



OYER and TERMINER, &c
at Philadelphia:

September Sessions, 1789

RESPUBLICA *versus* MESCA *et*

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

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

To prove the practice, *Thomas Clifford*, upon his solemn affirmation, stated, that in *February* 1764, a burglary was committed in his dwelling house in *Philadelphia*; that one *Brinkloe*, being apprehended upon suspicion, accused *William Frederick Ottenreed*; whereupon they were both imprisoned and tried; and to the best of

1783.

the witnesses recollection, *Ottenreed* was allowed to have a moiety of foreigners on his jury.

The *Attorney General* observed, that the question turned upon this point—how far the *English* statutes were extended to *Pennsylvania*? and by what authority they could be extended, whether exclusively by an act of the Legislature, or, likewise, by the adjudications of the supreme court?—The sentiments of the foreign jurists seemed, he said, to be crude and undigested upon this subject; but certain principles, which had obtained the authority of a general assent, might serve as a directory to form an accurate judgment. He then adverted to several acts of parliament which did not extend, as the act of limitations, *Jac.* 2. the 28 *H.* 8. respecting Pirates, &c.; and urged, that, by the royal charter, the common law, and statute law, relating to felonies were extended; but that statutes merely relating to the mode of trial did not extend; on which account, laws were passed in that respect, soon after the settlement of the province.

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

The *Attorney General* cited 2 *Hawk.* 420. *Tri. per Pais* 247. *Dyer* 357. *a. Cro. E.* 869. *Smith's Hist. of New-York* 24. 243. 2 *Pen. Laws.* 2. 1 *Pen. Laws in App.* 318. *Votes of Ass.* Vol. 1. p. 6. 53. 106. *id. in App.* 11. 1 *Pen. Laws* 88. 114. *Votes of Ass.* Vol. 2. p. 22. 211. 234. *Robinson's view State of Europe* 395.

The CHIEF JUSTICE delivered the opinion of the court as follows.

M'KEAN, C. J. The point before the court has been well argued; and, on a full consideration of the subject, we now find little difficulty in pronouncing our decision. The first legislature under the *Commonwealth*, has clearly fixed the rule, respecting the extension of *British* statutes, by enacting, that “*such of the statutes as have been in force in the late province of Pennsylvania, should remain in force, till altered by the Legislature:*” And it appears in evidence, that the 28. *Edw.* 3. c 13. has been *in force* in the late province, since a trial *per medietatem linguæ* was allowed, in the case of a burglary committed by one *Ottenreed*, in the mansion house of Mr. *Clifford*.

Whether it was intended by the act, to which I have referred; to include only such statutes as were *in force*, by an express extension of the Legislature; or to comprehend, likewise, such statutes, as had been extended by the judgment of the supreme court, or received there in usage, seems to be, in some degree, uncertain. We

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know, however, that many statutes for near a century, have been *practised under* in the late province, which were never adopted by the *Legislature*; and that they might be admitted *by usage*, and so become *in force*, was the opinion of the *British* parliament, declared in a statute passed in the year 1754, enabling legatees to be witnesses to wills and testaments. If, therefore, the statute in question has been, by any means, *legally in force*; a necessity is, seemingly, imposed upon us, to grant the challenge to the array, which has been made on the behalf of the prisoners.

But if this was a new case, the judgment of the court would be different; for, the reasons which gave rise to the 28 *Edw.* 3. do not apply to the present government, nor to the general circumstances of the country. Prisoners have here a right to the testimony of their witnesses *upon oath*, and to the assistance of counsel, as well in matters of *fact*, as of *law*; which was not the case in *England* in the year 1353, when that statute was enacted. We do not think, indeed, that granting a *medietas linguæ*, will, at all, contribute to the advancement of justice; and we know it is a privilege which the Citizens of *Pennsylvania* cannot reciprocally enjoy, as, at this day, there are no juries in any part of *Europe*, except in the *British* dominions.

On the ground, however, of the precedent which has been shewn, we hold ourselves bound, on this occasion, to allow the challenge, and to grant a trial *per medietatem linguæ*.