1796. in which, if ſuch a writ could ever have been maintained, precedents would moſt certainly have been recorded.

BY THE COURT :—Great doubt and difficulty have ariſen in this caſe, from the force of the arguments uſed by the counſel for the defendants. As, therefore, the object of the plaintiff may be ſafely and effectually attained by a compromiſe, in which the defendants declare themſelves ready to unite, we wiſh to avoid an immediate deciſion of the point of law, that has been agitated.*

ROBERTS *verſus* CAY'S Executors.

MANY actions were brought, returnable to *January* Term 1794, againſt the defendants, as Executors of *Cay*, the ſurviving partner of *Clow* and *Cay*, whoſe affairs were exceedingly deranged; and, on the 11th of *January* 1794 (declarations having been previouſly filed in all the actions) rules were obtained, "that the defendants plead as of this day, or ſhew cauſe to the contrary, &c." The declarations were filed, and the rules obtained, under a ſuſpicion (affirmed upon oath) that judgments would be confeſſed by the Executors, to other creditors, in prejudice of the ſeveral plaintiffs in theſe actions, which, it was agreed, ſhould all be governed by the deciſion upon an argument in any one of them.

For the plaintiff, if it was contended by *Thomas*, that granting an imparlance (particularly where the ſuit was by original, ſetting forth the cauſe of action, and that, in the preſent inſtance, is done by filing the declarations) was diſcretionary, and matter of favour, with the Court; and a variety of caſes were cited, in which the imparlance was refuſed, or granted only upon terms that would prevent an injury to the plaintiff. *Skin.* 2. *pl.* 2. 2 *Show.* 310. *pl.* 321. 2 *Wils.* 381. 1 *Salk.* 186. *Ibid.* 80. *Gilb. H. C. P.* 42. 2 *Vern.* 62. A rule to enlarge the term for pleading, has, indeed, been expreſsly refuſed, unleſs Executors would agree not to plead judgments confeſſed ſubſequent to the expiration of the term. 1 *Bulſt.* 122. 8 *Mod.* 308. But the principle on which Executors are allowed to retain debts due to themſelves, is, that they cannot ſue; and not being able to ſue, ſo as to obtain a preference in that way, the law gives it them in another. By a parity of reaſoning, he who firſt ſues, ought to be firſt paid. 3 *Bl. Com.* 18. 19. *Shep. T.* 479. *Eſp.* 252. *Doug.* 436. *Cro. E.* 41. It is true, that counſel, argumentatively, ſtate, in *Doug.* 436, "that although

* On this intimation, the parties entered into an amicable partition by deed, which terminated the controverſy.

though an Executor, or Adminiſtrator, cannot pay a debt of the ſame degree, after action brought and notice given of ſuch action, unleſs there is judgment for the debt which he pays; yet that he may pay ſuch debt after judgment; and he is intitled to give it a preference by imparlances, and pleading dilatory pleas to the firſt action, and, in the meantime, confeſſing judgment for the ſecond demand": But *Buller, Juſtice,* ſays, "that all legal means may be uſed to obtain a preference"; and as priority of ſuit is a legal means, entitled to countenance more than any right of favoritiſm on the part of executors, the only queſtion is, whether the Court will, under the circumſtances of the preſent caſe, reſtrain the exerciſe of that right, which muſt depend upon the favor of the Court, in granting imparlances, and allowing dilatory pleas. 1796.

Moylan, for the defendants, having averred, that no ſyſtem of favoritiſm would be purſued; but that, nevertheleſs, the executors felt an equitable obligation to diſcharge, in preference, debts due from the teſtator for loans of friendſhip, and clerks, or ſervants, wages;* proceeded to ſhew, by numerous quotations, that the right of an executor to give a preference to any creditor, of the ſame degree, was poſitive and unqualified. *Wentw.* 142. 3 4. 5. 11 *Vin. Abr.* 269 *pl.* 4. 1 *Sid.* 21. *Vaugh.* 95. *Lov. on Wills.* 56. *Doug.* 436. *Morg. Att. vade mecum.* 196. He analyſed the authorities cited for the plaintiff, and inſiſted, that ſome of them were contradictory, each to the other; that ſome of them were *obiter dicta*; and that ſome were decided in actions, whoſe forms and principles were not applicable to the preſent caſe: yet, that taken in the groſs, a candid expoſition would reconcile them to the doctrine, that wherever there was no covin or fraud, an executor may give a preference to a creditor of the ſame degree. It is true, that they prove, likewiſe, the diſcretionary power of the Court, to allow, or refuſe, imparlances, according to the weight of the reaſons aſſigned: but, taking into view the deranged ſtate of the teſtator's affairs, at the time when the motion for pleading was made, there certainly could not be a more proper occaſion, than the one now depending, for granting every poſſible indulgence to the executors. At that time no aſſets were aſcertained; and if the executors could not plead ſatisfactorily then, the court will not compel them to plead matter, which has ſince occurred; for, if the rule is made abſolute, it muſt be in relation to the ſtate of things, at the period when the motion was made.

But ſo far from precipitating the executors into a premature plea, they are entitled, by a liberal and fair conſtruction of the Act

* *Moylan* offered to ſign an agreement that ſuch preferences alone ſhould be given; and the propoſition, though not adopted, ſeemed to be approved both by Court and Bar.

1796. Act of Aſſembly, to a delay of twelve months after the teſtator's death, that they may aſcertain the legal priority of his debts. The act of Aſſembly,* having claſſed debts in the order in which Executors ſhall be bound to pay them, adds that, nevertheleſs, "executors, or adminiſtrators, ſhall not be prevented from, or damnified for diſcharging the decedant's juſt debts, as the ſame ſhall come to their knowledge, without regard to the priority of the ſame, in payment, after the expiration of twelve months from the time of the ſaid decedant's deceaſe." If, then, twelve months are allowed to ſpecialty creditors, for giving notice of their debts to the executors, ſo as to preſerve the priority preſcribed by the law, it is an unreaſonable and unjuſt doctrine to advance, that the executors ſhall, before the expiration of that period, nay, at the very firſt term after the death of their teſtator, be compelled to plead thoſe ſpecialties, of which they may have received no notice, but to which they are ſtill bound to give a preference, in the courſe of adminiſtration. The very force of the expreſſion, that the executors ſhall not be *damnified*, if they make the payment after the expiration of twelve months, proves that they would be liable for any previous payment, contrary to the legal rule of priority. There is no proviſion of this kind in the *Engliſh* ſtatutes; for, in *England*, a ſpecialty creditor can only ſecure his preference to ſimple-contract creditors by giving the legal notice of a ſuit, in the firſt inſtance. The reaſon of the diverſity, however, ſtrengthens the conſtruction contended for. While *Pennſylvania* was a province (and the fact exiſts in a great degree, at the preſent day) the creditors of its inhabitants chiefly reſided abroad; and, if executors had been compellable to pay ſimple contract debts, whenever iſſue could be joined by the ordinary practice of our courts; or whenever a plea could be exacted in the manner now propoſed, the whole of the aſſets might be abſorbed in ſuch payments, before notice could be received of any preferable claims. Hence the neceſſity of allowing twelve months for giving notice; and hence juſtice requires that the executors ſhould have the ſame period, for entering their pleas to actions on ſimple contracts, which they muſt otherwiſe ſatisfy at their own peril.

For the Plaintiff, in reply. The act of Aſſembly was not intended to embrace caſes, in which executors were compelled to make payments by a due courſe of law; but only caſes, in which they voluntarily undertook to diſcharge the teſtator's debts. Before the paſſing of the act, an executor could never voluntarily pay a ſimple contract debt, without taking an indemnification

* The act here referred to, has been repealed and ſupplied, 3 *vol. Dall. Edit. p.* 527. It may be found, however, in *Galloway's Edit.* of the Province Laws *p.* 32. See 1 *vol. Dall. Edit. p.* 57. (C)

tion againſt ſpecialty creditors; and, it was only to obviate this inconveniency, that the proviſion was made, authoriſing ſuch payments, without regard to any priority, after the lapſe of twelve months from the teſtator's death. But the fallacy of the oppoſite conſtruction moſt forcibly appears, when it is remembered, that executors or adminiſtrators are required by law, to make diſtribution of the *reſiduum* of the teſtator's effects, among his next of kin, at the end of a year; and yet, it is ſaid, that 'till the end of a year, they cannot even be compelled to make payment of his debts. Again: the law requires, that adminiſtrators ſhall render their accounts to the regiſter of wills, &c. within a year; and yet, if within the year, they are not compellable to pay the debts, there can be no accounts to render. 1796.

BY THE COURT. There does not exiſt a doubt in our minds, about the genuine meaning of the act of Aſſembly. It would be attended with the moſt inconvenient and pernicious conſequences, to determine, that a creditor could not compel a payment from his debtor's eſtate, nor even bring a ſuit againſt the executors, for a period of twelve months. The order of paying debts, obviouſly reſpects voluntary, and not compulſory, payments. Such was the conſtruction coeval with the act; and there has not, to this time, been a ſingle departure from it.

With reſpect to the other ground of argument, we were in hopes that ſome compromiſe might have been effected. But, we do not heſitate to declare, that although the Court has diſcretionary power to grant, or to refuſe, imparlances, we do not think, that the circumſtances of the preſent caſe would juſtify a ſpecial interpoſition, to compel the executors to plead at the firſt term, contrary to the uſual courſe of practice. The executors have an unqueſtionable right, generally ſpeaking, to give a preference to any creditor of the ſame degree; and the preferences propoſed to be given by the defendants, are certainly n f a covinous, or illiberal nature.

The Rule diſcharged.

Before the Court had delivered their opinion on the principal caſe, *Ingerſoll* ſuggeſted, as a collateral conſideration, whether Promiſſory Notes, diſcounted at the Bank of *Pennſylvania*, were placed on a footing with proteſted Bills of Exchange, *in point of priority of payment*, by the following proviſion in the 13*th ſection* of the Act of Incorporation. "All notes or bills, at any time diſcounted by the ſaid Corporation, ſhall be, and they are hereby, placed on the ſame footing as foreign bills of exchange; ſo that the like remedy ſhall be had for the recovery thereof againſt the drawer and drawers, indorſee and indorſors, and with like effect, except ſo far as relates to damages, any law, cuſtom, or uſage, to the contrary thereof in anywiſe notwithſtanding." 3 *vol. Dall. Edit. p.* 330. *Ingerſoll* obſerved, that previouſly to this proviſion, there

1796. there were two points of diſcrimination between Promiſſory Notes and Bills of Exchange:—1ſt. Promiſſory Notes were taken by the indorſee, ſubject to all the equitable circumſtances, to which they were ſubject in the hands of the indorſor. 1 *Dall. Rep.* 441. And 2d. Proteſted Bills of Exchange were entitled to a priority in payments by executors, or adminiſtrators. The Legiſlature meant, in the caſe of Bills and Notes, diſcounted at the Bank of *Pennſylvania*, to aboliſh all diſtinction between thoſe commercial inſtruments; and the expreſſion of the act is ſufficiently comprehenſive to effectuate that object.

But, it was anſwered, by *Moylan*, *Thomas*, and *M. Levy*, that the Act of Aſſembly only applied to the remedy upon a Promiſſory Note; and did not alter the nature and character of the inſtrument. The exiſting miſchief, intended to be removed, was the right of ſet-off, claimed by the drawer againſt the indorſee; and even upon the words of the two acts, it was remarkable, that the priority is given by the firſt to *proteſted* Bills of Exchange; whereas the ſecond places Promiſſory Notes on the ſame footing as *Foreign* Bills of Exchange.

BY THE COURT. Though the queſtion is not regularly before us, we have no objection to intimate our opinion, that Promiſſory Notes are not entitled to the ſame priority as Bills of Exchange. The Act of Aſſembly applies only to the caſe of defalcation.

STILES, Plf. in Er. *verſus* DONALDSON.

WRIT of Error. To an action of Debt on a Bond, dated in *Auguſt* 1774, the defendant pleaded *payment*, and gave notice of a *ſet-off*. The cauſe was tried in the Common Pleas of *Philadelphia* County on the 19th of *November* 1794, when the Bond being proved, without any indorſement of a payment, for principal, or intereſt, the defendant, by way of ſet-off, offered evidence to ſhew, "that after the execution of the Bond, and before the commencement of the ſuit, the Plaintiff had become indebted to him in a ſum exceeding the amount of the Bond, upon accounts ſtill remaining unliquidated and unſettled between them, as merchants, concerning the ſales of merchandize made by the Plaintiff, in parts beyond the ſea, as agent and factor for the defendant." To the admiſſion of this evidence, the plaintiff objected, that there was a lapſe of more than 17 years, ſince the date of the laſt item of the accounts, and no proof given of any ſubſequent demand of the money now propoſed to be ſet-off; and that the long acquieſcence of the defendant, as well as the poſitive bar of the ſtatute of limitations,