

Cassell v. Carroll.

DECREE.—These causes came on to be heard, &c. : On consideration whereof, this court is of opinion, that there is no error in the interlocutory decree, nor in so much of the final decree as approves and confirms the report made by the master ; but there is error in so much thereof as directs a sale of the premises therein mentioned, all the heirs who are shown to be interested in the said premises not being made parties, and it not being shown or alleged that they could not be made parties. So much of the decree, therefore, as directed a sale of the premises in the *bill mentioned, is reversed and annulled, and the residue thereof is affirmed ; [*134 and the cause is remanded to the said circuit court, with liberty to the plaintiffs to make all proper parties, that the whole may be sold, if all the heirs can be made parties, otherwise the shares of such as are made parties. Each party to pay his own costs in this court.

HENRY CASSELL, Administrator of LOUISA BROWNING, v. CHARLES CARROLL, of Carrollton.

Quit-rents on lands in Maryland.

The title and claim of Charles, Lord Baltimore, his heirs and representatives, to the quit-rents reserved by the proprietary of the late province (now state) of Maryland, was extinguished by the agreement between the heirs, devisees and personal representatives of the said Lord Baltimore, and of his son and heir, Frederick, Lord Baltimore, made in 1780, and confirmed by an act of the British parliament, in 1781.

It seems, that a *bonâ fide* assignment, for a valuable consideration, made by a husband, of a debt, actually and presently due to his wife, divests, in equity, the title of the wife.

But however this may be, in general, the agreement made in 1780, including the quit-rents then actually due (if at all), to Louisa Browning, the daughter of Charles, Lord Baltimore, and assigning them to Henry Harford, the devisee of Frederick, Lord Baltimore, having been entered into in England, by the husband of Louisa Browning and her committee (she being a lunatic), and the consideration having actually gone beneficially for their use, and the *whole transaction having been between British subjects, under the direction of the high court of [*135 chancery, and confirmed by an act of parliament, transferred a complete legal and equitable title to the assignee.

ERROR to the Circuit Court of Maryland. This was an action of debt, brought by the plaintiff in error, in the court below, for the recovery of certain quit-rents alleged to be due from the defendant to the plaintiff's intestate. The special verdict found by the jury stated the following facts :

The jury find, by their verdict, that Charles I., in the eighth year of his reign, granted to Cælius Calvert, Baron of Baltimore, his heirs and assigns, for ever, in fee-simple, the province (now state) of Maryland, by a charter dated the 8th of June 1633. Cælius Calvert died in 1675, and left Charles, afterwards Baron of Baltimore, his son and heir, who entered into the said province, and was seised thereof. The said Charles, in 1711, granted, according to the laws of the province, to Charles Carroll, Esq., father of the defendant, a patent for a tract of land containing 10,000 acres, "to have and to hold the same unto him, the said Charles Carroll, his heirs and assigns, for ever ; to be holden of us, and our heirs, as of our manor of Baltimore, in free and common socage, by fealty only, for all manner of services ; yielding and paying therefor, yearly, unto us and our heirs, at our receipt at the city of St. Mary's, at the two most usual feasts in the year, viz., at

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the feast of the Annunciation of the Blessed Virgin *Mary, and St. Michael the archangel, from and after the second day of April, which shall be in the year of our Lord 1723, the rent of one hundred pounds sterling, in silver and gold."

The defendant inherited the said tract of land from his father, and is now seised and possessed of the same. On the 31st day of December 1698, the said Charles, Lord Baltimore, executed a deed, by which he settled the province of Maryland on himself, remainder on his son Benedict, for life; remainder on the heirs male of the body of the said Benedict; remainder to the said Charles, in fee. There were trusts created in the said deed, all of which are determined. The said Benedict died in 1714, and Charles, his father, in 1715. The said Benedict left issue male, Charles, his heir, afterwards Lord Baltimore, and proprietor of Maryland. Benedict left other sons, all of whom died without issue. The last-mentioned Charles entered into the province of Maryland, and was seised thereof, as the law requires; and on the 11th day of July 1730, executed a deed to trustees, to the use of the said Charles and his assigns, for life, remainder to the use of the first and other sons of the said Charles in tail male successively; remainder to the use of the said Charles, in fee. There were other trusts created in the deed, but they were all determined at the death of Mary, the wife of the said Charles, which took place in 1769.

In 1692, an act was passed by the legislature of Maryland, which declares, that no manor, land, *tenements or hereditaments whatsoever,
*137] within the province, shall pass from one to another, except the deed or conveyance be acknowledged before certain magistrates, and enrolled or recorded. This act was in force when the indenture of the 31st of December 1698, was executed, but the said indenture was not acknowledged or recorded. The legislature of Maryland, in 1715, ch. 47, passed an act, which requires deeds, and leases for more than seven years, to be acknowledged and recorded within six months from their date. It also declares all deeds, not acknowledged and recorded, according to the provisions of the act of 1692, to be void. The deed of the 11th of July 1730, was neither acknowledged nor recorded.

The last-mentioned Charles, Lord Baltimore, had issue only one son, named Frederick, and two daughters, one named Louisa (who is the plaintiff's intestate), and the other named Caroline. The said Charles, Lord Baltimore, being seised of the province of Maryland as aforesaid, made his will, in 1750, and devised the province of Maryland to trustees, for the use of his son Frederick, and his assigns, for life; remainder to the use of the sons lawfully begotten of the body of the said Frederick, successively, in tail male; remainder to the daughters of the said Frederick; "and, in default of such issue, then to the use and behoof of Louisa, my eldest daughter, her heirs and assigns, for ever." Charles, Lord Baltimore, died seised, the 23d
*138] day of April 1751. The *said Frederick, Lord Baltimore, died without lawful issue, on the 4th day of September 1771.

Louisa, the plaintiff's intestate, was married to John Browning, on the 15th day of May 1762, and remained *covert baron* of the said John, until 1792, when he died. The said Louisa was a lunatic from the year 1780, till the day of her death, which took place in November 1821. She has never been in the state of Maryland since the death of her father. Letters of

administration were regularly granted to the plaintiff, on the 17th day of April 1823.

Frederick, the son of Charles, Lord Baltimore, entered into the province of Maryland, and was seised thereof as the law requires. On the 1st day of July 1761, the said Frederick, and Cæcelius Calvert, his uncle, executed a deed of bargain and sale to Thomas Bennett and William Sharp, of the province of Maryland and its appurtenances, for the purpose of docking the entail of the province. On the 8th of April 1767, the said Frederick executed a deed of lease and release of Ann Arundel manor, and all other manors held by the lord proprietary in the province, to Bennett Allen, and recoveries were afterwards suffered of the said manors, in pursuance of the said deed of lease and release. On the 4th day of March 1771, Frederick, Lord Baltimore, made his will, and devised the province of Maryland, and all its appurtenances, to Henry Harford.

That upon the death of the said last-mentioned Frederick, Baron of Baltimore, Henry Harford, *the devisee named in his will, was a minor, and a ward, under the guardianship of the court of chancery in England, [*139 and so continued until 1779. That the said Henry Harford, as devisee as aforesaid, was recognised and acknowledged by the provincial government of Maryland, as the lawful proprietor, under the charter, and by his guardians, with the knowledge and consent of the British government, entered into the possession of the government of the province of Maryland, and received the rents and revenues thereof, as proprietor, until the beginning of the disturbances which separated the United States of America from the British government. That those disturbances began in 1774, at which time the people of the province of Maryland took the government of the said province into their own hands, and ousted the officers of the proprietor; and the government of the said province so continued in the hands of the people, until the declaration of independence, the 4th of July 1776. That no quit-rents, nor any revenues which fell due in the said province, after the year 1773, were paid to the proprietor, or his officers; that, after the revolutionary war, the British government paid to the said Henry Harford 60,000*l.*, as a compensation for his losses in Maryland by the revolution; and paid to the above-mentioned John Browning, and to Robert Eden, who married the above-mentioned Caroline, 10,000*l.* each, as a compensation for their losses in the said province, by the said revolution. That suits in the chancery court of *England were instituted in 1772, by the said Browning and wife, [*140 and the said Eden and wife, against the said Harford, to recover the province and revenues of the said province of Maryland, which suits continued until 1782, when the said bills were dismissed by the complainants.

In 1780, the legislature of Maryland passed an act, which declares, that "the citizens of Maryland, from the declaration of independence, and for ever, be, and they are hereby declared to be, exonerated and discharged from the payment of the aforesaid quit-rents, and that the same shall be for ever abolished and discontinued."

In 1780, an agreement was entered into, in England, by deed, between Henry Harford, of the first part, John Browning, the husband of Louisa Browning, and Sir Robert Eden and Caroline his wife (the said Louisa and Caroline being the heirs-at-law of Frederick, Lord Baltimore), of the second part, Sir Cecil Wray, the committee of the real and personal estate of the

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said Louisa (she being a lunatic), of the third part, and Hugh Hammersley and Peter Prevost, two of the executors named in the will of Frederick, Lord Baltimore, of the fourth part, all the said parties being British subjects. The agreement makes an absolute cession of the province, and revenues, &c., from the time of the decease of Lord Frederick, to Henry Harford and his heirs, upon the payment (among other things) of 10,000*l.* to John Browning and Louisa his wife, and 10,000*l.* to Sir Robert Eden and *141] Caroline his wife, in the manner stipulated in the *agreement. It also provided, in the event of the restoration of Henry Harford to the possession of the province and its revenues, growing, or in arrear, for an additional sum of 10,000*l.* for the benefit of each of said ladies, payable out of the same. The agreement further stipulated for an application to the British parliament for an act to confirm the same, and to vest in Henry Harford and his heirs, the title to the province, and its revenues, with a provision that the agreement should be void, unless the royal assent should be given to the act within three years. The act, accordingly, passed, and was assented to by the king, within the period prescribed. It vests the title to the province, and its revenues, and quit-rents, &c., absolutely in Henry Harford and his heirs, subject only to the payment of the sums before mentioned, and some others not material to be stated.

Upon this special verdict, a judgment was entered in the court below *pro forma*, by consent, for the defendant, and the cause was brought, by writ of error, to this court.

March 13th and 14th. The cause was argued by *Webster* and *Raymond*, for the plaintiff; and by the *Attorney-General* and *Taney*, for the defendant.

It has not been thought proper to report the arguments of counsel, at large, involving a great variety of feudal and constitutional learning, which the court did not think it necessary to examine, as the cause was determined *142] upon the single point of the effect of the agreement made *in 1780, and confirmed by act of parliament in 1781.

On the part of the *plaintiff*, it was contended: 1. That the deeds of 1698 and 1730, were void under the acts of assembly of 1692 and 1715, referred to in the special verdict; and that, consequently, Charles, Lord Baltimore, the testator of the plaintiff's intestate, was tenant in fee-simple of the province of Maryland, at the time of his death in 1751.

2. If those deeds were not void, then the said testator was tenant in tail, under the deeds, with reversion in fee, which reversion was a devisable interest, and was well devised to the plaintiff's intestate. *Calvert v. Eden*, 2 Har. & McHen. 279, 337; Opinion of Sir F. Hargrave, in s. c. p. 341.

3. Payment of rent to Henry Harford, or his agents, did not discharge the defendant from his liability to pay the plaintiff.

4. The act of the legislature of Maryland of 1780, which professes to abolish the quit-rents from and after the declaration of independence, is void, on the general principle of the law of nations, that a division of an empire does not affect vested rights of property, and by a special provisions of the treaty of peace of 1783, and the treaty of 1794, between the United States and Great Britain. The original charter to the first Lord Baltimore, distinguished between his public and his private character, and

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meant to confer upon him beneficial rights of property *independent of his political character as the ruler of the province. At all events, the act of 1780 could not affect, retrospectively, the quit-rents which were then actually due, and had accrued from the death of Frederick, Lord Baltimore, in 1771, until May 1780, when the act was passed. Vattel, *Droit des Gens*, liv. 4, c. 2, § 22; *Ware v. Hylton*, 3 Dall. 199, 239; *Georgia v. Brailsford*, Ibid. 1; *Terrett v. Taylor*, 9 Cranch 43, 46; *Orr v. Hodgson*, 4 Wheat. 453; *Society, &c., v. New Haven*, 8 Ibid. 464.

5. That the agreement of 1780, alleged to have been confirmed by act of parliament in 1781, is no bar to the plaintiff's right of action. Upon this last point (which was the only one determined by the court), it was argued for the plaintiff, that the agreement contemplated a restoration of Henry Harford to the possession of the province, and the payment of large sums of money, consequent on that event, and that this being an essential part of the contract, which became incapable of execution by the result of the war, the agreement could not legally be enforced. It was also contended, that it was not competent for John Browning, the husband, as such, to convey the title to these quit-rents belonging to Louisa Browning, his wife, so as to bar her, in case of survivorship, from the right of recovery (Roper on Husb. & Wife, 204, 223, 227), and that, she being a lunatic, no act done by her committee could in any manner affect her rights. A mere intention to reduce into possession the wife's *choses in action*, has been *held insufficient to bar the widow of her right to them. *Blount v. Bestland*, 5 Ves. [*144 515; *Lamb v. Milnes*, Ibid. 517. So, a general assignment in bankruptcy has not the effect of reducing into possession, a legacy of stock, in trust for the bankrupt's wife, whose right by survivorship will be established against the assignees. *Mitford v. Mitford*, 9 Ves. 87. And a transfer of stock into the wife's name, to which she became entitled as a distributive share of personal estate during the marriage, will not be considered as a payment or transfer to her husband, so as to defeat her right by survivorship. *Wildman v. Wildman*, 9 Ves. 174. See also, *Nash v. Nash*, 2 Madd. 133; *Hornsby v. Lee*, Ibid. 16. Supposing, therefore, the husband had agreed to transfer this specific claim, it would only operate as an equitable assignment; the assignee must sue in the name of the husband; and if he did not recover during the lifetime of the husband, the right would survive to the wife. But in no point of view, could it be considered as a legal defence, or be pleaded in bar of this action.

On the part of the *defendants*, it was insisted: 1. That as soon as Maryland became a sovereign and independent state, the quit-rents which fell due after the declaration of independence, were due to the state, and not to the representative of Lord Baltimore. They belonged to him in his public political character as lord *proprietary, and not in his individual private capacity. 2 Bl. Com. 53, 288; Co. Litt. 244, note b; Pownall, *Colonies*, 48-9; *Kirk v. Smith*, 9 Wheat. 241, 266, 282. [*145

2. That Henry Harford, being acknowledged by the province of Maryland, and by the king of Great Britain, as the proprietor of Maryland, was, by such acknowledgment, the lawful proprietor, and entitled to the quit-rents, until Maryland became an independent state. 1 Bl. Com. 106-7; *Derby v. Athol*, 2 Ves. sen. 337; *Penn v. Baltimore*, Ibid. 455.

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3. If the province was private property, and entailable and devisable, then the entail was barred by Frederick, Lord Baltimore, and the devise to Henry Harford was good.

4. If Henry Harford was not lawful proprietor, he was proprietor *de facto*, and as such, payment to him would discharge the tenants.

5. That the treaties with Great Britain have no application to rents falling due subsequent to the declaration of independence. At all events, the act of assembly of 1780, effectually confiscated the quit-rents due before that time, and so divested the title of whoever might be entitled to them, as to extinguish all claim to those quit-rents. *Smith v. Maryland*, 6 Cranch 306.

6. That the agreement of 1780, confirmed by act of parliament in 1781, bars the plaintiff's right of action. Upon this last point, it was argued for the defendant, *that John Browning, the husband, had a right to *146] bind all the rights of Louisa Browning, the wife, with respect to such debts as were then actually due and payable, and therefore, had a right to transfer, for a valuable consideration, the quit-rents actually and presently due. The cases cited on the other side did not shake this principle. The case of *Blount v. Bestland*, 5 Ves. 515, was not the case of a sale for a valuable consideration, but of a bequest by a husband to his own children, of a legacy due to the wife, which he had not reduced to possession. *Mitford v. Mitford*, 9 Ves. 87, was the case of a general assignment of all his effects, by a bankrupt husband, and the court determined that it did not pass a legacy which he had not reduced into possession. But the argument manifestly admitted, that a particular assignment of the specific legacy, for a valuable consideration, would have produced the effect. The case of *Hornsby v. Lee*, 2 Madd. 16, was the sale of a wife's reversionary, not a present, interest. So that the power of the husband over the wife's present debts, immediately recoverable, remained untouched by these decisions. But in the present case, the wife was a ward of chancery, and was represented by her committee in the transaction, which was advantageous for her, the benefit of which she had received, and now actually enjoys. The compromise was confirmed by an act of parliament obtained on an application *147] of *the parties, and ought, therefore, to be considered as annihilating all her claims to the subject in controversy.

March 17th, 1826. STORY, Justice, delivered the opinion of the court.— This is the case of an action of debt, brought by the plaintiff, as administrator of Louisa Browning, against the defendant, for the recovery of certain quit-rents, asserted to be due to the intestate, as proprietary of the province of Maryland, and accruing between the years 1771 and 1780. In the circuit court for Maryland district, upon the trial of the cause, upon the general issue, a special verdict was found, upon which that court gave judgment *pro formâ* for the defendant, and the cause has been brought before us for a final decision, by a writ of error.

The cause has been here argued with great ability and care. Many important and difficult points have been discussed at the bar, upon which, if we were called to pronounce a decision, we should wish for more time and consideration to mature our judgment. But as we have all come to a conclusion upon one point, which finally disposes of the whole cause, it is

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deemed proper at once to put the parties in possession of our opinion, without attempting to analyze the learning which is involved in others of more complexity, and would require more extensive researches.

For the purposes of the present decision, it is assumed (without, however, meaning to intimate *any real opinion on the subject), that every other difficulty in respect to the title and claim of Louisa Browning [*148 to the quit-rents in controversy, is overcome, and the question of the effect of the agreement concluded between the parties, in June 1780, and subsequently confirmed by parliament, in the year 1781, is that to which the court has addressed its attention. If that agreement, so confirmed and executed, as the case finds, extinguished, in point of law, the title of Louisa Browning to these quit-rents, and passed it to Henry Harford, there is an end to the present suit. And such, upon the best consideration of the case, in our judgment, was the legal effect of that agreement so confirmed and executed.

The agreement is *quadripartite*, between Henry Harford, of the first part, John Browning, the husband of Louisa Browning, and Sir Robert Eden and Caroline his wife (the said Louisa and Caroline being the heirs-at-law of Frederick, Lord Baltimore), of the second part, Sir Cecil Wray, the committee of the real and personal estate of the said Louisa, she being a lunatic, of the third part, and Hugh Hammersley and Peter Prevost, two of the executors named in the will of Lord Frederick, of the fourth part. The object of the agreement was to make a final settlement between the parties of all differences, and particularly to settle the title to the province of Maryland, and all the hereditaments and revenues connected therewith. It makes an absolute cession of the province and revenues, &c., *from the decease [*149 of Lord Frederick, to Henry Harford and his heirs, upon the payment (among other things) of 10,000*l.* to John Browning and Louisa his wife, and 10,000*l.* to Sir Robert Eden and Caroline his wife, in the manner stipulated in the agreement. It further stipulates, in the event of the restoration of Henry Harford to the possession of the province and its revenues, growing or in arrear, for an additional sum of 10,000*l.*, for the benefit of each of these ladies, payable out of the same; but as that event never occurred, it is unnecessary to dwell further upon it; the other sums were duly and regularly paid. The agreement further stipulated for an application to be made to the British parliament for an act to confirm the same, and to vest in Henry Harford and his heirs, the title to the province, and its revenues, &c.; with a provision, that the agreement should be void, unless the royal assent should be given to the act within three years. The act passed, and was assented to by the king, within the period prescribed. It vests the title to the province, and its revenues and quit-rents, &c., absolutely, in Henry Harford, in fee, subject only to the payment of the sums before mentioned, and some others not material to this cause.

What is there, then, to prevent the agreement and act from having full effect? The parties were all British subjects, resident within the realm; the act of parliament was passed upon their own application and agreement; all persons in interest were fully represented, so far as by law *they [*150 were capable of being represented; the conditions stipulated have been complied with; the confirmation was absolute; and the intention was,

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to extinguish, at law, as well as in equity, every claim of Louisa Browning to the quit-rents now in controversy.

It has been argued, that the agreement contemplated a restoration of Henry Harford to the possession of the province, and the payment of large sums consequent thereon; and that, this being a material ingredient in the contract, which became incapable of execution, the agreement ought not to be enforced, or held obligatory. It would be a sufficient answer to this objection, that the parties, at the time of the execution of the agreement, knew perfectly well that the province had assumed independence, and that the chance of restoration depended upon the issue of the war then waged between the United States and Great Britain. They acted upon that state of things, and provided for the payment of these additional sums, only in the event of an unsuccessful struggle on the part of the province. The stipulation, therefore, has not failed, in point of consideration, from the misconduct of either party; but the event, in which alone it was to have any effect, never has occurred. The payment was conditional, and the condition has never arisen, upon which alone the contract could act.

But there is another answer presented by the very terms of the agreement itself. It is, that the parties expressly agreed, that the title to the *151] *province, &c., should vest absolutely, upon the payment of the first 10,000*l.*; and, of course, the other provisions were to rest in covenant only between the parties, and were not to be construed to defeat or divest that title. The act of parliament treats it in that way, and vests the title in Henry Harford in fee, conclusively.

It has been further argued, that it was not competent for John Browning, the husband, as such, to convey the title to these quit-rents belonging to his wife, so as to bar her, in case of survivorship, from the right of recovery; and that, she being a lunatic, no act done by her committee could in any manner touch her rights. It is to be recollected, that the quit-rents, as claimed, were debts then actually due (if at all) to Louisa Browning; they were not future contingent or reversionary interests vested in her. How far, in respect to such interests, the husband, or the committee of a lunatic, is by law authorized, by a conveyance or assignment, to dispose of her rights, is a question which we are not called upon to decide, and upon which we give no opinion. The case here, is of *choses in action* actually due to the wife. There can be no question, that he was entitled to receive them to his own use, or to extinguish them by a release. What, then, is there to prevent him from disposing of them by assignment, at least, in equity?

It does not appear to us, that it has ever yet been decided, that a *bonâ fide* assignment, for a valuable consideration, made by a husband to a third *152] person, of a debt actually and presently *due to his wife, does not divest, in equity, the title of his wife. So far as authorities have gone, they seem to proceed upon a different and opposite doctrine. The cases of *Lamb v. Milnes*, 5 Ves. 517, and *Mitford v. Mitford*, 9 Ibid. 87, are distinguishable. They were cases of a general assignment under the bankrupt laws, which are not supposed to do more than place the assignees in the same situation as the bankrupt himself. The case of *Hornsby v. Lee*, 2 Madd. 16, turned upon another distinction, that the interest was not a present, but a reversionary, interest. But without deciding any general principle, we

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think, that under the particular circumstances of this case, where the consideration has actually gone beneficially for the wife, and the whole transaction has been under the direction of a court of chancery, and been confirmed by parliament, the assignment was, to all intents and purposes, valid to assign the rents. If, in ordinary circumstances, such an assignment would pass an equitable title only, we think, the act of parliament makes it, to all intents and purposes, a legal title and assignment. Without dwelling upon the known principles of the paramount and omnipotent authority over private rights and authorities, which is often attributed to parliament, it may be justly said, that it is competent for the legislature, upon the application, and with the consent of all the parties in interest, to give a legal and conclusive effect to their own agreements, and to pass that at law, which the parties, in the most *unreserved manner, intended to pass. A title so passed, and so confirmed, by authorities perfectly competent to make [*153 it, ought, under such circumstances, to be recognised as valid in the tribunals of every other country.

This is a summary exposition of the views of the court upon this subject; and it at once disposes of the whole matter in controversy. The judgment of the circuit court is, therefore, affirmed, with costs.

Judgment affirmed.(a)

Mr. Justice DUVALL, being a land-holder in Maryland, did not sit in this cause.

(a) The editor has supposed that it would gratify the curiosity of the learned reader, to be presented with the following note (with which the editor has been favored by his friend Mr. Taney) of an argument in the court of king's bench, in 1775, upon a case sent from the court of chancery, in the suit brought by Sir Robert Eden and others against Henry Harford, to recover possession of the province of Maryland and its revenues, in which the learning respecting the nature of the dominion and proprietary interest of Lord Baltimore in the province, was very elaborately discussed.

Trinity Term, 15 Geo. III., B. R., Tuesday, 27th June 1775.

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Serjeant *Hill*, for Mrs. Browning and Mrs. Eden.—He first stated the case, and when he had finished this, Lord MANSFIELD asked, in what shape the cause came before the court, and for whom Mr. Serjeant Hill was to argue. The serjeant answered, that the case came from chancery, to know whether the last lord had a right to devise; and that, if he could not, it was the same to Master Harford whether the property went to Mrs. Browning and Mrs. Eden, the last lord's sisters, as co-heirs of the first grantee of Maryland, or to Mrs. Browning alone, as devisee of her father. Lord MANSFIELD then observed, that there would have been no question, if the estate had been situate in England, and *that the ground of the doubt was its being a seignory and [*154 proprietary government in America.

Serjeant *Hill* proceeded in his argument, to the following effect: The general question is, whether the province, and proprietorship, and port-duties of Maryland, are well devised by the will of the last Lord Baltimore; and to show that they could not pass, I shall submit two general points: 1. That the property is so high in its nature, and in other respects, so peculiar, as not to be devisable: 2. That the subsisting entails were not well barred by the last Lord Baltimore, either because he did not do the proper and necessary acts for barring, or because such entails were not capable of being barred in any way.

¹ See the case of Harford v. Browning, in Chancery, 1 Cox 307.

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1. I apprehend, that the proprietorship of Maryland is not alienable, without the license of the crown, and much less devisable. The design of the Maryland charter was, to erect a province in the district called Maryland, to establish a form of government similar to our own, and to place Cæcil, Lord Baltimore, and his heirs, at the head of it. The highest powers are conferred, and, perhaps, the crown's right to grant some of them may be doubtful; but it is not necessary to this case to determine which could, and which could not, be granted. The charter gives royal jurisdiction, and a royal seignory. Of the first kind, are the powers of enacting laws with the consent of the assembly, of erecting courts, of appointing magistrates, of punishing criminals, and of levying men, and all the powers of war and peace. Of the second kind, is the power of making sub-infeudations. The charter reserves a tenure of the king, as of the castle of Windsor; for the law would otherwise have created a tenure *in capite*. The king cannot grant without reserving a tenure, for he cannot change the principles of the constitution, one of which is, that there must be a tenure. The king constituted Lord Baltimore the lord and proprietor of the whole province. There is no instance before, of the grant of a proprietorship. But though there was not before any such sovereignty in name, yet, in specie, there was such a property, and the counties palatine of Chester and Durham resembled it. From the high nature of these powers and jurisdictions, I argue, that the province could not be aliened, without license of the *crown, nor could it be a subject of the statute of wills. At the time of *155] that statute, no such high property existed in the empire. The 32 Henry III., in giving the power of devising, mentions manors, lands, tenements and hereditaments. It begins with manors, and though hereditaments, which is the last word, would, singly, have been sufficient to have extended to this property, yet, coupled with the former words, it is not so. The 18 Eliz., cap. 10, § 3, begins with enumerating deans, &c., and then adds, all others having spiritual or ecclesiastical promotions; but bishops and archbishops being higher than deans, are not included. So, the statute of wills, beginning with manors, shall not extend to a higher dominion, such as proprietary government. Dependent kingdoms are not devisable, without the consent of the superior prince. Dominion is not the subject of testamentary disposition; and Craig says, that all feudists agree in this. Nor are things given for the support of dominion, such as the port-duties here, in their nature devisable. With us, the king cannot devise the lands and revenues allotted for the support of his royal dignity. This, indeed, has not been the subject of judicial decision; and in the Bankers' Case, Lord SOMERS, though he reversed the judgment of the court of exchequer, avoided this point; but our kings never attempted to exercise such a power. See 5 Mod. 46, and Lord SOMERS's argument in the Bankers' Case. The 9 & 10 Wm. III., cap. 23, which gave a revenue to King William for his life, recites it to be for his household and family expenses; and now, by the civil list act of Queen Anne, the alienation of the crown revenue is expressly provided against. But, even before the civil list act, there is no instance of a devise of the royal revenues. In the present case, it could not be intended, that the port-duties should be alienable. The port-duties were created for the benefit of the subject, and they, and the proprietorship, were intended to go together. But I insist further, that the lands themselves are not alienable. Anciently, when the king made a duke, and gave possessions to him, they were so annexed to the dignity as not to be transferable, without a preceding act of parliament. See Godb. 397. In Dyer, fol. 2 a, there is a case very analogous to the present; for there it is said, that if the king creates a duke, and gives him 20 pound a year for the maintenance of his dignity, he cannot give it to another, because it is not incident to his dignity. Many things, of *156] a special nature, are inalienable. Dignities *are so, because they are personal, and in the blood. Offices of trust are not assignable, unless by the original terms of the grant, or by prescription, which supposes such a grant. Ministerial offices, are, indeed, assignable, and the power of appointing a deputy is incident, where the office is assignable, but not *vice versa*. See Bro. Abr. tit. Office, pl. 108. The office of forester is of such a trust, that it cannot be granted over without license. 4 Inst. 315. The Register and Fitzherbert, there cited, warrant Lord COKE in his

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doctrine. Earldoms are not alienable. The case about the office of Great Chamberlain in Sir W. Jones 96, and Collins's Baronies, contain much learning on this subject, which applies strongly here. DODDRIDGE, who was with the majority of the judges, states everything which made against his own opinion.

LORD MANSFIELD.—The case is very well reported both in Sir W. Jones, and in Collins; but there is a great difference between offices and territories.

Serjeant *Hill*.—The judges who held the office alienable, only hold it partly so, that is, that it might be settled, so as to keep it in the male line; because males were more fit for the office than women. But they agreed, that though the office was granted in fee, it could not be disposed of from the blood of the first grantee. In the present case, it is observable, that the charter makes a difference in the use of the word assigns. That word is used in granting the land, but it is omitted, where the charter gives the power of calling assemblies, and enacting laws, of appointing judges, and of pardoning crimes. Therefore, these powers, at least, were not intended to be alienable.

2. If the whole of the property, or any part, is disposable by will, it must be so, on this ground, that all the statutes and laws of England, in force at the time of the settlement of Maryland, attached on the province, though subsequent statutes will not extend to it, without express words. Then, I have a right to assume, that the property is entailable; for the statute *de donis* was an existing law, at the time of the grant and settlement of the province, as well as the statute of wills, and so was the statute of uses. Now, the property was entailed, and, upon the supposition and the entail was within the statute *de donis*, I argue, that the entail *was not well barred by the last Lord Baltimore, and that this gives a title to his sister, Mrs. Browning, all [*157 the entails being now spent for want of issue male, and she being the devisee of the reversioner in fee, by the will of her father.

Lord Baltimore's mode of barring was by lease and and release, a conveyance the weakest of all in its operation. Before *Machell v. Clarke*, it was understood, that such a conveyance, by tenant in tail, would only pass an estate during his life; and, even according to that case, the estate it passes is voidable on his death, by entry of the issue in tail. See *Machell v. Clarke*, 3 Ld. Raym. 678; 2 Salk. 619; 7 Mod. 18, and *Comyn* 119. As against those in remainder, it still passes only an estate during the life of the tenant in tail. But a feoffment, without warranty, would have been a discontinuance, and, with warranty, when it becomes collateral, it would have become a bar at this day; for the statute of Anne doth not take away the effect of collateral warranty, when it is by a tenant in tail in possession. See 4 & 5 Ann. c. 16. Therefore, I say, that this was one mode by which Lord Baltimore might have barred the entail; because, if he had made a feoffment with warranty, the warranty would have been collateral to Mrs. Browning.

But there was another mode of barring which might have been used. The Province of Maryland is a fief holden of the king, as of the castle of Windsor, for so the tenure is reserved. As, in the grant, is not similitudinary, but is the same as *ut* in pleading that one was seised *ut de feodo*, which, says Lord Coke, is to be understood positively that the party was seised in fee. Co. Litt. 17 b. The tenure, then, being as of the castle of Windsor, the province is to be considered in the same way as other lands originally holden of the castle, and, like other fiefs, is to be impleadable within the manor. To every manor a court baron is necessarily incident, and therefore, it is so to every castle. The jurisdiction of a court baron is well known. Without the king's writ, it holds pleas of personal actions, where the demand doth not amount to 40 shillings. With the king's writ of right, it may hold plea of land. Writs of right are of two kinds, patent and close. If the writ is brought in the lord's court, it is directed to him, and is patent. If he holds no court, or waives, or the tenure is immediately of the king, it is brought in the king's court, is directed to the sheriff, and is close. *Magna Charta*, c. 24, provides against the abuse of the writ of right in the latter case, by declaring, that *præcipe in capite* shall not issue, where the [*158 land is not holden *in capite*. But the practice is otherwise, and the writ of right has been

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usually brought in the common pleas, in all these cases. Another writ of right close lies for lands in ancient demesne. This writ is well known, and recoveries are suffered upon it, in the courts of ancient demesne. See F. N. B. and Booth on Real Actions. The general writ of right patent lies in the court of the manor, in all cases where the tenure is of the subject, or of the king, as of an honor; and where the estate lies, makes no difference. 4 Inst. 219, and Fitzh. Abr. Jurisdiction, pl. 61, there cited. If a man holds lands as of an honor, the bailiff may execute the process as of the court of the honor, wherever the lands lie. In the case in Fitzh. Abr., it was objected, that the officers of the county palatine of Chester, could not execute writs in a foreign county; but it was adjudged otherwise, because the lands were within a manor holden of the principality of Chester.

There are many precedents of recoveries on writs of right patent. One is in N. Bendlow, p. 4, pl. 4, on a writ of right patent directed to the bailiff of the castle of Rising. According to this ancient principle, that wherever a fief lies, it is impleadable in the manor of which it is holden, the province of Maryland might have been impleaded in the court of the castle of Windsor, for it is clearly holden of the castle, and there is a court baron necessarily incident. True it is, that if the tenant pleads a foreign plea, or the mise is joined on the mere right, to be tried by the grand assize, the cause must be removed into the common plea. But I insist, that a writ of right patent might have been brought in the court of the castle of Windsor, and that a common recovery might have been suffered; because, then, neither foreign plea, nor joining of the mise on the mere right, by the grand assize, is necessary. The precedent cited from N. Bendl. is in point, and conformable to the principles I am arguing upon. The writ of right patent was for a manor holden of Rising Castle, and was directed to the bailiffs of the castle. It appears clearly, that there was a recovery in the court of Castle Rising. There was a plaint by the demandant, the tenant vouched to warranty, and the vouchee making default, judgment was given for demandant. Afterwards, a writ of false judgment was brought in the common pleas by the

*vouchee, and the error was, that the writ of right patent should have been
 *159] directed to the suitors; but the court held, that the bailiffs were the proper persons, and judgment was affirmed. See Mod. 1. Another instance of a like proceeding in the court baron of the manor of Wolverhampton, is in Robbins' Ent. 323. There, false judgment was brought on this error, that the lands were not mentioned to be within the manor; but the judgment was affirmed. In Restell, there are several instances of writs of false judgment, on judgments in writs of right close, in courts of ancient demesne. Rest. Ent. 221 b. Also, Booth states the manner of proceeding in the court baron, on a writ of right patent, where the cause is not removed. Booth on Real Actions 89. If then a recovery might be had on a writ of right, in the court baron, when the proceeding is adverse, much more might a common recovery be suffered. Errors in common recoveries are aided by the statutes of jeofails, and no objection is fatal to them, but such as might be pleaded to the jurisdiction of the court where they are suffered. But how could such an objection hold in this case? Every plea to the jurisdiction must state, that there is another court in which the cause may be tried and which that court is. Therefore, if want of jurisdiction is objection to the court baron of Windsor Castle, it should be stated, where else the province of Maryland can be impleaded; for fines have been levied in the court of common pleas here, of shares of a proprietorship in America. The only proprietorships at present are Pennsylvania and Maryland; but Carolina was once a proprietorship, and whilst it was so, fines were levied here of shares in it. The first grant of Carolina was to eight persons, and the word assigns was used throughout: *scire facias* was bought to repeal the letters patent; but no judgment was ever given, for the proprietors were well advised, and agreed to surrender, and an act was made to confirm the agreement. See 2 Geo. II., c. 34. Though the proprietors were seised in fee, yet this act recites, that from the nature of the estates proposed to be surrendered, great difficulties might arise as to the manner of conveying. In the present case, like difficulties induced the advisers of

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the last Lord Baltimore to recommend the applying to parliament : but no act was obtained.

Lord MANSFIELD.—He was stopped by the difficulty of proceeding.

*Serjeant *Hill*.—The last thing I have to submit is, that if no recovery could be suffered, and feoffment with warranty would not have been sufficient, then [*160 the entail was not barrable in any way, and the Province of Maryland was in the same condition as land here, before the introduction of common recoveries, and of barring by fine under the statute Hen. VII. Like an executory devise, the entail is not barrable, because a recovery cannot be suffered. See the case of *Scatterwood v. Edges*, 12 Mod. 278. The words of Lord HARDWICKE, in 2 Ves. 353, are very applicable. In speaking of the limitations in the act of parliament, which made the Isle of Man inalienable, he says, that if they were considered on the foot of the statute *de donis*, and they were estates-tail, they was no want of a restrictive clause ; for, before *Taltarum's Case*, which established the doctrine of recoveries, and the 4 Hen. VII., of fines, these, by the statute *de donis*, were inalienable, and of Man there could be neither fine nor recovery. Here, I say, that the property is not entailable ; but if it is, it must be because within the statute *de donis*, and if that statute operates upon Maryland, and no recovery could be suffered, there was a perpetuity. It is absurd to say, that there must be the means of making property alienable, because it is within that statute ; for the statute was made to restrain alienation. A recovery might have been sufficient to bar ; but the conveyance by lease and release is too mild in the operation, and on such a conveyance by tenant in tail, the old use reverts to the releasor.

The capability of losing in an action is a very different thing from the power of alienation. What is the objection to a perpetuity, in such a case as this ? Can any useful end be attained by making a sovereignty alienable ? The cases of copyholds are not authority in point, for they depend on custom. Here, Serjeant *Hill* cited many authorities to confirm and illustrate some of the doctrine he had advanced in the previous part of his argument. He cited Co. Litt. 108 *a*; Dyer 44 *a*, and Bro. Abr., Tenure, 94, to show the difference between tenure *ut de corona*, and *ut de honore*, and that it was in the king's option to reserve either ; Co. Litt. 17 *a*, and 1 Lev. 222, to prove the word *ut* affirmative, and not similitudinary ; Co. Litt. 5 *a*, 2 Inst. 31, and the Register, to prove a castle contains a manor ; and 4 Inst. 26, Hob. 170, and 2 Bro. Abr. 45, to prove that a court baron is incident to a manor, and that they are inseparable. For the distinction *between writs of right patent, and writs of right close, and the [*161 causes of removal, and that where the former lie, they may be preferred to the latter, he cited F. N. B. 1-9, 11-14, Old Nat. Brev., Fitz. Abr. tit. Droit, pl. 45, Magna Charta, cap. 24, and Bro. Abr. To show that it was immaterial where the land happened to lie, he cited Fitzh. Abr. tit. Jurisdiction, pl. 61, and 4 Inst. 219. He then observed, that the king might make a new island, arising out of the sea, part of a county, and for this he cited *Collis on Sew.* 45, and asked why he could not make a province part of an honor. He also cited from 1 Str. 177, the case of the King v. City of Norwich (which was the case of an information against the latter for not repairing some bridges), to show that the king may enlarge, contract or vary the bounds of a county, for the purpose of jurisdiction. He next mentioned, a second time, that fines had been levied of shares of the Carolina proprietorship, and added, that error on a fine of land in America had been brought in B. R. and that it might be proper to search in order to know what was done.

Lord MANSFIELD.—Fines and recoveries of plantations in America, with a viz., to bring them within a parish here, were frequent in the court of common pleas, till provincial laws were made to provide other modes of barring. But I do not know of any instance of such fines or recoveries in the case of a seignory.

Serjeant *Hill*.—In 1 Vent. 258, Lord HALE says, that the writ of right close (for lands in ancient demesne) is not to be resembled to another *præcipe*, and that being directed *ballivis manerii*, mention of the manor, without naming the vill in which the

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lands lie, is sufficient. So, here, mention of the castle of Windsor, in the writ of right patent, without a viz., to bring Maryland within England, would have been sufficient. Lord C. J. NORTH, in 2 Mod. 49, observes, that it had been long a dispute whether a fine of lands in a *lieu conus* was good; that in King James's time it was settled to be so, and that, by the same reason, a recovery shall be good; for they are both amicable suits and common assurances, and as they grow more in practice, the judges have extended them further. He adds, that a common recovery may be of an advowson, *162] and that no reasons are to be drawn from *the visne, or execution of the writ of seisin, because it is not an adverse proceeding, but by agreement. This is material, for common recoveries of advowsons were anciently on writs of right; and though writs of entry are now used, they are improper for an advowson, and they are only allowed, because common recoveries are by agreement. The observation about the writ of seisin answers the reason in 1 Vent. 59, why an ejectment of lands in Jamaica will not lie here, and shows that it is not applicable to the present case. That where one jurisdiction is pleaded to, another must be shown, I cite Barker v. Dormer, 1 Show. 191; and that a seignory out of England may be impleaded in the courts here, I cite 4 Inst. 213; Bro. Abr., Jurisdiction, 101, Lien, 75, Trial, 58; Fitzh. Abr., Assize, 282; Vaugh. 405. As to suing for ancient demense lands, I cite 1 Salk. 56, and 1 Ld. Raym. 43. Upon the whole, the property in question is neither alienable nor devisable, or, at least, the seignory is not so. If the property is both alienable and devisable, then, I insist, that it is entailable, and that the entail is not barred.

The supposed necessity of barring by lease and release, doth not exist; for, 1. There might have been a feoffment with warranty; and 2. The province being holden of Windsor Castle, is impleaded in the court baron there, and a common recovery might have been suffered there. Besides the authorities already cited, to show that the bailiffs of that court were officers competent to hold plea of the province in a writ of right patent, there is one in Aston's Ent. 375. If a recovery could not be suffered in the court of the castle of Windsor, it might have been suffered on a *præcipe quod reddat* in the court of common pleas; and the property not being in England was no objection to a recovery, either in the common pleas, or the court of Windsor Castle. If it is denied, that a recovery could be suffered in either of these courts, it must be shown what court has the proper jurisdiction, or the object cannot be taken. If a recovery could not be suffered anywhere, then I insist, that the entail of the property made it inalienable, *and that it descended as a perpetuity; and that it might so descend, *163] I cite the authority of Lord HARDWICKE in 2 Ves. 353. and of Jenkins, in his Centuries, 250 and 257. Serjeant Hill concluded with citing a case about the writ of right patent, in 6 Co. 11.

Kenyon, for Master Harford.—The principal questions in this case, arise on the grant by the crown of the Province of Maryland, in 8 Charles I., and the settlements made of it in 1730 and 1761. The grant by the crown being by letters-patent under the great seal of England, the law of England is, therefore, the rule by which the property must be adjudged upon. It has been truly observed by the court, that no points could arise, if the property was in England. If the property was situate here, it would be alienable, devisable and entailable, and the entail might be barred by common recovery. But the property lies in America, and thence arise the difficulties.

The questions referred to this court concern both the province and the port-duties, and their value is great. But the great value and extent of the property will not make any difference in deciding upon it, though its situation will. The Province of Maryland was settled by Englishmen, and these carried the law of England with them. In 2 P. Wms. 75, it is said to have been adjudged by the privy council, that if a new country is found out and settled by English subjects, they carry their laws with them, though subsequent acts of parliament, without naming, will not bind the plantation. The like doctrine is laid down in Penn v. Baltimore, 2 Ves. 349, with more precision; for, there it is said, that an English colony carries with them all the laws of England in being at the time of planting it, which are adopted to the situation; but that no statute, made

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afterwards, binds, without naming them. Now, both the statute *de donis*, and that of wills, were before the settlement of Maryland, and both have words sufficient to comprehend the proprietorship, the word *tenement* being used in the former, the *hereditament* in the latter. Therefore, both statutes must extend to the property in question, unless it can be shown that there is something incongruous in applying them to Maryland. But they are necessary and convenient laws for Maryland, nor is the law of descents more so. It is objected, that these statutes may extend to lands granted to the Lord Proprietor * in the way of sub-infeudation, but that they ought not to be applied to the seignory and proprietorship. But no reason is given for the [*164 distinction, except saying, than the proprietorship is a transcendent property, and hath regalities and high powers annexed to it. Is an assignee or devisee less likely to be fit and able to govern it, than the descendants of the first grantee, who may be infants? Higher property than this hath been the subject of wills; for kingdoms have been devised. Constantine devised an empire, and so did Charlemagne; and the same was done in our own country by Hen. VIII., under an act of parliament. It is said, that the property is not alienable, because it is annexed to an office of trust. But lands to which offices are annexed, may pass together with the office. When the Champion of England passes his manor, his office passes with it. The Province of Maryland may be resembled to a large manor. The jurisdictions of some manors were anciently as extensive, both in criminal and civil matters, as the jurisdiction of the lord of Maryland. The power of making by-laws to regulate commons, and other subjects, relative to the tenants, is incident to many manors.

But the question doth not depend merely on arguments of analogy. The proprietorship is granted in free and common soccage, and it was intended to be alienable. The word assigns is used in the letters-patent, and, in some places, is applied to the seignory itself. The first grantee would not have accepted the grant on other terms. We should consider, not the present value of the property, but its value when the grant was made; and then, Maryland was a desert, and it is not to be supposed, that the first grantee would have been at the expense of settling it, if it had not been made alienable. Besides, the usage, since the grant, is an argument in favor of its being alienable. Both Maryland and Pennsylvania have been constantly subjects of entails and settlements, and this practice ought to weigh something. Another strong argument arises from the preamble of the statute 2 Geo. II., c. 34, about the shares of the Carolina proprietorship. In deriving titles to the several shares, wills are mentioned; this shows that it was deemed to be within the statute of wills. The preamble also recites a cause in chancery about an agreement to sell the share of one Dawson, and a decree by the Lords for a specific performance, on an appeal. The preamble further recites various grants to show title in those with whom the crown was contracting *for the surrender of their shares. All this shows, that parliament thought a [*165 proprietorship in America alienable like other property.

Lord MANSFIELD.—In Dawson's Case, the question between the parties was not about the power of alienating.

Kenyon.—The statute of 7 & 8 Wm. III., c. 22, § 16, is also of consequence, for it restrains all persons, and their assigns, claiming any right or propriety, in any islands or tracts of land on the continent of America, by charter, or letters-patent, from selling to any, but natural-born subjects. This act supposes a proprietorship to be alienable.

Lord MANSFIELD.—The clause in the act of William is odd. Without such a restriction, aliens were incapable of purchasing.

Kenyon.—In *Penn v. Lord Baltimore*, the question of alienation actually occurred; and though it was not necessary to decide upon it, yet Lord HARDWICKE seems indirectly to have given an opinion, that the proprietorship of Maryland was alienable. See 1 Ves. 448.

Lord MANSFIELD.—The question before Lord HARDWICKE was on the effect of an agreement between the Penn and Baltimore families, about the limits of Maryland and

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Pennsylvania, it being contended that Lord BALTIMORE had not power to dismember his province, though he might make sub-infeudations ; but the question was determined without deciding anything on the power of alienating the whole province.

Kenyon.—I cite the case for the sake of Lord HARDWICKE's *dictum*, and not as an adjudication. Thus, I am in possession of the opinion of the legislature, and of the house of lords, and of Lord HARDWICKE, as authorities, to show, that the property is as alienable as other property. It remains to show, that the entail was well barred by Lord BALTIMORE, so as to enable him to dispose by will; and this Mr. Serjeant Hill makes the great point. The question is as to the whole province and seignory, and *166] not as to any particular parts or sub-infeudations. If it had arisen on the *latter, the forms required by the provincial laws might have been complied with. But no court within the province can hold plea of the seignory itself. See Vaugh. 404. If no court can be found in Maryland for a common recovery, some other court must be found, or there must be some mode of barring the entail, without a recovery. When this cause was before the chancellor, Mr. Serjeant Hill said, that a recovery might have been suffered before the king in council ; but that ground is now deserted.

Lord MANSFIELD.—If anything had been done for barring there, it could only have been a proceeding having analogy to common recovery, the council being the proper place for adverse proceedings about the title to Maryland. The jurisdiction over all the seignories of the provinces in America, has resided in the privy council, from the time of Elizabeth.

Kenyon.—Two places for suffering a recovery have been mentioned; the court of common pleas, and the court of the castle of Windsor. As to the former, it is said, that fines have been levied of lands in America, with a viz., to bring them within England. But the plea for land is local, and it is impossible, by a viz., to transfer the place to England; and two or three precedents are not sufficient for this purpose. As to the court of the castle of Windsor, I admit, that one manor holden of another may be pleaded for in the principal manor; but I do not know of any instances in which there can be such a plea, except the cases of copyhold, and of lands in ancient demesne. Besides, how is seisin to be given of Maryland, by a court baron in England? It is said, that a recovery may be on a writ of right, in a court baron of Windsor Castle; but if such a court exists (which I do not admit), it is allowed, that joining the mise carries the cause to the common pleas, and the moment the suit comes there, it fails, for that court cannot give seisin; and this deficiency, according to the case of the Isle of Man, in 2 Ves. 353 would make the recovery ineffectual. It is said, that Maryland might have been annexed to a county in England; but the answer is, that it is not so annexed. Further, it doth not appear that a court baron is incident to the castle of Windsor. Such a court may belong to the honor of Windsor; but Maryland is bolden *167] of the castle, and *the castle and honor are distinct. A castle may be part of an honor or manor. F. N. B. 6, d. I am told, that the only court belonging to the castle is for personal actions.

If the entail was not barrable by common recovery, it is to be considered, whether an alienation by some other common assurance is not sufficient. The mode by lease and release, is found fault with; but this conveyance is founded on the statute of uses, and since that statute, it passes the fee as well as any other. As to feoffment with warranty, in general, it would have failed; and I am not sure, that it would have had the proper effect, in the case which hath happened, because, here, the warranty would have descended both on Mrs. Browning and Mrs. Eden, as heirs of their brother; and, on the supposition that the property is entailable, to prevent perpetuities, the entail must be barrable in some way. In general, the power of barring by common recoveries, is incident to entails; and if that mode had not been adopted, the other modes would have been found out. Where common recoveries cannot be suffered, alienation is sufficient; and whether it may be by feoffment, or lease and release, the effect ought to be the same. In the case of copyholds, where there is a custom for entailing, and

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no custom for a common recovery, a surrender is equivalent to a recovery. This point was adjudged by three judges against one, in *Carr v. Singer*, 2 Ves. 603; and the doctrine was approved of by Lord HARDWICKE in a subsequent case. See *Moore v. Moore*, 2 Ibid. 601, which case, though given by the reporters before *Carr v. Singer*, is subsequent in point of time. These authorities alone are sufficient; but the same principles in favor of alienation are to be met with in ancient books. In *Willion v. Berkley*, Plowd. 244, Judge WESTON argues on the principle, that every estate-tail is barrable; and, in *Mary Portington's case*, 10 Co. 40 *a*, Lord COKE mentions, that Lord DYER, in a case before the Lords of Parliament, reproved one of the counsel for finding fault with common recoveries. But, besides the case of copyholds, I have another authority, to show, that complying with the law of England as nearly as circumstances will allow of, is sufficient. I have in my hand the report of a committee of the privy council in the case of Governor Wentworth, who was complained of on various charges. One of these was, that he had set aside grants of land, in the American province of which he was governor, without office, according to the forms of the law of *England; and the lords of the committee of the privy council, one of whom was Sir EARDLY WILMOT, say in their report, that in some of the American]*168 provinces they have not courts so correspondent to those in England as to admit of the same forms, and that in such cases, if a mode of doing the same thing *cy pres* is adopted, it ought to be good *ex necessitate*. See p. 10 of the report. This doctrine is applicable to the present case. The property is entailable, but a common recovery cannot be suffered for want of a proper court, and therefore, *ex necessitate*, alienation being the only mode of barring the case will admit of, ought to be adjudged sufficient.

But if the property is not within the statute *de donis*, and yet should be within the statute of wills, it may be material to consider, what consequences will follow. Then, under the settlement of 1733, the last Lord Baltimore had a fee-simple conditional, and if a possibility of reverter is not grantable, as Lord HARDWICKE holds, in *Stafford v. Buckley*, 2 Ves. 180, then the possibility of reverter in this case, did not pass to Mrs. Browning by the will of the father of the last Lord Baltimore, but descended on him, and for want of an intervening estate, the former merged in the latter. During the life of the father of Lord Frederick, they were distinct; but after the father's death, they met in the son, and this union gave him the whole fee.

Lord MANSFIELD.—A possibility of reverter is certainly not grantable.

Kenyon.—As to the Isle of Man, there is an annotation by Lord HALE, in the new edition of Coke upon Littleton, now publishing, which explains the reason why the statutes *de donis*, of uses, and of wills, do not extend to Man, in a way not applicable to Maryland. Man was a dominion belonging to the King of England, before those statutes; and Lord HALE says, it was ruled, that those statutes do not extend there, because Man was not parcel of the realm of England, and is not specially named. But the grant and settlement of Maryland are subsequent to those statutes. See 20 *b*, of the new edition of Co. Litt.¹

*Lord MANSFIELD.—It will be very proper to consider the case of the Isle of Man, in 4 Inst. and 2 Anderson. Both Maryland and Man are dominions held of [*169 the crown of England; and the grant of Man to the Derby family, was prior to the statute *de donis*, and yet the judges held, that it did not extend to it, any more than the statutes of uses and wills, which were subsequent. The case of the Duke of Athol and the Bishop of Man, should also be considered. Lord HARDWICKE took great pains in giving his opinion in that case. He gave me a corrected note of his opinion, and another to the Duke of Athol.

Sergeant Hill, in reply.—It is agreed, that if the property was in England, the case would be clear against the devisee of Lord Baltimore, for want of a recovery; and it has not been shown that a recovery was impossible. The distinction between the land

¹ Hargr. & Butler's ed.

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and port-duties has not been answered. They were separated by King William. He seized the former, but did not touch the latter. The distinction between sovereignty and mere land is solid. The case from 2 P. Wms. 75, was cited, to prove, that subjects of the King of England carry over our laws with them into a new settlement; which I do not controvert. A manor is not to be compared with the seignory of Maryland. The principal powers given to the proprietor of Maryland do not belong to the lord of the manor. The word assigns is necessary to make offices of trust transferable; and the reason for omitting it in some parts of the Maryland charter, was, to make some parts of the property inalienable. It is omitted in the grant of the seignory. It is said, that kindoms are devisable; but there is no instance of the devise of a dependant kingdom. I say this on the authority of Craig. Henry VIII. and Elizabeth had acts of parliament.

Lord MANSFIELD.—By the feudal law, land was not devisable; much less a kingdom, though William the Conqueror claimed England under a will.

Serjeant Hill.—It is said, that recoveries on writs of right in manor courts, have only been in the case of copyholds, and of lands in ancient demesne. But in the cases I cited from Benloe and Robinson, of recoveries in the courts baron of Rising and Wol-
 *170] verhampton, the recoveries were of freehold land, and the words *secundum consuetudinem manerii*, which are used where the recovery is of copyhold, or ancient demesne, are not mentioned. The argument from the entails of copyholds, which are barrable by surrenders, supposes, that there is no custom to warrant another mode; but the argument of necessity fails here, for there is another mode. I give the same answer to the *cy pres* doctrine in the report to the privy council in Governor Wentworth's case.

Lord MANSFIELD.—The questions in this case are new, and of great difficulty. I have often considered them. I do not know of any litigated case, before the present, in which the question has been, whether a seignory like that of Maryland can be aliened or devised. Both the Baltimore and Penn families have made their proprietorships the subjects of settlements and entails. As to the statute of William & Mary, it is strange, that it should restrain from selling lands or proprieties to aliens; because, before that statute, they were incapable of purchasing. But still, the words of the statute, which mention any right or property in any island or tract of land in America, by charter, or letters-patent, furnish some argument. In the case of Penn v. Baltimore, the question of alienation could not arise. There, the suit was about an agreement as to the bounds of two provinces; and it is certain, that a province cannot be dismembered, be aliening one part so as to be holden of another province. Something might be incidentally said as to the point of alienation, but there could be no solemn adjudication, for the case did not require it. The jurisdictions and powers granted by the Maryland charter, are larger than those in any other. Doubts may arise as to the principality, from the nature of the property. Taking in execution, and other consequences of its being subject to alienation, may furnish strong reasons of policy against the power of alienating. The law being settled as to the principality, a secondary question will be, whether the lands or port-duties can be severed from it. The rule of applying to America all the laws of England, in force at the time of settling a colony, is subject to many qualifications. The statute of charitable uses doth not extend to Antigua. There may be a difference, too, between the seignory and proprietorship of Maryland, and other estates here. The seignory and proprietorship passed under the
 *171] great seal, and that carries the law of England. Another *thing quite new, is the question as to barring the entail. The history of barring entails in the provinces is material. If there had not been provincial laws, to regulate the barring of entails, it might have been proper to have supported the mode of barring fines and recoveries in England. The necessity of the case might, perhaps, have justified it. But the provincial laws do not apply to the seignory and proprietorship of Maryland. The question as to them is entirely new, and of great difficulty. The pains taken to show, that a recovery might have been suffered in the court of the castle of Windsor, proves

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the force of the argument of necessity as to barring by alienation. The case of descendible freeholds, the entails of which are barred in that way, may have influence on the present case.

The case was ordered to stand for argument a second time, next Michaelmas term; and Lord MANSFIELD said, that, probably, several arguments would be necessary.

THE PRESIDENT, DIRECTORS and COMPANY OF THE BANK OF THE UNITED STATES v. SMITH.

Demurrer to evidence.—Action on promissory note.

On a demurrer to evidence, the judgment of the court stands in the place of the verdict of a jury; and the defendant may take advantage of any defects in the declaration, by motion in arrest of judgment, or by writ of error.¹

It seems, that as against the maker of a promissory note, or against the acceptor of a bill of exchange, payable at a particular place, no averment in the declaration, or proof at the trial, of a demand of payment at the place designated, is necessary.²

But as against the indorser of a bill or note, such an averment and proof is in general, necessary.

Where the bill or note is made payable at a particular bank, and the *bank itself is the holder, such averment and proof may be dispensed with, and all that is necessary is, for [*172 for the bank to examine the account of the maker with them, in order to ascertain whether he has any funds in their hands.³

On a demurrer to evidence, the court is substituted in the place of the jury, as judges of the facts, and everything which the jury might reasonably infer from the evidence, is to be considered as admitted.⁴

The practice of demurring to evidence is to be discouraged, and courts will be extremely liberal in their inferences, where the party takes the question of fact from the appropriate tribunal.⁵

Proof necessary to support an action against the indorser of a bill or note.

United States Bank v. Smith, 2 Cr. C. C. 319, reversed.

ERROR to the Circuit Court for the District of Columbia.

February 7th, 1826. This cause was argued by *Lear*, for the plaintiffs, citing 2 H. Bl. 509; 3 Mass. 403; Ibid. 524; 12 Ibid. 403; 8 Ibid. 430; 1 Wheat. 373; 1 Doug. 132, 218; 1 Johns. 241; 5 Ibid. 1; 2 Wash. 253; and by *Taylor*, for the defendants, citing 2 Brod. & Bing. 165; 17 Johns. 248; Chitty on Bills 321.

¹ A court of error is bound to notice a fatal defect, apparent in the face of the declaration. *Maher v. Ashmead*, 30 Penn. St. 344.

² If the maker or acceptor was at the place of payment, at the time designated, and was ready and offered to pay, it is matter of defence to be pleaded, and proved on his part. *Wallace v. McConnell*, 13 Pet. 136; *Cox v. National Bank*, 100 U. S. 714; *Caldwell v. Cassidy*, 8 Cow. 271; *Huxtun v. Bishop*, 3 Wend. 13.

³ *Rahm v. Philadelphia Bank*, 1 Rawle 335; *Jenks v. Doylestown Bank*, 4 W. & S. 505; *Sherer v. Easton Bank*, 33 Penn. St. 134; *Hallowell v. Curry*, 41 Id. 322.

⁴ *Smith v. Steinbach*, 2 Caines Cas. 158; *Forbes v. Church*, 3 Johns. Cas. 159; *Thornton v. Bank of Washington*, 3 Pet. 36; *Snowden v. Phoenix Ins. Co.*, 3 Binn. 457. The testimony is to be taken most strongly against the party

demurring, and such conclusions only as a jury might justifiably draw, the court ought to draw; but he is not bound to admit forced and violent inferences. *Pawling v. United States*, 4 Cranch 219; *United States v. Williams*, 1 Ware 175.

⁵ A demurrer to evidence not being a matter of right, it has fallen into disuse; and in lieu of it, the practice has prevailed, of requesting the court to give a binding instruction to the jury, that admitting the evidence to be true, the plaintiff is not entitled to recover; this answers the same purpose, and is to be tested by the same rules. *Parks v. Ross*, 11 How. 362. If the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly. *Pleasants v. Fant*, 22 Wall. 121; *Schuchardt v. Allen*, 1 Id. 370.