that she and her husband were inhabitants of Georgia on the 19th of April, 1775, then under the dominion of Great Britain; that her husband continued a subject of Great Britain and never owed allegiance to Georgia, nor was ever convicted by any lawful authority of any crimes against the state. That the tenant demurred to the replication, the demandant joined in demurrer, and judgment was pronounced by the circuit court (composed of *Washington*, Justice, and *Clay*, District Judge) for the demandant. On this judgment the writ of error was brought, and the following errors assigned.

1. The general errors.
2. The attainder of G. Kincaid and the forfeiture and sale of his estate; so no right to dower accrued, and no land out of which it could be enjoyed.
3. The alienage of the widow on the 4th of July, 1776, and ever since, by which she was incapable to take and hold real estate in Georgia.

The principle question (whether an alien, British subject was entitled, under the treaty of peace, to claim and hold lands in dower) 21*] *was not discussed, as the judgment was reversed, for want of a sufficient description of the parties to the suit, on the authority of *Bingham* v. *Cabot*, 3 Dall. 382, and *Turner* v. *The Bank of North America*, *ante*. But an important point of practice was previously settled, relative to the mode of ascertaining the value of the matter in dispute, in actions like the present.

For the plaintiff in error, it was admitted, in answer to an objection, that the value of the matter in dispute did not appear upon the record; but it was urged, that, from the nature of the subject, the demand of the plaintiff could not ascertain it; nor from the nature of the suit (like a case of ejectment, where the damages are only given for the ouster) could it be fixed by the finding of a jury on the judgment of the court. 3 Bl. Com. 35, 36. As, therefore, there was no act of Congress, nor any rule of the court, prescribing a mode to ascertain, in such cases, the value in dispute, that the party may have the benefit of a writ of error, it was proposed to continue the cause, to afford an opportunity to satisfy the court by affidavits of the actual value of the property.

BY THE COURT: Be it so. Let the value of the matter in dispute be ascertained by affidavits, to be taken on ten days' notice to the demandant, or her counsel in Georgia. But consequently, the writ of error is not to be a supersedeas.

Ingersoll and *Dallas*, for the plaintiff in error.
E. Tilghman, for the defendant in error.

Distinguished—21 How. 392. Cited—post 26.

BLAIR *et al.* Plaintiffs in Error,
v.
MILLER *et al.*

A writ of error not returned at the term to which it is returnable, is a nullity.

WRIT of error from the circuit court of Virginia. The judgment was rendered in the circuit court on the 28th of May, 1799, and a writ of error issued returnable to August term, 1799; but the record was not transmitted, nor the writ returned into the office of the clerk of the supreme court, till the 4th of February, 1800. Swift objected to the acceptance and return of the record and writ: And,

BY THE COURT: The writ has become a nullity, because it was not returned at the proper term. It cannot, of course, be a legal instrument, to bring the record of the circuit court before us for revision.[1]

Cited—4 Cranch. 131; 9 Otto, 506.

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*RUTHERFORD *et al.* Plaintiffs in Error,
v.
FISHER *et al.* [*22

A writ of error will only lie in the case of a final judgment.

ERROR from the circuit court of New Jersey; sitting in equity. It appeared, that the defendants in the circuit court had pleaded the statute of limitations to the bill of the complainants; and that the plea was overruled, and the defendants ordered to answer the bill. On this decree the present writ of error was sued out, and *Stockton* (of New Jersey) moved to quash the writ, because it was not a final decree, upon which alone a writ of error would lie, 1 vol. 61, 62, s. 22. *E. Tilghman*, for the plaintiff in error, acknowledged the force of the words "final judgment," in the act of congress; and submitted the case without argument.

CHASE, *Justice*:—In England a writ of error may be brought upon an interlocutory decree or order; and until a decision is obtained upon the writ, the proceedings of the court below are stayed. But here the words of the act, which allow a writ of error, allow it only in the case of a final judgment.

BY THE COURT: The writ must be quashed with costs.

Cited—Hemp. 12; 16 How. 314.

BLAINE v. Ship, CHARLES CARTER, *et al*

Whatever may be the original nature of the suit in a circuit court, it cannot be removed into the supreme court, except by writ of error.

THIS was an appeal from the circuit court of Virginia; and the preliminary question discussed was, whether such a process could be sustained? After argument,

THE COURT decided, that the removal of suits, from the circuit court into the supreme court, must be by writ of error in every case, whatever may be the original nature of the suits.

Cited—5 Wall. 579.

COURSE *et al* v. STEAD *et Ux, et al.*

The test of a writ of error is amendable, of course. The writ of error was directed to the judges, etc., of the district aforesaid, and no district was previously named, but the attestation of the record was

1.—See post. 22; Course v. Stead, *et al.*

contemplated, that any court under the United States should take cognizance of any thing favoring of criminalty against a state: That the action before the court is of a criminal nature and for the punishment of a crime against the state: That yielding to the prayer of the petitioner would be highly inconvenient in itself and injurious in the precedent: And that cognizance of it would not be accepted by the circuit court, if sent to them; for even consent cannot confer jurisdiction. For the reasons, and others, omitted for the sake of brevity, I conclude, the prayer of William Cobbet cannot be granted.

The petition rejected.

477*] *CAMBERLING *versus* M'CALL.

An action for a loss cannot be maintained on a policy of insurance payable three months after proof of a loss, till the three months have expired.

THIS cause (see 2 Vol. 280,) being again called on the list of arguments, the court declared, that although they had proposed to the defendant's counsel to waive the objection to the form of bringing the action, before the expiration of three months from the time of proving the loss; yet, that on his refusal to do so, they meant to decide in favor of the objection.

Judgment was, accordingly, entered for the defendant.

ANONYMOUS.

A devise "to my son James, the improvement whereon I now live," gives an estate in fee.

THIS was an ejectment, to be decided by the opinion of the court. It appeared that the lessor of the plaintiff claimed as heir at law of James Graham, who made his will on the 8th of October, 1745, devising "to my wife one "third part of all my effects, the improvements "excepted. Also I give to my son James the "improvement whereon I now live." The premises were held by warrant; and the only question was, whether an estate for life, or in fee, vested in the testator's son, James, by the devise?

The court decided, that the devisee took an estate in fee.[1]

478*] *COXE *v.* M'CLENACHAN.

COXE *v.* HUSTON. *Special Bail.*

Privilege of members of Congress from arrest.

JUDGMENT having been obtained against M'Clenachan, a *ca. sa.* issued to September term last, and was returned *non est inventus*. The plaintiff then issued a *scire facias* against Huston, the special bail, which was returnable to the present term; and within the first four days of the term M'Clenachan was surrendered in discharge of his bail, when a motion was made for leave to enter nn *exoneretur*. But the defendant, being a member of the Congress, which was in session at the time of his surrender, presented a memorial to the court, demanding, as his privilege, to be discharged from the custody of the sheriff and it was agreed, that the motion for an *exoneretur* on behalf of the bail, as well as the motion for a discharge on behalf of the defendant, should be argued together, upon rules to show the cause.

Ingersoll and *Dallas* contended, that both the rules ought to be made absolute. 1st. The defendant would be entitled to his privilege, even if he were in execution; and his being surrendered by his bail, places him in custody at the suit of the plaintiff. Had the defendant been arrested before he was entitled to privilege, he could not have been held in custody after his privilege; but, in the present case, he was never in custody till the session of Congress has actually commenced. The following authorities were cited on this point. Const. Art. 1. s. 6. 1. Bl. C. 64, 6; 11. Vin. Abr. 36, 12, and 13; W. 3. c. 3. 11, Geo. 3. c. 24; 10. Geo. 3. c. 50; 3 Com. Dig. 310; 5 T. Rep, 686; 1 Jac. 1. c. 13; 4 Com Dig. g36.

2d. An *exoneretur* ought to be entered on the bail piece. Indulgence is always shown to bail, where no injury is produced to the plaintiff. If the defendant had been taken on the *ca. sa.* or if he had been surrendered before Congress assembled, he would now have been entitled to his privilege; so that the plaintiff has suffered nothing by the delay. *The [*479 general rule is, that the bail may surrender within the first four days of the term, to which the *scire facias* is returnable. Sherid. Pr. 377, 381; 4 Burr. 2134. And if the bail is prevented from making a surrender by any legal bar, even arising from matter *ex post facto*, he shall be entitled to an exoneretur. 1 Burr. 339, 340; Sell. 180; Str. 1217; 1 Burr. 339, 340; Doug. 45; Sell. 183. Whether, therefore, the bail could, or could not, surrender the defendant after the time that privilege had occured, the present application is equally well founded. But to place the case on the fairest footing, the bail will consent on principles recognized in 1 Str. 419, to remain responsible for surrendering the defendant, within four days after the sessions of Congress, provided that time is allowed to make the surrender.

E. Tilghman and *Ross*, the plaintiff's counsel, having considered the proposition, for allowing further time to make the surrender agreed to it: and the court declared their approbation of the compromise, as affording a good precedent for future cases of a similar kind.

Tilghman then acknowledged, that he thought the privilege of Congress extended to arrest on judicial, as well as mense, process; but controverted the doctrine, that a person arrested before he had privilege, was entitled to be discharged, in consequence of privilege afterwards acquired.

PEMBERTON'S Lessee *versus* HICKS.

Tenancy by the courtesy—whether forfeited on attainder for treason.

THIS ejectment was tried at Fewton, in Bucks county, May, 1794, when the jury found the following special verdict:

1.—I was favored with this memorandum by Mr. Duncan of Carlisle, one of the counsel who argued the cause.

The objections overruled, and judgment affirmed.

Distinguished—3 Pet. 84.
Cited—11 How. 526.

409*] *FEBRUARY TERM, 1799.

ON the opening of the court a commission, dated the 20th of December, 1798, was read, appointing Bushrod Washington, one of the associate judges of the Supreme Court of the United States, and he was qualified according to law.

DEWHURST *versus* COULTHARD.

The supreme court cannot take cognizance of any suit or controversy, which was not brought before them by the regular process of the law.

An agreed statement of a case was presented to the court, at the instance of the attorneys for both the parties, in a suit in a circuit court, with a request, that it might be considered and decided, and it was agreed, that judgment, in accordance with the opinion of the court, be entered.

Held: that the court will not take cognizance of the case.

THE following statement of a case was presented by *E. Tilghman* to the court, at the instance of the attorneys for both the parties, in the suit in the circuit court of the New York district, with a request, that it might be considered and decided.

"This was an action commenced by Isaac Coulthard, against John Dewhurst in the Supreme Court of the state of New York, and was removed by petition to the circuit court of the United States for the New York district, agreeably to the act of Congress in such case made and provided, by the defendant, he being a citizen of the state of Pennsylvania.

"The plaintiff's action is prosecuted against the above defendant, as the indorser of a foreign bill of exchange drawn by G. B. Ewart of the city and state of New York, on Thomas Barnes of Baldork near London, dated the tenth day of January one thousand seven hundred and ninety-two.

"On the part of the defendant, it is admitted that at the time of the making and indorsing said bill, the said John Dewhurst was a citizen of, and resident in, the city and state of New 410*] York, *and that he duly received notice of the protest of the said bill, for non-acceptance and non-payment.

"That on or about the twenty-fifth day of May, one thousand seven hundred and ninety-two, the defendant removed to the city of Philadelphia, in the state of Pennsylvania, where he has resided since that period. That shortly after his removal to Philadelphia, viz., on or about the seventh day of June, one thousand seven hundred and ninety-two, a commission of bankruptcy was awarded and issued forth against him, in pursuance of two certain acts or statutes of the said state of Pennsylvania, the one entitled "An act for the regulation of bankruptcy;" the other entitled, "An act to amend an act entitled, an act for "the regulation of bankruptcy." And in pursuance of which said statutes the defendant did actually deliver, assign and transfer, to the commissioners appointed under the said commission, the whole of his effects, as well in the state of Pennsylvania as elsewhere, which consisted principally of credits due to the said defendant, in the state of New York. It is further admitted, that the said John Dewhurst in all things complied with the said statutes of bankruptcy before referred to, and that on the eleventh of August, one thousand seven hundred and ninety-two, he obtained a certificate of bankruptcy duly executed.

"Upon the above state of the case, it is submitted to the Supreme Court of the United States, to determine, whether the certificate issued under the laws of Pennsylvania, operates as a discharge of the said debt, notwithstanding its being contracted in another state, where there was no bankrupt laws, and while the defendant was resident in the said state of New York. If the court should be of opinion that it does, it is agreed that judgment be entered for the defendant; otherwise for the plaintiff, for eleven hundred and twenty dollars damages, and six cents costs."

THE COURT, on the ensuing morning, returned the state of the case, declaring, that they could not take cognizance of any suit or controversy, which was not brought before them, by the regular process of the law.

Motion refused.

EX PARTE HALLOWELL.

MR. *Hallowell* had been admitted, originally, as an attorney of this court; but now *Lewis* moved, that his *name should be taken [*411 from the roll of attorneys, and placed on the list of counsellors.

THE COURT directed the transfer to be made; and Mr. *Hallowell* was qualified, *de novo*, as counsellor.

3 Dall. 410.

FOWLER *et al. versus* LINDSEY, *et al.*

FOWLER *et al. versus* MILLER.

Action in the nature of ejectment, in circuit court of Connecticut, to recover land; defendants pleaded that they were inhabitants of New York, and the premises were in that state, and that the circuit court of New York or the courts of that state, and no other court, could take cognizance of the action; plaintiff replied, that the premises lay in Connecticut; on rule to show cause why the action should not be removed by *certiorari* into the supreme court, as exclusive belonging to that jurisdiction:

Held: That a case which belongs to the jurisdiction of the supreme court, on account of the interest that a state has in the controversy, must be a case in which a state is either nominally, or substantially, the party. It is not sufficient if a state be consequently affected; for in such case the circuit court has jurisdiction.

1.—The appointment of Mr. Washington was in the room of Mr. *Justice* WILSON, deceased. Mr. *Justice* CHASE was prevented by indisposition from attending the court during the whole of the present term.

suit within the jurisdiction must appear on the record. 9 Mod. 95.

Dexter, (of Massachusetts) urged, on the other hand, that sufficient appeared to show that, by legal intendment, the cause was within the jurisdiction of the court; that though it is difficult to establish a general rule, as to what makes citizenship, yet that the citizenship of a particular state, may be changed, by a citizen of the United States, without going through the forms and solemnities required in the case of an alien; that, on the principle of the constitution, a citizen of the United States, is so to be considered more particularly as a citizen of that state, in which he has his house and family, is a permanent inhabitant, and is, in short, domiciliated; that stating in the declaration the party to be of a particular place designates his home, and, of course, his citizenship; and that the description of Francis Cabot (of Boston, aforesaid, now resident in Philadelphia, etc.,) proves what was intended, by stating the places of abode of the several parties. 2 Danv. Cont. p. 20; 5 Com. Dig. 289; 2 Stra. 786, 290; 1 L. Raym. 405; 2 L. Raym. 1403.

THE COURT were clearly of opinion, that it was necessary to set forth the citizenship (or alienage, where a foreigner was concerned) of the respective parties, in order to bring the **384***] *case within the jurisdiction of the circuit court; and that the record, in the present case, was in that respect defective.

This cause and may others, in the same predicament, were, accordingly, struck off the docket.

JONES, Indorsee,
versus
LE TOMBE.

In an action against the consul general of the French republic, upon a bill of exchange, which he had drawn upon the paymaster at the national treasury at Paris, styling himself "consul general," and referring in the body of the bill to public accounts, in conformity with which it was drawn, which bill had been protested for non-payment.

Held: That the contract was made on account of the government; that the credit was given to it as an official engagement; and that therefore, there was no cause of action against the defendant.

CAPIAS in case. This was an action brought, originally, in the supreme court, by John Coffin Jones, a citizen of Massachuetts, as indorsee of James Swan, against the defendant, the consul general of the French republic, as drawer of a number of protested bills of exchange (for the aggregate amount of 385,964 livres turnois, 3 sols 8 den. equal to 70,052 dollars and 46 cents) corresponding with the following form:

CONSULAT GENERAL.

Philadelphie, le an de la République Française, une et indivisible. } 179 (v. s.)

ARGENT TOURNOIS——— faisant, à 18 cents et 15-100e cent de Dollar par livres tournois

Prés les ETATS UNIS.

CITOYEN,

A trente jours de vue, je vous prie de payer par cette troisième de

AN

No.

TROISIEME.

Enregistrée sous le No. au Consulat particulier de la République Française. A Philadelphie, le an

(Signé) *Le Consul*, LIVT.

change (la première, la seconde ou la quatrième ne l'étant) à l'ordre de la somme tournois, en écus de six livres ou autres espèces d'or ou argent, à la valeur réduite de dix-huit cens et quinze centièmes de cent de Dollar, par livres tournois, ou en Lettres-de-change sur Hambourg, à l'acceptation & au change convenus avec le Porteur, valeur reçue de dit, conformément au compte rendu au Ministre de par dépêche du an No. timbrée et a ma lettre d'avis en date de ce jour No.

(Signé,) LE TOMBE.
Le Consul Général.

Au Citoyen Payeur Général des dépenses du Département de

A la Trésorerie Nationale,
A PARIS.

Je prie le Citoyen Ministre de de faire acquitter la présente de laquelle j'ai garanti le payment sur l'honneur de la Nation Française.

Signé, ADET,
Le Ministre Plénipotentiare de la République Française prés les Etats Unis d'Amérique.

*At the opening of the term, *Dallas* [*385 and *Du Ponceau* had obtained a rule, that the plaintiff show his cause of action, and why the defendant should not be discharged on filing a common appearance; and now *Ingersoll* and *E. Tilghman* showed cause, produced the bills of exchange, and the plaintiff's positive affidavit of a subsisting debt, including a declaration, "that he was induced, principally, to purchase "the bills, in consideration of the character and "private fortune of the defendant, and that "without the fullest confidence in the personal "credit and responsibility of the defendant, he "verily believed he would not have purchased "them." They then contended, that the positive affidavit was sufficient, in this court, for holding the defendant to bail; that it was not incumbent on them to show to whose use the money was applied, since it was paid to the defendant; that when a consul acts as a merchant, and draws bills for cash advanced, he is not entitled to any privilege; that the defendant must prove that he had a right to draw the bills as consul; that even if he had the right to draw, he might pledge his private credit, in aid of his official function; and that the critical situation of the French republic raises a presumption, that the reliance was placed on the private credit of the defendant. The cases heretofore decided in the English courts, are perfectly distinguishable from the present case. 1 T. Rep. 174. They occurred between parties belonging to the same government; and there was no proof of credit being given to the individual. In support of these positions were cited. 2 H. Bl. 551; Vatt. b. 4, c. 6, s. 74, p.) 139, s. 114; 2 Dall. Rep. 247; 2 Stra. 955.

The counsel for the defendant were stopped when they rose to reply; and the court were unanimously and clearly of opinion, that the contract was made on account of the government; that the credit was given to it as an official engagement; and that, therefore, there was no cause of action aganist the present defendant.

generally, on the impolicy and inconveniency of suffering privateers to equip in our ports.

ELLSWORTH, *Chief Justice:*—Suggestions of policy and conveniency cannot be considered in the judicial determination of a question of right: the treaty with France, whatever that is, must have its effect. By the 19th article, it is declared, that French vessels, whether public and of war, or private and of merchants, may, on any urgent necessity, enter our ports, and be supplied with all things needful for repairs. In the present case, the privateer only underwent a repair; and the mere re-placement of her force cannot be a material augmentation; even if an augmentation of force could be deemed (which we do not decide) a sufficient cause for restitution.

BY THE COURT: Let the decree of the circuit court be affirmed.[1]

Cited—3. Dall. 296; 4 Wheat. 69. (n)

320*] *GRAYSON *versus* VIRGINIA.

When process at common law, or in equity, shall issue against a state, it shall be served upon the governor, or chief executive magistrate, and the attorney general, of such state.

Process of subpœna, in equity, to be served 60 days before the return day. If defendant, duly served, does not appear on return day, complainant may proceed *ex parte*.

The general rule prescribes to this court an adoption of the practice which is founded with custom and usage of courts of admiralty and equity, constituted on similar principles; but with discretionary authority to deviate from that rule, where its application would be injurious or impracticable.

BILL in equity. The service of the subpœna in this case, being proved, *Lewis* moved, at the last term, that a *distringas* might be awarded, in order to compel the state to enter an appearance; arguing from the analogy between a state and other bodies corporate, that this was the proper mode of proceeding. The court, however, postponed a decision on the motion, in consequence of a doubt,—whether the remedy to compel the appearance of a state, should be furnished by the court itself, or by the Legislature? And, in the present term, *Lewis* argued, that the court was competent to furnish all the necessary means for effectuating its own jurisdiction.

On the 12th of August, the Chief Justice delivered the following opinion:

BY THE COURT:—After a particular examination of the powers vested in this court, in causes of equity, as well as in causes of admiralty and maritime jurisdiction, we collect a general rule for the government of our proceedings; with a discretionary authority, however, to deviate from that rule, where its application would be injurious or impracticable. The general rule prescribes to us an adoption of that practice, which is founded on the custom and usage of courts of admiralty and equity, constituted on similar principles; but still it is thought, that we are also authorized to make such deviations as are necessary to adapt the process and rules of the court to the peculiar circumstances of this country, subject to the interposition, alteration, and control, of the Legislature.[2]

We have, therefore, agreed to make the following general orders; and the counsel, in the present case, will take his measures accordingly.

1. ORDERED, That when process at common law, or in equity, shall issue against a state, the same shall be served upon the governor, or chief executive magistrate, and the attorney-general, of such state.

*2. ORDERED, That process of sub- [*321
pœna issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return day of the said process: and, further, that if the defendant, on such service of the subpœna, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*.

Lewis then observed, that the subpœna in this case, had been issued on the same principles; but as the orders could only operate *in futuro*, he thought it best to withdraw his motion for a *distringas*, and to pray that an *alias subpœna* might be awarded; which was, accordingly, done.

Cited—2 Dall. 422, (n) Id. 415; 4 Id. 6; 3 Pet. 466; 5 Pet. 289, 291; 12 Pet. 760, 761; 17 How. 492; 24 How. 97.

WISCART *et al.* Plaintiffs in Error, *versus* DAUCHY Defendant in Error.

In causes of equity or admiralty jurisdiction removed to this court from the circuit court, with a statement of facts. Such statement is conclusive as to all the facts it contains, even when accompanied with the evidence (*Wilson* J., dissents as to cases where the statement of facts is accompanied by the evidence.) If a decree in an equity cause contains a statement of fact, it is sufficient.

The constitution vests in the supreme court, an original as well as appellate juridiction; original, in cases affecting ambassadors, other public ministers, consuls, and where a state is a party; appellate, in all other cases, qualified however "with such exceptions, and under such regulations as congress shall make" when writ of error, final judgments and decrees in civil actions, including admiralty cases, and suits in equity in the circuit court, are here examined, reversed or affirmed.

A writ of error in a process more limited in its effects than an appeal: the former removes nothing for the re-examination of this court, but the law.

ERROR to the circuit for the Virginia district. The original proceeding was on the equity side of the court below, where the defendant in error had filed a bill, charging Adrian Wiscart and Augustine De Neufville, copartners, with having fraudulently conveyed all their estate, real and personal, by three separate deeds, to Peter Robert De Neufville (who was also made a defendant to the bill) with a view to prevent the complainant's recovering the amount of a decree, which he had formerly obtained in another suit against them. The answers averred the conveyances to be made *bona fide*, and for a valuable consideration; but after a full hearing of the case, the circuit court (consisting of Judges IREDELL and GRIFFIN) delivered the following opinion: "That the deeds filed as exhibits in this cause, one dated

1.—See p. 285, *ante. Geyer et al. versus, Michell et al.* and the ship, *Den Onzekeren.*

2.—See the Judicial Act, s. 14. The Act to Regulate Processes in the Federal Courts. s. 2.

sources of information are easily accessible; 304*] *but here there are no data; so that the enquiry, if at all tolerated, can only be made by affidavits, the worst mode of judicial investigation. The evil, however, does not occur, when nothing is left for this court to do, but to calculate the interest on the sum previously assessed and ascertained by the competent tribunal.[1]

After advisement, the chief justice delivered the opinion of the court, that where a judgment, or decree, was affirmed, on a writ of error, there could be no allowance of damages, but for the delay; and, thereupon, the following order was made in this cause:

BY THE COURT:—It is ordered, that the defendant in error recover as damages against the plaintiff in error the sum of 3,515 dollars and 11 cents, being the interest on 34,841 dollars and 55 cents, the amount of the sales of the brig, Everton and her cargo, from the 5th of May, 1795, the date of the decree of the circuit court in the said cause, being one year, 3 months and 4 days, at the rate of 8 per cent per annum: And, also, that the said plaintiff in error, do pay the costs accrued in this cause since the last term. And a special mandate is awarded to carry this order into execution.

305*] *HUNTER *versus* FAIRFAX'S Devisee.

A cause continued on account of the death of counsel.

BY order of the court, a letter from the plaintiff in error, dated the 29th of July, 1796, and directed to the clerk was read. The letter stated, "that the plaintiff had employed Mr. *Campbell*, of Virginia, to argue the cause; that on the 25th of July, he was informed, that Mr. *Campbell* had died in Richmond, on the 18th of the same month; and that, being left without counsel, in consequence of this event, he prayed the cause might be continued till next term."

Lee and *Ingersoll*, in objection to the request, stated, that, from the nature of the cause, delay would be worse to the defendant in error, than a decision adverse to his claim: that the plaintiff ought always to be ready for trial; that there had been sufficient notice of Mr. *Campbell's* death for engaging the assistance of other counsel; that the case depended entirely on the record, might yet be considered by counsel, so as to obtain a decision during this court, and that it had already been postponed one term, at the instance of the plaintiff in error.

But, BY THE COURT:—In all questions of this nature, we must be governed by a sound discretion; in order to prevent, on the one hand, an unnecessary procrastination, and, on the other hand, to avoid an injurious precipitation of trials. In the present instance, we think there is a sufficient foundation laid before us, to justify our granting a continuance till the next term. If the cause were now to be taken up, it must be heard and decided *ex parte*. It is true, that counsel might even at this time be employed, so as to admit, perhaps, of an argument before the court rises; but it is reasonable, that in a cause of such magnitude,[2] the counsel should have an opportunity *to investigate the princi- [*306 ples, and to consider the authorities connected with it, out of term, and unencumbered by the pressure of the current business of the court.

Let the cause be continued.

3 Dall. 305.

ARCAMBEL *versus* WISEMAM.

Upon a writ of error counsel fees will not be allowed as damages. Where a decree is affirmed, damages for the delay only, will be allowed.

THE decree of the circuit court, for the district of Rhode Island, was affirmed in this cause, without argument, the principal question, which it involved, having been just decided upon the discussion of another writ of error. It appeared, however, by an estimate of the damages on which the decree was founded, and which was annexed to the record, that a charge of 1600 dollars for counsel's fees in the courts below, had been allowed; to which *Coxe* objected; and *Ingersoll* contended that it might fairly be included under the idea af damages. But

BY THE COURT:—We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.

There are several ways in which the charge may be expunged: but we recommend, as, per-

1.—IREDELL, *Justice*:—This case is distinguishable from the case of Penhallow *vs.* Doane (*ante*. p. 54) for there the damages were decreased, to the benefit of the plaintiff in error. In the case of Talbot *vs.* Janson, however, it appears from the decree, that increased damages were allowed to the defendant in error. *Ante*. p. 133.

CHASE, *Justice*:—In the case of Talbot *vs.* Janson, did the court go back beyond the decree of the circuit court, to increase, the damages; or was the increase allowed merely for the delay in executing that decree?

PATERSON, *Justice*:—In every case, in which there has been adjudged either a decrease, or an increase of damages, the facts that regulated the decision of the court arose and appeared upon the record. I have always, however, entertained, and still entertain, great doubts, whether a writ of error is the proper remedy, to remove an Admiralty cause.

On this remark, the other counsel employed (Lewis and E. Tilghman, for the plaintiff in error, and Ingersoll for the defendant in error) left the general question of damages, to the court on the argument already stated, and entered into a discussion upon the regularity of the process by which the cause had been removed. See post *Wiscart et al.* vs. *Dauchy. Jennings et al.* vs. *The Brig, Perseverance.*

2—The attorney general stated the point in controversy, to arise on these facts: Lord Fairfax was a citizen of Virginia, and died in the year 1780; having made a will by which he devised certain lands in that state, to the defendant in error, who then was, and ever has been, a British subject, resident in Great Britain. The question is, whether being thus an alien, the defendant in error can take and hold the lands by devise? And, it will be contended, that his title is completely protected by the treaty of peace, concluded between the United States and Great Britain, in the year, 1783.

CHASE, *Justice*:—I recollect, that in Harrison's case, a decision in favor of such a devisee's title was given, by a court in Maryland. It is a matter, however, of great moment; and ought to be deliberately and finally settled.

contemplated, that any court under the United States should take cognizance of any thing favoring of criminalty against a state: That the action before the court is of a criminal nature and for the punishment of a crime against the state: That yielding to the prayer of the petitioner would be highly inconvenient in itself and injurious in the precedent: And that cognizance of it would not be accepted by the circuit court, if sent to them; for even consent cannot confer jurisdiction. For the reasons, and others, omitted for the sake of brevity, I conclude, the prayer of William Cobbet cannot be granted.

The petition rejected.

477*] *CAMBERLING *versus* M'CALL.

An action for a loss cannot be maintained on a policy of insurance payable three months after proof of a loss, till the three months have expired.

THIS cause (see 2 Vol. 280,) being again called on the list of arguments, the court declared, that although they had proposed to the defendant's counsel to waive the objection to the form of bringing the action, before the expiration of three months from the time of proving the loss; yet, that on his refusal to do so, they meant to decide in favor of the objection.

Judgment was, accordingly, entered for the defendant.

ANONYMOUS.

A devise "to my son James, the improvement whereon I now live," gives an estate in fee.

THIS was an ejectment, to be decided by the opinion of the court. It appeared that the lessor of the plaintiff claimed as heir at law of James Graham, who made his will on the 8th of October, 1745, devising "to my wife one "third part of all my effects, the improvements "excepted. Also I give to my son James the "improvement whereon I now live." The premises were held by warrant; and the only question was, whether an estate for life, or in fee, vested in the testator's son, James, by the devise?

The court decided, that the devisee took an estate in fee.[1]

478*] *COXE *v.* M'CLENACHAN.

COXE *v.* HUSTON, *Special Bail.*

Privilege of members of Congress from arrest.

JUDGMENT having been obtained against M'Clenachan, a *ca. sa.* issued to September term last, and was returned *non est inventus*. The plaintiff then issued a *scire facias* against Huston, the special bail, which was returnable to the present term; and within the first four days of the term M'Clenachan was surrendered in discharge of his bail, when a motion was made for leave to enter nn *exoneretur*. But the defendant, being a member of the Congress, which was in session at the time of his surrender, presented a memorial to the court, demanding, as his privilege, to be discharged from the custody of the sheriff and it was agreed, that the motion for an *exoneretur* on behalf of the bail, as well as the motion for a discharge on behalf of the defendant, should be argued together, upon rules to show the cause.

Ingersoll and *Dallas* contended, that both the rules ought to be made absolute. 1st. The defendant would be entitled to his privilege, even if he were in execution; and his being surrendered by his bail, places him in custody at the suit of the plaintiff. Had the defendant been arrested before he was entitled to privilege, he could not have been held in custody after his privilege; but, in the present case, he was never in custody till the session of Congress has actually commenced. The following authorities were cited on this point. Const. Art. 1. s. 6. 1. Bl. C. 64, 6; 11. Vin. Abr. 36, 12, and 13; W. 3. c. 3. 11, Geo. 3. c. 24; 10. Geo. 3. c. 50; 3 Com. Dig. 310; 5 T. Rep, 686; 1 Jac. 1. c. 13; 4 Com Dig. g36.

2d. An *exoneretur* ought to be entered on the bail piece. Indulgence is always shown to bail, where no injury is produced to the plaintiff. If the defendant had been taken on the *ca. sa.* or if he had been surrendered before Congress assembled, he would now have been entitled to his privilege; so that the plaintiff has suffered nothing by the delay. *The [*479 general rule is, that the bail may surrender within the first four days of the term, to which the *scire facias* is returnable. Sherid. Pr. 377, 381; 4 Burr. 2134. And if the bail is prevented from making a surrender by any legal bar, even arising from matter *ex post facto*, he shall be entitled to an exoneretur. 1 Burr. 339, 340; Sell. 180; Str. 1217; 1 Burr. 339, 340; Doug. 45; Sell. 183. Whether, therefore, the bail could, or could not, surrender the defendant after the time that privilege had occured, the present application is equally well founded. But to place the case on the fairest footing, the bail will consent on principles recognized in 1 Str. 419, to remain responsible for surrendering the defendant, within four days after the sessions of Congress, provided that time is allowed to make the surrender.

E. Tilghman and *Ross*, the plaintiff's counsel, having considered the proposition, for allowing further time to make the surrender agreed to it: and the court declared their approbation of the compromise, as affording a good precedent for future cases of a similar kind.

Tilghman then acknowledged, that he thought the privilege of Congress extended to arrest on judicial, as well as mense, process; but controverted the doctrine, that a person arrested before he had privilege, was entitled to be discharged, in consequence of privilege afterwards acquired.

PEMBERTON'S Lessee *versus* HICKS.

Tenancy by the courtesy—whether forfeited on attainder for treason.

THIS ejectment was tried at Fewton, in Bucks county, May, 1794, when the jury found the following special verdict:

1.—I was favored with this memorandum by Mr. Duncan of Carlisle, one of the counsel who argued the cause.