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Toland Vs. Sprague

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SooperKanoon Citation : sooperkanoon.com/79621

Court : US Supreme Court

Decided On : 1838

Appeal No. : 37 U.S. 300

Appellant : Toland

Respondent : Sprague

Judgement :

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U.S. Supreme Court Toland v. Sprague, 37 U.S. 12 Pet. 300 300 (1838)

Toland v. Sprague

37 U.S. (12 Pet.) 300

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLLABUS

Process of foreign attachment cannot be properly issued by the circuit courts of the United States in cases where the defendant is domiciled abroad or not found within the district in which the process issues, so that it can be served upon him.

The true construction of the eleventh section of the Judiciary Act of 1789 is that it did not mean to distinguish between those who are inhabitants, or found within the district, by process issued out of the circuit court and persons domiciled abroad, so as to protect the first, and leave the others not within the protection, but even with regard to those who are within the United States, they should not be liable to the process of the circuit courts of the United States unless in one or other of the predicaments stated in the clause. And as to all those who were not within the United States, it was not in the contemplation of Congress that they would be at all subject, as defendants, to the process of the circuit courts which, by reason of their being in a foreign jurisdiction, could not be served upon them, and therefore there was no provision whatsoever in relation to them.

By the general provisions of the laws of the United States:

1. The circuit courts can issue no process beyond the limits of their districts.

2. Independently of positive legislation, the process can only be served upon persons, within the same districts.

3. The acts of Congress adopting the state process adopt the form and modes of service only, so far as the persons are rightfully within the reach of such process, and did not intend to enlarge the sphere of the jurisdiction of

the circuit courts.

4. The right to attach property to compel the appearance of persons can properly be used only in cases in which such persons are amenable to the process of the circuit court *in personam* -- that is, where they are inhabitants, or found within the United States -- and not where they are aliens or citizens resident abroad at the commencement of the suit, and have no inhabitancy here.

In the case of a person being amenable to process *in personam,* an attachment against his property cannot be issued against him except as a part of or together with process to be served upon his person.

The circuit court of each district sits within and for that district, and is bounded by its local limits. Whatever may be the extent of the jurisdiction of the circuit court over the subject matter of suits in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any circuit court to have run into any state of the Union. It has not done so. It has not in terms authorized any civil process to run into any other district, with the single exception of subpoenas to witnesses within a limited distance. In regard to final process, there are two cases, and only two, in which writs of execution can now by law be served in any other district than that in which the judgment was rendered -- one in favor of private persons in another district of the same state and the other in favor of the United States in any part of the United States.

A party against whose property a foreign attachment has issued in a circuit court of the United States, although the circuit court had no right to issue such an attachment, having appeared to the suit and pleaded to issue, cannot afterwards deny the jurisdiction of the court. The party had, as a personal privilege, a right to refuse to appear, but it was also competent to him to waive the objection.

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The Judiciary Act of 1789 authorizes the Supreme Court to issue writs of error to bring up final judgments or decrees in a civil action, &c.; The decision of the circuit court upon a rule or motion is not of that character. Such decisions are not final judgments.

No principle of law is better settled than that to bring a case within the exception of merchandise accounts between merchant and merchant in the statute of limitations, there must be an account, and that an account open or current; that it must be a direct concern of trade; that liquidated demands on bills and notes, which are only traced up to the trade or merchandise, are too remote to come within this description. But when the account is stated between the parties, or when anything shall have been done by them which by their implied admission is

equivalent to a settlement, it has then become an ascertained

debt. Where there is a settled account, that becomes the cause of action, and not the original account, although it grew out of an account between merchant and merchant, their factors or servants.

T. shipped a quantity of merchandise by P. to Gibraltar, who, on arriving there, placed the goods in the hands of S. and received advances from S. upon them. In 1825, S. sold the goods and transmitted an account sales, as of the merchandise received from P. to T., who received it in September, 1825, stating the balance of the proceeds to be two thousand five hundred and seventy-eight dollars. T., in 1825, wrote to S. directing him to remit the amount to him, deducting one thousand dollars, which had been advanced by S. on the goods, and which had been remitted by P. to T. S. refused to make the remittance, alleging that P. was largely indebted to him. No suit was instituted by T. against S. until August, 1834. The account was a stated account, and the statute of limitations applied to it.

The mere rendering an account does not make it a stated account, but if the other party receives it, admits the correctness of the items, claims the balance, or offers to pay it, as it may be in his favor or against him, then it becomes a stated account. It is not at all important that the account was not made out between the plaintiff and the defendant, the plaintiff having received it, having made no complaint as to the items or the balance, but, on the contrary, having claimed that balance, thereby adopted it, and by his own act treated it as a stated account.

T. shipped merchandise consigned to P. as supercargo; P. put the goods into the hands of S., a merchant of Gibraltar, as the merchandise of T., and received an advance upon them. S. having sold the merchandise, rendered an account of the sales, stating the sales to have been made by the order of P. and crediting the proceeds in account with P. The account came into the hands of T. in 1825, and he claimed the balance of the proceeds from S., deducting the advance made by S. to P., and payment of the same was refused by P. *Held* that as T. had a right in 1825 to call on S. to account, and as no suit was instituted against S. until 1834, S. having always denied his liability to T. for the amount of the sales from the time

of the demand, the statute of limitations was a bar to an action to recover the amount from S.

The effect and nature of an averment in a plea put in by a defendant, when it is not essential to the plea.

Where the items of an account stated were not disputed, but were admitted and payment of the same demanded, it was not taking the question of fact whether the account was a stated account from the jury for the court to instruct the jury that the account was a stated account.

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This action was commenced on the fifth day of August, 1834, by the plaintiff in error by process of foreign attachment in the Circuit Court for the Eastern District of Pennsylvania. The writ of attachment stated the defendant, Horatio Sprague to be a citizen of the State of Massachusetts and the plaintiff to be a citizen of the State of Pennsylvania. The attachment was served on the property of the defendant on the sixth day of August, 1834, in the hands of Mr. John McCrea, Mr. S. Brown, and Mr. P. Lajus, residents in the City of Philadelphia. At the following term of the circuit court, the counsel for the defendant moved to quash the attachment, which motion was overruled by the court.

The record showed that Horatio Sprague, although stated to be a citizen of the State of Massachusetts, was at the time of the commencement of the suit and for some years before had been a resident at Gibraltar, where he was extensively engaged as a merchant. The defendant entered special bail to the attachment, and having appeared and pleaded to the same, the case was tried by a jury on the twenty-first day of November, 1836, and a verdict, under the charge of the circuit court, was rendered for the defendant, on which a judgment was entered by the court.

The plaintiff at the trial took a bill of exceptions to the charge of the court, stating in full all the evidence given to the jury in the case. The plaintiff prosecuted this writ

of error.

The plaintiff declared in assumpsit on three counts against the defendant: first charging the delivery of certain articles of merchandise upon a promise to account and pay over the proceeds of the sale of the same, alleging a sale thereof by the defendant and a breach of promise in not paying or accounting for the same. Second, a count in *indebitatus assumpsit,* and third, on an account stated. The third count was afterwards, on the application of the plaintiff to the court, struck out of the declaration. The defendant pleaded the general issue and also the statute of limitations. The plaintiff replied that at the time of the transactions with the defendant in which this suit was brought, the defendant was a merchant and the factor of the plaintiff, and

"as such had the care and administration of the money, goods, wares, and merchandise in the said declaration mentioned of the said Henry, and he merchandised and made profit

of for the said Henry, and to render a reasonable account to the said Henry, when he, the said Horatio, should be thereunto afterwards required, and that the said money, in the said several promises and undertakings in the said declaration mentioned, became due and payable on trade had between the said Horatio and the said Henry, as merchants and merchant and factor, and wholly concerned the trade of merchandise between him, the said Henry, as a merchant, and the said Horatio as a merchant and factor of him, the said Henry, to-wit at the district aforesaid, and the said Henry further says that no account or accounts whatever of the said money, goods and merchandise in the said declaration mentioned, or any part thereof, was or were ever stated, settled, or adjusted between him the said Henry."

To this replication the defendant rejoined stating that he was not the factor of the plaintiff, nor did the said money, in the said several supposed promises and undertakings, in the said declaration mentioned, become due and payable in trade

had between the said Horatio Sprague and the plaintiff, as merchant and merchant and factor, in manner and form as the plaintiff had alleged.

The bill of exceptions set out at large the evidence given on the trial of the cause. It consisted of a letter, dated Philadelphia, September 25, 1824, from the plaintiff to Charles Pettit, by which certain goods and merchandise, the property of the plaintiff, shipped on board of the *William Penn,* bound to Gibraltar, was consigned to him for sale, and stating the manner in which returns for the same were to be made; letters from Charles Pettit to the plaintiff relative to the shipment, and a statement of remittances made to him by Charles Pettit, with an account sales of some of the merchandise; also two bills of exchange, one for five hundred and thirty dollars seventeen cents, the amount of the proceeds of sales of eleven hogsheads of tobacco, and a bill of exchange for one thousand dollars, both drawn by Horatio Sprague the defendant, on persons in the United States, to the order of Charles Pettit and by him endorsed to the plaintiff.

By a letter from Charles Pettit to the plaintiff, dated at Gibraltar, December, 1824, after communicating the sales of the eleven hogsheads of tobacco, and the enclosure of the bills, and stating that the bill for one thousand dollars was to be considered as an advance on his shipment, he informed the plaintiff:

"I shall sail from this tomorrow in the ship *William Penn* for Savannah, and have left the following instructions with my friend,

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Mr. Sprague regarding your property left by me in his hands:"

" With respect to the gunpowder tea, cassia, and crape dresses, shipped by Henry Toland, you will please to dispose of them as you may think most for the interest of the shipper, and remit the amount to him in bills on the United States, forwarding me account of sales of the same."

By a letter addressed by Charles Pettit to the defendant, Mr. Sprague; written at Gibraltar, on 18 December, 1825; he says, among other things:

"By your account current rendered this day, a balance stands against me of five thousand five hundred and seventy-four dollars thirty-one cents, to meet which you have in your possession 550 barrels superfine flour, on my account entire, my half interest of 372 barrels flour; an invoice of crapes, &c.;, amounting to two thousand and twenty dollars; 100 ten-catty boxes gunpowder tea; 500 bundles cassia; and 2 cases super satin Mandarin crape dresses, containing 101 dresses."

"With respect to the gunpowder tea, cassia, and crape dresses, shipped by H. Toland, you will be pleased to dispose of them as you may think most for the interest of the shipper, and remit the amount to him in a bill on the United States, forwarding me account sales of the same."

On 6 January, 1825, the plaintiff wrote to the defendant, from Philadelphia, "I am expecting soon to hear the result of my shipment by the *William Penn* and hoping it will be favorable."

On 22 February, 1825, the plaintiff addressed the following letter to the defendant:

"Philadelphia, February 22, 1825"

"MR. HORATIO SPRAGUE, Gibraltar."

"Dear Sir -- By the ship *William Penn,* I consigned to Mr. Charles Pettit 100 boxes gunpowder tea, a quantity of cassia, 11 hogsheads Kentucky tobacco, and 2 cases Mandarin robes. I directed Mr. Pettit to make the returns of this shipment immediately on his arrival at Gibraltar as follows: if quicksilver could be had at forty cents, then the whole amount in said article; if not, to ship the whole amount in dollars by the first vessel for this port or New York, or if good bills of the United States could be had on more favorable terms for a remittance, then to make the return in bills. Mr. Pettit promised a strict compliance with all these things, but since the

sailing of the *William Penn* from this port, I have never received a line from him. I have heard of his arrival in Savannah, and of his proceeding to Charleston, but I

have not yet been favored with a single letter from him."

"As my property may be left in your hands by him unsold, I beg of you to follow the directions given to him as herein detailed and make the remittance direct to me. I have particularly to beg your attention to this matter and to remit as early as possible."

The bill of exceptions also contained letters from the defendant to the plaintiff, written at Gibraltar, commencing on 18 January, 1825, to February 22, 1827, and other correspondence of the plaintiff with the defendant up to an anterior date.

The letters of the plaintiff assert the liability of the defendant to him for the whole amount of the shipment made to Charles Pettit, deducting the two bills of exchange, one for five hundred and thirty dollars seventeen cents and the other for one thousand dollars, the balance of the sales being one thousand five hundred and seventy-nine dollars.

The letter from the defendant to the plaintiff of 18 January, 1825, informs the plaintiff

"that Charles Pettit had left Gibraltar on 19 December, and had placed in his hands, for sale for his account, an invoice of gunpowder tea, cassia, and crape dresses, with directions to dispose of them as he may judge most for his interest, which shall have my best attention."

Letters written afterwards inform the plaintiff of the state of the markets at Gibraltar, and on 7 June, 1825, the defendant wrote to the plaintiff, "I have closed the sales of the crapes and cassia, left by Mr. Pettit some time since, and settled his account."

On being informed by the plaintiff that he was held liable to him for the proceeds of the shipment per the *William Penn,* the defendant addressed the following letter to the plaintiff:

"Gibraltar, October 24, 1825"

Dear Sir -- I have just received your letter of 12 September, which I hasten to reply to. It would appear by your letter that Mr. Pettit's agency here was not so full as his own instructions to me gave me to expect. The property which he has brought and consigned to me at various times has ever been delivered over to me with invoices in his own name, and I have ever been punctilious in following his instructions, sometimes in remitting to one, sometimes

to another, and on which property I was always ready, and at various times did advance sums of money, but how he, Mr. Pettit, appropriated this money it was not my province to inquire; he might have remitted it to you or anyone else. Here follows the other part of his instructions of the date of 18 December, which you appear to have overlooked, but which must establish in your mind the nature of Mr. Pettit's transactions here. Had you have consigned your property to me instead of Mr. Pettit, I should then have been accountable to you, but it cannot be expected that I am to guarantee the conduct of your agent, who always is accountable to you for his conduct. Here follows the extract of his order of 18 December, 1824:

" By your account current, rendered this day, a balance stands against me of five thousand five hundred and seventy-four dollars and thirty-one cents, to meet which you have in your possession five hundred and fifty barrels of superfine flour, on my account entire, my half interest of three hundred and seventy-two barrels of flour, and invoice of crapes, &c.;, amounting to two thousand and twenty dollars, one hundred ten-catty boxes gunpowder tea, five hundred bundles cassia, and two cases superior satin Mandarin crape dresses, containing one hundred and one dresses,"

"&c.;"

"This paragraph, I repeat, cannot but convince you that all my advances to Mr. Pettit were on the various property which he placed in my hands for sale. It is very true I corresponded with your good self on the subject of the articles which you

entrusted to the management of Mr. Pettit, and it is no less true I did the same with him, and from time to time promised him account, which I never did to you, and until his last visit to this did not close the sales of the articles, when, at his particular request, closed every account before he left this. This explanation, I trust, will prove satisfactory, so much so that I may continue to enjoy your confidence."

The letter of the plaintiff of Philadelphia, January 4, 1826, repeats and insists on the liability of the defendant to him, to which the defendant gave the following reply:

"Gibraltar, February 10, 1826"

"Dear Sir -- I am this moment in receipt of your letter of 4th ultimo, per Charles, and from your reference to my letter of 18 January, 1825, have looked into the same. That I was aware the property handed over to me by Mr. Pettit did not belong to himself there is no question, but on what terms you and others consigned it

to him is not for me to inquire. On his arrival, he submitted to me invoices of several shipments, required advances, and gave orders for sales, and on his leaving this, as you may suppose, directed me to correspond with the different shippers by him, which, in my opinion, was very proper, and could not in the faintest degree lessen my claim to the property, on which I had made liberal -- yes, more than liberal -- advances, so much so that Mr. Pettit is over two thousand dollars my debtor; yet so particularly desirous am I to satisfy your mind, as I am in possession of all the original papers, letters, &c.;, connected with the business, I have no hesitation in submitting the question to any two respectable merchants here, one to be appointed by you, the other by myself, and to their decision I shall most readily subscribe; or if you are willing to leave the business to me, I will submit every paper to two disinterested merchants, and they shall address you on the subject, and the affair shall be settled to our satisfaction."

"Herewith duplicate of my respects of 28th ultimo, since which I have delivered a part of your hyson skin tea, at three and a half rials per pound. This parcel has been sold off, and if no complaints of its quality be made hereafter, I shall be glad."

The bill of exceptions also contained a number of accounts sales of merchandise made by the defendant, by order of Charles Pettit, and accounts current with him commencing in 1822. The only account which was the subject of notice in the charge of the circuit court was one dated at Gibraltar June 30, 1825, of the property of the plaintiff left in the hands of the defendant on 18 December, 1824. This was an account sales showing a balance of two thousand five hundred and seventy-eight dollars and eleven cents. The account sales was stated to be:

"Sales of merchandise received 3 November, 1824, ex ship *William Penn,* William West master, from Philadelphia, by order of Mr. Charles Pettit, for account and risk of the concerned, per Horatio Sprague Gibraltar."

"Gibraltar, June 30, 1825"

By the account current between the defendant and Charles Pettit, dated "July 6, 1825," in which credit was given for the net proceeds of the sales of June 30, 1825, a balance appeared to be due from Charles Pettit to the defendant, of one thousand four hundred and six dollars and _____ cents.

The bill of exceptions contained no other account in which the

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sales of the shipment made by the plaintiff by the William Penn were stated; nor did it contain any account rendered by the defendant to the plaintiff relating thereto.

The circuit court charged the jury:

"That there being a plea of the statute of limitation, the plaintiff must by his replication bring himself within the exception concerning merchants' accounts in the said statute, or must fail. To be within the said exception, such accounts must

concern trade and merchandise, and must also contain mutual demands, and must be an open and running account, and must be such for which an action of account would lie, and must be between merchant and merchant, their factors or servants, not merely between those who hold their goods under an obligation to account."

Here the plaintiff claimed one thousand five hundred and seventy-nine dollars, the balance of sales of property, as per account sales June 30, 1825, amounting to two thousand five hundred and seventy-nine dollars. Credit by one thousand dollars -- Bill on Pearson. The plaintiff and defendant agree in the amount of sales, and no item is objected to.

Thus far the account is a stated one, not being objected to for ten years; if any balance is due, it is ascertained by mutual consent.

There is no mutual account between them, nor an open one, and there can be no new account open between them. The contest does not depend on an account, but on who has a right to a liquidated balance, admitted by defendant to be in his hands as the proceeds of plaintiff's property: plaintiff claims it as his own; the defendant claims to apply it to a debt due by Pettit.

On the pleadings, the question is not who has a right to the money, but whether plaintiff is not barred by the statute.

The plaintiff had not made out a case which exempts him from the statute. If Sprague had rendered the account sales to the plaintiff, and admitted the balance to be payable to him, that would not bring plaintiff within the exception.

The plaintiff had a complete right of action, on demand of a settled balance, and he made this demand in 1825, and the statute would then begin to run. The plaintiff's only claim is for a precise balance, and this would not have been the mutual open account current between merchant and merchant, concerning the trade of merchandise between plaintiff and defendant. It did not become so by defendant's claiming to retain the balance for Pettit's debt, nor did it change the

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nature of the transaction, or make the cause more a matter of account than if he admitted the plaintiff's right to it.

The only question is who is entitled to the balance of a settled account. Admitting, then, that defendant was the factor of the plaintiff, he has failed in making out his replication as matter of law; it was not a case of trust, not embraced by statute.

Taking the account, then, as one where defendant was factor for plaintiff, bound to account to him and pay him the balance, and having no authority to apply the proceeds to Pettit's debt, and plaintiff not bound by receipt of one thousand dollars, the nature of the transaction does not bring it within the exception, being for a liquidated balance admitted, and by the correspondence between the parties, the controversy brought to a contest for the balance, this can be an exception only on the ground of merchants being privileged characters.

The correspondence between the parties, so long ago as early in the year 1826, shows that the question between them was not about the account or any item in it, but on the right of Mr. Sprague to retain the admitted balance to repay the advances he made to Pettit; that was the only question in dispute between them, and it is the only one now, and has so continued for more than ten years.

This view makes it unnecessary to consider the other interesting questions as to the powers of agents, factors, supercargoes, pledging, and of sub-agents; the jury are to take the direction of the court in the question, which is a matter of law, and so left the same to the jury.

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MR. JUSTICE BARBOUR delivered the opinion of the Court:

The suit was commenced by the plaintiff in error against the defendant in error by a process known in Pennsylvania by the name of a foreign attachment, by which, according to the laws of that state, a debtor who is not an inhabitant of the

commonwealth is liable to be attached by his property found therein to appear and answer a suit brought against him by a creditor.

It appears upon the record that the plaintiff is a citizen of Pennsylvania and the defendant a citizen of Massachusetts, but domiciled at the time of the institution of the suit and for some years before without the limits of the United States, to-wit, at Gibraltar, and when the attachment was levied upon his property, not being found within the District of Pennsylvania.

Upon the return of the attachment, executed on certain garnishees holding property of, or being indebted to the defendant, he, by his attorney, obtained a rule to show cause why the attachment should not be quashed, which rule was afterwards discharged by the court, after which the defendant appeared and pleaded. Issues were made up between the parties on which they went to trial, when a verdict and judgment were rendered in favor of the defendant. At the trial, a bill of exceptions was taken by the plaintiff stating the evidence at large and the charge given by the court to the jury, which will hereafter be particularly noticed when we come to consider the merits of the case. But before we do so, there are some preliminary questions arising in the case which it is proper for us to dispose of.

And the first is whether the process of foreign attachment can be properly used by the circuit courts of the United States in cases where the defendant is domiciled abroad and not found within the district in which the process issues, so that it can be served upon him.

The answer to this question must be found in the construction of the 11th section of the Judiciary Act of 1789, as influenced by the true principles of interpretation and by the course of legislation on the subject.

That section, as far as relates to this question, gives to the circuit courts original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity where

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the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars and an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state. It then provides that no person shall be arrested in one district for trial in another in any civil action before a circuit or district court, and moreover that no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ. As it respects persons who are inhabitants or who are found in a particular district, the language is too explicit to admit of doubt. The difficulty is in giving a construction to the section in relation to those who are not inhabitants and not found in the district.

This question was elaborately argued by the Circuit Court of Massachusetts in the case of *Picquet v. Swan,* reported in 5 Mason 35.

Referring to the reasoning in that case generally as having great force, we shall content ourselves with stating the substance of it in a condensed form, in which we concur. Although the process acts of 1789 and 1792 have adopted the forms of writs and modes of process in the several states, they can have no effect where they contravene the legislation of Congress. The state laws can confer no authority on this Court, in the exercise of its jurisdiction by the use of state process, to reach either persons or property which it could not reach within the meaning of the law creating it. The Judiciary Act has divided the United States into judicial districts. Within these districts, a circuit court is required to be holden. The circuit court of each district sits within and for that district, and is bounded by its local limits. Whatever may be the extent of their jurisdiction over the subject matter of suits in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any circuit court to have run into any state of the Union. It has not done so. It has not in terms authorized any original civil process to run into any other district, with the single exception of subpoenas for witnesses within a limited distance. In regard to final process, there are two cases, and two only, in which writs of execution can now by law be served in any other district than that in which the judgment was rendered --

one in favor of private persons in another district of the same state and the other in favor of the United States in any part of

the United States. We think that the opinion of the legislature is thus manifested to be that the process of a circuit court cannot be served without the district in which it is established without the special authority of law therefor.

If such be the inference from the course of legislation, the same interpretation is alike sustained by considerations of reason and justice. Nothing can be more unjust than that a person should have his rights passed upon and finally decided by a tribunal without some process being served upon him by which he will have notice which will enable him to appear and defend himself. This principle is strongly laid down in *Buchanan v. Rucker,* 9 East 192. Now it is not even contended that the circuit courts could proceed to judgment against a person who was domiciled without the United States and not found within the judicial district so as to be served with process where the party had no property within such district. We would ask what difference there is in reason between the cases in which he has and has not such property? In the one case as in the other the court renders judgment against a person who has no notice of the proceeding. In the one case as in the other they are acting on the rights of a person who is beyond the limits of their jurisdiction, and upon whom they have no power to cause process to be personally served. If there be such a difference, we are unable to perceive it.

In examining the two restraining clauses of the eleventh section, we find that the process of capias is in terms limited to the district within which it is issued. Then follows the clause which declares that no civil suit shall be brought before either of the said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ. We think that the true construction of this clause is that it did not mean to distinguish between those who are inhabitants of or found within the district and persons domiciled abroad, so as to protect the first and leave the others not within the protection, but that even in regard to those who

were within the United States, they should not be liable to the process of the circuit courts unless in one or the other predicament stated in the clause, and that as to all those who were not within the United States, it was not in the contemplation of Congress that they would be at all subject, as defendants, to the process of the circuit courts, which, by reason of their being in a

foreign jurisdiction, could not be served upon them, and therefore there was no provision whatsoever made in relation to them.

If, indeed, it be assumed that Congress acted under the idea that the process of the circuit courts could reach persons in a foreign jurisdiction, then the restrictions might be construed as operating only in favor of the inhabitants of the United States, in contradistinction to those who were not inhabitants, but upon the principle which we have stated that Congress had not those in contemplation at all who were in a foreign jurisdiction, it is easy to perceive why the restriction in regard to the process was confined to inhabitants of the United States. Plainly because it would not have been necessary or proper to apply the restriction to those whom the legislature did not contemplate as being within the reach of the process of the courts, either with or without restrictions.

With these views, we have arrived at the same conclusions as the Circuit Court of Massachusetts as announced in the following propositions, *viz.,*

1st. That by the general provisions of the laws of the United States, the circuit courts can issue no process beyond the limits of their districts.

2d. That independently of positive legislation, the process can only be served upon persons within the same districts.

3d. That the acts of Congress adopting the state process adopt the form and modes of service only so far as the persons are rightfully within the reach of such process, and did not intend to enlarge the sphere of the jurisdiction of the circuit courts.

4th. That the right to attach property to compel the appearance of persons can properly be used only in cases in which such persons are amenable to the process of the court *in personam* -- that is, where they are inhabitants, or found within the United States, and not where they are aliens, or citizens resident abroad at the commencement of the suit and have no inhabitancy here, and we add that even in case of a person being amenable to process *in personam,* an attachment against his property cannot be issued against him except as part of or together with process to be served upon his person.

The next inquiry is whether the process of attachment having issued improperly, there has anything been done which has cured the error. And we think that there is enough apparent on the record to produce that effect. It appears that the party appeared and pleaded to issue. Now if the case were one of a want of jurisdiction in the court, it would not, according to well established principles, be competent for the parties by any act of theirs to give it. But that is not the case. The court had jurisdiction over the parties

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and the matter in dispute; the objection was that the party defendant, not being an inhabitant of Pennsylvania nor found therein, personal process could not reach him, and that the process of attachment could only be properly issued against a party under circumstances which subjected him to process *in personam.* Now this was a personal privilege or exemption, which it was competent for the party to waive. The cases of *Pollard v. Wright,* 4 Cranch 421, and *Barry v. Foyles,* 1 Pet. 311, are decisive to show that after appearance and plea, the case stands as if the suit were brought in the usual manner. And the first of these cases proves that exemption from liability to process, and that in case of foreign attachment, too, is a personal privilege which may be waived, and that appearing and pleading will produce that waiver.

It has however been contended that although this is true as a general proposition, yet the party can avail himself of the objection to the process in this case, because it appears from the record that a rule was obtained by him to quash the

attachment, which rule was afterwards discharged, thus showing that the party sought to avail himself of the objection below, which the court refused. In the first place, it does not appear upon the record what was the ground of the rule, but if it did we could not look into it here unless the party had placed the objection upon the record in a regular plea, upon which, had the court given judgment against him, that judgment would have been examinable here. But in the form in which it was presented in the court below, we cannot act upon it in a court of error. The Judiciary Act authorizes this Court to issue writs of error to bring up a final judgment or decree in a civil action, or suit in equity, &c.; The decision of the court upon a rule or motion is not of that character. This point, which is clear upon the words of the law, has been often adjudged in this Court; without going further, it will be sufficient to refer to 31 U. S. 6 Pet. 648; 34 U. S. 9 Pet. 4. In the first of these cases, the question is elaborately argued by the Court, with a review of authorities, and it comes to this conclusion that it considers all motions of this sort (that is) to quash executions, as addressed to the sound discretion of the court, and as a summary relief, which the court is not compellable to allow. That the refusal to quash is not, in the sense of the common law, a judgment, much less is it a final judgment. It is a mere interlocutory order. Even at common law, error only lies from a final judgment, and by the express provisions of the Judiciary

Act, a writ of error lies to this Court only in cases of final judgments.

Having now gotten rid of these preliminary questions, we come, in the order of argument, to the merits of the case. To understand these, it will be necessary to look into the pleadings, the evidence, and charge of the court as embodied in the exceptions.

The declaration is in assumpsit, and originally contained three counts, *viz.,* the first, a count charging the delivery of certain goods to the defendant upon a promise to account and pay over the proceeds or sale thereof by the defendant, and a breach of promise in not accounting or paying the proceeds of the sale; 2dly, a count in *indebitatus assumpsit;* and 3dly a count upon an account stated.

A rule having been granted to amend the declaration, by striking out this last count, and that rule having been made absolute, we shall consider the declaration as containing only the two first counts. To this declaration the defendant pleaded the general issue, which was joined by the plaintiff, and also the act of limitations; to this second plea the plaintiff replied, relying on the exception in the statute in favor of such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, averring that the money in the several promises in the declaration became due and payable on trade had between the plaintiff and defendant, as merchant, and merchant and factor, and wholly concerned the trade of merchandise between the plaintiff as a merchant, and the defendant as a merchant and factor of the plaintiff, and averring also that no account whatever of the said money, goods, and merchandises, in the declaration mentioned or any part thereof was ever stated or settled between them. The defendant rejoined that he was not the factor of the plaintiff and that the money in the several promises in the declaration mentioned did not become due and payable in trade had between the plaintiff and defendant as merchant and merchant and factor, and on this issue was joined. On the trial of these issues there were sundry letters between the parties and accounts given in evidence, which are set forth at large in a bill of exceptions in relation to which the court gave a charge to the jury, the jury having found a verdict for the defendant, U.S. and the court having rendered a judgment in his favor, the case is brought by the plaintiffs into this Court by writ of error. And the question is whether there is any error in the charge of the court as applied to the facts of the case stated in the exception. The court, after going

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at large into the facts of the case and the principles of law applying to it, concluded with this instruction to the jury: that there was no evidence in the cause which could justify it in finding that the account in evidence was such a mutual open one as could bring the case within the exception of the act of limitations.

In deciding upon the correctness of this instruction it is necessary to inquire what is the principle of law by which to test the question whether a case does or does

not come within the exception of the statute in favor of accounts between merchant and merchant, their factors or servants. No principle is better settled than that to bring a case within the exception, it must be an account, and that an account open or current. *See* 2d Wms. Saund. 127, d. e., note 7. In 2 Johns. 200, the court said that the exception must be confined to actions on open or current accounts; that it must be a direct concern of trade; that liquidated demands, or bills and notes which are only traced up to the trade or merchandise, are too remote to come within this description. But the case of *Spring v. Ex'rs. of Gray* in this Court. 6 Pet. 151, takes so full and accurate a review of the doctrine and cases as to render it unnecessary to refer to other authorities. It distinctly asserts the principle that the account, to come within the exception, must be open or current. This construction, so well settled on authority, grows out of the very purpose for which the exception was enacted. That purpose was to prevent the injustice and injury which would result to merchants having trade with each other, or dealing with factors, and living at a distance, if the act of limitations were to run, where their accounts were open and unsettled; where, therefore, the balance was unascertained, and where too the state of the accounts might be constantly fluctuating by continuing dealings between the parties.

But when the account is stated between the parties, or when anything shall have been done by them which, by their implied admission, is equivalent to a settlement, it has then become an ascertained debt. In the language of the Court of Appeals of Virginia, 4 Leigh 249, "all intricacy of account, or doubt as to which side the balance may fall, is at an end," and thus the case is neither within the letter nor the spirit of the exception. In short, when there is a settled account, that becomes the cause of action, and not the original account, although it grew out of an account between merchant and merchant, their factors or servants.

Let us now inquire how far this principle applies to the facts of

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this case. It appears by the bill of exceptions that the facts are these:

In the year 1824, the plaintiff consigned a quantity of merchandise, by the ship *William Penn,* bound for Gibraltar, to a certain Charles Pettit, accompanied with instructions as to the disposition of it. Pettit, after arriving at Gibraltar and remaining there a short time, placed all the merchandise belonging to the plaintiff which remained unsold in the hands of the defendant, to be disposed of by him for plaintiff's account. The plaintiff produced on the trial an account of the sales of the aforesaid merchandise, dated June 30, 1825 signed by the defendant, as having been made by him, amounting in net proceeds to two thousand five hundred and seventy-nine dollars and thirteen cents, and showing that balance.

In September, 1825, the plaintiff wrote to the defendant, requesting him to remit to him the net proceeds of this merchandise, amounting to two thousand five hundred and seventy-nine dollars and thirteen cents, after deducting therefrom a bill of exchange of one thousand dollars, which had been drawn by defendant in favor of Charles Pettit, on a house in New York. Pettit being indebted to the defendant, as alleged by him, in a large sum of money, for advances, and otherwise, the defendant refused to pay the plaintiff the amount of the sales of the merchandise, and denied his liability to account to him therefor.

In addition to the demand before stated, by plaintiff on the defendant, for the balance of the account of sales by letter, on the trial of the cause, the counsel for the plaintiff, in opening the case, claimed the balance of an account between Sprague the defendant, and Charles Pettit, being the precise amount of the balance of the account of sales, after deducting the bill of exchange for one thousand dollars.

It appears that the plaintiff was in possession of the account of sales as early as September, 1825.

Upon this state of facts appearing in the record, the question is whether the cause of action in this case is an open, or current account between the plaintiff and defendant, as merchant and factor, concerning merchandise; or whether it is an ascertained balance, a liquidated sum, which, although it grew out of a trade of merchandise, is, in legal effect, under the circumstances, a stated account? We

think it is the latter.

In the language of the court which gave the charge, we think that

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"the claim is for a precise balance, which was demanded by the plaintiff from the defendant in 1825." From the nature of the account and the conduct of the parties, there was from the time the account of sales was received by the plaintiff showing the balance, and demanded by the plaintiff of the defendant, no unsettled open account between them as merchant and merchant, or merchant and factor. We agree in opinion with the circuit court that there was a matter of controversy brought to a single point between them -- that is, which of them had, by law, a right to a sum of money, ascertained by consent to amount to one thousand five hundred and seventy-nine dollars. That the nature of the account is not changed by there being a controversy as to a balance stated, which the defendant does not ask to diminish, or the plaintiff to increase, and as neither party asks to open the account, and both admit the same balance, there can be no pretense for saying that it is still open. As the circuit court said, the question between them is not about the account or any item in it, but as to the right of the defendant to retain the admitted balance, to repay the advances made to Pettit. We agree with the court that the mere rendering an account does not make it a stated one, but that if the other party receives the account, admits the correctness of the items, claims the balance, or offers to pay it, as it may be in his favor or against him; then it becomes a stated account. Nor do we think it at all important that the account was not made out as between the plaintiff and defendant, the plaintiff having received it, having made no complaint as to the items or the balance, but on the contrary having claimed that balance, thereby adopted it, and by his own act treated it as a stated account. We think, therefore, that the act of limitations began to run from the year 1825, when that demand was made, and consequently that the instruction of the court was correct in saying that it was not within the exception.

It has however been argued that whatever might be the conclusion of the court as resulting from the evidence that the defendant had admitted upon the record that

the account was an open one. It is said that the plaintiff having averred in his replication that there was no account stated, or settled between him and the defendant, and the defendant not having traversed that averment in his rejoinder, the matter contained in that averment is admitted. It is a rule in pleading that where in the pleading of one party there is a material averment, which is traversable, but which is not traversed by the other party, it is admitted. We think that the rule does not apply to this

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case, because the negative averment in the replication that no account had been stated between the parties, was not a necessary part of the plaintiff's replication, to bring him within the exception of the statute in relation to merchants' accounts. Inasmuch, then, as the replication without that averment would be sufficient, we do not consider it as one of those material averments, the omission to traverse which is an admission of its truth, within the rule before stated.

But in another aspect of this case, the statute of limitations would apply to, and bar the plaintiff's claim, if the account of sales were regarded as having no operation in the case. The plaintiff, standing in the relation which he did to the defendant as it respects this merchandise, had a right to call upon him to account; he did make that demand, and the defendant refused to render one, holding himself liable to account to Pettit only. From the moment of that demand and refusal, the statute of limitations began to run. *See* 1 Taunton 572.

It was argued that the question whether there was a stated account or not, was a question of fact for the jury, and that therefore the court erred in taking that question from them and telling them that this was a stated account.

The answer is that there was no dispute about the facts, and that the plaintiff claimed the balance of the account as being the precise sum due to him. It was therefore competent to the court to instruct the jury that it was a stated account.

Upon the whole, we think there is no error in the judgment: it is therefore

Affirmed with costs.

MR. CHIEF JUSTICE TANEY.

I concur with the majority of the Court in affirming the judgment of the circuit court. But I do not assent to that part of the opinion which declares that the circuit courts of the United States have not the power to issue the process of attachment against the property of a debtor who is not an inhabitant of the United States. It does not appear by the record that this point was raised in the court below, and I understand from the learned judge who presided at the trial that it was not made.

The decisions on this question have not been uniform at the circuits. In several districts where this process had been authorized by the laws of the states, the circuit courts of the United States adopted it in practice, and appeared to have considered the Act of Congress of

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1789, as having authorized its adoption. The different opinions entertained in different circuits, show that upon this point the construction of the act of 1789 is not free from difficulty, and as the legality of this process has been recognized in some of the circuits for many years, it is probable that condemnations and sales have taken place under such attachments, and that property is now held by *bona fide* purchasers who bought, and paid their money, in the confidence naturally inspired by the judgment of the court.

If the case before us required the decision of this question, it would be our duty to meet it and decide it. But the point is not necessarily involved in the decision of this case, and I am therefore unwilling to express an opinion upon it.

The attachment, in the case before us was dissolved by the appearance of the defendant, and no final judgment was given upon it in the court below. When the defendant appeared and pled in bar to the declaration filed by the plaintiff, the controversy became an ordinary suit between plaintiff and defendant, the proceedings on the attachment were at an end, and could in no degree influence

the future progress and decision of the action. And this Court, in revising the judgment given by the circuit court in such an action, cannot look back to the proceedings in the attachment in which no judgment was given, nor can the refusal of the circuit court to quash the attachment on the motion made by the defendant, be assigned as error in this Court. The validity of that process, therefore, need not be drawn into question in the judgment of this Court, on the case presented here for decision. For whether the attachment was legal or illegal, the judgment of the circuit court, as the case comes before us, must be affirmed. And as the question is an important one, and may affect the rights of individuals who are not before the court, and as the case under consideration does not require us to decide it; I think it advisable to abstain from expressing an opinion upon it, and do not assent to that part of the opinion of the court which declares that the process in question is not authorized by the acts of Congress.

MR. JUSTICE BALDWIN agreed with THE CHIEF JUSTICE in the opinion delivered by him; if it was necessary, he would go further as to the authority of the courts of the United States to issue foreign attachments.

MR. JUSTICE WAYNE agreed with THE CHIEF JUSTICE in opinion.

He

thought the circuit courts of the United States had authority to issue foreign attachments. The decision on that point is not necessary to the decision of this case.

MR. JUSTICE CATRON had not formed any opinion on the question of the right of the circuit courts to issue foreign attachments.

He thought that question did not come before the court in this case, and it was not necessary to examine or decide it.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was

argued by counsel. On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said circuit court in this cause be and the same is hereby affirmed with costs.

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