

Rawle, in support of the Common Pleas judgment, remarked, 1805. }
 that his opponent was not content to enjoy an equality, but insisted upon a preference; and, therefore, there was no equity in his favour. He then contended, that there was an essential difference between the law of *England*, and the law of *Pennsylvania*, on the subject; that, although the question would often arise here, as lands were subject to execution and sale, it would seldom arise there; that the practice had uniformly been to pay judgments, out of the sale of real estates, according to the actual date of entering them; (1) and that the point had already been adjudged in *Hooton v. Will.* 1 *Dall. Rep.* 185. 450.

By the COURT: We are clearly of opinion, that the judgment first entered, is entitled to be first paid. The plaintiff in the Common Pleas must, therefore, enjoy his preference. (2)

Dupont *versus* Pichon.

THE plaintiff had issued a *capias* against the defendant, in an action upon the case, &c. and a citation was served upon him, in the following terms:

(1) The following certificates were founded on the fact of practice:

"I certify, that while I held the office of sheriff for the city and county of *Philadelphia*, I uniformly settled the payment of judgments, in the case of sales of real estates, according to the actual dates of those judgments certified by the respective prothonotaries, without reference to the terms, of which the said judgments were entered.

JAMES ASH."

Philadelphia, December 18th, 1804.

"I certify that the above was also my practice, while I held the office of sheriff.

ISRAEL ISRAEL."

"I certify that the above was also my practice, while I held the office of sheriff.

JOHN BAKER."

(2) A question of priority of judgments, also, arose in the Common Pleas, of *Philadelphia* county at *June* term 1806, in the case of *Emmel v. Garwood*.

It was on a case stated, between two creditors of the defendant, each of whom had entered judgment, by virtue of a bond and warrant, on the same day, at the distance of a few hours. It was held by the COURT (*Rush*, president) that there should be no precedence between the judgments; but that the proceeds of the sales, which arose from real estate, should be divided.

The reason chiefly assigned by the *President*, was the inconvenience of a contrary rule, there being several courts, in which judgment might be entered on the same day; and the authority on which he chiefly relied was lord *Porchester's* case, as stated by *Buller* in 1 *Durnford and East*, 118.

Milnor for the second creditor.

Rawle contra.

1805.

" SIR,

" You are hereby cited to show your cause of action, and why the defendant, claiming privilege as charge d'affaires of the French republic, should not be discharged from the process issued against him, at the city hall, in the city of *Philadelphia*, at 10 o'clock to-morrow forenoon. *Philadelphia*, 1st of *March* 1805.

" EDWARD SHIPPEN."

The citation was returned to the Judges of the Supreme Court, then holding a Court of *Nisi Prius*; (1) and after argument, by *Du Ponceau* and *Dallas*, for the defendant; and by *Ingersoll* and *Wallace*, for the plaintiff, the following order was made by the Judges, who did not think, that individually, or sitting at *Nisi Prius*, they could quash the process:

" *It is ordered*, that the defendant be discharged on common bail; and that at the next Supreme Court, in Bank, on the 4th day of this instant *March*, it may be considered by that Court, whether the defendant should, or should not, be discharged from the process issued against him; or whether he should be held to bail, and the present order be discharged."

At the opening of the Court, on the first day of the term (all the Judges being present) *Du Ponceau* and *Dallas* moved, that the defendant be discharged absolutely from the process. They produced Mr. *Pichon's* credentials, by which it appeared, that he had not only been appointed commissary general of commercial relations, but, also, charge d'affaires of the *French* republic; his continuance in the latter character, however, being limited, until a minister plenipotentiary should arrive in the *United States* from *France*. It appeared by Mr. *Pichon's* deposition, that the minister, general *Toureau*, had arrived in the *United States* about the 12th of *November* 1804; that in compliance with Mr. *Pichon's* instructions from his government, he had been anxiously making all the necessary arrangements, for his return to *France* with his family; that his detention in the *United States*, since the arrival of general *Toureau*, had solely and exclusively been owing to the business of closing his official transactions as charge d'affaires, and to the delay in receiving his public papers and documents, which were shipped in a vessel from *Alexandria* for *Philadelphia*, but were carried into *New-York*, in consequence of the obstructed navigation of the *Delaware*: and to the impracticability of obtaining a passage for *Europe* at the port of *Philadelphia*, for a considerable time past; that Mr. *Pichon* had never, in the slightest degree, abandoned, or suspended, his intention of returning to *France*; but, on the contrary, was determined to go thither, with all possible dispatch, as soon as the obstacles, which

(1) SHIPPEN, *Chief Justice*, and SMITH and BRACKENRIDGE, *Justices*, composed the Court.

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he had stated, should be removed, and the condition of his family would permit. It was further stated in the deposition, that during the time of Mr. *Pichon's* executing the functions of charge d'affaires, and before the arrival of general *Toureau*, it became his official duty to superintend and direct the equipment and supply of certain *French* frigates, lying in the harbour of *New York*; that he employed the plaintiff in that business, to make the necessary advances of money; and for his reimbursement gave him certain bills of exchange on *France*, drawn, however, on his private bankers; that the plaintiff well knew, that Mr. *Pichon* acted in the premises merely as public agent of the *French* republic, and is not indebted to the plaintiff on his private account; nor, in any other manner, than as the drawer of the bills of exchange, which were delivered to the plaintiff by the *French* consul at *New-York*; and the fate of which Mr. *Pichon* had not definitively heard. (1) 1805.

Upon these facts, it was urged, that although no privilege was claimed for Mr. *Pichon*, as consul, he was entitled to privilege, as charge d'affaires, *eundo, morando, et redeundo*; 1 vol. p. 110. s. 25, 26, 27. *Vatt. B. 4. c. 6. s. 74, 5. p. 675, 6. Ib. c. 7. s. 83. p. 682. Ib. c. 9. s. 125. p. 726. Ib. c. 8. s. 111. p. 713. Mart. 206.* that he was not bound to produce any testimonials of his diplomatic character, the notoriety of his reception by the President, being all that the nature of the case, or uniform usage, required; that a day's delay, in recognising the privilege of a public minister, to obtain certificates from our own government, must either compel him to give bail, or to submit to actual imprisonment; and that the precedent established on this occasion, would attract the serious attention of every foreign minister and government. It, therefore, became highly important to claim and obtain the discharge, on the single ground of diplomatic privilege, without adverting to the official origin of the debt, for which the suit was instituted; and for which Mr. *Pichon* ought never to be deemed personally responsible. (2).

Ingersoll, Wallace, and Binney disputed the extent of the privilege; and the sufficiency of the excuse for Mr. *Pichon's* protracted residence in the *United States*, after general *Toureau's* arrival. They insisted that the appointment as charge d'affaires was limited in its own terms; that his arrival and continuance in the *United States* were, principally, on account of his consular com-

(1) After Mr. *Pichon* was discharged from the process in this suit, the plaintiff issued another *capias* from the Circuit Court of the *United States*; but before the writ was served, information arrived, that the bills drawn in favour of the plaintiff had been paid by the *French* government; and the proceedings were suspended, after notice of a motion to quash the writ on the ground of privilege.

(2) See 3 *Dall. Rep.* 384.

1805. mission; and that, at least, proof should be produced from the secretary of state of his reception as a minister, before he was discharged from the *capias*, upon the claim of privilege.

The Court were decidedly of opinion, that Mr. *Pichon* would be entitled to privilege as charge d'affaires, till his return to *France*; but Chief Justice SHIPPEN seemed inclined to wait for information, from the department of state, as to his actual reception by the president in that character. On its being intimated, however, that the attorney of the district had become responsible to the sheriff for Mr. *Pichon's* appearance, only till the sense of the Court could be obtained; and that Mr. *Pichon* must now, probably, submit to imprisonment under the *capias*: the judges concurred in discharging him absolutely from the process.