

*MAY TERM, 1801.

Present—TILGHMAN, Chief Justice, and BASSET and GRIFFITHS, Circuit Judges.¹

HURST's Lessee v. JONES.

Costs of former suit.

A defendant cannot be compelled to proceed to trial, until payment of the costs of a former action, between the same parties, for the same cause, which had been *non-prossed*.

A FORMER ejectment, between the same parties, for the same land, had been *non-prossed*; but the costs of suit remained unpaid.

The defendant's counsel objected to the trial of the present ejectment, until the costs of the former were paid.

BY THE COURT.—The objection is reasonable and just. The defendant cannot, under such circumstances, be compelled to proceed to a trial.

The cause continued.

Roale, for the plaintiff. *E. Tilghman*, for the defendant.

HOLLINGSWORTH v. DUANE.(a)

New trial.

A verdict will not be set aside, on account of the alienage of a juror. *Semble*, that it is a cause of challenge, before he is sworn.

IN this case (which was an action for a libel), the defendant filed a plea to the jurisdiction of the court, on the ground, that he, as well as the plaintiff, was a citizen of Pennsylvania. Issue being joined on that fact, it was found by the jury, that the defendant was not a citizen; and thereupon, in consequence of a previous agreement, a *venire* issued to ascertain the *quantum* of damages, which the verdict settled at \$600. After ^{the} verdict was given, it appeared, that one of the jurors was an alien; and [^{*354}

(a) s. c. Wall. C. C. 47, 51, 77, 141.

¹ This was the court established under the act of 13th February 1801 (1 U. S. Stat. 89), under the Adams' administration. Hon. William Tilghman (afterwards and for many years Chief Justice of Pennsylvania) was commissioned as its president judge, on the 3d March 1801, to hold his office, during good behavior, as provided by the constitution. But on the 8th of March 1802, on the coming in of the Jefferson administration, the act was repealed (1 U. S. Stat. 132), and the judges were deprived of their offices, without the imputation of a fault. It is known, that Chief Justice Tilghman's opinion was against the validity of the repealing law; for, in a very able protest, published by Judge Basset, in which the breach of the constitution was strenuously as-

serted, he remarks: "If any difference between me and my associates in office exists, it relates merely to the point of time for expressing our sentiments. I can confidently assert that, on deliberation, they coincide with me in other respects." It is said, that Judge Tilghman, in after life, never alluded to the circumstance of his having been a judge of that court. Binney's Eulogium, 16 S. & R. 441. Its decisions are chief reported in Mr. John B. Wallace's reports, originally published in 1801, by Asbury Dickens. The constitutionality of the repealing act was mooted, in the case of *Stuart v. Laird*, 1 Cr. 299, but the judges avoided any expression of opinion upon the question.