CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

EASTERN DISTRICT, MARCH TERM, 1822.

HERMAN *against* FREEMAN.

IN ERROR.

An agreement to refer all matters in variance between A. and B., to certain persons, "who, or a majority of whom, shall make an award under their hands and seals, under a rule, under the Act of 1705, which makes an award of referees as binding as the verdict of a jury," is sufficient to authorize the entry of an action and a rule of reference, without being attested by subscribing witnesses, or accompanied by an affidavit that it was duly executed; and the docket entry of such an agreement, is evidence of its having been filed. If a party deny the existence of such a submission, he should apply to the Court in which the action was entered, to strike it off.

On such a submission, it is not necessary to file a declaration, or to state the cause of action in the agreement to refer; which embraces all causes of action between the parties.

If the rule does not state the time and place of meeting, or the notice to be given, the Court will set aside the report, if reasonable notice be not given, or if it be shown that no notice was given of a particular meeting; but these exceptions, being founded in fact, are not proper for the decision of a Court of Error.

ERROR to the District Court for the city and county of *Philadelphia*.

An award of referees was made and returned in the Court below, in favour of *Christopher Freeman* against *William Herman* for the sum of 131 dollars, under the following submission, which appeared in the docket entries reurned with the record.

"Amicable action, entered by agreement filed, *June* 3d, 1819. It is agreed, that all matters in variance, between *Christopher Freeman* and *William Herman*, be referred to *Sylvester Roberts, Benjamin Martin*, and *Joshua Raybold:* they *or a majority of [*10] them, shall make an award under their hands and seals, under a rule, under the Act of 1705, which makes an award of referees as binding as a verdict of a jury."

(Herman *v.* Freeman.)

The defendant filed the following exceptions to the award in the Court below.

1. The agreement filed, does not authorize the entry of an action.
2. There was no subscribing witness to the agreement, nor any affidavit exhibited to the prothonotary, that it was duly executed.
3. It does not appear what was the nature of the action, when or where the referees were to meet, nor what notice was to be given.
4. The award is not according to the submission.
5. The defendant had no notice of the meeting of the 18th of *June*.
6. The plaintiff's cause of action was an unsettled partnership account between the plaintiff and defendant.

The Court below overruled these exceptions, and entered judgment on the award in favour of the plaintiff.

Kittera, for the plaintiff in error, suggested diminution, in the original agreement, not being sent up with the record. A *certiorari* issued, and it was returned, that no such paper was to be found; whereupon,

Kittera, insisted, that the judgment was erroneous. It did not appear that the parties agreed to enter this action in the District Court, or in any Court, and there must be a suit depending, to justify a reference under the Act of 1705. Nor does it appear whether the cause of action for which the suit was brought, was case, debt, ejectment or otherwise.

King and *T. Sergeant*, answered, that the agreement to refer under the Act of 1705, authorized the entry of an action: and that where all matters in variance are referred, it is unnecessary to specify any form of action. They cited *Massey* v. *Thomas*, 6 *Binn.* 333.

[*11] *The opinion of the Court was delivered by

DUNCAN, J.—The determination of causes by referees, under a rule of Court, has been so frequent, and is so useful a practice, that Courts of justice favour them, and do not lend a ready ear to formal objections, when no substantial rule of justice has been violated.

The submission in this case is expressly under the Act of 1705, and is different from the three species of awards in *England*, which are, *First*, Arbitration bonds out of Court. *Second*, Submissions in causes depending in Court. *Third*, Bonds of arbitration under stat. 9 and 10 *W.* 3. *C.* 15. *Williams* v. *Craig*, 1 *Dall.* 313. The reference under the Act of 1705, is where the plaintiff and defendant consent to a rule of Court, for the adjustment of their controversies by persons mutually chosen by themselves.

The paper filed affords such evidence of consent. It is the entry of an amicable action, designating the parties as plaintiff and defendant, and a submission of all matters in variance between them under the Act of 1705; specially referring to that Act, and stating its provisions as to the binding effect of the award to be made. The docket entry pursues the agreement; it required not the ceremony of subscribing witnesses. If the plaintiff had denied the existence of such submission, the Court below should have been moved to strike it off. The docket entry is the full entry of a submission. The record, we must take as absolute verity. No such objection was made when the report was filed, but the objections in fact were, that the defendant had not notice of last meeting of the referees, and that the cause of action was a partnership account. It is true that the entry does not state what was the cause of action, but the act does not require it, nor would it have comported with the views of the parties,

which were, not the submission of any particular cause of action, but of all matters in variance between them; not of the matters confined to one particular cause of action, but comprehending all the matters in controversy between them; all causes of action.

In cases of compulsory arbitration, no pleadings are necessary; neither declaration, nor statement nor plea. 6 *Binn.* 177, *Brown* v. *Scheaffer.* And in delivering his opinion in that case, the CHIEF JUSTICE thus expresses himself, "Before the system of arbitration had been introduced, it had been decided by this Court, that in cases of voluntary reference, judgment might *be entered on a report of referees [*12] without declaration. So in *Maryland;* judgment on an award on a reference by consent, affirmed on writ of error, though no declaration was filed in the cause. *Dorsey* v. *The State,* 3 *Harris & McHenry,* 388. The rule here did not stipulate any time of notice. In such case, the Court would have set aside the report unless reasonable notice had been given, and the plaintiff in error had excepted that no notice had been given to him of the last meeting of the referees. This was an exception in point of fact, which does not come up for the decision of this Court. It must be taken for granted that he failed in this exception. The plaintiff in error has not made good any of his exceptions to this record, and the judgment is affirmed.

Judgment affirmed.

Appeal of BAKER and another, from the settlement in the Orphans' Court of Philadelphia county, of the account of RICHARDS, Guardian.

One, being about to marry a widow, who had an estate of her own, consisting of shop goods and outstanding debts, and household furniture and effects, which had belonged to her former husband, entered into articles, by which it was agreed, that she should enjoy all the property she then possessed, or might afterwards acquire, as her separate estate, with power to dispose of it as she pleased, in her life time, or by last will; and in case of her making no disposition of it by will or otherwise, it was to be equally divided among all her children by her first husband. There was no inventory of the goods or outstanding debts, but it was agreed that the amount or value of the goods, chattels, wares, merchandises, and debts then due or to become due to the said widow was 4000 dollars. The marriage took place, and the husband was appointed guardian of the infant children of his wife by her first husband, and was in possession of the whole of his wife's property, subject to her right to dispose of it: and she did dispose of part of it, in her life time. *Held,* that on the settlement of his accounts with his wards, the guardian was not chargeable with the whole amount at which her separate estate was agreed to be valued, but only with the balance remaining in his hands, after deducting the amount of payments, made by order of his wife, from the gross amount of receipts.

In stating his account with his wife's separate estate, he charged himself with "Sundries had for my children, 330 dollars, 66 cents." He afterwards paid his wife a sum of money with which he credited himself thus, "By cash paid Mrs. R. for sundries had on account of my children, 310 dollars." The credit was allowed.

It is the duty of a guardian to keep a separate account with each of his wards, and it is no justification for him, that he suffered household goods, &c., which ought to have been distributed equally among all the children, to go into the possession of some of the family. But the Court refused the appellants interest on the value of furniture, books, plate, &c. from the time of their mother's death, when they were entitled to receive them.

Where money is in the hands of a guardian, which has been used by himself, or which

(Baker and another *v.* Richards.)

might have been put out to interest, but for his negligence, he is chargeable with interest. But he is allowed to keep a reasonable sum on hand for contingencies, and also a reasonable time to put out the surplus.

AFTER argument by *Atherton* and *Binney* for the appellants, and *Tod* and *Condy* for the appellee,

[*13] *The opinion of the Court was delivered by

TILGHMAN, C. J.—The appellants are children of *Hilary Baker*, who died in the year 1798. *John Richards*, the appellee, married *Mary*, the widow of *Hilary Baker* and mother of the appellants, in the year 1801; soon after which he was appointed guardian of the seven infant children of the said *Hilary* and *Mary Baker*. When *Richards* married the widow, she kept a dry goods shop, and was possessed of goods to a considerable amount, besides outstanding debts. She was also possessed of a quantity of household furniture and effects, which had belonged to the estate of her former husband, *Hilary Baker*, and was in expectation of receiving other property on the death of her father. Previous to her marriage with *Richards*, articles were executed, by which it was agreed, that she should enjoy all the property which she then possessed, or might afterwards acquire, as her separate estate. She was to have power to dispose of it, as she pleased, in her life time, or by her last will; and in case of her making no disposition of it by last will or otherwise, it was to be equally divided between all her children by her first husband. There was no inventory of the goods or outstanding debts, but it was agreed, "that the amount or value of the goods and chattels, wares, merchandises, and debts, then due, or to become due, to the said *Mary*, and then outstanding, was 4000 dollars." Mrs. *Richards*, the mother of the appellants, died in the year 1808, intestate, in consequence of which, the appellants became entitled each to one-seventh part of her separate estate. The main dispute is, concerning the amount of that separate estate. The appellants say, that *Richards* had possession of his wife's property, and is bound to account to her children for 4000 dollars, the sum at which he agreed to value it. On the contrary, *Richards* says, that his wife had the free disposal of the property during her life, and did dispose of part it; so that the balance in his hands, at the time of her death, amounted to no more than 1732 dollars 92 cents, according to an account which he has rendered. This case was submitted to auditors, in the Orphans' Court, and the evidence which was before them, has been read to us, by consent. It appears, that the principal part of the goods, which were the separate property of Mrs. *Richards*, were sold within a year

[*14] *after her second marriage. But some of them were kept in the house, and made use of from time to time, for the clothing of her children. She had five daughters, who were dressed very genteelly, and kept as much company as was common for persons of their rank in society. Mr. and Mrs. *Richards* lived in great harmony, and Mrs. *Richards*, seems to have been supplied with as much money as she desired. The account exhibited by *Richards*, of his wife's separate estate, shows the several sums of money received and paid by him, on her account. The gross amount of receipts is 7578 dollars 51 cents,—payments 5845 dollars 59 cents; leaving a balance, as before mentioned, of 1732 92 cents. If these payments were all made by the order of Mrs. *Richards*. (which was the opinion of the auditors, and there appears no good reason

to doubt it,) her husband is entitled to an allowance for them. She had a right to dispose of her property as she thought good; and although her estate was valued, by consent, at 4000 dollars, for which sum her husband would have been accountable to her children, if she had diposed of no part of it, yet, if she disposed of part, he was chargeable only with the balance. But there is one item of 310 dollars, which is particularly objected to. It is thus expressed:—"By cash paid Mrs. *Richards*, for sundries had, on account of my children, 310 dollars." The objection is, that *Richards* ought not to have credit, for money paid for goods purchased by himself, for his own children. Whether he has stated his account of his wife's property in a manner strictly mercantile, I will not say; but upon viewing both sides of the account, it will appear, that this sum of 310 dollars ought to be deducted. The mode of stating the account is this:—He first charges himself with the several sums received by him, which were the separate property of his wife; one of these charges is, "To sundries had for my children, 330 dollars 66 cents." Then, if having increased his wife's fund to the amount of 330 dollars 66 cents, by throwing into it that sum for sundry articles purchased for his children, he afterwards paid to his wife 310 dollars, which she might spend at her pleasure, he certainly must be entitled to credit for it. She had a right to call for what money she pleased, and her husband, who paid it, was discharged *pro tanto*. Mrs. *Richards'* children, *particularly her daughters, (and there were five of them) [*15] could not be maintained without considerable expense. Their father's estate was inadequate to their support, and their mother, who had property, would naturally assist them. This may account for the diminution of her estate during the seven years for which she was the wife of Mr. *Richards*. It appears to me therefore, that *Richards* ought not to be charged with more than the balance of 1732 dollars 92 cents, as stated in his account. But there was other property of his wife, not included in this account: household furniture, plate, books, &c. which had belonged to the estate of *Hilary Baker*. As these things were in constant family use, no doubt their value (with the exception of plate, of which there was but little) was greatly diminished, before the death of Mrs. *Richards*. But they were of some value, and whatever it may be, the appellants are entitled to their share. Only two of the children have appealed from the decree of the Orphans' Court. But it is no answer to them, to say, that their guardian suffered this furniture, books, &c. to go into the hands of some of the family. It was his duty to keep a *separate* account with every child, and I cannot help remarking, that in this respect he has been extremely negligent. The inevitable consequence is confusion; and if he suffers by it, he has only himself to blame. All that this Court can do, is, to appoint an auditor, who shall state an account of the goods, &c. of *Hilary Baker* which was the property of Mrs. *Richards*, and remained in specie at the time of her death, fixing a reasonable value on them, and crediting each of the appellants with one-seventh part of the whole value. If any of these goods have come to the hands of either of the appellants, they will of course be charged with them. The counsel for the appellants claims interest on the value of these goods, from the time of Mrs. *Richards'* death; but this is bearing rather too hard on the guardian. The furniture, books, plate, &c. would not have sold for much,

and as there were a good many children who wanted the use of them, it was not unreasonable to suffer them to remain with the family. The two who appeal, ought to be satisfied with their share of the value, without interest. But interest is claimed likewise on the money, which, according to the guardian's own statement, was in his hands, [*16] at the *time that he was charging his wards with the expenses of their board and education. The principle adopted by the Court, is, that where money is in the hands of a guardian, which has been used by himself, or which might have been put out on interest but for his negligence, he shall be charged with interest. But he is allowed a reasonable sum for contingencies, and also a reasonable time to put out the surplus. The auditor must be directed to state an interest account, showing what money of each of the appellants was in the guardian's hands, at the end of each six months. A hundred dollars, for each, will be allowed to be retained, for contingencies; for the balance, provided it amounts to a hundred dollars, the guardian will be chargeable with interest, at the end of six months from the time it has been in hand. A less sum than one hundred dollars could not conveniently be let out, and therefore, unless that sum was in hand, there was no negligence in not letting it out. An interest account, stated on these principles, will be favourable to the guardian, because, as he kept the estates of all the children in mass, he might have between three and four hundred dollars in hand, though not more than fifty dollars belonged to each child. But in this particular case, where it appears that the guardian has considerably overpaid five of the children, who have acquiesced in the decree of the Orphans' Court, it is most convenient to state the account as it affects the appellants only, throwing out of consideration all that part of the estate, in the hands of the guardian, which did not belong to them. It will be understood, however, that the rule laid down in this case is not intended as a general precedent. When the auditor makes his report, the Court will be enabled to settle the whole matter, by a final decree.

[*17] *GRIFFITH *against* CHEW Executor of CHEW.

IN ERROR.

A confession of judgment by an executor or administrator, is an admission of assets to the amount of the debt.

If the obligee in a joint and several bond, appoint one of the administrators, of one obligor, having assets, to be one of his own executors, the debt is paid, and the surviving obligor discharged. The law is the same where the obligee in his life time, obtains several judgments against the surviving obligor, and the representatives of the deceased obligor.

FROM the bill of exceptions accompanying the record of this cause, from the Court of Common Pleas of *Philadelphia* county, it appeared that in *June* Term, 1807, a judgment was confessed in that Court, by virtue of a warrant of attorney, in an action brought by *Benjamin Chew*, the testator of the defendant in error, who was plaintiff below, against *Robert E. Griffith*, the plaintiff in error, on a joint and several bond in which

(Griffith v. Chew's executor.)

Griffith and *Philip Nicklin*, since deceased, were co-obligors, conditioned for the payment of 28,346 dollars 79 cents. To *June* term, 1812, a *scire facias* to revive the judgment, issued in the name of *Benjamin Chew* and *Elizabeth Chew*, executors of *Benjamin Chew*, deceased, to which *Griffith* appeared and pleaded payment, with leave to give the special matters in evidence. On the 26th *October*, 1820, the cause came on for trial, (the plaintiff below having previously suggested the death of his co-executrix) when the defendant, in support of his issue, and under his notice of special matter proved, that a *fieri facias* issued on the above mentioned judgment, returnable to *September* Term, 1807, by virtue of which a levy was made on a tract of land belonging to the defendant, called *Eaglesfield*. *Benjamin Chew*, the plaintiff's testator, had in his life time, entered up another judgment against the defendant, on two bonds with warrants of attorney, given by the defendant to a certain *John Warner*, which had been assigned to Mr. *Chew*, conditioned for the payment of 3180 pounds. On this last mentioned judgment a *fieri facias* issued, returnable to *September* Term, 1807, which was also levied on the same tract of land, and on a moiety of another tract, containing fifty acres, which was held by the defendant and *Philip Nicklin*, as tenants in common. Both estates having been condemned, a writ of *venditioni exponas* issued, by virtue of which they were exposed to sale on the 5th *December*, 1807. *Philip Nicklin*, in his life time, had given a mortgage to Mr. *Chew*, the plaintiff's testator, on his moiety of the tract [*18] held in common with the defendant, upon which a judgment was obtained against *Benjamin Chew*, jun. and *Juliana Nicklin*, administrators of *Philip Nicklin*, deceased, upon which a *levari facias* was issued, by virtue of which *Nicklin's* moiety of the last mentioned tract of land, was also exposed to sale on the 5th *December*, 1807. Mr. *Chew*, the testator, became the purchaser of the estate called *Eaglesfield*, for the sum of 20,600 dollars, and *John Thoburn* of the fifty acre tract, for the sum of 7750 dollars. The proceeds of these sales were paid by the Sheriff to the plaintiff in the execution, on account of his several judgments against the present defendant and *Philip Nicklin*. To *June* Term, 1808, *Benjamin Chew*, the testator, instituted a suit on the joint and several bond of *Robert E. Griffith* and *Philip Nicklin*, already mentioned, against *Benjamin Chew*, jun. and *Juliana Nicklin*, the administrators of *Philip Nicklin*, for the recovery of the balance due on the said bond, to which the defendants appeared by attorney and confessed a judgment, which was renewed by *scire facias* to *June* Term, 1812, and again to *September*, Term, 1818. After having given the evidence stated above, the defendant offered to prove, that *Benjamin Chew*, the plaintiff, at the time of becoming one of the administrators of *Philip Nicklin*, had, and still has, in his possession, fifty shares of the stock of the *Schuylkill Permanent Bridge Company*, and two shares of the stock of the *Germantown and Perkiomen Turnpike Road Company;* at the same time offering to prove their value. The evidence was objected to by the counsel for the plaintiff, and rejected by the Court. The defendant then offered to show, that *Benjamin Chew*, the plaintiff, as administrator of *Philip Nicklin*, had committed a *devastavit*, in applying the assets of the estate to the maintenance of the family of Mr. *Nicklin*, and in paying simple contract debts, when he had due notice of the existence of the said

bond. The counsel for the plaintiff objected to this evidence likewise, and the Court refused to receive it. In further support of the issue, the counsel for the defendant offered in evidence, a paper in the hand writing of the plaintiff, which he had previously delivered to the defendant, for the purpose of showing that there were in the hands of the plaintiff, as administrator of Mr. *Nicklin*, certain monies, which the [*19] *counsel for the defendant contended, amounted to a payment of the debt *pro tanto*. The admission of this paper being objected to, it was rejected by the Court.

On the several points above stated, bills of exceptions were tendered by the counsel for the defendant, and sealed by the Court.

Tod and *J. R. Ingersoll*, for the plaintiff in error.

If it can be shown that the plaintiff below could not sustain this action, provided he had assets belonging to the estate of Mr. *Nicklin*, the defendant's co-obligor, the evidence offered was strictly admissible, and the Court of Common Pleas erred in rejecting it. The separate estate of *Griffith* has already paid more than one half of the bond and the interest due upon it, and as it was the joint and several bond of *Nicklin* and *Griffith*, neither *Nicklin* nor his representatives could claim any thing further. In equity, the estate of *Nicklin* is bound to pay the remainder. The administrator of this estate, with assets in his hands, now seeks in another capacity, to compel the defendant to pay the whole of the bond, while he retains a fund, which, both at law and in equity, he ought to have applied to the payment of the proportion due from his intestate. If, after the application of all the assets in a legal course of payment, any balance should remain due from the bond, there might be some colour of equity in claiming it from the defendant, but as the case now presents itself, it cannot be supported either at law or in equity. After Mr. *Griffith's* separate estate had paid nearly two-thirds of the whole debt, the obligee commenced an action for the balance, against the administrators of the co-obligor, who appeared to the suit, and voluntarily confessed a judgment, without any reservation or restriction. Thus they admitted assets for the payment of the debt; for the law is, that if executors or administrators confess a judgment or suffer judgment to go by default, they admit assets come to their hands, and are estopped afterwards to deny it. *Rock* v. *Leighton*, 1 *Salk.* 310. *Skelton* v. *Hawling*, 1 *Wils.* 258. 3 *Bac. Ab.* 878. In what manner the assets have been applied, matters not. In contemplation of law, they are still in the [*20] hands of the administrators, and they are personally *responsible for the amount. *Wentw.* 356. The stock in the hands of the plaintiff, and the money admitted to have been received by him, together with every thing which has not been legally appropriated, are clearly assets. If the Court below had permitted evidence to be given, proving assets to have come to the hands of the administrator of the co-obligor, applicable to this debt, it is clear this action could not be maintained. We rely upon the position, that wherever the obligee appoints the executor or administrator of one obligor, *having assets*, his own executor, he discharges the co-obligor. *Fryer* v. *Gilring*, *Hob.* 10. *Wankford* v. *Wankford*, 1 *Salk.* 305, 306. *Cheetham* v. *Ward*, 1 *Bos. & Pull.* 630, (see note.) The case of *Dorchester* v. *Webb*, *Cro. Car.* 372, fully supports this ancient and well established doctrine, though upon a slight

examination, it may appear in some measure to impugn it. The case was this. One of two joint and several obligors, made the obligee and the plaintiff his executrixes. The obligee renounced. The other executrix, the plaintiff, settled the estate of the obligor, and paid away all the assets. Afterwards, the obligee made the executrix of the deceased obligor, her executrix, who brought suit against the surviving obligor; and the Court say, that although she was the executrix of the obligor, *yet as she had fully administered his effects, before she was made executrix to the obligee, she had in a manner discharged herself of being executrix of the obligor, and hath not any thing of his estate.* And having fully administered all the goods of the deceased obligor, and *not being chargeable to that debt* as his executrix, she as executrix of the obligee, may maintain an action against the surving obligor. Thus the whole case turned upon the plaintiff, as executrix of the deceased obligor, *having no assets* applicable to the payment of the debt, which distinguishes it from the case before the Court, in which the assets in the hands of the administrator were abundant, and were admitted on record. No distinction exists between a joint bond, and one that is joint and several, though such a distinction was once attempted to be raised; for although the debt is joint and several, the duty is one, and the discharge of one obligor, is the discharge of both. Nor is there any difference between the case of an executor, and that of an administrator of the *debtor*, where the right *to *demand* flows from the appointment of the creditor, in making the administrator of his debtor his own executor. [*21]

The distinction exists only where the party, who is *plaintiff*, derives his right to demand from the ordinary, and not from the creditor. The law for which we contend, is not supported by transatlantic authorities alone. The case of *Thomas* v. *Thompson administratrix*, 2 *Johns. Rep.* 471, in the Supreme Court of *New York*, differs from this only in being less strong in its circumstances. There, a judgment was obtained by a creditor against an administrator. The administrator, *having assets*, was made the executor of the creditor. The debt was by simple contract, and the Court held, that by making the administrator of his debtor his executor, the creditor had discharged his claim upon him; the action was suspended, and another creditor of the estate of which the defendant was administrator, recovered the whole of his debt. The same person being receiver and payer, the action was suspended, and being once suspended, it was gone for ever. It is to be observed, that in the case just referred to, a *judgment* was held to be extinguished by the appointment of the defendant as an executor. It is, therefore, an answer to an argument which may be raised, that the case under discussion, is to be distinguished from those previously cited, in which the debt remained merely on bond. Although, in the principal case, two judgments were obtained, they both were founded on the same obligation, and constitute one duty, which might be discharged by the payment or release of one of the debtors; for it will not be pretended that if one of these judgments should be discharged, a recovery could be had upon the other. It is impossible for a defendant to come before the Court under circumstances of greater equity. He has already paid more than his proportion of the joint debt, and is now called upon for the remainder, by one, who having admitted assets, as the representative of the co-obligor, is personally answerable for it himself,

and ought to pay it. If this claim is enforced, the result will be, that the defendant must come in with all the simple contract creditors of Mr. *Nicklin*, and receive an inconsiderable dividend. The doctrine we contend for, cannot, in any manner, interfere with any of the modern decisions in equity by which it has been held, that although the [*22] remedy *is gone, the assets shall be accounted for by the administrator in settling his accounts; because the plaintiff must apply the assets in his hands to the payment of the only debt due by specialty from the estate he represents. The money being in the hands of the person who is to receive it, is *ipso facto* payment, and, as such, is to be accounted for when he settles the estate of his testator. During the argument 5 *Cranch*, 34. 39. 11 *Ves.* 24. 3 *Johns. Ch. Ca.* 349. 1 *Scho. & Lef.* 261, 262. 1 *Ch. Rep.* 138. *Freeman*, 49, were also cited.

S. Chew and *Binney*, for the defendants in error.

In *July*, 1808, a judgment was obtained by the testator of the plaintiff below, against the administrators of Mr. *Nicklin*, and the question below was, whether this judgment had been satisfied or discharged. Actual satisfaction was not pretended; it was altogether a question of legal satisfaction. The argument of the plaintiff in error is, that it has been paid or extinguished; 1st. By the appointment of one of the administrators, of one of the obligors, to be one of the executors of the obligee. 2d. By the confession of judgment by the administrators of Mr. *Nicklin*, which it is said, is an admission of assets. 3d. By an alleged *devastavit*. 4th. By the present existence of assets. And further, it is urged, that as the defendant has paid more than his proportion of the debt, he is entitled in equity, to have these funds applied to his relief.

Before an obligor can go into equity to compel the obligee to proceed against his co-obligor, he must not only show that he has paid his proportion of the bond, but that he is a creditor on a general settlement of accounts. *Nicklin* and *Griffith* were partners; if not in this, at least in other business, and it should appear, if a bill were filed by *Griffith*, that the accounts were settled and he a creditor. Chancery, moreover, would call in all who were interested in the estate; both administrators would be made parties, for they constitute but one, and with the whole administration account before it, would classify the creditors. The administrators stand in the situation of trustees for the creditors, and next of kin, and then if the equity of the creditors were equal, they would be sent to law. If the funds in the hands of the administrator go to [*23] *satisfy this bond, the creditors of *Nicklin* get nothing, and *Griffith*, who at the time of *Nicklin's* death had no interest in his estate (his claim arising by a subsequent payment,) takes away from the creditors, the whole of the fund upon which the law gives them a lien. This cannot be the law; on the contrary, the creditors of *Nicklin* might go into chancery, and compel his administrators to resort to *Griffith* for the whole, on the ground that the obligee had two funds, and they but one. If the obligee of a joint and several bond, enter judgment against one and take his property in execution, it will not be contended that a Court of equity would stop him, and compel him to resort to the other obligor. And if one apply to equity for relief against the other, he must at least show payment; and even then it is doubtful whether a transfer of the security would be directed. But this subject was not before

the Court below. The notice of special matter contained no intimation that the defendant had paid more than his proportion. The funds were raised, as it there appeared, from their joint property. If the notice had stated a payment by the defendant, our answer would have been, that the accounts of *Griffith*, who conducted the business of the partnership after *Nicklin's* death, were never settled, and that he never claimed as a creditor.

(DUNCAN, J.—I would give a notice all the effect of a bill in chancery.)

The notice in this case, referred to but a small part of the transactions between *Nicklin* and *Griffith*. To have the effect of a bill in equity, it must contain a statement that *Griffith* was a creditor on a general settlement of accounts. Another objection to considering the notice as a bill in equity, is, that one of the administrators of *Nicklin* is not a party to the suit, and the accounts of an absentee cannot, in this way, be concluded. If *Griffith* has paid more than his share, he has his remedy against the assets belonging to the estate of *Nicklin*. This equitable ground, however was not taken in the Court of Common Pleas, and is not open now. The authorities cited as to the legal points do not apply. They were all cases of one obligation, which is not this case. Mr. *Chew*, the testator, obtained a separate judgment against Mr. *Griffith*, and *after the death of Mr. *Nicklin*, another against his [*24] administrators; and thus, what was a joint and several obligation, became two several judgments. If the obligee release to one of two several obligors in the same bond, it is a release to both; and so if he appoint one executor; but if there be two several bonds, though for the same consideration, a release of one is not a discharge of the other. Nothing short of actual satisfaction will do. So if one of two joint defendants be released, the other is also released; *secus*, where there are several judgments, though founded on the same cause of action. Again; if one of two joint defendants be taken in execution and committed to prison, you may have a *ca. sa.* against the other, but not an execution of a different nature; but if the judgments be several, a *ca. sa.* may go against one, and a *fi. fa.* against the other. Two several judgments on a joint and several bond, are as distinct, as if they were on separate bonds. Nothing but very satisfaction will discharge them. *Foster* v. *Jackson*, *Hob.* 59. *Parker* v. *Lawrence*, *Hob.* 70. The doctrine of extinguishment, upon which the Court below gave no opinion, because the point was not made, is confined to the case of *one* administrator. The reason upon which this doctrine rests, as given in *Hob.* 10, is that the same hand is to receive and to pay. One administrator, where there are several, cannot pay, and with what propriety can the assets which both are bound duly to administer, be applied to the payment of a debt which one only represents?

How far a confession of judgment by an executor or administrator, is an admission of assets, has never been decided in *Pennsylvania*. But admitting the law to be so, it cannot benefit the defendant. Such a confession of assets operates by way of estoppel, and can be set up only by the creditor in the judgment. Other parties cannot allege it.

Nor is it competent to Mr. *Griffith* to show that the plaintiff committed a *devastavit* by paying simple contract debts. He was not a creditor of Mr. *Nicklin's* estate, and cannot take advantage of it. A *devastavit* can be investigated only on a settlement of the administration account, or in

a suit against the administrator. With respect to the creditors of Mr. *Nicklin*, and the next of kin, the *devastavit*, if it was committed, was harmless, for if this debt had been paid, it would have swept away all the assets.

[*25] *But it is urged that there are assets now in hand. If it be so, they are not in the hands of the plaintiff nor under his control. In point of law, they are the assets of both administrators, who make one representative of the estate, and whose interests are indivisible. In the course of the argument the following authorities were referred to. *Toll.* 188. 350. 424. *Wheatly* v. *Lane.* 1 *Saund.* 217. *Jacomb* v. *Harwood*, 2 *Ves.* 265. *Watson on Part.* 374. 1 *Chitty Pl.* 37. *Lang* v. *Keppele*, 1 *Binn.* 123 *Yelv.* 160. 1 *Salk.* 303, 304. *Wilson* v. *Wilson*, 3 *Binn.* 357. *Winship* v. *Bass.* 12 *Mass. Rep.* 199.

DUNCAN, J. delivered the opinion of the Court.

The judgment confessed by the administrators of *Philip Nicklin*, in the life time of the testator, and the subsequent confessions of judgment on *scire facias*, are admissions of assets to the amount of this debt. So long as these judgments stand unreversed, this is incontrovertible. The whole rests on the solution of one question of law, and the application of one principle of equity. The legal question is, did the plaintiff receive payment in fact, or satisfaction by operation of law? If the evidence offered did not tend to prove this, would the relation in which the parties stand to each other, form such a ground for equitable relief, that a Court of Chancery would enjoin the plaintiff below, the defendant in error, from recovery? For if it is a cause calling on a Court of Chancery to interpose, our common law Courts can and ought to accomplish the some end, under the plea of payment, with leave to give the special matters in evidence; for equity is part of our common law, and our Courts, from the earliest period, have constantly exercised Chancery powers from necessity, lest there should be a failure of justice; and it is a maxim in our jurisprudence to consider that to have been done, which equity would compel, and which good conscience requires should be done, and on this basis rests the whole doctrine of equitable ejectment, and all our laws as to trust estates. Rules of Court, corresponding with this, have been framed. In debt on bond, where the parties would be forced into a Court of Chancery; under the plea of payment, with leave to give the special matter in evidence, every equitable circumstance, every thing which will

[*26] go to show that in *conscience the defendant ought not to be charged, may be shown, and the jury directed to presume every thing to have been paid, which *ex æquo et bono* ought not to be paid. But this assumption of equitable jurisdiction, is not, as some have most erroneously supposed, the exercise of a wild discretion in each particular case, ungoverned by any rule and without any plan, depending on the caprice of any twelve jurors, drawn by lot, and empannelled in a jury box, to decide according to their own conceptions of equity, by a crooked descretion *ex re nata;* but a sober, well understood, uniform system, governed by Chancery rules, attaining the same end in substance, though not in mode. The relief, the manner, and the extent, are matters of law for the Court, as much as any matter at the common law; the jury are confined to the province of the fact; the Court exercising the judicial functions of a Chancellor, by the instrumentality of a jury. Nor is it any

objection that the Court cannot in all cases grant equitable relief. Because they cannot do every thing, is a bad reason for their not doing any thing.

Executors and administrators are trustees, and it would be matter of regret if the powers of the Court were incompetent to compel the fulfilment of their trust. It was the opinion of a most inflexible adherent to the course of the common law, administering justice in that form, that decisions of Courts of equity, on the powers and duties of executors and administrators, were to be regarded in the Courts of common law; but it appears to me that if the facts offered to be proved by the plaintiff in error, had been put into the form of a special plea on the record, and the defendant had demurred to it, judgment must have passed against him.

The testator knowing that the plaintiff below was one of the administrators of *Philip Nicklin*, for he had proceeded against him as such, and rendered him personally liable by his judgment for this debt, constitutes him by his will one of his executors. It then stands precisely as if the testator had become the administrator of Mr. *Nicklin*. This is the first ground, and if so, it is uncontroverted law, of a standing of many centuries, that where two are jointly and severally bound, as here, and the obligee takes out administration on one, he cannot sue the other. A succession of cases from 21 *E.* 4. 8. (*in the year book*) down to the present day, will be found clearly *esta- [*27] blishing this principle of discharge. That case was, thus: *Copley*, Prothonotary, asked of BRIAN Chief Justice, if three be bound in an obligation to a man, jointly and severally, and the obligee make one of the obligors his executor, and die, whether he who is made executor, shall have his action against any of the others; and BRIAN said, that he should not, for if one was discharged all shall be, because making one of them executor, is as perfect a discharge in law, as if he had released to one in deed.—*Copley;* Sir, the obligation is several. BRIAN; This does not matter, for a recovery against one, and execution sued, will discharge the other. The reason is a good one: there is but one duty extending to both obligors, and therefore it was pointedly put by BRIAN, that a discharge of one or satisfaction made by one, discharges the other. *Hutt.* 128, cites *Trugeon* v. *Meron. Garret Trugeon*, plaintiff, against *Anthony Meron and others, administrators of Benjamin Scriven*, on a single bill. The defendants demand oyer of the bill, whereby it appears that one *John Scneacks* was jointly and severally bound with *Scriven*. The defendants said that the said *Scneacks* died intestate, and that administration of his goods was granted to the plaintiff, who accepted the burden and administered. The plaintiff demurred and judgment against the plaintiff. I can see no difference between this case and the one before us. So *Dorchester* v. *Webb, Cro. Car.* 372: The defendant pleaded that *John Dorchester*, late husband to the said *Anne*, and the said *William Webb* was bound jointly and severally to *Anne Rowe*, and that the said *John Dorchester* died, and made the said *Anne*, his wife, the now plaintiff, and the said *Anne Rowe*, the obligee, his executrixes, and that the said *Anne Rowe* renounced, and the said *Anne Dorchester* administered, and that assets to pay the debt came to plaintiff's hands. The plaintiff replied, that before the death of the said *Anne Rowe*, she had administered fully all the goods of *John Dorchester:* demur-

rer, and judgment for plaintiff; for this reason, that she having fully administered all the goods of *John Dorchester*, and not being chargeable to that debt as executrix of *John Dorchester*, may as executrix of *Anne Rowe*, maintain this action against *Webb*, the other obligee. But here the plaintiff offered to prove the assets. To the same purpose is *Fryer* v. *Gildridge*, *Hob.* 10. If *A.* and *B.* are bound in an ob-
[*28] ligation jointly and severally to *C.*, and *C.* makes *D.* the wife *of *A.* his executrix and dies, *D.* administers, and afterwards, *A.* the baron of *D.* makes *D.* his executrix and dies, leaving sufficient assets to pay the debt, and afterwards *D.* dies, and *E.* takes out administration of the goods of *C.* unadministered; yet he cannot have his action against *B.*, the other obligor, because when the obligor made the executrix of the obligee his executrix, and left assets, the debt was immediately satisfied by way of retainer. In *Freeman's Rep.* 49. *Pl.* 59, *A.* and *B.* are obliged to *C.* *A.* makes *D.* his executor and dies; *D.* makes *C.* his executor and dies. *A.* sues *B.* for the debt; *B.* pleads the matter aforesaid, and says that *diversa bona et catalla* of *A.*, the first testator, came to the hands of *C.;* but it was ruled against him, because he did not say *ad valorem debiti*, and perhaps the goods were not of the value of six cents. The same principle is decided in *Thomas* v. *Thompson's administrators*, 2 *Johns.* 475. 477, but there put on the footing of extinguishment. But I rest this case on payment and satisfaction, for the law will not allow the plaintiff below to refuse to reap that satisfaction which he has already received from one obligor, without discharging the other. The reasoning of Holt Chief Justice, in *Wankford* v. *Wankford*, 1 *Salk.* 305, is unanswerable. "If the obligee makes the obligor or the executor of the obligor his executor, this alone is no extinguishment, though there be the same hand to receive and pay; but if the executor has assets, it is, because that is within the rule, that the person who is to receive the money is the person who ought to pay it; but if he has no assets, then he is not the person to pay, though he is the person who is to receive; and to that purpose is, 11 *H.* 4. 83. And the case of *Dorchester* v. *Webb*, *Cro. Car.* 372, 1 *Jones*, 345, where the obligee makes the executrix of one of the obligors his executrix, who has no assets, this is no discharge of the debt, because though this executrix, as executrix of the obligee, is the person to receive, yet having no assets of the obligor, he is not the person who ought to pay. But if the executor of the obligee is made one of the executors of the obligor, and has assets of the obligor, the debt is extinct, for the having assets amounts to payment. So was it determined in *Lock* v. *Cross*, where the obligee was made executor of one of the obligors, and in an action by him against the other, where this was
[*29] pleaded, the plea was held naught, because he did not show *to what amount the assets were that he had administered; but if the defendants had shown that he had administered goods to the value of the debt, it had been a good plea.

According to the opinion of Holt, the having assets amounts to payment. The right to retain, in the case from *Hobart*, is satisfaction. The executor's right to retain for his own debt, is founded principally on this, —that he cannot sue himself. The executor having the right thus to apply the assets, they are by operation of law applied to payment. It is the presumption of law and equity, that one having the right to retain,

(Griffith v. Chew's executor.)

does retain; it requires no election. *A.* lent money to *B.* on bond, who died intestate. *C.* took out administration to him; after which *C.* dying, *A.* took out letters *de bonis non* to *B.* It was determined, that out of the assets, *A.* might retain; and though *A.* happened to die before he made his election in what particular effects he would have the property altered, yet the Court said it must be presumed, that he would elect to have his own debt paid first; and this being presumed, there would remain no difficulty as to the alteration of the property; for as the executors of *A.* were to account for the assets of *B.*, they must in their account deduct the amount of the money lent by *A.* to *B.* *Weeks* v. *Gore*, 3 *P. Wms.* 184 (note.) So here, Mr. *Chew*, as administrator of Mr. *Nicklin*, would be allowed, in his administration account, the amount of this judgment. This case falls within the opinion of the Court, in *Thomas* v. *Thompson*, which was, that as the defendant, the administratrix of the debtor, was personally liable for the judgment, at the time she was appointed executrix of the creditor, in the event of the failure of assets, she was, for that reason, discharged and released by this appointment, by the judgment creditor.

There is no person who can enforce the judgment. It was the voluntary act of the creditor,—a voluntary suspension of the remedy, which is thus, for ever, lost and gone. The avowed object is to compel *Griffith* to pay this debt, and to come on *Nicklin's* estate as a simple contract creditor. This may proceed from the purest motives. To put all the creditors on a footing of equality, is a very specious equity, and in most cases is substantial justice; for priority of payment, the grade and order, are very artificial and technical; but when positive law has established the order, and not *vested in the executor or administrator any power to prefer, it cannot depend on his volition, [*30] whether the debt shall remain as it stood at the death of the debtor, or for some purpose of his representative, be changed into simple contract, and swallowed up in the vortex of claims of that description. The order of payment of debts of a deceased, is to be according to the nature of his debts, as they existed at the time of his death. I do not sensibly feel that kind of equity, which was so much pressed on the Court,—the equity of compelling *Griffith* to pay beyond his due proportion of this debt, in order that the meritorious creditors on simple contract of his co-obligor may not go altogether unpaid,—that he should furnish the fund for the purpose, and come in upon his own fund for a dividend with them. No man should be suffered to use his right, so as to prejudice the rights of others. *Sic utere tuo, ut alienum non lædas*, is the golden rule of the law. In a case like this, there is a legal obligation on *Philip Nicklin's* administrator to retain; it was his duty on all sides; to the estate of which he was executor, to that of which he was administrator, and to Mr. *Griffith*. All this is, however, foreign to the doctrine of *devastavit*. *Griffith* is not a creditor. Mr. *Chew* would be both debtor and creditor. As executor of Mr. *Chew*, he is a creditor to the amount of the debt, and as *Nicklin's* administrator, would stand debtor to that amouut. He has received it; he has it in his hands; but he is relieved from that awkward state by the laws considering that the debt due to the testator is paid, and the debt due by the intestate paid, by the simplest of all operations, considering that to have been done, which the law requires should be done,—which a Court

of law would consider as done; and without so considering it, justice could not be done to either estate; for the estate of the testator would never compel payment; the executor of the creditor's will is the personal debtor, by reason of the judgment and admission of assets, and it is only by supposing that he has actually received the debt, that it is so much money had and received for those entitled under the will, that it can be come at in a Court of law. He cannot sue himself. So universal is this principle, that partners in one house of trade cannot maintain an action [*31] against partners in another house of trade, of which one of *the plaintiffs in the partner's house is a member, for transactions which took place while he was a member of both houses. *Bosanquet* v. *Wray*, 6 *Taunton*, 597. So that the executor of the creditor being in that state in which he could not proceed against the co-obligor of *Griffith*, suspending the debt, would, in point of strict law, be an extinction; for a personal action, once suspended, is for ever discharged. But my opinion is founded on the payment and satisfaction; for so much is retainer, payment, that on *plene administravit*, it may be given in evidence. *Plumer* v. *Marchant's administrators*, 3 *Burr.* 1380. And *Chapman* v. *Turner*, 11 *Vin. Exr. D.* 12, 2, gives an answer to the objection, that here are two administrators, one only of whom is the executor of the creditor; for there it was held that the retainer of one was the retainer of both, and this was quite just, as it enured to the benefit of both estates. If there are two administrators, one may retain for his own debt; but if both have debts, assets ought to be applied to their mutual benefit.

In strict pleading, it may be doubted, whether the matter alleged as a defence, ought not to have been specially pleaded. So it was done in all the cases I have stated, but as retainer may now be given in evidence on *plene administravit*, though formerly it could not, I can see no good reason why the special matter, which in fact is payment by the co-obligor, may not be given in evidence, to show, if it was not an actual payment, that in equity and good conscience it ought not to be paid; for the notice is substantially a bill in equity. Besides this was an issue, directed by the Court, to try the effect of this very matter,—the effect of these acts,—to try what was really due on this bond. The evidence went to show that the defendant in error had in his actual possession the very money which ought to have been applied to this debt. This was evidence of actual payment, and it could make no difference, whether the debt was paid by Mr. *Nicklin* to Mr. *Chew* in his life time, or by his administrator to Mr. *Chew's* executor. But whether extinguishment, payment, or satisfaction, in very deed, or by act and operation of law, under this issue and notice, the evidence was proper and ought to have been admitted. The evidence offered was proposed as one entire body of evidence, to show the fact of assets applicable alone to the discharge of this debt; each item [*32] formed a link in *the chain of evidence; not of *devastavit*, but of satisfaction and payment. The case, however it might be put on extinguishment, according at least to the ancient doctrine of extinguishment, by making the debtor executor, and according to the case in 2 *Johns.*, yet I put it on the stronger ground, on which it can safely rest,—payment and satisfaction; for extinguishment scarcely now exists to any purpose in a Court of equity; the executor being accountable to the residuary legatee, or next of kin, where the residue is not disposed of, for a

debt due by him to the testator, and compellable to state on oath whether he stands indebted to the testator. The appointment of the executor is only a parting with the action; but he is chargeable in equity; equity prevents the extinction of the debt. *Winship* v. *Bass and others*, 12 *Mass.* 202. This doctrine of extinguishment has become obsolete, in consequence of the application of principles and rules of equity, unless it appears the testator, by naming the debtor his executor, gives him not only the office of executor, but some beneficial interest. He is considered as a trustee, holding a resulting trusteeship for those entitled either as residuary legatees, or next of kin. At no one time in this State was it an extinguishment of the debt, for the executor has always been held a trustee. *Wilson* v. *Wilson*, 3 *Binn.* 557; and an action for money had and received, will lie against him in his personal character, to recover a distributive share. The executor takes nothing but what is given him by the will, and this even before the Act of 7th *April*, 1807, which expressly enacts, that in a will not disposing of personal estate, the executor shall distribute the residue among next of kin. The executors and administrators are placed on the same footing. In *Massachusetts* there is a similar provision; and there it is held, that naming a debtor executor, and his acceptance of the trust, does not extinguish the debt. It may suspend the remedy by action, but as soon as he takes upon him the execution of the will, to the amount of his debt, he has actually received so much money, and is accountable in his personal character, to those legally entitled to it; as the same hand is to receive that is to pay. There is no ceremony to be performed in paying the debt, and no mode of doing it, but by considering the money to be in his hands. *Stephens et al.* v. *Gayland*, 11 *Mass.* 259. The executor is *quasi* administrator, which never [*33] was held to extinguish the debt; and having voluntarily assumed the trust, which prevents any other from receiving it, and being unable to sue himself, he shall be considered as having paid the debt, and holding the amount in his hands as executor, it being *the same hand which ought to pay*, that is to receive; it is therefore considered as actually paid. *Winship* v. *Bass and others*, 12 *Mass.* 202. These decisions show, that where there are assets or where the executor has rendered himself personally liable, the law applies the payment. As soon as Mr. *Chew* accepted the executorship of his father's will, the assets in his hands as administrator of *Philip Nicklin's* estate, became applicable to this debt alone; he has it actually in his hands as executor of his father. I repeat it, had the whole matter been pleaded, the administration, the assets, the appointment and acceptance of the executorship, and the plaintiff below had demurred, judgment ought to have been rendered for the defendant. But if this were not so clear at law, it would be a denial of justice to exclude equitable considerations. *Equitas sequitur legem.* Where the law is ineffectual, equity steps in to redress, following however the rules of law. In *Cowper* v. *Earl Cowper*, 2 *P. Wms.* 753, *Sir Joseph Jekyll*, in commenting upon chancery jurisdiction observed, that the discretion to be exercised in that Court was to be governed by the rules of law and equity; that in some cases it followed the law, and assisted it by advancing the remedy, though in others, it relieved against the abuse or allayed the rigour of it, but in no case contradicted or overturned the rules of law. One *English* Judge of great learning, Ch. J. De Grey, said, he

never liked equity so well as when it was like law. The day before Lord MANSFIELD had said, that he never liked law so well as when it was like equity; remarkable sayings of two very great men. But here, as I shall proceed to show, the law and equity are the same,—they meet together, and no man can dislike their junction. It may be observed, that what once was mere equity, is now law. The allegation of the plaintiff in error was, that he and his partner, *Philip Nicklin*, gave this joint and several bond, to the defendant's testator; that separate judgments were obtained against him and the plaintiff in error, as administrator of *Nicklin;* that he has paid, or is willing to pay, his half of this bond; and

[*34] *that sufficient effects of *Philip Nicklin* to pay the other moiety, have came to the hands of the executor of the obligee, the administrator of his co-obligor, which can alone legally be applied to this debt, which his duty, as the administrator of one, and executor of the other, required him to appropriate. The question has no relation to marshalling assets, or equitable assets. The natural equity of the case is, that *Griffith* should pay one half of the debt, and the other half fall on the estate of *Nicklin*. In this state of the case what would chancery do, even if the defendant in error had not the fund in his possession, but it was an effectual one,—one appropriated by law, and which he had the power of reducing to possession, and dependent on his own will? I think chancery would compel him to resort to this; for there are cases where equity would compel a creditor to resort to a partially available fund before he pursues his creditor personally. The cases on this head are reviewed by Chancellor KENT, in *Hayes* v. *Ward*, 4 *Johns. Ch. Rep.* 132, and the principle acknowledged as applicable not only to a surety, but a principal debtor. This case has a very strong recommendation to the exercise of the equitable principle, when it is considered that the party admits of record, that he has not the fund to seek; that there can be no delay, expense, or hazard incurred by him, for he has the satisfaction already, and that which never can receive a satisfactory answer, he cannot assign it, if *Griffith* paid it. He cannot assign the debt due by himself. Besides, there would be nothing to assign, the debt is paid. The reason of the decision has been, that the creditor could not assign the benefit of the fund to the debtor. The law never would exact so idle and vain a ceremony, as to require *Griffith* to pay the debt and demand an assignment—to distress him by compelling him to pay this debt to the defendant in error, in order to enable him instantly to recover it back. I do not say that the obligee in a joint and several bond, may not proceed against each, and recover judgment against each, and issue execution at his pleasure against either, or several executions against each, for he stands in no other situation than a creditor, with a choice of remedies; but he can have but one satisfaction. Here he has it; here the creditor has done an act which suspended his action against one; here his repre-

[*35] *sentative has received very satisfaction, very payment at law, certainly in equity; holds in his hands trust money, which chancery, on a bill filed by *Griffith*, would compel him to appropriate to this debt. As chancery would compel it to be done, under the plea of payment with leave and notice, the Court here would consider it as done, and direct the jury to presume it to have been paid. The evidence offered as to actual assets in the hands of the defendant, connected with the judg-

ments confessed, would have established the fact of a fund in the power of the defendant, and more than that, an actual adequate fund in his actual possession, not an outstanding one; and show that he was himself the debtor on the bond which he seeks to recover from *Griffith*. I do not see the difficulty as to the want of proper parties. The creditors of *Nicklin* would not be necessary parties in a bill, so long as the judgments admitting assets to pay the debt stand unreversed. And if it is alleged that *Griffith* is indebted to *Nicklin's* administrators, this does not preclude the administrators from an action against him. The attempt of the defendant in error to put all the creditors of *Nicklin* on an equal footing, is the struggle of an honest and honourable mind to do what he supposes to be just, in a moral point of view, but which cannot be allowed by a sacrifice of the rights of the plaintiff in error, who has the strict law with him, and as I view this case in all its aspects, the strongest equity; an equity in which the claims of other creditors can enter into no competition with him. It is manifest that the action is gone at law, because the administrator of *Philip Nicklin* could not proceed against him, and because a personal action once suspended by the voluntary act of the party entitled to it, is for ever gone and discharged. Unless the plaintiff below was entitled to equitable relief, the defendant stood protected by law; the right of action was discharged, and a *scire facias* is in the nature of an action. If the equity of the other creditors were equal to *Griffith's*, (superior it could not be,) the law must prevail, for equity cannot prevail against both law and equity.

Judgment reversed, and a *venire facias de novo* awarded.

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*HORNKETH *against* BARR. [*36]

IN ERROR.

A father may maintain an action on the case, for the seduction of his minor daughter, *per quod servitium amisit*, though at the time she did not reside with him; provided she was subject to his control, and he was entitled to command her services.

THIS was an action of trespass on the case, brought in the District Court for the city and county of *Philadelphia*, by *Hugh Barr*, the defendant in error, against the plaintiff in error, *George Hornketh*, for debauching his minor daughter, *per quod servitium amisit*.

On the trial, it was proved, that the plaintiff below resided in *Northampton* county, and that his daughter, about eleven years since, came, with his consent, to *Philadelphia*, to reside with a married sister, with whom she remained until the year 1815, when she returned to her father, and continued with him a year. She then went again to *Philadelphia*, with her father's consent, and lived occasionally at service, under an engagement for wages. After her return from the country, a young brother also came to reside with the married sister, who received from their father, when he came to town, such articles of provisions and household furniture, as his circumstances enabled him to bestow. The seduction and

confinement of the plaintiff's daughter, took place in *Philadelphia*, before she attained the age of twenty-one years.

Upon these facts, the following charge was delivered to the jury by

McKean, J.—The form of action may be trespass or case. If trespass be brought, some actual or constructive trespass must be stated and proved. But the slightest technical trespass is sufficient to maintain the action,—as the mere entry on the premises of the plaintiff without permission. The seduction and loss of service are considered as consequential to it. But damages may be given, not for the trespass merely, but for the injury done by the seduction of the child.

If case be brought, the action is founded on the *loss of service merely*. The daughter is considered as the servant of the father. If the child be above twenty-one, it has been held, that some evidence of [*37] service must be given,—but any *the least act of service, is held to be sufficient. If the child be *under twenty-one*, as the parent is entitled to her service, no act of service need be proved, if seduced while living with the father; but if not living with the father, or under his immediate control, it was thought by some that the action could not be sustained, because the relation of master and servant did not exist.

The law had not expressly given a remedy, or provided a punishment for the wrong done to the parent by the seduction of his child. This form of action was adopted and encouraged by the Courts, founded and sustained on technical notions of the relation of master and servant, and the actual or supposed loss of the service of the child. I consider it now as a mere technical form of action to recover for the loss of service, but in substance to recover damages for the injury to the honour, the comfort, and the happiness of the parent. If the child was above twenty-one at the time of the seduction, to sustain the action, it is now necessary to show some act of service, though trifling; but if the child be under twenty-one, it is not necessary to prove any act of service. The father is bound to maintain his minor child, and he is entitled to and may command her services.

It is contended that as the child in this case did not live with her father, he could not lose by the want of her services. We may answer that the father could command the services of his child at any time. Therefore during her pregnancy and confinement, he lost, because he could not have had her services, if he had required them.

The father was entitled to the wages she earned; and if he permitted her to use the wages to clothe herself, the appropriation was for his benefit, as he must otherwise have clothed her; and by her inability to labour, he lost the benefit of her services. But I put the loss of service out of the question. The loss of service in general would be very small,—in this case not more than seven or eight dollars. I consider the action now substantially an action by the father, to recover damages for debauching his minor daughter; and I hold that it is not necessary, the child should actually reside with the father, if she resides elsewhere, with, or not against his consent.

[*38] *A child, at a boarding school,—residing with a friend to be educated,—or on a visit,—or at service, is still subject to the control of the parent, and under his protection and care.

Whether she resides under her father's roof or abroad, the destruction

of the family's honour and the parent's peace, is still the same. The crime is a great one, and every parent must know and feel that he would consider it so, if such an occurrence should happen in his family.

In this case the child did not live in the house of her father: the reason assigned is, that her father had married a second wife, and that the step-mother did not use the children by the first wife well; that the father was therefore obliged to place his children elsewhere; and he placed this daughter with her elder and married sister;—perhaps the most proper place.

To this charge the counsel for the defendant tendered a bill of exceptions, and the verdict being for the plaintiff, a writ of error was sued out.

The case was argued by *P. A. Browne* for the plaintiff in error, who contended, that the father could not maintain an action, for an injury to his child, *per qod servitium amisit*, without proof of actual service. Where the child resides permanently with another, the suit should be brought by the person with whom the child resides; who in the present case was the sister. In support of his argument, he referred to *Grey* v. *Jefferies, Cro. El.* 55. *Barham* v. *Dennis, Cro. El.* 769, 770. *Robert Money's Case*, 9 *Co.* 113. *Norton* v. *Jason, Style*, 398. *Russell* v. *Corne*, 2 *Lord Ray.* 1032. 6 *Mod.* 127, *S. C. Postlethwaite* v. *Parkes*, 3 *Burr.* 1878. *Peak's Ev.* 333, 334. *Esp. N. P.* 645. 1 *Bac. Ab.* 87. 4 *Bac. Ab.* 593. 3 *Selw. N. P.* 967, 969.

Norris and *Scott*, contra, relied on *Reeve's Dom. Rel.* 291. 1 *Bl. Com.* 446, 447. 3 *Serg. & Rawle*, 218. *Foster* v. *Scoffield*, 1 *Johns.* 297. *Martin* v. *Payne*, 9 *Johns.* 387. *Nickelson* v. *Stryker*, 10 *Johns.* 115. 1 *Woodis.* 452. *Logan* v. *Murray*, 6 *Serg. & Rawle*, 175. *Norris* v. *Baker*, 1 *Roll's Rep.* 393. *Hunt* v. *Wotton, T. Ray*, 259. 2 *Com. on Cont.* 354.

*The opinion of the Court was delivered by [*39]

DUNCAN, J.—In this action, the loss of service is the legal foundation of the plaintiff's right; and though it is difficult to reconcile to principle the giving damages *ultra* the mere loss of service,—damages for the injured feelings of the parent, for family honour and distress,—damages for loss of comfort; and though the pecuniary loss is generally the smallest, where the damages recovered are the greatest, and where the real loss of service is lost sight of in the higher injury done to the child, yet the loss of service is still the foundation of the action; though, in fact, she was not accustomed to perform any servile labour or menial office in the family. Yet, however liberal Courts may have been, by letting in other evidence than the value of the services, to increase the damages, they have never extended the boundaries of the action. There is no authority or principle to warrant the position, that civil actions may be considered as *media* of punishment for moral offences; but where there exists this ground of loss, that is made the instrument of punishment, and to operate as a lesson to the offender, as the invader of domestic happiness. But the *extra* damages have no foundation to stand upon, except the loss of service. I do not by any means agree in opinion with those who think that loss of labour (which is the gist of the action) is not in question, where the inquiry is on the legal cause of action; though I agree with them that it is pretty much lost sight of in assessing the damages: for if it was not in question, then mere seduction, inconsequential fornication,

would be actionable, whether the daughter was an adult or a minor, which it certainly is not. If the daughter be above the age of twenty-one, there must exist some kind of service, however slight; but under twenty-one, though not living under her father's roof, but residing with another, and in the temporary service of another, (if the father has not renounced and abandoned her totally, divested himself of all right to reclaim her services,) she continues under his protection and control; her services may be demanded and coerced; he is liable for her support, and she is his servant *de jure;* and the defendant having done an act which has deprived the father of his daughter's services, which he might have required and enjoyed, but for this injury, his obligation to sup-
[*40] port her, his right to *her services, his title to her wages, until her majority, are the grounds of the action. He does not rely on the relation of parent and child, but master and servant. During pupilage, the child gains no *domicil* distinct from the parent. The cases of emancipation have always been decided either on the circumstance of the child's being twenty-one, or married, or having contracted a relation inconsistent with his being in a subordinate situation in the father's family: and a child under twenty-one, who resides not with his father's family, but permanently with another, is entitled to his father's settlement, acquired after he ceased to reside with him; because in that time he remained under the power of the father. The father having had a right to the child's custody, might have obtained it on a *habeas corpus;* for his parental care, power, and authority had, by no act, been finally renounced by him: nor had the right of an actual master or one standing *in loco parentis,* become vested in another. Taking the whole structure of the charge, it may be so construed, as thus leaving it to the jury, and the whole of it must be taken as one connected opinion. The Court say, it is not necessary to maintain the action, that the child should actually reside with the father; if she reside elsewhere, with or not against the consent of the father: and put the action on its true principles,—the subjection of the child to the father's power; his right to her services, and his liability to support her. Who could maintain the action for services lost, if the father could not? *Taylor,* with whom she was in service, (when the injury was done) for seven weeks could not, for he had sustained neither *damnum* nor *injuria.* Her sister could not, for she did not stand in *loco parentis;* she was not entitled to her services; she had not lost her services; the child lived with her on account of some disagreement with her stepmother; it may be fairly presumed, placed with her sister by her father as the most proper place; and it is not an unnatural presumption, that the presents made by the father to the married sister were considered by her as some small allowance towards her support. The father's right to recover does not depend on her returning to her family during pregnancy, and on her lying-in expenses. She might have returned; and he be bound to support her. The *per quod servi-*
[*41] *tium amisit* is technically made *out by the evidence, that by the acts of the defendant below, the plaintiff in error, he was deprived of the services of his child,—services which he had a right to claim, which were his *in potentia,* which the child owed to him, and which he put it out of her power to perform. The judgment stands affirmed. Judgment affirmed.

NEWLIN *v.* NEWLIN.

IN ERROR.

Notice of the taking of a deposition, served on the attorney in the cause, is good unless he objects at the time of service.

It is not essential that the time and place of taking a deposition should appear on the face of it; it lies on the party objecting, to show the irregularity: and if nothing of the kind was attempted in the Court below, it is not admissible in a Court of error.

ERROR to the Court of Common Pleas of *Delaware* county, in a suit brought by *Samuel Newlin* the plaintiff below, and defendant in error, against *Nathaniel Newlin*, the defendant below.

On the trial of the cause in the Court below, the defendant offered in evidence a deposition taken under a rule of Court on the 23d *March*, 1820, before a Justice of the Peace of *Chester* county; and proved that notice of the time and place of taking the deposition had been served on *William Graham*, esquire, the plaintiff's attorney in the cause, on the 17th *March* preceding, when he was sick, who made no objection to receiving it. The plaintiff objected to the deposition, and in support of objection proved that Mr. *Graham* had been indisposed from *January*, 1820; that in *February* he was dangerously ill, and that at and after the 17th *March*, he was not able to attend to business. He also proved that the plaintiff lived nine miles nearer to the defendant's house than Mr. *Graham*, and that a former notice of the taking of the deposition of the same witness had been served on the plaintiff himself. The Court overruled the deposition and the defendant excepted to their opinion.

Edwards and *J. R. Ingersoll*, for the plaintiff in error.

**Tilghman*, contra, besides the above ojections to the depo- [*42]
sition, stated as a further one, that it did not appear by the deposition, that it was taken at the place specified in the notice.

The opinion of the Court was delivered by

GIBSON, J.—According to our practice, service of notice on the attorney, is held insufficient in the case of depositions, only where the attorney has objected at the time of the service. To be exempt from the trouble and responsibility of transmitting the notice to his client, is a personal privilege, which, if he please, he may waive; and he does tacitly waive it by not objecting: otherwise the adverse party might be taken by surprise. The silence of the attorney therefore is equivalent to an agreement; which will bind his client. But here the case is stronger, for there was an express recognition of the notice by the attorney. On every principle, then, this act of his shall bind. There may be cases where acceptance of notice by the attorney, like every other act of his, may be invalid by reason of its having been obtained by fraud; but I see nothing in the case before us, to distinguish it from any other. The fact of Mr. *Graham*, the attorney, being too ill to attend to business, has no weight: he ought to have told the adverse party that he was so, and have desired him to serve the notice on his client. Neither can we infer a fraudulent intention from the circumstance that it would have cost the defendant little more trouble to serve the notice on the plaintiff himself; for in the country, notice is frequently served on the attorney and received without objection: and as to a party being prevented, by some one of the innumerable accidents to

which human affairs are subject, from attending at the time and place appointed, it is a matter of every day occurrence, and therefore not a circumstance to induce a suspicion of fraud.

Then as to the objection that it does not expressly appear by the deposition itself, that it was taken at the place specified in the notice: that was a matter which the Court below, on a suggestion from the adverse party, would have inquired into; and if the inquiry had in fact been made, and the deposition had been rejected on that ground, it would have presented another sort of case. But it is not essential that *the
[*43] time and place of taking, should appear on the face of the deposition: it lies on the party objecting to show the irregularity; and here nothing of the kind was attempted.

Judgment reversed, and a *venire facias de novo* awarded.

McNEILLEDGE *against* GALBRAITH and others Executors of THOMAS.

CASE STATED.

Bequest of personal estate to the testator's wife, "and at her decease to be divided between her and my poor relations equally." The estate, after the wife's death, is to be divided, share and share alike, *per capita*, between the brothers and sisters of the testator, living at his death, and the children of such brothers and sisters as were dead, and the mother of the wife the father being dead. No other relations of the wife take.

Such bequest is to be construed as if the word *poor* were not in it.

On the 12th *October*, 1816, *Alexander Thomas*, the testator, made his last will and testament in writing, and thereby, after making sundry devises and bequests, devised as follows, to wit:—"*Further, it is my will, that my beloved wife, Eleanor Thomas, shall receive only the interest on the remaining part of my real and personal estate during her life, and at her decease to be divided between her and my poor relations equally.*" He constituted his said wife and the defendants in this cause, his executors, and died. On the 12th *May*, 1817, the will was duly proved, and letters testamentary granted thereupon to the defendants. On the 13th *March*, 1817, *Eleanor Thomas*, widow of the testator, died. At the time of the testator's death, there were living of his relations, two brothers and three sisters, namely; *Daniel McNeilledge*, the plaintiff, *Peter McNeilledge*, *Isabella McFarland*, *Ann McFarland*, and *Mary Clark*. To each of these there were legacies given by the will, which have been paid. There are a number of his brother's and sister's children; but no claim has been made by any except the following, to wit, *Daniel Campbell McNeilledge* and *Catherine McNeilledge*, who are the only children of *James McNeilledge*, who was a brother of the testator, and died previous to the date of the will; and *Alexander McNeilledge*, who is a son of the plaintiff. The testator left
[44*] no father or mother. At the decease *of the testator's widow, there were living of her relations, two brothers and two sisters,

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namely; *William Burns, Robert Burns, Margaret Wainwright,* and *Catherine Burns.* Also a mother named *Helen Burns;* but no father. *Margaret Wainwright* is dead, and has left one child, *John B. Wainwright.* The widow of the testator left also at her decease, uncles and aunts, to wit, *James Burns, Robert Burns, Catherine Burns, Isabella Burns, James Keir,* and *Jane Keir,* who have claimed as poor relations.

There is a balance in the hands of the defendant, of 2944 dollars 53 cents in cash, and a bond and mortgage for 2700 dollars, and interest on it, being the residue of the personal estate of the testator.

The plaintiff, previous to the commencement of this suit, filed a refunding bond with sureties. The executors have given public notice of the will, by advertising in *Scotland* and the *United States.*

The questions submitted to the Court upon this case are; 1st. Whether the plaintiff is entitled to recover a part of the residue of the estate, bequeathed by the will of *Alexander Thomas?* And if he is, 2d. In what character he is so entitled to recover? And it is agreed that upon the decision of these questions by the Court, if it shall be decided that the plaintiff is entitled to recover a part of said residue, it shall be referred to an auditor to be appointed by the Court, to state the amount, in conformity with the Court's decision, and judgment shall be entered thereon.

If the Court shall be of opinion, that the plaintiff is not entitled to recover, then judgment to be entered for the defendants.

Chauncey, for the plaintiff in error, contended, that by poor relations, the testator meant those who would have taken by the Statute of Distributions; and that there should be an equal division between the poor relations of the husband and those of the wife. He cited *Roach* v. *Hammond, Prec. Ch.* 401. *Whithorne* v. *Harris,* 2 *Vez.* 527. **Thomas* v. *Hale, Cas. Temp. Talb.* 251. *Devisne* v. *Mellish,* 5 *Vez.* 529. *Anon.* 1 *P. Wms.* 327. *Brunsden* v. *Woolridge, Amb.* 507. *Edge* v. *Salisbury, Amb.* 70. *Green* v. *Howard,* 1 *Bro. Ch. Cas.* 32. *Isaac* v. *De Friez, Amb.* 595. *Widmore* v. *Woodroffe, Amb.* 636. *Blackler* v. *Webb,* 2 *P. Wms.* 383. 1 *Rop. Leg.* 134, 135. [*45]

J. S. Smith and *P. A. Browne,* for the defendants in error, contended, that half went to the relations of the husband, and half to those of the wife; that they took *per stirpes,* because it would make a much more equal dvision, and therefore must be supposed most agreeable to the testator's intent. They cited 4 *Bac. Abr.* 350, *tit. Legacy.* 2 *Ch. Rep.* 77. 179. *Cas. Temp. Talb.* 251. 1 *Bro. Ch. Rep.* 31.

Chauncey, in reply.

The testator had no intention to make two distinct classes, namely, his own, and his wife's relations. If he had so intended, he would have given a moiety to each. All the individuals who take, must take equally. The testator's brothers and sisters were probably as dear as his wife's mother.

The opinion of the Court was delivered by

DUNCAN, J.—Who were the persons intended by the testator, in the distribution of this residuary personal estate, which he directed to be divided between his own poor relations, and the poor relations of his wife equally, on his death? This bequest is to be construed, as if the word *poor* were not in it. There is no distinguishing between the degrees of poverty; for if degrees of poverty were to be taken into consideration,

and govern the construction, it would open a field of inquiry into the relative poverty of relations, rendering it very difficult and embarrassing, if not impracticable, ever to arrive at a just conclusion who were poor. The devise to relations is of itself not free from ambiguity, and Courts have been obliged to lay hold of the Statute of Distributions as the standard, to prevent an inquiry which would be infinite, and would extend to relations *ad infinitum*. It is therefore confined for convenience sake, and that Statute is the rule and measure of distribution. *Widmore* v. *Woodroffe, Amb.* 636. But though it be the rule by which relations
[*46] are *to take under so general description, yet the wills under which they claim will be the guides as to the proportions into which the fund is to be divided. That depends on the fair construction of each will. Did the testator intend, that whoever should take, should take *per stirpes*, and not *per capita;* that this residue should be divided into two equal parts, one to go to his own, and the other to his wife's relations? I cannot think either was in the view of the testator. He did not intend to constitute two *præpositi*, one to consist of his own, and the other of his wife's family; but that the relations of both were to come in equally; one description; one class; *personæ designatæ;* as much so, as if he had directed a division *nominatim*, between them equally. Strict representation was not in contemplation, but equality. Since the decision of *Thomas* v. *Hale, Talbot's Cases*, 251, the effect in a will, where the devise is to relations, is to cause a division *per capita*. Where the bequest is to relations generally, the expediency of the application of the rule of the Statute, is manifest; but when the testator explains himself, and says he does not intend that his relations should take unequal parts, but take equally, as this is a lawful intent, and clearly expressed, it is the duty of the Courts to effectuate it. Let us illustrate this by a few instances. A legacy to the relations of *A.* and *B.* equally; all take, children and grand-children *per capita*. So a bequest to a brother and the children of a deceased brother; though under the Statute of Distributions they would take *per stirpes*, by express bequest they take *per capita*. A devise to the relations of *A.* and *B.*; they would take as joint tenants a joint interest in the fund. A devise to them equally; they take as tenants in common in equal portions. The Statute of Distributions, though used as a rule to designate the persons entitled under the denomination of relations, yet is no guide as to the *quantum*. Perhaps this rule which is adopted from necessity, lest the devise should be void for uncertainty, does not, in all cases, quadrate with the intention of all testators: perhaps it may not be altogether consistent with the views of this testator; yet it must prevail universally, or it is of no use. Here, if it be not the rule, the wife's relations could take nothing. They must call it in *to support their claim;* for there is no other rule known to the law in
[*47] *dispositions to relations, than the Statute; they cannot go out of it, or beyond it. If there had been no mother, then the brothers and sisters of the wife, and the children of deceased brothers and sisters, would have fallen in with the Statute; but the life of the mother intercepts the distribution to them: they cannot take either as next of kin of their sister or aunt, or *jure representationis*. If they could not take under the Statute, if the property had been the wife's own, they cannot take under the denomination of relations. The residue of the personal

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estate (for the Court give no opinion how the real estate is to go) is to be divided share and share alike, *per capita* between the brothers and sisters of the testator, living at his death, and the children of such brothers and sisters as were then dead, and the mother of the wife. The distribution is deferred to the death of the wife, but that does not prevent the interest from vesting at the death of the testator. I had a strong desire to bring in the relations of the wife, who stand in the same relation to her, that the testator's relations stand to him. That was the only difficulty I had. But, on further reflection, I cannot see how this can be done, without introducing some other rule than the Statute; for the mother cannot be excluded; and if she takes, she takes as the relation of her daughter, and as the relation of the daughter, takes all. She is the sole relation, that can come in, and excludes all other relations under the Statute, and as the Statute is the only rule, under which any can claim under the devise, if they cannot take under the Statute, they cannot under this will.

THE COMMONWEALTH *against* DEACON.

The keeper of the prison is bound to receive a person arrested and brought to him by a constable, and charged with a breach of the peace in his presence.

THIS was an indictment found in the Mayor's Court of the city of *Philadelphia*, against *Israel Deacon*, keeper of the prison of *Philadelphia*, and removed to this Court by *certiorari*. It charged the defendant with refusing to *receive into his custody, *Albert Canfire*, who was arrested by *John Topham*, a constable of the said city, for committing a breach of the peace in his presence. The indictment was tried in *December* last, before DUNCAN J. at *Nisi Prius*, when a verdict was found for the Commonwealth, subject to the opinion of the Court, whether the offence described in the indictment was indictable. [*48]

Kittera, for the Commonwealth.

The inspectors of the prison wish the question decided, whether the keeper of the prison is bound to receive into his custody, persons arrested by a constable, under the circumstances described in the indictment. There can be no doubt that the constable had a right to arrest the party, and keep him safe till he could have a hearing before a magistrate. Where is he to keep him? His own house is not safe. The authorities show, that in every case of treason, felony, and actual breach of the peace, the offender may be apprehended without warrant; and even though no crime were actually committed, a peace officer would be justified if he acted on the information of another. 6 *Bac. Ab.* 572. 1 *Chitt. Cr. L.* 14. 16. 40. *Hawk. B.* 2. *Ch.* 16. *S.* 3. A justice who detains one for further hearing, (which should not exceed three days,) should keep him in the common jail.

Bradford, contra.

The object is to settle the law as respects the duty of the keeper. We contend, that he is not bound to receive a prisoner without a previous warrant from a justice. DALTON, (*Justice* 4,) lays it down, that if any

man shall make an affray or assault upon another, in the presence of the constable, or threaten to kill, beat, or hurt another, or shall be in a fury ready to break the peace, the constable may commit the offender to the stocks, or to some other safe custody for the present, as his or their quality requireth, and after, may carry them before some justice of the peace or to the jail, until they shall find surety for the peace, which the constable may take by obligation, &c. *Hawkins*, in treating of this subject, confines it to cases of felony or treason. It would be of dangerous consequence to say that a constable may arrest whom he chooses to charge, and lodge him in jail. This *Court has held, that common report will not justify a Judge in issuing a warrant, 3 *Binn.* 38. At all events, if the constable can commit, he should do it in writing, so that the ground of it may be distinctly stated.

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GIBSON, J. delivered the opinion of the Court.

Although the authorities are not decisive on this subject, they go a considerable length to establish the right of a constable to deposit a prisoner arrested without warrant, in the common jail for safe keeping, till he can be carried before a magistrate. Even a private person, who may have apprehended another for *treason* or *felony*, may convey him to the jail of the county; although it is said, the safer course is to cause him, as soon as convenience will permit, to be brought before a justice of the peace, and I cannot see any reason why a private person should not have the same authority on an arrest during an affray, which has taken place in his presence. A constable may put a party arrested for an affray in the stocks; and, in case of any offence for which the party suspected may be arrested, may convey him to the sheriff, or jailer of the county; although in this case also, and in every other of the kind, it is said to be the safest and best course, to carry the offenders before a magistrate as soon as circumstances will permit. This is the sum of what is found in the books on the subject; and without saying what would be the duty of a jailor in case of an arrest by a private person, I think it may fairly be inferred, he is bound to receive a prisoner offered by a constable for safe keeping. A constable is a known officer, charged with the conservation of the peace, and whose business it is to arrest those who have violated it. It would therefore be strange if, while all private persons are bound to obey and assist him in suppressing an affray, an officer of justice should be at liberty to refuse the most efficient assistance of all, the confinement of the parties engaged. The officers of justice are bound to assist each other in their several departments, and to afford each other all the facilities which the public means have put in their power. There may be cases of such urgency as not to admit of delay till a warrant of commitment can be procured,—as in the case of an affray near the jail; and there the necessity of the case would prove that the jailer ought to take *charge of the parties actually engaged; and if he is bound to receive in one case, on the bare charge of a peace officer, I know not why he should not in another. There is no danger to the liberty of the citizen in this; for if the arrest and detention be improper, the prisoner can have instant redress by the writ of *habeas corpus*, and the constable may be punished by indictment, or subjected to damages in an action of trespass. On the other hand, were the law otherwise, the means of securing the persons of prisoners, and of acting with decisive

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effect in quelling affrays and riots, would be greatly and unnecessarily lessened. I am therefore of opinion, that the indictment is sufficient.

THE COMMONWEALTH *against* GILLAM.

INDICTMENT.

Under the Act of the 10th of March, 1817, the officer, appointed by the corporation of the city of Philadelphia for the cording of wood, has no right to enter on a private wharf or landing, unless wood be taken there which is subject to seizure; and the owner may lawfully prevent the officer from coming there for other purposes.

The ordinance of the city of Philadelphia, of the 28th January, 1808, is, so far as concerns private wharves or landings, superseded by the Act of the 10th of March, 1817.

THIS case was argued by *Sykes* and *Tilghman*, for the Commonwealth, and *Purdon*, *C. J. Ingersoll*, and *Hopkinson*, for the defendant.

The opinion of the Court was delivered by

TILGHMAN, C. J.—This is an indictment against *Samuel Gillam*, for an assault and battery, in which a verdict was found for the Commonwealth, subject to the Court's opinion on the validity of an ordinance by the citizens of *Philadelphia* in select and common councils assembled, regulating the cording of wood, &c., passed the 28th of *January*, 1808. The question arises on the fourth section of this ordinance, by which it is enacted, "that whenever any cord wood shall be landed for sale at any *private* wharf or landing within the city, the corder who shall superintend the nearest public wharf thereto, is enjoined and directed to inspect and measure the same, for which service he shall receive eight cents per cord, for the benefit of the corporation, to be paid *by [*51] the purchaser; and if any person shall prevent or oppose such corder in the execution of his duty therein, every such person shall, for every such offence, forfeit the sum of twenty dollars."

It is not denied, that the corporation has the right of regulating the cording of wood landed on the *public* wharves, which are *the property of the city*. But the present case relates to a *private* wharf, the owner of which contends, that he has a right to permit any person to land and sell wood, without the interference of the officers of the corporation, provided, each cord offered for sale be of the legal measure. In order to decide this question, we must take into consideration an Act of Assembly, passed on the same subject, the 10th *March*, 1817; for it is admitted by the counsel for the corporation, that if there be any inconsistency between the Act and the ordinance, the latter must give way. It seems that the Legislature had it in contemplation to make a complete provision on the subject, at least so far as concerned wood exposed to sale on ground not the property of the city; and this provision was to extend to the *county*, as well as the *city*. The Act is entitled "An Act for the better regulation of cord wood and bark exposed to sale within the city and county of *Philadelphia*." The first section ascertains the measure of a cord. The second section directs that all cord wood, brought to market within the city and county of *Philadelphia*, shall be at least four feet in length,

including one half the kerf; and describes the manner in which it shall be stowed and packed; the crooked wood to be placed at the bottom, and the straight wood on top. The third section enacts, "that if any person shall expose to sale, within the said city and county, any wood less than four feet in length, it shall be liable to be seized by any corder of wood, and forfeited, one half to the use of the corder, and the other to the guardians of the poor of the city, district, or township in which it shall be seized: And if any person shall, within the said limits, sell, as a cord of wood or bark, for fuel, any quantity less than the standard measure prescribed by this Act, unless the same shall have been previously measured by a corder, and is sold without any change since such measurement, he shall forfeit and pay the sum of ten dollars."

[*52] *It is not to be supposed, that it was the intent of the Legislature to make a man subject to a double penalty for any offence, nor to make him subject to any penalty, unless he offended against some provision of the Act. The main object was, to compel a strict observance of the legal standard of a cord of wood; if that was done, it was immaterial whether the wood was measured by a sworn corder or not. Accordingly, we find no direction that all wood exposed to sale, shall be measured by a *public* corder. Any man, on a *private* wharf, might sell a cord of wood, at his peril. But if it was less than four feet in length, the wood was subject to forfeiture, and if the whole cord was less than the standard measure, the seller was subject to a penalty of ten dollars. But the seller, if he chose, might call in a public corder, to measure the wood, and then, if the cord was less than the standard measure, the seller was subject to no penalty, because the fault was not his, but the corder's. This provision was made for the ease and safety of the seller. The seller, in the case before us, chose to act at his peril. He supposed, that he could ascertain the measure of a cord of wood, without the expense of a public corder. It was not alleged, that the law was broken, by selling, or offering to sell, wood of less dimensions than the legal standard; but the officer of the corporation insisted on his right to enter on a *private* wharf, and inspect the wood, and measure it. In entering, he acted at his peril. If the wood, which he found on the wharf, was below the standard, he had a right to seize it; and therefore he had a right to enter, in order to make the seizure. But if it was up to the standard, there was no right of seizure, and consequently no right of entry. A right of entry is not given by any thing less than *direct implication.* It is not sufficient to say, that unless the corder be allowed to enter and inspect, it is impossible for him to determine whether the wood is of the standard measure or not. It certainly would be difficult, but not impossible. If the wood was less than four feet in length, that might be ascertained, after the wood was moved off the wharf on which it was landed. So if the whole cord was less than the standard measure, the fact might be proved, by cording it over again, with the consent of the purchaser, who would have an interest in detecting the fraud.

[*53] No doubt it would be *more convenient, if the corder had a right to enter, and inspect the wood, before it is removed; and therefore it is very common to give a right of entry in Statutes which make things subject to seizure and forfeiture. But no such right is given by our Act of Assembly; and we must not, for the sake of avoiding an

inconvenience, which the Legislature may remedy at its pleasure, break in upon one of those principles by which property is protected. This case is something analogous to that of *The Commonwealth* v. *Eyre*, 1 *Serg. & Rawle*, 347, in which we decided that a justice of the peace has no right to enter into a man's inclosure, in order to see whether he was not breaking the Sabbath. Upon the whole, then, I am of opinion, *First*, That the ordinance of the city is superseded, so far as concerns private wharves or landings, by the Act of Assembly made on the same subject: and *Secondly*, That the Act gives no right of entry, on a private wharf or landing, to the officer of the corporation, unless wood be there which is subject to seizure. Consequently, in the present case, the owner of the wharf, or any person acting under his order, might lawfully resist the entry of the officer. The defendant in this indictment ought therefore to be acquitted.

Defendant acquitted.

WILSON *against* WALLACE executrix of WALLACE.

If a house, consisting of several active partners, carry on business in the name of one, he cannot, alone, maintain an action for goods sold by the house, though the contract was made with him only. Nor can the names of the other partners be added, after the action is brought.

NARR. in *assumpsit* for goods sold and delivered by the plaintiff, *Thomas Wilson*, to the defendant's testator. Plea *non assumpsit*. A verdict was taken for the plaintiff, at *Nisi Prius* subject to the opinion of the Court, whether upon the evidence, the suit was rightly brought, or can be sustained, in the name of *Thomas Wilson* alone, or ought to have been brought originally in the name of all the partners: the *fact being, that the goods were sold to the defendant's testator [*54] by a house in *England*, trading under the name of *Thomas Wilson*, but consisting of *Thomas Wilson*, *William Rowlett*, and *Gabriel Shaw*. It was agreed between the parties, that the names of the partners might now be introduced, if, at or before the trial, such amendment might have been made.

J. R. Ingersoll, for the plaintiff.

The question is, whether, in the institution of legal proceedings, the name of the firm may be used. It is true, that in a suit by partners, the evidence must agree with the writ and declarations, as to the names of the plaintiffs; and a variance may be taken advantage of, on the general issue. But here the contract was with *Thomas Wilson;* and if a recovery is had, no other can sue. In 7 *Johns.* 549, it was held that the omission of the word *junior* would not vitiate. In *Alsop* v. *Caines*, 10 *Johns.* 396, where *A.* carried on business in the name of *B.*, a suit brought in the name of *B.* was held good. It has been customary here to bring suits in the names of *A.*, *B.*, and Co., without naming all the partners. But the omission is amendable under the Act of the 21st of *March*, 1806, *Sec.* 6, *Purd. Dig.* 327, and also under the Acts of the 21st of *February*, 1814, *Purd. Dig.* 335, and the 24th of *March*, 1818, *Sec.* 7, *Purd. Dig.* 28.

Wallace, contra.

An amendment cannot be made which goes to substitute new parties.

(Wilson *v.* Wallace's executrix.)

There is nothing to amend by. The Act of the 21st of *March*, 1806, does not authorize the addition of new parties, but only the amendment of the statement. The Act of the 24th of *March*, 1818, applies only to assignees, &c.

The opinion of the Court was delivered by

DUNCAN, J.—The declaration is in *assumpsit*, for goods sold and delivered by *Thomas Wilson* to the defendant's testator. The plea is *non assumpsit*.

It is agreed, that the contract was made with a house, carrying on trade under the name of *Thomas Wilson*, but which consisted of
[*55] *Thomas Wilson*, *William Rowlett*, and *Gabriel *Shaw*. *Shaw* and *Rowlett* were not secret or dormant partners, but acting and ostensible.

As the law stood formerly, the rule prevailed, as well as to defendants as to plaintiffs, that if, in *assumpsit*, it appeared on the trial, that all the contracting parties, whether plaintiffs or defendants, were not made parties to the action, this might be taken advantage of, on the general issue, because the contract proved was not the same. But in *Rice* v. *Shute*, 5 *Burr.* 2615, a distinction was made, that when brought by one of several contracting parties, it might be so taken advantage of; but where against contracting defendants, it must be pleaded in abatement. Perhaps, weighing the conveniences and inconveniences, it would be more convenient, that the parties should, after issue joined, proceed on the merits, than that the defendant should be allowed to non-suit the plaintiff, on a mere matter of form. But the distinction is well settled. Yet the non-joinder of a dormant partner, as plaintiff, is no ground of non-suit, *Lloyd* v. *Archbowle*, 2 *Taunt.* 324. The real parties to the suit are those with whom the contract is made. There is a material difference between cases where partners are defendants, and where plaintiffs. If you find out a dormant partner, you may make him pay, because he has had the benefit of your work; but a person with whom you have no privity of contract, shall not sue you. The ostensible men are the only proper plaintiffs; for the only acting partner might owe much money to the defendant, which the defendant might set off: but if the plaintiff and the dormant partner had sued, the debt of the acting partner could not be set off. It seems not yet quite settled, whether it is not in the option of a creditor, without notice of a dormant partner, to consider himself a joint or a separate creditor, 19 *Ves.* 294. It certainly is not agreeable to reason, that when a creditor contracts with one man, without knowledge of another having a secret concern in the contract, when he commences his action against that person, he should, for the first time, be informed by plea in abatement, that there is such dormant partner, and should be obliged to pay the costs of the suit, and have recourse to a new one. It would seem more rational to adopt the rule,—that the creditor may, at his option, consider himself either a joint or a separate creditor. The *acting
[*56] men here were *Wilson*, *Shaw*, and *Rowlett*; the action therefore cannot be maintained in the name of *Wilson* alone.

But application is made to amend, by adding the names of *Rowlett* and *Shaw*. This, it is said, may be done during the trial. This is not an amendment warranted by the Act of the 21st of *March*, 1806. It is not an informality affecting the merits of the controversy, which, under the

Act, Courts may amend; for it has been often decided, that this power, extensive as it is, does not, under the name of amendment, authorize an alteration or change of the cause of action, though it does every defective statement of it; much less does it the introduction of a new plaintiff; for if a new plaintiff may be added, why not a new defendant? But you must go farther than the declaration or the statement here; you must amend the writ, to make it consistent with the declaration; and you have nothing to amend that by. In ejectment in the ancient form without writ, Courts permitted a new demise to be added, or the demise in the declaration altered; but that is, because ejectments are creatures of the Court, which the Court may mould, so as to answer the ends of substantial justice;—practices of the Court wisely established for attaining justice with ease, certainty, and dispatch.

But it is further contended, that if the Court cannot add a new party under this Act, they may under the Act of the 24th of *March*, 1818, *Purd. Dig.* 27. It is entitled "An Act to compel assignees to settle their accounts, and for other purposes." It appears to me, that great misconception has prevailed in the construction of this Act, if it ever has been construed to extend to any other actions, than actions by assignees of insolvent debtors, trustees under deeds of general assignment for the benefit of creditors, executors, and administrators. The title, the preamble, the beginning, the middle, and the end, convey a distinct meaning of the Legislature. The whole scope and every provision of the Act, relate to that description of persons,—to those who sue in a representative character, as executors and administrators, or those who sue *quasi* representatives, as assignees and trustees, on account of the fund, and for the benefit of those interested in it. On no principle of just construction, can it be carried beyond this.

The seventh section enacts, that no suit or action now commenced, or hereafter to be commenced, in any of the *Courts [*57] of this Commonwealth, by executors, administrators, trustees, or assignees, shall abate, or the judgment which may be entered thereon be reversed or set aside, for, or by reason *of any or all of such executors, administrators, trustees, or assignees, being dead, either at the time of the suit brought, or during the pendency thereof; or by reason of all or any of them being superseded or removed; or the letters testamentary or of administration being repealed or annulled;* but the same may be proceeded in to final judgment, by their legal representatives, upon making the proper suggestions upon the record, which the case may require: nor shall any suit or action abate, or the judgment thereon be reversed or set aside, by *the omission to name on the record any one of the party or parties;* but, in such case, *the names of the persons so omitted* may, upon application to the Courts, be added to the record; and the cause, shall, thereupon, be proceeded in to trial and final judgment, with the same effect, *as if such name had been originally inserted in the record.* The first part of the section provides for cases, not of omission of the names of the parties, but of their being dead at the time of suit brought, or dying during its pendency; or the letters testamentary, or of administration, being revoked or annulled; and provides for these events by enabling the legal representatives to be substituted and become parties, and proceed to final judgment. The second case provided for, is that of the omission to

name on the record all the parties, and authorizes the Court to add the names of the parties omitted. It is not, as was urged, a provision made for suitors of particular descriptions, and suits of a certain class, and then a general provision, embracing all suits and all suitors; but several and distinct provisions for the same class of suits and description of suitors. In the one case, it is a substitution of legal representatives, in case of the death, removal, or disability of the original parties in whose name the action was instituted; in the other, an addition of the names of the parties to the trust, where the names were omitted in the institution of the action.

It would be sweeping work, indeed, to add new names to any action and at any time; and it is unreasonable to suppose the legislature would introduce so great and universal an innovation, in an act whose [*58] declared object was not general, *but specific,—where the provision, applied to the specific subject, would be salutary, but, when applied to all actions and all persons, would produce inextricable confusion and uncertainty. Such a design was as far removed from the view of the legislature, as it is from a fair construction of the words they have used. But if the sense were more dubious, from the generality of expression, than it appears to me to be, I would expound it by a reference to the actual case in the contemplation of the legislature, as manifested by their words; and this is a sound rule of construction.

The Court deny the application to add the names of *Shaw* and *Rowlett* to the action and to the record. Rule discharged.

WILLIAMS *against* TEARNEY.

CASE STATED.

Taking a bond with warrant of attorney, and entering judgment on it, is not filing a claim or instituting a suit, within the meaning of the Mechanics' Lien Law.

Hugh Tearney, the defendant in the above case, commenced a building on a lot in *Walnut street* on the 19th *October*, 1812, and finished it in *August*, 1814. *Alexander Napier*, who did stone cutters' work on the building, on the 7th *March*, 1814, took a bond and warrant of attorney from the defendant, conditioned for the payment of 280 dollars, (the amount of his bill,) within one year from the date of his bond. On the 31st *March*, 1814, a judgment was entered in the District Court for the city and county of *Philadelphia*, on this bond, which was assigned to the plaintiff. *No claim was ever filed, or suit brought on the original account.* On the 15th *February*, 1814, the said *Hugh Tearney* mortgaged the above premises (*inter alia*,) to *Jacob Franks and others*, surviving executors of *George Schlosser*, deceased. This mortgage was recorded on the 19th *February*, 1814, and assigned to *Anna Maria Esler* on the 1st *February*, 1818. The property was sold by the sheriff of the city and county of *Philadelphia* on the 20th *April*, 1818.

[*59] **The question was, whether taking a bond and entering a judgment on it, is a claim filed, or suit commenced within the meaning of the Act of Assembly, relative to mechanic's liens?

(Williams *v.* Tearney.)

Barclay and *Gibson*, for the administrators of *Anna Maria Esler*.

P. A. Browne, for the assignee of *Napier*.

The opinion of the Court was delivered by

DUNCAN, J.—The only question the Court are now called on to decide, is whether the taking a judgment bond and entering a judgment on it, by a mechanic for materials and labour, in erecting a house in this city, is an action for the recovery of the debt or a claim filed, so as to preserve the lien on the building. It is not required to give an opinion, whether the taking a bond with warrant of attorney, and judgment confessed on it, extinguishes the lien,—a matter which, when it comes in judgment before the Court, will require very grave consideration.

In questions of personal property, possession and enjoyment, are *indicia* of the right, and liens on personal property are lost by parting with the possession. So possession of real estate may be sufficient to put a party on his inquiry. The term lien, as it respects real estate, is technical. It signifies a charge on lands, running with them, and incumbering them in every change of ownership. Public convenience, where alienations are so frequent as they are with us, would require some notice in some public office, within a reasonable time after the creation of the lien, to which those who give credit or become purchasers, may have access and the means of information afforded.

Consistent with this policy, the legislature, when they gave the mechanic and material man this lien, guarded it against the mischief of secrecy, by providing, that it should not continue longer than two years from the commencement of the building, unless an action for the recovery of the debt, was instituted, or a claim filed within six months after performing the work or furnishing the materials, in the office of the prothonotary of the county.

*On the 15th of *February*, 1814, the mortgage was executed, and on the 1st *February*, 1818, was assigned to *A. M. Esler*. She then became the legal owner of the premises, the purchaser, so far as the amount of the mortgage, for a valuable consideration, without notice or the means of notice,—for the confession of a judgment on a warrant of attorney, on a bond with penalty, though it gave her notice of a judgment, yet gave her notice of a judgment and lien subsequent to that which she was about to acquire by assignment. There is then no equity in favour of the judgment creditor,—no inequity or bad faith, laches or negligence in the assignee, to postpone her if she has the law with her. Purchasers without notice, are highly favoured. Equity never interposes unless for their protection. Equity never strips them of their legal rights. An action of debt on bond, is not an action instituted for the recovery of the price of labour or materials, nor is it a claim filed for them. A judgment confessed on a bond with warrant of attorney, is not an action instituted either in legal phrase, or common acceptation, or a claim filed for the recovery of the price of labour and materials. Enrolment of a deed not proved nor acknowledged according to law, is not notice. [*60]

This species of lien is novel. It may tend to improve and embellish the city, and may be a just security and protection to the mechanic and material man, but it is not to succeed or prevail, when the law conferring it has been disregarded, not in a formal or mere ceremonial matter, but in substance,—for the requisite of instituting an action or filing a claim

within the time prescribed, is as much a matter of importance, as the recording of a mortgage; and the legislature have prescribed the mode and time in which notice shall be given. Courts of justice cannot dispense with it, and substitute something else as an equivalent. But here the judgment could be no equivalent. It gives no notice. If this were considered notice within the meaning of the proviso, the provision which was introduced for the sole purpose of giving notice, would be delusive and nugatory, and worse than that, for it would lead a purchaser or judgment creditor into error, who confiding in his searches for actions for the recovery of the price of labour and materials, or for claims filed, and finding none such, parts with his money.

[*61] The Court unhesitatingly decide, that this entry of judg*ment on a judgment bond, was not the institution of an action, or filing a claim, within six months after performing the work, within either the letter or spirit of the Act. Consequently, the assignee of *A. Napier* is not entitled to the balance stated to be in Court.

WALKER and others *against* BAMBER and others.

A positive affidavit of a debt, made before a justice of the peace in England, is sufficient to hold a party to special bail.

RULE on the plaintiffs to show their cause of action, and why the defendants, who had been arrested on a *capias*, should not be discharged on common bail.

The plaintiffs produced an *affidavit* of *John Walker*, one of the plaintiffs, who were the assignees of the defendants under a commission of bankruptcy in *England*. The action was for money received by the defendants, for the use of the plaintiffs. The *affidavit* was made before *J. Norris*, a justice of the peace of the county of *Lancaster*, *England*, and was accompanied by a certificate of a notary public of *Manchester*, in the county of *Lancaster*, that *Norris* was a justice, &c.†

The opinion of the Court was delivered by

TILGHMAN, C. J.—This case comes before us on a citation of the plaintiffs, to show cause of special bail. As cause of bail, the counsel for the plaintiffs has produced the affidavit of *John Walker*, one of the plaintiffs, by which the debt is positively sworn to, taken before *James Norris*, styling himself a magistrate of the county of *Lancaster* in *England*, and the signature of the said *Norris* and his authority to administer an oath, have been sufficiently verified by other evidence. The question is, whether this affidavit be sufficient to hold the defendants to special bail, and a very important question it is; for it is contended by the counsel for the defendants, that no oath made in a foreign country, however positive,

[*62] is sufficient to hold to bail, unless accompanied *with some written acknowledgment by the debt of the defendant. If the law be so, it may create great embarrassment to foreigners, and be inju-

† See *Morsell* v. *Julian*, 1 *Wils.* 231. 1 *Crompt. Pract.* 39. 41. *Walrond* v. *Van Mons*, 8 *Mod.* 322. *O'Meally* v. *Newell*, 8 *East.* 364.

rious to the commercial credit of the State. We have therefore endeavoured to ascertain the ground on which the rule, set up by the defendants' counsel, is supported. We have no Act of Assembly or rule of Court on the subject. But the authority of the case of *Taylor* v. *Knox*, decided by the late Ch. J. SHIPPEN, when President of the Court of Common Pleas, in the year 1785, is relied on. Of course, we have examined that case thoroughly; and it appears, that the President found himself embarrassed by a practice, which had been established before he came on the bench, of refusing special bail, unless the debt were sworn to before one of the Judges of the Court, agreeably to the Stat. 12 *Geo.* I. This practice he considered as illegal, because that Statute had never been extended to this State, before the revolution. The consequence ought to have been, the establishment of a practice, agreeable to the general principles of commercial law and the usage of the most enlightened nations. The mind of President SHIPPEN was inclined to liberality, and we may plainly discover a struggle between his own view of the law, and his wish to avoid too wide a departure from the sentiments of his brethren who were not lawyers. Accordingly, he made a compromise, by striking out *a middle way*, as he called it, between the Statute 12 *Geo.* I., which required an affidavit before one of the Judges of the Court, and the general principles of law which admitted an affidavit before a notary public, or magistrate, of a foreign country. President SHIPPEN was aware that in *England*, before the Statute of 12 *Geo.* I. an affidavit before a notary public of a foreign country, was received in proof of cause of bail; for he cites a case to that purpose, reported in 8 *Mod.* 323, (11 *Geo.* I.) But he does not seem to have understood, that the same evidence has been received, *since that Statute.* Nevertheless, it certainly has. For, the construction put upon the Statute by the *English* Judges, was, that although it prohibited a plaintiff from arresting the defendant and holding him to bail without an affidavit before a Judge of the Court, *of his own authority*, and without a Judge's order, yet it did not restrain a Judge from making an order to hold *to [*63] bail, on an affidavit made in a foreign country. The reason why it is presumed, that this had escaped the President is, that he says, the Court of Common Pleas desired to keep up a *reciprocity* between this country and *England*, and therefore required an affidavit before a Judge. But there could be no reciprocity if one country admitted an affidavit before a foreign magistrate and the other did not. But we may see clearly, which way the judgment of President SHIPPEN, who was a man of large views, inclined; for in that very case of *Taylor* v. *Knox*, he held the affidavit before the lord mayor of *London*, a sufficient ground for *an attachment*, and even in cases of *capias*, where a written acknowledgment of the defendant was required, he thus expresses himself:— "This rule, however, affects the inhabitants of other countries as well as *England, and it may possibly be found necessary at some future time to make an alteration in it, more conformable to the general law on these subjects.*" Had he been now living, I make no doubt that he would have *thought that future time was now come*, especially had he been assured, (as we have been by very satisfactory evidence,) that in the year 1807, the Court of King's Bench in *England*, ordered special bail, on the affidavit of a citizen of *United States*, made before a magistrate in *Paris*, proving

a debt contracted in the *United States*. Our commerce has increased prodigiously since the year 1785, when the rule was laid down in the case of *Taylor* v. *Knox*, and in order to do justice, it is necessary that the law of evidence, in commercial cases, should keep pace with the progress of business. This Court is unfettered by the rule of the Common Pleas, and after diligent search, we have found no case, either reported or in manuscript, in which we have decided that an affidavit made in a foreign country, should not be received. Affidavits made in *other States* have always been received without scruple, and I understand that *sub silentio* it has been customary to demand special bail on affidavits made in *Europe*. It is time the matter should be settled. We have considered it deliberately, and are of opinion, that in the case before us, the plaintiffs have shown good cause for special bail. It should be remarked, that in the present case, an acknowledgment under the hand of the defen-
[*64] dant, could never be expected; *because he received the money without the approbation or knowledge of the plaintiffs. But our opinion is not founded on that special circumstance,—it takes broader ground. We think that the evidence would have been sufficient, had it been a case of goods sold. Rule discharged.

COMMONWEALTH *ex relatione* THOMAS *against* THE COMMISSIONERS OF THE COUNTY OF PHILADELPHIA.

The clerk of the Quarter Sessions is not entitled to a fee of eighteen and three-quarter cents for each certificate given to a witness for the Commonwealth, of his attendance on an indictment on which the county is to pay the costs, when such certificate is not given at request of the County Commissioners, though they refuse to pay the witnesses without it.

RULE to show cause why a *mandamus* should not be issued to the defendants, commanding them to draw an order on the County Treasurer in favour of *Erasmus Thomas*, Clerk of the Court of General Quarter Sessions of the county of *Philadelphia*, for the sum of 2 dollars 87½ cents, for fees due to him from the county of *Philadelphia*.

Rawle, for the defendants, showed cause.

Wurts, argued in support of the rule.

The opinion of the Court was delivered by

TILGHMAN, C. J.—This case comes before us on a rule on the Commissioners of the county of *Philadelphia*, to show cause why a *mandamus* should not be issued, commanding them to draw an order on the County Treasurer to pay to *Erasmus Thomas*, Clerk of the Court of General Quarter Sessions, the sum of 2 dollars and 87½ cents, for fees dues to him from the county. These fees were for certificates given to witnesses who attended on behalf of the Commonwealth, showing the number of days they attended, and the amount of money they were entitled to receive from the county. The Clerk claimed a fee of 18¾ cents for each certificate. The case depends upon the fee bill passed the 22d *February*, 1821, sect. 9, by which, the Clerk of the Quarter Sessions is
[*65] *allowed "for taxing a bill of costs, other than Clerk of the Sessions, 18¾ cents." The construction put upon this law by

(The Commonwealth *v.* The County Commissioners.)

the Clerk is, that he is entitled to a fee of 18¾ cents from the Commissioners, for every bill of costs taxed by him, that is to say; for every separate bill for the Sheriff, the Attorney, the crier, and each witness. But this is contrary to the decision of this Court, in the case of *The Commonwealth ex. rel. Coxe* v. *The County Commissioners.* It was there determined, that the Clerk was not entitled to charge the Commissioners for more than one bill of costs, unless they *requested him* to make out a bill for each witness, and then they must pay for it. The Commissioners made it their practice *not to request* the Clerk to make out separate bills for each witness; but as they refused to pay the witnesses unless a certificate of their attendance at Court was produced, the witnesses were in the habit of obtaining a certificate from the Clerk, for each of which he charged the fee allowed by the Act of Assembly for taxing a bill of costs. When the case of *Coxe* v. *The Commissioners* was decided, the fee was 25 cents, but it was afterwards reduced to 18¾ cents by the Act of 22d *February*, 1821. The Legislature disapproved of this charge against the witnesses, and enacted, by the Act of 16th *March*, 1820, sect. 2, "that no prothonotary or Clerk of any Court in this Commonwealth, shall demand of any witness, any sum for a certificate that he has served as a witness." Being thus prohibited from taking a fee from the witnesses, the Clerks returned to the charge against the Commissioners of the county, to which they say they are entitled under the decision in *Coxe's Case;* because the Commissioners by refusing to pay the witnesses unless a certificate from the Clerk is produced, do substantially request the Clerk to make out the certificate. But it is not so. The witnesses demand the certificate, which the Clerk is obliged to give them *without fee*, by virtue of the Act of *March*, 1820, and this certificate being presented to the Commissioners, the money is paid without further trouble. It is true, that this mode of proceeding throws labour on the Clerk without compensation. But it is presumed, that upon the whole, the office is profitable. Be that as it may, he can charge nothing that is not allowed in the fee bill. It is the opinion of the Court, that according to the rule established in the case of **Coxe* v. *The Commissioners*, the county ought not to be [*66] charged with the fee claimed by the Clerk in the present instance, and therefore the rule to show cause why a *mandamus* should not be issued, must be discharged. Rule discharged.

PASSMORE and another, to the use of SPARHAWK, *against* the Insurance Company of Pennsylvania.

On the 11th of July, 1817, *P. & B.* borrowed of the Insurance Company of Pennsylvania 5000 dollars on *respondentia*, on a voyage to Batavia, and back to Philadelphia. The ship performed her voyage, and returned to Philadelphia with a cargo of coffee, consigned to the president of the Company. On the 29th of January, 1818, *B.*, without the knowledge of his partner, drew an order on the Company, to pay the proceeds of the shipment to *K. & C.*, deducting the debt due on *respondentia* and the premium of insurance. On the 2d of February, 1818, the partnership of *P. & B.* was dissolved, and *P.* authorized to close the business of the house. About the 18th of May, 1818, *P.* entered into a negotiation with the president of the Company, when it was verbally agreed that the coffee should be delivered to *P.*, he paying the *respondentia*

(Passmore and another *v.* The Insurance Company of Pennsylvania.)

debt and interest, and also ten shillings in the pound on three notes drawn by *P. & B.*, and held by the company. On the 14th of May, 1818, *P.* (for *P. & B.*) consigned to *S.* all the interest of the house in the coffee which was in the possession of the Company. On the same day *P.* tendered to the president of the Company the *respondentia* debt and interest, and also ten shillings in the pound on the said three notes; but the president refused to receive the money or to deliver the coffee, because the directors of the Company refused to ratify his verbal agreement. On the 25th May, 1818, *S.* (who was the son-in-law of *P.*,) tendered to the president, the *respondentia* debt and interest, but not the ten shillings in the pound on the three notes; but the money was refused. Some time afterwards, the Company sold the coffee, by virtue of a power in the *respondentia* contract. The Company brought suit on the three notes to July Term, 1818, in this Court. The case was arbitrated, and *P.* insisted, before the arbitrators, on the agreement to take ten shillings in the pound; and *S.* was examined to prove the tender made in pursuance of the agreement. The Company demanded the full amount of the notes; but the arbitrators decided against them, and the Company did not appeal. *S.*, in his evidence before the arbitrators, did not mention the assignment of the coffee to him; nor did it appear, that, at that time, the Company had any notice of it, unless it might be implied from the tender of the *respondentia* debt made by *S.* *P.* compromised the claim of *K. & C.* An action of trover was then commenced for the coffee, in the name of *P. & B.*, against the Company, which was originally marked for the use of *P.*; but an entry was afterwards made on the docket, that it was for the use of *S.* *Held*, That under the circumstances of the case, the defendants might, in equity, set off the judgment obtained against *P. & B.*, on the three notes above mentioned.

This case was argued by *Randall* and *J. R. Ingersoll* for the plaintiffs, and *Binney* and *Rawle* for the defendants.

The opinion of the Court was delivered by

Tilghman, C. J.—This is an action of trover for a quantity of coffee, imported in the ship *Margaret* from *Batavia*, and consigned
[*67] to *J. S. Cox*, president of the Insurance *Company of *Pennsylvania*. A verdict was taken for the plaintiffs, by consent, subject to the opinion of the Court, whether the defendants were entitled, under all the circumstances of the case, either at law or in equity, to a credit, for a judgment obtained by them against *Passmore & Birckhead*, on three promissory notes drawn by them, and held by the defendants. The case is circumstanced as follows: On the 11th of *July*, 1817, *Passmore & Birckhead* borrowed of the defendants 5000 dollars on *respondentia*, on a voyage to *Batavia* and back to *Philadelphia*. The ship performed her voyage in safety, and arrived at *Philadelphia*, in *July*, 1818, with a cargo of coffee, consigned to *James S. Cox*, president of the Insurance Company of *Pennsylvania*, the defendants. On the 29th of *January*, 1818, *Birckhead*, without the knowledge of his partner *Passmore*, drew an order on the defendants, to pay the proceeds of the shipment in the *Margaret*, to *Kintzing, Son & Coxe*, deducting the debt due to the defendants on *respondentia*, and the premium of insurance on the said shipment. On the 2d of *February*, 1818, the partnership of *Passmore & Birckhead* was dissolved; and *Passmore* was authorized to close the business of the house. About the 18th of *May*, 1818, *Passmore* (acting for the Company) entered into a negotiation with *James S. Cox* (acting for the defendants,) when it was verbally agreed between them, that the coffee should be delivered to *Passmore*, he paying the *respondentia* debt and interest, amounting to 5900 dollars, and also ten shillings in the pound on three notes drawn by *Passmore & Birckhead*, and held by the defendants, which, at that rate, would amount to 484 dollars 57

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cents, making an aggregate of 6384 dollars 57 cents. On the 19th of *May*, 1818, *Passmore* (for *Passmore & Birckhead*) assigned to *Thomas Sparhawk* all the interest of that house in the coffee which was in the possession of the defendants. On the same day, *Passmore* tendered to *James S. Cox* the *respondentia* debt and interest, and also ten shillings in the pound on the three notes before mentioned; but *Cox* refused to receive it or to deliver the coffee, because the directors of the Insurance Company refused to ratify the verbal agreement made by their president. On the 25th of *May*, 1818, *Sparhawk*, the son-in-law of *Passmore*, tendered to *James S. Cox* the *respondentia* debt and interest, but not the ten *shillings in the pound on the notes; but the money [*68] was refused. Some time after this, the defendants sold the coffee, by virtue of a power in the *respondentia* contract. The defendants brought suit against *Passmore & Birckhead* in this Court, to *July* Term, 1818, on the three promissory notes, amounting to 960 dollars 91 cents. This action was submitted to arbitration, and *Passmore* insisted, before the arbitrators, on the agreement to take ten shillings in the pound on these notes, and examined *Sparhawk* as a witness to prove the tender made by him, in pursuance of the agreement. The Insurance Company demanded the full amount of the notes, but the arbitrators decided against them, and made an award for no more than 503 dollars 95 cents, from which award the Insurance Company made no appeal. *Sparhawk*, in his evidence before the arbitrators, made no mention of the assignment of the coffee to him; nor does it appear, that, at that time, the Insurance Company had received any notice of that assignment, except it may be implied from the tender of the *respondentia* debt, made by *Sparhawk*, on the 25th of *May*, 1818. When the present action was commenced, it was marked for the use of *Passmore*, but afterwards, (about the 16th of *January*, 1819) a docket entry was made, that it was for the use of *Sparhawk*. It does not appear, that notice of this entry was given to the defendants' counsel. *Passmore* compromised the claim of *Kintzing, Son & Coxe*, by a payment of 500 dollars; and he complains of damage sustained in consequence of the premature sale of the coffee, made by the defendants; that article having afterwards risen in price.

Sparhawk, who may now be considered as the substantial plaintiff in this suit, denies that the defendants have any equity in their pretension to set off the amount of their judgment, because that pretension is founded on an agreement, which they refused to perform on their part, and always resisted, till an award was made against them. It is certain that the defendants have no *legal* set off; they must stand therefore on the *equity* of their case. But this equity does not arise solely out of the agreement, but, in part, on the conduct of *Sparhawk*. If the action stood now for the use of *Passmore*, as it was originally brought, it cannot be doubted that the defendants would have an equitable set off [*69] *against him; for, although the defendants had refused to carry the agreement into effect, yet as *Passmore* set it up before the arbitrators, and succeeded in his plea, it could never be endured, that he should be permitted, first, to obtain the fruits of the agreement in one action, and, afterwards, disaffirm the same agreement in another. The defendants denied the agreement, but *Passmore* compelled them to perform it, by striking off ten shillings in the pound from the notes. I mean that he

compelled them, so far as concerned the notes. As to the delivery of the coffee, they could not be compelled, because it was sold. But that is immaterial, as the present action will give redress for the non-delivery of the coffee. Now, if the defendants' equity be good against *Passmore*, why should it not be good against *Sparhawk*, who claimed under him? Because, say the plaintiffs' counsel, *Sparhawk* is not to be affected by any thing which passed between *Passmore* and the defendants, subsequent to the assignment to him. And I should agree with them, if explicit notice of that assignment had been given to the defendants. But the circumstances of the case do not warrant the conclusion of notice having been given. *Sparhawk* relies on the *tender* made by him, which, he says, is tantamount to notice. But I do not think so. He was the son-in-law of *Passmore*, (by marriage with his daughter) and had been in company with him, when he (*Passmore*) made the tender on the 19th of *May*. The defendants might well have supposed therefore, that the second tender was on account of *Passmore*. It is somewhat extraordinary, that this suit, at the commencement, was marked for the use of *Passmore*. The plaintiff's counsel say, that this was not so intended, but done accidentally. It is possible that it may be so. But how are we to account for *Sparhawk's* silence as to this material fact of the assignment to him, before the arbitrators, when he appeared as *Passmore's* witness? It cannot be supposed, that those arbitrators would have deducted ten shillings in the pound from *Passmore & Birckhead's* notes, if they had known that *Sparhawk*, who claimed the coffee under *Passmore & Birckhead*, was to receive the *value* of the coffee from the Insurance Company, in another action, without any allowance for the notes. It cannot [*70] be doubted, that *Sparhawk* had notice of the *agreement between *Passmore* and the defendants, because he went with him to make the tender, under that agreement. It was incumbent on him, therefore, when he was giving his testimony before the arbitrators, to inform them that all the interest of *Passmore & Birckhead* had been transferred to him, and that he was prosecuting an action, in which he expected to recover from the defendants the value of the coffee, without any deduction for the notes. This, I say, was incumbent on him; and having failed to do it, he must abide by the consequences. That was the time to declare that he was the owner of the coffee, and that he stood upon different ground from *Passmore & Birckhead*. But not having distinguished his case from theirs, at that time, he cannot do it now. His conduct has injured the defendants, and given them an equity against him, which they would not have had, if he had disclosed his true situation. As to the compromise, by which 500 dollars were paid to *Kintzing, Son & Coxe*, the defendants had nothing to do it, nor can their equity be affected by it. It was *res inter alios*. When *Passmore* agreed with the defendants for the delivery of the coffee, he knew of the order in favour of *Kintzing, Son, & Coxe*, and took upon himself to answer it. As to those parties, the defendants were stakeholders, for they received no consideration for that order. But the fact is, that *Passmore* affirmed it to be of no validity, because it was improperly drawn by his partner *Birckhead*, and the impropriety, as he said, was well known to *Birckhead's* father-in-law Mr. *Kintzing*. Neither *Passmore*, therefore, nor *Sparhawk*, who stands in his place, has any equity against the defendants, arising out of that order.

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I am of opinion then, upon the whole, that the defendants have a right to set off against *Sparhawk* the amount of their judgment against *Passmore & Birckhead*, with the interest and costs thereof.

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*DICKINSON *against* PURVIS and another executors of BYRON. [*71]

Bequest of five hundred pounds sterling to a niece and *her heirs*. The legatee dies before the testator, leaving a husband and children. The legacy is lapsed.

THIS action was entered by agreement, and the following case submitted to the Court for their opinion.

Joshua Byron, of the county of *Philadelphia*, by his last will and testament, dated *March* 2d, 1819, after directing his executors, the defendants, to sell and dispose of such real and personal property as he should die possessed of, and the discharge of his just debts, and bequeathing various legacies to different members of his family, says:—"I give to *Elizabeth Byron* and her heirs, daughter of my brother *William Byron*, deceased, five hundred pounds. She is married, and her name, I believe, is *Elizabeth Dickinson*." The testator died on the 19th of *April*, 1819. *Elizabeth Dickinson*, formerly *Elizabeth Byron*, died on the 23d *March*, 1819, leaving a husband, the plaintiff, and several children surviving her.

The question for the opinion of the Court was, whether the above mentioned legacy was lapsed.

Hopkinson, argued the case for the plaintiff.

Ewing, for the defendants, was stopped by the Court.

PER CURIAM:—This is an action for a legacy bequeathed by *Joshua Byron*, to his niece *Elizabeth Dickinson*. The testator gave five hundred pounds sterling to her *and her heirs*. She died before him, leaving a husband and children. It is an unfortunate case, but the law is clear. The legacy was lapsed by the death of the legatee in the life of the testator. The word *heirs*, cannot operate in favour of the issue. It is an improper expression, because personal property does not go to the heirs, but to the personal representative. But the testator intended, by that expression, only to denote the absolute property which he gave to his niece, in the legacy bequeathed to her. She was to have the whole. Her children were not in the contemplation of the testator, and could *take nothing by his will. We have an Act of Assembly [*72] (passed 19th *March*, 1810) which prevents the lapse of legacies bequeathed to *a child or other lineal descendant* of the testator. But it does not reach the present case, and the Court is sorry for it. Judgment must be entered for the defendants.

Judgment for defendants.

THE COMMONWEALTH *ex relatione* NORTON and others *against* DEACON.

This Court will not discharge prisoners, on a *habeas corpus*, while an indictment is pending against them, on which they have been committed by a Court having competent jurisdiction; on the ground that they have been tried on that indictment, and acquitted on some of the counts, but no verdict given on the others. The remedy, if an erroneous judgment should be rendered, is by writ of error.

THIS was a *habeas corpus* directed to the defendant, the keeper of the prison of *Philadelphia*, to bring up the bodies of *Norton*, *Roosewelt* and *Eddy*. By the return it appeared, that the defendants were indicted for forgery, and tried in the Mayor's Court of the city of *Philadelphia*. There were sixteen counts in the indictment, and the jury found the defendants not guilty on nine counts, and said nothing as to the residue. The Mayor's Court afterwards committed the defendants to take their trial on the other seven counts.

Phillips, for the prisoners, insisted, that an acquittal on the nine counts, was an acquittal on the whole indictment, and that they could not be tried again.

DUNCAN, J.—You need not use any argument to prove that the plaintiffs cannot be tried again on this indictment.

Duane, for the Commonwealth, then contended, that if there were any error, it should be brought before the Court on a writ of error.

P. A. Browne, for the prisoners, urged, that under the circumstances, they were entitled to a discharge. They had been detained in prison more than two Courts.

[*73] *By the Court.—It appears that *Roosewelt* and *Eddy* are in custody by order of the Mayor's Court, and that an indictment against them is still depending in that Court. No judgment has been given on the verdict, nor do we know what judgment will be given. But we know that the Mayor's Court has jurisdiction over the offences with which the prisoners are charged, and if they should give an erroneous judgment, remedy may be had by writ of error, which will bring the case properly before us. We are of opinion, that it would be improper to discharge the prisoners under the present circumstances, and therefore they are remanded to the custody of the keeper of the prison.

Prisoners remanded.

MORGAN and another assignees of WALN *against* THE BANK OF NORTH AMERICA.

A party entitled to a transfer of the stock of an incorporated company, may maintain a special action on the case against those whose duty it is to permit a transfer to be made, and who refuse permission.

It is a principle of equity, whenever the Court finds mutual demands, to endeavour to set off one against the other, and Courts of Law in Pennsylvania, have adopted the doctrine of Courts of Chancery with respect to equitable set-offs.

A stockholder who borrows money of a Bank, with full knowledge of an usage not to permit a transfer of stock, while the holder is indebted to the Bank, is bound by such

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usage, and neither he nor his assignees under a voluntary general assignment, can maintain an action against the Bank for refusing to permit his stock to be transferred.

Query, whether an action could be maintained by a special assignee for a valuable consideration?

THIS was a special action on the case, brought by *Benjamin R. Morgan* and *John C. Smith*, assignees of *Robert Waln*, against the *Bank of North America*, to recover damages for refusing to permit a transfer of certain shares of stock by Mr. *Waln* to the plaintiffs, and for refusing to pay to them the dividends on those shares. The cause was tried before the CHIEF JUSTICE at *Nisi Prius* in *February* last, when a verdict was taken for the plaintiffs, for six cents damages and six cents costs, subject to the Court's opinion on the evidence.

The facts proved on the trial were as follow:—*Robert Waln* became a stockholder of the *Bank of North America* in *October*, 1791, and was elected a director in *January*, 1792, and so continued until *January*, 1820. *Benjamin R. Morgan*, one of the plaintiffs, became a director of the same institution in *January*, 1811, and remained so until *March*, 1821. On the 15th of *September*, 1819, *Robert Waln* made a voluntary general assignment to the plaintiffs, for the benefit of his creditors. At that time he was the owner of six shares of the stock of the said Bank, and was indebted to it in the sum of 25,786 dollars 92 cents. On the 19th *February*, 1820, the plaintiffs and Mr. *Waln*, went to the Bank, accompanied by a notary public, who, after exhibiting to the cashier the certificates of stock and Mr. *Waln's* assignment, requested that a transfer might be made to the assignees. The cashier declined giving the permission demanded, saying, that there was an order of the board, with which Mr. *Waln* was acquainted, that no stockholder indebted to the Bank, should transfer his stock until the debt was paid. In a day or two after, the notary again waited upon the cashier, who gave an answer in writing in these words:—"The Bank holds the shares, as a set-off for the debt due from *Robert Waln.*"

[*74]

On the part of the defendants it was proved, by a witness who had himself been a director of the *Bank of North America* twelve years, that during that period, two cases occurred, of which his own was one, in which stockholders became indebted to the Bank, and did not transfer their shares, in consequence of the regulation of the board, not to permit a stockholder to transfer his shares while he remained indebted to the Bank. The rule was acquiesced in by the stockholders in both instances. Three cases, which occurred before the witness became a director, also came under his knowledge. In one of them he believed an application was made to the Bank, for permission to transfer. The witness had no doubt Mr. *Waln* was acquainted with these instances, as he was an active, excellent director, and often on committees of accounts. He must have been acquainted with this regulation and claim of the Bank. There was but one opinion at the board, and Mr. *Waln* could not have been ignorant of it. The Bank always insisted on the right, and never yielded it. The witness always considered it the fixed law of the *Bank. He believed the debts due in the cases mentioned by him, were on notes discounted by the Bank.

[*75]

It was agreed by the parties to this suit, that *James Willes* being a

creditor of *James Smith* (one of the debtors above alluded to) received from him an assignment of two shares in the *Bank of North America*, with a power to transfer them; that he attended at the Bank, and claimed the right to transfer, which was denied by the directors, and permission to transfer refused, on the ground that Mr. *Smith* was indebted to the Bank. After some opposition, Mr. *Willes* abandoned his claim, and the shares have ever since been held by the Bank. It was further agreed, that *William Lewis*, esq. counsel for the Bank, advised the directors, while *Robert Waln* was one of them, that they had a right to refuse the transfer of any stock while the holder was indebted to the Bank.

The Bank furnished to the assignees of *Robert Waln*, an account against him, in which, after charging him with the debt due to the Bank, and giving him credit for the six shares of stock at the current price, and the dividends received, there remained a balance due to the Bank of 22,815 dollars 98 cents. It was admitted that the debt due from *Robert Waln*, arose from notes discounted by the Bank while he was a director.

Rawle, jun. and *Rawle*, for the plaintiffs.

The policy of the law being, that the effects of an insolvent should be equally distributed among all his creditors, instead of being monopolized by one or a few, the claim of the plaintiffs which has this end in view, is entitled to much more favour than that of the defendants, who seek to appropriate the whole fund to themselves, to the exclusion of all others. In considering the liability of the shares of stockholders to be applied to the extinguishment of debts due by them to the Bank, it will be proper to advert to the nature of the capital stock of these institutions, and to the nature and extent of the interests of the stockholders in it. The property held by banking companies is partly real and partly personal.

[*76] By their charter, the real estate of the *Bank of *North America* is confined to a banking house and the lot on which it stands, and to such other real property as may be *bona fide* mortgaged as a security for debts. Their principal estate is personal, the real being merely accessory to the personal, and permitted to be held to enable them to carry on their banking operations. Nevertheless, both species of property are so intimately blended together, that the character of one will be found to have a considerable influence upon the other. With respect to the interest of the stockholders, it is perfectly clear that they are not joint tenants, because no survivorship takes place which is an essential incident to this species of tenure. It is equally clear that they are not to be viewed in the light of mercantile partners, because unlike partners, they are not individually responsible for the debts of the company, whose corporate property alone is applicable to the payment of them. None of the consequences therefore, flowing from the relations of joint tenancy and partnership, attach to members of a corporation. The character in which they hold their property is that of tenants in common of a mixed estate, partly real and partly personal, and of course all the characteristics of this kind of tenancy belong to them. Each tenant in common has an undoubted right to withdraw from the concern, and to dispose of his interest to any one, who, by the transfer, becomes the proprietor of an undivided share in the estate of the company. This transferable quality belongs peculiarly to shares in commercial incorporated companies, which are intended, for the benefit of trade, to pass freely from hand to hand. There is nothing in

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the charter of the *Bank of North America*, which can authorize the imposition of such a restraint upon the alienation of shares, as they now claim; and even in the by-laws, which if opposed to the general policy and intent of the corporation are void, there is nothing to support their claim. A corporation may make by-laws for its own regulation, not inconsistent with the law of the land, or with the intention and objects of the corporation. If contrary to its design and spirit, they are void. 2 *Kyd on Corp.* 113. *Maidstone Case*, 4 *Burr.* 2204. *Breton's Case*, 4 *Burr.* 2260. The design of the *Bank of North America*, as declared in the preamble to the Act by which it was created, 2 *Sm. L.* 399, was to advance objects of general interest and utility, to promote agriculture and *commerce, particularly the latter, by giving them facilities [*77] which they would not otherwise possess. These objects do not require that the Bank should possess so great an advantage over the other creditors of an insolvent stockholder, as to have the right to retain his stock; on the contrary, it is more consistent with general utility, and especially with the interests of commerce, that the transfer of shares should be under the control of the stockholder, unclogged by any lien of the Bank, because the consequences of establishing the lien, would be injurious to his commercial credit. If then the defendants' claim rested on a positive by-law, instead of an alleged usage, it would, if opposed to the general objects of the corporation, be void. Another rule in relation to this subject is, that although a by-law may regulate the exercise of a right, it cannot destroy or even abridge the right itself, 2 *Kyd*, 122. *Commonwealth* v. *Woelper*, 3 *Serg. & Rawle*, 33. A by-law which creates a lien on the stock of a member, tends to abridge and even to destroy the right of alienation, which is incident to this species of property, and which every one, on becoming a member of the company, acquires. If then a by-law regularly passed and known, authorizing the claim now asserted, would not be binding, still less would a mere usage of the Bank, introduced we know not how, and known to very few. No lien having been given by the terms of the charter, nor even by a by-law, it must be supported, if at all, upon the general principles of law. The cases in which the law gives a lien, are thus stated by Lord MANSFIELD, in *Green* v. *Farmer*, 4 *Burr*, 2221:—1. Where there is an express contract authorizing it. 2. Where a contract may be implied from the usage of trade, or 3. From the manner of dealing between the parties. 4. Where the defendant has acted as factor for the plaintiff. The law is laid down in the same manner, in *Jarvis* v. *Rogers*, 15 *Mass. Rep.* 394. An express contract between the Bank and Mr. *Waln*, is not pretended. Nor can an agreement be implied from the usage of trade, for there was in fact no trading, and unless it be shown that the Banks in *Philadelphia* generally are in the habit of asserting and enforcing the same claim, it does not amount, properly speaking, to an usage. Nor is it to be inferred from the manner of dealing between the parties, that there was an *agreement that the Bank should retain in the event which [*78] took place. The meaning of this rule is, that where, from the manner of dealing, it is apparent that security arising from the possession of a particular thing was looked to, rather than the personal credit of the debtor, there the party should not be compelled to part with the possession until the debt was paid. But where personal credit was originally

relied upon, the creditor cannot withhold specific property, either in discharge of the debt, or to compel payment. *Esp. N. P.* 585. *Green* v. *Farmer*, 4 *Burr.* 2214. *Allen* v. *Megguire*, 15 *Mass. Rep.* 490. The security to which the Bank looked when they discounted Mr. *Waln's* notes, was his personal credit, and that of his endorsers. It is beyond a doubt, that except where stock is expressly pledged, which is not very common, discounts are granted upon personal credit alone, and as except in the case of a pledge, a stockholder may unquestionably transfer his stock before his notes become due, it is idle to suppose that the Bank placed any reliance upon a security which might be placed beyond their reach at any moment before the debt was payable.

A strong analogy exists between the interest of stockholders and that of part owners of a ship. Part owners, like stockholders, are tenants in common of their respective shares, each having a distinct interest, which on his death passes to his personal representative, and not to the survivors. *Abbot*, (*Story's Ed.*) 103. (83). The rule now established in relation to part owners is, that where one becomes bankrupt, the others may deduct from his share of the profits of the voyage in prosecution at the time, his share of the expenses of that voyage, but for his proportion of the expenses of former voyages which remains unpaid, no deduction can be made; and for no debt whatever have they a lien on his share of the ship, which passes unencumbered to his assignees. *Abbot*, 113. (93.) 1 *Holt on Shipping*, 358, 359. 2 *Ves. & Beames*, 242. *Livingston* v. *Lynch*, 4 *Johns. Ch. Rep.* 573. *Nicoll* v. *Mumford*, *Id.* 526.

The cases of stockholders in an incorporated company, and of part owners of ships, though nearly parallel, are however in some respects different; but these distinctions operate in favour of the present argument. Like members of a corporation, part owners have liberty to withdraw from the concern when they please; but, unlike corporators,
[*79] *they are individually liable for the whole of the common debts. Another distinction arises from the different nature of the property they respectively hold. The property of part owners is purely personal; that of the corporators of the *Bank of North America*, both real and personal, which are so amalgamated, that they cannot be separated. When the charter of the Bank expires and its affairs are wound up, the stockholders will be tenants in common of the banking house and all the other real estate held by the company. Any one of them may sue out a writ of partition, and no debt due by him to the Bank would operate as a lien on his share, or prevent a partition from taking place. Nor could the debt be always deducted out of his share of the personal property; because the debt might exceed the debtor's proportion of it, and the balance would be no lien on the real estate. If a lien could not take place on the winding up of the affairs of the Bank, there is no reason why it should before that crisis arrives.

As a set-off, there is nothing to support the claim advanced by the defendants. Our Defalcation Act, it is true, is very comprehensive in its terms, and the decisions under it have been extremely liberal, but they do not reach the point now proposed. They have gone no further than to establish, that unliquidated damages may be set off, when they arise from a breach of the very contract on which the plaintiff sues. As, for example, damages for a breach of warranty on a sale of goods. *Kachlein* v. *Mul-*

hollan, 1 *Yeates*, 571. 2 *Dall.* 237, *S. C. Dunlop's Lessee* v. *Speer*, 3 *Binn.* 169. *Steigleman* v. *Jeffries*, 1 *Serg. & Rawle*, 477. *Heck* v. *Shener*, 4 *Serg. & Rawle*, 249. Upon the same principle, in an action for a breach of contract, nothing can be set off, not immediately connected with the plaintiff's cause of action; much less can a debt be set off, in an action sounding merely in damages, founded upon no contract whatever, but arising from the malfeasance of the defendants. The Defalcation Act of *Pennsylvania*, though very comprehensive in its provisions, is not so much so as 5 *G.* 2 *C.* 30, *sec.* 28, which authorizes a defalcation of mutual credits as well as debts, under which a debt is allowed to be set off even before it is due. *Prescot's Case*, 1 *Atk.* 250. 1 *Cooke's Bankrupt Law*, 569, 570. 572. Under this section, two cases *have [*80] occurred, which go far to decide the present question. In *Gibson* v. *Hudson's Bay Company*, 1 *Str.* 645, on a bill filed by the assignees of a bankrupt, to compel the company to permit him to transfer his stock, there being a bye-law subjecting every member's stock to his debts due to the company, the Court refused to decree the transfer. In the marginal note it is stated, that the general doctrine is exploded, for which 7 *Vin. Ab.* 125, *pl.* 2, is referred to; and it is so treated in 1 *Cooke's Bankrupt Law*, 591. 1 *Bac. Ab.* 444. In *Meliorucchi* v. *Royal Exchange Assurance Company*, 1 *Eq. Ca. Ab.* 9, where there was no by-law to support the claim of the company to detain the stock, it was not allowed.

The main ground of the defence is the alleged usage of the Bank and Mr. *Waln's* supposed assent to it. This part of the case rests upon the testimony of one witness, who mentions but five cases as having occurred, from the institution of the Bank to the present period; certainly too few to constitute a general, uniform, undeviating usage. In only one instance was any opposition made; in the others the claim of the Bank was acquiesced in. Mr. *Waln's* knowledge of the usage is proved, and also that there was but one opinion at the board on the subject. Giving to this evidence the fullest effect it can claim, it amounts to no more than this, that the board of directors, and Mr. *Waln* among the number, entertained an opinion on a subject closely connected with their own interests; that they acted upon that opinion; and were fortunate enough to induce some of their debtors, who by the time their notes were protested, had little stock remaining, and who were not in a situation to contend with a wealthy and powerful corporation, to acquiesce in their demands. There was therefore no such usage or assent to it, as will bind Mr. *Waln* or his assignees. An usage is only binding, when it is ancient, undeviating, and reasonable; and even when it has these characteristics, if against the established rules of law, it has no effect. *Resp* v. *Guardians of the Poor of Philadelphia*, 1 *Yeates*, 476. *Shefflin* v. *Hervey*, *Anthon's N. P.* 57. It must also be general, *Money* v. *Leach*, 3 *Burr.* 1767. It is not sufficient, therefore, to show, that it is the practice of the *Bank of North America*, without showing that it is acted upon by the banks generally. It is not an ancient usage. If the Bank *had been [*81] created at a remote period, and its charter could not be found, and this alleged right had been invariably insisted upon, it might be presumed that the charter authorized the claim; but there is now no room for such presumption, because the charter is before us, and is silent on the

subject. It is not reasonable; because it tends to put the corporation, without any superior equity, upon higher ground than other creditors: And if there be any soundness in the doctrine already contended for, it is against the established rules of law, and therefore whether ancient, general, and reasonable, or not, it cannot be sustained. The usage attempted to be set up, amounts merely to a construction of the charter, which does not belong to the corporation, but to the judicial powers. To point out the danger of permitting the corporation virtually to alter their charter, by giving it a construction to suit their own purposes, would be superfluous. "Every man who becomes a member of a corporation, looks to the charter; in that he puts his trust, and not in the uncertain will of a majority of the members." *Per* TILGHMAN, C. J., *Commonwealth* v. *St. Patrick's Society*, 2 *Binn.* 449. It does not follow, because Mr. *Waln* was a member of the board, that he was of opinion that the Bank had a right to retain, or that he even assented to it; he may have been overruled by the majority, while his own opinion was decidedly against it. But, admitting that he went with the majority, a man is not bound by an opinion which, upon closer investigation and better information, he finds to be wrong. If a man makes an acknowledgment, or promises to pay, under a mistake of his rights, he is not bound. *Evans* v. *Llewellyn*, 2 *Bro. Ca.* 150. *Levy* v. *Bank of the United States*, 1 *Binn.* 27. *Blesard* v. *Hirst*, 5 *Burr.* 2670. It is worthy of remark, too, that the conduct of Mr. *Waln*, in relation to this subject, was not an admission against himself, but merely an opinion entertained by him, in an official character, upon a question of law, on cases which came before the board, and in which his opinion coincided with his interest. That this asserted right formed part of the contract with Mr. *Waln*, cannot be supposed. He was then in good credit, and to that, and the solidity of his endorsers, alone, the Bank looked. His stock certainly could not have been in the contemplation of either party at the time, for it was not

[*82] *expressly pledged, and it was in Mr. *Waln's* power to dispose of it, at any moment before his notes became due.

What were the opinions of the Legislature and of several of the banks in this city, is deducible from the charters of the *Philadelphia Bank* and the *Farmers' & Mechanics' Bank*, both of which contain special clauses authorizing them to detain the stock of a debtor stockholder. 4 *Sm. L.* 133. 5 *Sm. L.* 23.

J. S. Smith and *Binney*, for the defendants.

The first charter of the *Bank of North America* was granted on the 18th of *March*, 1782. 2 *Car. & Bio. L.* 324. It was repealed on the 13th *September*, 1785; and a new charter granted by an Act passed on the 17th of *March*, 1787, 3 *Car. & Bio. L.* 188, which has been extended from time to time since. By a by-law passed on the 4th *November*, 1782, the directors are authorized to make rules and regulations for the management of the affairs of the corporation, provided they are not repugnant to the laws and ordinances of the corporation. In pursuance of this by-law, rules and regulations were made on the 12th of *November*, 1782. The sixteenth regulation directs that "The sale or alienation of bank stock shall be made by transfer, in a book kept as a register thereof, in the Bank, in the presence of the president or attending directors, who, with the accountant, shall witness the said sale." The eighteenth, prescribes the form

of the certificate; the nineteenth, the form of the transfer, and of a power of attorney to sell the stock of an absentee; and the twentieth, the form of a proxy.

The defence we place upon three grounds:

1. Independently of the charter, by-laws, and usage of the Bank, the defendants had an equitable lien.

2. By the charter, by-laws, and usage, they had a right to retain.

3. The right was given by Mr. *Waln's* own agreement.

1. The plaintiffs' action is in the nature of a bill in chancery, seeking to obtain a transfer of stock; and they have no claims which are not of a character purely equitable. Strictly, they could not sue in their own names. Mr. *Waln* is the party standing on the books of the Bank as the owner of the stock, and if the action had been brought by him, for the use *of his assignees, the Bank could defend on equita- [*83] ble grounds. In equity, they are entitled to be paid, before he is entitled to receive his stock; and before a Court of chancery would assist him to obtain a transfer, they would compel him to pay what was due. A mortgagor, who goes into chancery to redeem, will not be permitted to do so, until he has paid a bond which is not secured by mortgage. Putting aside by-laws, usage and agreement, had Mr. *Waln* claimed the interposition of a Court of equity in his behalf, he would be obliged to do equity; and the plaintiffs, who are not purchasers for a valuable consideration, but trustees under a general voluntary assignment, are in no better situation than himself.

If the *Bank of North America* were an unincorporated association, no question could be raised as to the liability of the members, as partners; for it has been decided by this Court that such an association is a partnership, and that each of the members is individually responsible for the debts of the company. *Hess* v. *Wertz*, 4 *Serg. & Rawle*, 356. The distinctions between partnerships and corporations, are not applicable to the present case. A corporation has perpetual succession, and the corporators are not liable *in solido;* but, in other respects, they are partners. *Introduction to Kyd on Corp.* The great object in obtaining a charter, is to secure an exemption from individual responsibility. With regard to their rights and responsibilities, as between the members of the association, the charter makes no difference; and, wherever, independently of a charter, a lien would take place, a charter will not take it away. If the company are to be regarded as partners, there is an end to the question; for partners are only entitled to the clear balance, on a statement of an account of profit and loss. *Fox* v. *Hanbury*, *Cowp.* 449. *West* v. *Skip*, 1 *Ves.* 239. *Watson on Part.* 140. Where one has received part of the joint fund by way of loan, it is equity, that when a distribution takes place, what he has already received should be deducted from his share. If, by the regulations of the Bank, shares were transferable from hand to hand, there could be no account with a person to whom a transfer was made; but if, on the other hand, no right of alienation existed, it is equally clear, that the corporators would be liable to account on the *expira- [*84] tion of the charter. Without the permission of the company, no old member could sell out, and no new one be introduced. If therefore, by virtue of a regulation emanating solely from the will of the Bank, a new partner comes in, he does so subject to the equity which existed

against the shareholder from whom he derived his interest, and is liable to an account. Any one who purchases a share, does it with notice of the equity of the Bank, because all transfers must be made in a book kept for the purpose; and if he does not inquire how the account stands, it is his own folly.

The whole of the property of the Bank is considered personal. It is the result of a joint contribution for the purpose of trading; and it is not necessary, as in the case of a ship, that it should be kept entire; but for the purposes of trade, in the objects of the association, it is lent out to different persons. The loan to Mr. *Waln* was in pursuance of this leading object, and was therefore strictly a loan by the Bank in its corporate character. This feature distinguishes the present case from that of *Meliorucchi* v. *The Royal Exchange Assurance Company*, in such a manner as to make it an authority in our favour. The loan to Sir *Justus Beck*, it is stated, was not made by the company in their corporate capacity, wherein alone, it is said, he stood related to them, but as private persons; for which reason, they could not stop his stock, which he held as a member of the company in his corporate character. The precise meaning of this distinction is not explained; but it is manifest that it was of the essence of the case, and the point on which the decision turned, and that if the loan had been in their corporate capacity, the company would have been deemed partners, and the consequences of partnership visited upon the members. Before the case of *ex parte Young*, the same rule was uniformly extended to part owners of ships. In *Doddington* v. *Hallet*, 1 *Ves.* 497, Lord HARDWICKE held, that the clear balance only was to be divided among them as partners. This decision, which was upon a bill in equity and is upheld by the irresistible reasoning of Lord HARDWICKE, has stood for more than half a century, and ought not to be overturned by a doubt, unsupported by reasoning, expressed by Lord ELDON, in an order in a case of bankruptcy, from which there was no appeal. If the opinions of
[*85] the Legislature are to *have any weight, they are in favour of the claim asserted by the defendants; for, in passing the Act of the 29th of *April*, 1819, *Pamph. L.* 226, authorizing stock to be taken in execution, they took care to preserve the equitable right of the corporations, with regard to the payment of debts due from the stockholders to the company. Their giving express liens, in granting charters to certain banks, amounts to nothing; for laws are not always drawn up by men of legal education. Their conduct, in this respect, however, is a full answer to the allegation, that the claim of the Bank is contrary to the policy of the law.

2. The charter and by-laws, by which the directors are authorized to make such rules and regulations as may be necessary for the government of the corporation, also give a lien. The regulation of the 12th of *November*, 1782, was evidently passed with a view to enforce the claims of the Bank against those stockholders who were in their debt, by requiring all transfers to be made in the books of the Bank, and in the presence of its officers, who of course must be acquainted with the debts due to the institution. That the by-laws of a corporation may confer the right to retain the shares of a debtor stockholder, is fully established, not only by the case of *Child* v. *Hudson's Bay Company*, 2 *P. Wms.* 207, but by those cited against us.

(Waln's assignees *v.* The Bank of North America.)

3. But if all other grounds of defence fail, the case is plain upon Mr. *Waln's* own implied agreement, which neither he nor his assignees can resist. Where there is an established usage as to the mode of doing business, it enters into and forms part of all contracts made in relation to such business. Usage and custom have been confounded in the opposite argument. Usage need be neither ancient nor general. Two individuals may establish an usage or course of dealing between themselves, and so may a bank with its customers, and it is not essential to its validity, that similar institutions should be governed by the same rule. Liens from the course of dealing, very often take place, and so far from being deemed unreasonable, they are highly favoured by Courts of justice. They may always be secured, provided the debtor has notice beforehand. *Ex parte Deez*, 1 *Atk.* 228. *Rushforth* v. *Hadfield*, 7 *East.* 224. *Green* v. *Farmer*, 4 *Burr.* 2214. *Ex parte Bevan*, 9 *Vez.* 223. *Kirkman* v. *Shawcross*, 6 *T. R.* 14. *Davis* v. *Bowsher*, 5 *T. R.* 488. 2 *Phill. *Ev.* 123. 2 *Bos. & Pull.* 44. *note a.* *Whitaker on* [*86] *Liens*, 35, 36. 1 *Madd. Ch.* 537. *Edge* v. *Worthington*, 1 *Coxe's Cases*, 212. *Mandeville* v. *Welch*, 5 *Wheat.* 284. *Lincoln and Kennebeck Bank* v. *Page*, 9 *Mass. Rep.* 155. *Weld* v. *Gorham*, 10 *Mass. Rep.* 366. *Blanchard* v. *Hilliard*, 11 *Mass.* 85. The established, undeviating usage of the *Bank of North America* was, never to permit a stockholder to transfer his shares, while his debts to the Bank remained unpaid. This usage was brought home to the knowledge of Mr. *Waln*, who was himself for twenty-seven years, an active and influential director, fully concurring with the rest of the board in applying to others the rule by which he is now unwilling to be bound himself. He received his discounts when this practice was in full force, and with a perfect knowledge that it was uniformly exercised; it was therefore a part of his contract that he would be bound by it. Misconception of the abstract legal right of the Bank to retain, would not vitiate his agreement that they should retain. The question is not so much what is the right of the Bank, as what was the understanding of the parties. If Mr. *Waln* had his notes discounted with an understanding that the rule which was invariably applied to others, would be applied to him, let the general principles be what they may, equity will enforce the contract.

The opinion of the Court was delivered by

Duncan, J.—In form, this is a special action on the case, for refusing to permit *Robert Waln* to transfer to the plaintiffs, his assignees, six shares of the stock of the *Bank of North America*, on their books, agreeably to a by-law. In *January*, 1791, *Robert Waln* became a stockholder; *January*, 1792, a director, and so continued until *January*, 1820. On the 15th *September*, 1819, he made a general assignment to the plaintiffs, for the benefit of his creditors. At this time he was largely indebted to the Bank. On the 20th *November*, 1819, the Bank stated an account, and delivered it to his assignees on the 25th. In that account he is charged with his notes and endorsements due at the time of assignment and still unpaid, and credited with the amount of his stock at the current price. The balance still due to the Bank is 22,185 dollars. *Benjamin R. Morgan* was *appointed a director in *January*, 1811, [*87] and continued so till *March*, 1821. On the 19th *February*, 1820, the plaintiffs, with Mr. *Waln* and Mr. *Lohra*, a notary, made a

formal demand of the cashier of the Bank, to permit the transfer of these shares to be made on their books. This was declined. On the 20th Mr. *Lohra* renewed this demand. The cashier refused, claiming to hold the shares as a set-off against the debt of Mr. *Waln's*, observing, that there was an order or by-law or understanding, which Mr. *Waln*, being a director, well knew, "that no stockholder could transfer his stock, while in debt to the Bank; that the debt must be paid, before the Bank would suffer a transfer of the stock." It was given in evidence, that Mr. *Waln* well knew of this early regulation of the board. It was an unvaried course, always insisted on, and in no instance departed from;—acted upon by the unanimous opinion of the directors, while Mr. *Waln* was in the direction. There was no by-law or written regulation of the board on the subject of transfers, but the by-law of the 12th *November*, 1781, which prescribed, "that the sale or alienation of Bank stock should be made by transfer, in a book kept as register thereof, in the Bank, in presence of the president, or attending directors, who with the accountant, should witness the said sale."

That a party entitled to a transfer of stock, may maintain a special action of assumpsit against those whose duty it is to permit the transfer to be made, in the manner prescribed by this by-law, cannot be questioned. This principle was decided, in *The King, on the prosecution of Dawe's executors* v. *The Governor and Company of the Bank of England. Dougl.* 526, and in the notes, 528. In *The Union Bank* v. *Laird*, 2 *Wheat.* 390, Chancery was resorted to, to compel the transfer; but in this State, where there is no other relief than what a common law Court can give, damages only can be recovered. The remedy is by special action on the case; for the very ground of that action is, that the law will not suffer an injury and a damage without a remedy. *Winsmore* v. *Greenback*, *Willes*, 581. But in whatever shape the claim comes before the Court, in whatever *forum* it is to be decided, either of law or equity, whether it be special assumpsit directly on the contract, or whether the contract be inducement and the *gravemen ex delicto*, or bill in chancery, *the same rule must prevail; for in mercantile questions, there is no distinction between Courts of law and of equity. Mercantile law is founded on principles of equity, and it is for this reason, as Mr. Justice BULLER observed, in *Tooke* v. *Hollingworth*, 5 *T. R.* 229, "Courts of law have of late years said, that where an action is even founded on a *tort*, they would discover some mode of defeating the plaintiff, unless his action were also founded on equity; and that though the property might, on legal grounds, be with the plaintiff, if there were any claim or charge by the defendant, they would not consider the retaining of the goods as a conversion." It is a principle in equity that wherever the Court has found a demand on one side and on the other, to endeavour that one should be set off against the other. *Ryall* v. *Rowles*, 1 *Vez.* 875. This Court has in all instances very liberally extended the Defalcation Act, and very freely and to the full extent, adopted all the doctrines of Courts of equity, with respect to equitable set-offs. *Murray* v. *Gray's administrator. Dunlop* v. *Speer. Heck* v. *Shener. Steigleman* v. *Jeffries.* It would be an unnecessary undertaking to define the character of these certificates of stock, whether in their nature they partake, in any degree, of the quality of negotiable paper, or are purely assignable;

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passing into the hands of the assignees, who, like every other purchaser of a *chose in action*, must always abide by the case of him from whom he buys. And to decide whether the equitable specific assignee for a valuable consideration, without notice of the restriction in the transfer, could not compel a legal transfer without relation to the accounts between the Bank and the stockholder, would be an arduous one. But these inquiries are not necessary, for this is not the case of such assignees. The plaintiffs are general assignees of Mr. *Waln*, and stand precisely in his situation; they cannot be entitled to any property to which he has not a title,—to any remedy which he did not possess. The stock passed into the hands of his assignees, subject to all the rights and all the equities of the Bank; and this without taking into consideration the evidence of at least the knowledge of one of the plaintiffs of the restriction on transfers, where the stockholder was debtor to the Bank. It is reduced to the narrow question, was this regulation of the Bank,—this usage to *retain,—this course of dealing between the Bank and her [*89] customers, unquestionably known as it was to Mr. *Waln*, binding on him? That such a by-law was within the power of the Bank,—a by-law imposing this restriction,—giving the power, is decided in *Child* v. *Hudson's Bay Company*, 2 *P. Wms.* 207. The agreement of the stockholders would be equally binding on them and all who stand in their shoes, as a by-law. By-laws bind, because the members of the corporation, either individually, or by those who represent them, are supposed to give their assent to them. A course of dealing,—a usage,—an understanding,—a contract express or implied, is the *lien of the parties and a law to them*, provided they are not repugnant to the charter or the laws of the land. This is contrary to neither. If the restrictive clause had been inserted in the Act of Incorporation, as it is in the charters of the *Philadelphia Bank*, *Farmers' and Mechanics' Bank*, and *Union Bank of Georgetown*, then, according to the decision of the Supreme Court of the *United States*, in *The Union Bank* v. *Laird*, "no person could acquire a real right to any share, except under a legal transfer, according to the rules of the Bank under the Act of Incorporation, of which he is bound to take notice." The understood notice to Mr. *Waln*, his continuing to deal with the Bank, with full knowledge of this term and condition, is equally binding on him and the present plaintiffs, as if it were a written regulation, a by-law, a provision in the charter, or clause inserted in the very certificate of stock. The Bank had an undoubted right to say to any stockholder, "We discount your note; but remember, until it is paid, we shall hold your stock in security. You shall not be permitted to transfer it, until you pay us." There is nothing unfair in this. The terms are known and are accepted, as between the parties to the present agreement,—the stockholder and the Bank. This amounts to an hypothecation, a pledge of the stock. How it would have been, in a controversy between a *bona fide* purchaser for valuable consideration and without notice, who pays his money to the stockholder on the faith of the certificate, entrusted with the symbol of the property, the constructive legal possession, the title deed, on its face an instrument transferable and assignable, I do not give any opinion. It is a very *different question. But as between these parties, call this [*90] answer of the Bank what you please,—lien, set off, legal or

equitable, pledge, retainer, stoppage, course of dealing, general understanding, usage, contract express or implied; it is a bar in law and equity to this action. Liens are either, by the common law, a general usage, or a course of dealing and understanding between the parties themselves, or on a contract express or implied. 1 *Bl. R.* 651. 4 *Burr.* 2221. 6 *East.* 519. In *Davis* v. *Bowsher*, 5 *T. R.* 488, it is decided to be the general law, that where a banker has advanced money to another, he has a lien on all paper securities which come to his hands, for the amount of a general balance. These can never be taken from him, without paying him, unless such securities were delivered on an agreement so to do; and Justice GROSE, in that case, stated the question to be, whether, under all the circumstances of the case, the banker had not a lien for the general balance; and that the evidence went far to show he had, *according to the general dealing and understanding between the parties.* If this be sound doctrine, it settles the present question. Here was positive evidence of a general dealing and explicit understanding between Mr. *Waln* and the Bank, that his stock, like the stock of all others, was to remain untransferred, until his debts were paid. Here was a public institution, declaring it to be a term on which they loaned their money to the stockholders. Here is one of the directors conducting their affairs on that principle, and with that understanding, for many years; for the first time objecting to that rule, calling for a transfer to be made to his assignees, in defiance of this notorious regulation, which had never been deviated from, and rigorously and impartially imposed on *all.* Can the Bank be said *tortiously* to refuse that which the party agreed he never would demand? If the action be in *tort*, and the plea, Not guilty, would not this be a complete defence? *Volenti non fit injuria.* If it be in *assumpsit*, on the plea of *non assumpsit*, would the *allegata* and *probata* agree? The matter alleged would be a promise unconditionally to suffer the transfer to be made; the matter proved would be a promise, on condition he paid all that was due to the Bank. If it were a bill in Chancery, would not the defendants' answer, disclosing and proving the

[*91] facts, silence every equitable *pretension? Where is the equity in the plaintiffs' demand? They demand not only that to be done which the Bank never agreed to do, but which their constituent agreed never to ask them to do. I can see no equity in the plaintiffs' demand, no inequity in the defendants' refusal. There can be no want of equity in the Bank, who merely insist on holding, as a security, that, which, from a fair consideration of the evidence, it must be implied, Mr. *Waln* agreed they should hold. Equity never would deprive one creditor of any plank which the law affords him, and give it to another creditor. Mr. *Waln* having appropriated the stock to the payment of this particular debt, could not make a second appropriation of it to his general creditors. The assignees take it *cum onere*, subject to the prior incumbrance of the Bank. The definition of an equitable lien, is that it is an equitable obligation which the conscience of another is bound to perform. *Perry* v. *Philips*, 1 *Ves. jun.* 254.

This case has, on the difference of opinion between the assignees of Mr. *Waln* (whose duty it was to try the question) and the Bank, been brought before the Court, in the most amicable manner, for their decision on the rights of the parties, without relation to any matter of form, and to obtain

the opinion of the Court on the merits. The Court are of opinion, that in no form in which the claim could be put, can it be sustained, until the debt due by Mr. *Waln* to the Bank be satisfied. We direct judgment to be entered for the defendants.

Judgment for the defendants.

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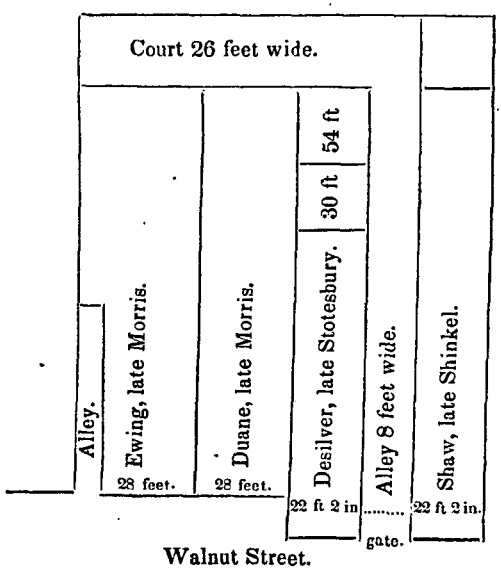
*EWING *against* DESILVER. [*92]

By accepting a deed conveying ground adjoining an alley and court, together with the use of the alley, in common with the grantor, "and his tenants and occupiers of the adjoining ground, *as also of his* (the grantor's) *other ground bounding on the said court*," the grantee is estopped from denying the right of way through the alley, to the occupiers of ground adjoining the court, but not adjoining the alley; though at the time of the execution of the deed, the grantor had no right to grant a right of passage through the alley, as appurtenant to ground adjoining the court, but not adjoining the alley. And although the grantor and grantee could not grant a right of way through the alley as appurtenant to any ground not adjoining it, without the consent of the owners of the land on the opposite side of the alley, yet the estoppel operates on one who, with full notice on the face of his deed, purchases land on that side of the alley, of the grantee, who, after the execution of the first mentioned deed, became the owner of the land on both sides of the alley.

ACTION on the case for disturbing the plaintiff's right of way in an alley running in a southern direction from the south side of *Walnut street* in the city of *Philadelphia*. The title of the plaintiff was as follows. *Arthur Stotesbury* and *Frederic Shinkel* were each the owner of a lot containing twenty-two feet two inches on the south side of *Walnut street*, and extending one hundred and eighty-five feet in depth. These lots were contiguous; and on the 2d of *February*, 1796, the owners entered into an agreement to open an alley eight feet wide, running from *Walnut street*, south, one hundred and forty-eight feet, to which each lot contributed an equal proportion, by four feet being taken from each. This alley was for the accommodation of the parties, each of whom retained the right of soil in his own four feet, and the right of building over the alley, provided sufficient head way were left for carriages. *Stotesbury* owned the ground to the east of the alley, and *Shinkel*, that to the west. On the 30th of *April*, 1796, *Stotesbury* conveyed to *Benjamin W. Morris* the whole of his lot, including one-half of the alley, together with the free use of the alley. On the 25th of *April*, 1808, *Morris* conveyed to the defendant part of his lot, *viz.* twenty-two feet two inches, front on *Walnut street*, including half the alley, and running back from the street sixty-four feet, together with the free use of the alley. On the 7th of *May*, 1808, *Morris* conveyed to the defendant another part of the same lot, immediately in the rear of that which he had conveyed before, eighteen feet two inches in breadth, and thirty feet in depth, bounded on the west by the alley; together with the free use of the alley. On the 13th of *August*, 1808, *Morris* conveyed to the defendant another part of the same lot, immediately in the rear of that last conveyed, containing eighteen feet two inches in breadth, and fifty-four feet in depth, bounded on the west by the alley, and on the south by a court twenty-six feet in width, "together with the free use of the said alley and of the said court,

(Ewing v. Desilver.)

and the right of ingress, egress, and regress, of, into, and out of the same, *in common with the said Morris, and his tenants and occu-*
[*93] *piers of the adjoining ground, as also of his other *ground, bounding on the said court.*" On these words in the deed of the 13th of *August*, 1808, the cause turned; for the plaintiff, who was the owner of another lot of ground adjoining the court, but not adjoining the alley, purchased from *Morris* on the 19th of *September*, 1808, by *J. W. Condy*, under whom she claimed, contended, that the defendant having accepted the indenture of the 13th of *August*, 1808, was estopped from saying that the right of passage through the alley into *Walnut street*, was not appurtenant to all the ground held by *Morris*, adjoining the court, at the time of the execution of the indenture. At that time, the defendant was the owner of all the ground adjoining the alley on the *east*, and *John Kinnan*, who had purchased of *F. Shinkel*, was owner of all adjoining it on the *west*, together with half the alley, and the free use of the whole alley. But on the 17th of *December*, 1811, the defendant purchased the whole of *Kinnan's* property, so that he was then the owner of the soil of the whole alley, except that part which remained in *Morris*, and of the ground adjoining it on both sides. On the 28th of *January*, 1813, *Desilver*, the defendant, conveyed to *George Shaw*, by an indenture reciting all the former conveyances, all the ground on both sides of the alley; and on the 16th of *June*, 1813, *Shaw* re-conveyed to the defendant all the ground on the east side of the alley. The accompanying diagram exhibits the relative situations of the alley, the court, and the adjoining grounds:



[*94] *It was agreed that *Shaw* should be considered as a defendant in the cause.

Judge DUNCAN, before whom the trial took place at *Nisi Prius*, having instructed the jury, that the defendant was prevented by the deed of the

13th of *August*, 1808, from denying the plaintiff's right of way through the alley, they found a verdict in conformity with the charge; and the case now came before the Court, on a motion by the defendant for a new trial.

Pettit and *J. R. Ingersoll*, in support of the rule, insisted that the Judge erred in his opinion that there was an estoppel on *Desilver*, on the face of the deed of the 13th of *August*, 1808. The intent was, that *Desilver* should have the use of the court, in common with those tenants of *Morris*, and occupiers under him who lived adjoining it, and the use of the alley in common with all those who had a right to use it. When *Morris* gave that deed to *Desilver*, he had no right to the use of the alley for himself and his tenants on the Court; and consequently could convey no right to *Condy*, under whom the plaintiff claims. The effect of establishing the right asserted by the plaintiff, would be to conclude third persons, by an arrangement to which they were not parties; for whatever might be the consequence to *Desilver* of accepting the deed of 13th of *August*, 1808, he could not thus convey to *Morris* the use of the alley for the occupiers of land on the court, without the consent of the owners of the ground west of the alley; and although he subsequently became the owner of the land on both sides, that was an accident which could not have been contemplated when the deed of the 13th of *August*, 1808, was executed. These considerations should have great weight in the construction of that deed, which is certainly expressed in ambiguous terms. The case does not come within the law of estoppels, by which a man is precluded from denying what he has asserted, or prevented by his act or acceptance, from speaking the truth. But an estoppel must be a precise affirmation of that which makes the estoppel. It must be certain, and is not to be taken by argument or inference. *Co. Litt.* 352. These requisites are not found in the present case. *Desilver* has asserted nothing, *and the deed contains no precise affirmation, but at most, an implied and argumentative affirmation. Besides, estoppels are confined to land, and do not extend to any thing arising out of land. *Co. Litt.* 47, *b.* The case is very different from that of *McWilliams* v. *Nisly*, 2 *Serg. & Rawle*, 507, in which it was held that one who conveys land to which he afterwards acquires title, is estopped from denying his title at the time he conveys.

[*95]

T. Sergeant and *Binney*, contra, said that if the defendant, upon any principle of law or equity, was prevented from denying the plaintiff's right of way through the alley, a new trial ought not to be granted. The obvious meaning of the deed, was a grant by *Morris* to *Desilver* of a right of passage in the court and alley, in common with himself and his tenants who occupied ground adjoining the court. This deed, which was strictly speaking an indenture, was accepted by *Desilver*, who is therefore bound by it. He received an advantage in having a front on the court, and perhaps had some allowance in price, for granting the privilege now claimed. The plaintiff and defendant are therefore tenants in common of the way through both the court and the alley. When *Desilver* sold to *Shaw*, he was the owner of the ground on both sides of the alley, and as *Shaw* purchased with full notice on the face of his deed, he is in no better situation than the defendant. When an estoppel can be used for an equitable purpose, instead of being odious in the eye of the law, it is

favoured. They cited *Watson* v. *Bioren*, 1 *Serg. & Rawle*, 227. *Litt. Sec.* 666, 667. 10 *Vin.* 462. *Rawling's Case*, 4 *Rep.* 54. *Trevivan* v. *Lawrence*, 1 *Salk.* 276. *Shelby* v. *Wright*, *Willes Rep.* 9. *Shep. Touch.* 52. 5 *Bac. Ab.* 429. 1 *Madd. Ch.* 313. *Took* v. *Hoskins*, 2 *Vern.* 97. 1 *Bac. Ab.* 463. *Green* v. *Moody*, *Godb.* 314. 10 *Vin.* 432, *pl.* 13. *McWilliams* v. *Nisly*, 2 *Serg. & Rawle*, 507.

TILGHMAN, C. J. (After stating the case) delivered the opinion of the Court.

The main question is, what is the true meaning of the indenture of the 13th *August*, 1808? For, when that is ascertained, the decision of this cause will be matter of no great difficulty. I have no doubt [*96] that the meaning was, *that the free use of both court and alley should be appurtenant to the ground conveyed by *Morris* to the defendant, and also to the grounds adjoining the court and not adjoining the alley held by *Morris* and others claiming under him. This, I say, was the meaning; but whether the deed was sufficient to carry that meaning into effect, is another question. It is contended by the defendant's counsel, that the deed was not sufficient to effectuate such an intent, because *Morris* had no right to grant a right of passage through the alley, as appurtenant to grounds not adjoining the alley. Neither could *Morris* and the defendant together, grant a right of passage through the alley as appurtenant to any ground not adjoining it, without the consent of *John Kinnan* who owned all to the west of it. I agree with the defendant's counsel, that on the 13th *August*, 1808, *Morris* had no right to grant a right of passage through the alley as appurtenant to ground adjoining the Court and not adjoining the alley. Neither, at that time, had the defendant a right to make such a grant. But the defendant had a right to say, that he would never deny the right of passage through the alley, to the occupiers of ground adjoining the court, neither should any person claiming under him deny such right. This he did say, and this would operate as an estoppel against him. But then we are to consider the case of *Shaw*, the owner of the ground *west* of the alley, for it is agreed between the parties to this suit, that *Shaw* shall be considered as a defendant. As to *Shaw*, then, it is to be observed, that he claims under the defendant, who, after the indenture of the 13th *August*, 1808, became the owner of all the ground west of the alley, by his purchase from *John Kinnan*, 17th *December*, 1811. Now, immediately after that purchase, the estoppel created by the indenture of the 13th *August*, 1808, operated on the ground west of the alley, which afterwards came to *Shaw*, by purchase from the defendant *with full notice*, as his deed contains a recital of the indenture of the 13th *August*, 1808. A good deal has been said about the law of estoppels, an ancient and curious doctrine; but I do not think it necessary to go deep into that subject on the present occasion; because whether there was a strict estoppel or not, the case will be with the plaintiff, if under all circumstances, equity would enjoin the defen- [*97] dant from disputing the plaintiff's right of *way. And this, I think, it certainly would; because by the indenture of *August*, 1808, the defendant gained the free use of the court; an important privilege, which gave him a right to open doors and windows on the court, and for which no return was asked, but his consent to permit the occupiers of ground on the court, to have a passage through the alley. This right

is essential to them, because they have no other way of passing with carriages into *Walnut Street.* If the plaintiff is deprived of it, her lot, which fronts on *Walnut Street,* and runs back to the court, will be greatly lessened in value. Now, what is the equity between the plaintiff and defendant? The plaintiff derives her title under *J. W. Condy,* who purchased from *Morris* in *September,* 1808. When *Condy* purchased, he saw that the defendant, only a month before, had accepted an indenture, in which it was confessed, that the right of passage through the alley, was appurtenant to the ground which *Morris* sold to him, and no doubt, in consideration of this right of passage, he paid a higher price than he would otherwise have done. The case of the plaintiff is stronger than *Condy's,* for not only had she the indenture of *August,* 1808, before her eyes, but this important circumstance in addition, that the occupiers of ground adjoining the court, were in the actual enjoyment of the use of the alley. Shall the defendant then, be permitted to hold out false colours to the injury of innocent purchasers? Is not the case as strong against him, as against a prior mortgagee, who is privy to a second mortgage, and conceals his own? Nor is *Shaw,* in point of equity, in a better situation than *Desilver;* for he purchased, with full notice of all that had passed. I am of opinion, therefore, that the verdict for the plaintiff, which was given in conformity with the charge of the Court, was right, and the rule to show cause why there should not be a new trial, should be discharged.

Rule discharged.

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*BELL and another *against* THE MARINE INSURANCE COMPANY. [*98]

The defendants having, upon the exhibition of a letter of the captain of a ship, stating that she was at Grass Island, which is within the *port* of Limerick, but at the distance of about nine miles from the *town,* insured the vessel from Limerick to Philadelphia, the jury decided, she was *at* Limerick according to the representation of the plaintiffs and the understanding of the defendants; and the Court refused to set aside the verdict.

Insurance at and from Philadelphia to Cork and back to Philadelphia. The vessel arrived at Cork, and afterwards proceeded to Limerick. On this fact being made known to the underwriters, a new agreement was entered on the margin of the policy in the following words:—"It being represented by the assured, that the Amiable was ordered from Cork to Limerick, and had arrived there, it is hereby agreed that for a further consideration of one per cent., to us paid, *we engage to see the said ship from thence, instead of Cork, back to Philadelphia.*" A loss having happened while the vessel was in the port of Limerick, it was *held,* that it was covered by the new agreement.

THIS was an action on a policy of insurance on the ship *Amiable, Erickson,* master, "at and from *Philadelphia* to *Cork,* and back to *Philadelphia.*" The ship sailed from *Philadelphia* on the 10th *July,* 1819, laden with staves, and arrived at the cove of *Cork* on the 4th *September.* Having suffered damage in getting up to the cove, the consignees sold the cargo *deliverable at Limerick;* and on the 16th *September,* the ship sailed for *Limerick,* having on board a coasting and *Shannon* river pilot. On the 35th *September,* she entered the mouth of the *Shannon,* and on the 26th proceeded up to *Grass Island,* where she anchored. The captain, being informed by the pilot that he could proceed no farther, without

lightening the ship, went on the 27th *September* to the custom house at *Limerick*, and entered the ship. He then returned to *Grass Island* and took out part of the cargo, after which he proceeded in the ship up the river to the *Poole*, the safest place for ships of considerable burthen, especially if they are sharp built, like the *Amiable*. At the *Poole* they cast anchor, and in a few hours, at the falling of the tide, the ship struck upon a rock, by which she received so much injury that upon a survey she was condemned as unfit for sea, and not worth repairing. The *port* of *Limerick* extends to *Torbet*, about thirty-five miles below the town of *Limerick*, and twenty-six miles below *Grass Island*. The *Poole* is about two miles below *Limerick*, and seven above *Grass Island*. On the 27th *September* the captain wrote to the plaintiffs from *Limerick*, informing them that the ship was lying at *Grass Island*, where she arrived the day before; that he was going down with lighters that evening, and should commence the discharge of the cargo
[*99] *the next day; which was necessary to lighten the ship before she could come up to the port. This letter was shown to the defendants, who thereupon came to a new agreement with the plaintiffs on the 5th *November*, 1819, which was entered on the margin of the policy in the following words:—"It being represented by the assured, that the *Amiable* was ordered from *Cork* to *Limerick*, and had arrived there, it is hereby agreed, that for a further consideration of one per cent., to us paid, we engage *to see the said ship from thence, instead of Cork, back to Philadelphia.*"

The cause came to trial before TILGHMAN, C. J. at *Nisi Prius*, when two questions arose:—1. Whether the ship had arrived safe at *Limerick*, according to the representations made by the plaintiffs at the time of entering into the second agreement? 2. Whether that agreement covered the ship while she was in the port of *Limerick*? The first was submitted by the Chief Justice to the jury as matter of fact. The second was reserved as matter of law for the opinion of the Court. The jury found a verdict for the plaintiffs.

E. Ingersoll, for the plaintiffs, opened the facts of the case, and contended, that if no memorandum had been made to take a new risk, the plaintiffs would have been entitled to a return of premium on the home voyage; and this might have induced the defendants to take the new risk at a moderate premium. The intent was simply to substitute *Limerick* for *Cork*, and keep the ship covered during her stay at *Limerick*.

Binney, for the defendants.

The question in this case must be subdivided. We contend, 1. That the defendants took the risk only *from Limerick*. 2. That the risk at *Limerick* had not commenced when the policy took effect.

1. What was the intent of the memorandum must be collected from the words, not from conjecture. The insured might intend one thing, the insurers another: their words therefore must decide the understanding of both. The captain's letter, which was laid before the defendants, states the facts which had occurred; but the memorandum has no
[*100] reference to that letter. The expressions contained in it *are, "from *Limerick*." A policy *from* a place, does not include a risk *at* the place. The difference between these words is well established. The defendants did not mean to take the risk at *Limerick*. They had

run the risk at *Cork*, and had suffered by it, and did not intend to incur a new risk of the same kind. This would be doubling the risk at the end of the outward voyage. They meant, we take up the ship *from Limerick*, instead of from *Cork*. The words "from thence," are here exclusive, and take effect from the moment of departure. It is denied that the plaintiffs were entitled to any return of premium, if the voyage had been terminated at *Cork*. It was an insurance on the whole voyage, which was indivisible. The policy is express that there shall be no return of premium after a deviation. The additional premium for the new risk, was but one per cent.

2. The Chief Justice charged, that the voyage from *Cork* to *Limerick* was not covered. Now, we say, that the vessel had not arrived and been twenty-four hours moored in safety at *Limerick*. She had not arrived at, and been so long in, the *Poole*, the ultimate place of discharge. Suppose the insurance had been from *Philadelphia* to *Limerick*, when would the risk have ended? Not until she had anchored in the *Poole*, where part of her cargo was to be discharged. He cited *Dickey* v. *United Insurance Company*, 11 *Johns.* 358. *Garrigues* v. *Coxe*, 1 *Binn.* 592. *Parmeter* v. *Cousins*, 2 *Camp.* 235. 2 *Str.* 1243. 1 *Marsh. Ins.* 264. *Kemble* v. *Bowne*, 1 *Caines*, 75. *Horneyer* v. *Lushington*, 15 *East.* 46.

J. R. Ingersoll, in reply.

1. The jury have decided the fact that the ship was *at Limerick;* and their verdict ought to stand, unless the Court should think that the weight of testimony was greatly against it.

2. The construction of the memorandum in the policy is matter of law; namely, whether the risk *at Limerick* was covered. The intent of the plaintiffs certainly was, to be covered during the whole voyage. When the ship went from *Cork* to *Limerick*, the policy was void by reason of the deviation; but the parties instead of opening a new policy, thought proper to ingraft a new agreement on the old policy, by putting *Limerick* instead of *Cork;* as if the policy were **from* [*101] *Philadelphia to Limerick and back:* The printed form of the policy is, at and from; which would have been adopted, if a new policy had been opened. When the memorandum to take a new risk was made, the defendants had the letter of captain *Erickson* before them, and the memorandum mentions a representation. Now there was no other representation than that of the captain. There was no order of insurance except this letter, and the defendants ought not to be allowed to depart from their own construction of it. It is held, that the written order for insurance controls the policy. *Norris* v. *The Insurance Company of North America*, 3 *Yeates*, 91. The defendants have said, that in their understanding, *Grass Island* was *Limerick*. As to the word *at*, it was not inserted with respect to *Cork;* and yet it is conceded that the ship was covered at *Cork*. Policies of insurance are most informal instruments, and are liberally construed to effectuate the intent of the parties. 5 *Cranch*, 335. It is a mistake to say that the risk at *Cork* had been run. No part of the cargo was discharged there. The ship grounded in the harbour of *Cork*, but before she got to the town, at which she never arrived. She went to *Limerick* immediately after getting off and being put in proper repair. Had she remained at *Cork* to discharge her cargo, and take in a home cargo of passengers, according to the original plan of the voyage,

the risk at *Cork* would have been much greater than it was in the course actually pursued.

TILGHMAN, C. J. (after stating the case) delivered the opinion of the Court.

The jury, without hesitation, found for the plaintiffs, and I think they were right. It was not simply a question, whether, supposing the ship to have been insured from *Cork* to *Limerick*, she could, within the meaning of such a policy, have been said to have *arrived at Limerick*, so as to discharge the underwriters, before she had been anchored twenty-four hours in safety, in the *Poole*. Supposing the usage of trade to be to lighten, by discharging part of the cargo at *Grass Island*, and to discharge the residue at the *Poole*, I should think the underwriters were on the ship until twenty-four hours after she had anchored in safety at the *Poole*. But the true question between these parties is, [*102] Was the ship *at* *Limerick, according to the representation of the plaintiffs, and the understanding of the defendants? Now there was no other representation than that which was contained in the captain's letter of the 27th of *September*, which was shown to the defendants. That letter stated, that the ship was at *Grass Island;* and *Grass Island* is within the port of *Limerick*. It is true, therefore, that the ship was in the *port* of *Limerick*, though not at the *town* of *Limerick*. Then, when the parties, with this letter before them, called it a representation that the ship had arrived *at Limerick*, they must have intended, according to the letter, the *port* and not the *town* of *Limerick*. The representation, therefore, was agreeable to the truth, and there is no ground for impeaching the verdict, as being against the evidence.

The second question is purely matter of law. Does the marginal agreement cover the ship while lying within the port of *Limerick?* When she sailed from *Cork* to *Limerick*, there was a plain deviation, by which the defendants were discharged; and they would have remained so, but for this new agreement. Had the policy been cancelled, and a new one made by which the ship had been insured "from *Limerick* to *Philadelphia*," no doubt she would not have been covered while lying in the port. The policy would not have attached before she sailed. But it is not a new policy; it is an agreement written on the margin of the policy, and expressly referring to it. It must be construed, therefore, in connexion with it. We must attend, in the first place, to the words of the original insurance,—"at and from *Philadelphia* to *Cork*, and back to *Philadelphia*." It is not said, *at Cork*, and yet it is conceded, that the ship was covered, *while lying at Cork*, because, considering all the expressions, it cannot be doubted, that the intention was, to insure the ship during the whole voyage, from the time she left *Philadelphia* until her return. There is no instrument of writing more loosely drawn than a policy of insurance,—none which stands in greater need of good faith and liberal construction. In the present case, there is no reason to suppose, that the intent was altered, of keeping the ship covered, from *Philadelphia* to *Philadelphia*. What was the situation of the ship when the second agreement was made, and what are the words of that agree- [*103] ment? The ship was not at *Cork* *but at *Limerick;* and the underwriters said, "*we will see the ship from thence, instead of Cork, back to Philadelphia.* Is it straining too hard, to say, it was

(Bell and another *v.* The Marine Insurance Company.)

intended to follow the original insurance, *substituting Limerick for Cork*, as if it had been *from Philadelphia to Limerick, and back to Philadelphia?* I verily think that such was the real meaning, and that the words will bear us out in giving that construction to the marginal agreement. It is a point lying in so narrow a compass, as not to admit of much argument. No general principles are involved. It is a question of construction of this individual policy. I am of opinion that the ship was covered while lying in the port, and therefore judgment should be entered for the plaintiffs.

Judgment for the plaintiffs.

SIMS *against* WILLING and others.

A., by order of *B.*, chartered a vessel to take a cargo of flour and Indian corn on freight from Philadelphia to Lisbon. Part of the flour belonged to *A.*, part to *B.*, and the remainder to *C.*, and the share of each was paid for out of his separate funds. *A.* effected separate insurance on his own interest in the flour. The whole of the shipment was consigned to *C.* in Lisbon, and the whole appeared as his property, for the purpose of protecting it from British cruisers. Had the vessel arrived at Lisbon, the whole of the flour was to have been sold by the consignee, and the net proceeds of *A.*'s interest remitted, on his account, to his correspondent in London. *Held*, That *A.*, *B.* and *C.* were partners, and individually liable for the whole amount of a general average due upon the flour.

Interest, upon the amount of a contribution for general average, runs from the time the money was advanced upon which the average arose.

THE plaintiff, *Joseph Sims*, brought this action against *T. M. Willing*, surviving partner of the late firm of *Willing & Francis*, *F. T. Sampayo*, and *H. T. Sampayo*, to recover contribution to a general average on the cargo of the ship *Rebecca Sims* captured in *October*, 1812, by the *British* ship *Southampton*, and carried into *Jamaica*. As to the Messrs. *Sampayo*, the Sheriff returned *Nihil habent*.

The case was tried before his honour, Judge DUNCAN, at *Nisi Prius*, when a verdict was returned for the plaintiff for 3980 dollars 26 cents, subject to the opinion of the Court on the evidence; from which it appeared, that in *August*, 1812, Messrs. *Willing & Francis*, by order of *F. T. Sampayo*, chartered of the plaintiff the ship *Rebecca Sims*, to take a *cargo of flour and Indian corn on freight [*104] from *Philadelphia* to *Lisbon*. The cargo consisted of 3167½ barrels of flour, and 6304½ bushels of corn; and by the bill of lading dated the 4th of *September*, 1812, appeared to have been shipped by *Willing & Francis*, acting for *F. T. Sampayo*, on account and risk of *H. T. Sampayo* of *Lisbon*, to whom it was consigned; the whole cargo appearing as the property of the consignee, for the purpose of protecting it from capture by the *British*. It was however owned as follows: One half of the flour, *viz.* 1583½ barrels, and all the Indian corn belonged to *H. T. Sampayo;* 500 barrels of the flour to *F. T. Sampayo;* and the remainder, *viz.* 1084 barrels to *Willing & Francis*. *F. T. Sampayo* paid for his own and his brother's shares by bills of exchange on *London*, and *Willing & Francis* paid for theirs out of their own funds. On the arrival of the ship at *Lisbon*, the whole of the flour was to have

been sold by *F. T. Sampayo*, who was ordered to remit the net proceeds of the interest of *Willing & Francis* to *London*, on their account. The interest of *Willing & Francis* was separately insured,—5000 dollars with the *North American Insurance Company*, and 5000 dollars with the *Marine Insurance Company*, leaving 654 dollars 54 cents uninsured. Each company paid an average loss of 636 dollars 35 cents. *Willing & Francis* admitted their liability to the plaintiff for the average loss upon their own interest in the cargo, according to a statement presented to them, of 1390 dollars 81 cents, less their proportion of the average charges, taken from the sales of the cargo at *Jamaica*, amounting to 450 dollars 98 cents, leaving a balance, admitted to be due, of 939 dollars 83 cents. An adjustment of the average was made on the 15th of *December*, 1815, but all the money upon which it arose, had been paid by the plaintiff on or before the 17th of *June*, 1813. No demand, however, appeared to have been made on Mr. *Willing*, for contribution, until the 6th of *February*, 1816.

Binney, for the plaintiff.

It is not denied that all the flour on board the *Rebecca Sims* was subject to general average, and the question is, whether Messrs. *Willing & Francis* were partners with Messrs. *Sampayo* in the whole, or each was owner of a separate part. It is a clear case of limited part-
[*105] nership. The *purchase was joint, though different persons were interested in different proportions, and the whole was to be jointly sold, on the arrival of the vessel at *Lisbon*. There was no separate identification of the property; no distinguishing mark upon the barrels; and neither was entitled to any separate parcel. The charges attending the passage to *Lisbon* and the entrance there must have been joint; and loss or damages at sea would have affected the whole concern. It is now settled by a variety of decisions, that a joint purchase, with a view to a joint sale, constitutes a partnership, though a joint purchase, with a view to a separate sale, does not. So where the purchase is separate, but the interests of the purchasers are mingled with a view to a joint sale, from the time of their commixture they become objects of partnership. Community of profit and loss makes a partnership. Where each has paid for his share and brought it into the common mass, a partnership exists from that time. *Watson on Part.* 7. 65. *Coope* v. *Eyre* 1 *H. Bl.* 48. *Saville* v. *Robertson*, 4 *D. & E.* 720. A debt incurred for ransom or salvage would be joint. If half were lost, it would fall upon all; and if part were sold to a loss or gain, all would participate in the event. General average is a debt due by the property and its owner, for a service rendered to it; and an action at law may be maintained against one whose goods are liable to contribution. *Birkley* v. *Presgrave*, 1 *East.* 220. *Dobson* v. *Wilson*, 3 *Camp.* 480. The liability for average flows from the ownership; if that be mixed, the liability cannot be separate. The motives which led to the arrangement of these parties cannot affect its legal character, nor can the separate insurance which was effected. Limited partners frequently insure separately. If Mr. *Willing* had been sued alone, he might have pleaded in abatement.

But the establishment of a partnership is not essential to the plaintiff's right of recovery. It exists even if the property was held in common. A *necessary* contract, whether express or implied, in relation to property

(Sims *v.* Willing and others.)

held in common, binds all the owners. Thus, a contract made by one of several part owners of a ship for repairs, binds all. The power of tenants in common, to bind each other by their contracts, is not so extensive as that of partners, the former being limited to cases of necessity; but if the contract be a *justifiable one, there is no difference [*106] in the consequences flowing from it. For entire injuries to tenants in common, all must sue, and why should they not be all liable for entire benefits,—such as a general average? General average is a legal obligation flowing from the ownership of the property, and therefore giving a remedy against all interested. The benefit is conferred upon undivided property. A lien exists upon the whole until all is paid, and the personal liability is co-extensive with the lien. 1 *Holt*, 367. 370. 372. 2 *Bl. Rep.* 1077. 1 *Saund.* 191. (*c.* note.)

The plaintiff claims interest from the 17th of *June*, 1813, when he advanced his money. It is a general rule, that where money is paid by one for the use of another, on his express or implied request, interest is due from the time of payment. The money advanced by the plaintiff was for the benefit of the defendant, and therefore he ought to pay interest from the time it was advanced. The circumstance of the average not having been adjusted until sometime afterwards, cannot affect this right, because the statement of a general average is merely to show what proportion each is to pay, and may be made by the jury at the trial. Insurance companies by a special clause in their policies, cannot be called on for payment until thirty days after adjustment; but the obligations of individuals, arising not from the adjustment, but from the payment for their benefit, must be governed by the general rule. *Dilworth* v. *Sinderling*, 1 *Binn.* 488. *Crawford* v. *Willing*, 4 *Dall.* 286.

Rawle, for the defendant, denied the existence of a partnership between Messrs. *Sampayo*, and *Willing & Francis*, in the shipment in question. In mercantile operations, he argued, regard must be had to the intentions and views of the parties in entering into an arrangement. The shipment was made to *H. T. Sampayo* alone, for the purpose of protection; but the purchase shows that there was no joint contract, each having separately advanced his own funds for his own interest. Whatever might have been the fate of the cargo in *Lisbon*, *Willing & Francis* could not have been benefited or injured, beyond the extent of their own interest. If *Sampayo* had sold his own barrels of flour for a higher price than *Willing & Francis* obtained for theirs, the advantage would *have been all his own; and if either party had sold to an in- [*107] solvent person, the other could not have been called upon to bear part of the loss. Thus, although there was a joint possession, there was no joint interest which could make one responsible for the other. *Sampayo* was the agent of *Willing & Francis* in *Lisbon*, and they were his agents in *Philadelphia*. He might have sold the flour of *Willing & Francis*, because that was within the scope of his agency; but they might have followed their own barrels any where, except into the hands of those to whom he had legitimately sold them. If he had pledged them, they might have reclaimed them, and it would have been no answer, that they were not distinguished by marks. If *Willing & Francis* had insured by a good insurance, and the underwriters on *Sampayo's* interest had failed, the latter could not avail himself of the insurance made by the former.

To constitute a partnership, the interest must be indivisible. The mixture of property does not prevent a separate interest. There must not only be a joint purchase, but it must be made with a view to a joint sale, to give rise to the relation of partners. Here there was not even a joint purchase, because each paid for his own share with his separate funds, and the arrangement did not contemplate a sale of the whole on joint account. If the cargo had arrived and *Sampayo* had sold the whole, he would have sold his own share as owner, and that of *Willing & Francis* as agent. *Whitehouse* v. *Frost*, 12 *East.* 618. *Jackson* v. *Anderson*, 4 *Taunt.* 24. *Holmes* v. *United Insurance Company*, 2 *Johns. Cas.* 329.

If they were not partners originally, an action will not lie against them as such, although the whole property on which the average fell was held in common. *Saville* v. *Robertson*, 4 *D. & E.* 720. On the principle contended for on the opposite side, every owner of any part of a cargo subject to average, would be liable for the whole amount of average, which would be certainly an extravagant position. Nothing can be more clear than that each is answerable for freight and average on his own goods only. *Birkley* v. *Presgrave*, 1 *East.* 220. The liability of part owners of a ship on the contracts of each other, which has been adverted to, extends only to the case of necessaries, where there was no contract with the ship's husband. Underwriters, who upon [*108] a cession *become part owners of property held in common, are not responsible as partners, but each is liable only for his proportion of the expenses in the ratio which the sum insured by him, bears to the whole amount insured. 1 *Holt. Ship.* 368. *Abbot.* 120.

Where interest is not of course, it cannot be claimed if the defendant offers what is due. *Delaware Insurance Company* v. *Delaunie*, 3 *Binn.* 295. *Willing & Francis* were guilty of no injurious delay, they received no money from the plaintiff, and had none of his property in their hands. They were therefore not in default until a specific demand, which was not made till *February* 6th, 1816. This, therefore, is the period from which the interest is to be calculated. At all events, it cannot run back beyond the time at which the average was adjusted, for until then the plaintiff had no specific demand, and the defendant could not ascertain what he was to pay.

The opinion of the Court was delivered by

Gibson, J.—The case submitted, is neither so full nor so satisfactory as could be desired, but still enough appears to warrant a legal inference that a partnership existed between *Willing & Francis*, and the *Sampayos*. It is of no consequence whether the flour was *purchased* on joint account or not, as a partnership may be formed by each contributing in specie, his portion of the article or thing in which the trade is to be carried on. A more material consideration is, that the whole was to be managed and sold on joint account, all equally participating in the profit or loss. The entire adventure was to have been sold on its arrival at *Lisbon*, by *H. T. Sampayo*, the consignee. As far as we can discover, the agreement entered into by *Willing & Francis* with *F. T. Sampayo* for himself and brother, went that far and no farther. Accordingly, there was an entire commixture of the interests of all; no part of the flour being the separate property of either, but the whole constituting one mass, without distinction as to brand or number. What

would have been *H. T. Sampayo's* power over the cargo if it had arrived at *Lisbon?* The counsel for the defendant says, he was authorized to sell the part of *Willing & Francis,* as their agent, and remit the proceeds to their correspondent in *London.* *Every [*109] partner may be said to be an agent of the firm while he acts within the scope of the partnership. But could Mr. *Sampayo* have sold the number of barrels which constituted the share of *Willing & Francis,* either separately, or as an undivided interest; or was he not bound to sell his own share and that of his brother, at the same time? By the terms of the agreement he was to dispose of the whole together. This, in the event of the arrival of the cargo at its place of destination, would have been extremely important to *Willing & Francis,* as it would have secured to them the utmost degree of faithfulness in the management of their interest, by connecting it with that of the *Sampayos;* but, in return, it subjected them to all the responsibilities of partners. It is of no consequence that the flour was separately paid for with the respective funds of each: that was nothing more than a particular mode of contributing to the joint stock, and cannot affect their liability to third persons: nor is it of any importance that *Willing & Francis* insured their part separately. In case of abandonment for a total loss, the underwriters could have claimed nothing more than their share, after a settlement of the partnership account; and this circumstance cannot change the nature of the agreement between the partners themselves. Then the partnership being established, the liability of the defendant, as the surviving partner of the firm of *Willing & Francis,* results of course.

This decision of the principal question, renders it unnecessary to consider the point made by the plaintiff's counsel, as to a supposed liability of the defendant as a *joint owner,* in case the Court should think the partnership not established.

Then as to the last question: We are clear that interest ought to be charged from the time the advances were actually made by Mr. *Sims.* This action to compel contribution to what was a general charge, is in the nature of a bill in equity, and the money may be said to have been paid and advanced to the defendant's use; in which case interest, in the shape of damages, would clearly be recoverable from the time of the advancement. It is said, that interest follows the debt, as a shadow does the substance; and although this is not a rule of universal application, I can discover no ground to make this case an exception. In actions for *money had and received, or money lent and ad- [*110] vanced, interest is of course; and I cannot see why it should not be demandable in every case where one man has used, or been benefitted by the application of the money of another. It would be inequitable to allow interest only from the time when the principal was demanded, in a transaction like this, happening in a foreign country, where it is long before the plaintiff can be advised of his having a claim, and longer still before he can know exactly what he is entitled to demand. Neither can I discern any show of reason for referring the calculation to the period when the average was adjusted. The adjustment forms no part of the plaintiff's title, and cannot affect the rights of any one. The plaintiff is entitled to interest from the time the average was actually paid.

Judgment for the plaintiff.

COPE *against* SMITH and another surviving Executors of SMITH.

The mere omission by a creditor to bring suit against the principal debtor, does not discharge the surety.

If a creditor, after being requested to bring suit against the principal debtor, refuse or neglect to do so, the surety is discharged; *provided the request be proved clearly and beyond all doubt, and provided it be positive and accompanied with a declaration that unless the request be complied with, the surety will be considered as discharged.* And although a request, if not in writing would not be void, it is best that it should be in writing.

Query, Whether the surety would be discharged if it should appear that the insolvency of the principal would have prevented the recovery of the debt, if suit had been brought against him when required.

If the principal be dead, the creditor is under no obligation to resort to his estate, unless requested by the surety to do so; notwithstanding the 14th sect. of the Act of 19th April, 1794, which requires creditors to exhibit their accounts to executors and administrators, within twelve months after public notice given.

On the 23d *May*, 1809, *Godfrey Smith* and *Henry K. Helmuth* (joint merchants, trading under the firm of *Smith & Helmuth*,) together with *Henry C. Helmuth*, the father of the said *Henry K. Helmuth*, and *John Frederick Smith*, the father of the said *Godfrey Smith*, became bound jointly and severally to the plaintiff, in a bond, in the penalty of 14,000 dollars, conditioned for the payment of 7000 dollars, by the said [*111] *Godfrey Smith* and *Henry K. Helmuth*, on the 23d **May*, 1810, with interest from the date. *Smith & Helmuth* were the principals, and their fathers sureties, as appeared on the face of the bond. On the 10th *May*, 1812, *J. F. Smith* died, and the defendants were his surviving executors. On the 3d *March*, 1814, *Godfrey Smith* died, and the defendants administered on his estate. The *interest* on the bond was regularly paid by *Smith & Helmuth*, during the life of *Godfrey Smith*, and after his death by his surviving partner, *Helmuth*, down to the 23d *May*, 1819; and on the 23d *June*, 1815, the said surviving partner paid 3800 dollars in part of the *principal*. This action was commenced on the 6th *June*, 1820. Soon after the death of *Godfrey Smith*, his administrators inserted an advertisement in the newspapers, desiring all persons who had demands against the estate, to present them to the administrators. Whether the plaintiff knew of this advertisement, there was no evidence, but it did not appear that he had demanded payment of his bond from the administrators. If payment had been demanded, there were assets in the hands of the administrators to pay at least a part of the plaintiff's debt. It was proved by the oath of *John Long*, that the plaintiff told him, that *Frederick Smith*, one of the defendants, had come to him at his stall in the market, (the plaintiff was a butcher,) and told him *he should call on Henry K. Helmuth, and demand the money or ask, the money*. This was after the death of the testator, *J. F. Smith*, but the witness could not fix the time. *Henry K. Helmuth*, the surving partner, continued to pay his bank engagements down to the year 1817, when his credit failed. What his real situation was prior to the year 1817, did not not appear with certainty. He was examined as a witness, and swore that by the assistance of his friends, he discharged his bank engagements, but declined answering questions which led to a complete

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disclosure of his affairs. Under these circumstances, the defendants contended on the trial, which took place on the 9th *March*, 1822, before Judge DUNCAN, that they were discharged from the bond. The jury found a verdict for the plaintiff for 3741 dollars 34 cents, subject to the opinion of the Court on the evidence.

The cause was argued in bank, by *J. R. Ingersoll*, for the plaintiff, and by *Ewing* and *Binney*, for the defendants. *The [*112] leading features of their arguments, and the principal authorities cited by them, are noticed in the opinion of the Court, which was delivered by

TILGHMAN, C. J.—This case may be considered under three points of view:

1. *The neglect to bring suit against the principals*, without regard to the request of *Frederick Smith*, one of the defendants.

2. The same neglect, *after the request* of the said *Frederick Smith*.

3. The neglect *to give notice of the bond to the administrators of Godfrey Smith, and demand payment of them.*

I take it to be well settled, that the bare omission to bring suit against the principal, will not discharge the surety. It is the business of the surety to look to the principal, and if he thinks himself in danger, to apply to the creditor, and insist on his taking measures for the recovery of the debt. But without such demand by the surety, he has no equity against the creditor. The surety may have recourse to equity to compel the creditor to bring suit against the principal. Therefore, when a creditor makes an agreement, by which he disables himself from bringing suit, without the consent of the surety, he acts against equity, and ought not to hold the surety responsible. But nothing short of an engagement by which his hands are tied and a suit prevented, can discharge the surety. It was indeed decided by the Court of Common Pleas of *Northumberland* county, in the case of *Thursby* v. *Gray's administrators*, that an omission to bring suit for something more than two years after the bond was due, was a discharge of the surety; but the judgment was reversed by this Court sitting at *Sunbury*, in the Middle District, in the year 1808, (4 *Yeates*, 518,) and that our decision was right, will clearly appear from a review of the principal cases on this subject. In *The People* v. *Jansen*, in the year 1811, the opinion of the Supreme Court of *New York* was delivered by THOMPSON, J. (7 *Johns.* 338,) who said, "that mere delay in calling on the principal will not discharge the surety, and this is a sound and salutary rule both at law and in equity. In *Hunt* v. *United States*, *(in the year [*113] 1812, 1 *Gallison*, 34,) Mr. Justice STORY declared, "that in no case which he could find, (and we all know the depth of his researches,) had the mere delay to require *payment*, without any *contract* for that purpose, been held to vary the responsibility of the surety." In *King* v. *Baldwin*, (2 *Johns. Ch. Ca.* 559, in the year 1817,) Chancellor KENT lays it down as *an established doctrine*, "that *delay in calling on the principal* will not discharge the surety, provided the delay be unaccompanied with any *settled and binding contract*, for that purpose." And in support of this opinion, he cites the opinion of Baron WOOD, 10 *East.* 34, of Judge STORY, in *Hunt* v. *United States*, referred to before, of THOMPSON, J., in *The People* v. *Jansen*, also referred to before, and of Lord

ELDON, in *Wright* v. *Sampson*, 6 *Ves.* 734. The expressions of Lord ELDON are, that he "never understood that as between obligee and surety there was any obligation of *active diligence* against the principal. The surety is a guarantee, and it is his business to see whether the principal pays, and not that of the creditor." From all these authorities then, and from the reason of the thing divested of all authority, I am satisfied that the defendants have no ground for discharge from the obligation, on the naked circumstance of delay in bringing suit. This brings us to the second point. Are the defendants discharged in consequence of the plaintiff's neglecting to bring suit against *Henry K. Helmuth*, the surviving partner of *Godfrey Smith*, after what passed between him and *Frederick Smith*, one of the defendants, at his stall in the market? Although the surety is positively bound for the payment of the whole debt, and there is no distinction in the bond between principal and surety, yet it would be against good conscience for the obligee to refuse to bring suit against the principal, though requested to do so by the surety, who was apprehensive that the debt might fall upon him by delay. The security has a right to expect that when the day of payment comes, the principal shall not be indulged with further time at his expense and against his will. Chancery, therefore, on the application of the surety, will compel creditors to bring suit against the principal. This is conceded by the counsel for the plaintiff, and indeed it is a position too plain to [*114] be denied. But suppose no application be made to *chancery, but the surety demands of the creditor, *in pais*, to bring suit against the principal, and the creditor refuses or neglects it; is the surety discharged from his responsibility? This has been much controverted in the Supreme Court of *New York*, and has never been expressly decided in *Pennsylvania*. In *Pain* v. *Packard*, (13 *Johns.* 174, in the year 1816,) the case was, that the surety requested the creditor to sue the principal, who neglected to do it, whereby, the opportunity of recovering against the principal was lost. It was held, that the surety was discharged. This was in the Supreme Court of *New York*. The same point was afterwards brought before the Chancellor, in *King* v. *Baldwin*, (2 *Johns. Ch. Cas.* 559, in the year 1817,) who differed from the Supreme Court in opinion. The Chancellor, with his usual industry and accuracy, reviewed all the cases which had been decided, and declared, "that there was no case in the *English* law, in which the *personal application* of the surety to the creditor, was held to be compulsory on the creditor, at the hazard of discharging the surety." But the decree in *King* v. *Baldwin*, was reversed in the Court of errors, who held, that the surety was discharged. In this reversal, however, the Court was much divided, the decision having been carried only by the casting vote of the Lieutenant Governor. It is worthy of observation also, that of all the Judges of the Supreme Court, the CHIEF JUSTICE (I presume) alone was in favour of the reversal, and that PLATT, J., with great candor and liberality, availed himself of the opportunity of declaring that he was satisfied that he had been wrong in the case of *Pain* v. *Packard*. This declaration takes something from the authority of that case; yet it must be confessed, the CHIEF JUSTICE defended that opinion with great strength of argument. Between such high conflicting authorities, it would be a painful task to decide, and I am happy in being relieved from it by the

peculiar nature of our judicature, which has no Court of Chancery. Under such circumstances, I cannot help supposing that Chancellor KENT would have agreed that a demand *in pais* would be sufficient. He not only granted that in equity the surety might compel a suit against the principal, but founded his opinion upon that very circumstance. He thought a request *in pais* insufficient, because recourse might have been had *to chancery. But where there is no Court of chancery, the [*115] equity of the surety must be sacrificed, unless a demand *in pais* be sufficient. In *Pennsylvania*, the Court hold themselves bound to administer equity, in all cases where the forms of law do not restrain them. They cannot compel the specific performance of an agreement, because they cannot take cognizance of a bill in equity. But they come as near it as they can. In the action of ejectment, for instance, which is very little tramelled by form, they consider that as actually done, which a Court of equity would decree to be done. They will permit a purchaser of land to recover it from the seller, when he has paid all the purchase money according to the contract or tendered it, and brings it into Court. So in an action on a bond, they will permit the obligor to make any plea which would entitle him to relief in equity. On the same principle, a surety ought to be relieved, who has done every thing to enforce his equity, which the nature of the case admitted. But the counsel for the plaintiff deny that the surety has any remedy in *Pennsylvania*, but by paying the debt and taking an assignment of the bond, and in support of this opinion, they rely on the cases of *Dehuff* v. *Turbett's executors*, 3 *Yeates*, 158, and *The Commonwealth* v. *Wolbert*, 6 *Binn.* 292. *Dehuff* v. *Turbett* was decided by YEATES and BRACKENRIDGE Justices, at a Circuit Court at *Lancaster*, *April*, 1801. I have considered that case attentively, and do not think it warrants the inference drawn by the plaintiff's counsel. The surety had requested the creditor to bring suit against the principal, and the creditor answered, that when the principal, who was then absent, came home, he would make application to him and bring suit, unless he paid the interest and found new sureties for the principal. With this assurance the surety was well satisfied, and the Court submitted to the jury to decide whether the suit had been brought against the principal in a reasonable time. This case, therefore, seems to have been determined on its own particular circumstances. It is true, however, that YEATES, J. is reported to have expressed himself as follows, after having submitted the case to the jury, in the manner before mentioned. "We cannot say, *sitting as a Court of law*, that a creditor, neglecting to sue his principal debtor on the requisition of his surety, *thereby discharges his surety in general, and we think [*116] it will require great consideration, before such a rule is adopted." To make the most of this, it is not a decision, but rather a caution that the law was not settled. But it really does appear to me, either that the words said to have been uttered by that venerable Judge, must have been spoken in very great haste, or there must be an inaccuracy in the report. For no man knew better than Judge YEATES, that he was sitting not only in a Court of *law*, but of *equity*, and that by the established usage of our Courts, the defendants might protect themselves by an equitable defence. In *The Commonwealth* v. *Wolbert*, it was not decided, nor was it necessary, to decide, whether a surety is discharged by the

neglect of the creditor to bring suit, after request by the surety. The report of that case will show, that I expressly declined giving an opinion on that point, and Judge YEATES said nothing decided. His words are these:—"The rule in equity in *English* cases, is admitted, as to indulgence given to the principal debtor; but I do not know that we have extended these cases in their full latitude." It appears then that Judge YEATES has given no positive opinion on this subject, though we may discover the inclination of his mind. But in opposition to this inclination, may be placed the opinions of SHIPPEN and BRADFORD, Justices, in the case of *Eddowes* v. *Niell*, at *Nisi Prius*, in the year 1793, 4 *Dall.* 133. They were of opinion, "that if the obligee be requested by the surety to proceed against the principal, in order to save the debt, and he neglects or refuses to do so, the surety both in law and in equity, is exonerated." From a consideration therefore of all the adjudged cases, and the inconvenience and injustice that would flow from establishing the principle that no request *in pais* would be sufficient to give the surety an equity against the creditor, I am of opinion, that an equitable defence may be supported on a request *in pais, provided it be proved clearly and beyond all doubt, and provided the request be positive, and accompanied with a declaration that unless it be complied with, the surety will be considered as discharged.* But I give no opinion at present, whether even all this would be sufficient, if it should appear that the insolvency of the principal would have prevented the recovery of the debt, if [*117] suit had been brought against him when *required. I need hardly add, that the evidence in the case before us, was quite insufficient to bring the defendants within the rule I have laid down. It did not appear at what time the request was made by *Frederick Smith*, nor that a suit was requested at all. The words of the witness are, that the plaintiff told him, *Frederick Smith* said, *he should call on Henry K. Helmuth and demand (or ask) the money;* not that unless suit was brought, the defendants should consider themselves as discharged. We have no right to say that a request of this sort should be void unless in writing, but certainly it would be best to make it in writing, because of the difficulty of establishing the truth, with sufficient accuracy by parol evidence; and when the penalty is so great on the creditor as the loss of his debt, the surety who sets up this defence should be held to *strict proof.*

I come now to consider the third question: Whether the defendants are discharged by the plaintiff's omission to demand payment from the administrators of *Godfrey Smith. Godfrey Smith* was the brother of the defendants, and son of *J. F. Smith*, the testator. Why did not the defendants request the plaintiff to demand payment from the estate of their brother? Or, rather, why did they not pay him without demand, as they were the administrators of their brother? It is said, they did not know of their father's being bound in this bond. Possibly it may be so, but of this we are left to conjecture. So on the part of the plaintiff, it is said, that he did not know of the advertisement of the administrators of *Godfrey Smith*, desiring all creditors to bring in their claims. And there is no evidence bringing this notice home to him. The plaintiff had his interest regularly paid by *H. K. Helmuth*, the surviving partner of *G. Smith*, and as long as his credit remained good, the plaintiff might be

(Cope *v.* Smith's executors.)

easy, and not think of resorting to any other person. He might well suppose that the executors of *J. F. Smith* had no desire that he should resort to the estate of their brother, because they had never expressed such desire, and he could have no reason to suppose that they were ignorant of their father's being bound in the bond. It is true, an Act of Assembly provides that those persons who do not exhibit their claims within a certain time after the administrators have given notice by public advertisement, shall be postponed to those *who make such [*118] exhibition. But if there had been no such provision, we know that the administrators might confess judgment to a creditor who brought suit, and thus, in case of a deficiency of assets, the creditor who did not bring suit might be cut out. And yet, no case has been shown, where an equity arose to a surety in a bond, because the obligee had omitted to bring suit against the administrators of the principal, and thus lost the money which might have been recovered from his estate. Whether the principal be alive or dead, it is the business of the surety to keep an eye on his affairs, and request the creditor to bring suit, whenever he thinks himself in danger. I do not say that there may not be cases of collusion, in which the conduct of the creditor would be deemed fraudulent; but such cases would turn on a different principle. In the case before us, it cannot be said, that the plaintiff has voluntarily relinquished a fund, to which he ought to have resorted in case of the security. The law must be presumed to be as well known to the surety as the creditor; and no request having been made by the surety, there was no obligation on the plaintiff to resort to the estate of *Godfrey Smith*. Under all the circumstances of this case, I am of opinion that the defendants have shown no equity to discharge them from the bond executed by their testator, and therefore judgment should be entered for the plaintiff.

Judgment for the plaintiff.

FISHER *against* WILLING and another.

CASE STATED.

The master has no lien on the ship for his wages, unless it be so expressly agreed.
A mortgagee of a ship at sea does not, merely by delivery of the documents, acquire such a possession, as to be liable to the master for wages accruing after the date of the mortgage.

On the 5th *May*, 1819, *Robert K. Fisher*, the plaintiff, was employed by *Robert Waln* to command the ship *Neptune* *be- [*119] longing to him, then bound on a voyage from *Philadelphia* to *Batavia* and *Manilla*, and back to *Philadelphia*, at the rate of fifty dollars per month.

The plaintiff entered on board the ship, as master, on the same day, and proceeded in her as such from *Philadelphia* to *Batavia*, and back to *Philadelphia*, at which last mentioned port the ship arrived on the 16th of *March*, 1820. During all the time aforesaid and until the 16th of *April*, 1820, the plaintiff performed in all things his duty as captain

and commander of the ship. On the 28th *August*, 1819, the ship was sold, and assigned by *Robert Waln* to the defendants, *Thomas M. Willing* and *Richard Willing*, in trust; and they, after the 16th of *April*, 1820, sold the ship, and received her freight; but the proceeds were insufficient to discharge a debt due to *Palmer & Co.*, upon a bill of exchange, to pay which the assignment in trust was made. There remained due to the plaintiff for wages for his services, from the 28th of *August*, 1819, until the 16th of *April*, 1820, the sum of 429 dollars 18 cents. The question submitted to the Court was,—whether, at law or in equity, the defendants were liable to the plaintiff for the amount unpaid of his wages.

The assignment referred to was an indenture made the 28th day of *August*, 1819, between *Robert Waln*, of the city of *Philadelphia*, merchant of the one part, and *Thomas M. Willing* and *Richard Willing*, of the same city, merchants of the other part, reciting that, Whereas the said *Thomas M.* and *Richard Willing* were the holders of a certain bill of exchange, dated at *Calcutta*, the 20th day of *August*, 1818, and drawn by *Thomas Rodman* upon the said *Robert Waln*, in favour of Messrs. *Palmer & Co.*, for 5000 pounds sterling, payable four months after sight, at the current rate of exchange, which said bill was accepted by the said *Robert* on the 25th day of *January* last, and was afterwards duly protested for non-payment, and still remained wholly unpaid: And whereas the said *Robert* was desirous of providing a security for the payment of the said bill, in the manner therein set forth: The said *Robert Waln*, in consideration of the premises and of the sum of one [*120] dollar to him in hand paid, *had granted, bargained, sold, assigned, transferred, and set over to the said *Thomas M.* and *Richard Willing*, the ship *Neptune* of *Philadelphia*, *Fisher* master, then on a voyage from *Philadelphia* to *Batavia*, &c. and back, together with all her masts, yards, sails, rigging, anchors, cables, boats, tackle, apparel, outfit, and appurtenances, (of which said ship, a bill of sale, in conformity with the Registry Act of the *United States*, had that day been also executed and delivered by the said *Robert* to the said *Thomas M.* and *Richard Willing*,) also the charter party of affreightment of the said ship, entered into and made on the 10th day of *April* last between the said *Robert* of the one part, and *Abraham Kintzing*, jun. and *Jesse Waln* of the other part, and all freight, money, demurrage, and other benefits which might be derived therefrom, together also with four certain policies of insurance, particularly described: To have and to hold, take, recieve, and enjoy all and singular the premises aforesaid, with the appurtenances, unto the said *Thomas M.* and *Richard Willing*, their executors, administrators, and assigns, upon this special trust and confidence, that is to say, that in case the said *Robert Waln* should, at any time before or immediately upon the arrival of the said ship at *Philadelphia*, well and truly pay to the said *Thomas M.* and *Richard Willing*, their executors, administrators, or assigns, the full amount of principal and interest then due upon the said bill of exchange, then that the said *Thomas M.* and *Richard Willing*, their executors, administrators, and assigns, should and would forthwith re-assign to the said *Robert Waln*, all and singular the premises thereby assigned; but in case such payment should not be so as aforesaid made, then, upon the arrival of the said ship

(Fisher *v.* Willing and another.)

as aforesaid, to sell her, either at public or private sale for the best price that could be gotten, to collect and receive her freight and other monies, under the said charter party, and apply the same and the sales of the said ship to the discharge of the said bill of exchange; and in case a loss of either the said ship or freight, or both, should occur upon the voyage for which the said interests were insured, then to recover and receive the amount from the respective insurance companies to whom it might appertain to pay the same, and to apply the said amount in like manner; returning to the said *Robert*, his executors, *administrators, or assigns, any surplus monies which might remain [*121] in the hands of the said *Thomas M.* and *Richard Willing*, after discharging the said bill of exchange as aforesaid. *Provided* always, and it was thereby expressly declared to be the intention of the parties, that nothing therein contained should be deemed or taken to impair or affect the personal liability of the said *Robert* for the payment of the said bill, except to the extent of the sums actually received on account thereof from the objects thereby assigned; but that he was in all respects to continue personally liable therefor, as if that assignment had not been made, until the said bill was fully paid. (With a power of attorney to act in the premises.)

P. A. Browne, for the plaintiff, cited *Whit. on Liens*, 8. 13. 1 *Ray.* 393. *Portland Bank* v. *Stubbs*, 6 *Mass. Rep.* 422. 2 *Black.* (*Christian's* note) 445. *Watkinson* v. *Bernadiston*, 2 *P. Wms.* 367. *Abbot*, 9, 10.

Binney, contra, cited *Wilkins* v. *Carmichael*, *Doug.* 101. *Clay* v. *Sudgrave*, 1 *Salk.* 33. *Baily* v. *Grant*, 1 *Ray.* 632. *Hook* v. *Moreton*, 1 *Ray.* 397. *Hussey* v. *Christie.* 9 *East.* 426. *Smith* v. *Plummer*, 1 *Barn. & Ald.* 575. *Abbot*, 85. 94. 460. *Jackson* v. *Vernon*, 1 *H. Bl.* 116. *Twentyman* v. *Hart*, 1 *Starkie*, 366. 1 *Holt on Ship.* 353.

The opinion of the Court was delivered by

Tilghman, C. J.—This cause comes before us on a case stated, to which I refer for the material facts. The principal question is—whether the plaintiff, who was master of the ship *Neptune*, on a voyage from *Philadelphia* to *Batavia*, and back to *Philadelphia*, had a lien on the ship for his wages. The plaintiff contracted for his wages with *Robert Waln*, the owner, before the vessel sailed from *Philadelphia.* The defendants are but stakeholders, the money in their hands being held in trust for certain persons to whom Mr. *Waln* was largely indebted, and for whose use he executed a mortgage of the said ship *Neptune*, while on her voyage, to the defendants, with power to sell in case the debt was not paid in a certain time.

That the master has not a lien on the ship for his wages, unless it is expressly so agreed with his owners, seems to be as [*122] *well settled as any principle of maritime law can be. But the mariners and the mate have a lien, and may libel the ship in the admiralty for their wages. The reason is, that the master contracts with the owners *on their personal credit*, but the mariners and mate contract with the master *on the credit of the ship.* I refer to the cases of *Clay* v. *Sudgrave*, 1 *Salk.* 33. *Hook* v. *Moreton*, 1 *Raym.* 397. *Baily* v. *Grant*, 1 *Raym.* 632. *Wilkins et al.* v. *Carmichael*, *Dougl.* 101. *Smith* v. *Plummer*, 1 *Barn & Ald.* 575. *Hussie* v. *Christie et al.*, 9

East. 426, and *Abbot on Ship* 460 (London Edition). I know of no authority or *dictum* to the contrary, except it be the case of *Watkinson* v. *Bernadiston*, 2 *P. Wms.* 367, cited by the counsel for the plaintiff. In the report of that case by *Peere Williams*, no mention is made of a lien for the master's wages; but in Mr. *Coxe's* note, where the case is stated as extracted from the register, it is said that the Master of the Rolls held the captain's and mariner's wages to be a lien on the ship. There may have been something peculiar in the contract between the captain and the owners, which gave him a lien on the ship, in that case; otherwise the Master of the Rolls was clearly mistaken in the law. For an opinion, that, in general, the captain has a lien on the ship for his wages, would be contrary to all authority both before and since the case of *Watkinson* v. *Bernadiston*. As to its being *in equity*, that can make no difference, for this is a point on which law and equity must be the same. But it is said, that, in the case before us, the plaintiff is at least entitled to recover from the mortgagees (the defendants) his wages for all the time that he commanded the ship, *subsequent to the date of the mortgage*. It certainly is a hard case on the plaintiff, who seems to have little chance of recovering from Mr *Waln*, but that cannot alter the law. He contracted with Mr. *Waln*, and there is no privity between him and the defendants. If the ship had come to the *actual possession* of the defendants, and they had retained the plaintiff in their service without any particular contract, the law would have raised an assumption. But the kind of possession which was vested in the defendants by the mortgage and delivery of the ship's documents, is not sufficient to make them responsible. The plaintiff still acted under his contract with [*123] Mr. *Waln*, and if the debt for which *the ship was mortgaged, had been paid at any time before or immediately after her arrival at *Philadelphia*, the property would have been revested in Mr. *Waln*. The case of *Martin* v. *Paxton*, decided by C. J. ABBOT, (reported in 1 *Holt on Shipping*, 353) bears a strong resemblance to the one before us. It was there held, that the mortgagees of a ship, who were the registered owners, were not liable to a claim for wages by a sailor, though they accrued upon a voyage which was prosecuted for the benefit of the mortgagees, and the ship's freight and earnings during the voyage were made over to them, by the same deed which conveyed the ship, as a security for advances. The reason assigned was, that the plaintiff had made the contract on which he sued, *with the mortgagor*, (the master of the ship) and had given credit to him: he, therefore, and not the mortgagees, was liable.

The defendants have thrown no unnecessary impediments in the way of the plaintiff's recovery. They have agreed to a fair and candid statement of the case, and are very willing to pay, if the Court shall think that the plaintiff is entitled to a recovery. But they have no right to give away the property of those persons for whom they act in trust. The plaintiff has done his duty, and acted faithfully, as master of the *Neptune;* and it would give me pleasure, if I could say that he is entitled to payment from this fund in the hands of the defendants. But this I cannot say, without setting a bad precedent, and breaking down established principles. I am of opinion that judgment should be entered for the defendants.

Judgment for the defendants.

WILMARTH and another *against* MOUNTFORD and another.

IN ERROR.

If assignees for the benefit of creditors, sell the goods which have been assigned to them, the action for the price of the goods should be in their own names; but if in the writ and declaration they style themselves assignees, it is mere surplusage, and does not affect their right of action.

If any evidence be given tending to show that two defendants were concerned in the purchase of goods, it is not error to refuse to charge the jury, that the evidence proved an assumption by one only.

A witness stated in the course of his examination, that he had been sent by the plaintiff, in whose service he was, with goods to the defendant, and received orders to bring the goods back, unless the money was paid, but that the defendant obtained possession of the goods by stratagem and refused to deliver them, unless he would receive a note of F. R. in payment. *Held*, that as it appeared from the whole of his evidence, that he did not voluntarily surrender the possession of the goods, and was therefore not liable to an action by the plaintiff for a breach of orders, his competency was not affected.

A. made an assignment to B. & C. in trust, first, to pay the costs and charges of executing the trust, and then to pay such creditors as should execute a release within sixty days. None of the creditors released within the time prescribed. The assignees afterwards brought an action to recover the price of goods which had belonged to the assignor, and which were sold by themselves to the defendants. *Held*, that the assignor's note held by one of the defendants, could not be set off.

If a deed of assignment be read in evidence without objection, on the trial in the Court below, it cannot be urged in a Court of error, that it was not recorded within thirty days from its date, as required by the Act of 24th March, 1818.

ERROR to the District Court for the city and county of *Philadelphia*.

Phillips and *J. C. Ingersoll*, for the plaintiffs in error.

Page and *P. A. Browne*, contra.

The opinion of the Court was delivered by

TILGHMAN, C. J.—*Mountford* and *Crowley*, the defendants in error, who were plaintiffs below, brought an action on the case, against *Wilmarth* and *Schofield*, the plaintiffs in error. The declaration contained a count on an *indebitatus assumpsit*, and another on a *quantum valebant*, for goods sold and delivered. The pleas were *non assumpsit* and payment, and a set-off of a note for 574 dollars 93 cents, given by a certain *Frederick Reed* to *Wilmarth*, one of the defendants. On these pleas, issues were joined. On the trial of the cause, in the District Court, several questions of law were proposed by the counsel for the defendants, which were decided against them; on which they excepted to the Court's opinion.

1. The plaintiffs gave evidence of a sale and delivery of goods by themselves to the defendants, on which the *defendants' [*125] counsel contended, that the action could not be maintained, because the plaintiffs, in their writ and declaration had styled themselves "Assignees of *Frederick Reed*, in trust, for the use of his creditors." The fact was, and it was so proved, that *Frederick Reed* had made an assignment of all his estate, real and personal, to the plaintiffs, in trust that they should sell the same, and pay the debts of such of his creditors as should execute a release to the said *Reed*, within sixty days from the date of the assignment. The goods which were sold to the defendants, having been delivered to the plaintiffs, in consequence of the assignment,

the legal property was completely in them, and it was not only unnecessary, but improper, that they should be called *assignees*, &c. in the writ, and declaration. This, however, did not destroy their right of action, but was merely surplusage. It is like the case of executors, who sell the goods of their testator. In an action for the price of goods sold, if they name themselves executors, it is surplusage, and if they fail in the action, they are liable to costs. The District Court was right therefore, in deciding, that the action was maintainable.

2. The counsel for the defendants requested the Court to charge the jury, that the evidence did not prove an assumption by the two defendants, but by *Schofield* only. This the Court refused to do, but left it to the jury to decide whether the assumption was by one or both. The Court was certainly right. There was evidence which had a tendency to prove that both the defendants were concerned in the purchase of the plaintiff's goods, but it was not positive. Under these circumstances, the Court had no right to decide. It was a question of fact for the jury, and therefore very properly submitted to them.

3. *Hilary Wentz* was produced as a witness on the part of the plaintiffs, and sworn, without objection. After he had gone through his testimony, the counsel for the defendants alleged, that it appeared he was interested in the cause and therefore incompetent; and they prayed the Court to tell the jury, that they were to pay no regard to his evidence. But the Court was of opinion, that the witness was competent. *Wentz* was in the service of the plaintiffs, and sent by them with the [*126] goods to the tavern where the *defendants boarded. He swore, that the orders of the plaintiffs were, that he should bring back the goods, unless the defendants paid the money; but that the defendants got possession of the goods by stratagem, and then refused to pay for them, unless he would receive *Frederick Reed's* note in payment. The supposed interest of *Wentz*, consists in his being subject to an action by the plaintiffs, for delivering the goods, contrary to order. But the defendants must not select part of *Wentz's* testimony and reject the rest. Taking it altogether, he was not guilty of any breach of orders; for he did not voluntarily give possession of the goods to the defendants. They obtained them by artifice and without his consent. The plaintiffs, therefore, could support no action against him, and the objection to his competency falls to the ground.

4. The defendants contended for the right of setting off *Frederick Reed's* note to *Wilmarth*, on the supposition that this action was brought for the use of *Reed*. They endeavour to prove that it was for his use, because there was no evidence that any of his creditors had executed releases within sixty days, and therefore that a trust resulted to him, for the whole estate conveyed by him to the plaintiffs. This is a very subtle kind of argument. It is assumed, contrary to the fact, that the action was brought *for the use of Reed*. Neither the plaintiffs nor *Reed* himself say, that the action was for his use. The express trust was, that the plaintiffs should sell *Reed's* property, and convert it into money. The sale to the defendants was directly in execution of this trust, and even if none of the creditors had released, the assignment directs, that the money shall be applied, in the first place, to the payment of all costs and charges on account of the trust. So that there would not be a resulting trust to *Reed*,

(Wilmarth and another *v.* Mountford and another.)

for the whole proceeds of the sales. Besides, *Reed* might enlarge the time for the creditors releasing, if he thought proper, and as it does not appear that he makes any claim to the money to be recovered in this suit, it is not in the power of the defendants to make him a *cestui que trust* against his will. They cannot force him on the record and make him a party to this action against his consent. I am of opinion, therefore, that the defendants were not entitled to the set-off which they claimed.

These are all the objections to the plaintiffs' recovery, *made [*127] at the trial of the cause. But in the argument before us, another exception has been brought up, *viz.* that the deed of assignment from *Reed* to the plaintiffs was void, because not recorded within thirty days from its date, as required by the Act of 24th *March*, 1818; and therefore the plaintiffs had no property in the goods sold to the defendants. This exception comes too late. The deed was read without any objection on the part of the defendants. The presumption therefore is, that it was recorded according to law. That is a fact, of which we, sitting as a Court of error, cannot judge. We know not when it was recorded. Although there may be an endorsement on the paper which was given in evidence, mentioning that it was recorded *after* thirty days, yet that is not conclusive. The plaintiffs might have shown that the endorsement was erroneous, and that the deed was in fact recorded *within thirty days.* But this he had no opportunity of doing because the defendants permitted the deed to be read without objection. The time of recording was a fact, which might have been tried in the Court below, if brought into question. But not having been questioned, it is too late to bring it up now before us, who can try no fact. No objection on account of the lateness of the recording having been made, we must presume that none existed.

I am of opinion, on the whole, that there is no error in this record, and therefore the judgment should be affirmed.

Judgment affirmed.

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*The Commonwealth *against* BRYAN and another. [*128]

IN ERROR.

An administration bond, conditioned for the return of an inventory within one month, and the settlement of an account within one year, is forfeited, if the inventory be not rendered within one month, and the account settled within one year, though there be no citation.

Such inventory and account need not be final; but the administrator may afterwards file another inventory of goods coming to his hands since; and on rendering an account so far as the nature of the case admits, pray time to file another, which will always be granted.

The judgment on the bond stands as a security: but the party cannot take out execution, till he has proved his damages, after taking out a *scire facias.*

The limitation of seven years in the second section of the Act of the 4th of April, 1797, does not apply to all sureties on administration bonds, but only to cases where *nulla bona* has been returned to an execution against an executor or administrator; that is, an execution against the estate of the testator or intestate in the hands of the executor or administrator.

Error to the District Court for the city and county of *Philadelphia.*

This action was brought against *Sarah Billington, Thomas Billing-*

(The Commonwealth *v.* Bryan and another.)

ton, Guy Bryan, and *Robert Kid*, on an administration bond. *Sarah Billington* and *Thomas Billington*, who were both dead, were the administrators of *Thomas Billington* the elder, and *Bryan* and *Kid* were their sureties. The suit was brought in the District Court for the city and county of *Philadelphia;* and, on the trial, two questions were made, on which the President of the Court delivered his opinion in his charge to the jury.

1. Whether the administration bond was forfeited, in consequence of the administrators not having exhibited an inventory within one month, or settled their account within one year from the date of the bond.

2. Whether the action was not barred by the Act of the 4th of April, 1797, not having been instituted within seven years from the date of the bond.

On both these points the President charged in favour of the defendants, and the counsel for the plaintiff excepted to their opinion.

Newcomb, for the plaintiff in error, on the first point, referred to *The Archbishop of Canterbury* v. *Willis*, *Salk.* 172. 251. 315, where it was expressly decided that an administrator is bound to settle his [*129] account within the time directed *in the condition of the bond, though not cited; and if he does not, his bond is forfeited. The Act of Assembly of the 19th of *April*, 1794, *Purd. Dig.* 287, declares that an inventory shall be exhibited in one month from the date of the bond and an account settled within one year. This is the condition of the bond: and it is clear that as it was not complied with, a forfeiture took place.

2. The Act of the 4th of *April*, 1797, *sec.* 2, *Purd. Dig.* 495, which is relied on as a bar to this suit, does not relate to an original action, but only to bonds given for additional security.

J. S. Smith and *Ewing*, for the defendants, contended, on the first point, that the administrators were not bound to return an inventory within a month or settle an account within a year, though such were the words of the condition of the bond. A strict literal compliance with the condition is not required by law. The oath of the administrator is, to return the inventory within one month *or when required*, and he is not bound to do so until cited. The printed form of oath required by the Register is, that the administrator "will exhibit a full, true, and perfect inventory of the personal estate of the said deceased, and render an account of his administration into the Register's office, when he shall be thereunto lawfully required." The letters of administration are to do the same, at or before a day certain or when legally thereunto required. The form of oath in *England* is, that the administrator will exhibit an inventory and render an account, when thereunto lawfully required. It is in most cases impossible to settle an account within one year: and the constant practice has been, not to furnish an inventory or settle an account, until cited. This is the first instance in which such a construction has been contended for; and the District Court decided the point on the uniform usage, as explanatory of the law. In the present case, the administrators had filed an inventory many years before this suit was brought: and an account has been exhibited, while this suit was pending, on which the party suing on this bond, had auditors appointed by the Orphans' Court.

(The Commonwealth *v.* Bryan and another.)

2. The second section of the Act of Assembly of the 4th of *April*, 1797, is not clearly drawn, but its object seems to *be [*130] to protect the sureties of administrators generally. It is in analogy to other Acts of Assembly by which sureties on bonds of public officers are protected from suit after seven years.

Tod, in reply, controverted the practice as stated, and alleged that it had been the usage to obtain judgments on the bond upon the slightest forfeitures, and then to bring a *scire facias*, in which the party was bound to show the damage he had sustained, and he recovered accordingly. In the *English* law, the time for the return of the inventory is fixed by the ordinary, and inserted in the condition of the bond at his discretion. And this was the law in *Pennsylvania* under the old Act of 1705, till the Act of 1794 fixed the time for the inventory and account to be brought in. The bond is express, and the authority of *The Archbishop of Canterbury* v. *Willis*, decisive.

2. The second section of the Act of 1797 refers to the first: it speaks of *such* executors and administrators, and relates only to those who have been wasting the decedent's effects.

The opinion of the Court was delivered by

TILGHMAN, C. J.—The Act of the 19th of *April*, 1794, under which this bond was taken, prescribes the form of the condition, and expressly declares that an inventory is to be exhibited within one month, and an account settled within one year, from the date of the bond. If, therefore, we are to pay any regard to the positive injunction of the Act of Assembly, or to the words of the condition of this bond, which was taken as prescribed by the Act, the bond was forfeited. But, in answer to this, it is said by the defendants' counsel, that the practice has been, not to exhibit an inventory or settle an account, *till the administrator is cited* by the Register or the Orphans' Court; and that this practice is supported by the oath taken by the administrator and the form of the letters of administration, both of which are in the alternative, *viz.* "at or before a certain day, *or when legally required.*"

As to the practice, I can only say, that if it be so, it is a bad one, and should be abolished. It was not without *reason, [*131] that the Act of Assembly insisted on an inventory being exhibited within a month, and an account settled within a year. When the inventory is delayed for a considerable length of time, it will be extremely difficult for the administrator himself, should he live, and almost impossible for any other person, in case of his death, to do justice to the estate of the intestate. And there is no difficulty whatever in complying with this part of the condition. All that the administrator is required to do, is, to make an inventory of all the goods, chattels, &c. which have *then come to his hands;* that will prevent the forfeiture of the bond. If other goods, &c. come to his hands afterwards, an *additional* inventory may be exhibited. Then as to the *account*. It is undoubtedly for the interest of those concerned in the estate, to know how it stands, at the end of a twelvemonth. It may not be in the power of the administrator to settle a *final* account. But he may settle as far as the nature of the case admits, and pray time for the settlement of another account, which will always be granted. As to the *oath* administered to the administrator by the

Register, or the form of the *letters of administration*, they cannot affect the question; for it must not be pretended that the Register has power to repeal or gainsay an Act of the Legislature. The most, therefore, that can be said, is, that the oath is not violated, though the bond is forfeited, by an administrator who exhibits an inventory and settles his account, *when cited*, though after the time limited in the condition of the bond. The truth is, the Act of 1794 not having prescribed the form of oath, or of letters of administration, the Registers of wills have adhered to the *old forms*. But that can have no effect on the condition of the bond, which is *prescribed* by that Act. The point of law, now under consideration, has been expressly decided in *England*, before our revolution; and that decision recognized here, since the revolution. In the case of *The Archbishop of Canterbury* v. *Willis*, *Salk.* 172. 251. 315, Lord HOLT declared it to be the unanimous opinion of the Court of *King's Bench*, that the administrator is bound to settle his account, by the time specified in the condition of the bond, *though not cited or summoned.* Formerly, in *England*, the condition of the bond was, that the administrator should account *when thereunto required.* But by the [*132] *Statute of 22 *Car.* 2, *a day for accounting* was to be specified in the condition, which was left to the discretion of the Ordinary. Our Legislature, however, did not think proper to trust the Register of wills with this discretion, but commanded him to make the inventory returnable in one month, and the account in one year, from the date of the bond. That this Court has adopted the principle laid down in the case of *The Archbishop of Canterbury* v. *Willis*, will appear from a manuscript note of the late Judge SMITH in my possession, of the case of *Campbell* (*Register of Wills for the city and county of Philadelphia*) v. *Adcock*, before SHIPPEN, C. J. and SMITH, J. in the year 1801. It was an action brought by a creditor against the surety in an administration bond. No account had been exhibited by the administrator, nor is any mention made of *his having been cited.* The Court was of opinion that judgment should be entered for the penalty of the bond, and said "*that it was usual, in such cases, to give judgment without trial*, because the creditor could not take out execution without a *scire facias* on the judgment, on which he would recover only the amount of the damages that he could prove he had sustained." It is so ordered, by the Act of the 27th of *March*, 1813, which directs the judgment for the penalty of the bond, to stand as a security for all persons interested therein, and prohibits any execution, without a previous *scire facias*, on which the party grieved shall prove his damages, to be assessed by the jury who try the cause. The late Judge YEATES, who had long experience in the practice both of the Supreme and County Courts, frequently declared on the bench, that the administrator was held to a strict performance of the condition, according to the letter of the bond, and that he was protected from an execution, till the plaintiff had proved his damages after suing out a *scire facias*. I am of opinion, therefore, that in the present case, the bond was forfeited.

I will now consider the question on the Act of the 4th of *April*, 1797. By the first section of that Act, on its being made to appear to the Orphans' Court, that executors or administrators are wasting or mismanaging the

estate entrusted to them, the Court is authorized to order such security to be given as it may think proper, and to remove such executors or administrators, and appoint others in their place, in case *the order be not complied with. The second section enacts, [*133] that "In all cases where a return of *nulla bona* shall have been made by the Sheriff of the proper county to an execution against any such executors or administrators, their sureties shall, on notice thereof, unless they can show goods or chattels, lands or tenements, in some other county which may be seized and taken in execution by a *testatum fieri facias*, to satisfy the same, be liable to pay the amount of the debt and costs therein, in actions brought against them on the said bonds, and such further proof or evidence in support thereof, as by law would have entitled the suitor or suitors to recover his, her, or their demand, of the said executors or administrators *de bonis propriis. Provided, such suit shall be instituted against the sureties within seven years after the date of the respective bonds*, and the whole amount of the sums of money to be recovered thereupon, shall not exceed the penalties of the said bonds respectively." I have given the words of the law, and certainly it is an obscure paragraph. I shall therefore give it a construction, so far as is necessary to decide the case before us, and no farther. It surely cannot have been intended, as *a general Act of Limitation*, barring all suits against the sureties on administration bonds, unless commenced within seven years from the date. If such had been the intention, we must suppose that there would have been some saving for infants and *femes covert*. In most of these bonds infants are interested, and it ought not to be intended, that the Legislature overlooked or neglected them, unless it be plainly expressed. But it is not so expressed. On the country, the whole section looks to cases where *nulla bona* has been returned to an execution against an executor or administrator; that is, as I understand it, an execution against the estate of the testator or intestate, in the hands of the executor or administrator. Now no such execution has been issued in the present case, nor does its nature admit of it. It is a demand by the children who are entitled to a distributive share of *Thomas Billington's* estate; and in no form of action could these children have an execution to be levied on the estate of the intestate. The demand is immediately against the administrators *in their own right*, for not settling the estate and distributing it according to law; and any execution which the plaintiffs could sue out *on a judgment [*134] against them, would be levied *on their own estate*, and not on the estate of *Thomas Billington*. It is a case, therefore, not within the words or meaning of the Act of Assembly, and consequently the action is not barred by it.

The judgment is to be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

LANGER *against* PARISH.

IN ERROR.

In a suit brought into the Common Pleas by appeal from the decision of an alderman or justice, if the declaration lay the assumption after the commencement of the suit before the magistrate, it is error. And the Court will not send the record back to be amended by the Common Pleas.

ERROR to the Court of Common Pleas of *Philadelphia* county.

This case came into the Court of Common Pleas by appeal from a judgment rendered by an alderman, in favour of *Robert Parish*, plaintiff below, against *Joseph Langer*. The summons was issued by the alderman on the 1st and was returnable the 6th *May*, 1820, and judgment was rendered on the 8th. The declaration in the Common Pleas stated the assumption to have been made by the defendant on the 17th *May*, 1020.

Phillips, now assigned for error, that the cause of action was laid after the commencement of the suit and even after the appeal, and cited *Miller* v. *Ralston*. 1 *Serg. & Rawle*, 309, as in point.

Milnor, for the defendant in error, thereupon moved that the record might be sent back to the Court of Common Pleas to give them an opportunity to amend it.

BY THE COURT.—This case cannot be distinguished from [*135] *Miller* v. *Ralston*, where the judgment was reversed, because the declaration in the Court of Common Pleas laid the promise of the defendant, at a time subsequent to the entering of the appeal. 1 *Serg. & Rawle*, 309. The very same point was decided, in *McLaughlin* v. *Parker*, 3 *Serg. & Rawle*, 144. In *Miller* v. *Ralston*, the Court refused a *venire de novo*, because there had been no error in the trial of the cause; and it has been refused in other similar cases. Sending back a record to be amended, is always matter of discretion. If there had been a mere clerical error, there would have been no difficulty in sending it back, or in considering it as amended, without sending it back. But we do not consider it as a clerical error. The judgment must therefore be reversed. Judgment reversed.

THE COMMONWEALTH at the instance of BIRD Treasurer of the county of Philadelphia *against* BACON Treasurer of the city of Philadelphia.

Under the act of 2d April, 1821, laying a duty on retailers of foreign merchandize, the Treasurer of the city of Philadelphia is the proper person to grant licenses to, and receive the duties from, all retailers residing within the bounds of the city.

RULE to show cause why an information in nature of a *quo warranto*, should not be filed against the defendant, to show by what authority he receives, or claims the right to receive, the duties laid on retailers of

foreign merchandise, by the Act of Assembly in such case made and provided.

The case was argued by *Binney* and *Chauncey*, for the defendant, and *Kittera* and *Condy*, for the relator.

The opinion of the Court was delivered by

TILGHMAN, C. J.—The only question in this case is, whether *John Bacon*, Treasurer of the city of *Philadelphia*, be entitled to issue licenses to the retailers of foreign merchandize residing in the city, by virtue of an Act passed the 2d *day of *April*, 1821, entitled [*136] "An Act laying a duty on the retailers of foreign merchandize."

The duty to be paid by those persons who obtain licenses, goes into the *State Treasury*, and hence it has been argued, that the licenses should be issued by the *county* Treasurer, and *not* by the *city* Treasurer, because the general policy of the Legislature has been, to make all duties which went into the State Treasury, receivable by the county Treasurer. There is no doubt that this has been generally the case, and there are several reasons why it is most convenient. And therefore, if the expressions of the Act of Assembly in question, were such as to leave its meaning in doubt, the Court would be inclined to give it such a construction as would best accord with the general system of finances. But whatever may have been the causes, which induced a departure from the usual practice, in the present instance, the intention of vesting the power of granting licenses, in the Treasurers of *cities*, is so plainly expressed throughout the whole Act, that this Court has no right to gainsay it. This will be evident, from a cursory view of the several sections. The first section directs the retailers to take out their licenses, from "*the Treasurer of the proper city or county.*" There are three cities in *Pennsylvana; Philadelphia, Lancaster*, and *Pittsburgh*, and neither of them is an entire county. What then can be the meaning of the expressions "*proper city, or county,*" but the city, or the county, in which the retailer resides? But, suppose we convert the disjunctive, *or*, into a copulative, *and*, (as it is contended, we ought to do,) we shall then read, "*the Treasurer of the proper city and county.*" This mode of expression might suit the county of *Philadelphia*, which includes the city; and where the Sheriff of the county is sometimes (though not accurately) called the Sheriff *of the city and county.* But how would these words apply to all those counties which have no city in them, and which constitute almost the whole State. Unless we preserve the distinction, between the cities and counties, those counties which have no city, will be excluded from the operation of the law, because the retailers who live in them, cannot apply for licenses to the Treasurer of the *city and county.* The third section orders the constables of each *town- [*137] *ship*, or *ward, of the counties and cities of this Commonwealth, as the case may be*, to make a list of all the retail dealers within their *respective districts*, and deliver the same to the Clerk of the *Quarter Sessions*, or to the Clerk of the *Mayor's Court* of the proper *city or county, as the case may be;* and it shall be the duty *of the proper city or county Treasurer*, to furnish the attorney for the Commonwealth with a correct list of all those who have paid the duty, and obtained a license. The fourth section authorizes, the *respective city and county*

(The Commonwealth v. Bacon.)

Treasurers, to demand and receive a certain fee, from each person to whom a license is granted. The fifth section provides that *the said city and county Treasurers respectively*, shall settle their accounts with the State Treasurer. And finally, it is enacted, by the sixth section, that *the aforesaid city and county Treasurers*, before they enter upon the duties enjoined on them, shall give bond for the faithful performance of their trust, with sufficient security, to be approved by the Court of *Quarter Sessions*. Language cannot be plainer than is used in all these sections, to demonstrate an intent, that the Treasurer of each city, and of each county, should grant licenses to the retailers residing within their respective limits. Nor is there any thing in the whole law which bears a contrary aspect, except the form of licenses, which is prescribed in the end of the first section. This form is intended for the counties in general. It is headed —— County, *SS.* and concludes with a blank for the name of the county. But it must not be understood, that is the exact form for a license granted by a *city* Treasurer. It prescribes the form in general, but must be subject to such alterations as the nature of the case requiers, when the license is issued by a *city* Treasurer. Either this must be done, or we must alter the law, by striking out the word *city* from four sections, and striking out also several other provisions which refer to *cities*, as distinguished from *counties*. This would be, to change its frame and texture to an unwarrantable extent, and therefore the Court is clearly of opinion, that the Treasurer of the city of *Philadelphia*, is the proper person to grant licenses to, and receive the duty from, all retailers residing within the bounds of the city. Rule discharged.

[*138] *The Insurance Company of Pennsylvania *against* DUVAL and another.

In a *respondentia* bond, in the form generally used in Philadelphia, (*for which see the case,*) the payment of the debt and marine interest, depends upon the safe return of the goods, and not on that of the ship. Therefore, if the borrower receives his goods uninjured by another vessel, he is bound to pay.

An *utter loss* of the ship, within the meaning of such a contract, is not a technical total loss, but an actual one.

A *respondentia* bond, is a contract of insurance on the goods, as well of loan.

The Insurance Company of Pennsylvania, the plaintiffs in this cause, brought an action of debt against *James S. Duval* and *Andrew Curcier*, the defendants, on a *respondentia* bond, bearing date 11th *December*, 1818, the condition of which was as follows:

"Whereas, *The Insurance Company of the State of Pennsylvania*, have this day lent unto and advanced the said *Andrew Curcier* and *James S. Duval*, the sum of twelve thousand dollars upon the specie, goods, wares and merchandises laden or to be laden on board the ship *Atlas*, whereof *James Girdon* is master, bound on a voyage from *Philadelphia* to *Bombay*, with liberty to touch and trade at *Pulo Penang* and *Calcutta* or *Malacca*, and at and from either, back to *Philadelphia*, with the usual liberties on such voyages: Now the condition of this obligation is such, that if the said ship do and shall, with all convenient speed, proceed and sail on the said voyage from *Philadelphia* to *Bombay*, with

(The Insurance Company of Pennsylvania *v.* Duval and another.)

liberty to touch and trade at *Pulo Penang* and *Calcutta* or *Malacca*, and without any unnecessary delay shall return to this port of *Philadelphia*, with the usual liberties on such voyages, and here end her voyage, and that without any deviation, (the casualties of the seas excepted:) And if the said *Andrew Curcier* and *James S. Duval*, their heirs, executors or administrators, do and shall within sixty days next after the said ship shall have returned to the said port of *Philadelphia*, from her said intended voyage, well and truly pay or cause to be paid to the said *The Insurance Company of the State of Pennsylvania*, their successors or assigns, the sum of twelve thousand dollars money of the *United States*, together with the sum of two thousand four hundred dollars of the like money, and also with interest for the said sixty days after the said ship shall have returned to this port of *Philadelphia, or* if during the voyage, and before the return of the said *property* to *Philadelphia*, *an utter loss of the said ship or* *vessel, *by fire, enemies, men* [*139] *of war or any other casualties, shall unavoidably happen*, and the said *Andrew Curcier* and *James S. Duval*, shall and do within three calender months after such utter loss, well and truly account for upon oath or affirmation, and pay unto *The Insurance Company of the State of Pennsylvania*, their successors or assigns, a just and proportional average on all the said specie, goods, wares and merchandises of the said *Andrew Curcier* and *James S. Duval*, so carried from *Philadelphia* on board the said ship, and the neat proceeds thereof, and on all other goods, specie, wares and merchandises which the said parties shall therefrom acquire during the said voyage, and shall ship on board the said vessel, and which shall not be unavoidably lost as aforesaid; then this obligation to be void, otherwise to be and remain in full force and virtue. It being first declared to be the mutual understanding and agreement of the parties to this contract, that the lenders shall not be liable for any charge, damage or loss that may arise from seizure or detention of the within mentioned property, in consequence of illicit or prohibited trade. But the *said lenders shall be liable to average, and entitled to all the benefits of salvage, in the same manner, to all intents and purposes as underwriters, as though this instrument was a policy of insurance, executed by the said The Insurance Company of the State of Pennsylvania.*"

The following agreement accompanied the bond:—

"Whereas it hath been agreed, that the bills of lading for the specie, goods, wares and merchandises mentioned in the within obligation, shall be endorsed to *The Insurance Company of the State of Pennsylvania*, as a collateral security for the loan within mentioned: Now it is hereby expressly declared and agreed, that such endorsement shall not be held to exonerate the persons of the borrowers nor to compel *The Insurance Company of the State of Pennsylvania* to accept the goods, specie, wares and merchandise which may arrive under such bills of lading, in discharge of such debt. But it shall be lawful for the said *The Insurance Company of the State of Pennsylvania*, their successors or assigns, to receive and hold the said goods, specie, wares and merchandise for the space of sixty days after their arrival at this port of *Philadelphia*, and in case the principal *and interest in the within obli- [*140] gation mentioned, shall not be paid or satisfied within the said

time, to dispose of the same at public auction, and to charge the borrowers with the balance that may remain due after deducting from the amount of said sales, the freight, duties, commissions, and other just and proper charges.

The ship went to *Calcutta*, where she took in a cargo and sailed for *Philadelphia*. In going down the river from *Calcutta* she grounded; in consequence of which she sprang a leak after she got to sea, and put in at the *Isle of France* in order to stop the leak. Having sailed from the *Isle of France*, the ship was found to be in a bad condition, and not being able to make *Philadelphia*, she went to *Port Royal*, in the island of *Martinique*, for repairs. There she was condemned, because it was found that the repairs would cost more than she was worth, and the goods of the defendants were unladen and sent to *Philadelphia* in other vessels. At *Philadelphia*, the goods, which had suffered no damage, were delivered to the plaintiffs, according to the agreement annexed to the *respondentia* bond, and at the expiration of sixty days were sold by the plaintiffs, by virtue of the power vested in them by the same agreement. On receiving intelligence of this disaster, the defendants offered to abandon the goods, but the plaintiffs refused to accept the abandonment, and brought this action to recover the balance due upon the bond, after deducting the proceeds of the sale of the goods.

Upon these facts the defendants contended, they were not personally responsible to the plaintiffs; and at the trial at *Nisi Prius* before the Chief Justice, on the 12th *February*, 1822, a verdict was found for the plaintiffs for 4765 dollars 52 cents, subject to the opinion of the Court upon the evidence; conformably to which, it was agreed, judgment should be entered for the plaintiffs or the defendants.

Binney and *Rawle*, for the plaintiffs.

The ship not having been wrecked or lost, but condemned at *Martinique*, because the repairs would cost more than she was
[*141] worth, and all the goods having arrived safely at **Philadelphia*, the defendants are personally bound to pay the debt. A *respondentia* contract, comprises both a loan and an insurance on certain goods, for a certain voyage, and the material thing is, the safe arrival, not of the ship, but of the goods. The contract should be construed liberally, according to its spirit. But the plaintiffs are entitled to recover, whether the case be put:—1. Upon the strictest construction of the contract: 2. Upon the settled law in relation to *respondentia* loans; or 3. Upon the terms of this particular instrument, which is in some respects a policy of insurance.

1. The defendants agreed, that the ship should perform her voyage and return to *Philadelphia*, (the dangers of the seas excepted,) and that if she should be *utterly lost*, they would account for the goods saved. The *utter loss* contemplated by the bond, does not mean a technical total loss, but an actual one, and one which naturally and unavoidably destroys some of the goods. Where the ship is so much damaged as not to be worth repairing, it is not an utter loss in the case of a bottomry bond, as was decided in *Thomson* v. *Royal Exchange Assurance Company*, 1 *Maule & Selw.* 30. This is the established construction of a bottomry bond; but Lord ELLENBOROUGH evidently does not mean to con-

fine the rule to that description of instruments, but to extend it to *respondentia* bonds also; making a policy of insurance the only instrument in reference to which a technical total loss will be sufficient. If therefore a rigid and literal construction is insisted upon, the plaintiffs come within it; for no actual loss has occurred, the ship having remained in specie in the hands of the owners. A literal construction, however, is not the true construction of such an instrument; for if the ship had arrived at *Philadelphia* without any goods, by the letter of the bond, the defendants would have been liable to pay, though by the spirit of it, they were discharged. And if she had stranded at *Calcutta*, by the letter they would have been bound to account for the goods saved within three months, though it would have been impossible to have heard of the disaster within that period.

2. The *English* law is rather barren on this subject, but the *French* is full and clear. In case of shipwreck, contracts *a la grosse* (and bottomry and *respondentia* contracts are *a la grosse*) are to be reduced to the value of the effects saved. *2 *Valin.* 20. *Ord. of Louis XIV. art.* 17. 2 *Emerig.* 504. 3 *Pothier*, 247. If only part [*142] of the goods be saved, the borrower accounts only for the part saved; but if all the goods be landed safe, before the loss of the ship, the borrower pays the whole, provided the goods be put on board another vessel; the risk of bringing the goods in the other vessel being upon the lender. But the lender does not run the risk, if the goods are shifted to another vessel without necessity. 2 *Emerig.* 545. 523. If the ship be rendered innavigable and no other vessel can be found, on board of which to put them, they are then in the predicament of goods saved, and the value is to be reduced to that standard. The contract is then dissolved, and the goods are sold for the benefit of the lender; but if a ship might be obtained, and the borrower will not take her but sells the goods, he shall pay the whole debt and maritime interest. 2 *Emerig.* 546. 550. This contract is always liberally construed. If no mention is made of maritime interest, this being a contract of good faith, the error shall be corrected, and maritime interest inserted according to the usual rate. 2 *Emerig.* 406. By the *French* law, *respondentia* is a contract of loan, with insurance superadded. 2 *Valin.* 13. In this respect it differs from the English law, and resembles our own.

3. By the terms of the contract between the parties, the plaintiffs are entitled to recover. It is declared in express terms to be a contract of insurance, and was so considered in the case of *Gibson* v. *Philadelphia Insurance Company*, 1 *Binn.* 405, in which it was taken for granted, that the lenders were liable for a partial loss on the homeward cargo. On a *respondentia* contract there can be no abandonment, nor could the defendants have abandoned, if this had been a policy of insurance in the usual form, because when the abandonment was offered, it was known that the goods were to be sent to *Philadelphia*. If the master may get another vessel to bring the goods on and does not, the insurers are discharged; for there is no loss of the voyage, if the goods are or may be brought on. *Schieffelin* v. *New York Insurance Company*, 9 *Johns.* 21. *Wilson* v. *Royal Exchange Assurance Company*, 2 *Camp.* 623. *Anderson* v. *Wallis*, 3 *Camp.* 440. *Henrickson* v. *Margetson*, 1 *Marsh.* 101. Though, if at the time of the abandonment there was no prospect of getting an-

[*143] other *ship to bring the goods on, the insured may recover for a total loss, although the goods should be afterwards sent on. The mere suggestion that a *respondentia* contract depends upon the safe return of the ship, and not of the goods, in opposition to an uniform practice and usage of twenty years, is alone calculated to excite uneasiness; and if such should be the opinion of the Court, it will probably put a stop to loans of this sort altogether. The entire property in relation to which the contract was entered into, was returned to the borrowers; and by the agreement annexed to the bond, it was to be placed in the hands of the lenders as a collateral security, no matter in what vessel it returned. It is a contract highly favourable to the borrower; for if he borrows elsewhere, he is obliged to repay the amount with interest in any event, besides a premium of insurance; and in case of loss, he encounters the uncertainty of recovery against the underwriters. But where the characters of lender and insurer are united, he has nothing to pay in case of loss. Our form is borrowed from the *English*, with the exception of the clause which makes the lender liable to average and gives him the benefit of salvage. In both, the loss of the ship is spoken of, probably in compliance with ancient forms and because it was the expectation of the parties that the ship would return. The ship however is merely a description of the vehicle for the transportation of the goods. If before she got out of the *Delaware*, she had been rendered innavigable and the goods had been put on board another vessel, and proceeded on the voyage, the contract would certainly have continued in full force. The return of the *property* which is stipulated for, means the return of the goods, because it is upon the goods, and not the ship, that the money is lent. This has been the uniform construction of these instruments in *England*. The lender must be paid if the ship perish, provided the goods are safe. *Park.* 410. *Marsh.* 734. By the agreement of the parties, a lien was provided for, by making the goods deliverable to the plaintiffs; and what shows the understanding of the master on the subject is, that by the bills of lading by the schooners, the goods were consigned to the President of the Company. The defendants themselves have also affirmed our right; for if such a loss had happened

[*144] as exempted them from liability to pay, they ought not to have *permitted the goods to go into the hands of the lenders; thus treating it as a subsisting contract. The question is, whether the plaintiffs have received satisfaction by receiving the goods? The express terms of the bond prove that they have not. The goods discharge the loan only *pro tanto*. If the borrower was to receive the excess in case of profit, it follows that he was to sustain the loss, if there should be loss. Profit or no profit, is the concern, not of the lender, but of the borrower. The lender insures only against casualties. But the doctrine of the defendants, by making the contract depend on a subject, in reference to which it was not made, would involve the lender in the risk of the market, and thus convert the contract into a wager.

C. J. Ingersoll and *Chauncey* for the defendants.

The question is, whether, as the ship was lost, the borrowers are personally liable? The defendants shield themselves under what they consider the terms of the condition of the bond, which cannot be illustrated by reference to any general system of commercial law. The *French*

authorities only show that the *French* have turned much attention to the subject; but as commercial contracts are variously shaped by the parties, and the laws of different countries vary, we must refer ourselves to the particular contract before us. The conditions of the bond upon which this suit is brought are two: 1. That the borrowers shall pay the debt and marine interest within sixty days after the return of the ship. 2. If during the voyage and before the return of the property, an utter loss should happen and the borrowers pay an average, they shall be discharged.

1. If the ship never arrives without the fault of the borrowers, the day of payment never arrives. But it is argued, that as the goods have been received, the defendants are liable; and thus the Court are called upon to substitute a new contract, by declaring, that although the parties have said that payment shall depend on the return of the ship, it shall depend on the return of goods. The Court are to enforce contracts, not to make them. *Cook* v. *Jennings*, 7 *T. R.* 377. The language of the condition is explicit, and no latitude of construction is admissible. The defendants are not responsible for inevitable delay. If they do all in their *power to get the ship back, which is all they are bound to do, they have the benefit of the condition. They bind themselves to perform the voyage without unnecessary delay, casualties excepted; and if from casualties the ship never returns, they are under no obligation to pay. It is said that a literal construction of the instrument would involve the borrowers in difficulties; for they are required, in case of loss, to pay an average within three months after the loss, which, in some cases, for example if the ship stranded near *Calcutta*, would be impossible. But the contract is not to be interpreted so literally as to require impossibilities. If by an absolutely literal construction, it cannot be carried into execution, the construction must be as nearly literal as possible; and in the instance put, the three months must be calculated from the time of information or notice of the loss. But if the contract can be effectuated by giving it a literal construction, it must be so construed. If the parties had intended to make the loan dependent on the return of the goods, they would have said so. But this they have omitted to say; and it is evident, that a shipment of the goods on board of other vessels, was not contemplated when the contract was executed. The plaintiffs might have had good reasons for making it depend upon the ship. They probably wished to connect the goods with the fate of the ship, and did not choose to insure the goods even against sea damage, unconnected with the vessel in which they were originally shipped. But whether or not they had good reasons, is not material. If the parties shaped their contract in this way, the Court are bound to enforce it. [* 145]

The defendants are protected from responsibility, because there was an utter loss, and they have paid the salvage. What is an utter loss? In *England* it seems to be settled, that nothing but absolute annihilation of the ship will discharge the borrower on bottomry. But are the Court, in relation to this contract, to construe the words "utter loss" by the rule settled in *England*, where there is no salvage on average? Terms are to be construed with reference to the contract in which they are used. The fair meaning of the words of this contract is, that if the ship should become innavigable, incapable of transporting these goods, if a total loss

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should take place for the purposes of this voyage, the responsi-
[*146] bility of the borrowers should be discharged. If the *ship is lost, and the goods saved are equal in value to the loan, the lender is satisfied. Nothing more is required than to account for the goods saved in proportion to the amount lent, and this we have done. The plaintiffs have the goods in their possession, and we have nothing more to do. The parties have made this a contract on the ship, and the Court cannot convert it into a contract on the goods. *Appleton* v. *Crowningshield*, 3 *Mass. Rep.* 443.

The *French* law, if it is to have any weight, is with us; and the definition given of the contract, *contrat à retour de voyage*, is conclusive of the question, 3 *Pothier, art.* 1, *sec.* 1, *p.* 175, *Bottomry*. In *Rome*, the cradle of the law, the lending was upon the venture; the lender running maritime risks until the ship returned. 2 *Valin.* 1, 2. 2 *Emerig.* 386. And so it sometimes is in *England*. In speaking of bottomry and *respondentia* loans, *Blackstone* says, money is sometimes lent not only on the ship or goods, but on the voyage itself. 2 *Bl. Com.* 458. The cases of *Gibson* v. *Philadelphia Insurance Company*, 1 *Binn.* 405, and *Jenning* v. *Insurance Company of Pennsylvania*, 4 *Binn.* 244, though they decide nothing material to this case, show it to be the understanding of the commercial world, that the venture shall be fortunate, at least so far as regards the return of the ship. On what basis does marine interest rest? It is allowed, in consequence of the risk the lender runs, that the ship will not return. This risk alone prevents the interest from being usurious, and is what was contemplated by the parties, when the contract now in question, was entered into. 1 *Holt*, 419. 2 *Marsh.* 733. 736.

The opinion of the Court was delivered by

Tilghman, C. J.—By the condition of the bond, the defendants were to be discharged from their obligation, "if, during the voyage, and before the return of the *said property* to *Philadelphia, an utter loss* of the said ship, by fire, enemies, men of war, or any other casualty, unavoidably shall happen, and the said *Duval* and *Curcier* shall and do, within three calendar months after such utter loss, well and truly account for, upon oath, and pay unto *The Insurance Company of the State of Pennsylvania*, their successors or assigns, a just and proportional
[*147] average, on all the said *specie, goods, wares and merchandises of the said *Duval* and *Curcier*, so carried from *Philadelphia* on board the said ship, and the nett proceeds thereof, and on all other goods, specie, wares and merchandises, which the said parties shall therefrom acquire during the said voyage, and shall ship on board the said vessel, and which shall not be unavoidably *lost as aforesaid.* It being first declared to be the mutual understanding and agreement of the parties to this contract, that the lenders shall not be liable for any charge, damage, or loss, that may arise from seizure or detention of the within mentioned property, in consequence of illicit or prohibited trade. But the said lenders shall be *liable to average, and entitled to all the benefits of salvage, in the same manner, to all intents and purposes, as underwriters, as though this instrument was a policy of insurance, executed by the said Insurance Company of the State of Pennsylvania.*

This is the usual form of *respondentia* bonds in *Philadelphia*, and is peculiar to this city. It resembles the *French* contract of *respondentia*

much more than the *English*, but is not like the *French*, or any other which is known to me. In fact, contracts of this kind, are so different, in different countries, (although they resemble each other in some prominent features,) that when disputes arise, they are to be decided by the words of the particular contract in question, rather than by any principles of general commercial law. In the present instance, therefore, we must endeavour to ascertain the meaning of the bond, and be governed by it. According to the construction given to it, by the defendants' counsel, the risk which the plaintiffs took upon themselves, relates to the ship, and not to the goods; so that if the ship returned to *Philadelphia*, the defendants, would be liable for the whole principal and interest, though the goods were all lost. This indeed would be very hard, and very extraordinary, considering that the loan was made upon the goods, and that the goods are the source from which the defendants were to derive the means of payment; and when we add to this, that by the express understanding of the parties, the plaintiffs are *liable to average, and have the benefit of salvage, in the same manner, to all intents and purposes as underwriters, as if this instrument was a policy of insurance*, it will plainly appear, that the defendants' construction is so *contrary to the main intent of the agreement, as not to be maintainable. [*148] The defendants say, indeed, that the *average* to which the plaintiffs are liable, is *only general average*, but I see no reason for taking it in that restricted sense. Average, both general and particular, must have been intended; for how can the instrument be considered *to all intents and purposes as a policy of insurance*, if the lenders are not to be subject to particular average? Indeed I take this construction to have been settled in the case of *Gibson* v. *The Philadelphia Insurance Company*, 1 *Binn.* 405. There, both Court and counsel, took for granted, that the lender was liable to *particular average*, arising on damage sustained by goods on the homeward voyage; and the only question was, as to the sum, on which the average was to be calculated. It is true, that the point now brought up, was not then presented to the Court. But why? Because it never entered into the heads of the counsel that it was tenable. That cause came into Court on an exception to the report of referees. The referees were, I believe, the late Mr. *Edward Tilghman* and *Mr. Rawle;* and when the legal character of those gentlemen, as well as of the counsel who argued the exceptions, is considered, it is hardly supposable, that they should all have fallen into so gross an error as is imagined by the counsel for the defendants. Let us consider now, whether the condition of this bond has been performed? The defendants say it has, because the ship was *utterly lost*, and the goods which were saved, came to the hands of the plaintiffs, who sold them, and have received the proceeds. But I cannot think that the ship was lost within the meaning of the contract. *Utterly lost* are strong expressions, intended, as I conceive, to be distinguished from *technically lost.* A ship is not *utterly lost*, while she remains in specie, in the hands of the owners. Had she been taken by an enemy, she would have been utterly lost to the owner. So, had she been burnt, or wrecked and gone to pieces. But she is not utterly lost, merely because it may cost more than she is worth to repair her. These words, in a bottomry bond, received a construction in the case of *Thomson* v. *The Royal Exchange Assurance*

Company, 1 *Maule & Selw.* 30. It was there decided, that nothing but an *actual total loss*, will discharge the borrower of money
[*149] upon bottomry, and the distinction was taken *between the contract of *bottomry* and of *insurance*. In the latter, the assured may abandon for a total loss when the ship is in such a condition, that her repairs will cost more than she is worth; but in the former, nothing short of a *total destruction* of the ship will constitute *an utter loss*. If she exists in specie, in the hands of the owner, it will prevent an utter loss. Then it appears, that if the defendants stand upon the *words* of the bond, the case is against them. And it is equally against them, if they forsake the *letter*, and resort to the *spirit*, of the contract. It must have been intended, that the borrower should pay the debt, when he received all his goods undamaged, otherwise the lender would be involved in the risk of the market, which could not have been intended. The defendants' argument, does in fact reduce the contract, under the existing circumstances, to a simple wager upon the market, than which nothing can be more foreign from the whole scope of the writing. The most liberal construction, and in general the most favourable to the borrower, would be to consider it as a contract of insurance; for then, he will be indemnified for those partial losses which so frequently occur. Now considering this as an insurance on the goods, the assured could not recover. It is not essential that the goods should be brought home in the same bottom in which they were shipped. They must not be shifted, without necessity; but where necessity exists they may be sent in another vessel, and while in that vessel, they are at the risk of the insurer. Had the goods, in the present case, suffered damage on the voyage from *Martinique* to *Philadelphia*, the plaintiffs would have been answerable. But they received no damage, and therefore the defendants had no right to abandon. In whatever light, then, this case is considered, whether on the letter of the bond, or in the more enlarged view of a policy of insurance, the law and the merits are with the plaintiffs. They are therefore entitled to judgment upon the verdict.

Judgment for the plaintiffs.

[*150] *JONES *against* WILDES.

IN ERROR.

A Judge is not bound to give an opinion, as to the law, on the facts of the whole case; and if he do so, and direct the jury that their verdict should be for a particular party, it is error.

All that is material in this case, which came before the Court on a bill of exceptions, accompanying a writ of error, from the District Court for the city and county of *Philadelphia*, will be found in the opinion of the Court, which was delivered by

Gibson, J.—Whether the evidence, if believed, were sufficient to make out a case on which the plaintiff below could recover, we are, from the manner in which it is stated in the bill of exceptions, unable to say. Possibly it was not: but it may have been so, and the question is, whether

the Court gave a binding direction as to matters of fact? When the evidence was closed on both sides, the defendant moved for a non-suit, to which the plaintiff refused to submit; and, insisting on his right to go to the jury, prayed a direction, that on the whole case the law was with him. This was refused by the Judge; who charged, that the law was with the defendant, *and that the verdict should be in his favour*. Now this was a positive direction to find in a particular way, at all events, and necessarily left nothing to the jury. We have often had questions of this sort in the country, and have reversed judgments on this ground, when the direction was less positive than in the case before us. It may, however, be justly remarked, that the Judge was probably led into the error, by the very objectionable manner in which the matter was put to the Court by the plaintiff's counsel, who asked exactly the same sort of direction in his own favour. A Judge is not bound, nor ought he to be required, to give an opinion, as to the law, on the facts of the whole case. We have already had occasion to remark on the manner in which questions are put, and bills of exceptions taken, *in the Court in which this cause was tried, and we shall be glad to see it amended. [*151]

Judgment reversed, and a *venire facias de novo* awarded.

Phillips and *J. R. Ingersoll*, for the plaintiff in error.
Atherton and *S. Levy*, for the defendant in error.

THE COMMONWEALTH *ex relatione* NORBURY *against* THE COMMISSIONERS OF THE COUNTY OF PHILADELPHIA.

A suit on a forfeited recognizance conditioned for a party's appearance to answer on an indictment, is not a civil action.

The county is not obliged to pay the Prothonotary's fees accruing in suits on forfeited recognizances, since the Act of 24th March, 1818, appropriating the monies arising from fines and forfeitures to county purposes, where such fees cannot be collected from the defendants.

RULE to show cause why a *mandamus* should not issue, commanding the defendants to draw an order in favour of *Joseph B. Norbury*, Esq., late Prothonotary of the Court of Common Pleas of *Philadelphia* county, for four dollars, for fees claimed by him as Prothonotary, in the case of *The Commonwealth for the use of the Commissioners of Philadelphia County* v. *Joseph Conover*.

In the year 1818, Mr. *Norbury* was commissioned Prothonotary of the Court of Common Pleas of *Philadelphia* county. On the 24th *March*, 1818, an Act of Assembly was passed, (*Purd. Dig.* 230,) by which it was enacted, that "All fines, issues, amercements, forfeited recognizances, and other forfeitures, which now are, or hereafter shall be set or imposed, lost or forfeited for the use of the Commonwealth, in the several Courts thereof, shall, by the respective Clerks of the same, be certified and estreated into the office of the Commissioners of the respective counties, within ten days after the expiration of the term at which such fines and forfeitures were imposed; together with the judgments and orders of the

said Courts respectively, on all forfeited recognizances as shall be sued upon in such Courts, which estreats, or returns of fines and for-
[*152] feitures shall be under oath *or affirmation of the respective Clerks, and all sums of money collected in pursuance thereof, shall be paid to the respective county Treasurers, for the use of the counties respectively; and it shall be the duty of the Commissioners of the respective counties, to superintend the collections of said sums of money, and the accounts thereof shall be annually settled by the county auditors: *Provided*, That nothing herein contained, shall impair the right of the respective Courts to moderate or remit forfeited recognizances as heretofore." After the passage of this Act, various suits were directed to be brought on recognizances forfeited in the said county, by the attorney of the county Commissioners, in the said Court of Common Pleas, and process was accordingly issued by the Prothonotary. These suits were directed in the *præcipes*, to be in the name of "*The Commonwealth for the use of the county of Philadelphia*," and the declarations, conformed to the process. Besides issuing process, various other official services were performed by the Prothonotary, in and about the said suits, which services were the same as those performed in all suits instituted on forfeited recognizances before the passage of the above mentioned Act. No costs, of the description claimed, have been paid by the Commissioners of the county of *Philadelphia* since the passage of that Act, nor were any such paid by the Commonwealth to the Prothonotaries of the Courts of Common Pleas, prior to its passage. On the 29th *March*, 1819, an Act of Assembly was passed, the fifth section of which (*Pamph. L.* 274,) declares, "That in all cases in which fines and forfeited recognizances are appropriated to the use of the county of *Philadelphia*, the Commissioners of the said city and county are authorized to employ counsel to prosecute and collect the same, and shall cause to be laid before the auditors, at the settlement of the Commissioners' accounts for the said county, an account of the sums collected, and the costs attending the collection of the same." After the passage of this Act, similar process was issued by the Prothonotary on recognizances forfeited in the said county, by the direction of the attorney of the county Commissioners, and other and similar official services were performed by him. Towards the end of the year 1819, or beginning of 1820, the form of sueing was
[*153] changed, and the writs were directed to be issued *in the name of the Commonwealth; but in the declarations, the suits were stated to be for the use of the County Commissioners. Both before and after the passage of the last mentioned Act, some of the said suits were prosecuted to judgment, and executions were issued, which were returned *nulla bona*.

The question for the opinion of the Court was, whether the relator, as Prothonotary, was entitled to receive from the County Commissioners, the fees specified in the fee bill, for issuing process and other official services performed by him in the said suit.

The case was argued by *T. Sergeant*, for the relator, and *Peters*, for the Commissioners; after which, the opinion of the Court was delivered by

Duncan, J.—This is a rule on the Commissioners to show cause why a *mandamus* should not be issued against them, compelling them to

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draw their order on the County Treasurer for the sum of four dollars, accrued to the relator as Prothonotary, on a suit on a forfeited recognizance, which had been sued in the name of the Commonwealth, for the use of the County Commissioners, but which had never been collected, and could not be collected.

The case of the relator presents a claim of much equity. On principles of natural justice, every one who performs services, at the request and for the benefit of another, should receive a due compensation. The plaintiff, in every civil action, is eventually liable to the officers for the fees prescribed by law; for, in the contemplation of the law, he is supposed to have paid them as the action proceeded. Hence it is, that the award of execution is for all the costs to the plaintiff, "by him about his suit in that behalf expended." The Commonwealth is not liable for costs on her own prosecutions, whether civil or criminal. This exemption, whether it be called prerogative or privilege, is founded on the sovereign character of the State, amenable to no judicial tribunal, subject to no process. Such was the decision of this Court in *The Commonwealth* v. *Johnson's executrix*, 5 *Serg. & Rawle*, 195. But if this had been a mere civil action, as is contended *by the relator, debt for a sum *in numero*, in which the State was purely a nominal party, the [*154] county her grantee, I can see no good reason why the Court would not look to the real party on the record, the assignee of the State, as they would where, on a bond irregularly assigned, the action was in the name of the obligee, for the use of the assignee, and compel him to pay costs, or as they do in all official bonds sued in the name of the Commonwealth, for the use of parties aggrieved. This sovereign privilege of the State is not communicated nor communicable to those who sue in her name and for *their own exclusive benefit*, the action not being hers, nor under *her control*. Nor is it in the power of any Court or executive magistrate either to remit or mitigate the debt or duty owing to the person for whom, by the law, the State stands as a mere naked trustee, without authority and without interest. In such case, the relator would be entitled: but this is not a just view of the subject. There is here no grant of the recognizance to the county, because that would interfere with the constitutional rights of the Governor, and would restrain the power of mitigation or remission vested in the Court in which the recognizance is forfeited, which is reserved to them; but a bare appropriation of the money, when collected on the recognizance, to the use of the county. But what is decisive is this: The action on the recognizance was not a civil action for a numerical sum, but one of a criminal nature; an instrument to coerce the appearance of the accused to take his trial,—a power incident to every criminal Court, a power to commit to prison, to deliver on the recognizance, into the custody of the bail; these manucaptors being his jailors, and he constantly in a state of commitment. The jurisdiction of the offence, which is the principal, involves the power over the accessary, which is the commitment; and that being a matter of a criminal nature, draws after it all its incidents and consequences; and though the action is not directly to punish the offender, yet it partakes of punishment for an offence against the State, and is not in the nature of a violation of a contract. Besides, a recognizance is a matter of record, and, when forfeited, it is in the nature, in some respects, of a judgment of record. The pro-

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cess on it, whether *scire facias* or summons, is rather judicial
[*155] than original; and is for the purpose of carrying the *judgment into effect. It is no further to be reckoned an original suit, than that the defendant has a right to plead to it. It is founded on the recognizance, partakes of its nature, must be considered as flowing from it, and, when final judgment is given, the whole is to be taken as one record. These principles are all acknowledged in *The Commonwealth* v. *Cobbet*, 2 *Yeates*, 352. That was an action of debt on a recognizance for good behaviour. The defendant filed a petition, as an alien, to have the cause removed to the Circuit Court of the *United States*, for this District. This was disallowed on the ground that it was not a suit of a civil nature; the counsel for the defendant admitting, that had the recognizance been to enforce an appearance to answer an indictment, the action would be deemed of a criminal nature. If the county was in debt to the cognizors, this could not be defalked, because the action is not a civil action, and because there is no debt due to the county. Costs are not of common law origin. Where there is no Statute giving costs, none are payable, and where they are given, the Statute declares by whom they are to be paid, and many burthensome duties are thrown on officers without any allowance. Here there is no Act imposing costs on the State, and when the Legislature directed the money, when collected, to be paid into the county treasury, it left the proceedings on the recognizance in all other respects unenlarged. When the money is collected, the right of the county first attaches. The county and the county officers have no control over the action. The recognizance is not granted to the county; the county is not the assignee of the State; it can neither release the action, nor mitigate or remit the forfeiture. The power is lodged elsewhere. The Court have such discretionary power. It is very properly entrusted to them. When the accused is surrendered, or appears voluntarily, and takes his trial, all the purposes of the recognizance being answered, the Court may exercise a discretion. The appropriation could not deprive the Governor of his constitutional power over the recognizance, because the money is not the money of the county until collected.

The Act of 1821, making it the duty of the officers to perform the requisite services without fee, unless the money on the recogni-
[*156] zance is collected, has been invoked by both *parties; the counsel for the relator contending, that it required a positive enactment to exempt the county from the payment of fees *in futuro;* and that this is tantamount to a legislative declaration that for past services the county was liable: while the Commissioners contend that it is a plain declaration that the officers never were entitled. But this law, though it puts down all future claims, leaves the past claims just as it found them; neither taking from the officers any vested right they had under the law as it stood when the fees accrued, nor giving them any new right for past services.

If the action on the recognizance is a criminal one, as it has been decided to be, this case would be governed by the opinion given by the Chief Justice in *Irwin* v. *The County Commissioners*, 1 *Serg. & Rawle* 505, who observes that "criminal actions were formerly prosecuted in the name of the King who paid no costs. Upon the revolution the Commonwealth stood in the place of the King, and therefore not liable

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for costs, except when so directed by the Act of Assembly. Suppose then, for argument's sake, that the county is substituted for the Commonwealth, the Commissioners who represent the county would not be liable, except when the Commonwealth would have been liable:" As the Commonwealth were not liable for costs on forfeited recognizances, if it were true that the county now stands as the State's substitute, the Commissioners on this principle would not be liable.

As the law stood when these fees accrued, the county is not liable, and the rule must be discharged. Rule discharged.

End of March Term, 1822.