by the local law of such other States.—

It is supposed, and it has been very ably argued to that effect by the counsel for the defendant, that the supreme court in deciding such judgments to have no precedence of simple contract debts rested their decision, in this regard wholly on the supposed intention of the legislature of Georgia as expressed in its enactment. To my mind it is clear, the court meant to assert the principle independently of all legislation of the State, and to rest it for support on the principles of the common Law. The doctrine and reasoning of the case of Cameron vs. Adm^r. of Wartz 4 M'Cord 278, are both adopted and the court observe, in speaking of that decision, that it was correctly placed upon the footing that the first section of the fourth article of the constitution has effected no change in the nature of a judgment." And if possible to prevent misapprehension the court go on to observe, that if this case had not been before them and the point had been then presented as an original question they would have come to the same conclusion. And this seems to be the view taken by our court of Appeals in the case of Brengle vs. M'Clelland 7 Gill and John 443, where it is said a judgment obtained in another State "can rank only as a simple contract claim in the distribution of assets, the conclusive effect given to it by the constitution and act of Congress as a judgment not operating to place it upon an equal footing with a judgment obtained in Maryland, in the distribution of assets, but leaving it in this respect to the operation of common law principles, according to which it would be considered a foreign judgment, and be paid as a simple contract debt."

Now if it be true that neither the construction or the act of the 26th of May 1790, effected any change in the nature of the judgment, then it follows as a necessary consequence, that its character is precisely the same as though the constitution had been silent on the subject. And this being so, the question is,— in what light are foreign judgments viewed:— There can be no doubt on this subject. They have always been considered in the light of simple contracts, and being so regarded they cannot be held to merge the original cause of action for it is of equal dignity. Indeed the whole doctrine of merger proceeds on the idea, that the simple contract has been merged in one of a higher dignity and grade.—

To use the language of Chief Justice Tindal, in Smith vs. Nicholls 35 Eng. C.L. 94. "the ground on which a plea of judgment recovered bars the plaintiff from any action is, that the original nature of the debt or damage, where it may be sought to be recovered, is changed; that he has a higher remedy; he has a judgment in a court of record on which he can issue an execution."

Now let us test this case by these principles for the purpose of ascertaining whether there is any merger because of the judgment rendered in Philadelphia, Ch. Justice Tindal tells us that this takes place because "the original nature of the debt, or damage, where it may be sought to be recovered, is changed;" and the Supreme Court of the United States have decided, that the constitution "has effected no change in the nature of the judgment." adopting the language of 4th M'Cord 278, which is, that beyond the limits of the State where it is rendered, it is regarded but as a simple contract.— From this it is clear, there is no change in the nature of the original cause of action, and therefore there can be no merger. Again Chief Justice Tindal tells us, that merger takes place because the party "has a higher remedy, he has a judgment in a court of record on which he can issue an execution."

The Supreme Court of the United States both in the case of Mills vs. Duryee 7 Cranch,— and the case of M'Elmoyle vs. Cohen, tell us that a judgment rendered in a

sister State is not such a judgment as on which an execution may issue in a different State.— From this examination of the nature of a judgment rendered in a sister State, and what is necessary to work a merger, it must be apparent, that the judgment in Philadelphia does not work an extinguishment or merger of the original cause of action which is the ground work of this case. And this view is fully and most distinctly taken in numerous cases.—

In the case of Smith v. Nicholls 35 Eng. C.L. 94. it is expressly decided that a foreign judgment (and I have shewn this be such, in the attitude in which it is presented us) is nothing more than an agreement between the parties to the extent of the debt or damage; and Judge Parsons in the case of Russell v. Briggs, 9 Mass. R. 462 (a case recognized with the highest application by the Supreme Court of the State of New York in 5 Wendall 155,) says that such judgments i.e. judgments of sister States, may be declared on "as evidence of debt or promises" thus showing that the original nature of the cause of action is not merged in the judgment.—

But it is said, admitting this to be so, still the plea is good and the judgment a conclusive bar to this action because it is used defensively.—

It is undoubtedly true that a distinction has been taken between suits brought to enforce a foreign judgment, and a suit brought against a party who sets up such judgment as a defence to the suit. In the former, it is held that no Sovereign is bound to enforce a foreign judgment; but it is otherwise where the defendant sets up a foreign judgment, as a bar to proceedings. Story's conflict of Laws section 598.

But does this case come within this rule? Is not what is meant by setting up a foreign judgment as a bar to the suit, the pleading of such foreign judgment as shows that the right has been decided to lie with the defendant or such an one as shows that he is exonerated from all liability? In such a case the matter is Res Judicata and ought to be received as conclusive evidence of right. But this is not such a case; here, the judgment plead does not establish the right to be with the defendants but with the plaintiff; it being nothing more to use the language of Chief Justice Tindall than an ascertainment of the amount of the debt, and as it does not merge that by giving a higher remedy it can be no bar to the action. This is precisely the doctrine asserted in Smith v. Nicolls and in Hall v. Odber, 11th East 118.—

Entertaining these views it is not necessary I should consider at length the other questions raised in the case. I shall therefore merely remark, that the construction which I place on the 5th section of the act of Assembly of 1832 Chapter 280 is;— that the appearance authorized by it is;— that the defendant appears both to the Capias, and the attachment, the attachment not however, being dissolved by the appearance but remaining as a security: that it is impossible to obtain a judgment after appearance in the attachment without also obtaining a judgment in the other action.— the one which commences with the Capias.—

As regards the matter pleaded, I think, independently of the principles of pleading, our court of Appeals have decided it should have been pleaded Pendens lite continuance, if it be a defence at all. 2 Harris and Gill, 491, and 12 Gill & J. 361.— Moreover, I think it should have been pleaded in abatement in as much as it does not show an absence of all cause of action, but goes upon the idea that the original cause of action is merged