*Hamilton *v.* Moore.

Practice.

A writ of error or appeal must be docketed at the term to which it is returnable, otherwise, it will be non-prossed.

Error from the Circuit Court for the district of Georgia. Judgment had been rendered in the court below, for the defendant in error, on the

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all nations of controlling all those by their laws, who live among them, exemplified, as Grotius mentions, 2 c. u. n. 5, in the instance of personal arrest, practised everywhere.

Whoever makes a contract in any particular place, is subjected to the laws of the place, as a temporary citizen. Nor, indeed, are they supported or justified by any reason, in compelling foreigners to abide by the decisions of the law, where they happened to be, except on the general principle that the jurisdiction of a government is considered as competent to the control of all those who are within its limits.

From these considerations, the following position arises. All business and transactions in court, and out of court, whether testamentary or other conveyances or acts, which are regularly done according the law of any particular place, are valid, even where a different law prevails, and where, had they been so transacted, they would not have been valid. On the contrary, transactions and acts which are executed, contrary to the laws of a country, as they are void at first, never can be good and valid, and this applies, not only with respect to those who have their residence in the place of the contract; but those who were there only occasionally; under this exception only, that if the rulers of another people would be affected by any peculiar inconvenience of an important nature, by giving this effect to transactions performed in another country, according to the laws of the place they are in, such particular place is not bound to give effect to those proceedings, or to consider them as valid, within their jurisdiction. It is worth while to exemplify the principle by examples and instances.

In Holland, a last will and testament may be made before a notary, and two witnesses: in Friezeland, it is of no effect, unless established and witnessed by seven witnesses. A Batavian makes a will in Holland, according to the law of the place, under which the goods, situated and found in Friezeland, are demanded; ought the judges of Friezeland to grant the demand, founded upon the will made in Holland? The laws of Holland cannot bind the people of Friezeland, therefore, to decide according to the first maxim, the will would not be good in Friezeland; but by the third maxim, its validity is supported, and by that, judgment is given in its favor. But a Frizian *makes a journey into Holland, and there executes a will, according to the law [*372
of the place, contrary to the law of Friezeland, and returns and dies there: Is the will good? It is good according to the second maxim; because, while he was in Holland, though but for a temporary purpose, he was bound by the law of the place, and an act, good where done, ought to prevail everywhere, according to the third maxim, and that, without any distinction between movable and immovable estate, and so the law is practised. On the other hand, the Frizian makes his will in his own country, before a notary, with two witnesses; it is carried into Holland, and demand made of the goods found there: it will not be granted, because not made in a valid manner at first, being made contrary to the laws of the place. It would be the same thing, if the Batavian was to make such a will in Friezeland, although in Holland it would have been good; for it is true, that such a deed would not be good in its commencement, for the reasons just stated.

What we have said with respect to wills, applies equally to conveyances to take effect during the life of the grantor: provided a contract is made according to the law of the place in which it is entered into, throughout, in court, and out of court, even in those places where such a mode of contracting is not allowed, it will be supported. For example, in a certain place, particular kinds of merchandise are prohibited—if sold there, the contract is void—but if the same merchandise were sold

15th of November 1796. On the 2d of January 1797, the writ of error was sued out, and lodged in the office of the clerk of the circuit court; and it

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elsewhere, in a place where there was not any prohibition, and a suit is brought in a place where they were prohibited, the purchaser will be condemned, and the suit maintained, because the contract was good in its origin, where made. But if the merchandise, sold in another place, where they were prohibited, were delivered, the purchaser would not be condemned, because it would be contrary to the law and convenience of the government where they were sold, and an action would not be countenanced, wherever instituted, even to compel the delivery; for, if, on the delivery being made, the purchaser would not pay the price, he would be bound, if at all, not by the contract, but that having got the goods of another, it would be unreasonable, that he should enrich himself at the expense and loss of another.

The rule is equally applicable to adjudged cases. A sentence pronounced in any place, or a pardon granted by those who had jurisdiction, has equal effect everywhere. Nor is it lawful for the magistrates of another commonwealth, to prosecute, or suffer to be prosecuted, a second time, one who has been absolved or pardoned, although without a sufficient reason. Still, however, under this exception, that no evident danger or inconvenience result from it to the other commonwealth, as an instance within our own memory may exemplify. Titius having struck a man on the head, on the borders (within the limits) of Friezeland, who, the following night, discharged a great deal of blood at the nose, and after having supped and drank heartily, died: Titius escaped into Transylvania; being apprehended there, as it appears, voluntarily, he was tried and acquitted, upon the suggestion that the man did not die of the wound. This sentence was sent into Friezeland, and he applied for a discharge from the prosecution, as having been acquitted. Although the manner of trial was not very exceptionable, yet the court of Friezeland was much disgusted at the idea of excusing the delinquent, and giving effect to the foreign proceedings, although demanded by the Transylvanians; because the flight into the neighboring government, and the pretended process, appeared too evidently calculated to elude the jurisdiction of Friezeland; which is the exception under the third maxim.

*373] *The same principle is observed in judgments respecting civil matters, as is evident from the following example, within our memory. A citizen of Harlem made a contract with one in Groningen, and submitted himself to the judges of Groningen. Being cited by virtue of this submission, and not appearing, he was condemned, as contumacious. Execution of the sentence being demanded, it was doubted, whether it ought to be granted in a Frizian court. The reason of doubting was, that by force of the submission, if he was not found in the foreign territory, they could not proceed against him, as contumacious, as we shall see elsewhere; nor without prejudice to our jurisdiction, and also of our citizens, could effect be given to such sentences. However, it was allowed at that time, certain magistrates concurring, that it should not be permitted to the Frizians to examine by what principle the sentence passed at Groningen could be justified, but only whether it was valid, according to the law of the place. Others were governed by the following reason, that the magistrate at Harlem, on request, had granted a citation, which he ought rather not to have done, and the Amsterdam magistrate denies the execution of the sentence passed against the absent, being cited to the court of Friezeland by an edict founded on the terms of the submission, and condemned without being heard, and that such proceedings ought not to affect any one. With this opinion, I concur, on account of the restriction contained in the third axiom.

Again, it has been made a question, whether, if a contract is entered into at any supposed place abroad, and an action is commenced with us, and the rule was different here, and there, either in allowing or denying the action, which law is to govern? For instance, a Frizian becomes a debtor in Holland, on account of merchandise sold there, and is sued in Friezeland, after the expiration of two years; the act of limita-

was served, with the proper notices, on the defendant in error, upon the 14th of January 1797; but the affidavit of service was not made until the

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tion is pleaded, which bars such actions with us, after a lapse of two years; the creditor replies, that in Holland, where the contract was made, such prescription and limitation do not exist; and therefore, is not to be urged against him in this case. But it was otherwise decided, once between Justice Bleckenfeldt against G. Y., and again, between John Jenollin against N. B., both before the great holidays in 1680. For the same reason, if a debtor, resident in Friezeland, executed an instrument in Holland, before a magistrate, which may there entitle him to an execution, but not by common right, no execution can issue here, but the merits of the original demand must be examined. The reason is, that acts of limitation, and modes of execution, do not belong to the essence of the contract, but to the time and manner of bringing suits, which is a distinct thing, and therefore, it is established upon the best ground, that in entering a judgment, the law of the place where it is rendered, is to govern, although it respects a contract made elsewhere—Sandius, lib. 1, tit. 12, def. 5, where he says, that in the execution of a sentence given abroad, the law of the place in which the execution is asked, is to govern, not the law of the place where the judgment was given.

The contract of matrimony is also regulated by the same rules. If it is regular and valid in that place where it was contracted and celebrated, it is binding everywhere, under the same exception of not doing prejudice to others—to which exception, may be added, if incest should be permitted anywhere, or marriage in the second degree, which indeed is scarcely supposable. In Friezeland, matrimony is, when a man and woman agree to marry, and voluntarily take each other for man and wife, although no ceremony is performed at church. *In Holland, matrimony cannot be contracted in that manner. The Frizians, however, without doubt, enjoy among the Hollanders the right of married people, in the particulars of dower, jointure, the rights of children to inherit the property of their parents, &c. [*374

In like manner, if a Brabanter, who should marry under a dispensation from the Pope, within the prohibited degrees, should remove here, the marriage would be considered as valid; yet, if a Frizian marries the daughter of his brother, in Brabant, and celebrates the nuptials there, returning here, he would not be acknowledged as a married man, because, in this way, our law might be eluded, by bad examples, and this induces me to make an observation upon this point. It often happens, that young people, desirous of forming improper connections, and to sanction their illicit intercourse with the ceremony of marriage, go into East Friezeland, or other places, in which the consent of curators or guardians is not necessary to marriage, according to the Roman laws. There they celebrate marriage, and presently return to their country—I think, that this is a manifest fraud or evasion of our law, and therefore, that the magistrates here, are not obliged, by the law of nations, to acknowledge such marriages, or to hold them as valid; especially, with respect to those, who transgress and evade their own laws, knowingly and intentionally. Moreover, not only the contract of marriage itself, properly and regularly celebrated in one place, is good in all places, but the rights and incidents which attend it where celebrated, attend it elsewhere. In Holland, married people have a communion of all their goods, unless it be otherwise expressly covenanted by them; this will be the effect, as to goods situated in Friezeland, although there, marriage only occasions a common risk of profit and loss, not of the goods themselves; therefore, the Frizians remain, after the marriage, each one, both husband and wife, separate owners of their goods situated in Holland. When, however, the married couple remove from the one state or province to the other, whatever is afterwards acquired or falls to either, is not in common, but held by distinct right, and what was before made common between them, will be either in common, or otherwise, as they direct: as Sandius lays it down, who tells us, lib. 2, decis., tit. 5, def. 10, there was a dispute among the learned doctors, whether immovable goods, situated in another country, were to be affected and regulated by the rules as

May following; nor was the writ even transmitted, or returned, until the present term.

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we have laid it down. The reason of the doubt was, that the laws of one commonwealth cannot affect the integral parts, the territory of another commonwealth—to this two answers may be given. First, That it cannot be done by the immediate force and operation of a foreign law, but with the concurring consent of the supreme power in the other government, which gives an effect to foreign laws, exercised upon property within its own jurisdiction, without any prejudice being received to its sovereignty or the rights of its citizens, regarding the mutual convenience of the two nations or governments, which is the foundation of all these rules. The other answer is, that it is not so much by force of law, as by the consent of the parties reciprocally communicating their rights to each other, by which means a change or modification of property may arise, not less from matrimony than any other contract.

The place, however, where the contract is entered into, is not to be exclusively considered: if the parties had in contemplation another place at the time of the contract, the laws of the latter will be preferred, in the construction of the contract. Every one is considered as having contracted in that place, in which he bound himself to pay or perform anything, lib. 21, de O. et A., and the place where matri-
*375] mony is contracted is not so much the place where *the ceremony is performed, as where they expect and intend to live and settle. It happens daily, that men in Friezeland, natives or sojourners, marry wives in Holland, which they immediately bring into Friezeland. And if, at the time of the marriage, they intended immediately to settle in Friezeland, there will not, in such case, be a community of goods. Although they make no special marriage contract, not the law of Holland, but of Friezeland, will govern: the latter, not the former, is the place of their contract.

There is a further application of the restriction so often mentioned. The effects of a contract entered into at any place, will be allowed, according to the law of that place in other countries, if no inconvenience results therefrom to the citizens of that other country, with respect to the law which they demand, and the sovereignty of the latter place is not bound, nor indeed, can it so far extend the law of another territory. For example, the oldest and first hypothecation (mortgage) of a movable, is to be preferred even against a third possessor, by the law of Cæsar, and in Friezeland, not among the Bavarians; therefore, if any one, upon such an hypothecation, proceeds to demand the article from a third person, he shall not be heard, but his suit rejected; because the right of the third person to that chattel shall not be taken away by the law of another jurisdiction or territory. Let us enlarge this rule to the following extent: If the law of the place in another government is contrary to the law of our state, in which also a contract is made, inconsistent with a contract celebrated and made in another place, it is reasonable, in such case, that we should observe our own law, rather than a foreign law. For example: In Holland, matrimony is contracted with this agreement, that the wife shall not be responsible for the debts contracted by the husband only; although this is a private contract, it is said to be valid, in Holland, to the prejudice of the creditors, with whom the husband shall afterwards contract debts, but in Friezeland, such a kind of contract would not be binding, unless published, nor would ignorance of the necessity of making it public, be an excuse, according to the law of Cæsar and equity. The husband contracts debts in Friezeland, and the wife is sued as jointly responsible, and liable for one-half of the debt—she pleads her marriage contract; the creditors reply, that this contract is contrary to the laws of Friezeland, because not published; and this is the rule with us, where the marriage was contracted here; as I lately gave my opinion, when consulted upon the point. But those who contracted in Holland, and in whose favor the debts were contracted there, were nonsuited, notwithstanding their suit was brought in Friezeland, because, so far as respected them, the law of the place where the marriage was contracted, not the laws of the two countries, came into consideration.

From the rules laid down in the beginning, the following axiom may be deduced.

Ingersoll and *Dallas*, for the defendant in error, objected, that a writ of error must be tested of the term preceding that to which it is made returnable; that a term cannot intervene between the *teste* and the return.

Personal rights or disabilities, obtained or communicated by the laws of any particular place, are of a nature which accompany the person wherever he goes, with this effect, that in all places, he either enjoys the immunities or exemptions, or is subject to the disabilities imposed by the law of the country where they at any time happen to be, on characters of that description. Therefore, those who, with us, are under tutors or curators, as young men, prodigals, married women, are everywhere reputed as persons subject to curators, and whatever the law of any place considers as the right or disabilities of persons of that description, they may suffer, exercise and enjoy; hence, he who is excused the consequences of crimes, or *contracts, on account of his want of age, in Friezeland, cannot make binding contracts in Holland, [*376 and one declared prodigal here, contracting elsewhere, will not be bound. Again, in some provinces, one above the age of twenty-one years may convey his real estate; such a person may do the same in those places where twenty-five is the period of full age; because, whatever the laws and judicial proceedings in any place, decide as to their subjects, other people allow to have the same effect with them, unless a prejudice or inconvenience would result to them or their laws.

There are persons who understand these personal rights to the following extent, that whoever, in a certain place, is of full age, or a minor, a child, or put out of the control of the father, will enjoy the same rights, and be subject to the same disabilities, as in the place where he became such a character, or was so reputed; and whether the same thing would, or would not, have happened in his own country, still, that the same consequence necessarily follows. It appears to me, that this is laying down the rule too broadly, and would subject us to a burdensome inconvenience by the laws of our neighbors. An example will make the thing plain: A child, not emancipated or exempted from the power of his father, and who has not ceased to be one of his family, cannot make a will in Friezeland. He goes into Holland, and there makes a will—is it valid? I think it valid in Holland, by the first and second rules, that the laws regulate as to all those within its limits, nor is it reasonable, that the people there, respecting a business done there, neglecting their own laws, should judge according to the laws of other people; but that will would not be valid in Friezeland, by the third rule, because, by that means, nothing would be more easy than to elude our laws, and our citizens might elude them every day. But in other places, out of Friezeland, the will would be valid, even where, by their laws, a child, while one of the father's family, could not make a will, because there the reason would not apply, that their citizen had gone to Holland to elude their law *in fraudem legis*.

The example I have given respects an act prohibited at home, on account of a personal disability. We will give another act allowed at home, but prohibited abroad, where done, some time since, decided in our supreme court: Rudolph Monsema, aged 17 years and 14 days, was born and lived at Groningen, after that, he went abroad to learn the business of a druggist, he made a will, which he might have made in Friezeland, but at Groningen, says D. Nauta, the reporter, it is not lawful for an infant to make a will, under twenty, or in the time of his last illness, or for more than half his patrimony. The young man died of that sickness, leaving his father his heir, and leaving nothing to his mother's relations, who contended that the will was void, as made against the law of the place. The heirs insisted, that a personal quality accompanies the person everywhere, and, as he could have made this will at home, he could make it abroad. But it was decided against the will, although there was no intention to avoid the law, but the judgment was not universally approved, Nauta himself dissenting. MS. 134, An. 1643, d. 27 Oct.

The foundation of all this doctrine, we have said, and we insist upon it, is the subjection that men owe to the laws of every country within which they are at any time;

E. Tilghman endeavored to support the writ, considering the objection as founded on a mere error in form, and cited 2 W. Bl. 918; 2 Ld. Raym. 1269; Judicial Act, § 32.

But THE COURT observed, that there was no error in point of fact; nor any clerical error to amend. The writ bears the date when it was actually sued out and lodged in the office: there is, therefore, nothing on the record, by which it can be amended; and the objection is fatal.

The writ of error was, therefore, non-prossed.

AUGUST TERM, 1797.

RULE.

IT is ORDERED BY THE COURT, that no record of the court shall be suffered by the clerk to be taken out of his office, but by consent of the court; otherwise, he is to be responsible for it.

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from whence it follows, that an act, valid or void, in its beginning, and where it first takes place, must be the same elsewhere. But this observation does not apply equally to immovable property, since it is considered, not as depending altogether upon the *377] disposition of every master or owner of a family—but the commonwealth *affixes certain rights as resulting from real property, and is interested in its disposal nor could a nation, without a great inconvenience, suffer its real property to be conveyed, with these incident rights, by the laws of another country, and contrary to its own laws—therefore, a Frizian having fields and houses, in the province of Groningen, cannot make a will disposing of them, because it is prohibited there, to make a will of real estate; the Frizian law not affecting lands which constitute integral parts of a foreign territory. But this does not contradict the rule that we have before laid down, that if a will is made accordingly to the ceremonies of the place, where the testator resides, it will be good with respect to his property in another country, if a will could be made there; because the diversity of laws in that respect, does not affect the soil, but directs the manner of making the will, which being rightly done, may pass real estate in another country, so far as may not interfere with any incidents connected with the ownership of real property in the country where it is situated. This rule takes place in common conveyances—things annexed to the freehold in Friezeland, sold in Holland, in a manner prohibited in Friezeland, but allowed in Holland, are well sold—corn growing in Friezeland is sold in Holland, according to the lasts, as it is called, the sales are void, because it is prohibited in Friezeland, whether prohibited in Holland or not, because it is annexed to the freehold, and is a part of it.

The same rule held with regard to the succession to an intestate estate. If the deceased was father of a family, whose property was in different provinces, so far as respects the real estate, it would descend according to the laws of the place where situated: but with respect to the personal property, it would go according to the law of the place where the intestate lived, and of which he was an inhabitant—for which see Sandius, lib. 4, Decis. tit. 8, def. 7.

These observations are of a nature that require more full explanation, seeing there are not wanting writers, who think otherwise in some particulars, whom you will see respectfully spoken of by Sandius, in his reports of causes; to which add Rodenbergius' Treatise of Laws, in the title of the Marriage Contract."