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the allegations of the appellees, that the shipments of produce to Cadiz, Lisbon and Bordeaux were made pursuant to their orders and under their superintendence.

He has failed also to prove that he is entitled to the credit insisted on in his fourth exception. To be entitled to the credit, it is incumbent on him to prove that the twenty-five hogsheads are exclusive of the eighty hogsheads of tobacco shipped in the Mercury. The record affords no testimony whatever.

With respect to the second exception, it is considered by this court, that the circuit court erred in sustaining the report of the commissioner as to the manner of stating the account between the parties. The commissioner adopted the mode established in Virginia, and which it is believed prevails generally throughout the United States: but by the written agreement of the parties, in April 1795, it is stipulated, that the interest shall be charged agreeably to the custom and manner of settling accounts in London. In all other respects, the opinion of the circuit court is affirmed.

\*It is, therefore, the opinion of this court, that the decree of the circuit court with respect to the second exception be reversed, [\*152 and that the cause be remanded to the circuit court, in order that an account may be taken pursuant to the written agreement of the parties, agreeable to the custom and manner of settling accounts in London.

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WELCH v. MANDEVILLE. (a)

*Error.—Discontinuance.—Dominus litis.*

The refusal of the court below to reinstate a cause, which has been legally dismissed, is no ground for a writ of error.

The nominal plaintiff may dismiss a suit, brought in his name, by a creditor, who has not an assignment of the cause of action.

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ERROR to the Circuit Court for the district of Columbia, sitting at Alexandria.

An action of covenant was brought in that court, in the name of James Welsh, the plaintiff, but really for the use and by the sole order of Allen Prior, against Mandeville & Jameson, upon a contract for the sale of land to them by Welch. At the second term after an office-judgment had been entered against Welch, at the rules, the defendant Mandeville, who alone had been taken, produced to the clerk a release, under the seal of Welch, and an order from him to dismiss the suit; whereupon, the clerk made an entry on the minutes of the court, that the action was dismissed by agreement of the parties.

Afterwards, at the same term, the attorney who brought the suit in the name of Welch, moved the court to reinstate it, and grounded his motion upon his own affidavit, and the papers mentioned therein. The affidavit stated, that in the autumn of 1789, Prior brought to the attorney three bills of exchange, drawn by Welch upon Mandeville & Jameson, for \$2500 each, and an account, in the handwriting of Mandeville, acknowledging a balance

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due to Welch, on the 31st of January 1798, of \$8707.09, to be paid in the times and manner therein stated. Prior, at the same time, stated, that Welch was indebted to him, and that he had taken those bills in payment, which Mandeville & Jameson refused to accept, saying, that Welch \*153] \*had deceived them in the sale of the lands. Prior left the papers with his attorney, and requested him to take the best measures to obtain the money from Mandeville & Jameson; whereupon, he brought two suits in the county court of Fairfax, in Virginia, the one was a suit at law, in the name of Welch against Mandeville & Jameson, founded upon their acknowledgment of the balance of account; the other was a chancery attachment, in the name of Prior, against Welch, as an absent debtor, and charging Mandeville & Jameson as garnishees.

Upon the trial of the suit at law, the defendants produced the original contract respecting the sale of land, whereupon, the attorney for Welch suffered a nonsuit, and having obtained an office copy of the contract, brought the present suit thereon, for the use of Prior, in the name of Welch, but without his directions, which was known to Mandeville. There had been no decision in the chancery attachment. The attorney never had any communication with Welch, upon the subject of this suit; but he had reason to believe that Welch knew of the suits in Fairfax county, and did not interfere with them. The attorney corresponded solely with Prior, on the subject of this suit, who had directed the application of the money, when recovered. That the attorney did not know of the release and order to dismiss the suit, until after the entry was made on the minutes, and that the suit had been dismissed, without his consent, or that of Prior, who had been at all the expense of the suit. That he had been informed, that Welch was in the prison-bounds, and that when Prior put the papers into his hands, he informed him, that it was his only prospect of receiving payment of the debt due to him by Welch.

Whereupon, the defendant Mandeville produced the affidavit of Welch, stating that he drew the bills in favor of Prior, merely for him to get them accepted, and negotiate them for account of Welch and as his agent. That Prior never gave value for them, and instead of being the creditor of Welch, was his debtor; and that he (Welch) never made a transfer or assignment of the contract with Mandeville & Jameson to Prior, or any other person. \*154] \*The defendant Mandeville also produced a paper purporting to be the answer of Welch to the chancery attachment in Fairfax county (but which had not then been filed in the suit), which contained the substance of his affidavit; and also a letter written by Welch to Mandeville & Jameson, and sent by Prior at the time he presented the bills, corroborating the fact that Prior was only his agent in that business.

In this state of the case, the court below continued the motion to reinstate the cause, until the next term, to give an opportunity to Prior to produce evidence of an assignment of the contract, and of his right to bring suit upon it; at which term, he produced his own affidavit, stating that Welch was indebted to him upwards of \$14,000, and that Welch gave him the three drafts on Mandeville & Jameson, for his (Prior's) own use and benefit, for and on account of a tract of land sold to Welch, and which Welch sold to another person. He produced also certain other documents, tending to corroborate his affidavit.

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But the court below refused to reinstate the cause, and ordered it to be dismissed, according to the agreement of the parties ; to which refusal, Allen Prior took a bill of exceptions, which the court signed.

Upon the opening of the case, MARSHALL, Ch. J., inquired, whether the question, whether a refusal to reinstate a cause, be ground of error, had not been decided by this court ?

*E. J. Lee*, for plaintiff in error, said, that it had not been directly decided. The clause of the act of congress which gives this court appellate jurisdiction of causes decided in the circuit court for the district of Columbia (2 U. S. Stat. 106, § 8), differs from that clause of the general judiciary which gives this court its appellate jurisdiction in other cases. The expression of the former clause is "any final judgment, order or decree ;" but the expression in the general law (1 U. S. Stat. 84, § 22), is "final judgments and decrees." The word order must mean something different from a judgment or a decree. It seems peculiarly applicable to a final order \*dismissing a suit. This [\*155 peculiar phraseology was relied upon to give jurisdiction to this court in the case of *Custiss v. Georgetown Turnpike Company*. (6 Cr. 233.)

*Swann*, contra.—This case is within the principle of the cases already decided by this court—such as the refusal of the court below to grant a new trial, or to continue a cause. To reinstate a cause, after it has been once legally decided, is a matter of mere discretion.

*E. J. Lee*, in reply.—If the clerk had dismissed it at the rules, and the plaintiff had applied to the court, at the next succeeding term, to reinstate it, and the court had refused, it would not have been an exercise of discretion, but denial of right. It would have been error in law. *Newell v. Pidgeon*, 1 Str. 235.

*C. Lee*, on the same side.—There is a difference between dismissing a cause without trial, and refusing a new trial. It cannot be possible, that the court may dismiss every suit upon the docket, and yet the injured parties have no remedy; which would be the case, if the dismissal of a suit be matter of discretion which this court cannot control.

March 5th, 1812. All the judges being present, MARSHALL, Ch. J.—The majority of the court is of opinion, that the motion to reinstate the cause, was an application to the discretion of the court, and its refusal is not a ground for a writ of error.

After the court had delivered this opinion, it became a question, whether the writ of error should be dismissed, or the judgment affirmed.

After consideration of the case again, on the 7th of March, \*MAR- [\*156 SHALL, Ch. J., stated it to be the opinion of the court, that the judgment of the court below should be affirmed. The writ of error is to the judgment generally. The refusal to reinstate the cause being no error in law, the court can see no error in the principal judgment.

Judgment affirmed.