court which can contest its obligation. It is true, that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case, the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside.[1]

Jacob Resler *v.* James Shehee.

Practice.—Opening of default.

After the first term next following an office-judgment, in Virginia, it is a matter of mere discretion in the court, whether they will admit a special plea to be filed, to set aside that judgment. Sheehee *v.* Resler, 1 Cr. C. C. 42, affirmed.

This was a writ of error upon a judgment of the Circuit Court of the district of Columbia, sitting at Alexandria, in an action for a malicious prosecution, brought by *Shehee* v. *Resler*, originally in the court of hustings for the town of Alexandria, and transferred by act of *congress of the 27th of February 1801, concerning the district of Columbia to the circuit court of that district. (Reported below, 1 Cr. C. C. 42.) [*111

The declaration stated, that on the 26th of December 1799, Resler, without reasonable cause, procured a certain false, scandalous and malicious warrant to be issued against Shehee, by F. Peyton, Esq., then mayor of the town of Alexandria, charging Shehee with having received from a certain negro slave, called ——, the property of Baldwin Dade, certain stolen goods, viz., one box of tallow, knowing the same to be stolen; which warrant was executed upon the said Shehee, who, by means of the false and malicious representations of Resler, was recognised to appear before the court of hustings of Alexandria, at April term 1800, to answer to the charges contained in the warrant, at which court, Shehee was acquitted.

At the rules, held at the clerk's office, on the 2d February 1801, an office-judgment was entered against Resler, for want of a plea, and a writ of inquiry awarded, returnable to the court of hustings, which by law would have been held on the first Monday of April 1801. But the act of congress of 27th February 1801, which provides for the government of the district of Columbia, erected a circuit court for the district, to which it transferred all the causes then pending in the court of hustings; and enacted, that the circuit court should hold four sessions a year, in Alexandria, viz., on the 2d Mondays of January, April and July, and the 1st Monday of October.

Two terms of the circuit court, viz., April and July, having elapsed, without the writ of inquiry being set aside, the defendant Resler, by his counsel, at October term 1801, on the 9th day of the month, appeared and

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[1] See Hartung *v.* People, 22 N. Y. 95.

moved the court to set aside the writ of inquiry, on filing the following special plea in justification, viz. : "And the said defendant, by his attorney, George Youngs, comes and defends the force and injury, &c., and for plea saith, that on the 26th day of December, in the year 1799, at the town of Alexandria aforesaid, and within the jurisdiction of the court of hustings of said town, a box of tallow belonging to the defendant, as his own proper goods and chattels, of the value of two dollars, *was stolen out of the house of the defendant, by some person unknown to the defendant, and the said defendant being informed by a certain John McGill, his journeyman, that the said box of tallow was in the house of the plaintiff, complained to Francis Peyton, mayor of the said town, of and concerning the said box of tallow, who, by his warrant, dated the 27th day of December, in the year 1799, called the plaintiff before him and examined him ; and upon his examination, and the testimony of sundry persons, bound the plaintiff to appear at the next grand jury court of hustings of said town, to answer the charge contained in said warrant, of and concerning the receiving the said box of tallow, so stolen as aforesaid, and which was found in his possession, whereupon, the plaintiff appearing, was acquitted and discharged by the said court, which is the same procurement of the said warrant and acquittal whereof the aforesaid action is brought, and this the defendant is ready to verify," &c.

*112]

The plaintiff objected to the filing of that plea, in this stage of the cause, and upon argument, the court, on the 13th day of October, refused to receive it ; whereupon, the defendant took a bill of exceptions, and pleaded the general issue, upon which, on the 14th day of October, there was a verdict for the plaintiff, and judgment for $1000 damages. On that judgment the defendant brought his writ of error to this court, and the error assigned was the refusal of the court below to suffer the defendant to file the special plea above recited.

The cause was, at this term, argued by *C. Lee*, for plaintiff in error, and *Simms* and *Mason*, for defendant.

Lee.—This case depends upon the law and practice of Virginia. By the act of congress of 3d March 1801, supplementary to the act concerning the district of Columbia, § 3, it is enacted, "that the circuit court for the county of Alexandria shall possess and exercise the same powers and jurisdiction, civil and criminal, as is now possessed and exercised by the district courts of Virginia." *The act of assembly of Virginia, respecting the district courts of that state, § 28 (Rev. Code, p. 85), provides, that "every judgment entered in the office against a defendant and bail, or against a defendant and sheriff, shall be set aside, if the defendant, at the succeeding court, shall be allowed to appear without bail, put in good bail, being ruled so to do, or surrender himself in custody, and shall plead to issue immediately." And in § 42 of the same act (p. 87), it is further provided, "that all judgments by default, for want of an appearance or special bail, or pleas as aforesaid, and nonsuits or dismissions obtained in the office, and not set aside on some day of the next succeeding district court, shall be entered by the clerk, as of the last day of the term ; which judgment shall be final in actions of debt founded on any specialty, bill, or note in writing, ascertaining the demand, unless the plaintiff shall choose, in any such case, to have a writ of inquiry of damages ; and in all other cases, the damages shall be

*113]

ascertained by a jury, to be impannelled and sworn to inquire thereof, as is hereinafter directed."

Upon an equitable construction of these sections of the act, the practice in Virginia has been, to permit the defendant to come in at a subsequent term, and avail himself of any such defence as he has, in the same manner as if he had pleaded it, at the particular term mentioned. This question has been discussed in Virginia, and received the construction for which I contend. The case of *Downman* v. *Downman's Executors*, 1 Wash. 26, was a plea of tender, after office-judgment confirmed. In p. 27, the court say, "these words, 'plead to issue immediately,' are the same as were used in the old act of 1753, for establishing the general court; under which, the practice of that court was very liberal, in allowing a defendant to plead that which did not make an issue, but required subsequent pleadings, provided the real justice of the case, and not intended delay, was thereby promoted. This is unavoidable in cases of bonds with collateral conditions, where the defendant cannot plead to issue." This is also agreeable to the principle laid down by Lord Holt, in 2 Salk. 622: "That though a judgment be ever so regularly entered, it shall be set aside at any time, on payment of costs, so as the plaintiff does not *lose a trial." And again, in p. 28, "Considering [*114 the circumstances of this country, and the dispersed situation of attorneys and their clients, who can seldom communicate with each other but at court, justice seems to require a relaxation in these rules (English rules) of practice. It would seem to me proper to allow a discretion in the judges to admit any plea which appears necessary for the defendant's defence, and only to resort to the rigor of the rule, where delay appears to be intended." This plea, then, if necessary for the defendant's defence, ought to have been admitted. It contains nothing exceptionable, and the facts stated in it, if true, are a justification. There is no case more proper for special pleading than one in which the prejudices of the people are enlisted on one side or the other. The law only directs what is to be done, the first term, but afterwards, it is left open to the discretion of the court. In this case, there can be no pretence, that the plea was intended for delay, as it was offered on the 9th, and the cause was not tried until the 14th of October, so that there was full time to answer the plea and make up the issue.

To show that this plea is a good justification, I refer to the case of *Coxe* v. *Wirrall*, Cro. Jac. 193, where a similar plea was adjudged good, upon demurrer.

It is a common practice, even in the English courts, to permit the general issue to be withdrawn, and a special plea filed, where it is not done, with an intent of delay. *Jefferys* v. *Walton*, 1 Wils. 177; and *Taylor* v. *Joddrell*, Ibid. 254. But the case of *Downman* v. *Downman's Executors*, before cited, seems conclusive upon this question.

Chase, J.—Have the rules of the Virginia courts been adopted in the circuit court?

Lee.—I conceive the circuit court of Alexandria to be in the same situation as the district court at Richmond. And as I understand the act of congress, they are obliged to adopt the practice of the courts of Virginia, except where the circuit court has actually made a different rule.

Simms, for defendant in error.—I will not deny that the courts of Virginia have gone the length stated in Washington's Reports. They have used their discretion, and have considered whether the plea offered tends to the justice of the cause, or whether it is intended only for delay. In this case, the time having passed, when the defendant could file his plea as a matter of right, it was entirely in the discretion of the court to admit or reject it.

It is certainly not a sufficient justification, for the defendant to say that the magistrate committed the plaintiff; for that neither destroys the evidence of express malice, nor shows probable cause for the prosecution. The magistrate might have committed upon the evidence of the defendant Resler himself; so that this plea would most probably have been overruled, upon demurrer, and at any rate, would have created delay; for in a matter of so much consequence, it cannot be presumed, that the counsel for the plaintiff could at once determine whether to demur or to join issue.

The defendant was not precluded from making a proper defence. He might have shown probable cause, on the general issue, for the gist of the action is the want of probable cause; and the court had the power of instructing the jury whether such cause was shown or not. Bull. N. P. 14.

It is said, that the plea was offered in a reasonable time. It cannot surely be said, that three days, in the hurry of the court, is a reasonable time to answer such a plea—so say the courts of Virginia.

This plea amounts to the general issue, and therefore, ought not to have been received. The justice of the case did not require it, and it is only to promote justice that the courts have ever deviated from the precise terms of the law.

Mason, on the same side.—Admitting for a moment, that the practice of the Virginia courts was binding upon the circuit court, yet the *court have only exercised the same discretion which a Virginia court might have exercised. There is a particular time allowed for special pleading; after that time, the admission of a plea is discretionary with the court. The case in Washington's Reports is clear, to show that it is altogether a matter of discretion. The court might have refused to receive any plea at all; for the right of the defendant to set aside the office-judgment, by pleading to issue, is confined to the court next succeeding the office-judgment.

*116]

But the defendant had every advantage under the general issue, which he could have had under his plea. It is extremely clear, that the plaintiff must show malice, and the defendant matter of justification. The rules of practice in the courts of Virginia, are confined to Virginia; the courts of the United States are not bound by them; they have power to make their own rules.

Lee, in reply.—Our complaint is, that the inferior court has not exercised its discretion in the manner it ought to do. I use the word *discretion* differently from Mr. Mason. The exercise of such discretion is subject to the control of this court. If we look to the decisions of the courts in Virginia, we find, that they have soundly exercised their discretionary power. The practice has constantly been, to let in the parties, notwithstanding any *laches*. Was it proper in the court to say, that although we have a right to suffer you to bring the question of probable cause before the court, and to take it from the jury, and although you wish so to do, yet we will not permit you,

but will compel you to go before the jury; where facts disclosed, not pertinent to the issue, might make an improper impression?

CUSHING, J.—Do you admit, that the defendant might have given in evidence, under the general issue, the facts stated in the plea offered?

Lee.—It is sufficient for us, if it was a matter of doubt. In such a case, a cautious practitioner will always take the safest method, and plead the facts specially.

*There is no doubt, but the court had a right to make rules of practice for itself. But not having made such a rule in this case, its [*117 discretion ought to have been guided by the practice of the Virginia courts. We, therefore, hope, that this court will correct the indiscreet exercise of the power of the court below in this case.

THE COURT.—It is true, that the courts in Virginia have been very liberal in admitting any plea, at the next term after an office-judgment, which was necessary to bring forward the substantial merits of the case, whether it was strictly an issuable plea, or not.[1] But at a subsequent term, it is a matter of mere discretion with the court, whether they will admit any special plea at all.

In the present case, the facts stated in the plea offered, might have been given in evidence on the general issue; the court exercised their discretion soundly in rejecting the plea.

Judgment affirmed.

TURNER *v.* FENDALL.

Execution.—Proceedings against sheriff.—Evidence.

A sheriff makes the money upon a *fi. fa.* at the suit of A. *v.* B., and afterwards a *fi. fa.* against A. is put into his hands, he cannot levy it upon the money of A., made by the *fi. fa.* of A. *v.* B., for it does not become the goods and chattels of A., until it is paid over to him; and by the command of the writ, the sheriff is, in strictness, bound to bring the money into court, there to be paid to the plaintiff.

Money may be taken in execution, if in the possession of the defendant.

On a motion, in Virginia, against a sheriff, for not paying over moneys by him collected on execution, it is not necessary that the judgment against the sheriff should be rendered at the term next succeeding that to which the execution has been returned.

Proceedings before magistrates, in cases of insolvent debtors, are matters *en pais*, and may be proved by parol testimony.

It is not error in the court below, to reject, as incompetent, admissible testimony, tending to prove a fact not relevant to the case before the court.

Fendall *v.* Turner, 1 Cr. C. C. 35, affirmed.

THIS was a writ of error to reverse a judgment of the Circuit Court of the district of Columbia, sitting at Alexandria, rendered on a motion by Fendall against Turner, late serjeant of the corporate town of Alexandria, for the amount of money received by him on a *fieri facias* issued on a judgment in favor of Fendall against one Towers. (Reported below, 1 Cr. C. C. 35.)

This motion was grounded on an act of assembly of Virginia (Rev. Code, p. 317, § 51), by which it is enacted, that "if any sheriff, under-sheriff or

[1] See Mechanics' Bank of Alexandria *v.* Withers, 6 Wheat. 106.