1784.

RESPUBLICA *verſus* DOAN.

AARON DOAN, being attainted of a robbery in the county of *Bucks*, by proceſs of *Outlawry*, he was brought before the Court on the 24th day of *September* 1784; and, after hearing his Counſel upon ſeveral exceptions to the outlawry, (which were all over-ruled) execution was awarded againſt him on the 9th day of *October*. The following correſpondence then took place between the Honorable the *Supreme Executive Council*, and the judges; in the courſe of which ſeveral important points of law were ſtated and conſidered.*

On the 22d of *November* 1784, the Preſident and Supreme Executive Council addreſſed the following letter to the Judges.

Gentlemen,

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

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

This liberality of ſpirit ſeems to have advanced with the improvement of the human mind, and of thoſe laws, from which our own are compoſed: For, by the ſtatute of 4 & 5 *W.* & *M. c.* 22. wiſely and benevolently reciting, that, "it is agreeable to juſtice, that proceedings in out-lawries in criminal caſes, ſhould be as public and notorious, as in civil cauſes, becauſe the conſequences to perſons out-lawed in criminal caſes, are more fatal and dangerous to them, and their poſterities, than in any other cauſes;" it was enacted, that, "upon iſſuing an *exigent* in a criminal caſe, there ſhould

* As the opinions given, upon this occaſion, have governed ſeveral ſubſequent caſes, I am perſuaded, it will not be thought improper to inſert them here, though they do not come within the ſtrict idea of judicial deciſions.

ſhould iſſue a proclamation, according to the form of the ſtatute made in the one and thirtieth year of Queen *Elizabeth*" &c. And the firſt mentioned ſtatute was made perpetual by the 7 & 8 *W.* 3 *c.* 36. 1784.

It is our deſire to regulate our conduct by the juſt maxims, and generous principles, that have been eſtabliſhed, for keeping under proper directions, and reſtraining within proper limitations, this menacing part of jurisprudence.

We ſhall, therefore, be obliged, if you will be pleaſed to take the queſtions now propoſed into your conſideration, and to favor us with your anſwers.

Firſt.—Whether the proceedings in this caſe are founded on common law, the Act for the advancement of juſtice, or on any other, and what acts of Aſſembly, or of Parliament?

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

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

Fourth.—Is ſuch a mode of attainder compatible with the letter and ſpirit of the Conſtitution of this State, which eſtabliſhes, with ſuch ſtrong ſanctions, the right of trial by jury?—See ſection the ninth of the Declaration of rights——ſection the twenty-fifth of the Frame of government, &c.

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

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

Seventh.—As the perſon was brought into the Supreme Court by *Habeas Corpus,* ought not judgment to have been *expreſsly* pronounced, as the reaſon aſſigned of judgment not being pronounced " afreſh," in *Ratcliffe's* caſe, who was brought into the King's Bench by *Habeas*

1784. *bear Corpus* is, "it having been pronounced before:" And in the caſes of *Stafford, Bartſtead, Okey*, and *Corbet*, who were attainted by act of parliament, (caſes nearly reſembling this) "the Chief Juſtice pronounced the *uſual* judgment as in caſes of high treaſon." *Foſter* 44.

Eighth.—If all the proceedings in the preſent caſe are as rigidly exact as the law requires, in this uncommon mode of taking away life, ought Council to form a new kind of warrant for execution, thereby ordering, that on a certain day the offender be hanged by the neck till he be dead, or order in the warrant, that on a certain day execution be done upon the offender, leaving the ſheriff to decide what is the puniſhment by law to be inflicted?

It would be agreeable to us, if you, gentlemen, would alſo be pleaſed to conſider, whether the outlawry in the preſent caſe, may not be legally reverſed, and the offender brought to a trial, for theſe defects in the proceedings.

Firſt.—By the act for the advancement of juſtice it is directed, "that the *capias* ſhall be returnable before the *juſtices of that court*, where ſuch party ſhall be indicted or appealed, at the Supreme or Provincial Court next after the taking of ſuch indictment or appeal;" and that the party ſhall be called on by proclamation "to appear *before the ſaid juſtices* at the ſaid Supreme Court;" and it is ſet forth in the indictment in the preſent caſe, that it was taken at "*a Court of Oyer and Terminer and general Gaol Delivery*;" but, the *capias* in the preſent caſe directs the party to be called on by proclamation, to "appear *before the juſtices of the Supreme Court.*" 'Tis true, the ſame perſons are juſtices of both courts; but, the title of "*that court where the party ſhall be indicted*," expreſsly required by the act, is omitted.

Second.—It is not returned by the ſheriff, that the party was called on by proclamation, "to anſwer *to the Commonwealth*," as by the act aforeſaid, and by the *capias* is directed.

Third.—It is not ſet forth that the *capias* was "delivered to the ſheriff three months before the return thereof," as the ſame act requires: Nor does the ſheriff even return, that he made the proclamations *by virtue of the ſaid capias.*

The proclamations might be made without the writ; and though it may be inferred, that they were not, ought inferences againſt the accuſed to be admitted in a caſe ſo highly penal?

Fourth.—Is not the *form* of the proclamation preſcribed by the act aforeſaid, and ought it not to have been ſtrictly purſued? and does not the firſt line of that form require the proclamation to begin with a ſetting forth of the indictment?

Fifth.—Ought it not to appear, *when*, and how, the party was "*for the cauſe aforeſaid* BEFORE committed to the cuſtody of the ſheriff of the City and County of *Philadelphia*," or at leaſt, that it was *ſubſequent* to the proclamations in *Bucks* County?

Sixth.—The act beforementioned, and the *capias*, order the ſheriff to "*make* proclamation *in* every Court of Quarter Seſſions," &c.

but

but the ſheriff returns that he "*cauſed* public proclamation to be made *at* two ſeveral courts of quarter ſeſſions," &c. The word "*at*" is uncertain. So is the word "*public.*" Neither of them is uſed in the act. The requiring "*the ſheriff to make* the proclamations," appears to have been intended to oblige his attendance in perſon at ſo ſolemn a tranſaction, leading to ſuch fatal conſequences. It is not returned, that he was *preſent.* As to the other words, proclamations might be in ſome ſenſe ſaid to be "public," and "at the courts," and yet not "in the courts." Where life depends on proclamations, it ſeems ſcarcely poſſible to adhere with too ſcrupulous an exactneſs to injunctions poſitively directed by law, for giving them their deſtructive efficacy. 1784.

Seventh.—It does not appear by the return *who* was called on by proclamation to appear.

The offender has repreſented to us by petition, that, at the time, when the outlawry was ſued forth againſt him, he was in *New-York*, then in the poſſeſſion of the Britiſh army. What regard ought to be had to that circumſtance, you, gentlemen, can determine.

I am with Reſpect,
Gentlemen,
Your moſt obedient
And very humble Servant,
John Dickinſon.

To theſe enquiries the following anſwers were returned, addreſſed to his Excellency the Preſident in Council, on the 15th of *January* 1785.

Sir,

WE had the honor of receiving on the 29th of *November* laſt, the letter from your Excellency, and the Honorable The Supreme Executive Council, dated the 22d of the ſame month, reſpecting the caſe of *Aaron Dyan*, who ſtands attainted of a robbery in the county of *Bucks*, by *Outlawry*, and againſt whom execution has been awarded. In this letter the council expreſs difficulties with regard to their iſſuing the warrant for his execution, and have deſired the opinion of the judges on nine ſeveral queſtions. Before we gave our anſwers to theſe queſtions, it was expected that all the judges might conſult together, in court upon them: but, as we now deſpair of this for ſome months, we ſhall offer what we think may be material on the occaſion without further delay.

Previouſly to the giving our anſwers, we beg leave to obſerve, that the judges do not hold themſelves bound to aſſign any reaſons for their judgments; and when they do give reaſons, it is always *in public.** This is mentioned, that the preſent proceeding may not be drawn into a precedent.

* Kel. 54.

171 We would next obſerve generally, that an outlawry for felony, is a *conviction and attainder* of the offence charged in the indictment, and has been as long in uſe as the law itſelf. The intention of it was to compel all men to ſubmit to the laws of their country, and to prevent their eſcaping juſtice, by flying, and ſtaying away, until all the witneſſes are dead. It is a very important part of the criminal law; and we do not find an occaſion, where any queſtion of law, upon a writ of error to reverſe an outlawry in a *criminal* caſe, ever underwent a *ſerious* litigation, before that of *John Wilkes, Eſquire*, in 1770.*

If there be any thing improper in taking away the life of a man upon an attainder by a judicial outlawry, it belongs to the legiſlature to alter the law in this particular; the judges cannot do it. But council can interpoſe their mercy.

In our anſwers, we ſhall refer to the queſtions, in the order they are placed in your Excellency's letter, without inſerting them here.

Anſwers to the Queſtions.

Firſt. The proceedings in this caſe are founded on the Act of Aſſembly, intitled, "An act for the advancement of juſtice, and more certain adminiſtration thereof."

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

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

Fourth. We conceive, ſuch a mode of attainder compatible with the letter and ſpirit of the Conſtitution of this State, and that it is no infringement of the *right* of trial by jury; for, that the party had not that trial, was owing to himſelf; he was not deprived of the

* See 2 *H. H. P. C.* 205. 207. &c. 4 *Burr.* 2541. 2549. 2 *Hale* 208. 4 *Burr.* 2551.

the right. As well, indeed, might an offender, who confeſſed the fact in court, by pleading guilty to the indictment, after ſentence, complain that he had not a trial by jury. By refuſing to take his trial, he tacitly ſeems to have admitted himſelf guilty. 2 *Hawkins fo.* 170 *Chap.* 23. *ſec.* 53. 2 *Hale* 208. 1784.

Fifth. We conceive, all the authorities and precedents of outlawries in *capital* caſes at common law in *England*, as applicable to the preſent caſe; there being no difference, but in the form and manner of proceeding to the outlawry, which is made by the before-mentioned Act of Aſſembly.

In particular we would refer council to 4 *Burr.* 2527 and to 2577, where almoſt all the authorities are collected together and fully conſidered.

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

Seventh. We conceive, that, where a perſon is attainted by an Act of Parliament or Aſſembly, and is brought before the court, and execution awarded, the practice *moſt generally* has been to do ſo, by pronouncing the *expreſs* ſentence; and the reaſon given for it, is, becauſe no *judicial* ſentence had been pronounced *before*; but in caſe of an outlawry by *judicial proceedings only*, no *expreſs* ſentence is given upon the party's being brought before the court, but merely an award on the roll, *that the ſheriff do execution at his peril*, or *execution awarded by the court*; becauſe a judgment had been given *before*. Judgments in criminal caſes are divided into two kinds—1. By *expreſs* ſentence to the puniſhment proper for the crime. 2. Judgments without *any ſuch ſentence*. Of the *latter* there are two kinds. 1. Outlawry. 2. Abjuration. Judgment of outlawry in *England* is given by the *Coroner*, and is in theſe words, "Therefore the ſaid A. B. by the judgment of the Coroner of our Lord the King of the county aforeſaid is outlawed." The party is thereby as much attainted, and ſhall forfeit and looſe as

1782. much, as if ſentence had been given againſt him upon a verdict or confeſſion. *Finch of Law*, 467. 3 *Inſt.* 52. 212. *Cro. Car.* 266. &c. And after ſuch outlawry, if the party is brought before the court of *King's Bench*, "execution ſhall be awarded againſt him, *but no "ſentence pronounced*, becauſe the outlawry is a *judgment*, and no "man ſhall have two judgments for one offence." 2 *Hawk. chap.* 48. *ſec.* 23. *fo.* 447, and the caſes there cited. But in the preſent caſe, the judgment was pronounced before *by this ſame Supreme Court*, that *Aaron Doan* is *outlawed and attainted of the crime whereof he is indicted*, and we do not think, that it would have been formal to have given a ſecond expreſs judgment. This matter was mentioned, and well conſidered by the judges, at the time they awarded execution in the preſent caſe of *Aaron Doan*.

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

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

the writ. All was by conſent of the King, and the reverſal took place, though there was really *no error at all.* 1784.

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

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

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

We have the honor to be, with the greateſt reſpect,
Sir,
Your Excellency's and the Council's,
Moſt obedient humble Servants,

Thomas M'Kean.
George Bryan. Jacob Ruſh.

HAMILTON's *Leſſee verſus* GALLOWAY.

A DEED proved by the affidavit of one of the witneſſes before a Juſtice of the Court of *Common Pleas,* but not recorded, was offered in evidence.

It was objected, however, that this atteſtation is no proof of the deed at *common law,* unleſs it be an ancient deed, and poſſeſſion is proved to have gone along with it; for, the witneſs ought to appear in Court.—Nor is it admiſſible under the *Act of Aſſembly,* for that expreſsly requires it to be recorded.

Yeates anſwered, that the point had already been ruled in *M'Dill,* verſus *M'Dill.**

And, BY THE COURT: The deed may be read in evidence; for, the recording does not contribute to the proof of the deed, which

* Ant. 63.