*Welch *v.* Mandeville.

Dominus litis.

A nominal plaintiff, suing for the benefit of his assignee, cannot, by a dismissal of the suit, under a collusive agreement with the defendant, create a valid bar against any subsequent suit for the same cause of action.[1]

Welch *v.* Mandeville, 2 Cr. C. C. 82, reversed.

Error to the Circuit Court for the district of Columbia, for Alexandria county. This was an action of covenant, brought in the name of Welch (for the use of Prior) against Mandeville & Jamieson. The suit abated as to Jamieson, by a return of "no inhabitant."

The defendant, Mandeville, filed two pleas. The second plea, upon which the question in this court arose, stated, that, on the 5th of July 1806, James Welch impleaded Mandeville & Jamieson, in the circuit court of the district of Columbia, for the county of Alexandria, in an action of covenant, in which suit such proceedings were had, that, afterwards, to wit, at a session of the circuit court, on the 31st day of December 1807, "the said James Welch came into court and acknowledged that he would not further prosecute his said suit, and from thence altogether withdraw himself." The plea then averred, that the said James Welch, in the plea mentioned, was the same person in whose name the present suit was brought, and that the said Mandeville and Jamieson, in the former suit, were the same persons who
*234] are defendants *in this suit, and that the cause of action was the same in both suits.

To this plea the plaintiff filed a special replication, protesting that the said James Welch did not come into court and acknowledge that he would not further prosecute the said suit and from thence altogether withdraw himself; and averred, that James Welch, being indebted to Prior, in more than $8707.09, and Mandeville & Jamieson being indebted, by virtue of the covenant in the declaration mentioned, in $8707.09, to Welch, he, Welch, on the 7th of September 1799, by an equitable assignment, assigned to Prior, for a full and valuable consideration, the said $8707.09, in discharge of the said debt, of which assignment, the replication averred Mandeville & Jamieson had notice. The replication further averred, that the suit in the plea mentioned was brought in the name of Welch, as the nominal plaintiff, for the use of Prior, and that the defendant, Mandeville, knew that the said suit was brought, and was depending, for the use and benefit of the said Prior; and that the said suit in the plea mentioned, without the authority, consent or knowledge of the said Prior, or of the attorney prosecuting the said suit, and without any previous application to the court, was "dismissed, agreed." The replication further averred, that the said James Welch was not authorized by the said Prior to agree or dismiss the said suit in the plea mentioned; and that the said Joseph Mandeville, with whom the suppoesd

[1] In such case, the court will not permit the legal plaintiff to arrest the suit; the *cestui qui use* has a right to impetrate the writ, and to carry on the suit for his own benefit. Insurance Co. *v.* Smith, 11 Penn. St. 124. But the court, in a proper case, will search out the actual plaintiff, and fix on him the responsibility of a party, by subjecting him to costs, a plea of set-off, or any other liability that may be necessary to protect the defendant. Armstrong *v.* Lancaster, 5 Watts 68.

agreement for the dismissal of the said suit was made, knew, at the time of making the said supposed agreement, *that the said James Welch [*235 had not authority from Prior to agree or dismiss said suit. The replication further averred, that the said agreement and dismissal of the said suit were made and procured by the said Joseph Mandeville, with the intent to injure and defraud the said Prior, and deprive him of the benefit of the said suit in the plea mentioned. The replication also averred, that the said Prior did not know that the said suit was dismissed, until after the adjournment of the court at which it was dismissed; and further, that the supposed entry upon the record of the court in said suit, that the plaintiff voluntarily came into court and acknowledged that he would not further prosecute his said suit, and from thence altogether withdraw himself, and the judgment thereupon was made and entered by covin, collusion and fraud; and that the said judgment was fraudulent. To this replication, the defendant filed a general demurrer, and the replication was overruled.

It appeared by the record of the suit referred to in the plea, that the entry was made in these words: "This suit is dismissed, agreed," and that this entry was made by the clerk, without the order of the court, and that there was no judgment of dismissal rendered by the court, but only a judgment refusing to reinstate the cause.[1]

The cause was argued by *Lee*, for the plaintiff, and *Swann*, for the defendant.

March 11th, 1816. STORY, J., delivered the opinion of the court.—The question upon these pleadings comes to this—whether a nominal plaintiff, suing for the benefit of *his assignee, can, by a dismissal of the suit, [*236 under a collusive agreement with the defendant, create a valid bar against any subsequent suit for the same cause of action?

Courts of law, following in this respect the rules of equity, now take notice of assignments of *choses in action*, and exert themselves to afford them every support and protection not inconsistent with the established principles and modes of proceeding which govern tribunals acting according to the course of the common law. They will not, therefore, give effect to a release procured by the defendant, under a covinous combination with the assignor, in fraud of his assignee, nor permit the assignor injuriously to interfere with the conduct of any suit commenced by his assignee to enforce the rights which passed under the assignment.

The dismissal of the former suit, stated in the pleadings in the present case, was certainly not a *retraxit;* and if it had been, it would not have availed the parties, since it was procured by fraud. Admitting a dismissal of a suit, by agreement, to be a good bar to a subsequent suit (on which we give no opinion), it can be so only when it is *bonâ fide*, and not for the purpose of defeating the rights of third persons. It would be strange, indeed, if parties could be allowed, under the protection of its forms, to defeat the whole objects and purposes of the law itself.

It is the unanimous opinion of the court, that the judgment of the cir-

[1] See Welch v. Mandeville, 7 Cr. 152.

cuit court, overruling the replication to the second plea of the defendant, is
*237] erroneous, *and the same is reversed, and the cause remanded for further proceedings.

Judgment reversed.(*a*)

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*238] *L'Invincible: The Consul of France and Hill & McCobb, Claimants.

Prize jurisdiction.

During the late war between the United States and Great Britain, a French privateer, duly commissioned, was captured by a British cruiser, afterwards re-captured by an American privateer; again captured by a squadron of British frigates, and re-captured by another American privateer, and brought into a port of the United States for adjudication: restitution, on payment of salvage, was claimed by the French consul. A claim was also interposed by citizens of the United States, who alleged, that their property had been unlawfully taken by the French vessel, before her first capture, on the high seas, and prayed an indemnification from the proceeds. Restitution to the original French owner was decreed; and it was held, that the courts of this country have no jurisdiction to redress any supposed torts committed on the high seas, upon the property of its citizens, by a cruiser regularly commissioned by a foreign and friendly power, except where such cruiser has been fitted out in violation of our neutrality.[1]

The Invincible, 2 Gallis. 29, affirmed.

Appeal from the Circuit Court for the district of Massachutetts. The French private armed ship L'Invincible, duly commissioned as a cruiser, was, in March 1813, captured by the British brig of war La Mutine. In the same month, she was re-captured by the American privateer Alexander; was again captured, on or about the 10th of May 1813, by a British squadron, consisting of the frigates Shannon and Tenedos; and afterwards, in the
*239] same month, again re-captured by the American privateer Young *Teaser, carried into Portland, and libelled in the district court of Maine for adjudication, as prize of war.

(*a*) By the common law, *choses in action* were not assignable, except to the crown. The civil law considers them as, strictly speaking, not assignable; but, by the invention of a fiction, the Roman jurisconsults contrived to attain this object. The creditor who wished to transfer his right of action to another person, constituted him his attorney, or *procurator in rem suam*, as it was called; and it was stipulated, that the action should be brought in the name of the assignor, but for the benefit and at the expense of the assignee. Pothier, *de Vente*, No. 550. After notice to the debtor, this assignment operated a complete cession of the debt, and invalidated a payment to any other person than the assignee, or a release from any other person than him. Ibid. 110, 554; Code Napoleon, liv. 3, tit. 6, *De la Vente*, c. 8, § 1690. The court of chancery, imitating, in its usual spirit, the civil law, in this particular, disregarded the rigid strictness of the common law, and protected the rights of the assignee of *choses in action*. This liberality was at last adopted by the courts of common law, who now consider an assignment of a *chose in action* as substantially valid, only preserving, in certain cases, the form of an action commenced in the name of the assignor, the beneficial interest and control of the suit being, however, considered as completely vested in the assignee as *procurator in rem suam*. See Master *v.* Miller, 4 T. R. 340; Andrews *v.* Beecker, 1 Johns. 411; Bates *v.* New York Insurance Company, 3 Johns. Ch. 242; Wardell *v.* Eden, 1 Johns. 532, *in notis;* Carver *v.* Tracy, 3 Ibid. 426; Raymond *v.* Squire, 11 Ibid. 47; Van Vechten *v.* Greves, 4 Ibid. 406; Westor *v.* Barker, 12 Ibid. 276.

[1] The Bee, 1 Ware 332; The William, 1 Pet. Adm. 12. And see Hernandez *v.* Avery, 1 Journ. Jur. 131; The Santissima Trinidad, 7 Wheat. 283; The South Carolina, Bee 422.