

Respublica Vs. Doan

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Appeal No. : 1 U.S. 86

Appellant : Respublica

Respondent : Doan

Judgement :

RESPUBLICA v. DOAN - 1 U.S. 86 (1784)

U.S. Supreme Court RESPUBLICA v. DOAN, 1 U.S. 86 (1784)

1 U.S. 86 (Dall.)

Respublica

v.

Doan

Supreme Court of Pennsylvania

September Term, 1784

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

Gentlemen,

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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

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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. 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 alligned of judgment not being pronounced 'afreth,' in *Ratcliff's case*, who was brought into the King's Bench by Habeas

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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. [88-Continued.]

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 before mentioned, and the *capias*, order the sheriff to 'make proclamation in every Court of Quarter Sessions,' &c.;

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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.

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. [89-Continued.]

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 22nd of the same month, respecting the case of Aaron Doan, 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 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.

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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, intituled, '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 files 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 outlawry.' 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

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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 so. 170 Chap. 23. sec. 53. 2 Hale 208. 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, show, 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

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much, as if sentence had been given against him upon a verdict or confession. Finch of Law, 467.3 Inst. 52.212.Cro. Coro.266.&. 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.so.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 shows 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 implies 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 latter instance. 2 Hawk. chap. 51.sec.4. 5. so. 463. Finch of law, 478.3 Mod. 42. Cro. Fac. 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. The 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

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

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 McKean.

George Bryan. Jacob Rush. Footnotes

[[Footnote *](#)] 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.

[[Footnote *](#)] Kel. 54.

[[Footnote *](#)] See 2 H.H.P.C.205. 207. & 4 Burr.2541.2549. 2 Hale 208. 4 Burr. 2551.