of the Supreme Court might do under the act of April 5th, 1790. (post. chap. 1505.)

See the act of April 7th, 1807, (chap. 2824,) with respect to the daily allowance to poor insolvent debtors.

Respublica v. *Negro Jacob. Franklin, April* 1799.

The prisoner was convicted of larceny, on an indictment removed from the sessions, upon slight evidence, and against the charge of the Court. Under the special circumstances, his counsel moved that he should be bailed till the day in bank, when they would move for a new trial.

The counsel for the prosecution gave no consent, but submitted to the Court's decision.

The Court said it lay in their discretion to admit him to bail, though after conviction.—One convicted of manslaughter has been bailed before clergy had. 1 Salk. 61, 103. 12 Mod. 109. 2 Hawk. c. 15. § 40. And the peculiar circumstances of the present case call for the Courts interposition. The prisoner accordingly entered into a recognizance; and in December 1799, a new trial was granted in bank, upon a statement made of the evidence, and the Attorney-General immediately entered a *nolle prosequi*. MSS. Reports.

See the statute 1 and 2 Philip and Mary, Sect. 2, 3, 4, 5, which extend to *Pennsylvania*. The 4th section which is in daily practice, is in these words: "And that the said justices, when any such prisoner is brought before them for any manslaughter or felony, before any bailment or mainprise, shall take the examination of the said prisoner, and information of them that bring him, of the fact and circumstances thereof, and the same, or as much thereof as shall be material to prove the felony, shall put in writing before they make the same bailment; which said examination, together with the said bailment, the said justices shall certify at the next general gaol delivery to be holden within the limits of their commission."

The 5th section relates to the duty of coroners.

So—Stat. 2d and 3d *Philip* v. *Mary*, chap. 10, sect. 2; "And for as much as the said act, (1 and 2 P. and M.) doth not extend to such prisoners as shall be brought before any justice of the peace for manslaughter or felony, and by such justice shall be committed to ward for the suspicion of such manslaughter or felony, and not bailed, in which case the examination of such prisoner and of such as shall bring him, is as necessary, or rather more than where such prisoner shall be let to bail or mainprize: *Be it therefore enacted*, &c. that from henceforth such justice or justices, before whom any person shall be brought for manslaughter or felony, or for suspicion thereof, before he or they shall commit or send such prisoner to ward, shall take the examination of such prisoner, and information of those that bring him of the fact and circumstance thereof, and the same, or as much thereof as shall be material to prove the felony, shall put in writing within two days after the said examination; and the same shall certify in such manner and form, and at such time, as they should and ought to do, if such prisoner so committed, or sent to ward, had been bailed or let to mainprize, upon such pain as in the said former act is limited and appointed for not taking, or not certifying such examinations as in the said former act is expressed. *And be it further enacted*, that the said justices shall have authority by this act, to bind all such by recognizance or obligation, as do declare any thing material to prove the said manslaughter or felony against such prisoner as shall be so committed to ward, to appear at the next general gaol delivery to be holden within the county, city, or town corporate where the trial of the said manslaughter or felony shall be, then and there to give evidence against the party; and the said justices shall certify the said bonds taken before them, in like manner as they should and ought to certify the bonds mentioned in the said former, upon pain as in the said former act is mentioned, for not certifying such bonds as by the said former act is limited and appointed to be certified." 1705.

CHAPTER CLII.

An ACT *for taking lands in execution for payment of debts.*

TO the end that no creditors may be defrauded of their just debts, due to them from persons who have sufficient real, if not personal, estates to satisfy the same, *Be it enacted*, That all such lands, tenements and hereditaments whatsoever, within this province, where no sufficient personal estate can be found, shall be liable to be seized and sold, upon judgment and execution obtained. Lands, &c. may be sold for the payment of debts;

1705.

unless the rents will satisfy the debt in seven years.

II. *Provided always*, That when any debt is hereafter recovered, and damages awarded, or when any debt is acknowledged before such as have, or shall have, power to take cognizance thereof, and executions awarded thereupon, to be levied upon the lands, tenements or hereditaments, of any person or persons whatsoever, it shall not be lawful for any Sheriff or other officer, by virtue of such executions, or of any writ or writs thereupon, to sell, or expose to sale, any such lands, tenements or hereditaments, in this province, which shall or may yield yearly rents or profits, beyond all reprizes, sufficient within the space of seven years, to pay or satisfy such debts or damages, with costs of suit; but that all those lands, tenements and hereditaments, shall, by virtue of the writ or writs of execution, be delivered to the party obtaining the same, until the debt or damages be levied by a reasonable extent, in the same manner and method as lands are delivered upon writs of *elegits* in England.

If not, &c. the lands may be sold.

III. *Provided nevertheless*, That if the clear profits of such lands or tenements shall not be found, by inquest of twelve men, to be sufficient within seven years, to satisfy the debt or damages in such executions; or if, before the extent be out, any other debts or damages shall be recovered against the same debtor or defendant, his heirs, executors or administrators, which, with what remains due upon such extent, cannot all be satisfied out of the yearly profits of the lands or tenements so extended within seven years, then, and in every such case, the Sheriff or other officer shall accordingly certify the same upon the return of such executions; whereupon writ or writs of *venditioni exponas* shall issue forth, to sell such lands and tenements, for and towards satisfaction of what shall so remain due upon such extent, as also towards satisfaction of all the rest of the said debts or damages, in manner as is herein after directed concerning the sale of other lands.

Proceedings thereon.

IV. *And be it further enacted*, That it shall and may be lawful for the Sheriff, or other officer, by a writ of *levari facias*, to seize and take all other lands, tenements and hereditaments in execution, and thereupon, with all convenient speed, either with or without any writ of *venditioni exponas*, to make public sale thereof, for the most they will yield, and pay the price or value of the same to the party, towards satisfaction of his debt, damages and costs. But before any such sale be made, the Sheriff, or other officer, shall cause so many writings to be made, upon parchment or good paper, as the debtor or defendant shall reasonably desire or request, or so many, without such request, as may be sufficient to signify and give notice of such sales or vendues, and of the day and hour when, and the place where, the same will be, and what lands or tenements are to be sold, and where they lie; which notice shall be given to the defendant, and the said parchments or papers fixed by the Sheriff, or other officer, in the most public places of the county or city, at least

Notice to be given ten days.

ten days before the sale; and upon such sale, the Sheriff or other officer shall make return thereof, indorsed or annexed to the said *levari facias*, and give the buyer a deed, duly executed and acknowledged in court, for what is sold, as has been heretofore used upon the Sheriff's sale of lands. But in case the said lands and hereditа-

After the sale the Sheriff to give the buyer a deed, &c.

ments so to be exposed, cannot be sold, then the officer shall make return upon the writ, that he exposed such lands or tenements to sale, and the same remained in his hands unsold, for want of buyers; which return shall not make the officer liable to answer the debt or damages contained in such writ, but a writ, called *liberari facias*, shall forthwith be awarded, and directed to the officer, commanding him to deliver to the party such part or parts of those lands, tenements and hereditaments, as shall satisfy his debt, damages and interest, from the time of the judgment given, with cost of suit, according to the valuation of twelve men; to hold to him as his free tenement, in satisfaction of his debt, damages and costs, or so much thereof as those lands, by the valuation thereof as aforesaid, shall amount unto. And if it fall short, the party may afterwards have execution for the residue against the defendant's body, lands or goods, as the laws of this province shall direct and appoint, from time to time, concerning other executions. All which said lands, tenements, hereditaments and premises, so as aforesaid to be sold or delivered by the Sheriff or officer aforesaid, with all their appurtenances, shall or may be quietly and peaceably held and enjoyed by the person or persons, or bodies politic to whom the same shall be sold or delivered, and by his and their heirs, successors or assigns, as fully and amply, and for such estate and estates, and under such rents and services, as he or they, for whose debt or duty the same shall be so sold or delivered, might, could or ought to do, at or before the taking thereof in execution. 1705.

How the creditor shall be satisfied, and hold the said lands, &c.

V. *Provided always*, That the messuage, lands or tenements, upon which the defendant is chiefly seated, shall not be exposed to sale before the expiration of one whole year after judgment is given, to the intent that the defendant, or any other for him, may redeem the same.

See the note to chap. 48, ante, pa. 8.

VI. And forasmuch as divers persons have mortgaged their lands and tenements in this province, for securing the payment of monies, and some of them have died before the time of payment, and left others to succeed them, that have proved insolvent, and others have neglected to pay the mortgage-money, and so mortgages have become no effectual security, considering how low the annual profits of tenements and improved lands are here, and the discouragements which the mortgagees meet with, by reason of the equity of redemption remaining in the mortgagers: *Be it therefore enacted*, That where default or defaults have been or shall be made or suffered, by any mortgager or mortgagers of any lands, tenements, or other hereditaments within this province, or by his, her or their heirs, executors, administrators and assigns, of or in payment of the mortgage-money, or performance of the condition or conditions, which they or any of them, should have paid or performed, or ought to pay or perform in such manner and form, and according to the purport, tenor and effect, of the respective provisoes, conditions or covenants, comprised in their deeds of mortgage or defeazance, and at the days, times and places, in the same deeds respectively mentioned and contained; that in every such case, it shall and may be lawful to and for the mortgagee or mortgagees, and him, her or them, that grant the said deeds of defeazance, and his, her and their

The mortgagee, upon non-payment of the mortgage-money, may, after one year, sue forth a writ of *scire facias*, &c.

1705. heirs, executors, administrators or assigns, at any time after the expiration of twelve months, next ensuing the last day whereon the said mortgage-money ought to be paid, or other conditions performed as aforesaid, to sue forth a writ or writs of *scire facias*, which the Clerk of the Court of Common Pleas for the county or city where the said mortgaged lands or hereditaments lie, [and he*] is hereby impowered and required to make out and dispatch, directed to the proper officer, requiring him, by honest and lawful men of the neighbourhood, to make known to the mortgager or mortgagers, his, her, or their heirs, executors or administrators, that he or they be and appear before the Magistrates, Judges or Justices of the said court or courts, to shew, if any thing he or they have to say, wherefore the said mortgaged premises ought not to be seized and taken in execution for payment of the said mortgage-money, with interest, or to satisfy the damages which the plaintiff in such *scire facias* shall, upon the record, suggest, for the breach or non-performance of the said conditions. And if the defendant in such *scire facias* appears, he or she may plead satisfaction or payment of part or all the mortgage-money, or any other lawful plea, in avoidance of the deed or debt, as the case may require: But if the defendants in such *scire facias* will not appear on the day whereon the same writ shall be made returnable, then, if the case be such as damages only are to be recovered, an inquest shall be forthwith charged to enquire thereof, and the definitive judgment therein, as well as all other judgments to be given upon such *scire facias*, shall be entered, that the plaintiff in the *scire facias* shall have execution by *levari facias*, directed to the proper officer; by virtue whereof the said mortgaged premises shall be taken in execution, and exposed to sale in manner aforesaid; and upon sale, conveyed to the buyer or buyers thereof, and the money or price of the same rendered to the mortgagee or creditor; but for want of buyers, [and] to be delivered to the mortgagee or creditor, in manner and form as is herein above directed concerning other lands and hereditaments, to be sold or delivered upon executions for other debts or damages; and when the said lands and hereditaments shall be so sold or delivered as aforesaid, the person or persons to whom they shall be so sold or delivered, shall and may hold and enjoy the same, with their appurtenances, for such estate or estates as they were sold or delivered, clearly discharged and freed from all equity and benefit of redemption, and all other incumbrances made or suffered by the mortgagers, their heirs or assigns; and such sales shall be available in law, and the respective vendees, mortgagees or creditors, their heirs and assigns, shall hold and enjoy the same, freed and discharged as aforesaid; but before such sales be made, notice shall be given, in writing, in manner and form as is herein above directed concerning the sales of lands upon executions, any law or usage to the contrary notwithstanding.

And expose to sale the mortgaged premises.

Such sales shall be available in law, &c.

Overplus to be returned to the debtor.

VII. *Provided also*, That when any of the said lands, tenements, or hereditaments, which by the direction and authority of this act

* *The words* [*and he*] [*and*] *inserted between crotchets in this section, are contained in the original roll and record, but not in the last edition. Though the insertion destroys the context, it has not been deemed proper to omit it. (Note to former edition.)*

are to be sold for payment of debts and damages, in manner aforesaid, shall be sold for more than will satisfy the same debts or damages, and reasonable costs, then the Sheriff or other officer, who shall make the sale, must render the overplus to the debtor or defendant; and then, and not before, the said officer shall be discharged thereof upon record, in the same Court where he shall make return of his proceedings concerning the said sales. 1705.

VIII. *Provided also*, That no sale or delivery, which shall be made by virtue of this act, shall be extended to create any further term or estate to the vendees, mortgagees or creditors, than the lands or hereditaments so sold or delivered shall appear to be mortgaged for, by the said respective mortgages or defeazible deeds. The estate of the mortgager shall pass to the buyer.

IX. *Provided also*, That if any of the said judgments, which do or shall warrant the awarding of the said writs of executions, whereupon any lands, tenements or hereditaments, have been or shall be sold, shall, at any time hereafter, be reversed for any error or errors, then, and in every such case, none of the said lands, tenements or hereditaments, so as aforesaid taken or sold, or to be taken or sold upon executions, nor any part thereof, shall be restored, nor the Sheriffs' sale or delivery thereof, avoided, but restitution, in such cases, only of the money or price for which such lands were or shall be sold. The lands, &c. not to be restored upon the reversal of the judgments, &c.

Passed in 1705.—Recorded A. vol. I. page 199. *(h)*

(h) For a general view of the law on the subject of this act, see the notes to chap. 48, ante. page 8 The additional notes are here arranged according to the subject matter of the different sections.

§ 1. Although the sheriff is bound to sell the defendant's personal estate, before he can sell his lands, yet it has been held in the Supreme Court, that he may proceed otherwise with the party's consent. All possible, contingent titles in lands, accompanied with a real interest, may be seized and taken in execution. MSS. Reports—as a vested remainder in tail. 2 Dallas, 223.

The *fieri facias*, by virtue of which the lands of defendant had been sold, only directed the sheriff to levy of the *goods* and *chattels*, &c. and it was objected, that this was not an authority to take *the lands* in execution.

By the Court. Lands are to be considered as *chattels* in *Pennsylvania* for the payment of debts. In some counties of this state, the writs of *fieri facias*, always issue in that form. It is said that the precedents mention "Lands and Tenements:" but this has not been proved, as it ought to be, by producing in Court such precedents before, at the time, and subsequent to the issuing of the writ. At most, however, it is but an omission in point of form, which is too slender a foundation for oversetting a sheriff's sale of lands. *Andrews lessee vs Fleming*, 2 Dallas, 93.

§ 2, 3. There had been a levy upon lands by virtue of a *fieri facias*, and the inquisition which had been held upon it, previous to the return, was quashed for irregularity. It then became a question whether a new *Fieri Facias* must be issued; or whether the sheriff might proceed, after the return of the former writ, to take a new inquisition without further process?

Shippen, President. I cannot perceive any thing in the act of assembly which precludes the sheriff from holding an inquest after the return of the *fieri facias*, and I have always understood it to be the practice to do so. The present inquisition being quashed for irregularity, becomes a nullity, and leaves the case just as if none had been taken. *Weaver* v. *Lawrence*, 1 Dallas, 379. But if *the levy* is set aside, and a *venditioni exponas* is issued without a fresh levy, a sale under it is void, and the purchaser derives no title, 2 Binney, 92.

The sheriff had levied on a house and lot by virtue of a *fieri facias*, and an inquest was held which declared the rents of the estate sufficient to pay the debt in seven years; but in the return to the *fieri facias*, it was stated that the defendant had only a life estate in the premises. A motion was thereupon made to quash the inquisition.

Shippen, President. The question is, whether an estate for life can be taken in execution, and delivered to the plain-

1705. tiff, upon return of an inquest, that the rents and profits are sufficient for paying the debt in seven years? On a fair construction of the act of assembly, we do not think the legislature intended, that an estate for life should be delivered to the plaintiff in satisfaction of his debt. The general interest, and of consequence, the septennial value, are so precarious, that they could not have been in contemplation, in making a positive provision, that the estate should be delivered *until the plaintiff's debt* is paid. Besides, if the legislature had so intended, a provision would surely have been added, to supply any deficiency in case of a failure of the estate, before the discharge of the debt; as, in another case, the same act especially provides, that, if the valuation of the land delivered to the plaintiff towards satisfaction of his debt, shall fall short, he may have another execution against the defendant's body, lands or goods, for the residue.

We are, therefore, of opinion, that the estate for life taken in execution, may be sold, without holding an inquest on its value: and consequently, that the inquest, in the present case, must be quashed. *Howel & al.* v. *Woolfort*, 2 Dallas, 75.

So, likewise, it has been held in the Supreme Court, that is not necessary to hold inquisitions on estates for life, or reversions and remainders, previous to a sheriff's sale, or on the estate of the husband in the wife's lands. MSS. Reports.—Resolved on error, *Burd.* v. *Dansdale*, 2 Binney, 91.

So, where the plaintiff claimed under a sheriff's sale, made in 1771, the land levied on being then *woodland*, and *wholly unimproved*; and it did not appear, that an inquisition had been taken, condemning the lands previous to the sale. Upon an exception taken to the proceedings for want of an inquisition, it was held by the Court, that this part of the act cannot possibly relate to unimproved lands. What yearly rents or profits can mere wood land yield? In *Duncan's Lessee* v. *Lawrence*, it was ruled on argument, in *Cumberland* county, by the judges, at *May assizes*, 1769, that the want of an inquisition on a vacant lot in *Carlisle*, did not vitiate the sale by the sheriff. And the same resolution also took place in this county, in *Johnson's Lessee* v. *Lochry.—Duncan's Lessee* v. *Robeson*, at *Nisi Prius*, *Westmoreland county*, *May* 1799. Before *Yeates* and *Smith*, Justices. MSS. Reports.

It is not necessary to notify the defendant of the time and place of taking an inquisition on the lands levied on: nor is the sheriff bound to levy on all the defendant's lands in his bailiwick, though he cannot cut up and divide a particular tract. MSS. Reports, Supreme Court, (infra,) and see, now, the 11th section of the act of 21st March, 1806, (post. chap. 2686.)

It has been adjudged, December 1809, that an inquisition cannot be supported unless there has been notice in fact to the defendant either of the levy, or, of the time and place of holding the inquest.

Tilghman, C. J. It is not necessary to say how the case would be, if there had been notice either of the levy or inquest; but where there has been neither, the inquest cannot be supported. Here the defendant had no notice of the levy, nor any, except the general notice of the inquest put up in the prothonotary's office. The inquisition must be set aside.

Yeates, J. of the same opinion.

Brackenridge, J. The notice required by the act, (chap. 2686,) has nothing to do with the levy, but relates solely to the inquisition. The return of the levy is notice; but there does not appear either time or place for holding the inquisition, without notice to the defendant. The object of the act was to prevent surreptitious inquests to procure the condemnation of property without giving the defendant an opportunity to shew that the rents and profits would pay in seven years. They might be held in an obscure place, or at an unseasonable time; but when notice is given, the defendant may say, hold the inquest on the land. *Heydrick* v. *Eaton*, 2 Binney, 215.

A Mortgage, payable by instalments, all of which become due within seven years next after an inquisition taken, must be taken into consideration by the jurors. MSS. Reports, Supreme Court.

The English Statute of 13th *Edward*, 1, chap. 18, which gives the writ of *Elegit*, does not extend to *Pennsylvania*; yet where the rents, issues and profits of lands will pay the debt within seven years, they are to be delivered to the plaintiff until the debt or damages be levied by a reasonable extent, in the same manner or method as lands are delivered upon writs of *elegit* in *England*. The law thus recognizing and adopting the English practice in this respect, it may be useful to give a brief view of that practice. But as there are no cases to be met with in *Pennsylvania* ascertaining the extent to which the English practice has been in use, it will be evident to the reader that this part of the note is not sanctioned by the authority of our Courts. In *England*, upon the writ of *elegit* the sheriff delivers to the plain-

tiff only one half of the defendants lands and tenements, to be occupied and enjoyed until his debt and damages are fully paid. In this respect, our law is more beneficial to creditors. The estate by *elegit*, is, therefore, a mere conditional estate, defeasible as soon as the debt is levied. Upon this writ the sheriff is to impanel a jury, who are to make inquiry of all the goods and chattels of the debtor, and to appraise the same, and also to inquire as to his lands and tenements; and upon such inquisition, the sheriff is to deliver all the goods and chattels (except the beasts of the plough) and a moiety of the lands to the party, and must return his writ, in order to record such inquisition in that court, out of which the *elegit* issued. And when the jury have found the seizin and value of the land, the sheriff, and not the jury, is to set out and deliver a moiety thereof to the plaintiff by metes and bounds.

It is clear, therefore, that in extending lands in *Pennsylvania*, "In the same manner and method as lands are delivered upon writs of *elegit* in *England*," as the act in the text directs, the sheriff must summon an inquest, to ascertain the value of the land, and the clear yearly rents and profits beyond all reprizes, and the number of years, within seven, which will be necessary to satisfy the debt and damages and costs; and the sheriff must deliver possession accordingly, and return his writ, with the inquisition annexed.

And it would seem by the English practice, in order to do complete justice, the creditor is entitled to carry on the interest of his debt, until it shall be gradually diminished, and finally discharged by the receipt of the rents and profits. And in *Pennsylvania*, it is the uniform practice to calculate the interest on all judgments for the seven years, to enable the jury, on the first inquisition, to decide whether or not the estate will satisfy them, by the yearly rents and profits, beyond all reprizes, within the term of seven years.

A difference is also to be observed, in the practice under our law, and that by the writ of *elegit* in *England*. The sheriff does not deliver the goods and chattels to the creditor here, upon a valuation, as is commanded by the *elegit*, for that writ cannot issue in *Pennsylvania*. And before lands can be seized and xtended or sold, the personal property must be exhausted by the levy on the *fieri facias*, which is the only process known to our law in such cases. But if no sufficient personal estate can be found, the land may then be taken in execution, and a mode of proceeding is introduced by the act in the text, which is unknown to the *English* law; that is, the first inquisition, to ascertain whether the real estate levied upon will, or will not satisfy the debt and damages within seven years. If the inquest finds that it will not, then a writ of *venditioni exponas* issues, to make sale of the premises; but if the real estate can be extended, then a *liberari facias* issues, commanding the sheriff to deliver the possession to the creditor, and upon this writ, the second inquisition takes place as before stated. 1705.

In pursuing this subject, it is further to be observed, that in *England*, the sheriff does not now, as formerly, deliver *actual*, but only *legal*, possession of a moiety of the lands; and in order to obtain *actual* possession, the plaintiff must proceed by ejectment, in which he must not only prove the judgment, and that an *elegit* issued and was returned, but he must also prove the writ of *elegit*, and inquisition upon it, which carve out the term, and give the right of entry.

In following the "Manner and method of delivering lands upon writs of *elegit* in *England*," this inconvenient practice crept into our law; and it was conceived that the sheriff, on a *liberari facias*, could only deliver the *legal* possession to the plaintiff, but could not turn the defendant out of the *actual* possession, and that the plaintiff must have recourse to the ejectment to obtain the benefit of his process. The legislature, therefore, to remedy this mischief, provided, by an act passed April 13th, 1807, (post. chap. 2872,) "That on the execution of a *liberari facias*, where the defendant or his tenant is in possession of the premises to be extended, the sheriff shall deliver the *actual* possession thereof to the plaintiff or his agent."

By the third section of the act in the text, it is provided, that if before the extent be out, any other debts or damages be recovered against the same debtor or defendant, his heirs, &c. which with what remains due upon such extent, cannot be satisfied within seven years, &c. then a *venditioni exponas* shall issue to sell the lands, &c. and by the 4th section, provision is made for a new execution in certain cases. And to complete the remedy, it is necessary to state, that the English statute of 32 Henry 8, chap. 5, which is in force in *Pennsylvania*, provides for the case of an eviction of the lands extended. It is intitled "For the continuance of debts upon execution," and (omitting the preamble, which recites the mischiefs to be remedied) is in these words: "That if hereafter any

1705. such lands, tenements, or hereditaments, as be, or shall be had or delivered to any person or persons in execution as aforesaid, upon any just and lawful title, matter, condition or cause, wherewithal the said lands, tenements, and hereditaments were liable, tied and bound at such time as they were delivered and taken in execution, shall happen to be recovered, lawfully divested, taken or evicted out, of and from the possession of any such person and persons, as now have and hold, or hereafter shall have and hold the same in execution, as is aforesaid, without any fraud, deceit, covin, collusion, or other default of the said tenant, or tenants by execution, before such time as the said tenants by execution, their executors or assigns, shall have fully and wholly levied or received the said whole debt and damages for the which the said lands, tenements and other hereditaments were delivered and taken in execution as is aforesaid; then every such recoverer, obligee and recognizee, shall and may have and pursue a writ of *scire facias* out of the same court from whence the said former writ of execution did proceed, against such person or persons as the said writ of execution was first pursued, their heirs, executors or assigns, of such lands tenements or hereditaments as were or been then liable or charged to the said execution, returnable into the said Court at a certain day, being full forty days after the date of the same writ, at which day if the defendant, being lawfully warned, make default, or appear, and do not show and plead a sufficient matter, or cause (other than the acceptance of the said lands, tenements, or hereditaments by the said former writ of execution) to bar, avoid or discharge the said suit for the residue of the said debt and damages remaining unlevied or unreceived by the said former execution, then the Lord Chancellor, or other such Justice or Justices, before whom such writ of *scire facias* shall be returnable, shall make eftsoons a new writ or writs out of the said former record of judgment, statute merchant, statute staple or recognizance, of like nature and effect as the said former writ of execution was, for the levying of the residue of all such debt and damage, as then shall appear to be unlevied, unsatisfied, or unpaid, of the whole sum or sums in the said former writ of execution contained; any law, custom, or other thing to the contrary heretofore used in any wise notwithstanding." And this statute is by a favourable construction, extended to the executors, administrators or assigns of the recoveror. See Lord C. Justice *Coke's* construction of this statute, Co. Lit. 290, *a.*

But how, if the plaintiff should be fully satisfied for his debt, damages and costs before the term assigned to him shall expire? Shall he continue to hold over, and receive the rents and profits, which in equity belong to the defendant? By the English law, there is a clear remedy. Whether the act in the text, which pointedly refers to the "Manner and method of delivering lands upon the writ of *elegit* in England," adopts all the consequences of the execution by *elegit*, does not appear to be settled in any reported case known to the editor; nor does common experience justify him in expressing any opinion on this point. Yet if the case should arise, a reference to the English law on this head may, at least, be convenient.

If tenant by *elegit*, neglect to take the profits, the defendant, at the time when the debt might have been satisfied thereout, may sue out a *scire facias* to have his land again, (*ad rehabendam terram,*) for the statute which gives the *elegit*, is construed to mean, that the plaintiff shall hold the land not simply until *he be*, but until *he may be satisfied*, without his wilful default. In some cases, the defendant may have a *scire facias* to have his land again before the tenant by *elegit* can have been satisfied for the debt out of the extended value of the land. As where the defendant brings the whole residue of the money into Court, or has a release from the plaintiff, or has paid him the money, and has his acquittance; and may also have a *scire facias to account,* (*ad computandum,*) as well as to have his land again, where the tenant by *elegit* has been satisfied by some casual profit. But the defendant cannot enter, because the possession of the plaintiff, being founded upon matter of record, is not to be taken away by entry before he has an opportunity of answering in a Court of Record.

Yet in the case of an *elegit* upon a judgment at common law, when the tenant by *elegit* has received payment of his debt out of the *usual* and *ordinary* profits of the land, the defendant may enter, that is, bring an ejectment without suing out a *scire facias*, because the tenant is only to retain the land until his debt be levied; and as that is a sum certain, it may be ascertained when the plaintiff was, or might have been satisfied out of the extended value of the land.

It will, perhaps, not admit of a reasonable doubt, but that on this latter ground, an ejectment would lie in

Pennsylvania, after the expiration of the term assigned under the writ of *liberari facias*. This is, however, but a single case, and leaves the question entirely open as to the mode of proceeding where the plaintiff has been otherwise satisfied, either by payment, or bringing the money into Court, or by some casual and unforeseen profit arising out of the land delivered. The learned reader will likewise distinguish between such parts of this branch of the English law, which apply more to the cases of extent under the *statutes merchant* and *staple*, which are unknown to our law; and the mere case of the extent by the writ of *elegit*. On the general subject, the able note of *serjeant Williams* to the case of *Underhill* v. *Devereux*, 2 Saunders' Reports, 71, 72, may be profitably consulted.

After an inquest has returned that the rents and profits will pay the debt in seven years, the plaintiff cannot discontinue his *fieri facias*, and take out a new one without leave of the Court. This has been the practice and understanding of the Courts of *Nisi Prius*, and great inconveniences might ensue from a contrary practice; because the plaintiff might set aside the proceedings, and levy again on the same land repeatedly, until he got a jury to condemn it, which would take away from the defendant, the benefit of the act of Assembly on this subject. *M'Cullough* v. *Guetner*. 1 Binney, 214.

Nor will the Court on the trial of the title of lands sold by the Sheriff, examine whether the jury who condemned them acted erroneously: if there has been any injury done herein, or if the jury have refused to receive evidence of the yearly value of the premises, application should have been made to the Court from whence the process issued, to quash the inquisition. *Murphy's Lessee* v. *M'Cleary & al. Mifflin, May*, 1802, before *Yeates* and *Brackenridge*, Justices. MSS. Reports. So, 2 Binney, 227.

§ 4. A motion being made for a rule on the Sheriff to return a *venditioni exponas*, the Chief Justice, upon a doubt expressed by that officer, said, that by the spirit and words of the act of Assembly, the Sheriff must sell, not merely to the *highest*, but to the *best* bidder; that therefore, if the highest bidder was unable to pay, the Sheriff might make an offer to the next highest; and that if the property was not paid for after a sale, the return should be, that, "the premises were knocked "down to A. B. for so much, and that "the said A. B. has not paid the pur"chase-money, and that therefore, the "premises remain unsold." *Zantzinger* v. *Pole*. 1 Dallas, 419.

The general rule is, that the Sheriff should sell different houses or tracts of land separately. If he does otherwise, the Court will set aside the sale, unless there can be shewn a clear exception to the rule. MSS. Reports, Sup. Court. It is essential to justice, and to the protection of unfortunate debtors, that this should be the general rule; any other would lead to the most shameful sacrifices of property. *Rowley* v. *Brown*. 1 Binney, 61. 1705.

Part of a tract of land could not be levied on by a Sheriff, legally, since the act of 1705, nor since the act of 21st March, 1806; nor could an administrator agree to such levy. MSS. Reports, Sup. Court.

The act of March 1806, sect. 11, (post. chap. 2686,) declares, that the Sheriff shall levy on the personal estate; but for want of sufficient personal estate, he shall levy the real estate of the defendant, or such part thereof (*but not less than one whole tract or lot of land* with the appurtenances,) as he may deem sufficient to pay the same. And all inquisitions for the condemnation of real estates, shall be held on the premises in execution, if required by the defendant, or his agent, of which notice shall be given. (ante.)

Levying upon any thing less than the whole tract of land, with the appurtenances, is clearly against the act of assembly; and we are far from thinking that it was proper before that act (March 1806,) it evidently tends to defeat the design of that act. *By the Court. Snyder* v. *Castor's administrator*. 2 Binney, 216, (note) S. C. *supra*.

A Sheriff cannot advertise lands for sale, nor proceed to sell without a *venditioni exponas*, nor acknowledge his deed till after the return day of the writ.

In *Porter's Lessee* v. *Neelan*. The only question before the Court was, whether a sale made by the Sheriff, of lands levied, without a writ of *venditioni exponas*, was valid.

By the Court. (*Yeates* and *Smith*, Justices.) The act of 1705, expressly directs, that on the condemnation of the lands, a *venditioni exponas* shall issue; and under this authority, the Sheriff sells the lands. The act of 23d March, 1764, is a strong exposition of the former law. It renders Sheriffs' deeds and sales made *bona fide heretofore, before the publication of the act*, for valuable consideration valid in law, though there had been no *venditioni exponas* issued. But that act is, in this particular, wholly retrospective, and has no effect on future cases. *Circuit Court, Fayette county, October*, 1804. MSS. Reports. And in *Glancy's Lessee* v. *Jones*, at York Circuit Court, April 1805. Both points

1705. came before the same Judges for determination. The lands in question had been levied on and condemned. A *venditioni exponas* afterwards issued thereupon on the 29th of January, 1785, returnable to April term, 1785. The Sheriff's deed was dated Feb'y 8th, 1785, and acknowledged at an adjourned Court of Common Pleas on the same day. It recited the judgment, fi. fa. levy, inquisition and *venditioni*; and that the premises were sold, after due advertisements made for that purpose, on the 29th of January, 1785.

The Court charged the jury, that it has been the policy of this government, since the first settlement of the province, to subject real, as well as personal property to the payment of debts; but the mode of selling lands by Sheriffs is pointed out by our municipal acts, which must be conformed to. The act of 1705 expressly directs, that a *venditioni exponas* shall issue to sell lands, unless in the case of a *scire facias* on a mortgage. Without such writ, the sale by a Sheriff is utterly void, and has been so determined in *Porter* and *Neelan*. Two acts of Assembly have been passed to remedy defects of this nature. The one on the 23d of March, 1764. The other on the 26th of March, 1785. But the language of both acts is confined to cases which happened before those laws were enacted, and is not prospective. They clearly shew, that a legislative provision was deemed necessary to cure such titles. Under what authority could the Sheriff proceed to advertise lands for sale, unless by a writ of *venditioni* directed to him? His power is derived from his writ.

Another objection occurs equally fatal to the Sheriff's deed. It was acknowledged on the 8th of February, seven weeks before the Sheriff was to return his writ, and thereby make known to the Court what he had done thereon. This is the proper time for persons injured by Sheriff's sales to apply to the Court for redress. This is the period of acknowledgment according to the words of the 4th section of the act of 1705, which "has been heretofore used upon the Sheriff's sales of lands." It cannot be dispensed with. A contrary doctrine would open a door to the greatest mischiefs. Such were the grounds of decision in *Murphy's Lessee & M'Cleary*, at *Lewistown*.

The points thus strongly given in charge to the jury, were confirmed on a motion for a new trial in this case. The Court said they did not feel disposed to throw any weight against Sheriffs' sales, but were bound to preserve the law inviolate. That both the exceptions which had been made to the Sheriffs' sale appeared to be fatal. They knew of no practice which sanctions a Sheriffs' deed under circumstances similar to the present; but if such a practice had prevailed, it is bad in itself, and must lead to the most injurious consequences. No usage can repeal the positive provisions of an act of the Legislature. MSS. Reports.

But the sale of lands by a Sheriff may be adjourned till after the return of the *venditioni exponas*. 2 Binney, 91.

This practice is very frequent, and is much to the advantage of the debtor. The writ being always returnable the first day of the term, the land is duly advertised for sale on a day previous to the return day, or on that day; and is then, not uncommonly, adjourned to some more public day, during the court week, when from the attendance of a large number of citizens, a better price may be reasonably expected from the competition of bidders. But in such cases, it is also usual in many counties, to issue another *venditioni*, tested on the first day of the term, for greater caution.

By the act of March 23d, 1764, (post. chap. 510,) lands taken in execution, by one Sheriff who had died or been removed, before sale, and sale had been made by his successor—or where sale had been made by a Sheriff so removed or deceased, and the deed had been executed by his successor, with or without a writ of *venditioni exponas*—or where such sales had been made, and deeds executed by any Sheriff after removal from office, *bona fide*, and for valuable consideration; all such sales are ratified and confirmed. And by a supplement passed Feb'y 24th, 1770, where one Sheriff has sold, but had died, or been removed from office before any deed executed, though such sale were with or without a writ of *venditioni exponas*, if such sale was *bona fide*, for a valuable consideration had and received, on petition of the plaintiff or purchaser, the Court was authorized to direct the Sheriff, or proper officer for the time being, to complete the title by executing a deed, (chap. 604.) And by the 7th section of the limitation act of March 26th, 1785, (post. chap. 634,) no Sheriffs' deed, given *bona fide*, and for a valuable consideration, of any lands, &c. where quiet and peaceable possession hath been had of the same for the space of six years, shall be adjudged or taken to be defective, avoided or prejudiced, for not producing in court, upon trial, or otherwise, any writ of *fieri facias*, *levari facias*, or *venditioni exponas*, or any returns thereupon, or for want of proof

that due and legal notice of the sales of the same was given, or for not having been recorded in the office for recording of deeds.

The foregoing provisions are entirely retrospective; and such is the construction of them, as appears by the cases before cited. But the second and third sections of the act of March, 1764, are general and prospective, and regulate the proceedings in the following cases: Where any Sheriff shall, pursuant to the said act (of 1705,) hereafter take in execution, and sell any lands, &c. and shall die, or be removed before any deed executed for the same by him to the purchaser, the plaintiff or purchaser may apply to the Court wherein judgment was obtained, and set forth the case to the said Court, with the reason why the title was not perfected by the former Sheriff who sold the same; and thereupon the Court, as they shall see cause, and as justice and equity shall require, may order and direct the Sheriff or other proper officer, for the time being, to perfect such title, and execute a deed to the purchaser, &c. And if any Sheriff, who shall hereafter take lands in execution, and shall die or be removed, before any sale made thereof—in every such case, the like process shall issue to his successor, and the same proceedings be had, that might, could, or ought to have issued, or have been had, if such former Sheriff, or other officer had not died or been removed, &c. And see the act of April 2d, 1803, (post. chap. 2378,) whenever any Sheriff or other proper officer, who by virtue of any *testatum* executions, or any other executions, issued either by the Supreme or Circuit Courts, shall take lands in execution, and sell them, and shall die or be removed before any deed executed, similar application is to be made to the Circuit or Supreme Court, in the county where the lands lie, for a deed to be executed by his successor, in the method prescribed by the former act. But much of this act is now inoperative by the abolition of the Circuit Courts.

Transcripts of judgments obtained before Justices of the Peace, may be entered on the docket of the prothonotary, and from the time of such entry shall bind the real estate of the defendants. But no *fieri facias* shall issue thereupon, until a certificate shall be first produced to the prothonotary, from the Justice before whom the original judgment was entered, that an execution had issued to the proper constable, and a return thereon that no goods could be found, sufficient to satisfy the said demand. Act of March 20th, 1810, (post.) which repeals and supplies a similar provision in the "act for the more easy and speedy recovery of small debts," passed March 1st, 1745-6. 1705.

Various laws have been passed with respect to the acknowledgment of Sheriffs' deeds.

By the 11th section of the act of April 13th, 1791, (post. chap. 1564,) where lands are sold by the Sheriffs of the several counties of this State, by virtue of writs issuing out of the Supreme Court, the deed may be acknowledged before the Judges at *Nisi Prius* held in and for the county where such lands lie; but this part of the act has now become inoperative, except in the county of *Philadelphia*, by the abolition of the Courts of Nisi Prius and Circuit Courts.

And, by the same section, wherever any lands are sold by virtue of writs of testatum, the deed may be acknowledged in the Court of Common Pleas of the county where the sale is made. And by the 7th section of the act of 30th September, 1791, (post. chap. 1590,) deeds executed by any Sheriff, by order of Court, for lands sold by his predecessor in office, such deeds may be acknowledged in the county where the lands lie, in the same manner as is permitted to be done by the Sheriff who sells and conveys such lands.

And by the 10th section of the act establishing Circuit Courts, passed March 20th, 1799, lands sold by virtue of testatum executions, issued either by the Supreme or Circuit Courts, the deeds thereof may be acknowleged before the Justices of the said Circuit Courts in the county where the lands are situated, or in the Courts whence the executions respectively issued, but not elsewhere; but as there are now no Circuit Courts existing, part of this section is also inoperative.

It had been considered that on an execution and sale of lands, conformably to the English law, that the sheriff could not give possession to the purchaser; and an elaborate and learned opinion and judgment on this point, is to be found in *Addison's* Reports, page 199. The legislature, therefore, by the act of April 6th, 1802, (post. chap. 2294,) entitled "An act to enable purchasers at sheriff's, or coroner's sales, to obtain possession," have remedied this inconvenience, and where the defendant or his tenant is in possession of the premises sold, the purchaser may serve a notice on him or them, requiring them to surrender the possession within three months after the date of such notice; and upon neglect or refusal to comply therewith, the purchaser may

1705. apply to two justices and proceed to recover possession according to the well known form of proceeding in case of tenants holding over, under the act, commonly called the landlord and tenant's act; and a mode of proceeding is also provided where the party in possession disclaims holding under the defendant in the execution.

Where the land sold is under lease, the purchaser is to stand in the place of the lessor, and be entitled to receive the rents, &c.

Acknowledging a sheriff's deed in Court, and registering it in the Prothonotary's office, as is always done, is a sufficient recording of it, though not recorded in the office for recording of deeds. 1 Dallas, 68.

§ 6. See the act for acknowledging and recording of deeds, passed in 1715, (post. chap. 208,)—A mortgage to be void unless recorded within six months. See 1 Dallas, 434, 438, 4 Dallas, 153.

A subsequent simple contract debt cannot be recovered on a *scire facias* upon a prior mortgage, but only the principal, interest and costs, on payment of which the Court will stay the proceedings on the *scire facias*. *Dorrow*, assignee v. *Kelly*, 1 Dallas, 142.

Febiger's Lessee v. *Craighead.*

A case was stated for the opinion of the Court containing these facts. A tract of land in *Cumberland* county, was mortgaged by J. G. to the trustees of the loan-office (whose rights, powers and duties have been transferred by law to the plaintiff, as state treasurer,) and the land was afterwards levied upon, and sold at sheriff's sale to the defendant, by virtue of a subsequent judgment and execution. The question was, whether the mortgage remains a lien upon the land, against the purchaser at sheriff's sale?

By the Court. The case admits of no doubt. Judgment must be entered for the plaintiff. 4 Dallas, 151.

Husband and wife have issue, and mortgage the lands of the wife without acknowledging the same. The lands of the wife are bound only during the life of the husband. MSS. Reports, Supreme Court.

§ 9 Objections to sheriffs' sales must be made before the deeds are acknowledged. 2 Binney, 227.

The sheriff's vendee is not to be affected by any secret agreement between the parties to the suit on which the sale was grounded, or by a deed unduly recorded, if he had neither actual, or constructive notice thereof. MSS. Reports, Supreme Court.

But where the sale is fraudulent and covenous, though the sheriff's deed has been acknowledged, after a rule to shew cause why the sale should not be set aside, the party, or his creditors, may try the fairness of the sale before the Jury. *Lessee of Dawson* v. *Morris, Philadelphia*, Feb'y, 1807, at *Nisi Prius*. MSS. Reports.

Where a levy is set aside, and a *venditioni exponas* is issued without a fresh levy, a sale under it is void, and the purchaser derives no title. The 9th section of the act in the text protects a purchaser in the event of the reversal of a judgment under which the sale was made; but not where the sale was made under void process. *Burd* v. *Dansdale's lessee*, in error. 2 Binney, 92.

If a plaintiff levies a *fieri facias* upon the defendant's lands, and then charges him in execution upon a *ca. sa.* either the *fieri facias* or the *ca. sa.*; may be set aside at the defendant's election; but if he submits to the *ca. sa.* and obtains a discharge from it by the insolvent law, then the *fieri facias*, and all the proceedings under it, are gone; and if the plaintiff sues out a *venditioni exponas* and sells, the Court will not permit the Sheriff to acknowledge the deed to the purchaser.

If defendants lands are aliened by him before execution, the plaintiff is not obliged to take a *scire facias* against the terre-tenants, before he can have execution in the hands of the alienee.

An execution within a year and a day, continues the lien of a judgment, without resorting to a *scire facias* under the act of April 4th, 1798.

Whether a sale of defendant's lands under a younger judgment, affects the lien of an older one, remains undecided. *Young* v. *Taylor and Barron*. 2 Binney, 218.

The *alias* execution, with the *testatum* clause in *Pennsylvania*, is founded on the 24th section of the act of 22d May, 1722, post. chap. 255.

The following English statutes, relating to this subject, extend to *Pennsylvania*.

13 Edward 1, stat. 1. chap. 39. "The manner to deliver writs to the Sheriff to be executed. The sheriff returneth "a liberty," when none is. Returning of issues. Resistance of execution of process."

Those parts only of this statute are in force, which define "what shall be accounted issues."—Direct the punishment of the Sheriff for false returns;—give authority to the Sheriff to do certain things, in case of the resistance of the execution of process; and direct the punishment of those who resist the execution of process.

And 28th Edw. 1, stat. 3, chap. 16. "What shall be done with them that make false returns of writs?" is in these

words: "That shall be done with them that make false return, whereby right is deferred, as it is ordained in the second statute of *Westminster*, (13 Edw. 1, stat. 1, C. 39,) with like pain.' This is merely in confirmation of the statute of 13 Edw. 1. See 2 Inst. 457.

13 Edward, 1 stat. 1 chap. 45, "The process of execution of things recorded within the year, or after." The *scire facias*, after the year and day, in *personal* actions, is given by this statute. For though it had been doubted by judges of great learning, yet the settled opinion seems to have been, that at common law, if after judgment given, or recognizance acknowledged, the plaintiff sued out no execution within the year, he was driven to his original upon the judgment.

12 Edw. 2, stat. 1, chap. 6. "An indenture shall be made between the Sheriff and Bailiff of Liberty, of every return."

That part only of this statute is in force, which obliges Sheriffs and other officers, to sign their name to the return of writs.

3 James 1, chap. 8, "An act to avoid unnecessary delays of execution." A writ of error shall be no *supersedeas*, unless sufficient surety entered, &c. So. 16 and 17 Charles 2, chap. 8, sect. 3.

12 James 1, chap. 24. "An act for the relief of creditors against such persons as die in execution." 1705.

It is enacted by this statute, that "The party or parties, at whose suit, or to whom any person shall stand charged in execution for any debt or damages recovered, his or their executors or administrators, may after the death of the said person so charged, and dying in execution, lawfully sue forth and have new execution against the lands and tenements, goods and chattels, or any of them, of the person so deceased, in such manner and form to all intents and purposes, as he or they or any of them might have had by the laws and statutes of this realm, if such person so deceased, had never been taken or charged in execution;" but the act does not extend to lands *bona fide* sold by the party in execution, after judgment.

By the second section of the act of 1705, (ante. chap. 132,) page 32, all and every person or persons to whom any lands, &c. shall hereafter be sold or delivered upon executions, shall hold and enjoy their respective parts in severalty, or as tenants in common, and not as joint-tenants.

The Sheriff is not intitled to poundage on a *ca. sa.* unless he receives and pays the money. 2 Binney, 137.

CHAPTER CLV.

An ACT *for confirming the sales of lands by attornies or agents, and for ascertaining the proof of instruments or writings made out of this province.*

WHEREAS divers persons living out of this province, are and have been owners of lands within the same, and such persons have usually appointed attornies to sell and dispose thereof: to the end, therefore, that those who have so purchased, and their heirs or assigns, for ever hereafter, be secured in their titles and estates, *Be it enacted*, That all sales of lands, tenements and hereditaments, formerly made by any attornies or agents, who have been appointed such by any person or persons who had right so to do, and especially given them power or directions therein to sell or convey lands, are and shall be deemed and adjudged good and effectual in law, to all intents, constructions and purposes, whatsoever, as fully as if the said owners of such lands had, by their own deeds, bargains and sales, actually and really sold and conveyed the same; and all and singular the lands, tenements and hereditaments, sold and conveyed as aforesaid, shall be and remain to such purchasers respectively, their heirs and assigns, for ever, as they were or ought to have been to the owner or owners of such lands and premises, so employing his or their attornies or agents as aforesaid.

Sale of lands formerly made by attornies, shall be effectual in law.

II. *And be it further enacted*, That all and every bonds, specialties, letters of attorney, and other powers in writing, which shall be

Bonds and letters of at-