ralized under it, having the rights of the old, is in a ſituation pre- 1797.
ferable to a natural born citizen under the accumulative reſtraints of the new conſtitution. But a contrary conſtruction has been given whenever the point was directly preſented for conſideration (which was not the caſe in *Collet v. Collet*) by the legiſlature, by our courts, and by the bar.

PETERS, *Juſtice.* At the time of committing the defendant, ſome doubts aroſe in my mind; which, on account of the importance of the ſubject, I thought it more proper to ſubmit to a ſolemn diſcuſſion, than haſtily to decide at my chambers. I take the earlieſt opportunity, however, to acknowledge, that I am now convinced the commitment was erroneous. The act of aſſembly is obviouſly inconſiſtent with the exiſting conſtitution of the ſtate; and, therefore, cannot be ſaved by the general proviſion of the ſchedule annexed to it. On that ground only my opinion is formed; but it is ſufficient to authoriſe a declaration, that the proceeding before the Mayor was, *ipſo facto*, void; that, the priſoner is not a citizen of the *United States*; and that, conſequently, he muſt be releaſed from the charge of *High-Treaſon.*

IREDELL, *Juſtice.* I am of the ſame opinion. Difficulties, it is true, have been ſuggeſted on points not neceſſary to a deciſion on the preſent occaſion; and, certainly, if the queſtion had not previouſly occurred, I ſhould be diſpoſed to think, that the power of naturalization operated excluſively, as ſoon as it was exerciſed by Congreſs.

But the circumſtances of the caſe now before the court, render it unneceſſary to enquire into the relative juriſdictions of the State and Federal governments. The only act of naturalization ſuggeſted, depends upon the exiſtence, or non-exiſtence, of a law of Pennſylvania; and it is plain, that upon the abolition of the old conſtitution of the ſtate, the law became inconſiſtent with the proviſions of the new conſtitution, and, of courſe, ceaſed to exiſt, long before the ſuppoſed act of naturalization was performed.

The Priſoner muſt, therefore, be diſcharged.

The UNITED STATES *verſus* PARKER. *et al.*

A *Capias* had iſſued in this cauſe againſt *Daniel Parker*, *Wm. Duer, and John Holker*, returnable to *April* term 1792; and the Marſhal then returned, *Cepi Corpus* as to *Duer*, (who gave ſpecial bail in due time) and *non ſunt inventi*, as to *Parker* and *Holker*. After a declaration was filed (reciting that the Marſhal had not found two of the defendants within his Diſtrict, and proceeding againſt the other alone, upon the principles

1797. ciples of the practice of the Courts, of Pennſylvania) after iſſue had been joined, and a variety of continuances, and other entries, made upon the record, an original, not an *Alias*, *Capias* was iſſued, on the 8th of Auguſt 1796, returnable to October term following, againſt *Holker* alone, upon which writ he was arreſted; but on a hearing before WILSON, *Juſtice*, he was diſcharged on common bail.* In October term, the Attorney of the Diſtrict *(Rawle)* had obtained two rules:—1ſt. That *Holker* ſhew cauſe on the firſt day of the preſent term; why the writ iſſued ſhould not be amended, conformably to the precept, which, it was alledged, directed an *Alias Capias*:—And 2d. That *Holker* ſhew cauſe, why the Plaintiff ſhould not file common bail for him. It was agreed, however, that the caſe ſhould be argued, as if the laſt writ had been an *Alias Capias*, reciting the original *Capias* and return; and the only queſtion diſcuſſed was—Whether an *Alias Capias* could iſſue, after the lapſe of ſo many terms, and under the circumſtances appearing upon the record, to arreſt *Holker*, and make him a party to the exiſting ſuit?

Rawle, for the plaintiff, obſerved, that upon principles of common juſtice, and, he thought, upon principles of law too, when there were ſeveral defendants, and one only was taken on the firſt writ, proceſs might iſſue, from time to time, to bring the others into Court, without compelling the plaintiff to diſcontinue his action. By the *11th ſection* of the Judicial Act *(1 Vol. Swift's Edit. p. 58. 9.)* it is provided, that the Courts of the United States "ſhall have power to iſſue writs of *Scire Facias*, *Habeas Corpus*, *and all other writs not ſpecially provided for by ſtatute*, *which may be neceſſary for the exerciſe of their reſpective juriſdictions*, *and agreeable to the principles and uſages of law.*" It is only incumbent on the plaintiff, therefore, to ſhew, that the preſent writ is neceſſary to the efficient exerciſe of the Court's jurisdiction, and that it is agreeable to the principles and uſages of law. It is admitted, that the courſe of proceeding in *England* is different. There, the defendant, who is not taken upon the writ, muſt be purſued to outlawry; and if he does not enter bail, in order to avoid the penal conſequences, the plaintiff applies to the *Exchequer* for a ſequeſtration, and obtains payment from the outlaw's effects. 1 *Stra.* 473 2 *Bl. Rep.* 759. 2 *Bl. Com.* 283. But no mode of proceeding

* This action had been originally inſtituted in the Supreme Court of *Pennſylvania*; and *Holker* (who was then the only perſon arreſted) preſſed for a trial; but after an ineffectual oppoſition to an order for bringing on the cauſe, the Attorney of the Diſtrict entered a diſcontinuance. On this ground, I am informed, Judge WILSON directed common bail to be accepted from *Holker* in the ſecond ſuit.

proceeding to outlawry in *civil caſes*, is recognized, or preſcribed, by any law of the Federal, or State, government; and even in criminal caſes, it is queſtionable, whether the State law could furniſh a rule for the *United States*. Unleſs, therefore, the mode now purſued ſhall be ſanctioned, endleſs inconveniencies will ariſe in the adminiſtration of juſtice; for, the plaintiff cannot diſcontinue his action, without certainly loſing bail as to one defendant, while he has only a chance of obtaining it from another. If then, there is a neceſſity of adopting ſome proceſs to prevent a right being without a remedy, the preſent proceſs will be found perfectly conſiſtent with the principles and uſages of law; and the informality of the continuances will not be of ſufficient moment to attract the attention of the Court. *Sell. Pr.* 400. Such proceſs has been iſſued repeatedly, both in the Supreme Court and Common Pleas of *Pennſylvania*; though the regularity of it was never, indeed, conteſted. In *England*, however, the Courts of Law and Chancery were bound by forms of writ, of almoſt immemorial antiquity, and always preſcribed by the expreſs authority of Parliament; 'till the preſſure of buſineſs, and the diverſity of the caſes that aroſe, produced the ſtatute of *Weſtm.* 2. which authoriſed the clerks in Chancery to frame writs *in conſimili caſu*; and in the exerciſe of that authority, from time to time, a conſiderable latitude has been taken. 4 *Reeves H. E. L.* 426. 2 *Reeves H. E. L.* 202. 2 *Inſt.* 404. 407. *Gilb. C. P.* 2. 3. 4. 8. *Co.* 48. An authority ſtrictly analogous is given to the Federal Courts by the Judicial act; and as there is no common *officina brevium*, it follows, of courſe, that each Court muſt frame its own writs, according to the nature of the reſpective caſes. 1797.

Gibſon, *Ingerſoll* and *Dallas*, for the defendant, *Holker*, waved all objection to the mere form of the ſecond *capias*; but inſiſted, that even an *alias capias* could not iſſue, unleſs it was *teſted* of the term, to which the original was returned, and made returnable to the next immediately enſuing term.* They exemplified the mode of proceeding by outlawry in *England*, on a return of *non eſt inventus* as to one of ſeveral defendants; the force of the iſſue joined; and the impracticability of making an amendment in the declaration filed, to meet the new caſe to be brought upon the record; from 1 *Stra.* 473. 1 *Wils.* 78. 2 *Sellon Pr.* 389. 5 *Com. Dig.* 652. One defendant has given bail for the whole amount of the demand; the declaration expreſsly ſtates, that *Holker* is not a party to the ſuit; and an iſſue

* IREDELL, *Juſtice*. Is it intended to maintain the writ on the footing of an *alias*, unleſs iſſued to the next term, after the return of the original *capias*?

Rawle. I think it can be ſo maintained.

1797. sue is actually joined by *Duer* alone. If, therefore, the plaintiff succeeds in the present object, how is the record to be new modelled, upon any principle of law, or practice, so as to be rendered consistent with itself, and with the truth of the case? What will be the title of the declaration;—of what term shall it be filed;—what shall be the form of the old, or any new, issue;—and what is to be done with the original writ, and its return? Thus, the perplexity arising from the plaintiff's doctrine, (which, if it is just in one case, must be just in every case) is endless and insurmountable. Suppose the suit originated in the Common Pleas, but had been removed into the Supreme Court before the second writ issues:—from which Court shall the second writ issue, and may one half of the cause be depending in the Court above, and the other half in the Court below? Suppose a verdict given on the first writ, before the second writ is returned:—can there be two verdicts for the same cause, how shall the amount be ascertained, or execution issue; and what is to be done if the verdicts should be contradictory? Suppose there are ten defendants to one contract, can it be reasonable or just, that there should be ten writs issued, or that ten bail bonds should be successively taken, for ten times the amount of the demand, or how is the bail to be modified and apportioned? Many other hypotheses might be fairly suggested to evince the extravagance, to which an allowance of the present motion would lead; and even after allowing it, there would arise another difficulty, in ascertaining in what action common bail should be entered for *Holker*, as there are now clearly two actions for the same cause on the records. See 5 *Com. Dig.* 297.

But it is not intended to leave the plaintiff without a remedy. If the bail is satisfactory (and satisfactory bail can always be exacted, to the full amount of the demand upon the arrest of any one of the parties) the plaintiff may proceed to recover judgment, conformably to the state practice. If the plaintiff is not satisfied with the bail, then there may be a discontinuance; or, perhaps, the process may be kept alive, from term to term, till all the parties to the contract are brought into court.

Rawle, in reply. The consequences ascribed to the doctrine, in support of the motion, owe all their extravagance to the imagination of the opposite counsel. There is an important distinction between usages of law, and the practice of courts;—the latter being only a part of the former, and not, of course, as extensive. The question, therefore, should not be referred to the practice of the State Courts, but should be decided by the usages of law, under the act of Congress; and if it is shewn, that the mode of proceeding, now pursued, is not inconsistent with the State practice, while it is agreeable to the usages and principles

principles of law, it ſhould be ſanctioned by the Court. The proceſs of outlawry in *England* is neither a dilatory, nor a precarious, remedy; for, all the writs may iſſue at once; the effect, by pronouncing the civil death of the party, cannot be prevented; and the plaintiff is entitled to receive his money from the public treaſury out of the ſequeſtered effects of the delinquent. *Sell. Pr.* Here, however, it would be idle to ſuſpend all proceedings againſt the defendant who is arreſted; ſince there is no legal proceſs by which the effects of a non-appearing defendant can be made reſponſible; and it is uncertain when (if ever) he will come within the juriſdiction of the Court. The proceſs of outlawry was deviſed, principally, to get clear of the return of *non eſt inventus*, and to ſhew that the plaintiff has done every thing in his power to bring all the parties before the Court; but it was never intended as an inſtrument of indulgence and benefit to the arreſted defendant. It is aſked, however, in what way the record and pleadings may be made conſiſtent, on the inſertion of *Holker's* name as a defendant? In the firſt place, it is to be anſwered, that whenever bail is entered, it has relation, by a legal retroſpect, to the firſt day of the term to which the *capias* was returnable; ſo, the Court may order *Holker's* bail to be filed as of *April* term 1792; and, thereupon, grant leave to imparl. As to the declaration, it may be amended to correſpond with the fact; and even the caſe in 3 *Wils.* 78, ſhews in what manner this difficulty may be overcome. 1 *Sell. Pr.* 260. 88. Nor is it important how many defendants enter bail, or for what ſum, ſince the plaintiff can recover no more than the amount of the demand for which the action is brought; and joint defendants may, in any caſe, give ſeveral bail bonds. The objection to the diviſion and multiplication of ſuits, will, likewiſe, vaniſh, when it is recollected, that the ſame effect is produced by the ſeverance of pleas, which may take place (as many precedents in *Lilly's Entries* eſtabliſh) in every action againſt ſeveral defendants:—A joint iſſue, and a joint judgment are not indiſpenſably requiſite; and this Court has no ſuperior Court, which might involve the inconveniency of a removal of the ſuit upon the firſt writ, before the ſecond writ had iſſued. If, upon the whole, the proceſs is a neceſſary inſtrument for the accompliſhment of juſtice, it will be recognized and confirmed by the Court, although it is not to be found in the ancient authorities of *Engliſh* law. 1797.

THE COURT, having taken from the 12th to the 16th of *April*, to adviſe upon the ſubject, delivered the following opinions, after a recapitulation of the entries on the record.

PETERS, *Juſtice*. There is no controverſy on the ſtate of the action as it reſpects *Wm. Duer*, who has given bail for the

1797. full amount demanded by the plaintiff; and, it is conceded, that the proceſs uſed on the preſent occaſion, could not have been uſed in *England*. In that country, the outlawry in a civil caſe is, perhaps, an adequate remedy for the plaintiff; but it is always optional with the defendant, whether he will ſubmit to the rigor of the proceeding, or enter ſpecial bail. In *Pennſylvania*, likewiſe, a remedy has been introduced by long uſage; the plaintiff being allowed, if he pleaſes, to proceed, at once, againſt the defendant who is arreſted: And now, as the laws of the *United States* have preſcribed no ſpecific mode for a caſe of this deſcription, it is propoſed, under the authority of the 14th ſection of the Judicial act, that the Court ſhall frame, or rather ſanction, a new form of writ, which the plaintiff deems adequate to the purpoſe, and conſiſtent with the principles and uſages of law. But I am not a friend to this ſpecies of Judicial legiſlation; nor do I think it neceſſary, or proper, to exerciſe the power of the Court, in the preſent inſtance; even admitting the exiſtence of the power to the extent contended for. It appears ſufficient to my mind, to defeat the preſent motion, that the *alias* is not teſted at the return of the original *capias*, nor made returnable at the next enſuing term. 5 *Com. Dig.* 239. There is no principle, or uſage of law, that will ſanction the idea of giving a retroſpective teſte, as far back as *April* term 1792, to an *alias capias* iſſued in *Auguſt* 1796. I am, therefore, clearly of opinion, that, on this ground alone, both the rules muſt be diſcharged.

IREDELL, *Juſtice*. I agree, in ſubſtance, with the opinion of my brother PETERS. Whatever idea may be entertained of the authority of the Court, to adopt the practice of *Pennſylvania*, or to deviſe a new form of proceſs upon the principles and uſages of law, it does not appear to me, that the plaintiff would be regularly entitled, under the preſent circumſtances, to the benefit of either proceeding: For, there is no effectual mode of iſſuing an *alias capias*, but by teſting it of the term to which the original writ was returned.

The practice of *Pennſylvania* may be reaſonable; and its antiquity at leaſt would certainly entitle it to reſpect; but that practice goes no farther, than to give to the Plaintiff an option, either to ſuſpend his proceedings 'till the non-appearing defendant can be arreſted, or to waive, on filing a declaration, all chance againſt him, and enforce the ſuit only againſt the defendant, who is taken on the *capias*. In the preſent inſtance, it may have been expedient to adopt the latter courſe of the alternative, on account of *M. Holker's* permanent reſidence in another State; but being adopted, the plaintiff is bound by it, and cannot, even on the principles of the *Pennſylvania* practice, avail himſelf

himſelf of *Mr. Holker's* caſual viſit to *Philadelphia*, without diſ- 1797.
continuing the firſt action. What, indeed, would be the con-
dition of the defendant, who is arreſted, if a different conſtruc-
tion were to prevail? He might be ready for trial; he might
be able to prove that there was no cauſe of action; he might be
deſirous to avoid trouble and expence by a prompt confeſſion of
judgment; or he might be the principal, and the non-appearing
defendant merely a ſurety, ſo that he could derive no advantage
from the arreſt of his colleague;—and yet he would be expoſed
to an indefinite term of impriſonment, or be held with his bail
for an indefinite period in ſuſpenſe, at the pleaſure of a plaintiff,
who ſhould chuſe to calculate upon any remote poſſibility of
bringing all the defendants into Court. The injuſtice and op-
preſſion to the defendant, furniſhes a ſtrong argument againſt
the allowance of ſuch a privilege to the plaintiff.

It is conceded, however, by the plaintiff's counſel, that the
motion would be irregular, unleſs leave is given to file com-
mon bail for *Mr. Holker*, as of *April* term 1792, when the ori-
ginal action was inſtituted. But why ſhould ſuch a retroſpect
be allowed? *Mr. Holker* was not then arreſted; and ſhall the
Court countenance a mere fiction;—a fiction not indiſpenſable
to juſtice, unknown in the law, and directly adverſe to the truth
of the caſe, exhibited for a number of years upon the record?
No:—I am an enemy to every ſpecies of fictions. The fictions
which have been incorporated into the law by long uſage, (and,
I believe, the caſes of ejectment and common recovery afford
the only fictions recognized in *America*) muſt be ſuſtained; but
as far as I can prevent the introduction of novelties of this nature,
I ſhall be aſſiduous to do ſo. All the entries upon the record
were true and regular at the time of making them. There is,
therefore, no error to amend; but the Court is aſked, for the
convenience of the *United States*, arbitrarily to aboliſh the writ
and its return, the declaration, the iſſue, and the continuances;
and not only to undo all that has been previouſly done, but by
an entry of common bail, to ingraft, in effect, this falſhood upon
the record, that *Mr. Holker* was arreſted in *April* 1792.

But after all, I will not anticipate an opinion, upon a caſe,
in which an *Alias* ſhall be regularly taken out, and continued,
from term to term; though my preſent impreſſions are unfa-
vorable, even on that ground, to the plaintiff's doctrine. The
multiplication of ſuits, the perplexity of entries, and the op-
preſſive vexation of ſucceſſive bail bonds, each for the full a-
mount of the demand, are effects that could not be eaſily tole-
rated in the adminiſtration of juſtice. I have not heard, during
the diſcuſſion, of any principle, or uſage, of law, that would re-
concile them to my mind: but this is not the foundation of the
preſent deciſion; for, the irregularity in the teſte and return

1797. of the *Alias Capias* is a ſufficient reaſon to reject the plaintiff's motion.

The rules diſcharged.*

HANCOCK Adminiſtrator *verſus* HILLEGAS.

THE defendant had given a Promiſſory Note to the plaintiff for a ſpecific ſum, on which, in different modes, there had been ſeveral partial payments. Before any ſettlement of accounts, however, the defendant entered into an agreement, that judgment ſhould be entered againſt him by an Attorney, "for the amount that may be due". In purſuance of this agreement judgment was confeſſed, generally, on the 12th of *March* 1796; and on the 14th of *May* following, without any previous trial, writ of enquiry, or notice to the defendant, a *Fi. Fa.* was iſſued and levied, for the full amount of the Promiſſory Note.

Thomas, thereupon, obtained a rule to ſhew cauſe why the defendant ſhould not be allowed a ſet-off for the amount of his payments, and that, in the meantime, proceedings on the execution be ſtayed.

The rule was afterwards oppoſed by *Lee*, the Attorney-General, who contended, that the regular relief was by application to the equity ſide of the Court, for an injunction; which would

* The cauſe (which was *Indebitatus Aſſumpſit*) came on for trial before CHASE and PETERS, *Juſtices*, at *April* term 1798, when, after the opening was commenced by *Rawle*, for the Plaintiff, it was diſcovered, that the plea of "*non aſſumpſit*" was entered *in ſhort*, and that the Statute of Limitations had, alſo, been pleaded; though the Jury were only ſworn to try *the iſſue*, and not *the iſſues*, joined between the parties.

CHASE, *Juſtice*. The whole proceeding is to my mind unintelligible and irregular. There is only one of the parties to the contract, and only one of the defendants named in the writ, before the Court; and no proceſs of outlawry has been proſecuted againſt the others: how ſhall we proceed to give judgment? Again: to what is the plea of *non aſſumpſit* to be applied? It, that the appearing defendant did not aſſume himſelf, or that he did not jointly aſſume with the other defendants? And how comes the plea of the Statute of Limitations to be added, without the leave of the Court? But the counſel will have time to reflect upon theſe difficulties. For, the Jury are not ſworn, even in this irregular ſtate of the record, to try the iſſues between the parties; and, therefore, the Court, on its own authority, will direct the Juror laſt qualified to be withdrawn.

A Juror was, accordingly, withdrawn, and the action continued 'till the next term.