

Penman Vs. Wayne

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Court : US Supreme Court

Decided On : 1788

Appeal No. : 1 U.S. 241

Appellant : Penman

Respondent : Wayne

Judgement :

PENMAN v. WAYNE - 1 U.S. 241 (1788)

U.S. Supreme Court PENMAN v. WAYNE, 1 U.S. 241 (1788)

1 U.S. 241 (Dall.)

Penman et al.

v.

Wayne

Court of Common Pleas, Philadelphia County

March Term, 1788

A Rule had been obtained to show cause why the Capias, which issued in this case, should not be quashed, the Defendant being a freeholder in the county of Chester. It appeared, that, with the Pracipe for the writ, an affirmation of one Rumford Davis, was filed in the Protbonotary's Office, setting forth, that 'the

Defendant had not been Resident in this State for two years before the date of the writ;' and, it was contended, that this was sufficient, under the Act of Assembly, to repel the Defendant's claim of privilege. 1 St. Laws 139.

The question, therefore, was, whether the Court could, notwithstanding the affirmation filed before the writ issued, enquire into the matter of residence; in order to determine, on all the circumstances of the case, whether the Defendant was within the exceptions of the act? It was twice argued, on the 21st and 23rd of May, by Sergeant for the Plaintiff, and Lewis for the Defendant; and the substance of both arguments was as follows.

For the Plaintiff. The Act of Assembly rests the proof exclusively on the Affidavit of the party, or some person for him; requiring only that he should make the fact, which defeats a freeholder's privilege from arrest, appear to the Justice who grants the writ. Nor will the section admit of the division for which the adverse counsel contend; because, though there is a clause providing that things shall not be proved by affidavit, which, in their nature establish a higher degree of proof; as judgments, mortgages &c.; yet

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even subsequent to that clause it is said, as the Deponent believes; an expression which manifestly relates to the first part of the section, and necessarily connects the whole. If, indeed, the Court were to investigate the facts, both parties are entitled to a hearing, and a new and preliminary scene of litigation would be opened, involved in endless difficulties. The Legislature, therefore, wisely made the filing the affidavit before the writ issued, the conclusive test for holding the Defendant to bail; and, from the circumstances under which the law was passed, we are authorized to assert, that without these easy exceptions, the privilege itself would never have been granted. But, if the doctrine which the opposite side advance is allowed, the 2nd and 3rd Sections of the act, would contradict each other, instead of holding that clear and fair meaning, which, taken according to their distinct objects, they naturally present. For, should any one, contrary to the spirit of the 1st Section, issue a Capias against a freeholder, then the 3rd Section

provides a remedy, by directing the Court to stay all proceedings against the Defendant, until they examine his circumstance, and if they find he is such as the act intended to be exempted, they are required to abate the writ. But this is in the case of an arrest in the first instance, and not of a Capias founded upon an Affidavit previously filed, according to the terms of the 2nd Section; which terms make a Condition precedent, and, being complied with, the most wealthy freeholder is subject to an arrest; nor can the Court afterwards interfere to relieve him. For the Defendant. The Act of Assembly upon this subject is clearly divided into two parts; first, it treats of those cases which depend implicitly on the affidavit of the party, stating the facts uncomplicated with law; and secondly, it treats of those cases, which depend on their respective circumstances, when brought into question before the Court. The present case does not come within the first class, but is fairly within the second; for, having enumerated all the exceptions which may be proved by the oath of the party, or some person for him, the act goes on to state the exceptions which are to be made appear from Records or otherwise; and, the very last of these, is the instance on which the controversy arises. The Defendant's objection being thus warranted by the letter of the law, will be supported, likewise, by the principle and reason of the thing. For, would it not be absurd to leave it to an illiterate, though honest, man, to determine what constitutes a legal residence? Or, to suffer an unprincipled, though cautious, Plaintiff, to take advantage of a short absence, to justify his swearing, that the Defendant has not been resident within the State, for two years before the arrest? If the Court cannot at all develop the circumstances, it will make no difference in the case, whether the absence is for a year, or a day; on a party of pleasure, or a journey of business; the privilege of the most substantial freeholder, must lie forever at the mercy of his antagonist; and even a continental officer, dispatched upon the duties of his profession to another state, will be equally liable

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to this constructive abridgment of the rights of citizenship. A stronger illustration of this truth cannot be required, than the cause before the Court; for, the Defendant has, within the very two years specified in the affirmation, represented this

Commonwealth in the General Assembly, in the State Convention, and in Congress; and yet, it is contended, that the vague idea of an unlettered individual on the point of residence, shall be sufficient to deprive him of the privilege of his freehold, and, in effect, to declare him an alien. There is, however, an essential difference between residence, and abiding in a particular place. It is admitted, that the Defendant did not abide with the State for two years before the arrest; but, we contend, that, nevertheless, in contemplation of law, his residence was here: For, a man is always presumed to reside where his family is; and, though when he goes abroad upon any temporary avocation, he abides in that district to which he goes, yet this does not destroy his original, domestic, Residence. By one Act of Assembly it is provided, that foreign attachments shall only issue against such as are not resident within the State; 1 State Laws 44. And by another act, 1 State Laws 170, it is declared, that no person who has not resided within the State two years before his imprisonment, shall have the benefit of the insolvent laws: In these cases, and in the construction of the Poor Laws, and, in short, of all the statutes in which the word occurs, it has been the invariable practice of the Courts to enquire into the facts, upon which the residence is either asserted or denied; and, on that enquiry, to pronounce the law. Thus on the petition of one M'Intire for the benefit of the insolvent law, although he had been absent more than two years and a half; yet, as it was in proof that he was a Native, and always intended to return hither, this Court lately determined that his residence became a matter of law, and that the *animus revertendi* was sufficient to prevent his losing the advantages of it. What then is the proper interpretation of the act upon this subject? That the party shall set forth in his affidavit such facts, as will enable the Court to draw the legal inference, with respect to the Defendant's residence; which, after all, is a technical term, 5 Burr. 2724, and the maxim is well established, that a witness may swear to matter of fact, but not to matter of law. This rule, indeed, (which applies in all cases of evidence) satisfactorily explains why a disjunctive is introduced in the section under consideration; why the provision in the former part of the clause, that the Justice who grants the writ shall administer the oath, is omitted in the latter; and why the words, the Plaintiff, or some other person for him, are dropt, when the section comes to treat of those things which are matter of law; for the expression as the Deponent believes, at the

same time that it precedes the sentence respecting the Defendant's residence, evidently relates to the value of the estate, and not the mode of proving the incumbrances that affect it. But surely the legislature could not mean to make a man the judge both of fact and

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law in his own cause, and that without appeal. Holt asserts that an Act of Parliament which should authorize so unreasonable a thing, would be void; and it is fortunate, on this occasion, that a candid review of the law itself, does not countenance this absurdity, which lies only in the Plaintiff's construction. The first clause defines the Persons privileged; the second narrows down the privilege by a variety of exceptions; these exceptions are either in fact or law; and the exceptions in law are such as must either be determined by the records themselves, or by the Court upon a statement of the facts on which they arise. If, therefore, it had been intended to leave the matter of residency entirely to the affidavit of the party, the division of the section by the word or, would have been postponed, and this sentence must then have been classed before those things which are to be proved from records or otherwise. Nor is the word otherwise to be considered as merely distinguishing the proofs by record, from those by affidavit; but as meaning such other evidence as the common law requires: for, surely it would be as improper, nay, more dangerous, to permit a man to swear as to the residency of his adversary, than as to the existence of a mortgage or judgment, which he might easily ascertain, by inspecting the dockets and records in which they are entered.

But, let us suppose, that there was no disjunctive in the section, and enquire, for a moment, whether the Court, even on that ground, have not a right to investigate the facts contained in the affirmation? By the last sentence of the second section, all the affidavits, taken in pursuance of the act, are directed to be filed: now, this cannot be intended merely to show that an affidavit has been made, for that would sufficiently appear from the entry in the docket; but as another, more beneficial, purpose, results from this practice, the Court will think themselves bound to support that purpose, as the real object of the legislature; and will determine, accordingly, that the filing of the affidavits is intended to give the Judges an

opportunity of seeing, on any future controversy, whether the allegations bring the case legally within the exceptions of the act. In the instance of residence, above all others, as few Plaintiffs comprehend the technical import of the word, this provision seems to be indispensable; and when the 3rd section says, that if the Court find the Defendant is such as by the act is intended to be exempted from arrest, it furnishes a conclusive argument, that they must examine the evidence produced by the Parties; for, in order to find a particular object, it is clearly requisite, in the first place, to search for it.

These ideas on the subject are, likewise, corroborated by the uniform practice of the Courts; which has been to issue the Capias at once, leaving the proof of the exception, 'till the Defendant makes his claim of privilege. The Defendant in the present case would be under no difficulty to obtain bail; but the principal ground of his opposition is, that if he now tacitly suffers himself to be arrested, his privilege, by the words of the act, will be forever extinguished.

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For the Plaintiff, in reply. Though the best Freeholder may be arrested after notice to enter special bail, yet, as this is a compulsory process, it will not destroy his privilege in another action. To do that, there must be a willing submission to an arrest, by which the Defendant holds out to the world that he is not within the privilege of the act. Residence is certainly a construction of law in a great variety of instances. Nutbrown's case in Foster 76. shows that a man may have several places of residence, and any of them may be the subject of a Burglary. O, by the Poor laws, a man may live in a particular place all his life except one day, and yet not acquire a legal residence; for, he may be under a certificate, or he may not have complied with the conditions of the statutes: And in the case of Ambassadors, although they actually reside abroad, their children are deemed natural born subjects of the realm. 5 Burr. 2724. is grounded on the words of the Act of Parliament. But the Act of Assembly in discussion, clearly meant a literal and not a technical and constructive residence, or it would not have been made the subject of an affidavit, which is to be sworn by persons not generally possessed of technical information. The decisions under the attachment law,

establish a distinction between inhabitants and residents; as in the case of Lazarus Barnet,* where the foreign attachments were quashed, because he came under the former description. With respect to decisions under the insolvent laws, whether the petitioner has resided in the state two years, or not, is a matter immediately before the Court; but in the present case, it is a fact to be sworn to in order to entitle the Plaintiff to a certain advantage. The whole law is connected, indeed, by the idea of an affidavit; and there are many instances where an incumbrance to diminish the value of the Defendant's estate may be proved without producing the mortgage or record. For example; at any time before the acts for recording deeds and mortgages; or, within six months, since those acts respectively, evidence might be given of a mortgage in the hands of a third person; or a scrivener might prove that he had witnessed the execution of a conveyance from the Defendant. The reason for filing the affidavit, is, that it may appear to the Court what it contains; for, swearing to any thing does not entitle the Plaintiff to bail. If, however, it is made in conformity to the act, it is conclusive; then, (as Lord Mansfield somewhere expresses himself) he is sworn, and you have no remedy but to prosecute him. The act says, in all such cases, that is, where the regular affidavit is made, a Capias shall issue. This is included in the very clause where judgments are mentioned; so that, in strictness, the exception founded on judgments, ought, likewise, to be accompanied with an affidavit. Nor is this making a man the judge in his own cause; for he only swears to the words in their literal and customary meaning and import.

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The law declares that if any Freeholder exempted from arrest by virtue of this act, shall happen to be taken by a writ of arrest, the Court shall abate the writ. But, if an affidavit has been filed agreeably to the second section, no man can be a Freeholder exempted by the act from arrest; and, consequently, the Capias, in this case, shall be maintained. The act was evidently the result of a compromise between contending parties; one side obtained a general clause exempting Freeholders from arrest; and the other side, guarded against this privilege by a Proviso, which, in fact, puts it in the power of any person to compel a Freeholder

to give bail. But if the Court can enquire into the facts in all cases, this provision is a mere snare; for should the weight of affidavits be eventually against the Plaintiff, he will not only lose his action, but be condemned in treble costs. Upon the first argument, SHIPPEN, President, observed, that there was considerable ambiguity in the Act of Assembly; and that he was not satisfied with respect to the meaning of the expression 'where the Plaintiff can make appear from records, or otherwise,' as it was not specified to whom the exception should be made appear. He said that in several cases (one of which he remembered was on Mr. Levy's motion) it had been determined that the second section of the act was disjoined; and that no affidavit was necessary to support the exception founded upon a judgment, which was the legal test of its own existence, and no other evidence would be received to prove it. He added, at the same time, that the words, as the Deponent believes, clearly related to the Defendant's not having a sufficient estate left to satisfy the Plaintiff's demand; that it is not necessary to set forth the facts in the affidavit under this act, as it is in England where a positive affidavit is required to hold the Defendant to bail; that it, indeed, the whole of the second section were connected, it would amount to a condition precedent, and a positive affidavit would preclude the Court from any enquiry into the facts; but, he continued, that the section was not only disjoined by the words of the act (in the first place admitting proofs by affidavit or affirmation; and in the second place requiring proofs from records or otherwise) but also by the reason and propriety of the case, which will not permit a Plaintiff, in his own favor, to determine what constitutes a legal residence. Smith, the Prothonotary, being asked as to the Practice, said, that in some cases the affidavits were filed before, but, more frequently, after the issuing of the writ. If the suggestion was, that the Defendant intended to go abroad, the affidavit had always been filed in the first instance; but with respect to the case of residence, he did not recollect any instance, before the present, where that was done. The President now delivered the opinion of the Court.

SHIPPEN, President. We have found some difficulty in obtaining a satisfactory idea of the meaning of the second section of this act. It would seem, by the former part, that the exception, upon

which the Capias is grounded, ought to be made appear to the Justice who grants the writ; but, in the latter part, when the disjunction of the clause occurs, the expression is general, if the Plaintiff can make appear from records or otherwise, without saying to whom he shall make his allegation appear. At first, indeed, I thought this might also relate to the Justice who grants the writ; but on a further consideration of the subject, I am convinced, that unless the legislature intended something more, it would never have been provided by the third section, that the Court shall stay all proceedings against the Defendant, till they examine his circumstance; for, it would have been useless and nugatory to direct that examination, if they were, nevertheless, bound by the contents of the affidavit. Besides, upon the principles of common justice, it is material, that the Court should have the power of making an enquiry into the facts; for, though the Plaintiff's opinion is taken, in the first instance, to ascertain whether there is a sufficient estate left for the payment of his demand; yet it would be unreasonable to deprive the Defendant of his privilege, if he could, afterwards, show, that independent of a trifling mortgage or judgment, an ample security was left for his adversary's debt. Nor is the equity of the case less applicable upon the question of residence; for, an occasional absence of a month, or a week, might with safety be made the foundation of the affidavit required by the act; and, yet, who will say, that, in law or reason, this ought to work a disfranchisement of the Defendant? The law is explicit, that if the Court find the Defendant is such, as by the act is intended to be exempted, the writ shall be abated; and this, surely, also implies something beyond a mere enquiry, whether an affidavit has been previously filed. If he is such 'as by the act is intended to be exempted,' is a sentence materially to be regarded in the clause; for, otherwise, it would have been sufficient to say, that if no affidavit is filed, nor any mortgage or judgment is produced, the Defendant shall be discharged from the action. It is evident, upon the whole, that the Legislature did not mean to subject a citizen of large estate to the process of a Capias, on account of a short absence from the state; and, therefore, we are of opinion, that they have left a controuling power in the Court to enquire into the circumstances of the case, and to relieve a Defendant from an arrest, if we think he was intended to

be exempted, although the words, that he has not been resident, may be inserted in the Plaintiff's affidavit. The Defendant was, accordingly, allowed to controvert the fact, of his not being resident in the State for two years before the writ issued.*
Footnotes

[[Footnote *](#)] See Ant. 152.

[[Footnote *](#)] See post the same case.

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