

Hurst's Case.

the vessel ; but subjects the owner to a penalty, although it is physically impossible, that he should do the thing, for the omission of which he is to be punished.

But an American vessel does not cease to be entitled to her privilege, any more by the act of sale, than by the act of altering her form or burden ; both cases being embraced by the provisions of the 14th section. Let us suppose, therefore, that the construction of the vessel should be altered, either in the port to which she belongs, or in any other port : would she lose her privilege, before the owners could have an opportunity to apply for a new registry ? And if not, why should the privileges be lost, before an opportunity occurs to make the application for a new registry, in the case of a sale ? I can perceive no reason for a distinction.

As to the provisions of the 17th section, they are designed to compel a discovery of any transfers of a vessel, which may have been made, during her absence from the port ; in order that it might appear, whether she continued to be a privileged vessel of the United States. If it appeared, that she had been transferred to a foreigner, her privileges were forfeited, from the moment of transfer ; and if it appeared, that she had been sold to a citizen, the officers of the customs were enabled, by a knowledge of the fact, to exact the foreign duties, in future, should no application be made for a new registry.

I am, upon the whole, of opinion, that the appellants are not liable for higher duties, than are payable by vessels of the United States ; and consequently, the judgment of the district court must be reversed.

Judgment reversed. (a)

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\*OCTOBER TERM, 1804.

Present—WASHINGTON, Justice, and PETERS, District Judge.

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*Privilege of suitor.*

A citizen of another state, who, when in attendance on court as a suitor, has been subpoenaed as a witness in another case, is privileged from an arrest in execution, issuing from a state court, while at his lodgings ; and the sheriff will be indemnified, by an order of discharge of a court of competent jurisdiction.

On the affidavit of Timothy Hurst, it appeared that he had come from his residence at New York, to attend the trial of *Hurst v. Hurst* (in which he was a party), at the present term ; that after his arrival, he had been subpoenaed as a witness, in the case of *W. Hurst v. Rodney*, which was also upon the trial-list ; that yesterday (the 13th of November), while he was at his lodgings, in Hardy's tavern, he had been arrested by the sheriff, upon a *ca. sa.* issuing from the supreme court of Pennsylvania ; and that he had come to Philadelphia, and was remaining here, at the time of the arrest, only upon the business of his suit, and in obedience to the *subpœna*.

(a) This judgment was affirmed by the supreme court, in 4 Cr. 48.

(b) s. c. 1 W. C. C. 186.

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*Ingersoll*, upon these facts, moved that Hurst should be discharged from the custody of the sheriff. And he argued, in support of the motion: 1st. That the application was properly addressed to this court, and not to the supreme court. 2d. That a discharge from the *ca. sa.*, by order of the court, without the consent or concurrence of the plaintiff, would not operate as a satisfaction of the debt; and another execution might afterwards be taken out. 3d. That the discharge by a competent court, would excuse and protect the sheriff, in an action for an escape. Barnes 2; Ld. Raym. 1524; Bac. Abr. 631; 5 T. R. 686; 5 Bac. Abr. 617, 673; 1 H. Bl. [\*\*388 636; Tidd Pr. 61; 2 Str. 990; 1 Dall. 356; (a) 3 Ibid. 478; Dyer 60.(b)

*Rawle*, in opposition to the discharge, insisted, that under the circumstances of this case, Hurst was neither privileged as a witness, nor as a party. 1st. Not as a witness: the arrest was made at the lodgings of the defendant; but although a witness is privileged, while he is going from home, while he is actually attending the court, and while he is returning to his home; he is not privileged while he is at home. 2d. Not as a party: if the privilege of a party is not limited to the same times and places, as the privilege of a witness, its extent is indefinite, and its operation unequal. Is a suitor in this court, residing in Georgia, protected from arrest, as soon as he receives the notice of trial, in his own state, and in every state through which he passes on his journey to Philadelphia? Again, is every resident citizen of Philadelphia, who has a suit depending, privileged during the trial term, not only while actually attending the court, but while at home, with his family? And if not, why should a non-resident suitor be protected at his lodgings, which are his home? There is, indeed, a distinction between the cases, favorable to the witness; for a witness is under an absolute obligation to attend the court; but a party may prosecute his suit by an attorney, without personal attendance. Besides, the sheriff will be bound to show a regular discharge, in an action for an escape; and if the supreme court should adhere to the rule in *Starret's case*, the order of this court will not be a justification. 1 Brownl. 15; Barn. 200; 5 T. R. 686; 2 Cha. Ca. 69; T. Raym. 100; 2 Ld. Raym. 1524; 6 Com. Dig. 89, 88; Wood's Inst. 478; 2 Bro. Abr. 159, tit. Priv., pl. 37.

WASHINGTON, Justice.—I will not examine the powers of the supreme court of the state, upon the present occasion. It is enough, to ascertain that the power of this court is competent to the object proposed. If, indeed, any injury would be done either to the plaintiff in the suit, or to the sheriff (both of whom have acted innocently, and without knowledge of the facts, on which the claim of privilege arises), by our interposition, we might be induced to pause upon the subject. But, as to the plaintiff, it is clear, that he may renew his execution, whenever the privilege ceases: and as to the sheriff, the order of a court of competent jurisdiction, touching the subject-

(a) It was admitted by the counsel, on both sides, that the authority of *Starret's case*, had been often doubted, both on the bench and at the bar, though never expressly overruled.<sup>1</sup>

(b) See also, 1 Dall. 357 note.

<sup>1</sup> But see the opinion of Yeates, J., in *Hannum v. Askew*, 1 Yeates 25.

Walker v. Smith.

matter, must be a conclusive justification in every other court, acting upon sound principles of law and justice.

To decide the principal question, therefore, I find it necessary to go no further than to state, that I think the witness was, in <sup>\*389]</sup> this case, privileged, while he was at his lodgings. The *subpœna* was in force, and the arrest of the witness, at that place, has all the effects which could be produced by an arrest in the streets while coming to or going from the court.

PETERS, Justice.—I concur in the sentiments that have been expressed by the presiding judge; and add, as my separate opinion, that the party is entitled to be discharged, upon both the grounds of privilege.

A special order of discharge was, accordingly, made and filed, at the instance of *Dallas*, who appeared for the sheriff.

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WALKER *et al.* v. SMITH.

*Factor.—Damages.*

One who accepts a consignment, is liable in damages for a breach of instructions, though his services were rendered gratuitously.

Where there is a legal measure of damages, the jury are bound by it, though the action sound in tort.

CASE. On the trial of this cause, the following facts appeared: The plaintiffs were merchants of London; and in March 1796, shipped and consigned to the defendant certain goods, invoiced at 270*l.* 14*s.* 8*d.* sterling, accompanied with a letter, stating that "these goods were shipped by order of Mr. J. B., and for his account; and he was to remit us the amount, on his arrival at Philadelphia: but since they were shipped, some circumstances have occurred, which have created some doubts in our minds, respecting his solidity; and by the advice of our friends, we have adopted this method to secure ourselves, through your friendly assistance, which we request on this occasion. As we do not want to deprive B. of the benefits to be derived from the sale of these goods, we wish you to hold them at his disposal, but not to deliver them to him, without being paid for the amount, or having such security given you therefor, as is satisfactory to yourself. Should he not be able to effect either of these, in a reasonable time, we would wish you to dispose of them for our account, and remit us the amount in good bills." The defendant duly received the goods, but delivered them over to B., without receiving payment, or exacting security; and shortly afterwards, B. failed. The defendant, however, representing other creditors of B., as well as the plaintiffs, made a composition, by which he received for the proportion of the plaintiffs, 151*l.* 16*s.* sterling, and remitted that sum to them, without charging commissions, in a letter dated the 11th of December 1800. The plaintiffs refused to ratify the composition, and brought the present suit to recover the invoice value of the goods, with interest, according to the usage of trade.

On the trial, *Ingersoll* assumed three grounds of defence: 1st. That there was no cause of action; as the defendant had accepted the consign-