SUPREME COURT

OF

PENNSYLVANIA.

April Term 1790.

Geyer's Lessee *versus* Irwin.

THIS ejectment, depending in *Alleghany* county, was marked for trial, on the list of causes at *Nisi Prius*. The defendant's attorney, after looking at the papers of the opposite party, confessed judgment.

But now *Lewis*, producing an affidavit of a just and legal defence, moved to set aside the judgment, on the ground, principally, that the defendant was a member of the general assembly, attending his public duty at *Philadelphia*, at the time of marking the cause for trial, and confessing the judgment. He said, that the attorney had been compelled, either to go to trial, or to confess judgment; and that not being possessed of his client's proofs, he had preferred the latter course: but, he insisted, that, during the session of the legislature, every member was privileged against the necessity of attending to his private suits; and that, therefore, the cause had been irregularly placed upon the trial list.

Ingersoll, for the plaintiff, denied, that the legislative privilege extended to the present case; and urged, that even if it was a case of privilege, the attorney had waived it, by omitting to object at the proper time.

By the COURT: A member of the general assembly is, undoubtedly, privileged from arrest, summons, citation, or other civil process, during his attendance on the public business confided to him. And, we think, that upon principle, his suits cannot be forced to a trial and decision, while the session of the legislature continues.

But every privileged person must, at a proper time, and in a proper manner, claim the benefit of his privilege. The judges are

1790. are not bound, judicially, to notice a right of privilege, nor to grant it without a claim. In the present instance, neither the defendant, nor his attorney, suggested the privilege, as an objection to the trial of the cause: and this amounts to a waiver, by which the party is forever concluded.

We are, therefore, unanimously of opinion, that the judgment cannot now be set aside, or opened.

Carson *versus* Hood's Executors.

4 Dall. 7n 721

DEBT. Plea, *nil debet*. The principal point in this case was, whether debt would lie against executors, on a simple contract of the testator?

Bradford, for the plaintiff, stated the rule to be, that if the executors demur to the action, they are entitled to judgment; but, if they plead to issue, they cannot, afterwards, make the objection: and the following authorities were cited to maintain the distinction. *Cro. E.* 600. *557. Cro. C.* 187. *Cro. E.* 121. 1 *And.* 182. *Golds.* 106. *Leon.* 165. *Vaugh.* 99. 1 *Sid.* 333. *Plowd. Rep.* 182. *Palm.* 32. *Cro. E.* 435. 459. *Yelv.* 56. 1 *Lev.* 200. 1 *Vent.* 139. *Vaugh.* 97.

The COURT, being unanimously of this opinion, gave judgment, for the plaintiff: having, on a preliminary point, decided, that after a verdict, they will presume, every thing was done, at the trial, which was necessary to support the action, unless the contrary appeared upon the record. 3 *Burr.* 1725. 1729. 1 *Wils.* 225. 2 *Stra.* 1180.