sale, and pay treble the value thereof; one moiety to the support of government, and the other moiety or half to him that shall discover and prosecute the same. 1705.

Passed in 1705.—Recorded A. vol. I. page 196.

CHAPTER CXLIX.

An ACT *for county seals, and against counterfeiting hands and seals.*

BE it enacted, That there shall be a county seal in every county of this province, for the use of each county; and if any person, within the said province, shall be convicted of counterfeiting the hand or seal of another, with intent to defraud, such person shall suffer three months imprisonment, at hard labour, and be fined treble the value he or she shall have defrauded, or attempted to have defrauded, thereby, to the use of the party wronged; and whosoever shall counterfeit the privy or broad seal of the said province, being convicted thereof, shall suffer seven years imprisonment as aforesaid, and be fined, at the discretion of the court where such party shall be convicted, in any sum not exceeding one hundred pounds, to the support of government. Penalty on counterfeiting hand or seal.

Passed in 1705.—Recorded A. vol. I. page 197. *(c)*

(c) A law of a similar title was passed in 1700, and recorded in book A. vol. 1, page 11, which was repealed by the king and council on the 7th day of February, 1705.

The first act passed under the existing constitution, entitled "An act to declare and establish the seals of this commonwealth," constituted the seal, known by the name of the state seal, lately in the custody of the supreme executive council, the state seal, to be affixed to all patents, &c. and also the lesser seal lately in custody, as aforesaid; and declared them to be the great and less seals of the commonwealth. This act was passed January 8th, 1791, (chap. 1510.) The device of the broad seal of the province consisted of the armorial bearings of the family of the late proprietor. But there had been no description on record of the great seal of the commonwealth.

Therefore, by an act passed March 2nd, 1809, entitled "An act to perpetuate the great seal of this commonwealth;" reciting that it was necessary to renew the same; and that as there was no description on record thereof; and as it was proper that it should be particularly described and established, that it may hereafter be more fully known and recognized—The secretary of the commonwealth was authorized and directed to record a description thereof in his office, that the same may be made perpetual.

In pursuance of the foregoing act, the secretary of the commonwealth, on the 1st of July, 1809, described and recorded the seal of the state in his office.

See the note to the act against defacers of charters, ante. chap. 16, page 4.

CHAPTER CL.

An ACT *for defalcation.*

BE it enacted, That if two or more, dealing together, be indebted to each other upon bonds, bills, bargains, promises, accounts, or the like, and one of them commence an action in any court of this Persons sued upon bond, bill, &c. may plead payment of part

1705. province, if the defendant cannot gainsay the deed, bargain or assumption, upon which he is sued, it shall be lawful for such defendant to plead payment of all or part of the debt or sum demanded, and give any bond, bill, receipt, account, or bargain, in evidence; and if it shall appear that the defendant hath fully paid or satisfied the debt or sum demanded, the jury shall find for the defendant, and judgment shall be entered, that the plaintiff shall take nothing by his writ, and shall pay the costs. And if it shall appear that any part of the sum demanded be paid, then so much as is found to be paid shall be defalked, and the plaintiff shall have judgment for the residue only, with costs of suit. But if it appear to the jury, that the plaintiff is overpaid, then they shall give in their verdict for the defendant, and withal certify to the court how much they find the plaintiff to be indebted or in arrear to the defendant, more than will answer the debt or sum demanded, and the sum or sums so certified shall be recorded with the verdict, and shall be deemed as a debt of record; and if the plaintiff refuse to pay the same, the defendant, for recovery thereof, shall have a *scire facias* against the plaintiff in the said action, and have execution for the same, with the costs of that action.

or the whole debt, and give their accounts against the plaintiff in evidence.

Proceedings on such suit.

II. *Provided always*, That in all cases where a tender shall be made, and full payment offered by discount, or otherwise, in such specie as the party by contract or agreement ought to do, and the party to whom such tender shall be made doth refuse the same, and yet afterward will sue for the debt or goods so tendered, the plaintiff shall not recover any cost in such suit.

The report of referees to have the same effect as a verdict.

III. *Provided also*, That in all cases where the plaintiff and defendant, having accounts to produce one against another, shall, by themselves, or attornies or agents, consent to a rule of court for referring the adjustment thereof to certain persons, mutually chosen by them in open court, the award or report of such referees being made according to the submission of the parties, and approved of by the court, and entered upon the record or roll, shall have the same effect, and shall be deemed and taken to be as available in law, as a verdict given by twelve men; and the party, to whom any sum or sums of money are thereby awarded to be paid, shall have judgment, or a *scire facias*, for the recovery thereof, as the case may require, and as is herein before directed concerning sums found and settled by jury, any law or usage to the contrary of this act, in any wise notwithstanding. *(d)*

Passed in 1705.—Recorded A. vol. I. page 197. *(c)*—See note in page 51.

(d) There are four species of awards: *First*, those made by mutual consent, in pursuance of arbitration bonds, entered into out of court; *secondly*, those which are made in a cause depending in a court of law or equity, upon the consent of the parties to refer the matter in variance (which are awards at common law;) *thirdly*, those which are made under a rule of court by virtue of the statute of 9 and 10 W. III. chap. 15; and, *fourthly*, awards by the act of assembly in the text. 1 *Dallas*, page 314. Perhaps to this enumeration might be added the report of auditors, appointed by virtue of the act of the 3d of April, 1781, post. chap. 924.

From this source of judicial references a variety of decisions have flowed, which are susceptible of the following classification: 1st. Cases respecting the appointment of referees, notifying and hearing the parties. 1 Dallas, pages 81, 161, 251. Cases respecting clerical errors in making out the rule of reference. 1 Dallas, 293, 379. Cases respecting

the time allowed for striking off the rule of reference, or for moving to set aside the award. 1 Dallas, 312, 347, 349, 430. Cases in which an award will be set aside. 1 Dallas, 83, 129, 145, 187, 293, 313, 355, 486. Cases in which an award will not be set aside. 1 Dallas, 81, 119, 145, 161, 173, 188, 364, 420.

In the case of *Respublica* v. *Mitchell* (in the Supreme Court, January term, 1789,) interest was added by the court to the sum awarded against the state, although the referees had not expressly given it in their report. 2 Dallas, 101. *(Note to former edition.)*

For other cases on awards since reported, see 2 Dallas, 157; 4 Dallas, 71, 120, 222, 232, 271, 284, 298, 300, (note 1.) The law on this subject, with a reference to manuscript cases, will be arranged under the laws relating to arbitrations. See 1 Binney, 43, 59, 109, 458, 461.

(e) By the 10th section of the act of 14th February, 1729-30, (post. chap. 315,) for the relief of insolvent debtors, where there are mutual debts, between the debtor, or debtors, and his, her, or their creditors; or if either party sue or be sued, as executor or administrator, where there are mutual debts between the testator or intestate, and either party, one debt may be set against the other, and such matter may be given in evidence on the general issue, or pleaded in bar, as the nature of the case shall require; so as, at the time of the pleading the general issue, where any such debt of the plaintiff, his testator, or intestate, is intended to be set off in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due; or otherwise such matter shall not be allowed in evidence upon such general issue.

This section, together with the act in the text received a full consideration, both in the argument of counsel, and the judgment of the court, in the case of *Primer* v. *Kuhn*. 1 Dallas, 452. And it was held, that the assignee of a bond, which had been entered into by an insolvent debtor *before his* discharge, is entitled to a defalcation of the amount in an action brought against him by the obligor, (the insolvent debtor) to recover a debt contracted by such assignee with the insolvent debtor, *subsequent* to his discharge. The act in the text says, that if two or more *dealing together*, be indebted to each other upon bonds, &c. when an action is commenced, the defendant may plead payment, and give his bond, &c. in evidence against the plaintiff's demand. No doubt could be reasonably entertained but that the obligee could have defalked the bond in question, and having legally assigned all his right and interest, why should not the assignee be entitled to the same advantage, since the act for the assignment of bonds, (post. chap. 207,) has placed him on the same footing? 1705.

And the last section of the act in the text, provides, that where a plaintiff and defendant have *accounts* to produce one against another, they may refer them, and the report of the referees shall have the effect of a verdict; now, although the words are confined to the case of *accounts*, yet the construction of the act has liberally extended the right and benefit of such a reference, to every other cause of action.

But a creditor of an insolvent debtor, is not entitled t a set-off, in an action brought by an insolvent debtor's factor, for goods sold by the factor to the creditor; as, where L. an insolvent debtor, after his insolvency, deposited with the plaintiff, an *atlas* to be sold, and the defendant purchased it at plaintiff's store. The defendant who was one of L's creditors, discovering that the *atlas* had belonged to L., refused to pay for it to the plaintiff, insisting that he had a right to set off the debt against the price. But the court held, that the plaintiff, the factor, had a right to recover. *Boinod* v. *Pelosi*. 2 Dallas, 43.

Unliquidated damages in covenant, sounding in *tort*, cannot be defalked, under the plea of payment, in a suit on a bond.

The evidence offered, was, that the bond was given for the payment of the consideration money of a tract of land and mill, which plaintiffs had sold to defendants, reserving in the deed a right to swell and raise the water, so as not to injure the mill; but that the plaintiffs had raised the water, so as to injure the mill.

By the Court. The question is, whether, under the liberality of the practice of our Courts of Justice, such evidence is admissible? To decide in the affirmative, the case must either be embraced by the general provision of the act for defalcation, or by the 39th rule of the Supreme Court. Now, although our act of assembly extends further than the British Statutes of set-off, we do not think it comprehends a defalcation of the nature contended for: and, though the 39th rule of the court, ascertains what evidence is admissible on the plea of *payment*, *(want of consideration, that the deed was obtained by fraud*, or by a *suggestion of a falsehood, or suppression of the truth,)* it contains nothing descriptive of the present circumstan-

1795. ces, where there was a good consideration for the bond, though the defendants have been injured by the subsequent conduct of the plaintiffs.

If, however, the defendants would otherwise be without a remedy, we should be solicitous, by any rational construction of the law, to admit the evidence; but it is clear, that they may have an adequate redress for the wrong which they have suffered, in a form of action suited to their case. *Kachlin et al. v. Mulhallon et al.* 2 Dallas, 237.

And in *Sweitzer* v. *Garber*, at *Nisi Prius* in *Cumberland*. Where the vendor had interrupted the vendee in the enjoyment of the land sold; vendee was not allowed to give the matter in evidence, in an action brought by vendor, to recover the purchase money. *Ibid.* 239 in note.

But in a suit by executors against executors, where due notice has been given; a demand, in consequence of the plaintiffs, as executors, selling lands held in partnership between the two testators, by agreement, may be given in evidence by way of set-off; otherwise where such notice has not been given, nor the matter pleaded.

Thus in the case of *John Boyd's Executors* v. *William Thompson's Executors*, *Westmoreland*, May 1797. In an action on the case for £.300 for money had and received for the use of *John Boyd*, and a 2nd count for other £.300 on an *insimul computassent* by the parties in their capacity of executors; on the pleas of *non assumpsit* and *payment*, the defendants offered in evidence an agreement between the testators *Boyd* and *Thompson*, that four certain tracts of land were held by them in partnership; and further offered to prove, that plaintiff, after her testator's death, had sold two of the tracts, as surviving executor, and received the consideration money, of which one moiety belonged to *Thompson's* estate, and that plaintiff was consequently accountable for said moiety to defendants.

This evidence was objected to, because no notice had been given of a set-off, and for that unliquidated damages could not be set-off.

The Court, however, thought it might well have been given in evidence, if it had been pleaded, or proper notice given. The debt claimed, and counterdemand, respect the representative character of the parties. Our defalcation act has often been said to be more comprehensive than the British Statutes of 2 Geo. 2. c. 22, and 8 Geo. 2. c. 24, though it never could have intended that all kinds of damages under covenants should be set-off, and it has been ruled accordingly in *Kachlin* v. *Mulhallan*.

In *England*, where a debt intended to be set-off, accrues by reason of a penalty in a specialty, it shall be pleaded in bar, and the sum truly due must be shewn in such plea by the statute. Unliquidated, uncertain damages there cannot be pleaded by way of set-off, according to *Comp.* 57.—But sums in the nature of *stipulated* damages, for breach of any agreement, may be so pleaded. The demand insisted on, in this case, not having been pleaded, or notice given of the set-off, the court is bound by the positive words of the 10th section of the act of 14th February, 1729-30, and cannot admit the set-off in evidence. MSS. *Nisi Prius* Reports.

Notice of a set-off should be certain and particular; and if the set-off is to be proved by the acknowledgment of the party, it should be so expressed in the notice. *Beatty* v. *Smith*, *Circuit Court. Franklin, September*, 1804. MSS. Reports.

And where it is barred by the act of limitations, it cannot be received in evidence on a mere notice of set-off. But if it be pleaded in bar, the defendant is not bound to give written notice of the set-off; and plaintiff should reply the act of limitations, if the set-off demand was barred thereby.

Thus, in debt, the plea was payment, with leave to give the special matters in evidence, *with notice of set-off*, replication, *non solvit* and issue.

The defendant offered to shew in evidence, that his son, during his minority, had performed certain services for plaintiff, for ten months; and claimed a reasonable compensation therefor.

The plaintiff, denying that any allowance for such services, was ever in the contemplation of the parties, contended, that supposing it to be a real debt, it was barred by the act of limitations, and could not now be set-off: and cited *Buller*, N. P. 176. The services alleged to have been rendered, were in 1784, and the bond on which the suit was brought was dated 26th December, 1785, subsequent to the transaction, and had been previously renewed. That if the defendant meant to avail himself of the leave to give the special matter in evidence at the trial of the cause, he ought, under the 37th rule of the practice of the Court, to have given notice in writing, at least ten days before, of the special fact or matter on which he intended to rely by way of defence: and on the foot of mutual dealings, he ought under the 38th rule, to have given the like written notice, and at the same time furnished the plaintiff

with a copy of his account. And not having complied with these requisites, he was precluded from giving the intended evidence.

By the Court. If the defendant had pleaded the set-off specially, he would have been under no necessity to have given any other written notice. It would then have been incumbent on the plaintiff to have replied the act of limitations. Here the set-off is not pleaded, and under the case cited, the evidence may be well objected to, on the *mere notice of set-off*. It was accordingly over-ruled. *Jacks* v. *Moore*, Lancaster, May 1794, before *M'Kean, C. J.* and *Yeates, J.* at *Nisi Prius*. MSS. Reports.

William Robinson, assignee of *Alexander Armstrong* v. *Benjamin Beall* & *Henry Russell*.

Circuit Court, Fayette county, October 1801, before *Yeates* & *Smith*, Justices.

This was a case stated for the opinion of the Court.

On the 20th of July, 1800, the present suit was commenced on a bond given by the defendants to *Armstrong*, dated May 6th, 1799, and duly assigned to the plaintiff, June 30th, 1800.

The plea was payment with notice of a set-off; and defendants claimed a defalcation of a joint bill by *William Cameron*, (since deceased,) and *Alexander Armstrong* aforesaid, to *Andrew Baine*, for the payment of £. 36. 5. 6. on the 9th Oct'r, 1799, and duly assigned to *Benjamin Beall*, on the 28th Feb'y, 1800. *Cameron*, the co-obligor, died before the times of either of the assignments.

The question was, whether the bill in the hands of *Beall*, the defendant, ought not to be allowed as a set-off against the bond, in the hands of *Robinson*, the plaintiff?

It was objected, that the bill intended to be defalked, was joint, and between other parties—that the demands must be mutual, and such as are due in the same right, Buller, 175. No sett-off is allowed where the demand is in *auter droit*. 1 Vez. 208. There are exceptions in the case of surviving partners—A debt due to a defendant, as a surviving partner, may be set-off against a demand on him in his own right, because the defendant might have declared against the plaintiff for this demand, and also for any sum due to him separately, if any such had been due.

It was answered, that the plaintiff by the assignment, took the bond subject to all the equity and defalcation, which it carried in the hands of the obligee. *Cameron* died before his bill was assigned in February, 1800, and the remedy by *Beall*, the assignee, was transferred solely as against *Armstrong*; the joint nature of the bill was destroyed by *Cameron's* death; and *Beall* possessing this demand against *Armstrong* antecedent to the assignment of the bond by the latter to the plaintiff, must be entitled to a defalcation. *Armstrong's* assignment would not put *Beall* in a worse situation than he was before. 1795.

By the Court. There can be no doubt, but, circumstanced as this case is, the bill is a *good set-off* against the bond. MSS. Reports.

And, in the case of *Humphries* v. *Blight's assignees*, in the Circuit Court of the *United States*, for the *Pennsylvania* district, it was held, that a commission of bankruptcy is legal notice to affect a subsequent assignee of a promissory note with the statute right of set-off. 4 Dallas, 370.

In *Cramond* & *others*, executors of *Cay*, surviving partner of *Clow* v. the *Bank of the United States*, which was a *scire facias* obtained in Sept'r, 1801, against the defendants, as garnishees in a foreign attachment against *James Brown*. The case was, that on the 19th of August, 1793, *Clow* & *Cay*, partners in trade, indorsed a note drawn by *H. Darrach*, bearing that date for the sum of $ 852, which was discounted by the defendants, and the amount paid to the indorsers. Before the note became due, the drawer and indorsers died, and notice of non-payment was duly given to the executors of the surviving partner, *Cay*.

On the 11th of April, 1798, *Clow* & *Cay* laid a foreign attachment on the property of a certain *James Brown*, in the hands of the defendants, and judgment was obtained thereon, on the 14th of June, 1794, in the names of the present plaintiffs, as executors of *Cay*, surviving partner; and after a writ of inquiry, there was final judgment for plaintiffs for £. 255,43. 2. 3. A *scire facias* then issued against the defendants as garnishees, returnable to September term, 1797, and upon the 10th of Sept'r, 1801, a verdict was found for the plaintiffs for $ 3354, and on the same day a judgment nisi.

The defendants, as garnishees of *J. Brown*, were in possession of 13 shares of bank stock, and of the dividends thereon, arising and accruing since the 1st July, 1801, subject to this attachment. They had received payment of $ 284. 27 cents, being a dividend of *H. Darrach*, the drawer of said note.

The question for the opinion of the Court, was, whether the defendants in this action were entitled to set off

1705. against the demand of the present plaintiffs, the balance due on said note with interest?

But the set-off was not allowed. It was said, that set-offs were agreeable to reason and justice; and in actions by or against executors, where there are mutual debts, they are allowed with great reason. But *this mutuality of debt is the essential circumstance in a set-off*; and was there any thing of the kind in this case? The debt of the bank was due to *Brown*; it owed nothing to *Clow & Cay* at the time of their death. The object of a foreign attachment is none other than to get the party's appearance by attaching his property, and it would produce great confusion to turn it to the purpose of settling collateral accounts like this. To allow the defendants to pay themselves in this way, would be an injustice to the other simple contract creditors of *Clow & Cay*, whose right to this debt from *Brown* to *Clow & Cay*, vested in them generally upon the death of the latter, and could not be diminished by the subsequent act of the defendants; upon this point a majority of the Court relied, in giving judgment for the plaintiffs. 1 Binney, 64.

The assignee of a policy of insurance takes it liable to all defalcations to which it was subject before the assignment: and in a suit by the assignee, the underwriters may set-off a debt due by the assignor at the time of effecting the policy, though it be an *open* policy, and the claim for a *partial* loss.

Thus, in the case of *Rousset* v. *the Insurance Company of North America*. The case for the opinion of the Court was, in substance, that the defendants, on the 28th Jan'y, 1799, underwrote a policy of insurance in the name of *B. Nones*, for $ 4000, on the brig *Charlotte*, at and from *Philadelphia* to *Wilmington, N. C.* and at, and from thence to *Martinique*. At the time of effecting the insurance, *Nones* was the true owner of the *Charlotte*, and she was duly registered in his name. He continued to own her until the 28th of Nov'r, 1799, when he sold her to the plaintiff. On that day, he executed a bill of sale of the brig, and delivered into the hands of the plaintiff, the above policy of insurance, as his own, and for his own use and benefit. And on the 21st Jan'y, 1800, the policy was formally assigned by indorsement. In the month of March, 1799, the brig sailed upon the voyage insured, and during the prosecution of it, suffered damage from stress of weather, which was repaired in the *West-Indies*, during the winter of 1800, and to recover for which this action was brought; but at the time of effecting the policy, and ever since, *Nones* was indebted to the defendants for *premiums* on insurance made by them for him on other vessels and cargoes, and on the same vessel for a former voyage; and he was insolvent at the time he sold the vessel, and at the commencement of this suit. The question for the Court was, whether the defendants had a right to set-off against the plaintiff's demand for a partial loss, so much of the debt due to them by *Nones*, as was equal thereto.

Tilghman, C. J. after stating the case, said, The Court considered this point as having been settled in the case of *Gourdon*, (for the use of his assignees,) v. the same insurance company tried in *bank*, at March term, 1802. The charge of C. J. *Shippen*, delivered with the approbation of all the Judges, established a principle decisive of the question now before us; that is to say, that a policy of assurance was to be considered as other *choses in action*, which are not assignable by the common law, but only in equity; and consequently the assignee takes it liable to all defalcations, to which it was subject before the assignment. Upon the authority of that case, therefore, the Court are now of opinion, that the defendants are entitled to the set-off for which they contend. 1 Binney, 429. S. C. 4 Dallas, 291.

Gourdon's case above cited, will also be found in the note, 1 Binney, 430, and affords considerable light to the principles of set-off, as against assignees.

The Court held, that bills of exchange, and notes payable to order in the city of *Philadelphia*, are properly negotiable paper, after such notes have been indorsed *bona fide* in the course of trade. The effect is, that the holder may sue in his own name, and may recover the money from the drawer without any embarrassment whatever on account of any counter demands, or want of consideration, as between the drawer or maker and the payee.

Bonds may be assigned by our law, so as to enable the assignee to bring an action on them in his own name, but without the other qualities of negotiable paper; that is, if the obligor had before the assignment any just demand against the obligee, which he could have set-off against him if there had been no assignment, he may set-off the same against the assignee, who takes the bond subject to all the equity that it was subject to before the assignment. This rule is, however, subject to one qualification. If the assignee, when he is about to take the assignment, calls upon the obligor to know whether the whole money is due, and the obligor tells him it is a good bond, but is entirely silent as to any claim of his against

the bond, he can never after open his mouth against the demand of the assignee. See 1 Dallas, 23.

A policy of insurance is not assignable in its nature; but it is assignable in equity. It is not like a bill of lading, which is assignable in its nature, and the assignment of which vests the absolute property in the goods assigned in the assignee. A policy of insurance, in its qualities, resembles a bond for payment of money at a future day, more than any other instrument. They are both *choses in action*. It is only by a particular act of assembly that the assignee may bring the action in his own name, if the assignment be sealed and delivered in the presence of two subscribing witnesses; but the law does not prevent the obligor from showing a want of consideration, or setting off any counter demand against the obligee.

It is before mentioned, that it is incumbent on the assignee of a bond to call on the obligor to know the quantum of the debt due; it is likewise incumbent on the assignee of a policy to call upon the underwriter, and to inform him before any account of a loss, and to inquire if he has any thing to set-off against the policy. If the underwriter has this notice, and either makes no objection and claim, or is totally silent as to any claim, the assignee of the policy is in the same condition as the assignee of a bond under like circumstances; and both are entitled to recover, notwithstanding the underwriter in the policy, or the obligor in the bond, should afterwards discover that he had a counter demand; and their mouths are stopped by their acquiescence or silence; otherwise, in both cases, it would lead to a deception.

See the act to devise a particular form of promissory note, not liable to any plea of defalcation or set-off, passed Feb'y 27th, 1797, (post. chap 1909.) This act extends only to notes bearing date in the city and county of *Philadelphia*, and is for the protection of indorsees. But in every action brought by the holder of such note, whether against the drawer or indorsers, the defendant may set-off and defaulk so far as the plaintiff shall be justly indebted to him in account, by bond, specialty, or otherwise.

A balance of accounts due from a factor to his principal, may be set-off in an action on a bond by the latter against the former; and such accounts are not within the act of limitations. *Stiles* v. *Donaldson*. 2 Dallas, 264.

Promissory notes are taken by the indorsee, subject to all the equitable circumstances to which they were subject in the hands of the indorser. 1 Dal. 441.

1705.

Where the Commonwealth sues on a settlement of accounts, the party shall have the benefit of a set-off, but not so as to bring the Commonwealth in debt; for the defendant shall not indirectly recover from the State, a substantive, independent claim, by way of set-off, any more than he could directly recover a debt due from the State, by bringing a suit against her. *Commonwealth* v. *Matlack*. 4 Dallas, 303.

Debt on bond. On the plea of payment, defendants offered to give *no consideration* in evidence. Objected, that the consideration of a bond is not inquirable into, the passing the bond being a gift in law of the money. To this it was answered, and so ruled by the court, that there being no Court of Chancery here, there is a necessity, in order to prevent a failure of justice, to let the defendants in, under the plea of payment, to prove mistake, or want of consideration. *Swift* v. *Hawkins* and others. 1 Dallas, 17. And the jury may, and ought to presume every thing *to have been paid*, which in equity and good conscience, ought not to be paid. *Ibid.* 260.

Plaintiff shall not be liable for costs, if his demand is reduced to the sum within a Justice's cognizance, by a set-off, which it was in the option of defendant to plead or not. 1 Dallas, 308-9. 2 Dallas, 74.

By the 7th section of the act to amend and consolidate with its supplements, the act entitled "An act for the recovery of debts and demands, not exceeding one hundred dollars before a Justice of the Peace," &c. passed March 20th, 1810, a defendant, who shall neglect or refuse in any case to set off his demand, whether founded upon bond, note penal, or single bill, writing obligatory, book account, or damages, which shall not exceed one hundred dollars, before a Justice of the Peace, shall be; and is for ever barred from recovering against the party plaintiff, by any after suit—but if on judgment by default, and he is entitled to a set-off, he may have a rehearing, on application within a limited time, on certain conditions therein prescribed. And by the 20th section of the same act, the powers of Justices of the Peace shall extend to all cases of rent not exceeding one hundred dollars, so far as to compel the landlord to defalcate or set-off, the just account of the tenant out of the same; but the landlord may waive further proceedings, and pursue the method of distress for the balance so settled, &c. See the act relating to domestic attachments, passed Dec'r 4th, 1807, sect. 10, (chap. 2873,) as to set-off between the debtors and trustees, in cases of domestic attachment.