goods, wares or merchandise, other than the provisions and sea-stores necessary for the voyage, such ship or vessel, and the specie and cargo on board, shall be wholly forfeited."

She was originally an American vessel, but had been captured and condemned as prize, and purchased by Hurst, her former master, an American citizen. She took on board goods other than the provisions and sea-stores necessary for the voyage, and cleared out as a Dane.

Martin, for the appellant, contended, that notwithstanding these circumstances, the vessel, being really American, could not be condemned under that section of the law; for in criminal cases, there can be no estoppel. A man may prove the truth of the case against his own averment.

Pinkney, Attorney-General, relied upon the capture, condemnation and sale, and the Danish burgher's brief, which the master had obtained, to show that she was a foreign vessel.

The sentence of the circuit court was affirmed.

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*Bond and another *v.* Jay. (*a*) [*350

Statute of limitations.

The exception, in the Maryland statute of limitations, in favor of "such accounts as concern the trade or merchandise between merchant and merchant, their factors and servants, which are not residents within this province," applies to dealings between a merchant-creditor, residing out of Maryland, and a debtor residing in Maryland.

And in order to take the case out of the exception, it is not sufficient to aver, that the creditor returned to, came, and was within the state of Maryland, after the cause of action accrued, and more than three years before bringing the suit.

Error to the Circuit Court for the district of Maryland, in an action of *assumpsit*, brought by Bond & Brooks against Jay, surviving partner of Samuel Jay and Gabriel Christie, trading under the firm of Samuel Jay & Company, upon an account for merchandise sold and delivered.

The defendant, Jay, pleaded the statute of limitations of Maryland, 1715, c. 23, which limits actions of *assumpsit* to three years after the cause of action shall have accrued. To this plea, the plaintiffs replied, "that at the time when the several sums of money in the declaration mentioned grew due, viz., on the 20th of March 1799, and long before, to wit, on the 27th of November 1797, and from thence until the said 20th of March, and from the said last-mentioned day until the suing forth the original writ in this suit, the plaintiffs were merchants, carrying on trade and merchandise under the name and firm of Bond & Brooks, and residing and carrying on trade without the limits of the district aforesaid, and of the state of Maryland, viz., at Philadelphia, in the state of Pennsylvania; and that at the several times aforesaid, the said Jay and Christie were merchants, trading under the firm of Samuel Jay & Company, and residing and carrying on trade at and within the district aforesaid, and that on the said several days, and on sundry days from the first of those days to the second of those days, the plaintiffs were engaged in mutual trade and merchandise with the said Jay

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(*a*) February 20th, 1813. Absent, Todd, Justice.

and Christie, by reason of which trade, and of and concerning the same, the said several sums of money in the declaration mentioned grew due to the plaintiffs, and this they are ready to verify ; wherefore," &c.

To this replication, the defendant rejoined, that the plaintiffs ought not to have and maintain their said action by reason of anything alleged in their replication aforesaid ; because, protesting, that the said several sums of money *351] in the declaration aforesaid mentioned, *do not concern the trade and merchandise between merchant and merchant ; and also protesting that the plaintiffs have not continued to reside without the state of Maryland and district aforesaid, since the contracting and growing due of the said several sums of money, and until the suing out the original writ in this cause ; yet, for answer to the said replication, the said Samuel Jay says, that true it is, that at the time of the contracting and growing due of the said several sums of money, he, the said Samuel and the said Christie, were merchants and residents within the state and district of Maryland aforesaid, and continued to reside therein, until the decease of the said Christie, and the said Samuel has continued to reside therein ever since ; and that the several sums of money in the declaration mentioned had become due and were payable on the 20th of March 1799, to wit, at the district aforesaid ; and that afterwards, to wit, on the 20th of May 1799, the plaintiffs returned to, came, and were within the state aforesaid, to wit, at the district aforesaid ; and that afterwards, to wit, on the 18th day of October 1799, the said Joshua B. Bond came to, and was within the said state, viz., at the district aforesaid ; and that the original writ in this cause was sued forth on the 19th day of May 1809, and not before ; and so the said Samuel Jay saith, that three years and more had elapsed and expired, after the return of the plaintiffs and of the said Joshua B. Bond to, and after their being within, the said state and district, and after the contracting and growing due of the said several sums of money, and before the suing out of the said original writ in this cause, viz., at the district aforesaid ; and this the said Samuel is ready to verify, wherefore," &c. To this rejoinder, there was a general demurrer and joinder.

The court below overruled the demurrer, and adjudged the rejoinder to be good ; whereupon, judgment was rendered for the defendant, and the plaintiffs sued out their writ of error.

The act of assembly of Maryland, 1715, c. 23, enacts, " that all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, sur-trover, or replevin for taking away goods or chattels, all actions of account, con- *352] tract, debt, book, or upon the case, other *than such accounts as concern the trade or merchandise between merchant and merchant, their factors and servants, which are not residents within this province, all actions of debt for lending," &c., " shall be commenced or sued within the time and limitation hereafter expressed, and not after," &c. The third section contains a clause saving to persons within the age of twenty-one years, *feme covert, non compos mentis*, imprisoned, or beyond seas, the right of suing within the respective times limited, after the removal of their several disabilities.

The cause was argued by *Harper*, for the plaintiffs in error, and *Pinkney*, Attorney-General, for the defendant in error.

February 22d, 1813. MARSHALL, Ch. J., delivered the opinion of the court as follows :—This suit was brought by the plaintiff, a merchant of Pennsylvania, against the defendant, a merchant of Maryland, upon an account which grew out of their trade with each other as merchants. The defendant pleaded the statute of limitations, to which the plaintiff replied that the plaintiff, who resided in the state of Pennsylvania, and the defendant, were employed in mutual trade and merchandise, of and concerning which the said several sums of money in the said declaration mentioned grew due. The defendant rejoined, that the plaintiff came within the state of Maryland, in 1797, and that the original writ in this cause issued on the 5th of July 1808, and not before. The plaintiff demurred, and upon argument, the demurrer was overruled, and the bar adjudged to be good.

A writ of error has been sued out to the judgment of the circuit court, and the questions in the cause are, 1. Is the replication good in itself? 2. Does the rejoinder avoid the replication and sustain the plea?

These questions depend on the act of limitations passed in 1715 by the legislature of Maryland. The *material part of that act is in these words: "Be it enacted, that all actions, &c., other than such accounts [*353 as concern the trade of merchandise between merchant and merchant, their factors and servants which are not residents within this province," &c., "shall be commenced or sued within three years ensuing the cause of such action, and not after." By the plaintiffs, it is contended, that if either party reside without the province, the case is within the exception: by the defendant, that to bring the case within the exception, both parties must reside without the province.

It is so unusual for a legislature to employ itself in framing rules which are to operate only on contracts made without their jurisdiction, between persons residing without their jurisdiction, that courts can never be justified in putting such a construction on their words, if they admit of any other interpretation which is rational and not too much strained.

This, it is thought, may be done in the case now to be decided. The words "which are not residents" refer, it is said, to both parties, plaintiff and defendant. They comprehend all the persons previously enumerated. Let this be conceded. Then, read the exception as if the word "both" or "all" were inserted. It will stand thus: "other than such accounts as concern the trade or merchandise between merchant and merchant, their factors and servants which are not, both or all, residents within this province." The plain meaning of the sentence so read would be, that accounts between merchant and merchant, either of whom resided out of the province, would come within the exception. It is admitted, that without the word "both" or "all" the more obvious meaning of the sentence is that for which the defendant contends. Yet it will bear the same construction, without, as with, either of those words, and the subject-matter of the law so clearly requires this interpretation, that the court thinks it may be made.

The rejoinder is founded on the third section of the *act which [*354 contains the usual exception in favor of infants, &c., and allows three years after the removal of the impediment, to bring their suit.

It is contended, that since the act of limitations runs against a person beyond sea, from the time of his coming into the country, so, from analogy,

it ought to run against a non-resident merchant, from the time of his coming, though for a mere temporary purpose, within the country. The court cannot assent to the correctness of this reasoning. To render it applicable, the rejoinder ought to have averred that the plaintiff had become a resident of the state of Maryland, more than three years before the institution of the suit. Not having done so, the words of the exception have never ceased to be applicable to the plaintiff; and consequently, the statute has never commenced to run.

It is the opinion of this court, that the circuit court erred in overruling the demurrer of the plaintiff to the rejoinder of the defendant in this cause, and that the judgment be reversed and annulled, and the cause remanded, with instructions to render judgment on the said demurrer in favor of the plaintiff, and that further proceedings may be had therein according to law.

Judgment reversed.

Preston *v.* Tremble. (*a*)

Merger.

If an equitable title be merged in a grant, the party has no relief in equity, although the grant be void, as being contrary to law.

Error to the Circuit Court for the district of East Tennessee, who had dismissed the plaintiff's bill in chancery, upon demurrer, for want of equity.

The bill stated, that Preston, the complainant, had title to a tract of land, in the state of Tennessee, but the defendant, Tremble, fraudulently and deceitfully entered into it, and holds him out. *In setting forth the title, it stated, that the land formerly lay within the state of North Carolina, during which time, one Ephraim Dunlop made an entry for the land, in regular form, paid the purchase-money to the state, and performed every other requisite to complete the contract; but before a patent was obtained, the legislature of North Carolina passed a law, defining the limits of the Indian boundary, declaring all entries and surveys already made within those limits, to be null and void, and directing the entry-takers to refund all moneys received therefor. That Dunlop never received back the purchase-money, nor consented to annul the contract. That the law of North Carolina, rescinding the contract, was void. That Dunlop afterwards obtained a warrant to survey the land, and obtained a patent therefor, from the state of North Carolina, and afterwards, conveyed the land to John Rhea, who conveyed to Preston, the plaintiff.

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P. B. Key, for plaintiff in error, contended, 1. That the land was within the territorial limits of North Carolina, who had a right to grant it. 2. That the entry and payment of the purchase-money, vested in Dunlop an equitable estate in fee in the land. 3. That the act of May 1778, was void and inoperative, so far as it attempted to rescind the contract, and destroy the equitable estate of Dunlop. 4. That although the patent which was issued in 1793, in contravention of the law of May 1778, was declared void and inoperative, to convey the legal title, yet the equitable estate existed and remained in Dunlop. 5. That no legal title to the land having passed to

(*a*) February 23d, 1813. Absent, Todd, Justice.