, to the amount of $150. The jury gave a verdict for the plaintiff for $40. Judge Duncan, in delivering the opinion of the court, said, "the action in the present case is clearly an action on the contract; and it is an action on the contract, where there is a measure of damages, namely, the difference between the value of a sound horse, and one with such defects as existed at the time of warranty." (p. 293.) "The legal cause of action was contract, and the law prescribed the rule, the estimate of the value between this horse in a sound and unsound state; which value could never exceed the price given for the horse." (p. 300.) Accordingly, it was held in this case, that the District Court had not jurisdiction of the action, it being within the cognisance of a justice of the peace. The reasons of Judge Ginsin, also, in Sadler v. Slobaugh, seem unsupported, by the provisions of the act, or by the construction put upon it in other cases. The words of the clause are certainly broad enough to cover a claim of set-off for an unliquidated sum. A demand founded on bond, note, &c., or "damages on assumption," would seem intended for all cases of contract, whether the damages were definite or unliquidated. In fact, the court had expressly decided (in Sneively v. Weidman, 1 S. & R. 417), that under the words in the act of 1745, "actions of debt, and other demands," a justice of the peace had jurisdiction of an action for breach of warranty of a horse, where the damages sustained did not exceed the limit of his jurisdiction; and the Chief Justice there said, "The present action is founded on contract, and although the damages are uncertain, I think it must be included in the description, which ascertains the jurisdiction of justices of the peace. It cannot be said, that the word demand was intended to be restricted to cases in which a certain sum of money was demanded," &c.

The decision in the case of Sadler v. Slobaugh, however, has continued to govern the
practice, to the present time. The next case upon the subject of costs, is Stewart v. Mitchell (18 S. & R. 287), which occurred under precisely the same circumstances as Cooper v. Coats, and not being distinguished from it, the court determined that the plaintiff was not entitled to costs. In a very recent case (Grant v. Wallace, 16 S. & R. 253), the question again arose on the construction of the 7th section of the act of 1810, respecting set-off. The plaintiff brought suit in the common pleas, for a debt exceeding $100, without previously filing an affidavit. On the trial, a verdict passed for the plaintiff for a sum under $100, in consequence of a set-off by the defendant, but of what nature the report is silent. The court were divided in opinion on the right of the plaintiff to costs, Judges Duncan, Rogers, and Top holding that he was entitled to them, while the Chief Justice delivered a contrary opinion. Judge Top, who expressed the opinion of the majority, puts it upon the ground upon which Brailey v. Miller was decided, that where there is a set-off of any description, the plaintiff is entitled to his costs, although he has made no affidavit; and he relied upon the case of Sadler v. Slobaugh, decided, notwithstanding the act of 1810, as conclusive upon the point. The learned judge does not seem to have adverted to the circumstances of that case, or the reasoning of the court; otherwise, he would not have considered it as an authority in point. Whatever may be the value of that case, as a precedent, it certainly cannot be invoked as authority, beyond the mere question it decided, viz., that a defendant in an action before a justice, for the price of a chattel, cannot be compelled to set off a claim, arising from a breach of the warranty of such chattel; and therefore, that the plaintiff in such action has a right to costs in the common pleas, although he should recover less than $100, if his claim was reduced by such set-off. It seems to have been admitted by C. J. Tilghman, in that case, that where a defendant could be compelled to set off his demand, the plaintiff would be deprived of his costs, if he sued in the common pleas. It is difficult, therefore, to find any support for the decision in Grant v. Wallace, from the authority of Sadler v. Slobaugh. Chief Justice Grisson, who dissented from the majority in Grant v. Wallace, expressed an opinion, that it was the intention of the legislature, by the provision in the act of 1810, to remove the difficulty as to costs, first suggested in Brailey v. Miller, and he thought the difficulty was effectually removed: "If the plaintiff," he said, "knows that there is a cross-demand for a sum certain, let him give credit for so much, and bring suit for the residue; and thus do for the defendant all that the defendant could do for himself. If the cross-demand be unliquidated, let him give credit for enough to give the justice jurisdiction, leaving the defendant to reduce it still lower, if he can, at the hearing. If, however, he shall believe the defendant not to be entitled to an allowance sufficient to reduce the demand to the limit of a justice's jurisdiction, he is then precisely in a condition to make the affidavit required by law, the effect of which is to entitle him to costs, no matter how small a sum he may recover." It is remarkable, that the Chief Justice here seems to consider an unliquidated cross-demand as one which the defendant might be compelled to set off; whereas, in Sadler v. Slobaugh, he expressly states, that he considers the provision of the act as inapplicable to such cases. He added also (16 S. & R. 256), that in the case of Patton v. Newell, decided in 1822, but not reported, the supreme court held, that the plaintiff was not entitled to costs, under similar circumstances.

The question of the right to costs, may, therefore, as we have said at the commencement of this note, be considered as yet unsettled. The truth is, that so many inconveniences present themselves, in carrying out the intentions of the legislature, that the courts have had great difficulties to surmount, and it is not surprising, that their decisions should be in some measure inconsistent with each other, as well as with the literal provisions of the acts of assembly. Perhaps, it would have been better, if the legislature had left it discretionary with the judges, to give or refuse costs to a plaintiff suing in the courts of record, where his standard is reduced below the standard of their jurisdiction, in consequence of a set-off.1

1 The law is now settled, that when the plaintiff's recovery is reduced to less than $100, by a set-off, or equitable defence, he is entitled to costs, without a previous affidavit. Bartram
*Keely v. Ord et al.*

**Evidence.**

*Indebitatus assumpsit* for goods, to wit, sixteen hogsheads of rum, sold and delivered. The plaintiff, by his books, and oath of his clerk, proved the sale to the defendants.

The defendants gave in evidence, that a certain George Henry was two-thirds owner of the cargo of which this rum was a part; and, in order to prove that the rum was purchased of George Henry, and not of the plaintiff, they offered to prove by Henry's clerk, that he had made a charge in Henry's books, by the direction of Henry, of the sale of the rum to the defendants.

To this, it was objected, that the books of Henry should be produced to show the entry; and that, otherwise, the evidence of the clerk to the contents of the books ought not to be admitted.

And of this opinion was the Court; but, at the request of the counsel for the defendants, they reserved the point. (a)

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**Lynch v. Wood.**

**Costs of a commission.**

*Levy* exhibited an account of expenses in the execution of a commission, which had issued for the plaintiff, *ex parte*, and moved that they might be allowed in the costs. Besides the charges for swearing the witnesses, and their attendance on the commissioners, there were charges for agency, and for the expenses of travelling to collect the testimony.

The Court allowed the charges for swearing the witnesses, and for their attendance; but rejected those for agency and travelling.

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**Hudson v. Howell.**

**Privilege of freeholders.**

The privilege of freeholders to be sued by *summon* extends to actions of trespass *vi et armis*.

*Trespass vi et armis.* *Capias,* returnable to this term. *Howell* moved to quash the writ, the defendant being a freeholder.

*Millegan* objected, that this was a case excepted by the act; a fine being due to the commonwealth, upon the judgment *capiatur pro fine*, in actions *vi et armis*. But, by—

(a) See Kelly v. Holdship, 1 Bro. 36.

v. Mckee, 1 Watts 38; Manning v. Eaton, 7 Id. 346; Odell v. Culbert, 9 W. & S. 66; Barry v. Mervine, 4 Penn. St. 330; Glamorgan Iron Co. v. Rhule, 53 Id. 93. And where the pleas are payment and set-off, the supreme court, on error, will presume that it was so reduced, the court below having given judgment for costs. Minick v. Minick, 33 Penn. St. 378. If, however, the recovery be so reduced by proof of actual payments, no costs are recoverable. Harrigan v. Insurance Co., 37 Leg. Int. 166. But though the plaintiff be not entitled to recover the costs of suit, for want of a previous affidavit, yet, the court having jurisdiction of the cause of action, he may collect the costs of an execution. Daventport v. Williams, 10 Phila. 574.
Hudson v. How. II.

Shippen, President.—The practice has been long settled under this act. Unless it is a suit on a recognisance, or for a fine actually due to the state, we cannot take up a mere fiction, to defeat a positive privilege.

The writ quashed. (a)

(a) It has been held, however, that if a freeholder commit a trespass, jointly with one who is not a freeholder, he may be arrested upon a joint capias issued against both. Fife v. Keating, 2 Bro. 185. And see Jack v. Shoemaker, 3 Binn. 280.
SUPREME COURT OF PENNSYLVANIA.

JULY TERM, 1788.

Appeal of Brown, executor of Edgar.

Responsibility of Executors.

Where one executor had received money belonging to the estate of the testator, and paid it over to his co-executor, who became insolvent; it was held, that though he would be chargeable, if there were creditors, and a deficiency of assets to satisfy them, yet, that he was not answerable to the legatees.

This was an appeal from the orphans' court of Philadelphia county, on the following case: Brown, having received 400£, on account of the estate of his testator, Edgar, paid it over (according to his uniform practice on such occasions) to his co-executor Dougherty. In Brown's books, this money was charged generally, as so much cash paid to Dougherty; but, in Dougherty's books, credit was given for it on account of the estate of Edgar. Dougherty became insolvent; and upon a settlement of Brown's administration, the orphans' court refused to allow him the 400£ thus paid over to his co-executor; but charged him with the principal sum, and interest from the time he received it, until the year 1776 (nine years), dropping the interest from that time until 1781, and afterwards reviving it.

It was argued in the January term, by Wilcocks, in support of the appeal, and Lewis, against it; when three points were made: 1st. Whether the money was a loan to Dougherty, or a payment to the estate of Edgar? 2d. Whether, if it was a payment to the estate of Edgar, Brown was thereby discharged? and 3d. Whether interest was payable to the residuary legatees, who were the appellees upon this occasion?

The Chief Justice, having stated the points that were made in the cause, now delivered the opinion of the court.

McKean, Chief Justice.—From the evidence, we must determine, on the first point, that the money was a payment to the estate of Edgar. It was Brown's constant practice to transfer all his receipts to Dougherty; and this sum of 400£ is credited to him in the accounts of the estate kept by the latter.

With respect to the second and third points, it must be observed, that the courts of chancery make it a general rule, that he who receives money should be answerable for it; and therefore, if one executor becomes insolv—

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supreme court

williams v. craig.

assembly, setting forth, that "where the plaintiff and defendant consent to a rule of court for referring the adjustment of their accounts to certain persons mutually chosen by them in open court, the award or report of such referees, being made according to the submission of the parties, and approved by the court, and entered upon the record or roll, shall have the same effect, and be as available in law, as a verdict by twelve men." (act of 1705, 1 sm. laws, 50.)(a)

this act differs essentially from the statute of w. iii., in many respects, but particularly, that to render a report or award, valid and effectual, the former requires, that it be approved by the court; but no such provision is made by the latter, and therefore, awards under rules of court, are conclusive in england, unless some corruption * or other misbehavior *315] in the arbitrators is proved. the courts of equity, indeed, have taken a wider ground, and wherever a plain error appears, either in matter of fact or law, it seems, they will make it an object of inquiry (2 vern. 705; 1 id. 157; 3 atk. 494). from some expressions in the authority, we might presume, that the error must be apparent on the award; but as the chancellor, at the same time, speaks generally, that it must be set forth in the bill for relief, there is, at least, great room to doubt upon the subject.

in pennsylvania, however, since the revolution, as the approbation of the court is made a necessary ingredient in the confirmation of reports, we have thought it our duty, from time to time, to inquire into the allegations against them, before we gave them our sanction. but, in doing this, we have always confined ourselves to two points: 1st, whether there is an evident mistake in matter of fact: or 2d, whether the referees have clearly erred in matter of law.(b) if either of these is satisfactorily proved, the argument is, surely, as strong for setting a report aside, as where injustice has been done by the corruption or other misconduct of the referees.

is it not reasonable, indeed, that the same cause which would induce us to set aside a verdict, and grant a new trial, should be sufficient for vacating an award? in the one case, the decision is made by twelve men, upon oath, with all the information which the judges, and learned counsel can communicate—in the other, it is the act of three persons, who are not sworn to the faithful discharge of their duty, and who are unassisted, either in ascertaining the law, or in developing the fact, upon which the question submitted to them may depend. this abundantly shows that the sacredness of awards ought not to be extended beyond that of verdicts; and must justify the court in putting them upon the same footing, when errors are suggested, either in clear points of law or fact.

if, therefore, we would have granted a new trial, had the present exceptions been made to a verdict, we ought, for the same reasons, to set aside the report in question.

let us, then, consider the case upon its merits. the evidence has failed in establishing the first and second exceptions, which relate to the misconduct.

(a) a fifth species of awards has been created by the act of 20th march 1810 (5 sm. l. 131), which authorizes either party to refer a suit to arbitrators.

(b) this rule has since been recognised in many reported cases. see particularly williams v. paschall, 3 yeates 569; hurst v. hurst, 1 w. c. c. 56; large v. passmore, 5 s. & r. 52.

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of the referees; and with respect to the fourth and fifth, though the court incline to think that the arguments are in favor of the defendant, yet we do not find it necessary to give any opinion upon these, as we have no doubt, that, for the third and sixth reasons, the report ought to be set aside.

Thus, under the third exception, it has been proved by the statement exhibited by the referees, that interest was allowed to the plaintiff upon an unliquidated account; which is contrary to the general rule of law, as well as to the repeated decisions of this court. There are only three cases in which interest can be allowed upon an open account: 1st, where it is payable by the express agreement of the parties: 2d, where it is payable by a general usage, as in the trade between England and America, to which (with an exception during the continuance of the late war) we have uniformly acceded: and 3d, where there has been a vexatious and unreasonable delay in making payment, which will induce the court to direct, and the jury to grant, an adequate compensation, under the name of damages, for which the rate of interest is generally made the rule of computation. The doctrine upon this subject was fully discussed and determined in Henry v. Risk et al., ante, 265.(a) We think it establishes a just and useful principle, which tends equally to promote credit, and to prevent feuds and litigations. In transgressing this principle, the referees have mistaken a clear point of law, which would alone be sufficient for setting aside their report.

But besides this, we find by the evidence, under the sixth exception, that they have also allowed the charge of premium and commission for making an insurance, without requiring the policy to be produced, or any proof of its being lost; which is the only evidence that, in such cases, can be admitted in any court, either of civil or common-law jurisdiction. It is, indeed, a fundamental maxim in the laws of evidence (wisely framed for the prevention of frauds), that the best proof, of which the fact reasonably admits, ought to be given. This has not been complied with on the present occasion; and the referees, in overlooking it, have violated another plain principle of law.

Upon the whole, as our decision against the plaintiff can produce no material injury, but if against the defendant, would for ever preclude him from a chance of justice, the Court unanimously direct—

That the report be set aside.

For the plaintiff, were cited: 5 Bac. 250; 1 Id. 134; 2 Burr. 701; Salk. 71, 73; 3 Burr. 1259; 2 Vern. 705; 1 Id. 157; Bull. N. P. 179, 190; 8 Vin. 61; 1 Atk. 67; 2 Vern. 706; 3 P. Wms. 25, 408; 3 Atk. 509.

For the defendant, were cited: 2 Vern. 515; 1 Atk. 64; 2 Vern. 705; 3 Atk. 494; 3 Burr. 1259; 5 Id. 2729; 1 Ld. Raym. 271; 12 Vin. 25, pl. 35; Cowp. 445; Doug. 627; 1 Show. 173; 1 Salk. 392; Gilb. L. Ev. 4, 5, 16, 17.

(a) See the note to Henry v. Risk, ante, p. 265.
libellous in the depending action; and argued, that, though the liberty of the press was invaluable in its nature, and ought not to be infringed; yet, that its value did not consist in a boundless licentiousness of slander and defamation. He contended, that the profession of Browne, to whom the education of more than a hundred children was sometimes intrusted, exposed him, in a peculiar manner, to be injured by wanton aspersions of his character; and he inferred the necessity of the action, which had been instituted, from this consideration, that if Browne were really the monster which the papers in question described him to be, he ought to be hunted from society; but, that if he had been falsely accused, if he had been maliciously traduced, it was a duty that he owed to himself and to the public to vindicate his reputation, and to call upon the justice of the laws, to punish so gross a violation of truth and decency. For this purpose, he continued, a writ had been issued, and bail was required. The defendant, if not before, was certainly, on the hearing at the judge's chambers, apprised of the cause of action; the order of Mr. Justice Bryan on that occasion, and the appeal to the court, were circumstances perfectly within his knowledge; and yet, while the whole merits of the cause were thus in suspense, he thought proper to address the public in language evidently calculated to excite the popular resentment against Browne; to create doubts and suspicions of the integrity and impartiality of the judges, who must preside upon the trial; and to promote an unmerited compassion in his own favor. He has described himself as the object of former persecutions upon similar principles; he has asserted that, in this instance, an individual is made the instrument of a party to destroy him; and he artfully calls upon his fellow-citizens to interest themselves to preserve the freedom of the press, which he considers as attacked in his person. Nay, in order to cast an odium upon the new government of the United States, he insinuates, that his arrest was purposely protracted until the ratification of nine states had given stability to that system; a falsehood, as unwarrantable as it is insidious; for, it will be proved that this delay took place at his own request, communicated by Col. Proctor.

Col. Proctor, being examined on this point, said, that he, at first, desired the action might not be brought, in hopes of accomplishing a compromise between the parties; that, afterwards, he requested Mr. Lewis to defer issuing the writ until as near the term as it was possible; but that all this interference was of his own accord, and not at the instance of the defendant. He acknowledged, however, that he had informed Oswald, that the commencement of the action would be postponed as long as possible, after having obtained a promise to that effect from Mr. Lewis.

Lewis said, he was very much mistaken, indeed, if Col. Proctor had not mentioned the request as coming from the defendant; and Col. Proctor answered, "if ever I told you so, he certainly sent me; but I cannot remember that he ever asked me to do a thing of the kind."

Lewis then added, that the address to the public manifestly tended to interrupt the course of justice; it was an attempt to prejudice the minds of the people in a cause then depending, and, by that means, to defeat the plaintiff's claim to justice, and to stigmatize the judges, whose duty it was to administer the laws. There could be no doubt, therefore, that it amounted to a contempt of the court; and it only remained, in support of his motion, to
country, and among an enlightened people? Let every honest man make this appeal to his heart and understanding, and the answer must be—no!

What then is the meaning of the bill of rights, and constitution of Pennsylvania, when they declare, "That the freedom of the press shall not be restrained," (a) and "that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of the government?" (b) However ingenuity may torture the expressions, there can be little doubt of the just sense of these sections; they give to every citizen a right of investigating the conduct of those who are intrusted with the public business; and they effectually preclude any attempt to fetter the press by the institution of a licenser. The same principles were settled in England, so far back as the reign of William III., and since that time, we all know, there has been the freest animadversion upon the conduct of the ministers of that nation. But is there anything in the language of the constitution (much less in its spirit and intention) which authorizes one man to impute crimes to another, for which the law has provided the mode of trial, and the degree of punishment? Can it be presumed, that the slanderous words, which, when spoken to a few individuals, would expose the speaker to punishment, become sacred, by the authority of the constitution, when delivered to the public through the more permanent and diffusive medium of the press? Or, will it be said, that the constitutional right to examine the proceedings of government, extends to warrant an anticipation of the acts of the legislature, or the judgments of the court? and not only to authorize a candid commentary upon what has been done, but to permit every endeavor to bias and intimidate with respect to matters still in suspense? The futility of any attempt to establish a construction of this sort, must be obvious to every intelligent mind. (The true liberty of the press is amply secured by permitting every man to publish his opinion; but it is due to the peace and dignity of society, to inquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity."

If, then, the liberty of the press is regulated by any just principle, there can be little doubt, that he who attempts to raise a prejudice against his antagonist, in the minds of those that must ultimately determine the dispute between them; who, for that purpose, represents himself as a persecuted man, and asserts that his judges are influenced by passion and prejudice—wilfully seeks to corrupt the source, and to dishonor the administration of justice."

Such is evidently the object and tendency of Mr. Oswald's address to the public. Nor can that artifice prevail, which insinuates that the decision of this court will be the effect of personal resentment; for, if it could, every man could evade the punishment due to his offences, by first pouring a torrent of abuse upon his judges, and then asserting that they act from passion,

(a) Declar. of Rights, § 12.
(b) Const. of Penn. of 1776, § 35.

opinion respecting the punishment. I cannot surely be suspected of partiality to libellers; I have had my share of their malevolence. But it is true, I have not suffered much; for these trifles do not rankle in my mind.

The Chief Justice pronounced the judgment of the court in the following words:

McKeen, Chief Justice.—Eleazer Oswald: Having yesterday considered the charge against you, we were unanimously of opinion, that it amounted to a contempt of the court. Some doubts were suggested, whether, even a contempt of the court was punishable by attachment; but, not only my brethren and myself, but, likewise, all the judges of England, think, that without this power, no court could possibly exist—nay, that no contempt could, indeed, be committed against us, we should be so truly contemptible. The law upon the subject is of immemorial antiquity; and there is not any period when it can be said to have ceased or discontinued. On this point, therefore, we entertain no doubt.

But some difficulty has arisen with respect to our sentence; for, on the one hand, we have been informed of your circumstances, and on the other, we have seen your conduct; your circumstances are small, but your offence is great and persisted in. Since, however, the question seems to resolve itself into this, whether you shall bend to the law, or the law shall bend to you, it is our duty to determine that the former shall be the case.

Upon the whole, therefore, the Court pronounce this sentence:—That you pay a fine of 10l. to the commonwealth; that you be imprisoned for the space of one month, that is, from the 15th day of July to the 15th day of August next; and afterwards, until the fine and costs are paid. Sheriff, he is in your custody.

(a) In Repubica v. Passmore, 3 Yeates 438, it was held, that a publication, attempting to prejudice the public mind on the merits of a suit pending at court, was punishable by attachment; and the defendant in that case was sentenced to fine and imprisonment. The power of the courts to punish in a summary way, for what are called constructive contempts, has since been taken away by the act of 19th April 1809 (6 Sm. L. 55), which restricts their power of summary punishment, to cases of "official misconduct of the officers of the courts, to the negligence or disobedience of officers, parties, jurors or witnesses, against the lawful process of the court, and to the misbehavior of any person in the presence of the court, obstructing the administration of justice." The act, however, declares that publications tending to bias the public mind respecting any question depending in court, may be punished by indictment, or by a civil action.

(b) The sentence on the point of imprisonment, was entered upon the record for the space of one month, without taking notice of the explanatory words used by the court. At the expiration of the legal month (28 days), Mr. Oswald demanded his discharge; but with this, the sheriff, who had heard the sentence pronounced, refused to comply, until he had consulted the Chief Justice. If his honor, remembering the meaning and words of the court, told this officer, at first, that he was bound to detain his prisoner until the morning of the 15th of August; but, having shortly afterwards examined the record, he wrote to the sheriff, that Mr. Oswald, agreeable to the entry there, was entitled to his discharge.

On the 5th of September 1788, Mr. Oswald presented a memorial to the General As-

¹ The case of Repubica v. Passmore led to an impeachment of the judges of the Supreme Court, on which they were acquitted. See Trial of the Judges, which contains an exhaustive review of the prior authorities on the question of contempts.
SUPREME COURT

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On the second point, he engaged in a long and ingenious disquisition upon the nature of what is called the liberty of the press; he represented the shackles which had been imposed upon it during the arbitrary periods of the English government; and thence deduced the wisdom and propriety of the precaution, which declares, in the bill of rights, that the press shall not be subject to restraint. He gave an historical narrative of the British acts of parliament and proclamations, which debarred every man of the right of publication, without a previous license obtained from officers established by the government to inspect and pronounce upon every literary performance; but observed, that this oppression (which was intended to keep the people in a slavish ignorance of the conduct of their rulers) expired in the year 1694, when the dawn of true freedom rose upon that nation. 9 vol. Stat. at Large, p. 100. Since that memorable period, the liberty of the press has stood on a firm and rational basis. On the one hand, it is not subject to the tyranny of previous restraints, and on the other, it affords no sanction to ribaldry and slander—so true it is, that to censure the licentiousness, is to maintain the liberty of the press. 4 Black. Com. 150, 151, 152. Here, then, is to be discerned the genuine meaning of this section in the bill of rights, which an opposite construction would prostitute to the most ignoble purposes. Every man may publish what he pleases; but it is at his peril, if he publishes anything which violates the rights of another, or interrupts the peace and order of society—as every man may keep poisons in his closet, but who will assert that he may vend them to the public for cordials? If, indeed, this section of the bill of rights had not circumscribed the authority of the legislature, this house, being a single branch, might, in a despotic paroxysm, revive all the odious restraints which disgraced the early annals of the British government. Hence, arises the great fundamental advantage of the provision, which the authors of the constitution have wisely interwoven with our political system; not, it appears, to tolerate and indulge the passions and animosities of individuals, but effectually to protect the citizens from the encroachments of men in power.

It has been asserted, however, that Mr. Oswald's address was of a harmless texture; that it was no abuse of the right of publication, to which, as a citizen, he was entitled; and, in short, that in considering it as a contempt of the court, the judges have acted tyrannically, illegally and unconstitutionally. But let us divest the subject of these high-sounding epithets, and the reverse of this assertion will be evident to every candid and unprejudiced mind: for such publications are certainly calculated to draw the administration of justice from the proper tribunals; and in their place to substitute newspaper altercations, in which the most skilful writer will generally prevail against all the merits of the case. But it is moreover the duty of the judges to protect suitors, not only from personal violence, but from insidious attempts to undermine their claims to law and justice. Hence, Lord Chancellor Hardwicke (who was an ornament to his country, and not one of whose decrees, during the period of twenty years which he sat as Chancellor, was ever reversed) has described three sorts of contempts—1st, Scandalizing the court itself: 2d, Abusing parties who are concerned in causes there; and 3d, Prejudicing mankind against persons, before the cause is heard. 2 Atk. 471. And in 2 Vesey 620, though no reflection was cast upon the court, and the offender pleaded ignorance of the law, yet, it is expressly laid down, that ignorance was not an excuse, and that the reason for punishing was, not only for the sake of the party injured, but also for the sake of the public proceedings in the court, to hinder such advertisements, which tend to prepossess people as to those proceedings. A similar doctrine is maintained in 1 P. Wms. 675. And 4 Black. Com. 282, pronounces the printing, even true accounts of a cause depending in judgment, to be a contempt of the court.

But it has been said, that this cause was not depending in court, when the offence was committed, because the address was published on the first of July, and the writ against Mr. Oswald was not returnable until the succeeding day. This idea originates in an ignorance of the constitution of our courts, which, in this respect, differs essentially from the constitution of the courts of England. There, all original process issues out of the court of Chancery, and is made returnable into the King's Bench or Common Pleas; so that, in truth, the writ gives the jurisdiction, and of course, until it is returned, the
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thought it impracticable at this day to ascertain its source; but insisted, that enough appeared, to prove it to be of immemorial usage, and a part of the law of the land.

He then adverted to the leading objection made by the advocates for Mr. Oswald, that, however the process of attachment might be legal in England, it was not so in Pennsylvania. From a decision in the time of Judge Kinsey, he showed, that, before the revolution, an attachment had issued for a contempt, and that the party had, in fact, answered certain interrogatories filed by order of the court; so that, it only remained to inquire whether any alteration had been introduced by the constitution of the state. In the 24th sect. of that instrument, it is declared, that, "the supreme court, and the several courts of common pleas of this commonwealth shall, besides the powers usually exercised by such courts, have the powers of a court of chancery, so far as relates, &c." Now, as it appears by the case which occurred while Mr. Kinsey was chief justice, that the power of issuing attachments was usually exercised by the supreme court, so far from altering the law, this is a direct confirmation of the jurisdiction of the court; for the greater naturally includes the less; and if the court is vested with all its former powers, by what possible construction can we deprive it of this? But it is answered, that a section in the bill of rights provides, that "in all prosecutions for criminal offences, the trial shall be by jury, &c." True, but the whole system must be taken together; or, if we examine a particular part, it must be with a recollection of the immediate subject to which that part relates. For otherwise, this very section might as properly be brought to prove, that the judges could not be impeached (since surely that is not a trial by jury), as that they have not the power of issuing attachments. All cases proper for a trial by jury, the bill of rights clearly meant to refer to that tribunal; but can anything more explicitly demonstrate, that the framers of the constitution were aware of some cases, which required another mode of proceeding, than their declaration, that "trials shall be by jury as heretofore?"—Who will assert that contemptes were ever so tried? who will hazard an opinion, that it is possible so to try them?

But does not the constitution of Pennsylvania further distinguish between the laws of the land, and the judgment of our peers; furnishing a striking alternative, by the disjunctive particle or? This very sentiment, expressed in the same words, appears in the Magna Charta of England; and yet Blackstone unequivocally informs us, that the process of attachment was confirmed by that celebrated instrument. In the 14 chap. of Magna Charta, it is also said, that "no amercement shall be assessed, but by lawful men of the vicinage;" and who, that is at all acquainted with the law, or with the reason of the law, can think it possible, in that case, to pursue the generality of the expression?

From these analogous principles, therefore, and the construction of ages, we may safely argue on the present occasion. But the wild and hypothetical interpretations which some men have offered, would inevitably involve us in a labyrinth of error, and eventually endanger that liberty, which they profess, and every honest citizen must wish, to preserve.

As to the manner of proceeding upon the attachment, the court on this occasion have followed the precedent in Moseley's Rep. 250, where it is liberally said, that the defendant shall not be permitted to be examined to bring himself into contempt; but upon proof of the contempt, he shall be allowed to purge himself upon his oath.

Upon the whole, Mr. Lewis concluded, that the only grounds of impeachment, were bribery, corruption, gross partiality, or wilful and arbitrary oppression; and that as none of these had been proved, Mr. Oswald's memorial ought to be dismissed. He said, indeed, that it would be preferable to return to the state of nature, than to live in a state of society upon the terms that memorial presented—terms, which left the weak and the innocent a prey to the powerful and the wicked; and which gave to falsehood and licentiousness, all that was due to freedom and to truth.

When Mr. Lewis's argument was closed, Mr. Findley, a member from Westmoreland, rose, and delivered his sentiments, with great ability and precision. He acknowledged, that he had received great information and pleasure from the learned and eloquent
penses, which the latter cannot recover. This distinction, however, does not apply to the case of partners in trade; for one partner, though charged as a receiver, is entitled to every just allowance against the other.

Nor does the verdict of the jury affect the principles of the settlement; for, suppose, I engage in trade with another man, and pay into his hands 1000£, as my share of the stock; if, afterwards, I bring an action of account, render against him, and the jury find the receipt of this money; such finding does not surely fix the sum for which he shall be responsible to me, but the auditors will, nevertheless, on the one hand, allow me a proportion of any profits which have been accumulated; or, on the other hand, charge me with a proportion of any losses or expenses that may have happened in our joint negotiations. Co. Litt. 172, § 259. (a)

**Butcher v. Coats.**

*Costs of an attachment.*

Two witnesses, who had been duly served with a *subpoena*, were brought before the court upon an attachment; but having satisfactorily proved, that they were so much indisposed, as to be utterly incapable of attending in obedience to the *subpoena*, they were discharged. And—

**By the Court.**—As we do not find these persons in contempt, the costs of the attachment must abide the event of the suit. (b)

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(a) See Griffith v. Willing, 3 Binn. 317; Irvine v. Hanlon, 10 S. & R. 220; Whelen v. Watmough, 15 Id. 168; Gratz v. Phillips, 5 Binn. 568; Crousillat v. McCall, 5 Id. 433; s. c. 3 S. & R. 7.

(b) See Thomas v. Cummings, 1 Yeates 60.
wall, until the second house is built; and even then, it is frequently delayed for several years; so that it must necessarily be inferred, that the usage extends to make the purchaser of the second house, as liable as the person who built it, for the moiety of the partition; of which, indeed, all the positive evidence has been given, that the nature of the case affords.

For the defendant, two points were made: 1st. That the action could not be maintained at common law: And 2d. That it was not authorized by the act of assembly.

1. On the first point, it was observed, that bonâ fide purchasers for a valuable consideration are highly favored in law (2 Black. Com. 247); and of these, purchasers under an execution are the most esteemed; insomuch that if the execution is afterwards set aside for irregularity, they shall nevertheless hold the lands. 2 Bac. Abr. 370. (1 Sm. L. 61.) Pursuing this regard for honest purchasers, if a trustee sells trusts lands for a valuable consideration, without giving notice of the trust, the law declares that the buyer shall hold the lands discharged (Cas. Temp. Tabl. 260); and even if a man purchases for a valuable consideration, with notice of a settlement, from one who bought without notice, he shall shelter himself under the first purchaser. 1 Atk. 571. The defendant is a bonâ fide purchaser under an execution, for a valuable consideration, without notice of the plaintiff's demand: he is, therefore, in all respects, within the benefit of these authorities, and ought not to be made responsible for the negligence of the plaintiff, who had it in his power to recover from the original owner of the house, who knew of the sales, who never gave notice of his claim, at the times of sale, and who has suffered so long a period to elapse, before he made a demand, as to justify a presumption, that, whatever was due, has been paid. Cowp. 100. If, indeed, a man will stand by, at the time of sale, and not disclose his lien, the law deems him guilty of a fraud, and postpones his right to that of the purchaser. 2 Atk. 83; Gilb. Eq. Rep. 85; 1 Ves. 94. In the present case, particularly, it would be highly dangerous, if the rule were otherwise; for there is no record, as in the cases of mortgages and judgments, to which a man can refer in order to ascertain the incumbrances that will thus affect his purchase; nor is there any means by which a remote purchaser can show that the lien has been discharged by his predecessors.

It is evident, then, that a lien of this kind can only be created by the operation of law, or the act of the parties. It is not pretended, that the defendant is liable from his own act; for he neither built the house, nor assumed to pay the money; and when the plaintiff would avail himself of a usage, it is incumbent upon him to make strict proof of its existence; which he has failed in doing upon this occasion—whatever might be the effect of the testimony, as between Ingles and Waters, the original builders of the houses, to whom alone it has any relation.

2. Nor, on the second point, is the action authorised by the act of assembly. The words relating to this controversy are, that "the first builder shall be reimbursed one moiety of the charge of the party-wall, or for so much as the next builder shall have occasion to make use of, before he shall in any wise use or break into the said wall, &c." Here, then, is the remedy which, by operation of law, is given to the first builder: and when a statute gives a new remedy, the party must take it on the terms of the act. 2 Burr.
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WALTON v. WILLIS.

Partition in the Orphans' Court.

Under the act of 1764, the eldest son of the eldest son of an intestate was held to be entitled to an estate which could not be divided, at the valuation, in the same manner as his father. A decree of the orphans' court, on a partition of an intestate's estate, was set aside, because there was no provision made for a tenant by the curtesy. The fee of an estate, adjudged to the heir-at-law, does not vest in him, until he has paid or secured the shares of the valuation money, to those entitled to it.

This was an appeal from the Orphans' Court of the county of Philadelphia. It was argued in January term, by Levy and Tulghman, for the appellant; and Sergeant and Ingersoll, for the appellee. And now, the Chief Justice stated the case, and delivered the opinion of the court, in the following manner.

McKea, Chief Justice.—Elizabeth Willis being seised of a messuage and lot of land in the city of Philadelphia, with the appurtenances, died intestate, leaving issue, a daughter named Elizabeth, who had intermarried with Samuel Walton, the appellant, and by him had issue, two sons, Joseph and Boaz; and four grandchildren, to wit, Thomas, the respondent, Solomon, Musgrove and Rebecca, being the children of her son Solomon Willis, deceased, who had died before her, intestate. The daughter, Elizabeth Walton, died after her mother, and her husband, the appellant, and their two children, before named, survived her. Thomas Willis, the respondent, applied by petition to the Orphans' Court of the county of Philadelphia, held on the 1st of April 1782, for a partition of the premises; or, if they could not be divided, without prejudice to, or spoiling the whole estate, that a valuation thereof might be made, agreeable to the directions of the acts of assembly in such case made and provided. An inquest was accordingly had, and a return made, that the premises could not be divided, without prejudice to, or spoiling the whole, and valuing the same at 358l. This return was confirmed by the court, on the 10th of June 1782, and the premises were adjudged to, and accepted by Thomas Willis, the respondent, at the above valuation; and for securing the payment of that sum, in due proportions, to the other grandchildren, he offered to the court two sureties, who were approved of, and directed to give bonds in the office of the clerk.
Hart v. James.

On a rule to show cause why the writ should not be quashed, Moylan contended, that foreign attachments might be laid in any hands whatsoever; that, in England, they issued out of an inferior court, and, therefore, could not call money from a superior jurisdiction; but that this reason, which governed all the adverse cases determined there, did not apply under the law or practice of Pennsylvania.

Cox, in support of the rule, observed, that there are many instances where attachments would not lie, besides the one mentioned by his opponent. A debt due by recovery on record, cannot be attached; nor goods levied in execution by fieri facias (Com. Dig. 424); nor property of a sovereign state (Nathan v. Virginia, ante, p. 77, in note). But he contended, that the mischief would be intolerable, if the effects of one suit could be thus drawn into perpetual litigation by another.

BY THE COURT.—The money is to be considered in the same state, as if it had been paid into the hands of the sheriff. If a proceeding of this kind were allowed, there could be no end to suits. We are unanimously of opinion, that the foreign attachment has issued irregularly, and ought to be quashed.

The rule made absolute. (a)

Hart et al. v. James. Two Actions.

Reference.

Referees have no power to consolidate.

Where referees had made one report, in two several actions referred to them, on promissory notes, and afterwards filed a supplementary report, distinguishing the sums found in each action, the court set aside both reports.

Where referees were to report to the next term, it was held, that the agreement did not authorise the issuing an execution, upon a report into office, during vacation; although a term had intervened between the entering the rule, and the appointment of referees.

These actions were brought upon three promissory notes, two of which (included in one declaration) had been indorsed to the bank; and the third was in the possession of Messrs. Hartshorne & Large, as a collateral security from the plaintiffs, for the payment of a debt amounting to nearly the sum mentioned in the note. In both actions, judgment had been entered, generally, on the 28th day of April 1788, with an agreement in each, that the quantum should be ascertained by a reference, and a report made to next term. The referees, however, were not appointed until the 8th of July 1738, six days after the commencement of the term, and they made no report until the 5th of August following; when one report was made in favor of the plaintiffs, for one sum, including what was due in both actions. On

(a) In McCarty v. Emlen, 2 Yeates 190, s. c. Dall. 277, it was held, that a debt in suit might be attached in the hands of the defendant in the suit. C. J. McKean, however, in the course of his opinion, recognised the case in the text, as one in which an attachment would not lie. 1

1 So, the proceeds of an execution, in the hands of the sheriff, cannot be attached. Fritz v. Heller, 2 W. & S. 397; Taylor v. Hume, 4 Id. 407; Bentley v. Clegg, 1 Clark 411; a. v. Crossen v. McAllister, Id. 357.
for the loss; and the authority of the comptroller-general was intended, and has always been understood, to be competent for granting the satisfaction which is now claimed.

The Chief Justice, after stating the case, delivered the opinion of the court as follows:

McKEAN, Chief Justice.—On the circumstances of this case, two points arise: 1st, Whether the appellant ought to receive any compensation, or not? And 2d, Whether this court can grant the relief which is claimed?

Upon the first point, we are to be governed by reason, by the law of nations, and by precedents analogous to the subject before us. The transaction, it must be remembered, happened flagrante bello; and many things are lawful in that season, which would not be permitted in a time of peace. The seizure of the property in question, can, indeed, only be justified under this distinction; for, otherwise, it would clearly have been a trespass; which, from the very nature of the term, transgression, imports to go beyond what is right. 5 Bac. Abr. 150. It is a rule, however, that it is better to suffer a private mischief, than a public inconvenience; and the rights of necessity, form a part of our law.

*363] Of this principle, there are many striking illustrations. If a road be out of repair, a passenger may lawfully go through a private enclosure. 2 Black. Com. 36. So, if a man is assaulted, he may fly through another’s close. 5 Bac. Abr. 173. In time of war, bulwarks may be built on private ground (Dyer 8; Brook., Trespass, 213; 5 Bac. Abr. 175); and the reason assigned is particularly applicable to the present case, because it is for the public safety (20 Vin. Abr., Trespass, B. a, § 4, fo. 476). Thus, also, every man may, of common right, justify the going of his servants or horses, upon the banks of navigable rivers, for towing barges, &c., to whomsoever the right of the soil belongs. 1 Ld. Raym. 725. The pursuit of foxes through another’s ground is allowed, because the destruction of such animals is for the public good. 2 Buls. 62; Cro. Jac. 321. And, as the safety of the people is a law above all others, it is lawful to part affrayers, in the house of another man. Kelyng 40; 5 Bac. Abr. 177; 20 Vin. Abr. fo. 407, § 14. Houses may be razed, to prevent the spreading of fire, because for the public good. Dyer 30; Rud. L. and Eq. 312; See Puff. lib. 2; c. 6, § 8; Hutch. Mor. Philos. lib. 2, c. 10. We find, indeed, a memorable instance of folly recorded in the 3 vol. of Clarendon’s History, where it is mentioned, that the Lord Mayor of London, in 1660, when that city was on fire, would not give directions for, nor consent to, the pulling down forty wooden houses, or to the removing the furniture, &c., belonging to the lawyers of the temple, then on the circuit, for fear he should be answerable for a trespass; and in consequence of this conduct, half that great city was burnt.

We are clearly of opinion, that congress might lawfully direct the removal of any articles that were necessary to the maintenance of the continental army, or useful to the enemy, and in danger of falling into their hands; for they were vested with the powers of peace and war, to which this was a natural and necessary incident: and having done it lawfully, there is nothing in the circumstances of the case, which, we think, entitles the appellant to a compensation for the consequent loss.

With respect to the second point: This court has authority to confirm
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or alter any proceedings that come properly before the comptroller-general; but if he had no jurisdiction, we can have none. It appears, then, that his power is expressly limited to claims "for services performed, moneys advanced, or articles furnished," by order of the legislature, or the executive council. And, as he has no right to adjudge a compensation from the state for damages, which individuals may have suffered in the course of our military operations, we are of opinion, that we could grant no relief, even if the appellant was entitled to it.

By the Court.—Let the rule be discharged; and the judgment for the commonwealth be made absolute.
that the court will refuse an attachment for that part. Yet, as the plaintiff in the present case would receive the benefit of what the defendant has done in taking up the security, we should certainly think it equitable, that he should abate so much out of the money to be recovered, and upon application would oblige him to do it; and, in general, see that the report was carried into execution, in all its parts, agreeable to the intent of the referees, and the justice of the case.

We, therefore, confirm the report. (a)

GORGERAT et al. v. MCCARTY.

Bankruptcy.—Bail.

Where one who had declared himself bankrupt according to the law of France, but had not received a conclusive discharge, was arrested in Pennsylvania, by one of the creditors, who had proved and registered his debt in the French court, it was held, that he was not entitled to be discharged on common bail.

On a rule to show cause why the defendant should not be discharged on common bail, McCarty stated in his deposition, that, being considerably embarrassed, he had, according to the laws of France, declared himself a bankrupt, by filing a statement of his debts and credits, and delivering all his books and papers into the consular court of L'Orient, for the benefit of his creditors; the principal part of whom, in consequence of this surrender, had met together, appointed trustees or syndics, in the usual form, and then granted him a letter of license, for three years, together with a power of attorney, to collect his outstanding debts in America, in order to remit the same for their use; stipulating, however, that he should return to France within one year from the time of his departure. The plaintiff, among others, had proved and registered his debt in the consular court; and it was agreed by the counsel for both parties, that, on a surrender of this description, if three-fourths in value of the creditors had consented to the defendant's discharge, the agreement or composition by them signed, being homologated, that is to say, recorded and confirmed by the court of parliament (which is a matter of course, unless fraud is shown), became, by the lex loci, obligatory upon the non-subscribing creditors.

Ingersoll, in support of the rule, contended, that it was settled by the decisions in Millar v. Hall (ante, 229) and Thompson v. Young (ante, 294), that a discharge under the laws of one country, operated as such in every other; and he offered to prove, by the testimony of the defendant himself, that three-fourths in value (the deposition only stating that the principal part) of the creditors had agreed to the composition at L'Orient; observing, that, if this would be sufficient to induce the court to order an exoneretur, after judgment, it would also be sufficient to induce them to discharge the defendant, in the present stage of the cause.

Du Ponceau, having read a positive affidavit of a subsisting debt, op-

(a) See Blackburn v. Markle, 6 Binn. 174; s. c. 12 S. & R. 148; Nicholas v. Wolfersberger, 5 Id. 167.

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This construction accords with the case cited in support of the motion out of 1 Peere Wms. 737. The principle of that case, so far as respects the present purpose, is this, that where there is a prior judgment, and afterwards a sale of the land, and then a bankruptcy, the purchaser holds the land subject to the prior lien, which must be for this plain reason, that in that case there was no possibility that the creditors of the bankrupt could be prejudiced by it, the land being actually sold before the bankruptcy, and never vested in the commissioners; and, consequently, there was no lien as to them, it could only subsist against the purchaser, and was not at all affected by the bankrupt laws, as it was indifferent to the creditors, whether it subsisted or not.

In the present case, there has been no act of the party, previous to the bankruptcy, to prevent the vesting of the estate in the commissioners; and, consequently, all liens, if they operate at all, must operate to their prejudice; which is contrary to the express intent of the act, which directs that they shall take the estate, subject only to the claims of such judgment-creditors who had levied their executions upon it. For, if any judgment-creditor, who has no execution, under the idea of his having a prior lien, could have the benefit of the execution transferred to him, then not only that creditor, but all the prior judgment-creditors must be satisfied, before the commissioners could take anything to divide among the general creditors, as they would all have an equal right with him.

It is said, that, although the court should order the prior judgment-creditor to be first paid, there would be no injury done to the other creditors, because the commissioners might recover the money from him, if he was not entitled to it. Whether they could, or could not, recover it from him, will, I think, make no material difference as to the present motion. It must, however, be observed, that, if he can claim this money at all, it must be under the execution, and as execution-creditors are saved, it would be very questionable, whether the commissioners could recover it from him. If they could not, then the creditors at large must be postponed to him and the other judgment-creditors—if they could recover it, then, it would not only be a vain thing to order the money into his hands, as he must, by a circuity of action, be obliged to refund it, but it would, in fact, be ordering it into the hands of a person not entitled to receive it; and the consequence would be, that the real execution-creditor, whose claim is saved by the act, would infallibly be cut out of his preference.

Whether this is, or is not, a bona fide debt, is not the subject of our present inquiry. If any fraud could be proved, this court would certainly, on motion, set aside both the execution and the judgment, but that could not be for the benefit of the prior judgment-creditor, whose claim is founded upon the execution; but for the benefit of the creditors at large, under the commission; who may still have a remedy by action, if they can show the execution to have been collusive and unfair.

The only question, however, now before us, is whether a prior judgment-creditor shall come in under this execution, which, we think, he cannot, as it would defeat the express intent of the bankrupt law. (a)

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(a) See Ralston v. Bell, 2 Dall. 158; White v. Hamilton, 1 Yeates 188.
Elliot v. Elliot.

Upon the whole, we are of opinion, that the refusing to admit the defendant in the attachment to produce his evidence before the jury of inquiry, is not a sufficient reason for setting aside the inquisition. (a) Rule discharged.

Penrose v. Hart.

Application of payments.

Mode of applying partial payments on a bond bearing interest.

On a rule to show cause why the judgment confessed by warrant of attorney in this case should not be opened, Fisher stated, that several partial payments had been made by the defendant, which the plaintiff had applied first to the discharge of the arrearages of the interest; whereas, he insisted, that it ought first to have been deducted from the principal debt. But—

Shippen, President, said, that the practice had been otherwise; and he thought with great reason and propriety. He remembered to have heard of an old decision when Logan was Chief Justice, in which it was expressly settled, that money paid on account of a bond, should first be applied to discharge the interest due at the time of the payment, and the residue, if any, credited toward satisfaction of the principal. By this rule, the gentlemen of the bar had uniformly governed their calculations, before the revolution.

Lewis, for the plaintiff, insisted, that the practice was the same at the present day, and appealed to the attorneys in court, who confirmed his assertion. (b)

Oneil v. Chew.

Foreign attachment.—Sale of chargeable property.

Foreign attachment. The defendant's interest being attached in a shallop, Levy, after filing a positive affidavit of the debt, moved, at the first term, that the shallop might be sold, as a chargeable commodity: And the motion was accordingly granted.

Elliot v. Elliot.

Amendment.

There was an agreement filed in this action, to refer the matter in dispute to one Lewis; but in the official rule, by mistake of the clerk, the name inserted was Lewis.

After report, Sergeant moved to amend the rule, by the agreement filed: and leave was accordingly given.

(a) See Moore v. Hess, 4 Yeates 201.
(b) See Tracy v. Wikoff, ante, p. 124 and the cases there cited.

1 James Logan was appointed Chief Justice of Pennsylvania, by Lieutenant-governor Gordon, on the 10th of August 1731. 3 Colonial Records, 412. He resigned on the 6th August 1739, and was succeeded by Jeremiah Langhorn, 4 Id. 348.
was an object of the act, by being a trader, and having committed an act of bankruptcy.

What then was the alteration introduced by the 5 Geo. II., c. 30? It had been found very inconvenient to compel a bankrupt, as often as he was sued, to enter into a proof of all the circumstances which had already been proved before the commissioners: this statute, therefore, enacted, that "the certificate should be sufficient evidence of the trading, bankruptcy, commission, \&c., and here, \textit{ex vi termini}, we must infer that this was not the case before, as the word \textit{sufficient} naturally respects what had been hitherto \textit{insufficient}. The statute, however, does not declare, that the certificate shall be *incontrovertible, or conclusive evidence, but, in rendering it sufficient evidence of certain facts, which the bankrupt was before under the necessity of establishing by specific proofs, it has merely transferred the burden from him to the creditor, with whom it now lies to prove, according to the terms of our act of assembly, that the certificate was unfairly obtained.

That the certificate was unfairly obtained, is, indeed, an expression attended with some ambiguity; but it must have respect to the subject-matter, which was the trading, bankruptcy, commission, \&c. And if a man had not been a trader, or, if he had not committed an act of bankruptcy, it was \textit{unfair} to grant him a certificate: so that \textit{unfair} is tantamount to \textit{illegal}; holding equally with the converse of the proposition, that a certificate illegally, must be unfairly obtained.

If the parliament of England intended to make so essential a change in the bankrupt system, as to leave the proceedings of the commissioners without control or appeal, it would be strange, that no stronger, no clearer expression, was employed for that purpose; and, if such was indeed their sense, it must appear still more strange, that the courts of law have been so far from understanding it, that in every case, since the passing of the statute, they have permitted the same investigation which was before allowed. In Cowp. 823 (\textit{Martin v. O'Hara}), it appears, that a bankrupt, having obtained a certificate under a second commission, pending a former one, under which a certificate had been refused, an application was made for an \textit{exonereatur} to be entered on the bail-piece; but the judges pronounced the second commission to be absolutely void, and discharged the rule to show cause. Now, if the certificate were conclusive, this decision was illegal; for the certificate is as much evidence of the commission, as of the trading and bankruptcy; and its validity was a question equally before the commissioners, whose sanction it had received.

It is clear, therefore, in every view, from the words of the law, and from judicial interpretations of its meaning, that the legislature has only made the certificate evidence; and the nature of evidence necessarily implies an adverse right to controvert and repel. A foreign judgment is allowed to be \textit{prima facie} evidence of a debt, and yet it was adjudged to be open to examination; for as I have already hinted, although some kinds of evidence are stronger than other kinds, yet, in that respect, they are all placed on the same footing. \textit{Walker v. Witter}, Doug. 1.

But there is a general consideration, independently of the act of assembly and the authorities; which is, that the matters determined by the commissioners are certainly matters of law, arising from the facts; as, what
having a †a. sa. against all four, at the suit of Rose & Dickens, had made inquiries for Smith and Goodwin, at the place where Meng kept his store in Philadelphia, and at the ferry-house from which they usually crossed to New Jersey, but could not find them; that they had requested the ferryman to keep a boat in readiness for them, for fear of a writ being issued against them; that the ferryman, observing the approach of the sheriff's officer, gave them notice; that, thereupon, they concealed themselves in the ferry-house, saying, that they did not like to go to jail, but would be able to pay all their debts; and that, soon afterwards, they crossed the river to elude the pursuit of the officer.

On these facts, the plaintiff's counsel contended: 1st. That the debt of the petitioning creditor was not within the bankrupt law, which provides, that the debt, on which the commission issues, "shall have arisen upon a contract or transaction subsequent to the passing of the act." (3 State Laws, 644, § 3.) But here the bond could be given for no other purpose than to make the defendants bankrupts; and although it may extinguish, it cannot change the original nature of the debt. The doctrine of extinguishment at common law, is, indeed, more limited than the adverse counsel will admit; for although a security of a superior nature will alter the remedy, the debt itself remains. 0 Co. 44; 1 T. Rep. 17; Barn. 81; 2 Str. 1042; Cases temp. Hardw. 267. And the doctrine which applies in the last case to support the commission there, applies to prove the invalidity of the one at present in controversy. Besides, an act between obligor and obligee, that tends to the injury of other persons, the law deems a fraud, by which, so far, at least, it is vitiated and annulled. 1 Burr. 474; 3 Co. 80. The bond of the petitioning creditor, therefore, taken in every point of view, was insufficient to found a commission; for, whether it was given without a consideration, or in consideration of a precedent debt, it is equally contrary to the act; and if it is regarded as a fraudulent collusion between the petitioning creditor and the bankrupts, although it may be obligatory upon them, it is void as to a third person. See 1 Term Rep. 406; Doug. 282.

2. The petition and affidavit of Rose alone, notwithstanding it is said to be on behalf of himself and his partner Dickens, was also irregular and illegal. There are, perhaps, no express decisions on this point; but upon general principles, he who acts for another must show his authority; and in the case of partners, for a purpose of this nature, all must subscribe the petition or delegate an express power to another for doing it in their name; a point already determined in this court, in the case of Gerard v. Basse et al. (ante, p. 119). This is not an act that can be in contemplation in the business of a partnership; and the reason is the stronger against allowing it, *386] *as a bond must be given by the petitioning creditor. 3 State Laws, 644, § 3.

3. But the commission itself had issued erroneously and illegally; for the defendants were not partners, at the time it issued; and a joint commission can only issue against partners. The assignment of the 25th of June 1785, divested all their partnership stock, and, consequently, dissolved their joint connection; for partnerships may be dissolved by tokens, &c., or, they necessarily cease with the objects of their institution. 1 Domat, lib. 1, tit. 8, par. 10, 11, § 5, p. 155. But although there was no forma dis-
in a foreign port, then, indeed, a similitude arises between the cases, and the
master is as liable for those repairs, as for the wages of his sailors, because
the workmen, as well as the sailors, are, in the latter instance, employed by
him, and equally subject to his control and dismissal.

The opinion of the court was, conclusively, that, if the mate had served
on board the vessel, the master's having admitted him to do so, rendered
him liable for the payment of the wages.

And the jury, accordingly, found a verdict for the plaintiff. (a)

CAMP v. LOCKWOOD.

Confiscation.

Where the estate, real and personal, of an inhabitant of Connecticut, had been confiscated, by
virtue of a law of that state, on account of his adhering to the enemy, and a suit was brought
by him, in Pennsylvania, after the peace, to recover a debt due by a citizen of Connecticut,
residing in this state, at the time of the suit, it was held, that the action was not maintainable
in the courts of this state.

The plaintiff and defendant had both been inhabitants of Connecticut,
previous to the revolution, when the debt for which this action is brought,
was alleged to be contracted, and continued so, for some time after
the commencement of the war. Subsequent, however, to the declara-
tion of independence, the plaintiff joined the British army, and on the return
of peace, he removed, with other loyalists, to Halifax, where he continues to
reside. On the second Thursday of May, in the year 1778, the legislature of
Connecticut enacted a law, declaring that all the estate, real and personal,
of any person or persons who had joined the enemies of the United States,
or had assisted them, or should thereafter do so, should be confiscated; and
that, with respect to those persons who had been inhabitants of the state
(the last section of the act providing for the case of persons who had never
been inhabitants), the county court, upon application, was empowered
and directed to give judgment, that all their estate should be forfeited to
the commonwealth, and thereupon, to appoint administrators (as in the case of
intestates), who were to sell such confiscated estate, institute suits, recover
and pay debts, and to deliver the surplus, if any, into the treasury of the
state, &c. In September 1779, the plaintiff was proceeded against, under
this law, as one who had been lately a resident of the town of New Haven;
and it being duly adjudged that he was guilty of joining the enemies of
the United States, his estate was declared to be forfeited for the use of the
state of Connecticut, and certain parts of it were seized and sold; but no
steps were taken to recover from the defendant the debt said to be due from
him to the plaintiff, although the defendant, at the time of the confiscation,
and for some time afterwards, remained an inhabitant of Connecticut, and
had always had property there, liable to legal process.

Under these circumstances, Camp instituted this suit; in bar of which,

(a) See Atkyns v. Burrowes, 1 Peters Adm. 244; Smith v. Leard, Hopkinson's Adm.
Cases, 199. 1

1 And see Bayley v. Grant, 1 Salk. 33; s. c. 12 Mod. 440; Hook v. Moreton, 1 Le. Raym.
397; Brando v. Haven, Gilp. 592.
session, and the state where the debtor resides has no power to do so, it necessarily follows, that the debt, remaining on its original footing, is liable to the plaintiff's demand. When, indeed, the act of Connecticut was passed, the defendant resided in that state; but when this suit was instituted, he had removed hither; and the law is clear, that the debt follows the person, in every instance, except that of a distribution, in the case of intestacy. Carth. 373.

2. Considering the point, in the second place, upon a supposition that the action had been brought in Connecticut, the question arises, whether a right, not reduced into possession, within due time, can afterwards be recovered? If the administrators had recovered from the defendant, it would certainly have been sufficient to bar the plaintiff's claim; but when the state allowed the debtor to remove from its jurisdiction, an implied power was given to the creditor to pursue him elsewhere. Should a husband neglect, during his lifetime, to recover choses in action belonging to his wife, she is entitled to them afterwards, and not his executors or administrators; for the law will never favor negligence. The reasoning in this case will apply as well with respect to nations as individuals. Lee on Capt. 119. Besides, a right vested for a particular purpose, ceases with that purpose: the war being at an end, the object of confiscating the plaintiff's debts, &c., is also extinguished; and if the administrators could not recover the debt in Connecticut, nor a fortiori, in Pennsylvania, by the rules of natural justice, Camp may recover it; for there can be no plausible reason why Lockwood should be exonerated. Under the treaty of peace, indeed, and the law of Connecticut (passed the 2d Thursday of May 1787), repealing all acts repugnant to the treaty, the administrators could not now interfere to prevent the plaintiff's recovery; for the act by virtue of which they were appointed, is certainly of that description; so that, by the 4th article, Lockwood is estopped from saying that he will pay the debt to the administrators; and by the 6th article, they are precluded from compelling him to do so. This exposition has also prevailed in England; for the agents on the claims of the loyalists make no allowance for outstanding debts; because, as it has been already observed, they may be recovered under the treaty.

Ravelle then proceeded to consider, particularly, the objections offered by the defendant's counsel, in support of his plea; which were, he stated, 1st, That the plaintiff was not an enemy, but a rebellious subject; 2d, That by the act of Connecticut, and the proceedings under it, he was attainted, and considered as actually dead; and 3d, That he was not entitled to any benefit under the treaty of peace.

1. To the first objection, he answered, that the proceedings were expressly against Camp as an enemy: that it was by reason of his adherence to the enemies of the United States, and of actions, not merely criminal as they relate to his duty to the state, but to a foreign nation at war with the state, that the forfeiture had been effected; and that the law of Connecticut neither knew nor indicated a distinction between the iminical character of a subject and a foreigner. But he urged, that, as against a delinquent citizen, merely in relation to the state of which he was a member, not an enemy in the strict sense of the word, the act of the state, non valet extra territorium; that, therefore, it could never be any bar to Camp's recovery in Pennsylvania; and that, even in Connecticut, he would now be entitled by the treaty.
In pursuance of this act, Abiathar Camp (who is stated to have been lately a resident of the town of New Haven), in the month of September 1779, was charged, on the information of the selectmen, before the county court, with having joined the enemies of the United States, and put himself under the protection of the king of Great Britain: he was thereupon adjudged guilty, and sentence passed, that all his estate, real and personal, should be forfeited to the use of the state. Certain parts of Camp's estate were, in consequence of this forfeiture, seized and sold; but no proceeding was had to recover against James Lockwood, the present defendant, the debt said to be due from him to the plaintiff, although the defendant was at that time, and for some time afterwards, an inhabitant of Connecticut and amenable for the same.

And here the question arises, whether the plaintiff himself can now recover it: It is contended, on the part of the plaintiff, that the proceeding against him was as an enemy, and not as a traitor, and that, therefore, the war being over, his right revives. The sentence against him was certainly not expressly for treason, and there is no judgment against him that, in terms, subjects his person to punishment as a traitor. The act of assembly directs the proceeding to be had only against the estates of such persons as had joined the enemy, but it distinguishes between such as had been inhabitants of that state, and those who never had an abode within it, but had estates there. The present plaintiff was convicted as an offender of the former description, being late a resident in the town of New Haven, and is plainly pointed out as a subject. Indeed, the fact is conceded, that he really was a citizen of the state, who joined the enemy long after the declaration of independence and the organization of our state governments. He cannot, therefore, be considered in the light of such a public enemy whose rights are said, by the writers on the law of nations, to revive after the termination of the war; the municipal law of the country operated upon him as a subject, and he could not be an object of the law of nations.

The objection to the courts of this state, as a sovereign independent state, interposing to prevent the recovery of a debt, on account of the confiscation of it, in another independent state, is, in a great measure, obviated by the statement which I have before made of the peculiar relation that these states stand in to one another. Though free and independent states, they appear not to be such distinct sovereignties as have no relation to each other but by general treaties and alliances, but are bound together by common interests, and are jointly represented and directed, as to national purposes, by one body as the head of the whole. The offence which incurred the forfeiture, was not an offence against the state of Connecticut alone, but against all the states in the Union; and the act which directed the forfeiture, was made in consequence of the recommendation of congress, composed of the representatives of all the states, and was a case within the general powers vested in them, as conductors of a war in which we were all equally principals. Our courts must, therefore, necessarily take notice of the confiscations made in a sister state, on these grounds. (a)

It remains, then, only to consider, whether this debt was vested in the

(a) See Marks v. Johnson, Kirby's Reports, p. 290.
state of Connecticut, and, if it was, whether it is revested in the plain-
tiff, by the treaty of peace?

All his estate, both real and personal, in that state was confiscated. All things come within the description of confiscable personal estate, which a man has in his own right, whether they be in action or possession; this debt was due from a person then residing within the state of Connecticut, and was, consequently, confiscated, as other debts due there, and the right of action, as well as the debt, was vested in the state.

The 4th article of the treaty of peace, which directs that creditors, on either side, shall meet with no lawful impediment to the recovery of all bona fide debts theretofore contracted, is most certainly confined to real British subjects, on the one side, and the citizens of America, on the other; and it has been always so construed. As to the restitution of estates, rights and properties, already confiscated, it is not required by the treaty to be done, even as to real British subjects. It is agreed, indeed, by the 5th article, that congress shall recommend it to the several legislatures to provide for such a restitution; and to those of another description, they have liberty given them by the treaty, to reside twelve months in the United States to solicit a resti-
tution and composition with the purchasers of their estates, and congress is to recommend to the states, that they be restored, on refunding the money paid for them. But no acts for those purposes have been passed by the legislature, in consequence of any such recommendations. Indeed, the ample provision made for these people in England, seems to have been considered by the government there, as an act of justice, for not having been able to obtain a restitution by the treaty.

For these reasons, we are of opinion, that Abiathar Camp is not such a person as has a right to sue for and recover this debt, already vested by confiscation in the state of Connecticut.
SUPREME COURT OF PENNSYLVANIA.

JANUARY TERM, 1789.

PINCHIN v. FRY.

Justice of the Peace.

On the return of a certiorari to one of the justices of Philadelphia county, it appeared, that the defendant had been summoned to answer tomorrow, that is, on the day succeeding the date of the summons, for a debt under forty shillings; that the matter in dispute was then referred to three men, who reported the sum of 2l. 2s. 4d. due to the plaintiff; and that for the amount of this report, the justice had entered judgment with costs.

Levy moved to reverse the judgment: 1st, Because the summons was returnable on the next day, whereas, the act of assembly requires that there should be allowed a time not less than five, nor exceeding eight days. (1 State Laws 204; Act of 1745.) And 2d, Because the summons was to answer a debt under forty shillings, and the judgment was for a greater sum.

BY THE COURT.—Let the judgment be reversed. (a)

HALHEAD v. ROSS et al.

Practice.—Rules for trial or non-pros.

MOYLAN had entered a rule for trial at the last term or non-pros. The rule being continued until this term, a plea was added, and particular facts referred; and upon these, a report had been made, a few days before the day appointed for the trial of the cause.

Lewis, for the plaintiff, now objected to the trial's coming on; and Moylan insisted that he was entitled to a non-pros. But by—

(a) See Gibbs v. Alberti, 4 Yeates 373; Anon., Addis. 272.
SUPREME COURT.

Johnson v. Hocker.

*McKean, Chief Justice.—The subsequent plea and reference virtually vacate the previous rule for trial or non-pros. The cause must, therefore, be continued, under a new rule.

CALVERT v. PITT.

Justice of the Peace.—Practice.

This was a certiorari to one of the justices of Chester county. On arguing the case, the judgment of the justice was affirmed.

And, by McKean, Chief Justice, it was stated, that conformable to the act of assembly, the defendant, after judgment was given against him by a justice, ought to enter into a recognizance instanter, with, at least, one good surety. (b) He may afterwards withdraw his security, or appeal to the common pleas, within the six days allowed by the act.

JOHNSON v. HOCKER.

Evidence.—Tender.

A certificate by a public officer, made evidence by an act of assembly, is admissible, though the officer certifies, in addition, to extraneous matter, not evidence.

Construction and effect of the tender laws of this state of 1777, 1778 and 1781.

This was an action of debt, brought upon a bond, bearing date the 24th of April 1769, and conditioned for the payment of 500l. lawful money of Pennsylvania. To the plaintiff's demand, the defendant pleaded payment, and issue was thereupon joined.

On the trial of the cause, Sergeant, in order to prove payment to the treasurer, agreeable to the tender law, offered to read the following certificate to the jury:

"Received, 29th March 1780, of Mr. George Hocker, the sum of 373l. 6s. 6d., being two-thirds of a bond and interest due to Mr. J. Johnson, of Germantown, which he refused to receive, when legally tendered to him in presence of Balzer Hidricks and Conrad Reedheiffer; the other one-third he left in my hands, to be given to such poor and distressed persons as I shall think proper objects of charity.

ISAAC SNOWDEN, Treasurer."

Lewis, for the plaintiff, objected to the evidence, that this was not a certificate, merely official, but containing certain extra-judicial facts, to which Snowden, like any other witness, ought to be produced and sworn. The consequence of admitting it, would be highly dangerous.

Sergeant answered, that what was surplusage might be rejected, and the paper go to the jury only as proof of the receipt of the money. If a

(a) See Respublica v. Coates, 1 Yeates 35; Smith v. Davids, post, p. 410; Thurston v. Murray, 3 Binn. 413; King of Spain v. Oliver, 1 Peters C. C. 217.
(b) Contr., Mann v. Alberti, 2 Binn. 195, under the act of 1804.
suspend the interest, until a subsequent demand and refusal have taken place. If, therefore, the tender, on this occasion, was made in continental money emitted by congress before the 29th of January 1777, it is certainly conclusive against the present demand. Conscientious men may, indeed, reflect upon the enormous advantage of making a payment at the rate of sixty for one; but we are bound by the explicit language of the law (except where it violates the constitution of the state), and must leave those to answer for its policy, by whom it was enacted.

But on the other hand, how will the case stand, if the tender was not made in bills of credit of a date antecedent to the 29th of January 1777? The arguments of the counsel have differed widely on this ground; and the question is, whether the words of the act apply only to the bills of credit which congress had emitted; or extend also to those bills which congress might emit?

The doubt, in this respect, is not entirely novel. A British sergeant, having a license, in the year 1778, to carry clothing from Philadelphia to Lancaster, for British prisoners of war, brought with him some forged paper money, and passed it at the latter place. He was tried for this offence, and the distinction was then taken, that the forgery was of an emission subsequent to the 29th of January 1777. The point, however, did not prove to be material; for the court considered the defendant as an alien enemy, who might, indeed, be punishable for any action malum in se, but was not liable to the penalties of a municipal regulation; and on that ground, directed the jury to acquit him.

By the act which was passed on the 20th of March 1777 (2 State Laws 48), we find, that the state paper money, then emitted, was only made a tender at common law; for the words of the act merely declare that a tender in that money shall have the same effect as a tender in specie, which is clearly no more than a suspension of the interest. The succeeding act, passed on the 25th of May 1778 (2 State Laws, 31), after providing for the exchange of bills of credit issued under the authority of the king of Great Britain, gives to the bills of credit issued by congress, only the same currency and effect in payment of debts which the above mentioned act of the 20th of March 1777, had given to the bills of credit emitted by the state; and that, as I have already remarked, did not amount to an absolute discharge of the obligation. By the act of the 3d of April 1781 (1 Sm. Laws 519), tenders are declared to have no other force than that which was given to them by the laws in existence at the time they were made. (1 State Laws 447.)

The intention of the legislature must be collected from the words which they have used, unless a different meaning can be manifestly shown. The construction, then, that we have put upon the words of the act of the 20th of March 1777 (which by express reference, is made to govern the operation of the act of the 25th of May 1778), is, that the legislature only intended to make a tender of the 200,000l. bills of credit, equivalent to a tender at common law. There is no satisfactory reason opposed to this construction; and but for this, the act of the 29th of January 1777, might be as well extended to the bills of credit which were afterwards, as to those which were previously emitted by congress—a matter that we are not bound, nor are we inclined to countenance.
This opinion, unanimously formed, upon mutual consultation, and full deliberation, leads to a more particular consideration of the evidence; and if the jury think that the bills of credit, or any part of them, which were tendered to the plaintiff, on the 29th of March 1780, were emitted subsequent to the 29th of January 1777, they must only give this tender the effect at common law.

It may be proper here to notice, that there were two bills, of thirty dollars each, in the bundle of paper money tendered; and the plaintiff's counsel has said, that there were no bills of that denomination emitted prior to the 29th of January 1777. But he is certainly mistaken; as I remember well the trial of a man for counterfeiting a thirty dollar bill emitted in 1776: and therefore, this circumstance is by no means conclusive.

But should the jury, upon the whole of the evidence, find, that this tender was made in bills of credit emitted since the 29th of January 1777, and so not an absolute discharge of the debt, they will next inquire, in what manner the bond ought now to be paid? By the act of the 3d of April 1781, it is declared, that all debts and contracts entered into between the 1st of January 1777, and the 1st of March 1781, shall be liquidated according to the scale of depreciation. The plaintiff, therefore, is not entitled to recover the whole 500l. in specie, but only so much as that sum in paper money was worth, at the time the contract was entered into; which was on the 24th of April 1777; nor is he entitled to any interest from the date of the tender, until this action (which is to be considered as a new demand) was instituted.

The jury found a verdict in favor of the plaintiff for 272l. 3s. 4d. debt, with costs: from which, it seems, that they were of opinion, that the tender was not made entirely in bills of credit emitted before the 29th of January 1777; and that they pursued the directions of the court in that alternative.

Steele v. Steele.

Practice in divorce.

This was an issue joined on the facts alleged in a libel for a divorce: and upon the trial, the Chief Justice observed, that notice ought to be given of the facts intended to be proved under the general allegations of the libel.

Rush, Justice.—I think it would be most convenient to give notice, that between two specific dates, acts of cruelty, &c., were intended to be proved.

The Court seemed to adopt that idea, and recommended it for the future practice of the bar. (a)

(a) See Garrat v. Garrat, 4 Yeates 244.
OF PENNSYLVANIA

*SMITH v. DAVIDS.

Rule for trial or non-pros.

A rule for trial, or non-pros, was taken in September term 1787, and notice at bar was entered on the docket. The cause was afterwards continued, generally, until January term 1789, and no notice given.

The cause being now marked for trial, the plaintiff moved to put it off.

But the Court held, that the rule for trial, or non-pros., was continued; and that no new notice was necessary. If, therefore, the plaintiff does not go on to trial, the defendant is entitled to a non-pros.(a)

ROBBINS v. WHITMAN.

Practice on certiorari.

Where a justice's judgment is affirmed, on certiorari, execution issues out of the court above, without a remittitur.

This cause was removed by certiorari from one of the justices of the peace for Northumberland county; and after argument, the judgment of the justice was affirmed.

It then became a question, whether execution could issue out of this court upon the judgment so affirmed.

And it was ruled by the Court, that execution might issue at once, without referring the cause again to the justice; as that would be a circuitous, inconvenient and unreasonable mode of proceeding.

(a) a. p. King of Spain v. Oliver, Peters C. C. 217; and see Halhead v. Ross, ante, p. 405.
As to the first point, it is agreed by the counsel on both sides, and it is undoubtedly the law, that where an original is replied to the plea of the statute of limitations, it is sufficient to show when the writ issued, without any continuances; but where the writ is a latitut from the king's bench, or a clausum fregit, in the common pleas, the continuances must be set forth, to be entered to the time of filing the bill or declaration, in order to show that it was for the same cause of action.

This gives rise to the question, whether our writs of capias and summons resemble more the original writs, or the latitut and clausum fregit? And in order to solve this question, it will be necessary to consider the reason of the difference between these writs in England.

The latitut and clausum fregit are both writs of trespass, yet, by the course of the courts of king's bench and common pleas, the plaintiff may ground upon them declarations in any personal actions. But when the declaration is in assumpsit (for instance), a writ of trespass, issued within the six years, could not be presumed to be a writ that issued in that cause, unless it was further shown in the replication, that it was taken out with an intention to declare in that action; and as evidence of that intention, that the continuances were entered, from the time of issuing it, to the filing the bill or declaration. But in the case of an original, proper to the action, that is never necessary, because, if the declaration was in assumpsit, the original would show, it was issued in case: if the declaration was upon a bond, the original would show it was issued in debt; and consequently, that it was a proper and legal foundation for the action; and the continuances are not necessary to be shown, as a proof that the writ issued for the same cause of action; for, being such a writ as corresponded with the declaration, the law presumes it was for the same cause of action, unless the contrary is shown.

That this is the reason of the distinction between originals and the writs of latitut and clausum fregit, to this purpose, will appear from this: that whenever the writ which commences the action, is of such a nature as to correspond with the declaration, we find, it will be sufficient to set it forth, without the continuances, although it be not an original: and on the contrary, whenever the writ does not correspond with the declaration it will not support the replication, without the continuances, although it be an original. An instance of the first kind is the attachment of privilege in the common pleas, which will be found by the precedents always to specify the nature of the particular action, whether in debt or case, which is afterwards declared upon; and hence, we find, in 1 Wils. 168, the replication showing only the time of issuing the writ, without the continuances, will be sufficient. So, in the reversed case, when a common clausum fregit is the writ, although it be an original writ issuing out of chancery, yet, not being adapted to the action of assumpsit or debt, being only a foundation for the capias in the common pleas, and intended merely to give that court jurisdiction, it will not be presumed to be the foundation of such an action, unless the continuances are set forth, from the time of issuing the writ. Hence, it is evident, that it is from the disagreement of the writ with the declaration only, that it becomes necessary to enter the continuances, to show it issued for the same cause of action, in order to prevent the bar of the statute of limitations; and after all, the entry of the continuances, in those cases where they are said to be necessary, is little more than matter of mere form, as it appears in 1 Sid.
53, 60, that they may be entered by the attorney, in his chamber, at any time, even after the statute of limitations is pleaded.\(^{(a)}\)

By our act of assembly, and the practice under it, the writs of capias and summons always specify the nature of the action you are to declare upon, and are, therefore, similar, in this respect, to the originals out of chancery, and the attachments of privilege in the common pleas.

The second point made by the defendant's counsel is, that, admitting the plaintiff, by issuing the writ, has saved the bar of the statute, yet, that the action ought to have been prosecuted again, within a reasonable time after the six years expired, and that \textit{that} reasonable time has been held to be one year.

In considering the dates and times of the several transactions, the period during which the act of assembly suspended the act of limitations, that is, between the 1st of January 1776, and the 21st of June 1784, is, to every purpose, to be thrown out of the computation. Then, from the time of the cause of action arising, to the time of issuing the summons, is four years, nine months and ten days; from that time to the prosecuting the suit again, is two years, six months and two days; making, in the whole, seven years, three months and twelve days.

The cases cited in support of the second point, are all cases where, by the death of one of the parties, or from some other cause, the action had abated, and the court, in considering what was a reasonable time to permit the party to bring a new action, have drawn their reasonings from the equity of the statute, which provides only for two cases; one, where the plaintiff had obtained a judgment which was reversed for error, and, the other, where a verdict had passed for the plaintiff, and the judgment was arrested, and judgment given that the plaintiff should take nothing by his writ. But other cases arising, which put the plaintiff in the like situation, by an abatement of the action, the judges thought, that they ought to have a reasonable time after the expiration of the six years to renew their actions; some of them say, \textit{that} reasonable time was in the discretion of the court, depended upon the circumstances of the case; and others say, that, within the equity of the statute, \textit{that} reasonable time ought to be one year. But these are all cases where the writ had actually abated, and could, consequently, afford no support to the new action. How are the cases of originals and \textit{latitats}, where nothing had happened to abate the writs? They are considered as subsisting foundations upon which the parties may prosecute their suits; in the one case, by entering the continuances from the time of suing out the writ, and in the other, without any such continuances; in both cases they are deemed subsisting writs, and the *commencement of the action, *\^{414}\) for the purpose of taking the case out of the statute of limitations, and the prosecution of the suit afterwards is not considered in the light of a new action, although some process might be necessary to bring the party into court. In Lilly's Prac. Reg. 19, it is said, "the taking out the writ of \textit{latitut} is in nature of filing an original, and by doing it, the suit is commenced, within the meaning of the statute, although he does not declare against the party within the time limited by the statute."

\textbf{As the cases of subsisting writs and abated actions are thus totally differ-}

\(^{(a)}\) Pennock \textit{v. Hart}, 8 S. \& R. 380, \textit{per Gibson, J.}

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the second is, "Whether, by the action of partition brought by the demandant, wherein it is acknowledged that the moiety out of which dower is now claimed, belonged to the tenants, she is not stopped from recovering in this action?"

In delivering our opinion on this occasion, we shall avoid a recapitulation of the arguments offered by the counsel on either side; confining ourselves to the questions proposed, a brief statement of the reasons of our judgment, and a reference to the books, on which we rely, as authorities to support it.

1. Dower is a legal, an equitable and a moral right. Prec. in Chan. 244. It is favored in a high degree by law, and, next to life and liberty, held sacred. Lill. Abr. 666, G. Three incidents entitle a woman to dower: marriage, seisin and the death of the husband. 1 Inst. 32 a, b. And a widow may be barred of dower by a jointure made in pursuance of the statute of 27 Hen. VIII, c. 10, § 6. Such a jointure may, indeed, be made either before or after marriage; but with this difference, that if it is made before, the wife cannot waive it, and claim her dower at common law; which she can do, if the jointure is subsequent to the marriage. No other settlements, however, in lieu of jointures, are bars to a claim of dower; nor, it must be remembered, was a jointure itself any bar, antecedent to the passing of the statute of Hen. VIII, for it is established law, that a right or title of dower, cannot be barred by a collateral satisfaction. Wood's Inst. 125; 1 Inst. 36 b. Nor, in short, by anything but a plain and express intention of the parties. Ibid.; Finch, 368; 1 Chan. Ca. 181; 2 Ibid. 24; 2 Vent. 340; 4 Co. 1, 2.

In the will before the court, it is nowhere expressed, that the devises to the demandant shall be in lieu of dower; but it is contended, that the intention of the testator, collected from the words of the whole will, appears to be, that the demandant shall be barred of her claim at common law; that the devises to her are of lands in fee; and that these, being of four times the value of her dower, ought to be considered as a recompense or satisfaction for it. But in the words of the whole will, we can discover no express intention to that purpose; and, although an estate for life, or even during widowhood (which is the same as an estate for life, since it is in the wife's own power to make it such; and these by the bye, are the lowest estates that will operate in bar of dower, either in a jointure or will), may be given with the view, and operate to bar a widow's claim at common law; yet, it must appear to be so intended, by the words of the will, and not inferred from its silence, or presumed upon conjecture. For no devise to a wife, even of an estate in fee-simple, although ten times more valuable than her dower, will be, of itself, a bar of dower; but it will be considered as a benevolence, and she is entitled to both. 2 Freem. 242; Prec. in Chan. 133.

Nor, in such a case, will equity interpose against the wife; for I cannot find any instances in which relief upon this subject has been given, but in the following: 1st, Where the implication, that she shall not have both the devise and the dower, is strong and necessary; 2d, Where the devise is entirely inconsistent with the claim of dower; and 3d, Where it would prevent the whole will from taking effect: that is, where the claim of dower would overturn the will in toto. 3 Atk. 437.

In short, the authorities are numerous and explicit, that dower cannot be
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barred by a collateral recompense; that the devise of anything to a wife, cannot be averred to be in bar of dower, because a will imports a consideration in itself; and that the devise, without other matter, is to be taken as a benevolence, and the devisee deemed a purchaser. 4 Co. 3, 4; 9 Mod. 152; 2 Vern. 365; 2 Freem. 242; Prec. in Chan. 133; 2 Will. 524; 3 Atk. 8, 436; 1 Ld. Raym. 483; 1 Lutw. 734; Brook (tit. Dower), pl. 69; Dyce 248; 1 Ves. 55, 230; 2 Eq. Abr. 388, pl. 14, 18; 1 Ibid. 219; 1 Brown Chan. Rep. 292. To which may be added, two decisions in this court, Blackford et ux. v. Kennedy, in 1769; and Kennedy et ux. (the present demandant) v. Wis- tar, 1779.

The court, therefore, unanimously think, that the devises to the demandant, in the will of Richard Johnson, cannot be deemed a satisfaction or bar of dower in this action.(a)

2. The second question inquires, whether the demandant is barred in this action, by the recovery in the action of partition? And, in support of the affirmative, the counsel for the tenants have cited 1 Roll. Abr. 862, pl. 4; 864, pl. 8; Co. Litt. 27 a.

Dower is an excrecent interest taken out of the inheritance for a time, which being elapsed, the interest falls again to the owner of the inheritance. But the institution of the action of partition became necessary to appropriate a moiety of the 500 acres of land to each of the devisees, not merely for life, but for ever; for the judgment is, that the partition should remain firm and stable for ever. If, then, any other person than the demandant had a right of dower in the whole of the 500 acres, although such person could not have been made a party in the partition, the partition *might certainly have been effected, notwithstanding that right of dower. And why should not the same be done, in the case before the court? The devisee held the moiety allotted to her, subject to the claim of dower, and in doing this, there was nothing inconsistent or uncommon: Nor can we perceive, how the recovery in partition, stops the demandant from saying, that she has a claim of dower in that part of the premises which has been assigned to the tenant. As, indeed, on the one hand, there is no case, nor dictum of any judge, to warrant this plea, so, on the other, we think reason and justice are against it. The case cited by the counsel for the tenants only says, that, in dower, the demandant claims dower of lands unde nihil habet, &c., and therefore, she shall be stopped from claiming anything more.

Upon the whole, the Court are clearly of opinion, and direct, that judgment be entered for the demandant.

(a) See the act of 4th April 1797 (8 Sm. Laws, 300); and Evans v. Webb, 1 Yeates 424; Webb v. Evans, 1 Binn. 586; Hamilton v. Buckwalter, 2 Yeates 389; McCulloch v. Allen, 3 Id. 10; Crearcraft v. Dille, Id. 79; Crearcraft v. Wions, Addis. 380; Duncan v. Duncan, 2 Yeates 302; Sample v. Sample, Id. 483; Wilson v. Hamilton, 9 S. & R. 424.

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gant as to assert, that it is no discharge, where the advantage of converting interest into principal has been obtained; which is, in itself, a reasonable satisfaction to ground the extinguishment; and independently of the cases, the broad principle of equity declares, that when a party is bettered by his bargain, he shall be bound by it.

But, it appears from the report of the referees, that there was an absolute giving and taking of the bond; and as the payment must be according to the will of the defendant (Cro. Eliz. 68), if Bird gave the bond in question, in payment, we show that it was accepted, and it is no matter whether that acceptance was in satisfaction, or not, since the bond must be received to the intent with which it was given. 1 Ld. Raym. 60, 61.

The case, however, does not, after all, depend upon the doctrine of extinguishment, but upon the act for defalcation; by virtue of which the acceptance of the bond in question may be given in evidence by way of set-off against the plaintiff’s demand. (1 Sm. L. 49.)

For the plaintiff, in reply, it was insisted, that the object of the act of defalcation was to prevent a multiplicity of suits, and that it could have no possible effect upon the general question, whether Bird’s bond operated as a payment or extinguishment pro tanto of the preceding debt? This question has been agitated in England, as well since as before the statute, and the present idea has never been suggested. The act of assembly speaks of two or more being mutually indebted; and, although it authorises a defalcation, *it does not define what shall be deemed a payment or [*423 extinguishment.

There is no fair ground to assert that Hamilton received an adequate satisfaction, by converting the interest into principal; for he was entitled to have his interest punctually paid; and the books of chancery have gone so far as to declare, that, where money is in arrear upon a mortgage, it was not usury to take interest upon the interest. In the case from Cro. Jac. 579, indeed, the interest was also added to the principal; but this the court did not consider a sufficient bar. Nor was Hamilton benefited in respect to time; for the bond was given not to shorten the period of payment but to protract it: as the money was actually due, and ought to have been previously paid.

After considering the case and arguments, the chief justice, at the present term, delivered the opinion of the court.

McKeAn, Chief Justice.—The case appears to be this: That the testator of the defendants gave a mortgage to the testator of the plaintiff, on four several tracts of land. The heirs of the mortgagor sold the equity of redemption of three of these tracts to Mark Bird, who, afterwards (on the 3d day of May 1783), executed a bond for 65l. to the mortgagee; and this bond being for the amount of the interest then due upon the mortgage, also bore interest. No receipt, however, for the bond, for the interest, nor, indeed, any minute of the proceeding, was entered upon the mortgage; nor has any express proof been offered, that the bond (upon which there has not been anything paid) was accepted as a satisfaction pro tanto of the money due upon the mortgage. The three tracts of land conveyed to Mark Bird have been sold, in order to satisfy the mortgage; but proving insufficient, the question now arises, on the circumstances which I have stated, whether the
bond given by Mark Bird is to be taken, either in law or equity, as a payment, discharge or recompense for so much of the mortgage-money?

The court, having maturely considered the case, are of opinion, that the bond is not a payment pro tanto of the mortgage-money: for which opinion they will content themselves with declaring the general principles, and referring to the authorities whence those principles are deduced.

1. First, then, one judgment cannot be pleaded in bar of another, which is of equal nature and dignity, no more than one bond or obligation can be pleaded in bar of another. Cro. Eliz. 817; 2 Bac. Abr. 552.

2. In the second place, a bond, which is no satisfaction of another bond, cannot be deemed a satisfaction of a mortgage, which is a security of a higher nature. To render it a satisfaction, it ought to better the plaintiff's case, in point of safety, and expedite the time of payment; for a bond with sureties will not be a satisfaction of one without, unless the time of payment is thereby shortened. 1 Str. 427; 1 Brownl. 47, 71; Hob. 68, 69; 1 Mod. 225; 2 Id. 136; Cro. Jac. 579; Cro. Car. 85, 86; 3 Lev. 55; 1 Salk. 124; 1 Burr. 9; 2 Wils. 87.

3. And in the third place, as there is no entry of the bond in question upon the mortgage, showing that it was received in payment or satisfaction of the interest then due, nor any proof that it was so intended by the parties, a presumption naturally arises, that the bond was merely taken as a collateral or supplementary security; and no debt or duty can be extinguished, but by a security of a higher nature than the first.

For these reasons, we decide the question submitted by the referees to the court, in favor of the plaintiff, and direct judgment to be accordingly entered upon the report. (a)

DE HAVEN v. HENDERSON.

Evidence.—Oath of party.

The plaintiff was examining a witness to prove the purport of an order given to him by the adjutant-general, during the late war, for the restoration of his horse, saddle and bridle, which had been seized by the defendant, as the property of a disaffected person, although upon trial the plaintiff was acquitted, when Levy objected, that the order itself ought to be produced, or some account given of its loss, before the witness was admitted to give evidence of its contents.

McKEAN, Chief Justice.—The oath of the plaintiff must be received to prove what has become of the order. It is, I think, the only way in which satisfactory information can be obtained on a point of this nature. (b)

(a) See Musgrove v. Gibbs, ante, p. 216, and the cases cited in the note.1
(b) See the note to The King v. Lukens, ante, p. 6.

1 The receipt of a security of equal degree, either from the debtor, or from a stranger, is no extinguishment of the original cause of action. Oliphant v. Church, 19 Penn. St. 318. Whether it is to operate as a satisfaction, by substitution, depends on the intention of the parties. Reed v. Defebaugh, 24 Id. 495. The transfer of a chose in action to a creditor is presumed to be a collateral security, not a satisfaction, unless so expressed. Leses v. James, 10 S. & R. 307; Stone v. Miller, 16 Penn. St. 450; League v. Waring, 85 Id. 244. And see Bank v. Cheney, 10 W. N. C. 187.
The plaintiff being accordingly sworn, and proving the loss of the order, he was allowed to proceed in examining the witness as to its contents.

Lessee of Thomson et ux. v. White.

Parol evidence, when admissible.

Husband and wife, having no children, convey the estate of the wife to A., who reconveys the estate to them, as joint-tenants in fee, under a parol agreement between the husband and wife, that the husband should settle the fee upon the wife's heirs; the husband having died without settling the estate, it was held, that parol evidence of this agreement was admissible.¹

Ejectment for a house and lot in Second street, in the city of Philadelphia. The action was tried by a jury at bar, in January term 1788, and a verdict given for the plaintiff. A motion was then made, by the defendant's counsel, for a new trial, which was argued, in favor of the new trial, by Lewis and Heathly, and against it, by Ingersoll and Sergeant, in January term 1789; and the court having continued the cause under advisement, gave their opinion in the present term.

The case upon the evidence was as follows: Dorothy Gordon, being seized in fee of the moiety of the premises in question, intermarried with Laurence Saltar, and having lived long with him, and no prospect of children, she was desirous of making a provision for an only sister of the whole blood, to wit, Mary, one of the lessors of the plaintiff, whose husband, John, the other lessor, was considerably reduced in his circumstances. It then appeared, that Mrs. Saltar, while upon a visit, with her husband, to his brother, John Saltar, who resided at some distance, was taken sick; and after a conversation relative to her estate, it was agreed by her husband and herself, that it should be settled on them for their lives, and for the life of the survivor of them, and afterwards, that it should go to her sister, the said Mary Thomson, for life, and the heirs of her body lawfully begotten; and for want of such heirs, to the children of her three sisters of the half-blood. Mr. Saltar, accordingly, procured a deed of the above effect to be drawn by a conveyancer in Philadelphia; but the second remainder being expressed to be "for the issue of the bodies of the three half-sisters," one of whom was unmarried, Mrs. Saltar, when the instrument was read to her, thought the expression indelicate with respect to her three half-sisters, and for that reason, persisted in refusing to execute it, notwithstanding all the persuasion of her friends. Upon this refusal, her husband proposed to her, that a deed should be drawn from them to his brother John, who, with his wife, should reconvey the premises to him (the said Laurence) and herself, as joint-tenants, in fee; and he promised that as soon as he got home, he would make his will, or by some other means, settle the estate in the manner that they had before projected. Mrs. Saltar hesitated at this proposition; but, on her sister, Elizabeth Saltar's, telling her, that, "she might rely upon him; for, if there was a man in the world, who could be trusted in such a case, it was him;" and on her husband's requesting her

¹ This case went upon the ground of fraud, and is a land-mark in our law, which has been frequently followed. Wolford v. Herrington, 74 Penn. St. 314; Sharswood, C. J. Overton v. Tracey, 14 S. & R. 828, Duncan, J., and cases cited.
to comply, declaring, that "if there was faith or truth in man, he would honestly perform what he again promised;" she executed the deed to John Saltar, who, with his wife, reconveyed the estate, according to the previous stipulation. Mrs. Saltar died in the year 1781, about six months after the deeds were signed; and her husband died, intestate and without issue, about eighteen months after her decease. Mr. Laurence Saltar always, during his lifetime, managed the estate that had been his wife's, as if it belonged to the lessors of the plaintiff; in his last sickness, indeed, when near expiring, he told his brother, that he was very uneasy on account of his leaving no will; and soon after this declaration, he lost his reason.

The preceding facts were proved by John Saltar and Elizabeth, his wife; together with the confession of the defendant, that the lessors of the plaintiff had the title in equity, although he had it in law.—There was, indeed, a contradiction, in some respect, of the case of the lessors of the plaintiff, in the testimony of Abel James, who related a conversation which he had with Laurence and Dorothy Saltar, a few days before the deeds were executed, at which time,* the witness said, that they had agreed to settle the estate in a different manner.

The motion for a new trial was made, on two grounds: 1st, Because the parol evidence ought not to have been admitted to go to the jury; and 2d, Because the jury gave a verdict against evidence.

The Chief Justice having stated the case, and the objections to the verdict, proceeded to deliver the opinion of the court in the following manner:

McKean, Chief Justice.—The court have heard the reasoning in support of the motion, and the arguments against it; and upon a perusal and full consideration of the cases cited on both sides, our opinion is unanimously formed in favor of the plaintiff.

In support of the first ground assigned for a new trial, it has been urged, that the parol proof contradicted the deed given by the witnesses themselves; that in Pennsylvania, lands must pass by deed, will, or some writing signed by the parties, or by the act and operation of the law; that a declaration of uses must be by deed; that no parol evidence should be admitted respecting an agreement or deed, which may add to, diminish, vary or contradict the agreement or deed, but only to explain it; and that John Saltar and his wife were estopped from saying anything against their own deed. In corroboration of these positions, the following books have been cited: Cowp. 47, 260; 2 W. Black. 1250, 335, 327; 2 Atk. 383; 3 Id. 388; 2 Wils. 506; 3 Id. 275; Bac. Max. 90, Regula, 23; 1 Black. Com. 78, 79; 2 Id. 13; 3 Id. 439; Bull. N. P. 357; 5 Bac. Abr. 362; Brown Chan. Cases, 92, 94; 2 Bac. Abr. 309; 1 Wils. 111; Fitzgib. 213; 1 Bac. Abr. 75; 1 State Laws, 462–3.

Since the statute of frauds and perjuries, in England, and the act of assembly for preventing frauds and perjuries in Pennsylvania, it has, indeed, been a general rule, that no estate or interest in lands shall pass, but by deed, or some instrument in writing, signed by the parties; and that no parol proof shall be admitted to contradict, add to, diminish, or vary from a deed or writing. (a) But it is certain, that there are several exceptions to this rule,

(a) There are in the Pennsylvania reports, recognising this rule, are very numerous,
tenant in tail not o suffer a recovery, in order to provide for younger children, upon an assurance that the tenant in tail would provide for them himself, which he afterwards refuses, equity will compel him to do it. Devenish v. Baines, Prec. in Chan. 3; Chamberlain v. Chamberlain, 2 Freem. 34.

A voluntary settlement is made by A. to B., who, afterwards, without any consideration, agrees to deliver it up: this agreement shall bind in equity; for a voluntary settlement may be surrendered voluntarily. Wentworth v. Deverginy, Prec. in Chan. 69.

The statute and act of assembly were made to prevent frauds, as well as perjuries; they should be construed liberally, and beneficially expounded for the suppression of cheats and wrongs. Thus, where there has been a fraud in gaining a conveyance from another, the grantee may be considered as a mere trustee. Lloyd v. Spillet, Barnard. in Chan. 388. *In the case now under consideration, Mrs. Dorothy Saltar was seised in fee of the premises stated in the ejectment; and had she made no conveyance, her sister, Mary Thomson, would have been her heir-at-law; but her husband, whom she loved, wished to enjoy the estate during his life, and she designed that her sister, and her sister's children, should have the estate uncontrolled by her husband. With this view, the deeds were executed; and if the solemn promise and agreement of Laurence Saltar is not to be enforced, his heir-at-law will have the estate, contrary to the intention of all parties.

The question then is, whether the engagement of Saltar, not being in writing, although it concerns lands of inheritance, is void by the act of assembly for preventing frauds and perjuries?

We are of opinion, that it is not; and that the parol evidence was proper to be admitted upon the trial of the cause. (a) Here was a breach of trust in Laurence Saltar, a fraud in law, which is not within the act. This is the reason of our judgment; a reason warranted by a due construction of the act, and an attentive consideration of its frame and design; which was not only to guard against perjuries, but also, as I have already observed, against frauds. It is to be remembered, that there is no purchaser, bona fide, for a valuable consideration, without notice, in the present case; the defendant claims under the heir-at-law of Laurence Saltar; he ought, therefore, to perform what Laurence should have performed; and equity will consider that as done, which ought to have been done; Grounds, &c., of Law and Equity, 75. Every man's contract (wherever it is possible) should, indeed, be performed as it was intended.

The numerous cases cited, as well as some determined in this court, both before and since the revolution (several of which are in point) all turn upon the same principle, and are uniformly in favor of the plaintiff; and so many uniform, solemn decisions, ought to be always of great weight and consideration, that the law may be certain. I am glad, indeed, that the present motion has been made, because it has afforded an opportunity of full deliberation on the subject, and of settling it upon a satisfactory and permanent foundation.

With respect to the second objection, we are clearly of opinion, that the

(a) See Gregory v. Setter, ante, p. 193; and German v. Gabbald, 3 Binn. 302; Wallace v. Duffield, 2 S. & R. 521; Peebles v. Reading, 8 Id. 492.
The case being held for some days under advisement, the chief justice now delivered the opinion of the court to the following effect:

McKean, Chief Justice.—It is unnecessary at this time to determine, whether the plaintiff might have instituted an action of covenant, or deceit, in order to obtain a redress of the wrong which he has sustained; for we think it is sufficient for his purpose, that an action of *assumpsit for money had and received to his use, has been brought; and that, to maintain this action, he may give in evidence, that the defendant got his money by mistake, imposition or deceit. To prove the alleged mistake, imposition or deceit, *deeds or other writings, which are not the immediate foundation of the suit, but only leading to it, may be read. We are all, therefore, of opinion, that a new trial ought not to be granted.

Judgment for the plaintiff.(a)

Oxley et al. v. Oldden.

Reference.—Practice.

This cause had been referred, and the referees, having examined the evidence, in presence of both parties, agreed upon their report, but about an hour before it was delivered into court (though it was signed the preceding day), J. B. McKean, on behalf of the defendant, had obtained a rule to show cause why the rule of reference should not be stricken off.

There was no charge of irregularity or partiality against the referees; and after argument by Lewis, for the plaintiffs, and Ingersoll and J. B. McKean, for the defendant, the rule to show cause was discharged. And—

McKean, Chief Justice, observed, that the motion was much too late to annul the reference, when the referees had investigated the whole transaction, had agreed upon their report, and were clear from any imputation of misconduct, or any precipitancy in refusing to hear the testimony offered by either party.(b)

(a) In Weaver v. Bentley, 1 Caines 48, Judge Livingston is reported to have said, "The case of D'Utricht v. Melchor, 1 Dall. 428, cannot be law." The majority of the court, however, differed in opinion from Judge Livingston, upon the principle of that case, and held, that *assumpsit would lie, to recover back the consideration paid on a sealed agreement, the defendant having failed to perform his part; and it is believed that D'Utricht v. Melchor, which is said by Judge Yeates (in Ritchie v. Summers, 3 Yeates 539), to be "imperfectly reported," may be supported as an authority, if the assertion of the same learned judge, in a later case (Dorsey v. Jackman, 1 S. & R. 51), be correct, viz., that it "was determined upon the ground of fraud and imposition." Chief Justice Tilghman, in the case last referred to (p. 48), instanced "fraud or deception," as furnishing an exception to the rule, that money could not be recovered back, and such, according to Judge Yeates (in Steinhauser v. Witman, 1 S. & R. 447), is the settled law. See also Mathers v. Pearson, 13 S. & R. 258; Landis v. Urie, 10 Id. 316; Charles v. Scott, 1 Id. 294.

(b) Ruston v. Dunwoody, 1 Bin. 42; Pollock v. Hall, 4 Dall. 222; s. c. 3 Yeates 48; Grubb v. Grubb, 2 Dall. 191; s. c. 1 Yeates 193; McCall v. Craeussilat, 2 S. & R. 167.
For the defendant, it was contended, that, although the letter of the act was against him; the spirit of it, which is the true guide in the construction of laws, was in his favor. It is a general rule, that cases without the letter, if within the mischief, shall have the remedy. 4 Bac. Abr. 648. Nay, words shall sometimes be expounded against the letter, in order to maintain the intent. 10 Vin. 519. 1 Black. Com. 61. Statutes must be expounded by a consideration of the previous law, the mischief complained of, and the remedy provided. Ibid. 512. Now, by the common law, the mortgage would have been good, although not recorded; and the sole reason for calling for a record of the deed, must be to protect subsequent purchasers, since it could be of no consequence to the mortgagor himself. The construction of this very act has, in another respect, been contrary to the letter; for it requires, that the deed shall not only be executed, but acknowledged and recorded; and yet the execution, without the acknowledgment, has always been held sufficiently binding on the party. But the authorities to this point are express and numerous. By the statute of 13 Eliz., c. 10, all leases by ecclesiastical bodies, for longer terms than three lives, or twenty-one years, are declared "utterly void to all intents and purposes, any law, custom or usage to the contrary thereof notwithstanding;" and yet, as no legislature could mean to make a man's act void against himself, the mischief, which was the impoverishing their successors, has always been deemed sufficiently suppressed, by vacating longer leases, after the death of the grantors, but the leases, during their lives, being not within the mischief, are not within the remedy. 1 Black. Com. 87. Were it otherwise, the grantors would be allowed to do wrong to other persons. 3 Bac. Abr. 390. And every principle that applies in that case, equally applies in the one before the court. By the act of assembly (1 Sm. L. 422), an absolute conveyance, not recorded within six months, is made void against a subsequent purchaser for a valuable consideration; but let us suppose, that such subsequent purchaser had notice of the previous conveyance, it is certain, that he would not be protected by the act, although his case would come fully within the words.(a)

Thus, also, the words of the English statute of frauds and perjuries, 29 Car. II., c. 3, § 1, are as strong as those in the act now under discussion; and any agreement which is not to be performed within a year from the making thereof, is declared to be invalid, both in law and equity; and yet, if an agreement to lease for a longer term is confessed, in an answer to a bill in chancery, the court will compel the party (though the law has expressly declared the agreement void) to execute the lease. In Cowp. 141–2, is a case within the letter of a rule of the king's bench, respecting warrants of attorney given by persons in custody, and yet, as it was not within the intent, the court refused to consider it within the remedy. But it is clear, that, if the common law could not grant relief, a court of equity would; 2 Eq. Ca. Abr. 684; 1 P. Wms. 279. See 4 & 5 W. & M., c. 20. And this court exercises both jurisdictions. Against Levinz, the defendant has a specific lien in equity, though the mortgage had been void (which is denied) at common law; and notwithstanding the action is brought in his name for the use of others, the assignees can be in no better situation than the assignor,

(a) Stroud v. Lockhart, 4 Dall. 152.
and are bound by the same equity. 1 Chan. Cases, 170. If, indeed, a judgment or mortgage had been obtained by any person, before the sale of the land, and actual payment of the money to the defendant, the preference so obtained at law, would have been conclusive against him; but as the case stands, the court will do justice and support right. If a father conveys to a child, for love and affection, though this will not be good as a bargain and sale, it is good in equity as a covenant to stand seised to uses. 3 Eq. Ca. Abr. 482, pl. 10. See, how far a deed operates against the maker; 4 Burr. 2209. And the relief in cases of defective titles; Gilb. For. Rom. 228; 1 Eq. Ca. Abr. 357, 385.

*For the plaintiff, in reply, it was observed, that the arguments of *433 the adverse counsel proved the imperfection of human language; for never were words more definite, more clear, than those in question, and yet, it is contended, that they do not express the intention of the legislature that used them. Two general positions, however, are to be discussed: 1st, Whether a mortgage not recorded within six months is absolutely void? and 2d: Whether the creditors can take any advantage which the defendant himself could not? But we trust that the decision of the first will be so plain, that it is hardly necessary to consider the second.

i. The cases cited from 4 Bac. Abr., and 19 Vin., contain nothing but general observations, that where the meaning of the legislature is evidently different from the letter of the act, the latter shall be construed agreable to the former: and this it is not intended to deny. But we contend, that the legislature had in view the protection and interest of creditors, as well as subsequent purchasers; to prevent frauds upon those, as well as to secure the rights of these; and there is no just reason for giving the one class a superiority over the other, since all the bankrupt acts, by which the present act may in this respect be explained, are made to prevent a false appearance of property, by which men may be induced to give credit, as well as to purchase an estate.

There must be some force given to all the words of the legislature, as well as to the words of a deed; and as the words vary in the two acts (1 State Laws, 79 and 520), we must presume there was an intentional variation of the meaning. The case from Black. Com., on the 13 Eliz., c. 10, shows that the statute was made for the benefit only of the successors of ecclesiastical bodies; and had no respect to the party himself or to his creditors. But we will meet them on the statute of frauds and perjuries, from which they have argued by analogy; for are not leases for more than three years void? It is said, that if an agreement to lease for more than three years is confessed in an answer, the chancellor, if money has been received, will compel a performance: though we do not admit this doctrine, it does not affect the present argument, which turns upon the validity of a mortgage actually executed. A deed of bargain and sale, not enrolled, is void. 1 Danv. Abr. 696; 2 Vern. 564. The case from Cowper, was that of an attempt to commit a fraud, which vitiates every transaction.

But we still insist, that where the letter is plain, the court cannot construe it differently (1 Term Rep. 101). It would, indeed, be the assumption of a dispensing power, if the judges could give relief against a positive act.

Property is the foundation of credit; and hence, with an admirable
COURT OF COMMON PLEAS

OF PHILADELPHIA COUNTY.

JUNE TERM, 1789.

HOLMES v. COMEGYS.

Witness.—Confidential communications.

The confidential agent or factor of a party is not privileged from giving testimony.

This was a scire facias against the garnishee in a foreign attachment, upon the trial of which, the confidential agent or factor of the original defendants, who was casually attending in court, was offered as a witness, to prove effects in the hands of the garnishee.

Levy, objected to the admission of the witness; and contended, that he ought not to be allowed, or, at least, compelled, to give evidence of matters confidentially communicated to him as an agent; and that the court had then no power over him as a witness, because he had not been subpoenaed to attend. But by—

Shippen, President.—It would be of very dangerous consequence, if it was established, that a commercial agent was not amenable as a witness in a court of justice, in a cause against his constituent. It is straining the matter of privilege too far. And if the law makes him a witness, we are too fond of getting at the truth, to permit him to excuse himself from declaring it, because he conceives, that, in point of delicacy, it would be a breach of confidence.

BY THE COURT.—Let the witness be affirmed. (a)

PHILLIPS v. HYDE.

Verdict on replevin-bond.

Debt upon a replevin-bond, after judgment de retorno habendo in the replevin, and thereupon, a return of elongatur.

Sergeant, on the trial of the cause, offered witnesses to prove, that the

(a) See Morris v. Vanderen, ante, p. 64.
For the defendant, it was urged, that at common law, bonds and notes were mere choses in action, and the assignee took them under all the equitable circumstances to which they were liable in the hands of the assignor. That promissory notes do not come within the law of merchants is clear; for, if they did, the statute of Anne would have been unnecessary. The question, therefore, is, whether that statute has been extended to Pennsylvania? or, whether, by our act of assembly, notes are put on the same footing with bills of exchange?

From the general rule of the extension of statutes, the 3 & 4 Anne. has not been extended; because it was passed subsequently, to the settlement of Pennsylvania; because the province is not particularly named in it, nor would it, indeed, have been the policy of the British legislature to promote the circulation of our paper credit; and because it has not been recognised and adopted by any positive act of assembly. With respect to the introduction of the statute by practice, it operates no further than this, that the payee of a promissory note has brought an action on the note against the signor, before our act of assembly was passed; but until then, the indorsee could not maintain such an action; and obligations and promissory notes, are put on the same footing.

With respect to the act itself, that the legislature could not intend to put promissory notes upon the same footing with bills of exchange, appears evidently from this consideration, that the preceding part of the act pursues the statute of Anne, nearly verbatim; but when it comes to that clause in the latter, which places notes on the same footing with bills of exchange, the act equally varies its spirit and expression: and, it is declared, that the assignee of a note, &c., shall recover so much thereof as shall appear to be due at the time of the assignment, in like manner as the assignor could have done.

The chief justice now delivered the opinion of the court, in the following manner:

McKen, Chief Justice.—In pronouncing the opinion of the court, on the point reserved for their consideration, I shall premise, that bonds and promissory notes in writing stood on the same footing, at common law; and that the assignment of those instruments, as well as the form, operation and effect of such assignment, depends entirely upon the municipal law of the place where it is made.

By an act of assembly of Pennsylvania, passed on the 28th day of May 1715, entitled "An act for the assigning of bonds, specialties and promissory notes," it is recited in the preamble, "that it hath *been held, that bonds and specialties, under hand and seal, and notes in writing, signed by the party who makes the same, whereby such party is obliged, or promises to pay unto any other person, or his order, or assigns, any sum of money therein mentioned, are not by law assignable or indorsible over to any person, so as that the person to whom the said bonds, specialties, note or notes, is or are assigned or indorsed, may, in their own names, by action at law, or otherwise, recover the same," &c. (1 Sm. Laws 90.)

This, then, is conclusive as to the operation or effect of the assignment of a bond, or the indorsement of a note, previously to the passing of the
any solid or good reason to introduce a distinction in the particular case before us.

Upon the whole, we are unanimously of opinion, that the indorsee of a promissory note does take it, subject to all equitable considerations to which the same was subject in the hands of the indorser, the original payee. And, therefore,

Let the defendant have a new trial. (a)

CUMMINGS, assignee, v. LYNN.

Assignment of bond.

Under the act of 1715, the assignee of one holding the equitable interest in a bond, cannot sue in his own name.

The assignor of a bond is not liable to the assignee, on the failure of the obligor to pay, where there is no special covenant for that purpose.

This was an action of covenant, and the circumstances under which it came before the court, were these: The plaintiff filed a declaration to the following words:

"Joseph Lynn, late of the county of Philadelphia, yeoman, was summoned to answer James Cummings, assignee of James Campbell and Stephen Kingston, who were assignees of George Turner, of a plea that he hold with him the covenants and agreements of him the said Joseph, with the said George made, according to the force, form and effect of a certain deed thereof by him the said Joseph, with the said George made, &c. And thereupon, the said James Cummings saith, that on the 6th day of February, in the year of

(a) See Stille v. Lynch, 2 Dall. 194. Subsequently to the decision of McCullough v. Houston, an act was passed to render notes negotiable, dated in the city or county of Philadelphia, and containing the words "without defalcation," &c. (3 Sm. L. 278). And notes or bills discounted at the bank of Pennsylvania were placed on the footing of foreign bills of exchange (except as to damages), by an act passed the 30th March 1793 (3 Sm. L. 97). It is not to be disguised, however, that the authority of McCullough v. Houston, has often been doubted in the argument of counsel, and sometimes shaken by the opinion of the court. In Ludlow v. Bingham, in the high court of errors and appeals, July sessions 1799, 4 Dall. 47, Mr. Shippen, the present chief justice and Mr. Addison, then the president of a circuit of courts of common pleas, declared, that a note "expressed in commercial form, was negotiable upon commercial principles," notwithstanding the case of McCullough v. Houston, and independently of the act of assembly. In Gray v. Sutton, 8 S. & R. 488, C. J. Tilghman said of this case, that although it has not been denied for law, yet it certainly has not been generally approved of." Afterwards, in Lewis v. Reeder, 9 S. & R. 197, and Ridgway v. Farmers' Bank, 12 Id. 265, a similar opinion was expressed of this case, by the same learned judge. And see Cromwell v. Arrutt, 1 S. & R. 180; Harrisburg Bank v. Meyer, 6 Id. 537; Lighty v. Brenner, 14 Id. 127; Humphreys v. Blight, 4 Dall. 370; s. c. 1 W. C. C. 44; Evans v. Smith, 4 Binn. 66.

1 The case of McCullough v. Houston, after having been frequently questioned as sound law, was formally overruled, in Bullock v. Wilcox, 7 Watts 328, where it was decided, that the bond fide holder for value, and without notice, of a negotiable note, payable to A. or bearer, is entitled to recover on it, against the maker, free from all subsisting equities between the original parties, on a review of all the authorities, by Judge Kennedy. And see Smith v. Hogeland, 78 Penn. St. 282.
and seals, before two credible witnesses, did ass'n, indorse and make over the obligation or writing obligatory to the said James Cummings, and by the same deed of assignment, the said James Campbell and Stephen Kingston did then and there covenant with the said James Cummings, that the said sum of money should be well and truly paid to the said James Cummings, agreeable to the said obligation or writing obligatory, as by the same deed of assignment, to the court here shown, appears. Yet the said Nicholas Eveleigh, or the said Joseph Parker, or the said Joseph Lynn, or the said George Turner, or the said James Campbell, or Stephen Kingston, the sum of money aforesaid, or any part thereof, to the said James Cummings, although often required, hath not paid; by reason whereof, action hath accrued to the said James Cummings, to demand and have the said sum of money of and from the said Joseph Lynn: nevertheless, the said Joseph Lynn, the same sum of money, or any part thereof, to the said James Cummings, hath not paid, although, to do this, the said Joseph Lynn, afterwards, to wit, on the 19th day of the same month of December, in the year last aforesaid, at the county aforesaid, was, by the said James Cummings required, but the same to him to pay hath hitherto refused, and still doth refuse; to the damage of the said James Cummings, one thousand pounds, lawful money of the state of Pennsylvania; and thereof he bringeth suit, &c."

The defendant craved oyer of the bond, condition and assignments stated in the declaration, which was given in the following words:

"South Carolina.

Know all men, by these presents, that I, Nicholas Eveleigh, of the said state, planter, am held and firmly bound unto Lewis Lestarjette, merchant, in the full and just sum of three hundred and sixty-four pounds, twelve shillings, sterling money, in gold or silver specie, at the rate of four shillings and eight pence to the dollar, or one pound, one shilling and nine pence to the guinea, to be paid unto the said Lewis Lestarjette, his certain attorney, executors, administrators or assigns: to which payment well and truly to be made and done, I bind myself, and each and every of my heirs, executors and administrators, firmly by these presents: sealed with my hand, and dated the sixth day of February, in the year of our Lord, one thousand seven hundred and eighty-four."

"The condition of the above obligation is such, that if the above-bound Nicholas Eveleigh, his heirs, executors or administrators, shall and do well and truly pay, or cause to be paid, unto the above named Lewis Lestarjette, his certain attorney, executors, administrators or assigns, the full and just sum of one hundred and eighty-two pounds, six shillings, sterling money, in gold and silver specie, at the rate of four shillings and eight pence to the *dollar, or one pound, one shilling and nine pence to the guinea, with interest from the date hereof, on or before the first day of January, which will be in the year of our Lord, one thousand seven hundred and eighty-five, without fraud or further delay, then the above obligation to be void and of non-effect, or else to remain in full force and virtue.

Sealed and delivered in the presence of

John McQueen." (L.S.)
"N. B.—This bond is a renewal of an old debt contracted by Col. N. Evelyn, to Mr. Jos. Parker, for the above amount, in the year 1780.

L. LESTARJETTE.""

"I do hereby assign all my right, title, claim, property and demand of the within bond to Joseph Lynn, of the city of Philadelphia, merchant, for his sole use and benefit, for value received, 12th May 1784.

Witness.  
CROPELY ROSE,  
ALEXANDER MAJOR.

"I do hereby assign, at the request, and with the consent of the above-signed Joseph Parker, all my right, title, claim, property and demand, of, in and to the within bond, to George Turner, of Philadelphia, for his sole use and benefit. Value received of him, this twenty-eighth day of September 1784.

Witness.  
JACOB BAKER,  
CAD. MORRIS.

"I do hereby assign all my right, title, claim, property and demand of, in and to the within bond, to Messrs. James Campbell and Stephen Kingston, of Philadelphia, merchants, for their joint use and benefit. Value received in account with him, Philadelphia, 18th December 1784.

Witness.  
ALEXANDER MAJOR,  
HENRY M. VAN SLINGEN.

"We do hereby assign all our right, title, claim, interest, property and demand, of, in and to the within bond, to James Cummings, of Charleston, merchant, for his use and benefit. Value received in account with him, Philadelphia, 18th December 1784.

Witness.  
JAMES RANKIN,  
ALEXANDER MAJOR.

*Upon this, the defendant demurred, for the variance between the covenants stated and assigned in the declaration, and the covenants appearing upon oyer of the bond, condition and assignments: and upon a joinder in demurrer, the question was brought before the court, whether this action of covenant could be maintained on Lynn's assignment? which was argued at the last term, by Tilghman and Sergeant, for the defendant, and Lewis and Ingersoll, for the plaintiff.

For the defendant it was contended, in support of the demurrer, that the assignment by Parker was not within the act of assembly (1 Sm. Laws 90), for Lestarjette was the legal obligee, and Parker only the obligee in interest; and as no suit could have been maintained in Parker's name, arguments drawn from the act cannot apply to support the present action, but the assignment must be considered as made at common law.

That although Turner might have sued Lynn, yet, as it was only an equitable assignment, which is the case in respect to all choses in action, where positive law does not interpose, Turner's assignee could not support
such an action. 2 Ves. 181; 1 P. Wms. 252; 2 W. Black. 1140; Cro. Jac. 179. The assignment is only an authority to receive the money; or, at most, a covenant, that, if Lynn received it, he would pay it to his assignee. There is nothing like an express covenant on the part of Lynn; though, relying on the word assigned, it will, perhaps, be contended, that there is an implied covenant. But that (as it is already observed) is only an authority to receive the money; and the assignor can be guilty of no breach, unless he interferes with the recovery of his assignee. 1 Ld. Raym. 683; 3 Kek. 304; 2 Ld. Raym. 1242; 12 Mod. 553; 1 Id. 113. The law, indeed, will make a covenant, where a man contravenes his agreement, by deed under hand and seal. See 11 Mod. 171; Cro. Eliz. 157. But no action of covenant has ever been brought, in England, by the assignee of a bond, against the assignor; which furnishes a strong argument that no such action will lie. 1 Ld. Raym. 683; 12 Mod. 553. And there has been no judgment of any court in Pennsylvania upon this point. The law is clear with respect to chattels in possession, that then an express warranty is necessary. 2 Salk. 210; 1 Str. 459. See Bull. N. P. 272. Promissory notes are assignable to this effect, by positive statute; for, at common law, the indorsee could not sue the indorser, in his own name. (See 1 Sm. Laws, 90.)

That, at least, due diligence ought to have been used to obtain the money from the obligor, as in the case of bills of exchange or promissory notes, where a demand should not only be proved, but alleged, or it would be fatal on a writ of error. See Doug. 679. In the present case, no action was ever brought, nor any other attempt alleged to have been made, for the recovery of the money, from the person who was originally bound to pay it.

*449] For the plaintiff, in answer to these objections, it was insisted, that the assignment was under the act of assembly; and the following books were cited: 1 Bac. Abr. 527–30; 2 Com. Dig. 560, a, 4; 2 W. Black. 1640; Ld. Raym. 442; 1 Salk. 138. That, by all the cases cited, it appeared, that the word assigned amounts to a covenant that the money shall be paid; that it was immaterial, whether the assignment was legally made to Lynn or not; since, if he had assigned what he had not a right to assign, that would, in itself, be a breach, to support an action of covenant; that a bill, originally negotiable, will be so in the hands of every indorsee, although the indorsement should not be to order. 1 W. Bl. 295; 1 Str. 557. And that as this bond was assignable in its nature, by virtue of an act of assembly, the defendant, having undertaken to assign it, rendered himself liable, in an action of covenant, to every subsequent assignee. And that, if a demand was at all necessary, it sufficiently appeared in the general allegation in the declaration.

The Chief Justice now delivered the unanimous opinion of the court: That the assignment by Joseph Parker to Joseph Lynn was not an assignment according to the act of assembly (1 State Laws 77), but only a transfer of the equitable interest in the bond; and that Joseph Lynn could not, by virtue thereof, maintain an action against the obligor, in his own name. The bond was payable to Lestarjette; and, although Parker might have released it, it could only, at common law, be sued or assigned by the former. See Jenk. Cent. 221, ca. 75.

That Joseph Lynn, the defendant, only assigned his equitable interest in
SUPREME COURT

Hooton v. Will.

The Court were of opinion, that the general power was sufficient for the purpose of the release; and having directed the person acting under it, to enter an acknowledgment of satisfaction on the record, they ordered the defendant to be discharged.

Hooton v. Will.

Relation of judgment.

Held, that a judgment related back to the first day of the term, so as to exclude a domestic attachment.

Domestic Attachment. This cause being removed by certiorari from the common pleas, now came before the court, on the following case, stated for their opinion:

"The term of September, in the common pleas for the county of Philadelphia, in the year of our Lord 1782, began on the 4th day of September, and on the 16th day of September, in the same year, judgment was entered in the court aforesaid, in an action then depending at the suit of the plaintiff, above named, against John Levinz, which action had been brought to the term of June, in the same year. On the fifth day of the same month of September, a domestic attachment issued out of the same court, at the suit of John McFarland against the said John Levinz, and was served on the lands of the defendant, on the same day, at 11 o'clock in the morning. No auditors were ever appointed, nor any other proceedings had, under the said attachment, until a similar case was stated for the opinion of the court of common pleas for the county aforesaid, the 9th day of November, in the *451] year of our *Lord 1784. At the time of rendering the judgment aforesaid, the said John Levinz was seised of the aforesaid lands in fee, and so continued until the same were sold under the same judgment, by the said William Will, as sheriff of the county, in whose hands the money remains. The question submitted to the court is, whether the said Benjamin Hooton, or the said John McFarland, is entitled to receive the money from the sheriff?"

The case was argued, at the last term, by Lewis, for the plaintiff, and Ingersoll, for the defendant, when two questions were made: 1st. Whether Hooton's judgment related to the first day of the term, so as to exclude the domestic attachment, in his favor? And 2d. Whether the domestic attachment, for want of the regular continuances, was not out of court?

Lewis contended: 1st. That the act of assembly, and English statute, with respect to docketing judgments, extend only in favor of subsequent purchasers for a valuable consideration. (1 Sm. L. 390.) 3 Black. Com. 420; 14 Vin. tit. Judgment, 618; Cro. Car.; s. c. Het. 72. Under the bankrupt laws, there is a relation to the time of the act of bankruptcy; and yet the legal relation of a judgment to the first day of the term, was held sufficient to defeat the claim of the commissioners. Sid. 271; Skin. 257.

2d. That from the case stated, it does not appear that auditors have been appointed under the domestic attachment. This, however, is not so material, as that there is no continuance of the cause. There is not, indeed, any law which directs a judgment in a domestic attachment; but since, on the report
of the auditors, the business is to be settled, until that is done, it is necessary to continue the action; as in the cases of a writ of partition, and an action of account. (See 1 Sm. L. 218.)

Ingersoll, on the first point, adverted to the opinion of the court of common pleas (see ante, p. 187), and urged, that the domestic attachment law (1 State Laws, 128), was to be considered as applying to an insolvent debtor, the great outlines of law with respect to a bankrupt. From the moment that the attachment is in the hands of the sheriff, the property ceases to be the defendant's, and must be disposed of agreeable to the act. See Comb. 33; Skin. 257. Under a commission of bankrupts, which is thus analogous to the domestic attachment, creditors are to be considered as purchasers, and nothing can exclude a general distribution, but an execution executed. See Co. Bank. Law. Fictions, indeed, ought never to be allowed to work an injury; but if the technical relation of a judgment to the first day of the term, were suffered, in a case of this nature, all the expense and trouble of a domestic attachment would be rendered oppressive and nugatory.

*2d. With respect to the second point, the act of assembly as to the appointment of auditors, is merely directory; and continuances [*452] are matters of mere form, which may be entered at any time; so that the court will even presume it to have been done. 2 Har. C. P. 312; 1 Str. 139; 2 Barn. Not. 172; 1 Sid. 53, 60. See 18 Vin. tit. Purchaser; Prec. in Chan. 478; Schlosser v. Lesher, ante, p. 411.

Lewis, in reply, still urged, that the acts for docketing judgments and recording deeds, were only made in favor of purchasers, and, although, generally speaking, every man who does not take by descent, is called in law, a purchaser, he contended, that the object of those acts was not of that general import, but merely to secure persons who had paid an actual and immediate consideration for the premises, and not to aid those who, by process of law, were endeavoring to recover an antecedent debt, which was the case in a domestic attachment. The attachment, when levied, is binding between the parties; but it does not affect the legal relation of a judgment obtained by another person; and the case cited from Co. B. L., is that of an execution taken out, but not levied. See Prec. in Chan. 478.

With respect to the omission of continuances, he answered, that if there was anything to enter them from, and day has been given to the defendant, from time to time, then the doctrine and authorities of the adverse counsel would apply. But he insisted, that where day was given to the defendant, and afterwards, nothing was done in the cause, the continuances could not be arbitrarily entered, in the manner suggested by the defendant's counsel.

After consideration, the Chief Justice delivered the opinion of the Court, in which he declared, that he and his brethren were unanimously of opinion: with the plaintiff, on the case stated; and directed judgment to be entered accordingly.

Judgment for the plaintiff. (a)

(a) See the note to Hooton v. Will, ante, p. 187.
Primer, Plaintiff in error, v. Kuhn.

Set-off.

The assignee of a bond given by an insolvent, who obtained his discharge after the bond became due, may set off the bond against the price of goods purchased by him of the obligor, although the latter had no notice of the assignment, at the time of the purchase of the goods. Kuhn v. Primer, ante, p. 225, reversed.

Error from the Common Pleas of Philadelphia county. On the trial of the cause below (see ante, p. 225), a bill of exceptions was taken to the opinion of the court, in the following words:

"Trespass sur le case, in the common pleas, Philadelphia county; and now, the 6th day of February 1788, upon the trial of this cause, the counsel for the defendant, under the plea of non assumpsit, payment and defalcation, and in order to maintain the same issue, offered to give in evidence a certain bond or obligation of the said Ludwig Kuhn (prout obligation), assigned (prout assignment), entered into by the said plaintiff, before his discharge under the insolvent act, and prayed that the moneys thereon due might be defalked against the said Ludwig Kuhn's demand, which, it was argued, had commenced after his said discharge. To this the counsel for the plaintiff objected, and prayed the court not to admit the same obligation and assignment thereof in evidence; to which the court assented, and overruled the testimony. Whereupon, the said counsel for the defendant did, then and there, on behalf of said defendant, except to the said opinion of the court, and did, then and there, request of the said court to put their seals to this bill of exceptions, which was granted accordingly."

To the bill of exceptions, a memorandum was subjoined by the counsel, on both sides, stating, that the plaintiff below had notice of the bond and assignment, before the suit brought, but not before the sale and delivery of the goods by him to the defendant.

The refusal of the court of common pleas to permit the bond and assignment to be given in evidence, was the error now alleged; and on the 26th of September, the case was argued by Levy, for the plaintiff in error, and Sergeant, for the defendant.

Levy.—Before the acts of assembly are particularly examined, it may be proper to consider some of the inconveniences that existed, in such cases, at common law. Goods delivered in part might, perhaps, be given in evidence in an action of assumpsit, by way of mitigating the damages, but not under a plea of payment to a specialty; nor could the defendant discount any note, bill, bond, recognizance or judgment entered into by, or obtained against, the plaintiff. This necessarily multiplied suits and costs; and it often happened, that a plaintiff, in desperate circumstances, recovered against a defendant to whom he was, in fact, indebted in a greater sum. If, indeed, by accidental circumstances, his action was brought to a conclusion, earlier than the defendant’s cross-action, he might receive the money, and for his larger debt, become utterly insolvent, by the time the defendant had obtained a judgment.

Inconveniences of this kind have been perceived by the legislature, or judicial power, of the most enlightened nations, and a remedy, in a greater
bill, dated the 3d of January 1784, by which John Thompson binds himself in the penalty of 200,000 weight of net crop tobacco, of the inspection of Fredericksburg, or Falmouth, on Rappahannock river, in Virginia, to pay 100,000 weight of tobacco, of the same inspection, to John Musser, or his assigns, as soon as it could be collected of those who are indebted to the said John Musser and the obligor; but the said John Thompson agrees, that, in case it cannot be collected or obtained, he will be answerable for the same." After oyer of the bill, the defendant pleaded payment, the plaintiff replied non solvit, and thereupon issue was joined.

The case was tried at Lancaster, on the 7th of December 1786, when the plaintiff below gave in evidence the penal bill stated in the declaration, upon which an indorsement was made and subscribed, on the 25th of May 1785, that "it was agreed by the parties, that the within tobacco should be settled at the current price at Fredericksburg, on the 1st of May 1784; at which time, the within bond is considered due, and is to carry interest from the date." There was, likewise, a receipt on the back of the bill, signed by Musser's attorney in fact, on the 5th of July 1785, acknowledging that he "received the within bill in full."

On behalf of the defendant below, two indentures were given in evidence, from which it appeared, that the plaintiff and defendant had entered into a copartnership, for carrying on an inland trade, during a limited period; and on the indenture last made between them, a memorandum was indorsed, dated the 3d of January 1784, setting forth the receipt of the two penal bills, on which the present actions were brought, and declaring that the same, when paid, were to go in discharge of what was due from Thompson to Musser. Several letters were read from the latter to the former, in which it was confessed, "that Musser had no other claim, but upon these bonds, against Thompson, and that every payment, which had been made since they were given, was on their account. The payment of a note for 40l. was then proved, and an agreement, which had been entered into by Musser, that, "on the payment of 40l. specie, and the remainder that may appear due, in warrants on the treasurer of the state of Virginia, which are received there in taxes at par, or equal to gold and silver, allowing Musser at the rate of 12½ per cent. on the whole amount of the said warrants, the same shall be a sufficient discharge of the bill." To prove the payment of Virginia warrants, according to the terms of the foregoing agreement, a receipt was produced from Musser's attorney, dated the 5th of July 1786, to this effect: "Received from John Thompson 168l. 11s. 0½d. Virginia currency, in warrants on the treasurer of Virginia, which is settled in specie at 148l. 4s. 4d. Virginia currency; being in full payment of his bond to John Musser, dated the 3d January 1784, for 100,000 weight of net crop tobacco, of the inspection of Fredericksburg, or Falmouth, in Virginia." And in order to show that the warrants thus paid, were receivable in taxes, at par, or equal to gold and silver, the counsel for the defendant below offered to read an act of the legislature of Virginia (which contained a recital of a preceding act) on that subject, from a pamphlet, stitched in blue paper, with the following title page:—"Acts passed at a general assembly of the commonwealth of Virginia, begun and held at the public buildings in the city of Richmond, on Monday the 3d day of May, in the year of our Lord 1784. Richmond: Printed by John Dunlap and James Hayes, printers to
3d. That the judgment is erroneous, because, ensuing the nature of the verdict, it is for the value of the tobacco in money, and not for the tobacco itself; or, if that cannot be had, for the value thereof in money.

4th. That the court below were in error, in overruling the evidence of the printed copy of the act of assembly of Virginia, which purported to have been printed by the law printers of that commonwealth, respecting the nature and value of treasury warrants or certificates.

The second and third of these errors were also alleged and applied against the smaller record, with an additional exception, to wit, that after the jury had once been sworn, the court, without the consent of the defendant below, discharged them, permitted the plaintiff to amend his declaration, swore the jury again, and neither gave the defendant an impalance, nor ordered the plaintiff to pay the costs occasioned by his faulty declaration.

The causes being held under advisement for a considerable time, in hopes that a compromise would take place between the parties, the Judges now delivered their opinions separately and at large.

McKeAN, Chief Justice.—The arguments on the records before the court have been ably and learnedly enforced. To these, and to the authorities produced on both sides, I shall briefly refer, while I consider in their order, the objections that have been made in favor of the plaintiff in error.

1. In support of the first objection, a variety of precedents have been shown of declarations upon penal bills from 1 Mod. Ent. 180, 281; Brown's Mod. Intrandi, &c., and the following books were cited: Doug. 658; 8 Co. 138; 4 Bac. Abr. 13; 7 Co. 10 a; 4 Bac. Abr. 10, 363; 5 Id. 321; Cro. Eliz. 548; Cro. Jac. 183, 500; Cro. Car. 515; Hob. 82, 232; 12 Mod. 81; 1 Bulstr. 163; Salk. 602; 2 Ld. Raym. 814; Carth. 322; Doctrin. Placit. 329; Co. Litt. 303.

But the counsel for the defendant in error have answered these cases, by urging, that oyer of the penal bill was prayed and granted; that the defendant below pleaded in chief to the declaration, payment, and joined issue; and that the verdict was for the plaintiff below. They contended, that the plaintiff was only bound to prove the gist of the action; that it was not incumbent on him to prove that the smaller quantity of 100,000 weight of tobacco was not paid; that under the act for defalcation (1 Sm. L. 49), the jury are to find the sum really due; and that the defect, if it was one, is cured by pleading over in chief, and also by the verdict. In corroboration of these positions, they cited, Doug. 658; 8 Co. 133; Vaugh. 93, 4, 5; 4 Bac. Abr. 19, 16; Hob. 199; 1 Lill. Pract. Reg. 418; Cro. Car. 209; 5 Con. Dig. 57, 58, 60; 1 Mod. 169; 1 Salk. 37, 98, 133; 8 Mod. 350; 1 Lev. 190; 12 Mod. 44; Cro. Jac. 668; Tri. per Pais 289, 290, 306, 367, 308; Cro. Car. 515; Cro. Eliz. 68; 12 Mod. 459, 414; Carth. 80, 94; 2 Wils. 380; Cowp. 407; 1 Str. 238; 2 Id. 925, 1006, 1011; 1 Wils. 255; 1 Salk. 9; Bull. N. P. 147, 148; 3 Black. 410; Barr. on Stat. 103; 2 Black. 406; 1 Vent. 108, 114, 122, 156; 1 Com. Dig. 60; 2 Vent. 153; Keelw. 187 b; 7 Rep. 10 a; 9 Vin. Abr. 599, pl. 1; 10 Id. 3, pl. 1; 16 & 17 Car. II., c. 8.

We are clearly of opinion, that this defect in the declaration, with respect to the averment, cannot now be taken advantage of as an error. It might, indeed, have been fatal on demurrer; but, at this period of the cause, it is cured by the plea in bar, by the verdict, and by the statutes of
without being entangled in technical niceties. Cro. Jac. 502; ed Mod. 270; 1 Wils. 1; 2 Str. 931, 1013; 1 Sid. 370; 5 Mod. 227; 1 Vent. 119; 2 Wils. 380; Cowp. 407.

4. The last error assigned in this record, respects the refusal of the court of common pleas to admit the defendant below to read in evidence, a copy of an act of assembly of the state of Virginia, printed by the law-printers there, and stitched up, with a few other acts, in a blue paper cover.

*463* To maintain this objection, it has been argued, that in Great Britain, a public act of parliament is proved by the printed statute book; that a general history is a proof of a general transaction, though not of a particular one; that this is a general act, and promulgated in the usual mode of promulgating the laws of Virginia; that by the fourth article of the late confederation, the courts are obliged to take notice of the acts and proceedings of other states, as much as if they had occurred here; and that the ordinances of France, the laws of the Danish islands, proclamations in our sister states, the statutes of England, Ireland and Scotland, heralds' books and registers, have frequently been read in evidence in this court, because of their public notoriety. 12 Mod. 86, 215, 216, 403; 12 Vin. Abr. 119; 1 Atk. 47; 2 Eq. Abbr. 408, 409; Cowp. 407; Gilb. L. Ev. 13.

In opposition to these arguments, it was contended, that the laws of Virginia ought to be proved as other facts in foreign countries; that in Great Britain, private statutes must be proved, either by sworn copies, or authenticated under the great seal; that every man is, indeed, obliged to know the laws of his own country, for they are presumed to be in every man's breast, and the statute book contains hints of them; but the laws of Virginia are unknown in Pennsylvania, and are not in any wise obligatory upon us; that the reason why private statutes must be proved, before they can be received in evidence, applies strongly to foreign acts of assembly, for no man is obliged to know them; that an act of assembly in print is no better verified than if it were in writing only; that this act of assembly might have been forged or repealed, and yet, it would be impracticable on a sudden, pending a trial, to prove it; and that there is no precedent of determination of any court, that such a copy is good evidence; for, indeed, it militates against the general rule of evidence, "that the best evidence the nature of the case will admit ought to be produced, and a sworn copy compared with the votes might have been had, or some other regular authentication. Gilb. L. Ev. 4, 5, 13, 16, 17; 12 Mod. 403; Vin. Abr. 129, pl. 59; Id. 119, 120; 1 Salk. 121; Cowp. 174; Prec. in Chan. 207; 1 Lill. Abr. 207; 3 Salk. 154; Doug. 1, 572; Bull. N. P. 21; Old Law of Ev. 66; Trials per Pais 232; 3 Journ. of Cong. 493, 12th November 1777.

This subject has been very ingeniously discussed. It is in a great measure new; so far, at least, that it does not appear to have come formally before any court, until it arose in the present cause at Lancaster. But, at the same time, I must remark, that I never heard until then of such evidence being refused; and without opposition, I am certain it has very frequently been admitted.

Our law is not confined to particular precedents and cases, but consists in the reason of them; for the reason of the law is the life of the law. I admit, that this printed copy of an act of assembly, though it purports
and then had the jury sworn again, and received their verdict, without consent, without giving the defendant liberty to plead anew, and without an imparlance, or awarding the payment of costs by the plaintiff.

In support of this objection, it has been urged, that the amendment was an alteration in substance, and changed the nature of the defence; that there is no precedent of such an amendment, after the jury was sworn, therefore, it is hoped, that this court will not enlarge the precedents of amendments, by making a new one; and that the court below had no power to discharge the jury, after sworn, without consent; or, if they had, that they ought to have granted an imparlance. Stiles' Pract. Reg. 45, 49; Salk. 47; 3 Lev. 347; Carth. 465; 2 Black. Rep. 785; 2 Str. 890; Fitzg. 193; 3 Bac. Abr. 236; Gilb. Pract. C. P. 79, 80.

On the other side, it was insisted, that the amendment was only to make the declaration conformable to the writ; that the merits came before the jury, and the cause was fairly tried; and that such an amendment may be made at any time. 3 Black. Com. 406; Cunning. Rep. 43; 2 Burr. 756; 5 Id. 2834; 3 Lev. 347; Sir T. Raym. 53; 4 Burr. 2569; Cowp. 841; 1 Wils. 7; 4 Bac. Abr. 30; Comb. 13; 2 Vin. Abr. 326.

The court would willingly support this proceeding, if they legally could; for, they are no friends to exceptions like the present, where the merits have been fairly tried. But we can find no case, or opinion, to favor it in all its parts. I have met with but one, which mentions, that "after a jury sworn, sometimes a juror is withdrawn, on purpose that there may be an amendment, if it be not entered upon record." This case was not mentioned at the bar, but is reported in Comberbach 419, Rex v. Edwards.

Suppose, however, that the court had given the plaintiff leave to make the amendment, before the trial; which they might unquestionably have done, as the nature of the action was not thereby changed; yet, it was in the election of the defendant, either to take costs of the plaintiff, or to imparl to the next term; for he had a right to advise upon a plea fitting the declaration so amended; or, if the amendment did not, in his opinion, require an alteration of the plea, he might take the costs, and enter the same plea immediately. At all events, I think, he ought to have been allowed, if he pleased, to plead again, after the amendment, and so join a new issue. 1 Lill. Abr. 70 d; 71 a; Comb. 58; 2 Str. 950. And I have found two cases in Judge Jenkin's Centuries, in which it is held, that a jury discharged before verdict, shall not be charged again, but there must be a new venire facias Jenk. Cen. 7, ca. 9; Id. 283, ca. 13.

Since, then, the facts relating to the amendment appear upon the record, I am of opinion, that the proceeding of the court below was erroneous: and this judgment also ought, therefore, to be reversed. (a)

(a) See Smith's Lessee v. Brown, 1 Yeates 413, where the court permitted a declaration in ejectment to be amended, after the jury was sworn, to make it conformable to the record, without the consent of the defendant. It has been said, that the act of 1806 was intended to authorize the courts to grant amendments, after swearing the jury, as fully as they could do at common law, before swearing the jury; but not to require the court to allow amendments, which would change the ground of action, and introduce a new matter altogether distinct from that originally set forth. See Wilson & Hamilton,
In Doug. 657, by a recent and solemn decision of the whole court, it has been held, that if the indorsee does not prove at the trial a demand on the acceptor and refusal, even a verdict, in such case, will not help him. The well-known case of omitting the *scienter* is there admitted to be law. The case is expressly referred to, as reported in Salk. 662. The declaration was, that the defendant kept a bull that used to run at men, but did not say *scienter*, &c. This was held ill, after verdict; for the action does not lie, unless the master knows of this quality; and the court cannot intend it was proved at the trial, as the plaintiff need not prove more than was in his declaration. So, in the case at bar: the court cannot intend that the plaintiff proved at the trial, that the defendant did not pay or deliver 100,000 weight of tobacco; because, not being alleged in the declaration, the plaintiff was not under any necessity of proving it. With respect to the other objections to the larger record, I entirely concur with my brethren.

I concur also, that there has been a mistrial in the other cause tried between the same parties. W. Black. 785, is in point. Where the declaration is amended in a material point, a rule should be given to plead. If the plaintiff has a right to amend, he is also bound, at the same time, to give a rule to plead, that the defendant may not be surprised at the trial; and omitting to do so, is error. The jury was sworn to try the precise and identical issue joined by the pleadings; and if that was afterwards altered or changed by the plaintiff, the verdict will not help it; because a verdict will not help that which was not in issue. Gilb. Hist. and Pract. Com. Pleas, p. 100.

The court below had no power to discharge the jury, after they were sworn, without the consent of both parties. It is true, that in 2 Str. 1117, it appears, that a jury was dismissed, after they were sworn, because no issue was joined. But as there was an issue joined in the cause of *Musser v. Thompson*, the court below have acted erroneously, and contrary to law, in discharging the jury, without the consent of both parties.

I think, upon the whole, that judgment should be reversed in both causes.

*Bryan, Justice.—As I agree entirely in the opinions given by the chief justice, for the reasons which he has assigned, I shall content myself with generally declaring, that I think the judgments on these records ought both to be reversed.

**By the Court.—** Let the judgments of the court below, on both records, be set aside.

**Respublica v. Negro Betsey et al.**

*Slaves.*

Under the act of 1st March 1780, a negro born before that date, and not registered agreeable to the directions of the act, could not be held as a servant until he attained the age of twenty-eight years; but was absolutely free.

This was a *habeas corpus ad subjiciendum*, which had been allowed by Mr. Justice Bryan, and afterwards, brought by him before the court. The case was twice argued; first, on the 29th of June 1788, by Bradford, on be-

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half of Samuel Moore, who claimed the negroes as his servants, and by Lewis, in behalf of the negroes; and a second time, in April term, 1789, by the same counsel for the claimant, and by Ingersoll and Fisher, for the defendants. The court having held the matter under advisement until the present term, the judges delivered their opinions separately, in the following order; the chief justice stating the circumstances of the case, and the arguments of the counsel, in the course of his observations.

McKean, Chief Justice.—The negro Betsey, for whom the habeas corpus issued (and upon whose fate, that of the two other negroes depends), was born before the 1st of March 1780, to wit, in the 1779, and her name, age, sex, &c., were not registered in the office of the clerk of the peace of the county of Chester, in which the master, Samuel Moore, then inhabited, on or before the 1st of November 1780, agreeable to the directions of the act of assembly, entitled, "An act for the gradual abolition of slavery," passed on the 1st of March 1780. (See 1 Sm. L. 492.)

The question that is submitted to our consideration upon these facts, is, whether the negro can be held as a servant, until she attains the age of twenty-eight years? or, whether she is absolutely free?

On the part of the master, it has been argued, that, although by the fifth and tenth sections of the act of assembly, the owner or master of any negro or mulatto slave, or servant for life, or for thirty-one years, then within the state, or his lawful attorney, ought to cause such negro or mulatto to be registered, on or before the 1st day of November 1780: yet, by the fourth section, it is provided, that every negro or mulatto child, born within this state, after the passing of the act, who, in case the act had not passed, would have been born a servant for thirty-one years, for life, or a slave, shall be deemed a servant until the age of twenty-eight years. It was urged also, that the legislature could not intend a greater favor to negroes and mulattoes, born as slaves, or servants for life, or until the age of thirty-one years, before the passing of that act, than to those born after; that the intention of the legislature is to govern in the construction of this act, which, as well as in other legislative acts, in doubtful cases, must be construed according to the reason and sense of the law-makers, expressed in the several parts of the act, or to be collected by considering the frame and design of the whole. 11 Mod. 161. And that the maxim is ubi eadem ratio, ibi idem jus.

For the negro Betsey, the counsel have agreed in the rule for the construction of acts of assembly, but they argue, that the fifth section of the act under consideration is positive, that all negroes and mulattoes, held as slaves or servants for life, or until the age of thirty-one years, should be registered before the 1st of November 1780, or that they should be free; that this was the intention of the legislature is confirmed by the tenth section, which declares that they shall be deemed free-men and free-women; that where the words are express and positive, there is no room left for construction; that the law favors liberty more than property; and that if the case should appear doubtful, the judgment should be in favor of the liberty of negro Betsey.

Since the argument, the court have again read the act of assembly, and maturely considered that, and the several reasons urged by the learned counsel on both sides; and as this is the first case that has come before them,
of twenty-eight years, unless freed sooner by her master; and that she be then entitled to the like freedom dues and other privileges, as if she had been born after passing the act for the gradual abolition of slavery.

I know not what other construction to put on the sixth section. If the word "not" in the fifth line from the end of this section, had been expunged, I should have been a different opinion; but the engrossed act has been examined, and the word "not" is in it. The legislature must have had some meaning in using this word, as well as in the sentence that provides, that, "unless his or her master or owner, shall, before such slave or servant attain his or her twenty-eighth year, execute and record in the proper county, a deed or instrument, securing to such slave or servant his or her freedom."

By this judgment, if I should be mistaken, the negro Betsey is in no worse situation, than if she had been born after the passing the act, and I do not know a reason why she should be in a better. Were she discharged from her master, she would be incapable to take care of herself, and her parents are unable to educate her: she cannot suffer so much by living with a good master, as being with poor and ignorant parents. By a contrary judgment, she, as I have just hinted, would be little benefited, and her master, who hitherto has derived no advantage from her services, and has been subjected to considerable expenses for her food, clothing and lodging, would be a great sufferer; so that the balance on this consideration seems, likewise, to preponderate on the side for which I have declared my opinion.

**Atlee, Justice.**—This cause was argued in the supreme court, in June 1786; but as Mr. Justice Rush and myself were then absent, another argument was requested for our satisfaction, and the gentlemen of counsel for the parties having obligingly acquiesced in our wish.

The question arises upon an act of assembly of this state, entitled, "An act for the gradual abolition of slavery," passed on the 1st day of March, in the year 1780; and it is, whether a negro child, born before the passing of that act, and not registered agreeable to the directions it contains, shall be free, or be in a similar situation with those born after the passing of the act, that is a servant until twenty-eight years of age?

It is agreed, that these negro children were born before the passing of the act, and that they and their parents were, at the time, the slaves or servants for life of Samuel Moore, of Chester county, who neglected to register them agreeable to the directions of the act. In consequence of this neglect on his part, the parents have obtained their freedom and the children now seek it, that they may follow, and be under the care and direction of those parents, instead of a master.

The act, after declaring in the third section, that negroes and mulattoes, born after it was passed shall not be deemed slaves or servants for life, and extinguishing all slavery of children, in consequence of the slavery of their mothers, provides in the fourth section, that such children as should be born after the passing of the law (who would, in case it had not been made, have been born servants for years or life, or slaves), shall serve until they attain the age of twenty-eight years, and in case of such children being abandoned by the master or mistress, directs their being placed out apprentices by the overseers of the poor.
So far the act confines itself to children born after it was passed. The following section, to wit, the fifth, includes every description of these people, of both sexes and all ages, and under this and the tenth section it is, that the parents of these children have obtained their freedom. This directs that every owner of negro and mulatto slaves, or servants for life, or until the age of thirty-one years, at that time within the state, shall cause the names, ages and sex of such their slaves and servants to be registered, or entered on record, in books to be provided for that purpose, by the clerks of the sessions in the several counties of the state, on or before the first day of November 1780; and declares, that no negro or mulatto then within the state, shall, from and after the said 1st day of November, be deemed a slave, or servant for life, or until the age of thirty-one years, unless his or her name shall be entered as aforesaid on such record.

And by the tenth, it is enacted and declared that, no man or woman, of any nation or color, except the negroes and mulattoes who shall be registered as aforesaid, shall be deemed, adjudged or holden, within the territories of this commonwealth, as slaves or servants for life; but as free-men and free-women.

Under these sections of the act, it should seem, that freedom is secured to every negro or mulatto within the state, at the time of making the act, who was not registered agreeable to its directions, on the 1st day of November 1780; but a doubt hath arisen, under the sixth section, with respect to those who are under the age of twenty-eight years, though born before the making of the act.

This section comes in by way of proviso to the fifth, and declares, That any persons who had the ownership or right to the service of any negro or mulatto, at the time of passing the act, his or her heirs, executors, administrators and assigns, shall be liable to the overseers of the poor of the city or place to which such negro or mulatto shall become chargeable, for the expenses such overseer may be put to, through the neglect of the owner, master or mistress of such negro or mulatto, notwithstanding the name and other descriptions of such negro or mulatto shall not be entered and recorded as aforesaid; unless the master or owner shall, before such slave or servant attain his or her twenty-eighth year, execute and record in the proper county, a deed or instrument securing to such slave or servant, his or her freedom.

This clause has given rise to the argument, and it is contended, on behalf of Samuel Moore, that he has a right, upon a just and reasonable construction of it, to the service of these children, until they arrive to their respective ages of twenty-eight years, notwithstanding they were born before the passing of the act, and were not registered. But I cannot hold with that opinion.

The fifth section of the act requires entries of all the negro and mulatto slaves, or servants for life, or until the age of thirty-one years, within the state at the time of making the act; it directs the mode of those entries; it fixes the time within which the entries shall be made: and without any exception in respect to their ages, declares that no negro or mulatto then within the state, should be deemed a slave or servant for life, or for thirty-one years, unless his or her name should be registered within the time limited. The master or owner had his election whether to enter them, or not;
if he did, he secured to himself the right he had in them before the making of the law; and if he did not, it appears to have been the intention of the legislature, that he should forfeit all right to their services. The tenth section, I think, shows this expressly; for it not only enacts that such unregistered persons shall not be deemed as slaves or servants for life, as in the other sections, but adds that they shall not be held or adjudged so; and further, that *they shall be deemed, adjudged, and holden as free-men and free-women, in opposition to every species of servitude before taken notice of in the act. As this ambiguous section seems annexed indeed as a proviso to the fifth, it may be taken as intended to deter persons from holding in their service negroes and mulattoes, whom they had not registered according to law.

Had the legislature intended, that all those who were born before the making of the act, and had not attained the age of twenty-eight years, should serve until they arrive to that age, they would have shown that intention in express terms. As persons of that description among the negroes and mulattoes, made a great part of their number, they would have made provision for those of tender age, who might happen to be abandoned by their owners, as they have done with respect to those born after the act, and abandoned; they would have made like provision for their redress, in case of severe treatment, and in proportion to their terms of servitude before they attained the age of twenty-eight years, they would have directed freedom dues, as they have done for the others.

With respect to persons of this color, those who were servants among us, before the passing of the act, were either slaves or servants for thirty-one years: the servitude of twenty-eight years is created by this act, and appears to me to be limited to those who are born of registered slaves, after it was passed, and to those only.

The preamble to the act, among the unhappy circumstances formerly attending these people, mentions their being cast into the deepest affliction by an unnatural separation and sale of husband and wife, from each other, and from their children: in the present case, it is attempted to separate these children from their parents, by a construction which appears to me to clash with the intention of the makers of the law; while such a construction as will secure freedom to them, and restore them to their parents, will, I think, agree best with the design of the legislature.

I am, therefore, of opinion, that the implied construction contended for in behalf of Samuel Moore, on a doubtful and dark clause in the act, cannot be admitted to operate in his favor, against the express letter and direction of its fifth and tenth sections; and, consequently, that these persons ought to be discharged from his service.

Rush, Justice.—The question on the habeas corpus, in the case of Samuel Moore's negroes, is a question of construction, arising on the act for the gradual abolition of slavery.

It is admitted, that those negroes were born before the 1st of March 1780, the date of the law: and that Samuel Moore, who now claims them, was then in possession of them, and that he neglected to register them. It is also admitted, that they were slaves for life, when the act passed. *475] On the one hand, it is contended, that his neglecting to register
why provide for a child born after the act, in case it should be abandoned, and not for a child born before the act, in a similar situation? Surely, an abandonment was as likely to happen in the one case, as in the other, and from the same cause. The silence of the legislature on this point affords a striking argument to prove, that they never entertained an idea that children born before the act, were to be servants until the age of twenty-eight; otherwise, the same provision would have been made in both cases. The master, in the case before the court, had it in his power to have acquired a right to the children for life, if he had chosen to register them; or by neglecting it, to give them up for ever: and this observation appears to me a satisfactory answer to the argument, that children born before the act, ought not to be placed in a better situation than those born after it. The master might have put them in a much worse situation; and having run that chance, they ought not now to be placed on the same footing with those born after the act.

But the greatest difficulty in the cause still remains; that is, the sixth section of the act. By this clause, “Every owner of a negro or mulatto, at the time of passing the act, his heirs, executors, administrators and assignees shall be liable to the overseers of the poor, where such negro or mulatto shall become chargeable, for such necessary expenses as the overseers may be put to, through the neglect of the owner or master of such negro or mulatto; notwithstanding the name and other descriptions of such negro or mulatto shall not be entered and recorded as aforesaid; unless his master or owner shall, before such slave or servant attain his twenty-eighth year, execute and record in the proper county, a deed or instrument securing to such slave or servant his freedom.”

The first observation to be made on this section is, that the neglect of the owner or master therein mentioned, does not mean his neglect to register, but his neglecting to provide for the negro, whereby the overseers are obliged to do it. I have on several former occasions considered this clause with a good deal of attention. I once suspected there was a mistake in it, and that the word not should be expunged in the paragraph which says, “notwithstanding the name and other descriptions of such negro or mulatto, shall not be entered and recorded as aforesaid.” *Accordingly, I examined at the roll’s office, the law signed by the speaker, and also the recorded act, but found them both correspond with the printed law. I still think, however, in construing the act, that word should be rejected. The clause then will mean this—that, notwithstanding such act of registering, whereby a right is vested in the master, yet in case the negro should become unable to support himself, and the overseers should do it, the master should be liable to them. In other words, although you comply with the law, and register your negro, which will make him your property; yet, that circumstance shall not exempt you from the burden of supporting him afterwards; unless you set him free by deed, recorded in the proper county, before he attains the age of twenty-eight years.

If it should be observed, that this would make the legislature say a very idle thing, to wit, that a man shall be bound to support his own slave; I answer, the clause goes further: it prohibits him from abandoning his right, unless he does it before his arrival at the age of twenty-eight; and where, at the time of registering him, he was above that age, he can never after
makes void all leases by bishops, to all intents and purposes, yet the lease is
good against the lessor. To which cases I will only add a determination
lately given in this court, in the case of Levinz v. Will (ante, p. 430).
Although the words of our act of assembly declare, "that no mortgage
deed shall be good or sufficient to pass any freehold or inheritance, or any
estate for life or years, unless recorded within six months from the date;"
yet this court very properly held such mortgage good against the mortgagor;
a decision which is certainly repugnant to the express words and letter of
the act.

I concur, therefore, with my brother, Judge Atlee, that the negro chil-
dren Betsey, Cato and Isaac, mentioned in the return to the habeas corpus
as detained by Samuel Moore, should be discharged; it appearing to me, he
holds them in custody against the law of the land.

Bryan, Justice.—In this case, I confess, that hitherto I have agreed in
opinion with the Chief Justice; but I now unite with *my brothers,
Atlee and Rush, upon this principle, that it was in the power of
Samuel Moore to have secured the service of the negroes in question; and
having omitted to do so, he cannot, on the one hand, take advantage of his
own negligence; nor, on the other, will an ignorance of the law excuse him.
The tenth section of the act of assembly seems, indeed, inaccurate and
insensible; but, as upon a clause of so obscure a kind, I would not wish to
press an argument against liberty, I must declare my voice to be in favor of
the discharge of the negroes.

By the Court.—Let the negroes be discharged. (a)

(a) See Pirate v. Dalby, ante, p. 167; Miller v. Dwilling, 14 S. & R. 442.
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Graff v. Smith's Administrators.

Contribution.

Where one died intestate, indebted to several persons, and leaving several children, and after a sale of certain parts of his real estate, by order of the orphans' court, for payment of debts, the remainder was divided among his children, and the eldest son sold his share to bona fide purchasers; it was held, that the purchasers were bound to contribute in aid of the other heirs, whose lands remained unsold, to the payment of the remaining debts of the intestate.

This case came before the court on a rule to show cause why the sheriff should not be directed to postpone the sale of lands taken in execution, in the hands of the purchasers from John Smith, the eldest son of Robert Smith, the intestate, until all the lands remaining unsold, in the hands of the other children of Robert Smith, should be sold by virtue of the execution.

After argument, the President stated the circumstances of the case, and delivered the opinion of the court, in the following manner.

Shippen, President.—The facts agreed on both sides in this cause, are, that Robert Smith died intestate, indebted to several persons, and possessed of a considerable real estate, but not of sufficient personal estate to pay his debts; that his administrators applied to the orphans' court for an order to sell certain parts of the real estate, sufficient to pay the debts and maintain the children; that such order was accordingly obtained, and that part of the real estate was sold for that purpose; that a subsequent application was made to the orphans' court for a division of the remainder among the children; that the part allotted to John Smith, the eldest son, on that division, was by him sold and conveyed to bona fide purchasers; and that John Smith was himself an administrator, and neglected to discharge all the debts out of the sum arising from the sale of the lands ordered to be sold by the orphans' court, but wasted the money, and is supposed to be insolvent. Some of the creditors of Robert Smith, whose debts remained unpaid, have since obtained judgments, and issued executions against the lands of the intestate, as well those sold by John Smith, under the order of division, as against the lands remaining unsold in the hands of the younger children. Three questions have arisen upon the argument.

1. Whether, upon the death of the intestate, his lands were bound to the payment of the debts, in such a manner, as that they may be taken in execution and sold, notwithstanding the heir may have previously sold and conveyed the same to bona fide purchasers?

2. Whether the purchasers from one of the heirs, are bound to contribute to the other heirs?

3. Whether the purchasers under the order of the orphans' court, are likewise bound to contribute?

I. In order to solve the first question, it will be necessary to take into view the several acts of assembly which subject lands to the payment of debts.

The act of 1700 subjects all lands of debtors to sale on judgment and execution against them, their heirs, executors, and administrators.

*482* The act of 1705 repeats the same provision, with the restriction that, if the clear yearly profits will pay the debt in seven years, the land shall be delivered to the plaintiff upon a reasonable extent.
the whole personal estate, or its value, is bound, from the moment of the
debtor's death, to the payment of his debts. (a)

The real estate is, likewise, confessedly, a fund for the payment of debts.
It is a fund, however, that does not actually go into the hands of the execu-
tor or administrator, as assets in the ordinary course; but it is a fund, made
such by positive law, in another form; that is, creditors may issue execu-
tions, and sell it for the payment of their debts, on a judgment against the
executor or administrator; for it is not necessary, nor has it been usual, to
bring the action against the heir. The lands, however, go into the hands of
the heir or devisee, who gives no security, and between whom and the credi-
tors there is no privity; they are made a fund for the payment of all debts,
and must necessarily have been intended by the legislature to be a certain,
and not a precarious fund; for since it is declared, that the creditors may take
them in execution on a judgment against the executor or administrator, it
must be meant, that they should have the fruit of that execution; and as
there is the same reason, under the law, that they should be equally liable
with the personal estate, from the death of the debtor, they must necessarily
be liable in such a manner as to be answerable at all events, which can no
otherwise be, than by considering them as specifically liable, in whosesoever
hands they may be. If it were otherwise, they would prove no fund at all;
for the devisee or heir, knowing that if judgments were obtained, he should
lose his land, would, in every instance, where he apprehended debts beyond
the amount of the personal estate, immediately sell them, and thereby en-
tirely defeat the intent of the legislature, in making them a fund for the
payment of debts.

The mischief of this doctrine is still more striking, if we consider, that
the estates of the inhabitants of Pennsylvania, out of the city of Philadel-
phia, are chiefly real estates, and if they were immediately alienable by the
heirs, without being afterwards liable for the ancestor's debts, few creditors
to any amount would ever recover their debts, although, perhaps, the debts
*484] may really have been contracted on the credit of the lands. *Another
consequence might likewise follow, that where the father dies indebted,
leaving sufficient real estate, and but little personal, if the heir or devisee,
being likewise indebted on his own account, takes the land in the manner
contended for, then his creditors, by obtaining judgment against him, before
his father's can obtain judgment against the executors, will recover their
debts out of his father's lands, whose creditors would in that case be entirely
cut out. This would certainly be too unjust, and repugnant to the spirit of
our laws, ever to receive the sanction of a court of justice.

On these grounds, it is, as I take it, that lands of deceased persons, have
always heretofore been considered as liable to be taken in execution for debt,
in the hands of a purchaser from the heir or devisee. It is a construction of
the law that has so long prevailed, that it would be now very dangerous to
unsettle it, as many titles to land may depend upon it. (b)

Although there may not have been any express determination of this

(a) See Keyzey's case, 9 S. & R. 72.
(b) s. r. Morris v. Smith, 1 Yeates 243; Wilson v. Watson, Peters C. C. 273.
the purchase, to be secured against such debts. If he neglects this, he
seems to confide in the seller, that he hath both the will and ability to do it.

The hardship upon purchasers may, in particular instances, be great, but
may generally be prevented by a proper caution. Where there has been a
suspicion of out-standing debts, it has been very usual to make the purchase
under an execution. At any rate, the fundamental security which the law
has given to creditors should not be destroyed, or the title of co-heirs af-
fected, by the omissions or temerity of purchasers.

It is here suggested, that there may be probably sufficient in the hands
of the younger children to pay the debts, without calling on the purchasers.
But is it reasonable, is it just, or can it be legal, that the younger children
should be stript of all their fortunes, and that the share allotted to the eldest
son, who had no better right of exemption than they, should not bear part of
the burden? especially, as those younger children had no participation
in the sale, or wasting the money: nor was it by any precaution whatever, in
their power, to prevent either; whereas, it was in the power of the pur-
chasers to be indemnified, if they had thought proper. Such a doctrine
would enable the elder son, in most cases, to lay the whole burden upon the
younger children, who are frequently helpless; and during their minority at
least, prevented from standing an equal chance with him.(a)

*486] *III. The remaining point to be considered, is, whether the pur-
chasers under the order of the orphans' court are likewise bound to
contribute? These purchasers, I acknowledge, appear to me to stand in a
very different light from the voluntary purchasers from the eldest son. The
law, for the benefit of the families and creditors of persons dying intestate,
has vested the orphans' court with a power to direct the sale of certain parts
of the intestate's real estate, for the payment of his debts. The same law
has directed the means of information to be given to the court, to prevent
imposition and the unnecessary dismemberment of the real estate. The
power given to the orphans' court by this act is very great, and ought to be
discreetly exercised; but when the sale is made under their order, it is cer-
tainly a good one. The administrator is vested with as completo a power
to sell the specified part of the real estate, as he has, by the common law, to
sell the personal; and the purchasers from him ought to hold as securely in
the one case, as the other. To say, that because the administrator is to ex-
hibit upon oath an account of the debts, therefore, the purchasers are to look
to the payment of those debts, is in effect saying, that the purchasers are to
look to the legal exercise of the power vested in the orphans' court, who may,
unquestionably, impose such terms upon the administrator, as are necessary
to secure to the creditors and children, the consideration money arising from
the sales; and such security has, in fact, been required in many instances
by the orphans' court in Pennsylvania. Besides, if the purchaser is to look to
the payment of the debts, he must, likewise, look to the other objects for
which the land is to be sold; that is, the education and maintenance of the
children, and the proper improvement of the residue of the estate; which no
law founded in reason could require. The case of these purchasers, however,

(a) See Guier v. Kelly, 2 Binn. 290; Wilson v. Watson, Peters C. C. 278; Bryant
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is not regularly before the court; their lands have not been taken in execution, neither are they comprised within the rule. (a)

The rule, as it stands, must be discharged.

PRINGLE v. McCLENACHAN.

Award.

A report of referees set aside, where they admitted the accounts of one of the parties as conclusive evidence of the value of specie and depreciated money.

This cause being referred, a report was made in favor of the plaintiff, to which the following exceptions were filed by the defendant:

1. For that the referees have entirely omitted to charge the plaintiff, John Pringle, with the sum of 146l., specie, for a loss on a policy of insurance that he underwrote to the defendant, Blair McClenachan, upon the brig Nancy, Richay, master, on a voyage from Cadiz to Philadelphia, in 1775.

2. For that in the month of December 1776, there was a balance due from John Pringle to Blair McClenachan of 2455l. 13s. 4d., as appears by the account-current furnished the referees; *and yet the referees, by continuing down the subsequent items of account in continental money, to August 1780 (when they struck a balance of 21,191l. 13s. 0d., continental money, at seventy for one), have reduced the balance of 2455l. 13s. 4d., specie, due to Blair McClenachan in 1776, by a scale of depreciation of seventy for one; so that instead of 2445l. 13s. 4d., Blair McClenachan has credit for about 35l. 1s. 8d., specie.

3. For that in an item of 6403l. 17s. 8d., continental money, on a transaction of November 1778, to the debt of Blair McClenachan, they have omitted to charge him with that sum in November 1778, and reduce it by the scale of seventy for one, as they did the balance in August, but have taken that single item out of the general mass of the account, which amounts to upwards of 360,000l., continental money, and reduced it by a scale of six for one; which, upon their own principles, will turn to the disadvantage of Blair McClenachan 975l. 16s. 7d., specie.

4. That Blair McClenachan, in September 1777, drew a bill of exchange on Newry, payable in London, for 200l. sterling, in favor of John Pringle, which was protested; and the defendant, Blair McClenachan, never had notice thereof, until the latter end of 1778, or beginning of 1779, and the referees have charged the defendant for the same, the sum of 656l. 19s. 3d., specie, and by reason of the referees having scaled the aforesaid balance of 21,191l. 13s. 0d., at seventy for one, the said Blair McClenachan, has to his credit for the said bill only the sum of 8l. 11s. 5d., specie.

After argument, the President delivered the opinion of the court, as follows:

(a) In Moliere's Lessee v. Noe, 4 Dall. 450, it was expressly decided, that a purchaser under a sale by order of the orphans' court, took the land free from judgments and other debts of the intestate; but, it seems, not discharged from mortgages. And see McPherson v. Cunliffe, 11 S. & R. 492.

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laws and constitution of the kingdom of England, vested in the king, as supreme magistrate, and in the chancellor acting under his appointment?

Answer. I am of opinion, that a court of equity is a necessary part of the English constitution, that relates to the administration of justice; and that the chancellor appointed by the king, or the keeper of the great seal, are, by virtue of their office, entitled to exercise that jurisdiction.

Quest. 2. Whatever courts the king may now erect by his commission within England, where all necessary courts are already in being, yet, whether King Charles the Second, could by law grant sufficient authority, by a commission under the great seal, unto William Penn and his deputies, to erect courts of equity in the province of Pennsylvania, or is it absolutely necessary that the consent of the legislature there, should be first had, in order to the erecting such courts?

Answer. I conceive King Charles the Second might, by law, grant power to William Penn and his deputies, to erect a court of equity in Pennsylvania, without the consent of the legislature there.

Quest. 3. Whether the unanimous resolution of the assembly, requesting William Keith to open and hold a court of equity for the said province, with the assistance of his council, laid before him on the 4th May 1720, his assent to that request, and establishment of the said court pursuant thereunto, by the advice of his council, the subsequent approbation of the assembly given to that establishment, and the notification thereof to the public in Pennsylvania, by written proclamation under the great seal there, may not be called an act of the whole legislature there, although not reduced into the ordinary form of a law, or, at least, may not be deemed a sufficient signification of the consent of the legislature thereto?

Answer. I conceive this is not an act of the legislature there, nor a sufficient signification of their approbation, supposing their approbation was necessary.

Quest. 4. Whether the original establishment and holding of the court of chancery, by such desire as aforesaid, after the time of William Penn's charter of privileges to the inhabitants, but before the resolve of the assembly in January 1735, can justly be construed as a violation of the 6th clause of the said charter (whatever that clause may import), seeing it was provided that the governor, and six parts in seven of the legislature, might alter that charter; or whether a proceeding heretofore before the governor and his council (not as a council of state, but as a court of chancery according to equity, and the stated rules and practice of that court), was not a proceeding in the ordinary course of justice, and consequently, within the reservation in the said 6th clause?

Answer. I conceive the establishing the court of chancery in the manner above mentioned, was no violation of the 6th clause of the charter of 1701, both, because there was the assent of the governor and six parts of seven of the assembly met; and because the proceedings in a court of equity may be justly called the ordinary course of justice.

Quest. 5. Whether, since the assembly have come to their resolution of January 1735, it will now be contrary to the charter of privileges, or unlawful to continue to hold the said court of chancery, notwithstanding such last-mentioned vote; or ought the court of chancery to be established there by act of assembly, and not otherwise?
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Answer. I apprehend the resolution of the assembly does not make that illegal, which was not so before, and therefore, that it is not unlawful to hold the said court of chancery, notwithstanding that resolution.

(Signed) D. Ryder.

Oct. 13, 1736.

A true copy, ab origine.

(Signed) J. Hamilton.

Mr. Attorney-General Willes, his opinion upon the case stated relating to the court of chancery in Pennsylvania.

N. B. The case is stated in the same words as that, upon which Mr. Solicitor-General Ryder gave his opinion.

Quest. 1. Whether a court of equity is not a vital and fundamental part of the English constitution incident to, and inseparable from it, and whether the power of determining cases on bill in equity is not, by the fundamental laws and constitution of the kingdom of England, vested in the king, as supreme magistrate, and in the chancellor acting under his appointment?

Answer. It is pretty difficult to trace out the original foundation of courts, most of them having their beginning either from necessity or expediency; but it has always been held, that the power of determining cases in equity, was originally vested in the king of England, and that the chancellor only acts by virtue of a delegate power from him, being appointed at first as his assistant, when causes in equity began to be so very numerous, that the king could not dispatch them himself.

Quest. 2. Whatever court the king may now erect by his commission within England, where all necessary courts are already in being; yet, whether King Charles the Second could, by law, grant sufficient authority, by a commission under the great seal, unto William Penn, and his deputies, to erect courts of equity in the province of Pennsylvania; or is it absolutely necessary that the consent of the legislature there, should be first had, in order to the erecting such courts?

Answer. Though it is held that his majesty cannot now, by his commission, erect a new court of equity in England, where all proper courts have been long since established, yet, I am of opinion, that King Charles the Second, when he was erecting a new form of government in Pennsylvania, might, by his charter, grant to Mr. Penn and his deputies, a power to erect new courts of equity in that province, and that the consent of the legislature there was not necessary to be first had, until Mr. Penn made it so by his instrument or charter of 28th October 1701.

Quest. 3. Whether the unanimous resolution of the assembly, requesting Mr. Keith to open and hold a court of equity for the said province, with the assistance of his council, laid before him on 4th May 1720, his assent to that request, and establishment of the said court pursuant thereto, by the advice of his council, the subsequent approbation of the assembly given to that establishment, and the notification thereof to the public in Pennsylvania, by written proclamation under the great seal there, may not be called
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18. Assumpsit for money had and received, &c., will lie, to recover back the consideration money given for the purchase of lands, where it was obtained by fraud or imposition; and deeds or other writings which are not the immediate foundation of the suit, but only tending to it, may be given in evidence. D'Urlicht v. Melchor. .......... *429

See Alien: Assignment, 2, 4, 5; Covenant, 3; Lis Pendens: Practice: Reference, 6.

ACTS OF ASSEMBLY.

1. An act of assembly of the late province was not deemed to be repealed by the king and council, until notification here. Albertson v. Robeson. .......... *9

2. It is fairly to be inferred, from the general tenor of the act of assembly for the revival of the laws, that the legislature thought that the separation from Great Britain worked a dissolution of all government. Republica v. Chapman. .......... *68

See British Statutes.

ADDITION.

1. J. B. of West Bradford was required by proclamation to surrender, &c., by the name and addition of “J. B. of East Bradford township,” and it was held to be fatal. Republica v. Buffington. .......... *60

ADMINISTRATOR.

1. On the plea of want of assets, in an action against an executor, by a residuary legatee, auditors shall be appointed ex tempore; and it is not sufficient to object, that the executor’s accounts have been before settled by a reference. Marriott v. Davey. .......... *164

2. Payment to an executor or administrator of a deceased partner, can be no satisfaction to the survivor, who has the sole right of suing for, and of receiving the money due to the company. Wallace v. Fittsimsmons. ...... *250

3. Although an executor, by paying money over to his co-executor, who becomes insolvent, would be chargeable, if there were creditors, and a deficiency of assets to satisfy them, yet, he is not answerable to legatees. Brown's Appeal. .......... *312

4. A creditor taking a bond from the executors or administrator of his deceased debtor, discharges the old debt. Geyer v. Smith. .......... *347 n

5. Letters of administration, granted by the Archbishop of York, in England, are not a sufficient authority to maintain an action here. Gravine v. Harris. .......... *456

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ADMIRALTY.

1. The Delaware is within the admiralty jurisdiction. Montgomery v. Henry. ........ *49

2. A court of admiralty cannot carry an agreement into specific execution, nor give damages for the breach. ........ Id.

3. The owners of Letters of Marque are responsible for injuries committed on the high seas, by the commanders sent out by them; at least to the value of the vessels. Talbot v. Three Brigs. .......... *95

4. In cases of capture from enemies, persons in other vessels acquire no right, merely by seeing the capture made. ........ Id.

5. In what cases, the admiralty has cognizance. .......... Id.

6. In what cases, appeals from the admiralty to the high court of errors and appeals, are regular. .......... Id.

7. The master of a ship is answerable over to his owners, where they have been obliged to pay a third person for damages sustained by his misconduct; but the court, under favorable circumstances, may reduce the quantum of damages below what the owners have paid. Purviance v. Angua. .......... *180

8. It is a wrong position, that a master of a ship is not answerable for an error in judgment, but only for a fault of the heart, in civil matters. .......... Id.

9. Where the question to be tried, though not directly a question of prize, is yet a question arising upon the immediate and necessary consequence of a vessel’s being taken as prize, it is solely and exclusively of admiralty jurisdiction, and an action will not lie in a common-law court. Doane v. Penthalow. .......... *218

See Damages: Master and Servant, 1, 4.

AGENT.

1. There must be some satisfactory proof of a defendant’s being actually an agent, before the court will allow him to be sworn, under the act respecting continental money, to identify the money in dispute. Eastwick v. Hugg. .......... *224 n

2. A confidential agent cannot excuse himself, on that account, from being a witness against his constituent. Holmes v. Commegy. .......... *439

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See Frauds and Perjuries, 4: Insurance, 3, 4.

ALIEN.

1. An alien enemy has no right of action, during a war: but the rights which the subjects
BANKRUPTCY.

1. The rational and legal construction of the 30th section of the state bankrupt act of 1785 appears to be, that no judgment-creditor, who has not levied his execution, shall receive any benefit from his judgment, as to the estate or effects of the bankrupt, vested in the commissioners of bankruptcy by the act, to the exclusion or prejudice of the creditors at large, but must be put upon the same footing with them. Gibbs v. Gibbs. ................................................. *373

2. Yet, as to liens which do not affect the general creditors, he will have the benefit of them in the same manner, as if the act had never been made. ........................................ Id.

3. It would defeat the express intent of the bankrupt law, if a prior judgment-creditor could come in under an execution, which, being issued upon a subsequent judgment against a bankrupt, was levied before the act of bankruptcy committed. ........................................ Id.

4. In that case, the creditor who sues out the execution is entitled to the money levied. ........................................ Id.

5. Upon a trial at law, the creditor of a bankrupt may give evidence to controvert the trading, bankruptcy, and conformity; and the certificate is not conclusive proof of all the proceedings before the commissioners. Picassanus v. Meng. ................................................. *381

6. Though the bond of the petitioning creditor is given for a debt contracted prior to the act of assembly, and with a view to take out a commission, the court would be unwilling, on that account alone, to invalidate the certificate. ........................................ Id. *388

7. A petition subscribed by one of two partners, in the name of himself and partner, is sufficient for the purpose of taking out a commission, on a partnership demand against the bankrupt. ........................................ Id. *389

8. To found a joint commission upon a fictitious partnership, is certainly unfair within the meaning of the act of assembly. ........................................ Id. *390

9. But if a partnership did exist at the time of taking out the commission, a previous assignment of the partnership effects for the payment of the creditors, or the smallness of the quantity of the goods in their store, cannot invalidate the commission, or defeat the benefit of the certificate. ........................................ Id.

10. Quære. Whether the flight of a stranger to his own home, in another state, amounts to an act of bankruptcy, within the meaning of the act of assembly? ........................................ Id.

See INSOLVENT.

BILL OF EXCHANGE.

1. Where a man voluntarily pays the damages on a bill of exchange, without waiting for a protest for non-payment; and the defendant might with justice receive them, the money cannot be recovered back. Morris v. Turin. ................................................. *147

2. The court, in an action on a bill of exchange, will allow the plaintiff to strike out a special, as well as a general indorsement on the bill. Morris v. Foreman. ................................................. *193

3. A protest for non-payment must appear under a notarial seal. ........................................ Id.

4. In an action by the payee against the drawer, it was held that possession of a bill of exchange was evidence of an authority to demand payment of its contents. ........................................ Id.

5. A bill of exchange without the words, "or order," or other words of negotiability, is not indorsable over, so as to enable the indorsee to bring an action on it, against the acceptor, in his own name. Gerard v. La Coste. ................................................. *194

6. Notice of protest ought to be given in a reasonable time; and, by not giving it, the holder takes the loss upon himself. Steinmetz v. Curry. ................................................. *254, 270

7. The reasonableness of notice of a protest must, in Pennsylvania, be left to the jury, as a question of fact, and not of law. Robertson v. Vogle. ................................................. *254

8. A bill of exchange, neither paid nor received in satisfaction of a precedent debt, but upon condition of its being honored, will not entitle the drawer to 20 per cent. damages, in case of its being protested for non-payment. Chapman v. Steinmetz. ................................................. *261

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BRITISH STATUTES.

1. No act of parliament made in England previously to the settlement of the province of Pennsylvania, was extended here, unless by acts of assembly, adjudications of courts or established usage. Morris v. Vanderen. ................................................. *67; Respublica v. Mesca. ................................................. *74-5

2. The common law of England has always been in force in Pennsylvania; but all statutes made since the settlement of the province, have no force here, unless the colonies are particularly named. Morris v. Vanderen. ................................................. *67

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2. The demandant in dower is not estopped from recovering therein, by an action of partition which she had before brought, for dividing lands under a devise in her husband's will, and in which it was acknowledged, that the moiety of the premises, out of which dower is claimed, belonged to the tenants. *67

See Deveis, 6: Partition, 4.

EJECTMENT.

1. An ejectment is almost the only action for trying the title to lands in Pennsylvania. Morris v. Vandergris. *87

2. A bare perception of profits will not oust a tenant in common; and for the statute of limitations to bar, the possession must be adverse. *11

3. Lessor of the plaintiff shall not be obliged to show his title further back, than from the person who last died seised, first showing the estate to be out of the proprietaries, or the commonwealth. Shriver v. Nargen. *68

4. Ejectment may be maintained in Pennsylvania, by the cestui que trust, in his own name. Kennedy v. Fary. *72

5. A sheriff's deed, which did not recite the record, was allowed to be given in evidence of title, without producing the record. Burke v. Ryan. *94

6. The defendant in ejectment must confess lease, entry and ouster for all the tenements laid in the declaration; confession for a part only will not be allowed. Wilson v. Campbell. *126

7. The plaintiff in an action of trespass for mesne profits, shall not give evidence of the annual value of the premises beyond the time of the lease mentioned in the declaration in ejectment. Shotwell v. Bahn. *172

8. On an appeal from the regulations of party-walls, &c., the question ought to be tried by ejectment. Wells v. Fox. *308

See Limitations, 4.

ERROR.

1 Error was assigned, that "the declaration is for the penalty in a penal bill, but omits to state that the smaller sum was not paid, so that no cause of action is shown to have accrued to the plaintiff for the penalty." But it was held, that this want of an averment could not be taken advantage of on error. Thompson v. Musser. *461

2 The court below having refused to admit the defendant to read in evidence a copy of an act of assembly of the state of Virginia, printed by the law-printers of that Commonwealth, and stitched up with a few other acts, in a blue paper cover, it was held fatal, on error brought. *146

3 It was adjudged to be error, that the court below permitted the plaintiff there to amend his declaration by the writ, after the jury had been sworn, and then had them sworn again, and received their verdict, without consent, without giving the defendant leave to plead anew, and without an imparlance, or awarding the payment of costs by the plaintiff. *11

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EVIDENCE.


2. Copy from a register of births and deaths of Quakers, in England, admitted in evidence to prove the death of a person. *11

3. In partition, on the plea of non ten. invenient, &c., evidence may be given, that some of the defendants were not tenants of the freehold, but only tenants at will. Bethel v. Lloyd. *2

4. The exemplification of a will, made in England, and certified under the seal of the prerogative court, may be given in evidence. Watson v. Stammers. *2

5. Minutes of the commissioners of property may be given in evidence. *3

6. The original private book of memorandums of the secretary of the land-office, respecting the description of the land originally applied for, was given in evidence, by consent, on the recommendation of the court. Hayes v. McDowell. *5


8. A letter from the receiver-general and secretary of the land-office, to the surveyor-general's deputy, was allowed to be given in evidence, as the foundation of the defendant's title. Fothergill v. Storer. *6

9. A survey made in pursuance of the above letter, not returned into the proper office, but found among the deputy-surveyor's land papers, many years after his death, was allowed to be given in evidence, against a regular warrant and survey of a subsequent date, a settlement and possession being proved. *9

10. The votes of assembly, and minutes of council, admitted in evidence, to prove the time of the notification of the repeal of an act by the king and council. Alberson v. Robeson. *39

11. Evidence of a parol declaration of Mr. Penn, that the land in dispute was sold to the defendant, rejected by the court. Richardson v. Campbell. *10
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12. Hearsay permitted to be given in evidence, to prove pedigree. Strickland v. Poole. *14
13. The strict rules of evidence ought not to be extended to mercantile transactions. Riche v. Broadfield.................*16
14. An account sales allowed to be given in evidence, on proof of the handwriting of the factor who signed it. ...................... Id.
15. On plea of payment, in an action of debt on a bond, the defendant may give evidence of a mistake, or want of consideration. Swift v. Hawkins. ..................*17
16. No man shall create evidence for himself; therefore, letters written by the lessee of the plaintiff, to show that his grant, on which the defendant made title, was conditional, were rejected. Proprietary v. Ralston...........*18
17. The list commonly called the list of first purchasers, was admitted in evidence to prove a grant of 5000 acres from W. Penn, by deed, alleged to be lost. Hurst v. Dippo, *21; Morris v. Vanderen. ..................*64
18. The pass of a justice of New Jersey is not admissible in evidence, in a cause respecting the seizure of goods brought into Pennsylvania against an act of assembly. McVeagh v. Goods. ..................*62
19. Any deed under seal, when proved, is proper to be given in evidence. McDill v. McDill.....................*63
20. A deed sworn to by one witness before a magistrate, who certifies the same, is within the rule. Id.; Hamilton v. Galloway....*93
21. A paper copied from the books of the surveyor's office, stating that a survey had been made, was not allowed to be read in evidence; but the book from which it was taken, was admitted, without showing any actual survey. Morris v. Vanderen..................*65
22. On proof that the defendant in ejectment was in under J. P., or his heirs, the lessor of the plaintiff was allowed to give evidence of the detention of deeds by the heirs of J. P., and also to read letters written by J. P. Id.
23. Evidence allowed to be given of the confession of the defendant, made after the commencement of the suit. ..........Id.
24. Probate of a will in the Prerogative court of Canterbury, not recorded here, allowed to be given in evidence. ..........Id.
25. Two deeds, both executed in England, but only one of them recorded here, were allowed to be given in evidence. ..........Id.
26. A letter from a third person no way concerned in the title, was offered in evidence, to prove under whom he had possession, but refused. ..............Id.
27. Recital of one deed in another is no evidence, but against the party claiming under it. ......................Id.
28. In forciulé entry, &c., title cannot be given in evidence, to prevent restitution. Republica v. Shryber...............*86
29. An entry made nineteen years ago in the defendant's books, that a note of thirteen years standing was paid, was allowed to be read in evidence, to support the general presumption of payment, after such a length of time. Rodman v. Hoops.................*85
30. A book given in evidence to the jury, with a direction, that if they thought it a transcript from another book, to pay no regard to it. ......................Id.
31. A sheriff's deed allowed to be read in evidence, without producing the record. Burke v. Ryan. ..................*94
32. If one of two witnesses to a deed become interested, the other must be called, or proof given that he cannot be found; otherwise, the deed may not be read in evidence. Davison v. Bloomer....*123
33. The register of a ship, certified by the naval officer under his seal of office, admitted to be read in evidence against the defendants, though the writ, with respect to the defendant that made the register, was returned non est inventus. Woods v. Courter.............*141
34. On an indictment for a nuisance, the defendant cannot give evidence, that the act charged is beneficial to the public. Republica v. Caldwell............*159
35. Parol evidence of the declaration of the grantor, amounting to a confession against himself, though made after the execution of a deed, may be given to the jury. Gregory v. Setter, *193; Thompson v. Waite, ..................*426
36. Possession of a bill of exchange is evidence of an authority to demand payment of its contents. Morris v. Foreman.........*193
37. A writing under seal cannot be given in evidence to support an action of assumpsit on a promissory note. January v. Goodman.*208
38. An entry in a shop-book is not evidence, to charge a man upon a collateral assumpit, to pay the debt of another. Poulney v. Ross..................*238
39. When a confession is given in evidence, all that was said must be stated, and the whole, generally speaking, ought to be taken together, unless circumstances of improbability appear. Newman v. Bradley, *240; Farrel v. McClea..................*392
40. A judgment in a foreign attachment in a sister state, is not conclusive evidence of the debt, in an action here between the same parties. Phelps v. Holker..............*261
41. Quare? How far books are admissible (not to prove a charge against a party to the suit, but) to show a collateral fact, whether a third person was the defendant's debtor at a particular period? Mifflin v. Bingham.*278
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42. In order to prove that the goods in question were bought of a third person, and not of the plaintiff, the entry in the books of the third person must be shown: his clerk’s swearing that he had made it, will not be admitted. Kelly v. Ord. *310
43. The procedes verbal delivered into the Admiralty at a foreign port, was not admitted to be read in evidence, in an action against the underwriters. Ritchie v. Stewart. *317
44. The protest of a master of a vessel, made at a distant day, and not at the first port of arrival, was refused to be admitted in evidence. *410 Id.
45. A special verdict in another action upon the same policy, but against different underwriters, was allowed to be read in evidence, upon proof of an agreement of all the underwriters, to be bound by one verdict. Patton v. Caldwell. *419
46. In what cases, parol testimony is proper to be admitted, to explain and control the operation of a deed. Thompson v. White. *426
47. In an action of assumpsit for money had and received, deeds and other writings, which are not the immediate foundation of the suit, but only leading to it, may be read in evidence. D’Utricht v. Melcher. *428
48. A printed copy of an act of assembly of Virginia, printed by the law-printers there, and stitched up, with a few other acts, in a blue paper cover, is good evidence to be read to a jury. Thompson v. Mueser. *462

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EXECUTION.

1. Execution cannot issue upon a judgment confessed on a bond by warrant of attorney, until the time given for payment of the bond is elapsed. Shoemaker v. Shircliffe. *138
3. A person attending court is not privileged from being arrested on a ca. sa. Starrel’s Case. *355
4. A prior judgment-creditor, cannot come in under an execution, issued upon a subsequent judgment against a bankrupt, and levied before an act of bankruptcy: but the plaintiff in the execution shall have the money. Gibbe v. Gibbe. *378
5. There is nothing in the act of assembly, which precludes the sheriff from noting an inquest, after the return of a fi. fa. Weaver v. Lawrence. *879
6. When the judgment of a justice of the peace is affirmed, upon a removal into the supreme court, execution may issue at once, without referring the cause again to the justice. Riddins v. Whitman. *410
7. Lands of an intestate are bound for the payment of his debts, and may, for that purpose, be taken into execution, although the heir may have previously sold and conveyed them to a bona fide purchaser. Graff v. Smith. *481

See Bankruptcy, 3, 4: Intestate, 9.

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EXTINGUISHMENT.

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FORCIBLE ENTRY AND DETAINER.

1. In an indictment for forcible entry and detainer, title cannot be given in evidence to prevent restitution. Rexpublica v. Shryber. *63
2. Wife of the prosecutor in an indictment for forcible entry and detainer may be a witness to prove the force, but only the force. *Id.
3. Motion in arrest of judgment. 1st. That the indictment of forcible entry, &c., stated that “the prosecutor was seized in his demesne as of fee,” without saying when: 2d. That the indictment stated, that “he was seized in his demesne as of fee,” and that his possession thereof as aforesaid, continued until, &c.” which was repugnant: but both objections were overruled. *Id.
4. The proceedings on an inquisition of forcible entry, &c., were quashed, because the defendant was stated in the inquest to have been possessed, but no estate or term was laid. Rexpublica v. Campbell. *654

FOREIGN ATTACHMENT.

1. Goods consigned to be sold on account of the consignor, and to be applied first to the payment of a debt due to the consignee, are not liable to a foreign attachment, until the consignee is satisfied. Stevenson v. Lamerton. *38
2. Property of a sister state is not liable to an attachment in Pennsylvania, for a debt due from such state to an individual. Nainan v. Virginia. *77
3. A man who comes from another place to reside amongst us, introduces his family here, takes a house, engages in trade, contracts debts, and, after some time, runs away, with design to defraud his creditors, is such an inhabitant as not to be an object of the foreign attachment, but of the domestic attachment. Barnet’s Case. *152

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INFANT.

1. The appearance of an infant to a suit brought against him, is not a judicial act, and will be fatal on a writ of error. *Silver v. Sheilback.* *166

2. A judgment against an infant may be reversed, after full age, except in cases of real actions, and fines and recoveries, which are, in their operation, mere modes of assurance; and the fact must be tried *per paim*, and not by inspection. *Id.*

See Orphans' Court, 1.

INFORMER.

See Prosecutor, 3.

INHABITANT.

See Domestic Attachment: Foreign Attachment: Privilege, 1, 6.

INQUEST.


INSOLVENT.

1. Practice of the courts, on an application to be discharged under the insolvent laws, *Mijlin v. Gaspin,* *142; Henderson v. Allen.* *149

2. A discharge of the defendant from imprisonment, in New Jersey, by virtue of the general insolvent laws of that state, was held not to entitle him to a similar discharge in this state, although the debt was contracted in New Jersey. *James v. Allen.* *188

3. Where a debt had been contracted in Maryland, where the defendant resided, but the plaintiff was a citizen of Pennsylvania, it was held, that a discharge under an insolvent law of Maryland, in nature of a general bankrupt law, entitled the defendant to an *exoneretur* in Pennsylvania. *Miller v. Hall,* *229; Thompson v. Young.* *294


See Bankruptcy.

INSURANCE.

1. The defendant underwrote an open policy on a vessel from Philadelphia to Jamaica; she was taken by the enemy, and afterwards re-taken and carried into Jamaica; where, by agreement between the captors and recaptors, without going into the court of admiralty, she was sold at public sale for one-fourth of the sum insured, and bought by the master for the original owners, who afterwards acquiesced in the purchase, and now sued for the whole sum insured as a total loss: but, agreeable to the directions of the court, the jury only allowed a compensation for salvage, charges, and loss of time. *Story v. Stratall.* *10

2. A warranty that "orders will be given that the ship shall not cruise," is not complied with unless such orders are expressly given to the master; an implication from the general instructions will not do. *Ogden v. Ash.* *162

3. An agreement entered into by underwriters to be bound by one verdict, is equally binding on the parties, whether made in person, or by a broker mutually employed. *Patteson v. Caldwell.* *419

4. All such agreements ought first to be entered on the records of the court. *Id.*

See Evidence, 45.

INTEREST.

1. Where money is received, as well as paid, in a mistake, and neither fraud nor surprise can be imputed to either party, interest will not be allowed, in an action to recover the money back. *Jacobs v. Adams.* *52

2. The rule for computing interest on partial payments. *Tracy v. Winkoff,* *124; *Penrose v. Hart.* *578

3. Interest will not be allowed upon an open account for goods sold and delivered. *Henry v. Risk,* *265; *Williams v. Craig.* *815

4. Money received for another, and retained without the owner's consent, ought to carry interest. *Rapalje v. Emory.* *849

See Usury.

INTESTATE.

1. J. F., having two sons and a daughter, devised a plantation to Mathias in fee: Mathias died in his minority, intestate, and without issue: Ruled, that the plantation should not go to the heirs of Mathias at common law, but be divided among his brothers and sisters, under the supplemental intestate law. *Anon.* *20; Kerlin v. Bull.* *175

2. Where the heir-at-law takes an intestate's lands at a valuation, the orphans' court ought, instead of bonds, which are a mere personal security, to take his recognizance, by which the lands themselves would be bound for the payment of the distributive shares. *Walton v. Willis.* *265

3. The eldest son of the eldest son of an intestate, is entitled to an estate which cannot
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MARINERS.

See MASTER AND SERVANT, 4.

MASTER AND SERVANT.

1. Upon a general retainer, for no particular voyage, the owners of a vessel may dismiss the master, at any time, without cause assigned; but where there is a charter-party, bills of lading, or a particular voyage agreed upon, though the owners may dismiss the master, yet they would be liable in a court of common law. *49

2. As vilainage never existed in America, no part of the doctrine founded upon that condition, is applicable here. *167

3. Property in a negro may be obtained by a bona fide purchaser, without deed. *449

4. The master is liable for the wages of mariners, if he admit them to serve on board the vessel, although they were originally shipped by the owner. *392

5. A negro born before the first of March 1780, to wit, in 1779, and not recorded agreeable to the act for the gradual abolition of slavery, cannot, under that act, be held as a servant until she is 28 years of age, but is absolutely free. *469

See ADMIRALTY, 7; CUSTOMS, 4.

MEDITAS LINGUAR.

See TRIAL, 3.

MESNE PROFITS.

See EJECTMENT, 7.

MORTGAGE.

1. A subsequent simple-contract debt cannot be recovered on a scire facias upon a prior mortgage; but only the principal, interest and costs; on payment of which, the court will stay the proceedings on the scire. *142

2. A mortgage, though not recorded within six months, is good against the mortgagor; the deed, so far, is sufficient to pass the land; and under it, the possession of the premises might have been recovered in ejectment. *430

3. A mortgage, acknowledged and recorded the day after the declaration of Independence, by officers appointed under the proprietary government, was, nevertheless, held to be void against a subsequent judgment-creditor, and

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3. To insult a secretary to the legation in the house of the minister plenipotentiary, is a violation of the law of nations, punishable by fine and imprisonment. *Id.

4. But a person convicted of that offence, although claimed as a subject of a foreign power, cannot be given up on such claim: but cases may occur, where, pro bono publico, offenders may be delivered up to the justice of the country from which they endeavor to escape. *Id.

4. Nor can the person so convicted be imprisoned, until the sovereign, whose officer was insulted, shall declare that the reparation is satisfactory; for punishments must be certain and definite in all respects. *Id.

5. The person, house and comites of a minister, are all protected by the law of nations. *Id.

See ALLEN: UNITED STATES.

LEGACY.

See ADMINISTRATOR, 1.

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1. Where a special letter of attorney was given to institute a suit, and afterwards, a person having a general power, executed a release to the defendant in the suit, the court held the authority to be sufficient, and discharged the party. *449

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2. So does the 21 Jac. I., c. 16. Biddle v. Shippen *19


4. For the statute of limitations to bar an ejectment, the possession must be adverse. *239

5. The court will never open a regular judgment, to let in a plea of the statute of limitations. Brown v. Sutter. *411

6. It is only necessary to enter the continuances, in order to prevent the bar of the statute of limitations, where the writ and declaration disagree as to the nature of the action. Schlosser v. Lesher. *77

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1. Before the return of the writ, the plaintiff moved for a special court; but it was held, that the action was not depending for that purpose, until the writ was returned. *77

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NUISANCE.

1. It is no justification, on an indictment for a nuisance, by intruding on the public property, that it is beneficial to the public. Republica v. Caldwell........................... *150

ORPHANS' COURT.

1. The Orphans' Court have a power to assign the guardianship of minors, under 14 years of age, to whom they please, and are not confined to the guardian in socage or by nurture. Graham's Appeal.................. *136

2. Where an heir-at-law takes an intestate's lands at a valuation, the orphans' court ought, instead of bonds, which are a mere personal security, to take recognisances, by which the lands themselves would be bound for payment of the distributive shares. Walton v. Willis............................... *205

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PARTITION.

1. Although it would be proper for the party praying for a partition of an intestate's real estate, to be particular in the names of the persons entitled to shares, and of the party of each, yet the court would not reverse an inquest for omitting this. Walton v. Willis............................... *351

2. The decree of the orphans' court was reversed, because in partition of an intestate's estate, no provision was made for a tenant by the curtesy of his wife's share...... Id.

3. The practice in the orphans' court has been to direct the same inquest which is appointed to make a partition of real estate, if that cannot be done, without prejudicing the whole, then to make the valuation...... Id.

4. Where a recovery in partition is no bar to an action of dower, in that moiety of the premises, which is assigned to the tenant. Kennedy v. Nedrow........................................... *413

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PARTNERSHIP.

1. One partner cannot bind another, by executing a deed under the firm name. Gerard v. Basse.............................. *117

2. Not only the ship's husband, but all the real owners at the time of the work done, are liable to the tradesmen. Scottin v. Stanley............... *129

3. Payment to an executor or administrator of a deceased partner, can be no satisfaction to the survivor, who has the sole right of suing for, and of receiving the moneys due to the company. Wallace v. Fitzsimmons........ *248

4. Articles of copartnership being res inter alios acta, the limitations cannot be known, and therefore, ought not to affect a third person, who acts under a legal authority from one of the partners. Tillier v. Whitehead............................... *269

5. One of two partners may give an authority to a clerk under the firm name of the house; and the clerk may, in consequence thereof, accept bills, and sign or indorse notes, in the name of the company............................................................ Id.

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1. The reimbursement of the cost of the moiety of a party-wall, is only a personal charge against the builder of the second house, and not a lien upon the house itself. Inglis v. Bringham................. *341

PAUPER.

1. It is not necessary that an examination should appear, upon an order of sessions for the removal of a pauper. Fallowfield v. Marlborough................................. *28

2. If a pauper was injured by removal, a remedy may be had by information........ Id.
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2. A bond given in payment of a precedent debt, is conclusive evidence of the contract, to prevent the obligor's claim of paying by instalments, under the act of assembly. Snowden v. Heming. *83


4. Payment to an executor or administrator of a deceased partner, is no satisfaction to the survivor, who has the sole right of suing for, and receiving the moneys due to the company. Wallace v. Fitzimmons. *248

5. In an action of debt upon a bond, and where the issue is joined on a plea of payment, the jury may, and ought, to presume everything to have been paid, which, ex aquo et bonus, ought not to be paid. Hollingsworth v. Ogle. *257

6. Money paid into the hands of the prothonotary upon a judgment, is to be considered in the same estate as if paid to the sheriff; and is not liable to be attached by the person who paid it, on a suggestion that the debt may have been otherwise satisfied. Ross v. Clarke. *354

7. When a bond shall not be considered as payment, or extinguishment, pro tanto, of money due upon a mortgage. Hamilton v. Callender. *423


PLEADING.

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POLICY.

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PRACTICE.

1. Where the defendant has shown title in a third person, he may take the opinion of the court on that title, by motion for a nonsuit, before he has gone through all his evidence. Proprietary v. Ralston. *18

2. In such case, the plaintiff cannot demur to the defendant's evidence, until he has gone through the whole. Id.

3. When a deed is produced in evidence, it must be shown in habe verba, upon demurrer. Hurst v. Dippo. *20

4. Whenever a writ issues fairly, if delivered first, it shall take preference. Steiner v. Fell. *22

5. The proceedings on a hab. pet. are de moro, but on a certiorari, the court proceed on the state returned. Id.

6. Fl. fa. issued on a judgment in the bail-bond suit: proceedings were stayed, on affidavit of a defence, pleading issuable in the original action, and consenting that the judgment on the bail-bond should remain as a security. Carrew v. Willing. *180

7. To entitle the plaintiff to judgment by default, the service of a summons, on the person of the defendant, as well as if left at his house, must be ten days before the return. Case v. Huffy. *154

8. On affidavit that material witnesses for the defendant (who was in confinement) were about to leave the state, the court granted a rule to take their depositions, though the writ was not returnable until next term. Stotesbury v. Covenhoven. *164; Schlusser v. Lesher. *251


10. The defendant, by mistake of his attorney, had notice of trial for the 17th, instead of the 13th, and not appearing on the 13th, judgment was entered by non sum in forma; but afterwards, on proof of the mistake, the judgment was opened. Jackson v. Vanhorn. *241

11. Although the words that "the defendant has not been resident in the state for twelve months before the writ issued," are inserted in an affidavit to found a capias against a freeholder, yet the court will inquire into the circumstances of the case, and relieve him from arrest, if they think he was intended by the act to be exempted. Penman v. Wayne. *241

12. A third person, fully acquainted with the circumstances, is admissible to make the affidavit of a defence, when the party himself, from extreme sickness, is incapable of making it. James v. Young. *248

13. Auditors will be appointed only where there is a dispute about the depreciation. Cooper v. Coates. *248

14. The plaintiff, after stating the want of a material witness, who had been subpoenaed, put off the trial; but the court, notwithstanding, granted the defendant a rule for trial next term or non pros. Schlusser v. Lesher. *261

15. It is an invariable rule, not to appoint referees, but in the presence of both parties. Shippen v. Bush. *251

16. The court will grant a rule to take the de-
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17. After judgment has been regularly entered in a foreign attachment, it is too late to move to quash it. Whiteside v. Oakman. .... 294
18. On an appeal from the determination of the regulators of party-walls, &c., a feigned issue can only decide, whether the regulators have done right or not; it cannot decide the title and finally settle the matter; and therefore, it is proper to try the question by ejectment. Wells v. Fox. ..........*808
19. The privilege of a freeholder to be sued by summons, extends to actions of trespass vi et armis. Hudson v. Howell. .........*810
20. The rule is, that unless exceptions to the report of referees are filed within four days, the judgment nisi becomes absolute. Stewart v. Wycoff. .........*812
21. A distinguishing will lie against a sheriff while in office, upon a return of levied to the value, &c., but under particular circumstances, it would be hard to issue it, without moving the court. Zane v. Cooperthwaite. ..........*812
22. The venue was laid in Philadelphia county, and judgment being there obtained, execution was immediately issued into Bucks; but upon motion, the writ was quashed, the court being of opinion, that the plaintiff ought to have proceeded by testament. Leisher v. Gehr. .............*830
23. On a rule for trial or non pro, the non pro, must be moved for in court; it cannot be signed in the prothonotary's office. McKegg v. Crawford. .............*847
24. A capias will not lie against a freeholder, although the attorney directs his appearance to be accepted. Barnard v. Field. ...........*848
25. Rule to refer and report to next term; after the next term, the referees were changed by consent, and report returnable into office: Determined, that the rule to report to next term was expired by its own limitation. Abbot v. Pinchin. .................*849
26. On motion, and positive affidavit of the debt, at the first term, a shallup attached under a foreign attachment, was ordered to be sold as a chargeable commodity. O'Neil v. Chew. .......................*879
27. It has been the practice for the sheriff to hold an inquest, as well after as before the return of a f. f. Weaver v. Lawrence. *879
28. Rule for trial or non pro, but afterwards a plea added, and particular facts referred: It was ruled, that, by this, the rule for trial or non pro, was virtually vacated. Halhead v. Ross. .........................*405
29. On a libel for divorce, notice ought to be given that, between two specific dates, acts of cruelty, &c., were intended to be proved. Steele v. Steele. ..............*409
30. Rule for trial or non pro, in September term, and notice at bar; and the cause continued generally until January term: It was determined, that the rule for trial, or non pro, was continued; and that no new notice was necessary. Smith v. Davids ..........*410
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X
CASES DETERMINED

IN THE

FEDERAL COURT OF APPEALS.

AUGUST SESSION, 1781.

THE RESOLUTION.

MILLER et al., libellants and appellants, v. The Ship Resolution, and INGERSOLL, claimant and appellee.

MILLER et al., libellants and appellees, v. The Cargo of the Ship Resolution, and O'BRIEN, claimant, appellant.

Prize.—Neutral property.—Recaptures.—Illegal contract.—Capitulation.—Allies.

The capture of neutral property, by one of the belligerent parties, and its retention for twenty-four hours, does not vest the property in the captors, so as to render it lawful prize to the other power.

The legality of a capture is open for question and examination, until a competent jurisdiction has decided the question, and a decree passes for condemnation as prize.

But the possession and occupation of the property, in such case, is evidence of title, which is conclusive upon all mankind, except the rightful owner.

On a surrender, by capitulation, the property of the inhabitants, protected by the articles, is considered neutral; and is not liable to capture by the belligerent, or his allies.

A subject cannot divest himself of the obligation of a citizen, and voluntarily make a contract with the enemy, stipulating to special neutrality; but he may enter into such contract, by capitulation, when it is out of the power of his government to protect him.

The compacts and agreements of allied nations with the common enemy, bind each other, when they tend to the accomplishment of the common object.

The United States, as allies of France, were bound by the capitulation between Great Britain and France, for the surrender of Dominica.

Miller v. The Resolution, Bee 404; s. c. 3 Hopk. 70, affirmed as to the ship, and reversed as to the cargo.¹

These were appeals from the Admiralty Court of Pennsylvania, where the ship had been acquitted and the cargo condemned.

¹ But see infra, p. 19, where the original exception of a certain portion thereof, condemned. 1
After argument, by Wilcox, Lewis and Sergeant, for the appellants, and Morris and Wilson, for the appellees, the opinion and judgment of the court (comprising a statement of all the facts and documents material to the case) were delivered by Cyrus Griffin, the presiding Commissioner, in the following terms:

By the Court.—We have considered these appeals, and are now ready to give our judgment.

It has been very truly observed, that this appeal is a case of importance, not only with regard to the subject in contest, but also with regard to the great questions of law, which the investigation and discussion of the merits necessarily introduced; and being before this court for their determination, the judgment and decree of this court must be directed by the resolves and ordinances of congress, and, where they are silent, by the laws, usage and practice of nations. Upon these grounds, the case has been considered and argued by the counsel on both sides; and considered so thoroughly, and argued so copiously, fully and ably, that we have now every possible light of which the subject admits.

The general question is, “whether, on all the circumstances of this case, the ship or cargo, or both, or any part of the cargo, be a prize; and as such ought to be condemned and confiscated?” The libellants contend, that both ship and cargo are prize—if not the ship, yet the cargo is prize; if not the whole of the cargo, yet the principal part of it must be condemned. Different grounds have been taken to support these several positions—one ground is taken to affect both ship and cargo; other and different grounds, to affect the cargo; other and different grounds, to affect the principal part of it.

The argument directed against both ship and cargo is this: By the law of nations, after a capture and occupation for twenty-four hours, the property captured is transferred to the captors: but the ship and cargo in question were captured and occupied twenty-four hours; therefore, the property was transferred to the captors; and as the captors were British subjects, the property was British property, and therefore, legally attacked and captured by the American privateer Ariel.

There is no doubt, but that a capture, authorised by the rights of war, transfers the property to the captor; but the question is, whether a capture, not authorised by the rights of war, can have that legal operation: for the claimant says, “that the ship was not originally British, but Dutch and neutral property, and that the cargo also was not originally British, but neutral property, in consequence of articles of capitulation, stipulated on the conquest of Dominica, by the arms of his most Christian Majesty.”

All the authorities cited on cases of capture authorised by the rights of war, are, where the property captured was the property of an enemy: not an instance has been produced, where a capture, not authorised by the rights of war, has been held to change the property; but many authorities have been brought to show, that no change is effected by such capture. To say, that a capture, which is out of the sanction and protection of the rights of war, can nevertheless derive a validity from the rights of war, is surely a contradiction in terms. The rights of war can only take place among enemies, and therefore, a capture can give no right, unless the property captured be
or acceptance of it, must determine its import and signification. But, suppose, the term prize merely imported a capture, without any reference to its legality, and that it was the spirit and intention of the ordinance, to subject to prize all captures, both legal and illegal, after twenty-four hours; it does not follow, that it would affect the present case. The municipal laws of a country cannot change the law of nations, so as to bind the subjects of another nation; and by the law of nations, a neutral subject, whose property has been illegally captured, may pursue and recover that property, in whatever country it is found, unless a competent jurisdiction has adjudged it prize. The municipal laws of a country can only bind its own subjects.

The ordinance of congress is, in truth, a new regulation of the jus post limitii, and limits it to a recapture within twenty-four hours, and therefore, can only relate to the subjects of the United States: it adopts the ordinance of France, and that ordinance relates only to the subjects of France. In both cases, with regard to the owner, a subject, the property captured is not passed away, before the expiration of twenty-four hours. But, put the case of a capture and the sale of it, before twenty-four hours, to a neutral subject; the sale is certainly good and conclusive upon the owner; for the question must be decided by the law of nations, and by the law of nations, the property captured is transferred to the captor, as soon as it is taken. Both the ordinances, therefore, of congress and of France, in our opinion, relate only to property captured from a subject and re-captured; and not to property captured from a neutral and re-captured.

It is said, "that arguments drawn from the law of nations with regard to pirates, do not apply to the present case, because pirates have not the rights of war." If the principal fact was properly attended to, the present case could not be questioned. Whence is it, that pirates have not the rights of war? Is it not, because they act without authority and commission from their sovereign? And is it not objected and proved, that the British privateer, with regard to the property captured, acted without commission and authority from the British crown? So far from there being any dissimilarity in the cases, it is, in fact, the very case in judgment, considering it on the first ground of argument.

But it is alleged, "that the capture by the British privateer must be considered as legal: for, after a capture and occupation for twenty-four hours, the legality of the capture is not open for question and examination." *

*This doctrine must never be suffered; there is no example or precedent for it to be found in any of our books; it breaks down and destroys the distinction between right and wrong; it gives a sanction to injustice, robbery and piracy, and it is reproved by the laws, usage and practice of nations. Lord Mansfield, in the case so often quoted (Goss v. Withers), 2 Burr. 693, says, "The question, whether the property is transferred by the capture, can only happen between the owner and vendee, and between the owner and the re-captor." But the question could never happen between the owner and the re-captor, if the legality of the capture was not examinable on every libel for condemnation as prize. The question is—prize or no prize? This is, whether the capture be legal or not.

The legality of a capture is open for question and examination, until a competent jurisdiction has decided the question, and a decree passes for condemnation as prize; then, and not before, all further questions and
British property, protected from capture, by the articles of capitulation; and that it is in the predicament of neutral property, and therefore, was not originally prize."

Upon these facts and allegations two capital questions arise:—1st. Whether the cargo was British property, protected by the articles of capitulation against French and British captures? 2d. Whether America, as the ally of France, is bound by the articles of capitulation?

With regard to the first question, it is contended, on a variety of grounds, that this cargo is not protected from capture by the articles of capitulation.

1. Because the capitulation does not extend to property shipped and on passage at sea.
2. Because the owners were principally non-residents, at the time of capitulation, and therefore, although owning estates at Dominica, cannot be considered as capitulants.

*7] 3. Because the proceeds of this cargo were to be remitted from Holland, to the owners residents in Great Britain.

4. Because the voyage was in fact calculated for Great Britain and for Amsterdam, in Holland, and wherein was a breach of the articles of capitulation, and a forfeiture of its protection.

5. Because the cargo on board was the property of British subjects, not residents, nor owning estates, in Dominica, and therefore, not within the protection of the capitulation.

The first, fourth and fifth grounds apply to the whole cargo, and the second and third to the principal part of it.

Whether the articles of capitulation extend protection to property, after being shipped and on its passage at sea, depends on the 13th article, and the general tendency and scope of the capitulation itself. The main design of the capitulants was, to obtain a perfect security for their estates and property; and a full exercise of all the rights of property and ownership: and one great object with the French general was, to secure to France the commerce of the island, and all its advantages, emoluments and revenues; but it was inconsistent with the design and object which both had in view, to open to French and British capture, the produce of the island, and property of the capitulants, as soon as afloat at sea. This would have injured the rights of property, discouraged the labor and agriculture of the island, lessened its exports, and diminished the revenues of its government.

But the thirteenth article seems decisive: it stipulates, "that the merchants and inhabitants of this island, included in the present capitulation, shall enjoy all the privileges of trade, and on the same conditions as are granted to the subjects of his most Christian Majesty, throughout the extent of his dominions." By this article, the capitulants are placed, with regard to their trade and commerce, on an equal footing with the subjects of France; every commercial privilege which the subjects of France enjoy, is conceded to the capitulants; but it is certainly one privilege which a subject of France enjoys, that his property at sea, in the line of a fair trade and commerce, shall not be captured as prize, by French subjects; consequently, the cargo, in this case, which is the property of capitulants, cannot be subject as prize to French captures.

But it is asked, "was it not subject to British capture?" The article, it
ulation, shall have a limited time to accede to it.” And the 13th article says: “The inhabitants and merchants of this island, included within the present capitulation, shall enjoy all the privileges,” &c.

The fact is admitted, that the cargo is the produce and growth of Dominica, and that the principal part of it belongs to British subjects; possessing estates in the island, but non-residents at the time of the capitulation. It is objected, “that with regard to such non-residents, the operation of the 9th article extends no further than to protect the estates of such persons from seizure and confiscation by the rights of conquest; that the 12th article extends only to those who have acceded to the capitulation, within the time limited, and that the 13th article extends only to such inhabitants and merchants as are included at the time of capitulation, and not to non-residents. To this, it is replied, “that by the 12th article, absentees may come in, within a limited time, and accede to the capitulation, and that then they fall within the description of the 13th article, which says, “the inhabitants and merchants of this island, included within the capitulation, &c.”

Upon these allegations and facts, two questions arise: 1st. Whether the claimants, who were non-residents and absentees, at the time of capitulation, have acceded to it? 2d. Whether, having acceded to it, they come within the description of the 13th article, and are entitled to the rights and privileges of trade there conceded?

We have carefully examined all the bills of lading and the depositions annexed, and find that the property mentioned in each bill is proved, by the respective depositions, to be the property of a British capitulant. Whether he, personally, or by attorney, representatively, subscribed the capitulation, does not appear; nor do we think it material, for the maxim is a true one, *10* qui facit per alium, facit per se. It is proved by the deposition of Mr. Fitzgerald, that the general sense and opinion of the people of the island, the subscription of an attorney, for his principal was sufficient, and Mr. Fitzgerald mentions an instance, where a principal was refused by *the French* governor the benefit of the capitulation, because his attorney had neglected to subscribe for him. He also proves, that it was the uniform and uninterrupted practice of the island, for principals, non-residents, to subscribe by attorney; which would not have been the case, unless such mode had been agreeable to the spirit and intention of the capitulation.

But it is said, “that none could accede to this capitulation, but such as were in a capacity to stipulate a neutrality, and that non-residents, in Great Britain, although owning estates in Dominica, could not, consistently with their allegiance, engage a neutrality of conduct.” It must be admitted, that where the supreme authority is competent to protect the rights of subjects, a subject cannot divest himself of the obligation of a citizen, and wantonly make a compact with the enemy of his country, stipulating a neutrality of conduct; but, certainly, he may enter into such an agreement, when it is no longer able to give him protection. In the present case, the British crown was not able to secure to the owners their estates in Dominica, and therefore, they had a natural right to make the best terms they could, for the preservation of their property; for, it is a general maxim of the law of nations, “that although a private compact with an enemy may be prejudicial to a state in some degree, yet if it tends to avoid a greater evil, it shall bind the states, and ought to be considered as a public good.” The owners, therefore,
plexion; the agents could not ship this property, in their own right, without taking upon themselves a risk of the voyage; and the bills of lading necessarily allowed that the proceeds were at the disposal of the owners. Could agents have acted with more propriety? Every step they took was the natural result of the rights of trade conceded by the capitulation.

But it is objected, "that the 20th article shows, that no remittance was to be made, but for education and support of children." The article is this: "The inhabitants of the island shall have liberty to send their children to England, to be there educated, *and to send them back again, and to make remittances to them, while in England." This article by no means proves, that no remittances were to be made of proceeds on sales in a neutral country; though the children might have had remittances in that train of intercourse, yet the mode might have been thought too circuitous and dilatory. A remittance in a direct line was more eligible. Besides, remittances on sales abroad could only be in money or bills; but by this article, there is no limitation of the species of remittance, and it may be in produce.

The capitulation must receive a liberal construction. It was the fabric of a great, enlightened general, and every part of the structure exhibits a liberality and grandeur of spirit, that does honor to human nature. It is said, that if the property of the capitulants is thus protected from capture, it is in a better situation than French, American or British property; it is precisely in the situation of neutral property. It was far from being the wish of the capitulants, to have had their property placed in such a predicament, upon the terms it was done. They were reduced and obliged to submit to it, by force of arms. But the situation of those people is mentioned as a happy one: if to be a conquered people, and enforced to all the contingent consequences of a conquest, be a pleasing condition, these people may then boast of their being in an happy one.

It is said, the British crown must be benefited by this condition of their subjects. The British crown may indeed be benefited in some degree; it was not meant to deprive Great Britain of every benefit; she draws some benefit, from having a few remittances made from sales abroad, to a few of her subjects in England, owning estates in Dominica. But then to gain the advantage, she yields up the personal service of those subjects, for they are bound to observe a neutrality. But has Great Britain lost nothing by the conquest? Who possesses the Island of Dominica? Who possesses all the advantages and benefits of its trade? Who has obtained its commercial revenues? It is true, she is not at the expense of the government of that island. But it is true, she has lost island, government and revenues. When the consignees disposed of the cargo, they became debtors for the monies received. The making of remittances, in satisfaction of debts, although to subjects of a nation at war, is no violation of the duties of a citizen. Nor will the usage and practice of civilized nations forbid it. Tobacco shipped to France, with an avowed intent to remit the proceeds to England for the payment of debts, would not be prize on an American capture.

*13] We come now to the fourth ground of argument, on which it is contended, that this cargo is not within the protection of the articles of capitulation; that is, that the voyage was calculated for Great Britain, and not for Amsterdam, in Holland, and therefore, in breach and out of the protection of the capitulation. This argument is grounded upon several cir-
burgh was ordered to Dominica. This letter was probably delivered by Waterburgh, as it is not to be found among the ship's papers. We have no evidence of the contents of this letter, but it appears to us, to have been a letter recommending Brantlight & Son to Moreson's house. The plan of the voyage being settled in London, it was natural, to obtain letters of introduction from thence.

But Moreson's letter, it is objected, speaks expressly of Kender Mason having shipped property on board, and there is no proof that he is a British capitulant, and therefore, here was property on board belonging to a British subject, who was neither a resident in Dominica, nor an owner of estate there, and consequently, it was British property, not protected by the capitulation. Moreson's letter, if good evidence, to prove the fact with regard to Kender Mason, must be taken as good evidence to prove every fact stated in it; for it must be taken altogether and admitted, or rejected in toto. He says, then, "no one but Kender Mason and myself would put a hogshead on board, &c." Moreson, then, as well as Kender Mason, had property on board. Moreson also mentions in his letter, that afterwards, there was an agreement to ship, generally, and assigns the reasons. The shippers must be other persons besides Mason and Moreson: so that even upon the evidence of Moreson's letter, Kender Mason could have but a part of the cargo, the quantum of which is not at all ascertained.

But we are inclined to think, that this letter of Moreson's, with regard to Kender Mason shipping property on board, is a mistake. Kender Mason was certainly not at Dominica, and yet the letter conveys that idea: "A general panic had seized the merchants, they would not ship, until the arrival of the king's proclamation, and even then Kender Mason and myself were the only persons who would ship a hogshead." The person Moreson *meant to speak of, must have been on the spot. He was one whom the panic had not taken hold of; he was one who, with Moreson, took the resolution to ship, notwithstanding the alarming rupture between Great Britain and the States General; he was one who was led to ship from a confidence in the king's proclamation. We have it in evidence, that Captain Waterburgh had letters of recommendation both to Moreson and a Mr. Alexander Henderson. These letters were inclosed to the captain, in a letter from Brantlight & Sons. *It appears, that on the captain's application to Moreson, nothing could be done, without Henderson; Moreson and Henderson were the persons who were consulted, and the first who moved to provide a loading for the ship. It appears from the bills of lading, that Henderson was a principal shipper. These circumstances considered, the supposition which was made by the counsel for the claimants, is not altogether without foundation, that Kender Mason, was by mistake, inserted for Henderson.

But, be the fact as it may, we must determine according to the weight of evidence. The bills of lading show, that Kender Mason had no property on board; for every bill mentions the person to whom the property belongs, and each bill has a deposition annexed to it, proving the property mentioned to be the property of the persons mentioned, and it appears, that there was no other property than what was mentioned in the bills of lading, and nowhere in those bills is the name of Kender Mason to be found. To say, then, that Kender Mason had property on board, is to say, that upwards of twenty
The Resolution.

*17* This argument is not a fair one; it blends together what ought to be distinguished; a difference ought to be observed between the property of British subjects and British capitolants. British subjects, not capitolants, may rightfully capture American property: Americans may rightfully capture their property; but British capitolants cannot capture American property; and therefore, it is a perfect equality, that Americans shall not capture the property of capitolants.

But it is thought strange, that while French, Spanish, American and British property should be liable to capture, the property of the capitolants should be exempted from it. Let us advert for a moment to the peculiar situation of those capitolants. They are a conquered people, and reduced to the government of France; they are, by compact, a neutral body; they have neither the power of war nor peace; they commit hostilities against no nation; neither against France, nor Spain, nor America, nor Britain; where then is the strangeness in the doctrine, that the property of a people thus reduced, thus defenceless, and thus acting in the line of neutrality, should be protected from capture?

But the resolutions of congress with regard to Bermudas and other islands, have been objected, and it is said, that Count d'Estaing captured the vessels belonging to those islands, though, by the resolve of congress, they were exempted from capture; which, it is contended, shows that the agreement of one ally does not bind the other. The resolutions of congress cannot be considered as a compact with the people of Bermudas and the other islands; for those people were not in a capacity to make a compact; they were under subjection to the British Crown, and had no authority from the crown to enter into engagements with America. The resolutions, therefore, of congress were a mere voluntary suspension of the rights of war, with regard to those people, the continuance of which was perfectly optional with America.

If France was bound by these resolutions of congress, she would only be bound in the extent that America was. America might say, when she pleased, that those resolutions should not exist, and so might France. But if France was bound to a neutrality with regard to Bermudas and those other islands; then Bermudas and those other islands were bound to a neutrality with regard to France: but those islands were not bound, therefore, France was not bound; and Count d'Estaing was well justified in the captures he made.

With regard then to the question, "whether the articles of capitulation bind America," we are of opinion, that they do.

*18* But the claimants take a ground which, they say, will save the cargo at all events; and this ground is the ordinance of congress, which relates to the rights of neutrality. Congress, October 1786, taking into consideration the declaration of her Imperial Majesty of Russia, with regard to the rights of neutrality, adopt the principles of the declaration,
DECEMBER SESSION, 1781.

THE RESOLUTION.

MILLER v. THE SHIP RESOLUTION, &c.

THE SAME v. THE CARGO OF THE SHIP RESOLUTION, &c.

Rehearing.—Evidence, in case of prize.—Neutrality.

A rehearing may be granted in a case of prize, where the original decree has not been carried into execution: under what circumstances, it will be granted or refused. The burden of proving a capture to be lawful prize, lies in the captors; the claimants are not, in the first instance, required to disprove it. In a prize cause, the ship's papers are prima facie, but not conclusive evidence of the national character of the property. Though Great Britain, after the commencement of hostilities against Holland, declared by proclamation, that Dutch vessels carrying the produce or manufactures of Dominica, should be exempt from capture, for a limited time, this could only operate against British captures; it did not restore the neutrality of Holland, nor take away the rights of war, in favor of other nations, who should retrieve a Dutch vessel from a British privateer.

On motion of Wilson, for the appellants, a rule had been granted, in September session last, to show cause why there should not be a rehearing in these appeals: 1st, because the decree had erred in fact; and 2d, because there had been a discovery of material testimony since it was pronounced. And it was argued, on the 27th December 1781, by Morris, in support of the rule, and by Serjeant and Wilcocks, in opposition to it.

In support of the rule, it was said, that the rehearing ought to be allowed, on the principle that humanum est errare; and by analogy to the practice of the court of chancery, founded on that principle. It is true, that the interest of the community requires, that there should be an end to controversies; but this must be attended to, consistently with doing justice. A rehearing of the chancellor's decree seems, indeed, to be a matter of course, on application, for that purpose, by any two counsel of respectable character. Bohun's Cur. Can. 240, 243, 364, 385, 405. The petition for a rehearing was filed, as soon as information of the decree was received: there has, therefore, been no laches in making the application; and even when the chancellor has made his final decree, the form of petition merely states that he has erred in conscience, as to the facts; and the application is seldom refused. But though the request of counsel should not, of itself, be deemed sufficient, the discovery of new evidence subsequently to the decree, ought to be admitted as a foundation for a rehearing. By this evidence, it will appear, that other vessels, though really British, have been fitted out by the same parties, under the same cover; and, of consequence, the inference will be strong, that the Resolution was also British property.

In opposition to the rule, it was observed, that the most pernicious consequences would ensue, if a new trial should be granted, upon every request, and that the payment of costs will not be a sufficient check; as the advantage of having the property in hand, more than compensates that inconvenience. But in answering the causes assigned for a rehearing, it was contended, that the law of chancery did not apply. In chancery, the suits being
new, and the parties liable to surprise, rehearings are frequently allowed; but in the House of Lords, a rehearing is never allowed. Nor is it consonant with the practice of this court; though if the court was itself dissatisfied with the principles of the decree, that would, undoubtedly, be a satisfactory reason for the measurement. Besides, on a rehearing in chancery, no new evidence can be introduced; and the petition for a rehearing must state the reasons at large. 2 Prec. Ch. 450; Ibid. 10. But this application is in the nature of a bill of review, and must, consequently, state new evidence. Ibid. 40, 452; 3 Black. Com. 451; 3 Atk. 35; 3 P. Wms. 371, 372. Nor is the new evidence, which is assigned as another cause for a rehearing, admissible: it respects another vessel; and the papers found on board the ship herself must be the ground of acquittal or condemnation.

BY THE COURT.—As the original decree has not been carried into execution, we think it proper, under the peculiar circumstances of the present case, to allow a rehearing. But this is not to be drawn into precedent; nor is any point, previously determined, to be brought again into litigation, unless the state of the facts respecting it, shall be altered by the new evidence.

The causes were, accordingly, argued for several successive days; and on the 24th of January 1782, the following revisionary decree (altering the suspended decree only as to a part of the cargo) was delivered by William Paca and Cyrus Griffin, the presiding commissioners.

BY THE COURT.—We have considered the new evidence which has been laid before us, and we have also considered the observations and arguments which the counsel upon both sides have made upon it.

On the first argument, we were of opinion, that the ship ought to be considered in the predicament of neutral property, and entitled to all the rights and privileges of neutrality, which the ordinance of congress ascertained and conferred; we took up this idea, from a construction of the articles of capitulation and the British proclamation, which issued immediately on the rupture between Great Britain and the States General, and which protected the ship Resolution, for a limited time, from British capture, on her passage from Dominica to Amsterdam. We conceived, that the neutrality of the States General, with regard to the ship, abstractedly considered, was not broken by the rupture; the proclamation having controlled the extent of the war, by its exemption of the ship from being a subject of hostility and capture.

Such was our opinion, on the first argument: but on consideration of the last argument, we are of a different opinion.

The writers upon the law of nations, speaking of the different kinds of war, distinguish them into perfect and imperfect: A perfect war is that which destroys the national peace and tranquillity, and lays the foundation of every possible act of hostility: The imperfect war is that which does not entirely destroy the public tranquillity, but interrupts it only in some particulars, as in the case of reprisals. Before Great Britain commenced war with the States General, the states were a neutral nation with regard to the war between Great Britain, France, Spain and America: They had taken no part in the war, and were a common friend to all. This is precisely the legal idea of a neutral nation: it implies two nations at war,
and a third in friendship with both. The war which Great Britain commenced with the States General was a perfect war: it destroyed the national peace of the States General, and with it, the neutrality of the nation. The States became a party in the general war against Britain: they were no longer a common friend to the belligerent powers; and therefore, they ceased to be a neutral nation.

War having thus destroyed the neutrality of the States General, they can never resume the character of a neutral, until they are in circumstances to resume the character of a common friend to Great Britain, France, Spain and America: But this character is not to be acquired, while war subsists between them and Great Britain. Only a peace, therefore, between Britain and the States, can put the States in a capacity to resume their original character of neutrality. But there can be no peace, without the concurrence of both nations: the British could not, therefore, by the mere authority of their proclamation, restore back to the ship Resolution her original neutrality. The proclamation could only operate as a protection of the ship from British capture. We, therefore, lay out of question the ordinance of congress with regard to the rights of neutrality; this case is not within it.

But the ship Resolution is captured, and both ship and cargo are labelled as prize. A question is made; on whom lies the onus probandi? We think, on the captors. There can be no condemnation, without proof that the ship or cargo is prize; and it cannot be expected, that the persons who contest the capture will produce that proof.1

Every capture is at the peril of the party. A privateer is not authorised to capture every vessel found on the high sea: she is commissioned to capture only such ships as are the property of the enemy. Every ship, indeed, may, in time of war, be brought to and examined; but she is not to be seized and captured, without the captors have just grounds to think she is the property of an enemy, and not the property of subjects of a nation in peace and friendship, or neutrality. If such seizure and capture are made without just grounds, the party injured is entitled to have an action for damages: and it is the policy of all nations at war, to oblige the captains of privateers to give bond and security, to enforce a proper conduct while at sea, and to prevent seizures and captures from being wantonly made.

The sea is open to all nations: no nation has an exclusive property in the sea. Put the case, then, that a privateer meets a ship at sea; is it to be inferred, from the mere circumstance of the ship's being found on the high seas, that she is the property of an enemy? Surely, there is no ground for such an inference: On this ground, a privateer might seize and capture the ships of its own nation. But the privateer attacks, seizes, captures and brings the ship into port: it is plain, here is an act of violence; a seizure and capture. The captain, therefore, must do two things: at all events, he must show just grounds for the violence, or he will be punishable at law, by an action of damages: and in the next place, before he can obtain condemnation, he must prove the ship to be the property of an enemy; for it can never be enough for condemnation, that he found the ship at sea.

1 But the burden of proving a neutral interest rests on the claimant. The Amiable Isabella, 6 Wheat. 1; The Jenny, 5 Wall. 183; The Mersey, Blattch. Pr. Cas. 187.
engaged in a fraudulent and illicit commerce, and are chargeable with a breach of moral obligation. The claimants stand upon two grounds of presumption: First, the presumption which arises from the papers; and then the presumption that no man would do that which he is morally bound not to do. The claimants cannot be affected, while these presumptions remain uncontested. How are they to be contested? By what evidence? Certainly, the best evidence that the nature of the case will admit, and which the captors have in their power to produce. And if an attested copy of the articles, and of the names subscribed is the best evidence to prove who are capitulants, it is the best to prove who are not capitulants; and therefore, the captors ought, on their own principles, to produce it; they having it as much in their power to produce such copy as the claimants.

But it is said, "the ship’s papers are defective; the register is not produced; it is withheld, and gives a ground of suspicion." We have no doubt, a register was on board at the time of the capture: but we do not think there is any ground for suspicion, under the circumstances of the case. The Resolution was captured by a British privateer. The British captain took possession of the ship’s papers, and Captain Waterburgh, the captain of the Resolution, was made prisoner. Afterwards, the Resolution was captured by the American privateer, and the American captain took possession of such papers as the British captain had suffered to remain on board the Resolution. Captain Waterburgh was not brought into port with his ship. It was the interest of both the British and American captains to withhold the register, if it proved the ship to be the property of subjects of the States General; and neither the British captain nor the American captain have made oath, that the papers produced to the court are all the papers which were found on board, and came respectively to their hands and possession.

But it is said, "no credit or faith is to be given to those papers, because replete with contradiction and absurdity. The manifest, it is said, contradicts the bill of lading: the manifest purports the property of the cargo to be in the persons named therein as the shippers, and the bills of lading show, in many instances, that the property is in others."

The manifest exhibits a column under the description of shippers; and it also exhibits a column under the description of marks, and other columns for the cargo. The bills of lading correspond with the column of marks; and the persons described as shippers in the manifest, are ascertained by the bills of lading to be persons, who acted principally as attorneys, managers or agents for those who are mentioned in the bills to own the property for which the bills are taken; the property in the bills being in the general produce of such owners' estates in Dominica. There is, therefore, no contradiction between the manifest and bills of lading; for the term shippers does not imply the property to be in such shippers; the term as properly applies to a factor, or attorney or agent, as to the owner.

"But," it is said, "Governor Duchilot was imposed upon; that he refers in his passport and certificate, which is indorsed on the manifest, to the 17th article of the capitulation; that the 17th article speaks of such merchants as have goods or merchandise; and that, therefore, the governor must have been informed that the shippers were the owners of the cargo." It is true, the 17th article says, the merchants may sell their merchandise, and carry
on their trade, and the term their implies the property to be in them: but the term their may also apply to the property which a factor, agent or attorney has the possession, management and shipment of, for others; for, although they have not the general, yet they have the special property.

"But," it is said, "the shippers dared not to avow the names of the persons mentioned in the bills of lading, from a consciousness that they were not capilants, and that the governor would have refused them a license, passport and certificate." If the shippers felt such a consciousness, why avow the names of such in the bills of lading? It was not only necessary to take measures to prevent discovery on the island, but also to guard against detention, on a capture at sea. Why was the governor's passport and certificate obtained? Was it not to protect the ship and cargo from capture? But if the manifest, passport and certificate had no reference to the bills of lading, but were contradictory and inconsistent, and the persons avowed by the bills of lading to be the owners of the property were not capilants, is it not a novelty in the game of fraud, to furnish a ship with such papers as proclaimed a contradiction to the manifest, passport and certificate, announced the criminality of the commerce, and exposed both ship and cargo to capture and confiscation?

Prudence required, and very probably it was enjoined by the government, that before a ship should be suffered to clear out, and proceed on her voyage, proofs should be made and taken with her, not only that the shippers of the cargo were capilants, but also, that the owners of the cargo were capilants. It appears, in this case, that above three-fourths of this cargo were shipped by agents, and attorneys and factors. The governor certifies the shippers to be capilants. The chief justice certifies the owners to be capilants, and where his certificates are deficient, the depositions prove it. All this may be done, in conformity to the law, usage and practice of the island.

But another contradiction is objected: It is said, "the bills of lading contradict the other papers, which import the property of the ship to be in Brantlight & Son; for the bills consign the cargo to Brantlight & Son; and therefore, it is contended, the property of the ship could not be in Brantlight & Son; because, it is observed, to direct a man to pay freight to himself." The bills of lading are not chargeable with any such absurdity. The freight is not directed to be paid to Brantlight & Son; the freight is to be paid to the master; he is responsible for the wages of his crew, and other debts, contracted on account of the ship. Freight is answerable for all such claims, and the master is entitled to receive it, to indemnify himself: he may, therefore, refuse to deliver the cargo until the freight is paid. And by this means, in case of the bankruptcy of his owners, he is sure of an indemnification, to the extent of the freight.

But still another contradiction is objected: It is said, "that both the bills of lading, and the oath of Morson, on the back of the manifest, contradict the assertion of the other papers, that the ship is the property of Brantlight & Son: for they prove the consignment of ship to Brantlight & Son; and therefore, it is contended, the property could not be in them, because it is absurd to consign a ship to the owners." We do not see any such absurdity. Consignment is a mercantile phrase, adopted to distinguish the person to whose care a ship is addressed, and when applied to the owners, it
is merely in conformity to forms. It is the common usage and practice of merchants, to apply the phrase, indiscriminately, to owners and others.

"But," it is said, "the papers found on board the Resolution, do not sufficiently prove the ship to be the property of Brantlight & Son, when she arrived at St. Eustatius, from Amsterdam, early in 1780." It is proved, by t.i.e oath of Morson, and captain Waterburgh, indorsed on the back of the manifest, that this property *was subsisting, if not, at the time of the deposition, yet, at least, on the arrival of the ship at Dominica, October 1780. And Morson & Company's letter, to Brantlight & Son, dated 6th March 1781, after the rupture with Holland, and shortly before the ship left Dominica, and which was found on board, proves the property to be then subsisting: for, in the close of the letter, they say, "captain Waterburgh has drawn on you, in our favor, for disbursement, 101l. 15s.;" which disbursement plainly refers to disbursements of the ship, which Brantlight & Son could not be chargeable with, if they had parted with the property, and were no longer owners.

No evidence at all is produced to show a change of property, or transfer of the ship. And therefore, the fact being admitted, that she was the property of Brantlight & Son, on her arrival at St. Eustatius, in 1780, and the property being proved to be subsisting in October 1780, and proved, to be subsisting in March 1781, a few days before she sailed from Dominica, we cannot doubt, but that the property was subsisting, at the time of her capture. She was then no prize to the British privateer; because protected by the British proclamation: she was no prize to the American privateer; because she was the property of the subjects of the States General, a nation in peace and friendship with America.

"But the papers," it is said, "prove the cargo to be the property of persons, not capitulants: for Morson & Company, in their letter of the 6th March 1781, speak of Kender Mason, as a shipper, who is not a capitulant." What does this letter say? It is addressed to Brantlight & Son, and informs them, that the rupture with Holland, occasioned all shipments to stop; that afterwards, the British proclamation, protecting the Holland vessels from capture, for a limited time, on their passage back from Dominica, came to hand; that even then, no one but Kender Mason and themselves would ship; that, afterwards, shipment went generally on. This letter proves clearly, that the cargo was shipped by many different persons. Not only Kender Mason shipped, but Morson & Company also shipped, and there were other shippers, who were alarmed, notwithstanding the British proclamation, and would not immediately ship, though afterwards they proceeded to ship.

To what extent did Kender Mason ship? Morson & Co.'s letter, which is the only evidence that he shipped at all, goes no further than to prove, that he shipped a part of the cargo. How shall this part be ascertained? The ship, it is admitted by counsel on both sides, was consigned to Morson & Co., and Alexander Henderson; and it appears from the papers on board, that upwards of two-thirds of the cargo were shipped by Henderson, as agent and attorney for the British capitulants; the residue of the cargo was shipped, partly by James Morson, agent and attorney for British capitulants, partly by Morson & Co., and partly by others, in their own right, as agents and attorneys for others.
The letter of correspondence which Henderson addressed to Brantlight & Son, to whom the ship and cargo were consigned, and his letters of correspondence, addressed to the gentleman at London, for whom he was agent and attorney; the bill of lading he took for the property shipped, and his deposition annexed to the said bill, give a fair history of such part of the cargo, as was shipped by him: they prove it to be the property of British capitulants, and not the property of Kender Mason. The depositions of James Morson, the bills of lading, and the certificates of the chief justice, point out and ascertain, what part of the cargo he shipped as agent and attorney, and prove it to be the property of British capitulants, and not the property of Kender Mason. The depositions, bills of lading, manifest, letters of correspondence, the governor's passport and certificate, and the deposition of Morson and Fitzgerald prove that the residue of the cargo, except what was shipped by Morson & Co., Morson, Vance & Co., and Lovell, Morson & Co., was the property of British capitulants, and not the property of Kender Mason.

If Mason, then, had any property on board, that property must have been in such parts of the cargo as were shipped by Morson & Co., Vance & Co., and Lovel, Morson & Co. With regard to this part of the cargo, the evidence is not full and complete: for although Morson is proved to be a capitulant, yet the company is neither ascertained, nor proved to consist of capitulants.

But it is contended, that the property shipped by Henderson was the property of Kender Mason. On what ground is the idea taken up, that Mason had any property at all on board? It is founded solely on that part of Morson & Co's. letter, which mentions Kender Mason as a shipper. Exclusively of this letter, there is nothing, besides mere conjecture and possibility, to prove that he had any property at all on board.

This much must be clear; that if Henderson was meant, then Mason was not meant. Morson & Co. say in their letter, "that even after the arrival of the British proclamation, no one but Kender Mason and ourselves, would immediately ship." If Henderson was not meant for Kender Mason, then Henderson was amongst those who were still alarmed, and would not immediately ship, on the arrival of the British proclamation; and, consequently, Kender Mason could have no property in what was shipped by Henderson: *for it is absurd to say, that Kender Mason proceeded to ship, and Henderson did not, if what Henderson shipped was the property of Kender Mason.

But it is objected, "that although Kender Mason is mentioned in the letter, as a shipper, yet it is to be understood, that he is there described as principal to Henderson, and therefore, what was shipped by Henderson, may with propriety be said to have been shipped by Kender Mason."

What evidence is there of such a connection between Mason and Henderson? Mason's letters of correspondence are all addressed to Morson, and the ship is consigned to Morson and Henderson, as persons in separate and distinct interests. The idea too, of such a connection, is contradicted by the whole tenor of the papers found on board. If Henderson was the agent or attorney for Kender Mason; if he was the person, with whom Mason was so extensively interested, in his commercial connections, then the idea of his connection with Morson & Co., Morson, Vance & Co., and Lovel, Morson &
vessels, for a limited time, on, their passage back, shipments went on; but the protection, which the proclamation gave, ceased on the arrival of Holland vessels back to their ports in Holland.

What ground, then, is there to think, that the Resolution, with her cargo, were destined, after her arrival at Amsterdam, to proceed to London, where both ship and cargo would have been liable, after her departure from Amsterdam, not only to British capture; but, as contended by the counsel for the captors, liable also to Dutch capture, war prohibiting all commerce between the belligerent powers; and not only liable to British and Dutch capture; but, as the law of nations has been stated by the counsel of the captors, liable also to French, Spanish and American capture?

"But the papers," it is said, "of the Erstern, prove that Morson and Mason, who planned the voyage of the Resolution, *also planned the voyage of the Erstern; and, therefore, if the Erstern was engaged in an illicit commerce, the presumption is, that the Resolution was also employed in such commerce." We have already observed, that the Resolution could not possibly be engaged in the illicit commerce, with which the Erstern is charged; but if Morson and Mason planned both voyages, Morson knew the plan on which the Resolution was chartered, and he has proved it, on oath, to be a fair one, and in perfect conformity to the articles of capitulation.

"But Mason, in his letter from Ostend, August 1781, found on board the Erstern, writes to Morson, that he has nearly accomplished the plan, which he informed him of in his letter dated October 1780, from Rotterdam, and it is contended, that this letter proves, that a plan is established at Ostend, to centre there the whole Dominica trade, and to furnish British goods for Dominica, through that channel." Admit the facts to be so; how does it affect the Resolution and her cargo? The rupture with Holland had taken place, and the Resolution was captured, and brought into port, several months before the plan was accomplished at Ostend, and, consequently, whatever illicit practice that plan points at, cannot apply to the Resolution.

But it is said, that the plan established at Ostend, was the plan, which was concerted at London, and established at Amsterdam and Rotterdam, and shifted from those cities to Ostend, on account of the rupture with Holland. If the plan, now established at Ostend, is nothing more than the plan adopted at London, with regard to the Resolution, then it is a fair one; for Morson has told us, what the plan was, and he has declared it on oath. But we are of opinion, that the system now established at Ostend is a new one, and that it is not a former plan, shifted from Holland to Ostend, on account of the rupture. It originated, indeed, before the rupture, and might have taken place in Holland, had it been completed before that event. It is of such a nature as requires Morson to take his residence at Ostend. It occasioned a change in his commercial connection at London, and a dissolution of the partnership, in which he was there engaged. The cargoes shipped from Dominica, though consigned to Liebert, Baas, Dardine & Co. were nevertheless to be disposed of, under his superintendency. It was upon this plan, whatever it was, that the Erstern sailed; she may be affected by it, but the Resolution never can.

We have said, the whole cargo of the Resolution is disproved to be the property of Mason; except such parts of it as were shipped by Morson & Co., and therefore, if Mason had any property at all on board, it must be in
such part of the cargo. *We feel the force of the reasoning which has been employed to show, that the name of Kender Mason was inserted by mistake; but, as Mason, who appears to us to be a partner in three partnerships, and to have been the active person in shipping this part of the cargo, has acknowledged, for himself and company, that Kender Mason was a shipper, and the evidence, upon a careful review of it, leaves an opening to apply that acknowledgment to a concern in the three partnerships, we are led to change the opinion we had entertained on the first argument, with regard to this point, and now think, that this part of the cargo must be condemned as prize; and not only Mason’s proportion of it, but also the whole interest of the three partnerships: for the shipping of produce by Mason, who is not a capitulant, is a violation of the capitulation; and as the three partnerships were consenting to it, and neglected their interest with Mason, they are participes criminis, and must equally suffer. So far we have thought proper to animadvert on the new evidence, and the argument and observations of the counsel upon it. And although, on a decree of acquittal, almost the whole cargo will go into the hands of those who are not the friends of America, notwithstanding they have stipulated a neutrality during the war; yet, as they are entitled to it, by the articles of capitulation, which bind America, the law of nations operating on those articles as a solemn compact, commands that such a decree must be given. We hope, we feel just impressions of the wrongs and cruelties of Great Britain; but public faith must be maintained; the honor and dignity of the United States preserved and the law of nations dispassionately and righteously administered.

We, therefore, adjudge and decree, that the order of this court, suspending the original decree, be discharged, and the said original decree be affirmed in all its parts, except with regard to such parts of the cargo, as were shipped by Morson & Co., Morson, Vance & Co., and Lovell, Morson & Co., which parts of the cargo we do adjudge and decree to be condemned, for the use of the captors, chargeable, nevertheless, with the stipulated freight,

JANUARY SESSION, 1782.

*THE EASTERN. [*34

DARBY et al., appellants, v. THE BRIG EASTERN et al.

Neutral property.—Prize.

If the owners of a neutral vessel violate their neutrality, by taking a decided part with the enemy, their ship is in the predicament of enemy’s property, and subject to seizure and confiscation, as lawful prize.

This was an appeal from the admiralty of the state of Massachusetts-bay, where the brig and her cargo had been acquitted. The case was argued on the 28th, 29th and 30th of January; and on the 5th February 1782, the definitive sentence of the court was pronounced by Paca and Griffin, the presiding Commissioners, in the following terms:
BY THE COURT.—Upon the evidence in this case, we are of opinion, that the brig, at the time of her capture, was the property of Imperial subjects at Ostend, and that the cargo was British property, unprotected by the capitulation of Dominica.

It is objected, "the brig is not prize, because neutral property." Neutral property cannot be captured: for while the character of neutrality is preserved, such property is the property of a friend, on which the rights of war cannot attach; but the owners of a ship may violate their neutrality, by taking a decided part with the enemy: in what light is such a ship then to be considered, and what is to be done with her? The law of nations says, that a ship, under those circumstances, is in the predicament of enemy's property, and subject to seizure and confiscation.

But it is said, "the ordinance of congress ascertains in what cases the rights of neutrality are forfeited; that the present case is not comprehended; and therefore, if not protected by the law of nations, yet it is protected by the ordinance of congress."

We are of opinion, that congress did not mean, by their ordinance, to ascertain in what cases the rights of neutrality should be forfeited, in exclusion of all other cases; for the instances not mentioned are as flagrant as the cases particularized. The ordinance does not specify the case of a neutral vessel employed in carrying provision to a place which is besieged, and in want of bread: for although one of the articles says, "you shall permit all neutral vessels freely to navigate on the high seas, or the coasts of America, except such as are employed in carrying contraband goods or soldiers to the enemy;" yet another article says, that the term contraband shall be confined to the articles there enumerated, and provision is omitted.

*35* Were congress asked, whether they meant to protect from capture, a neutral ship loaded with provision, and destined for York and Gloucester, when besieged by the armies of the United States and France, no one could possibly doubt what their answer would be. The plain and obvious construction of the ordinance is, that while neutral vessels observe the rights of neutrality, they shall not be interrupted by American captures: Congress meant to pay a regard to the rights, and not to the violations of neutrality.

But it is objected, "that in this case, if the brig has violated the rights of neutrality, it is because she intended a violation of the capitulation of Dominica; that the capitulation of Dominica can only be considered as a local law, of which there can be no breach, until the offending ship comes within the civil jurisdiction of the island; that the brig was captured before the arrival within the jurisdiction of Dominica; and that, therefore, she was captured, before there was any violation of the rights of neutrality." If nothing could be objected against the brig, but an intentional violation of the capitulation, abstractedly from the consequences, with regard to the war between Great Britain, France and the United States, possibly, such reasoning might be conclusive: but we are of opinion, that the brig has done more than a mere intentional offence, with regard to the capitulation.

The subjects of a neutral nation, cannot, consistently with neutrality, combine with British subjects, to wrest out of the hands of the United States and of France, the advantages they have acquired over Great Britain by the rights of war; for this would be taking a decided part with the
enemy. On the conquest of Dominica a capitulation took place, and by that capitulation, a commercial intercourse between Great Britain and that island was prohibited: the object was, to weaken the power of Great Britain, by lessening her naval and commercial resources. But what has been the conduct of the brig, and the Imperial subjects, her owners? Kender Mason, a British subject, establishes a plan at Ostend, by which the commerce of Great Britain with Dominica is to be kept up and preserved, through the intervention of that port. On this plan, Liebert, Beas, Dardine & Co., Imperial subjects, purchase at London the brig Erstern: Kender Mason puts on board a cargo of British merchandise, the property of British subjects: the brig clears out from London, ostensibly for Ostend, and there arrives: Liebert, Beas, Dardine & Co. supply her with false and colorable papers, assume upon themselves the ownership of the cargo, and dress it up in the garb of neutrality, to screen it from detention and capture: the brig then clears out for Dominica, and sails for that island with the cargo she took on board at London.

*Can such conduct consist with neutrality? Can there be a more flagrant violation of it? Does it not aim to wrest from France and the United States, the advantages they acquired by the conquest of Dominica: And does it not evince a fraudulent combination with British subjects, and a palpable partiality?

But, “why shall the rights of neutrality be broke by works of supererogation? If the cargo was British property, unprotected by the capitulation, it was then the property of enemies, and as it did not consist of contraband articles, it was protected from capture, by the ordinance of congress: the brig, therefore, needed not to employ fraud and stratagem, to give it the garb of neutrality, in order to screen it from capture.”

If the offence which the brig has committed, consisted in employing fraud and stratagem, merely to protect property which belonged to an enemy, the objection might, in consequence of the ordinance of congress, be of some force. But the offence is not of so limited a nature; it is far more extensive, and comprehends a flagrant violation of the rights of neutrality: it results from a fraudulent combination with British subjects, to give weight and energy to the arms of Great Britain, by the re-establishment of a commerce, and its emoluments, which she had lost by the conquest of Dominica.

But it is objected, “The cargo is not prize, because it is not contraband, and all the other effects and goods, though the property of an enemy, are exempted from capture by the ordinance of congress.” If the Erstern had been employed in a fair commerce, such as was consistent with the rights of neutrality, her cargo, though the property of an enemy, could not be prize; because congress have said, by their ordinance, that the rights of neutrality shall extend protection to such effects and goods of an enemy. But if the rights of neutrality are violated, congress have not said, that such a violated neutrality shall give such protection: nor could they have said so, without confounding all the distinctions between right and wrong.

Upon the whole, we are of opinion, that the decree below be reversed, and that the said brig and cargo be condemned, as prize, for the use of the captors, without costs.
THE GLOUCESTER.

KEANE et al., libellants and appellants, v. THE BRIG GLOUCESTER et al.,
appellees.

Prize money.

A libel will lie, in the admiralty, by the crew of a privateer, for their respective proportions of a prize.
If the marshal undertake to make distribution among the captors, without the orders of the court, he does it at his peril.
If no articles be executed, the admiralty court will make distribution of the proceeds of prize property, in proportion to the number, interest and merits of the captors.
Persons who sign the articles, and are, subsequently, without fault on their part, discharged, and put on shore by the captain, are entitled to participate as captors in the prizes taken, although fresh articles were signed by the captain and the remainder of the crew, after their discharge.
Mahoon v. The Gloucester, 3 Hopk. 55, affirmed.

This was an appeal from the Admiralty of Pennsylvania, and after argument, PACA and GRIFFIN, the presiding Commissioners, delivered the following sentence.

*37* By the Court.—Two objections are made to the decree below:
The first objection is, that a libel does not lie by the crew of a privateer, for their respective proportions of a prize. The second objection is, that the libellants, in this case, are not part of the privateer's crew, nor captors, entitled to a proportion of the prize stated in their libel.

With regard to the first objection, we are of opinion, that a libel does lie, and that it is the proper and regular mode of redress: for the commission of a privateer, according to the form established by congress, extends not only to the captain, but also to the ship and crew; they are captors, as well as the captain, and their rights to the thing captured, are equally founded on the commission. The ship is figuratively considered as an agent, and represents the owners. Articles of agreement generally direct the distribution; but if no articles are executed, the admiralty courts will make distribution, in proportion to the number, interest and merits of the captors.

But it is said, "the admiralty court, in this case, had exercised all its jurisdiction and power; that a libel was filed by the captain, and a decree passed for condemnation; that the prize has been sold, and the money lodged in the hands of the marshal; that the marshal must make distribution, according to the list of the crew, which the captain shall deliver; and if the captain makes a false list, the party injured has no other remedy than by an action at law."

The original libel, we find, was filed by the captain, in behalf of himself and crew, and the decree adjudges the prize to the captors. The marshal has sold the prize, and the money lies in his hands; on application, he refuses to pay the libellants; and the question is, what is the mode of redress? We are of opinion, that the libellants had a double remedy: they had an action at law, for money had and received to their use; and they were entitled to a supplemental libel, upon which a decree and order might have been obtained, to compel the marshal to pay the money. Such a libel is nothing more than a form of proceeding, to carry into execution the original decree; and if the admiralty courts are competent to give judgment, they must be competent to carry it into execution.
mariner, who is once shipped on board, and is dismissed by the captain, without fault, before the voyage is ended, is entitled to his stipulated wages for the whole voyage; yet the residue of the crew can only claim to the extent of their contract; although, by the dismissal of such mariner, the risk and labor becomes proportionally greater.

But it is said, that after the dismissal of the libellants, new articles were executed by the captain and residue of the crew; by which their shares of prizes were augmented, in proportion to the lessening of the crew, by the libellants' dismissal: and that the libellants' claim affects their right under the subsequent articles. The captain and the residue of the crew could not cancel the original articles of agreement. When a contract is made, it can only be dissolved by the consent of all parties. The after-articles, therefore, cannot affect the original articles, nor authorize a departure from them. These articles, instead of mitigating against the libellants' claim, tend to establish it on another ground: for they show that the residue of the crew approved of the dismissal, and therefore, ought to be considered as participes criminis, and equally responsible with the captain.

But it is said, "that the libellants did not, by any personal service, contribute to the capture in the present case; that the prize was taken by the ship, the captain and officers, and residue of the crew; and that although the libellants had a right, under the commission, to make captures, yet the right was not exercised in the capture of the prize in question." The ship, captain, officers and crew were joint-tenants of the right to capture and make prizes conceded by the commission. Whatever was acquired in consequence of this joint right and interest, must be considered as common stock, and like the case of a joint partnership, not subject to survivorship. Where the right and interest is a joint concern, the question never can be material, which of the parties have been most active and alert: the only question that can arise must be—whether the joint concern and interest is fairly subsisting?

Upon the whole, we are of opinion, that the decree below be affirmed, with costs to the libellants.

MAY SESSION, 1783.

*40]

*The Squirrel.

Stoddard, appellant, v. Reed, appellee, and The Schooner Squirrel and Cargo.

Sale of perishing property.

Prize property, in a perishing condition, may be ordered to be sold, before appearance.

On motion of the appellant's counsel, before an appearance filed on behalf of the appellee, stating that the prize schooner was in a perishing condition, it was ordered—

By the Court.—That the schooner, her tackle, apparel and furniture be sold at public auction, to the highest bidder, for the use of those to whom the same shall be finally decreed.
The Experiment.

The Owners of the Sloop Chester v. The Owners of the Brig Experiment et al.

Rehearing on appeal.

An appeal ought not to be granted, by reason of irregularities in the proceedings, unless it appear that thereby substantial justice has been prevented.

A Petition for sustaining an appeal, with testimony in support of the allegations contained in the petition, being filed, a rule was granted to show cause why the appeal should not be sustained. The case was argued, on the 1st of May; and on the 3d of May, Griffin, Read and Lowell, the presiding commissioners, delivered the decision of the court.

By the Court.—Having considered the evidence, and arguments adduced by the counsel for the petitioners and respondents, we are of opinion, that there is not sufficient cause to admit the appeal of the petitioners, from the decree of the Court of Admiralty in the state of South Carolina, condemning the Sloop Chester, her apparel and cargo. If the appeal should be admitted, it must be on this principle, that there had been such irregularities in the proceedings, as that justice and right required, that the cause should be reheard, in order to do that justice here, which had not been done in the court below. The irregularity suggested is, that the captors did not bring or send the master of the captured vessel, in order to be inquired of touching the property, &c., nor produce the documents mentioned by the master, in his protest; and that, for want thereof, a condemnation had taken place. However blamable the captor may have been, in omitting to send or bring the master before the admiralty court, and in not producing those documents, such omission alone is not sufficient to set aside the decree and rehear the cause, unless it appeared that substantial justice has been thereby prevented.

In this case, upon an examination of all the evidence produced, it appears, that the condemnation of the Sloop Chester must have taken place, if the same evidence had been offered in the admiralty court. Peter Theodore Vantylengen appears to have been a merchant, in a British settlement, on the Bay of Honduras; not barely having a transient residence, but carrying on trade from that settlement, like other inhabitants. It is not material to whom his natural allegiance was due; he was enjoying the privileges, and subject to the inconveniences of other merchants, residing in the same place. The Sloop Chester appears to have been a British vessel, possessed of British papers, purchased by Vantylengen, and employed by him; and although he might have executed the bill of sale of her, to certain subjects of the United Netherlands, with whom the United States were at peace and amity, for the purpose, as he expresses it, of preventing her being taken, such a transfer cannot be considered as bona fide; but from the tenor of the instructions of said Vantylengen, to the master of the sloop, that transfer appears to have been intended merely to deceive and cover, under the name of a friend, property which ought to be considered as that of an enemy. Examining the protest made by the master of the Sloop Chester, it does not appear, that he was prevented by the captors, from going to Charleston; but on the contrary,
although his factor might have a lien, the vendee of the factor certainly had none. That, in strictness, perhaps, the assignees of Loyer had the right to the atlas, or the price for which it sold; but that, certainly, at the time of the sale, it was not the property of Loyer, and if not vested in the assignees, it must have belonged to Boinod, by virtue of some special lien. And that upon the whole, the plaintiff was entitled to recover, though he was answerable over to the assignees.

Verdict for the plaintiff.

AUGUST SITTINGS, 1790.

Bowen v. Douglass.

Continuance.

A plaintiff under rule for trial or non-pros, may nevertheless have a continuance, on showing reasonable cause.

The plaintiff had taken out a subpoena, returnable to December term last, for two witnesses who lived in Montgomery county; but as they did not then appear, an attachment, directed to the sheriff of Montgomery county, was issued, returnable to the succeeding March term; when, likewise, default was made in the appearance of the witnesses; and the cause was continued, on a rule for trial at the next term or non-pros. Another subpoena had been taken out, returnable this day, on which the cause was marked for trial; but it proved as ineffectual as the preceding writs.

Under these circumstances, Levy, for the plaintiff, moved to postpone the trial. He stated (and it was not denied by the opposite counsel), that an application on his part to take the depositions of the witnesses had been refused; and he read a letter from the sheriff of Montgomery, to show that an attempt had been made to serve the attachment upon the witnesses; a certificate from the doctors, to prove that one of the witnesses was sick; and a certificate from disinterested and credible persons, to prove that the other witness was out of the way. Schlosser v. Lesher, 1 Dall. 251.

McKean, for the defendant, objected to the postponement; and insisted, that the rule for trial, or non-pros., ought to be enforced, as the plaintiff, having neglected to issue a second attachment, had not done everything in his power to procure the attendance of the witnesses. But—

By the Court.—It is questionable, whether the act of assembly empowers us to issue writs of attachment into another county; and there are other modes of proceeding, equally efficient, and clear of any doubt. It is unnecessary, however, to enlarge at present on this topic; as the plaintiff has evidently done all in his power to procure the attendance of the witnesses; and the refusal of his overture to take their depositions, is a strong additional circumstance in his favor. The cause must, therefore, be continued, subject to the rule for trial at the next term, or non-pros. And in the mean time, we direct, on our own authority, a rule to be entered for taking the depositions of infirm witnesses de bene esse; to be read in evidence
amount of Mr. Coxe's debt would be paid. If notice, therefore, was necessary, it is decided, that notice to a first purchaser is binding upon all who follow him. 2 Atk. 242.

But it is certain, that whoever gets the verdict, an innocent person will suffer. The only question, therefore, is, whose right is the best? Where the parties are equal in equity, the priority of right furnishes a fair rule for decision; and the claim of Willing & Morris is not only founded on a greater value in point of confidence, but on a superior title in point of date. The executors had early notice of it; they were justifiable in retaining the legacy to pay it; and the action now trying is sufficient evidence of their refusal (after being warned for that purpose) to recognise the adverse assignment.

The President, having recapitulated the evidence, as stated in the commencement of this report, proceeded in delivering the following charge to the jury:

Shippen, President.—The action brought to recover the legacy in question, turns, in reality, upon a dispute between Reed & Forde (who have a right to use the legatee's name on the occasion), upon the one hand, and Willing & Morris, upon the other. The assignees of the nominal plaintiff have produced a regular transfer of the legacy; and are unquestionably entitled to a favorable verdict, unless their claim is satisfactorily repelled by any circumstance of law or equity, arising from the defence which has been made.

It is objected to their claim, then, that Willing & Morris are entitled to the legacy, by virtue of a prior assignment; and although this assignment is not so regularly proved as the other; yet, the defendant's counsel has argued, that it is equally effectual in point of equity. The facts respecting the alleged assignment to Willis & Morris are briefly, that G. Inglis, being entitled to a sum of money for his share in the commissions, arising from the sale of goods consigned to S. Inglis & Co., applied for payment to Willing and Morris, the surviving partners; that they refused, at first, to make the payment, insisting that they would retain the amount in satisfaction of a debt due to them from G. Inglis; but that, eventually, they complied, being strongly solicited by G. Inglis, who in his letters offered to serve them in any way, and particularly to make over his legacy. Now, it is contended, that this compliance must be taken to have been on the terms of the request; and that the terms amount, at least, to a promise of an assignment. The case upon the facts disclosed is not, indeed, free from doubt, but if the jury shall, upon the whole, be of opinion, that the parties, in paying and receiving the commissions, contemplated and intended a transfer of the legacy, as a consideration, then, the law stated by the defendants being well founded, the promise to assign created an equitable right, and without any further formality, vested the legacy in Willing & Morris. For by making and accepting an offer, every bargain is consummated.

Much has been said on the point of notice; and it is true, that if the obligee of a bond assigns it, notice ought to be given to the obligor, in order to prevent his paying the money to the person who has thus parted with his interest. But there is no positive law, that requires a first assignee to notify a subsequent one; and the case is not within the general principle of the rule that has been cited.
The sole object of consideration, therefore, is, whether the money arising from the commissions, was advanced by Willing & Morris to G. Inglis, on the faith of his promise, and the credit of the legacy? That fact it is the province of the jury to ascertain and decide: if the affirmative prevails in their minds, the verdict ought to be for the defendants; but if they entertain a contrary opinion, the nominal plaintiffs are entitled to recover.

Verdict for the plaintiff.(a)

INNIS v. MILLER.

Competency of witness.

One who expects to be benefited by the result of the cause, though not directly interested, is not a competent witness. ¹

REPLEVIN. The defendant offered Francis Bailey, as a witness; who being sworn on his voir dire, said, "that he was a judgment-creditor of the defendant; that he expected, if the defendant recovered, to be paid, at least, a part of his debt; and that he did not know that the defendant had any other property than what was involved in the replevin, to satisfy him; but, on the contrary, he believed that his payment depended on the defendant's recovery." It appeared, likewise, that Bailey was the attorney in fact of the defendant, and in that character, was active in prosecuting this, and other suits.

The admission of the witness was opposed by Bradford, Todd and Levy, who cited McVeagh v. Goods, 1 Dall. 82. And supported by Sergeant, who cited Abrams v. Bunner.

BY THE COURT.—The law on this subject has been fully settled in the modern cases, by an accurate discrimination between the competency and the credibility of witnesses. The stream of justice should, however, be preserved clear and uncontaminated: and although a creditor is not excluded from giving testimony, as such; yet if he acknowledges an expectation, that he shall be betted by the fate of the cause (as in the case of McVeagh v. Goods, which was properly ruled), he is sensible of a positive interest, that must give a bias to his mind. From the answers of the witness, therefore, we must reject his testimony.

(a) There was a motion made for a new trial; but on the 26th of August 1790, it was withdrawn, and judgment entered conformable to the verdict.

¹ Overruled, in Long v. Baille, 4 S. & R. 222, where it was decided, to be no objection to the competency of a witness, that he believes himself to be interested in the event of the suit, when, in fact, he is not so. And to the same effect, see Cassiday v. McKenzie, 4 W. & S. 292; Eriaman v. Walters, 20 Penn. St. 467.
COWPERTHWAIT v. JONES et al.

NEW TRIAL.—Slaves.

In an action of tort, it is not ground for a new trial, that the jurors each set down a particular sum, divided the aggregate by twelve, and returned the quotient as their verdict; in the absence of any fraudulent abuse of the mode adopted.

If the jury in an action upon a bond given for the return of a slave, on a homine replegiando, return the value of the negro as the measure of damages, and the amount of the verdict is accepted by the master, this will, in equity, operate as a manumission of the slave.

A motion for a new trial having been made and argued in this cause, the President now delivered the opinion of the court, in the following terms.

SHIPPE, President.—The motion for a new trial in this cause has been made on several grounds: 1st. Because the jury have misbehaved, in adopting an improper mode of estimating the damages; by setting down each the particular sum he thought just, and then dividing the aggregate by the number of jurymen. 2d. Because the damages are said to be excessive. 3d. Because the verdict was contrary to the evidence. And 4th. Because it was founded on a mistake in point of law; the jury supposing that, on payment of the damages, the negro (whose freedom was in question) would be emancipated.

New trials are frequently necessary, for the purpose of attaining complete justice; but the important right of trial by jury requires they should never be granted, without solid and substantial reasons; otherwise, the province of jurymen might be often transferred to the judges, and they instead of the jury, would become the real triers of the facts. A reasonable doubt, barely, that justice has not been done, especially, in cases where the value or importance of the cause is not great, appears to me, to be too slender a ground for them. But whenever it appears, with a reasonable certainty, that actual and manifest injustice is done, or that the jury have proceeded on an evident mistake, either in point of law or fact, or contrary to strong evidence, or have grossly misbehaved themselves, or given extravagant damages, the court will always give an opportunity, by a new trial, of rectifying the mistakes of the former jury, and of doing complete justice to the parties.

The first objection, as to the manner of the jury collecting the sense of its members, with regard to the quantum of damages, does not appear to us to be well founded, or at all similar to the case of casting lots for their verdict. In torts and other cases, where there is no ascertained demand, it can seldom happen, that jurymen will, at once, agree upon a precise sum to be given in damages; there will necessarily arise a variety of opinions, and mutual concessions must be expected; a middle sum may, in many cases, be a good rule; and though, it is possible, this mode may sometimes be abused by a designing juryman, fixing upon an extravagantly high or low sum, yet unless such abuse appears, the fraudulent design will not be presumed.

The 2d and 3d objections may be considered together. The action is brought upon a bond, given to the sheriff, upon his executing a writ of homine replegiando. The condition is for prosecuting with effect, and for making a return, if awarded. The plaintiff discontinued his suit, and no return has been made; of course, if the case was divested of its particular
circumstances, the defendants would be liable for the payment of damages, equal to the value of the thing replevied. The question, then, upon the trial was—whether the circumstances were such as, in justice and equity, ought to discharge the defendants from the legal obligation they were under, to return the negro, or pay the price of him.

Many circumstances were given in evidence; but the most material one in favor of the defendants, was, that when the writ of _homo replegiando_ was delivered to the sheriff to be executed, he was instructed by the defendants, or their counsel, not to take the negro out of the possession of the master, but to leave him in his hands, during the dispute; that he was, accordingly, left in his possession, and from thence, it was concluded, that he, the master, and not the sureties, became responsible for him. The evidence upon this point comes from the sheriff himself; who, by consent, was sworn as a witness: he proved the leaving the negro in his master’s house, when he executed the writ, and that he did not either take charge of him, or deliver him from his confinement; but he says, that some short time afterwards, the master brought the negro to his office, to deliver him up, and he refused to take him; and ordered him to return to his master.

There is some evidence of his being afterwards seen at his master’s house; but he has finally abandoned, and has never since returned. In the charge to the jury, the court told them, that though this was an irregular way of executing the writ, yet if they were satisfied, from the evidence, that the negro was actually left in the hands of the master, with his own consent, and that he had either expressly or impliedly engaged to take charge of the negro, during the dispute, it would be unjust to make the defendants answerable for him, contrary to the master’s own stipulation and agreement; and in that case, they ought to give damages only in proportion to the actual loss of service the master had sustained, through the fault of the defendants.

The evidence, in my opinion, preponderated in favor of the master’s acquiescence in the directions given to the sheriff; but the jury appear to have thought otherwise; they probably considered, that when the sheriff went to execute the writ, he did not find the master himself at home; but mentioned his business only to his wife; that there was, consequently, no express acquiescence on the part of the master; that, as to the time he kept the negro, after the service of the writ, from whence an implied acquiescence might be presumed, there was some uncertainty in the evidence; the sheriff who spoke to the time which had elapsed before he was brought to his office, expressing himself with great caution, and not being able to ascertain it with any degree of precision, although he rather thought it might be about a month or six weeks; and that, notwithstanding what had passed, he had actually returned, that he had replevied the negro. They might likewise have balanced the testimony of Israel Jacobs, with that of Thomas Harrison; although, I own, I should have put more reliance on the positive evidence of the latter, than the negative evidence of the former. However, as in this case, there was no direct proof of an acquiescence, but the evidence of it arose from presumption, and inferences drawn from the circumstances attending the case, we think, it was properly with the jury to decide upon those circumstances, and that their verdict cannot be said to have been given contrary to that plain evidence, which ought to induce us to set it aside; although we might not have drawn the same inferences which they did.

2 _Dall._—4
As to the supposed mistake in the jury, it must be observed, that as the *hominem replegiando* was not prosecuted with effect, the plaintiff having discontinued it, and the negro never returned, the defendants were legally answerable upon their bond; and as the jury were of opinion, there were no such equitable circumstances, as ought to discharge them from their obligation, the price of the negro was, in that view of the evidence, the proper measure of damages; which, if accepted by the master, will, in equity, and perhaps by operation of law too, emancipate the negro; he having been a party to the *hominem replegiando*, and a full satisfaction, equal to his value, made by his sureties for him.

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**Rue v. Mitchell.**

*Slender.—Construction.*

The sense in which words are received by the world, is that which courts of justice ought to ascribe to them, in slander.¹

This was an action of slander, for pronouncing the words set forth by the declaration, in the following form, after the general introduction and averments, respecting the plaintiff's good name and character: "That the defendant published, then and there, the following false, scandalous, lying, English words, of the plaintiff, in the hearing, &c., to wit, You (him, the said plaintiff, meaning) have taken a false oath, before squire Rush (meaning that the said plaintiff had committed the crime of perjury, in a certain oath, by the said plaintiff, then lately taken, before William Rush, Esq., one of the justices of the peace, &c., in and for the city and county of Philadelphia, in a cause before the said justice depending), and I (himself, the said defendant, meaning) can prove it: By reason whereof, &c."

It appeared, on the trial of the cause, that the oath in question was voluntarily taken by the plaintiff, in order to satisfy the defendant upon a controverted fact, involved in the suit depending before the justice, and in which the situation of the present parties was reversed: Mitchell being then the plaintiff, and Rue the defendant.

There was a verdict for the plaintiff, with damages; but the cause was again brought before the court, on a motion in arrest of judgment, which was founded on two grounds: 1st. That the words charged in the declaration did not import perjury, in a legal acceptation of their meaning; and therefore, did not, in themselves, independent of any injurious consequence to the plaintiff, render the speaker liable to an action at law. 2d. That the oath does not appear, in the declaration, to have been of a nature, that by taking it the party could commit the legal crime of perjury.

I. **J. B. McKeen**, in support of the motion, observed, that actions of slander ought not to be encouraged; and that they had hitherto been strictly confined to cases, which endanger a man in law; which exclude him from society; which impair the exercise and benefit of his trade or profession;

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¹ Lukehart v. Byerly, 53 Penn. St. 418; Pelton v. Ward, 3 Caines 76; Goodrich v. Woolcott, 3 Cow. 231; s. c. 5 Id. 714; Demarest v. Haring, 6 Id. 76; Carroll v. White, 33 Barb. 615; Wright v. Paige, 36 Id. 438.
or, which may affect magistrates, or other persons employed in public trusts. There is no special damage laid in the declaration; and *to allege, that a man has forsworn himself, generally, is not actionable; because he may be forsworn in common conversation; or, it may be an expression of mere passion and anger (4 Co. 15 b), nor shall it be intended to refer to a case where perjury may be committed. 1 Com. Dig. 192.

II. But in the next place, the oath must appear to have been a lawful one, administered in the course of a judicial proceeding, upon a matter material to the issue on trial. 2 Bulst. 150. The oath in question, was merely a voluntary affidavit; and that, too, taken by a man in his own cause; which can never judicially be allowed: the justice could not have compelled him, and ought not to have permitted him, to take it. 1 Hawk. P. C. 174–5; 4 Bac. Abr. 484. For that cause alone, the judgments of justices have often been reversed in the supreme court; and the act of taking or administering, voluntary affidavits, is highly censured by Sir William Blackstone. 4 Bl. Com. 137. Nor, in favor of this species of action, will there be any intendment, that the suit was depending before a proper tribunal. 4 Co. 16 b. An innuendo is not, in itself, sufficient to show that Rush was a justice, and had authority in the cause. Yelv. 21; 3 Lev. 166; 4 Co. 17; 5 Burr. 2700.

Sergeant, for the plaintiff, arguing in support of the verdict, said, that in modern times, a very salutary change had taken place in the doctrine, respecting actions of slander; which were now liberally encouraged, with a view to the correction of licentiousness, and the preservation of peace. 4 Bac. Abr. 497, 505, 506. Nice exceptions are never allowed to prevail, against a reasonable interpretation and common understanding of the slander. 2 Wils. 87, 114, 300. The words shall be taken in the same sense, as they would be understood by those who hear or read them. Bull. N. P. 3, 4. But as the jury have passed upon the subject, the innuendoes must be taken to be true. It is too late, therefore, to contend, that the words do not import a charge of perjury: the verdict establishes that point, and the competency of the jurisdiction of the justice, as well as the malice and falsehood of the slander.

The President delivered the opinion of the court, in the following terms.

Shippen, President.—The sense in which words are received by the world, is the sense which courts of justice ought to ascribe to them, on the trial of actions for slander. Slander imports an injury; and the injury must arise from the manner in which the slanderous language is understood.

The words, in the present case, certainly import a crime; and the innuendo (which the jury have found to be true, and which, therefore, must govern our interpretation of the fact) *shows that the reference was not to a matter of common conversation, but to an act committed before a justice of the peace, in relation to a cause actually depending.

Generally speaking, indeed, actions of slander, founded on trifling causes, to gratify a petulant and quarrelsome disposition, will not be encouraged by the court: but when the reputation, trade or profession of a citizen is really affected, for the sake of doing justice to the dearest interests of individuals,
as well as for the sake of preserving public order and tranquillity, every appeal to the tribunals of our country ought to be liberally sustained.

__Judgment for the plaintiff.__

**PRICE v. RALSTON, assignee of POLLARD, a Bankrupt.**

*Factor.—Bankruptcy.*

If a factor, to whom goods are consigned for sale, take in payment therefor, the purchaser’s bond, in his name, such bond does not pass to the factor’s assignee, on his subsequent bankruptcy.

This cause came before the court, on a case stated for their opinion, in the following words: “On the 23d day of March 1784, William Price, the plaintiff, shipped and consigned goods, by the Christian, to William Pollard, the bankrupt, one-half for the account of the said William Pollard; and at the same time, shipped and consigned other goods, by the Prince of Liege, to the said William Pollard, for the same account. And on the 18th day of May following, the said William Price shipped and consigned other goods, by the John, to the said William Pollard, for the same account; and on the 2d day of September, in the same year, shipped and consigned, by the George, to the said William Pollard, other goods, for the same account; and the said William Price, on the 2d day of December 1785, shipped and consigned other goods, to Messrs. Robert Duncan, Jr. & Co., of Philadelphia, being for and on account of the said William Price. The said Robert Duncan & Co., on receipt of them, deposited the said goods in the hands of the said William Pollard, for account of the said William Price. Considerable sales of the above-mentioned goods were made, from time to time to time, by the said William Pollard, and moneys received for the debts outstanding on account of the said sales; the said Pollard, at different times previous to his becoming a bankrupt, as hereafter mentioned, took from some of the debtors, bonds, payable to him, the said William Pollard, and not expressing his capacity of agent for the said Price. A commission of bankruptcy issued, the 28th day of June 1787, against the said William Pollard, and on the 29th day of June 1787, he was declared a bankrupt. At the time he was so declared a bankrupt, he had no specie, proceeding from the said sales, in his possession, separated and distinguished from specie belonging to himself.

*61] The commissioners of bankruptcy appointed the said Robert Ralston, assignee. Part of the above several parcels of goods were sold by the said William Pollard, previous to his bankruptcy; who, also, previous to his said bankruptcy, received part of the money for which they were sold; the debts due for others of them were outstanding at said time, and part of each of the said several parcels, at the time of the said bankruptcy, were in the hands of said bankrupt, and were taken possession of by the said Robert Ralston, as assignee, and by him sold.

Query 1st. Is not William Price entitled to a moiety of the outstanding debts, not reduced to bond or note, due from the goods shipped as aforesaid, on his and said William Pollard’s account, each one-half?

2d. Is he not entitled to a moiety of the sales, made by said Robert Ralston, of the said goods, shipped as aforesaid, on said William Price’s and William Pollard’s account, each one-half; which came to the said Robert Ralston’s hands, as assignee, and which he has sold since?
3d. Is not the said William Price entitled to the whole of the outstanding debts, not reduced to bond or note, due for the goods shipped to Messrs. Robert Duncan, Jr. & Company, and which were deposited with the same William Pollard, and sold by him, previous to his bankruptcy?

4th. Is not the said William Price entitled to the whole of the moneys proceeding from the sales of said last-mentioned goods, which were in William Pollard's hands, at the bankruptcy, and which the said Robert Ralston took as assignee and sold?

5th. Is William Price, or is the assignee of William Pollard, entitled to recover and receive the moneys aforesaid, due upon bond payable to William Pollard, without describing him as agent or attorney for William Price?

Four of the questions being voluntarily yielded to Price's claim, the fifth was argued in favor of the plaintiff, by Rawle and Todd; and in favor of the defendant, by Ingersoll and Coxe. It turned principally on the comparative meaning and construction of the following sections, in the statutes of 21 Jac. I., c. 19, and in the act of Pennsylvania for regulating bankruptcy.

"And for that, it often falls out, that many persons, before they become bankrupts, do convey their goods to other men, upon good consideration, yet still do keep the same, and are reputed the owners thereof, and dispose of the same as their own: Sect. 11. Be it enacted, that if, at any time hereafter, any person or persons shall become bankrupt, and at such time as they shall so become bankrupt, shall, by the consent and permission of the true owner and proprietary, have in their possession, order and disposition, any goods or chattels, whereof they shall be reputed owners, and take upon them the sale, alienation or disposition, as owners, that in every such case, the said commissioners, or the greater part of them, shall have power to sell and dispose the same, to and for the benefit of the creditors, which shall seek relief by the said commission, as fully as any other part of the estate of the bankrupt." 21 Jac. I., c. 19, § 11.

"And be it further enacted, &c., that if any persons shall become bankrupt, and, at such time, by consent of the owner, have in their possession and disposition, any goods whereof they shall be reputed owners, and take upon them the sale or disposition, as owners, the commissioners shall have power to sell the same, for the benefit of the creditors, as fully as any other part of the estate of the bankrupt." 2 Dall. Laws, 376, § 20.

For the defendant (whose counsel opened the case), two points were made: 1st. That by the bankrupt law of this state, all the property of a bankrupt, whether in possession or in action, or of which he was reputed owner, at the time of the bankruptcy, vests in the commissioners and assignees. 2d. That even if the law thus stated, might be deemed too general, and not applicable to the case of factors, executors, &c., yet, where the specific lien of the principal, upon goods consigned on his account to a factor, is destroyed by sale, or otherwise, he can only come in for a dividend, with the general creditors, upon the bankruptcy of the factor.

1st Point. There is a material difference between the analogous clause in the 21 Jac. I., c. 19, § 11, and the 20th section of the act of Pennsylvania, 2 Dall. Laws, 370 (2 Bl. Com. 485). For the latter has no preamble to explain and mark its meaning, as the English statute has, and, on the construc-
tion of which, all such effects are expected, from the sale of the bankrupt's goods, as he held en auter droit. Thus, in 3 Burr. 1369, Lord Mansfield, proceeding, doubtless, on the ground of the preamble to the statute, says, "if an executor becomes bankrupt, the commissioners cannot seize the specific effects of his testator; not even in money, which specifically can be distinguished, and ascertained to belong to the testator, and not to the bankrupt himself." But the meaning of the act of assembly, unqualified by any introductory explanation, must rest entirely on the words of the section; and those clearly embrace all the property of the bankrupt, of which he was actual or reputed owner at the time of his failure.

2d Point. But whatever way that question may be decided, it was urged, that the specific lien of the plaintiff was destroyed by the sale, before Pollard became a bankrupt. Bull. N. P. 43. It is true, that if the goods had remained in specie, the plaintiff's lien would have excluded the claim of the general creditors (2 Ves. 583; 2 Atk. 623; 1 Id. 234); but as they were *63] actually disposed of, the lien was lost; and even the simple-contract debt had been extinguished, by taking bonds from the vendee, not in the quality of Price's agent, but in Pollard's own name. If a factor sells goods for a principal, he may bring an action in his own name, or the action may be brought in the name of the principal, against the vendee. 1 Atk. 248. But when the debt is reduced to a bond, the principle of the case no longer operates; the commercial relation of the parties is at an end, and the action can only be brought in the name of the obligee. In Geyer v. Smith's Administrator, it was held, that the lien of a creditor upon the intestate's estate was destroyed by his taking a bond from the administrator; and that 'the obligor's calling himself administrator, in the bond, was surplusage; since he could be chargeable only in his own right. 1 Dall. 347 n. And in Cummings v. Lynn, the court adjudged that the assignment of cestui que trust, was not a valid assignment, within the act of assembly. 1 Dall. Laws, 107; 1 Dall. Rep. 444. If a factor dies insolvent, the principal has no lien on the money or effects in the hands of the administrator or executor; and it would be a devastavit, to satisfy his claim, in the first instance, if there were debts of a higher nature. 13 Vin. Abr. tit. "Factor," 5.

But an attorney in fact or agent may release the debt. 1 Dall. 449. And if he may release the debt in toto, he may in part; nor, if he exceeds, in so doing, his authority, will that impair the rights of an innocent purchaser or releasee, though it will render him personally liable to his principal; as he would be, by giving further day of payment, whether the contract or security was under seal or not. Suppose, then, Pollard had legally assigned the bonds for a valuable consideration, would the assignees ad infinitum be mere trustees for Price, though without notice of his claim? Or, independently of any bankruptcy or assignment, would it have been in the power of the administrator of the obligor, to class Pollard's debt merely with the debts of simple-contract creditors? To maintain the affirmative of either of these points (which indeed the adverse counsel must endeavor to maintain), will be attended with inextricable embarrassment and mischief. Bankruptcy is equivalent to payment. Cowp. 472. And the assignees of a bankrupt stand precisely in the shoes of a bankrupt. 1 Atk. 233. But what shall be deemed the rights of the bankrupt would, by the success of the opposite doctrine, become matter of incessant doubt and litigation; and
the assignees would, at every step, be entangled in the difficulty of understanding, for whose use his name has been employed.

For the plaintiffs, it was stated, that Pollard was placed in two situations—in one, being half-part owner of certain shipments; and in the other, being merely the factor of shipments, made originally to Robert Duncan & Co., on the sole account of Price, the plaintiff, but delivered over by them to Pollard, on the same account. And it was contended: 1st. That if the joint shipments remained in specie, or if the goods were sold, but no money paid, or bonds or notes taken for the value, so that the property could be specifically traced, Price was entitled to his moiety: And 2d. That Price was entitled to the whole of the goods, or their proceeds, in the case of the shipments made for his sole use. But considering the subject in the order pursued by the defendant's counsel—

On the 1st point, it was observed, that the resemblance between the statute of James I., and the act of assembly, is so strong, that the latter may almost be said to be a copy of the former. In both, it was obviously the design of the legislature, to transfer the actual property of the bankrupt, and nothing more, to the general benefit of his creditors; unless, indeed, in the case of a sale made by the bankrupt, and the goods being afterwards allowed to continue in his possession and use. The 20th section of the act, it is true, is not introduced by a preamble, similar to that which is contained in the English statute; but the general preamble to the whole act must be taken as having some relation to all the parts; and that is sufficiently explanatory of the legislative meaning on the present subject. Though, therefore, the clause is unrestrained in terms, and seems to extend to all the goods in the bankrupt's possession; yet this latitude of expression must be controlled by the decisions on the statute of James; for there is no material variance between the two laws; and under the statute of James, though the bankrupt is in possession of the goods, if he is only empowered to dispose of them in trust for another, they are not liable to the bankruptcy, either in law or equity. 1 P. Wms. 314. Even at common law, indeed, the vendor of goods, which still remained in his possession, might give a sufficient title to a second vendee; for it shall be presumed, as to all other persons but the parties to the first contract, that, with the possession, he still retains the property. The case of factors, however, has been excepted from the statute of 21 Jac. I., contrary to the express words, for the sake of trade and merchandise (1 Atk. 232; 2 Ves. 585; 1 T. R. 619); and the same principle will produce the same consequence, in construing the act of Pennsylvania. The case in 1 Atk. 174, 1 Ves. 365, could not have been saved by the preamble of the statute; but only by the general principle, which is the same here, as in England, of protecting a trust unaccompanied by fraud. Cowp. 232. Goods left to sell, with one who sells on commission, are not within the statute. Bull. N. P. 262. The trust of factors is definite; *their powers are limited: As, for instance, they cannot pledge the goods of their principal for their own debts. 2 Str. 1178. And such great injustice would be the result of the opposite doctrine, in the case of bankruptcy, that the court will not, without absolute necessity, sustain it.

On the 2d point, it was said, that the doctrine of extinguishment was irrelevant; for it could not be doubted, that if a bond was taken in dis-
of the goods—in all these instances, the property of the principal is clearly separated from the factor's; and being thus distinguished, and distinguishable, it must, upon the principles of law and equity, be appropriated, upon the factor's bankruptcy, to the individual use of the principal; it cannot be applied by the commissioners to the benefit of the general creditors.

But it has likewise been contended, that the factor's taking a bond, may be distinguished from the case of taking a note; as the bond extinguishes the simple-contract debt, but the note does not. The extinguishment of a book-debt, by receiving a security of a higher nature, may vary the mode of recovery, but cannot alter the right. The money due upon the bond, is still the money of the principal; and he has an unquestionable right to employ the name of the obligee, in an action to recover it. If, indeed, in the case of negotiable notes (which are to many purposes considered as money), the sum due upon them shall still be deemed to be the property of the principal; there seems a stronger reason that the rule shall operate in the case of bonds, which, even in Pennsylvania, are instruments of a less negotiable nature than notes.

Upon the whole, we are of opinion, that the law is clearly in favor of the plaintiff."

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**Woglam v. Cowperthwaite.**

**Distress.—Replevin.**

Where goods are distrained for rent, and repleived, the distrainer retains no lien thereon; he cannot subsequently take them, by virtue of a quia non habendo, out of the possession of a stranger, who has acquired a valid lien thereon.

It seems, that by the custom of Pennsylvania, a distrainer may impound the distress upon the premises, during the five days allowed for replevying the same, in analogy to the statute of 11 Geo. II., c. 19, though that clause of it is not incorporated in our act of assembly.

This was an action brought against the sheriff of Philadelphia, for taking goods by virtue of a writ de retornado habendo. The facts were as follows: One Cresson distrained goods of Hamilton, for rent due to Samuel Emlen; Hamilton repleved the goods, and gave security to the sheriff, in the usual form; he afterwards moved, with his goods, into the house of the plaintiff, who, after rent had accrued to him, distrained the goods; Hamilton, the next day after this distress, removed the goods from off the premises; they were followed by the officer, who made the second distress, and he had them appraised in the house to which Hamilton had removed them; shortly after this appraisement, and while the goods remained where they were appraised,

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1 So long as trust property can be traced and distinguished, it is liable to the claims of the *cuiusque trust;* but the right of reclamation is at an end, when the subject-matter has been converted into money, and mixed with other funds. Thompson's Appeal, 22 Penn. St. 16; 6 Pa. Reed's Appeal, 34 Id. 207; Robb's Appeal, 41 Id. 45; Keener v. Cross, 63 Id. 303; Kepler v. Davis, 80 Id. 158. And moneys held in a fiduciary capacity require no ear-mark, if not mingled with those of the trustee. Cox's Estate, 5 W. N. C. 474; Jordan's Appeal, 10 Id. 37. Otherwise, if trust-moneys have been mixed with other funds, so as to be incapable of identification. People's Bank's Appeal, 93 Penn. St. 107; Schneider's Estate, 11 Phila. 71. Equity will follow a trust-fund, through every transmutation, if the right of a bona fide purchaser, without notice, does not intervene. Sadler's Appeal, 87 Penn. St. 154; Sheetz v. Marks, 2 Penn. 302.
COURT OF COMMON PLEAS

Powell v. Biddle.

The case of Griffin v. Scott, in 2 Str. 717, was determined many years previous to the statute of 11 Geo. II. It was an action of trespass against a landlord, for entering his house, and keeping possession of his goods for eight days. The defendant justified, under a distress for rent; and the court say in that case, that the defendant ought to have removed the goods at the five days' end, but having kept them for eight days, he was a trespasser for the other three days. This implied strongly, that the construction of the statute of William was, that the distraintor might leave the distress on the premises, for five days, mentioned in the act, that the tenant might have the opportunity of replying them, in the same plight in which they were when distrained. If that was the construction of the statute of William, the like construction will hold under our act of assembly, which follows the words of the statute. Even at common law, goods distrained might be left on the premises, for a reasonable time. In the present case, they were left but one day, before they were removed by the tenant himself, and they were quickly followed, and appraised in the house to which they were removed. By the act of assembly, they could not be appraised, until five days after the distress; they were actually appraised, within eight days, though clandestinely removed by the tenant, in the mean time.

By the common law, in the case of a pound-breach, by the owner of the goods, the distraintor may have his action de parco fracto, or may take the goods distrained wherever he finds them, and impound them again. Co. Litt. 47 b.; 1 Roll. Abr. 674; 12 Mod. 661. The following the goods and making the appraisement, in so short a time, under the directions of the officer who made the distress, was all that could be reasonably expected from the landlord, who ought not to be defeated of his remedy, by the unlawful act of the tenant. If not defeated as against the tenant, he could not be defeated as against the first distraintor, who had no better right than the tenant himself had, unless his original lien had continued. The judgment for a return, in favor of the first distraintor, the issuing the writ of retorno habendo, and the taking of the goods under it by the sheriff, were all subsequent to the second distress and appraisement, and before the distraintor could by law expose them to sale. We, therefore, think, there was no default in him, that the goods were in custodia legis, subject to his lien, and were, consequently, wrongfully taken by the defendant, under the writ of retorno habendo.

POWELL v. BIDDLE, administrator de bonis non, &c., of S. MIFFLIN.

Parol evidence.—Will.

Parol evidence is admissible, to show the person intended, to whom a bequest has been made by a wrong Christian name.1

This was an action of debt to recover a legacy, under the following circumstances. The testator, by his last will and testament, bequeathed "unto his friend Samuel Powell (son of Samuel Powell, of the city of Philadel-

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1 S. p. Domestic and Foreign Missionary So- Appear, Id. 437. But see Appel v. Byers, 38

n's Appeal, 30 Penn. St. 426; Cresson's Leg. Int. 479.
under the fictitious name? Could he not, likewise, take it, after assuming his proper name? And if so, does not the claim depend on a fact dehors the will, which must be established by independent proof? The present dispute, in the same manner, resolves itself into this question, whether evidence may not be given, in the case of two persons of the same family, one called William, and the other called Samuel, that the testator knew the latter, though he did not know the former? And, consequently, that the legacy given, by a mistake of names, to the person he did not know, was intended, in fact, for the person he did know, who in the bequest is emphatically called his friend? It is admitted, from the authorities cited by the opposite counsel, that where there is not a person of the name mentioned in the will, explanatory evidence may be given of the testator's intention; and that if Samuel had not existed, William might have enjoyed the benefit of the legacy, under Samuel's name. But the principle extends further than that admission; and as between William and the testator, an obvious mistake ought not to be enforced, against all the truth and justice of the case. In P. Wms. 141, both the Christian name and surname of the legatee were mistaken; and there were other persons capable of taking the legacy; yet the decree was favorable to the party intended, though not designated, by the bequest. All the authorities, indeed, concur in that point, that no injury can arise from admitting parol proof to ascertain the thing, or person, described by the testator. Rich. Law of Wills 163, 279, 281; 2 Vern. 593; 8 Vin. Abr. 197; Ca. in Eq. 212.

Shippen, President.—The court entertain no doubt in this case; and, therefore, ought not to postpone a decision. The bequest was made to a person who was always called Samuel by the testator, though, in fact, named William; and whom the testator had nurtured and educated from his infancy; when on the other hand, he did not even know the person really called Samuel. The evidence to explain those facts was proper to be laid before the jury; and their verdict perfectly accords with the law and equity of the case. Therefore—

Let the rule be discharged.

*73]

Lawrence v. Doublebower.

Justices of the Peace.

Justices have no jurisdiction of an action of trespass for taking the plaintiff's goods.1

This was an appeal from the decision of a justice of the peace, in an action of trespass, brought before him, against a constable, for wrongfully taking the goods of the plaintiff; and in which judgment had been given for 6l. 18s.

Roberts, for the plaintiff, and Bradford, for the defendant, submitted the case to the court, without argument, upon this single question, whether a justice of the peace has jurisdiction in actions of trespass, for taking goods?

Shippen, President.—Actions of trover are expressly excepted from the jurisdiction of justices of the peace; and this being such a trespass, as might

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1 This jurisdiction has been conferred by the act of 1814. 6 Sm. Laws 182.
BRAYLEY v. MILLER.

Costs.

Where the plaintiff's recovery is reduced by a set-off, to a sum within the jurisdiction of a justice, he is entitled to costs.

This action was brought to recover a debt exceeding 10l., but upon being referred, the debt was reduced by a set-off, and the report of the referees was for no more than 8l. As the plaintiff had not previously filed an affidavit of his belief, that the sum due exceeded 10l. (agreeable to the provision of the 13th section of the act of the 1st March 1745), Bankson contended, that he was entitled to recover costs. 1 Dall. Laws, 308; 2 Id. 364.

Howell, for the plaintiff, said, that if this action could not have been brought before a justice of the peace, his client was, of course, entitled to costs. The demand, in fact, amounted to 20l., although it was liable to a defalcation; and it could not be known whether the defendant would elect to set off his debt, in the present action, or to make it the foundation of a separate suit. If the defendant had been sued before a justice, and declined making a set-off, the plaintiff could not bring his debt within the justice's jurisdiction, and must, consequently, have been nonsuited there; and it would be an intolerable grievance, to subject him to costs here, merely because his adversary, after the action was instituted, determined to take advantage of the defalcation. The act of assembly meant only to impose costs on the plaintiff, where the defendant actually owed no more than 10l., at the time of bringing the action; which was not the case before the court. 1 Dall. 308.

On the 11th of September, the President delivered the opinion of the court.

Shippex, President.—The question to be decided is, which of the parties shall pay the costs, the plaintiff having recovered less than ten pounds. The 5l. act provides, that where the person suing shall obtain a verdict or judgment for debt and damages, which, without costs of suit, shall not amount to more than 5l. (not having filed an oath or affirmation, before the issuing of the writ, that he truly believed the debt due, or damage sustained, exceeded that sum), he shall not recover any costs. The act extending the jurisdiction of justices to cases not exceeding 10l., refers to all the provisions of the preceding law.

The intent of the legislature was, to prevent the bringing actions in this court, for debts within the cognizance of the justices, by imposing the payment of costs on the plaintiff, unless he had previously filed an affidavit, that he believed his demand exceeded the specified sum. This provision, however, must be confined to the plaintiff's own demand, and not extended to the case of set-offs, which the defendant may, or may not, at his pleasure, defalk. The demand in the present case, was ostensibly above 10l.; though it was in the power of the defendant either to reduce it, or not, by setting up his counter-claim. The plaintiff could not, therefore, sue before a justice, because the defendant might there lie by; and if afterwards he was liable to be defeated in the common pleas, he would, in fact, be punished in
costs, for resorting to the only court in which his action could be main-
tained.

Wherever, therefore, an action is brought for a debt above 10l., and the
amount is reduced below that sum, by a set-off, we think the plaintiff ought
not to be charged with the costs.

Judgment for plaintiff, with costs.¹

HOWELL et al. v. WOLFERT.

Execution.

An estate for life cannot be extended; the tenant's interest may be sold, without an inquest.

In this case, the sheriff had levied on a house and lot, by virtue of a fl. fa.;
and an inquest was held, which declared the rents of the estate sufficient to
pay the debt in seven years; but in the return of the fl. fa., it was stated,
that the defendant had only a life-estate in the premises. 1 State Laws, p.
6, 49, 50.

On a motion made by S. Levy, to quash the inquest, the point submitted
to the consideration of the court, was, whether an inquest ought to have
been held on a life-estate, under the provision "in the act of assembly;"
that if real estate taken in execution was found sufficient to pay the
debt in seven years, it should not be sold.

Banks, for the defendant, said, that the question was, in fact, whether
a life-estate could be extended, under the act of assembly, or under the law
of elegit in England; and whether the former referred to the practice under
the latter? He urged, that the advantages and disadvantages involved in
the discussion, were equal; for, if, on the one hand, a life-estate was liable
to be suddenly destroyed; on the other hand, that consideration would par-
ticularly affect the price, and it might be sold on the extent, for a mere trifle,
though the tenant should survive for many years. It is proper, therefore,
that the strict terms of the act should govern the decision of the court. By
the first act that touches the subject, it is provided, generally, "that all lands
and houses whatsoever, within this government, shall be liable to sale, upon
judgment and execution obtained against the defendant, the owner, his heirs,
executors and administrators, where no sufficient personal estate is to be
found." But this general authority is restrained by the second act, which
declares, "that no such sale shall be made of lands, tenements or heredita-
mants, which shall or may yield yearly rents or profits beyond all expenses,
sufficient within the space of seven years, to pay or satisfy the debts and
damages, with costs of suit; but that all those lands &c., shall, by virtue of
the execution, be delivered to the party obtaining the same, until the debt
or damages be levied, by reasonable extent, in the same manner and method
as lands are delivered upon elegits in England."

The law of England respecting the writ of elegit being thus expressly
recognised and adopted, it only remains to show, that an estate for life may
be extended by elegit; and that is proved from the passage in 4 Black. Com.
418, 419, where it is laid down, that "if the goods are not sufficient, then

¹ See note to Cooper v. Coats, 1 Dall. 308, and Samuel v. Scott, 7 W. N. C. 438.

2 DALL.—5
the moiety or one-half of the defendant's freehold lands, whether held in his own name, or by any other, in trust for him, are also to be delivered to the plaintiff; to hold until out of the rents and profits thereof, the debt be levied, or until, the defendant's interest be expired: as, until the death of defendant, if he be tenant for life, or in tail." It is to be remarked, besides, that if the tenant for life dies, before the debt is paid, the plaintiff has still a remedy over upon any other property of which he was possessed.

S. Levy, for the plaintiff. The sheriff is authorised to hold an inquest, wherever he takes real estate in execution; but when the estate is of this transient and precarious kind, it cannot be deemed within the intention of the legislature, in making the provision for delivering instead of selling estates, whose rents are capable of paying the debt in seven years. The first act of assembly, being in derogation of the common law, ought to be strictly construed. It does not direct an inquest to be held; but gives a general authority to levy upon all lands, and of course, a power to sell at once, all the defendant's estate in the premises. The second act does not repeal, but only alters the preceding one, by directing an inquest to be held, where real estate is taken in execution. It does not, however, describe the particular estates on which the inquest shall pass; and the inconveniences of admitting it, in the case of life-estates, are insurmountable.

After consideration, the President delivered the opinion of the court, to the following effect.

Shippen, President.—The question is, whether an estate for life can be taken in execution and delivered to the plaintiff, upon return of an inquest that the profits are sufficient for paying the debt in seven years? On a fair construction of the act of assembly, we do not think, the legislature intended, that an estate for life should be delivered to the plaintiff, in satisfaction of his debt. The general interest, and of consequence, the septennial value are so precarious, that they could not have been in contemplation, in making a positive provision, that the estate should be delivered, until the plaintiff's debt is paid. Besides, if the legislature had so intended, a provision would, surely, have been added, to supply any deficiency, in case of a failure of the estate, before the discharge of the debt; as, in another case, the same act especially provides, that if the valuation of the land delivered to the plaintiff, towards satisfaction of his debt, shall fall short, he may have another execution against the defendant's body, lands or goods, for the residue.

We are, therefore, of opinion, that an estate for life, taken in execution, may be sold, without holding an inquest on its value; and consequently, that the inquest, in the present case, must be quashed.¹

¹ The law on this subject has been altered by the act of 13th October 1840 (P. L. 8), which has provided a complete system for execution against estates for life. For the decisions under this act, and its supplements, see Bright Dig. 1092-4.
OCTOBER SESSIONS, 1790.

SHARPE v. THATCHER.

Certiorari.

It is ground for the reversal of a justice's judgment, on certiorari, that it was given merely on the testimony of the party interested.

No justice ought to take cognisance of a cause, which has been previously decided by another magistrate.

This was a certiorari to remove the judgment given in this case by Justice Wharton. On a motion, made by Sergeant, to reverse the judgment, it appeared, that Thatcher, the present defendant, had originally sued Sharpe, the plaintiff, before Justice Coates, to recover a debt; that Sharpe offered to make a set-off, for water-money, that is, a charge for Thatcher's drawing water at his pump; but that Justice Coates refused to admit it, and gave judgment for the debt demanded. That, thereupon, Sharpe sued Thatcher before Justice Wharton; and his son was sworn, as a witness, to prove an agreement between the parties, relative to paying water-money, but he declared he knew nothing about it. That Sharpe himself was then qualified to the truth of his account; and upon this evidence alone, Justice Wharton gave judgment for the amount; though it was formally certified to him, that Justice Coates had already decided upon the same question.

The Court, in terms of great disapprobation, declared that no justice ought to take cognisance of a cause, which had previously been decided by another justice. But without taking that point into consideration, they said, a judgment given, merely on the attestation of the party interested, could not be sustained.

Judgment reversed.

—— v. GALBRAITH, garnishee.

Depositions.

In a scire facias against a garnishee in foreign attachment, a rule may be granted to take depositions, before the return-day, on notice to the garnishee.

This scire facias against the garnishee in a foreign attachment, was returnable to December term next; and on motion of Howell and Hallowell, the Court granted a rule for taking the depositions of witnesses, on notice to the garnishee.

BANK OF NORTH AMERICA v. VARDON.

Notice of non-payment.

This was an action against the indorser of a promissory note; in which the only defence attempted, on the trial, was the want of notice that the note had not been paid by the maker, when it became due. Lewis, for the plaintiff, would not admit, that in Pennsylvania, the strict doctrine of notice applied to the case of promissory notes, as in England; where notes are put
by statute upon the same footing with bills of exchange, and must, therefore, in that respect, as well as every other, be regulated by the same rules; nor that a protest on a promissory note was at all necessary here, except for the convenience of ascertaining the demand and non-payment. He produced, however, the messenger of the bank, to prove the fact of notice being given to the indorser, in the present case, in a short time, and within the customary period, after the maker had made default.

The Court were of opinion, that the notice was sufficiently proved, to have been given within a reasonable time; and that it was, therefore, unnecessary to make any remarks on the law, which had been suggested by the counsel.

Verdict for the plaintiff.

MILTENBERGER v. LLOYD.

Foreign attachment.

In foreign attachment, a rule to show cause of action must be moved for, at the first term.

A foreign attachment issued against the defendant, returnable to the June term 1790, and in the vacation after September term, special bail was entered. At the present adjourned court, Hallowell moved for a rule to show cause why the defendant should not be discharged on common bail. But—

Shippen, President.—The obvious hardship of tying up property by foreign attachments, induced us to investigate the cause of action, and to dissolve the attachments, if, under the same circumstances, in the case of a capias, common bail would be ordered. This authority must, however, be exercised by the court; and therefore, such cases are always referred thither by a single judge. But even the court will not exercise it, unless the application is made at the first term: and consequently, the present motion is much too late.¹

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DECEMBER SESSIONS, 1790.

MYERS v. YOUNG.

Exoneretur.

Where a defendant has been discharged on common bail, an exoneretur will be entered upon a recognisance of special bail, which has been given by the bail to the sheriff, without the defendant’s knowledge.

In this case, a capias had issued, and bail was given to the sheriff; but on a citation to show the cause of action, &c., before Mr. President Shippen,

¹ But see, contrd, Penman v. Gardiner, 4 Yeates 6; Morris v. Tanner, 3 Clark 423; Mills v. McFarland, Serg. on Attachments 142.
the defendant was ordered to be discharged on common bail. Before the citation, however, and without the knowledge of the defendant, the bail to the sheriff had entered special bail at the prothonotary's office.

But on motion of Dallas, for the defendant, the court directed an exoneretur to be entered.
SUPREME COURT OF PENNSYLVANIA.

SEPTEMBER TERM, 1766.

*Stackhouse's Lessee v. Stackhouse.

Will.—Parol evidence.

This was an ejectment brought by Isaac Stackhouse, against his brother Joseph Stackhouse, for 215 acres and 74 perches of land, which he claimed, instead of 100 acres, under the following clause in their father's will: “I do give and bequeath unto my son Joseph Stackhouse, his heirs and assigns, a certain piece of land, to be taken off the east end of my plantation, joining to William Paxton's land, to be laid out as followeth; to begin at the said Paxton's land and the fourth line, and to run along as it is laid out westward, until it come at the ditch of the meadow fence, then to follow the said fence, as it now stands, to take in the little meadow and the field; then along the northward line of my land, to William Paxton's land aforesaid; then by the said Paxton's line to the place of beginning; supposed to be about one hundred acres, be it more or less.” Isaac was willing to allow his brother Joseph, 171 acres and 90 perches; but Joseph insisted that he was also entitled, agreeable to the designated boundaries of the devise, to include a piece of land, containing 43 acres and 144 perches, that jutted out to the southward of the meadow fence: and he offered parol testimony to explain the meaning of the will.

For admitting the testimony, the following authorities were adduced: 2 Vern. 152, 648, 736, 517, 593; 5 Co. 68; Freeman 292, 477 (The judgments in Freeman were reversed 1 Vent. 341, but for another reason); 9 Mod. 10; 2 P. Wms. 419, 135.

In exclusion of the testimony were cited, 4 Co. 4; Vin., title Devise, 188, 190, 195; Str. 1262; 1 Salk. 234; 2 Vern. 625; 2 Ibid. 98. Cheyney's Case, 5 Co. 68; 12 Mod. 183; 2 P. Wms. 318; 10 Mod. 98; 3 P. Wms. 51; Ld. Raym. 438; 3 Ch. Rep. 170, 176, 183; 2 Bac. Abr, 309; 2 Vern. 98, 337; Cas. temp. Talb. 240-1; Brownl. 132; 19 Vent. 195; 2 P. Wms. 419; 2 Eq. Ca. Abr. 426; 2 Barn. 118.

*The note with which the reporter has been favored does not specify, whether the testimony was admitted or rejected; but there was a verdict in favor of Joseph Stackhouse, for the whole of his claim.
yet that is coupled with the original taking, and draws the cognisance to the admiralty. It is admitted, that if the plaintiffs were without a remedy expressly given by law, the judges would provide some remedy to redress the injury which has been sustained: but where the law prescribes a particular mode of redress, the judges are not at liberty to invent and allow a new one. The legal appropriate methods of redress, in this case, are either by writ of restitution, founded on the reversal of the sentence of the vice-admiralty of Rhode Island; or by suit upon the stipulations which were taken in that court. No action like the present has ever been instituted; which, according to Littleton, is a good argument that no such action can be maintained.

But waiving, for a moment, the question of jurisdiction, the action of *trover* is not the proper action: it should be a special action on the case setting forth all the particular circumstances of the transaction. For in *trover*, three points are essential to be proved: 1st. The plaintiff's property; 2d. A possession in the defendant; and 3d. A conversion by the defendant to his own use. Now, the plaintiff's property was unquestionably altered; and, in law or fact, they had no property in the vessel or cargo, at the time the writ was issued; both having been sold, as perishable goods, under the sentence of the court of admiralty; and consequently, all the property of the plaintiffs (without which they cannot maintain *trover*) was completely divested. Nor were the vessel and cargo ever converted to the use of the defendants: they seized them in the execution of their duty as officers; they pursued the legal steps to get them condemned; and while the cause was in suit, the property was in *custodia legis*. But even supposing that a forcible taking might be construed into a conversion (which, however, is denied in Bunbury's reports) yet still the action fails; for some of the captains, being at a distance, when the seizure was made, were not parties to the force, nor consequently, to the constructive conversion, and therefore, ought not to have been joined as defendants.

When, it is to be inquired, did the right to bring this action accrue?

*83*] Did it accrue at the time of the capture? No, because *prize or no prize, is only determinable in the admiralty* (Carth. 475. Comb.). Did it accrue after the sentence in the court of admiralty of Rhode Island? No, because by that sentence, it was adjudged that the plaintiffs had no right to the vessel or cargo. Did it accrue after the sentence was reversed? No, because the personal action had been suspended, and must always be so. There is a great distinction between judgments vacated, and reversed by writ of error: if vacated, the case is *in statu quo*; but not, if they are reversed. A reversal on an appeal is similar to a reversal on a writ of error; it does not restore matters to the state in which they were at first; it has no retrospective operation. In this case, then, there was a suspension of action. While the sentence of the admiralty court of Rhode Island was in force, the action would not lie; and consequently, there was an intermediate period between the time of committing the injury complained of, and the present time, when the action was suspended; a suspension which has not and cannot be cured, by any relation to the reversal of the sentence; for a personal action, once suspended, is always so.

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1 Ettriche v. An Officer of the Revenue, Bunb. 67. And see Israel v. Etheridge, Id. 80.

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and demands nothing more than damages. Sid. 171; Cro. Jac. 50. 

*85* Trover is never intended to recover the specific article. It lies, therefore, for money, not in a bag, though detinue cannot be brought in such case (Noy 12; Cro. Car. 89; 1 Roll. Abr. 5, pl. 1); and if the nature of the thing is altered, it is evidence of the conversion; but it is not good evidence in detinue, where the demand of the thing is in specie, and where no conversion is alleged. Gilb. L. Ev. 261. There are cases, indeed, in which detinue could afford no adequate remedy; as in the case of drawing out part of the wine out of a pipe, and filling it up with water. 1 Str. 576. A forcible taking is, likewise, evidence of a conversion. Gilb. L. Ev. 264; Cro. Eliz. 824. But while the sentence of condemnation was in force, neither trespass nor trover would lie. Raym. 336.

*It is likewise to be considered, that though a sale under the sentence of a court of admiralty, like a sale in market-overt, alters the property; yet, in both cases, the wrongdoer remains liable, or he would be suffered to take advantage of his own wrong: and even after a sale has been made, if the goods come again into the possession of the original owner, his right of property will revive. 2 Inst. 713. There are, however, many instances of pleading a sale in market-overt, by the innocent purchaser, but not a single instance of such pleading in the case of the wrongdoer. From the sentence of condemnation, therefore, to the sentence of reversal, it is but one transaction; and the issue of it places the parties in statu quo. A court of admiralty is not a court of record; and consequently, a writ of error will not lie upon its decrees: but this does not justify the distinction between judgments vacated and reversed; and the reversal in this case is similar to vacating. See 4 Inst. 340; 8 Co. 135; 5 Id. 76; Salk. 32. That a relation will make a nullity between the parties themselves, but not as to strangers, is a common rule. Ld. Raym. 521. The whole doctrine of relations, indeed, is favorable to the plaintiffs. 18 Vin. 291, 293; Str. 996; 1 Burr. 20. And, correctly speaking, their property has never been in suspension, but in custodia legis.*

After the argument, the Court were divided in opinion on the question —whether the action of trover was proper? Two of the judges deciding in the affirmative, against the other: but they concurred, clearly and unanimously, on the point of jurisdiction; and accordingly, gave

Judgment for the plaintiffs.(a)

(a) Since the Revolution, however, the nature and extent of the admiralty jurisdiction, has been more strictly investigated and defined, both in the state courts and the courts of the United States. See 1 Dall. 49, 96, 180, 218, and several cases in the sequel of this volume.
clusive force. We do not hesitate, however, to receive it in corroborate of any other evidence that may be adduced in support of the prosecution.

The evidence and arguments of counsel being concluded, the chief justice delivered the following charge to the jury:

McKea, C. J.—The crime imputed to the defendant by the indictment, is that of levying war, by joining the armies of the King of Great Britain. Enlisting, or procuring any person to be enlisted, in the service of the enemy, is clearly an act of treason. By the defendant's own confession, it appears, that he actually enlisted in a corps belonging to the enemy; but it also appears, that he had previously been taken prisoner by them, and confined at Wilmington. He remained, however, with the British troops for ten or eleven months, during which he might easily have accomplished his escape; and it must be remembered, that, in the eye of the law, nothing will excuse the act of joining an enemy, but the fear of immediate death; not the fear of any inferior personal injury, nor the apprehension of any outrage upon property. But had the defendant enlisted merely from the fear of famishing, and with a sincere intention to make his escape, the fear could not surely always continue, nor could his intention remain unexecuted for so long a period.

In the present instance, the confession of the defendant was not taken in writing and subscribed: but the statute of 1 & 2 Philip & Mary, c. 10, is in force in Pennsylvania; and, as in common cases, it is sufficient for the purposes of evidence, if a man subscribes his examination before a magistrate, so, in the case of a treason, a confession reduced to writing and subscribed before a justice and another witness, would be sufficient ground for a conviction under our act of assembly, or even under the statute of Wm. III. At the time of William's landing in England, James still maintained a strong party; of whom some were to be found in the House of Lords, and some in the House of Commons. The statute was, probably, therefore, framed, so as to be *most favorable to those who espoused the cause of the invading monarch; and hence we may derive all the provisions, which, on charge of high treason, make two witnesses necessary to the same overt act, or to two different overt acts of the same treason, or the confession of the defendant in open court. 5 Bac. Abr. 145. It appears, however, as I have before intimated, that it has been decided that a confession, though not made in open court, if made in the presence of two witnesses, may be read in evidence against the defendant, contrary to the opinion of the Chief Justice Trevor, and the doubts of Justice Tracy. 5 Bac. Abr. 152; Fost. 10, 240. The case in 5 Bac. must have been the case of an examination in writing, as it is said, it might be read in evidence: but Berwick's Case was a confession at the time of the fact; so that the former had no conclusive influence on the latter authority.

It must, at the same time, be allowed, that most of the authorities on this point, seem to lean against the admission of the party's confession in the presence of two witnesses, as sufficient for conviction, unless it is made at the time of committing the criminal act, or before a magistrate duly authorised. But the case now before us, arises on a confession in open court, and though the whole confession must be considered together; yet the jury
Yeates, for the defendant, premised, that the law on which the indictment arose, was new, and could only be justified by the crisis of American affairs at the time of passing it, when it was necessary to seal the lips of the disaffected. The necessity no longer existed; and policy would admit, what legal authorities required, that, as a penal law, it should be strictly construed. The part of the section of the act, to which the evidence applies, is then materially incorrect: for, it is not sense in the present form of wording and pointing; and can only be rendered intelligible, by adding some words, and by omitting the semicolon, and the disjunctive "or." By that correction, it would read thus: "If any person, by publicly and deliberately speaking *or writing against our public defence, shall maliciously and advisedly endeavor to excite the people to resist the government of this commonwealth, &c." The act, indeed, has, in this respect, been thought so harsh by the legislature, that the offence has since been reduced to the class of misdemeanors.

But it is the essence of the offence, as well upon general principles, as upon the positive language of the act of assembly, that the words should be spoken publicly, deliberately, maliciously and advisedly, with a view to persuade others to resist the government. Words of mere heat and passion will not constitute the crime alleged; they are often uttered, when the heart is properly disposed; and they must be construed according to their natural and common import, independent of the paraphrase of *innuendoes. It is true, that the words, in the present instance, are exceptional; but they manifest in themselves no intention, nor is there any proof of an intention, to persuade others to resist the government; they merely express a matter of opinion; and cannot fairly be converted into matter of treason. Comb. 460; 4 Bl. Com. 79.

Bradford, in reply. It is admitted, that the 4th section of the act of assembly is inaccurately and ungrammatically composed; but the clause which has been the subject of comment on the other side, has always been deemed a substantive and independent one. Let that clause, however, be rejected on account of its imperfections, there still remains abundant matter to support the indictment; for the words being proved, are evidence on another clause, that the defendant "maliciously and advisedly endeavored to excite the people to resist the government of this commonwealth, and to persuade them to return to a dependence upon the crown of Great Britain."

Again, it is agreed, that the words should be spoken maliciously and advisedly; but by malice, the law only intends, that the speech be made in an evil and wicked temper of mind; and deliberation is so far essential, that the mere ebullition of a transient passion shall not be rigidly construed into design and criminality.

The court delivered a charge to the following effect:

McKean, Chief Justice.—This indictment charges all the various acts which constitute misprision of treason; and it is the duty of the jury to inquire, whether the evidence supports any one of the charges. It is said, indeed, that the law on which the indictment is founded, is so inaccurately penned, that it cannot be understood, without supplying certain material words; and it is, undoubtedly, true, that although, in a common case, on a mere question of property (as in the case of a will), the rule of construction
is according to the sense of the instrument; yet, a law constituting a crime, must be strictly and literally *interpreted and pursued. The obscure passage in the act of assembly would be rendered perspicuous and intelligible, without the addition of any words, by expunging the semicolon, and the monosyllable "or," but even that is unnecessary to support the prosecution; since the words spoken tended to excite resistance to the government of this commonwealth, to persuade the audience to return to a dependence upon the crown of Great Britain, and to favor the enemy; which are distinct and substantive charges of misprision of treason.

It is proper to add, that the words must be spoken with a malicious and mischievous intention, in order to render them criminal: a mere loose and idle conversation, without any wickedness of heart, may be indiscreet and reprehensible, but ought not to be construed into misprision of treason. On the other hand, drunkenness is no justification or excuse for committing the offence; to allow it as such, would open a door for the practice of the greatest enormities with impunity.¹

Verdict, guilty.

SEPTEMBER TERM, 1785.

*BOYD v. BOPST. (a)

Sale.—Implied warranty.

In every sale of a chattel, there is an implied warranty of title in the vendor.³

In the charge to the jury, the Court observed, that the maxim of caveat emptor only applied to real estates; as the purchaser had the means of examining the title, within his own power. But the possession of chattels, is a strong inducement to believe, that the possessor is the owner; and the act of selling them, is such an affirmation of property, that, on that circumstance alone, if the fact should turn out otherwise, the value can be recovered from the seller.

(a) This cause was tried at Easton nisi prius, on the 10th June 1785, before the Chief Justice and Rush, Justice.

¹ Commonwealth v. Dougherty, 1 Bro. App. xvii.; Commonwealth v. Hart, 2 Brewst. 548. But intoxication, though not an excuse for crime, if it deprive the intellect of the power to think, and weigh the nature of the act, may reduce the crime of murder to the second degree. Jones v. Commonwealth, 75 Penn. St. 403. It will not, however, affect the grade of crime, unless so great as to render the prisoner unable to form a wilful, deliberate and premeditated design to kill, or incapable of judging of the acts and their consequences. Keenan v. Commonwealth, 44 Penn. St. 68. Drunkenness does not necessarily incapacitate from forming a premeditated design to kill; but it may be evidence of passion only, and of want of malice and design. Pennsylvania v. Lewis, Add. 279; Commonwealth v. Hart, 2 Brewst. 546. The doctrine of this case would appear to apply with peculiar force, to the offence of misprision of treason, by words. See also, the cases collected in Bright. Dig. 520.

³ McCabe v. Morehead, 1 W. & S. 513; Egan v. Call, 34 Penn. St. 238; Wiltaker v. Eastwick, 75 Id. 229.
SUPREME COURT

*WYCOFF v. LONGHEAD. (a)*

Usury.

If more than legal interest be included in a note, the payee can only recover the principal and legal interest. The bonâ fide purchase of a security, at any rate of discount, is not usurious.

This was an action on a promissory note; to which the defendant pleaded the act of assembly against usury; and thereupon, the following points were ruled by the court, in their charge to the jury.

1st. That where more than legal interest was included in any note, bond or specialty, the whole amount could not be sued for and recovered: but the plaintiff was entitled, in such case, to a verdict for the just principal and lawful interest.

2d. That if a man, directly or indirectly, actually receives more than six per cent., he incurs a forfeiture equal to the money &c., lent; but if an action is brought to recover the amount of the loan, a verdict ought not to be given for the defendant, as that would, in effect, be putting the money into his pocket, instead of working a forfeiture to the commonwealth.

3d. That a man may, bonâ fide, purchase any security for the payment of money, at the lowest rate he can, without incurring the penalties of usury.

**Respublica v. Steele. (b)**

Outlawry.

Process of outlawry must state the township of the defendant; but it is enough, to show him to have been there. The addition of "yeoman," is a sufficient one.

The defendant being outlawed for robbery; and afterwards apprehended, was brought up for judgment; but denying that he was the same Robert Steele, who was mentioned in the outlawry, an issue was joined by the attorney-general to try the identity.

*Lewis,* as counsel for the prisoner, took two exceptions, on the trial: 1st. That it was not proved, that the defendant was an inhabitant of Wright's Town, as stated in the process of outlawry; for though it appeared that he worked there, he contended, that circumstance alone did not establish a residence. 2d. That the addition is false and defective; for he is called "yeoman," which means (contrary to the fact) that he is a freeholder of the value of forty shillings per annum; and the addition does not extend to the town or hamlet, the name, degree or mystery, without which the outlawry is void. 1 Bl. Com. 406; 2 Inst. 668; Johnson's Dictionary, word, "Yeoman;" 2 Hawk. 185, § 102; Id. 186, § 106; Id. 187–8.

*Bradford,* attorney-general, insisted, that the proof of residence was sufficiently made; and that, by the statute, the description *might either be of the degree or mystery; the latter of which had been chosen in the present case. 2 Hawk. 186; Wood. Inst. 45.

(a) This cause was tried on the 26th September 1785.
(b) Argued and decided the 14th October 1785.
SUPREME COURT

Pennington v. Scott.

virtue of which the lands in question had been sold, only directed the sheriff to levy of the goods and chattels, &c., which is not an authority to take the lands in execution.

By the Court.—Lands are to be considered as chattels, in Pennsylvania, for the payment of debts. In some counties of this state, and throughout the state of Delaware, the writs of fi. fui. always issue in that form. It is said, that the precedents mention “lands and tenements;” but this has not been proved, as it ought to be, by producing in court such precedents, before, at the time, and subsequent to, the issuing of the writ. At most, however, it is but an omission, in point of form; which is too slender a foundation for overseeing a sheriff’s sale of lands.

Wilson, for the plaintiff. Yeates and Smith, for the defendant.

 PENNINGTON v. SCOTT.(a)

Continuance.

It is only necessary for the party to show due diligence, to entitle him to a continuance: what is such diligence.

This cause being marked for trial, the defendant moved to postpone it, upon an affidavit, stating, “that he took out a subpœna, three weeks ago, as soon as the time for holding the court was known, and immediately employed one Rabb to serve it on the witness, who lived at a distance; that he had likewise sent, by the messenger, a letter to his brother, requesting him to see that the subpœna was served, and the witness expedited, in case of any accident to Rabb; that the witness was material, without whose testimony, the defendant could not safely go to trial; that Rabb had not returned, nor had the defendant heard anything of him, since his departure; and that he thinks it probable, that the attendance of the witness might be procured at the next court.”

Yeates insisted, that the defendant must produce a subpœna, and prove the service of it, in order to bring his case within the general rule. But—

By the Court.—It appears, that as soon as the defendant had notice of the time of trial, he took out a subpœna for a witness, at a great distance, in Washington county; but that neither the witness, nor the person employed to serve the subpœna, attends. This would not, in strictness, be a sufficient ground for putting off the cause: but it must be remembered, that the defendant, once before, at a considerable expense, brought the same witness to court; and when the cause was continued, without any fault imputable to him, he took the witness’s deposition. Having thus, on a former, as well as on the present, occasion, pursued every preparatory step which the law requires, to procure the attendance of the witness, we think, it would be unreasonable, to take advantage of any accident that may have happened to the messenger.

(a) Ruled at Lancaster nisi prius.
LESHER'S LEPSEE v. LEWAN.

Proof of deed.

The testimony of a subscribing witness, that he was called on to sign as a witness, is sufficient to go to the jury; they may infer therefrom, a sealing and delivery.¹

In this cause, articles of agreement, for the sale of a house and lot in Germantown, were offered in evidence as a deed, under the following circumstances. The articles purported to be for the sale of a house and five acres of land, for the consideration of 1200l., payable, 700l. in cash, and remainder in bonds. Daniel Longsdorff, who was produced as the witness to the execution of the articles, stated that he was called into a room by Stawaker (the contractor to sell), to witness the execution of the bonds; that when he came in, the papers were lying on a table before Lesher (the contractor to purchase), and Lesher desired him to sign as a witness: that he did not actually see Stawaker sign, seal, or deliver the papers, which he supposed to have been regularly executed, before he was called in; but that he saw the money paid, and he knew the handwriting to be Stawaker's; and that possession of the premises was afterwards, in pursuance of the agreement, delivered to one Harb, of whom Stawaker rented a room in the house in question, for 8l.

The counsel for the defendant opposed the admission of the articles of agreement, contending, that there was no proof of the sealing and delivery, which are essential to a deed. But—

BY THE COURT.—There is sufficient proof that the instrument was signed by Stawaker; and therefore, we shall let it go to the jury; who will determine for themselves, whether that, and the other circumstances in the case, are satisfactory evidence of sealing and delivery.

Rush, Justice. (Dissenting.)—I differ in opinion from the rest of the court. I think, that before the instrument is read, sealing and delivery should be proved. If, indeed, the witnesses were *proved to be dead, or absent beyond the reach of the process of the court, the proof of their handwriting would be admitted; or, if that was not practicable, proof of the handwriting of the obligor might be satisfactory. But these circumstances do not occur on the present occasion; and as far as the testimony of Longsdorff goes, it is calculated to induce a belief that there was, in fact, no sealing and delivery of the instrument. It is not, therefore, proved as a deed; and in my opinion, it ought not to be left to the jury as a memorandum.

A bill of exceptions was taken to the opinion of the court, but never prosecuted.

APRIL TERM, 1787.

Cocksht's Lessee v. Hopkins.

Amendment.

A declaration in ejectment may be amended, by enlarging the term.

Ejectment. The demise laid in the declaration having expired, during the pendency of the action, Coulthurst, moved for leave to amend, by inserting the word twenty, instead of seven, so as to enlarge the term: and he cited Cowp. 841; 4 Burr. 2448.

Lewis was about to reply, when the Chief Justice observed, that the point was not only decided by the English authorities, but by a recent adjudication in this court.

BY THE COURT.—Let the amendment be allowed on payment of costs.


Foreign attachment.

A foreign attachment does not lie against an executor.

Foreign Attachment. A rule was obtained to show cause why the foreign attachment should not be quashed: and the only question discussed on the argument was, whether a foreign attachment would lie against an executor?

*After hearing counsel on both sides, and taking time to advise upon the subject, the Court were of opinion, that the foreign attachment ought to be quashed; and, accordingly, made

The rule absolute. (a)

MAY SESSIONS, 1788.

McCurdy v. Potts et al. (b)

Trespass.

Possession under an equitable title is sufficient to maintain trespass.

This was an action of trespass vi et armis, for cutting the plaintiff's trees; to which the defendant pleaded non cul., with leave to justify, &c. The title to the premises was the subject of controversy; and the Chief Justice delivered the following charge to the jury.

(a) This minute was furnished by Mr. Coulthurst, one of the plaintiff's counsel; and though I cannot state at large the argument at the bar, nor the reasons of the judgment, the point appeared to deserve notice, even in this imperfect form. The authorities cited for the plaintiff were 2 Str. 877; 3 Atk. 409; 2 Ves. 489; Priv. Lond. 256, 268, 263 4, 6; 1 Ld. Raym. 56.

(b) Decided at Carlisle nisi prius.
McKean, Chief Justice.—It is essential to private justice, and to public peace and order, that the rules of property, as well as of the other objects of society, should be settled and promulgated. Wretched, indeed, is the condition of that people, where the law is either uncertain or unknown.

In the present cause, it appears, that, in the year 1767, Hugh McCurdy, the plaintiff, having obtained a location for 200 acres, desired that a survey might be made by the proper officer; who, accordingly, surveyed the tract in question, amounting to 157 acres. On this tract, the plaintiff actually entered, and enjoyed, for a length of time, a peaceable possession. He also improved it, by first erecting a cabin, then a house; and afterwards a barn; and by clearing and cultivating two acres of meadow, forty acres of arable land, and an orchard with 40 or 50 apple trees in it. The proof of these facts is certainly sufficient to maintain an action of trespass; for the plaintiff had *not only an actual, but a legal possession;* and on payment of the purchase money to the former proprietaries, his legal title to the premises would have been perfected.

For the defendant, however, it is stated, that he discovered the tract, of which the plaintiff's survey is a part, in the year 1755; that at several times, he erected a cabin, a mill, and a lime-kiln upon it; that he cleared some of the land, and that he made a consentible line with a neighbor. But these circumstances the court declare, will not constitute a legal title. Even in a state of nature, they would confer no right to the 157 acres, within the plaintiff's survey; for, on any part of those acres, it is not pretended that the defendant has ever exercised any act of industry, or that he has even maintained a pedis possessio. He made no inclosure, he cut no timber; nor, in short, in any form, appropriated or set apart the premises in question, from the common mass of the circumsjacent land. To assert, therefore, that he has acquired an exclusive title, is not less extravagant, than to suppose, that a whole river becomes the property of him who takes a pitcher of water out of it; or that no other man is afterwards entitled to use any part of the water, which may happen again to fall from the pitcher into the stream. For, let me ask, what is the definition of an improvement? Has it no quality or form? And is the quantity of land attached to it circumscribed by no limits? To these inquiries, I have been unable to obtain a satisfactory answer.

The owners of the soil of Pennsylvania were, originally, the proprietaries; and under their authority, agents were appointed to make sales and grants of particular tracts. If two or three persons claimed the same land, the agent had, in strictness, a power to grant it to which of the claimants he pleased; but if one of them had seated himself on the land, and by his own labor and money had improved its value, the proprietaries and their agent always felt an equitable obligation to make the grant in favor of such possessor. If, however, the proprietaries, who are the owners of it, should not choose to do so, the court cannot interfere to control or regulate the exercise of their undoubted territorial right. An attempt of that kind would shake the very foundations of property; and render a verdict or judgment, not a solemn determination on evidence and law, but an instrument of favor to

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1 See Sims v. Irvine, 3 Dall. 448, where it is argued by counsel, that the learned judge inadvertently used the words "legal possession," for lawful possession."
ment on the bond, were to be credited in part payment, when paid. (a)
*101] *For several years, no suit was instituted on the bond, and the cir-
cumstances of Bird became greatly embarrassed. The bills had been
duly protested for non-payment; and the plaintiff (who had never returned
them, nor even, at the trial did he offer to return them) furnished accounts,
in which he charged twenty per cent. damages. The question, therefore,
was, whether the bills were, under these circumstances, to be considered as
a payment of so much of the bond? And in the charge to the jury, it was
ruled—

    BY THE COURT.—That originally the plaintiff had his election to consider
himself either as an agent, or as a purchaser, with respect to the bills of
exchange; but that the two circumstances of retaining them in his own
hands, and of charging twenty per cent. damages, were sufficient evidence
to show an election to receive them in payment; and that, therefore, for the
amount of the bills, the defendant was entitled to be credited, in an action
on the bond.

    Verdict accordingly.

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    RESPUBLICA v. ST. CLAIR.

    Service of subpoena.

    The defendant had been outlawed for robbery; and being afterwards
apprehended, the present issue was joined on the identity of the person.
Bradford, Attorney-General, prayed the assistance of the court in sending
a subpoena for witnesses into Bucks county, as he could not employ the
sheriff on a service out of his jurisdiction. The application was for a special
messenger; the attorney-general observing, that if, as in England, the
judges were attended by tipstaves, those would be the proper officers to em-
ploy on the occasion.

    But the Court recommended, that he should consult with the sheriff, on
a proper person to be hired for the special service.

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    RESPUBLICA v. MITCHELL.

    Interest.

    In the settlement of a public account, the commonwealth is liable for interest on the balance.

    This was an appeal from the settlement of Mitchell's account by the
Comptroller-General; and the cause had been referred, by consent. The
referees reported a sum due to Mitchell; but had omitted to allow him,
interest; which, being stated to the court—

    It was resolved, That the state was liable to pay interest, as well as
individuals; and that the court would add it, under the circumstances of
the case, although the referees had not expressly given it in their report.

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    (a) Chapman v. Steinmetz, 1 Dall. 261.
HOARE v. ALLEN and terre tenants.

Interest.

Interest does not run, during a state of public war, between citizens of the contending powers. 1

This was a scire facias on a mortgage, given on the 4th December 1773, for securing the payment of 16,000l. sterling, with interest. It was tried at Chester nisi prius, on the 4th May 1789, before the Chief Justice, and ATLEE and BRYAN, Justices; when it appeared, that the plaintiff was a British subject, resident in London; that Amos Strettle was his attorney in fact, at the time of the execution of the mortgage, and after: but it did not appear, whether he continued to act as such subsequently to the war. He resided in the state until his death, which was about ———. The question that was made in this cause, was, whether interest should run during the war?

The defendant contended, that when two independent nations are at war, the debt is suspended, and no interest can be demanded. That all intercourse was at an end, and a remittance could not be made. All trading with enemies is illegal. Park Ins. 270–1; 2 Valin 31–2; Magens 257. If not so at common law, the resolutions of congress made it criminal. That a statute may repeal a covenant to do a thing that is lawful before: and a war is equivalent to an act of parliament in this case. That where the law prevented the payment of the principal, it never required payment of interest, as in the case of a garnishee. That whether the contract be express and in writing, or merely by parol, the construction must be the same: for equity will imply the exception, though not expressed. Thus in Pollard v. Shaffer, 2 Dall. 210, the war excused the non-performance of an express contract. So, in the case of the way-going crop. Doug. 190. So, in case of a division of a risk in a policy. 3 Burr. 1240. They finally urged, that this point had been determined in the case of Osborne v. Mifflin, which was the case of a bond; and there the court determined, that no interest should be paid during the war.

The plaintiff urged, that though debts might be suspended during the war, yet they revived on the peace, and were not extinguished. That, although the court determined the case of Osborne v. Mifflin; yet they distinguished that case from the present, by urging that that case went on the principle of the plaintiff's being in England, and having no attorney here: and that while he had an agent here, which was until 1778, the interest ran, and only 3½ years' interest was stricken off from the plaintiff's demand.(a) That in the present case, Strettle was the attorney: that a

(a) BY THE COURT.—There was no proof before the court, that he was an alien enemy: he had lived here many years, and went to England before the war.

1 See Crawford v. Willing, 4 Dall. 286; Conn v. Penn, Pet. C. C. 496, 524; Bainbridge v. Wilcocks, Bald. 536; Brown v. Hiatt, 15 Wall. 177; Shortridge v. Macon, 1 Abb. U. S. 58;

tender or payment to him would have been good; and that such payment did not in any manner contravene the resolution of congress. That payment in bills of exchange would be lawful, at any time, and could not in any manner aid the arms of the enemy. That this case was different from that of a bond: for the very land mortgaged was the consideration of the debt; and the defendants were actually in the enjoyment of the profits of the land, during the whole war.

The defendant, in reply, contended, that the war was a revocation of Strettle's authority; and that which another cannot do by himself, he cannot do by attorney: that even his power to sue, during the war, was gone.

**BY THE COURT.**—This action is brought on a mortgage for 16,000L., payable on 4th December 1774. No suit could be brought on the mortgage, before the 4th December 1775. Before that period, the war commenced, and on the 10th September 1775, the congress prohibited the exportation of commodities, &c., to Great Britain, or any of her dominions. This was obligatory on their constituents, and it became unlawful to make any remittances, after this, to the enemy. During a war, all civil actions between enemies are suspended; debts are suspended also, but restored by the peace. For the term of 7½ years, viz., from the 10th September 1775, to the 10th March 1783, the defendant could not have paid this money to the plaintiff, who was an alien enemy, without a violation of the positive laws of this country, and of the laws of nations. They ought not, therefore, to suffer for their moral conduct, and their submission to the laws.

Interest is paid for the *use* or *forbearance* of money. But in the case before us, there could be no forbearance; because the plaintiff could not enforce the payment of the principal; nor could the defendants pay him, consistent with law; nor could they pay it, without going into the enemy's country, where the plaintiff was. Where a person is prevented, by law, from paying the principal, he shall not be compelled to pay interest, during the prohibition, as in the case of a garnishee in a foreign attachment.

It is urged, that a remittance in bills of exchange furnished the enemy with no money. Yet, it is clear, that it would furnish the enemy with the means of carrying on the war, within the *bowels* of the country, without bringing any money into it. It is well known, that the bills drawn by the British army were the principal bills that were bought and sold; those drawn by American citizens were generally protested.

It has been said, that it might have been paid to Strettle: but that depended upon his pleasure, whether he chose to act as attorney or not.

I have searched for precedents, both in the civil law, and in the books of reports; but could find none. We, therefore, determine on principle and analogy, and are unanimously of opinion, that the plaintiff is not entitled to interest from the 10th September 1775 to 10th March 1783; but during the rest of the time, he must be allowed full interest.

The jury adopted the principles of the charge; but struck off 8½ years interest. (a)

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(a) Since the decision of this case, the abatement of interest, during the war, in all actions for the recovery of British debts, antecedently due, has been the uniform practice.
accesory to the debt, which may be barred by circumstances which do not touch the
debt itself—suffice to prove that interest is not a part of the debt, neither comprehended
in the thing, nor in the term; that words, which pass the debt, do not give interest,
necessarily, that the interest depends altogether on the discretion of the judges and
jurors, who will govern themselves by all existing circumstances; will take the legal
interest for the measure of their damages, or more, or less, as they think right; or will
give it from the date of the contract, or from a year after, or deny it altogether, accord-
ing as the fault, or the sufferings, of the one or the other party shall dictate. Our laws
are generally an adoption of yours; and I do not know that any of the states have
changed them in this particular. But there is one rule of your and our law, which,
while it proves that every title of debt is liable to a disallowance of interest under
special circumstances, is so applicable to our case, that I shall cite it as a text and
apply it to the circumstances of our case. It is laid down in Vin. Abr., Interest,
C. 7, and 2 Abr. Eq. 529, and elsewhere, in these words, ‘Where, by a general and
national calamity, nothing is made out of lands which are assigned for payment of
interest, it ought not to run on during the time of such calamity.’ This is exactly the
case in question. Can a more general national calamity be conceived, than that universal
devastation, which took place in many of those states during the war? Was it ever
more exactly the case anywhere, that nothing was made out of the lands which were to
pay the interest? The produce of those lands, for want of the opportunity of export-
ing it safely, was down to almost nothing in real money; e. g., tobacco was less than a
dollar the hundred weight: imported articles of clothing or consumption were from
four to eight times their usual price: a bushel of salt was usually sold for 100 lbs. of
tobacco. At the same time, these lands, and other property, in which the money of the
British creditors was invested, were paying high taxes for their own protection, and
the debtor, as nominal holder, stood ultimate insurer of their value to the creditor; who
was the real proprietor, because they were bought with his money. And who will esti-
mate the value of this insurance, or say what would have been the forfeit, in a contrary
event of the war? Who will say, that the risk of the property was not worth the in-
terest of its price? General calamity, then, prevented profit, and consequently, stopped
interest, which is in lieu of profit. The creditor says, indeed, he has laid out of his
money; he has, therefore, lost the use of it. The debtor replies, that if the creditor has
lost, he has not gained it: that this may be a question between two parties, both of
whom have lost. In that case, the courts will not double the loss of the one, to save
all loss from the other. That it is a rule of natural as well as municipal law, that in
questions de damno exitando melior est conditio possidentis. If this maxim be just,
where each party is equally innocent, how much more so, where the loss has been pro-
duced by the act of the creditor. For a nation, as a society, forms a moral person, and
every member of it is personally responsible for his society. It was the act of the
lender, or of his nation, which annihilated the profits of the money lent; he cannot
then demand profits, which he either prevented from coming into existence, or burnt or
otherwise destroyed, after they were produced. If, then, there be no instrument or title
of debt, so formal and sacred, as to give a right to interest, under all possible circum-
stances, and if circumstances of exemption, stronger than in the present case, cannot
possibly be found, then no instrument or title of debt, however formal or sacred, can
give right to interest under the circumstances of our case. Let us present the question
in another point of view. Your own law forbade the payment of interest, when it for-
bade the receipt of American produce into Great Britain, and made that produce fair
prize, on its way from the debtor to the creditor, or to any other for his use and reim-
bursement. All personal access between creditor and debtor was made illegal, and the
debtor who endeavored to make a remittance of his debt, or interest, must have done it
three times, to assure its getting once to hand: for two out of three vessels were gen-
erally taken by the creditor nation, and sometimes by the creditor himself, as many of
them turned their trading vessels into privateers. Where no place has been agreed on for
the payment of a debt, the laws of England oblige the debtor to seek his creditor
wheresover he is to be found within the realm, Co. Litt. 210 b; but do not bind
SUPREME COURT
JUNE TERM, 1790.
*TODD v. THOMPSON.

Practice.

A rule for trial or non-proc. was granted, where the plaintiff had been guilty of negligence in obtaining documentary evidence.

This cause being marked for trial, it was continued by the plaintiff; wherupon, the defendant's counsel moved for a rule to try at the next term, *106 or non-proc. This, however, *was opposed, the plaintiff's counsel alleging, that there was no default on his part, as the procrastination arose, in fact, from the absence of a material witness, and the late arrival of a record from New Jersey, which was so imperfectly exemplified, that it could not be offered in evidence. To this it was answered, that there had been no subpoena taken out for the absent witness: and that as the action had been depending for more than two years, there was evidently a laches in not obtaining the exemplification sooner.

By the Court.—It is certainly a great default, that an earlier application was not made for the exemplification; and *that instructions *107 were not given to some person, to see that it was regularly made out. On that ground alone, therefore, the motion must be granted: But even if the plaintiff had been guilty of a laches; if it was a misfortune, and not negligence, that had prevented the seasonable arrival of the record, we should still doubt the propriety of refusing the rule.

*108]

*RESPUBLICA v. MATLACK.

Continuance.

A cause will be continued, when the defendant is absent, in the plaintiff's service.

Appeal from the settlement of the defendant's accounts by the comptroller-general. The defendant had been appointed a commissioner, by the executive council, to explore the navigable waters of the state; and on account of his absence upon that service, Lewis had moved, at the preceding term, and now moved again, to postpone the trial. The Attorney-General observed, that the appellant was not in duress, and might, if he pleased, attend. If, therefore, the cause was put off at this time, he hoped, at least, a peremptory rule for trial at the next term would be entered.

And whether it is their opinion, that interest during the war should be paid? And at the same time, they pass the act directing the courts to suspend rendering judgment for any interest that might have accrued between April 19 1775, and January 20 1783. But in 1787, when there was a general compliance enacted through all the United States, in order to see if that would produce a counter-compliance, their legislature passed the act repealing all laws repugnant to the treaty, and their courts, on their part, changed their rule relative to interest during the war, which they have uniformly allowed since that time. The circuit court of the United States, at their sessions at ——, in 1790, determined, in like manner, that interest should be allowed during the war. So that, on the whole, we see that, in one state, interest during the war is given in every case, in another, it is given wherever the creditor, or any agent for him, remained in the country, so as to be accessible; and in the others, it is left to the courts and juries to decide, according to their discretion and the circumstances of the case.
OF PENNSYLVANIA.

Vasse v. Spicer.

By the Court.—It would wear an aspect of hardship, if the trial were to be forced on, at the very time that the plaintiff had engaged the defendant in his service, and sent him to a distance. But let a peremptory rule for trial at the next term be entered.

*Republica v. Coates. [*109

Trial by proviso.

The defendant cannot have a rule for trial by proviso, against the commonwealth.

This was an action on an official bond executed by the defendant; and the real plaintiff having neglected to strike a jury, the defendant's counsel moved for a rule for trial by proviso; but on a suggestion from the Attorney-General, approved by the court, that such a rule could not be granted against the commonwealth, the motion was made for a peremptory rule to try at the next term; under which, the court said, they would order the jury to be qualified.

Levy, for the plaintiff; Sergeant, for the defendant.

*Borger v. Searle. [*110

Practice.

A rule to show cause of action will not be granted, on the last day of the term.

On a capias, returnable to the present term, Lewis, this day, moved for a rule to show the plaintiff's cause of action, and why the defendant should not be discharged on common bail; offering, at the same time, to file an agreement, that the question might be heard before a single judge at his chambers.

Bradford objected, that this being the last day of the term, the motion was out of season. He did not dispute the power of the court; but he appealed to their discretion, whether it would not be unreasonable to suspend the cause for three months, by granting the rule at so late a period.

By the Court.—The motion is certainly out of time. Before the return of the capias, a question of bail may be brought before a single judge; but after the return, it must be decided on an application to the court: which ought to be made, on the first day, or, at least, within a reasonable period, after the commencement of the term. The present motion cannot, therefore, be granted.

*Vasse v. Spicer. [*111

Practice.

The defendant will not be permitted, when the jury is called, to retract his plea, and enter judgment by non sum informatus.

Issue had been joined in this cause, and the jury were at the bar, ready to be qualified for trying it, when, Sergeant moved for leave to retract his plea, and to enter judgment by non sum informatus. Rawle and Du Pon-
ceau, for the plaintiff, opposed the motion. And Lewis, as amicus curiae, observing that the question was of general importance, hoped that the court would take this opportunity of correcting, what he considered to be an unreasonable and unwarrantable practice. In support of his opinion, he referred to Style Pr. Reg. 371; Jac. Law Dict., Tit. "Judgment;" 2 Lill. Abr. 104; 5 Com. Dig. 180; 2 Brownl. 196.

By the Court.—It has been a practice, for the plaintiff's attorney to accept a judgment in the mode proposed by the motion; but the point, for allowing the defendant's attorney, either as matter of right, or indulgence, to retract his plea, under such circumstances, has never been brought before the court, on argument. The inconvenience of the delay, where, in fact, there is no dispute, is, however, so palpable, that we cannot give a judicial countenance to the practice. Therefore, let the jury be called.

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Ex parte Holex.

Special court.

A going defendant is entitled to a special court, though he has a resident partner, who could remain.

Dallas moved for a special court to try various actions in which Mr. Holex was defendant, jointly with Duer and Parker; but it was objected by Lewis, that the reason of the act of assembly, for granting special courts, did not apply to cases, where there were partners, who could remain, during the usual course of proceeding, to defend the causes, and who did not join in the application.

By the Court.—The objection is not sufficient to justify the refusal of a motion for a special court. The legislature intended to relieve defendants, who were ready and willing to proceed to trial; and accelerating a decision cannot possibly injure the plaintiffs, unless some material witness is absent; which has not been pretended in the present case. The rule for a special court must, therefore, be granted.

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Criminal information.

An information, at the relation of a private person, must be drawn and prosecuted by him, using the name of the attorney-general pro forma.

Leave having been granted, on the motion of Sergeant, to file an information against the defendant, one of the Justices of the Peace for Chester county, it became a question, whether the information should be drawn, filed and prosecuted by the attorney-general, or by the party at whose instance it was awarded.

The Attorney-General (Bradford) objected, that it is not the duty of the attorney-general to draw and file this information. It must, indeed, be in the name of the commonwealth, and the prosecutor may make use of the name of the officer, who prosecutes for the state; but there is, in England,
FERGUSON, captain of militia, v. BARON, a private.

Certiorari.—Error.

A party cannot object to an error, in his favor; such as, giving him notice, when he was not entitled to it.

On the return to a certiorari, issued to remove the record of the proceedings that were had in this case, before Justices McKnight and Todd, it appeared, that the defendant, having been tried by a regimental court-martial, for a breach of the rules of discipline, was fined to the value of ten days' labor (1l. 15s.), that on an application made by the plaintiff, who acted as clerk of the company, to the justices, they issued a summons to the defendant; and that, on the return of the process, they gave judgment conformable to the sentence of the court-martial.

Bradford, in support of the judgment, read the proceedings of the court-martial; and the section of the militia act, relative to the recovery of fines.

Leny contended, that the justices had proceeded without jurisdiction; for, their authority under the act was merely ministerial, to issue an execution; whereas, they had undertaken to hold plea on the subject-matter.

*114* [By the Court.—It is an extraordinary objection, to proceed from the defendant, that he had notice before an execution issued against him. The measure was a liberal and indulgent one; and ought not to be discountenanced, if in general practice.

Judgment affirmed.

OVERSEERS of COVENTRY v. CUMMINGS.

Certiorari.—Return.

On certiorari, the court must take the case as stated in the return, without travelling into the merits.

Certiorari to remove the record of proceedings before Justice Bartholomew, to which the following return was made: "On hearing the matters between the parties, I gave judgment for plaintiffs for a debt of 38s., with 17s. 3d. costs: 30s. of which was money said defendants sued plaintiffs for, before Daniel Griffith, Esq., on account of John Ralston, Esq., and self, which thing he had no orders from us to do, and the remainder, 8s., being the costs the plaintiffs paid on said action. Execution granted for said debt and costs to the plaintiffs; and the costs paid by them."

Lewis and Todd excepted to the judgment, that Justice Bartholomew had undertaken to decide upon a matter, which had been previously decided by another justice.

Bradford and Sergeant objected to go into the merits of the case.

By the Court.—If the return is false, the justice is liable to an action, at the instance of the injured party: if he has acted contrary to justice, an information will be granted against him. But in the present state of the business (though we highly disapprove of the interference of a justice in any
SUPREME COURT

Douglass v. Sanderson.

By the Court.—We entertain no doubt upon this subject: It is the case of several persons, severally bound, and severally sued, where, until one has actually made the satisfaction, all are liable to make it. The cases cited clearly express the principle.

Let judgment be entered for costs.

APRIL TERM, 1791.

*116] *Douglass's Lessee v. Sanderson.¹

Evidence.

The plaintiff is competent to prove the death of a subscribing witness, in order to let in proof of his handwriting.

A leaf cut out of a family Bible, and certified by a notary of another state, admitted to prove pedigree.

On the trial of this cause, before Judge Bryan, at nisi prius, in Cumberland, in November 1790, the plaintiff offered in evidence a deed, and to prove its execution by the handwriting of one of the witnesses, who was dead. The other witness was said to be dead also; and to prove this, they offered the plaintiff himself, to testify that the witness had formerly lived in Philadelphia, that he had made inquiries for him, and heard he was dead. This testimony was objected to; but on argument, it was admitted, the judge reserving the point.

The plaintiff then offered a leaf, said to be cut out of a family bible, on which were written the names of the children of one McMichael, under whom the lessor of the plaintiff claimed, with the times of their respective births; which leaf was annexed to a notarial certificate from another state, setting forth, that the same was cut out of the bible, in his, the notary's, presence, and that the same was sworn before him, to be the property, and family bible, of the said McMichael, then deceased. To this, exception was also taken; but the evidence was admitted, and the point in like manner reserved.

On the return of the postea, Bradford obtained a rule to show cause why there should not be a new trial, and at April term 1791, the cause was argued.

Bradford, for the defendant, contended, that the evidence ought not to have been admitted in either case. Upon the first point, he said, the rule was, that the subscribing witness must be produced, unless proof be made that he is dead, or cannot be found. That this proof must be by disinterested witnesses. That a party might be admitted, in case of necessity, as where a writing had been lost, and in similar cases; yet this was only ex necessitate. That the fact in question was capable of proof by various means; by the register of his burial; by persons acquainted with him; by general report testified by disinterested witnesses. That in this case, strict

¹ a. c. 1 Yeates 15.
witness to prove the death of the subscribing witness, in order to let in evidence of the handwriting; and seemed to consider it as the common practice. (a)

On the second point, the Chief Justice observed, that the rules of evidence, with regard to pedigree, were by no means strict; and that the Court were inclined to think, that the evidence admitted by the judge who tried the case, was sufficient in such a case.

Shippen, Justice.—It must not be understood, that ex parte affidavits, taken in other states, are admissible evidence in cases of pedigree. I concur in the opinion of the court, upon the peculiar circumstances of the case, and the production of the paper itself. The general principle, attempted to be inferred by the defendant’s counsel, must not be considered as involved in this decision.

Rule discharged.

SEPTEMBER TERM, 1791.

RESPUBLICA v. LACAZE et al.¹

Debt.—Voluntary stipulation.—Interest.—Practice.

An action of debt lies upon an express contract in writing, without specialty. A voluntary stipulation, given in the admiralty, in a case in which there is no jurisdiction, is a valid obligation at common law. Legal interest is the usual measure of damages for delay of payment. A motion for a new trial cannot be made, after a motion on arrest of judgment; the latter tacitly admits the verdict is good.

This was an action of debt in the debet et detinet, for 4000l. sterling, equal to 6666l. 13s. 6d. currency, brought in the name of the Commonwealth, for the use of Lewis Lanoix, against James Lacaze, Michael Mallet and John Ross, upon a writing signed by the defendants, dated the 4th of November 1783, and taken in the court of admiralty of Pennsylvania, in the nature of a caution or stipulation. The information (which states the whole case) was in the following words:

"Philadelphia County, ss.

James Lacaze, Michael Mallet and John Ross, all late of the city of Philadelphia in the said county, merchants, were summoned to answer the Commonwealth of Pennsylvania in a plea, *that they render to the said Commonwealth, for the use of Lewis Lanoix, the sum of six thousand six hundred and sixty-six pounds, thirteen shillings and eight pence, which to the said commonwealth they owe and unjustly detain, &c. And thereupon, William Bradford, Jr., attorney-general of the said commonwealth, on behalf

(a) See 1 W. Black. 532, where the plaintiff himself was examined: and Godb. 198, 326; Shower 363.

¹ s. c. Yeates 55.
the court of admiralty had no jurisdiction of the original cause, from any
allegation, averment or other matter appearing in the information; and that
this writing would not warrant a suit in that court. But as to this, it is
not necessary to give a positive opinion.

II. I will then consider the second point, whether Fournie could take
this writing, by the common law, from the defendants? Although a court
of admiralty cannot take a recognizance, which is a bond or obligation of
record (that court not being a court of record, nor the judge, a judge of
record, 6 Vin. Abr. I. 500, pl. 1), yet, it can take a caution or stipulation;
which is usually for appearance, or to perform a decree, &c., and is in nature
of a recognizance. It appears, that the proceedings in the admiralty
*123] were without the participation or knowledge of Lewis Lanoix; that
no coercion was used by the court; that all was voluntary, and not only by
consent, but on the application, of the defendants. There is no positive law
for declaring such a writing void; it was not given for anything against
goods morals, or illegal, but for a meritorious valuable consideration, to wit,
a sum of money delivered in specie, and for an honest purpose. If the
taking this writing in the court, cannot give it any additional sanction, so,
on the other hand, it cannot destroy or prejudice its legal operation.
Though void as a stipulation, it is good as a contract; just as it was
determined in the case of Ascue v. Hollingsworth, Cro. Eliz. 544, that an
instrument, which was void as a statute-staple, was yet good as an obligation;
and the case in 2 Strange, 1137, favors this opinion.

For these reasons, I think, this transaction may be considered as done
out of court; and that it is good and binding on the parties, by the common
law.

III. The next and principal question is, whether the present information
in debt upon this writing is maintainable? It has not been doubted, but
that a special assumpsit would lie in this case; but it has been denied, that
an action of debt will lie. A debt is a sum of money due by express agree-
ment; either in writing, or by parol, where the quantity is fixed, and does
not depend on future calculation—the non-payment or non-performance is an
injury, for which an action of debt may be brought. 3 Black. Com. 153;
Fitzh. N. B. 145; 1 Litt. Abr. 554, C.; 2 Bac. Abr. 13. And it is held in
(Smith v. Avery) 6 Mod. 129, that a meritorious valuable consideration will
raise a debt. If A. gives money to B., to buy wares, or any other thing for
him, and B. does not buy them, debt will lie for the money (7 Vin. Abr.
title "Debt," K. pl. 28); for, by the delivery of the money, as it cannot be
known again, the property is altered, and a duty arises.

Debts, for which an action of debt may be brought at common law, may
be classed under four general heads:

1st. Judgments obtained in a court of record on a suit.

2d. Specialties acknowledged to be entered of record, as a recognizance,
statutes merchant, or staple, or such like.

3d. Specialties indented, or not indented.

4th. Contracts without specialties, either express or implied.

The present action comes under the last head, and is founded on an ex-
press contract in writing, whereby in consideration of five barrels of silver
coin, delivered by Anthony Fournie, by the advice of the court of admiralty,
to the defendants, they promise and engage to remit them to Lewis Lanoix,
at Bordeaux, *or to pay to the commonwealth 4000l. sterling for his use. The writing is in the form of a recognisance, taken as a stipulation in the admiralty, but deriving no advantage or prejudice therefrom: It is a legal, fair and honest contract, grounded upon a meritorious and valuable consideration; and although Mr. Ross is only a surety (and I am sorry he is such), yet, unless he had entered into the writing, the contract might not have been made; he has become a party in it, and is responsible for the performance, equally with the other defendants. The sum demanded is fixed and certain; there was a duty certain, which has not been performed, for which an action of debt lies. And, although I should have preferred an action of special *assumpsit; yet, I conceive an action of debt is maintainable.

The Commonwealth must be considered as a trustee for Lewis Lanoix, on the authority of 1 Vern. 439; 1 Ves. 453; 4 Burr. 2110. The verdict has been taken in the manner long practised in Pennsylvania, though peculiar to it, and is in consequence of an act of assembly. Upon the whole, the court unanimously agree, that the judgment be entered for the plaintiff.

Judgment for the plaintiff.(a)

APRIL TERM, 1791.

RESPUBLICA v. ROBERTS.¹

Criminal law.—Adultery.

An unmarried man cannot be convicted of adultery with a married woman.
On an indictment for adultery, the defendant may be convicted of simple fornication.

This was an indictment for adultery, which had been found in the quarter sessions of Bucks county. The woman was married; but the indictment did not state the defendant to be so; and indeed, the contrary was allowed, in the course of the argument, to be the fact. The question brought before this court was, whether, in such circumstances, the defendant would be convicted and sentenced for adultery, under the act of assembly? (1 Dall. Laws 47) the *Attorney-General* contending for the affirmative of the proposition, and *Sergeant* opposing it.

The Court, after consideration, delivered an unanimous opinion, that under the act of assembly, and the uniform practice of eighty-five years (a practice, which, though it does not make the law, must be strong evidence of what the law is), the indictment could not be supported on the charge of adultery: but that the judgment for fornication only, must be pronounced against the defendant.

Judgment accordingly.

(a) The defendants brought a writ of error; but on the 11th July 1798, the judges of the high court of errors and appeals unanimously affirmed the judgment of the supreme court.*

¹ s. c. 1 Yeates 6.

* See Addison 59, for a report of this case in the high court of errors and appeals.
Leech v. Armitage. (a)

Opening and conclusion.—Former recovery.

In trespass for cutting trees, the defendant pleaded liberum tenementum, to which the plaintiff replied liberum tenementum suum, absque hoc, &c.; hold, that the plaintiff had the affirmative of the issue, and was entitled to open. Where a former judgment between the same parties is given in evidence, it is not competent for the opposite party, to prove that the evidence now given by him, was not produced on the former trial, nor then discovered.

This was an action of trespass for cutting trees. The defendant pleaded liberum tenementum; and the plaintiff replied liberum tenementum suum, absque hoc, &c. The trial came on at nisi prius, in Montgomery county, before the Chief Justice and Judge Shippen, on the 28th April 1791.

A preliminary question arising, who should open the cause, it was decided by the Court, after argument, that the proof of the issue lay upon the defendant; and that he, therefore, ought to begin. The Chief Justice added, that in all cases, the party who is first in the affirmative ought regularly to open; and referred to Forsythe v. Jones, tried at nisi prius, in Chester county, where the same point was ruled.

On the trial of the cause, the defendant gave in evidence the record of a trial, verdict and judgment between the same parties, at a former period; to wit, in the year 1755. The plaintiff, thereupon, offered to prove by a witness, who was present at the former trial, that the evidence now given by the plaintiff, was not then produced nor discovered: but the proof was objected to, and the court refused to admit it.

By the Court.—It would be too dangerous to trust to the recollection of a witness, in so old a transaction, in order to shake the strength of the evidence which the record imports.

SEPTEMBER TERM, 1791.

*126]

Joy’s Legatee v. Cossart et al. 1

Bankruptcy.

To confer jurisdiction, under the act of 1785, there must have been a trading, a debt contracted, and an act of bankruptcy, subsequently to the passage of the statute. Any person in interest may contest the legality of the petitioning creditor’s debt.

Ejectment for a house in the city of Philadelphia. The lessors of the plaintiff were assignees, under a commission of bankruptcy issued against one Christian Wirtz, of whom Doctor Charles Moore, the landlord of Cossart, had purchased.

(a) Decided at Montgomery nisi prius. s. c. 1 Yeates 104.

1 s. c. 1 Yeates 50.
Upon the general issue, it was contended by the defendants, that the commission had issued irregularly, and was void, for the following reasons:

1st. The act of bankruptcy, alleged to have been committed by Wirtz, was a conveyance of a lot of ground, to one of his children, by deed, and without a valuable consideration. This, it was admitted, was fraudulent and void under the statute of 13 Eliz., but not an act of bankruptcy.

2d. The debt of the petitioning creditor was not within the act for the regulation of bankruptcy, which was passed the 17th September 1785; and which provides, that the debts of the petitioning creditor shall “have arisen on a contract, or transaction, subsequent to the passing of the act.” 2 Dall. Laws 389, § 3. Now, the debt due to the petitioning creditor was on a running account, every item of which was prior to June 1785, and which was thus indorsed: “We do acknowledge the within account to be just and true, errors excepted; and also excepting all such remittances as we have already made, since rendering the same, and which had not then come to the hands of Joy & Hopkins; and we promise to pay the balance thereof, being 3904l. 6s. 10d. sterling, to Joy & Hopkins, in London, or their order or agents here, with interest at five per cent. June 3, 1788. (Signed) C. Wirtz. W. Wirtz.” This, the defendant’s counsel contended, was no extinguishment or satisfaction of the original debt; and therefore, not within the meaning of the act.

In answer to the first point, the plaintiff’s counsel insisted, that every fraudulent conveyance by deed, was an act of bankruptcy. To the second point, it was answered, that the indorsement on the account was a real promissory note, which operated as a satisfaction of the original contract. But at all events, it was strongly urged, that it did not lie with third persons to inquire into or dispute the regularity of the proceedings under a commission of bankruptcy.

**The Court** charged the jury, in favor of the defendants, on the two last points; but left it to them to determine, whether the first was, or was not, an act of bankruptcy; inclining to think that it was: and the plaintiffs were desired to move for a new trial, if they doubted the direction of the court.

A verdict being found for the defendants, the motion was made and argued in July last, by Lewis, Tilghman and A. Morris, for the plaintiffs, and by Ingersoll, Sergeant and Rawle, for the defendants. At the present term, the unanimous opinion of the court was delivered to the following effect.

**By the Court.**—After stating the preceding transactions, and the several points made, the court left it to the jury to determine, on the first point, whether the deed made by Wirtz to one of his children, was, or was not, an act of bankruptcy: we are inclined to think it was.

As to the second point, we are of opinion, that this was not a sufficient debt to support the commission. No action of debt would lie upon this writing alone: it is no extinguishment, nor satisfaction. An insinul computassent, indeed, would lie; but that is a derivative action, recurring to the original account, which is prior to passing the act of assembly.

As to the third point made by defendants’ counsel, we are satisfied, that
it is competent to third persons, where their interest is affected, to take
advantage of the irregularity of the proceedings. Besides the numerous
cases cited in *Pleasants v. Meng*, 1 Dall. 380, and that case itself, see 2
Burr. 932. Whether a creditor, who has received a dividend, can object to
the commission, we will not say; but Doctor Moore, who never did receive
a dividend, certainly may object to it.

Let the rule for a new trial be discharged.

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**SCOTT v. CROSDALE.**

*Dower.*

Dower is barred by a sheriff's sale of the lands, under a *levare facias* upon a mortgage, executed
by the husband alone, after marriage.

This was an action of dower, brought in Bucks county, against the de-
fendant, who had purchased lands, sold by the sheriff under a judgment
obtained on a *scire facias* on a mortgage. The mortgage was executed by
the husband, but the plaintiff (his widow) was no party to it: and on the
trial, Justice Atlee reserved the point, whether the wife's dower was bound
by the mortgage?

*Sergeant,* for the plaintiff, contended, that there was a distinction as to
the effect of a sale under a *ft. fa.* and a *levare facias.* *That, in the
*128]* latter case, the act (1 Dall. Laws, 71–2) directs, that no greater estate
shall be conveyed than the lands are mortgaged for: and in this case, the
woman had not done any act to bar her estate in the lands. He added, that
in New Jersey, where the act of assembly was very similar, the wife was
always held to be entitled to dower.

*Wilcocks,* after stating that, at Chester, in the case of *Howell v. Lay-
cock,* it was determined, that a sale by an executor, to whom lands were
devised for the payment of debts, barred the widow's dower, would have
proceeded; but—

**BY THE COURT.**—The point has been too long settled, to be stirred now;
and judgment must be for the defendant.
made an improvement on a tract of land, which tract he afterwards exchanged with his brother, for the one in question, with a view to establish a permanent settlement for his family. The war, however, broke out soon afterwards; and there being a call for soldiers, he enlisted, on the assurance of his friends that they would take care of the premises for him. In the year 1775, the lessor of the plaintiff likewise went into Northumberland county, and obtained possession of the premises, by virtue of a contract in writing with the defendant's brother, in the nature of a lease, by which the plaintiff covenanted to make improvements for the benefit of the defendant. The lease was deposited in the hands of a third person; but the plaintiff's wife, by a trick, got it into her hands and destroyed it, in order to make way for a claim to the land, in the plaintiff's own right. The plaintiff having made considerable improvements, was driven away by the Indians, in the year 1778; and on the 3d of May 1785, he took out a warrant for the premises—the defendant's warrant being dated the preceding day. Upon a hearing before the board of property, there was a decision in favor of the defendant.

The argument turned principally on the construction of the 8th, 9th and 10th sections of the act of the 21st December 1784 (2 Dall. Laws 235), which give a pre-emptive right to those persons, and their legal representatives, "who had heretofore occupied and cultivated small tracts of land, &c., and by their resolute stand and sufferings, during the late war, merited that they should have the pre-emption of their respective plantations."

For the plaintiff, it was contended, that he was the actual settler contemplated by the law, having remained on the land, until he was driven off by the Indians; which brought him precisely within the favored description of settlers mentioned in the preamble of the subsequent act of the 30th December 1786 *(2 Dall. Laws 487), “Settlers who have been driven from their habitations, in the course of war, or have remained therein, and during the said time, with much suffering and at great risks.” The defendant could acquire no right, by merely clearing an acre of land, which was, in fact, a violation of the law; and consequently, he had no power to lease the premises. The "resolute stand and sufferings," which the legislature intended to favor, meant a residence and remaining upon the plantation claimed; defending the very spot from the enemy; and not a general enlistment in the army. The pre-emption was destined for the settlers who defended the soil; other rewards, donation lands, &c., were given to those who became soldiers. The plaintiff, therefore, was not in possession under the defendant; but as soon as he got possession of the lease (and how this was done is of no importance in law), he disavowed any such derivative occupancy, and asserted his own title.

For the defendant, it was urged, that the adverse construction put upon the act of assembly, was inconsistent with justice. The plaintiff was, in fact, the defendant's tenant; the possession of the former was the possession of the latter; and the law ought never to be so interpreted as to encourage fraud. Besides, a soldier is always considered to be resident at his home; he makes "a resolute stand" in the service of his country; and is fairly within the meaning of the legislature, expressed in the act already cited. But the act of 30th December 1788 (2 Dall. Laws 487), illustrates and en-
Nicholas v. Postlethwaite. (a)

Legacies charged on land.

Where a testator, having no personal estate, bequeaths several pecuniary legacies, and gives "all the rest and residue of his estate, real and personal," to his son, this makes the legacies a charge on the lands devised.

Where lands are sold, under a judgment against a residuary devisee, pecuniary legacies charged thereon, are payable out of the proceeds of sale. 1

John Davis, scissed of a tract of land, and having no personal estate, bequeathed several pecuniary legacies to different persons, and "all the rest and residue of his estate, real and personal" he gave to his son John Davis, whom he appointed executor, and who, after the testator's death, entered into the land. The plaintiff having obtained a judgment against the son, the land was sold to satisfy the judgment; and the question was, whether the legacies were a charge upon the land or not?

By the Court.—It is clear, that nothing is given to the residuary devisee, but what remains after payment of the legacies. These are a charge upon the testator's real estate. The money in the sheriff's hands must be first applied to the payment of these legacies, and the remainder must go to the plaintiff.

Referees accordingly were appointed to ascertain the balance due to the legatees.

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*Ricup v. Bixter et al. (b)

Construction.

A retrospective statute ought to receive a strict construction. 6

The defence set up in this action was a tender of continental money, in 1783. As the proof respecting the date of the bills was not clear, the defendant's counsel contended, that by the act of 3d April 1781, no more could be recovered than the value of the money tendered, reduced by the scale at the time of tender; and this, whether the bills were of an early or late date. 1 Dall. Laws, 880.

Shippen, Justice, in his charge to the jury, held, that the act of 1781 did not apply to this case. That it is an ex post facto act, and should be construed strictly; and though the legislature may have given certain powers to auditors (who seem to be a court of chancery, and can apply themselves to the conscience of the party), yet we are not to extend it further. A jury

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(a) Decided at Cumberland nisi prius.
(b) Tried at Berks nisi prius, before Shippen and Bradford, Justices, in October 1791.

6 A statute will not be construed to act retrospectively, unless the intent be indicated in clear and positive language. Oliphant v. Smith, 6 Watts 449; Mustin v. Vanhook, 3 Whart. 574; Neff's Appeal, 21 Penn. St. 249; Dewart v. Wardy, 29 Id. 113; Juniata Township, 81 Id. 301; Ihmsen v. Monongahela Nav. Co., 32 Id. 153; Alba Township, 35 Id. 271; Stockel's Appeal, 64 Id. 498; Philadelphia v. Passenger Railroad Co., 52 Id. 177; Chalker v. Ives, 55 Id. 81; Taylor v. Mitchell, 57 Id. 209; Hoch's Appeal, 72 Id. 58; People's Fire Ins. Co. v. Hartshorne, 84 Id. 453.
SUPREME COURT

Ingraham v. Gibbs.

ought to have been done, if it was intended to have the previous decisions reconsidered. If the plaintiffs mean to make it a point, they will have an opportunity so to do, at the return of the postea. We are all of opinion, however, that the interest during the war should be deducted; that is for seven and a half years.

Ingersoll and Tilghman, for the plaintiffs.

Sergeant, for the defendant.

Verdict accordingly. (a)

Bond v. Haas's executors.

Current money.

Parol evidence not admitted, to show what was meant by current money.

This was a scire facias on a mortgage, dated 15th August 1777, for the payment of 250l. at four per cent., current money of Pennsylvania, in one year. At the time the mortgage was executed, continental money was depreciated, and at three for one. The plaintiff insisted, that the whole sum should be paid in specie, and offered to prove that Adam Haas, in his lifetime, informed a scrivener, that the money he had received was as good to him as gold and silver; that it was so, in effect, to the plaintiff; that he was sensible that he ought to pay her specie, and desired the scrivener to draw a writing to secure it; and that Haas died soon after, before he had an opportunity of executing any instrument to secure it to the plaintiff. The defendant opposed the admission of this evidence: And—

By the Court.—This would be, in effect, altering the contract, and increasing the value of the money, in direct opposition to the act of assembly. It is settled in the case of Lee v. Biddis, (b) that such evidence shall not be received. The evidence stated, is not to explain the contract, but to prove a new and a different one: and if such an offer as is mentioned created any legal obligation, a different suit must be brought to enforce it. The witness, therefore, must be rejected.

The plaintiff, thereupon, suffered a nonsuit.

Ingraham, indorssee, v. Gibbs et al.

Bills of exchange.

If the drawer of a bill refuse to accept, and the payee return the first of the set to the drawer, the second cannot be subsequently indorsed over, so as to give a right of action thereon, to one who receives it, with notice.

This was an action brought on two bills of exchange; and upon the trial, the following facts appeared:—The defendants were the consignees of

(a) See Vattel, lib. 4, c. 2, §§ 22, 23.
(b) 1 Dall. 185. But see, likewise, Hollingsworth v. Ogle; Id. 267.

1 See post, p. 150.
defendants, as it might have been to any other person, with a desire that credit might be given for it; but if the credit was not given, the bill ought to have been returned to Schenckhouse; and the drawer's wrongfully withholding it, can never be allowed to destroy its obligation. As to the doubt, whether the action is maintainable on a protest for non-acceptance, Doug. 55, will effectually remove it; and we do not claim damages under the act of assembly (1 Dall. Laws, 23), but only the principal and interest.

*136]  **By the Court.—**The objection is, in our opinion, fatal to the action. The act of Schenckhouse, in redelivering the bill to the drawer, and desiring a remittance for the goods, must operate as a legal extinguishment of the bill. It was sent by the defendants as payment; Schenckhouse refused to receive it in that light; and accordingly, returned it to the drawer. From that moment, the bill was, in effect, cancelled; and Schenckhouse could not afterwards negotiate the second bill, so as to subject the defendants to an action upon it. The remedy of the real plaintiff, must, therefore, be founded on the original contract; and as we understand that an action in that form is now depending, the principal point of the controversy may be decided in that, without any expense or inconvenience.

On this opinion, the plaintiff suffered a nonsuit. (a)

JANUARY TERM, 1792.

*137]  **Hood's executors v. Nesbit et al.**

Barratry.—Deviation.

A mere deviation, without fraudulent intent, does not amount to barratry.

This was an action (tried at the sittings in Philadelphia in Nov. last) brought on a policy of insurance on the ship America, commanded by Captain W. Keeler, from Philadelphia, to, at and from Fuyal, against the de-

(a) Schenckhouse v. Gibbs et al., the action referred to in the report, was afterwards tried, in January term 1794, before the judges of the supreme court; and the only question agitated was, whether the defendants were liable for the amount of the bill remitted to the plaintiff, under the circumstances above stated?

Coxe and Ingersoll insisted, that the defendants, by mingling the interest of Schenckhouse with the interest of others, so as to deprive him of the possession and immediate remedy on Bassé & Soyer's bill, had rendered themselves liable for the loss that had happened, notwithstanding the general authority given to them, to make remittances in good bills of exchange. 1 Atk. 172, 234; Bull. N. P. 42–8; Cowp. 480, 227–8; 10 Mod. 109.

Ravens and Dallas contended, that the defendants had acted bond fide, within the spirit of their authority; and had done for Schenckhouse precisely as they did for themselves. Nothing more ought to be exacted from a factor than reasonable vigilance and strict fidelity. It is usual, that there should be one factor for several merchants; and if the vendee of all their goods fail, they must bear the loss. 10 Mod. 109; Molloy 493, 494; Cowp. 479, 496; Vin. Abr. 7; Price v. Ralston, ante, p. 60. Portner would always be regarded as a trustee for the parties, according to their proportions, and Schenckhouse might make him account.

The court left the cause to the jury, who found a verdict for the defendants.

1 s. c. 1 Yeates 114.
fendants, as underwriters. The jury found a special verdict; which, after stating the policy, the defendants' subscription, and the arrival of the ship at Fayal, on the 23d December 1785, proceeded thus: "And the said jurors further say, that about three weeks after the said William Keeler had so arrived at Fayal, in the said ship, he the said William Keeler, at the request of a certain Captain Barnes, on the suggestion of Duncan Ross, did, with and on board the said ship America, sail from the said island, in quest and pursuit of a certain sloop called the Fly, whereof the said Barnes was master; which said sloop had been run away with by the seamen belonging to her: and that the said William Keeler did return from the said pursuit, in the said ship, within eight days after she had sailed from Fayal aforesaid; and that the said ship afterwards, on the 31st of January 1786, was, by storm and tempest, wrecked upon the island of Fayal and totally lost. And the jurors further find, that the said W. Keeler, by his agreement with the said Captain Barnes, was to have received as a compensation for his services, in going with the ship America aforesaid, in pursuit of the said sloop, the sum of 100l. sterling; and that in going from the island of Fayal aforesaid, he had no view of, and did not intend, any exclusive profit or advantage to himself; but did intend that the benefit and advantage to be derived therefrom, should be for the owners of the said ship and himself. And whether the law be for the plaintiffs, &c., they submit, &c."

The cause was argued by Lewis and Sergeant, for the plaintiffs, and by Wilcocks and Ingersoll, for the defendants.

The plaintiffs contended, that the departure from the course of the voyage amounted to barratry, and could not be considered as a mere deviation. As the consent of the owners is not stated, it cannot be presumed, and in many of the cases, the want of consent is relied on as a principal ingredient in barratry. It is not necessary there should be a direct evil intention: luta culpa et cæssæ negligence will amount to a barratry. Park 95. Barratry is neglect of duty. Every wilful and inexcusable departure is a gross breach of duty, and amounts to barratry. Ibid. 93. It is said, he intended to benefit his owners as well as himself; but to construe this as an excuse, would be productive of fraud. The master may easily pretend great zeal for his owner's interests, and yet sacrifice them to promote his own. In the definition given by Park, it is said, p. 94, it must be "tending to his own benefit:" This does not mean exclusive benefit. The master runs no risk himself, by going out, but he might get 50l. by it; while he hazarded his owner's insurance, the mere premium of which was almost equal to the price he was to get, for giving chase to the Fly. The words of Park, p. 94, are "If it is for the benefit of his owners, and not for his own benefit, it is no barratry." But here, the departure was with a view to his own private advantage. He sacrifices the policy, wages, provisions and the safety of the ship, for a paltry expectation of private gain. A mere error might excuse; but here it is very different, and if the principle be established, there will be no security for owners. The cases put in the books, show that the principle contended for by the defendants is not sound. Deserting a ship is barratry. Park 93. "So, when the master of a ship defrauds the owners, by carrying the ship a different course." Post. Dict. His interest is out of the question. So, sailing out of port without payment of the duties, is barratry, though the master gains nothing by it: And Justice...
Buller seemed to think (Park 103, 63) that breach of an embargo (though perhaps done with a view to the owner's interest) was b erraty. But when he has his own gain in view, the case is stronger; nothing but pure intentions can purge the act: And in Vallejo v. Wheeler, Cowp. 143, stress is laid on the circumstance, that the master was acting for his own benefit.

On the part of the defendant, it was urged, that here was a plain deviation stated, and unless the departure was clearly an act of b arraty, judgment must be for the defendant. They said, that in all the cases respecting b arraty, some circumstances of fraud, gross negligence, or evil and criminal conduct towards the owners, were stated. 1 T. R. 323. It must be more than deviation; it must be something criminal. Park 93; 1 Post. Dict. 136, 214; Cowp. 154. All define it to be a trick, fraud or cheat upon the owners. The definition, in Park 94, is a good one; and we contend it must be for the exclusive benefit of the master to make it b erraty. There is no case which hints, that the master may not connect his own interest with that of the owners. In Stammers v. Brown, 2 Str. 1173, it must be something of a criminal nature, as well as a breach of contract. If he mistook honestly, the owners must bear the loss. The want of consent on the part of the insured is not sufficient of itself: so is Park 335. The owners abide by all *139] the misconduct of the master, but such *as imports fraud. There are some inaccurate expressions in the books, as that of "wilful deviation;" but they must mean criminal or fraudulent deviation.

The opinion of the court was delivered, on the 10th of January.

McKEAN, Chief Justice, after stating the material facts, said—This is either a deviation or a b arraty. The nature of b arraty seems now pretty well understood, and we think there ought to appear fraud in the master's conduct, before it is considered as b arraty. B arraty is a criminal act towards his owners, or an act done solely for his benefit, without the consent of the owners. We do not discover, in this case, any marks of criminal misbehavior, and the judgment must be for the defendants.

SHIPPEN, Justice.—It is a mere imprudence of the master, and for that the owners alone are answerable.

Y EATES, Justice, concurred, but gave no separate opinion.

BRADFORD, Justice.—As this is a mercantile question and divided a very respectable jury, I think it right, to state my opinion pretty much at large.

The special verdict states a voluntary departure from the due course of the voyage, without any necessity or just cause. This will, therefore, discharge the policy, unless the circumstances attending it, prove it to be (as the plaintiffs contend it is) an act of b arraty. Before I take notice of those circumstances, it will be proper to ascertain what is meant by b arraty. It has been often defined, and its general meaning seems now as well fixed, as that of any other term known in the law. From comparing these definitions, it appears, that the terms "villainy, knavery, cheat, malversation, trick, deceit, or fraud of the master," are used as synonymous with it. The adjudged cases, from that of Knight v. Cambridge (7 Mod. 230; 2 Ld. Raym. 1349), in 1724, down to that of Nutt v. Bourdieu (1 T. R. 323), in 1786, speak the same language. There is no case of b arraty, in which we may not perceive some fraud or criminal conduct in the master. Sailing out of port, without
be inconsistent with the general purity of the master's views. *Such was the case in Elton v. Brogden. On the other hand, the master may unite a small interest of his owner's, with a greater one of his own, yet we may discover a dishonest heart, regardless of their essential interests. In every case, therefore, of this kind, we must weigh every circumstance, and form our judgment from the impression of fraud, or fairness, which the whole transaction makes on our minds.

Taking into view the whole conduct of Keeler, I cannot discover any fraud or criminal conduct. Here was an act of piracy committed in open day: the pursuit of the Fly was, in itself, a meritorious action; and if Keeler had been the owner of the America, he would have been applauded for it. The whole mercantile world seems interested in the suppression of such villainy. He is solicited to employ his vessel on the occasion; he stipulates for a compensation; and though he expected to receive a part of it himself, yet that must have depended on the pleasure of his owners. It would have been their money, earned by their ship; yet the master might honestly expect, that they would approve his conduct and reward his exertions. It was a sudden thing; we cannot say that he knew of this insurance, or that he was aware of the consequences of his deviation. Here are no marks of knavery, nor even of a disregard to his owner's interests. It was an imprudence; and he is answerable for it to his owners; but the insurers are discharged.

For these reasons, I concur with the rest of the court, that judgment must be for the defendant.

CATON, assignee of the sheriff, v. McCARTY. 1

Practice.—Bail.

The filing of a declaration is not a waiver of special bail.

Levy had obtained a rule to show cause why the proceedings on the bail-bond should not be stayed, on the ground, that the plaintiff had accepted the defendant's appearance, by filing a declaration in the original action. This he contended was a waiver of bail, and cited Highm. 153, 157; Lilly Pr. Reg. 86; Barnes, 257; Rich. Prac. 132; Poph. 145.

Heatley, in reply, urged, that the English practice had never been extended here; and if it was, the declaration ought to have been delivered, before it could have had effect. 2 Term Rep. 112; 1 Crompt. 94; Impey Prac. 94; Rule B. R. 23, 24.

By the Court.—It has been the practice in Pennsylvania, to file declarations, before appearance. In the case of summons, the act requires that it should be filed —— days before the return-day. It has never yet been determined, that the filing a declaration is a waiver of bail. We have no such rule; *142 and unless *some substantial benefit is to be derived from adopting the practice contended for, the court will not alter the usual course.

Rule discharged.

1 S. C. 1 Yeates 108.
*Nesbit v. Pope.

Practice.

The entry of a continuance, by mistake, which is immediately discovered, and notice given, does not prevent the party from insisting on a rule for trial or non pros.

The defendant had, at a former term, obtained a rule to try, or non pros. At this term, the defendant’s counsel, not recollecting this, desired the plaintiff to continue the cause, which he agreed to, and the prothonotary entered a continuance accordingly: but, immediately after, discovering that he had a rule on the plaintiff, the defendant acquainted the opposite counsel with it, and gave notice that he should insist upon the rule. This day, the cause was called, and the defendant moved that it might be ordered on: the plaintiff objected; and insisted, that the entry of the continuance was conclusive.

By the Court.—Such an entry cannot be conclusive. This a mere mistake; and as it was immediately discovered, and notice given, no inconvenience arose from it. If the plaintiff had suffered anything by it, it might have been another matter: but here he could suffer nothing. If he was ready for trial, when the entry was made, he must be ready, when the mistake was notified to him.

Jones, qui tam, v. Ross.

Amendment.—Commission.

A declaration in a qui tam action is amendable.

On the execution of a commission, a paper intended to be given in evidence, must be proved before the commissioners, on oath.

This cause was set down for trial. Ingersoll, for the plaintiff, moved for liberty to amend the declaration, and stated it as a settled practice, even in qui tam actions.

The Chief Justice said, if you amend, the defendants will be entitled to an imparlance and costs.

Moylan, for the defendant. We cannot oppose the amendment, but we ask no imparlance. The plaintiff may amend at the bar, and we will go on to trial immediately.

Rule accordingly.

Same Cause.

In order to prove certain passengers, imported by the defendant into the state, to be convicts, and to have undergone punishment in the Spiel-House of Hamburg, in Germany, a commission to examine witnesses in that city had been taken out. This was returned by the commissioners, containing a written report of the names of the persons confined in the Spiel-House, in 1786, and of the offences for which they had been convicted, *certified by a clerk of the chancery, to have been signed by the late directors of the Spiel-House, in his presence, and that of the commissioners. The return was objected to, and—

By the Court.—This is not a good execution of the commission; the
from the payee, than from the indorser. But the possession of the bill and protest is evidence of an authority to demand its contents. *Morris v. Foreman*, 1 Dall. 193. It is *prima facie* evidence of property; and, as such, must be conclusive, until it is contradicted. 5 Burr. 2688.

For the defendant, it was answered, that in this action the declaration must state, that the plaintiffs had paid the indorsee, nor would the omission to do so, be cured by a verdict. Doug. 617. If it is material to allege the fact, it must be material to prove it; and the general rule is, that the party must produce the best evidence in his power. The possession of the bill and protest is merely presumptive; and from the very nature of the transaction, better proof must be in the power of the party. Even the acknowledgment of the obligor will not be received to prove his own bond; the attesting witnesses must be examined. In Id. Raym. 742, the case occurred; and it was there decided, that possession of the bill and protest was not sufficient, without producing a receipt from the subsequent indorsee; and this rule not only remains uncontradicted, but is recognised in Lovelass 177, where the author describes the proof to be given in an action like the present. With respect to the argument arising from the place where the bill was drawn, it is enough to observe, that though the *lex loci* may regulate the nature of the contract, it cannot prescribe the nature of the evidence to be produced in our courts in support of it.

The Judges now (January 1792) delivered their opinions *seriatim*, as follows:

**Bradford, Justice.**—This is an action brought against the acceptor of a bill of exchange, which had been several times specially indorsed, and the plaintiffs are the first of those indorsers. At the trial, the plaintiffs gave no direct proof of payment to the last indorsee, insisting that possession of the bill and protest was sufficient, or at least *prima facie* evidence of it. Whether it be so, or not, is the point in question.

It seems to be fully settled, in *Death v. Servonters*, Lutw. 885, *that* by a special indorsement of a bill of exchange, the indorser parts with his right, and discharges the acceptor as to any payment to him; and that he can regain his property only by taking up the bill, and making payment to the last indorsee. The same doctrine is laid down in *Brunetti v. Levin*, reported in Carthew 130, and afterwards, on error, in Lutw. 896, where it is held, "that if the bill has been specially indorsed by the plaintiff, he cannot recover, unless, at the trial, there be evidence of payment to the last indorsee." This payment, therefore, is a material part of the plaintiffs' case. They state it as such, in their declaration, and rightly; for it is clear, from the case of *Brunetti v. Levin*, that if it were not stated, the omission would be fatal. Carth. 130. Being a material fact, it must be proved.

The plaintiffs do not appear to deny this; but they contend, that possession of the bill is *prima facie* evidence of property in it. This is the case with bills payable to bearer, and sometimes, when the bill is payable to order. But among bills payable to order, there is a familiar distinction between those which are specially indorsed, and those which are indorsed in blank. Possession of the latter is evidence of title; and Ld. Mansfield assigns the reason in *Peacock v. Rhodes*, 2 Doug. 611. "Bills indorsed in
SUPREME COURT

FOXCRFT v. NAGLE.¹

New trial.

Under the rules of the supreme court, notice in writing must be given of an intended motion for a new trial.

Within the four first days of the term, Ingersoll and Tilghman moved for a new trial, on the point of a misdirection of the judge. Sergeant objected to the rule, no notice in writing of the intended motion having been given, as is required by the rules of the court. The counsel for the plaintiff then urged, that the point they wished to agitate was left open by the court, and reserved for argument in banc; at least, that they understood it so, and that they did not consider notice as necessary, where a liberty of removing the point was reserved in the presence of the parties at nisi prius. But at any rate, the mistake was a sufficient ground to dispense with the strictness of the rule. In 4 Burr. 2271, the mistake of the attorney induced the court to dispense with the four day rule. Sergeant.—In the rule of the K. B., there is a provision that such a motion may be made, after the four days, "on special leave being asked and obtained."

By the Court.—There was no point reserved on the trial of this cause. The court had no doubt in their minds; but as it was a great national question, we should have had no objection to a more solemn argument. We, therefore, told the jury, that if the plaintiff's counsel desired to have the question reconsidered, they would have an opportunity of moving it at the return of the postea. This motion is directly in the face of the rule, and cannot be sustained.

Rule refused.

CLAYTON'S Lessee v. ALSHOUSE.

Ejectment.

If a landlord mean to take defence, he ought to make himself a party to the record; otherwise he is not entitled to notice.

This cause was carried down for trial, at the last nisi prius, in Northumberland county; but the defendant refusing to confess lease, entry and ouster, the plaintiff was nonsuited.

¹ Wilcocks now moved to set aside the nonsuit, and to permit the cause to be tried, on an affidavit of Evan Owen, in which it was set forth, that the deponent was, in fact, landlord of the premises in dispute, and conducted the defence; that he had no notice of the trial; that he had been obliged to attend the argument of another cause, at Philadelphia, about the same time; and that he did not previously know of the holding of a court of nisi prius, in Northumberland. But—

By the Court.—Notice of trial was given to the defendant in the cause; and the nonsuit has been regularly entered. It was not necessary to give notice to Evan Owen: for, wherever a landlord means to take defence, he ought to make himself a party on the record.

The rule refused.

¹ a. c. 1 Yestes 108. For a former report of this case, see ante, p. 132.
MARCH TERM, 1792.

BARR v. CRAIG. (a)

Assumpsit for money had and received.

Assumpsit for money had and received is an equitable action; under the general issue, the defendant may go into all the equity of the case; and if he may, in good conscience, retain the money in his hands, there can be no recovery.

The circumstances of this case were as follows: Henry Banks, of Virginia, wishing to remit a sum of money to James Barr, the plaintiff, requested the defendant (then in Virginia, and to whom Banks was also indebted, in partnership with Preeson Boudoin) to take a charge of an order for 800l. on Mease & Caldwell, of Philadelphia, upon the terms specified in the subjoined receipt, which the defendant gave upon the occasion.

"Received, Richmond, 21st January 1783, of Henry Banks an order of Daniel Clarke, Esq., on Mease & Caldwell, for the sum of 800l. Virginia currency, on an insurance policy of the schooner General Wayne; which I promise to return him in ten weeks, or to account with Preeson Boudoin, for one half, and James Barr, of Philadelphia, for the other.

(Signed) JAMES CRAIG, Sen't."

By virtue of this order, the defendant, on the 4th of June 1784, received 77l. 7s. 0d.; and the present action was brought to recover one-half of that sum, with interest, as money had and received to the use of the plaintiff. But, besides a general count for that purpose, the declaration contained a special count, setting forth the particulars of the case, the order, and the receipt of the money. It likewise appeared, that the plaintiff having sued Henry Banks, Standish Forde became his bail, and as a means of indemnifying Forde, Banks deposited with him a certificate for £8000. In relation to that action, an agreement was afterwards made, on the 24th of October 1780, between Philip Barber, the attorney in fact of Henry Banks (who had also an assignment), and the plaintiff, to this effect—“that judgment should be entered in favor of the plaintiff, for the whole amount of the debt; but that he should only receive 500l.; that he should thereupon discharge Forde from his obligation as bail; and as to the residue of his demand, he should wait the issue of a suit against the defendant, Craig, and divide whatever might be recovered from him, with P. Barber, Banks’s attorney.” This agreement was made, after Barr’s attorney had discovered, that the cause of action was a joint debt due to James and Robert Barr, though the action was instituted in the name of James Barr only. But judgment was, accordingly, confessed, in April term 1790, for the whole sum claimed by Barr, to wit, 1355l. 17s. 8d.; a ca. sa. thereupon issued; and Forde the special bail, having then sold the certificate deposited with him by Banks, paid the full amount of the judgment with interest and costs, to the sheriff, reserving the balance to answer some other claim.

(a) At nisi prius, before the Chief Justice, Shippen and Bradford, Justices.
against Banks; the sheriff, on the 31st of July 1792, paid it over to the plaintiff, Barr; but Barr, on the same day, after deducting 500l., paid the balance, 887l. 15s. 2d., to P. Barber, in compliance with the terms of the agreement on which the judgment had been confessed. It further appeared, that Banks & Boudoin were indebted to Craig, in a sum exceeding the amount received under the order upon Mease & Caldwell; and that in September term 1788, Craig had issued a foreign attachment against Banks & Boudoin, which was served upon Forde, as garnishee; and in which judgment had been obtained, but no seire facias had issued.

The cause was tried, on the general issue, at the Nisi Prius, in March 1792, before the Chief Justice, Shippen, and Bradford, Justices; when M. Levy and Ingerson argued for the plaintiff; Randolph and Lewis, for the defendant.

The defence rested on three propositions: 1st. That Henry Banks was to be considered as the person really entitled to receive the money; 2d. That the defendant had a right to retain it in satisfaction of the judgment on the foreign attachment; and 3d. That the action was not supported by the evidence; *inasmuch as the only proof of the plaintiff's interest [*153] is the receipt given by the defendant for the order on Mease & Caldwell, which is not immediately set forth in the special court; and, affording an action of a higher nature, is no evidence on the general count for money had and received. Bull. N. P. 145, 131. Nor could any person bring this action, who was not a party to the assumpsit. Esp. 105; Cro. Eliz. 369.

The plaintiff's counsel, on the other hand, contended, 1st. That the money received by Craig, was the money of Barr; and the moment it was received, it was held in trust for Barr's use: to retain it, is contrary to Craig's own promise, and to the principles of equity; and a promise to account, is tantamount to a promise to pay. 1 Esp. 23; 1 Str. 264, 626. 2d. That a partnership debt cannot be set off against a separate debt; and, therefore, as Craig was the creditor of Banks & Boudoin, he could not discount his demand from the separate property of Banks; which was the present case. 3d. That there was nothing collusive or fraudulent between Banks and Barr, in relation to the judgment. The latter, finding that his action was erroneously instituted, was obliged to make use of some address, even to secure immediate payment of a part of an honest debt; but the right and the remedy for the balance were clearly left open. 4th. That the action is well brought, and ought to be sustained. Yelv. 23–4; 1 Vent. 318, 332; Bull. 133; Doug. 139; Comp. 443; 2 Bl. Rep. 1269; Ld. Raym. 303.(a)

The Chief Justice delivered the following charge to the jury, after stating the evidence on both sides of the cause.

McKean, Chief Justice.—The plaintiff had, unquestionably, a good cause of action, at the time of instituting his suit: But, it appears that, at that time also, the defendant had a good cause of action against Henry Banks; and accordingly, attached certain moneys belonging to Banks, in the

(a) By the Court—The form of the action need not be labored by the plaintiff's counsel.
hands of Forde, who was the special bail of Banks, in another action, brought against him by James Barr, the present plaintiff. Judgment being entered, and a ca. sa. issued in this last-mentioned action, the bail became liable for the debt; and accordingly, we find, that Forde paid the amount, with costs, to the sheriff; who paid it over to the plaintiff, and took a receipt in full. This, then, appears to be complete satisfaction; and the plaintiff apparently ought never to recover more even from Banks; unless, perhaps, the costs accrued in the action now trying, before the payment by Forde in the other action; as in the case of several suits against the maker and indorsers of the same promissory note.

But after such proceedings, what reasonable ground can be alleged, why Barr should recover the money in question from Craig, to whom Banks was justly indebted? It is said, that the arrangement permitted Barr to take no more than 500£ out of the deposit in Forde's hands: but surely, the act of Barr cannot prejudice the right of Craig; and Craig, by virtue of the foreign attachment, was entitled to all the property belonging to Banks in Forde's hands, beyond what was necessary to satisfy the judgment for which Forde was bound, and his own bond fide claim. Craig had a lien upon the whole money: it was, in effect, his own. Since, therefore, Barr took the whole amount out of Forde's hands, by virtue of his judgment, and so discharged Forde from his obligation as garnishee in Craig's foreign attachment, it is consonant with every principle of law and equity, that the receipt of Barr should avail Craig, as a full discharge from the present demand. Either Barr received all the money for himself, or he did not: in the former case, this action cannot be supported; and in the latter, he has withdrawn, under color of his judgment, a portion of Craig's funds, for which he must be answerable in an independent suit; or the amount may be set off against the present demand. I impute no fraud to the plaintiff; but his secret agreement with Barber, however honest, cannot affect the defendant. It appears, indeed, that four creditors were striving, with legal vigilance, to obtain a legal advantage; and the only question is, who has succeeded? In the opinion of the court, the plaintiff must, on this occasion, be considered as having received the whole debt that was due to him from Banks; and the original consideration of the debt, on account of which the order was given, is extinguished in the judgment.

Bradford, Justice.—If the plaintiff recovers, I think it must be upon the count for money had and received: and it appears to me, that the plaintiff had a good cause of action, at the commencement of the suit. He received this money, under an engagement to apply it to the payment of the debt due to Barr. He was merely a trustee: and while the debt was unsatisfied, the interest continued. But, I conceive, that as soon as Barr's demand is extinguished, the trust ceases: and in such a case, Barr, in his own name and for his own use, has no longer a demand on this money. This is an equitable action; the defendant, under the general issue, may go into all the equity of the case; and unless it appears, that he cannot in conscience and equity retain the money, unless, ex aequo et bono, he is bound to refund it; the verdict must be for him. Considering that Banks is insolvent, and that he is indebted to Craig, I cannot say, that it would be unconscionable to retain this money, after Barr's debt is satisfied.
*Now, it appears; that all Barr’s demands against Banks were liquidated, and included in the judgment confessed in 1790; that judgment is satisfied, and it is legally discharged on record: the whole amount of the debt and costs was actually paid into Barr’s hands.

But it is said, this judgment was, by a previous agreement, to operate in Barr’s favor, to the amount of no more than 500L; the balance was paid to Banks’s attorney; and therefore, Banks is still indebted to Barr. This may be true between the parties; but how does it operate as between Forde and Craig? For the law will not suffer Barr to give this transaction one operation upon Craig, as to himself; and another as to Forde. Here, the money in Forde’s hands was attached, and judgment obtained. If Craig proceeds against Forde, the garnishee, Forde will show the judgment at Barr’s suit, and that he was legally compelled to pay above 1400L, by virtue of that proceeding. This will be an answer to Craig’s demand. And why? Because it is a payment and a discharge of a regular judgment. Now, if the garnishee can hold up this to Craig, as a real satisfaction and payment of a just debt, Craig can hold it up as such to Barr. No man will be allowed to blow hot and cold. If Barr received this money on account of his judgment, he had a right so to do; but then his debt is extinguished. If he did not receive it on this account, then he had no right to it at all—887L, on which Craig had a lien, was wrongfully received; and Craig may consider it as money received to his use, and set it off in this action. Suppose, Craig had sued Barr for this 887L, how could he defend himself? By insisting that there was a bond fide debt due from Banks; and that he received it in payment and discharge of the judgment. Then, in this action, he shall not be allowed to deny, what he must affirm in that. If only 500L had been all that was due to Barr, and yet, for the purpose of protecting the money from the attachment, a judgment for 1300L had been confessed and the money received, I think Craig could have recovered it from Barr; and yet, has the case, as the plaintiff represents, this very aspect. Here is an action, in which judgment could never have been recovered; judgment is confessed for 1300L; though 500L is really to be paid to Barr, the residue is withdrawn from Craig, and paid to Banks. Upon the whole, the plaintiff is reduced to this dilemma: either it is a full payment and discharge of his debt; or he has unconsciously received 887L, on which Craig had a lien, and for which he is accountable to him. In the first case, his cause of action is extinguished; in the latter, Craig’s demand against Barr, exceeds Barr’s demand against him. In either case, the defendant ought to have a verdict.

Verdict for the defendant.

DUFFIELD v. STILLE.¹

Mesne profits.

The plaintiff in ejectment, after a recovery, may maintain an action for mesne profits, though he has parted with his title, by deed of bargain and sale, with special warranty.

This was an action for mesne profits, after a recovery in ejectment. It appeared, that subsequently to that recovery, the plaintiff had conveyed

¹ s. c. 1 Yeates 154.
Bank of North America v. McKnight.

ment might be affirmed for part, and reversed for part. 2 L. Raym. 843; 4 Id. 1534; 11 Co. 56. Besides, this was a reference, where niceties were dispensed with. It is assigning that for error, which is for the plaintiff's advantage.

By the Court.—We are here upon a point of practice. The usage of referring ejections, as well as accounts, is very ancient; and it has been the constant usage to confirm awards, although no damages or costs are found. It would shake many judgments, were niceties to prevail.

Judgment affirmed.

Stewart et al. v. Ross.¹

Commission.

Where both parties join in a commission, the commissioners on both sides attend, and the plaintiffs are present at the taking of the depositions, they cannot object that the witnesses have not answered all the interrogatories.

A commission was issued, on the part of the defendant, and various interrogatories filed, designed to be put to different witnesses. The return of the commission was signed by all the commissioners; and it appeared, that the plaintiff was present at the taking of the depositions; but, to certain of the interrogatories, no answers were returned by some of the witnesses, and those which were answered by one witness, were not answered by others. The plaintiff objected to the reading the commission: But—

By the Court.—Had the execution of this commission been ex parte, it would not only have been informal, but substantially exceptionable. As it is returned, however, by the commissioners on the part of the plaintiff, as well as by those on the part of the defendant, it is to be presumed, that the witnesses knew nothing about the subject-matter of the interrogatories, to which no answer is returned. At any rate, it is a waiver of the right which the plaintiff had to the answer of the witness; and on that ground, we hold the evidence admissible.

Bank of North America v. McKnight.²

Notice of non-payment.

If due notice of the non-payment of a promissory note be not given, an indorser is discharged.

The defendant was sued, as indorser of a promissory note drawn by S. Sidman, on the 10th February 1785, payable in forty-five days. Notice was given to Sidman, on the day it became due, and to McKnight, four or five days after; which the defendant now contended was too late.

By McKean, Chief Justice (the other judges declining to give any opinion, on account of their interest in the bank).—Before the revolution, it was not usual to give notice to the indorser, or even to call on the maker, as soon as a note became due; it would have been considered as harsh and unreasonable. But since the establishment of the bank, a rule has been intro-

¹ s. c. 1 Yeates 148. ² s. c. 1 Yeates 145.
cited then is in point. This is not the estate of Charles Hamilton that our execution is levied on: the opinion of Justice Shippen, in 1 Dall. 371, is full to this point.

As to second point, the powers of the supreme court are the same as those of the king's bench, and the lien is commensurate with its jurisdiction. 1 Lilly Ab. 509; Cro. Jac. 240. It has been the general understanding, that judgment in the supreme court, in a cause removed, bound land in all the counties of the state.

On the other side, it was said, that as the judgment was not executed before the bankruptcy, the judgment-creditor had no right to come against the purchaser. If it had not been for this purchaser, it is clear, he must have come in with the rest of the creditors; and it is not reasonable, that he should defeat the purchase, to benefit himself. So that his claim is both under, and in opposition to, the purchase. The distinction taken between legal and equitable estates cannot be the principle of the case in P. Wms.; for the consequence of that would be, that he who has the legal estate would be in a worse situation, than he who has only the equitable estate.

It was also said, that the analogy between the court of king's bench and the supreme court, was not perfect. This is a judgment in a cause removed, which can only be tried in the county from whence it is removed, and the whole purpose of removing is to bring the cause before other judges, and not to enlarge the effect of the judgment. This is illustrated by the fiction *160 which authorized the issuing a test. fl. fas. Besides, no case is produced to show, that if a *cause be removed from an inferior court in England, into the king's bench, the judgment will bind generally.

The Court thought, that the first point had been fully decided, in the two cases cited by the counsel for the plaintiff, from P. Wms. and Dallas's reports. The second they held under consideration, in order to inquire, what had been the practice in other counties; and being satisfied in that respect, in September term, they were all of opinion, that a judgment in the supreme court, in a cause removed thither from any inferior court, was a lien on all the lands which the defendant had in the state. (a)

Having been of counsel in this cause, Justice Bradford gave no opinion.

(a) Mr. Hale Graham, an eminent conveyancer, held, that these judgments in the supreme court did not bind lands generally; and it has not been usual for persons living in the country, to apply to the prothonotary of this court for lists of judgments; which Mr. Bird, on being asked by the court, confirmed. 1

1 See act 20th March 1799, § 14; 3 Sm. Laws 358.
Ross et al., executors, v. Rittenhouse.¹

Admiralty.—Judges.—Bond.

Jurisdiction in cases of prize, and of everything incidental and consequential thereto, is in the admiralty.

No action will lie against a judge, for an act done in his judicial capacity.

Non-payment at the day, is a forfeiture of a counter-bond.

In this cause, a verdict was taken for the plaintiff, subject to the opinion of the court on a case stated. After argument, the judges recapitulated the facts and arguments of counsel, and delivered their opinions seriatim, in the following terms:

McKea[n, Chief Justice.—This case is, in brief, as follows: The British sloop Active had been captured as prize, on the high seas, in September 1778, and was brought into the port of Philadelphia, where she was libelled in the court of admiralty of the state, held before George Ross, Esq., the then judge, on the 18th day of the same month. The four persons for whose use this action is brought, claimed the whole vessel and cargo, as their exclusive prize; but Thomas Huston, master of the brig Convention, a vessel of war belonging to the state of Pennsylvania, claimed a moiety for the State, himself and crew; and James Josiah, master of the sloop Gerard, a private vessel of war, claimed for himself, owners and crew, a fourth part, allowing a fourth for the four persons before named. All the claimants were citizens of the United States. The libels were tried by a jury, on the 15th of November 1778, and a general verdict given, in the proportions above mentioned, which was confirmed by the sentence of the court.

Gideon Olmstead and the other three persons, were American mariners on board the Active; they had risen upon the master, and confined him and the other mariners in the cabin, where a contest was kept up for the command of the vessel. The Convention and Gerard came up with her, and the question was, whether the four American mariners had subdued the rest of the crew, before these vessels came in sight; that is, whether hostilities had then ceased? The jury were of opinion, they had not, and gave the verdict accordingly.

Gideon Olmstead and the three other mariners appealed from the sentence to the court of appeals of the United States, which, on the 15th of December following, reversed the sentence of the judge of the admiralty, and decreed the whole to the appellants. The judge refused obedience to the decree of reversal, and paid a moiety of the net proceeds of the prize into the treasury of the state, taking a bond of indemnity from the defendant in this action, as treasurer of the state; upon which bond, this action is brought. The executors of Judge Ross, the obligee, having been previously sued in the court of common pleas for the county of Lancaster, in this state, for the

¹ s. c. 1 Yeates 443.
money so paid, and judgment being obtained against them by default, without any knowledge of the defendant:¹ thereupon, several questions have been made, which may be stated as follows:

1st. Had the court of appeals jurisdiction to investigate facts, after a trial and general verdict by a jury, and to give a contrary decision, without the intervention of another jury?

2d. Had the court of common pleas of Lancaster county jurisdiction in the action by Olmstead and others, against the executors of the judge; or should not the decree of the court of appeals have been carried into execution by that court, or the court of admiralty, without the aid or interference of any common-law court?

3d. Can an action be maintained on this bond, the condition whereof is virtually to disobey the court of appeals, and the laws of the land, if that court had of right a power to decide contrary to the general verdict of a jury? And can the plaintiffs, without having defended, or given notice to the present defendant, of the suit in the court of common pleas, support an action on this bond?

I conceive it proper to premise, that I took notice, at the time this action was first brought to trial in this court, "that when the business was before the court of appeals of the United States, in December 1778, I had the honor to be President of that court; but declined sitting, on account of my connection with this state as Chief Justice, and otherwise; and that the same reason still subsisted. That the next thing to giving a righteous judgment, was to endeavor to give general satisfaction; which circumstance might not probably be attained by our decision of the present controversy, both court and jury being in some measure interested, as they were all citizens of Pennsylvania. For these reasons, I expressed a wish, that some mode might be adopted for trying the cause in the supreme court of the United States." This proposition was then assented to, and a juror withdrawn; but, it seems, our expectations have been disappointed, and we are obliged, at last, to decide the controversy.

To determine the first question, we must take into consideration the act of congress for erecting tribunals competent to determine the propriety of captures, passed the 25th November 1775, the fourth section of which is in these words:

"That it be and hereby is recommended to the several legislatures in the United Colonies, as soon as possible, to erect courts of justice, or give jurisdiction to the courts now in being, for the purpose of determining concerning the captures to be made aforesaid, and to provide, that all trials in such case be had by a jury, under such qualifications as to the respective legislatures shall seem expedient." The sixth section provides; "that in all cases, an appeal shall be allowed to the congress, or to such person or persons as they shall appoint for the trial of appeals, &c."

The act of general assembly, passed the 9th of September 1778, entitled "an act for establishing a court of admiralty," allows appeals from that court, in all cases, unless from the determination or finding of the facts by the jury, which was to be without re-examination or appeal.

¹ For a further history of this case, see Olmstead's Case, Bright. Rep. 9; and United States v. Bright, Ibid. 19 note.
The congress, on the 15th of January 1780, resolved (inter alia) "that the trials in the court of appeals be according to the usage of nations, and not by jury." This has been the practice in most nations, but the law of nations, or of nature and reason, is, in arbitrary states, enforced by the royal power, in others, by the municipal law of the country; which latter may, I conceive, facilitate or improve the execution of its decisions, by any means they shall think best, provided the great universal law remains unaltered. Now, why may not a fact, respecting the capture from an enemy by citizens of the same state, and in which question no foreign nation or person is concerned, be determined by a jury, as well as in other cases? This mode of ascertaining a fact done on the high seas, to wit, who were the captors of a prize, when *the contending parties are all citizens or subjects of the same country, seems to be as reasonable, as in disputes about property acquired on land. I confess, I do not see how the law of nations is counteracted or infringed by it.

In England, if piracy was committed by a subject, it was held a species of treason, being contrary to his allegiance by the ancient common law; if by an alien, it was held to be felony. Formerly, it was cognisable by the admiralty courts, which proceed by the rules of the civil law; but the statute 28 Hen. VIII., c. 15, established a new jurisdiction for this purpose, which proceeds according to the course of the common law. Here is a precedent of an act of parliament, changing the common mode of trial in Europe and introducing the trial by jury, which remains in force and practice to this day. If this can be done, where life is the stake, à fortiori, it may be done in matters of meum et tuum.

It, then, appearing to me, that the congress and legislature of Pennsylvania, had power and authority to make the alteration in the mode of trial of facts litigated between citizens, it remains to be inquired, whether the verdict in the present case was capable of re-examination by the court of appeal, without another jury. The genius and spirit of the common law of England, which is law in Pennsylvania, will not suffer a sentence or judgment of the lowest court, founded on a general verdict, to be controlled or reversed by the highest jurisdiction; unless for error in matter of law, apparent upon the face of the record. 3 Black. Com. 330, 379; 1 Wils. 55. This is enforced by the act of assembly of the 9th of September 1778, in clear and express words, in the very case under consideration; which act was passed in compliance with the act of congress of the 25th November 1775, and allows an appeal in all cases, unless from a verdict of a jury; having a reference to the subject-matter, and meaning that the facts should not be re-examined or appealed from; but that an appeal might be made, notwithstanding, with respect to any error in matter of law. The advantage of nihilo voce evidence over written, in the investigation of truth, will hardly be controverted at this day in the United States; and the court of appeals had not the opportunity of seeing the witnesses on the trial, or of so well knowing the credit due to them, respectively, as the jury.

For these reasons, and others which I shall omit for the sake of brevity, I am sorry to be obliged to say, that, in my judgment, the decree of the committee of appeals was contrary to the provisions of the act of congress and of the general assembly, extra-judicial, erroneous and void. I am strengthened in this opinion, by the true construction of the resolve of congress of
the 15th January 1780, to wit, that the trials in the new court of appeals should be according to the usage of nations, and not by jury; which implies, that the court of appeals, prior to this, had, or ought to have, proceeded by jury-trials. Ad questionem facti, non respondent judices, ad questionem juris, non respondent juratores. 1 Inst. 155 b.

A- my opinion on the first question is in favor of the defendant, it will appear unnecessary to say anything to the other points; but as they have been strongly insisted upon, I shall briefly notice one of them. It rather seems to me, that the appellants had no other way of obtaining the execution of the decree in their favor, but by the aid of the court of appeals, or of admiralty, and no court of common law has any jurisdiction in the case. Douglas 572; 3 Term Rep. 344; 4 Ibid. 382, 400; 1 Dall. 221; 1 Wils. 211. And also, that an action will not lie against a judge, for what he does as such. Cro. Eliz. 80, 397; 1 Mod. 184, 185; 2 Ibid. 218; 12 Ibid. 388, 391; 1 Ld. Raym. 465; 2 Ibid. 767; Salk. 397.

Shippen, Justice.—This is a suit brought on an obligation from the defendant to the plaintiff’s testator, for the sum of 22,000l., on a special condition for the repayment and restitution of the sum of 11,496l. 9s. 9d., paid by the said George Ross, the judge of the state court of admiralty, to the defendant, treasurer of the state of Pennsylvania, as the share and dividend of the said state, in and out of the prize sloop Active, according to the verdict of the jury, on the trial of the same sloop, in the admiralty court of the said state, in case the said George Ross should thereafter, in due course of law, be compelled to pay the same, according to the decree of the court of appeals, in the case of the said sloop Active, and for the indemnification of the said George Ross from all actions and demands, which might arise on account of his having paid the said money to the defendant.

As a foundation for the present suit, the plaintiffs produced a record of a recovery in Lancaster county against them, for the sum of 3248l. 4s. 7½d., at the suit of Gideon Olmstead, Artemus White, Aquila Rumsdale and David Clark, in an action of assumpsit, for money had and received by the testator, George Ross, to the use of them the said Gideon Olmstead, and others. The judgment appears to have been taken by default, and the damages assessed by a jury of inquiry.

It is stated in the case, that the defendant had no notice of this recovery, until after the final judgment. It, therefore, seems to have been agreed, that whatever defence the defendant might have made, if he had been privy to that action, he may avail himself of in this. Two principal questions arise in the case.

1st. Whether the court of appeals or congress were competent to decide the question of prize, and the consequent question, who were the captors to whom the prize should be adjudged, contrary to the verdict of the jury, in the state court of admiralty?

2d. Was the action of Olmstead and others, against the judge of the admiralty, for the money lodged in his court, in consequence of his own decree, cognizable in the court of common pleas in Lancaster county?

As to the first question, I own, I am not convinced, that the sovereign power of the nation, vested by the joint and common consent of the people
verses his judgment, and directs a different distribution. The judge below refuses to obey the sentence, and persists in distributing the proceeds of the prize agreeable to his own decree. A suit is brought here, to compel the judge to perform the decree of the superior court. Was the case or question of prize at rest? or was there not something now to be done by the superior court to enforce the sentence? Can ours be a proper court to decide between the sentences of two contending courts of admiralty, or to enforce the sentence of either? It is in vain to say, the times were such, that the supreme court could not, or would not, proceed to extremities with the judge of the inferior court. We are not authorised to aid a defective or unwilling jurisdiction, by assuming an extraordinary power, unknown to the law. Can a judge, in the execution of his own judgment, although contrary to that of a superior court, be considered as in the situation of an agent receiving the money of his constituents? Or, if, by any strained construction, he could be called the agent of those in whose favor he decrees, can he be sued as the agent of those against whom he decrees? In whatever light I view this question, I am satisfied, that the court of common pleas was incompetent to carry into effect the decree of the reversal of the superior court of appeals, and that an action for money had and received, against the judge who distributed the money according to his own decree, could not be sustained in a court of law.

Yates, Justice.—On the statement of facts in this case, three points have occurred.

1st. Whether the court of appeals of the United States had jurisdiction in the case of the sloop Active?

2d. Whether the court of common pleas at Lancaster, had jurisdiction in the action by Gideon Olmstead and others, against the now plaintiffs?

3d. Whether the plaintiffs are damned so as to warrant the present proceedings, under all the circumstances of the case? I will consider the different points, inversely.

On the 3d point, I am satisfied by the authorities cited by the plaintiffs' counsel, that there is sufficient proof of a damnification, to warrant the suit in a common case. The non-payment of money at the day, is a forfeiture of a counter-bond. 1 Vent. 261; Cro. Eliz. 672. Putting the obligee in danger of being arrested, is a damnification. 3 Bulst. 233; 5 Co. 25; Cro. Jac. 340.

It was admitted, indeed, on the last argument, that the proceedings at Lancaster should be considered as evidence of a damnification; but that the defendant should be let into a full defence in this action. No notice having been given to this defendant of the institution of the suit against the now plaintiff, he is not estopped from saying, that they were not bound in the former action, to pay the money.

On the second point, it has been insisted by the defendant's counsel, that the courts of admiralty having exclusive jurisdiction in cases of prize and their consequences, the common pleas of Lancaster could have had no cognizance of the action commenced by Gideon Olmstead and others.

In the famous case of Le Caux v. Eden, Willes, Justice, says: "Where the injury is the necessary and natural consequence of the capture, the court
of admiralty has the sole and exclusive jurisdiction." Doug. 579. Ashurst, Justice, observes; "where the admiralty has jurisdiction of the original matter, it ought also to have jurisdiction of everything necessarily incidental." Id. 580. Buller, Justice, in a very elaborate argument, infers from all the adjudged cases, "that the admiralty has a jurisdiction on the question of prize or not prize, and its consequences, and that the common-law courts have none." Id. 587, 590. And in Smart v. Wolff, the words of Judge Buller are, "Every case that I know on the subject, is a clear authority to show, that questions of prize and their consequences are solely and exclusively of the admiralty jurisdiction." 3 T. R. 344.

In Lord Camden et al. v. Home, it is adjudged, that the prize courts, and courts of commissioners of appeal, have the sole and exclusive jurisdiction of the question of prize and no prize, and who are the captors. 4 T. R. 382.

In Doane's administratrix v. Penhallow, and at 1 Dall. 221, Mr. President expresses himself thus: In this case, "the validity of the sentence of the court of appeals is disputed. If we say, it is valid, we, in effect, say, the brigantine is no prize; if otherwise, we say she was a prize. We have clearly no authority to say either the one or the other." And again, "this is an action to carry into execution the sentence of the court of appeals, which we have no authority to do, that being the proper judicature to carry into effect its own sentences."

These adjudications militate strongly against the jurisdiction of the court of common pleas of Lancaster county. The cause of action there, was "the immediate and necessary consequence of the vessel's being taken as a prize." 1 Dall. 221. It was, in short, a demand instituted by the plaintiffs, as sole captors of the sloop Active.

But it has been contended by the plaintiffs' counsel, that here all parties affirm the same thing, to wit, that the sloop was a prize, and that question cannot now possibly arise; which is said to distinguish it from the several cases cited. And for this purpose, Henderson v. Clarkson, determined in this court (post, p. 174) is quoted; where the court held, that an agent for seamen might recover, at common law, the prize-money due under the decree of the court of admiralty of Pennsylvania.

I find from my notes, that the circumstances were as follows: The plaintiff was appointed agent for forty-three seamen on board the privateer brig Holker, to receive their prize-money. The defendant was marshal of the court of admiralty of Pennsylvania, where two of the prizes were libelled, condemned and sold. The plaintiff, on the 27th December 1781, gave a bond to the commonwealth in 250£ penalty, conditioned to account faithfully with the seamen, and to pay over the shares unclaimed, within one year, to the use of the corporation of Contributors to the Pennsylvania Hospital. The judge of the admiralty, on that day also, issued a writ to the defendants, to deliver over the goods and money due to the owners and seamen, or their agents, on the different prizes; to which he made return, that the goods and money were ready to be delivered over. That suit was brought to recover the prize-money due to the plaintiff's constituents. The marshal had paid a considerable part, and rendered his account, but some of the items therein were disputed. The court, on full argument, resolved, that the agent might, as a common head or centre for the captors and hospital, under the right acquired by the acts of assembly of the 8th March, and 22d September

2 Dall.—10 145
1780, institute a suit in his own name, as the captors themselves might have done; and as the question respecting "prize or no prize" could not come into controversy, he might recover the money due to them by the admiralty decree; they having a vested interest therein, under *the acts of congress and the legislature. The marshal had returned to the judge, that he had the goods and money ready to be delivered to the captors, or their agent; and this was held to amount to a written promise to pay the same to the plaintiff, Henderson, as agent of the seamen. *(a)

The two cases are not analogous; they possess distinct prominent features: In the former case, there was no question, who were the captors, or how the booty was to be divided; there were no discordant decrees of different marine courts; no dispute respecting the constitutional powers of the judicature which pronounced the final decree. Here, they all fully exist; and a common-law court at Lancaster was called on, to carry into execution the decree of the court of appeals, against the executors of the state judge, and in derogation of the decree he had given, sanctioned by the verdict of a jury.

On the first point, it is not essentially necessary to give an opinion, whether, if the resolve of congress had been absolute and imperative, instead of being barely recommendatory, as to the establishment of courts of admiralty in the different states, and the laws of any one state had been repugnant thereto, such resolution would be supreme, and control the law of the individual state. Nor shall I attempt to define the former powers of congress, by fixing how far they reached, anterior to the confederation; which was sent to the different states for ratification on the 17th November 1777, and finally acceded to by Maryland on the 1st of March 1781. I am, however, compelled to say, that the powers of congress must necessarily be supposed to have been co-extensive with the great objects which America ther. had in view, and competent to protect and advance the united interests of the whole. It is sufficient, in my idea, for the decision of the case before us, to observe, that the present suit resting on the judgment in Lancaster county as its basis, if the then plaintiffs were not legally entitled to recover against the executors of Mr. George Ross, the action now before the court is not sustainable. 3 T. R. 377. I have only to add, that it would also have afforded me much pleasure, if this argument had been conducted before the judges of the supreme court of the United States. We formerly indulged ourselves with hopes of it, when the jury were discharged in an action between the now plaintiffs and Thomas Leaming, in January term last, when the same points came in question. We may be considered, in some remote degree, as parties in the present suit, and the decision of the federal judges would probably have given more general satisfaction. But the parties have insisted on our opinion; and we are bound *to give it. On the best consideration, therefore, that I have been able to bestow on the subject, I find myself constrained to give my voice, that judgment be rendered for the defendant.

*(a) See the case of Henderson v. Clarkson, here alluded to, post, p. 174. The case of Ross et al., executors, v. Rittenhouse has been inserted, by mistake, of the term when it was argued, not when it was decided.
FIELD, for the use of OXLEY et al., v. BIDDLE. 1

Parol evidence.

Parol evidence is admissible, of a contemporaneous agreement that a written contract should not be enforced according to its terms, but should be qualified in accordance with that parol agreement. 2

This was an action of debt, on a bond dated the 1st of May 1786; conditioned for the payment of 1000l., on or before the first of Nov. ——; and the defendant pleaded payment, with leave to give the special matter in evidence. The defence set up on the trial was, that it had been agreed by the parties, that the bond should be void, unless Oxley & Hancock, merchants residing in England, transmitted a ratification of certain articles of composition within six months: and the following testimony was given:—

1. The articles of composition, dated the 3d of May 1786, stating, that the plaintiffs have agreed with I. Collins (who was indebted above 5000l. sterling, to Oxley & Hancock), that Collins shall pay 1000l. to Oxley & Hancock, "provided that this agreement of composition shall not take effect as to a full discharge of Collins, until Oxley & Hancock shall have transmitted their ratification to America."

2d. A receipt by one of the plaintiffs, for the bond in suit, "being given in consequence of the above agreement," although dated the 1st of May 1786.

3d. A letter dated 27th December 1786, from Field, acknowledging a demand made upon him by Biddle, for the bond in question.

The defendant then offered William Bell as a witness, to prove, that at the time the bond was executed, it was agreed that it should be void, if the ratification did not arrive in six months. The testimony was objected to; but after some argument, the point was reserved, and became the subject of discussion at the present term.

Ingersoll, for the plaintiff.—The intention of the parties must be construed by the bond and the indenture. The attempt is now made to explain away or vary a written agreement; to show that to be conditional, which the writing imports to be absolute. Bac. Elem. 90; 4 Bl. Com. 483–9. No parol averment varying the condition of a bond, shall be admitted as a plea. Cowp. 47; 1 Esp. 247. The exceptions do not reach this case; they may be reduced to three general heads: 1. To rebut an equity. 2. To ascertain a person or thing which cannot be ascertained by the writing itself. 3. When a clause is left out by fraud or mistake. The case in 3 Atk. 77, was of a circumstance which could not take place in the writing; Ib. 388, was [172] a suggestion of fraud, and is referred to in 2 Bl. Rep. 1241; 1 Vcs. 457, was a mistake, rectified by the minutes. The rule is always adhered to, unless there be fraud. The drawer of the articles there did not pursue the intent of the minutes. 2 Ves. 375. Evidence is never admitted to contradict a written agreement; but a subsequent agreement may. The case of Harvey v. Harvey, referred to in Fitzg. 240, was that of a deed made to save an estate from sequestration, and this could not be inserted. But without such foundation it would not be admissible. Pow. on Powers, Intr. p. 14.

1 s. c. 1 Yeates 182. 2 Lippincott v. Whitman, 83 Penn. St. 244.
SUPREME COURT

McMinn v. Owen.

and the defendant covenanted to pay 500l. in annual instalments. The first payment was made, and bonds were given for the residue of the money.

The question now principally agitated, was—whether the money was to be reduced by the scale of depreciation, or to be paid in gold and silver? The plaintiff offered a witness to prove, that at the time of the covenant being executed, it was agreed, the instalments should be paid in whatever money was current, at the time they became due.

Ingersoll, on the part of defendant, objected to this testimony. The value of money in contracts between 1776 and 1781, is ascertained by the act of assembly (1 Dall. Laws, 880). No parol proof is to be admitted to contradict this; it has always been repelled. It was so in Lee v. Biddis, 1 Dall. 175. The bonds, which are explanatory of the contract, are given to be paid in "lawful money of Pennsylvania." The evidence offered is to vary the agreement. Where the parties reduce the agreement to writing, that alone is the rule. 2 Bl. Rep. 1249. Even conversation of the parties at the time of the contract is not admitted, unless there be fraud. 1 Bro. Ch. 93-4. Powell 430. Ambiguous expressions are not to be explained by parol proof. So was the case of Benezet v. McClanachan, where proof being offered to show that by the term "specie," used in a policy of insurance, certain paper bills were intended by the underwriters, it was refused.

Sergeant, Lewis and Levy, for the plaintiff, urged, that the kind of money was not specified, and that this was an ambiguity, like that of a devise of a man to his son John; when he has two sons of that name. Here were two kinds of money in circulation, paper and specie; and the parties do not distinguish, *in the articles, which they mean. The auditors appointed under the act have this power; and shall not the court have it also? The principle of Lee v. Biddis was, that the court were bound by the words "current lawful money" and the positive words of the act of assembly. The proof is necessary to effect the intention of the parties, and to prevent an undue and fraudulent advantage. The case in Davies 48, proves, that, on principle, this money ought to be paid in such coin as is current at the time it is payable: and the act of assembly ought to be construed in consistency with this principle.

Shippen, Justice.—In Graff v. Whitmer, it was determined in this court, that such proof might be made; and even after judgment by default, in debt on bond, the cause was sent to auditors to ascertain the value or kind of money. I cannot, in consequence, say such proof ought to be rejected; and this very point has been settled in Hurst v. Kirkbride.

By the Court.—Let the evidence be heard, and the point reserved for the defendant, if he shall think it proper to move for a new trial.

The verdict being for plaintiff, a motion for a new trial was accordingly made, and argued by Ingersoll, at the same time with the case of Field v. Biddle (ante, p. 171); but the counsel for the plaintiff submitted the point without argument. And—

By the Court.—The rule must be discharged.

150
HENDERSON v. CLARKSON.

Prize-agents.

A prize-agent appointed under the act of 8th March 1780 (P. L. 313), could sue for prize-money in his own name, and when the question of "prize or no prize," was not involved, such action would lie in a common-law court.

Case for money had and received. Plea, non assumpsit. The action was brought to recover a sum of money, which the plaintiff claimed as agent for forty-three seamen, to whom it had been decreed in the court of admiralty, as their share of certain prizes taken by the privateer Holker. A writ had been issued from the court of admiralty, directed to the defendant, then the marshal of that court, commanding him to deliver the money to the plaintiff. The defendant made return, that the property in his hands consisted of certain articles specified, which he has ready, &c. Afterwards, the articles were sold.¹

The defendant's counsel moved for a nonsuit, on two grounds. 1st. That the action was not maintainable, in the name of the agent. 2d. That it is not of common-law cognisance, being a question of prize, and to enforce the decree of the admiralty. They contended, that his appointment under the act of assembly, did not give him any power to sue in his own name: the very term agent implies that he has a mere authority. The act is silent on the subject of suits, and leaves him to the operation of common-law principles. He has no right or interest vested in him, and the money was not received to his use. A factor may sue in his own name, for he makes the contract, or has a special property.

On the second point, they cited 1 Dall. 218; 3 T. R. 323, 344, 329; 2 Strange 761. They urged, that in the first of these cases it was held, that the consequences of a prize cause were not cognisable in a common-law court, although the question of prize or not, was determined and at rest. The judges say, "as this is a suit to carry into execution a decree of a court of admiralty, it is a thing which we have no authority to do." This is an action of the same kind. The goods in possession of the marshal, were in possession of the law and of the court; there is no contract, express or implied, between him and the party who may be interested. While the money is in the channel which the maritime law directs, no common-law courts can take cognisance of it. Will this court interfere between the marshal and the court of admiralty? 8 T. R. 329. Shall a sheriff, receiving money by order of this court, be sued for it in another? Or, would the court permit an action to be brought against a marshal, by every sailor interested in the proceeds of a prize?

The counsel for the plaintiff urged, that the agent was an officer appointed by virtue of an act of assembly of the 8th of March 1780, and is known to the law. He is to receive the money, and the unclaimed shares are to be paid over to the Pennsylvaniana Hospital. The marshal is directed to sell and pay over, under a penalty, by an act of the 22d September 1780, § 10, and surely, the penalty may be waived, and the plaintiff proceed for the

¹For a fuller statement of the facts of this case, see the opinion of Judge Yates, in Ross v. Rittenhouse, ante, p. 108.
sum due. Agents may sometimes sue, either in their name, or that of their principals, as factors and consignees. H. Black. 514. Where an agent has an interest as well as an authority, he may bring an action in his own name. Besides, here is a promise in writing, or declaration that he has the money ready. The complaint here is, that the defendant has not forty-three suits brought against him instead of one. If the sailor had died, how should money be recovered for the Pennsylvania Hospital? The agent gives bond; and the plaintiff has been sued on that which he gave.

As to the second point. This has no relation to a question of prize; the money has already been appropriated, and who shall receive it, is the only question that remains. This court is as competent to give relief as the admiralty; and as that court is now extinct, there is no remedy but a common-law suit. He that pleads to a jurisdiction must state another jurisdiction competent to give relief. The case in 1 Dall. 218, does not go the length of this. That in 3 T. R. directly involved a question respecting prize. In 1 Wils. 210, there is an instance of a suit for prize-money, brought *176 in the name of the assignee, against the agent. So, in Talbot v. Purviance, 1 Dall. 93, though it was consequential to a prize cause, the court of appeals of Pennsylvania sustained the suit. A later case is strongly in point (H. Black. 515); when prize is determined, the rights of the captors are a foundation for a suit at law; and the same doctrine is maintained, Ibid. 523.

By the Court.—In 1775, congress resolved that all prizes should be the right of the captors. They had the prerogative of making war and peace; and therefore, the jurisdiction in case of prize. This resolution vested a legal right in the captors to all property taken rightfully at sea. What was a legal capture, was to be determined by the courts of admiralty; but, being determined, the legal right was complete. The real meaning of the rule, that the courts of common law will not take into consideration the incidents of a prize cause, is, that they will not review or draw before them the question of prize, which ought to be determined by the law of nations, and in the court of admiralty. Here, the property has been condemned; the marshal is directed to sell it for the benefit of the captors; and the plaintiff is the agent appointed by the judge, agreeable to the 14th section of the act. It is his duty to receive it. To him are intrusted the rights of the absent seamen, and the contingent right of the Pennsylvania Hospital. He seems to be authorised to bring a suit in his own name. Besides, the return of the marshal is an admission of his right, and a promise to pay.

A motion for a nonsuit overruled; and a verdict for the plaintiff.
formable to the charge of the court, gave a verdict in favor of the plaintiff, for $586. 15s., the amount of the rents from February 1782, until the 2d March 1786.

The motion for a new trial (which was argued at the last term) was supported by E. Tilghman and Lewis; and opposed by Ingersoll and Sergeant.

In support of the motion, it was contended, that upon the evidence, the present action cannot be maintained, because the testator was a disseisor; and no action will, in such case, lie against executors: that it will not lie, because there was no privity; because the money was received as owner; and because the plaintiffs had conveyed away all their right to the estate. The testator received the money from his own tenants, for his own use; and the case is not tainted by any fraud, concealment or misrepresentation; nor affected by any question of infancy. For these general positions, the following authorities were cited: 3 Leon. 24; Owen 83; 2 Wils. 115, 208, 213, 217, 645, 744; 3 Atk. 124, 130; 2 Chan. Rep. 26, 32, 259; 2 Cas. in Chan. 71, 134; 1 Chan. Cas. 126; 1 Vern. 296; Prec. Ch. 517; 1 Ves. 171; 2 Atk. 336; 4 Vin. Abr. tit. “Chancery,” 388, 389, pl. 5; 18 Ibid. 563; 2 Vern. 696; 3 Bl. Com. 205.

In opposition to the motion, it was urged, that an action of indebitatus assumpsit will lie for the true owners, against one who pretends a title to lands, and receives the rents: an action of account will certainly lie, and this may with equal propriety be brought. It will lie for the profits received prior to the demise laid in the ejectment; and whoever receives rents by wrong, shall be construed a trustee, or bailiff, for him who has the right. Besides, the plaintiffs may consider the testator as a disseisor, or not, at their election; and waiving the tort, may proceed on the implied contract. Mr. Duche had certainly no right, in law or equity, to receive the money, and therefore, is not entitled, ex æquo et bono, to retain it. But even if an action at law could not be maintained in England, yet the money might, unquestionably, be recovered there in a court of equity; while in Pennsylvania, if it could not be recovered in this action, there would be a right without remedy, since no other remedy can be here pursued. For these positions, the following authorities were cited: 1 Salk. 28; 1 T. R. 378; Cowp. 371; 2 Wils. 644; Prec. in Chan. 517; 1 Bac. Abr. 18; Vin. Abr. tit. “Assumpsit,” p. 270.

The Chief Justice, after recapitulating the facts and arguments, proceeded to deliver the following opinion:

McKean, Chief Justice.—This does not appear to me to be a hard or difficult case. If a man receives my rent, it is at my election to charge him with a disseisin, by bringing an assize or other action, or to have an account. Cro. Car. 303, pl. 6; Litt. § 588. But if trespass is brought, and the disseisor dies, it cannot be renewed against his executors, at law; though it may, notwithstanding that actio personalis moritur cum persona, be recovered in equity. It does not seem necessary to determine, whether such an action as the present could be maintained in England; the question here is, whether the plaintiffs are entitled in equity to an account of the rents and profits of Mrs. Haldane’s estate; and if so, from what time.
SUPREME COURT

Wood v. Roach.

BY THE COURT.—It is never too late to grant the rule, when it will not delay the trial.

Rule granted.

LYNN v. RISBERG.

Parol evidence.

Parol evidence is admissible, to supply an ambiguity in an award, by applying it to its subject-
matter.1

An award was made that “an order for 550l., should be given on — (not mentioning the name), in whose hands, it is said, that sum was deposited by certain defendants in a former action, for the use of the plaintiff.” Risberg, the bail of those defendants, undertook in writing, to give an order for the money, to be received in New Providence; not mentioning by whom. This action was brought for not giving that order, and one Bunch was stated, in the declaration, to be the person on whom the order was to be drawn; and the plaintiff now offered parol proof to show that he was the person intended by the referees. This was objected to; and Gilb. For. Rom., and Bunb. 65, were read, to show that a blank in a charter-party could not be supplied.

BY THE COURT.—The award may be supplied, where it can be rendered certain. So was the case of Grier v. Grier, 1 Dall. 173. Here are words of reference; and we think it may, in this case also, be supplied by parol proof.

WOOD v. ROACH.2

Evidence.—Stoppage in transitu.

An unsigned copy of a bill of lading, kept by the master, is not evidence per se. The right of stoppage in transitu does not exist, where goods are shipped in payment of a precedent debt.

This was a scire facias against the defendant, as garnishee of twenty-one hogsheads of flax-seed, the property of James Elliot. The defence was, that the defendant, being a master of a ship, had received the flax-seed, and signed a bill of lading, engaging to deliver the flax-seed to a consignee in Europe. To prove this, Moylan offered a bill of lading, not signed, but annexed to an affidavit by Roach, setting forth that it was a copy of one signed and delivered to the consignee, before the attachment was laid. The evidence was objected to: And by—

McKEAN, Chief Justice.—This is not the best evidence; and therefore, it cannot be admitted.

BRADFORD, Justice.—The paper offered in evidence is not a bill of lading; but it is offered as a copy, and to prove that a bill of lading, of the same tenor and date, was executed. If the instrument itself were produced,

1 S. P. Commercial Bank v. Clapier, 3 Rawle 335.
2 a. c. 1 Yeates 177.
in Ireland, and received an indemnification from the consignee. He might have pleaded this; and as he has not done so, the matter is left open to equitable considerations. The freight, in strictness, is due when the goods are laden and bills signed. This is a rule founded on mercantile principles, and the inconveniences of the opposite doctrine. The cause, therefore, in the opinion of the court, depends principally, upon this fact, whether, at the time of the attachment, the property of the goods was vested in the consignor or consignee.

Verdict for the plaintiff.

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JONES v. LITTLE.

Continuance.

The sickness of the defendant is not alone ground of continuance.

The defendant’s counsel produced a certificate from a physician, stating that the defendant had been dangerously ill for three weeks last past; and thereupon, moved to put off the trial. But—

The Court held this to be no good cause for putting off the trial. And—

By Shippen, Justice.—If there had been an affidavit, stating that there were material witnesses, who had not been summoned, in consequence of this sickness; or if the plaintiff himself were a witness, to prove books or the like; that might have weight with the court; but as it is, the trial must proceed.

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KNIGHT v. REESE.

Trustee.—Interest.

A mere trustee to pay over, is not liable for interest, until after a demand.1

Charles Knight, father of the plaintiff, put out 200l. at interest, to be divided among his four children, at their mother’s death. The defendant was one of the trustees named in the bond, and had received the money on the widow’s decease. The only question was, whether interest should be paid from the time he received it.

By the Court.—Interest is not to be paid by a mere trustee, for the money which he holds for the use of another, unless he neglects to pay it, on demand. As there is no proof of demand in this case, it must be calculated only from the commencement of the action.

1As to the liability of a trustee for interest, see Bright. Dig. 2908.

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WHITE v. LYNCH.

Continuance.

The absence of an attorney of the court, who is a material witness, and has promised to attend, is ground for a continuance, though he is not subpoenaed.

The defendant moved to put off the trial, on an affidavit, that an attorney of this court was a material witness. He had not been subpoenaed; but had promised the defendant to attend; and had left town, a few days ago.

Under these circumstances, the Court did not think a subpoena necessary, to entitle the defendant to put off the trial.

BLOOMFIELD v. BUDDEN.¹

Sheriff’s sale.—Life-estate.

When land, in which there is a life-estate, is sold under execution, the tenant for life will be permitted to take the surplus out of court, on giving security therefor.

Richard Budden devised, after payment of debts, a house, to his wife for life, remainder to James and Susanna, his children. The widow and children afterwards mortgaged this property to the plaintiff, for the proper debt of James. The plaintiff sued out a scire facias, and after sale of the house, and satisfaction of the mortgage moneys, the surplus was brought into court, to be disposed of, as the court should direct.

Under these circumstances, M. Levy contended, that this debt, which James owed to the widow, was to be considered as a lien on the house, and that the surplus should be paid to her absolutely. Doug. 133; 2 Bl. Rep. 949; 2 Ves. 622; Bro. Ch. 421. Equity favors liens: a factor has a lien for his general balance. 4 Burr. 2220.

The Court ordered that the money be paid the widow, she giving security, that her executors or administrators should account for it, after her death, to those in remainder. And in case such security was not given, then that the money be paid to those in remainder, they, giving security to pay the annual interest thereof to the widow, during her natural life.(a)

SCOTT v. McKISSON.

Costs.

Where a cause is removed to the supreme court, by the defendant, the plaintiff cannot recover costs, if he would not have been entitled to them in the common pleas.

This was a special assumpsit, on the part of the defendant, to make up the depreciation of a certain sum of money, paid by him to the plaintiff's agent, if the plaintiff refused to receive it as specie. Upon a reference, the referees awarded only four pounds; and as the cause had

(a) This latter rule had been adopted by the court of common pleas, in the case of Whiteball v. Houston.

¹s. c. 1 Yeates 187.
been removed by the defendant, it then became a question, whether the plaintiff should recover double, or any other, costs.

By the Court.—Double costs is a relative term; and it has been settled, that the plaintiff shall not recover double costs here, when, in the court below, he could not be entitled to recover any. Under the late act, giving jurisdiction to the justices, the large powers vested in them seem to embrace this cause of action. There are, indeed, exclusive words in the act, but they do not comprehend the present case. There must, therefore, be

Judgment, without costs.

RAPP v. ELLIOT.¹

Plea in abatement.

A plea of coverture must be sworn to, or it will be set aside.

The defendant had pleaded in abatement, that the plaintiff was a *feme covert*; and now, Howell, for the plaintiff, moved to strike off the plea, not being supported by any affidavit, as the rules of the court require. Todd contended, that he could file the affidavit *instanter*, if the court should deem it necessary in this case; but Howell said, it was too late, and that a dilatory plea could not be recurred to, at this stage of this proceedings.

By the Court.—As the plea is not supported by any affidavit, it cannot be sustained; and we think it is too late to file a new one. The defendant must, therefore, plead in chief; or the plaintiff will be at liberty to sign judgment.

FURY v. STONE.²

Remittitur of damages.

Where the damages found by the jury exceed those laid in the declaration, a *remittitur* may be entered for the excess, even after error brought.

The plaintiff laid his damages at 500l.; but the verdict and judgment *nisi* were for 672l. 13s. 2d. The defendant, thereupon, took out a writ of error, and next day, the plaintiff moved for leave to enter a *remittitur* of the surplus damages, upon the authority of H. Black. 643; 1 Dall. 134. Todd opposed it. But—

By the Court.—There is no difference between this case and that in Blackstone’s Reports. We shall always be disposed to favor amendments. Let the *remittitur* be entered, upon payment of the costs of the writ of error.

¹ s. c. 1 Yeates 185. ² s. c. 1 Yeates 186. The judgment in this case was affirmed, on error, by the high court of errors and appeals. Addison 114.
officer necessary, or useful, "for the well-governing of the city, and the ordering the affairs thereof," this clause manifestly vested the power of instituting and supplying the office, in the corporation at large, at least, in exclusion of the executive authority of the state. But the very grant of a power to hold a court, carries with it everything that is incidental to the exercise of jurisdiction; and a clerk of the court must be regarded in that point of view. A court may appoint a bailiff, or sergeant, to execute its process, as an incident to the grant of jurisdiction. 1 Bac. Abr. 565.

Again, whenever one office is incident to another, such incidental office is regularly grantable by him, who hath the principal office. 3 Bac. Abr. 720, 721. And Lord Coke says, "that the justices of courts did ever appoint their clerks." 2 Inst. 425. The appointment vests, therefore, as an incident to the grant; and may also be asserted upon prescription and usage. Dyer 173; 4 Co. 32. Holt's Case, Show. P. C. See Bl. Rep.; 2 P. Wms.; 1 T. R. 196.

The power of amotion is incident to a corporation (Doug. 152); and it is to be inferred that the lesser power of appointing a clerk, is also incident. In the first charter of the city, the proprietary appointed the clerk; but all subsequent appointments were made by the corporation. The corporation being responsible, it is essential, that they should appoint their officers; and yet the construction contended for, would annihilate all the power given to them for that purpose, in the 30th section of the act of assembly. The council of censors, in their animadversion upon the 20th section of the old constitution, while they consider the appointment to office, as a natural incident of the executive authority, still contemplate exceptions from the general rule, by which the public welfare may be promoted. Journ. Coun. Cens. p. 139, Second Session.

The Attorney-General, in reply,—It is unnecessary to enter into an investigation of the authorities cited from the English books; since this is strictly a constitutional question. The reasoning of the Council of Censors in favor of the executive certainly applies to the present office; and it is conclusive, that the supreme executive power is now vested in the governor. But it is contended, that the right claimed by the corporation is established by the 3d section of the 7th Art. of the constitution; which gives rise to two questions: 1st. Is the appointment in controversy within the meaning of the constitutional reservation? 2d. Had the corporation the right to make the appointment, before the adoption of the existing constitution? In satisfying the inquiry, where the power resided under the old constitution, it must be remembered, that to exclude the supreme executive from the exercise of this natural attribute, the intention must be directly and explicitly expressed. Now, in the act of 1789, no such power was expressly granted to the corporation; but in the old constitution, § 20, it was expressly provided, that the supreme executive council should appoint all officers, civil and military; and the exposition given to this subject by the council of censors, is binding on the present decision. Upon the whole, the mayor's court must be considered as a judicial institution under the laws of the commonwealth: intended as a substitute for the city court, whose clerk was not appointed by the judges; but, originally, by the legislature; and afterwards, by the executive, upon the authority of the council of censors.

The Court having kept the case under advisement until the present
RESPECTICA v. Ashe2.

Criminal practice.

The defendant's affidavit cannot be read, in mitigation of sentence.

The defendant was indicted for a libel; and at the last nisi prius, retracted his plea and submitted, protesting his innocence, &c. He now appeared to receive judgment, and his own affidavit was offered to be read in mitigation of the fine. But—

By the Court.—It has been usual to hear the defendant, without oath; but we have never known his affidavit received, although it goes only in mitigation of the fine.

Affidavit refused.

appoint such an officer. Besides, by the 29th section of that act, the corporation have an express power given them to appoint all such officers as they shall think necessary for the well-governing of the city, and the ordering of the affairs thereof. It is now unnecessary to inquire, whether this section militated with the constitutional powers of the supreme executive council, or a former legislative construction of them, as we must be governed by the present constitution.

By the 1st section of the second article of the constitution, "The supreme executive power of this commonwealth is vested in the governor." By the 8th section of the same article, "he shall appoint all officers, whose offices are established by that constitution, or shall be established by law, and whose appointments are not therein otherwise provided for." In the 6th Art., § 4, "all commissions shall be in the name and by the authority of the commonwealth of Pennsylvania, and be sealed with the state seal, and signed by the governor; and by the 5th section of the same article, "the treasurer is to be appointed by the members of both houses." "All other officers in the treasury department, attorneys-at-law, election officers, officers relating to taxes, to the poor and highways, constables and other township officers, shall be appointed in such manner as is, or shall be, directed by law." Here then is an enumeration of the officers whose appointments shall be, or may be, made otherwise than by the governor, and this is the only provision in the constitution which limits his authority of appointing to office. The clerk of the mayor's court is a public officer; he is concerned in the administration of justice, and resembles in all respects the clerk or prothonotary of the supreme court, and of the courts of common pleas, quarter sessions and orphans' courts, all of whom are appointed by the governor; and what reason can be assigned for his being appointed otherwise, which will not equally apply to them? All commissions must be signed by the governor, and run in the name of the commonwealth. We need not here investigate the distinction between officers that may be appointed without commissions, and those who are to be commissioned; as the clerk of the mayor's court comes under the latter class, as much as the clerk of any other court. Perhaps, it might have been better, if the courts of justice had been empowered, respectively, to appoint their own clerks; it would have been more agreeable to the usage in England and most of the American states; but the convention have thought otherwise.

On the whole, I am of opinion, that the governor has the legal power to appoint and commission the clerk of the mayor's court for the city of Philadelphia, and that judgment be given for the plaintiff.

1 S. C. 1 Yeates 186.
Morris's executors v. McConnaughy.

Contribution.

When lands are devised, incumbered by a mortgage, not created by the testator, the several tracts must contribute to its payment, in proportion to their respective value.

James McConnaughy mortgaged to the plaintiff's testator, a certain plantation in Chester county; and then devised all his estate, consisting of many other tracts of land, to his mother Janet. Janet afterwards died, having devised the tract in mortgage to her niece Mrs. Darlington, and the residue of her estate to her executors. The plaintiff having obtained judgment on the bond which accompanied the mortgage, a motion was made that the sum due should be levied on the lands mortgaged; and that the residue of the estate should be discharged. After argument, several times, the court now delivered their opinion as follows:

By the Court.—We are of opinion, that all the lands which were the property of James McConnaughy, deceased (upon which we understand the sheriff has already levied), shall contribute, according to the value of the several tracts, to pay off and discharge the debt, interest and costs in this action. We consider real property in Pennsylvania as assets for the payment of debts; and it is always, in case of the deficiency of personal property, to be applied to discharge such debts. It does not appear from the will of Janet McConnaughy that her intention was, that Mrs. Darlington should take the land devised to her cum onere. It is, however, equally subjected to the payment of a proportion of the debt with the other lands of James McConnaughy, remaining undisposed of. Mrs. Darlington claims as a specific devisee; the residuary legatees cannot be considered as such. To charge the lands devised to them with a ratable part of the debts, would not disappoint the true intention of either of the wills; but to charge the lands devised to Mrs. Darlington would evidently produce that effect. We are, therefore, of opinion, that all the real estate of James McConnaughy should ratably contribute.

Bradford, Justice, having been of counsel in this cause, took no part in its decision.

1 s. c. 1 Yeates 189.

2 See Ruston v. Ruston, post, p. 248, and Mason's Estate, 1 Pars. 129, 137, which was affirmed by the supreme court. A devise of land acquired by a testator, subject to a subsisting mortgage created by a former owner, takes it charged with the incumbrance, without any claim for its satisfaction out of the personal estate, unless the will indicate an intention to charge the same on the personal estate, or the testator has so dealt with the incumbrance as to make it his proper debt. Hirst's Appeal, 92 Penn. St. 491.
SUPREME COURT

WALKER'S APPEAL.

CERTIORARI.

On an appeal from the decree of the orphans' court, the regular mode of bringing up the record is by certiorari. Ingersoll moved for the confirmation of the decree of the orphans' court of Northumberland, given the 26th March 1792, from which (as it appeared, by a certificate he produced) an appeal had been entered. But the Court, finding that there was no copy of the proceedings lodged with the prothonotary, refused to receive the motion: and by—

SHEPHERD v. GAUL.

TENDER.

A mere offer to pay money is not a legal tender. To take advantage of a tender, the defendant must plead it, and bring the money into court.

This was an action of debt on a bond, dated the 13th March 1787. The bond recited that the obligee, Paul Sheredine, had given a letter of attorney to the obligor, Martin Gaul, to recover a legacy due to him in Germany; and the condition was, that the obligor should, on or before the 1st January 1789, render to the obligee a true account of, and pay over, all money's received by virtue of the power. On the 17th November 1791, the bond was assigned by Paul Sheredine, to Abraham Sheredine, who brought the present suit, in his own name, and the issue was joined on the plea of performance of covenants. It appeared, that the defendant had received a certain number of guilders, but they were one-third less in value than German guilders; and that he had offered to pay the money to the plaintiff in the coin in which he had received it.

It was contended by M. Levy, for the defendant, that there was in this case a sufficient tender and refusal (3 Term Rep. 554); and this being a bond for the performance of conditions, it is not within the provision of the act of assembly, enabling assignees to sue in their own names; which speaks only of suits on bonds "for such sum of money as is therein mentioned;" so that the plaintiff must be nonsuit. 1 Dall. Laws, 107; 2 Ld. Raym. 1271; 1 Ibid. 1362.

But Sergeant answered, that, in the first place, there could be no nonsuit, after plea of payment, or performance of covenants; and in the next place, that the practice of Pennsylvania would justify the form of action. As to the tender, it is a mere offer to pay; and at all events, it ought to have been pleaded.

1Though it is the general practice to sue out a certiorari, to bring up the record of an appeal from the orphans' court, such writ is not indispensable. See Feather's Appeal, 1 P. & W. 822; Königsmacher v. Kimmel, Ibid. 207; Chill-11as v. Brett, 5 Clark 325; Tryon v. Cadwalader, 3 Luz. L. Obs. 226; Nixon's Estate, 8 W. N. C. 390.

2See act 12th March 1867 (P. L. 33), as to the effect of a tender, after suit brought.
BY THE COURT.—Whether the action is regularly brought, we are willing to reserve as a point for future consideration: but on the merits, we can see no ground for a verdict in favor of the defendant. A mere offer to pay the money is not, in legal strictness, a tender; and even if the tender was, in itself, sufficient, the defendant is not entitled to take advantage of it, unless he pleads it, and brings the money into court: for a verdict now given in his favor on the present pleadings, would for ever discharge him from the plaintiff's demand.

Little has been said on the score of interest. That, however, depends upon the time of the defendant's receiving it, before or after the 1st of January 1789, when he was bound to render his account.

Verdict for the plaintiff.

GRUBB's executors v. GRUBB's executors.¹

Practice.—Removal of cause.

A cause is not removable to the supreme court, by certiorari, after referees have entered upon their duties, though they had not agreed upon their report.

This cause being referred in the common pleas, the referees made report into office; and afterwards, the plaintiff removed the cause by certiorari into this court.

*But Ingersoll, on behalf of the defendant, now moved for a procedendo; alleging that in a case of Pigot v. Young, it had been [*192 decided, that a cause could not be removed, after the arbitrators or referees had entered on the business submitted or referred to them.

And THE COURT, accordingly, awarded a procedendo.

VAUGHAN v. BLANCHARD.

Execution of commission.

It is not necessary the witnesses should be sworn by the commissioners; if the oath was administered by a justice of the peace, it will be presumed to have been done in their presence.

Heately offered to read the return on a commission to examine witnesses, in which it was certified, that the witnesses were duly sworn by a justice of the peace, and examined by the commissioners. Sergeant objected, that the commissioners themselves should have administered the oath; or that if administered by a justice of the peace, he should himself have certified the fact. But—

BY THE COURT.—It is not necessary that the commissioners should administer the oath themselves; and it is to be presumed, that it was administered in their presence.

¹ s. c. 1 Yeates 198. ² s. c. 1 Yeates 175.
MALLORY v. KIRWAN. (a)

Bills of exchange.

Unless notice of non-acceptance be given to the drawer of a bill of exchange, within a reasonable time, he is discharged.

This was an action on a bill of exchange, against the drawer. The bill was dated the 29th of September 1781, and was drawn on the defendant's tenant for 500l., "being my part of the rent of Black Rock estate." It was presented for acceptance and refused, some time previously to the 19th of November 1781; but it was not protested until the 5th of August 1782. No notice of the protest was given, nor was any personal application made to the defendant, until some time in the beginning of the year 1790; though it appeared, that in the year 1790, he acknowledging having heard that the bill was not paid, so far back as the year 1783. When the bill was presented, the drawee had funds belonging to the drawer, in his hands; but he had paid the amount to the drawer's attorney in fact, who soon afterwards died, and the money was lost by his wife, to whom he had intrusted it, just before his death.

For the defendant, Sergeant contended, that the want of notice was a complete discharge. The money was in the hands of the drawee, when the bill was presented; and therefore, the plaintiff has no excuse, in law or equity, for the gross negligence of which he has been guilty. Esp. 47; Bull. N. P. 271, 3, 4; *Esp. 54–55; 2 Wils. 353; 1 Dall. 234, 270, 252.

For the plaintiff, Morgan urged, that the loss had not happened from the negligence of the plaintiff; that the fund on which the bill had been drawn was virtually paid to the defendant himself, since it was paid to his authorised attorney; that, therefore, the case should be considered as if no effects had been in the hands of the drawee, when no protest or notice is necessary (Esp. 51); and that no particular form of notice ought to be enforced, if it appears, as it does appear, that the defendant had an early knowledge of the fact.

By the Court.—The sole question is—whether the defendant is bound to pay the bill, under the circumstances of this particular case? It was drawn in September 1781; it was presented, and refused acceptance, in November 1781; and yet it was never protested until August 1782. This is, in our opinion, a fatal delay. The protest and notice are required, upon principles of convenience; and it is not necessary, that there should appear to be an actual loss, in consequence of neglecting them. Though what shall constitute a reasonable time for giving notice is a matter to be left to the jury, under the peculiar situation of our country; yet the rule is a general one, that reasonable notice of protesting a bill shall be given to the drawer. We think the rule has been grossly violated in the present case; and of course, that there ought to be a verdict for the defendant.

Verdict for the defendant.

(a) Decided at nisi prius, Delaware county, 11th October 1782, before Yeates and Meadford, Justices.

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Knox et al. v. Jones. (a)

Interest.—Custom of trade.

Interest is due on a claim for goods sold, after six months—such being the established custom of the trade.

This was an action on the case for goods sold and delivered; and the only question agitated upon the trial, was, whether the plaintiff was entitled to recover interest? It was proved, that at the time of the sale, the defendant was informed, that it was the course of the trade to give six months credit; or, if cash was paid, to discount five per cent.; but that punctuality, and not interest, was the object of the plaintiffs.

By the Court.—The established course of the plaintiffs' trade is proved; and also, the knowledge of the defendant. *It appears, therefore, to be a part of their contract, that interest should commence, at the expiration of the six months' credit.

Verdict accordingly.

Stille v. Lynch. (b)

Competency of witness.

The payee of a note is not a competent witness to invalidate it, for want of consideration, in an action by the indorsee against the maker. ¹

This case was an action brought by the indorsee of a promissory note, against the maker; and it was contended, on the part of the defendant, that the note, having been given without any consideration, was subject to the same equity in the hands of the indorsee, to which it was subject in the hands of the indorser, the original payee. 1 Dall. 441. To establish the defect of consideration, the testimony of Lynch, the indorser and original payee (who had since obtained his certificate as a bankrupt) was offered:

But it was ruled by the Court, that Lynch could not be a witness in this case; as he was offered, in fact, to invalidate his own instrument. Walton v. Shelley, 1 T. R. 296. ²

(a) This case was decided at Philadelphia nisi prius, held in November 1792, before the Chief Justice, and Shippen and Bradford, Justices.

(b) This case was decided at Philadelphia nisi prius, held in November 1791, before the Chief Justice, and Shippen and Bradford, Justices


SUPREME COURT

Cupisino v. Pérez.

Decree in admiralty.—Powers of master of vessel.

A judgment of the court of admiralty, directly upon the question, is conclusive in a court of common law.

The master has no power to hypothecate his vessel for a loan of money, in a foreign port, except in case of necessity, when the voyage would be otherwise defeated, or at least retarded.

This was an action brought against the defendant, owner of the brig Santissima Trinidad, for money lent to the master in the Havana, who gave the plaintiff the following note:

"Received of Mr. Santiago Cupisino, the sum of two hundred dollars current money of Mexico, for the victualling and first expenses of the brigantine, which sum I will pay, at first sight, in the name of the owner, Don Juan Joseph de Aguire Perez, who is in Philadelphia; which cash I receive, mortgaging the freight, the brigantine and her rigging, as the said Santiago Cupisino has lent me the above sum, for the advantage of the vessel at Havannah, June 6th, 1788.

(Signed) Narisco Sanchez y Serna."

On her arrival at Philadelphia, the brig was libelled on this hypothecation (as it was called) in the admiralty, and after hearing, the libel was dismissed. It appeared, that the master had goods, his own property, on board; and that he might have procured money from the intendant of the place, without pledging the vessel.

*195] *Heavily, for the plaintiff, contended, that the general principle was, that the owner was bound by all acts of the master. 2 Emerig. on Ins. 422, 448. It is laid down in Cowper 639, that whoever supplies a ship with necessaries has a threefold security, the ship, the owners and the master: and the same doctrine is recognised, 1 Term Rep. 108. As to the decree of the judge of the admiralty, it was founded wholly on the informality of the hypothecation, and therefore, not conclusive.

Moylan, for the defendant, contended: 1st. That the admiralty had already decided on the merits of the case, and that the hypothecation was adjudged void, because there was no necessity to warrant it. In assumptae, a decree of the admiralty, on a libel for wages, is conclusive against the plaintiff. 1 Esp. 178. So, a decision of the Leghorn court was held conclusive. 2 Str. 733. 2d. But be this as it may, it is clear, that if a master borrows and impawns the ship, without necessity, it will not be good. Hob. p. 12; Mol. lib. 2, ch. 2, § 14; 3 Mod. 244-5. 3d. He contended, in the last place, that the master cannot make his owners personality liable, by his contract in a foreign port. Molloy, lib. 2, ch. 11, § 11, is in point, and so is Johnson v. Shippin, 1 Salk. 36. The case in Cowper only applies to a contract for necessaries, in the port where the owners reside. The dictum in Emerigon is too extensive in its terms, and in other parts of the same book is limited. Thus, in p. 424, it is stated, that the master cannot hypothecate where the owners reside.

By the Court.—It is clear, that the master can hypothecate his vessel.

only in case of necessity—such a necessity as this, that if he did not take up the money, the voyage would be defeated, or at least retarded. This does not appear to have been the case, in the present instance. But in addition to that general rule, it is held, that the master cannot hypothecate, while there are goods of his own, or of his owner on board. Now, if there was no authority to hypothecate the vessel, how can it be pretended, that he can make his owners personally liable? Great mischiefs would ensue, if the master had such a power. Upon this ground, therefore, the action must fail.

Another point also is in favor of the defendant; namely, that this very question has been already decided in the court of admiralty. Since, then, we think, he had no authority to bind the persons of his owners, in a foreign port (and, in point of fact, he does not seem to have done it, as the writing appears to bind only the master and the vessel), and since the decision of the admiralty on the merits, is, in our opinion, conclusive, the plaintiff ought not to recover.

Verdict for the defendant.

JANUARY TERM, 1793.

*Boyce v. Moore.*

Evidence.—Marine protest.

A marine protest, to be admissible in evidence, must have been made at the first port at which the master arrived, after the loss of his vessel, if practicable.

In this action, which was brought on a policy of insurance, subscribed the 8th of September 1786, the plaintiff declared for a total loss, and offered in evidence the protest of the master, made at Alexandria, on the 22d September, but it appearing that the master who had been taken up at sea from the wreck, had arrived at Newbury-Port in New England on the 12th of August, and passed through Philadelphia, on his way to Alexandria, before he made his protest, the evidence was objected to—the defendant insisting that the protest ought to have been made at the first port, and cited 1 Dall. 317, as in point.

Levy contended, that where a protest is offered to excuse the master’s conduct, more strictness might be required. In Wesk. 432, it is stated, that the protest must be made at any place, where the master first arrives; but if that be impossible, he must make protest at any subsequent port. Here, the master states in his protest, that he could not make it, for want of money to pay the fees; he lost everything with the vessel.

McKean, Chief Justice.—Where there is no notary, a protest may be made before a magistrate. The excuse offered in this case, for not making

1Thomas v. Osborne, 19 How. 22; The Fortitude, 3 Sum. 228; The Emperor, Hopk. Dec. 5; s. c. Bee 339.
the protest at the first port, would be a very flimsy one, even if proved by indifferent witnesses. Protests are only admitted, from necessity; and the rule which requires that they should be made at the first port, is a good one, to prevent abuses. If it be not practicable to make it at the first port, it must be made at the next, where it is practicable. This protest, therefore, cannot be received as evidence.

PLEASANTS, administrator, v. PEMBERTON, administrator.1

Competency of witness.

The rule that a person shall not be permitted to give testimony to invalidate an instrument which he had signed, is restricted to such as are negotiable.2

This was an action brought to recover a child's share of the intestate's estate. The defendant gave in evidence a receipt from the guardian of the child, for "four thousand Continental dollars" dated the 19th of February 1780, while Continental money was a legal tender, but depreciated fifty for one. Upon this, the guardian (who was released so as to make him a *197] *disinterested witness) was offered to prove, that at the time of payment, it had been agreed, that the value of the Continental money so paid, should be adjusted afterwards, and credit given accordingly. This testimony was opposed by Sergeant, for the defendant, upon the principle, that no man shall be allowed to contradict or explain away his own instrument. The case in 1 Term Rep. 296, speaks of deeds as well as of negotiable paper. This evidence is to invalidate the force of the receipt, and to add a condition, which will take off 49-50ths of its operation. Great inconveniences might arise, and third persons may be deceived and injured, if such explanations are admitted.

Ingersoll, for the plaintiff, urged, that the rule is confined to negotiable paper. It is so settled, 3 Term Rep. 33, 36. Besides, it is not proposed to contradict the receipt, which only expresses the receipt of 4000 Continental dollars; but it would be fraudulent, to prevent the plaintiff from showing that the value was afterwards to be settled, in order to set up the implication of law against us. No inconveniences can arise; for it is clear, a third person may be admitted to explain. Even an atting witness was admitted in McMinn v. Owen (ante, p. 173).

Sergeant, in reply, said, that before SHIPPEX, President, in the common pleas, a master of a vessel was not allowed to prove, that he did not receive the goods mentioned in the bill of lading.

McKean, Chief Justice.—The general expression in Walton v. Shelley must be limited, as explained in Bent v. Baker, 3 T. R. 33, 36; and therefore, since the witness is disinterested, he must be admitted. Besides, he is not to contradict the writing, or deny anything that is in it.

1 s. c. 1 Yate, 202.
2 Hepburn v. Cassel, 6 S. & R. 113; Parke v. Smith, 4 W. & S. 287; Wilt v. Snyder, 17 Penn. St. 77; and the rule has no application, where the suit is not upon the bill or note itself.

Wright v. Trueitt, 9 Penn. St. 507; Campbell v. Knapp, 15 Id. 27

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A habeas corpus was issued to bring up the body of Benjamin, a minor, about fourteen years old, who had been bound, by his guardian’s consent, to the defendant, to serve her until he should arrive to the age of fifteen. Having absconded from her service, he was committed to jail, for that cause; and a general question was made, whether an infant could be bound as a servant, in Pennsylvania?

The Court were unanimously of opinion that the indenture, in this case, was void, and gave their opinions seriatim.

The opinion of Justice Bradford (which is all I have in my notes) entered fully into the principles of the decision as follows:

Bradford, Justice—The imprisonment of this infant, if justified [*198 at all, must be supported under the act of 1700, respecting servants; so that the only question for our determination is, whether he be a servant within the meaning of that act of assembly? 1 Dall. Laws, 13.

It is clear, that this indenture, by which the infant is bound to serve, and not to learn any trade, occupation or labor, cannot be supported upon the principles of common law, nor by the express words of any statute. But it is said, that it depends upon the custom of the country; and it is evident, that such a custom is referred to in our laws. I have taken some pains to ascertain its origin and extent.

This custom seems to have originated with the first adventurers to Virginia, and to have arisen from the circumstances of the country. Persons desirous of coming to America, and unable to pay for their passage in any other way, shipped themselves and their children, as servants. If they were imported under indenture, those indentures were held good, and they were to serve according to their stipulation; but if there was no indenture, they were to serve according to the custom, to wit, five years, if of full age, or above seventeen; and if under seventeen, until they arrived at the age of twenty-two, or, in some places, until twenty-four. The early laws of Virginia and Maryland (some of them so early as 1638) speak of these servants, thus imported: they are called, “servants according to the custom;” “servants bound to serve the accustomed five years;” and sometimes are described as “servants sold for the custom.”

These servants were in a very degraded situation. They were a species of property, holding a middle rank between slaves and freemen; they might be sold from hand to hand; and they were under the correction of laws exceedingly severe.

It appears by all the early laws on this subject, that the custom extended to imported servants only; and it extended to all such as were imported, whether minors or adults. The custom was founded on necessity; and it was thought to be mutually beneficial to the colony and to the emigrant. But no such necessity existed as to the children who were already in the province; the custom, therefore, never extended to them. And there was, in all the colonies, and particularly in Pennsylvania, a marked distinction between these two classes of minors. This is to be found in the articles of the
laws agreed on in England, and more fully in the laws of 1682. These speak only of imported servants; and direct how long such servants, brought into the province without indentures, shall serve; but in chap. 112, all parents and guardians in the province are enjoined to teach the children under their care to read and write, until they are twelve years old, and that then they be instructed in some useful *trade or skill.' This policy of putting children out as *apprentices, is carried into our poor laws, and those which relate to orphans. 'Overseers of the poor, and the orphans' courts, have no authority to bind out minors as *servants, even such as are the objects of public charity. They must be bound apprentices to some "art, trade, occupation or labor." There have been instances of children here being bound out as servants; but this has not been general; and the courts of justice have always frowned on the attempts.

I agree, that it is not necessary to determine how far a father may transfer to another, the right which he has to the service of his children, in consideration of that other's instructing him in reading, writing and the like; nor whether the court would interfere to take the child out of such person's custody. But I think it right to say, that no parent, under any circumstances, can make his child a *servant, in the sense in which this boy is held as such. Though he is entitled to the service of his child, he cannot enforce it, as a master can that of his servants; he cannot commit him to jail, if he runs away; he cannot demand the penalty of five days' service for every day of absence; and therefore, it is impossible that he can transfer such right to another.

I am, therefore, of opinion, with the rest of the court, that this boy is not a servant, within the meaning of the act of 1700; and consequently, he must be discharged.

**Barnes's Lessee v. Irwin et al.**

**Execution of power.**

When, by an ante-nuptial agreement, the intended husband covenants that the wife shall have full power to dispose of her real estate, by deed or will, during coverture, she may execute such power, in her husband's lifetime, by an instrument in the nature of a last will and testament.

This cause was argued upon a case stated, which included the following facts. The plaintiff was heir-at-law for one moiety of the real estate of Margaret Henderson, who died seised of the premises in question. Previous to her marriage with Mathias Henderson, articles of agreement, dated the 29th of June 1704, were executed between them and a third person; by which Matthew Henderson covenanted, that the real estate belonging to her, should be to their joint use, during the marriage; but that Mrs. Henderson should have full power to dispose of it, by deed or will, during coverture. They had no issue. On the 29th January 1790, during the coverture, Mrs. Henderson made a will in the usual form, appointed the defendants her executors, and gave them power to sell her real estate; the moneys arising

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1Old Province Laws, 149; and see Commonwealth v. Schultz, Bright. Rep. 29, as to German redemptioners.
from which were bequeathed, except some charitable legacies. To the plaintiff she left five shillings. The defendants entered and sold.

*The case was argued on the 19th of January 1792, by Bankson and Rawle, for the plaintiff, and Wilcocks and Sergeant, for the defendants.

For the plaintiff.—It is admitted by the defendants' counsel, that the devise was void at law, and we contend, that it would not be established in equity. A defective will, or the defective execution of a power, will not be aided in a court of chancery, for a meritorious or valuable consideration, and the heir-at-law, where the equity is equal, will not be disturbed in the enjoyment of his legal advantage. Pow. on Powers, 90, 155-165; 3 Atk. 715; Amb. 474. In this case, the parties all stood in equal relation, and there was no meritorious claim on the side of the devisees; they were not children unprovided for, they had no claim on the testatrix. Max. in Eq. 67-8. Whatever was the intention of Mrs. Henderson (though it was argued to have been to bar her husband, from the terms of the agreement), if that intention was not executed, chancery would not carry it into effect against the heir. Pow. 138, 164; Com. Rep. 250; Vern. 68. Chancery, indeed, exercises this power only in case of trusts, and never on legal estates. 2 Ves. 193; Ambler 467; Fearn. 89. It is true, that equity is admitted as a part of the law of Pennsylvania (1 Dall. 211); yet it must be applied with caution, as the full remedies of a court of chancery are not in our power; and the act of assembly, directing the mode of conveying the estates of feme coept, would, on the defendants' principles, be altogether unnecessary.

For the defendants, it was contended, that courts of chancery would favor the execution of such a power, and Wright v. Cadogan, Ambler 460, and Rippen v. Dawding, Ibid. 565, were relied upon, as in point, while 2 Term Rep. 695, was also read, to show, that Lord Kenyon held the same principles.

For the plaintiffs, it was replied, that Wright v. Cadogan was conformable to the principles stated for the plaintiffs, but did not apply in the defendants' favor. That Rippen v. Dawding (or Hawdin, as it is called in Powell on Contracts) was a solitary questionable case. That it contradicted Peacock v. Monk, 2 Ves. 203, and Bramhall v. Hall, Ambler 467. That Ld. Kenyon referred expressly to Peacock v. Monk; but took no notice of Rippen v. Dawding; so did Ld. Thurlow, in Bro. Parl. Ca. 10; from whence it was inferred, that it was not held as law even in England.

Cur. adv. vult.

In April 1792, a further argument was requested by plaintiff's counsel, and granted: but at the next term, September 1792, they informed the court, that they meant to leave the cause on the former argument.

The Court then desired the following points might be further considered.

1st. How far the case of Rippen v. Dawding is shaken by Hods-[*201

2d. How far the difference between a devise to children as in Rippen v. Dawding, and a devise to nephews, &c., as in this case, may operate; 1 Ch. Ca. 247; 2 Bro. C. C. 380.
3d. Whether these articles can operate as a covenant to stand seised to uses. 1 Co. 175; Powell on Powers 210.

4th. Whether the articles are to be considered as executory. 7 Mod. 147.

5th. Whether the bare consent of the husband, anterior to the marriage, can give the wife a power.

But, in January 1793, the Court informed the counsel, that upon consideration, they had removed their own doubts; and did not, therefore, desire a further argument. They then proceeded to deliver their opinions.

McKea, Chief Justice.—The question arising on the case stated for our opinion, is, whether a feme covert, seised of a real estate in fee, can, in consequence of a power contained in articles, executed between the husband and her, before their marriage (the legal estate not having been conveyed to trustees), give away such estate by will, or any instrument in nature of a will, during the coverture?

The articles of the 29th of June 1774, are therein called a deed tripartite, and the name of James Wallace is introduced into them as a party, along with Margaret Irwin and Matthew Henderson; and they are executed by all three; but no estate is thereby conveyed to James Wallace, as a trustee, or otherwise. Margaret Henderson, during her marriage with Matthew Henderson, makes a disposition, by an instrument in nature of a will, dated January 29th, 1790, of all her estate, real and personal.

It is very clear, that a feme covert, by virtue of an agreement between her and her husband, before marriage, may dispose of her personal estate by will or testament; because it is to take effect during the life of the husband; for, if he survived her, he would be entitled to the whole, and therefore, he alone could be affected by it. Peacock v. Monk, 2 Ves. 101.

It is also clear, that a married woman cannot devise her real estate. By the statute of the 34 & 35 Hen. VIII, § 14, it is expressly enacted, "that wills made of any manors, lands, tenements or other hereditaments, by any woman covert, shall not be taken to be good or effectual in law."

It is further agreed, that if the legal estate in the lands had been vested by the deed or articles in James Wallace, the appointment by Margaret Henderson would be valid and good in equity: for, then, she would have had only an equitable interest; a confidence would have been reposed in the trustee, that he would make such estates as she should direct; and her will would have amounted to a direction, which bound his conscience, and which a court of chancery would enforce. 2 Vesey 102; 6 Bro. Par. Ca. 156; Powell, Cont. 67, &c.

But in this case, Margaret Irwin, or Henderson, was the donor, and also the donee of the power; and it is contended, that she could not execute it, during her coverture, because the fee still remained in herself, and she was restrained by the statute of Hen. VIII. from making a will; and by the maxims and rules of the law, she is disabled, as having no will or her own.

The instrument of 1790, executed by Margaret Henderson, being then covert, is not strictly a will, but distinct from it, though in nature of a will. It takes its effect out of the articles or deed of 1774, which created the power to make such an instrument, and was made in execution of such power. She takes notice, in the preamble of it, that she was a married woman, and that, as to what she was legally entitled to dispose of, her will
was as therein mentioned. It is usually called an appointment. A *feme covert* can execute an appointment over her own estate. Powell on Powers 34; 3 Atk. 712. The reason or ground of a wife's being disabled to make a will, is, from her being under the power of the husband, not from want of judgment, as in the case of an infant or idiot.

Matthew Henderson and his wife, before their marriage, agreed that her real estate should remain her property, and might be disposed of by will and testament, in writing, by her, as she should think fit, as absolutely as if the marriage had never been solemnized. The intention of the parties is plain, and admits of no doubt. She has accordingly disposed of it by an instrument, in nature of a will and testament, in execution of the power and by the express consent of the husband, not to him, or his relations, but amongst her own nearest of kin. No fraud, force, flattery or improper use of the power he had over her, as a husband, has been exerted, nor is it alleged. This will bar him from any title to her estate, and why should it not bar the heir-at-law, in equity and reason? Here was a fair and lawful agreement between them, founded on a valuable and meritorious consideration. Mrs. Henderson, with her husband, could, during the coverture, have given away her real estate by fine or deed (if she had been secretly examined, agreeable to the act of assembly of Pennsylvania), conformable to their agreement; and if he had refused to join with her, a court of equity (if such a court had existed here) would, on her application, have compelled him to carry their agreement into execution. It is a lamentable truth, that there is no court clothed with chancery powers, in Pennsylvania; but equity is part of our law, and it has been frequently determined in the supreme court, that the judges will, to effectuate the intention of the parties, consider that as executed, which ought to have been done. This is also a rule in the court of chancery in England. Why may not her articles of agreement, or deed, of 1774, be considered as a covenant to stand seised of her real estate for the uses therein specially mentioned, and also to the use of her will or appointment? Marriage, which tends to join the blood, is one of the considerations held sufficient to validate such a conveyance. Why should she not have a right in equity, of disposing of her lands, as incident to her ownership? for, she is to be taken, as to the execution of this power, to be a *feme sole*. If the intention of the parties cannot take place, by this deed and appointment, in the common way of their operation, they may be considered good in some other way: The substance, and not the form, ought principally to be regarded. Why may not this case be considered, under all circumstances, of equal operation as a deed executed by the husband and wife, in her lifetime, to the use of the persons named in the appointment? The court of chancery will supply forms, where there is a meritorious consideration; it has gone as great lengths as is desired in the present case; and I am glad to find the last cited case determined there to be in point, "that there is no difference between a legal and equitable interest." Ambler 555; *Rippin v. Daviding*, or *Hawdin*, by Ld. Chancellor Camden, in 1769. The spirit of the case of *Wright v. Lord Cadogan et al.*, 6 Brown Par. Ca. 158, also implies this doctrine.

From all the circumstances of this case, taken together, I am of opinion, that the appointment of Margaret Henderson, passes this estate in equity, and that judgment be given for the defendant.
SHIPPEN, Justice.—I concur in the opinion delivered by the Chief Justice. I confess, however, that I had considerable doubts when the case was argued; but Powell's new edition of Wood's Conveyancing 467–8, has removed them. Powell, the editor, states the doctrine to be now settled in England, according to the case of Rippen v. Hawding. If so settled there, it certainly should be so settled here, where the alienation of real estate is much more favored.

YEATES, Justice.—If we sat merely as a court of law, I should be clearly in favor of the plaintiff. But the chancery maxim, to consider what ought to be done, as actually done, applies strongly to our judicial situation, having no court of equity to enforce the performance of contracts.

As to the right of a *feme covert*, under articles of agreement to devise, Ld. Kenyon, says, "what was once doubted is no longer so." The principles of Rippen v. Hawding are in some degree *impugned by the case of Hodson v. Lloyd, 2 Bro. C. C. 544, but Rippen v. Hawding now appears to be settled, since Powell, who, in his treatise on contracts, adds a *quere* to his account of the case, now states it as established. Since the statute of 27 Hen. VIII., c. 10, I cannot see that solid distinction between a trust, and a legal estate, which would warrant us to draw a line on the present occasion. 2 Bl. Com. 233, 327.

BRADFORD, Justice.—The legal estate is vested in the plaintiff. The defendants set up an equitable defence, relying on the articles, the consideration of those articles, and the devise in pursuance of them. As a will, the instrument is clearly void; but the question is not as to the formality of an appointment, but the creation of a power. The articles do not create a trust, nor expressly raise a power; but articles executory may, I think, create a power over real estate.

As to equity, the court has only a borrowed jurisdiction, from the want of a court of chancery; yet I think the constitution warrants our assuming it, from the expressions it employs. What is equitable, must, therefore, be adopted here; but it must be clearly settled to be so.

It has been urged, that the devisees are no nearer to the disposing party, than the plaintiff; the devisee is neither wife, child nor creditor; and that chancery will not interfere, except where conscience ought to oblige the party to give up a legal advantage. Upon this point Wright v. Cadogan, is distinguished from Bramhall v. Hall; and in Compton v. Collinson, the distinction is adverted to. But as I have already observed, the question is, as to the creation of the power; and that there was a sufficient consideration for creating it, in this case, cannot be doubted; for marriage has always been decreed to be sufficient.

Then, we are led to ask, are these articles executory? Did the husband engage to do anything to carry them into effect? In Wright v. Cadogan, the future husband covenanted to execute such deed as counsel should advise. It is not clearly stated in Rippen v. Hawding, whether the husband was, or was not, to do any act. In the case before us, he undertakes to do nothing; he only assents to his wife’s making a will. The ultimate question thereupon is, does this assent, by removing that power which marriage legally vests in him over his wife’s acts, confer upon her the power which by the articles she meant to reserve? And as the covenant is anterior, and

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*Afterwards, Sergeant moved for a writ of restitution; and urged, that it was a matter of right. 9 Vi. 589–90. Restitution is of duty; but re-restitution is of grace.

Ingersoll replied, that restitution in this case was not ex rigor juris; and in the case of forcible entries, it arises only from an equitable construction of the statutes. 1 Hawk. 140, § 64, 65. This may be considered as a fair agreement, and though the court may not be able to sanction the form of the proceedings, they will equitably interpose to prevent injustice being done. They have exercised chancery powers, and one of the objects of chancery is to prevent the party from availing himself of an unjust advantage at law. Mitford, 103.

Sergeant insisted, that although this court adopted the principles of decision, they did not assume the powers, of the court of chancery.

By the Court.—Execution is of right; yet it may be, and every day is, withheld, on proper reasons being shown. The defendant is in possession under the agreement of the plaintiff, and it is fraudulent, for any man to attempt to overthrow his agreement in this manner. Under all the circumstances of the case, we do not think it proper to issue a writ of restitution.

Motion refused.

Roach v. Commonwealth.

State navy.

Under the resolution of the general assembly of 1779, the officers of the state navy were chargeable for clothing, &c., delivered to them, in that year, only at the rate of depreciation at the time it was delivered, according to the price before the war. Such officers, who were honorably discharged, having accepted the commutation, were not entitled, under the resolution of 25th March 1784, to the previous arrears of half-pay.

Case. Pleas, non assumpsit and payment. The opinion of the judges was now delivered in this cause, the facts and principles involved in it, being stated by the chief justice as follows:

McKeans, Chief Justice.—This action was tried by a jury, in last January term, and a verdict taken for the plaintiff, for 298l. 8s. 1d.; to wit, 41l. 8s. 1d. for an uniform suit of clothes, which he claimed as a grant in 1779, from the state; and 257l. for half-pay as a captain in the state navy, from February the 13th, 1781, until July the 1st, 1783, together with interest from the said 1st of July; subject to the opinion of the court on two questions stated.

1st. Whether clothing received by the plaintiff as an officer of the state navy, from the commonwealth, in consequence of a resolution of the legislature, passed on the 24th of March 1779; or in consequence of an act of the legislature, passed the 1st of March 1780, is to be debited to the plaintiff, or considered as a gratuity; and, if debited, at what price?

2d. Whether the plaintiff is entitled to half-pay from the time of his discharge, until the 1st of July 1783, and interest thereon from that day?

These questions have been argued by Messrs. Ingersoll, Lewis and Scr.
then being twelve for one. As to this point, therefore, I think, if the plaintiff is to be debited at all, it can be only for this last sum, or in that proportion.

With respect to the second question, it appears to me, to be involved in obscurity and doubt; but in such a case, I shall conceive it less injurious to err (if I do err) in favor of the individual, than of the commonwealth; because the error against the individual may be very distressing; whereas, if against the commonwealth, it will hardly be felt; and I know I must contribute my proportion of the money awarded.

It seems to be unnecessary to cite the several resolves of congress, allowing half-pay to the officers of the army of the United States, or of the assembly of Pennsylvania, on the same subject, respecting the troops of the state, as the principal ground on which our present decision must stand in the act of assembly, entitled, "An act for the more effectual supply and honorable reward of the Pennsylvania troops, in the service of the United States of America," passed the 1st of March 1780. In the 15th section, it is enacted, "That the officers, &c., of the navy of this state, who were in service on the 13th March 1779, and shall continue therein until the end of the present war, or until honorably discharged, shall be entitled to the allowances and benefits hereinbefore granted to the military officers, &c., respectively, of the Pennsylvania troops, as to half-pay and clothing; and to the like supply and distribution of the articles above enumerated, subject to the same limitations and conditions; the half-pay of the officers of the navy to commence at the expiration of the present war, or their discharge." And the resolve of the assembly, of the 25th of March 1784, is in these words, "Resolved, that as one of the designs in granting half-pay to the said navy officers was to place them on a footing with the officers of the army, that the officers of the navy of this state, entitled to half-pay for life, under the resolutions of the 24th of March 1779, and confirmed by act of assembly, passed the 1st of March 1780, be allowed five years' full pay in lieu thereof, to be paid at the same time, and in the same manner, that the officers of the army, in the line of this state, are or shall be paid, and that their accounts be liquidated and settled by the comptroller-general, and certificates given them."

From the foregoing, it appears, that a distinction has been made, as to the time when the half-pay should commence, between the officers of the army in the line of this state, and those of the state navy; the half-pay of the former is confined to such of them as should continue in the service of the United States during the war, and was to commence at the conclusion of the war; but that of the latter was to commence at the time of their discharge from service. The plaintiff was honorably discharged from service on the 13th of February 1781, and was incontestably entitled to half-pay from that time, until the 25th of March 1774, when he commuted his half-pay for life, for five years' full pay. The sole question then is—whether this act of commutation has barred the recovery of the half-pay then due to him, to wit, for three years, one month and twelve days, as well as his future half-pay.

It has been contended, for the commonwealth, that his accepting a certificate for five years' full pay, is a bar to the arrearages; for that by a resolve of congress of the 22d of March 1773, adopted by the assembly on the
22d of September 1773, it is directed, “that, with respect to retiring officers, entitled to half-pay for life, the commutation, if accepted by them, shall be in lieu of whatever may be now due to them, since the time of their retiring from service.” On this, the whole difficulty respecting the plaintiff’s claim rests.

In answer, it has been asserted (and acceded to), that the plaintiff, at the time he received his certificate from the comptroller-general, as well as the other navy officers, gave him notice that they meant not thereby to relinquish the arrears of half-pay then due to them, respectively; and it was further contended, that the last-mentioned resolves did not relate to the officers of the state navy of Pennsylvania, but to the officers of the army, in the service of the United States only.

It appears to me, that the clause in the resolve of the 22d of September 1773, relates to retiring officers of the army, and that the navy of the state of Pennsylvania was not all then in the contemplation of the congress, or assembly. Besides, none of the officers of the state navy had retired; but the plaintiff and four or five others had been honorably discharged from the service by the supreme executive council of Pennsylvania. Who the retiring officers of the army were, I do not well know; perhaps, those who became supernumerary, or reduced, in consequence of the resolve of congress of the 21st of October 1770, or such as had retired, with the consent of the commander in chief, after notice of the provisionary articles of peace, of the 30th of November 1772. And it is at least doubtful, whether the half-pay of these officers was to commence before the conclusion of the war; for those who continued to undergo the fatigues and hardships of a camp, and to endanger their lives in battle, until the termination of the war, seemed to have a greater claim on their country, than those who retired from the service; and of this opinion was the congress, which appears in their resolve on General Maxwell’s case, on the 8th of August 1780. The words in the resolve, regarding reduced officers, of the 21st of October 1780, are, that they “are to be allowed half-pay for life;” but no mention is made of the time when it was to begin, nor did the congress make any provision for the payment of it, prior to the conclusion of the war. Be this as it may, it is certain, that no officers of the army in the line of the state, were entitled to half-pay, by any act or resolve of the assembly, excepting such as should serve until the end of the war, and that those in their navy were entitled to it from the time of their discharge. The navy officers could not be placed on a footing with the officers of the army of the state, if the latter got five years’ full pay, in lieu of what was to become due to them for half-pay from the end of the war, and the former got only five years’ full pay, in the lieu of what was to become due to them, but also of several years of arrears then past, for the payment of which they had a legislative security. Besides, the officers of the army had large bounties in lands, not only from the state, but also from the United States; but the officers of the state navy had none. Could this have been the intention of the legislature? I should think not, because of the great inequality it would create, not only between their officers in the land-service and sea-service, contrary to their express declaration, but also between the latter themselves; for by accepting the commutation, the one would lose more than another, in proportion to the times they were respectively discharged. This would be so unreasonable and unjust,
that unless they had expressly and manifestly thus declared, I am inclined to entertain a contrary sentiment. Their design rather appears to have been, to place their navy-officers on a footing with the most favored of their land-officers, because they expressly allowed them half-pay, from the time of their discharge; but to the others, only from the end of the war. It is a pity this affair has been left so embarrassed; but the best conclusion I can form, upon the whole, is in favor of the plaintiff, on this question also.

Shippen and Yeates, Justices, concurred with the Chief Justice in the first point; but differed from him in the second point.

Bradford, Justice, concurred with the Chief Justice in both points.

Walket et al. v. Gibbs et al., garnishees.¹

Foreign attachment.—Verdict.

A debt, payable in futuro, may be attached, by writ of foreign attachment.
A verdict will be so construed, as to effectuate the plain intention of the jury.

A FOREIGN ATTACHMENT issued in the common pleas of Philadelphia, returnable to March term 1788, at the suit of the plaintiffs, against Joseph Waldo, and the defendants were summoned as garnishees. Judgment being entered at the third term, a writ of inquiry was executed, and the sum of 3778L 9s. 9d. was found in damages. A scire facias was, thereupon, issued against the garnishees, returnable to March term 1789; but the cause was removed into this court, by a writ of certiorari, returnable to July term 1789; and was tried on the 24th of September 1790; when the jury found a verdict for the plaintiffs for 1204L 12s. 4½d.; and at the instance of their counsel, added the following words at the bar, which the court directed to be entered in the record—"being exclusive of certain outstanding debts, and exclusive also of a bond for 10,000L from the garnishees to Waldo, dated the 17th of November 1786, and payable the 17th of November 1790;" which bond was admitted in the garnishees' answers to interrogatories filed by the plaintiff. On this verdict, judgment was entered, generally; and, the time for paying the bond having elapsed a scire facias, returnable to January term 1792, was issued upon the judgment, requiring the garnishees to show cause why execution should not issue for the amount.

The questions arising upon these facts were submitted to the court, upon a motion to quash the scire facias, which was argued by Coxe, Rawle and Dallas, for the garnishees; and by Ingersoll, Lewis and McKean, for the plaintiffs.

For the garnishees, it was contended, 1st. That no verdict or judgment had been given for the bond; in respect to that, as well as to the outstanding debts, the language is exclusive; and what is excluded cannot be included. Where there is no verdict, there can be no judgment; for the consideration of the court is on the finding of the jury: a judgment must be warranted by the verdict. A verdict is void in all cases where it finds the matter in issue, by

¹s. c. 1 Yeates 253.

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Upper Dublin v. Germantown.

way of argument. 5 Com. Dig. tit. Pleader, § 22. 2d. That the bond, not being due, could not be attached. 3 Leon. 236; Roll. Abr. 553, pl. 2; Cro. Eliz. 713; 7 Vin. Abr. 229, pl. 2, 3, 4. 7 Ibid. 189, 189. 3d. That the scire facias ought to have been brought upon the original judgment in the common pleas, and not upon the judgment in this court. Style Pr. Reg. 573, 5, 6, 8; 4 Bac. Abr. tit. Scire Facias, § 1; Hob. 280.

For the plaintiffs, it was answered: 1st. That if the verdict was informal, the court could mould it into form, from the materials placed by the jury on the record. 1 Dall. 462; Hob. 54; 2 Burr. 699; 3 T. R. 749, 349; Doug. 121. 2d. That, from the uniform practice under the act of assembly (1 Dall. Laws 60), as well as from the authorities under the custom of London, debts payable at a future day might be attached. 3 Lev. 236; Vin Abr.; 1 Sid. 327; 1 Bac. Abr. 691; 1 Roll. Abr. 553; 2 Daw. 316. 3d. That the jurisdiction was recognised by the act which provides for the garnishees answering interrogatories. 2 Dall. Laws 734.

By the Court.—This scire facias is issued to revive and effectuate a judgment obtained in this court; and therefore, is regularly instituted here. It is true, that a bond is assignable in Pennsylvania; but if the bond in question had been actually assigned, the fact might have been pleaded to the former scire facias. As to the question, whether the debt was liable to attachment, we have no doubt. It was debitum in presenti, solvendum in futuro: and it has been the uniform construction of the act of assembly, that such debts were affected by the attachment.

It must be allowed, that the judgment is, in some degree, informally entered; but we can have no difficulty in fixing the meaning of the jury, though their verdict might have been better expressed. The fact, indeed, being admitted in the answers of the garnishees to the interrogatories, judgment would have been given, on motion; and of course, on all the facts now stated, we are equally competent to decide.

Let judgment be entered for the plaintiffs.

APRIL TERM, 1793.

*Upper Dublin v. Germantown.¹

Order of removal.

A justice cannot join in making an order of removal from his own township.²

Two Justices made an order, removing Rachel Peters, as a pauper, from Germantown to Upper Dublin. On appeal, the quarter sessions of Philadelphia county confirmed the order. It was brought into this court, by certiorari; and the fact upon which Upper Dublin relied, was, that the two

¹s. c. 1 Yeates 250.
²Washington v. Beaver, 3 W. & S. 548; Township v. Clover Township, 32 Leg. Int. McVeytown v. Union Township, 5 Id. 284; 449.

Bradford v. Keating, 27 Penn. St. 275; Ross 185
justices, at the time the order was made, were inhabitants of, and ratable and contributary to the poor-tax of Germantown.

Upon argument by Rawle, for Upper Dublin, and Ingersoll, for Germantown, The Court, unanimously, quashed the order of sessions, and the order of the two justices.

STANSBURY v. MARKS.

Witness.

A Jew may be fined for refusing to testify on his Sabbath.

In this cause (which was tried on Saturday, the 5th of April), the defendant offered Jonas Phillips, a Jew, as a witness; but he refused to be sworn, because it was his Sabbath. The court, therefore, fined him 10l.; but the defendant, afterwards, waiving the benefit of his testimony, he was discharged from the fine.

SHOEMAKER, assignee, v. KEELEY.¹

Assignment in bankruptcy.

An assignment in bankruptcy does not pass a cause of action arising in tort.

This was an action on the case, for deceiving the bankrupt in the sale of a quantity of claret; and the question submitted for decision to the court was—whether such an action could be maintained by the assignee?

The defendant's counsel (Rawle) observed, that the bankrupt was really indebted to his client; but that in this form of action, he would be deprived of the advantage of a set-off; and he contended, that the action would not lie. The 7th section of the bankrupt act (2 Dall. Laws, 371) gives to the commissioners a power only "to assign or dispose of all the debts due to, and for the benefit of, the bankrupt," &c. Debts, emphatically, and nothing else, pass under this power; goods and chattels passing under the general statutory assignment; and the remedy for a tort is not, in its nature, assignable. Doug. 101, 562; Co. 222, 228; 2 Vern. 98.

The plaintiff's counsel (M. Levy) answered, that this was not an action brought against the bankrupt, or the commissioners; and that it ought to be sustained, upon the same principle, which authorised such an action to be brought by executors or administrators (who are assignees of the deceased), though it could not be brought against them. Thus, likewise, though a chose in action is not assignable at law, it goes to executors. Cowp. 373; 2 Bl. Com. 389, 485. The statutes of bankruptcy were framed to ameliorate the condition of creditors; and it is obvious, that every right and interest of the bankrupt, even a mere possibility, is transferred. 3 P. Wms. 132; Co. B. L. in App. 45–6.

By the Court.—It is plain, that the action, in its present form, cannot be supported. Under the act of assembly, nothing but debts are assigned, or assignable; and torts must be considered as the mere personal concern of the bankrupt.

Let judgment be entered for the defendant.

¹n. c. 1 Yeates 245.
Caldwell, the same should be defalked out of the said sum for which judgment was rendered, and execution issue for the residue only." It appeared, that the attachments in question had been laid by the defendant himself, in the name of another person and without any authority, but what might be inferred from a general correspondence; and in one instance, an issue being formed and tried, on the plea of nulla bona, the verdict was in favor of the garnishee.

On the 9th of April 1793, the defendant's counsel (Sergeant, Ingersoll and McKean) moved to stay further proceedings, upon payment of the principal sum found due by the referees, and costs. The motion was opposed by Tilghman, Wilcocks and Lewis, for the plaintiff; who contended, that under the circumstances of this case, interest ought to be allowed.

McKean, Chief Justice.—It is clearly the general rule, that a garnishee is not liable for interest, while he is restrained from the payment of his debt, by the legal operation of a foreign attachment. But it is said by the plaintiff's counsel, and I assent to the proposition, that if there is any fraud or collusion; nay, if there is any unreasonable delay occasioned by the conduct of the garnishee himself, such cases will form exceptions to the general rule. In the present instance, however, there is no proof of fraud or collusion; nor of any wilful procrastination on the part of the garnishee; and fraud can never be presumed. It is true, likewise, that no express authority was given for laying the attachments; but an implied authority appears in the correspondence that has been produced: and the defendant is not answerable for the event. I am, therefore, of opinion, that interest ought not to be allowed.

Shippen, Justice.—Evidence will often strike different minds in a different manner. It does not appear to me, that there was sufficient authority for instituting the foreign attachment; but, on the contrary, that it was done officiously, and at the instance of the garnishee himself. I should, consequently, think it just, on this occasion, to allow the claim of interest; but the majority of the court will sanction a different decision.

Yeates, Justice.—I concur, generally, in the opinion expressed by the Chief Justice, that there is not sufficient ground to except the present case from the operation of the general rule.

Bradford, Justice.—As I was originally counsel in this cause, I forbear taking any part in the decision.

By the Court.—It is awarded, that the defendant be discharged, upon payment of the principal sum recovered, with costs. (a)

(a) A writ of error was brought by the plaintiff; and on the 18th of July 1793, the high court of errors and appeals delivered the following judgment.

By the Court—After making consideration and due deliberation, it is considered by the court here—1st. That the last judgment or decretal order of the supreme court "That Andrew Caldwell shall be discharged from the said judgment, on the payment of 4010l. 9s. 4d., to wit, the principal sum found due to Vance, Caldwell & Vance, by the second report of the referees, and all costs of suit," be reversed. 2d. That the judgment in the supreme court, rendered in the term of January 1791, in favor of George
OF PENNSYLVANIA.

JANUARY TERM, 1794.

* Vance, surviving partner, v. Fairis.

Evidence—Book-entries.

A book, some of the entries in which were made a considerable time after the transactions took place, and which are not distinguished from the regular entries, is inadmissible.

On the trial of this cause, the plaintiff, who was surviving partner of a commercial house established in Dominica, offered in evidence, a copy of entries in original books of the company, sworn to be truly transcribed. The witness premised, however, that the dates would, by no means, ascertain the exact period at which the transactions arose between the parties, as the entries were not made in the waste-book, for months afterwards. The defendant's counsel, thereupon objected to the admission of the evidence.

The counsel for the plaintiff stated, that their clients had, in fact, been engaged, during the late war, in an illicit trade with America, and that the defendant was their agent; that, therefore, it had been necessary to give a color to their transactions, and that they had not dared to make many of the entries at the time the facts occurred: but it was contended, that as the declaration of the witness did not go to all the items; as he does not specify any that are exceptionable, and as some are unquestionably proper to be laid before the jury, the objection to the evidence can only apply to its credibility, and not to its competency.

By the Court.—It does not even appear, that the clerk who made the entries, was in the service of the plaintiff, at the time the transactions took place; nor does any witness substantiate the transactions themselves, upon oath. We are always inclined to be liberal in the admission of evidence upon commercial controversies; but to establish a book, or the copies of entries in a book, kept under such circumstances, would be giving too great a latitude for deception; and, if drawn into precedent, might prove a pernicious innovation upon the rules of law. The evidence cannot, therefore, be received.

Fitzgerald, the plaintiff in error, for the sum of 5000l. 5s. 1d. with the costs of suit, and by agreement of the parties, stated in the record, made absolute in January term 1792, be and the same is hereby, according to the terms of the said agreement, affirmed and made stable. The record was thereupon remitted to the supreme court.

1 s. c. 1 Yeates 321.
* Also reported in Addison 119. See a further decision in this case, 4 Dall. 251; 1 Yeates 274.
WARD v. HALLAM. 4

Statute of Limitations.

The words, "beyond sea," in the act of 1713, mean out of the limits of the United States. 5

The plaintiff was a citizen of, and resident in, South Carolina, and the defendant was a citizen of, and resident in, Pennsylvania, for six years before the present action (founded upon a promissory note) was commenced. The statute of limitations being pleaded, judgment was confessed for the plaintiff, subject to the opinion of the court, whether, under the circumstances of the case, the plea in bar was sufficient?

The point was argued, on the 9th of April 1793, by Rawle, for the plaintiff, and Dallas, for the defendant.

In support of the plea, it was contended, that the exception in favor of absentees, contained in the last section of the act of Pennsylvania (1 Dall. Laws 97), obviously extended only to the case of creditors beyond sea; for it is to their case expressly, that the words "returning into this province," are applied. So, in the construction of the statute of 21 Jac. I., c. 16, respecting absent creditors, and the act of 4 & 5 Ann., c. 16, respecting absent debtors, the exception has always been confined to persons absent beyond seas; and Scotland has been adjudged not to be within the statute. Espinasse, 153; 1 Bl. Rep. 286. The several American provinces, before the revolution, were as nearly connected, under the same sovereign, as England and Scotland; since the revolution, they form one nation; it would be a geographical absurdity, to consider an inhabitant of South Carolina to be beyond the seas, in relation to Pennsylvania; and it would be a political absurdity, to consider him, in the phraseology of some English books, to be in foreign parts. If an inhabitant of South Carolina is to be regarded in either light, so must an inhabitant of Delaware or New Jersey.

It was answered, for the plaintiff, that, in the general opinion, the act of limitations had never been supposed to operate against persons who were out of the state, whether they resided in any other part of America, or were actually beyond sea. The act of Pennsylvania is subsequent in date to the English statutes on the same subject; and conforms to the 21 Jac. I., except that the 21 Jac. I., speaks of returning from beyond seas, while the act speaks of returning into this province. The words "beyond seas," however, will be found to have been adopted as a general substitute for the words "out of the realm," from the time that the two kingdoms of England and Scotland, became united under one king. To consider those words in our code, in a strict geographical sense, would render them extravagant, and in many cases useless; for a man might reside at Lima, or Cape Horn, and yet be within the operation of the act. Besides, the legislature of Pennsylvania has no political or moral right, to make laws to bind persons who are out of her jurisdiction.

of July, the plaintiff came back to the city, and approved what his clerk had done. On the 29th of July, Captain Southern arrived, in the sloop, at Philadelphia, bringing with him Mr. Dawes’s last dispatches, but no money. The plaintiff thereupon called a meeting of all the underwriters, submitted the facts and papers to them; made a verbal claim as for a total loss, and it was agreed, on all hands, that without prejudice to either party, Capt. Southern should be arrested, to compel him to account for the money. It was not, however, until the 6th of November 1789, that the plaintiff addressed a letter to the underwriters, making a formal abandonment of all the property in the sloop; and on the same day, they answered, that they did not think it proper to accept the abandonment, but offered to pay an average loss.

Upon these facts, a verdict was taken for the plaintiff, subject to the opinion of the court, whether they established a total, or an average, loss?

On the argument, however, two positions were asserted, by the defendant’s counsel: 1st. That the circumstances of the case did not warrant an abandonment, as for a total loss: and 2d. That even if the plaintiff had a right so to abandon, he had not exercised that right in due time.

On the first position, they had stated the general doctrine to be clearly established, that the owner of goods cannot abandon, unless, at some period or other of the voyage, there has been a total loss; and where the loss is not an absolute destruction of the property, an abandonment will not be allowed, unless the damage amounts to a moiety of the value. Park, Ins. 164, 165, 188. This was not the fact, in the present instance; the goods were not destroyed; they were not damaged to near the amount of a moiety of their value; nor can it be said, that the voyage was defeated, since the sloop, by returning to Philadelphia, has proved that she might have gone to Trinidad, where the superior price would have compensated for every expense. What, indeed, constitutes the defeating of a voyage, must depend on the circumstances of each case; and notwithstanding the generality of the expression in Park 164, it will be found, that when he, as well as other writers on the subject, enters into an exemplification of the rule, it is done by specifying instances of a total loss of the vessel, by tempest, capture or decay, and by instances of a total destruction of the cargo, or, at least, of such damage, as does not leave sufficient to defray the expense of repair, &c. Park, Ins. 165, 174, 176, 187, 189.

On the second position, they urged, that the abandonment was neither complete, nor in time. The indulgence allowed, under any circumstances, to the insured, to convert a partial into a *total loss, is a great one, and ought to be fairly merited by a candid and explicit conduct: to observe a cautious silence, in expectation of events, is not the characteristic of such conduct. The insured has, unquestionably, a right to say, in all cases, that he will not abandon; while he remains silent, he cannot be presumed to have abandoned: it is a matter of election on his part, and he must do some act, in due time, in order to manifest his election. In short, he must, unequivocally, and on the first opportunity, after information of the loss, abandon the whole property, before he can recover for a total loss. Park, Ins. 161, 162; 1 T. R. 615, 613; Doug. 220; 2 Burr. 1119; 1 T. R. 608; 2 Ibid. 407. In the present case, there was no positive act of abandonment, until the 8th of November 1789; the communication made by the plaintiff’s clerk to
tion of the plaintiff's intention; and no form of abandonment is prescribed by any law or authority extant. The plaintiff's conduct, on the 29th of July, was tantamount to an abandonment; but even if the formal act of the 6th of November was necessary, it will be remembered, that the underwriters have suffered no inconvenience or injury, by the delay.

The Court, on the 24th of January 1794, delivered their opinion, "that the plaintiff cannot recover in this action, as for a total loss;" and judgment nisi was, thereupon, entered for the defendant. (a)

E. Tilghman and Lewis, for the plaintiff. Ingersoll and M. Levy, for the defendant.

JANUARY TERM, 1795.

Lloyd's Lessee v. Taylor.*

Execution of power of sale.

When a testator directs his lands to be sold, and the proceeds distributed, but appoints no one to execute the power, a sale by the surviving executor is valid.

The question in this case arose upon a devise, that after the death of the testator's wife, certain lands should be sold, and the money divided among children; but the will did not declare by whom the sale should be made. The land was sold, however, by the survivor of two executors; and it was submitted for the opinion of the court, whether that sale was good, the plaintiff's counsel citing the following authorities in support of it: Dyer 371; Hard. 419; 1 Ch. Ca. 179; 2 Leon. 320; Shep. 449; Sir T. Jones 25; Savil. 72; 3 P. Wms. 92; 1 Atk. 420.

By the Court.—It is a plain case. Let judgment be entered for the plaintiff.

Rawle, for the plaintiff. Bankson, for the defendant.

(a) A motion, on behalf of the plaintiff, was made and granted, for re-argument, which took place on the 10th of September 1794.

The Court, however, adhered to their former opinion; and on the 22d of January 1795, gave—

Judgment for the defendant.

1 The opinion of the Chief Justice, embracing the two resolutions stated in the head-note, will be found in 1 Yeates 470. The rule, that when a voyage is defeated, the insured may abandon, and recover for a total loss, is a sound one, when applied to the subject insured. Goold v. Shaw, 1 Johns. Cas. 298. Thus, Judge Story says, in Bradie v. Maryland Ins. Co., 12 Pet. 401, that "a total loss of cargo may be effected, not merely by the destruction of that cargo, but by a permanent incapacity of the ship to perform the voyage—that is, a destruction of the contemplated adventure." S. P. Columbian Ins. Co. v. Catlet, 12 Wheat. 358; Robinson v. Commonwealth Ins. Co., 3 Sumn. 220. But a technical total loss of the cargo, will not authorize an abandonment of the vessel, if she might have been repaired for less than half her value, so as to have been competent to prosecute her intended voyage, though the voyage be actually broken up by the loss of the cargo. Goold v. Shaw, ut supra; Alexander v. Baltimore Ins. Co., 4 Cr. 370; Bradie v. Maryland Ins. Co., 11 Pet. 378. And if the voyage be broken up by fear of an anticipated peril only, this does not amount to a technical total loss of the cargo. Smith v. Universal Ins. Co., 6 Wheat. 176.

s. c. 1 Yeates 422.
care to keep three of the six old managers in office, until the last election, when six managers entirely new were appointed.

*Bradford* and *Ingersoll*, in support of the motion, contended, that the usage of re-appointing three of the old managers, was beneficial, and ought to be considered as the genuine construction of the law.

*Raule*, in opposing the motion, admitted the usage, but insisted, that, on the terms of the act of assembly, the defendants were authorised to appoint six new members at every half-yearly election.

The Court, after advisement, rejected the motion.

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**Respublica v. Richards.**

*Kidnapping.*

The 7th section of the act of 29th March 1783 (P. L. 448), did not extend to the case of a sojourner forcibly carrying off his slave; it only applied to free negroes.

This was an indictment, on the 7th section of the act supplemental to the act for the gradual abolition of slavery (2 Dall. Laws 589), which is expressed in the following words: "If any person or persons shall, from and after the passing of this act, by force or violence, take and carry, or cause to be taken and carried, or shall, by fraud, seduce, or cause to be seduced, any negro or mulatto, from any part or parts of this state, to any other place or places whatsoever, with a design and intention of selling and disposing, or of causing to be sold, or of keeping and detaining, or of causing so to be, as a slave, or servant for a term of years, every such person and persons, their aiders and abettors, shall, on conviction," forfeit 100£. and be confined at hard labor for any term not less than six months nor more than twelve months. The indictment contained two counts; the 1st charging the defendant with fraudulently seducing negro Toby from Pennsylvania into New Jersey, with a design to enslave him: and the 2d charging him with fraudulently causing negro Toby to be so seduced, for the same purpose.

Upon the evidence in support of the prosecution, it appeared, that negro Toby had been brought upon a temporary visit to Philadelphia, as a servant in the family of General Sevier, of the state of Virginia; that when General Sevier proposed returning to Virginia, the negro refused to accompany him; that after several propositions for securing him, the defendant told Mr. Sevier, that there was no way of managing the matter effectually, but by inducing the negro to go into New Jersey, and then to lay hold of him; that Toby was forcibly sent by General Sevier to Cooper's Ferry, whither the defendant went, on purpose to secure, and actually did secure him; that after some severity towards the negro, General Sevier arrived at the same place, and demanded Toby's pocket-book, which Toby, however, delivered to one of the witnesses, saying, "it contains my freedom papers"; that the witness delivered the pocket-book to General Sevier; and that, finally, the defendant and General Sevier put Toby on board of a boat and carried him down the river.

*§ c. 1 Yeates 225.*
state have a right to retain their slaves for a term of six months; and the delegates in congress from other states, foreign ministers, and consuls enjoy that right, as long as they continue in their public characters. *The succeeding section likewise expressly provides, that absconding slaves shall derive no benefit from the law; but that their masters shall have the same right and aid to demand, claim and take them away, that they had before. This act of assembly, and particularly these provisions, are not repealed by the supplemental act, on which the prosecution is founded. Then, we find, that any traveller, who comes into Pennsylvania, upon a temporary excursion for business or amusement, may detain his slave for six months; and the previous law (recognised by the act of assembly, during that term, authorizes the master to apprehend the slave, and entitles him to the aid of the civil police to secure and carry him away, By a regulation of this kind, the policy of our own system is reconciled with a due respect to the systems of other states and countries; while an opposite construction would render it impossible for any American, or foreigner, to pass with a slave through the territory of Pennsylvania.

It has been said, that the words "slaves or servants," which are used in the other provisions of the supplemental act, being omitted in this section, it must be inferred, that the legislature intended to protect the slave or servant, as well as the freeman, from the outrage contemplated: but in our opinion, that very omission shows the fallacy of such a construction; for if the legislature designed to protect freemen, and not slaves, they could not, in any other way, more effectually manifest their meaning. In short, the evil apprehended was that of forcing a free negro or mulatto, into another country, and there, taking advantage of his color, to sell him as a slave; and for such an offence, the punishment denounced by the law would be justly inflicted.

Upon a review of the facts, likewise, we find occasion to regret, that the prosecution should have been conducted with a zeal, which rarely appears in the prosecution of the highest criminal, on the strongest proof. There is not, however, a tittle of evidence to establish the charge, that the defendant seduced the negro, or that he even spoke to him in Pennsylvania, where the act of seduction must be committed, to vest the jurisdiction in the court. Nor can it be fairly said, that he caused the negro to be seduced; for the advice given to General Sevier was merely the advice of a friend; which could not surely merit the ignominious punishment of the law; and which was not, in fact, adopted, as the negro was forcibly, and not by seduction, sent out of the state.

But upon the whole, we were unanimously of opinion, as soon as it was proved the negro was a slave, that not only his master had a right to seize and carry him away; but that, in case he absconded or resisted, it was the duty of every magistrate *to employ all the legitimate means of coercion in his power, for securing and restoring the negro to the service of his owner, whithersoever he might be afterwards carried.

Verdict, not guilty.
Burrall v. Du Blois.

Arrest of judgment.

Judgment will not be arrested, because one of the counts of the declaration is defective; but the verdict will be directed to be entered on the good count.

This case was tried, and a general verdict given for the plaintiff, on the 11th of September. On the 15th of September, Lewis made a motion in arrest of judgment, because a general verdict was taken, and the action, clearly, would only be maintained on one of the counts in the declaration.

Dallas contended, that the motion was made too late, and cited 3 T. R. 623; Doug. 446; 1 T. R. 227; 4 Burr. 2526; 2 Woodeson 248; to show, in the computation of time, when the day on which an act was done, shall be deemed inclusive. He also moved to be allowed to enter the verdict on the first count in the declaration, agreeable to the authority in 4 Burr. 1235.

By the Court.—The day on which the verdict was given should be reckoned inclusive; and therefore, the motion in arrest of judgment has been made too late. But we have no doubt, that it is in our power to grant the plaintiff permission to enter the verdict on a proper count; and that it ought, in this case, to be granted.

The motion in arrest of judgment was accordingly dismissed, and the verdict entered on the first count. (a)

SEPTEMBER TERM, 1795.

*230] *Penn's Lessee v. Hartman. (b)

Evidence.—Copy.

A certified copy of a paper, found in a public office, is not evidence, unless the original would be admissible, if produced.

Ejectment, brought by the late proprietaries, for a tract of land in the county of Northampton. On the trial, it was material for the lessors of the plaintiff to show, that a survey had been duly made and returned into the murder of the second degree, punishable by imprisonment at hard labor. From the facts reported by the judge who presided on the trial, Honeyman's offence would clearly have fallen under the latter division.

(a) The court waited until the last hour of the term, for the defendants' counsel, who was indisposed; but said, that in a case in which they were so perfectly satisfied, they could not keep it longer under advisement.

(b) Tried at Easton nisi prius, the 25th of June 1795, before McKean, Chief Justice, and Smith, Justice.

RAPELJE v. EMERY.  

Foreign judgment.

The judgment of a foreign court, in a foreign attachment, under which the money adjudged to be in the garnishee's hands has been paid over, is a complete protection to the creditor who has received it on the footing of the judgment.

Rapelje v. Emery, ante, p. 51, affirmed.

A verdict having been taken for the plaintiff in this cause, subject to the opinion of the court, the question (arising upon the same facts, set forth in the decision in the common pleas, ante, p. 51) was argued in April term last, on a motion for a new trial, and the judges now delivered their opinions seriatim, to the following effect.

MCKEAN, Chief Justice.—Upon every view of the subject, I am of opinion, that a new trial ought to be granted. The proceedings of the court of St. Eustatius we must presume to be conformable to the law of the place; the decision appears to be strictly just; and independent of the merits, we are bound by it, as the decision of a competent tribunal.

SHIPPEN, Justice.—Having delivered my sentiments at large, in this action, from another bench, I mean now only to take notice of two new cases, cited at the last argument, by the plaintiff's counsel, to show that actions for money had and received, had been brought and supported against plaintiffs, who had recovered upon foreign attachments, to oblige them to refund to third persons the money so recovered. These are the cases of *Hunter v. Potts, in 4 T. R. 182, and Sill and others v. *232] Warvotok, in Henry Blackstone's Rep. 665; in both of which, the ruling principles appear to be, that all the parties were subject to the bankrupt laws of England, where every man is supposed to be consenting to every act of parliament; that there was an actual vesting of the property of the bankrupt in assignees, for the benefit as well of the plaintiffs in the attachments as all the other creditors; that the plaintiffs, being jointly interested with the other creditors, and having a full knowledge of the whole transactions, took indirect measures to apply the whole property to their own use, in direct violation of the bankrupt laws, and their virtual contract with their fellow-creditors. It was, therefore, consistent with every principle of law and justice, to make those plaintiffs answerable to the assignees of the bankrupt, for the money they had so unfairly recovered by attachments in America, and which the assignees were entitled to, as trustees, as well for the plaintiffs in the attachments themselves, as the other creditors. Lord Loughborough, in delivering the opinion of the court in the latter case, is very careful to distinguish that case from the general case of the creditor, unconnected with the bankrupt laws, who recovers his debt in a competent court of justice, in a foreign country: for although he is of opinion, that the operation of the proceedings under the bankrupt laws of England is such as to vest the personal property of the bankrupt, in every part of the world, in the assignees, from the time of the assignment, yet he expressly declares, that a creditor in a foreign country, not subject to the bankrupt laws of England, nor affected by them, obtaining payment of his

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1 S. c. sub nomine Meisner v. Amory, 1 Yeates 533.
tiff. A motion having been made and argued for a new trial, on the ground that there had been no proof of notice to the deceased indorser, that the bill was protested, and of a demand for payment on the drawer, the Chief Justice delivered the opinion of the court.

By the Court.—The only point before us is, whether due notice was given to the testator, of the demand and non-payment of the bill. From the peculiar situation of this country, notice must be considered as a matter of fact; and in that way it was left to the jury, in the present case, with this single remark, that the notice ought to be given as soon as it is practicable. No time, indeed, has been fixed, even in the city; but we should be disposed to think, that six or seven days would here be too great a delay.

The motion for a new trial rejected.

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*Caignet v. Pettit et al.*

Consular jurisdiction.

A French subject, who had never assented to the Republic, but, leaving the French West Indies, had settled in the United States, held not to be a French citizen, for the purposes of consular jurisdiction.

This was a *scire facias* against the defendants, as garnishees of Gilbauld, Rouge & Co., French citizens, residing in the West Indies. A rule was obtained by the defendants, to show cause why the proceedings should not be quashed, upon the ground, that the plaintiff was also a French citizen, and that, therefore, the court was precluded from exercising any jurisdiction, by the 12th article of the consular convention, which provides, “that all differences and suits between the citizens of France, in the United States, or between the citizens of the United States, within the dominions of France, &c., shall be determined by the respective consuls and vice-consuls, either by a reference to arbitrators, or by a summary judgment, and without costs. No officer of the country, civil or military, shall interfere therein, or take any part whatever in the matter: and the appeals from the said consular sentences shall be carried before the tribunals of France, or of the United States, to whom it may appertain to take cognizance thereof.”

The facts respecting the plaintiff’s citizenship were briefly these: He was a native of France, and resided in the Island of St. Domingo, at the period of the French revolution. He had afterwards accepted an office from Louis XVI., under the constitution establishing a limited monarchy; but previously to the abolition of monarchy, and the introduction of the Republican system (the 10th of Sept. 1792) he came to America, took an oath of allegiance to the State of Pennsylvania, under the act of March 1789 (2 Dall. Laws 676), which act, however, was at that time obsolete, (a) and purchased a tract of land, on which he resided. He had not been naturalized conformable to the act of congress; but he had frequently been heard to express his abhorrence of the existing constitution of France; he had never

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1 S. C. 1 Yeates 435.
HADDENS v. CHAMBERS.\(^1\)

Bankruptcy.

A discharge under the bankrupt law of Maryland, does not bar a surety, who has been compelled to pay, after the principal's discharge.

The opinion of the Court was delivered in this case, by—

SMITH, Justice.—At the court of nisi prius, held in Huntingdon county, the following case was stated for our opinion. The plaintiff was jointly and severally bound, as surety, in a bond with and for the defendant. After the bond became due, the defendant was discharged under the general insolvent act of the state of Maryland, passed in April 1787; and subsequent to that discharge, the plaintiff was sued on the bond, paid the amount, with interest and costs, and then instituted the present action (in which the declaration is for money paid for the use of the defendant) to obtain a reimbursement.

Under these circumstances, it is clear, that the action would be sustained in England, against a bankrupt, discharged by the bankrupt laws of that country. The insolvent law of Maryland does, indeed, exonerate the debtor from all debts due or owing from, or contracted by, him, prior to his deed of assignment; but the English statute contains words equally comprehensive; and yet, it has never been deemed to extend to cases like the present. The plaintiff could not have been entitled to a dividend of the insolvent debtor's effects, and it would be a denial of justice, to refuse him the only remedy, which he can have on this occasion.

Judgment for the plaintiff.

DE WILLER v. SMITH.

Penal action.

This case came before the court on a certiorari to remove a judgment, which Smith had obtained before the Mayor of the City of Philadelphia, in a qui tam suit, brought against Catharine De Willer, as a huckster, upon an ordinance of the corporation (passed the 26th November 1792) which imposes a penalty of 37s. 6d. upon any huckster, who, within the limits of the city, shall buy any provision, fruit, &c., more than is necessary for his or her family use, except after ten o'clock on market days.

Two exceptions were taken to the proceedings by J. McKean and S. Levy: 1st. That the judgment did not state that De Willer was proved to be a huckster. 1 Salk. 404; 4 Bl. Com. 280, 281; 1 Burr. Inst. 330, 331, 333, 335, 336, 233. 2d. That the ordinance of the corporation is contrary to

The Court, after hearing the counsel of both sides, on the question proposed, were of opinion, that the consular jurisdiction does not extend generally to all differences and suits between Frenchmen.

The plaintiff, thereupon, prayed leave to discontinue his said action, without costs; which being granted, he did discontinue accordingly.

1. c. 1 Yeates 539.
trial of the cause, to wit: That the bond was given for payment of the consideration money of a tract of land and mill, which the plaintiffs had sold to the defendants, reserving in the deed a right to swell and raise the water, so as not to injure the mill; but that the plaintiffs had raised the water, so as to injure the mill.

The counsel for the plaintiffs (Ross and Thomas) objected to the evidence, on the ground, that the injury, if it had really happened, was in the nature of a tort, for which the damages were not ascertained, and could not be set off, in an action upon the bond. 1 Bl. Rep. 394; Cowp. 5-6; 4 T. R. 74, 511; Doug. 665; 4 Bac. Abrid. 116.

The defendants’ counsel (Ingersoll and Sitgreaves) stated, that the evidence was not meant to operate, strictly, as a set-off, but as an equitable defence. The consideration of the bond had, in a great degree, failed, by the act of the plaintiffs; and as the consideration might be inquired into, anything is admissible in evidence, on the plea of payment, which tends to show, that the plaintiffs, ex aequo et bono, ought not to recover. 1 Dall. 17, 260. Besides, the reservation in the deed is in nature of a covenant, and wherever the intent of the parties appears under hand and seal, an action of covenant lies. 1 Ch. Cas. 294; 6 Vin. Abrid. 381, pl. 21, 22; 2 Mod. 91; 1 Leon. 277, pl. 1; Ib. 375; 6 Vin. Abrid. 319, pl. 12; 2 Com. Dig. 559, 560; 1 Saund. 322; 1 Salk. 196; Cro. Car. 437; 1 Sid. 423; T. Raym. 183.

By the Court.—The question is, whether, under the liberality of the practice of our courts of justice, such evidence is admissible? To decide in the affirmative, the case must either be embraced by the general provision of the act for defalcation (1 Dall. Laws 65), or by the 39th rule of the supreme court. Now, although our act of assembly extends further than the British statutes of set-off (2 Geo. II., c. 22, and 8 Geo. II., c. 24), we do not think it comprehends a defalcation of the nature contended for: and though the 39th rule of the court ascertains what evidence is admissible on the plea of payment, it contains nothing descriptive of the present circumstances, where there was a good consideration for the bond, though the defendants have been injured by the subsequent conduct of the plaintiffs.

If, however, the defendants would otherwise be without a remedy, we should be solicitous, by any rational construction of the law, to admit the evidence: but it is clear, that they may have an adequate redress for the wrong which they have suffered, in a form of action suited to their case. (a)

The evidence was rejected; and a verdict given for the amount of the plaintiff’s demand.

(a) Yeates, Justice, added, that in the case of Sweetser v. Garber, tried at nisi prius, in Cumberland county, when he was counsel for one of the parties, a similar principle was decided. The vendor had interrupted the vendee in the enjoyment of the tract of land, which had been sold; but the latter was not allowed to give the matter in evidence, in an action brought by the former, to recover the purchase-money. 1

1See Stelley v. Irvin, 8 Penn. St. 500.
3 T. R. 36; 1 Vent. 49. The decisions in Pennsylvania have been uniform in the admission of such witnesses. 1 Dall. 110, 62; Rex v. Chapman and Bates, before the recorder (Chew) in the mayor's court of Philadelphia, 1772; Smith's Case, in the quarter sessions of Northampton county; Shepherd's Case, before the recorder (Wilcocks), in the mayor's court.

McKean, Chief Justice.—Two objections have been taken to the competency of Joseph Heister, as a witness on the present indictment: 1st. Because his name appears to be subscribed to the note, which his evidence is intended to prove a forgery: and 2d. Because he is interested.

The first objection has been well and sufficiently answered, by the remark, that whether the name of the witness is really subscribed to the note, or not, is the fact in controversy, which the jury must decide. If the signature was allowed to be his, the objection would then, undoubtedly, be fatal.

On the second objection, I do not think, that the witness is so interested, as to render him incompetent. The verdict in the present case could not be received in evidence upon the trial of a civil action; nor would the court permit the counsel to refer to it. I confess, however, that, early in life, I entertained a different opinion on this point, conceiving then, that the weight of the adjudged cases was adverse to the competency of the witness, though I thought it hard that the law should be so. My *opinion has been changed by the modern authorities, which give an evident preponderance to the opposite scale; and in general, the judges have, of late, been inclined to a more liberal admission of testimony, applying exceptions rather to the credit, than to the competency, of a witness. In the existing state of commercial transactions, indeed, when promissory notes, bills of exchange, bank checks, and other instruments, not authenticated by any subscribing witness, are daily circulated to an incalculable amount, every principle of policy must enforce the necessity of allowing the person, whose name is forged, to give evidence of the fact.

But independent of these considerations, we find the law has been established by the repeated decisions of the courts of Pennsylvania, as well before, as since, the resolution; and, particularly, in a late case of Republica v. Wright (which may be added to those cases that were cited at the bar), determined by my brother Yeates and myself at nisi prius, in the county of Bucks. I am, therefore, of opinion, that the witness ought to be sworn.

Shippen, Justice.—I concur in the opinion given by the chief justice, but only for one of the reasons which he has assigned. It appears clearly to my mind, from all the English authorities produced, that in that country, there has been no relaxation of the rule upon the question of interest, respecting the testimony of the parties injured, in cases of perjury and forgery; but on the contrary, from the case in Hardress 331, down to the case in Leach 287, it has been the general practice, to give a release to the witness, in order to render him competent. In point of policy, likewise, there is, undoubtedly, an inconvenience arising from the adoption of either doctrine; for the witness may be biased by the reflection, that although the record on the indictment cannot be given in evidence in a civil action, yet, that the conviction will be talked of, and insensibly prejudice the public in his favor.
My acquiescence, therefore, in the opinion which has been just delivered, is founded entirely on the authority of the cases that have been adjudged in this state. These seem to have settled the law, in favor of admitting the testimony proposed; and I am sensible of the importance of preserving uniformity in our municipal decisions.

Yeates and Smith, Justices, declared their concurrence in the opinion of the court, as delivered by the chief justice.

II. The attorney-general offered Jacob Morgan the indorser of the note, as a witness, admitting that the indorsement was in the handwriting of Morgan, and that he was liable for the amount of the note to Thomas Allibone, the holder.

*The counsel for the defendant opposed the admission of the testimony, contending, that Morgan was disqualified from proving the note a forgery, having given credit to it, by his indorsement. [242]

1 T. R. 296; 3 Ibid. 34.

The counsel for the prosecution answered, that Morgan could have no interest, as he confessed himself to be liable to the holder of the note, whatever might be the issue of the trial. But—

By the Court.—The objection is not on the ground of interest; but on the impolicy of suffering a man to discredit an instrument, to which he has previously given credit, by his indorsement.1 The rule of law seems settled; and is, in general, a good one. However desirous, therefore, we may be to obtain the light of this witness's evidence, we must, for that reason alone, reject it.

III. The counsel for the prosecution then proved, that Jacob Morgan had paid the note and taken it up (which was done in court), and offered him again as a witness. The prisoner's counsel still objected; but the Court overruled the objection; and the witness was sworn.

Verdict, guilty on the count for fraudulently procuring Morgan to indorse the note, and not guilty on the other counts of the indictments.

MARCH TERM, 1796.

RALSTON, assignee, v. BELL.

Cause of action.

This was an action for money had and received, &c., brought by Ralston, as assignee of Dewhurst, a bankrupt, against the defendant, who had sold goods of the bankrupt, by virtue of an authority from him; but it appeared in evidence, that no money had been received by the defendant, at the time of commencing the action.

1 The rule in Walton v. Shelley has no application, except in a suit upon the note itself. Wright v. Trueftt, 9 Penn. St. 507; Campbell v. Knapp, 10 Ibid. 27.
SUPREME COURT

Ruston v. Ruston.

The counsel for the defendant (Ingersoll, Lewis and Dallas) objected, that, on this evidence, the present action could not be maintained.

The counsel for the plaintiff (Rawle and Wilcocks), after some remarks, and citing Doug. 132, submitted to the decided inclination of the Court, and suffered a

Nonsuit.

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*RUSTON's executors v. RUSTON.1

Legacy charged on land.—Payment of mortgage out of personal estate.

When land is devised to a son, provided he pay to the executors a sum of money, at fixed periods, this is a charge on the land; and if the devisee enter, he becomes personally liable for the same.

When land is specifically devised, incumbered by a mortgage given by the testator, his personal estate shall not go in case of the mortgaged premises, so as to defeat specific or pecuniary legacies; otherwise, as to the residuary legatees.

In this action, a verdict had been taken for the plaintiffs, for 2096l. 13s. 4d. subject to the opinion of the court, on a point reserved, to be argued upon a motion for a new trial. The case was this:

Job Ruston made his last will and testament, dated the 17th of January 1784, and thereby, first, “after his just and lawful debts and funeral charges paid, he bequeathed 500l., and some specific goods and chattels, to his wife. He next devised all his real estate to his eldest son Thomas, in fee, provided he paid to his executors 3000l., by annual instalments, during seven years and a half; and directed, in case of his son’s failing to make these payments, within three months after the times limited for them, respectively, that his executors shall sell and convey particular parts of his real estate; but he made no provision for the sale of the residue, consisting of a messuage, mill, and tract of 325 acres of land. He then gave to each of his children legacies in money, and also some specific legacies, which were to be in full of their respective shares of his estate: he bequeathed 100l. to a charitable use, to be taken out of the remainder of his estate, before any share or dividend shall be made to his sons and daughters: and lastly, he willed and bequeathed the remainder of his estate to his five children, to be divided into ten parts, of which one part is given to his said eldest son, Thomas Ruston, another to his daughter Sarah, and the remaining eight parts are given to the three younger children, in equal proportions.”

Part of the testator’s real estate, devised to his son Thomas Ruston, was subject to a mortgage given to the managers of the Pennsylvania Hospital. Thomas Ruston, the devisee, had paid no part of the 3000l.; the lands which the executors were empowered to sell had, consequently, been sold; but after applying the proceeds of the sale, some of the debts, and all the pecuniary legacies, remained unpaid. For the difference between the proceeds of the sale, and the 3000l., the present action was brought.

The case was argued, in September term last, by Ingersoll and McKean, for the plaintiffs, and by E. Tilghman and Healy, for the defendant: And two questions were made. 1st. Whether the whole of the real estate devised to the defendant, Thomas Ruston, was liable for the payment of the

1 s. C. 2 Yeates 54.
3000L., for satisfying the testator’s debts and legacies? 2d. Whether the
defendant was bound to discharge the mortgage on a part of the lands
devised to him, out of his own funds; or the executors were bound to dis-
charge it out of the testator’s personal estate?

On the first question the plaintiff’s counsel cited 2 Vent. 357; *244
*1 Eq. Abr. 109, pl. 10; 2 Vern. 26; Bendl. Rep. 281; Dyer 358;
1 Atk. 382; 3 Bro. Ca. in Ch. 105: And on the second question they cited,
1 Ch. Ca. 271; 1 P. Wms. 730-1; 1 Eq. Abr. 142, pl. 7; Ibid. 143, pl. 11;
3 Woodes. 485.

The counsel for the defendant cited, 2 Bl. Com. 119, 111; 1 Atk. 382;
Shep. T. 121; Lov. on Wills 54; 1 Cha. Ca. 271.

On the 2d of April 1786, the chief justice delivered the following
opinion:

McKean, Chief Justice.—In the case of an intestacy, the rule of law is
clear, that simple-contract debts, bonds, mortgages, and specialties of every
sort, must be paid by the administrators, out of the personal estate, this
being the natural fund for debts, though the younger children should be
thereby left destitute; but where there is a will, the testator can substitute
other funds in the place of the personal estate. What has Job Ruston
willed in particular, is the question.

The intention of the testator shall govern the construction of a will in
all cases, except where the rule of law overrules the intention, and this is
reducible to four instances. 1. Where the devise would make a perpetuity.
2. Where it would put the freehold in abeyance. 3. Where chattels are
limited as inheritances. 4. Where a fee is limited on a fee. Papillon v.
Voice, Sel. Cas. in Ch. 31. And this intention must be collected from the
whole of the will or writing itself. 3 Burr. 1541, 1581, 1662; 2 Ibid. 771,
1106; 1 Ves. 231; and many other books.

What then was the intention of the testator, as expressed in his will?
The value of the real estate devised to the defendant, the quantum of his
debts, and the amount of his personal estate at his death, would give consid-
erable light in this matter. These have not been satisfactorily ascertained
to us. However, we have been told, that the debts, specific and pecuniary
legacies, with the charges of administration, will amount to about 3860L,
and that the personal estate produced only 588L. 13s. 9d. So that if the de-
fendant had paid the 3000L there would have been a deficiency of 270L, and
upwards, and nothing left for the residuary legatees. The counsel and the
defendant insist, that he shall hold the remainder of the real estate, unsold
by the executors, exempt from the payment not only of any of the legacies, but
also of the debts, unless the personal estate and the produce of the land
sold shall prove insufficient for the discharge of the debts; because they say,
the 3000L. was no legacy to the executors; it was no charge on the lands, for
they were all devised to the heir-at-law; it was no condition, there being no
remedy in case of failure; and it was no limitation, there being no devise
over.

*The defendant took possession of the lands so devised to him; [**245
this evidences his assent to pay the 3000L, and the intention of the
testator that he should pay it to his executors, is too plain to bear argu-
ment. What rule of law or reason is there, to prevent the executors from

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recovering it? Suppose, the devise to the defendant had been subject to the payment of his debts, instead of a certain sum of money, viz., 3000l., as in this case, the lands would be assets at law. The testator has subjected the gift to the payment of the 3000l., and it must pass cum onere, I, therefore, consider the 3000l., on the first question, as an equitable, if not a legal charge, or as a trust or condition, which affects and binds the real estate devised to the eldest son Thomas Ruston, and which it was the manifest intention of the testator he should pay at all events. Thomas could not be considered, in this case, as heir-at-law, in Pennsylvania; where, if, at that time, a person died intestate, leaving divers children, his real estate descended to all his children equally, the eldest son having only a double portion or share; and therefore, the devise may be considered even a condition. Cas. in Eq. temp. Talbot 271; 1 Atk. 383; 3 Wils. 325.

The same judgment was given by all the then justices of the supreme court, five years ago, between the same parties, on a case stated on this very point; which I deem conclusive.

But the second question, respecting the payment of the mortgage on the 218 acres, is new.

It appears to have been the intention of the testator, that the legacies, specific and pecuniary, should be paid, as well as that the devise of the real estate should take effect; and if practicable, the assets should be so marshalled, that the testator's intention in the whole should be carried into execution. The testator seems to have thought the 3000l. would have been sufficient to have discharged all his debts, and also the particular pecuniary legacies; but in this, he has been mistaken.

A mortgage is a debt; it arises on a loan; and there is a covenant to pay the money: it is a specialty debt. Thomas Ruston is an hæres factus of the whole real estate, on his payment of the 3000l.; and if that sum had been more than sufficient to pay off all the particular pecuniary legacies, by which, I mean those given to his widow and children in full of their respective shares of his real estate, I would be of opinion, that the mortgage should be paid out of the residue of that sum, as much as any other debt, and that he should not take the estate with this additional incumbrance, as it does nowhere appear in the will, that the testator meant he should take it with this lien upon it.

It is the constant practice in chancery, to allow children the same favor as creditors. Talbot 275. I, therefore, think, that the specific and particular pecuniary legacies bequeathed to the children ought not to be brought in ease of the particular lands mortgaged; but it seems to me, that the devise of the residuary part of the personal estate should give way to the devise of the real estate, subjected to the mortgage, and be applied, so far as it will go, in discharge of the mortgage; for the devisee of the real estate must take it cum onere, that is, subject to the mortgage, unless the residue of the personal estate will be sufficient to discharge it. See Gilb. Rep. in Eq. 72; Talbot 202; 2 Atk. 230; 1 Wils. 780, 694; Prec. in Cha. 578.

The following judgment was thereupon entered.

BY THE COURT.—It is considered by the court, that the plaintiffs recover the sum of money mentioned in the verdict, together with lawful interest

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and town were taken by the British; after which, having purchased some produce, the plaintiff was permitted by the British captors to proceed to Cayemite, to obtain the money due to him from the French government, and to complete his return-cargo. On the 3d of November 1793, he sailed from Cayemite, for Philadelphia; but meeting with considerable damage on the American coast, he was compelled to bear away for the island of Guadaloupe. When he had arrived within three leagues of Basseterre (for which he was actually steering), he was boarded by a French privateer, carried into the road of Basseterre, and personally maltreated by the privateer’s men. The vessel and her cargo being libelled before the tribunal for the district of Basseterre, the judge, after a full examination of the ship’s papers, pronounced a decree “that the brig Kitty, her cargo, and all her appendages, should be restored, and that the captors should pay the costs.” But the defendant, who was the governor and commander in chief of Guadaloupe, directed an appeal from this decree to be brought before him; and although the court, and the national commissary protested, in the strongest terms, against his power to take cognisance of the case, he proceeded to confiscate the brig and her cargo, for the benefit of the privateer. The court attempted in vain to execute its decree, but the governor succeeded in enforcing his mandate. The defendant being obliged, soon afterwards, to seek an asylum in Philadelphia, the plaintiff (who had a considerable adventure on board the brig) arrested him in the present action, to recover the amount of his damages.

*On arguing the motion, it was contended by the defendant's counsel, that the defendant had acted in his official capacity, and was only responsible to his own government for his misconduct. That the remedy of any injured American citizen was, by applying likewise to his own government, which is bound to protect his rights, and to procure a redress. That the commission of the defendant gave him a general superintendence over the affairs of the Island; and that many things were justifiable to be done by an executive officer, in a revolutionary period, for which it was not just, or reasonable, to make him answerable by any other than the law of the country in which he acted.

The counsel for the plaintiff observed, that on a preliminary motion of this kind, it was only necessary to show a probable cause of action; and they contended, that having proved the plaintiff's interest in the cargo of the brig, and the tortious seizure by the defendant, in direct violation of the decree, pronounced by a competent tribunal, it was matter of defence, proper for a trial before a jury, to show that the defendant's conduct was justified by his official authority or duty.

But it was urged, that there was no color for such a defence. The commission of the defendant extends only to a military control; it gives no appellate jurisdiction from the tribunals of justice; and even state necessity could not be pretended, as the brig and cargo were not seized and appropriated to the public use; but were confiscated for the benefit of the owners of the privateer. The responsibility of a foreign magistrate to his own government exclusively, for his official acts, will not be disputed; but if a man, who happens to be the officer of a foreign government, does an injury to the property or person of an American, without a public authority, motive or
object, he is responsible, like any other individual, at the suit of the injured party. Whether the present aggression was a private, or an official, act, is the gist of the controversy; and on that point, the plaintiff is entitled to a trial; which, however, he is not likely ever to obtain with effect, if the defendant, a traveller, is discharged on common bail.

By the Court.—We think, that there is sufficient cause shown, for holding the defendant to bail. But it must not be understood, that, by this decision, we give any countenance to an opinion, that he is ultimately liable. It is a question of great delicacy, in which our regard for the rights of a fellow-citizen, and our respect for the sovereignty of a foreign nation, are equally involved. When, therefore, the subject is judicially investigated, we shall be governed, as well by the law of nations, as by our municipal law.(a)

*Barriére v. Nairac.*

Practice.—Arrest of judgment.

For a defect in the plaintiff’s title, apparent on the face of the declaration, judgment will be arrested, after a default, and writ of inquiry executed and returned.

This was an action upon a promissory note, brought by the plaintiff, claiming to be indorsee of one Vuyton, against the defendant, the maker of the note; in which the following declaration was filed.

“Philadelphia County, ss.

“Peter Nairac, late of the county aforesaid, yeoman, was attached to answer Peter Barriére, indorsee of Vuyton, on a plea of trespass on the case, &c. And, whereupon, the said Peter Barriére, by Peter Stephen Du Ponceau, his attorney, complains, that whereas, the said Peter Nairac, on the 8th day of June, in the year of our Lord one thousand seven hundred and ninety-two, at Cape François, to wit, at the county aforesaid, made his certain note in writing, commonly called a promissory note, with his own proper hand subscribed, bearing date the same day and year last aforesaid, in and by which said note, he, the said Peter Nairac, promised to pay to a certain Vuyton, the sum of five thousand five hundred and ninety-three livres, fifteen sols and eight deniers, money of the French colony of St. Domingo, equal to six hundred and seven dollars and four cents, lawful money of the United States, whenever he, the said Peter Nairac, should be thereunto required, for value received by the said Peter Nairac, of the said Vuyton, in acquittance and for balance of account with the succession of Fissont; and being so indebted, he the said Peter Nairac, afterwards, to wit, the day and year last aforesaid, at Cape François, to wit, at the county aforesaid, in consideration thereof, upon himself assumed, and then and there to the said Vuyton faithfully promised, that he would well and truly pay to him the said sum of five thousand five hundred and ninety-three livres, fifteen sols, eight deniers, of the value of six hundred and seven dollars and four cents, whenever afterwards he should be by him thereunto required.

(a) The defendant complained of his arrest to the government of France, by which it was made a matter of public complaint against the federal government; and eventually, the plaintiff discontinued his action.
make an allowance of interest, for the detention of the money, after the
time limited for its payment. Indeed, the strongest possible inference
to the contrary is to be drawn from the cases cited for the defendant; for,
Lord Mansfield, having asked what else the jury could give than the penalty,
expressly adds "unless they had also given interest after the three months,"
stipulated in the contract. 4 Burr. 2228. In short, the 5000l., paid with
interest at this day, is not, in fact or law, more than the 5000l. paid, without
interest, at the day it became due.

Smith, Justice.—The plaintiff is clearly entitled to the interest, on every
principle of law, morality and equity. It would have been sufficient to me,
therefore, if the verdict had been unsupported by any precedent: but I am the more strengthened in my opinion, as not a single [*250]
authoritative dictum is to be found against it.

Yeates, Justice, concurred.

By the Court.—Let judgment be entered for the plaintiff, for damages,
interest and costs.


Interest on Judgment.

When a judgment is affirmed, on error, the execution may include interest from the date of the
original judgment.

This cause had been removed by writ of error into the high court of
errors and appeals, and the judgment being there affirmed, it was remitted
to this court. On motion of Ingersoll, for the commonwealth, it was ruled—

By the Court.—That in all cases, where judgments were affirmed upon
writs of error, the execution may include the interest, from the date of the
original judgment.

Coates's Lessee v. Hamilton.

Amendment.

By mistake, the demise had been laid in the declaration, so as to com-
 menace before the death of the person, whose death gave rise to the con-
troversy. Ingersoll, therefore, moved for leave to amend the declaration,
by rectifying this mistake.

By the Court.—Let the amendment be made.
HARRIS v. MANDEVILLE. ¹

Foreign discharge in bankruptcy.

In the case of British subjects, a discharge under the bankrupt law of England will protect the person of the bankrupt, in Pennsylvania.

The plaintiff and defendant were both British subjects; the debt for which the present action was brought, had been contracted in England; and the defendant, before the suit was instituted, had obtained his certificate under a commission of bankrupt issued against him in that country.

Under these circumstances, Healy obtained a rule to show cause why an exoneretur should not be entered on the bail-piece; and in support of the rule cited 4 Term Rep. 182; Co. Bank. Law 497.

Tilghman declined opposing the rule, being of opinion, that between British subjects, the proceedings under a British commission of bankrupts must be valid and obligatory. He said, that it had been so decided by Irwin, Justice, in the circuit court for the district of Massachusetts (Gren*Hugh v. Emory), but at the same time, the judge had judicially circumscribed the operation of a certificate under the Pennsylvania bankrupt law, within the limits of the state.

BY THE COURT.—Let the rule be made absolute.

BEACH v. LEE.

Consideration.

Where a husband comes into possession of sufficient property, in right of his wife, this is good consideration for his express promise to pay her debt, contracted before marriage, which may be enforced, after the wife’s decease.

This was an action on the case, brought against the defendant, under the following circumstances, which were established by evidence on the trial. The defendant’s wife, previous to her marriage, had executed a bond to the plaintiff; which, at the time of her death, remained unsatisfied. It appeared, however, that, in consequence of the marriage, the defendant had become possessed of, and still enjoyed, a considerable property, belonging to his wife, more than equal to the amount of the bond; that, during her lifetime, he had assumed to pay the bond, and had actually made several partial payments on account of it; and that he had promised to pay the remainder, even subsequently to her decease.

The action was founded on the express assumptus; and though it was conceded by the plaintiff’s counsel, that the defendant was not liable, since the death of his wife, on the bond itself; yet, he insisted, that the bond was good evidence to prove the existence of the debt, to which the special assumptus applied. See 1 Roll. Abr. 331, pl. 35; Bro. Abr. tit. Debt, pl. 180; 1 Lev. 25; Cownp. 290; Bull. N. P. 281.

But upon the facts proved, it was agreed by the counsel for the defendant, and sanctioned by the Court, that the plaintiff was entitled to recover;

¹ S. C. 2 Yeates 99.
Walker v. Dilworth.

though it was not admitted, that, without proof of the special *assumpsit*, the defendant would have been liable for the debt.

The cause was accordingly, left to the jury, merely to ascertain how much was the balance due on the bond.


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**Walker v. Dilworth et al.**

**Partition.**

Whether a tenant by the curtesy can maintain a writ of partition, *dubitatur.*

This was a summons in partition, on which the plaintiff, as tenant by the curtesy, demanded partition against the defendants, under the circumstances stated in the following declaration.

Philadelphia County, to wit:—Ann Dilworth, the elder, late of the said county, widow, and Ann Dilworth, the younger, late of the same county, spinster, were summoned to answer Samuel Walker, as tenant [*258*] of the curtesy of the real estate of his late wife, Elizabeth, deceased, of a plea, &c. Whereas, the said Samuel, Ann Dilworth, the elder, and Ann Dilworth, the younger, held together and undivided one messuage, &c., which the said Ann Dilworth, the elder, and the said Ann Dilworth, the younger, deny to make partition thereof between them, the said Samuel, the said Ann Dilworth, the elder, and Ann Dilworth, the younger, according to the custom of the commonwealth of Pennsylvania, and the form of the statute in such cases made and provided; and do not permit the same to be done, unjustly and against the said custom and the form of the statute in such cases made and provided. And whereupon, the said Samuel, by John Craig Wells, his attorney, saith, that whereas, they the said Samuel, Ann, the elder, and Ann, the younger, held together and undivided the tenement aforesaid, with the appurtenances, in three equal parts to be divided, for and during the term of his natural life, and the reversion thereof to Nancy Walker, the daughter of the said Samuel, by his said wife Elizabeth; and it belongeth to the said Ann, the elder, to have one other third part of the said tenements, with the appurtenances, for and during the term of her natural life, and after her death, the remainder and reversion of the said last-mentioned third part, one moiety thereof unto the said Nancy, in severalty for ever; and the other moiety of the said last-mentioned third part, after the death of the said Ann, the elder, unto the said Ann, the younger, in severalty for ever. And it belongeth to the said Ann, the younger, to have the other third part, and residue of the tenements aforesaid, with the appurtenances, in severalty for ever: So that the said Samuel, of his third part happening to him, during his life, with the appurtenances; and the said Ann Dilworth, the elder, for and during the term of her natural life, her third part of the tenements, with the appurtenances, happening to her; and the said Ann Dilworth, the younger, her one third part of the tenements, with the appurtenances, and the reversion of the moiety of the third part happening to the said Ann Dilworth, the elder, after the death of the said Ann, the elder, to the said Ann Dilworth, the younger, in severalty for ever, they may severally improve them—

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1See Riker v. Darke, 4 Edw. Ch. 668; Sears v. Hyer, 1 Page 483.
OF PENNSYLVANIA.

Roberts v. Cay.

BY THE COURT.—Great doubt and difficulty have arisen in this case, from the force of the arguments used by the counsel for the defendants. As, therefore, the object of the plaintiff may be safely and effectually attained by a compromise, in which the defendants declare themselves ready to unite, we wish to avoid an immediate decision of the point of law, that has been agitated. (a)

ROBERTS v. CAY’S EXECUTORS.

Action against executors.

Executors will not be ordered to plead, as of a day in the term to which the summons is returnable so as to prevent the exercise of the power of giving preference, by confession of judgment. The act of incorporation of the Bank of Pennsylvania, which places notes discounted by it, on the footing of foreign bills of exchange, does not entitle them to priority of payment out of the assets of the deceased maker.

Many actions were brought, returnable to January term 1794, against the defendants, as executors of Cay, the surviving partner of Clow & Cay, whose affairs were exceedingly deranged; and on the 11th of January 1794 (declarations having been previously filed in all the actions), rules were obtained, “that the defendants plead as of this day, or show cause to the contrary, &c.” The declarations were filed, and the rules obtained, under a suspicion (affirmed upon oath) that judgments would be confessed by the executors, to other creditors, in prejudice of the several plaintiffs in these actions, which, it was agreed, should all be governed by the decision upon any one of them.

For the plaintiff, it was contended by Thomas, that granting an imparlance (particularly where the suit was by original, setting forth the cause of action, and that, in the present instance, is done, by filing the declarations) was discretionary and matter of favor, with the court; and a variety of cases were cited, in which the imparlance was refused, or granted only upon terms that would prevent an injury to the plaintiff. Skin. 2, pl. 2; 2 Show. 310, pl. 321; 2 Wils. 381; 1 Salk. 186; Ibid. 80; Gilb. H. C. P. 42; 2 Vern. 82. A rule to enlarge the term for pleading has, indeed, been expressly refused, unless executors would agree not to plead judgments confessed subsequent to the expiration of the term. 1 Bulst. 122; 8 Mod. 308.

But the principle on which executors are allowed to retain debts due to themselves, is, that they cannot sue; and not being able to sue, so as to obtain a preference in that way, the law gives it them in another. By a parity of reasoning, he who first sues, ought to be first paid. 3 Bl. Com. 18, 19; Shep. T. 479; Esp. 252; Doug. 436; Cro. Eliz. 41. It is true, that counsel, argumentatively, state, in Doug. 436, that although an executor or administrator cannot pay a debt of the same degree, after an action brought and notice given of such action, unless there is judgment for the debt which he pays; yet that he may pay such debt, after judgment; and he is entitled to give it a preference by imparlance, and pleading dilatory pleas to the first action, and in the meantime, confessing judgment [*261]

(a) On this intimation, the parties entered into an amicable partition, by deed, which terminated the controversy.
unjust doctrine to advance, that the executors shall, before the expiration of that period, nay, at the very first term after the death of their testator, be compelled to plead those specialties, of which they may have received no notice, but to which they are still bound to give a preference, in the course of administration. The very force of the expression, that the executors shall not be *damified, if they make the payment after the expiration of twelve months, proves that they would be liable for any previous payment, contrary to the legal rule of priority. There is no provision of this kind in the English statutes; for in England, a specialty creditor can only secure his preference to simple-contract creditors, by giving the legal notice of a suit, in the first instance. The reason of the diversity, however, strengthens the construction contended for. While Pennsylvania was a province (and the fact exists in a great degree, at the present day), the creditors of its inhabitants chiefly resided abroad; and if executors had been compellable to pay simple-contract debts, whenever issue could be joined by the ordinary practice of our courts; or whenever a plea could be exacted in the manner now proposed, the whole of the assets might be absorbed in such payments, before notice could be received of any preferable claims. Hence, the necessity of allowing twelve months for giving notice; and hence, justice requires that the executors should have the same period for entering their pleas to actions on simple contracts, which they must otherwise satisfy at their own peril.

For the plaintiff, in reply.—The act of assembly was not intended to embrace cases, in which executors were compelled to make payments by a due course of law, but only cases, in which they voluntarily undertook to discharge the testator's debts. Before the passing of the act, an executor could never voluntarily pay a simple-contract debt, without taking an indemnification against specialty creditors; and it was only to obviate this inconvenience, that the provision was made, authorizing such payments, without regard to any priority, after the lapse of twelve months from the testator's death. But the fallacy of the opposite construction most forcibly appears, when it is remembered, that executors or administrators are required by law, to make distribution of the residuum of the testator's effects, among the next of kin, at the end of a year; and yet, it is said, that until the end of a year, they cannot even be compelled to make payment of his debts. Again, the law requires, that administrators shall render their accounts to the register of wills, &c., within a year; and yet, if, within the year, they are not compellable to pay the debts, there can be no accounts to render.

By the Court.—There does not exist a doubt in our minds, about the genuine meaning of the act of assembly. It would be attended with the most inconvenient and pernicious consequences, to determine, that a creditor could not compel a payment from his debtor's estate, nor even bring a suit against the executors, for a period of twelve months. The order of paying debts, obviously respects voluntary, and not compulsory, payments. Such was the construction coeval with the act; and there has not, to this time, been a single departure from it.

With respect to the other ground of argument, we were in hopes that some compromise might have been effected. But we do not hesitate to
declare, that although the court has discretionary power to grant or to refuse
impairances, we do not think, that the circumstances of the present case
would justify a special interposition, to compel the executors to plead at the
first term, contrary to the usual course of practice. The executors have an
unquestionable right, generally speaking, to give a preference to any cred-
it of the same degree; and the preferences proposed to be given by the
defendants, are certainly not of a covinious or illiberal nature.

The rule discharged.

Before the court had delivered their opinion on the principal case, Ingersoll
suggested, as a collateral consideration, whether promissory notes, dis-
counted at the Bank of Pennsylvania, were placed on a footing with pro-
tested bills of exchange, in point of priority of payment, by the following
provision in the 13th section of the act of incorporation. "All notes or bills,
at any time discounted by the said corporation, shall be, and they are hereby,
placed on the same footing as foreign bills of exchange; so that the like
remedy shall be had for the recovery thereof against the drawer and
 drawers, indorser and indorsers, and with like effect, except so far as relates
to damages, any law, custom or usage to the contrary thereof in anywise
notwithstanding." 3 Dall. Laws, 330. Ingersoll observed, that previously
to this provision, there were two points of discrimination between
promissory notes and bills of exchange: 1st. Promissory notes were
taken by the indorsee, subject to all the equitable circumstances, to which
they were subject in the hands of the indorser. 1 Dall. 441. And 2d.
Protested bills of exchange were entitled to a priority in payments by
executors or administrators. The legislature meant, in the case of bills and
notes, discounted at the Bank of Pennsylvania, to abolish all distinction be-
tween those commercial instruments; and the expression of the act is suffi-
ciently comprehensive to effectuate that object.

But it was answered, by Moylan, Thomas and M. Levy, that the act of
assembly only applied to the remedy upon a promissory note; and did not
alter the nature and character of the instrument. The existing mischief,
intended to be removed, was the right of set-off, claimed by the maker
against the indorsee; and even upon the words of the two acts, it was
remarkable, that the priority is given by the first to protested bills
of exchange; whereas, the second places promissory notes on the same footing
as foreign bills of exchange.

By the Court.—Though the question is not regularly before us, we
have no objection to intimate our opinion, that promissory notes are not
entitled to the same priority as bills of exchange. The act of assembly
applies only to the case of defalcation.

Stiles, Plaintiff in error, v. Donaldson.¹

Statute of limitations.—Merchants' accounts.

Unliquidated accounts between merchants, as principal and factor, are not within the statute.

Writ of Error. To an action of debt on a bond, dated in August 1774,
the defendant pleaded payment, and gave notice of a set-off. The cause was

¹ S. C. 2 Yeates 105.
tried in the common pleas of Philadelphia county, on the 19th of November 1794, when the bond being proved, without any indorsement of a payment, for principal or interest, the defendant, by way of set-off, offered evidence to show, "that after the execution of the bond, and before the commencement of the suit, the plaintiff had become indebted to him in a sum exceeding the amount of the bond, upon accounts still remaining unliquidated and unsettled between them, as merchants, concerning the sales of merchandise made by the plaintiff, in parts beyond the sea, as agent and factor for the defendant." To the admission of this evidence, the plaintiff objected, that there was a lapse of more than seventeen years, since the date of the last item of the accounts, and no proof given of any subsequent demand of the money now proposed to be set off; and that the long acquiescence of the defendant, as well as the positive bar of the statute of limitations, *must be sufficient to prevent his recovering, or defalcating the amount.

The Court below, however, admitted the evidence, upon which a [*265 verdict was found in favor of the defendant for a balance; but the plaintiff took a bill of exceptions to the decision, and brought the present writ of error to try its validity.

Ingersoll, for the defendant in error, contended, that the case of a factor was not within the act of limitations (1 Dall. Laws 95). There may be some doubt, whether the exception in the act embraces accounts between merchants, which are not a proper foundation for an action of account-render; but account-render is the appropriate remedy for a principal against his factor (3 Woodes. 83, 85); and consequently, the present case is clearly within the principle, as well as the terms, of the exception. In 1 Eq. Abr. 8, pl. 6, there is an authority nearly in point; articles furnished being allowed, under similar circumstances, as a set-off against a bond; the court declaring that a discount was natural justice in all cases; and the legislature of Pennsylvania must have entertained a similar opinion, when the general act for defalcation was passed. 1 Dall. Laws 65.

Condy, for the plaintiff in error, submitted, implicitly, to the opinion of the court, whether under the circumstances of the case, the defendant's claim on the account was barred: but if the opinion was in the affirmative, he remarked, that the jury, by finding a verdict against the plaintiff, had established the accounts barred, as a substantive demand (not merely as a set-off, according to the case in 1 Eq. Abr. 8, pl. 6); and consequently, the verdict, and the judgment upon it, were erroneous. But—

The Court were, unanimously, of opinion, that the accounts, on which the set-off had been claimed, were not within the act of limitations; and that the common pleas had done right in admitting the evidence offered by the defendant.

Judgment affirmed.
ZANTZINGER V. OLD.

Attachment.

A testatum ca. sa. had issued to the the sheriff of Lancaster, upon which the party was arrested, and the money paid. But the sheriff paid it over to the nominal, instead of the real, plaintiff, though the indorsement for the use, &c., was on the writ. At the last term, Hallowell obtained a rule to return the test. ca. sa., or to show cause this day, why an attachment should not be issued against the sheriff; and now, upon proof of service of the rule, he moved that the attachment should be awarded.

By the Court.—Let the attachment issue, returnable the last day of the term.1

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GERMAN V. WAINWEIGHT.

Practice.—Non-pros.

At the last term, a non-pros. had been entered by consent, on a presumption, that, at the preceding term, a rule to try or non-pros. had been obtained. On examining the record, however, no such rule was entered; and now Thomas and E. Tilghman objected to take off the non-pros. notwithstanding the mistake, unless the plaintiff was put on the same footing, as if the mistake had not happened, by entering a rule to try or non-pros. as of the last term, so that it might operate at the present term, should the trial be postponed by the plaintiff's laches. Lewis, for the plaintiff, said he thought the proposition reasonable; and the rule was entered accordingly, by order of the court.

1 A sheriff is not liable to an attachment, as for a contempt, in not paying into court the money made upon an execution levied upon real estate, when he has, in good faith, after the return-day, and without notice of any opposing claim, applied the money, though erroneously, to the liens upon the property. In the absence of notice to the contrary, he has a right to distribute the money; he does so, however, at his own risk; but an attachment for contempt is not included in such risk; it is only his official bond that is in peril; he is liable upon that, if he has misapplied the money. Franklin Township v. Oser, 91 Penn. St. 160; In re Bastian, 90 Id. 472. And as a general rule, the court will not order the proceeds of personal property to be paid into court; the sheriff must take the responsibility of distribution. Baum v. Brown, 11 W. N. C. 202. Nor can he himself, on his own motion, pay such fund into court; there must be a special order authorizing it. Marble Co. v. Burke, 5 W. N. C. 134; Dunn v. McGarrigle, 6 Id. 204. He may, however, have leave to pay the money into court, for his own protection, when there are conflicting claims to it. Kochenderfer v. Feigel, 5 W. N. C., 402; Kirk v. Ruckholdt, 7 Id. 81; Mathews v. Webster, Id.; Geisel v. Jones, Id. 82.
DECEMBER TERM, 1796.

BOUDINOT et al., executors, v. BRADFORD. (a)

Revocation of will.

The revocation of a will of lands cannot be established by parol. When a former will is attempted to be established, from the cancelling of a later one, all the facts bearing on the testator's intention to revoke, are receivable in evidence.¹

This was a feigned issue, directed by the register, &c., of Philadelphia to try whether a will, dated the 28th April 1788, and republished on the 18th of October ensuing, in which the plaintiffs were named executors, was the last will of William Bradford, esquire, the deceased brother of the defendant, who claimed as in a case of intestacy. In the course of the trial, the following points were ruled:

I. The execution of the will having been proved, the defendant's counsel offered Dr. Rush as a witness, to testify, that the deceased, during his last illness had said, that he had destroyed his will; and that, meaning to die intestate, he had signed promissory notes, in favor of some of the members of his family, for whom he wished to make a particular provision. *It was likewise stated, that the defendant intended further to show, [*²67 that long subsequently to the will in question (which it was suggested had been forgotten), the defendant had made and destroyed another will, while in the perfect possession of his reason; so that his declarations had become important, to manifest, whether, by destroying the second will, he intended to revive the first, or to die intestate.

The counsel for the plaintiff objected to the admission of the evidence proposed; and relied upon the sixth section of the act of assembly (1 Dall. Laws, 55), which declares, "that no will in writing, concerning any goods and chattels, or personal estate, shall be repealed, nor shall any clause, devise or bequest therein be altered or changed, by any words, or will by word of mouth only, except the same be, in the lifetime of the testator, committed to writing, and after the writing thereof, read unto the testator, and allowed by him, and proved to be so done by two or more witnesses." It is attempted, however, to annul a will regularly proved, and long preserved, without any one formality that the law prescribes, or common prudence, in relation to so important a concern, would naturally exact. 1 Dall. 278.

For the defendant, it was answered, that whether the act of cancelling the second will revived the first will, or not, was the question to be decided;

(a) There was a special sitting of the court, after December term 1796, from the 2d to the 5th of January 1797, for the trial of this case.

¹ s. c. 2 Yeates 170. See Flintham v. Bradford, 10 Penn. St. 82; s. c. 1 Pars. 153, where the general doctrine is affirmed, that the cancellation of a second will, which had revoked a former will, by implication, leaves the former will in full force, if it be retained by the testator, until his death, uncancelled; and the court say, that Boudinot v. Bradford "was a case sui generis, with strong peculiarity of facts; in which it was necessary, in the application of general principles, to mould in some degree their harmony of outline, but the strong lineaments are there." See also Lawson v. Morrison, post, p. 286.
SUPREME COURT

Ewing v. McNair.

Practice.—Execution.

When judgment is had in term, an execution may be made returnable to the last day of the same term, for the purpose of founding a testatum.

JUDGMENT was entered in this cause, on the first day of September term, 1796; and the plaintiff issued a testatum f.t. f.a. to Allegheny county, founded on a f.t. f.a. to the sheriff of Philadelphia county, which was made returnable on the last day of September term 1796, but had never been actually taken out, though it was minuted on the roll. The testatum f.t. f.a. being levied on lands, E. Tilghman now moved to set the writ aside, as being founded on a f.t. f.a. not legally or properly returnable. But—

BY THE COURT.—The present case appears manifestly to be included in the words of the act of assembly, which declares, “that the last day, as well as the first day, of every term, shall be a common day of return in this court, at either of which periods any writs, original, mesne or judicial process, &c., may be made returnable; and that the writs and process returnable on the last day of the term, shall be as valid and effectual in all cases, and to all intents and purposes, as if the same had been made returnable on the first day of the term.” 3 Dall. Laws, 770.

We do not mean, however, to give any opinion, at this time, as to the effect of such a proceeding, in charging bail, or levying upon lands within the county in which the judgment was rendered.¹

Rule refused.

MARCH TERM, 1797.

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Vasse v. Ball.*

Decree of prize court.—Forfeiture.

In an action upon a policy of insurance, the decree of a foreign court of prize is not conclusive against the assured.

A small matter of dutiable or prohibited goods, is not sufficient to condemn a vessel.

This was an action on two policies of insurance for $28,000, upon the brig Salmon, and her cargo (both the property of the plaintiff, an American citizen), from Port au Paix to Philadelphia, in which these clauses were inserted: “It is declared, that this assurance is made only against capture of the British, or any of the subjects of Great Britain.” “The brig is warranted to be an American bottom; and the cargo of the said brig to be American property.”

On the trial, the following appeared to be the material facts: The brig, having carried a cargo of flour from Philadelphia to Port au Paix, under a contract with Mr. Fauchet, the French minister, was captured and taken into Bermuda, for adjudication, by a British privateer, on her return to Philadelphi. The master of the brig wrote to the plaintiff, his owner, stating the capture, and declaring the strongest apprehension, that a condemnation

¹See Baker v. Smith, 4 Yeates 185. ² a. c. 2 Yeates 178.
ing to the law of nations, but according to the instructions of the crown. But there is not, in fact, any judicial determination of the English courts, antecedent to the American revolution, which declares, that the sentence of a court of admiralty cannot be examined and controverted between persons who were not parties to it. The case of Bernardi v. Motteux, Doug. 554, occurred since the revolution; it has, therefore, no obligatory influence; and it carries the doctrine, respecting the conclusive character of a sentence in a foreign court of admiralty, to an extent so extravagant, that American tribunals should be well convinced of the reason and justice of the position on which it turns, before they voluntarily acquiesce in the decision. Besides, this is not a question of English municipal law, in which the judgment of an English court must be respected, as evidence of the law: but it is a question arising on the law of nations; and if there is a diversity of opinion in the courts of different nations, every nation is at liberty to examine the principle. Thus then, it has been determined in France, that the sentence of a court of admiralty is not conclusive in a controversy between the underwriters and the assured. Emerigon (a writer celebrated even in Westminster Hall) says: "Il est donc certain, que les assureurs répondent de la confiscation injuste prononcée par le tribunal du lieu ou le navire pris a été conduit. Les jugemens rendus par les tribunaux étrangers ne sont en France d'aucun poids contre les Français, et qu'il faut que la cause y soit de nouveau décidée. D'où il faut, que le jugement de confiscation prononcé par un tribunal ennemi, n'est ni une preuve que le véritable pour compte ait été caché, ni un titre que les assureurs puissent alléger pour se dispenser de payer la perte. Telle est notre jurisprudence." 1 Emer. 457-8. (a) Great Britain, as an underwriting nation, has an obvious interest in maintaining a contrary doctrine; but, as the policy does not apply to the situation of America, the practice ought not to be adopted.

Even, however, if the sentence of a court of admiralty were to be considered as conclusive as the strongest of the English cases can justify, the present cause would not be affected; for, it can only be conclusive upon what it appears to have decided; and it is impossible, from the present decree, to ascertain the ground of condemnation. In that respect, this cause is analogous to the case of Bernardi v. Motteux, Doug. 555; the general warranty being there as forcible, as the additional clause in the policies now controverted. Under every warranty, then, the only question is, what the parties meant. Park, Ins. 410, 392-5, 492; Ib. 301 (last Edit.). Here, they plainly meant, that, if the property assured was American, the underwriters should be bound to pay. But, it is answered, the libel [alleged the property to be French, the condemnation is general, and the decree is conclusive. It must be observed, however, that the libel alleges more; and that the allegations are in direct contradiction to each other; for, if the

(a) "It is certain, that the underwriters must be responsible, in the case of an unjust confiscation, pronounced by the tribunal of the place, to which the captured vessel has been conducted. Judgments rendered by foreign tribunals are of no weight in France, against Frenchmen; and the cause must there be decided de novo. Hence, it follows, that the sentence of confiscation pronounced by the tribunal of an enemy, is neither a proof that the real owner has been concealed; nor a title which the underwriters can allege, to avoid paying the loss. Such is our law."
vessel and cargo were French property, they could not, likewise be, as all the other allegations import, American property; and when the plaintiff can show, that it was impossible the decree should be on the ground of French property, it must be presumed to have proceeded on the other grounds stated in the libel. As to those other grounds, it is enough cursorily to observe, that the defendant has in vain endeavored to prove, that the vessel was employed in a trade with the French islands, not permitted before the war; that the transportation of a few, unarmed invalids, cannot be denominated contraband; nor will their personal baggage and furniture come within the description of the cargo; Park, Ins.; Bunb. 232; Str. 943; 1 Dall. 197; (a) and that the rest of the allegations are not causes of condemnation upon any principle of the law of nations.

The defence was supported by Lewis, E. Tilghman and Ravile, on three grounds: 1st. That there was a concealment from the underwriter of the facts, known to the assured, that flour had been exported in the vessel for the French minister, and that there were French soldiers and their property on board, at the time of the capture. 2d. That the warranty had not been literally fulfilled, as a part of the property on board was French, and furniture must be considered as part of the cargo; and it is immaterial, whether the loss is owing to a breach of the warranty or not, if the warranty has not been strictly complied with, even in a trifling circumstance; à fortiori, in a circumstance of such importance. Park, Ins. 318; 1 T. R. 345; 3 Ib. 360; Cowp. 607. 3d. That the sentence of the court of vice-admiralty is conclusive. Whatever was meant to be decided, shall be for ever at rest. Park, Ins. 354; Doug. 544. And in a great variety of cases, it is held, that when there is a warranty of neutral property, and the condemnation is general, the decree shall be conclusive; which is likewise the law, when the sentence is given on the very point of the warranty. 2 Str. 743; Skin. 59; 3 Show. 232; T. Raym. 473; Carth. 34; Salk. 32.

McKean, Chief Justice.—The same difficulty, that occurred in the case of Bernardi v. Mottetz, Doug. 555, certainly occurs in the present case—how is the ground of condemnation to be ascertained? The libel asserts in one place, that the property *is French; in another place, that it is American; and the several statements that the vessel was employed in assisting or supplying the French, also imply that it belonged to a neutral owner. The decree, however, is general: but can we impute to it, the absurdity of meaning to decide, that the vessel and cargo were, at the same time, neutral and enemy property?

Shippen, Justice.—If the libel had confined itself to allege, that the property was French, and the decree had been general; or, if the decree had specifically selected and stated that allegation, as the ground of condemnation, I should have been strongly inclined to think, that we were bound by the decision. But the object of the present inquiry is, to ascertain for what cause the vessel and cargo have been confiscated?

(a) Shippen, Justice.—The strongest case on the question of a cargo, is that in Bunb. 292. I remember, that before the revolution, there was a seizure of a Palatine vessel with passengers, on account of the baggage; but I acquitted her, on the authority of that case.
The counsel for the defendant, perceiving the bias of the court so much against them, declined pressing any further the argument in support of the binding nature of the decree of condemnation; and left their case to the jury, simply upon the plaintiff's alleged concealment of the information contained in the master's letter, communicating the capture of the vessel. The opposite counsel having, thereupon, proved that the plaintiff was an American citizen, and sole owner of the vessel and cargo, the following charge was delivered by the chief justice, after a general recapitulation of the facts:

McKean, Chief Justice.—The first ground of defence attempted to be taken on this occasion, is—that the vessel was engaged in a trade with the French islands, which, as it was not permitted by the French government, previously to the war, Great Britain, it is said, had a right to deem unlawful, and to construe into a violation of our neutrality. The fact has not been established: but if it had been established, I could not accede to the conclusion which the defendant's counsel contemplated. I cannot conceive, upon what principle, our accepting a benefit, is to be converted into the perpetration of a wrong. What injury can be done to any belligerent power, by our sending the exports of America (not of a contraband nature) to a new market? Where is the cause of offence? In what consists the infraction of neutrality? We are not actuated by motives of partiality and favoritism, for we are willing, of our own accord, to pursue the same course with Great Britain, as well as France; and we find that, in fact, the colonial governments of Great Britain often invite us, during a war, to an intercourse in trade, which is, at other times, absolutely interdicted. We cannot prevent another nation from offering a bounty to our commerce, by opening a free port, or by relinquishing its duties; and when we merely accept these advantages, on a principle of self-interest, why shall we be charged with a breach of our neutrality? No: the rule, on the point of neutrality, is just and clear: it is *simply this: If two nations are at war, a neutral power shall not do any act, in favor of the commercial or military operations of one of them; or, in other words, it shall not, by treaty, afford a succor, or grant a privilege, which was not stipulated for, previously to the commencement of hostilities.

The second ground of defence is founded on the capture and condemnation of the vessel at Bermuda. It is urged, that the libel states the property to be French; and that the decree, being general, affirms that allegation. But the libel consists of five charges; and if the charge of French property is affirmed, the other four, which stand precisely on the same footing, must be arbitrarily excluded; since, under different modifications, they allege the property to be American. It is impracticable, therefore, to fix the precise cause of condemnation, by an inspection of the record itself; but we are clearly of opinion, that, under such circumstances, evidence may be received to establish the American ownership, in conformity to the warranty. As, then, the proof leaves no doubt on the question of ownership, we cannot presume that the judge of a foreign court has perjured himself, by declaring that property to be French, which we know to be American; and of course, we must assume the position, that his decree proceeded upon the other allegations of the libel. Those other allegations do not furnish any cause for
SUPREME COURT

YOUNG v. WILLING.

Insolvent.

After a discharge in insolvency, the insolvent cannot sue in his own name, upon a prior cause of action.

This was an action of trover, instituted in September term 1794, to recover the value of certain public certificates, which the plaintiff claimed as his property. It appeared on the trial, however, that he had sold the certificates to the defendants, in November 1784, that his present claim was founded on a supposed disaffirmance of the sale (the circumstance, of which it is unnecessary to state), when the certificates were discovered to be counterfeit, in the month of December following; and that the action was instituted in his own name, though he had been discharged under the laws for the relief of insolvent debtors, in September 1785, after making a general assignment of his property, for the benefit of his creditors. On the opening of the defence, The Court thought the merits were in favor of the defendant; but being of opinion, that, at all events, the action could not be maintained in the plaintiff's name, they directed a nonsuit; which was, accordingly, entered.

Wilcocks, Rawle and Hallowell, for the plaintiff. Ingersoll, Lewis and Dallas, for the defendants.

McCARTY v. EMLEN.

Foreign attachment.

When one of two copartners is deceased, and the survivor sues for a firm debt, the moiety thereof, coming to such survivor, cannot be attached by his separate creditor.

This action was brought to September term 1789, by the plaintiff, as surviving partner of Cummings, to recover a debt due to the partnership. On the 4th of March 1793, the matters in dispute were referred; on the 21st of January 1795, there was a report filed, finding 165 l. 0s. 11d., in favor of the plaintiff; and thereupon, judgment nisi was entered. But it appeared, that a foreign attachment had been issued, in the Philadelphia common pleas, returnable to March term 1793, in the name of Elizabeth Pringle, administratrix of John Pringle, against William McCarty, the present plaintiff, for a debt due by him, in his separate individual capacity, to the deceased intestate; and that the attachment had been served upon effects, &c., in the hands of Emlen, the present defendant, who was a debtor to the partnership of McCarty & Cummings, but did not owe anything to McCarty, in his separate right.

On the 24th of January 1795, E. Tilghman and Wilcocks, for the defendant, obtained a rule to show cause why the execution in this action should not be stayed, until an indemnification is had against the foreign attachment of Pringle, administratrix, v. McCarty. And after argument, upon a case, stating the preceding facts (Ingersoll appearing for the plaintiff), the judges delivered their opinion, seriatim, to the following effect:

McKEAN, Chief Justice.—The question in this cause is—whether the debt due from Emlen to the late partnership of McCarty & Cummings, has been
secured by the foreign attachment, in favor of McCarty's separate creditor, or can only be discharged by a payment to the surviving partner?

Two objections are urged against the claim under the attachment: 1st. That the present action was commenced by the surviving partner, before the attachment was laid; and a debt in suit is not attachable. 2d. That the attachment is brought to recover a debt due from McCarty in his separate capacity; whereas, the debt attached is due from the garnishee to the company of McCarty & Cummings; and the partnership debts (which, it is said, are not yet settled) must first be paid out of the partnership funds.

But it is to be observed, on the first objection, that, although a debt in suit is not attachable in England, because the superior *courts of that country will not, in the plenitude of their authority, permit subjects [*278] depending before them to be affected by the process of inferior tribunals, exercising a jurisdiction by special custom; yet, here, the same cause does not operate, as the supreme and county courts have a co-ordinate, concurrent jurisdiction in other suits, as well as in cases of attachment; and of course, the effect is not, necessarily, the same. But on general principles of justice and reason, it would be difficult to satisfy the mind, why money should not be attached in the hands of a debtor, as well after, as before, the person to whom it is due, has sued for it. If justice and reason are not opposed to it, public policy and convenience strongly recommend it. Many foreigners, resident abroad, enjoy an extensive credit from one class of citizens in this country, on account of the debts which are known to be due to them from another class; and if nothing more were necessary to shelter such foreigners from the effects of an attachment, than to bring suits against their debtors, it is obvious, that the fund which constitutes the principal security of the American trader, might be easily and irretrievably withdrawn. The court are, therefore, unanimously of opinion, that the debt due from Emlen to McCarty & Cummings, might lawfully be attached, notwithstanding the suit previously instituted by the surviving partner to recover it.

On the second objection, it must be observed, as a general rule, that partnership effects are first to be appropriated to the payment of partnership debts: but this, like every other general rule, admits of exceptions; and is hardly, indeed, susceptible of a strict application in any cases, but those of bankruptcy, insolvency and execution. The consequence of its application to partnerships would be highly injurious to trade, and embarrassing to justice. A partner may owe separate debts; and his property may consist of partnership stock; yet, if the objection prevails, it is impossible to concieve when the separate creditors will be able to make that property responsible. While the partnership continues, how shall they compel a disclosure and liquidation of all the debts and credits of the company? and even when a partnership is dissolved, where will separate creditors find the inclination, or the power, to scrutinize and close the records of a long and complicated mercantile connection? But the law is happily otherwise: for it has been repeatedly settled here, as well as in England, that a partner may be sued for separate debts; that the partnership effects may be taken in execution and sold by moieties; and that the purchaser of the moiety, under the execution, shall be considered as tenant in common with the partner, owning the other
moiety. The case in Doug. 650, is, in my judgment, conclusive upon this point.

*279] The result of the view which I have taken upon the subject, is: that the defendant in this action, is liable as garnishee in the foreign attachment to pay to the representative of John Pringle, one moiety (or whatever may have been McCarty's partnership proportion) of the debt due to McCarty & Cummings.

Shippen, Justice.—I concur in the opinion which has been delivered. The doctrine, that debts in suit cannot be attached, depends entirely upon the superior dignity of the courts in England, before whom the suits must be instituted; but as the same kind of process issue in Pennsylvania from both descriptions of courts, there is no dignity to be violated here, by allowing the attachment.

As to the claim on account of the partnership, it appears pregnant with the greatest inconveniences. An honest, separate creditor, though he had obtained, by attachment, a fair and legal lien upon the debt, would thus be compelled to wait in suspense, during an indefinite period, for the settlement of every partnership account.

Yeates, Justice.—The act of assembly pursues, in general, the custom of London, on the subject of foreign attachments: but the decisions that prevent the operation of attachments, in the case of debts in suits, are evidently founded on that jealousy of the superior courts in England, for which, in this state, there exists no cause; since the process, for both kinds of suits, issues from both descriptions of courts. The preamble of the act, indeed, declares the propriety and the intention, to put the effects of absent debtors, and of debtors dwelling upon the spot, on an equal footing, for making restitution for debts (1 Dall. Laws, 60); but that intention would be easily frustrated, if every foreigner, by instituting a suit, could furnish a bar to the attachment: our courts would, in effect, be still open to non-residents, but shut against their creditors. Even, however, in England, while the superior courts refuse to give the effect described, to foreign attachments issuing from an inferior tribunal, they have exercised their own authority in a manner very similar to that which is now contemplated; by ordering the sheriff to retain in his hands, for the use of the plaintiff in one action, a sum of money which he had levied for the defendant at his suit, in another action. Doug. 219.

But on the second objection, I have the misfortune to differ from the opinion entertained by my brethren: for I think, it has been long and clearly settled, upon principles of natural justice, and commercial convenience, that joint effects shall first be applied to the payment of joint debts; and that the separate creditor of a partner shall not be let in to a share of the partnership property, until the whole of the partnership debts are satisfied. 2 Vern. 293, *280] 706; 1 Ves. 242, 497; Cowp. 449; P. Wms. 183. *It is only a moiety, therefore, of the surplus of the joint stock of McCarty & Cumming, after paying every lawful claim against the company, that can, in my opinion, be liable to the attachment instituted by Pringle's administratrix against McCarty, to recover a separate debt.

Smith, Justice.—A; I agree with the Chief Justice, in every point of his
of the said schooner, to the defendant, until the first day of November 1792, when the plaintiff informed the defendant by letter, that the said schooner had sailed about the ninth of November 1786, on the voyage in the policy mentioned, and that he had not since seen nor heard from the said captain, nor received any part of the property in the vessel or cargo, nor had any person on his behalf; which information the jury find to be true; and the said jurors further find, that the plaintiff did not abandon to the defendant, and to the other underwriters, on the said policy, or to either of them, his property in the said schooner, or any part thereof, before the bringing of the said action; nor has he since abandoned the same; nor was any other proof made of the said loss, previously to the bringing of the said action, than the information, given as aforesaid, by the plaintiff to the defendant. And the jurors aforesaid further find, that John Kaighn, one of the partners of Kaighn & Attmore, who effected the said insurance, as agent of the plaintiff, has ever since resided in the city of Philadelphia, and had, until the present action was brought, the policy aforesaid in his possession; and that the defendant has, ever since the date of the said policy, resided in the city of Philadelphia. If, upon these facts, the law be with the plaintiff, they find for the plaintiff, and assess damages to the amount of ninety-eight pounds, with interest from December 1st, 1794, amounting in the whole to ———, with six pence costs; but if the law be with the defendant, they find for the defendant.”

The arguments before the jury, on the trials, and before the court, on the special verdict, were, in substance, as follows:

For the plaintiff, Mr. Levy insisted, that every fact which could be necessary to entitle his client to recover, was found by the special verdict: for when a vessel has never been heard of, after such a lapse of time, the legal presumption is, that she is lost. 2 Str. 1199; Park, 71–2.

For the defendant, Lewis urged two points: 1st. That proof of a loss had not been made, three months previously to the commencement of the present action, agreeable to the stipulation contained in the policy. 2d. That the assured had never abandoned to the underwriters.

On the first point, he observed, that the memorandum at the foot of the policy provided, that “in case of a loss, the money shall be paid in three months after proof of the same;” and if the underwriter was entitled to three months for making payment, after the proof had been exhibited, there was no cause of action, at the time this suit was instituted. Some previous evidence of the loss was indispensable, by the express agreement of the parties. The nature of the evidence is not particularly defined; but the protest of the master, the affidavit of one of the seamen, or some other credible attestation of the fact, should have been furnished. If a creditor agrees to give a day for the payment, after a certain event takes place, he cannot sue before that day arrives. In the present instance, it is not sufficient to make the proof in court; it should be made en pais; as in the case in Palmer, 160, where the ground of action was a declaration by the defendant, that “after you have proved that I struck you, &c., then I do assume to pay you 20l.” The plaintiff’s letter, demanding payment of the underwriters, was dated the 1st of November 1792; and the suit was instituted the 1st of January 1793. The objection must, therefore, be fatal to the right of action.
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On the second point, it was insisted, that the duty of the assured required him to give notice of the loss, in a reasonable time, and to abandon to the underwriter. Park, 71–2, 161; 2 Mag. Ins. 174, 177. If this been done, the underwriter would have been enabled to make a diligent and seasonable inquiry after the vessel; which may have not been found, because she has not been properly sought for. Six years elapsed between the date of the policy, and the notice of the loss. The delay is unreasonable; and, if it does not entirely destroy all means of investigation, must certainly increase to the underwriter, the uncertainty and difficulty of ascertaining the reality of the loss; while it opens a door to the assured for the perpetration of the greatest frands. It is for this reason, that the law not only requires an abandonment, in such cases, but the abandonment should be made on the first opportunity; and that, even where there is no hope of recovering any part of the property. It is like the case of notice to the drawer of a bill of exchange, when the drawee refuses payment. 1 T. R. 613–4; *Wesk. *283 p. 5, § 15; Ibid. p. 344, § 3; Ibid. 546, § 4; 2 Mag. 174; 2 Emerig. 173.

In reply, M. Levy observed, on the first point, that the proof of the loss arose, in legal contemplation, from the fact, that the vessel had sailed, but for an unreasonable length of time had not been heard of; and therefore, he insisted, that it was not necessary to make the proof of loss at the insurance office, three months before the right of action accrued.

In answering the second point, he treated the idea of an abandonment, where no portion of the property was saved, as novel, unprecedented and absurd. The term abandonment has received a fixed and definite significance; to which, it is essential, that something should be saved, in order that something may be abandoned. Park, 161; 1 T. R. 613–4. The real purpose for requiring an abandonment, must be to transfer to the underwriters the property and the means of reclaiming and preserving it, which must otherwise continue in the assured. But when it is demonstratively obvious, that the subject-matter has utterly ceased to exist; that the loss is total and final; as where a ship has been consumed by fire, or has sunk in the ocean; what can be the use or benefit of an abandonment? And if there can be no use, lex neminem cogit ad vana sue impossibilita. The fallacy of the opposite argument lies in an application of the duties which the law has imposed upon the assured, in the case of one description of a total loss, to a total loss of an entirely different description. The term "total loss," in relation to insurances, is technical; and includes, as appears from Park, 110, 61, two species; one, where a part of the property has been saved, and still exists; the other, where the whole property is utterly destroyed. In the former case, abandonment is necessary to the safety of the insurer; it is the title, without which he cannot reclaim the residuum, nor exercise those acts of ownership, that are essential to reduce it to possession. But in the latter case, no such purpose can be contemplated or attained; and the common sense of mankind would be startled at the idea, that it was necessary to give up to another, the ownership of a thing, not in being; of a thing which had been completely annihilated. To require this useless and absurd act from the assured, under the heavy penalty of forfeiting his insurance, would be wantonly oppressive and unjust. The analogy stated by the opposite counsel between notice of abandonment, and notice of a protested bill of exchange,
is admitted and adopted: but it must be recollected, that the holder of the bill, neglecting to give notice, only loses his recourse upon the drawer, in case the drawee had effects in his hands; for, if the drawee had no effects, there need not be notice given of the refusal to accept or pay; and the holder shall not lose his debt for omitting to give a notice, which could be of no use to the drawer. 1 T. R. 410. The principle and authority of the cases are the same. If anything exists, that can be abandoned, the insurer ought to have notice; but if a notice can be of no use to him, there can be no reason why he should receive it, any more than the drawer of a bill of exchange, who has no effects in the hands of the drawee. It is true, that it would be expedient, on the part of the assured, to give notice and abandon, under any circumstances of loss; because then, if any portion of the property insured was saved from the general wreck, he would have a complete right to an indemnity; which he would not have, should a part of the property be saved, and he has neglected that precaution. The omission, however, is at the peril of the assured; and the risks to which the omission exposes him, will always be a sufficient guard against fraud. Every prudent man will give the notice: no designing man will neglect it, lest it should frustrate his purpose. Those who omit it will, therefore, generally, be of that description of men, from whom little is to be feared; and the omission will be the more effect of inadvertence or ignorance. But, although prudence recommends the practice, the law does not enjoin it. If, indeed, it is made essential, that notice, which was intended only for a shield against the assured, will be converted into a sword, in the hands of the underwriter; and a court of justice must condemn the owner of a vessel and cargo to sustain the loss, against which he meant to secure himself, merely for omitting a form, which, if complied with, could not have produced the slightest advantage to the underwriter. The penalty is surely disproportioned to the transgression.

On the first trial, The Court, in the charge to the jury, expressed a wish that the plaintiff had given earlier notice of the loss to the underwriters; as it would have rebutted every suspicion of unfair and collusive conduct. It was enough, however (the Chief Justice observed), that no fact of that kind had been proved, nor indeed, alleged; since fraud is never to be presumed. The defendant's counsel has urged, that before the assured can recover for a total loss, there must be an express and seasonable abandonment. But, by the word "abandonment," I understand, a yielding, ceding or giving up; and in general, it applies to cases where there has been a great loss, and the assured, resorting to the policy for an indemnity, surrenders whatever is left of the property insured to the underwriters. We cannot, however, conceive, that when there is nothing left to give up, there can be anything to abandon; and if there is nothing to abandon, it would be absurd, as well as useless, to insist upon a formal act of abandonment. Under all these circumstances of the case, therefore, we think, that the plaintiff is entitled to recover the principal sum insured, and interest, to commence at the expiration of three months after the demand for payment.

Verdict for the plaintiff. (a)

(a) The jury, after being out some time, returned to the bar, and declared they could not agree, on account of the lapse of time, and expressed a desire to examine Mr.
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After the second trial, and argument on the special verdict, The Court seemed to be of opinion, "that the plaintiff could not recover; because, he had not made proof of the loss, according to the terms of the policy, three months previously to the commencement of the action." No opinion was then, however, expressed on the second objection made by the defendant's counsel; but The Court asked, whether he would waive the objection to the time of commencing the action, that the cause might be decided on its merit? And he refused to comply.

Cur. adv. vult. 1

Kaignh (who had effected the insurance as agent), relative to the character and conduct of the plaintiff. It, thereupon, appeared, that the witness had not heard from the plaintiff from 1786 until 1792, when he desired that the policy might be given to Mr. Rose to be recovered; and that, some time before, in a conversation with the witness's partner, the plaintiff had said, as a reason for not applying to the underwriters, "that he must obtain the captain's protest and vouchers of the loss, before he could recover on the policy." It also appeared, that the plaintiff was a man of irreproachable character. The jury, having received this further satisfaction, soon delivered a verdict for the plaintiff.

1 The defendant's counsel having refused to waive the objection, the court subsequently sustained it, and gave judgment in favor of the defendant. 3 Dall. 477.
HIGH COURT OF ERRORS AND APPEALS
OF PENNSYLVANIA.

JULY SESSION, 1792.

Lawson, appellant, v. Morrison et al., appellees.

Revocation of will.

A will, revoked by the execution of a subsequent one, but not cancelled, is, in general, re-established by the cancellation of the subsequent will.

The fact of the execution of a second will, not found at the decease of the testator, and the contents of which are not shown, is not, ipso facto, the revocation of a former one; to have that effect, its existence must be shown, at the death of the testator, or that he cancelled the latter will, with an intent to die intestate.

Appeal from a sentence of the register of wills, &c., and two justices of the common pleas for the county of Cumberland. The case had been argued in July 1789 (before the present organization of the judiciary department under the existing constitution), and afterwards in October 1792, by Bradford and Ingersoll, for the appellant, and by Lewis, for the appellees.

The facts on which the appeal arose were as follows: A written paper, purporting to be the will of Janet Morrison, dated the 19th of October 1775, was exhibited for probate to the register of wills, &c., on the 19th of October 1786. A caveat was entered by the appellant, against admitting it to be proved, alleging that the testatrix had made a later will, which expressly revoked the former will; and that the latter will had not been cancelled or destroyed, although it could not be found after her death. The will of October 1775, was however, established, by the sentence of the register's court; from which sentence, the present appeal was brought; and new evidence was given in this court.

On the record and evidence, it appeared, that Janet Morrison had a will written, before this of 1775, by Oliver Anderson, which former will was duly executed. The same scrivener wrote this will. He afterwards wrote another will, in 1777, and a fourth will, about the latter end of the year 1779. The testatrix destroyed the first will, when the will of 1775 was executed, and also that of 1777, when she executed the will of 1779. In the last will, the scrivener (who was a witness) believes there were words revoking all former wills, and that he had usually inserted such a clause in all the wills he wrote; and John Ray, a subscribing witness to the will of 1779, swears, that, when it was executed, the testatrix declared it to be her last will, and that she revoked all former wills. The legatees were generally

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appear to be more than a codicil, as it is not proved that any executors were
constituted; and both might, therefore, stand together. There is no proof
that the latter will disposed of the personal estate differently, but only that
it increased the legacies. Perk. 179; God. Orph. Leg. 53, 12-3; Cro. Eliz.
721; Pow. Dev. 538; Swinb. 532; Cro. Eliz. 721; Cro. Car. 23-4; 1 Show.
537, 534; Salk. 592; Show. P. C. 149; Hard. 375; Cowp. 87-8; 3 Wil.
497; s. c. 2 W. Bl. 937. 3d. Does the destruction of the later, revive the
former will? The intention of the party is undoubtedly material upon this
question. The testatrix sent for the will; but whether she cancelled it,
with a view to die intestate, or James Lawson destroyed it, with a view to
claim the whole estate as heir-at-law, can only be explained by the circum-
stances; and there is one circumstance that is strong indeed, to show that
she never meant to give to him the whole; namely, that James Lawson had
arrived in Cumberland county, before the making of the latest will, and
yet she therein bequeathed to other persons, legacies to a considerable
amount. The cancelling of a later will, under circumstances less forcible,
has been deemed the revival of a former one. 4 Burr. 2512. 4th. Is there
any difference between the revocation of a will, in Pennsylvania, and in Eng-
land, since the statute of frauds and perjuries? The doctrine in the act of
assembly (1 Dall. Laws, 640) is the same as the doctrine in the statute 29
Car. II., c. 3, and the effect should be equally uniform.

For the appellant, in reply.—All the cases cited by the opposite counsel,
relate to real estate in England, subsequent to the statute of frauds and per-
juries. But our position is, that a subsequent will or testament does, of
itself, revoke all prior wills of personal estate. A later testament, says
Swinb. 15, always infringes a former one; but a codicil is different; and
the distinction between a testament and will is established in Cowp. 90.
The present will was not found (nor was any other will found) in the
*289] possession of the testatrix; and the presumption, therefore, is, that
she cancelled the will of 1777, with an intention to die intestate.

Chew, President, delivered his opinion, in general terms, in affirmation
of the sentence of the register's court.

McKeen, Chief Justice.—There has been no case or precedent cited,
which comes up to this, in all its parts; but there are several cases, which
depended upon the same principle.

Before the statute of 29 Car. II., c. 3, wills, in England, might be re-
voked by any express words, without writing; and so it was in Pennsyl-
vania, until altered by positive law; but in England, since that statute, and
in Pennsylvania, since the act of assembly of the 4th of Anne, “concerning
the probates of written and nuncupative wills, and for confirming devises of
lands,” wills of lands must be revoked by writing, accompanied with solemn-
nities similar to those necessary for making the wills. Here, later wills of
lands, or a writing, revoking a former will, must be proved by two or more
eredible witnesses; and no testament, or will in writing, for personal estate,
can be revoked by words, except the same be committed to writing and read
to the testator, and allowed by him, and proved by two witnesses at least.
Besides these actual revocations, there are other acts of the testator, which
have always been considered as revocations, because contrary to, or incon
sistent with the will, and evidence an alteration of intention; as a deed in fee; or a lease for years to the same devisee, to commence after the testator's death; a subsequent marriage and birth of a child; cancelling, obliterating or destroying the will, and such like. These are termed, "implied, constructive, or legal revocations," and still subsist as they were before the act of assembly, or the statute of frauds. Cro. Jac. 49; Carth. 81. But all presumptive revocations may be encountered by evidence, and rebutted by other circumstances. Cowp. 53; Doug. 37.

It has been often determined, that a will, revoked by a subsequent will, but not cancelled, was re-established by the cancellation of the subsequent will. 1 Show. 537; Show. P. C. 1461; 1 Wils. 345; 2 Vern. 741; s. c. Prec. Chan. 459; s. c. 4 Burr. 2512; Cowp. 86, 92; Doug. 40; 2 W. Black. 937; 3 Mod. 204; Salk. 592.

There are, however, some particular circumstances, in this case, besides the general question. It appears, that the appellant had lived in the neighborhood of the testatrix, when she made the will of 1770; that the legatees in that will were chiefly the same as in the present, but some legacies were larger, on account of the money being then depreciated, and that Oliver Anderson was expressly requested by the testatrix to take care of the will of 1775, left the last should get into the hands of the appellant, or [*290] be lost. On the other hand, it does not appear what became of the will of 1779, after it was sent and delivered to the testatrix, whether it was destroyed by her, or any other person—but it cannot be found. It does not appear, wherein the will of 1779 differed from the present one, nor what alteration was thereby made in particular, only that there were partial alterations, and there were no executors named in it.

In this view of the case, I am of opinion, that the mere circumstance of making the will of 1779, is not virtually a revocation of the former, the contents being unknown, and it not appearing to have been in esse at her death, but rather the contrary, and that she had cancelled or destroyed it. No other person was interested in its destruction, from anything I can discover, except the appellant or his brothers, who were not in America; and charity will induce a presumption, that she herself destroyed it. If this is the fact, the first will is not thereby revoked, as neither could be complete wills, until the death of the testatrix, and her destroying it had the same effect as if it never existed, unless it had been clearly proved, that she did it with an intention to die intestate. Should a contrary opinion hold, to wit, that the first will was revoked, at the instant the second was executed, yet the cancelling of the second by the testatrix herself, is a revival of the first, if undestroyed. Harwood v. Goodright, Cowp. 92.

Here is a good subsisting will properly attested: There is no way to defeat it, but by proving it was revoked by another will, subsisting at the death of the testatrix, or that she cancelled the later will, so revoking all former ones, with a mind to die intestate. And as the appellant has failed in such proof, I concur with the president, that the will of 1775 must stand; and that the sentence of the register's court be affirmed, with double costs.

The Court concurring, the sentence of the register's court was, accordingly, affirmed, with double costs. (a)

(a) See Boudinot et al., Executors, v. Bradford, ante, p. 266.
AUGUST SESSION, 1791.


Lien of decedents’ debts.—Sale under power.

The lien of a decedent’s debts is not discharged, by a sale under a power, for the payment of legacies.

Spear v. Hannum, 1 Yeates 380, reversed.

This was a writ of error from the supreme court, founded on a bill of exceptions, taken at nisi prius, in Chester county, on a trial before McKean, Chief Justice, and Justice Yeates.

The question arose on the will of Elizabeth Ring, who had given power to her executors to sell lands, for payment of legacies; and on the argument two points were made: 1st. Whether the power to sell, given by the will, was, in fact, for the payment of debts, or of legacies? And 2d. Whether by the laws of Pennsylvania, the creditors of the testatrix had such a lien on her lands, as could not be defeated by the sale, which the executors had made, by virtue of the power in the will?

The counsel for the plaintiff in error (Lewis, E. T ilghman, McKean and Ross) cited the following authorities: 1 Dall. Laws, app. 26, ch. 51; Ibid. p. 28, ch. 109; Ibid. p. 29, ch. 189; Ibid. p. 32; Penn. Laws, Weiss’s Edit. p. 6, pl. 109; Ibid. p. 9, pl. 14; Ibid. p. 10, pl. 4; 1 Dall. Laws, app. 43, 47; 3 Ibid. 521.

The counsel for the defendant in error (Ingersoll and Wilcocks) cited the following authorities: Bac. Law Tr. 93; 2 Bl. Com. 378; 2 Woodes. 348; Cowp. 90; 21 Vin. 505, pl. 1; 3 & 4 Wm. & Mary, c. 14 (a); 2 Ves. 590; Ambl. 188; Gilb. Ch. 330; 2 Ves. 587; Prec. in Ch. 397; Cha. Ca. 249; 1 Dall. Laws, 12, 67; Ibid. in App. p. 48, § 8; 1 Dall. 481; Lov. on Wills, 190, 213.

The Court delivered their opinion, seriatim, to the following effect.

Chew, President.—The question turns upon the power to sell lands, contained in the will of Elizabeth Ring. If the *power had been to sell *292] for the payment of debts, I should incline to the opinion, that the purchaser held the lands discharged from the debts. It has been the constant usage (and usage is the best interpreter of the law), to give, by will, the power to sell lands, for the payment of debts. The titles of purchasers under such powers, have never heretofore been called in question; and they ought not now to be undermined. But in the present instance, the power was only given by the testatrix to sell the lands, for the payment of legacies: the executor, in selling them for the payment of debts, has assumed a power, which is not given by the will; and if they were sold, with a view to the payment of legacies, the purchaser has no defence against creditors. I am,

(a) But Ingersoll observed, that the statute of W. & M., c. 14, did not extend to Pennsylvania; and neither the court, nor the opposite counsel, contradicted the assertion.
therefore, of opinion, that the judgment of the supreme court ought to be reversed.

Shippen, Justice.—Two questions arise in this cause: 1st. How far the lands of the deceased person are bound for his debts? And 2d. How far a testator may, by his will, affect the right which his creditors have in his lands?

1st. Lands were made subject to the payment of debts, by agreement between the proprietors, and the first adventurers for settling Pennsylvania, before they left England. This agreement was confirmed by a compact in 1682; and by a subsequent act of the legislature, lands were subjected to sale, for debts, on judgment and execution, in suits against executors. It is obvious, that the legislature intended to give creditors as good a security, with regard to the lands, as to the chattels, of their debtors. The execution issues against the executors; and by virtue of the writ, the lands of the testator, in the hands of an heir or devisee, may be levied on. In the last act for regulating defects (3 Dall. Laws, 523), a strong intimation is given of the sense of the legislature, that the lands are bound for the payment of debts, from the death of the debtor. This point seems, now, therefore, to be fairly at rest.

2d. There can be no satisfactory reason, why a testator should not have the power to order a sale of lands for the payment of his debts, provided the exercise of it does not militate with the general principle of the lien, which the law has given to creditors. This, however, is not the case before the court; for, the power given to the executors was to sell for the payment of legacies. Every purchaser is bound to know the law. An executor, with a power to sell, stands on the same footing as any other trustee, and must pursue the terms of his trust. The proceeds of the land, when disposed of, under a power to sell for the payment of legacies, cannot be considered as assets in the hands of the executor; so that if the sale were valid against creditors, they would be deprived of the security, which the policy, and positive provision, of our law, meant to give them. It appears, therefore, to me, that the judgment of the supreme court must be reversed.

Smith, Justice.—I do not feel myself at liberty to join in the decision of the general question, as I have acted in the character of an executor, in a manner that may be affected by it. But I strongly incline to the opinion of the president, that a sale by an executor, under a power to sell for the payment of debts, is valid; and the purchaser will hold the lands discharged from the general lien in favor of creditors. The present case, however, is not of that description; for the will only gives a power to sell for the payment of legacies; and such a sale must be void as to the creditors.

Biddle, President of the Philadelphia Common Pleas.—I have no doubt in this case. A sale by executors, under a power to sell for the payment of legacies, is not valid against creditors. If the power had been to sell for the payment of debts, a bona fide sale would, in my opinion, be good against creditors, and all the world.

By the Court.—Let the judgment of the supreme court be reversed.
CASES DETERMINED
IN THE
UNITED STATES CIRCUIT COURT
FOR THE
PENNSYLVANIA DISTRICT.

APRIL TERM, 1792.
Present—Wilson, Blair and Peters, Justices.

Collet v. Collet.

Naturalization.

The several states have a concurrent authority with the United States to naturalize aliens; but such authority cannot be exercised, so as to contravene the laws established by Congress. Thus, an individual state cannot exclude citizens naturalized by the authority of the general government; but she may adopt citizens upon easier terms than those which Congress may impose.

This was a bill in equity, which stated the complainant to be a subject of his Britannic majesty, and the respondent to be a citizen of Pennsylvania. The respondent, in his plea, averred, that the complainant was a citizen of Pennsylvania; and this plea, if true, deprived the court of its jurisdiction, as the federal courts cannot (unless in some particularly specified cases) take cognisance of controversies between citizens of the same state. The question was argued, on the 21st of April, by Randolph and Sergeant, in support of the bill, and by M. Levy, in support of the exception to the jurisdiction. It then appeared, that the complainant was born in the Isle of Man, part of the British dominions; but it was certified, by the mayor of Philadelphia, that on the 30th of April 1790, he had taken the oath of allegiance to the state of Pennsylvania, agreeable to an act of the general assembly, passed the 13th of March 1789 (2 Dall. Laws 677), founded on the 42d section of the old constitution (1 Ibid., App. 60). It was likewise shown by a certificate from the collector of the customs of the port of Philadelphia, that on the 5th of November 1790, he was commander of the Pigou, an American ship; and the 6th section of the act of Congress, for registering and clearing vessels (chap. 11, passed 1st September 1789) provides, that no
registry shall be made of any American ship, until it is sworn (among other things) that the "present master is a citizen of the United States."

*295] In support of the plea, it was contended, that the power given to the United States, was meant as a guard against the narrow regulations that might, at any future period, be adopted by the individual states, to check the admission of aliens; and not as a security against the too easy extension of the rights of citizenship. This object would, therefore, be most effectually attained, by leaving the authority of the individual states unimpaired; and as there is nothing exclusive in the nature of the power, so neither is there anything exclusive in the manner of vesting it in the federal government. Though "Congress shall have power to establish a uniform rule of naturalization," Art. I., § 8, it does not necessarily follow, that each state of the confederacy may not, likewise, exercise the power of adopting aliens, upon its own terms. That an opinion prevails here, in favor of the state jurisdiction, must be inferred from the various laws which Pennsylvania, even subsequently to the naturalization act of congress (passed 26th of March 1790), has enacted, respecting the right that aliens may enjoy within her territory. 3 Dall. Laws 9, 183, 653. Nor is there any force in the argument, that the jurisdiction in maritime and admiralty cases is exclusively vested in the federal government, without the use of exclusive words; for those in their nature are exclusive, belong appropriately to the national character and arise extra-territorially of any state; whereas, naturalization is merely a municipal and domestic concern.

In opposition to the plea, it was urged, that contemplating the present situation of the United States, the birth of the complainant had made him an alien; and that, in order to change the condition of alienage into that of citizenship, the interposition of a competent constitutional and legislative authority was indispensable. This authority, throughout the United States, resides in the federal government alone; for the power of naturalization (which is given by the 8th section of the 1st article of the constitution) does of itself import exclusion. That one member of the Union should be able to disturb all the rest, by the introduction of obnoxious characters, was an evil to be prevented, and no effectual mode could be adopted to obviate the inconveniences of different systems and regulations in different states, short of giving to congress the exclusive power of establishing a uniform rule of naturalization. Exclusive words were not necessary in this case, any more than in the case of admiralty and maritime jurisdiction, which is, nevertheless, allowed to be exclusively vested in the general government, without the use of such words. If, therefore, congress had the exclusive power to admit citizens, that power being exercised by the act of the 26th March 1790, the naturalization, under the act of the legislature of Pennsylvania, was a mere nullity, and the complainant remains a subject of the British crown.

*296] BY THE COURT.—The question now agitated, depends upon another question; whether the state of Pennsylvania, since the 26th of March 1790 (when the act of congress was passed), has a right to naturalize an alien? And this must receive its answer from the solution of a third question; whether, according to the constitution of the United States, the authority to naturalize is exclusive or concurrent? We are of opinion,
The circuit courts have concurrent jurisdiction with the supreme court, in cases affecting foreign consuls.  

A consul is not privileged from a criminal prosecution, for an offence against the laws of the country in which he resides.  

The offence of sending threatening letters, held to be indictable in a circuit court.

The defendant, a consul from Genoa, was indicted for a misdemeanor, in sending anonymous and threatening letters to Mr. Hammond, the British minister, Mr. Holland, a citizen of Philadelphia, and several other persons, with a view to extort money.

Before the defendant pleaded, his counsel (Heath, Lewis and Dallas) moved to quash the indictment, contending that to the supreme court of the United States belonged the exclusive cognisance of the case, on account of the defendant's official character.  

By the 2d section of the 3d article of the constitution, it is expressly declared, that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction."  

By declaring in the sequel of the same section, "that in all the other cases before mentioned the supreme court shall have appellate jurisdiction," the word original is rendered tantamount to exclusive, in the specified cases.  

But surely, an original jurisdiction established by the constitution in the supreme court, cannot be vested by law in any inferior courts.  

The 13th section of the judicial act provides, that "the supreme court shall have, exclusively, all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics or domestic servants, as a court of law can have or exercise, consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice-consul shall be a party."  

This provision obviously respects civil suits; but the 11th section declares, that "the circuit court shall have exclusive cognisance of all crimes and offences cognisable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognisable therein."  

This is a criminal prosecution, not otherwise provided for; and if the jurisdiction can be exclusively vested in the circuit court, it destroys the original jurisdiction given by the constitution to the

And in that case, as well as the case of the United States v. Villato (post, p. 370), the act of assembly was adjudged to be obsolete.  

1 And see the remarks of Chief Justice Taney, in the License Cases, 5 How. 585.  
supreme court. In justice to the legislature, therefore, such a construction must be rejected; and the cognisance of the case be left, upon a constitutional footing, exclusively to the supreme court. The argument is the more cogent, from a consideration of the respect which is due to consuls, by the law of nations. Vatt. lib. 2, c. 2, § 34.

Rawle, the District-Attorney, stated in reply, that there was a material distinction between public ministers and consuls; the former being entitled to high diplomatic privilege, which the latter, by the law of nations, had no right to claim; and he contended, that the supreme court has original, but not exclusive, jurisdiction of offences committed by consuls: that the district court had jurisdiction (exclusively of the state courts) of all offences committed by consuls, except where the punishment to be inflicted exceeded thirty stripes, a fine of one hundred dollars, or the term of five months imprisonment: and that the circuit court had, in this respect, a concurrent jurisdiction with the supreme court as well as the district court. If, indeed, this is a crime "cognisable under the authority of the United States," it is within the express delegation of jurisdiction to the circuit court.

Wilson, Justice.—I am of opinion, that although the constitution vests in the supreme court, an original jurisdiction, in cases like the present, it does not preclude the legislature from exercising the power of vesting a concurrent jurisdiction, in such inferior courts, as might by law be established: and as the legislature has expressly declared, that the circuit court shall have "exclusive cognisance of all crimes and offences, cognisable under the authority of the United States," I think, the indictment ought to be sustained.

Iredell, Justice.—I do not concur in this opinion, because it appears to me, that, for obvious reasons of public policy, the constitution intended to vest an exclusive jurisdiction in the supreme court, upon all questions relating to the public agents of foreign nations. Besides, the context of the judiciary article of the constitution seems fairly to justify the interpretation, that the word original, means exclusive, jurisdiction.

Peters, Justice.—As I agree in the opinion expressed by Judge Wilson, for the reasons which he has assigned, it is unnecessary to enter into any detail.

The motion for quashing the indictment was accordingly rejected, and the defendant pleaded not guilty; but his trial was postponed, by consent, until the next term.(a)

(a) The defendant was tried in April session 1794, before JAY, Chief Justice, and Peters, Justice; and was defended by the same advocates, on the following points: 1st. That the matter charged in the indictment was not a crime by the common law, nor is it made such by any positive law of the United States. In England, it was once treason; it is now felony; but in both instances, it was the effect of positive law. It can only, therefore, be considered as a bare menace of bodily hurt; and, without a consequent inconvenience, it is no injury, public or private. 4 Bl. Com. 5; 8 Hen. VI., c. 4, § 9; Geo. I., c. 22; 4 Bl. Com. 144; 3 Id. 120. 2d. That considering the official character of the defendant, such a proceeding ought not to be sustained, nor such a punishment inflicted. The law of nations is a part of the law of the United States; and the
*LIVINGSTON et al. v. SWANWICK.*

**Witness.—Pleading.—Variance.**

A broker is a competent witness, to prove his own authority to make the agreement upon which the suit is brought, notwithstanding his commission may depend upon the establishment of the contract.

In an action on a contract, made by a broker on behalf of the defendant, for the delivery of stock, a variance between the declaration and the written agreement is not material; the actual contract being proved as laid, of which the writing is merely corroborative.

This was an action on the case, to recover the difference upon a stock contract, which Samuel Anderson, as the broker and agent of the defendant, who resided in Philadelphia, had entered into with the plaintiffs, who resided in New York, in the following terms:—

"I do hereby engage to deliver to John R. Livingston, Esq., the engagement of John Swanwick, Esq., of Philadelphia, to deliver to J. R. Livingston, Esq., aforesaid, one hundred shares of the bank stock of the United States, on the 5th January next ensuing, upon receiving from the said John R. Livingston, payment for the same, at the rate of twenty-one shillings and six pence in the pound.

New York, 15th July 1791.

SAMUEL ANDERSON."

I. On the trial of the case, the plaintiffs produced a correspondence between Anderson and the defendant, in relation to the contract, after it was made, and then offered Anderson himself as a witness, to prove that he had received a verbal authority to make the contract for the defendant; that he had accordingly executed the instrument above set forth; and that there had been a punctual compliance with the stipulations, on the part of the plaintiffs.

The defendant objected, that Anderson was not a competent witness to prove his own authority; and that he was interested in the question, as he

Law of nations seems to require, that a consul should be independent of the ordinary criminal justice of the place where he resides. Vatt. lib. 2, c. 2, § 34. 3d. But that, exclusive of the legal exceptions, the prosecution had not been maintained in point of evidence; for it was all circumstantial and presumptive, and that too, in so slight a degree, as ought not to weigh with a jury on so important an issue. 2 Hale II. P. C. 289; 4 Smol. Hist. Eng. p. 382 in note.

Rawle, in reply, insisted, that the offence was indictable at common law; that the consular character of the defendant gave jurisdiction to the circuit court, and did not entitle him to an exemption from prosecution, agreeable to the law of nations; and that the proof was as strong as the nature of the case allowed, or the rules of evidence required. In support of this argument, he cited the following authorities. 4 Bl. Com. 142, 144; 1 Lev. 146; 1 Kebl. 809; 4 Bl. Com. 180; Str. 193-4; Bl. Com. 242; Crown Circ. 376; Fost. 128; Leach, 204; 1 Dall. 338; 1 Sid. 168; Comb. 304; Leach, 39; Ld. Raym. 1461; 1 Dall. 45.

The Court were of opinion, in the charge, that the offence was indictable, and that the defendant was not privileged from prosecution, in virtue of his consular appointment.

The jury, after a short consultation, pronounced the defendant, guilty; but he was afterwards pardoned, on condition (as I have heard) that he surrendered his commission and escrutuar.

As to the question of jurisdiction, see United States v. Worrall, post, p. 384.
had an action actually depending for his commissions on making the contract. But—

BY THE COURT.—The witness is competent to prove every part of the transaction. He is not interested in the event of the suit; nor can the verdict, in this case, be given in evidence, upon the trial of the action for his commissions. Anderson was a known, established broker; and unless he was admitted to give evidence of the instructions he received (which were oral in this case, and are usually so, in similar cases), it would be impracticable to ascertain the facts, that are essential to enable the court to decide upon the merits of the controversy.

The witness was, thereupon, admitted.

II. To the action and declaration (which contained five counts), the following exceptions were taken, in the course of the defence.

1st. That the action is brought in the names of Brockholst and J. R. Livingston, whereas, the contract in writing is made with J. R. Livingston only.

2d. That the first count states an agreement by Swanwick to transfer stock at a certain day: but the evidence is only of an agreement to deliver an engagement for that purpose.

3d. That the second and fourth counts state an agreement by Swanwick, to deliver an engagement to transfer stock to J. R. Livingston, or order: but the evidence does not prove that he engaged to transfer stock to the plaintiff’s order.

4th. That the third count states a contract being made by Anderson, as the authorised agent of Swanwick, that Swanwick should transfer stock to the plaintiff: but the evidence only shows a contract by Anderson, that there should be delivered to the plaintiff an engagement of Swanwick to transfer the stock.

5th. That the fifth count states the plaintiff’s attendance at the place of transfer; but there is no proof of the fact.

But the exceptions were considered and overruled, in the charge to the jury, of which, in that respect, the following is the substance.

BY THE COURT.—The objection to the form of the action ought not to prevail. The contract is proved by the testimony of Anderson; and the written paper is merely corroborative. At the time, then, of forming the contract, it was perfectly understood by the parties transacting the business, that Brockholst and J. R. Livingston were jointly concerned; and, if the action had not been instituted in their joint names, it might have been pleaded in abatement.

Nor is the objection to the variance between the declaration and the written contract, on account of the words “or order,” being stated in the former, though not contained in the latter, material in point of law. It was unnecessary to set forth the written contract at all, in the declaration; and it is only now offered as additional evidence, to prove the parol bargain between the parties. In the case of a bond, bill of exchange, or promissory note, there would be more weight in the objection; because they are, exclusively, the evidence of the respective contracts to which they give existence,
character and operation; but the written paper, in the present instance, is
of no more force, than any other testimony of its contents would be. The
words in the declaration must, therefore, be considered as surplusage, and
do not affect the material parts of the charge.

As to the other variances between the contract as laid, and the written
contract produced, the same principles will apply. And the non-attendance
*302] of the plaintiffs at the place of transfer, *is sufficiently excused
by the waiver, which has been proved on the part of the defendant.

Verdict for the plaintiffs, for $19,400.

Levis, Rawle, Randolph and Dallas for the plaintiffs. E. Tilghman,
Ingersoll, Wilcocks and Sergeant, for the defendant. (a)

 APRIL TERM, 1794.

Present, Wilson and Peters, Justices.

BRUDENELL et al. v. VAUX et al.

Computation of time.

A statute requiring mortgage to be recorded within six months, held, to mean calendar, not
lunar months.

The question in this cause arose upon the act of assembly for recording
mortgages (1 Dall. Laws, 112), the mortgage of the defendants having been
recorded after the expiration of six lunar, but within six calendar, months,
from the date: And The Court, having compared this with other acts of
the legislature, were of opinion, that by the word "months," calendar months
were intended.¹

Levis and Tilghman, for the plaintiff. Ingersoll, Rawle and Thomas,
for the defendant.

(a) The defendant's counsel tendered a bill of exceptions to the admission of Ande-
son's testimony; and, also, to the opinion of the court on the points stated in the charge.
A writ of error was, accordingly, brought; but never prosecuted.

¹ Commonwealth v. Chambre, 4 Dall. 143; 4 Wend. 512; People v. New York, 10 Id. 393;
Moore v. Houston, 2 S. & R. 169; Snyder v. Warren, 2 Cow. 518; Parsons v. Chamberlin,
264
Vanbore v. Dorrance.

debt, and issue execution at his own peril; that mode was adopted on the present occasion.\(^1\)

Judgment for the plaintiff.

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*304*

*APRIL TERM, 1795.*

Present, Paterson and Peters, Justices.

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Vanbore’s Lessee v. Dorrance.

*Erasure in deed.—Indian title.—Constitutional law.—Construction of statutes.—Condition.*

An erasure, addition, interlineation, or other alteration, will render void a deed, if done after its execution.

It is the province of the jury to determine, whether such alteration was made after delivery.

In Pennsylvania, the proprietaries had, by their charter, the exclusive right of pre-emption to all lands within the province; a grant from the Indians to any other person, conferred no title.

The constitution is paramount to the power of the legislature; and every statute repugnant to it, is absolutely void.

The judiciary is a co-ordinate branch of the government, and may declare a statute to be void, as repugnant to the constitution.

An act of a state legislature, divesting one person of his property, and vesting it in another, at a fixed compensation, is unconstitutional and void.

A statute shall never have an equitable construction, in order to overthrow or divest an estate.

Every statute, derogatory to the rights of property, or that takes away the rights of a citizen, is to be construed strictly.

Conditions precedent are such as must happen, or be performed, before an estate can vest, or be discharged; they must be strictly, literally and punctually performed.

When a condition coeval to an estate, the whole must be performed, before the estate can arise; so, when an act is previous to any estate, and consists of several particulars, every one of them must be performed, before the estate can vest.

This was a cause of great expectation, involving several important questions of constitutional law, in relation to the territorial controversy between the states of Pennsylvania and Connecticut. After a trial, which continued for fifteen days, the presiding judge delivered the following charge to the jury, comprising a full review of all the important facts and principles that had occurred during the discussion.\(^8\)

Paterson, Justice.—Having arrived at the last stage of this long and interesting cause, it now becomes the duty of the court to sum up the evidence, and to declare the law arising upon it. A mass of testimony has been brought forward in the course of the trial, the greater part of which is altogether immaterial, and can be of no use in forming a decision. The great points on which the cause turns, are of a legal nature; they are questions of law; and therefore, for the sake of the parties, as well as for my own sake, they ought to be put in a train for ultimate adjudication by the supreme court. In the administration of justice, it is a consolatory idea,

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\(^1\) If the action be brought for a sum certain, or which may be rendered certain by computation, the court may assess the damages, without a writ of inquiry. Reimer v. Marshall, 1 Wheat. 215; McLain v. Rutherford, Hemp. 47.

\(^8\) For a history of a Connecticut title in Pennsylvania, and a settlement under it, see Barney v. Sutton, 2 Watts 31.
II. Under the Indians. The Indian deed, under which the defendant claims, bears date the 11th of July 1754. It has been observed, that this deed is radically defective and faulty; that fraud is apparent on the face of it; and, particularly, that the specification or description of the land is written on a rasure. Of this, gentlemen, you will judge, as the deed will be given to you for inspection. Permit me to observe, that there are several ways, by which a deed may be voided or rendered of no effect. One of these is by rasure, addition, interlining or other alteration, in any material part, if done after its execution. It is the province of the jury to determine, whether any such alteration was made, after the delivery of the deed. Besides, this deed appears to have been executed at different times; and not in that open, public, national manner, in which the Indians sell and transfer their lands.

But if the deed was fairly obtained; if it has legal existence, then what is its legal operation? By the charter of William Penn, the right of pre-emption attached, and was vested in him, to all the lands comprehended within its limits. The Penn family had, exclusively, the right of purchasing the lands of the Indians; and, indeed, the Indians entered into a stipulation of that kind.

Again, this deed is invalid by the laws of Pennsylvania. The legislature of Pennsylvania, by an act passed the 7th February 1705, declare, "That if any person presume to buy any land of the natives, within the limits of this province and territories, without leave from the proprietary thereof, every such bargain or purchase shall be void and of no effect." (1 Dall. Laws, 5.) By an act passed the 14th February 1729–30, it is further declared, "That every gift, grant, bargain, sale, written or verbal contract or agreement, and every pretended conveyance, lease, demise, and every other assurance made, or that shall hereafter be made, with any of the Indian natives, for any lands, &c., within the limits of this province, without the order or direction of the proprietary, or his commissioners, shall be null, void and of no effect." (1 Dall. Laws, 248.)

The land in controversy, being within the limits of Pennsylvania, the Connecticut settlers were, in legal estimation, trespassers and intruders. They purchased the land without leave, and entered upon it without right. They purchased and entered upon the land without the consent of the legislature of Connecticut. True it is, that the legislature of Connecticut gave a subsequent approbation, but this was posterior to the deed executed by the Six Nations to Penn, at Fort Stanwix, and the principle of relation does not retrospect so as to affect third persons. The consequence is, that the Connecticut settlers derive no title under the Indian deed.

*III. The title which the defendant sets up under Pennsylvania. This is the keystone of the defendant's title, as one of his counsel very properly expressed it. It required no great sagacity to perceive, that the defendant's hope of success was founded on a law of Pennsylvania, commonly called "the quieting and confirming act." This act, and the two subsequent ones of a suspending and a repealing nature, open an extensive and important field for discussion. In general verdicts, it frequently becomes necessary for juries to decide upon the law as well as the facts. To form a correct judgment, legal principles must be taken up and applied, and when
potent in the scale of political existence. Besides, in England, there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In America, the case is widely different: every state in the Union has its constitution reduced to written exactitude and precision.

What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand. What are legislatures? Creatures of the constitution; they owe their existence to the constitution: they derive their powers from the constitution: it is their commission; and therefore, all their acts must be conformable to it, or else they will be void. The constitution is the work or will of the people themselves, in their original, sovereign and unlimited capacity. Law is the work or will of the legislature, in their derivative and subordinate capacity. The one is the work of the creator, and the other of the creature. The constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, gentlemen, the constitution is the sun of the political system, around which all legislative, executive and judicial bodies must revolve. Whatever may be the case in other countries, yet, in this, there can be no doubt, that every act of the legislature, repugnant to the constitution, is absolutely void.

*309] In the second article of the declaration of rights, which was made part of the late constitution of Pennsylvania, it is declared: "That all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences and understanding; and that no man ought, or of right can be, compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent; nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments, or peculiar mode of religious worship; and that no authority can, or ought to be, vested in, or assumed, by any power whatever, that shall, in any case, interfere with, or in any manner control, the right of conscience in the free exercise of religious worship." (Dec. of Rights, Art. II.)

In the thirty-second section of the same constitution, it is ordained; "that all elections, whether by the people or in general assembly, shall be by ballot, free and voluntary." (Const. Penn. § 32.)

Could the legislature have annulled these articles, respecting religion, the rights of conscience, and elections by ballot? Surely no. As to these points, there was no devolution of power; the authority was purposely withheld, and reserved by the people to themselves. If the legislature had passed an act declaring, that, in future, there should be no trial by jury, would it have been obligatory? No: it would have been void for want of jurisdiction, or constitutional extent of power. The right of trial by jury is a fundamental law, made sacred by the constitution, and cannot be legislated away. The constitution of a state is stable and permanent, not to be
worked upon by the temper of the times, nor to rise and fall with the tide of events: notwithstanding the competition of opposing interests, and the violence of contending parties, it remains firm and immovable, as a mountain amidst the strife of storms, or a rock in the ocean amidst the raging of the waves. I take it to be a clear position; that if a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and sound, that, in such case, it will be the duty of the court to adhere to the constitution, and to declare the act null and void. The constitution is the basis of legislative authority; it lies at the foundation of all law, and is a rule and commission by which both legislators and judges are to proceed. It is an important principle, which, in the discussion of questions of the present kind, ought never to be lost sight of, that the judiciary in this country is not a subordinate, but co-ordinate, branch of the government.

*Having made these preliminary observations, we shall proceed to contemplate the quieting and confirming act, and to bring its validity to the test of the constitution. In the course of argument, the counsel on both sides relied upon certain parts of the late bill of rights and constitution of Pennsylvania, which I shall now read, and then refer to them occasionally in the sequel of the charge. (The judge then read the 1st, 8th and 11th articles of the declaration of rights; and the 9th and 46th sections of the constitution of Pennsylvania. (See 1 Dall. Laws, app. p. 55–6, 60.)

From these passages, it is evident, that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent and inalienable rights of man. Men have a sense of property: property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society. No man could become a member of a community, in which he could not enjoy the fruits of his honest labor and industry. The preservation of property, then, is a primary object of the social compact, and, by the late constitution of Pennsylvania, was made a fundamental law. Every person ought to contribute his proportion for public purposes and public exigencies; but no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompense in value. This would be laying a burden upon an individual, which ought to be sustained by the society at large. The English history does not furnish an instance of the kind; the parliament, with all their boasted omnipotence, never committed such an outrage on private property; and if they had, it would have served only to display the dangerous nature of unlimited authority; it would have been an exercise of power and not of right. Such an act would be a monster in legislation and shock all mankind. The legislature, therefore, had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice and moral rectitude; it is incompatible with the comfort, peace and happiness of mankind; it is contrary to the principles of social alliance, in every free government; and lastly, it is contrary both to the letter and spirit of the constitution.1 In

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1 A federal court has no authority to declare a state law void, because it conflicts with the state constitution. Hunt v. Lamphire, 3 Pct 280; Satterlee v. Matthewson, 2 Id. 414; Wat
short, it is what every one would think unreasonable and unjust in his own

case.

The next step in the line of progression is, whether the legislature had
authority to make an act, divesting one citizen of his freehold and vesting it
in another, even with compensation? That the legislature, on certain emer-
gencies, had authority to exercise this high power, has been urged from the
*311] nature of the social compact, and from the words of the constitution,
which says, that the house of representatives shall have all other
powers necessary for the legislature of a free state or commonwealth; but
they shall have no power to add to, alter, abolish or infringe on any part
of this constitution. The course of reasoning, on the part of the defendant,
may be comprised in a few words. The despotic power, as it is aptly called
by some writers, of taking private property, when state necessity requires,
exists in every government; the existence of such power is necessary; gov-
ernment could not subsist without it; and if this be the case, it cannot be
lodged anywhere with so much safety as with the legislature. The pre-
sumption is, that they will not call it into exercise, except in urgent cases,
or cases of the first necessity. There is force in this reasoning. It is, how-
ever, difficult to form a case, in which the necessity of a state can be of
such a nature, as to authorize or excuse the seizing of landed property be-
longing to one citizen and giving it to another citizen. It is immaterial to
the state, in which of its citizens the land is vested; but it is of primary
importance, that, when vested, it should be secured, and the proprietor pro-
tected in the enjoyment of it. The constitution encircles and renders it an
holy thing.

We must, gentlemen, bear constantly in mind, that the present is a case
of landed property; vested by law in one set of citizens, attempted to be
divested, for the purpose of vesting the same property in another set of citi-
zens. It cannot be assimilated to the case of personal property taken or
used in time of war or famine, or other extreme necessity; it cannot be as-
similated to the temporary possession of land itself, on a pressing public
emergency, or the spur of the occasion. In the latter case, there is no
change of property, no divestment of right; the title remains, and the pro-
prietor, though out of possession for a while, is still proprietor and lord of
the soil. The possession grew out of the occasion and ceases with it: then
the right of necessity is satisfied and at an end; it does not affect the title,
is temporary in its nature, and cannot exist for ever. The constitution ex-
pressly declares, that the right of acquiring, possessing and protecting prop-
erty is natural, inherent, and inalienable. It is a right not ex gratia from
the legislature, but ex debito from the constitution. It is sacred; for it is

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1 The right to take private property for public
use, is incident to all governments; but the ob-
ligation to make compensation, is concomitant.
Bonaparte v. Camden and Amboy Railroad Co.,
Reg. 120. But the legislature cannot take one
man's property, and vest it in another. Palai-
ret's Appeal, 67 Penn. St. 479; and see
Ervine's Appeal, 16 Id. 356; Kneass's Appeal,
31 Id. 87; Saxton v. Mitchell, 78 Id. 479.
further declared, that the legislature shall have no power to add to, alter, abolish or infringe any part of the constitution. The constitution is the origin and measure of legislative authority. It says to legislators, thus far ye shall go and no farther. Not a particle of it should be shaken; not a pebble of it should be removed. Innovation is dangerous; one encroachment leads to another; precedent gives birth to precedent; what has been done may be done again; thus radical principles are generally broken in upon, and the constitution *eventually destroyed. Where is the security, where the inviolability of property, if the legislature, by a private act, affecting particular persons only, can take land from one citizen, who acquired it legally, and vest it in another? The rights of private property are regulated, protected and governed by general, known and established laws; and decided upon by general, known and established tribunals; laws and tribunals not made and created on an instant exigency, on an urgent emergency, to serve a present turn, or the interest of a moment. Their operation and influence are equal and universal; they press alike on all. Hence, security and safety, tranquillity and peace. One man is not afraid of another, and no man afraid of the legislature. It is infinitely wiser and safer, to risk some possible mischiefs, than to vest in the legislature so unnecessary, dangerous and enormous a power as that which has been exercised on the present occasion; a power that, according to the full extent of the argument, is boundless and omnipotent: for the legislature judged of the necessity of the case, and also of the nature and value of the equivalent.

Such a case of necessity, and judging, too, of the compensation, can never occur in any nation. Singular, indeed, and untoward must be the state of things, that would induce the legislature, supposing they had the power, to divest one individual of his landed estate, merely for the purpose of vesting it in another, even upon full indemnification; unless that indemnification be ascertained in the manner which I shall mention hereafter.

But admitting, that the legislature can take the real estate of A and give it to B, on making compensation, the principle and reasoning upon it go no further than to show, that the legislature are the sole and exclusive judges of the necessity of the case, in which this despotic power should be called into action. It cannot, on the principles of the social alliance, or of the constitution, be extended beyond the point of judging upon every existing case of necessity. The legislature declare and enact, that such are the public exigencies, or necessities of the state, as to authorize them to take the land of A and give it to B; the dictates of reason and the eternal principles of justice, as well as the sacred principles of the social contract, and the constitution, direct, and they accordingly declare and ordain, that A shall receive compensation for the land. But here the legislature must stop; they have run the full length of their authority, and can go no further: they cannot constitutionally determine upon the amount of the compensation, or value of the land. Public exigencies do not require, necessity does not demand, that the legislature should, of themselves, without the participation of the proprietor, or intervention of a jury, assess *the value of the thing, or ascertain the amount of the compensation to be paid for it. This can constitutionally be effected only in three ways. 1. By the parties
—that is, by stipulation between the legislature and proprietor of the land. 2. By commissioners mutually elected by the parties. 3. By the intervention of a jury.

The compensatory part of the act lies in the ninth section. "And whereas, the late proprietaries, and divers other persons, have heretofore acquired titles to parcels of the land aforesaid, agreeably to the laws and usages of Pennsylvania, and who will be deprived thereof by the operation of this act, and as justice requires that compensation be made for the lands, of which they shall be thus divested; and as the state is possessed of other lands, in which an equivalent may be rendered to the claimants under Pennsylvania, and as it will be necessary, that their claims should be ascertained by a proper examination: Be it, therefore, enacted by the authority aforesaid, that all persons having such claims to lands, which will be affected by the operation of this act, shall be, and they are hereby required, by themselves, guardians, or other lawful agents, within twelve months from the passing of this act, to present the same to the board of property, therein clearly describing those lands, and stating the grounds of their claims, and also adducing the proper proofs, not only of their titles, but of the situations, qualities and values of the land so claimed, to enable the board to judge of the validity of their claims, and of the quantities of vacant lands proper to be granted as equivalents. And for every claim which shall be admitted by said board, as duly supported, the equivalent by them allowed, may be taken either in the old or new purchase, at the option of the claimant; and warrants and patents, and all other acts of the public offices relating thereto, shall be performed free of expense. The said board shall also allow such a quantity of vacant land, to be added to such equivalent, as shall, in their judgment, be equal to the expenses, which must necessarily be incurred in locating and surveying the same. And that the board of property may in every case, obtain satisfactory evidence of the quality and value of the land, which shall be claimed as aforesaid, under the proprietary title, they may require the commissioners aforesaid, during their sitting in the county of Luzerne, to make the necessary inquiries, by the oaths or affirmations of lawful witnesses, to ascertain those points; and it shall be the duty of the said commissioners to inquire and report accordingly." (Act of 28th March 1787, § 9. P. L. 274.)

*314] In this section, two things are worthy of consideration. *1. The mode or manner, in which compensation for the lands is to be ascertained. 2. The nature of the compensation itself.

The Pennsylvania claimants are directed to present their claims to the board of property—and what is the board to do thereupon? Why, it is—1. To judge of the validity of their claims. 2. To ascertain, by the aid and through the medium of commissioners, appointed by the legislature, the quality and value of the land. 3. To judge of the quantity of vacant land to be granted as an equivalent.

This is not the constitutional line of procedure. I have already observed, that there are but three modes, in which matters of this kind can be concluded, consistently with the principles and spirit of the constitution, and social alliance. The first of which is by the parties, that is, to say, by the
legislature and proprietor of the land. Of this the British history presents an illustrious example in the case of the Isle of Man.

"The distinct jurisdiction of this little subordinate royalty being found inconvenient for the purposes of public justice, and for the revenue (it affording a commodious asylum for debtors, outlaws and smugglers), authority was given to the treasury, by statute 12 Geo. I., c. 28, to purchase the interest of the then proprietors, for the use of the crown; which purchase was at length completed in the year 1765, and confirmed by statutes 5 Geo. III., c. 26 and 38, whereby the whole island and all its dependencies, so granted as aforesaid (except the landed property of the Atholl family, their manorial rights and emoluments, and the patronage of bishoprics, and other ecclesiastical benefices) are inalienably vested in the crown, and subjected to the regulations of the British excise and customs." 1 Bl. Com. 107.

Shame to American legislation! That in England, a limited monarchy, where there is no written constitution, where the parliament is omnipotent, and can mould the constitution 'at pleasure, a more sacred regard should have been paid to property, than in America, surrounded as we are with a blaze of political illumination; where the legislatures are limited; where we have republican governments, and written constitutions, by which the protection and enjoyment of property are rendered inviolable. The case of the Isle of Man was a fair and honorable stipulation; it partook of the spirit and essence of a contract; it was free and mutual; and was treating with the proprietors on equal terms.

But if the business cannot be effected in this way, then the value of the land, intended to be taken, should be ascertained by commissioners, or persons mutually elected by the parties, *or by the intervention of the judiciary, of which a jury is a component part. In the first case, we approximate nearly to a contract; because the will of the party, whose property is to be affected, is in some degree exercised; he has a choice; his own act co-operates with that of the legislature. In the other case, there is the intervention of a court of law, or, in other words, a jury is to pass between the public and the individual, who, after hearing the proofs and allegations of the parties, will, by their verdict, fix the value of the property, or the sum to be paid for it. The compensation, if not agreed upon by the parties or their agents, must be ascertained by a jury.1 The interposition of a jury is, in such case, a constitutional guard upon property, and a necessary check to legislative authority. It is a barrier between the individual and the legislature, and ought never to be removed; as long as it is preserved, the rights of private property will be in no danger of violation, except in cases of absolute necessity, or great public utility. By the confirming act, the value of the land taken, and the value of the land to be paid in recompense, are to be ascertained by the board of property. And who are the persons that constitute this board? Men appointed by one of the parties, by the legislature only. The person whose property is to be divested and valued, had no volition, no choice, no co-operation in the appointment; and besides, the other constitutional guard upon property, that of a jury, is removed and done away. The board of property thus constituted, are

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1 The constitution of Pennsylvania of 1874, secures to the owners of land, taken for public use, the right of trial by jury. Art. xvi. § 8.
authorised to decide upon the value of the land to be taken, and upon the value of the land to be given by way of equivalent, without the participation of the party, or the intervention of a jury.

2. The nature of the compensation. By the act, the equivalent is to be in land. No just compensation can be made, except in money. Money is a common standard, by comparison with which the value of anything may be ascertained. It is not only a sign which represents the respective values of commodities, but is an universal medium, easily portable, liable to little variation, and readily exchanged for any kind of property. Compensation is a recompense in value, a *quid pro quo*, and must be in money. True it is, that land or anything else may be a compensation, but then it must be at the election of the party; it cannot be forced upon him. His consent will legalise the act, and make it valid; nothing short of it will have the effect. It is obvious, that if a jury pass upon the subject, or value of the property, their verdict must be in money.

> To close this part of the discourse: It is contended, that the legislature must judge of the necessity of interposing their despotic authority; it is a right of necessity, upon which no other power in government can decide: that no civil institution is perfect; and that cases will occur in which private property must yield to urgent calls of public utility or general danger. Be it so. But then it must be upon complete indemnification to the individual. Agreed, but who shall judge of this? Did there also exist a state necessity, that the legislature, or persons solely appointed by them, must admasure the compensation, or value of the lands seized and taken, and the validity of the title thereto? Did a third state necessity exist, that the proprietor must take land by way of equivalent for his land? And did a fourth state necessity exist, that the value of this land-equivalent must be adjusted by the board of property, without the consent of the party, or the interference of a jury? Alas! how necessity begets necessity. They rise upon each other and become endless. The proprietor stands afar off, a solitary and unprotected member of the community, and is stripped of his property, without his consent, without a hearing, without notice, the value of that property judged upon, without his participation, or the intervention of a jury, and the equivalent therefor in lands ascertained in the same way. If this be the legislation of a republican government, in which the preservation of property is made sacred by the constitution, I ask, wherein it differs from the mandate of an Asiatic prince? Omnipotence in legislation is despotism. According to this doctrine, we have nothing that we can call our own, or are sure of, for a moment; we are all tenants at will, and hold our landed property at the mere pleasure of the legislature. Wretched situation, precarious tenure! And yet we boast of property and its security, of laws, of courts, of constitutions, and call ourselves free! In short, gentlemen, the confirming act is void; it never had constitutional existence; it is a dead letter, and of no more virtue or avail, than if it never had been made."

1Of this decision, Judge Hussey says, in Satterlee v. Matthewson, 16 S. & R. 173: "It is not easy to determine whether the misapprehension of the facts in the cause, or the misapplication of the law to those facts, is most conspicuous." It led to the immediate passing of the intrusion act of the 11th April 1793 P. L. 708.
and scope of the act itself. The intent of the legislature was, to vest in Connecticut claimants of a particular description, a perfect estate to certain lands in the county of Luzerne; but then it was upon condition; it was to operate upon, secure and sanctify such claims only as should be admitted and ascertained, approved and established by the commissioners. This is further evident, from the powers and functions of the commissioners, who were to inquire, examine, hear proofs, &c., respecting the claims—and for what purpose? Why, that they might admit and approve of such as were supported by satisfactory evidence, and make return thereof to the executive council, who should thereupon cause patents to be issued for their confirmation. Until the commissioners had decided in favor of a claim, it remained in statu quo; the act did not cover and protect it. Further, if the act will admit of two constructions, that one certainly ought to be adopted which is in favor of the legal owner, and which will not divest his estate, until the terms specified in the act shall have been fully complied with. When the legislature undertake to give away what is not their own, when they attempt to take the property of one man, which he fairly acquired, and the general law of the land protects, in order to transfer it to another, even upon complete indemnification, it will naturally be considered as an extraordinary act of legislation, which ought to be viewed with jealous eyes, examined with critical exactness, and scrutinized with all the severity of legal exposition. An act of this sort deserves no favor; to construe it liberally would be sinning against the rights of private property.

Besides, it was the manifest intention of the makers of the act, that a just compensation should be made in land, to the Pennsylvania claimants; upon this principle, the act proceeds; and therefore, if it appear, that such compensation cannot be made, or that it is very dubious, whether it can be effected, the court ought not to give such a construction, as will deprive the owner of his estate, with little or no prospect of being recompensed in value. If either party ought to be driven to the necessity of controverting the question with the state of Pennsylvania, it ought to be the Connecticut settlers, who have no legal title to the land, and not the Pennsylvania claimants, in whom is vested a good estate at law.

Deeming the construction which has been put upon the act, to be the sound one, it precludes the inquiry, how far a patent of confirmation was necessary to substantiate the claim of the defendant, so as to render it available in a court of common law.

III. The nature and operation of the suspending act. This act was passed the 29th of March, 1788, and is as follows. (Here the judge read the act at large.)

This act was passed before the adoption of the constitution of the United States, and therefore, is not affected by it. If the legislature had authority to make the confirming act, they had also authority to suspend it. Their constitutional power reached to both, or to neither. By the act of the 28th of March 1787, the commissioners were to ascertain and confirm the claims of the Connecticut settlers, upon the doing whereof the estate, if the law was constitutional, would become vested in them. This has not been done; the claim in the present instance has not been ascertained and confirmed; and as this act suspends or revokes these ascertaining and confirming powers,
it never can be done. Of course, there is an end of the business. The parties are placed on their original ground; they are restored to their pristine situation.

IV. After the opinion delivered on the preceding questions, it is not necessary to determine upon the validity of the repealing law. But it being my intention in this charge to decide upon all the material points in the cause, in order that the whole may, at once, be carried before the supreme judicature for revision, I shall detain you, gentlemen, a few minutes only, while I just touch upon the constitutionality of the repealing act. This act was passed the 1st of April 1790: the repealing part is as follows: (Here the judge read the 1st and 2d sections of the act. See 2 Dall. Laws, 786).

This act was made after the adoption of the constitution of the United States, and the argument is, that it is contrary to it. 1. Because it is an _ex post facto_ law. 2. Because it is a law impairing the obligation of a contract.

1. That it is an _ex post facto_ law. But what is the fact? If making a law be a fact, within the words of the constitution, then no law, when once made, can ever be repealed: Some of the Connecticut settlers presented their claims to the commissioners, who received and entered them. These are facts. But are the facts of any avail? Did they give any right or vest any estate? No, whether done or not done, they leave the parties just where they were. They create no interest, affect no title, change no property; when done, they are useless and of no efficacy. Other acts were necessary to be performed, but before the performance of them, the law was suspended and then repealed.

2. It impairs the obligation of a contract, and is, therefore, void. If the property to the lands in question had been vested in the state of Pennsylvania, then the legislature would have had the liberty and right of disposing or granting them to whom they pleased, at any time, and in any manner. Over public property, they have a disposing and controlling power; over private property, they have none, except, perhaps, in certain cases, and those under restrictions, and except also, what may arise from the enactment and operation of general laws respecting property, which will affect themselves as well as their constituents. But if the confirming act be a contract between the legislature of Pennsylvania and the Connecticut settlers, it must be regulated by the rules and principles which pervade and govern all cases of contracts; and if so, it is clearly void, because it tends, in its operation and consequences, to defraud the Pennsylvania claimants, who are third persons, of their just rights; rights ascertained, protected and secured by the constitution and known laws of the land. The plaintiff's title to the land in question, is legally derived from Pennsylvania; how then, on the principles of contract, could Pennsylvania lawfully dispose of it to another? As a contract, it could convey no right, without the owner's consent; without that, it was fraudulent and void.

I shall close the discourse with a brief recapitulation of its leading points.

1. The confirming act is unconstitutional and void. It was invalid, from the beginning, had no life or operation, and is precisely in the same state, as if it had not been made. If so, the plaintiff's title remains in full force.

2. If the confirming act is constitutional, the conditions of it have not been performed; and therefore, the estate continues in the plaintiff.
3. The confirming act has been suspended. And—
4. Repealed.
The result is, that the plaintiff is, by law, entitled to recover the premises in question, and, of course, to your verdict.

Verdict for the plaintiff. (a)

*321] [United States v. Guinet et al.]

Neutrality.

The conversion of a merchant-vessel of a foreign belligerent power into a vessel of war, within a port of the United States, with intent to cruise against another belligerent power, at peace with this country, is to be deemed an original offense; and is a breach of the neutrality laws of the United States.

Thus was an indictment against Etienne Guinet and John Baptist Le Maitre, for a misdemeanor, in fitting out and arming Les Jumeaux (The Twins), in the port of Philadelphia, to be employed in the service of the Republic of France, against Great Britain, both powers being at peace with the United States. The act on which the indictment was founded, contained the following sections:

§ 3. "That if any person shall, within any of the ports, harbors, bays, rivers, or other waters of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out or arming, of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, to cruise or commit hostilities upon the subjects, citizens or property of another foreign prince or state, with whom the United States are at peace, or shall issue or deliver a commission, within the territory or jurisdiction of the United States, for any ship or vessel, to the intent that she may be employed as aforesaid, every such person, so offending, shall, upon conviction, be adjudged guilty of a high misdemeanor, and shall be fined and imprisoned, at the discretion of the court in which the conviction shall be had, so as the fine to be imposed shall in no case be more than five thousand dollars, and the term of imprisonment shall not exceed three years; and every such ship or vessel, with her tackle, apparel and furniture, together with all materials, arms, ammunitions and stores which may have been procured for the building and equipment thereof, shall be forfeited, one-half to the use of any person who shall give information of the offence, and the other half to the use of the United States."

§ 4. "That if any person shall, within the territory or jurisdiction of the United States, increase or augment, or procure to be increased or augmented, or shall be knowingly concerned in increasing or augmenting, the

(a) Writ of error was brought on the judgment in this case, and is now depending in the supreme court.

1 S. c. Whart. St. Trials 93.
2 Act of 5th June 1794, 1 U. S. Stat. 381. This act remained in force until the passage of the act of 30th April 1818, by which all laws on the same subject were repealed. The Estrella, 4 Wheat. 298.
3 As this case does not appear in the reports of cases in the supreme court, the writ, if ever issued, must have been abandoned, on the passing of the intrusion law. The case is frequently mentioned by judges, in opinions subsequently delivered, but no allusion is made to a writ of error.
master (who had returned from Wilmington, after piloting the vessel thither), two or three Frenchmen that belonged to the vessel, and two black boys, carried and delivered on board, three or four carriage guns; that the witness (who did not go on board) saw no appearance of other guns, which he could have done, though it was dark, had there been port-holes and the guns run out; that the pilot-boat returned to Philadelphia the same night, for the purpose of carrying to the ship some of her crew, and two or three hogsheads; that the hogsheads were put on board the pilot-boat the next day, and being there opened were found to be filled with a number of little kegs, the contents of which were unknown; that at the same time, twenty or thirty muskets, a number of lanterns, cans, &c., were put on board; that the whole of this transaction took place in the night-time, between ten and eleven o'clock; and that, during the same night, the pilot-boat, with three or four Frenchmen on board, pushed from the wharf, and sailed down to Wilmington, where the vessel still lay; that the things brought in the pilot-boat being put on board the ship, she got under weigh and proceeded to Reedy Island; that there were then between thirty and forty persons on board; that the witness could not perceive that she had any guns or gun-carriages on deck, though this might be owing to its being dark; that the vessel dropped down to New Castle; and the pilot-boat was again sent to Philadelphia, by order of an officer (as it would seem) belonged to the vessel, who met the witness there, and between nine and ten o'clock at night, put one or two trunks and a large box on board the pilot-boat, at South street wharf; that there were then lying on the wharf six guns, without carriages, which Guinet told the witness he must take on board the pilot-boat, at twelve o'clock at night; that the masts were so weak, that the witness was at first afraid to undertake it; that he went, however, to borrow a runner and tackle from an adjoining sloop; that Guinet concluded to postpone heaving the guns into the boat until the next evening; and in the intermediate time, the marshal seized the guns and boat, and apprehended the parties.

This was the amount of the general evidence relating to the equipment of the vessel, and the evidence particularly pointed against the defendant, Guinet, was to the following effect:—While the vessel was repairing, Guinet*324] was seen frequently attending *the people at work; and the master- warden, before whom he had attended with the owner, understood that he acted in the character of an interpreter, as the owner could not speak English. The ship-carpenter did not see Guinet, until the bargain was struck, and the repairs were considerably advanced; that afterwards, when the owner came, which was generally twice a day, he spoke so little English, that Guinet used to translate for him, and on all occasions act as his interpreter; that Guinet sometimes brought orders from the owner to the carpenter; that he never assumed any right of ownership himself, but, on the contrary, once complained to the carpenter, that the owners had not given him so much as a hat for interpreting. In opposition, however, to the idea of his being merely an interpreter, it was proved, that when the marshal seized the pilot-boat, Guinet claimed one of the trunks on board, and declared, that the guns lying on the wharf belonged to him, he having, as he alleged, purchased them, to sell again as merchandise. A runner and tackle was sent on board, while the pilot-boat was in the marshal's custody, but it had never been claimed. Guinet denied, before the judge, on his examination, that he
knew anything more of the pilot-boat, than that she was going to New Castle, and he had put his baggage on board to send thither; but the pilot’s apprentice being confronted with him, insisted that he was the person who had ordered the six cannon to be taken on board, and that he was acquainted with the transaction. When, likewise, Guinet was apprehended, two papers were found in his possession: one of them was an account, stated in his own handwriting, between Le Maitre and himself, in which were charges for supplying muskets, ball and cannon; for moneys advanced at sundry times on account of the equipments; and for commissions and attendance in superintending the repairs and outfit of the vessel. The other paper was a letter from Messrs. Mendenhall & Co., of Wilmington, to Guinet, dated the 20th of December 1794, containing the following passage: “Your favor per post is come to hand. We think it not possible to get any 4lb. shot, or any other size here. We think it probable, that we can let one of our boats go down with the things for the ship; they have taken the water-casks on board already. The account shall be ready against you call.” The deputy-collector proved the manifest of the sloop Farmer, which brought up six guns, consigned from Mendenhall & Co. to Guinet; and Guinet acknowledged before the judge, that the guns lying at South street wharf were those that had been so consigned to him.

**Levy,** for the defendant.—This is the first prosecution that has occurred since an act of congress was passed on the subject. Before the act was passed, an important and interesting controversy had arisen between the executive of the federal government and the French minister; [*325*] in the course of which the latter contended, that, if not by the general law of nations, at least, by positive compact, the French republic was entitled to repair and equip vessels of war in the ports of the United States; since the treaty, by making it expressly unlawful for the others, had, by necessary implication, made it lawful for her. **Treaty, Art. 22.** As a branch of this controversy, it had, likewise, been insisted, that an American citizen had a right to enter into the service of the French republic, and the position certainly received some countenance, from the refusal of a grand jury in Boston to find bills of indictment against persons who had acted in that manner, and from the acquittal of Gideon Henfield by a Philadelphia jury. These interpretations and proceedings were, however, disapproved by our executive; who, on the first point, contrary to the avowed sense of the great mass of the people, construed the 22d article of the treaty, to be merely an exclusion of other belligerent nations from the privilege of equipping in our ports, and not a permission to France; and this diversity of sentiment between the government and the citizens, finally produced the act of congress now in question.

The section on which this prosecution is founded is, indeed, a severe and penal one; but in proportion to the rigor of the punishment, will a conscientious jury require the degree of proof to be. It contemplates four descriptions of offence: 1st. To fit out and arm, or attempt to fit out and arm: 2d. To procure to be fitted out and armed: 3d. To be concerned, knowingly, in furnishing, fitting out, or arming any ship or vessel, with intent

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1 See Henfield’s Trial for illegally enlisting in a French privateer. Whart. St. Trials, 49.
that such ship or vessel shall be employed in the service of any foreign prince or state, to cruise or commit hostilities upon a nation at peace with the United States: and 4th. To issue or deliver a commission, within the territory or jurisdiction of the United States, for any ship or vessel, to the intent that she may be so employed. Two facts, then, are essential to justify a conviction. 1st. The vessel must have been fitted out and armed within the port of Philadelphia: and 2d. The defendant must, at least, have been knowingly concerned in her equipment.

1st. With respect to the first fact, there is no direct proof that the vessel sailed with more guns than she brought with her; and the mere intention to arm and equip her, is not criminal. Nor even if cannon, arms and ammunition had been put on board, does it follow, as a necessary consequence, that it was intended to arm her as a vessel of war, in the service of France, to cruise against the friends of America. There is no evidence of such cruising; nor of the design (whether as passengers or mariners) with which the thirty or forty persons were on board the vessel; and military stores may lawfully be sold here, or be exported to foreign countries by American citizens: the act is only punishable, when the armament and stores are applied to the use of the vessel in which they are shipped. But the most that can possibly be inferred from the evidence, is an augmentation of the force of the vessel, as she arrived here, with guns actually mounted; and then the indictment should have been founded on the 4th, instead of the 3d section of the act. There is a great difference in the language and penalties of the two sections, which undoubtedly arose from the very different nature of the cases to which they respectively apply. For, it is neither so offensive in itself, nor so dangerous to the peace of the nation, that a vessel, already armed, should add something to its force, as that a vessel should originally be constructed and equipped within our ports, for the purposes of war. Hence, therefore, the bare attempt in the latter case is made criminal; but in the former, the unlawful act must be consummated. The words of the 4th section refer to ships of war, cruisers or other armed vessels: all the writers on the subject state that there are four kinds of armed vessels, three with commissions, and one without commission, to wit, vessels of war, privateers, letters of marque, and all other armed vessels; and this vessel must be included in the last description, not being embraced by the others.

2d. With respect to the second essential fact, there is not sufficient evidence to show, that the defendant was knowingly concerned in the illegal outfit of the vessel. He acted only as an interpreter; which, notwithstanding the generality of the word, "concerned," cannot fairly be included in the definition of an offence, that calls for proof of a serious intention to furnish and outfit the vessel. There was no crime in being owner of the guns at South street wharf; and the object in ordering them to be put on board the pilot-boat, does not appear. The transaction with Mendenhall & Co. rather proves that the guns were not intended for this vessel, as it would have been easier, more expeditious and safer, in that case, to send them on board from Wilmington, with the water-casks, and other articles which were actually sent by them. The account found in the defendant's possession relates to the disbursements of a factor for his principal: It is not shown how it arose; whether before or after the articles were received; and
after a vessel illegally equipped has sailed, it cannot be an offence, within the act, to pay drafts in discharge of the tradesmen's bills. Presumptions unfavorable to innocence ought not to be encouraged, in cases so highly penal.

Ravole, the district-attorney, entered into a description of the principles and advantages of an honorable neutrality; and relied upon the good sense and patriotism of the jury, to prevent their being seduced by a retrospective view of the popular prejudices that had formerly prevailed. He then contended: 1st. That the offence had been committed; 2d. That the defendant was knowingly concerned in committing it; And 3d. That the indictment was founded on the proper section of the act of congress.

1st. There is evidence, that the vessel sailed from the wharf, with the guns that she brought into port; that four other guns, with military stores, were afterwards put on board of her, and that she had a crew of thirty or forty persons. It is arming a vessel, when arms are put on board, she being on her passage; and it cannot be material, that those arms should be arranged in a particular manner. As to the design of the equipment, there is no proof of an actual cruise; but the jury will decide, whether it was any other than that charged in the indictment. There is no attempt to prove that she had a cargo, or carried passengers; on the contrary, it is in evidence that she sailed in ballast; and the subdivisions of interest in the vessel are in the nature of all ownership of privateers.

2d. The defendant was knowingly concerned. As furnishing arms, knowing them to be designed for an unlawful purpose, constitutes the crime; and as an interpreter was the necessary instrument on the occasion; even if the defendant had appeared in no other character, this would have been sufficient to convict him. But he was not merely an interpreter—he appears to have interfered on various other occasions; and his account is conclusive evidence of a confidential and important agency in accomplishing the illegal outfit of the vessel. It might afford some color of defence, to say, that he only attempted to send the cannon on board from South street wharf, if this account did not demonstrate that he was concerned in the equipment from the beginning. There is nothing to justify an idea, that it arose from paying drafts, after the vessel had sailed; but on the contrary, several items are for money advanced; and the charge for commissions, &c., has relation to the very moment of commencing the repairs. The agency proved by the account, is corroborated by the purchase of cannon from Mendenhall & Co., which is evidently connected with the general plan for equipping this vessel.

3d. The indictment is well laid: the 3d section is the only one to which the case is applicable. The 4th section refers only to the augmentation of the force of the vessel, which, on her arrival in our ports, was, in fact, a vessel of war, either public or private. If, therefore, a man-of-war or privateer adds to the number or size of her guns, or makes any equipment solely applicable to war, it is an offence against this section. But if a vessel, having guns on board, and yet being neither a man-of-war, nor a privateer, enters our ports, she cannot legally be equipped for the purposes of war. Without this construction, the act of congress would be nugatory; as it might be evaded, by bringing a single gun in the vessel. In the present case, it appears, that Les Jumcaux had been employed in the Guinea trade, that she arrived here, with a cargo of sugar and cotton; and being converted
from a merchant vessel, carrying a few guns for self-defence, into a privateer, armed for hostilities, it is clearly an original outfit, within the meaning of the law. The distinction is justified by this further consideration, that the 3d section makes arming the vessel, with intent to employ her in hostilities, the offence; whereas, the 4th section refers nothing to the intent with which the force of the vessel is augmented, as it only contemplates the case of vessels originally fitted for war by the nation to which they belong.

Paterson, Justice.—This is an indictment against John Etienne Guinet, for being knowingly concerned in furnishing, fitting out and arming Les Jumeaux, in the port and river Delaware, with intent that she should be employed in the service of the French republic, to cruise, or commit hostilities upon the subjects of Great Britain, with whom the United States are at peace: and it is the province of the jury to inquire, whether the proof exhibited on the trial has fully maintained the charge contained in the indictment.

Much has been said upon the construction of the 3d and 4th sections of the act of congress; but the court is clearly of opinion, that the 3d section was meant to include all cases of vessels armed within our ports, by one of the belligerent powers, to act as cruisers against another belligerent power in peace with the United States. Converting a ship from her original destination, with intent to commit hostilities; or, in other words, converting a merchant ship into a vessel of war, must be deemed an original outfit; for the act would, otherwise, become nugatory and inoperative. It is the conversion from the peaceable use, to the warlike purpose, that constitutes the offence.

The vessel in question arrived in this port, with a cargo of coffee and sugar, from the West Indies; and so appears to have been employed by her owner with a view to merchandise, and not with a view to war. The inquiry therefore, is limited to this consideration, whether, after her arrival, she was fitted out, in order to cruise against any foreign nation, being at peace with the United States. It is true, she left the wharf with only four guns, the number that she had brought into the port; but it is equally true, that when she had dropped to some distance below, she took on board three or four guns more, a number of muskets, water-casks, &c.; and it is manifest, that other guns, were ready to be sent to her by the pilot-boat. These circumstances clearly prove a conversion from the original commercial design

*329 of the vessel, to a design of cruising against *the enemies of France; and of course, against a nation at peace with the United States, since the United States are at peace with all the world. Nor can it be reasonably contended, that the articles thus put on board the vessel were articles of merchandise; for, if that had been the case, they would have been mentioned in her manifest, on clearing out of the port, whereas, it is expressly stated that she sailed in ballast. If they were not to be used for merchandise, the inference is evident, that they were to be used for war. No man would proclaim on the house-top, that he intended to fit out a privateer: the intention must be collected from all the circumstances of the transaction, which the jury will investigate, and on which they must decide. But if they are of opinion, that it was intended to convert this vessel from a merchant ship into a cruiser, every man who was knowingly concerned in doing so, is guilty in the contemplation of the law.1

1 See United States v. Quincy, 6 Pet. 445; The Meteor, 1 Am. L. Rev. 401; United States 286
Parasset v. Gautier.

It will only, then, be necessary to ascertain, how far the defendant was knowingly concerned; for, though he were concerned, if he did not act with a knowledge of the real object, he would be innocent. It has been alleged in his defense, that he was merely an interpreter; and if, in fact, he had appeared in that character alone, we should not have thought it a sufficient ground for conviction. But the jury will collect from the other parts of the transaction, whether this is not used as a mask to cover his efficient agency in the equipment of the vessel. He carried orders from the owner to the ship-carpenter; he told the pilot-boy, at what time the guns should be taken on board his boat, to be carried to the ship; the account found in his possession states charges for supplies of cannon, ball, muskets, and commissions for services; and the whole is conducted in a secret and mysterious manner, under the shade of night. Would he have acted this part, as a mere interpreter? If it had been fair mercantile business, involving nothing repugnant to our laws, would it have been so much a work of darkness? This alone casts a gloom over the transaction, that will impress every just and ingenuous mind with an idea of fraud and delinquency.

If the defendant has been concerned in the offence, there is no doubt that it is effected, as far as it was in his power to complete it. The illegal outfit of the vessel was accomplished; and that an additional number of cannon was not sent to augment her force, was not owing to his respect to the laws, but to the vigilance of the public police.

Upon the whole, the jury will consider the indictment; and give such a verdict as shall comport with evidence and law.

Verdict, guilty.

*Parasset v. Gautier.*

Bail.

Where a reasonable cause of action is shown, the court will not discharge on common bail. Thus, on a motion to discharge on common bail, the court will not inquire into a question of fraud in the original contract.

A defendant may be held to bail in a new action, notwithstanding a discharge on common bail, in a former action in a state court—the plaintiff having lost his appeal from the judge's order, through the neglect of his agent.¹

A capias had issued in this suit, returnable to the present term; but previously to the return of the writ, there had been a hearing before Judge Peters, at his chambers, upon a citation to show cause why the defendant should not be discharged on common bail; the judge had ordered bail to be given; and the defendant had appealed from this order to the court. The merits of the appeal were now discussed; and independently of some circumstances relating to the origin of the debt, which the court said ought not to weigh upon a question of bail, (a) the material facts appeared to be these:

(a) Paterson, Justice.—If you make it a question of fraud in the original contract, or in the assignment, the court cannot inquire into it, upon a question of bail. We cannot travel into the merits of the controversy: it would be, in effect, a pre-adjudica-

¹ See Bingham v. Wilkins, Crabbe 50; Gardner v. Lingo, 1 Cr. C. 592.
An action had been instituted in the supreme court of Pennsylvania, between the same parties, for the same cause; and on a hearing before Chief Justice McKean, the defendant was ordered to be discharged on common bail. From that order, the plaintiff did not appeal; but afterwards applied by motion to the supreme court, for a rule upon the defendant to enter special bail. This the court refused; because they would not take cognisance of the subject, but by way of appeal from the decision of the chief justice; and the proper time for making such an appeal had elapsed. Under these circumstances, the plaintiff discontinued his action in the state court, and brought the present action here. It also appeared, that the plaintiff (who was a foreigner, ignorant of our laws) had not originally employed an attorney to appear before Chief Justice McKean, though the person that then attended him pretended to have a competent knowledge of legal proceedings.

M. Levy, for the plaintiff, contended that bail ought to be given. Nothing short of a judgment can be a perpetual bar in personal actions; and therefore, the certificate of a discharge on common bail by the Chief Justice of Pennsylvania, was not binding upon the judge of this court, who had given a different order. The person, character and legal talents of that judge could not be taken into view. The justices of the courts of common pleas possess a concurrent jurisdiction, without possessing a spark of his jurisprudential knowledge; and yet, if his discharge is conclusive, so likewise must theirs be. (a) Actions are often commenced after nonsuits; and it is clear, that the second court is not bound, in such cases, nor even in cases where a decision may have been had on the merits, by the opinion of a first court. It is true, that every species of vexation should be discomtented; but every mistake ought not to be interpreted into an act of vexation. The plaintiff was ill advised in the mode of presenting his case to the Chief Justice of Pennsylvania; and, considering his ignorance of our laws, he ought not to lose the benefit of bail, by the taches of his agent, in not pursuing the technical form of an appeal. Nor is the discontinuance of the former action, under these circumstances, to be imputed to him as matter of malice and persecution. If the plaintiff’s motive was originally just and commendable, to recover a bona fide debt, the allegation of any subsequent impropriety, must be manifested by some fact: now, if he was ever fairly entitled to hold the defendant to bail, the discharge can furnish no ground to accuse the plaintiff of vexation, for endeavoring, by various means, to accomplish that object; and after the state court had refused to interpose, he must either abandon that object, or discontinue his suit, and resort to another tribunal. A man may commence a suit, as often as he pleases; and may hold his debtor twenty different times to bail, if any reasonable cause can be assigned for so withdrawing and renewing the process of law. No argument to the contrary can be founded on 2 Wils. 381; for bail was there

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*331*}

(a) Paterson, Justice.—The certificate of the Chief Justice of Pennsylvania is produced, as evidence of vexation on the part of the plaintiff; and not to bind the judgment of the court.
GEYGER'S LESSEE v. GEYGER.

Notice to produce papers.

If notice of a rule to produce deeds and papers be served on an attorney, whose client resides at a distance, the trial will be postponed, until full opportunity has been afforded him to communicate with his client. 1

The court will not make an order for the production of deeds, which are duly recorded, unless a special reason be assigned.

A rule had been obtained by the plaintiff, requiring the defendant to show cause why an order should not be made for the production of certain deeds and papers, on the trial of this cause, agreeable to the provision of the 15th section of the judicial act: and now, on proof that a copy of the rule was served on the plaintiff's attorney, it was moved to make the same absolute.

*333* But, for the defendant, it was contended, that the notice of the rule should have been given to the party, and not to his attorney. In Rivers v. Walker, 1 Dall. 81, notice, in the case of referees, is directed to be given to the party; and the reason is stronger in the present instance, as the defendant lives at a great distance, and the attorney ought not to be put to the trouble and expense of transmitting the notice. Besides, there is no certificate produced, that the deeds are not on record; and the fact is, that they are recorded; so that the plaintiff might, at any time, procure exemplifications.

By the Court.—The provision contained in the judicial act was intended to prevent the necessity of instituting suits in equity, merely to obtain from an adverse party, the production of deeds and papers relative to the litigated issue. The act says, generally, that the court shall have power, "on motion, and due notice thereof being given, to require the parties to produce books or writings, &c.," without designating to whom the notice shall be given, the party himself, or his attorney. But we will always keep the cause under our control, for the purposes of substantial justice, and never suffer either party to be entrapped. If, for instance, notice is served on an attorney, whose client lives at a great distance, this will always be deemed a sufficient reason to postpone the trial, until a full opportunity has been afforded for the attorney's communicating the rule to the client. If likewise, the court find that the deeds are actually on record, we will not indulge the party with a rule for producing them, merely as a cheap mode of procuring evidence. The originals may, sometimes, indeed, be necessary, for a special reason, detached from the evidence; but in that case, the special reason must be assigned to the court.

The defendant's counsel offering to refer their opponents to the pages, &c., where the deeds in question are recorded, The Court declared, that this put an end to the matter; but added, that if it was not satisfactorily done, they would not allow the cause to be brought to trial.

Levy and Blair, for the plaintiff. Tulghman and Armstrong, for the defendant.

An attachment will not be awarded against a witness, unless the subpoena have been actually served; and all the documents on which it is granted must be filed.

This was an indictment for a misdemeanor, committed in Northumberland county, in which a subpoena had issued, on the part of the defendant, to summon Samuel McClay, Esq., and John McPherson, Esq., associate judges of the county courts of Northumberland, to appear in the circuit court as *witnesses, on the 4th of May. The subpoena was served on Mr. McClay, on the 28th of April, and on Mr. McPherson, the next day. E. Tilghman now produced an affidavit, "that they were material witnesses, without the benefit of whose testimony, the defendant apprehended and believed he could not safely proceed to trial;" and moved for a postponement, not only in this case, but also in cases of Montgomery, Lang and Stockman; in which, to save expense, no subpoena had issued, though the same persons were material witnesses for the respective defendants.

Rawle, the district-attorney, objected, that from the 4th of May, when the subpoena was returnable, a sufficient time had elapsed to have brought the witnesses to Philadelphia upon an attachment; but he consented to consider the subpoena as having issued in all the causes. There was no legal necessity for the witnesses, merely because they were county judges, to attend the nisi prius of the supreme court, which is alleged in excuse for their absence; and as this is not a capital case, the application for delay is not entitled to be treated with any peculiar indulgence.

E. Tilghman replied, that the subpoena had been served in a seasonable time; and although no attachment had been moved for, it is some excuse for the defendant, that he expected the trials for treason would first come on; and for the witnesses, that their official situation seemed to prescribe a respectful attention to the judges of the supreme court, who were then holding a court of nisi prius, in the county of Northumberland.(a) But after the oath which the defendant has taken, the court will not presume, that his application for delay is without just cause; and if there is just cause, they will not compel him to proceed to a trial, under such disadvantages. Besides, it is not desired, to put off the trial until the next term, but only for a few days, that an express may be sent for the witnesses; as, with the benefit of their testimony, it is immaterial to the defendant, when he shall be tried. Though, if the delay is limited to a few days, it will be necessary, in order to remove all future cavil, to move for an attachment against the witnesses.

By the Court.—We have no hesitation in granting the indulgence of a delay for a few days. The cause may, therefore, be continued until this day week; and in the meantime, let the attachment issue; but it can only

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(a) Paterson, Justice.—We pay no respect to persons: the law operates equally upon all; the high and low, the rich and poor. If we issue a subpoena to a justice or a judge, and it is not obeyed, we should be more strict in our proceedings against such characters, than against others, whose office did not so strongly point out their duty.
be in the case, in which the *subpoena* has been actually served. The practice must always *be strict in the previous stages of the business, before an attachment can be awarded; and all the documents, upon which it is awarded, must be filed with the court.

**UNITED STATES v. MONTGOMERY.**

*Process of contempt.*

An attachment against a witness, for contempt, must be served by the marshal, in any part of his district.

An attachment being awarded against the witnesses, who did not attend at the return of the *subpoena* that had issued in this cause, on the part of the defendant, the marshal, Nichols, suggested that they resided in a distant county, and asked the opinion of the court, whether it was his duty to serve the process.

*BY THE COURT.—An attachment is the process of the court, regularly issuing for the administration of justice; and therefore, must be served by the marshal.*

**UNITED STATES v. THE INSURGENTS OF PENNSYLVANIA.**

*Trial for treason.—Jury.—Copy of indictment.*

At common law, the court may direct any number of jurors to be summoned, on a consideration of all the circumstances under which the *venire* is issued.

The act of congress which refers the federal courts to the state laws, for certain regulations respecting juries, has respect to the designation and qualification of the jurors, and not to the number of which the panel should consist.

A copy of the caption of the indictment, as well as of the indictment itself, must be delivered to the defendant, three days before the trial.

In the list of the jury and witnesses, furnished to the defendant, the township in which they reside must be given—the county is not sufficient; but the statute does not require their occupations to be stated.

Several indictments for high treason having been found against persons concerned in the insurrection in the four Western counties of Pennsylvania, a *venire* was issued in each case, for summoning a jury, returnable to the present term; and to each writ, the marshal returned a separate panel, containing the names of thirty-six jurors from the city of Philadelphia, sixteen from the county of Delaware, nine from the county of Chester, and twelve from each county in which the treason was charged to have been committed, making twenty-two jurors on each panel, and one hundred and eight jurors summoned on the whole.

The act of congress (1 U. S. Stat. 88, § 20) having directed "that any person who shall be accused and indicted of treason, shall have a copy of the indictment, and a list of the jury and witnesses to be produced on the

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1 For a full account of the western insurrection in Pennsylvania, see Findley's History of that event, and Brackenridge's History of the same transaction, in which the writers consider the subject from opposite political stand points.
venire facias juratores, or other process for the trial of causes at bar before the justices of the supreme court, doth belong, shall, upon return thereof, unless in cases where a special jury shall be struck by rule of court, annex a panel to the said writ, containing the Christian and sur-names, additions and places of abode, of a competent number of jurors, the names of the same persons to be inserted in the panel annexed to every such writ, for the trial of all issues to be tried at the bar of the said court, during the ensuing term, which number of jurors shall not be less than forty-eight, nor more than sixty, &c."

The laws of the state being thus made for the federal courts, Lewis contended, that, in no case, could the marshal be authorized to return more than eighty jurors; that the power of extending the panel to that number does not vest in the circuit court, sitting in its ordinary character, as the act only vests it in the courts of oyer and terminer, general jail delivery, and nisi prius; but that in the present instance, even that number, and without the order of the court, had been far exceeded, since twelve jurors had been summoned from each of the four counties in which the charges were laid, and sixty had been summoned from other parts of the state, making in the whole one hundred and eight, which he considered as an unnecessary, as well as an expensive and oppressive, call on the citizens. He insisted that, as different charges were laid in the four counties, forty-eight jurors should have been summoned from them, and only the number necessary to complete the panel of sixty, or, in case of a special order, the panel of eighty might be summoned from any other part of the state. In England, the power of summoning jurors is limited to forty-eight, unless by the special order of the justices of oyer and terminer and general jail delivery. Kelyng, 16. The act of congress does not direct, that the twelve jurors, to be brought from the county where the offence was committed, shall be over and beyond the sixty jurors directed by the state law to be summoned; nor does it permit the marshal to summon the jurors whence he pleases, without the express order of the court.

The return of several panels for the trial of each issue, Lewis deemed to be equally inconsistent with the terms and policy of the Pennsylvania law, which the law of congress had likewise adopted. Great inconvenience had been experienced from such a practice; and the state legislature, as a reformation in the system of jurisprudence that previously prevailed, expressly enacted, that the panel annexed to every writ of venire facias juratores, should be "for the trial of all issues to be tried at the bar of the said court, during the said term."

*338] *a copy of the indictments, as well as a copy of the indictments themselves, had not been delivered to the respective prisoners.

The caption is material, for it must state the judges before whom, the grand jury by whom, the time when, and the place where, the indictment was preferred. For if the judges sit without a commission, or the commission has expired; if the grand jury was composed of a number less than twelve, or the members of it were not qualified according to law; if the indictment was found at a place where the court was not authorized to sit, or at a time when, in fact, it was not sitting, the prisoner is entitled to take advantage of the defect, and he cannot have the opportunity of
of congress, an intention cannot reasonably be inferred, to incorporate all the provisions of the Pennsylvania act relating to jurors, into the practice of the federal courts. The reference to the state laws respects only the mode of designating the jury by lot, or otherwise, and the qualification of the jurors; it does not respect the number to be returned on the panel, which is still left (under the power of framing writs suited to the exigency of every case (1 U. S. Stat. 270), in the discretion of the court, to be prescribed by venire, as at common law. But the Pennsylvania act, without admitting such a distinction, must produce the greatest embarrassment; for it prescribes a different number of jurors to be returned to different courts, and there is nothing in the act of congress to determine which number shall be adopted here.

The act of Pennsylvania, however, had obviously an economical object in view, when it limited the number of jurors to sixty, as a compensation was originally allowed for their attendance, though it has since been repealed (2 Dall. Laws, 268); and the practice of the supreme court, it is believed, changed in consequence of the repeal. But even taking the act of Pennsylvania as an indispensable rule, it is substantially complied with. The act of congress introduced a particular regulation for the trial of offenders, which required that twelve jurors should be taken from the county where the offence is charged to have been committed; and this is done. The act of Pennsylvania authorized sixty jurors to be summoned; and in addition to the twelve from the proper county, the marshal *has, accordingly, summoned sixty from the state at large. To each venire there are no more than seventy-two jurors returned.

The return of a separate panel in each case is, likewise, perfectly consistent with law, practice and public convenience. The indictments depending are all separate; none of them are joint. The exception, however, if it is at all available, goes to the venire, and not to the panel; for the latter is in strict conformity to the former. After the court has prescribed that twelve of the jurors shall be brought from the proper county, the marshal has a legal discretion to bring the rest from any part of the district that he pleases. The court will not, and cannot, interfere with the exercise of that power, unless it becomes necessary, in order to obtain an impartial jury. There must be as many panels, as there are counties, in which offences are charged to have been committed; and if twelve jurors are taken from the proper county for each case, there can be no legal ground to object that the same sixty, to complete the panel of seventy-two, are returned to all the cases. But the adverse doctrine would require the jurors to be brought from every county in which an offence is charged. Suppose, therefore, five counties involved, sixty jurors would, of course, be returned from them; and if the court (as it has been contended) cannot increase that number, then a pirate, or any other felon, charged with an offence committed out of those counties, could not be brought to trial at the same term.

2d. That it is not necessary, nor is it material, to furnish the prisoner with a copy of the caption, as well as of the indictment. The act of congress must be presumed to have been passed with a full knowledge of the state law; and by the state law, evinced and supported by a constant practice, nothing more than a copy of the indictment was required. 1 Dall. 33. Sufficient appears on the indictment to show, what it is incumbent on the
prosecutor to show. The case referred to in Fost. p. 229, was that of a special court, where a caption is undoubtedly necessary; and the distinction is expressly so taken. Fost. 11; 2 Hawk. c. 25, § 128.(a)

3d. That the addition of the jurors and witnesses, as to the place of abode, is sufficient; but if the court think otherwise, time will be allowed to amend it. The act of congress, however, does not require a specification of the occupation of the jurors and witnesses, but only of their names and places of abode; and it cannot be controlled by the provision of the state act, which is in that respect different; but must be deemed substantive and independent.

*On the 18th of May, the Judges of the Court delivered their opinions to the following effect.

PETERS, Justice.—I have considered the objections made to the panels, and do not conceive these objections relevant. Although, in ordinary cases, it would be well to accommodate our practice with that of the state, yet the judiciary of the United States should not be fettered and controlled in its operations, by a strict adherence to state regulations and practice. But I see not that, in a liberal view and construction of the laws of the United States on this subject, a rigid adherence to all the local and economical regulations of the state, is directed or necessary. It should seem, that the most pointed reference was had to the designation and qualification of jurors, and not to the exact numbers of which the panel should consist. The legislature of the state have in their consideration a variety of local arrangements, which cannot be adapted to the more expanded policy of the nation. It never could have been in the contemplation of congress, by any reference to state regulations, to defeat the operation of the national laws. Now, there are cases, which have been stated, in which some of the criminal laws of the United States may be rendered impracticable, by an adherence to the rule of numbers prescribed as to jurors, in criminal cases, by the state law; and especially, if there must be but one panel, as has been contended. Yet, the most substantial requisites, to wit, the qualifications of jurors and mode of selection, may be adhered to. As to the clause in the law of the United States, directing, that “the laws of the states (with certain exceptions) shall be regarded as rules of decision, in trials at common law in the courts of the United States,” I do not think, it applies to the case before us.

All the arguments founded on the inconveniences to the defendants, if, in this case particularly, any such exist (of which I much doubt), weigh lightly when set against the delays and obstructions which the objection would throw in the way of the execution of the laws of the nation.

PATERSON, Justice.—The objections that have been suggested on this occasion, are principally founded on the 29th section of the judicial act of congress, which refers the federal courts to the state laws, for certain regulations respecting juries. But the words of this reference are clearly restricted to the mode of designating the jury, by lot or otherwise; and to the

(a) PATERSON, Justice.—The case of special courts, or of inferior courts held by charter, &c., can furnish no analogy for this court, which is a court of original and permanent jurisdiction. The proceedings in the King’s Bench can alone be applicable.
United States v. The Insurgents.

qualifications which are requisite for jurors according to the laws and practice of the respective states. Since, therefore, the act of congress does not itself fix the number of jurors; nor expressly adopt any state rule for the purpose, it is a necessary consequence, that the subject must depend on the common law; and, by the common law, the court may direct any number of jurors to be summoned, on a consideration of all the circumstances under which the venire is issued. There are instances, indeed, where five juries have been summoned upon a trial for high treason, in order that, after the allowance of the legal challenges, a competent number might still be insured. In the present instance, the precept requires the marshal to return at least forty-eight jurors; and he has not, in my opinion, been guilty of any excess, in the exercise of that discretion for returning a greater number, with which he is legally invested.

Neither is the mode of making his return justly exceptionable. As the act of congress directs that twelve jurors shall be summoned from the county in which the offence was committed, I cannot conceive any more proper, or more legal, way of proceeding, than by issuing a venire in each case; and then, there must, of course, be a separate panel returned, in conformity to every writ. Thus, likewise, the act of congress and the state act have been reconciled, and both put into operation; twelve jurors being returned in pursuance of the former, and sixty jurors being returned, in pursuance of the latter law.

With respect to the objection, that a copy of the caption of the indictment has not been furnished to the prisoners, it may be observed, that, although the practice of Pennsylvania has been different, yet, the caption and the indictment seem naturally to form but one instrument; and copies of both should, therefore, be delivered under the provisions of the act of congress. There can be little inconvenience in adopting this rule; and it is calculated to avoid much difficulty and controversy.

The objection, that the place of abode of the jurors and witnesses, has not been sufficiently designated, in the lists furnished to the prisoners, is, likewise, in our opinion, a valid one. The object of the law was, to enable the party accused to prepare for his defence, and to identify the jurors who were to try, and the witnesses who were to prove, the indictment against him. It is contrary to the spirit and intent of such a provision, that the whole range of the state, or of a county, should be allowed, as descriptive of a place of abode; and it is the duty of the judges so to mould the practice and construction of statutes, as to render them reasonable and just. With regard to the place, therefore, we think the townships in which the jurors and witnesses respectively reside, should be specified; but the act of congress does not require a specification of their occupations, and the niceties of the state act, are not, in that respect, incorporated into the federal system.

In consequence of this decision, the trials were suspended, in order to give the attorney of the district the three days required by the act of congress, for delivering to the prisoners, amended copies of the caption and indictment, and of the lists of jurors and witnesses.
that the prisoners must long ago have known the nature of the charge, and
the proofs necessary to their defence; and ought to have made an earlier
application for the aid of the court to procure their witnesses. Due diligence
has not been used, nor, indeed, is it so stated in the affidavits; and it is not
only necessary to satisfy the court that the witnesses are material; but also
that the party applying has been guilty of no laches or neglect, in omitting
to apply to them and endeavoring to procure their attendance. 3 Burr.
1513. Ever since the 20th April, there has been an opportunity to make
this motion; which was not the case in Fost. 1, as that arose before a special
court, acting under a special commission, for special purposes. Nor can there
be a just reason to object to the trial's coming on, because of the place at
which the court is held. On the motion for a special court, sufficient was
disclosed to show, that the indictments would be presented in Philadelphia;
and it was a mere speculation afterwards to suppose that another place
would be appointed for the trials; particularly, as all the jurors and wit-
tnesses had been actually summoned.

By the Court.—The only argument of weight in support of the present
motion, is that which relates to the period of furnishing the prisoners with
the names of the witnesses; but it is, of itself, conclusive: for, unless an
opportunity were afterwards given to investigate the characters, and trace
the conduct of the witnesses, it would be nugatory and delusive to furnish the
list of their names. The act directs notice to be given; this must be in-
tended for the purpose alluded to, and, for the attainment of that purpose,
time is, undoubtedly, necessary. It must, therefore, be considered as a rule
in this case, and in all other cases of a similar nature, that a reasonable time
shall be allowed, after a list of the names of the witnesses is furnished to
the prisoners, for the purpose of bringing testimony from the counties in
which those witnesses live.

The trials of Stewart and Wright were, accordingly, postponed; and it
was then agreed, that they should not be brought on, until the trial of the
other prisoners, who were ready for trial, was concluded; but so
*345] much time was consumed in this previous business, that the judges
declared they could not longer protract the sitting of the court, on account
of other circuits, and therefore, directed the cases of Stewart and Wright to
be continued generally until the next term. It appeared, however, that on
the preceding day, Lewis had informed the attorney for the district, that he
would proceed to trial in the case of Stewart, with the testimony already in
his possession, though he expected other witnesses; and on this ground, as
the court was about to break up, he moved, that Stewart should be admitted
to bail. But—

By the Court.—It was Stewart's own fault, not the fault of the prose-
cutor, that the trial was postponed. He has now the same witnesses that
he had at the time of the postponement; but the judges cannot, consistently
with their other duties, enter on the trial. It is true, that we have estab-
lished it as a principle, that no laches should be imputed to the prisoner, for
taking time to send into the counties where the witnesses for the prosecution
reside, after he has received notice of their names; but that is not the case
at present. Stewart has no claim upon the legal discretion of the court;
and indeed, the circumstances must be very strong, which will, at any time,
induce us to admit a person to bail, who stands charged with high treason.
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on a proof of the overt acts by two witnesses, M. Levy and Lewis, for the defendant, and that the attorney of the district agreed, without argument, to submit to the decision of the jury, under the charge of the court; which was delivered to the following effect.

**Paterson, Justice.**—The first point for consideration, is the evidence which has been given, to establish the case stated in the indictment; the second point turns upon the criminal intention of the party; and from these points (the evidence and intention) the law arises.

With respect to the evidence, the current runs one way: it harmonizes in all its parts: it proves, that the prisoner was a member of the party who went to Reigan's house, and afterwards, to the house of Wells, in arms, marshalled and arrayed; and who, at each place, committed acts of violence and devastation.

With respect to the intention, likewise, there is not, unhappily, the slightest possibility of doubt: to suppress the office of excise, in the fourth survey of this state; and particularly, in the present instance, to compel the resignation of Wells, the excise officer; so as to render null and void, in effect, an act of congress, constituted the apparent, the avowed object of the insurrection, and of the outrages which the prisoner assisted to commit.

Combining these facts, and this design, the crime of high treason is consummate, in the contemplation of the constitution and law of the United States.

The counsel for the prisoner have endeavored, in the course of a faithful discharge of their duty, to extract from the witnesses some testimony, which might justify a defence, upon the ground of duress and terror. But in this they have failed; for the whole scene exhibits a disgraceful unanimity; and with regard to the prisoner, he can only be distinguished for a guilty pre-eminence in zeal and activity. It may not, however, be useless, on this occasion, to observe, that the fear, which the law recognises as an excuse for the perpetration of an offence, must proceed from an immediate and actual danger, threatening the very life of the party. The apprehension of any loss of property, by waste or fire; or even an apprehension of a slight or remote injury to the person, furnish no excuse. If, indeed, such circumstances could avail, it would be in the power of every crafty leader of tumults and rebellion, to indemnify his followers, by uttering previous menaces; an avenue would be for ever open for the escape of unsuccessful guilt; and the whole fabric of society must inevitably be laid prostrate.

A technical objection has been suggested in favor of the prisoner. It is said, that the offence is not proved to have been committed, on the day, nor the number of the insurgent party to be so great, as the indictment states. But both these exceptions, even if well founded in fact, are immaterial in point of law. The crime is proved, and laid to have been committed before the charge was presented; and whether it was committed by one hundred, or five hundred, cannot alter the guilt of the defendant. If, however, the jury entertain any doubt upon the matter, they may find it specially.

**Verdict, guilty. (a)**

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(a) The court having waited about an hour for the jury (until half past ten o'clock 302
*United States v. Mitchell.*

_Treason._—Evidence.

An insurrection, to prevent by force and intimidation, the execution of an act of congress, is treason, by levying war.

A bare conspiracy is not treason; there must be an overt act, proved by two witnesses.

On a trial for treason, a copy of a letter, inciting to insurrection, is admissible in evidence, on proof that it was one of the copies actually circulated.

Evidence is not admissible, that the defendant joined in the commission of a distinct felony, for which he is charged in another indictment: there being no evidence that such felony was committed with a treasonable intent.

**Indictment** for high treason, by levying war against the United States.

It was alleged, that the prisoner was one of the party that assembled at Couche's Fort, armed; that he proceeded thence to Gen. Neville's, and assisted at the burning of the general's house; that he attended with great zeal at the meeting at Braddock's field; and that on the day prescribed for signing a submission to the government, he was intoxicated, refused to sign himself, and was active in dissuading others from signing. The circumstance of the prisoner's being at Couche's, was proved by a number of witnesses; his being at Braddock's field, by one witness and his own confession; but there was only one positive witness to the fact of his having been at the burning of general Neville's house, though a second witness said, "it ran in his head, that he had seen him there," and a third declared, that he had passed him on the march thither. The scope of the testimony, as it respected the general object of the insurrection, and as it particularly applied to the prisoner, will be found sufficiently stated in the course of the arguments and charge.

The Attorney of the District (Rawle) having closed the evidence, proceeded to state the law, in support of the prosecution. So frequently and fully has the offence of levying war against the government been defined, that a doubt can hardly be raised upon the subject. Kings, it is true, have endeavored to augment the number, and to perplex the descriptions of treasons, as an instrument to enlarge their powers, and to oppress their subjects; but in republics, and particularly, in the American republic, the crime of treason is naturally reduced to a single head, which divides itself into these constitutional propositions: 1st. Levying war against the government; and 2d. Adhering to its enemies, giving them aid and comfort. In other words, exciting internal, or waging external war, against the state. The second branch of the crime, thus designated, renders it unlawful and

 offences, adjourned until eleven o'clock the next morning. Just after the adjournment took place, the jury requested to see Foster's Crown Law, and the Acts of Congress, which, by consent, were accordingly sent to them. I am told, that they remained together until between three and four o'clock in the morning, when they wrote, signed and sealed up their verdict, and adjourned. On the next morning (the 23d of May 1795), they appeared at the bar; and being called over, offered the written verdict, sealed up, to the clerk. But the Court said, that the paper could not be received. The foreman then pronounced the verdict, *vindicta*, and again offered the written verdict; but the Court repeated, "We cannot open or receive it." Nothing was said, publicly, of the jury's having adjourned. The defendant was eventually pardoned.
treasonable for any citizen to adhere to a foreign, public enemy, whether assailing the frontiers, or penetrating into the heart of our country. But while such a co-operation endangers the success and prosperity of the community, the effects of domestic insurrection (which the first branch of the division contemplates) strike at the root of its existence; and in free countries, above all, must be prevented, or corrected, by the most vigilant and efficient sanctions of the law.

What constitutes a levying of war, however, must be the same, in technical interpretation, whether committed under a republican, or a regal, form of government; since either institution may be assailed and subverted by the same means. Hence, we are enabled, in the first stage of our own experience, to acquire precise and satisfactory ideas upon the subject, from the matured experience of another government, which has employed the same language to describe the offence, and is guided by the same rules of judicial exposition. By the English authorities, it is uniformly and clearly declared, that raising a body of men to obtain, by intimidation or violence, the repeal of a law, or to oppose and prevent, by force and terror, the execution of a law, is an act of levying war. Doug. 570. Again, an insurrection, with an avowed design to suppress public offices, is an act of levying war: and although a bare conspiracy to levy war, may not amount to that species of treason; yet, if any of the conspirators actually levy war, it is treason in all the persons that conspired; and in Fost. 218, it is even laid down, that an assembly armed and arrayed in a warlike manner for a treasonable purpose is bellum levatum, though not bellum percussum. Those, likewise, who join afterwards, though not concerned at first in the plot, are as guilty as the original conspirators; for in treason all are principals; and whenever a lawless meeting is convened, whether it shall be treated as riot or treason, will depend on the quo animo. 4 Bl. Com. 81; 1 Hale H. P. C. 123-4; Fost. 213, 210, 215, 218; 1 Hawk. P. C. 37; 4 Bl. Com. 35; 1 Hale P. C. 440; 8 St. Tr. 247; 2 Ibid. 586-7; Kelyng 19; 3 Inst. 9.

The evidence, unfortunately, leaves no room for excuse, or extenuation, in the application of the law to the prisoner's case. The general and avowed object of the conspiracy at Couche's Fort, was, to suppress the offices of excise in the fourth survey. As an important measure for that purpose, it was agreed to go to General Neville's house, and compel him to surrender his office and his official papers. Some of the persons who were at Couche's Fort, went, accordingly, to General Neville's, and terminated a course of lawless and outrageous proceedings, by burning his house. The prisoner is proved by four witnesses to have been at Couche's Fort; and so far from opposing the expedition to General Neville's, he offered himself to reconnoitre. Being thus originally combined with the conspirators, in a treasonable purpose, to levy war, it was unnecessary that the purpose should be afterwards executed, in order to convict them of treason, and much less is it necessary to his conviction, that he should have been present at the burning of General Neville's house, which was the consummation of their plot, or that the burning should be proved by two witnesses. But he is, likewise, discovered, by one of the witnesses at least, within a few rods of the General's, at the moment of the conflagration; and he is seen marching in the cavalcade which escorted the dead body of their leader, in melancholy triumph, from the scene of action to Barclay's house. It is not necessary to consider the
meeting at Braddock's field as an independent treason, though the avowed intention was to attack the garrison at Pittsburgh, and to expel certain public officers from the town; but the conduct of the prisoner on that occasion, concurring in every violent proposition that was made; and his refractory and seditious deportment on the day prescribed for signing the declaration of submission to the laws, are corroborative demonstrations of that \textit{mala mensa}, that dark and dreary turbulence of soul, which is regardless of every social, moral and religious obligation.\(^{(a)}\)

The counsel for the prisoner (\textit{E. Tilghman} and \textit{Thomas}) premised, that they did not conceive it to be their duty to show, that the prisoner was guiltless of any description of crime against the United States, or the state of Pennsylvania; but they contended, that he had not committed the crime of high treason; and ought, therefore, to be acquitted upon the present indictment. The adjudications in England upon the various descriptions of treason, have been worked, incautiously, into a system, by the destruction of which, at this day, the government itself would be seriously affected: but even there, the best judges, and the ablest commentators, while they acquiesce in the decisions that have already taken place, furnish a strong caution against the too easy admission of future cases, which may seem to have a parity of reason. Constructive, or interpretative treasons, must be the dread and scourge of any nation that allows them. 1 Hale, P. C. 132, 259; 4 Bl. Com. 85. Take, then, the distinction of treason by levying war, as laid down by the attorney of the district, and it is a constructive or interpretative weapon, which is calculated to annul all distinctions heretofore wisely established in the grades and punishments of crimes; and by whose magic power, a mob may easily be converted into a conspiracy; and a riot aggravated into high treason. Such, however, is not the sense 

\[^{351}\] which congress has expressed upon this very subject; for, if a bare opposition to the execution of a law can be considered as constituting a traitorous offence, as levying war against the government, it must be equally so in relation to every other law, as well as in relation to the excise law; and in relation to the marshal of a court, as much as in relation to the supervisor of a district: and yet, in the penal code of the United States, the offense of wilfully obstructing, resisting or opposing any officer, in serving or attempting to serve any process, is considered and punished merely as a misdemeanor. (1 U. S. Stat. 117, § 22.) Let it be granted, that to compel congress to repeal a law, by violence or intimidation, is treason (and the English authorities, rightly construed, claim no greater concession), it does not follow, that resisting the execution of a law, or attempting to coerce an officer into the resignation of his commission, will amount to the same offence. Let it be granted also, that an insurrection, for the avowed purpose of suppressing all the excise offices in the United States, may be

\(^{(a)}\) \textit{Patterson}, Justice.—Before the defence is opened, I wish to direct the attention of the prisoner's counsel to two considerations: 1st. Whether the conspiracy to levy war at Couche's Fort, was not, in legal contemplation, an actual levying of war? 2d. Whether the proceedings at General Neville's house, were not a continuation of the act which originated at Couche's Fort? For, several witnesses have proved that the prisoner was at Couche's Fort, and one positive witness has proved, that he was at General Neville's house.
construed into an act of levying war against the government (and the English authorities speak expressly of the universality of the object, as an essential characteristic of this species of treason), it does not follow, that an attempt to oblige one officer to resign, or to suppress all the offices in one district, will be a crime of the same denomination. 1 Hale P. C. 135. Nor can another doctrine, urged in support of the prosecution, be fairly recognised. It is laid down in all the books which have been cited, it is admitted by the attorney-general, that a bare conspiracy to levy war, does not amount to treason; but it is contended, that if, at any time afterwards, a part of the conspirators should execute the plot, the whole of them will be involved in the guilt and punishment. Thus, no opportunity is left for repentance; the motives which restrain the absentees from attending at the scene of action, however pure, can furnish no excuse; and they are doomed to answer for the conduct of others, which they may, in fact, disapprove, and which they cannot, in any degree, control. The state of the evidence, however, renders it unavoidable, that this ground should be taken; for, unless the proceedings at Couche’s Fort and at Gen. Neville’s house can be so combined and interwoven, as to form one action, there are not two witnesses to prove that the prisoner was at the latter place; and the conduct at the former could only amount, under the most rigid construction, to a conspiracy to levy war, not to an actual levying of war against the government. With the necessity for two witnesses to an overt act of treason, it is not in the power of judges or juries to dispense; it is a shield from oppression, with which the constitution furnishes the prisoner; and it cannot be supplied by vague conjectures, founded on the feeble recollection of a witness; nor by idle declarations of the party himself, in a state of intoxication; a state that does not justify the perpetration of a crime, but may fairly be supposed to deprive the criminal of a knowledge of the extent of his confession. 2 Hawk. 604, in note; Fost. C. L. 240; 4 Bl. Com. 356; 1 Dall. 39, 40.

If this view of the law is correct, it will be easy to show, that its operation upon the facts will entitle the prisoner to an acquittal. By the meeting at Braddock’s field, no act of treason was committed; nor was any plan for levying war contrived. The people assembled there, upon a general invitation, founded on the calamitous state of the country; and though they proposed banishing certain citizens (who were not public officers of the United States) from Pittsburgh (which cannot surely be deemed treason), they neither executed that project, nor committed any other outrage; but after some menaces and an idle parade, dispersed to their respective homes. The prisoner was certainly at Braddock’s field; but no treason being committed there, his attendance is not a foundation for the present indictment. It may be admitted, likewise, that at Braddock’s field, he made some vaunting declarations of a traitorous intention; but a traitorous intention there, is no proof of his having levied war against the government, at another time and in another place. With respect to the criminal proceedings at Gen. Neville’s house (which, after all, amount to the crime of arson, and not of treason), it is agreed, that only one positive witness proves the fact of the prisoner’s having been there; but even that witness states, that the prisoner was alone, at the distance of thirty or forty rods; and it is not recollected, whether he had a gun. Then, it only remains to consider the
effect of the prisoner's presence at Couche's Fort; for his being seen in a
cavalcade on the road for Gen. Neville's, and his conduct on the day pre-
scribed for signing the submission to government, when he was notoriously
drunk, may prove him to be a very bad man, but will not be sufficient to
maintain a charge of high treason. It does not, then, appear by the testi-
mony of two witnesses, that the meeting at Couche's Fort was convened
for the purpose of accomplishing a compulsory repeal of the excise laws, or
a suppression of the excise offices. The meeting seems to have originated
merely in a wish to consider what it was best to do, in the actual state of
the country. On this point, a committee was chosen, or rather was self-
created; and the members determined to send a flag to Gen. Neville. It
does not appear, with what view the flag was to be sent; but it will not be
presumed, when the evidence is silent, to be with a view to attack the
General's house, to force a repeal of the excise *law, or to compel the
officer's resignation; and even the fact itself is only proved by one
witness. Besides, the conduct of the committee, however culpable, will not
be sufficient to involve the whole assembly in the guilt of treason. It is
true, that the prisoner expressed his willingness to reconnoitre Gen. Neville's
house; but this expression, likewise, is only proved by one witness; and
even if it were proved by fifty witnesses, it does not amount to an overt act
of treason, by levying war; nor does it appear that he ever did reconnoitre,
or furnish intelligence to the committee. The proof against Porter (ante, p.
345) was as strong, and yet he was acquitted. Upon the whole, if the pro-
ceedings at Couche's Fort and Gen. Neville's house, must be considered as
one action, that action must take its color, quality and character, from what
was done at the latter place; and as there are not two witnesses to the
overt act committed there, it is immaterial what was the conduct of
the prisoner at Couche's Fort. The perpetration is the gist of the crime;
and he only is to be adjudged guilty, who joined in the actual perpetration.

The Attorney-General of the United States (Bradford), in reply.—It is
essential to the security of life, liberty and property, that the powers of
government should exist under some modification; and under whatever
modification they exist, an attempt to defeat or destroy them, must be
treason. If, however, the principles asserted in the course of the prisoner's
defence should prevail, a flagrant attempt to obstruct the legitimate oper-
ations of the government, to prevent the execution of its laws, and to coerce
its officers into a dereliction of their trust, must no longer be regarded as
high treason; every man engaged in the administration of the public affairs
has erred in considering the insurrection as anything more than a common,
contemptible riot; Vigil, who has been convicted, ought to have been
acquitted; and all the prisoners committed upon the same charge, ought
instantly to be released! But this doctrine and its consequences will
not be found compatible with our constitution; and cannot receive the
countenance of a court of justice.

To proceed, however, in a more minute analysis of the defence; it has
been argued, that congress has provided a specific punishment for the
offence of resisting or obstructing the service of process, obviously distin-
guishing it from treason; and that it is as much treason to resist the execu-
tion of one law as another; to resist the marshal of a court, as much as the
supervisor of a district. The analogy is, in a great measure, just: in either case, if the resistance is made by a few persons, in a particular instance, and under the impulse of a particular interest, the offence would not amount to high treason; but if, in either case, there is a general rising of a whole county, to prevent the officer from discharging his duty in relation to the public at large, the offence is, unquestionably, high treason. Thus, an opposition was lately made to the appointment of a particular judge in Mifflin county, and he was forcibly driven from the bench; but the offence was prosecuted merely as a riot, upon this principle of discrimination, that the design was not to prevent the governor from appointing any judge, but only to displace an unpopular individual.

Again, it has been urged, that the criminal intention must point to the suppression of all the excise offices in the United States, or it cannot amount to high treason. If it is meant by this argument, that the insurgents of Pennsylvania must have contemplated a march from Georgia to New Hampshire, it is extravagant and absurd: but in another view, it is perfectly correct; for if it was intended that, by their lawless career and example, congress should be forced into a repeal of the obnoxious law, it necessarily followed, that, from the same cause, the offices of excise would be suppressed throughout the Union. That universality of object, which the books require, was inseparable from the nature of the opposition; for it was impossible to contemplate the repeal of the excise law in one survey, or in one state, without affecting it in every survey, and in every state.

The truth is, however, that the insurgents did not entertain a personal dislike for Gen. Neville; but in every stage of their proceedings, at Couche’s Fort, at the General’s house, and at Braddock’s field, they were actuated by one single, traitorous motive, a determination, if practicable, to frustrate and prevent the execution of the excise law. The whole was one great insurrection; and it is immaterial, at what point of time, or place, from its commencement to its termination, any man became an agent in carrying it on. Many persons, indeed, may have attended innocently at Couche’s Fort (as was the case with Porter), but those would not remain long, after the purpose of the meeting was developed. To render any man criminal, he must not only have been present, but he must have taken part with the insurgents; yet, whether he was present at Couche’s Fort, on the march to Gen. Neville’s, or at the burning of the General’s house, if his intention was traitorous, his offence was treason. 3 Inst. 9. The overt act laid in the indictment (which is drawn from the most approved precedents) is levying war; and war may be levied, though not actually made. Fost. 212. It is agreed, that this overt act must be proved by two witnesses; but there is a difference as to what constitutes the act itself. Now, it is manifest, from every authority, that to assemble in a body, armed and arrayed, for some treasonable purpose, is an act of levying war; this was the case at Couche’s Fort; and the prisoner’s active attendance there is proved by a number of witnesses. It is not required, that every witness should have seen him, at the same spot, at the same moment, and in the same act; but if they see him at the place and time of rendezvous, exhibiting the same species of traitorous conduct, the law is satisfied. The conspiracy to levy war being effected, all the conspirators are guilty, though they did not all attend at Gen. Neville’s house. 1 Hale, P. C. 132; Fost. 213, 215. Besides, the
meeting at Braddock's field is a distinct and substantive act of treason; and
the prisoner is proved by four witnesses to have been there. The design of the
meeting was, avowedly, to oppose the execution of the excise law, to over-
awe the government, to involve others in the guilt of the insurrection, to
prevent the punishment of the delinquents, to banish unpopular individuals
from the town, and to attack the garrison of Pittsburgh. The hasty declar-
ations of the quo animo, proceeding from the prisoner himself, ought not to
have much weight, were they not so strongly corroborated by other testi-
mony.

The charge of the Court was delivered to the jury in substance as fol-
lows:

Paterson, Justice.—The first question to be considered is, what was
the general object of the insurrection? If its object was to suppress the
excise offices, and to prevent the execution of an act of congress, by force
and intimidation, the offence, in legal estimation, is high treason; it is an
usurpation of the authority of government; it is high treason, by levying
of war. Taking the testimony in a rational and connected point of view, this
was the object: it was of a general nature, and of national concern.

Let us attend, for a moment, to the evidence. With what view was the
attack made on General Neville's house? Was it to gratify a spirit of
revenge against him, as a private citizen, as an individual? No, as a private
citizen, he had been highly respected and beloved; it was only by becoming
a public officer, that he became obnoxious; and it was on account of
his holding the excise office alone, that his house had been assailed, and his
person endangered. On the first day of attack, the insurgents were repulsed;
but they rallied, returned with greater force, and fatally succeeded in the
second attempt. They were arrayed in a military manner; they affected
the military forms of negotiation by a flag; they pretended no personal
hostility to General Neville; but they insisted on the surrender of his com-
mision. Can there be a doubt, then, that the object of the insurrection was
of a general and public nature?

The second question to be considered is, how far was the prisoner traitor-
ously connected with the insurgents? It is proved by four witnesses, that
he was at Couche's Fort, at a great distance from his own home, and that he
was armed. One witness proves, positively, that he was at the burn-
ing of Gen. Neville's house; and another says, "it runs in his head, that
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he also saw the prisoner there." On this state of the facts, a difficulty has been
suggested. It is said, that no act of treason was committed at Couche's Fort;
and that however treasonable the proceedings at Gen. Neville's may have
been, there are not two witnesses who prove that the prisoner was there. Of
the overt act of treason, there must, undoubtedly, be proof by two witnesses;
and it is equally clear, that the intention and the act, the will and the deed,
must concur; for a bare conspiracy is not treason. But let us consider the
prisoner's conduct, in a regular and connected course. He is proved by a
competent number of witnesses, to have been at Couche's Fort. At Couche's
Fort, the conspiracy was formed, for attacking Gen. Neville's house; and the
prisoner was actually passed on the march thither. Now, in Foster 213,
the very act of marching is considered as carrying the traitorous intention
into effect; and the jury (who will sometimes find the most positive testi-
mony contradicted by circumstances which carry irresistible conviction to the mind) will consider how far this aids the doubtful language of the second witness, even as to the fact of the prisoner's being at Gen. Neville's house.

On the personal motives and conduct of the prisoner, it would be superfluous to make a particular commentary. He was armed, he was a volunteer, he was a party to the various consultations of the insurgents; and in every scene of the insurrection, from the assembly at Couche's Fort to the day prescribed for submission to the government, he makes a conspicuous appearance. His attendance, armed, at Braddock's field, would of itself amount to treason, if his design was treasonable.

Upon the whole, whether the conspiracy at Couche's Fort may of itself be deemed treason; or, the conspiracy there, and the proceedings at Gen. Neville's house, are considered as one act (which is, perhaps, the true light to view the subject in), the prisoner must be pronounced guilty. The consequences are not to weigh with the jury: it is their province to do justice; the attribute of mercy is placed by our constitution in other hands.

Verdict, guilty. (a)

*357] *Same Cause.*

In the course of the trial, the following points were ruled by the court.

I. The attorney of the district proposed to prove, that a circular letter had been written at Canonsburgh, on the 28th of July 1794, by several leaders of the insurrection, calling upon the militia officers, and other citizens, to assemble at Braddock's field, on the 1st of August following, with arms, ammunition and provisions; that the witness had seen the original letter, which was left with him, under instructions to pass it on to another person; and that the copy now produced was conformable, in substance, to the original.

But it was objected, by the counsel for the prisoner, that before a copy of the letter could be given in evidence, the loss of the original must be proved; and even then, the witness must be able to attest, that he had compared them, and that the copy offered was in all respects correct.

It was answered, by the Attorney of the District, that from the general circulation of the letter, copies must have been multiplied, and during a season of such confusion (to which the common rules of evidence are entirely inapplicable), it is impracticable to trace the comparison of any one copy with the original.

By the Court.—If it can be proved, that the copy of the letter now produced, was one of those copies which were actually circulated at the time of the insurrection, it is admissible evidence: but otherwise, it cannot be read to the jury.

II. The Attorney of the District offered testimony to prove, that, in the course of the insurrection, the prisoner joined in robbing the public mail of

(a) The prisoner was pardoned; and the president afterwards granted a general amnesty to all the insurgents, who were not objects of pending prosecutions.
tion of offences where the fine does not exceed $100, it is evident, that the jurisdiction cannot be ascertained, until the judge is about to pronounce sentence.

Rawle, in opposing the rule, observed, that the act of congress did not recognise any distinction between actions for tort, and actions upon contract; but barely required that the matter in dispute should exceed the sum or value of $500, exclusive of costs; and the language is the same in the 9th section, in relation to the jurisdiction of the district court in suits brought by the United States. The very provision, indeed, which authorizes the court, in the 20th section, to adjudge that the plaintiff shall pay costs, where less than the sum of $500 is recovered, shows clearly that the jurisdiction was intended to be vested, if the matter in dispute, as stated in the declaration, exceeds the specified amount, though a jury or referees should not give so much. The matter in dispute in this case was an aggravated personal injury, which might have endangered the plaintiff's life, and certainly would have justified heavier damages.

The Judges, though they delivered their opinions separately, concurred in the following positions, as the ground of decision.

By the Court.—That the sum or value of the object in controversy should amount to $500, was deemed by the legislature a reasonable limit to the jurisdiction of this court: but the law itself likewise provided the remedy against any transgression of that limitation, by declaring that the plaintiff, who recovers less may be adjudged to pay costs. The very force of the expression vests a jurisdiction; since it would be impossible to adjudge that the plaintiff should pay costs, without taking cognisance of the cause.

But whatever distinction might be made, in other respects, between suits instituted to recover a sum certain, and suits brought to recover damages for a tort, certain it is, that in the latter cases, there can be no rule to ascertain the jurisdiction of the court, but the value laid in the declaration. If the finding of the jury was the criterion, then the jurisdiction of the court would depend entirely on the verdict; and if a verdict in favor of the plaintiff, for less than $500, would defeat the jurisdiction, a verdict against him must unquestionably be equally fatal.

We think, therefore, that the amount of the plaintiff's claim must be considered as the matter in dispute; and that upon a fair comparison and construction of the 11th and 20th sections of the judicial act, the mere finding of a jury, or of referees, upon the question of damages, cannot affect the jurisdiction of the court. (a)

Rule discharged.

(a) The following authorities were cited by Peters, Justice:—Debt, detinue, &c., will not lie for a debt under forty shillings; 2 Inst. 811, 812. Com. Dig. Yet, the smallness of the sum must appear on the face of the declaration, 3 Burr. 1592; Barnes 407, and though reduced by a set-off, it will not affect the jurisdiction of the court. 3 Wils. 40; Com. Dig. 590.

In Wilson, plaintiff in error, v. Daniel, in the supreme court of the United States, at August term 1798 (in the absence of Wilson, Justice), the Cover adjudged, that the verdict or judgment was not to be regarded as the rule for fixing the value of the matter in dispute, on a question of jurisdiction: and that the demand of the plaintiff, that is, the value of the thing put in demand, is to be considered; unless the law itself
But in answer to the two grounds urged for dissolving the injunction, it was contended: 1st. That, although an affidavit of the truth of the facts contained in the bill, is a regular, and perhaps, the most general foundation for an injunction, is not the only foundation on which it issues. Where the bill states an equity, depending on the discovery of the defendant; or a relief is prayed upon circumstances happening within the knowledge of the complainant, and several other analogous cases, the affidavit of the party is the best evidence of which the subject admits; but a court of equity will not, any more than a court of law, confine itself to one kind of proof, where there are various kinds of equal validity; much less will it adopt an inferior; in exclusion of a higher kind. Suppose, the fact depends on a record; the law says, that a record is the only regular proof of its own existence; and yet, if the rule in chancery is as inflexible as it is stated to be, the necessity for the affidavit of the interested party cannot be superseded by exhibiting the record itself. In the present case, would the complainant's affidavit be more satisfactory to prove the contents of the power of attorney, than the inspection of the instrument itself, as an exhibit in the cause? But it is not on general principles alone, that the regularity of the proceeding is maintained: all the books of practice concur in stating, that an injunction may be obtained either upon matter confessed in the answer, or upon some matter of record, or on some deed, writing or other evidence, produced in court. 2 Harr. Pr. Ch. 221; Hinde Pr. Ch. 583. It issues upon payment of money into court; and it has been granted to a bankrupt, upon the bare production of his certificate, to stay proceedings at law. 2 Harr. Pr. Ch. 222, 223. Besides, the present bill must, from the nature of the transaction, be filed by an attorney, as the complainant lives abroad; and it would have been fatal, to wait for an affidavit, as the stock would certainly have been transferred, on the first intimation of the suit, or intention to sue. It is conclusive, however, that by proof, independent of the allegations in the bill, to wit, the defendant's assignment of the property in question to the complainant's use, and Du Ponceau's affidavit of the defendant's having afterwards converted it to his own use, there is an apparent spoliation and fraud. The conscience of the court cannot be more satisfactorily informed upon the subject; and it is a strong additional circumstance, that notwithstanding the injunction has so long bound the property, the defendants have never attempted to release it.

2d. This naturally leads to the second consideration, whether the delay has been so unreasonable, as to warrant the court in dissolving the injunction; and of course, putting it for ever out of their power to do justice to the party really injured, as the stock will, doubtless, be instantaneously transferred. Neither of the grounds of the present motion at all relate to the merits; and it may fairly be remarked, that the delay might more easily have been prevented by the defendants, than by the complainant. The delay, however, has not proceeded from any intention to oppress the defendants, nor to avoid a discussion; it is, at most, an error, or laches of the solicitor, which the court will not allow to be converted into an instrument for the destruction of a just claim. The defendants being abroad, it was doubtful how the complainant could proceed to bring the suit to a decision; Mitford 30; 2 Harr. Pr. Ch. 222; and where an injunction is granted on the merits, it will not be dissolved, before a hearing. If, therefore, the merits
Wharton's executors v. Lowrey.

Amendment in equity.

After answer, setting up the statute of limitations, the complainant may amend, by alleging that the frauds charged in the bill came to his knowledge within six years before the commencement of the suit.

Bill in Equity. The bill was filed in October 1793, to open an account, which had been settled and signed by the complainants, in April 1781, touching the transactions between the testator and the defendant, while commissaries in the American army, during the revolutionary war. The bill charged the defendant (among other fraudulent practices) with making erasures in the complainant's books; and also set forth a number of specific errors and over-charges in the account. The defendant filed an answer to the bill, in which he denied all fraud, canvassed and refuted the specification of errors and over-charges, and pleaded the statute of limitations.

Rawle and Lewis, having obtained a rule to show cause why the bill should not be amended, by inserting, that the frauds charged had come to the complainant's knowledge within six years before the commencement of the suit, now moved to make the rule absolute; and cited 1 Har. Ch. 106; 3 P. Wms. 143.

Dallas, for the defendant, admitted that the allowance of amendments was discretionary with the court; but contended, that after a general answer to the allegations, and a denial of the frauds stated in the bill, the complainant ought not to be indulged, without some other proof to support the charge of fraud, than his bare assertion. In the cases cited in 3 P. Wms. 143, there was no answer to the bill, but merely a plea of the statute of limitations; and in the principal case, the chancellor only ordered the defendant to answer, which the present defendant has already done. Twelve years have elapsed since the account was settled; and the fraud being denied on oath, and unsupported by any species of evidence, the complainant ought not to be permitted to harass the defendant, and procrastinate a decision.

By the Court.—Considerations respecting the merits of the cause, ought not to weigh in the determination of the present question. The complainant could not foresee that the statute of limitations would be pleaded; and it is in order to bring before the court an essential fact arising from that plea, that the amendment is proposed.

The rule made absolute.
juristicion given by the judicial act, and not upon any special jurisdiction created for that purpose.

Wilson, Justice. — The court is bound to take notice of a question of jurisdiction, whenever it may occur, and however it may be proposed: for, if we are satisfied, that we have not legal cognisance of any cause—or, in terms less direct, if we are not satisfied, that we have cognisance; we ought not to proceed to a decision, or an investigation, upon its merits.

In the present instance, it is a question of great importance, and perhaps, of some difficulty; but the strong bias of my mind (which increases, indeed, with every moment's reflection upon the subject) is opposed to the alleged jurisdiction of the court. It is supposed by the counsel for the informant, that the jurisdiction is maintainable, on the positive words of the 11th section, and on a fair implication resulting from a view of the 21st and 22d sections of the judicial act: for it is said, if the court has not original jurisdiction, by the 11th section, it can have no jurisdiction at all; since its appellate jurisdiction established by the 21st and 22d sections, is confined to civil causes. But the jurisdiction in the case of crimes and offences, obviously relates to prosecutions against persons; and when viewed in that light, neither the positive words of the 11th section, nor any implication resulting from the 21st and 22d sections, can be applicable to the present cause, which is not described by the former, nor affected by the latter: to take cognisance of a proceeding merely in rem, cannot be considered as taking cognisance of a crime or offence.

When, however, we advert to the jurisdiction given to the district court, every shadow of doubt seems to vanish. The 9th section of the act declares that "the district court shall have exclusive original cognisance of all suits for penalties and forfeitures, incurred under the laws of the United States." The exclusion is expressed in strong and unqualified terms; nor can it, by any reasonable interpretation, be restricted to a mere exclusion of the state courts. Wherever, indeed, a qualified exclusion is intended, the expression of the legislature corresponds with that intention. Thus, it is provided, in two different members of the very same section, that: the district court shall have, "exclusively of the courts of the several states," cognisance of all crimes and offences committed upon the high seas, &c., and of suits against consuls and vice-consuls. But if the construction which I have stated is correct, no contradiction exists, to call for any strained exposition of the law. The jurisdiction given to the circuit court, whether exclusive or concurrent, will be supported, by applying it to prosecutions against delinquents, for crimes and offences; and the exclusive jurisdiction given to the district court, will be preserved, by allotting to it all suits for penalties and forfeitures under the laws of the United States. Whether, therefore, this is a suit for a forfeiture, appears, upon the whole, to be the only real object of inquiry. We think, that it is a suit of that denomination; and consequently, cannot take cognisance of it.

But the subject is entitled to the most solemn consideration, and the most authoritative judgment. We shall be happy, therefore, to assist in putting it upon any proper footing, to obtain the opinion of the supreme court. In the meantime—

By the Court.—Let the information be dismissed. (a)

(a) Lewis doubted, whether a writ of error would lie, for want of parties, as the
that the first naturalization act of congress, passed in the year 1790, furnished a new rule, but contained no repealing or negative words, to impair the operation of the pre-existing state laws; and that although, at this time, there was no other than the federal rule for naturalizing a foreigner, yet this was the direct effect of positive negative words, in the act of congress passed in the year 1795 (1 U. S. Stat. 414); Collet v. Collet, ante, p. 295.

Dallas, in reply.—It is conceded, that if the prisoner is not a naturalized citizen of the United States, he must be discharged. It is unnecessary to inquire, whether the federal power of naturalization is concurrent or exclusive; since, it will be sufficiently shown, that even if the power is concurrent, the state had ceased to exercise it, before the year 1793; and consequently, the prisoner could not have become a citizen of the United States, under any law of Pennsylvania. Before congress had exercised the power of naturalization given by the federal constitution, the then existing state constitution had declared, that "every foreigner, of good character, who comes to settle in this state, having first taken an oath or affirmation of allegiance to the same, may purchase, or by other just means acquire, hold and transfer land or other real estate; and after one year's residence, shall be deemed a free denizen thereof, and entitled to all the rights of a natural-born subject of this state, except that he shall not be capable of being elected a representative, until after two years' residence." 1 Dall. Laws, app. 60: While the test laws were in force, no particular form of qualification was prescribed for the purpose of naturalization, different from the oath or affirmation of allegiance and abjuration, exacted from every inhabitant of the state. But when the test laws were repealed, and before congress had legislated upon the subject, a special provision became necessary; and the proviso in the act of the year 1789 (2 Dall. Laws, 677) was expressly introduced to preserve and effectuate the 42d section of the constitution, with which it is in language and meaning inseparably connected. The next change in the business of naturalization was the act of congress, passed in the year 1790 (1 U. S. Stat. 103). This act, it is true, does not contain a repeal of the state law, nor any negation of a state power to naturalize; but the arguments ab inconveniunti are strong against a concurrent authority; and if not on the question of power, at least, on the principle of expediency, the state convention, who afterwards formed our existing constitution, have evidently avoided a collision of jurisdiction, by omitting to prescribe any state mode of naturalization, and leaving the subject implicitly to *the rules which congress had previously prescribed. A citizen of the United States, adopted under the act of congress, is a citizen of each and every state; and the convention of Pennsylvania could conceive no means of establishing uniformity (the very object contemplated by the federal constitution), if each state, in a distinct and different mode, might likewise convert the character of an alien, into that of a citizen of the United States.

The state constitution is, therefore, silent; and it only remains to be shown, that the law passed in the year 1789, was virtually repealed by the ratification of that constitution; which provides, indeed, that all the pre-existing laws, not inconsistent with itself, shall continue in force. Schedule, § 1. But the act of 1789 was not only entirely dependent on the existence
Stat. 81), it is provided, that the courts of the United States "shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." It is only incumbent on the plaintiff, therefore, to show, that the present writ is necessary to the efficient exercise of the court's jurisdiction, and that it is agreeable to the principles and usages of law. It is admitted, that the course of proceeding in England is different. There, the defendant, who is not taken upon the writ, must be pursued to outlawry; and if he does not enter bail, in order to avoid the penal consequences, the plaintiff applies to the exchequer for a sequestration, and obtains payment from the outlaw's effects. 1 Str. 473; 2 W. Bl. 759; 2 Bl. Com. 283. But no mode of proceeding to outlawry in civil cases, is recognised or prescribed by any law of the federal or state government; and even in criminal cases, it is questionable, whether the state law could furnish a rule for the United States. Unless, therefore, the mode now pursued shall be sanctioned, endless inconveniences will arise in the administration of justice; for the plaintiff cannot discontinue his action, without certainly losing bail as to one defendant, while he has only a chance of obtaining it from another. If, then, there is a necessity of adopting some process to prevent a right being without a remedy, the present process will be found perfectly consistent with the principles and usages of law; and the formality of the continuances will not be of sufficient moment to attract the attention of the court. Sel. Pr. 400. Such process has been issued repeatedly, both in the supreme court and common pleas of Pennsylvania; though the regularity of it was never, indeed, contested. In England, however, the courts of law and chancery were bound by forms of writ, of almost immemorial antiquity, and always prescribed by the express authority of parliament; until the pressure of business, and the diversity of the cases that arose, produced the statute of Westm. 2, which authorized the clerks in chancery to frame writs in consimili casu; and in the exercise of that authority, from time to time, a considerable latitude has been taken. 4 Reeves Hist. E. L. 426; 8 Ibid. 202; 2 Inst. 404, 407; Gilb. C. P. 2, 3, 4; 8 Co. 48. An authority strictly analogous is given to the federal courts by the judicial act; and as there is no common officina brevium, it follows, of course, that each court must frame its own writs, according to the nature of the respective cases.

Gibson, Ingersoll and Dallas, for the defendant, Holker, waived all objection to the mere form of the second capias; but insisted, that even an alias capias could not issue, unless it was tested of the term, to which the original was returned, and made returnable to the next immediately ensuing term. (a) They exemplified the mode of proceeding by outlawry in England, on a return of non est inventus as to one of several defendants; the force of the issue joined; and the impracticability of making an amendment in the declaration filed, to meet the new case to be brought upon the record, from 1 Str. 473; 1 Wils. 78; 2 Sellan Pr. 389; 5 Com. Dig. 652. One do-

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(a) Iredell, Justice.—Is it intended to maintain the writ, on the footing of an alias, unless issued to the next term, after the return of the original capias?

Rawle.—I think it can be so maintained.
Thomas, thereupon, obtained a rule to show cause why the defendant should not be allowed a set-off for the amount of his payments, and that, in the meantime, proceedings on the execution be stayed.

The rule was afterwards opposed by Lee, the attorney-general, who contended, that the regular relief was by application to the equity side of the court, for an injunction; which would only be granted, upon the defendant's bringing the money into court, or giving security to pay the balance.

But it was answered, by Ravle and Thomas, that the amount due must be ascertained, before any use could be made of the agreement to enter judgment. It was the express stipulation of the parties; and as the judgment has been improperly entered at common law, it is on the same side of the court that relief should be sought. The courts in England and in Pennsylvania are in the constant practice of staying the proceedings on executions, which are issued either for more than is due, or before the day of payment. See 1 Bac. Abr. 195.

By the Court.—The agreement is to enter judgment for what may be due. The plaintiff has no right to decide the question. It is evident, from the terms of the agreement, that there was something to settle; and the plaintiff, either by arbitration, or by a jury, should have proceeded to make the settlement, with notice to the defendant, before he entered the judgment; or, at least, before he issued the execution.

The rule made absolute.

Maxwell's Lessee v. Levy.¹

Jurisdiction.

A deed colorably executed, for the purpose of giving jurisdiction to the circuit court, will not sustain the jurisdiction.²

Ejectment. On a rule to show cause, why this ejectment, and many other cases depending on the same principle, should not be stricken off the record, upon a suggestion that the court had no jurisdiction, it appeared, that the lessor of the plaintiff was a citizen of Maryland, resident there, and that the defendant was a citizen of Pennsylvania, resident here. But as soon as the ejectment was instituted, a bill for discovery was filed against the lessor of the plaintiff, on the equity side of the court, in which it was alleged, "that the conveyance of the premises in controversy to the lessor of the plaintiff, was made by Morris, a citizen of Pennsylvania, for no other purpose than to give jurisdiction to the circuit court;" and the answer to the bill admitted, "that the lessor of the plaintiff had given no consideration for the conveyance; that his name had been used by way only of accommodation to Morris;" but it was not directly said, that it was for the purpose of creating a jurisdiction in the federal court.

¹ S. c. 4 Dall. 330, where it is more fully reported.
² Smith v. Kernochen, 7 How. 198; Jones v. League, 18 Id.; Barney v. Baltimore, 6 Wall. 280; Hurst v. McNeil, 1 W. C. C. 70; Starling v. Hawks, 5 McLean 318. The opinion of Mr. Justice Story to the contrary, in Briggs v. French, 1 Sumn. 251, is not law. But see Newby v. Oregon Central Railway Co., 1 Sawyer 63.
tificate, stealing or falsifying records, &c.; for the punishment of various crimes, when committed within the limits of the exclusive jurisdiction of the United States; and for the punishment of bribery itself, in the case of a judge, an officer of the customs, or an officer of the excise. (1 U. S. Stat. 117; Ibid. 175, § 66; Ibid. 210, § 47). But in the case of the commissioner of the revenue, the act constituting the office does not create or declare the offence (1 U. S. Stat. 280, § 6); it is not recognised in the act, under which proposals for building the light-house were invited (1 U. S. Stat. 388); and there is no other act that has the slightest relation to the subject.

Can the offence, then, be said to arise under the constitution or the laws of the United States? And, if not, what is there to render it cognisable under the authority of the United States? A case arising under a law must mean a case depending on the exposition of a law in respect to something which the law prohibits or enjoins. There is no characteristic of that kind in the present instance. But it may be suggested, that the office being established by a law of the United States, it is an incident, naturally attached to the authority of the United States, to guard the officer against the approaches of corruption in the execution of his public trust. It is true, that the person who accepts an office may be supposed to enter into a compact to be answerable to the government which he serves for any violation of his duty; and having taken the oath of office, he would unquestionably be liable, in such case, to a prosecution for perjury in the federal courts. But because one man, by his own act, renders himself amenable to a particular jurisdiction, shall another man, who has not incurred a similar obligation, be implicated? If, in other words, it is sufficient to vest a jurisdiction in this court, that a federal officer is concerned; if it is a sufficient proof of a case arising under the law of the United States to affect other persons, that such officer is bound by law to discharge his duty with fidelity—a source of jurisdiction is opened, which must inevitably overflow and destroy all the barriers between the judicial authorities of that state and the general government. Anything which can prevent a federal officer from the punctual, as well as from an impartial, performance of his duty; an assault and battery; or the recovery of a debt, as well as the offer of a bribe; may be made a foundation of the jurisdiction of this court; and considering the constant disposition of power to extend the sphere of its influence, fictions will be resorted to when real cases cease to occur. A mere fiction, that the defendant is in the custody of the marshal, has rendered the jurisdiction of the *King’s *391] Bench universal in all personal actions. Another fiction, which state the plaintiff to be a debtor of the crown, gives cognisance of all kinds of personal suits to the Exchequer, and the mere profession of an attorney attaches the privilege of suing and being sued in his own court. If, therefore, the disposition to amplify the jurisdiction of the circuit court exists, precedents of the means to do so are not wanting, and it may hereafter be sufficient to suggest that the party is a federal officer, in order to enable this court to try every species of crime, and to sustain every description of action.

But another ground may, perhaps, be taken to vindicate the present claim of jurisdiction. It may be urged, that though the offence is not specified in the constitution nor defined in any act of congress; yet, that it is an offence at common law, and that the common law is the law of the United
between citizen and citizen, whether they are instituted in a federal, or state court.

*395] But the question recurs, when and how, have the courts of the United States acquired a common-law jurisdiction, in criminal cases? The United States must possess the common law themselves, before they can communicate it to their judicial agents: Now, the United States did not bring it with them from England; the constitution does not create it; and no act of congress has assumed it. Besides, what is the common law to which we are referred? Is it the common law entire, as it exists in England; or modified as it exists in some of the states; and of the various modifications, which are we to select, the system of Georgia or New Hampshire, of Pennsylvania or Connecticut?

Upon the whole, it may be a defect in our political institutions, it may be an inconvenience in the administration of justice, that the common-law authority, relating to crimes and punishments, has not been conferred upon the government of the United States, which is a government in other respects also of a limited jurisdiction; but judges cannot remedy political imperfections, nor supply any legislative omission. I will not say, whether the offence is at this time cognisable in a state court. But, certainly, congress might have provided, by law, for the present case, as they have provided for other cases of a similar nature; and yet, if congress had ever declared and defined the offence, without prescribing a punishment, I should still have thought it improper to exercise a discretion upon that part of the subject.

Peters, Justice.—Whenever a government has been established, I have always supposed, that a power to preserve itself was a necessary, and an inseparable concomitant. But the existence of the federal government would be precarious, it could no longer be called an independent government, if, for the punishment of offences of this nature, tending to obstruct and pervert the administration of its affairs, an appeal must be made to the state tribunals, or the offenders must escape with absolute impunity. The power to punish misdemeanors, is originally and strictly a common-law power; of which, I think, the United States are constitutionally possessed. It might have been exercised by congress, in the form of a legislative act; but it may also, in my opinion, be enforced in a course of judicial proceeding. Whenever an offence aims at the subversion of any federal institution, or at the corruption of its public officers, it is an offence against the well-being of the United States; from its very nature, it is cognisable under their authority; and consequently, it is within the jurisdiction of this court, by virtue of the 11th section of the judicial act.

*396] The Court being divided in opinion, it became a doubt, whether sentence could be pronounced upon the defendant; and a wish was expressed by the judges and the attorney of the district, that the case might be put into such a form, as would admit of obtaining the ultimate decision of the supreme court, upon the important principle of the discussion: but the counsel for the prisoner did not think themselves authorised to enter into a compromise of that nature. The Court, after a short consultation, and declaring, that the sentence was mitigated in consideration of the defendant's circumstances, proceeded to adjudge—
That the defendant be imprisoned for three months; that he pay a fine of $200; and that he stand committed, until this sentence be complied with, and the costs of prosecution paid.

Hollingsworth v. Adams.

Jurisdiction in foreign attachment.

Process of foreign attachment cannot be issued by a circuit court, when the defendant is domiciled abroad, or not found within the district, so that it can be served upon him.¹

Foreign attachment, returnable to the present term. The defendant was stated to be a citizen of Delaware, in the process which had issued; and M. Levy, having produced an affidavit in proof of that fact, moved to quash the writ, on the ground that the federal courts had no jurisdiction, in cases of foreign attachment. By the 11th section of the judicial act (1 U. S. Stat. 78), it is expressly provided, that “no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court; and no civil suit shall be brought before either of the said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.” Now, this is a civil suit, brought here by original process against the defendant, who is an inhabitant of another district, and was not found in Pennsylvania at the time of serving the writ.

Thomas and Hallowell, on behalf of the plaintiff, wished for time to inquire into the practice; but not being able, on the next day, to assign any satisfactory reason in maintenance of the action,

The Court directed the writ to be quashed, with costs.

Wilkinson et al. v. Nicklin et al.

Bills of exchange.

The indorsement of a bill in blank, passes all the interest in it, to every indorsee in succession, discharged from any obligation subsisting between the original parties, which does not appear upon its face.

The fact that a bill is noted for non-acceptance, is not notice to a subsequent indorsee, of the existence of any equity between the original parties.

This was an action brought by the indorsees of a bill of exchange, drawn by McClenachan & Moore, upon George Barclay, of London, in favor of the defendants, and by them indorsed in blank, to Arthur Crammond & Co., who likewise indorsed and discounted it with their bankers, the present plaintiffs, under the following circumstances: The defendants, having opened a commercial correspondence with Arthur Crammond & Co., of London, remitted the bill of exchange in question, to be passed to their credit, in their general account with those gentlemen. The bill was noted

on the face of it for non-acceptance. It was, afterwards, on the 4th of August 1798, paid in short, on account of Arthur Crammond & Co., with their blank indorsement, to the banking-house of the plaintiffs; but on the 19th of the same month, the amount was carried out to the credit of Arthur Crammond & Co., as if it had been then discounted by the plaintiffs; and it was said by a witness, examined under a commission, that, after this discount, the money had been duly paid upon the drafts of Arthur Crammond & Co.

The counsel for the defendants stated, that they proposed to show by evidence, that the bill of exchange was remitted on account of the defendants; and that Arthur Crammond & Co. were in very great pecuniary embarrassment, at the time of the alleged discount of the bill of exchange, and had soon afterwards become bankrupt. From these premises, from the nature of the previous deposit, and, above all, from the dishonored state of the bill, when it was deposited and discounted (which was enough to have prompted an inquiry into the real circumstances of the case), it was intended to argue, that the plaintiffs knew that the bill was, in fact, the property of the defendants; and that the eventual discount was colorable and collusive, for the mere purpose of recovering the damages, or of securing a pre-existing balance due to the plaintiffs from Arthur Crammond & Co., who were on the eve of a public failure. 3 T. R. 80. If the plaintiffs did know the facts, they cannot be entitled to any more benefit from the possession of the bills, than Arthur Crammond & Co. themselves.

The counsel for the plaintiffs (who had, indeed, anticipated the defence in their opening) insisted, that the general, unrestricted nature of the indorsement, had empowered Arthur Crammond & Co. to pass the bill to whomsoever they pleased; and that whatever might be the imputation on them for a breach of trust, it could not affect the plaintiffs, who had paid a valuable consideration for the bill; and who ought not to be charged with collusion and fraud, upon strained inferences and slight presumptions. Their knowledge of the transactions between the defendants and Arthur Crammond & Co. has not been proved; and it would be a violation of the most important commercial principles, of the most authoritative adjudications, to permit such a defence to be made, against the claim of an indorsee. The distinction between restricted indorsements, and indorsements *which leave the bill to a free negotiation, has been fully established (2 Burr. 1216, 1226–7); and an indorsee, in the latter case, cannot be affected even by letters accompanying the bill. Rep. temp. Hardw. 11. Nor does the reason of the case in 3 T. R. 80 (where the note was negotiated after the term of payment had elapsed), apply to a protest for non-acceptance. Bills are often so protested, and yet are eventually paid. The strongest presumption arising upon a protest for non-acceptance, is, that the drawee has not effects of the drawer in his hands, at the time of presenting the bill: but when a note has been protested for non-payment, the fair presumption is, that the drawer is either unable to pay it, or has a legal excuse for not paying it; and the purchaser of the note, under such circumstances, has a reasonable warning, and must take it at his peril.
CHASE, Justice.—The defence cannot be admitted. There is no rule more perfectly established, there is none which ought to be held more sacred in commercial transactions, than that the blank indorsement of a bill of exchange passes all the interest in the bill, to every indorsee, in succession, discharged from any obligation which might subsist between the original parties, but which does not appear upon the face of the instrument itself.

PETERS, Justice.—Though I can easily suppose cases of hardship may arise, and though I am disposed, indeed, to think that strong equitable circumstances now exist in favor of the defendants; yet, the rule of law is so well established, and, upon general principles, is so beneficial, that I cannot persuade myself, in any degree, to dispense with its operation. I am, therefore, of opinion, that the evidence in support of the defence proposed, ought not to be admitted.

Verdict for the plaintiffs.

Ingersoll and Lewis, for the plaintiffs. E. Tilghman and Dallas, for the defendants.
do solemnly swear, that I will demean myself as an attorney (or counsellor) of the court, agreeably and according to law; and that I will support the constitution of the United States."

4. Ordered, That (unless, and until, it shall be otherwise provided by law) all process of this court shall be in the name of "the President of the United States."

The court adjourned, sine die.

AUGUST TERM, 1790.

The Court being met, a commission appointing James Iredell one of the justices, bearing date the 10th of February 1790, was read; and he was qualified according to law.

The court adjourned, sine die.

FEBRUARY TERM, 1791.

The Court being met at Philadelphia, the seat of the Federal government, it was—

Ordered, That the counsellors and attorneys, admitted to practise in this court, shall take either an oath, or, in proper cases, an affirmation, of the tenor prescribed by the rule of this court on that subject, made in February term 1790.

After qualifying a number of counsellors and attorneys, the court adjourned, sine die.

*401*]

AUGUST TERM, 1791.

West, Plaintiff in error, v. Barnes et al.

Writ of error.

Writs of error can only issue from the clerk's office of the supreme court.¹

On the first day of the term, Bradford presented to the court a writ, purporting to be a writ of error, issued out of the office of the clerk of the circuit court for Rhode Island district, directed to that court, and commanding a return of the judgment and proceedings rendered by them in this cause: and thereupon, he moved for a rule, that the defendant rejoin to the errors assigned in this cause.

¹ The act of 8th May 1792, § 9 (1 U. S. Stat. the supreme court; and this has been incorporated, provided, that the clerks of the circuit courts might issue writs of error, returnable in Revised Statutes, § 1004.

Return of process.

Return of process will be enforced, by rule on the marshal.

Simmons. Ingersoll moved for a rule on the marshal of the district of New York, to return the writ in this cause; and, after advisement, the Court granted the rule in the following terms:

Ordered, That the marshal of New York district return the writ to him directed in this cause, before the adjournment of this court, if a copy of this rule shall be seasonably served upon him, or his deputy, or, otherwise, on the first day of the next term. And that in case of a default, he do show cause therefor, by affidavit taken before one of the judges of the United States.

State of Georgia v. Brailsford et al.

Injunction.

An Injunction granted, to restrain the marshal from paying over money, collected by execution, until the right of the complainant to the same (which could not be decided in the original suit) should be determined.

This was a bill in equity, filed by "His Excellency Edward Telfair, Esq., governor and commander-in-chief in and over the state of Georgia, in behalf of the said state, complainant," against Samuel Brailsford, Robert Wm. Powell, and John Hopton, merchants and copartners, and James Spaulding, surviving partner of Kelsall & Spalding, defendants. The bill set forth the following case:

"That on the 4th of May 1782, the State of Georgia being then free, sovereign and independent, enacted a law entitled 'An act for inflicting penalties on, and confiscating the estates of, such persons as are therein declared *guilty of treason, and for other purposes therein mentioned.' That, among other things, the law contained the following clauses: 'And whereas, there are divers estates and other property within this state, belonging to persons who have been declared guilty, or convicted, in one or other of the United States, of offences which have induced a confiscation of their estates or property within the state of which they were citizens: Be it, therefore, enacted, by the authority aforesaid, that all and singular the estates, both real and personal, of persons under this description, of whatsoever kind or nature, together with all rights and titles, which they may, do or shall hold, in law or equity, or others in trust for them, and also all the debts, dues and demands, due or owing to British merchants, or others, residing in Great Britain (which shall be appropriated as hereinafter mentioned), owing or accruing to them, be confiscated to and for the use and benefit of this state, in like manner and form of forfeiture as they were subjected to in the states of which they respectively were citizens, and the monies arising from the sales which shall take place, by virtue and in pursuance of this act, to be applied to such uses and purposes as the legislature shall hereafter direct.

"And be it further enacted, that all debts, dues and demands, due or owing to merchants or others residing in Great Britain, be and they are hereby sequestered, and the commissioners appointed under this act, or a majority of
them, are hereby empowered to recover, receive and deposit the same in the treasury of this state, in the same manner, and under the same regulations, as debts confiscated, there to remain for the use of this state, until otherwise appropriated by this or any future house of assembly.

"And whereas, there are various persons, subjects of the king of Great Britain, possessed of or entitled to estates, real and personal, which justice and sound policy require should be applied to the benefit of this state; Be it, therefore, enacted, by the authority aforesaid, that all and singular the estates, real and personal, belonging to persons, being British subjects, of whatsoever kind or nature, which they may be possessed of, except as before excepted, or others in trust for them, or that they are or may be entitled to, in law or equity, as also all debts, dues or demands, owing or accruing to them, be confiscated to and for the use and benefit of this state, and the moneys arising from the sales which shall take place by virtue of and in pursuance of this act, to be applied to such uses and purposes as the legislature shall hereafter direct."

"That by the operation of these clauses, all the debts, dues and demands of the citizens of Georgia to persons who had *been subjected to the penalties of confiscation in other states, and of British merchants and others residing in Great Britain, and of all other British subjects, were vested in the said state.

"That James Spalding, a citizen of Georgia, and surviving copartner of Kelsall & Spalding, was indebted to the defendants in the penal sum of 7058l. 9s. 5d. upon a bond dated the —— of ——— 1774, which debt, by virtue of the said recited law, was transferred from the obligees and vested in the state—Brailsford being a native subject of Great Britain, constantly residing there from the year 1767, until after the passing of the law; Hopton's estate, real and personal (debt excepted), having been expressly confiscated by an act of the legislature of South Carolina; and Powell coming within the description of persons, whose estates, real and personal (debts excepted), were also confiscated by acts of the legislature of South Carolina, if, after refusing to take the oath of allegiance, they returned to the state.

"That an action had been brought upon the bond, by Brailsford, Powell and Hopton, against James Spalding, as surviving partner of Kelsall & Spalding, in the circuit court for the district of Georgia, of ——— term 1791, in which action, there was a plea, demurrer to the plea, joinder in demurrer, and judgment thereupon for the plaintiffs.

"That the state had never relinquished its claim to this debt, but on the contrary, had asserted it by divers acts of the legislative, executive and judicial departments; and, particularly, by directing the attorney-general to apply for a rule, to be admitted to assert the claim, in all suits brought in any court, for debts within the descriptions of the confiscation law above cited.

"That the attorney-general applied to the circuit court, for the admission of the state, as a party, to defend its claim in the said suit of Brailsford and others v. Spalding, then depending there, which application was rejected; and that in that suit, as well as divers other suits, recoveries were had against citizens of the state, by British merchants, for debts within the descriptions of the confiscation law, upon the sole principle of debtor and creditor, and without any reference to the right and claim of the state."
The bill proceeded to charge a confederacy between the parties to the 
suit in the circuit court, to defraud the state; and that in pursuance thereof, 
the plaintiffs had issued execution against the defendant, and the defendant 
had confederated with them not to take out a writ of error; so that the 
defendant's property would be levied on, and disposed of, and the state 
would be defrauded of its just claim thereon.

The bill then suggested the general foundation for the jurisdiction on 
the equity side of the court; put the proper interrogatories; and 
concluded with praying "that any levy, or further levies, under the 
said execution, and any sales in pursuance of a levy, and any moneys already 
raised, or that may be raised thereon, may be stayed in the hands of the 
marshal of the said circuit court, by an injunction from this honorable court. 
And that the marshal be directed to pay such sum, or sums, raised as afore-
said, to the treasurer of the said state of Georgia, to and for the use of the 
same, and that the said James Spalding be decreed to pay to the said 
treasurer the balance which may be due on the bond aforesaid, for the use 
aforesaid. And that the said state may be further or otherwise relieved, in 
all and singular the premises, as the nature and circumstances of the case 
shall require, and as to the court shall seem meet."

With the bill, there was filed an affidavit, made by Mr. John Wereat 
(the agent for Georgia), affirming "that the allegations therein contained 
are true;" and Dallas, for the state, moved that an injunction might issue, 
to the circuit court, to stay further proceedings, and also to the marshal of 
the Georgia district, to stay the money in his hands, if he should have levied, 
or shall levy, the same, on any execution issued in the cause of Brailsford et 
al. v. Spalding.

The motion was opposed by Randolph, for the defendants; and after 
argument, the judges delivered their opinions seriatim, on the 11th of 
August 1792.

JOHNSON, Justice.—In order to support a motion for an injunction, the 
bill should set forth a case of probable right, and a probable danger that the 
right would be defeated, without this special interposition of the court. It 
does not appear to me, that the present bill sufficiently claims such an 
interposition. If the state has a right to the debt in question, it may be en-
forced at common law, notwithstanding the judgment of the circuit court; 
and there is no suggestion in the bill, though it has been suggested at the 
bar, that the state is likely to lose her right by the insolvency either of 
Spalding, the original debtor, or of Brailsford, who will become her debtor 
for the amount, if he receives it, when in law he ought not to receive or 
retain it. Nor does the bill state any particular confederacy or fraud. 
The refusal to admit the attorney-general as a party on the record, was the 
act of a competent court; and it is not sufficient barely to allege, that the 
defendant has not chosen to sue out a writ of error. The case might, 
perhaps, be made better; but as I can only know, at present, the facts 
which the bill alleges, and which the affidavit supports, it is my opinion, 
that there is not a proper foundation for issuing an injunction.

IREDELL, Justice.—I sat in the circuit court, when the judgment was
rendered in the case of Brailsford and others v. Spalding; but I shall give my opinion, on the present motion, detached from every previous consideration of the merits of the cause.

The debt claimed by the plaintiffs below, was likewise claimed by the state of Georgia. The state applied to be admitted to assert her claim, but the application was rejected; nor has any writ of error been instituted upon the judgment. These facts, however, are only mentioned, to introduce this remark, that the circuit court could not, with propriety, sustain the application of Georgia; because, whenever a state is a party, the supreme court has exclusive jurisdiction of the suit; and her right cannot be effectually supported, by a voluntary appearance before any other tribunal of the Union. Not being a party, nor capable of resorting, as a party, to the circuit court, it is very much to be questioned, whether the state could bring a writ of error on the judgment there, even if her claim appeared on the record.

Every principle of law, justice and honor, however, seem to require, that the claim of the state of Georgia should not be, indirectly, decided or defeated, by a judgment pronounced between parties, over whom she had no control, and upon a trial, in which she was not allowed to be heard. If, indeed, the court could not devise a mode, for admitting a fair investigation and determination upon that claim, it would be useless to grant an injunction; but I think a mode may easily be prescribed, in strict conformity with the practice and principles of equity.

It was in the power of the defendant in the circuit court, to have filed a bill of interpleader, in order, for his own safety, to settle the rights of the contending parties; but neither in that form, nor by instituting a suit herself, could Georgia have derived the benefit of supporting her claim in her own way, before any other than the supreme court. In this court, therefore, we ought now to place the state upon the same footing, as if a bill of interpleader had been regularly filed here; which can be done by sustaining the present suit; and when the parties are all before us, we may direct a proper issue to be formed, and tried at the bar. Thus, justice will be done to Georgia, and an irreparable injury may be prevented; while the adverse party, even if he ultimately succeeds, can only complain of a short delay.

With this view, I think, that an injunction should be awarded to stay the money in the hands of the marshal, until this court shall make a further order on the subject.

Blair, Justice.—The State of Georgia seems to have done all that she could to obtain a hearing. An application was made to the circuit court, in the nature of a claim to interplead; but being refused, her alternative, under all the circumstances of the case, is an appeal to the equitable jurisdiction of the supreme court. It is true, perhaps, as the counsel has suggested, that the defendant below pleaded the confiscation act of Georgia in bar to the action; but it is a sufficient answer to this argument, that the state was not a party; and no right can be defeated, in law, unless the party claiming it has himself an opportunity to support it.

If the state of Georgia was entitled to the bond, she is equally entitled to the money levied by the marshal in satisfaction of the bond, or rather of the judgment rendered upon it; and as the execution directs the marshal to
pay the amount to the plaintiffs below, I can perceive no other mode of pre-
venting a compliance, while we inquire into the right of receiving the money,
than that of issuing an injunction to stay it in the hands of the officer.

It appears to me, to be too early, likewise, to pronounce an opinion upon
the titles in collision; since, it is enough, on a motion of this kind, to shew
a colorable title. The state of Georgia has set up, her confiscation act,
which certainly is a fair foundation for future judicial investigation; and
that an injury may not be done, which it may be out of our power to re-
pair, the injunction ought, I think, to issue, until we are enabled, by a full
inquiry, to decide upon the whole merits of the case.

WILSON, Justice.—I confess that I have not been able to form an opinion
which is perfectly satisfactory to my own mind, upon the points that have
been discussed. If Georgia has a right to the bond, it is strictly a legal
right; but to enforce a strictly legal right, the present seems, at the first
blush, to be an awkward and irregular proceeding. Again, Georgia had not
a right, or she had a right, to be admitted to a hearing in the circuit court;
but in the former case, it would be no ground of complaint, that her appli-
cation was rejected; for she is bound by the law; and in the other case,
she would be entitled to bring the subject before us, as a court of law;
since she was refused the exercise of a legal right.

It is true, that, under the federal constitution, an inferior tribunal cannot
compel a state to appear as a party; but it is a very different proposition to
say, that a state cannot, by her own consent, appear in any other court, than
the supreme court. The general rule applies among all sovereigns, who,
as equals, are not amenable to the courts of each other; and yet I remember
an action was instituted and sustained, some years ago, in the name of Louis
XVI., King of France, against Mr. Robert Morris, in the supreme court of
Pennsylvania.¹

Under these impressions, I am disposed to think, that the state of
Georgia ought rather to have sued out a writ of error, than to have asked
for an injunction; but still, in the existing *circumstances of the
*408] case, I have no objection to retain the money within the power of
the court, until we can better satisfy ourselves both as to the remedy and the
right.

CUSHING, Justice.—The judicial act expressly declares, that “suits in
equity shall not be sustained, in either of the courts of the United States,
in any case where plain, adequate and complete remedy may be had at law.”
Now, if Georgia has any right to the debt in question, it is a right at law,
for which, of course, the law will furnish a plain, adequate and complete
remedy. The decision of the circuit court, in a case to which Georgia was
neither party nor privy, did not, and could not, take away either the right
or the remedy of the state. Nor can Spalding, the defendant below, be
made liable twice, for the same debt, without his wilful laches. For it is in
his power to bring a writ of error; and then, the whole merits of the claim
of Georgia appearing on the record, we must decide it as a question of law,
either by affirming or reversing the judgment, so as to bind us, in any suit
which Georgia might institute for the same cause.

¹ King of France v. Morris, cited 3 Yeates 251.
Besides, the state of Georgia (notwithstanding the judgment of the circuit court) may bring an action of indebitatus assumpsit against Brailsford (who is a man of fortune), after they have received the money, upon the principle of Moses v. Macferlan (2 Burr. 1005), and with stronger reason; as, in that case, the parties, in both courts, were the same; but in the case proposed, they would be different, and one of them has never been heard. In some form, therefore, Georgia may obtain complete redress at law.

I do not, upon the whole, consider the refusal of Spalding to bring a writ of error (which he is not compellable to bring), nor any other suggestion in the bill, as a sufficient foundation for exercising the equitable jurisdiction of the court; and consequently, I think, that an injunction ought not to be awarded.

Jay, Chief Justice.—My first ideas were unfavorable to the motion; but many reasons have been urged, which operate forcibly to produce a change of opinion.

The great question turns on the property of a certain bond—whether it belongs to Brailsford, or to Georgia? It is put in suit by Brailsford; but if Georgia, by virtue of the confiscation act, is really entitled to the debt, she is entitled to the money, though the evidence of the debt happened to be in the possession of Brailsford, and though Brailsford has, by that means, obtained a judgment for the amount.

Then the only point to be considered is—whether, under these circumstances, it is not equitable to stay the money in the hands of the marshal until the right to it is fairly decided? and so avoid the risk of putting the true owner to a suit, for the purpose of recovering it back? For my part, I think, that the money should remain in the custody of the law, until the law has adjudged to whom it belongs; and, therefore, I am content, that the injunction issue.

An injunction granted. (a)

Hayburn's Case.

Constitutional law.

It is not in the power of congress, to assign to the judiciary any but judicial duties.

This was a motion for a mandamus, to be directed to the circuit court for the district of Pennsylvania, commanding the said court to proceed in a certain petition of William Hayburn, who had applied to be put on the pension list of the United States, as an invalid pensioner. The principal case arose upon the act of congress passed the 23d of March 1792. (1 U.S. Stat. 243.)

The Attorney-General (Randolph), who made the motion for the mandamus, having premised that it was done ex officio, without an application from any particular person, but with a view to procure the execution of an act of congress, particularly interesting to a meritorious and unfortunate class of citizens, The Court declared, that they entertained great doubt upon

(a) See the same case, post, p. 415, and 3 Dall. 1, as well as on a motion to dissolve the injunction, as on a trial of the merits, upon a feigned issue.
his right, under such circumstances, and in a case of this kind, to proceed *ex officio*; and directed him to state the principles on which he attempted to support the right. The Attorney-General, accordingly, entered into an elaborate description of the powers and duties of his office:

But the *court* being divided in opinion on that question, the motion, made *ex officio*, was not allowed.

The Attorney-General then changed the ground of his interposition, declaring it to be at the instance, and on behalf of Hayburn, a party interested; and he entered into the merits of the case, upon the act of congress, and the refusal of the judges to carry it into effect.

The *court* observed, that they would hold the motion under advisement, until the next term; but no decision was ever pronounced, as the legislature, at an intermediate *session*, provided, in another way, for the relief of the pensioners. 

(a) See an act passed the 28th February 1793 (1 U. S. Stat. 334).—As the reasons assigned by the judges, for declining to execute the first act of Congress, involve a great constitutional question, it will not be thought improper to subjoin them, in illustration of Hayburn's case.

The circuit court for the district of New York (consisting of JAY, Chief Justice, CUSINO, Justice, and DUANE, District Judge) proceeded, on the 5th of April 1791, to take into consideration the act of congress entitled, "An act to provide for the settlement of the claims of widows and orphans barred by the limitations heretofore established, and to regulate the claims to invalid pensions;" and were, thereupon, unanimously, of opinion and agreed,

"That by the constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either. That neither the legislative nor the executive branches, can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner.

"That the duties assigned to the circuit, by this act, are not of that description, and that the act itself does not appear to contemplate them as such; inasmuch as it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the secretary at war, and then to the revision of the legislature; whereas, by the constitution, neither the secretary at war, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.

"As, therefore, the business assigned to this court, by the act, is not judicial, nor directed to be performed judicially, the act can only be considered as appointing commissioners for the purposes mentioned in it, by official instead of personal description. That the judges of this court regard themselves as being the commissioners designated by the act, and therefore, as being at liberty to accept or decline that office. That as the objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of congress; and as the judges desire to manifest, on all proper occasions, and in every proper manner, their high respect for the national legislature, they will execute this act in the capacity of commissioners.

"That as the legislature have a right to extend the session of this court for any term, which they may think proper by law to assign, the term of five days, as directed by this act, ought to be punctually observed. That the judges of this court will, as usual, during the session thereof, adjourn the court from day to day, or other short periods, as circumstances may render proper, and that they will, regularly, between the adjournments, proceed, as commissioners, to execute the business of this act in the same court room, or chamber."
The circuit court for the district of Pennsylvania (consisting of Wilson and Blair, Justices, and Peters, District Judge) made the following representation, in a letter jointly addressed to the president of the United States, on the 18th of April 1792.

"To you it officially belongs to 'take care that the laws' of the United States 'be faithfully executed.' Before you, therefore, we think it our duty to lay the sentiments, which, on a late painful occasion, governed us with regard to an act passed by the legislature of the Union.

"The people of the United States have vested in congress all legislative powers granted in the constitution. They have vested in one supreme court, and in such inferior courts as the congress shall establish, 'the judicial power of the United States.' It is worthy of remark, that in congress the whole legislative power of the United States is not vested. An important part of that power was exercised by the people themselves, when they 'ordained and established the constitution.' This constitution is 'the supreme law of the land.' This supreme law 'all judicial officers of the United States are bound, by oath or affirmation, to support.'

"It is a principle important to freedom, that in government, the judicial should be distinct from, and independent of, the legislative department. To this important principle, the people of the United States, in forming their constitution, have manifested the highest regard. They have placed their judicial power, not in congress, but in 'courts.' They have ordained that the 'judges of those courts shall hold their offices during good behavior,' and that 'during their continuance in office, their salaries shall not be diminished.'

"Congress have lately passed an act, to regulate, among other things, 'the claims to invalid pensions.' Upon due consideration, we have been unanimously of opinion, that, under this act, the circuit court held for the Pennsylvania district could not proceed.

"1st. Because the business directed by this act is not of a judicial nature. It forms no part of the power vested by the constitution in the courts of the United States; the circuit court must, consequently, have proceeded without constitutional authority. 2d. Because, if, upon that business, the court had proceeded, its judgments (for its opinions are its judgments) might, under the same act, have been revised and controlled by the legislature, and by an officer in the executive department. Such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and consequently, with that important principle which is so strictly observed by the constitution of the United States.

"These, Sir, are the reasons of our conduct. Be assured that, though it became necessary, it was far from being pleasant. To be obliged to act contrary either to the obvious directions of congress, or to a constitutional principle, in our judgment equally obvious, excited feelings in us, we hope never to experience again."

The circuit court for the district of North Carolina (consisting of Iredell, Justice, and Simeons, District Judge) made the following representation, in a letter jointly addressed to the President of the United States, on the 8th of June 1792.

"We, the judges now attending at the circuit court of the United States for the district of North Carolina, conceive it our duty to lay before you some important observations which have occurred to us in the consideration of an act of congress lately passed, entitled, 'An act to provide for the settlement of the claims of widows and orphans, barred by the limitations heretofore established, and to regulate the claims to invalid pensions.'

"We beg leave to premise, that it is as much our inclination, as it is our duty, to receive with all possible respect every act of the legislature, and that we never can find ourselves in a more painful situation, than to be obliged to object to the execution of any, more especially, to the execution of one founded on the purest principles of humanity and justice, which the act in question undoubtedly is. But, however lamentable a difference in opinion really may be, or with whatever difficulty we may have formed an opinion, we are under the indispensable necessity of acting according to the
BLAIR, Justice—My sentiments have coincided, until this moment, with the sentiments entertained by the majority of the *court; but a doubt has just occurred, which I think it my duty to declare.

I do not conceive, indeed, that any judgment can be binding upon the rights and interests of a third person, who is not a party to the suit. The very nature of a bill of interpleader presupposes, that the party by whom it is exhibited, would be liable a second time, if he should either voluntarily, or otherwise, pay the money which he owes, to a wrong claimant. A judgment would not, therefore, in such a case, be a bar to the action of the claimant, who is legally entitled; and who might either bring detinue or trover for the bond, against the possessor of it; or, if he instituted an action of debt against the obligor, the court might, on a proper hearing, order the instrument to be delivered into his hands.

Presuming, then, that there was a remedy at law, I have hitherto thought that there was no ground for the interference of this court, as a court of equity. But, upon reflection, it appears, that if Brailsford, who is a British subject, should get the money, under the present judgment, and leave the country, there would be great danger of a failure of justice. It was for this reason, that the injunction was originally granted; and I think, the reason ought to carry us still further. Admitting, that Georgia has a complete remedy at law; her right, though not supported by herself, has been stated to the circuit court; and though the judgment in that case is not binding upon her, yet, in any future suit, brought by her against Spalding, who is bound by the judgment, a similar difficulty will arise; for the court would then be called upon to decide, in the absence of Brailsford (who could not be a party to the common-law suit), upon his claim, as well as upon the claim of Georgia.

Since, therefore, there is no other court that can bring all the parties before them, and do general and complete justice, it is my opinion, that the bill in equity ought to be sustained; and that the subject should be no further referred to a court of law, than to obtain an opinion upon the legal title to the debt in controversy.

JAY, Chief Justice.—All the court, except the judges who have just delivered their sentiments, are of opinion, that, if the state of Georgia has a right to the debt, due originally from Spalding to Brailsford, it is a right to be pursued at common law. The bill, however, was founded in the highest equity; and the ground of equity for granting an injunction continues the same—namely, that the money ought to be kept for the party *to whom it belongs. We shall, therefore, continue the injunction until the next term; when, however, if Georgia has not instituted her action at common law, it will be dissolved.(a)

(a) An amicable action was accordingly entered and tried at the bar of the supreme court, in February term 1794 (3 Dall 1), when a verdict was given for the defendant (Brailsford), and the injunction was, of course, dissolved.

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OF THE UNITED STATES.

CHISHOLM, executor, v. GEORGIA.

Suits against states.

A state may be sued, in the supreme court, by an individual citizen of another state. And in such suit judgment may be entered, in default of an appearance.

This action was instituted in August term 1792. On the 11th of July 1792, the marshal for the district of Georgia made the following return:

"Executed as within commanded, that is to say, served a copy thereof on his excellency Edward Telfair, Esq., governor of the state of Georgia, and one other copy on Thomas P. Carnes, Esq., the attorney-general of said state.

ROBERT FORSYTH, Marshal."

Upon which, Mr. Randolph, the Attorney-General of the United States, as counsel for the plaintiff, made the following motion, on the 11th of August 1792. "That unless the state of Georgia, shall, after reasonable previous notice of this motion, cause an appearance to be entered, in behalf of the said state, on the fourth day of the next term, or shall then show cause to the contrary, judgment shall be entered against the said state, and a writ of inquiry of damages shall be awarded." But to avoid every appearance of precipitancy, and to give the state time to deliberate on the measures she ought to adopt, on motion of Mr. Randolph, it was ordered by the court, that the consideration of this motion should be postponed to the present term. And now, Ingersoll and Dallas presented to the court a written remonstrance and protestation on behalf of the state, against the exercise of jurisdiction in the cause; but in consequence of positive instructions, they declined taking any part in arguing the question. The Attorney-General, therefore, proceeded as follows:

Randolph, for the plaintiff.—I did not want the remonstrance of Georgia, to satisfy me, that the motion which I have made, is unpopular. Before that remonstrance was read, I had learnt from the acts of another state, whose will must be always dear to me, that she too condemned it. On ordinary occasions, these dignified opinions might influence me greatly; but on this, which brings into question a constitutional right, supported by my own conviction, to surrender it, would, in me, be official perfidy.

It has been expressed, as the pleasure of the court, that the motion should be discussed, under the four following forms: 1st. Can the state of Georgia, being one of the United States of America, be made a party defendant in any case, in the supreme court of the United States, at the suit of a private citizen, even although he himself is, and his testator was, a citizen of the state of South Carolina? 2d. If the state of Georgia can be made a party defendant in certain cases, does an action of assumpsit lie against her? 3d. Is the service of the summons upon the governor and attorney-general of the state of Georgia, a competent service? 4th. By what process ought the appearance of the state of Georgia to be enforced?

I. The constitution and the judicial law are the sources from which the jurisdiction of the supreme court is derived. The effective passages in the constitution are in the second section of the third article. "The judicial power shall extend to controversies between a state and citizens of another state. In cases in which a state shall be a party, the supreme court shall have original
of states, which are to be annulled. If, for example, a state shall suspend the privilege of a writ of habeas corpus, unless when in cases of rebellion or invasion the public safety may require it; should pass a bill of attainder or ex post facto law; should enter into any treaty, alliance or confederation; should grant letters of marque and reprisal; should coin money; should emit bills of credit; should make anything but gold and silver coin a tender in payment of debts; should pass a law impairing the obligation of contracts; should, without the consent of Congress, lay imposts or duties on imports or exports, with certain exceptions; should, without the consent of Congress, lay any duty on tonnage, or keep troops or ships of war, in time of peace; these are expressly prohibited by the constitution; and thus is announced to the world, the probability, but certainly the apprehension, that states may injure individuals in their property, their liberty and their lives; may oppress sister states; and may act in derogation of the general sovereignty.

Are states then to enjoy the high privilege of acting thus eminently wrong, without control; or does a remedy exist? The love of morality would lead us to wish that some check should be found; if the evil, which flows from it, be not too great for the good contemplated. The common law has established a principle, that no prohibitory act shall be without its vindictory quality; or, in other words, that the infraction of a prohibitory law, although an express penalty be omitted, is still punishable. Government itself would be useless, if a pleasure to obey or transgress with impunity, should be substituted in the place of a sanction to its laws. This was a just cause of complaint against the deceased confederation. In our solicitude for a remedy, we meet with no difficulty, where the conduct of a state can be animadverted on, through the medium of an individual. For instance, without suing a state, a person arrested may be liberated by habeas corpus; a person attainted, and a convict under an ex post facto law, may be saved; those who offend against improper treaties may be protected, or who execute them, may be punished; the actors under letters of marque and reprisal may be mulcted; coinage, bills of credit, unwarranted tenders, and the impairing of contracts between individuals, may be annihilated. But this redress goes only half way; as some of the preceding unconstitutional actions must pass without censure, unless states can be made defendants.

What is to be done, if, in consequence of a bill of attainder, or an ex post facto law, the estate of a citizen shall be confiscated, and deposited in the treasury of a state? What, if a state should adulterate or coin money below the congressional standard, emit bills of credit, or enact unconstitutional tenders, for the purpose of extinguishing its own debts? What, if a state should impair her own contracts? These evils, and others which might be enumerated like them, cannot be corrected, without a suit against the state. It is not denied, that one state may be sued by another; and the reason would seem to be the same, why an individual, who is aggrieved, should sue the state aggrieving. A distinction between the cases is supportable only on a supposed comparative inferiority of the plaintiff. But the framers of the constitution could never have thought thus: they must have viewed human rights in their essence, not in their mere form. They had heard, seen, I will say, felt that legislators were not so far sublimed above other men, as to soar beyond the region of passion. Unfledged as America
of a common judicatory. So ready were the ancient governments to merge the injuries to individuals in a state quarrel, and so certain was it, that any judicial decree must have been enforced by arms, that the mild form of a legal discussion could not but be viewed with indifference, if not contempt. And yet, it would not be extravagant, to conjecture, that all civil causes were sustained before the Amphyctionic Council. (a) What we know of the Achæan confederacy, exhibits it as purely national, or rather consolidated. They had common magistrates, taken by rotation from the towns; (b) and the amenability of the constituent cities to some supreme tribunal, is as probable as otherwise. But, in fact, it would be a waste of time, to dwell upon these obscurities. To catch all the semblances of confederacies, scattered through the historic page, would be no less absurd, than to search for light in regions of darkness, or a stable jurisprudence in the midst of barbarity and bloodshed. Advancing then, into more modern times, the Helvetic union presents itself; one of whose characteristics is, that there is no common judicatory. (Stanyan, 117.) Nor does it obtain in Holland. But it cannot be concluded from hence, that the Swiss, or the Dutch, the jealousy of whom would not suffer them to adopt a national government, would deem it an abasement, to summon a state, connected as the United States are, before a national tribunal. But our anxiety for precedents is relieved by appealing to the Germanic Empire. The jumble of fifty principalities together, no more deserves * the name of one body, than the incoherent parts of Nebuchadnezzar’s image. The princes wage war, [542*] without the consent of their paramount sovereign; they even wage war upon each other; nay, upon the emperor himself; after which, it will add but little to say, that they are distinct sovereignties. And yet, both the Imperial Chamber, and the Aulic Council hear and determine the complaints of individuals against the Prince. (c)

It will not surely be required to assign a reason, why the confederation did not convey a similar jurisdiction; since that scanty and strict paper was of so different a hue and feature from the constitution, as scarcely to appear the child of the same family.

I hold it, therefore, to be no degradation of sovereignty, in the states, to submit to the supreme judiciary of the United States. At the same time, by way of anticipating an objection, I assert, that it will not follow, from these premises, that the United States themselves may be sued. For the head of a confederacy is not within the reach of the judicial authorities of its inferior members. It is exempted by its peculiar pre-eminences. We have, indeed, known petitions of right, *monstrans de droit*, and even process in the exchequer. But the first is in the style of treaty; the second, being apparent upon the record, is so far a deduction from the royal title; the third, as in the Banker’s case, in the 11th volume of the State Trials, is applicable only, where the charge is claimed against the revenue; and all of them are widely remote from an involuntary subjection of the sovereign to the cognisance of his own courts.

2d. But what, if the high independence of dissevered nations remained

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(a) See Anacharsis, 3 Vol. p. 300.
(b) See Gast’s Hist. of Greece, p. 321.
(c) See History of Germanic Body, p. 157-8.
them: of course, the part not surrendered must remain as it did before. The powers of the general government, either of a legislative or executive nature, or which particularly concerns treaties with foreign powers, do for the most part (if not wholly) affect individuals, and not states: they require no aid from any state authority. This is the great leading distinction between the old articles of confederation, and the present constitution. The judicial power is of a peculiar kind. It is indeed commensurate with the ordinary legislative and executive powers of the general government, and the power which concerns treaties. But it also goes further. Where certain parties are concerned, although the subject in controversy does not relate to any of the special objects of authority of the general government, wherein the separate sovereignties of the states are blended in one common mass of supremacy, yet the general government has a judicial authority in regard to such subjects of controversy, and the legislature of the United States may pass all laws necessary to give such judicial authority its proper effect. So far as states, under the constitution, can be made legally liable to this authority, so far, to be sure, they are subordinate to the authority of the United States, and their individual sovereignty is in this respect limited. But it is limited no further than the necessary execution of such authority requires. The authority extends only to the decision of controversies in which a state is a party, and providing laws necessary for that purpose. That surely can refer only to such controversies in which a state can be a party; in respect to which, if any question arises, it can be determined, according to the principles I have supported, in no other manner than by a reference either to pre-existent laws, or laws passed under the constitution and in conformity to it.

Whatever be the true construction of the constitution in this particular; whether it is to be construed as intending merely a transfer of jurisdiction from one tribunal to another, or as authorizing the legislature to provide laws for the decision of all possible controversies in which a state may be involved with an individual, without regard to any prior exemption; yet it is certain, that the legislature has in fact proceeded upon the former supposition, and not upon the latter. For, besides what I noticed before, as to an express reference to principles and usages of law, as the guide of our proceeding, it is observable, that in instances like this before the court, this court hath a concurrent jurisdiction only; the present being one of those cases where, by the judicial act, this court hath original but not exclusive jurisdiction. This court, therefore, under that act, can exercise no authority, in such instances, but such authority as, from the subject-matter of it, may be exercised in some other court. There are no courts with which such a concurrence can be suggested but the circuit courts, or courts of the different states. With the former, it cannot be, for admitting that the constitution is not to have a restrictive operation, so as to confine all cases in which a state is a party, exclusively to the supreme court (an opinion to which I am strongly inclined), yet, there are no words in the definition of the powers of the circuit court, which give a color to an opinion, that where a suit is brought against a state, by a citizen of another state, the circuit court could exercise any jurisdiction at all. If they could, however, such a jurisdiction, by the very terms of their authority, could be only concurrent with the courts of the several states. It follows, therefore, unquestionably, I think, that look
ing at the act of congress, which I consider is on this occasion the limit of our authority (whatever further might be constitutionally enacted), we can exercise no authority, in the present instance, consistently with the clear intention of the act, but such as a proper state court would have been, at least, competent to exercise, at the time the act was passed.

If, therefore, no new remedy be provided (as plainly is the case), and consequently, we have no other rule to govern us, but the principles of the pre-existent laws, which must remain in force until superseded by others, then it is incumbent upon us to inquire, whether, previous to the adoption of the constitution (which period, or the period of passing the law, in respect to the object of this inquiry, is perfectly equal), an action of the nature like this before the court could have been maintained against one of the states in the Union, upon the principles of the common law, which I have shown to be alone applicable. If it could, I think, it is now maintainable here: if it could not, I think, as the law stands at present, it is not maintainable; whatever opinion may be entertained, upon the construction of the constitution as to the power of congress to authorize such a one. Now, I presume, it will not be denied, that in every state in the Union, previous to the adoption of the constitution, the only common-law principles in regard to suits that were in any manner admissible in respect to claims against the state, were those which, in England, apply to claims against the crown; there being certainly no other principles of the common law which, previous to the adoption of this constitution, could, in any manner, or upon any color, apply to the case of a claim against a state, in its own courts, where it was solely and completely sovereign, in respect to such cases, at least. Whether that remedy was strictly applicable or not, still, I apprehend, there was no other. The only remedy, in a case like that before the court, by which, by any possibility, a suit can be maintained against the crown, in England, or, at any period from which the common law, as in force in America, could be derived, I believe, is that which is called a Petition of right. It is stated, indeed, in Com. Dig. 105, that “until the time of Edward I., the King might have been sued in all actions, as a common person.” And some authorities are cited for that position, though it is even there stated as a doubt. But the same authority adds—“but now, none can have an action against the King, but one shall be put to sue to him by petition.” This appears to be a quotation or abstract from Thelwall’s Digest, which is also one of the authorities quoted in the former case. And this book appears (from the law catalogue) to have been printed so long ago as the year 1579. The same doctrine appears (according to a quotation in Blackstone’s Commentaries, 1 vol. 243) to be stated in Finch’s Law 253, the first edition of which, it seems, was published in 1579. This also more fully appears in the case of The Bankers, and particularly from the celebrated argument of Somers, in the time of Wm. III., for, though that case was ultimately decided against Lord Somers’s opinion, yet, the ground on which the decision was given, no way invalidates the reasoning of that argument, so far as it respects the simple case of a sum of money demandable from the King, and not by him secured on any particular revenues. The case is reported in Freeman, vol. i, p. 331; 5 Mod. 29; Skin. 601; and lately very elaborately in a small pamphlet published by Mr. Harrgave, which contains all the reports at
with annual sums equal to an interest of three per cent., until redeemed by payment of one moiety of the principal sums. Hargrave's Case of the Bankers, 1, 2, 3.

Upon perusing the whole of this case, these inferences naturally follow: 1st. That admitting the authority of that decision, in its fullest extent, yet, it is an authority only in respect to such cases, where letters-patent from the crown have been granted for the payment of certain sums out of a particular revenue. 2d. That such relief was grantable in the exchequer, upon no other principle than that that court had a right to direct the issues of the exchequer as well after the money was deposited there, as while (in the exchequer language) it was in transitu. 3d. That such an authority could not have been exercised by any other court in Westminster Hall, nor by any court, that, from its particular constitution, had no control over the revenues of the kingdom. Lord C. J. Holt, and Lord Somers (though they differed in the main point) both agreed in that case, that the court of King's bench could not send a writ to the treasury. Hargrave's case, 45, 89. Consequently, no such remedy could, under any circumstances, I apprehend, be allowed in any of the American states, in none of which it is presumed any court of justice hath any express authority over the revenues of the state such as has been attributed to the court of exchequer in England.

The observations of Lord Somers, concerning the general remedy by petition to the King, have been extracted and referred to by some of the ablest law characters since; particularly, by *Lord C. Baron Comyns, in his digest. I shall, therefore, extract some of them, as he appears to have taken uncommon pains to collect all the material learning on the subject; and indeed is said to have expended several hundred pounds in the procuring of records relative to that case. Hargrave's Preface to the Case of the Bankers.

After citing many authorities, Lord Somers proceeds thus: "By all these authorities, and by many others, which I could cite, both ancient and modern, it is plain, that if the subject was to recover a rent or annuity, or other charge from the crown; whether it was a rent or annuity, originally granted by the King, or issuing out of lands, which by subsequent title came to be in the King's hands; in all cases, the remedy to come at it was, by petition to the person of the King; and no other method can be shown to have been practised at common law. Indeed, I take it to be generally true, that in all cases where the subject is in the nature of a plaintiff, to recover anything from the King, his only remedy, at common law, is to sue by petition to the person of the King. I say, where the subject comes as a plaintiff. For, as I said before, when, upon a title found for the King by office, the subject comes in to traverse the King's title, or to show his own right, he comes in the nature of a defendant; and is admitted to interplead in the case, with the King, in defence of his title, which otherwise would be defeated by finding the office. And to show that this was so, I would take notice of several instances. That, in cases of debts owing by the crown, the subject's remedy was by petition, appears by Aynesham's Case, Ryley, 251, which is a petition for 19l. due for work done at Carnarvon castle. So, Ryley 251, the executors of John Estrateling petition for 132l. due to the testator,
considered, which can, by any person, be pretended, in any manner, to apply to this case, but that which concerns corporations. The applicability of this, the attorney-general, with great candor, has expressly waived. But as it may be urged on other occasions, and as I wish to give the fullest satisfaction, I will say a few words to that doctrine. Suppose, therefore, it should be objected, that the reasoning I have now used, is not conclusive, because, inasmuch as a state is made subject to the judicial power of congress, its sovereignty must not stand in the way of the proper exercise of that power, and therefore, in all such cases (though in no other), a state can only be considered as a subordinate corporation merely. I answer: 1st. That this construction can only be allowed, at the utmost, upon the supposition that the judicial authority of the United States, as it respects states, cannot be effectuated, without proceeding against them in that light: a position, I by no means admit. 2d. That according to the principles I have supported in this argument, admitting that states ought to be so considered for that purpose, an act of the legislature is necessary to give effect to such a construction, unless the old doctrine concerning corporations will naturally apply to this particular case. 3d. That as it is evident, the act of congress has not made any special provision in this case, grounded on any such construction, so it is to my mind perfectly clear, that we have no authority, upon any supposed analogy between the two cases, to apply the common doctrine concerning corporations, to the important case now before the court. I take it for granted, that when any part of an ancient law is to be applied to a new case, the circumstances of the new case must agree in all essential points with the circumstances of the old cases to which that ancient law was formerly appropriated. Now, there are, in my opinion, the most essential differences between the old cases of corporations, to which the law intimated has reference, and the great and extraordinary case of states separately possessing, as to everything simply relating to themselves, the fullest powers of sovereignty, and yet, in some other defined particulars, subject to a superior power, composed out of themselves, for the common welfare of the whole. The only law concerning corporations, to which I conceive the least reference is to be had, is the common law of England on that subject. I need not repeat the observations I made in respect to the operation of that law in this country. The word “corporations,” in its largest sense, has a more extensive meaning than people generally are aware of. Any body politic (sole or aggregate), whether its power be restricted or transcendent, is in this sense, “a corporation.” The king, accordingly, in England, is called a corporation. 10 Co. 29 b. So also, by a very respectable author (Sheppard, in his Abridgement, 1 vol. 431), is the parliament itself. In this extensive sense, not only each state singly, but even the United States may, without impropriety, be termed “corporations.” I have, therefore, in contradistinction to this large and indefinite term, used the term “subordinate corporations,” meaning to refer to such only (as alone capable of the slightest application, for the purpose of the objection) whose creation and whose powers are limited by law.

The differences between such corporations, and the several states in the Union, as relative to the general government, are very obvious, in the following particulars. 1st. A corporation is a mere creature of the king, or of parliament; very rarely, of the latter; most usually, of the former only.
5th day of the next term, or then show cause to the contrary, judgment be then entered up against the state, and a writ of inquiry of damages be awarded."

WILSON, Justice—This is a case of uncommon magnitude. One of the parties to it is a State, certainly respectable, claiming to be sovereign. The question to be determined is, whether this state, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the supreme court of the United States? This question, important in itself, will depend on others, more important still; and may, perhaps, be ultimately resolved into one, no less radical than this—"do the People of the United States form a Nation?"

A cause so conspicuous and interesting, should be carefully and accurately viewed, from every possible point of sight. I shall examine it, 1st. By the principles of general jurisprudence. 2d. By the laws and practice of particular states and kingdoms. From the law of nations, little or no illustration of this subject can be expected. By that law, the several states and governments spread over our globe, are considered as forming a society, not a nation. It has only been by a very few comprehensive minds, such as those of Elizabeth and the Fourth Henry, that this last great idea has been even contemplated. 3d. And chiefly, I shall examine the important question before us, by the constitution of the United States, and the legitimate result of that valuable instrument.

I. I am first to examine this question by the principles of general jurisprudence. What I shall say upon this head, I introduce, by the observation of an original and profound writer, who, on the philosophy of mind, and all the sciences attendant on this prime one, has formed an era not less remarkable, and far more illustrious, than that formed by the justly celebrated Bacon, in another science, not prosecuted with less ability, but less dignified as to its object; I mean the philosophy of nature. Dr. Reid, in his excellent inquiry into the human mind, on the principles of common sense, speaking of the sceptical and illiberal *philosophy, which, under bold, but false pretensions to liberality, prevailed in many parts of Europe before he wrote, makes the following judicious remark: "The language of philosophers, with regard to the original faculties of the mind, is so adapted to the prevailing system, that it cannot fit any other; like the coat that fits the man for whom it was made, and shows him to advantage, which yet will fit very awkward upon one of a different make, although as handsome and well proportioned. It is hardly possible to make any innovation in our philosophy concerning the mind and its operations, without using new words and phrases, or giving a different meaning to those that are received." With equal propriety, may this solid remark be applied to the great subject, on the principles of which the decision of this court is to be founded. The perverted use of genus and species in logic, and of impressions and ideas in metaphysics, have never done mischief so extensive or so practically pernicious, as has been done by states and sovereigns, in politics and jurisprudence; in the politics and jurisprudence even of those who wished and meant to be free. In the place of those expressions, I intend not to substitute new ones; but the expressions themselves I shall certainly use for purposes different from those, for which hitherto they have been frequently used; and one of them I shall apply to an object still more different from that, to which it
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In another sense, according to some writers, (a) every state, which governs itself, without any dependence on another power, is a sovereign state. Whether, with regard to her own citizens, this is the case of the state of Georgia; whether those citizens have done, as the individuals of England are said, by their late instructors, to have done, surrendered the supreme power to the state or government, and reserved nothing to themselves; or whether, like the people of other states, and of the United States, the citizens of Georgia have reserved the supreme power in their own hands; and on that supreme power, have made the state dependent, instead of being sovereign; these are questions, to which, as a judge in this cause, I can neither know nor suggest the proper answers; though, as a citizen of the Union, I know, and am interested to know, that the most satisfactory answers can be given. As a citizen, I know, the government of that state to be republican; and my short definition of such a government is—one constructed on this principle, that the supreme power resides in the body of the people. As a judge of this court, I know, and can decide, upon the knowledge, that the citizens of Georgia, when they acted upon the large scale of the Union, as a part of the "People of the United States," did not surrender the supreme or sovereign power to that state; but, as to the purposes of the Union, retained it to themselves. As to the purposes of the Union, therefore, Georgia is not a sovereign state. If the judicial decision of this case forms one of those purposes; the allegation that Georgia is a sovereign state, is unsupported by the fact. Whether the judicial decision of this cause is, or is not, one of those purposes, is a question which will be examined particularly, in a subsequent part of my argument.

There is a third sense, in which the term sovereign is frequently used, and which it is very material to trace and explain, as it furnishes a basis for what, I presume, to be one of the principal objections against the jurisdiction of this court over the State of Georgia. In this sense, sovereignty is derived from a feudal source; and like many other parts of that system, so degrading to man, still retains its influence over our sentiments and conduct, though the cause, by which that influence was produced, never extended to the American states. The accurate and well informed President Henault, in his excellent chronological abridgment of the History of France, tells us, that, about the end of the second race of Kings, a new kind of possession was acquired, under the name of fief. The governors of cities and provinces usurped equally the property of land, *and the administration of justice; and established themselves as proprietary seigniors over those places in which they had been only civil magistrates or military officers. By this means, there was introduced into the state a new kind of authority, to which was assigned the appellation of sovereignty (b). In process of time, the feudal system was extended over France, and almost all the other nations of Europe; and every kingdom became, in fact, a large fief. Into England, this system was introduced by the conqueror; and to this era we may, probably, refer the English maxim, that the King or sovereign is the fountain of justice. But in the case of the King, the sovereignty had a double operation. While it vested him him with jurisdiction over others, it excluded all others from jurisdiction over him. With regard to him,

(a) Vatt. lib. 1, § 4.  
(b) Henault 113.
the expression *L'Etat*; and *complained of it as an indecency offered to his person and character. And, indeed, that kings should imagine themselves the final causes, for which men were made, and societies were formed, and governments were instituted, will cease to be a matter of wonder or surprise, when we find, that lawyers and statesmen and philosophers have taught or favored principles which necessarily lead to the same conclusion. Another instance, equally strong, but still more astonishing, is drawn from the British government, as described by Sir William Blackstone and his followers. As described by him and them, the British is a despotic government. It is a government without a people. In that government, as so described, the sovereignty is possessed by the parliament: in the parliament, therefore, the supreme and absolute authority is vested: *(a)* in the parliament resides that uncontrollable and despotic power, which, in all governments, must reside somewhere. The constituent parts of the parliament are the King's Majesty, the Lords spiritual, the Lords temporal, and the Commons. The King and these three estates together form the great corporation or body politic of the kingdom. All these sentiments are found; the last expressions are found *verbatis*, *(b)* in the Commentaries upon the Laws of England. *(c)* The parliament form the great body politic of England! What, then, or where, are the people? Nothing! Nowhere! They are not so much as even the "baseless fabric of a vision!" From legal contemplation, they totally disappear! Am I not warranted in saying that, if this is a just description, a government, so and justly so described, is a despotic government? Whether this description is or is not a just one, is a question of very different import.

In the United States, and in the several states which compose the Union, we go not so far: but still, we go one step farther than we ought to go, in this unnatural and inverted order of things. The states, rather than the people, for whose sakes the states exist, are frequently the objects which attract and arrest our principal attention. This, I believe, has produced much of the confusion and perplexity, which have appeared in several proceedings and several publications on state-politics, and on the politics, too, of the United States. Sentiments and expressions of this inaccurate kind prevail in our common, even in our convivial, language. Is a toast asked? "The United States," instead of the "People of the United States," is the toast given. This is not politically correct. The toast is meant to present to view the first great object in the Union: it presents only the second: it presents only the artificial person, instead of the natural persons, who spoke it into existence. *A state*, I cheerfully *admit*, is the noblest work [*463* of man: but man himself, free and honest, is, I speak as to this world, the noblest work of God! Concerning the prerogative of Kings, and concerning the sovereignty of states, much has been said and written; but little has been said and written, concerning a subject much more dignified and important, the majesty of the people. The mode of expression, which I would substitute in the place of that generally used, is not only politically, but also (for between true liberty and true taste there is a close alliance) classically, more correct. On the mention of Athens, a thousand refined and endearing associations

rush at once into the memory of the scholar, the philosopher, and the patriot. When Homer, one of the most correct, as well as the oldest of human authorities, enumerates the other nations of Greece, whose forces acted at the siege of Troy, he arranges them under the names of their different Kings or Princes: but when he comes to the Athenians, he distinguishes them by the peculiar appellation of the People(a) of Athens. The well-known address used by Demosthenes, when he harangued and animated his assembled countrymen, was "O! men of Athens." With the strictest propriety, therefore, classical and political, our national scene opens with the most magnificent object, which the nation could present: "The People of the United States" are the first personages introduced. Who were those people? They were the citizens of thirteen states, each of which had a separate constitution and government, and all of which were connected together by articles of confederation. To the purposes of public strength and felicity, that confederacy was totally inadequate. A requisition on the several states terminated its legislative authority: executive or judicial authority it had none. In order, therefore, to form a more perfect union, to establish justice, to insure domestic tranquility, to provide for common defence, and to secure the blessings of liberty, those people, among whom were the people of Georgia, ordained and established the present constitution. By that constitution, legislative power is vested, executive power is vested, judicial power is vested.

The question now opens fairly to our view, could the people of those states, among whom were those of Georgia, bind those states, and Georgia, among the others, by the legislative, executive, and judicial power so vested? If the principles on which I have founded myself, are just and true; this question must unavoidably receive an affirmative answer. If those states were the work of those people; those people, and, that I may apply the case closely, the people of Georgia, in particular, *could alter, as they pleased, their former work: to any given degree, they could diminish as well as enlarge it: any or all of the former state-powers, they could extinguish or transfer. The inference, which necessarily results, is, that the constitution ordained and established by those people; and, still closely to apply the case, in particular, by the people of Georgia, could vest jurisdiction or judicial power over those states, and over the state of Georgia in particular.

The next question under this head is—has the constitution done so? Did those people mean to exercise this, their undoubted power? These questions may be resolved, either by fair and conclusive deductions, or by direct and explicit declarations. In order, ultimately, to discover, whether the people of the United States intended to bind those states by the judicial power vested by the national constitution, a previous inquiry will naturally be: Did those people intend to bind those states by the legislative power vested by that constitution? The articles of confederation, it is well known, did not operate upon individual citizens, but operated only upon states. This defect was remedied by the national constitution, which, as all allow, has an operation on individual citizens. But if an opinion, which some seem to entertain, be just; the defect remedied, on one side, was balanced by a defect introduced.

(a) Iliad, I., 2, v. 54. Ἀνάστημα, Pol. 12, one of the words of which democracy is compounded.

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constitution of the United States. From all, the combined inference is, that the action lies.

Cushing, Justice.—The grand and principal question in this case is, whether a state can, by the federal constitution, be sued by an individual citizen of another state?

The point turns not upon the law or practice of England, although, perhaps, it may be in some measure elucidated thereby, nor upon the law of any other country whatever; but upon the constitution established by the people of the United States; and particularly, upon the extent of powers given to the federal judiciary in the 2d section of the 3d article of the constitution. It is declared, that "the judicial power shall extend to all cases in law and equity arising under the constitution, the laws of the United States, or treaties made or which shall be made under their authority; to all cases affecting ambassadors or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies, to which the United *States shall be a party; to controversies between two or more states and citizens of another state; between citizens of different states; between citizens of the same state, claiming lands under grants of different states; and between a state and citizens thereof and foreign states, citizens or subjects." The judicial power, then, is expressly extended to "controversies between a state and citizens of another state." When a citizen makes a demand against a state, of which he is not a citizen, it is as really a controversy between a state and a citizen of another state, as if such state made a demand against such citizen. The case, then, seems clearly to fall within the letter of the constitution. It may be suggested, that it could not be intended to subject a state to be a defendant, because it would affect the sovereignty of states. If that be the case, what shall we do with the immediate preceding clause—"controversies between two or more states," where a state must of necessity be defendant? If it was not the intent, in the very next clause also, that a state might be made defendant, why was it so expressed, as naturally to lead to and comprehend that idea? Why was not an exception made, if one was intended?

Again, what are we to do with the last clause of the section of judicial powers, viz., "controversies between a state, or the citizens thereof, and foreign states or citizens." Here again, states must be liable or liable to be made defendants by this clause, which has a similar mode of language with the two other clauses I have remarked upon. For if the judicial power extends to a controversy between one of the United States and a foreign state, as the clause expresses, one of them must be defendant. And then, what becomes of the sovereignty of states so far as suing affects it? But although the words appear reciprocally to affect the state here and a foreign state, and put them on the same footing so far as may be, yet ingenuity may say, that the state here may sue, but cannot be sued; but that the foreign state may be sued, but cannot sue. We may touch foreign sovereignties, but not our own. But I conceive, the reason of the thing, as well as the words of the constitution, tend to show that the federal judicial power extends to a suit brought by a foreign state against any one of the United States. One design of the general government was, for managing the great affairs of peace and war and the general defence, which were impossible to be conducted,
citizen, as defendant; and the truth is, that the state of Georgia is at this moment prosecuting an action in this court against two citizens of South Carolina. (a)

The only remnant of objection, therefore, that remains is, that the state is not bound to appear and answer as a defendant, at the suit of an individual; but why it is unreasonable that she should be so bound, is hard to conjecture: that rule is said to be a bad one, which does not work both ways; the citizens of Georgia are content with a right of suing citizens of other states; but are not content that citizens of other states should have a right to sue them.

Let us now proceed to inquire, whether Georgia has not, by being a party to the national compact, consented to be suable by individual citizens of another state. This inquiry naturally leads our attention, 1st. To the design of the constitution. 2d. To the letter and express declaration in it.

Prior to the date of the constitution, the people had not any national tribunal to which they could resort for justice; the distribution of justice was then confined to state judicatories, in whose institution and organization the people of the other states had no participation, and over whom they had not the least control. There was then no general court of appellate jurisdiction, by whom the errors of state courts, affecting either the nation at large, or the citizens of any other state, could be revised and corrected. Each state was obliged to acquiesce in the measure of justice which another state might yield to her, or to her citizens; and that, even in cases where state considerations were not always favorable to the most exact measure. There was danger that from this source animosities would in time result; and as the transition from animosities to hostilities was frequent in the history of independent states, a common tribunal for the termination of controversies became desirable, from motives both of justice and of policy.

Prior also to that period, the United States had, by taking a place among the nations of the earth, become amenable to the law of nations; and it was their interest, as well as their duty, to provide, that those laws should be respected and obeyed; in their national character and capacity, the United States were responsible to foreign nations for the conduct of each state, relative to the laws of nations, and the performance of treaties; and there the inexpediency of referring all such questions to state courts, and particularly to the courts of delinquent states, became apparent. While all the states were bound to protect each, and the citizens of each, it was highly proper and reasonable, that they should be in a capacity, not only to cause justice to be done to each, and the citizens of each; but also to cause justice to be done by each, and the citizens of each; and that, not by violence and force, but in a stable, sedate and regular course of judicial procedure.

These were among the evils which it was proper for the nation, that is, the people of all the United States, to provide by a national judiciary, to be instituted by the whole nation, and to be responsible to the whole nation.

Let us now turn to the constitution. The people therein declare, that their design in establishing it, comprehended six objects. 1st. To form a more perfect union. 2d. To establish justice. 3d. To ensure domestic

(a) Georgia v. Brailsford et al., ante, p. 402.
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of the two states to grant the land, are drawn into question, neither of the two states ought to decide the controversy. 10th. To controversies between a state, or the citizens thereof, and foreign states, citizens or subjects; because, as every nation is responsible for the conduct of its citizens towards other nations, all questions touching the justice due to foreign nations or people, ought to be ascertained by, and depend on national authority. Even this cursory view of the judicial powers of the United States, leaves the mind strongly impressed with the importance of them to the preservation of the tranquillity, the equal sovereignty and the equal right of the people.

The question now before us renders it necessary to pay particular attention to that part of the 2d section, which extends the judicial power "to controversies between a state and citizens of another state." It is contended, that this ought to be construed to reach none of these controversies, excepting those in which a state may be plaintiff. The ordinary rules for construction will early decide, whether those words are to be understood in that limited sense.

This extension of power is remedial, because it is to settle controversies. It is, therefore, to be construed liberally. It is politic, wise and good, that, not only the controversies in which a state is plaintiff, but also those in which a state is defendant, should be settled; both cases, therefore, are within the reason of the remedy; and ought to be so adjudged, unless the obvious, plain and literal sense of the words forbid it. If we attend to the words, we find them to be express, positive, free from ambiguity, and without room for such implied expressions: "The judicial power of the United States shall extend to controversies between a state and citizens of another state." If the constitution really meant to extend these powers only to those controversies in which a state might be plaintiff, to the exclusion of those in which citizens had demands against a state, it is inconceivable, that it should have attempted to convey that meaning in words, not only so incompetent, but also repugnant to it; if it meant to exclude a certain class of these controversies, why were they not expressly excepted; on the contrary, not even an intimation of such intention appears in any part of the constitution. It cannot be pretended, that where citizens urge and insist upon demands against a state, which the state refuses to admit and comply with, that there is no controversy between them. If it is a controversy between them, then it clearly falls not only within the spirit, but the very words of the constitution. What is it to the cause of justice, and how can it affect the definition of the word controversy, whether the demands which cause the dispute, are made by a state against citizens of another state, or by the latter against the former? When power is thus extended to a controversy, it necessarily, as to all judicial purposes, is also extended to those between whom it subsists.

The exception contended for, would contradict and do violence to the great and leading principles of a free and equal national government, one of the great objects of which is, to ensure justice to all; to the few against the many, as well as to the many against the few. It would be strange, indeed, that the joint and equal sovereigns of this country, should, in the very constitution by which they professed to establish justice, so far deviate from the plain path of equality and impartiality, as to give to the collective citizens of one state, a right of suing individual citizens of another state, and
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