BORDEN ET AL. *vs.* STATE, USE &C.

By the Court: SCOTT, J.—Notice before judicial sentence is not a law of nature; or, at least, not such in a sense that would make a human law non-obligatory that would circumscribe the sphere of its operation. Nor has the common law consecrated it as such by a strict conformity to its mandates.

It follows that there may be an obligatory law paramount to the law of notice before judicial sentence.

By the common law the judgment of a superior court is not void, but only voidable by plea on error.

As a consequence of this law, the judges of these courts are protected absolutely and universally from prosecution or suit for what they do in their judicial capacity.

The existence of this rule of law and this consequence, besides being established by authority, is maintained by the consideration that among the powers vested by law in these courts is the power to decide upon their own jurisdiction.

The rule being established that the judgments of superior courts are not void, but only voidable by plea on error, when this rule comes in conflict with the law of notice before judicial sentence it must be regarded as paramount, because it affects the public interest, whilst the latter looks to the protection of private rights, and it is a maxim of law "that a private mischief shall be rather suffered than a public inconvenience;" and because furthermore, the question whether there has been notice or not, relates not to the investiture of judicial power, but to its rightful exercise.

But the rule that judgments of superior courts are not void, but only voidable by plea on error, though a very general rule, is not adopted as universal; and is subject to exceptions; for example, if a circuit court were to assume jurisdiction of a matter committed by law to the probate court exclusively, or the county court were to assume jurisdiction of a military offence, or if the probate court were to try and condemn a man for high treason, such proceedings would be nullities. So a judgment might even be void under some circumstances, from some peculiar and inflexible policy of the law for the protection of infants, married women, idiots or lunatics.

The probate court being not only a court of record, but a constitutional court of fixed and permanent character invested with general jurisdiction and plenary powers over the matters committed by law to its peculiar cognizance, and open to superior review by appeal, is to be regarded as a superior court.

When the judgment of such court is collaterally drawn in question, jurisdiction of the subject matter appearing, jurisdiction of the person is not a legitimate subject of inquiry in such collateral proceeding. In this case a sheriff was sued for failing to execute a *fi. fa.* issued upon an

11/619. Distgd. in Kimball v. Merrick, 20/15.

allowance and order of payment upon which the *fi. fa.* issued was offered against an executor: under the plea of *nul tiel record,* the record of the allowance and order of payment upon which the *fi. fa.* issued was offered in evidence by the plaintiff, and objected to by the defendant on the ground that they were made without notice to, or appearance by the executor: HELD, that the court properly admitted the record as evidence, the jurisdiction of the subject matter appearing in the probate court, and the question of notice to the executor not being one of legitimate inquiry in such collateral proceeding.

The previous decisions of this court as to the absolute nullity of the judgments of superior courts, when the record fails affirmatively to show previous notice, express or implied, to the defendant are overruled.

By WALKER, J. dissenting. The record of the allowance and order of payment offered in evidence disclosing no fact from which the remotest inference may be drawn that any notice was ordered or issued, or that the executor had any notice actual or constructive, or that he was present, or made any appearance, or that he was called to defend, but simply that the claimant appeared, by attorney, and that the probate court first examined and allowed the claim; and thereafter, at a subsequent term, on motion of claimant's attorney, ordered it to be paid, such allowance and order of payment is void.

It is conceded that the probate court, having been created by the constitution, although of limited and defined constitutional jurisdiction, is nevertheless not an inferior court of limited jurisdiction in the sense in which that term is used.

The courts of this State are of defined constitutional jurisdiction with regard to the subjects over which such jurisdiction is to be exercised, and so far as the subject matter is concerned they must, at their peril, take notice that they do not exceed it, or usurp that which properly belongs to some other tribunal.

But so far as regards the manner of presenting the subject matter to the consideration of the court, no matter how imperfect or illogical the pleadings may be, if the cause itself be such as the court, by any possible form of presentation, could take jurisdiction of it.

The court in passing upon the facts necessary to present such subject matter properly before it so as to fix a legal liability upon the defendant, would have a right to decide, and whether such decision should be right or wrong, the proceeding, so far as that branch of the inquiry extends, would not be absolutely void, but might be erroneous, and if the ascertainment of that fact alone was sufficient to empower the court to proceed to judgment, then it would be true that the court, and all persons acting under its authority, would be protected by its decision.

It is well established by authority that the right to be heard and to defend life, liberty, property and reputation is a natural, inherent right of universal obligation; it is an inherent, indefeasible, constitutional right, and it is a common law right commencing with the earliest history, and never dispensed with in any government, where these rights are recognized or protected by the government; that before a judicial tribunal can render any judgment whatever binding on either, it is indispensably necessary that the court, either by its process or by voluntary appearance, should first have acquired jurisdiction of the person of the defendant as well

as of the subject matter; and that a judgment rendered by a court without a concurrence of these is absolutely void.

It is to the writ and return upon it (unless in case of statutory notice by publication) that the court must look for jurisdiction of the person, or to the record for voluntary appearance.

Where an attempt has been made by the proper officer to execute a writ (not void) by any mode prescribed by law, although the return is defective, yet as the legal sufficiency of the return is a matter for the consideration of the court, although the court may err in its judgment, yet as the court had a right to decide, and is presumed to have decided upon it, although it might be reversed for error, it would, until reversed, uphold the judgment of the court.

Where however the writ has no return, there are no facts upon which the judgment of the court can act, nothing to judge of, and therefore no judgment could be rendered.

Should the writ be lost, and it were made to appear that one had issued, then in its absence, service might be presumed, but not when there is nothing to show that a writ issued; to presume that a writ issued, and then that it was served, would be basing a presumption upon a presumption, which is not allowable.

It is not contended that every fact necessary to confer jurisdiction on a court of superior jurisdiction must affirmatively appear of record: in this the former decisions of this court have gone too far.

Every reasonable presumption in favor of the rightful exercise of jurisdiction ought to be indulged; but where the record (the writ and return being taken as part of it) repels the presumption of notice, as in case the writ should be returned "not found," and the record should state that defendant made default, then no ground for presumption would exist, for the writ would negative the presumption of service, and the record of voluntary appearance; and as these are the only legal means by which the court acquired jurisdiction of the person (unless by publication, and this the record would show, if made,) no presumption could be indulged.

Writ of Error to Pulaski Circuit Court.

This was an action of debt brought in the name of the State for the use of Robinson against Borden, as sheriff of Pulaski county and his securities, on his official bond, determined in April, 1847, before the Hon. WILLIAM H. SUTTON, then one of the Circuit Judges.

The plaintiff assigned as a special breach of the bond, that Samuel Robinson, on the 31st July 1841, obtained an allowance of a claim for $190, in the probate court of Pulaski county, against the estate of Cynthia Robinson deceased, of which Woodruff was

executor. That payments were afterwards made on the claim, leaving a balance due on the 23d April, 1845, the date of the last payment, of $155.66. That on the 18th November, 1845, during the October term of said probate court, Woodruff, as such executor of said Cynthia Robinson, was ordered by said probate court to pay over to said Samuel Robinson the said sum of $155.66, with interest, &c., whereof the said Woodruff as such executor was convicted, as by the record, &c., would more fully appear &c. That after the making of such order, Woodruff, though specially requested, failed to pay over said money &c. That said Samuel Robinson for the purpose of obtaining satisfaction of said allowance and order, on the 5th February, 1846, sued out a *fi. fa.* thereon, directed &c., commanding &c., which afterwards came to the hands of said Borden as such sheriff to be executed, &c., and which he failed to execute, &c.

Defendants pleaded,

1. That said Samuel Robinson did not obtain an allowance against said Woodruff as such executor in manner and form as in said declaration alleged.

2. That there was not any record of said supposed order requiring said Woodruff as such receiver to pay over said sum of money to said Samuel Robinson remaining in said probate court, in manner and form as in said declaration alleged, &c.

3. That said *fi. fa.* did not come to the hands of said Borden as such sheriff as alleged, &c.

Issues were taken to these pleas, the cause submitted to the court, sitting as a jury, and finding and judgment in favor of plaintiff for *one cent* damages.

Defendants filed a motion for a new trial, which the court refused, and they excepted, and set out the evidence.

On the trial, plaintiff was permitted to read from the record book of the probate court of Pulaski county, against the objection of defendants, the following order of allowance, made on the day in the declaration alleged:

"SAMUEL ROBINSON, *Plaintiff*,
vs.
WILLIAM E. WOODRUFF, Executor &c., of
CYNTHIA ROBINSON, *Defendant*.

On this day came the plaintiff, by Fowler his attorney, and the note filed in this case for allowance on the 15th day of July, A. D. 1841, was considered, and the court having examined the same doth alow unto the said plaintiff against the said defendant as executor as aforesaid the sum of one hundred and ninety dollar, and ten per cent. per annum interest thereon from the 20th day of May, A. D. 1840, until the same shall be paid, and all the costs in and about this suit expended, and that this claim be classed in class number four."

Plaintiff also introduced and read in evidence, against the objection of defendant, and entry made on the record book of said probate court, on the 18th day of November, 1845, at and during the October term of said court in the year 1845, as follows:

"SAMUEL ROBINSON, *Plaintiff*,
vs.
WILLIAM E. WOODRUFF, as Executor of
CYNTHIA ROBINSON, deceased, *Defendant*.

On this day came said plaintiff by attorney and files his motion for an order for said executor to pay over to him the amount of an allowance in his favor against the estate of Cynthia Robinson deceased; and said plaintiff shows to the court that heretofore, to-wit: on the 31st day of July, A. D. 1841, he obtained an allowance in this court against the said executor of Cynthia Robinson for the sum of $190, together with interest thereon at the rate of ten per cent. per annum from the 20th day of May, A. D. 1840 until paid: that there has been paid toward the satisfaction of said claim the sum of $127.75, and there is yet remaining unpaid on said claim the sum of $155.66 with interest on said sum from the 23d day of April, 1845, until paid at ten per cent. per annum. And said plaintiff further shows to the court that his said claim was placed in class number four in the order of payment, and that said executor has paid off and dis-

charged claims against the said estate over which his claim has priority in the order of payment. Therefore upon consideration of the premises, it is ordered by the court that said executor forthwith pay over to said Samuel Robinson the sum of $155.66, the balance of his said claim, with interest thereon at 10 per cent. per annum from the 23d day of April, 1845, until paid."

Plaintiff next read, against the objection of defendants, an execution issued upon the above order of payment against Woodruff, dated 5th day of February, 1846, directed to the sheriff of Pulaski county, and returnable to said probate court on the 13th day of April, 1846, with an endorsement thereon by defendant Borden, as such sheriff, showing that the execution came to his hands on the day it was issued, that on the same day he levied on a slave, and stating that he could not sell the slave owing to the fact that the writ was returnable previous to the first day of the circuit court for the county, when he was required by law to sell slaves, &c.

Plaintiff then proved that Woodruff filed his account current for settlement as such executor, in said probate court on the 22d day of July, 1845, and that said settlement as confirmed was entered of record on the 13th November, 1845, during the October term of that year; and read the same as evidence from the record.

In this settlement the estate is charged with $174.34, and credited with $280.71, showing a balance in the hands of the executor of $106.37. In a note at the bottom of the account, it is stated that claims amounting to $161.50 with which the estate is credited, had not been collected.

Defendants moved the court to exclude and reject as evidence the said order of payment, and the said execution issued thereon, but the court refused.

Defendants then proved that the final adjournment of the October term of said probate court in the year 1845, took place on the 2d day of December, 1845, and that no demand was made upon Woodruff in pursuance of said order of payment until at

least a month after such final adjournment, and that since the institution of this suit Woodruff had paid to said Samuel Robinson the full amount due upon the allowance mentioned in said execution—which was all the evidence introduced, or offered by either party.

WATKINS & CURRAN, for the plaintiffs.

The order of allowance and the order of payment and for execution are each absolutely void for want of notice to Woodruff; consequently, the sheriff was not bound to execute the writ of execution issued thereon. This court have uniformly decided that no judgment can be rendered against a party without notice.

It does not appear that Woodruff had any notice either of the original order of allowance or of the order of payment. The order of payment has the effect of a judgment; and if it can be made without notice, the administrator might be compelled to pay a large amount when if he had been afforded an opportunity of being heard, he could have shown that he had no available assets in his hands.

FOWLER, contra.

Mr. Justice SCOTT delivered the opinion of the Court.

The main question to be determined in this case is, whether or not the order of payment made in the probate court against Woodruff was a nullity. It is a question of great importance because it involves legal principles upon which some of the fundamental rules of property rest, on the stability of which in a great degree depends the repose of the country.

The ground of the supposed nullity of the order in question is the want of previous notice to Woodruff and of any waiver of such on his part. And it is insisted that in every case a judgment or decree is a nullity, if it has not been preceded by notice, actual or constructive, to the party against whom it is rendered. This position is understood to be based upon a general proposition that such a proceeding would be directly against a law of

nature that has been consecrated by the common law and by the immemorial usages of all civilized nations, and is therefore of paramount and universal obligation and must consequently have resistless sway. Man's laws being strengthless before God's laws (Noy's Maxims, 19,) consequently a human law, directly contrary to the law of God, would be an absolute nullity. *Doctor & Student, lib.* 1, *ch.* 6.

To sustain the position assumed upon the basis indicated the most imposing authority is relied upon. Among them, FORTESQUE, who says, in the case of *The King vs. Pecham, Carth.* 406. "It is certain that *natural justice* requires that no man shall be condemned in judgment without notice." And again, in the case of *Rex vs. Cleg,* 8 *Mod. R.*, "As to want of notice natural justice requires that every man be heard before he be condemned in judgment unless through his own default." And Chief Justice MARSHALL, in the case of *The Mary,* 3 *Peters' Cond. R.* 312, said, "It is a principle of natural law of universal obligation that before the rights of an individual can be bound by a judicial sentence he shall have notice, actual or implied of the proceedings against him." And Judge BLACKSTONE, in his commentaries (4 vol. p. 283,) when noticing the necessity of summoning a party defendant to give him an opportunity to defend, says, "A rule to which all municipal laws that are founded upon the principles of justice have strictly conformed; the Roman law requiring a citation at least, and our common law never suffering any fact, either civil or criminal, to be tried until it has previously compelled an appearance by the party concerned." Other authority of like import might be cited, but it is believed these fairly present the character of the whole of such.

In examining the question thus presented and supposed to be sustained, on one side, upon the basis assumed, we shall first inquire whether it be quite accurate to say that notice before judicial sentence is a law of nature, or at least of such universal application as seems to have been supposed, and whether indeed the common law has consecrated it as such by a strict conformity to its provisions. If we find it no law of nature at all,

we shall be at full liberty to give effect to certain known rules of the common law, although inconsistent with this supposed law of nature. And even if we find it a law of nature, consecrated as such by the common law, nevertheless, if we find these known rules of the common law, to which we have alluded, equally as well authenticated as laws of nature, we will still be at liberty to give effect to them, as well as this supposed law of nature, by construing them all *in pari materia*, as a system of natural laws.

We understand all laws to be either human or divine, according as they have man or God for their author, and divine laws are of two kinds, that is to say, 1st, Natural laws; 2d, Positive or revealed laws.

A natural law is defined by BURLAMQUI to be "A rule which so necessarily agrees with the nature and state of man, that, without observing its maxims, the peace and happiness of society can never be preserved." And he says that these are called natural laws, "because a knowledge of them may be attained merely by the light of reason, from the fact of their essential agreeableness with the constitution of human nature: while, on the contrary, positive or revealed laws are not founded upon the general constitution of human nature but only upon the will of God; though in other respects such law is established upon very good reason and procures the advantage of those to whom it is sent. The ceremonial or political laws of the Jews are of this latter class.

So, all rights which appertain to man are of one or the other of two classes, that is to say, 1st, natural rights; or 2d, acquired rights. The former are such as appertain originally and essentially to man, such as are inherent in his nature and which he enjoys as a man independent of any particular act on his side. The latter, on the contrary, are those which he does not naturally enjoy, but are owing to his own procurement. The right of providing for one's preservation is of the one class; while sovereignty or the right of commanding or the right to property are of the other class.

The same author (BURLAMQUI) defines "Justice in a judicial sense" to be "nothing more or less than exact conformity to some obligatory law;" and therefore he says that "all human actions are either just or unjust as they are in conformity to or in opposition to law." The doing of justice then in a judicial sense is the performance towards another of whatever is due to him in virtue of a perfect and rigorous right, the execution of which he may demand by forcible means unless we satisfy him freely and with good will. While, on the other hand, the performance of duties due to another only in virtue of an imperfect or non-rigorous obligation which cannot be insisted on by violent methods, but the fulfilling of which is left to each man's honor and conscience, are comprehended under humanity, charity or benevolence in opposition to justice.

Now according to these principles and definition which we have laid down from an author of the most unquestionable authority on these points, if it be contrary to natural justice that a man should be condemned without notice and an opportunity to be heard, as is said by Fortesque, such is because it is a principle of natural law, as is said by Judge Marshall, that before the right of an individual can be bound by a judicial sentence he shall have notice actual or constructive of the proceedings against him. Because otherwise there could be no non-conformity to an obligatory law to bring such a human action within the definition of injustice. Such a natural law then is assumed by the remark of Fortesque and its existence is affirmatively asserted by Judge Marshall with the further remark that it is of "universal obligation."

We would feel that it was presumption in us even indirectly to gainsay these great authorities, if we did not feel sure that they did not use these expressions in a scholastic sense, but only in that loose and general sense in which strong language is often used to affirm the existence of any highly important general rule of very extensive application. We feel therefore, in what we shall say on this point, that there is more of vindication from

heretical inference from these general expressions than of assault, even covert, upon these great names.

It is manifest at a glance that such a law of nature, as that supposed, could have had no operation even if it had existed before the establishment of the civil state and while man was in a state of nature. Because there was then no human right for such a law to act upon, so far at least as temporal affairs were concerned; no tribunal to enforce its mandates; no individual to claim its protection. In a word, there was no place for its operation among men in their temporal relations towards each other. If then it was a law of nature at all, it was a dormant rule, which, in that condition of man's estate, could never have been derived by the light of reason from "its essential agreeableness to the constitution of human nature." Because in that condition of man there could have been no data in the human mind from which reason could have essayed so far into civilization.

Then if a law of nature it could not have been developed from its dormant condition until after the establishment of the civil state. And then the same process of reasoning that would develope it as such would develope many other rules which would be equally authenticated, none of which, then and so developed, could in the nature of human affairs, with all due deference, be of universal obligation. Because in a state of nature there was no place for right and duty as such rules, and right and obligation are co-relative terms. Nor indeed is it at all probable that the most extensive rule that might be developed as a rule of human conduct in the civil state, either by the aid of reason, when exerted in reference to the constitution of human nature and the adventitious state of man's being, or by direct human legislation itself, could be of universal obligation. Because in the nature of things all such must be subordinate to some inalienable rights which pertain to man alike in a state of nature as when in the civil state, such as the right of self preservation; and consequently must put a limit to the operation of all rules set on foot by the civil state.

Then if it were conceded that notice before judicial sentence was a natural law, although not developed as such until after the establishment of the civil state, it could not be of universal obligation, even if it was the only law of all nature's enactment that had laid dormant in her chancery until after the establishment of the civil state which gave occasion for its development.

But we have already remarked that the same process of reasoning which, after the establishment of the civil state would develope notice before judicial sentence as a law of nature, would develope many other rules which would be equally well authenticated as such. And as civilization and refinement might advance, some of these might be even better authenticated and therefore of paramount obligation. Not that the laws of nature (if any of these rules deserve that name) are unfixed or vanish before man's progress in the scale of civilization and refinement; but that human affairs by this advancement are ever shifting and as they pass more or less from the influence of one of these rules they pass in the same ratio within the more direct influence of another, or else develope a new rule by the same process that those already in existence were developed. And thus it is that some old rules come to have a more circumscribed sphere of action and others become entirely obsolete. When therefore mischief would flow into society by the too general operation of a given rule there would be the same authority in that society to restrict its operation within conservative limits either by positive enactment or else by giving freer, and, to this extent, paramount scope to some already existing countervailing rules, that there was in the first place to give sway to the rules thus curtailed; because the badge of its authenticity, which, in the first instance, consisted in its necessary agreeableness with the nature and state of man has ceased to accredit it to the full extent of its former operation, although it amply does so to a less extent. And there would therefore be the same authority for thus restricting its operation that there was for its original adoption and that authority derived from the same source. Nor would any of these rules or modifications of them be any the less obliga-

tory merely because they had been called rules of public policy instead of laws of nature, if they were essentially the same in their nature and had been derived from the same source and by the same process of reasoning. And we apprehend that all those rules of law which are usually called rules of public policy are of this character, having more or less authority and operation as the public policy they are designed to sustain is of greater or less import to the community.

Now among these rules that have been and are so to be developed and are thus based, is that which sustains the inviolability of judicial sales: that which covers the officers of the law, judicial and ministerial, with the panoply of its protection, when within the pale of integrity and reasonable diligence: that which looks to the end of strife and the repose of society through the verity of the records of superior courts and the finality of their judgments and decrees when not disturbed by appellate power. And there are many others of like moment designed to sustain the stability of titles to property, a stable administration of justice and to promote the peace and happiness of the country in general. Now when we consider that the inevitable result of holding notice before judicial sentence to be a natural law is a serious desecration of all these important rules, we have abundant reason to doubt the correctness of such a doctrine. Because, so far from preserving the peace and happiness of society in thus operating, its tendency is in this directly the contrary. For it cannot be denied but that, if any serious inroad be made upon these great rules of property and repose, no little encouragement will at once be given to piratical adventures under color of law.

The judicial declaration of the nullity of a judicial sentence is far different, in its consequences, from its reversal on error. The latter does not affect titles, nor make innocent men trespassers, nor rob honest purchasers either of their money or the subject matter of their purchase after having been invited to buy under the sanctity of judicial proceedings. The former does all this and much more, for it strikes a deadly blow at that confidence

in and respect for the laws which is the highest guarantee for their enforcement.

Then for any operation to such an extent as this, the rule in question falls far short of the standard of a natural law, and if so to any extent some of these others must be of paramount import when tried by the same standard. Perhaps however it would be more accurate to say that none of these rules are natural laws although doubtless the rendition of a judicial sentence against a defendant without previous notice express or implied would be a violation of one of the most important principles connected with the administration of justice. Nor have we been able to find that the common law consecrated this rule as a law of nature by a strict conformity to its provisions. On the contrary, there is very conclusive evidence that it could not have been so regarded.

The common law proceeding of outlawry was inconsistent with such an idea to its full extent. The result of this proceeding was in the first place a judical sentence by which the defendant incurred a qualified forfeiture of his lands and goods and a suspension of his civil rights as a citizen: and in the second place it enabled the plaintiff in a civil action, by application to the court of Exchequer, or by petition, when his claim exceeded fifty pounds, to obtain satisfaction of his claim by a sale of the property thus seized. And there is a strong case as to a judgment of outlawry cited by the court in the case of *McPherson vs. Carliff et al.* 11 *Serg. & Rawle* 438, to sustain the proceedings of the probate court as to the sale of real estate when those proceedings were unsuccessfully attacked on the ground that it had proceeded under a total mistake as to the real parties in interest, the court having proceeded under the idea that a family of children, who were really bastards, were the heirs of the deceased. That case is cited from 10 *Vin.* (*Title Record C. pl.* 2, *from Br. E. pl.* 78,) "Record of outlawry of divers persons was certified in the Exchequer, among whom one was certified outlawed and was not outlawed, and that his goods forfeited were in the hands of I. N., and upon process made against him he came and said

he was not outlawed, and parcel of the record came by chancery out of B. R. into the Exchequer: and GREEN, Justice of B. R., came into the Exchequer and said he was not outlawed, but that it was misprison of the clerk. SKIPUNTH, said though all the justices would record the contrary they shall not be credited when we have recorded that he is outlawed. *Querae,* what remedy is for the party? It seems it is a writ of error inasmuch as there is no original against him but only record of outlawry without original. (*Br. Record, pl.* 49) and in the same book, *pl.* 4, cites *Br. Error, pl.* 78, it is said the diversity is this, that a man may assign error on a thing separate or out of the record but he cannot falsify it." The custom of foreign attachments, by which goods in the hands of a third person might be sold or money attached and unless the debtor appeared within one year and successfully disputed the debt, he was forever concluded as to his rights in the property or money, was also inconsistent with such an idea to its full extent.

The rule of the absolute verity of the return of the sheriff that he had executed process, although in fact and in truth he had never done so, was directly inconsistent with the idea that notice before judgment was a natural law because if so, the rule of the verity of the sheriff's return would have been an absolute nullity. An appearance of an unauthorized attorney was of the same class. So was the Scotch law of Horning. It was assimilated to the custom of foreign attachments in several respects. There is a case in 4 *Bing.* 686, (*Douglass et al. assignees, vs. Forrest ex. of Hunter,*) where, in an action in England on one of these judgments of horning, it was contended that the judgment should be held as a nullity upon the principle of universal justice, as the counsel expressed it, there having been no notice previous to the judgment of horning. But the English court refused to so hold and said, "On this question we agree with the defendant's counsel that if these decrees are repugnant to the principles of universal justice, this court ought not to give effect to them. But we think these decrees are perfectly consistent with the principles of justice. If we hold that they were not consistent with

the principles of justice we should condemn some of the proceedings of our own courts."

Finding then by this examination upon principle that notice before judicial sentence is no natural law in that sense that human laws would be strengthless before it, and also finding that the common law has not consecrated it as such by a strict conformity to its provisions, we are now at full liberty to examine into the common law for fixed and known principles, if any such there be, which may be inconsistent with the nullity of judicial sentence pronounced without previous notice to the defendant and an opportunity to defend.

If there be such fixed and known rules and they are well founded in public policy, that look to the stability of titles, the stated, peaceful and quiet administration of the laws and to the repose of society in general, they must be considered of paramount obligation, although in their enforcement cases of individual hardship may arise. And this upon the maxim, as old as the common law itself "that a private mischief shall be rather suffered than a public inconvenience." A rule that has application to all public sanctions in government and in legislation and is plainly recognized in some of the declarations in our bill of rights. And it has never been considered a valid objection to a rule of public policy that it may produce disadvantages unjustly to an individual, for partial inconvenience is the inevitable consequence of every such rule: nevertheless the production of the general good authorizes their establishment. Indeed, "partial evil is universal good."

It may be safely assumed that by the ancient common law, the idea that a judicial sentence was a nullity had no place at all; because so long as the King himself sat in judgment, such an imputation would have been a direct invasion of the principle that "the King can do no wrong." Nor subsequently, when his multiplying cases of state induced him to commission judges to dispense justice throughout his kingdom; for they so dispensed justice not for themselves but for the King, as the direct representative of majesty in the judgment seat, and as courts were

the repositories of the same judicial powers that had been before in the King and were to return to him again in his political capacity whenever their commission might come to an end. But after the establishment of inferior courts with limited and special jurisdiction closed to appellate review otherwise than through the powers of superintendency and control assumed by King's Bench, and the rule had been adopted as to all such courts to restrict their action within the express and explicit letter of their privileges, (3 *Black. Com. conclusion of 6th chap. p.* 85) a foundation was laid for such an idea as to the sentences of these courts, such an idea being a consequence of such a rule as to the action of these courts: because the rule itself was based upon the notion that the judicial powers of these courts derogated from the powers of the common law courts, not only of those at Westminster, but of all others that were open to the appellate powers of these, and their powers were therefore in their essence limited powers.

But nevertheless there was no ground for any such idea as to all these other courts of record, although some of them were limited in their jurisdiction like these inferior courts to particular subjects, persons or places; because, although thus limited in their jurisdiction the judicial powers invested in them were not limited powers, but were of the same class of those with which the courts at Westminster were invested.

Now in order that the rules of which we are in search may be traced to a reasonable source and thus be authenticated, upon principle as well as by authority, to be fixed rules of the common law, let it be assumed that the brief expose just given of the character of the powers invested in these two classes of courts, is correct. That is to say, that the powers invested in the superior courts were general powers and those vested in the inferior courts limited powers. And the consequence would be, as to the former, that there could be no defect of power so long as judicial action was confined to a subject within the jurisdiction of one of these courts, and consequently the functionary could never be a trespasser, however contrary to law might be

the proceedings on such a subject matter. But as to the latter there would be a defect of power, not only when the subject might be without the jurisdiction, but also when within it, if the mode of action was without the limits of the defined boundary, and consequently the functionary would be a trespasser whenever the boundary of his powers had been passed, either as to the subject matter or the mode of proceeding; because when the powers of the functionary ended, the acts of the trespasser began, all acts beyond these powers being but the private acts of a private person.

Accordingly the doctrine is distinctly laid down by some of the most respectable authorities that "The judgment of a superior court is not void but only voidable by plea on error." (8 *Bac. Ab.* VOID AND VOIDABLE, (C.) *p.* 170, citing 2 *Salk.* 674. *Priggs vs. Adams, S. C. Carth.* 274); thus an erroneous attainder is not void but voidable by writ of error. (2 *Inst* 184. 2 *R* 3 *fr.* 21, 22.) See also 1 *Chitty Pl.* 181; and cases cited in note (T.); also 7 *Bac. Ab.* 67. "The judgments of a superior court are never considered void and until set aside they are to be considered as regular judgments for every purpose." (*Stebbin Walbridge vs. Hiland Hall,* 3 *Vermont Rep.* 114.) "A judgment of a court of competent jurisdiction, though rendered in a form of proceeding unknown to our practice and apparently without service of process cannot be treated as a nullity while unreversed." (*Weyer vs. Zane,* 3 *Ham. Ohio R.* 305.) "However summary or irregular the judgment of a competent tribunal may be it cannot be treated as a nullity." (*Buell vs. Cross,* 4 *Ham. Ohio Rep.* 329.) "When judgment on a forthcoming bond states that notice was duly proved it will be taken for granted in the appellate court unless there be a bill of exceptions showing the contrary; but if the judgment contains no such statement and the defendant did not appear the judgment will be reversed as erroneous." (4 *Munford R.* 380.) "An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity, and it is not a nullity if the court has a general jurisdiction of the subject although it be erroneous." (*Ex parte Tobias Watkins, p.*

MARSHALL, C. J. 3 *P.* 202.) Nor will such a judgment be the less obligatory because the error is apparent upon the record. 3 *Peters* 207.

And the corresponding doctrine laid down with equal distinctness, "That the judges of the superior courts are never to be made liable either by civil proceedings or by indictment for any thing done by them in a judicial capacity." (*Hammon vs. Howell,* 2 *Modern R.* 218. *Miller vs. Seive,* 2 *Black. R.* 1141. *Doct. Grovevelt vs. Doct. Bomwell et al.* 1 *Ld. Raym.* 454. 1 *Salk.* 396. 1 *Swift's Dig.* 496. *Reed vs. Hood & Burdine,* 2 *Nott & McCord* 168. *Young vs. Herbert, ib.* 172. 1 *Day* 315. 2 *Bay* 5. *Brodie vs. Rutlege, ib.* 69. 2 *Caines R.* 312. *Rambeel vs. Kelly,* 1 *Const. Rep.* 64 *and note.*) And according to Lord Mansfield, in *Mostyn vs. Fabrigas, Cowper's R.* 172, the same rule applied to every judge of a court not of record, provided such court be "subject to a superior review."

But although this doctrine is thus strongly laid down and is sustained by unbroken authority, still a judge who would commit a crime and by a mere evasion endeavor to screen himself under the pretext of exercising his official functions would doubtless be liable to prosecution. Because Sergeant HAWKINS says, and no doubt correctly, in his 6th Book, ch. 28, 5, 6, "If the Court of Common Pleas give judgment in an appeal of death or a justice of the peace, on an indictment of high treason and award execution, both the judge who sentences and the officer who executes may be guilty of felony, because these courts having no more jurisdiction over these crimes than mere private persons, their proceedings are merely void and without any foundation."

But this rule of exemption from liability has never been held applicable to the justices of inferior courts any longer than while they were acting within their jurisdiction, and the reason generally given is that their powers are limited and the mode of their exercise and the extent of their jurisdiction are marked out and defined. And in looking into this part of the subject, one cannot but be struck with the numerous statutes that have been passed

in England from time to time for the protection of this class of judicial officers; such as for the limitation of suits against them, provision that they must be previously notified of an intention to proceed against them, declaring that without such notice there shall be a non suit or nol. pros.; that such suits shall be brought in particular localities; that these justices may tender amends; that criminal information shall not be allowed against them except under given circumstances; and others of like character, all designed to abate the rigor of the rule that made them trespassers and liable in most cases practically for the want of intelligence and learning and the errors of an honest judgment.

Now, in order to show the paramount sway of the first of these two great rules of the common law we will refer to its operation in several cases, where it has been made to override the supposed general rule that every court must have jurisdiction both of the subject matter of the suit and of the person of the defendant, otherwise its judgments in personam will be a nullity. As one of these instances take the case of *Priggs vs. Adams* already cited (from 2 *Salk.* 674.) There the act of Parliament erecting the court of conscience in Bristol, provided that if any action shall be brought in any of the courts of Westminster upon any cause of action arising in Bristol and it appeared upon trial to be under forty shillings, that no judgment should be entered for the plaintiff and "if one be entered it should be void," nevertheless the court of King's Bench held that the judgment in the Common Pleas in this case for five shillings on such a cause of action was not a nullity, but was only voidable by plea on error because the Common Pleas was a superior court. In this case the want of jurisdiction of the subject matter was upon the face of the record and yet the judgment was held not to be a nullity. And it would be no answer to this to show any rule of pleading that might be supposed to have prevented the nullity of the judgment because any such rule would necessarily presuppose that the judgment was voidable only for the reason that "it is a universal rule in regard to all things that are void

that they are as if they had never been: void things are no things." *Cable vs. Cooper,* 15 *John. R.* 155, citing 22 *Vin.* 13 *pl.* 17.

So the case of *Skellun's ex. vs. May's ex.* 6 *Cranch R.* 267, rests upon the same foundation. This case had been tried in the circuit court for the District of Kentucky, taken from thence to the supreme court of the United States and reversed and remanded, and, being again before the circuit court, it was then for the first time discovered to be a cause not within the jurisdiction of that court, and upon division of the judges as to whether it should be dismissed for want of jurisdiction that question was adjourned to the supreme court and after consideration it was determined that the circuit court of Kentucky should proceed with the cause. In this case then although jurisdiction did not appear upon the face of the record, and although the circuit court certified affirmatively that the cause was without the jurisdiction of the court, nevertheless for the reason that the merits of the cause had been finally decided in the supreme court its mandate had to be obeyed.

And upon the same foundation it was said by HOLT, C. J. in *Domina Regina vs. Barnaby,* 1 *Salk.* 182, that although the justice had no jurisdiction of a prosecution for cutting down trees in the night time under the *St. of* 43 *El. ch.* 7, if the defendant had title to the land, and that, upon a conviction in such case, the justice, as well as he who might execute his sentence would be liable to an action, yet that if the justice's proceedings were confirmed in B. R., in such case no action would lie against either "for then it is supported by the authority of this court." Here then although the justice had no jurisdiction of the subject matter, yet as soon as his judicial sentence has received the affirmative of a superior court, it has become as valid as it would have been in a case that had actually been committed by law to his jurisdiction and not excepted out of it as this was, the decision of the latter court having now become the law of the case, to remain so until reversed on error.

In the first two cases, that is to say, the cases from 2 *Salk.* and from 6 *Cranch,* there was no margin for any presumption

in favor of the jurisdiction of the court over the subject matter, because the contrary appeared. In the other case from 1 *Salk.* the principle is that upon a presumption of jurisdiction the superior court would pronounce a judgment that would render it forever afterwards impossible to show any thing against the jurisdiction of the inferior court. In all the cases however there was in fact and in truth an absolute want of jurisdiction of the subject matter. They were all cases that had never been committed to these courts respectively by law for their deliberation and adjudication and were therefore really without their powers. And if it be true that every judicial sentence is *ipso facto* a nullity, unless both the subject matter and the person be within its jurisdiction, these must all have been nullities. These are therefore cases that go to prove that this proposition, that the decision of a court on a case beyond its jurisdiction is a nullity, although true in the abstract, is to some extent practically false and is subservient at least to the paramount rule that the judgment of a superior court is not void: and it must be also subject to another paramount rule that a judgment of a court of record, whose jurisdiction is superior and final, is conclusive to all the world and puts an end to all enquiry concerning matters decided by it. Because this was the ground upon which the supreme court of the United States refused the writ of *Habeas Corpus* to Tobias Watkins, although urged to do so upon the ground that the record of the circuit court for the District of Columbia showed upon its face that the offence, of which he was convicted, was not within the jurisdiction of that court but without it. *Ex parte Tobias Watkins,* 3 *Peters* 193.

Upon the same ground rest the several decisions of the supreme court of the United States, that announce and reiterate the doctrine that although that court will not presume in favor of the jurisdiction of the other federal courts, because they are all courts of limited jurisdiction, and jurisdiction must therefore be alleged in their records, otherwise their proceedings are erroneous; nevertheless that without such allegation their judgments are not absolute nullities which may be totally disregarded.

And this seems clear from the remark of Mr. Justice WASHINGTON, in delivering the opinion of the court in *McCormick vs. Sullivan,* (10 *Wheaton* 192) that these courts "are all of limited jurisdiction; but they are not on that account inferior courts, in the technical sense of those words, whose judgments taken alone are to be disregarded." And then by the remarks of Mr. Justice WOODBURY, in delivering the opinion of the court in the case of *The Bank of the United States vs. Moss et al.* (6 *Howard's U. S. R.* 40,) when combating the idea that the judgment of these courts, when jurisdiction was not alleged, were nullities, "That this view is supported by the English doctrine. There though judgments of inferior courts or commissions are often void, when on their face clearly without their jurisdiction and may be proved to be so and avoided without writ of error, (3 *Bac. Ab. Error A.* 10 *Coke* 77, *a. Hawk. P. C. ch.* 50, *sec.* 3,) yet the judgment of a superior court is not void, but only voidable by plea on error." *Bac. Ab. Void and Voidable, C.* 2 *Salk.* 674. *Carth.* 276.

Nor is this remark of any the less force in showing the ground upon which these doctrines rest (that of the distinction between superior and inferior courts as to the conclusiveness of their judgments until reversed) that the particular case upon which Judge Woodbury was remarking had been tried upon the merits, because the principle is the same whether the judgment was rendered upon default or after the trial of issues of fact. No distinction as to this is to be found in any English case; nor indeed could it seem to have any existence any where unless it would be conceded that consent could give to a court jurisdiction of a subject matter that had not been committed to it by law.

If then this rule as to the validity of the judgments of a superior court will in some cases override the undoubted rule that to authorize a judgment the court must have jurisdiction of the subject matter and of the person, so far, in some cases, as not only to prevent the consequences of the judgment being held void that was rendered by a court having no jurisdiction at all over the subject matter, but actually to make such judgment perpetually good against all the world, as in cases where the court was

not only superior but final in its powers, is it at all more unreasonable, or indeed as much so, that for the mere purpose of preventing the consequences of holding a judgment a nullity the same rule should be made to override, in cases where the court has undoubted jurisdiction of the subject matter that which requires also the jurisdiction of the person? Upon general principles there would seem to be much less difficulty in dispensing with jurisdiction of the person than the subject matter. For it would seem at first blush almost clear that, if the subject matter was without the jurisdiction of the court, there was no foundation at all for the entire proceeding; and that nothing short of something approaching very nearly to judicial legerdemain could sustain proceedings under such circumstances; while on the other hand if there was a plaintiff and a declaration there would seem at least to be one party and a regular complaint against another, and whatever judicial action the court might take on these would be upon a valid foundation.

There would be another general consideration in favor of this view of the matter. Each person within the territorial jurisdiction of a court is subject to its power unless specially exempted, but causes of action are parceled out among different courts. Thus each court has jurisdiction of all persons within its limits unless specially excepted, but of no cause of action not committed to it. Therefore it would seem that there could very rarely be an absolute want of power as to the person and might often be as to the subject matter. In other words, under our system all our superior courts have a general jurisdiction as to persons and a limited jurisdiction as to subject matter, and therefore there should be a more liberal intendment as to the jurisdiction of the person than of the subject matter. And this would seem to be the true foundation of the rule that, although a presumption will not be indulged as to the subject matter, yet presumptions as to jurisdiction over the person will be indulged. And this general view seems not unsustained by the usages of the English courts in sustaining jurisdiction as to the person in some cases upon the ground of native allegiance; in others, upon

the ground that the obligation sought to be enforced was contracted within the county; and in others, upon the ground that property had been left in the county under the protection of the laws.

But apart from these general considerations there would seem to be others, touching the nature of the powers of a superior court and the protection of the judges of these courts, which is said by Ch. J. DEGRAY to be "absolute and universal," (*Witter vs. Seare* 2 *Wm. Black. R.* 1141) that are more conclusive. We have already alluded to the difference between the powers of superior and inferior courts, and shown that those of the latter were essentially limited powers and the former general powers. But the nature of these general powers will be more fully developed by the definitions respectively of superior and inferior courts given by the supreme court of the United States in the case of *Grignon's Lessee vs. Astor et al.* (2 *Howard U. S. R.* 341); in which case the county court of Brown county in the then territory of Michigan was held to be of the former class and its proceedings, when collaterally assailed, held valid in ordering the sale of lands of an intestate, without notice either actual or constructive to the parties in interest, although the statute, under which it proceeded, in express terms enacted that, before the court should pass upon the representation of the necessity to sell, "it shall order due notice to be given to all parties or their guardians to show cause against the granting of the license to sell," and providing also publication in a newspaper in case any of the parties were non-residents. The following are the definitions alluded to above: "The true line of distinction between courts whose decisions are conclusive, if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face, is this: a court which is competent by its constitution to decide on its own jurisdiction and to exercise it to a final judgment without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description: there can be

no judicial inspection behind the judgment save by appellate power. A court, which is so constituted that its judgments can be looked through for the facts and evidence which are necessary to sustain it, whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description, every requisite for either must appear on the face of their proceedings, or they are nullities." It appears then by these definitions that among the powers invested in the courts of the former class is that of deciding upon its own jurisdiction.

The definition of jurisdiction given in Burn's Law Dictionary (page 407) is this, "Jurisdiction is authority or power which a man hath to do justice in causes of complaint brought before him." And he cites *Lilly Abr.* 120, where that author remarks, "The courts at Westminster have jurisdiction over all England; all the other courts are confined to their particular jurisdiction, which if they exceed, then whatever they do is erroneous." And Ch. J. SHAW remarks in *Hopkins vs. The Commonwealth,* 3 *Metc. R.* 462, "The word 'jurisdiction,' (*Jus dicere*) is a term of large and comprehensive import and embraces every kind of judicial action upon the subject matter from finding the indictment to pronouncing the sentence."

So it is said in 12 *Peters R.* 718. "Any movement by a court is necessarily the exercise of jurisdiction." And although it is said correctly in 2 *Howard U. S. R.* 338, "where there are adverse parties the court must have power over the subject matter and the parties," this is but reiterating the general rule to which we have already seen there are exceptions, but which is of universal efficiency on a direct proceeding in error for reversal.

Such being the powers of these courts and such their jurisdiction and its exercise, we will proceed to illustration with a supposed case. Suppose a declaration regularly filed in one of our circuit courts, process of summons regularly issued thereon and returned in proper time, endorsed as follows: "Executed the within writ on the within named defendant by leaving a true written copy thereof at his residence in Washita county with Sarah Ann his wife who is a member of his family over the age

of fifteen years." At a proper time during the term upon calling the defendant and his failure to answer, the plaintiff moves for a judgment by default, whereby upon inspection of the sheriff's return the question arises whether there has been such service as the law requires. There could seem to be no ground of doubt but this would be a clear case for the exercise of rightful jurisdiction in determining the question whether or not the return that the copy was left with the defendant's wife sufficiently showed that the copy was left with "a white person." Because the question legitimately and directly arose in the regular progress of the cause and when passed upon would seem to be directly within the principle of the *Dutchess of Kingston's case,* (11 *State Tr.* 261,) restricted in operation in *Scott vs. Sherman,* (2 *Black. R.* 979,) to "courts of record having competent jurisdiction of the subject matter," and afterwards again enlarged in *Gohan vs. Maingay* (*Irish Term R.* 37, 39 & 50,) after full discussion and examination, to "all courts having competent authority."

When therefore the circuit court should have thus, within its rightful jurisdiction, decided this service of its process sufficient, and had so stated upon its record it would seem inevitable that a judgment thereupon rendered against the defendant could not be a nullity but must remain a valid judgment until reversed by appellate power. Because the judicial ascertainment of the due service of the process of summons in such case must be as authoritative as when ascertained by the inspection of a return by a sheriff that he had executed the process upon the defendant in proper person; since in each case the court exercised its competent judicial powers.

And the judgment by default which followed would be equally valid in each case, and would stand upon the same footing in all respects, except that it might be possible that an appellate court might reverse one of them for an erroneous adjudication as to the sufficiency of service, while in the other there would be no ground to suppose it insufficient. In both cases however the return of the sheriff was the record evidence, upon the inspection of which the court determined as to the existence of the

fact upon which depended its rightful exercise of jurisdiction over the person of the defendant and having found this fact to exist in the exercise of its power to decide upon its own jurisdiction and so entered it of record, the judgment against the defendant seems necessarily valid until reversed on error.

To determine whether or not the service of the process of summons is sufficient, is certainly, at this stage of the proceedings, as regular and as clearly within the rightful jurisdiction of the court as to these questions as would be decisions as to others at a subsequent stage of the proceedings as to such. In other words, the question presented as to the sufficiency of service is a case as legitimate to call into action the judicial powers of the court as to that question, as a demurrer to the declaration, interposed by the defendant, would be a case as to questions that would be thus raised. And each would be but different steps taken by the court in adjudicating upon the subject matter or "cause of complaint brought before the court," by the declaration, which, under our practice, is the first step.

Nor does the service of process of summons upon the defendant or the determination by the court that it has been properly served, confer any new power upon the court. If so the court would have power conferred upon it by its own officers and by itself, which would be absurd. The court had already power over the defendant, if within reach of its process, and the process is the instrumentality by which this power can be rightfully exercised. If the power is exercised without the process it is wrongfully exercised, but not the less exercised because wrongfully exercised. It is still the exercise of judicial power and the record speaks the verity of its exercise as the sheriff's return of "Executed" speaks the verity of service of process, although there may have been in fact no service at all. If a process of summons were executed upon an Ambassador, or upon a citizen of another State within his own sovereignty; or a court marshal should have one executed on one not subject to marshal law, all such would be nugatory acts, and there would be no more authority in such courts over such persons than before the service

of process upon them. Notice or no notice then cannot affect the question of judicial power, but can only relate to its rightful exercise.

The result of this mode of reasoning then from the premises that superior courts are invested by law with the power to decide upon their own jurisdiction, is simply the same that is announced by the authorities that we have first cited that the judgments of such courts are not void but only voidable by plea on error; and is in exact harmony with that other doctrine that the protection in regard to the judges of these courts is absolute and universal. And then these three concurring doctrines being thus well sustained by reason, authority and obvious public policy, and being in direct conflict with the supposed paramount rule that a judicial sentence without previous notice and an opportunity to defend is an absolute nullity, which at most can only work private mischief, we are of opinion that this, although a most important rule of law, must yield to the rule that judgments of superior courts are not void but only voidable by plea on error.

The consequence is that if a cause of complaint brought before one of these courts be of a subject matter actually within its jurisdiction, so as to give a foundation for its proceedings, although in these there may be errors of the most palpable kind, although in the exercise of its jurisdiction over this subject matter, it may have disregarded, misconstrued or disobeyed the plain provisions of the law, which gave it the power to hear and determine the case before it, nevertheless its judgment is not a nullity which may be entirely disregarded but must stand and be operative until reversed on error or appeal. And this, because, as is said by the supreme court of the United States, in the case of *The United States vs. Aredondo et al.* 6 *Peters* 729, "It is a universal principle that when power or jurisdiction is delegated to a public officer or tribunal over a subject matter, and its exercise is confined to his or their discretion, the acts so done are binding and valid as to the subject matter, and individual rights will not be disturbed collaterally for any thing done in the ex-

cise of that discretion within the power and authority conferred. The only question which can arise between an individual claiming a right under the act done and the public or any person denying its validity, are, power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer; whether executive (1 *Cr.* 170, 171,) legislative (4 *Wheat.* 423, 2 *Peters* 412, 4 *Peters* 563,) judicial (11 *Mass.* 227, 11 *Serg. & Rawle* 429, adopted in 2 *Peters* 167, 168,) or special (20 *J. R.* 739, 740, 2 *Dow. Par. Cases* 521,) unless an appeal is provided for, or other revision by some appellate or supervisory tribunal is prescribed by law."

We are fully aware that there are highly respectable authorities, besides some of the previous decisions of this court, which are directly against the conclusion to which we have arrived on the main question; but, with due deference, we think all such have lost sight of the controling distinction between the judicial powers of superior and inferior courts of special and limited jurisdiction and the consequent paramount doctrine that the judgment of a superior court can never be a nullity to be entirely disregarded. The English cases usually relied upon certainly afford no just grounds for conclusions opposite to ours, for those cases, like the old case of *Buchannon vs. Rucker,* (1 *Camp. R.* 63) and the most recent of *Farguson vs. Mahon,* (3 *Per. & Dav. R.* 143) having arisen upon actions of assumpsit upon foreign judgments, their true doctrine is simply that, to raise an assumpsit in law, the party assuming must either directly or indirectly be personally connected with the matter out of which the assumpsit is to be raised, all foreign judgments being there regarded as but *prima facia* evidence of debt or duty. And as to American authorities, some of these have been essentially modified; as the earlier by the later decisions in New York. (*Foot & Beebe vs. Stevens,* 17 *Wend.* 483. *Hart vs. Leixas,* 21 *ib.* 40); or strongly countervailed by the decisions of other tribunals of higher authority, as the case of *Wm. M. Gwin et al. vs. McCarroll,* (1 *Smedes & Marsh.* 351) by the case of *Grignon's Lessee vs. Alston et al.* (2 *How. U. S. R.* 319); or are equivocal and evasive. (See Mr. Justice TRIM-

BLE'S opinion as judge of the circuit court of Kentucky, quoted verbatim and endorsed in gross by the supreme court of the United States in *Hollingsworth vs. Barlow et al.* 4 *Peters* 475.)

Nor do any of the cases decided in England or in the supreme court of the United States, where the judgment was declared invalid or null for want of jurisdiction of the person of the defendant, in any degree conflict with our views; for after considerable search all such cases that we have been able to find were cases in inferior courts, and where there was an absolute want of jurisdiction of the person, as the Marshalsea case, which court had jurisdiction of only such as were of the King's household; and this case was not approved in England, and was greatly modified in *Truscott vs. Carpenter,* 1 *Lord Raym.* 229, where the court said "And therefore the resolution in the case of Marshalsea was a hard resolution and warranted by none of the books there cited." And the case of *Grant vs. Sir Charles Gould,* (2 *H. Black. R.* 102) where the prohibition was asked because Grant was not a soldier and was therefore not liable to marshal law: and the case of *Wise vs. Withers,* (3 *Cranch. R.* 331) where a court marshal had imposed a fine upon a justice of the peace, who, by act of Congress, was exempt from military duty and was consequently not a person over whom the court marshal had any jurisdiction.

We might further fortify our conclusions as to the main point by a further reference to some authorities having some bearing upon it. (*Buller's N. P.* 244, 245. *Ambler* 761. *Freeman* 84. *Str.* 733. *Harg. Law tracts* 465, 469.) And also by some analogies in reference to the rule of conclusiveness of Ecclesiastical sentences, Exchequer and Admiralty condemnations, and by a reference to the doctrines of the conclusiveness of sales made under decrees and on judgments, and execution on adversary process: and to the doctrine of protection to ministerial officers who issue and execute process both mesne and final; but we have already protracted our views to an unreasonable length and conclude as to this point by a brief summary of the grounds of our opinion.

Notice before judicial sentence, is not a law of nature; or, at least, not such in a sense that would make a human law non-obligatory, that would circumscribe the sphere of its operation. Nor has the common law consecrated it as such by a strict conformity to its mandates.

Then there may be an obligatory law paramount to the law of notice before judicial sentence.

By the common law the judgment of a superior court is not void but only voidable by plea on error. This is established not only by the common law books, but is also expressly recognized as the common law by the supreme court of the United States.

As a consequence of this law the judges of these courts are protected absolutely and universally from prosecution or suit for what they do in their judicial capacity.

This rule of law and this consequence from it are reasonably to be accounted for when the origin of these courts is looked at, and the nature of the judicial powers vested in them is considered. The existence of this rule of law and this consequence, besides being thus established by authority, is also further established by a legitimate process of reasoning predicated upon the foundation that among the powers vested by law in these courts is the power to decide upon their own jurisdiction. A direct and emphatic authority for this foundation is the supreme court of the United States in the case cited.

The rule then, that by the common law the judgments of a superior court are not void but only voidable by plea on error, being reasonably accounted for by an examination into the origin of these courts, and an examination of the nature of the powers vested in them, and being preserved as a part of the common law in books of the highest authority and expressly recognized as such by the supreme court of the United States and sustained by a legitimate process of reasoning from premises laid down by that court in reference to a distinguishing characteristic of superior courts, must be considered as ascertained and fixed law.

This being so, the question is one of precedence. When these two rules of law conflict, which must yield? To this the maxim of the law "that a private mischief shall be rather suffered than a public inconvenience" would seem to give a satisfactory answer. Because the law of notice looks clearly to the protection of private rights, while the law of the validity of judgments until reversed by appellate powers, whilst it also protects private rights, looks emphatically to the effective administration of justice, the sanctity of records, the protection of the ministers of justice that they may fearlessly discharge their duties, the stability of titles, the end of strife and the repose of society. And another answer equally conclusive is that a question, whether there has been notice or no notice, relates not to the investiture of judicial power, but its rightful exercise.

But although we adopt the rule in question as a very general rule, we do not adopt it or any of the rules with which it harmonizes, or is sustained as universal rules. We are not sure that we know any universal rule of law or that any exists that will have application to every matter that may be brought within the letter of the definition. We are sure this cannot embrace every case that might possibly arise that would come within the letter of its description, as we have more than once distinctly intimated in the course of our remarks. If a circuit court were to assume jurisdiction of a matter committed by law to the probate court exclusively, or the county court were to assume jurisdiction of a military officer, or if the probate court were to try and condemn a man for high treason, such proceedings would be all nullities, because there would be no foundation at all for such proceedings: no case had ever been presented to bring into action any judicial power of these courts. So a judgment might even be void under some circumstances, from some peculiar and inflexible policy of the law for the protection of infants, married women, idiots or lunatics.

These general observations we make simply to indicate more distinctly our views of the important questions passed upon.

The remaining question before us in this case is whether or

not the probate court is to be regarded as a superior court within the principles laid down.

We answer emphatically that in our opinion it must be so considered. Because it is not only a court of record, but a constitutional court of fixed and permanent character invested with general jurisdiction and plenary powers over the matters committed by law to its peculiar cognizance and open to review by appeal. There is abundant authority thus to hold as to this court, and if there was not, it would be a matter of serious public concern. Because, while in point of law it is equal, in point of fact it is a more important court to the people of this State than the circuit court. And this will be manifest at once when it is considered that it only requires a period of about forty years to pass every atom of property in the State real and personal and many choses in action through the ordeal of the probate court; while it is estimated that the whole would not be passed through the circuit court in an entire century.

We feel freely warranted therefore, not only on the score of authority, but for cogent reasons of public policy, to fix this court upon the footing of superior courts. 11 *Serg. & Rawle,* 429. 5 *Cranch,* 173. 2 *Howard S. C. R.* 340. 6 *Peters R.* 220.

Entertaining these views and so holding the law as to the two foregoing questions we have but to say, as to the supposed error in the case before us, that the general and well settled rule of law in such is that when the proceedings of such a court are collaterally drawn in question and it appears on the face of them that the court had jurisdiction of the subject matter, such proceedings are voidable only although there may be obvious errors, and therefore we can judicially see only what the court has done and not whether it has proceeded *in inverso ordine,* erroneously, according to the proof before them, or what they have omitted or ought to have done. *Voorhees vs. The Bank of the United States,* 10 *Peters R.* 476.

The several previous decisions of this court as to the absolute nullity of the judgments of a superior court, when the record fails affirmatively to show previous notice express or implied to

the defendant, will no longer be regarded as law and they are hereby overruled.

And finding in the record that the court had jurisdiction of the subject matter and that the orders in question were made, we find no error in the record and the judgment of the circuit court must be affirmed.

Mr. Justice WALKER, dissenting.

In this case it appears from the record that Robinson brought suit in the name of the State for his use against Borden and his securities upon the official bond of Borden as sheriff, in which it was alleged as a breach of the bond, that he had failed to levy and make the debt and costs as commanded in a certain writ of *Fi. Fa.* issued in favor of Robinson against Woodruff, Executor. Upon an issue of *nul tiel record* of such recovery, the plaintiff offered in evidence the transcript of a record of an allowance of the debt in the fi. fa. mentioned, and also an order directing the executor (Woodruff,) to pay the same. To the admissibility of these orders it was objected that although the demand or claim presented to the consideration of the probate court was a subject matter over which it might rightfully entertain jurisdiction, yet inasmuch as no notice whatever was given to the defendant Woodruff, and he not having in any manner made himself a party to the record by appearance or otherwise, that the probate court, in the absence of such jurisdiction over the person of the defendant, could not make a valid order or render any judgment which would bind him, or subject his estate to sale for the payment thereof, and that the adjudication and allowance of the claim and the order for its payment were in fact void.

The transcript offered in evidence discloses no fact from which the remotest inference may be drawn that any notice was ordered or issued, or that Woodruff had any notice actual or constructive, or that he was present or made any appearance, or that he was called to defend, but simply that the plaintiff appeared by attorney, and that the court first examined and allowed the claim. And thereafter at a subsequent term, on mo-

tion of the plaintiff's attorney ordered it to be paid.

Under this state of case the main, indeed the only question of importance is, whether the probate court in a proceeding in personam, as this is, can proceed to render judgment upon the subject matter, until it has by some means acquired jurisdiction of the person of the defendant; or in other words, whether jurisdiction of the subject matter alone is sufficient to authorize a court, not of inferior jurisdiction, to render a valid judgment, binding upon the person and the estate of the defendant.

If I correctly understand the opinion delivered by my brother judges in this case, it assumes the affirmative of this proposition and whilst they admit that such proceeding may be set aside for error, they hold that the judgment so rendered is valid and binding on the defendant, and sufficient to uphold a sale of his estate under it, and to justify the court that rendered the judgment, and the officers and others who executed it. With great deference, my mind, after a careful examination of authorities, has been lead to a different conclusion. And it becomes my duty under the law to express my individual dissenting opinion upon the several interesting points which are involved in the case.

Premising that my position is assumed alone in reference to proceedings in personam, in contradistinction to proceedings in rem, and that I do not controvert the position that the court of probate, having been created by the constitution, although of limited and defined constitutional jurisdiction, is nevertheless not an inferior court of limited jurisdiction in the sense in which that term is used, I shall first take a brief review of the grounds upon which the right of jurisdiction as contended for is supposed to rest and the authorities brought to its support.

One of the strongest arguments used in support of the jurisdiction of the court is, that as it must necessarily in a greater or less degree be the judge of its own jurisdiction, the fact that it has assumed and exercised such jurisdiction presupposes that it has passed its judgment in favor thereof, and that to hold a judge accountable for an error of judgment could not be sanctioned, as it would strike at the independence of the tribunal itself. This

seems to me to be assuming a right to avoid a consequence, and even if placed upon this ground there are consequences on the other side which might be not less weighty and worthy of consideration. If it be true that a judge is entitled to exercise a jurisdiction with impunity, because he himself has decided that he possessed it, then indeed to my mind all distinction of jurisdiction is broken down, and the only rule in future must be the will of the judge, or that he has jurisdiction because he has exercised it. I must not be understood as assuming that the opinion goes to this extent; but then if it is to be indulged in one single instance, the principle is admitted and it may with equal propriety be applied to any and every case, even the most extreme or absurd; for although such extreme case might tend to fix upon the judge a wanton abuse of power, it never could affect the principle itself upon which the judge acted.

To the contrary of this, I hold that ours are courts of defined, constitutional jurisdiction with regard to the subjects over which such jurisdiction is to be exercised, and so far as the subject matter is concerned, they must at their peril take notice that they do not exceed it or usurp that which properly belongs to some other tribunal. But so far as regards the manner of presenting the subject matter to the consideration of the court, no matter how imperfect or illogical the pleadings may be, if the cause itself be such as the court, by any possible form of presentation, could take jurisdiction of it. The court, in passing upon the facts necessary to present such subject matter properly before it so as to fix a legal liability upon the defendant, would have a right to decide, and whether such decision should be right or wrong, the proceeding, so far as that branch of the inquiry extends, would not be absolutely void but might be erroneous, and if the ascertainment of that fact alone was sufficient to empower the court to proceed to judgment, then it would be true that the court and all persons acting under its authority, would be protected by its decision.

To make myself fully understood I will suppose a case, an extreme one it is true, but not the less appropriate for that reason.

Suppose a declaration or statement in writing to be filed setting forth a contract for $500, but without date or any averment that it was due, or had not been paid; although it is evident a demurrer should be sustained to such a declaration, yet if the court should erroneously decide it good and render a judgment upon it, such judgment would not for this reason be held void; because the subject matter being within the jurisdiction of the court, its decision as to the proper averments to charge the defendant, no matter how erroneous, was made in the exercise of judicial discretion upon a matter of law, as to the sufficiency of such averments. But suppose, instead of such contract, there should be inserted in the statement in writing filed, a copy of "The Hymns to the Gods," and the court should be so lost to common sense and right as to render judgment upon it against its distinguished author, would any one contend that such judgment would not be void? And yet if the court is to be the judge of its jurisdiction and is to be protected in such judgment because it has so decided, whether of the subject matter or of the manner of presenting it, it necessarily follows that the judgment would be as valid in the one case as in the other. For if it is once admitted that the court has a discretionary power in regard to the subject matter itself, which when exercised will protect it in any one instance, the principle is conceded, and it must of necessity be extended even to the extreme case we have put. It will not do to say that it shall be protected where its judgments have been reasonably exercised in doubtful cases: that would be sitting in judgment upon the exercise of a discretionary power, and if applied to the subject matter itself, might also be applied to every opinion of the court upon law or fact submitted to it. The only safe rule then to my mind is to hold the court at its peril to keep within its jurisdiction, but to protect it fully in the free exercise of its discretion, in determining all questions which may arise in adjudicating upon such doubtful matter.

Another position assumed in support of the validity of judgments rendered without notice to the defendant is that courts of general jurisdiction have jurisdiction over all persons within

their territorial limits, which of itself, without notice, confers sufficient jurisdiction over the person of the defendant to uphold the judgment at least until reversed for error. Unless we could suppose that the citizen is bound to take notice of the proceedings of courts, as they are of public laws, this amounts to saying that their rights may be passed upon and their property taken by judicial determination unheard and undefended by them, and if this rule is to prevail in civil proceedings, where the rights of property is involved (saving perhaps some additional constitutional protection) it is difficult to see why life, liberty and reputation may not also be sacrificed under it; for I think I can show that all of these are natural inherent rights and so closely connected that they must stand or fall together.

That life and liberty preceded the right to property (as asserted) is a matter of but little moment. Concede it to be true that the right to hold and enjoy the use of property to the exclusion of others, that it grew up with and not before organized society, still the use of the one is so connected with the enjoyment of the other, that to impair or abridge the one materially affects if it does not destroy the other. When the means necessary to support life are withdrawn, it is a mockery to say that life is protected or secured. Without however entering into a metaphysical disquisition as to whether the right to be notified and afforded an opportunity to defend the one or the other is a natural or a conventional right, I will content myself with a reference to authorities of acknowledged weight.

In *Rex vs. Cleg,* 1 *Str. R.* 475, FORTESQUE, J. said, "It is certain that natural justice requires that no man should be condemned without notice."

In *Bloom vs. Burdick,* 1 *Hill R.* 139, BRONSON, J. said, "It is a cardinal principle in the administration of justice that no man can be condemned or divested of his rights until he has had the opportunity of being heard."

In *Bustard vs. Gates and wife,* 4 *Dana R.* 435, ROBERTSON, C. J. said, "It is a general rule of the common law and of common sense, as well as of common justice, that a court has no jurisdic-

tion to render a judgment against a person, who has had no notice whatever of the proceedings against him."

In the case of *The Mary*, 3 *Cond. U. S. R.* 312, MARSHALL, C. J. said, "But notice of the controversy is necessary in order to become a party. And it is a principle of natural justice, of universal obligation that, before the rights of an individual be bound by a judicial sentence, he shall have notice either actual or implied of the proceedings against him."

In *Boswell's lessee vs. Otis et al.* 9 *How. U. S. R.* 350, MCLEAN, J. said, "No principle is more vital to the administration of justice than that no man shall be condemned in his person or property without notice and an opportunity to make his defence."

In the face of these authorities, embracing the opinions of the most distinguished and profound jurists in the highest English and American courts, including their latest published opinions, can it be said that this right to be heard in defence of property is not a "natural right of universal obligation"? And if such then it is evident that such notice is indispensably necessary to the validity of a judgment against the person.

But, secondly, I insist that notice is not only a "natural right of universal obligation," as shown most conclusively from the authorities cited, but it is also a constitutional reversed right excepted out of the general powers of the government and declared to be "inherent and indefeasible," and placed in the bill of rights upon the same footing with life, liberty and reputation and with them it must stand or fall. The 1st sec. art. 2 const., ordains "That all freemen, when they form a social compact are equal, and have inherent and indefeasible rights, amongst which are those of enjoying and defending life, and liberty, and of acquiring, possessing and protecting property and reputation and of pursuing their own happiness." *Sec.* 10, "That no freeman shall be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or law of the land." Thus in each of these sections, the one asserting the rights and the other limiting the

means by which they may be affected, these great essentials to freedom and human happiness are presented together, and the like safeguards thrown around each, and for the express purpose that they may be "enjoyed and defended," and the authority to invade the one necessarily implies a like authority to invade either of the others. They are not to be invaded either directly or indirectly. To confer a right necessarily implies a right to use the means necessary to protect it; and when it is said that the citizen shall not be deprived of these rights but by the judgment of his peers or the law of the land, the privilege to appear and defend such rights and for that purpose to have notice of the time when, the place where and the tribunal before which such trial is to be had necessarily follows; or the reservation, to my mind, is a dead letter as to each. So that, in the absence of all other authority than these express constitutional provisions, notice is indispensably necessary to the validity of the proceeding.

Nor do I think it can be successfully contended that this right to notice was not a common law right, and has been so recognized from its earliest history. By the common law practice, suits were commenced by an original writ sued out of chancery. When this writ was served, if the defendant failed to appear, a judicial writ issued to bring him into court, where at an early day, he appeared alone in person and made oral pleadings. This practice was abandoned, so far as respects the original writ, the personal appearance and oral pleading, but the judicial writ was continued in use although the party usually appeared by attorney, the writ was served upon the defendant and he was in contemplation of law in person or by attorney in court before the declaration was filed against him, and as the writ after performing its office was not considered part of the record, when the record failed to show an appearance of the defendant it was nevertheless presumed that such was the fact. This doctrine of presumptions, so reasonable and almost indispensably necessary (holding the writ to be no part of the record, as the English courts did) was not however based upon the ground that

notice was not necessary, but the very reverse, that it had really been given.

So, with regard to the practice in New York, where the writ is no part of the record, the doctrine of presumptions in favor of the court's having proceeded upon due notice (although not apparent upon the record) has to some extent prevailed; yet even in that case I can find no case where the proceeding was against the person, that the doctrine, for which I contend, has been shaken. *Hilburn vs. Woodworth,* 5 *John. Rep.* 41. *Roberson vs. Executors of Ward,* 8 *id.* 90. *Fenton vs. Garlick, id.* 196. *Pawling vs. Bird's Executors,* 13 *id.* 192 and *Borden vs. Fitch,* 15 *id.* 142, are all cases showing that, in proceedings against the person, notice to the defendant is indispensably necessary to the validity of the judgment. THOMPSON, C. J. in the last cited case says, "That to bind the defendant personally, when he was never personally served, nor had notice of the proceedings would be contrary to the first principles of justice."

When this point was subsequently raised in 17 *Wend.* 484, *Foot vs. Stevens,* the whole decision was made to turn upon the effect of the omission of the words "in custody" &c. in the declaration. COWAN, J. said: "The pleader let slip the words "in custody &c." and under the state of case, the court on the express recognition of the doctrine of presumptions in favor of the regularity of the proceedings of that court decided in favor of jurisdiction, but not that notice was not necessary. In the case of *Hart vs. Seixas,* 21 *Wend.* 53, the same omission appeared in the declaration as in the case in 17 *Wend.* and, waiving the doctrine of presumptions, the court decided that the record showed affirmatively that the party appeared. COWAN, J. said "Although it does not appear directly on this record that the defendants were served, I think it is virtually declared that they appeared in the cause; it states an imparlance with Hart and Bush at the September term."

The case of *Bloom vs. Burdick,* 1 *Hill,* was a proceeding *in rem* before the Surrogate to sell certain lands. The administrator petitioned for the sale and set out substantially such facts as

would be required by our statute to authorize our probate court to make sale of an intestate's lands for the purpose of paying debts &c. BRONSON, J. said, "The Surrogate undoubtedly acquired jurisdiction of the subject matter on the presentation of the petition and accounts; but that was not enough. It was also necessary that he should acquire jurisdiction over the persons to be affected by the sale." And in the same case it is afterwards said, "It is not only a general principle in the law that courts must acquire jurisdiction over the persons to be affected by their judgments, but in relation to these sales the statute has specially pointed out the means and imposed the duty to bring the parties before the court." It is to be remarked in this case that the courts of New York held the Surrogate's court to be one of inferior jurisdiction, and for that reason perhaps it was that although this was a proceeding in rem, they decided that notice to the persons interested should be given. Still the general doctrine of notice is broadly and unqualifiedly asserted, and after reviewing the decisions in 17 and 21 *Wend.* it is said by BRONSON, J. page 141, "But the principle remains untouched that whenever the want of jurisdiction appears the judgments of any and all courts will be void, and when the party in interest is to be brought in by means of public notice the want of such notice will be a fatal defect."

And in a still later case the same court, 1 *Barber Rep.* 289, *In the matter of Flatbush Avenue*, comes directly up to the support of the position I have assumed in regard to the constitutional rights of the citizen. It was a case where an attempt was made without notice to the owner to appropriate private property for public use. EDMONDS, J. said, "Under our institutions no man can be deprived of his rights save by the law of the land or the judgment of his peers. Amongst the rights thus protected is the right of private property." And in that part of the opinion relating to notice to the owner of the land, he said, "It is an inflexible rule of law that no man shall be deprived of his property without an opportunity of defending himself." So that the doctrine of notice as indispensably necessary to the va-

lidity of a judgment against the person, is as well settled even in New York, as any doctrine can be, and when closely examined, with but little conflict of opinion anywhere

But there are a number of the other State courts (indeed all of them, so far as I can ascertain, where the question has been presented) that hold the same doctrine, and declare judgments void if rendered without notice; and some of these have gone fully as far as this court ever did, and require that the facts should affirmatively appear of record. These decisions I will briefly notice.

In Tennessee, in the case of *Mason vs. Killibrum,* it was held that, as it appeared from the sheriff's return that Killibrum was not found and the record did not show his appearance, "the court had no jurisdiction of his person; therefore the judgment rendered against him in the case is void and a nullity." (2 *Yerg. Rep.* 383.) The same court in the case of *Sumner vs. Wood* said, "there was no evidence before the court that ten of Jenkins Whiteside's heirs had been notified to appear to the suit by *scire facias* against them, and a judgment without notice to the heirs is void. The court had no jurisdiction of the person of the defendant." 6 *Yerg. Rep.* 522.

In Kentucky, in the case of *Shafer vs. Gates and wife,* the court said, "In a legal or available point of view, no person is a party to a suit, without either an appearance or judicial notice of some sort." (2 *B. Mon. Rep.* 455.) And in *Wickliff vs. Dorsey* the court said, "Had there been no service of process on any of the heirs, the decree would have been wholly ex parte and therefore void." And in the case of *Curry vs. Jenkins, Hardin Rep.* 493, the court said, "Natural justice independent of any positive statutory provision clearly indicates that an orphan should not be condemned to servitude in his absence and the absence of his guardian and friend."

In Mississippi, it was held in *Gwin et al. vs. McCarrall,* "That it must be shown by the record that the court had jurisdiction of the party either by service of process or by publication where

that is allowed, and if there be no notice actual or constructive the judgment is a nullity." 1 *S. & M. Rep.* 368.

In Connecticut it was held in 1 *Day's Rep.* 429, *Slocum vs. Wheeler* that the sentence of a court, that has not jurisdiction of the person and the subject matter, is an entire nullity.

In Ohio, *Lessee of Payne vs. Moreland,* 15 *Ohio Rep.* 444, REED, J. said, "A court acquires jurisdiction by its own process. If the process of the court be executed on the person or thing concerning which the court are to pronounce judgment, jurisdiction is acquired. The writ draws the person or thing within the power of the court; the court once by its process having acquired the power to adjudicate upon a person or thing it has what is called jurisdiction. This power or jurisdiction is only acquired by its process. To give jurisdiction is the object of process." It is worthy of remark that this is a later case than those referred to to sustain a different rule and not only reviews its former decisions but also the case of *Vorhees vs. U. S. Bank,* 10 *Peters Rep.*

In New Hampshire, *Smith vs. Knowlton,* 11 *N. Hamp. R.* 191, held, "That a judgment of a court, which has no jurisdiction of the cause, is an entire nullity. But not so, where it has jurisdiction of the cause and the parties, but only proceeds erroneously."

In Vermont, *Egerton vs. Hart,* 8 *Verm.* 208, held, that in order to render a valid judgment the court must have jurisdiction of the subject matter and of the person by notice.

In Missouri it is held in *Smith vs. Ross and Strong,* that "In order to ascertain whether there was notice reference must be had to the proceedings prior to the judgment, and if it does not appear from them that the party was notified, we cannot infer it because judgment was rendered against him. The judgment against Haneman, according to the principles above stated being void, the plaintiff did right in regarding it as a nullity as to him and declaring against Smith alone."

These authorities are clear and decided, going to establish, *first,* that notice in proceedings against the person is necessary;

secondly, that if there is no such notice the judgment is absolutely void.

Turning from the decisions of the highest State tribunals I will proceed to examine the decisions of the United States courts; and I think it will be found that these do not conflict with the doctrine as above laid down, but that such as would seem to favor a different doctrine, were in proceedings *in rem* and stand upon quite different grounds. Thus, in the case of *The Mary,* which was a proceeding *in rem* in the Admiralty court, Chief Justice MARSHALL takes the distinction between these and proceedings against the person, and says, "where the proceedings are against the person, notice is served personally or by publication: where they are *in rem,* notice is served upon the thing itself."

In the case *Voorhees vs. United States Bank,* 10 *Pet. Rep.* 450, the validity of a sale made under a judgment by attachment came in question. The objection to the validity of the judgment under which the sale was made was that it did not appear that an order of publication had been made as required by the statute giving to the defendant notice. It was argued by Mr. Fox that the proceedings being *in rem* and not against the person, the seizure of the property was tantamount to personal service in a personal action. The court sustained this position and held the judgment although erroneous, not absolutely void. The question is extensively discussed by Mr. Justice BALDWIN, who dwells at great length on the importance of protecting purchasers on the faith of judicial sales. But it is a remarkable fact that there is not an authority which he cites, in which the question of notice in a proceeding against the person is presented. The case cited in 4 *Cranch* 328, had no relation to judgments. The question was whether an execution issuing before the day allowed by law, was void or voidable. The case of *Wheaton vs. Sexton,* 4 *Wheaton* 503, was whether a marshal's sale after the return day was valid or not. The case of *Thompson vs. Talmie,* 2 *Pet.* 165, was a proceeding *in rem* for the partition of land amongst heirs by petition, setting forth all the facts necessary to give the court

jurisdiction over the subject matter. It was argued by Wilde and Jones as being such and so decided by the court. In *Taylor vs. Thompson,* 5 *Peters* 370, no question with regard to the validity of judgments was raised. The case of *The United States vs. Aredondo,* 6 *Pet.* 729, related to a grant made by Alexander Ramirez as Intendant of Cuba to certain lands in Florida. The Intendant was vested with discretionary power and his acts under such discretionary power were held valid. So that it will be seen that the only case cited by the court which bore upon the direct question before it was that of *Thompson vs. Talmie* and was a proceeding *in rem.*

McPhearson vs. Conliff, 11 *S. & R.* 429: *Perkins vs. Fairfield,* 11 *Mass.* 227: *Witer vs. Zane,* 3 *Ham.* 305 and *Gregnon's lessee vs. Astor et al.* 2 *How.* 340, are all cases in the probate or county courts for the sale of real estate to satisfy the intestate's debts and were clearly proceedings *in rem.* In the case in 2 *Howard,* Lord and Crittenden argued that the county court had jurisdiction to order the sale of the land of an intestate for the payment of debts, and expressly based the right to sell without notice to those interested in the lands upon the ground that it was a proceeding *in rem,* and so the court decided: because in such cases, in the language of Chief Justice MARSHALL, "notice is served upon the thing itself."

So that the decisions of the United States courts, when restricted to the particular cases under consideration may be all true, and yet in no wise controvert the position which I assume, which is, that in proceedings against the person, unless the court has first acquired jurisdiction both of the subject matter and the person, it can render no valid judgment by which either life, liberty, property or reputation can be affected.

If any doubt could arise as to the correctness of the construction I have placed upon these decisions of the United States court, that doubt will at once be removed by reference to a still later decision of that court, (indeed the very latest from that court) in which the question is discussed, and distinctly and clearly settled. It is the case of *Boswell's lessee vs. Otis et al.* re-

ported in 9 *Howard's (U. S.) Rep.* 366, and coming from the same court whose decisions are mainly relied on in support of a different doctrine from that for which I contend, I will briefly present the facts upon which the decision was made, as well as that portion of the decision directly bearing upon the point under consideration here. Hawkins, Boswell, Barry and Whitmore were partners in building a mill on a lot in Lower Sandusky. Hawkins, who was superintending the building of the mill, filed his bill against the other partners for a settlement, averring that he had laid out a sum over and above his proportionable part of the expenses incurred in the partnership business and that the other partners had acquired title to two-thirds of the lot and refused to convey any part of it to him, and prayed a decree for any balance due him and for one-fourth of the lot. One of the defendants resided in Massachusetts; the others, in Kentucky. Notice was given by an order of publication in a newspaper according to the Ohio statute. The defendants failed to appear; the bill was taken as confessed; the master reported a balance in favor of complainant, for which a decree was rendered; and it was also decreed that the decree should have the force of a judgment at law and be a lien on all the lots of the defendants in the county, and unless paid within thirty days execution should issue as on ordinary judgments. Upon this decree execution issued and a lot of ground (not that upon which the mill was built) was regularly sold and a deed in due form made to the purchaser. In an action in ejectment the question arose as to the validity of the title thus acquired. Mr. Justice MCLEAN, who delivered the opinion of the court, states two points: "1, Whether or not the proceedings and decree as set forth in the record above stated are *coram non judice.*" "2, Admitting said decree to be valid, so far as relates to the land specifically described in the bill, whether or not said proceedings and decree are *coram non judice* and void so far as relates to lot No. 7 in controversy in this case, and which is not described in said bill in chancery, or, in other words, whether the proceedings and decree are not *in rem,* and so, void and without effect as to the other lands sold

under said decree." And then with regard to these points he said, "When the record of a judgment is brought before the court collaterally or otherwise, it is always proper to inquire whether the court rendering the judgment, had jurisdiction. Jurisdiction is acquired in one of two modes; first, as against the person of the defendant by the service of process, or secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether he proceeds against the property by attachment or by bill in chancery. It must be substantially a proceeding *in rem.* The principle is admitted that where jurisdiction is acquired against the person by the service of process or by a voluntary appearance, a court of general jurisdiction will settle the matter in controversy between the parties. But this principle does not apply to a special jurisdiction authorized by statute, though exercised by a court of general jurisdiction." And in conclusion the court in that case said, "It may be difficult in some cases to draw the line of jurisdiction so as to determine whether the proceedings of a court are void or only erroneous. And in such cases every intendment should be favorable to a purchaser at a judicial sale. But the rights of all parties must be regarded. No principle is more vital to the administration of justice than that no man shall be condemned in his person or property without notice and an opportunity to make his defence." And the court proceeded to declare the decree and the sale under it absolutely null and void.

After this decision, so recently made by the highest judicial tribunal in the United States, in full and unqualified terms adopting the position assumed by Chief Justice MARSHALL in the case of *The Mary*, is it to be supposed that, if the doctrine laid down in 10 *Peter* and 2 *Howard* and the other decisions in support of them, conflicted with this, or did not, as I contend, apply to a very different class of cases, they would have passed unnoticed by the counsel and the court in this case; or that had these decisions been intended to controvert the doctrine laid

down by Chief Justice MARSHALL in the case of *The Mary*, none of the judges would have referred to and have overruled it or reconciled such conflict of opinion? I think not. And this late decision most clearly marks the true distinction to be observed in all these cases and the point upon which each is made to turn: thus, that "jurisdiction is acquired in one of two modes; first, against the person of the defendant by service of process; or secondly, by a procedure against the property of the defendant within the jurisdiction of the court." In this latter case the judgment is never binding on the defendant beyond the property that is brought before the court: it is a proceeding *in rem*, and in this case where the proceeding was against lot No. 9, and the decree was against the defendants for a sum of money found due in relation to improvements on lot 9, with a decreed lien on the real estate within the county, under which decree lot 7 was sold, although there was notice by publication, the court held the decree void and the sale under it void because it required jurisdiction over the subject matter and over the thing also in order to confer power upon the court to render judgment; and if it required that the thing should be brought before the court in proceedings *in rem* in order to confer jurisdiction and power in the court to bind the thing and make a valid decree in regard to it, does it not follow also, as a fair and necessary deduction that in proceedings against the person it requires jurisdiction of the person and also of the subject matter before the court can render a valid judgment, and if void in one instance, for like reason it is void in the other.

"A court acquires jurisdiction by its own process. If the process be executed on the person or the thing concerning which the court are to pronounce judgment, jurisdiction is acquired. The writ draws the person or thing within the powers of the court. To give jurisdiction is the object of process." (15 *Ohio Rep.* 444.) "Where the proceedings are against the person, notice is served personally, or by publication; where they are *in rem* notice is served upon the thing itself." Chief Justice MARSHALL'S opinion in the case of *The Mary*. "Where jurisdic-

tion is acquired against the person by the service of process or voluntary appearance, a court of general jurisdiction will settle the matter in controversy between the parties." (9 *How. U. S. Rep.* 348.) "No principle is more vital to the administration of justice than that no man shall be condemned in his person or property without notice and an opportunity to make his defence." *Id.* 350. And again it is said "Jurisdiction is not to be assumed and exercised in such cases upon the general ground that the subject matter of the suit is within the power of the court." *Id.* 350. Lord ELLENBOROUGH said, "If a judgment could thus be recovered against one behind his back, a man would have nothing more to do but to go to Tobago, there sue us to any amount and then return to this country to put his judgment in force against us." 1 *Campbell's Rep.* 66. Chief Justice ROBINSON said in 2 *B. Mon.* 455, "In a legal or available sense no person is a party to a suit without either an appearance or a judicial notice of some sort."

In view of these authorities (and so far as regards proceedings against the person there is not one within the range of my research to the contrary) I think I may safely say, that the right to be heard and defend life, liberty, property and reputation is a natural, inherent right of universal obligation; that it is an inherent, indefeasible, constitutional right, and that it is a common law right commencing with the earliest history and never dispensed with in any government, where these rights are recognized or protected by the government: that before a judicial tribunal can render any judgment whatever binding on either, it is indispensably necessary that the court, either by its process or by voluntary appearance, should first have acquired jurisdiction of the person of the defendant as well as of the subject matter. And that a judgment rendered by any court without a concurrence of these is absolutely void.

It is to the writ and the return upon it (unless in cases of statutory notice by publication, as to the effect of which I need not now pause to consider) that the court must look for jurisdiction of the person, or to the record, for a voluntary appearance.

It may be well, in order to show more clearly my views upon the subject of presumptions, which I will presently notice, for me to refer to the effect of an informal or defective service of the writ. Where an attempt has been made by the proper officer to execute a writ (not void) by any of the modes prescribed by law, although the return is defective; yet as the legal sufficiency of the return is a matter for the consideration of the court, like the legal sufficiency of the declaration is, although the court may err in its judgment, yet as the court had a right to decide and is presumed to have decided upon it, although it might be reversed for error it would until reversed uphold the judgment of the court. Where however the writ has no return, there are no facts upon which the judgment of the court can act, nothing to judge of, and therefore no judgment could be rendered. It would be like declaring a blank paper filed, a declaration, and assuming jurisdiction of the subject matter upon the strength of such judgment. Should the writ be lost and it was made to appear that one had issued, then in its absence we might presume in favor of service, but not where there was nothing to show that a writ issued. That would be basing a presumption upon a presumption; first, that there was a writ, and then that it was served. This is never permissible.

I do not intend to be understood as assuming that every fact necessary to confer jurisdiction on a court of superior jurisdiction must affirmatively appear of record. In this I think the former decisions have gone too far. Every reasonable presumption in favor of the rightful exercise of jurisdiction ought to be indulged. But where the record (the writ and return being taken as part of it) repels the presumption of notice, as in case the writ should be returned "not found," and the record should state that the defendant made default, there no ground for presumption would exist; for the writ would negative the presumption of service, and the record, or voluntary appearance; and as these are the only legal means by which the court could acquire jurisdiction of the person (unless by publication, and then the record would show that fact if it existed) no presumptions could be indulged.

Presumptions are deductions from known facts, and are strong or slight according to the number and conclusiveness of the facts from which they are drawn. According to the English practice there was strong ground in favor of the doctrine. There the writ is no part of the record, and the declaration is not filed until after the writ has been returned, as there is nothing on the writ to repel the presumption, and as it is no part of the record, there is nothing to weaken the presumption upon the record itself. But in this as in nearly all of the southern and western States, the declaration is filed before the writ issues, and the writ is held to be part of the record. There is consequently less ground for presumptions than under the English practice, because the fact that the declaration is filed here furnishes no evidence whatever upon which a presumption could rest; and so far as the writ is concerned it is before the court and affords record evidence as to what was done in obedience to it.

It is true that the restricting this rule may impose an increased vigilance upon purchasers at judicial sales, to enable them to avoid the consequences incident to purchasers under illegal proceedings; but then vigilance and investigation into facts furnish the only repose worth possessing. It is also true that one class of the community may repose under the soothing influence of this judicial opiate, but it is at the sacrifice of the repose of all others who hold property. If it is a serious desecration of the right of property under judicial sales to overturn titles thus acquired, is it not a still more serious desecration of the right of property to take it from the legal owner without notice? Can the title to property be secure under a rule by which it may be seized and sold without the consent or knowledge of the owner? Can the purchaser find repose when he reflects that the same process of seizure without notice may be applied to him? I think not. On the other hand it seems to me that a full hearing and fair opportunity to defend would be better calculated to inspire confidence in the laws and give repose to the community. But be this as it may, it only remains for me to express what I understand the law to be and leave its modifi-

cation, if oppressive, to another department of the government.

When I came on the bench there had already been made several decisions on this important subject, dating back to an early period after the organization of the court. They were not in accordance with the opinions of the court, at least of several of its members, in every particular, but in view of their importance it was thought best to let them stand until upon full and deliberate consideration they should be settled upon more satisfactory grounds.

I am aware that the subject has received the most careful and laborious examination by my associates on the bench, but as it has been my misfortune to differ with them upon several important points, the law imposed upon me the duty of presenting the reasons which have influenced my opinion. Having done so it only remains for me to add that I hold the record offered in evidence void and incompetent in evidence, for the reason that it was made without notice to the defendant Woodruff or any appearance on his part, or any facts from which such notice might reasonably have been inferred.