Upon the whole, though there cannot be a case, in which an *ex post facto* law in criminal matters is requisite or justifiable (for providence never can intend to promote the prosperity of any country by bad means), yet, in the present instance, the objection does not arise: because, 1st, if the act of the legislature of Connecticut was a judicial act, it is not within the words of the constitution; and 2d, even if it was a legislative act, it is not within the meaning of the prohibition.

Cushing, Justice.—The case appears to me to be clear of all difficulty, taken either way. If the act is a judicial act, it is not touched by the federal constitution: and if it is a legislative *act, it is maintained and justified by the ancient and uniform practice of the state of Connecticut. [*401

Judgment affirmed.

Wilson *v.* Daniel.

Jurisdiction in error.

The original citation to the defendant in error, signed by the judge, must be returned; otherwise, the case is not properly before the court.

If a judgment, though imperfect and informal, be one on which execution may issue, it may be reviewed on error.

The amount actually in dispute, and not the sum recovered by the verdict, determines the jurisdiction of the supreme court, on a writ of error.[1]

Error from the Circuit Court of Virginia. On the return of the record, it appeared, that the district judge had indorsed the following *fiat* on the petition and assignment of errors, presented by the plaintiff in error: "Let a writ of error and *supersedeas* issue, agreeable to the prayer of the petition, on the petitioner's entering into bond, with security, in the penalty of $3600, conditioned as usual in such case. Cyrus Griffin." A writ of error accordingly issued; but it would seem, that only a copy of the writ was transmitted with the record (to which the seal of the circuit court was affixed, though the writ itself was not said to be under the seal of the court), and the copy was signed by "William Marshall, clerk," who added, in the margin, the following memorandum, in his own handwriting, not subscribed by the judge: "Allowed by Cyrus Griffin, Esq., judge of the middle circuit in the Virginia district." The original citation to the defendant in error was, likewise, omitted, and only a copy accompanied the record, with an affidavit subjoined, that the deponent "did, on the 24th of September 1796, deliver to Thomas Daniel, within named, a citation, whereof the above is a true copy." There was no certificate of the judge or clerk of the court, that the record was returned in obedience to the writ, though at the end of the paper, purporting to be the record, the clerk subjoined the following minute: "Copy: *Teste*—William Marshall, clerk."

*In February term 1797, *E. Tilghman*, for the defendant in error, objected to the return of the writ, that it was not said to be issued [*402 under the seal of the court; that the seal affixed to the record was not stated to have been affixed by order of the court; that the original writ was not

[1] Overruled, in Gordon *v.* Ogden, 3 Pet. 33, on the ground that a contrary practice had since prevailed. See Cooke *v.* Woodrow, 5 Cr. 13; Wise *v.* Columbian Turnpike Co. 7 Id. 276; Spear *v.* Place, 11 How. 522.

transmitted; that the paper purporting to be a citation, being a mere copy, did not appear, from the signature, or any other proof, to have been signed by the judge, which the act of congress expressly requires (1 U. S. Stat. 84, § 22), and that there was not even any certificate of the clerk of the court, that the entire record had been annexed and transmitted with the copy of the writ of error.

Lee (the Attorney-General) and *Ingersoll*, answered, that the district judge had, in effect, allowed the writ of error, by directing it to issue, when security was given; that the seal being actually affixed, it was unnecessary to state that the writ was under the seal of the court; that the seal implies and authenticates the fact, that the citation had been signed, as well as the writ of error allowed, by the judge; and that the clerk having asserted that the proceedings transmitted were a copy, it must be presumed to be an entire copy of the record, unless diminution is alleged.

But THE COURT were clearly of opinion, that the verification of the record was defective; and that they could not, consistently with the judicial act, dispense with a return of the original citation, subscribed by the judge himself.

The cause was, then, continued, upon an agreement between the counsel, that the defendant in error might either argue it upon the record, in its present state; or allege a diminution of the record, and issue a *certiorari*. The latter mode was adopted; and the diminution alleged was, that "there is not certified the judgment of the said circuit court, rendered on inspection of the record of a district court of the commonwealth of Virginia, held in the town of Dumfries, awarding to the said Thomas Daniel his costs against John Hollingsworth, William Merle and William Miller, on the dismission of a certain attachment by them against him sued forth, which record of the said district court is stated in the declaration of the said Thomas Daniel, filed in the said circuit court, and is again stated in the replication of the said Thomas Daniel, in the said circuit court, with an averment, that he was ready to verify the same, by a transcript thereof, certified under the hand of a proper officer; to which said replication, the said William Wilson, in the said circuit court, rejoined, that there was no such record." The clerk of the circuit court returned the *certiorari*, with a certificate indorsed, "that there *403] is not remaining on the rolls and records, the judgment of the *said circuit court, on the inspection of the transcript of the record of the district court of Dumfries, awarding the said Thomas Daniel, his costs against John Hollingsworth and others, on the dismission of a certain attachment against him by them prosecuted; nor did the said circuit court ever enter up their judgment thereon."

The circumstances, which now became material on the record, were as follows: It appeared by the declaration, that an action of debt was brought in the circuit court, by Thomas Daniel, a British subject, against William Wilson and others, upon a bond, dated the 11th of October 1791, for the penal sum of 60,000*l.*; that the bond had been taken, as an indemnity, from the defendants below, in an attachment brought by them against the plaintiff in a state court; and that the attachment was dismissed by the court, and the plaintiffs adjudged to pay the costs. The present plaintiff laid his damages, in conseqence of the attachment, at 20,000*l.*

Wilson v. Daniel.

The sole defendant below, William Wilson (the other defendants being dead, or not being arrested on the process), pleaded: 1. Performance of the condition of the bond: 2. That no costs had been awarded to the plaintiff below, in the attachment-suit, nor had any damages been recovered by him against the parties, for suing out the attachment. The plaintiff below replied: 1. That the defendant had not performed the condition of the bond: 2. That the court did award costs in the attachment-suit to the plaintiff below, which he was ready to verify by a transcript of the record: and 3. The plaintiff demurred to so much of the defendant's plea, as respects damages. The defendant below rejoined: 1. As to the judgment for costs in the attachment-suit, *nul tiel record:* and 2. As to the replication upon the question of damages, joinder in demurrer.

The record then proceeded: "The parties, by their attorneys, being fully heard, it seems to the court; that the said second plea of the defendant, and the matter therein contained, are not sufficient in law to bar the plaintiff from having and maintaining his action against the said defendant: therefore, it is considered, that judgment be entered for the plaintiff on his demurrer to that plea." "And at another day, to wit, &c., came the parties, &c.: and thereupon, also came a jury, &c. And now, &c., the jury aforesaid returned into court, and brought in their verdict in these words:—'We of the jury find for the plaintiff, the debt in the declaration mentioned, to be discharged by the payment of $1800 damages.'" * "Therefore, it is considered by the court, that the plaintiff recover against the defendant 60,000*l.*, of the value of $200,000, his debt aforesaid, and his costs by him about his suit in this behalf expended. And the said defendant in mercy, &c. But the judgment is to be discharged by the payment of the said $1800 and the costs." [*404

At the present term, as well as in February term 1797, two questions were made and argued, independent of the objection to the form of issuing and returning the writ of error: 1. Whether the judgment below was so defective, that a writ of error would not lie on it, inasmuch as no judgment was given upon the plea of *nul tiel record.* 2. Whether the supreme court had jurisdiction of the cause, inasmuch as the real and operative judgment of the circuit court was only for $1800; and the judicial act provides, that there shall be no removal of a civil action from the circuit court into the supreme court, unless the matter in dispute exceeds the sum or value of $2000 (1 U. S. Stat. 84, § 22).(*a*) On the first point, no opinion was given by the court at the former argument; but on the second point, CHASE, PATERSON and CUSHING, Justices, concurred in considering the judgment as a judgment at common law, for the penalty of the bond, and therefore, that the court had jurisdiction: WILSON, Justice, dissented; and IREDELL, Justice (who had presided in the circuit court), declined taking a part in the decision. The second point was, however, re-argued, at the instance of *E. Tilghman*, who was answered by *Lee* and *Ingersoll;* and the opinion of the court was given to the following effect.

ELLSWORTH, Chief Justice.—There have been two exceptions taken to the record in the present case: 1. That the judgment of the inferior court

(*a*) See 2 Dall. 358; Cases temp. Hardw. 5.

is so defective, that a writ of error will not lie upon it. It is evident, however, that the judgment is not merely interlocutory; but is in its nature final, and goes to the whole merits of the case. Though imperfect and informal, it is a judgment on which an execution could issue; and as the defendant below might be thus injured by it, we are unanimously of opinion, that he is entitled to a writ of error.

2. The second exception is, that the judgment is not for a sum of sufficient magnitude to give jurisdiction to this court. On this exception, there exists a diversity of sentiment, but it is the prevailing opinion, that we are not to regard the verdict or judgment, as the rule for ascertaining the value of the matter in dispute between the parties. By the judicial statute, it is
*405] provided, that certain decisions of the circuit courts, in certain *cases, may be reversed on a writ of error in the supreme court; but it is declared, that the matter in dispute must exceed the sum or value of $2000. To ascertain, then, the matter in dispute, we must recur to the foundation of the original controversy—to the matter in dispute, when the action was instituted. The descriptive words of the law point emphatically to this criterion; and in common understanding, the thing demanded (as in the present instance, the penalty of a bond), and not the thing found, constitutes the matter in dispute between the parties.

The construction which is thus given, not only comports with every word in the law, but enables us to avoid an inconvenience, which would otherwise affect the impartial administration of justice. For, if the sum or value found by a verdict, was considered as the rule to ascertain the magnitude of the matter in dispute, then, whenever less than $2000 was found, a defendant could have no relief against the most erroneous and injurious judgment, though the plaintiff would have a right to a removal and revision of the cause, his demand (which is alone to govern him) being for more than $2000. It is not to be presumed, that the legislature intended to give any party such an advantage over his antagonist; and it ought to be avoided, as it may be avoided, by the fair and reasonable interpretation, which has been pronounced.

Iredell, Justice.—I differ from the opinion which is entertained by a majority of the court, on the second exception; though, if the merits of the cause had been involved, I should have declined expressing my sentiments. As, however, the question is a general question of construction, and is of great importance, I think it a duty, briefly, to assign the reasons of my dissent.

The true motive for introducing the provision, which is under consideration, into the judicial act, is evident. When the legislature allowed a writ of error to the supreme court, it was considered that the court was held permanently at the seat of the national government, remote from many parts of the Union; and that it would be inconvenient and oppressive to bring suitors hither for objects of small importance. Hence, it was provided, that unless the matter in dispute exceeded the sum or value of $2000, a writ of error should not be issued. But the matter in dispute here meant, is the matter in dispute on the writ of error. In the original suit, indeed, I agree, that the demand of the party furnishes the rule of valuation; but the writ of error is of the nature of a new suit; and whatever may have been form-

erly the question on the merits, if we think the plaintiff is not entitled to recover more than *$1800, the court has not jurisdiction of a cause of such value, and cannot, of course, pronounce a judgment in it. [*406

At common law, indeed, the penalty of the bond was alone regarded; and though, in a case like the present, only one shilling damages should be given by the jury, the judgment at common law would be rendered for the whole penalty; so that the suffering party would be obliged to resort to a court of equity for relief. The legislature, however, has deemed it expedient to guard against the mischief, and at the same time, to prevent a circuity of action, by empowering the common-law courts to render judgment, in causes brought to recover the forfeiture annexed to any articles of agreement, covenant, bond or other specialty, for so much as is due, according to equity. From the time of passing the act, the plaintiff can recover no more, under the penalty of the bond, than the damages assessed or adjudged; and if a court of common law is thus empowered to regard the matter in dispute, independent of the strict common-law forfeiture of the penalty, this ought to be deemed, to every legal intent, the proper mode of settling and ascertaining the value or amount, to which the words of the law shall be applied, in the case of a writ of error.

The objection, which seemed, principally, to operate against this doctrine, in the mind of the court, as well as of the bar, was its tendency to entitle one party to a writ of error, and to exclude the other: but the objection cannot arise in this case, as both parties would be alike estopped by the insufficiency of the sum. A new law, however, of a scope so extensive, cannot be expected to provide for every possible case; and it is no reason why a plain provision should not operate, that another provision may be necessary, to avoid an inconvenience, or to establish equality between the parties.

I must, therefore, repeat my opinion, that although the plaintiff's demand is to be regarded in the original action; yet, that the sum actually rendered by the judgment, is to furnish the rule for fixing the matter in dispute upon a writ of error. And the sum actually rendered being less than $2000, the court cannot, I think, exercise a jurisdiction in the present cause.

CHASE, Justice.—On the first exception to this record, there is no diversity of opinion; and I also agree with the majority of the court, in the decision upon the second exception, though for reasons different from those that have been assigned.

This is a question of jurisdiction; and the law vests the jurisdiction, if the matter in dispute between the parties exceeds the sum or value of $2000. Whenever the objection arises on the amount of the matter in dispute, it is not, in my *opinion, to be settled here, by what appears on the writ of error, but it is to be settled in the inferior court, according to the circumstances appearing there, in each particular case. There is no common, uniform rule that can be applied to the subject. I do not think, that the demand of the plaintiff ought to be made the sole criterion; for then every plaintiff might entitle himself, in every case, to a writ of error, by laying his damages proportionally high: and I think, that the amount rendered by the judgment would be found, in the far greater number of cases, to be the true rule. It must be acknowledged, however, that in actions of *tort* or tres- [*407

pass, from the nature of the suits, the damages laid in the declaration afford the only practicable test of the value of the controversy.

Inquiring, therefore, what was in dispute in the present case, we find, that the action was brought on a bond, with a condition for performing two acts, and the non-performance of both acts constitutes the breach assigned. The record is distorted by great irregularities; but every part of the pleadings, verdict and judgment, that is not conformable to the common law, I reject, as not belonging to the case, which is neither founded on the statute of 8 & 9 *Wm. III.*, *c.* 10, nor on the act of the assembly of Virginia. Considered, therefore, as an action at common law, the penalty is forfeited on the non-performance of either of the acts which are the subject of the condition. The judgment of the court is rendered for that penalty; and though it is stated, that the judgment shall be discharged, on payment of a smaller sum, such a stipulation is inconsistent with the nature of a common-law judgment; it must be treated as mere surplusage; and in this view of the case, I am of opinion, that the court has jurisdiction.

Ellsworth, Chief Justice.—I will repeat and explain one expression, which was used in delivering the opinion of the court, and which seems to have been misunderstood.

It was not intended to say, that on every such question of jurisdiction, the demand of the plaintiff is alone to be regarded; but that the value of the thing put in demand furnished the rule. The nature of the case must certainly guide the judgment of the court; and whenever the law makes a rule, that rule must be pursued. Thus, in an action of debt on a bond for 100*l.*, the principal and interest are put in demand, and the plaintiff can recover no more, though he may lay his damages at 10,000*l.* The form of the action, therefore, gives in that case the legal rule. But in an action of trespass, or assault and battery, where the law prescribes no limitation as to the amount to be recovered, and the plaintiff has a right to estimate his damages at any sum, the damage stated in the declaration is the thing put
*408] in *demand, and presents the only criterion, to which, from the nature of the action, we can resort, in settling the question of jurisdiction.

The proposition, then, is simply this: Where the law gives no rule, the demand of the plaintiff must furnish one; but where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded.

The objections overruled, and judgment affirmed. (*a*)

(*a*) Besides the exceptions above stated, several errors were assigned, which had been argued at a former term, in the absence of the chief justice. The court, after deciding the question of jurisdiction, called on the counsel to proceed in the argument on those errors; but *E. Tilghman* observed, that the court had been so evidently against him, that he would not press the subject further.