Ellsworth, Chief Justice.—This cause comes up on a bill of exceptions; on the face of which, three exceptions appear.

1. That bills of exchange, which had been non-accepted, and protested for non-payment, were admitted in evidence unaccompanied by protests for non-acceptance. According to a general rule, laid down by this court, in the case of *Brown* v. *Barry*, from Virginia, and from which rule there appear no special circumstances to exempt the present case, this exception will not hold.

2. A further exception is, that the judge, in his charge to the jury, held, that the two letters from the defendants to the plaintiff below, of the 20th and 21st of January 1796, which were set up to prove an undertaking or guarantee, might be explained by parol testimony; of which kind of testimony, some had passed to the jury, without objection, but for what purpose, does not now appear, as there were divers counts, some of which parol testimony might have supported. The undertaking declared upon, in the count to which the verdict applies, being for the duty of another, it must, to save it from the statute of frauds and perjuries, be in writing, and wholly so. The two letters, therefore, which are relied upon as the written agreement, cannot be added to or varied by parol testimony. Nor can they be so far explained by parol testimony, as to affect their import, with regard to the supposed *undertaking. The charge then, of the judge, that "they might be explained by parol testimony," expressed as a general rule, [*425 and without any qualifications or restrictions, was too broad; and may have misled the jury. On this ground, there must be a reversal.

3. It is, therefore, unnecessary to decide the remaining question—whether the two letters did, of themselves, import an undertaking or guarantee? It may be proper to suggest, however, that a majority of the court, at present, incline to the opinion that they do not.(*a*)

Judgment reversed, and a *venire de novo* awarded.

Sims's Lessee *v.* Irvine.

Land law of Pennsylvania.—Montour's Island.—Compact with Virginia.

In Pennsylvania, a survey and payment of purchase-money confer a legal right of entry, which will support an ejectment.

A military right to unappropriated land in America, acquired under a royal proclamation, in 1763, was assignable, by the law of Virginia, to an inhabitant of that state.

Obtaining a warrant on such right, and locating it, gave the assignee a complete equitable title, which was confirmed by the compact between Pennsylvania and Virginia.[1]

Error from the Circuit Court for the Pennsylvania district. An ejectment being instituted in the inferior court, by the lessee of *Sims* v. *Irvine*, the jury found a special verdict, upon which judgment was rendered for the plaintiff, by consent, and this writ of error was brought to settle the title.

(*a*) I have understood, that the Chief Justice, and Cushing, Justice, were for the affirmative; and Iredell, Paterson and Washington, Justices, were for the negative answer, on the third question.

[1] And see Ross *v.* Cutshall, 1 Binn. 399.

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The parts of the special verdict material to the points in controversy were, in substance, as follows:

Plaintiff's title. "The jury find that the premises in dispute was called Montour's Island, situated in the river Ohio, on the south-east side, within the original limits of the Virginia charter, granted in 1609, and within the limits of the territorial district in dispute between Virginia and Pennsylvania, for several years prior to the 23d of September 1780, when those states entered into the following compact relative to their boundaries, as it is inserted in the journals of the general assembly of Pennsylvania; and afterwards ratified by a law passed the 1st of April 1784 (2 Dall. Laws, 207).

"Resolved, That although the conditions annexed by the legislature of Virginia, to the ratification of the boundary line agreed to by the commissioners of Pennsylvania and Virginia, on the 31st day of August 1779, may tend to countenance some unwarrantable claims, which may be made under the state of Virginia, in consequence of pretended purchases, or settlements, pending the controversy, yet this state, determining to give to the world the most unequivocal proof of their desire to promote peace and harmony with a sister state, so necessary during this great contest against the common enemy, do agree to the conditions proposed by the state of Virginia, in their resolves of the 23d of June last, to wit:

*426] *"That the agreement made on the 31st day of August 1779, between James Madison and Robert Andrews, commissioners for the commonwealth of Virginia, and George Bryan, John Ewing and David Rittenhouse, commissioners for the commonwealth of Pennsylvania, be ratified and finally confirmed, to wit: That the line commonly called Mason's and Dixon's line, be extended due west, five degrees of longitude, to be computed from the river Delaware, for the southern boundary of Pennsylvania; and that a meridian line drawn from the western extremity thereof to the northern limits of the said states respectively, be the western boundary of Pennsylvania for ever. On condition, that the private property and rights of all persons acquired under, founded on, or recognised by the laws of either country, previous to the date hereof, be saved and confirmed to them, although they should be found to fall within the other, and that in the decision of disputes thereon, preference shall be given to the elder or prior right, whichever of the said states the same shall have been acquired under, such persons paying to the state within whose boundary their lands shall be included, the same purchase or consideration money which would have been due from them to the state under which they claimed the right; and where any such purchase or consideration money hath, since the declaration of American independence, been received by either state for lands, which, according to the before recited agreement, shall fall within the territory of the other, the same shall be reciprocally refunded and repaid; and that the inhabitants of the disputed territory, now ceded to the state of Pennsylvania, shall not, before the first day of December, in the present year, be subject to the payment of any tax, nor, at any time, to the payment of arrears of taxes or impositions heretofore laid by either state. And we do hereby accept and fully ratify the said recited condition, and the boundary line formed thereupon.

"Resolved, That the president and council of this state be, and they are hereby empowered to appoint two commissioners on the part of this state,

in conjunction wish commissioners to be appointed by the state of Virginia, to extend the line commonly called Mason's and Dixon's line, five degrees of longitude from Delaware river, and from the western termination of the line so extended, to run and mark, as soon as may be, a meridian line to the Ohio river, the remainder of that line to be run as soon as the president and council, taking into their consideration the disposition of the Indians, shall think it prudent. And the president and council are hereby authorized to give to the said commissioners such instructions in the premises as they shall think fit."

*"The jury find that William Douglas was a field-officer in the service of the king of Great Britain, in a regiment raised in the colony [*427 of New Jersey, who continued in service during the war between France and Great Britain, which terminated in 1763; and that the said king gave to him, his heirs and assigns, by proclamation, a right to 5000 acres of waste and unappropriated lands in America; the part of the proclamation relating to the gift being expressed in these words:

"And whereas, we are desirous, upon all occasions, to testify our royal sense and approbation of the conduct and bravery of the officers and soldiers of our armies, and to reward the same, we do hereby command and empower our governors of our said three new colonies, and other our governors of our several provinces on the continent of North America, to grant, without fee or reward, to such reduced officers as, having served in North America, during the late war, and are actually residing there, and shall personally apply for the same, the following quantities of land, subject, at the expiration of ten years, to the same quit-rents as other lands are subject to, in the province within which they are granted, as also subject to the same conditions of cultivation and improvement, viz.: To every person having the rank of a field officer, 5000 acres; to every captain, 3000 acres; to every subaltern or staff officer, 2000 acres; to every non-commission officer, 200 acres; to every private, 50 acres.

"We do, likewise, authorize and require the governors and commanders-in-chief of all our said colonies upon the continent of North America, to grant the like quantities of land, and upon the same conditions, to such reduced officers of our navy, of like rank, as served on board our ships of war in North America, at the times of the reduction of Louisburg, and Quebec, in the late war, who shall personally apply to our respective governors, for such grants."(*a*)

"The jury find that the said W. Douglas, for a valuable consideration, assigned, on the 17th of January 1779, to Charles Sims, and his heirs, all his right and title to the said bounty of 5000 acres of land; that C. Sims was born in Virginia, before the year 1760; that he was an inhabitant thereof since his birth; that he is the lessor of the plaintiff and a citizen of Virginia; that William Irvine, the defendant below, is a citizen and inhabitant of Pennsylvania; and that the lands mentioned in the declaration exceed the value of 2000 dollars.

*"The jury find, *in hæc verba*, a law of Virginia, enacted in May 1779, entitled 'An act for adjusting and settling the titles of [*428

(*a*) The proclamation also contains a provision, prohibiting any grant or purchase of lands occupied by the Indians. See the Annual Register for 1763.

claimers to unpatented lands, under the present and former government, previous to the establishment of the commonwealth's land-office'; the material parts of which law are expressed in the following terms :

"'An act for adjusting and settling the titles of claimers to unpatented lands under the present and former government, previous to the establishment of the commonwealth's land-office.

"'§ 1. Whereas, the various and vague claims to unpatented lands under the former and present government, previous to the establishment of the commonwealth's land-office, may produce tedious and infinite litigation and disputes, and in the meantime, purchasers would be discouraged from taking up lands upon the terms lately prescribed by law, whereby the fund to be raised in aid of the taxes for discharging the public debt, would be in a great measure frustrated ; and it is just and necessary, as well for the peace of individuals as for the public weal, that some certain rules should be established for settling and determining the rights to such lands, and fixing the principles upon which legal and just claimers shall be entitled to sue out grants ; to the end that subsequent purchasers and adventurers may be enabled to proceed with greater certainty and safety : Be it enacted by the general assembly, that all surveys of waste and unappropriated land, made upon any of the western waters, before the first day of January, in the year 1778, and upon any of the eastern waters, at any time before the end of this present session of assembly, by any county-surveyor commissioned by the masters of William and Mary college, acting in conformity to the laws and rules of government then in force, and founded either upon charter, importation rights, duly proved and certified according to the ancient usage, as far as relates to indented servants, and other persons not being convicts, upon treasury rights for money paid the receiver-general duly authenticated upon entries on the western waters, regularly made before the 26th day of October, in the year 1763, or on the eastern waters, at any time before the end of this present session of the assembly, with the surveyor of the county, for tracts of land not exceeding four hundred acres, according to act of assembly, upon any order of council, or entry in the council-books, and made during the time in which it shall appear, either from the original or any subsequent order, entry or proceedings in the council-books, that such order
*429] or entry remained in force, the terms *of which have been complied with, or the time for performing the same unexpired, or upon any warrant from the governor for the time being, for military service, in virtue of any proclamation, either from the king of Great Britain or any former governor of Virginia, shall be, and are hereby declared good and valid ; but that all surveys of waste and unpatented lands made by any other person, or upon any other pretence whatsoever, shall be, and are hereby declared null and void : provided, that all officers or soldiers, their heirs or assigns, claiming under the late Governor Dinwiddie's proclamation of a bounty in lands to the first Virginia regiment, and having returned to the secretary's office, surveys made by virtue of a special commission from the president and masters of William and Mary college, shall be entitled to grants thereupon, on payment of the common office fees ; that all officers and soldiers, their heirs and assigns, under proclamation warrants for military service, having located lands by actual surveys made under any such special commission, shall have the benefit of their said locations, by taking out warrants upon such rights,

resurveying such lands according to law, and thereafter proceeding according to the rules and regulations of the land-office. All and every person or persons, his, her or their heirs or assigns, claiming lands upon any of the before recited rights, and under surveys made as hereinbefore mentioned, against which no *caveat* shall have been legally entered, shall, upon the plats and certificates of such surveys being returned into the land-office, together with the rights, entry, order, warrant, or authentic copy thereof, upon which they were respectively founded, be entitled to a grant or grants for the same, in manner and form hereinafter directed.

"'§ 2. Provided, that such surveys and rights be returned to the said office, within twelve months next after the end of this present session of assembly, otherwise they shall be and are hereby declared forfeited and void. All persons, their heirs or assigns, claiming lands under the charter and ancient custom of Virginia, upon importation rights as before limited, duly proved, and certified in any court of record, before the passing of this act; those claiming under treasury rights for money paid the receiver-general, duly authenticated, or under proclamation warrants for military service, and not having located and fixed such lands by actual surveys, as hereinbefore mentioned, shall be admitted to warrants, entries and grants for the same, in manner directed by the act of assembly entitled *An act for establishing a land-office, and ascertaining the terms and manner of granting *waste and unappropriated lands*, upon producing to the register of the land-office the proper certificates, proofs or warrants, as the [*430 case may be, for their respective rights, within the like space of twelve months after the end of this present session of assembly, and not afterwards. All certificates of importation rights, proved before any court of record, according to the ancient custom, and before the end of this present session of assembly, are hereby declared good and valid: And all other claims for importation rights, not so proved, shall be null and void; and where any person, before the end of this present session of assembly, hath made a regular entry, according to act of assembly, with the county surveyor for any tract of land not exceeding four hundred acres, upon any of the eastern waters, which hath not been surveyed or forfeited, according to the laws and rules of government in force at the time of making such entry, the surveyor of the county where such land lies, shall, after advertising legal notice thereof, proceed to survey the same accordingly, and shall deliver to the proprietor a plat and certificate of survey thereof, within three months; and if such person shall fail to attend at the time and place so appointed for making such survey, with chain-carriers and a person to mark the lines, or shall fail to deliver such plat and certificate into the land-office, according to the rules and regulations of the same, together with the auditor's certificate of the treasurer's receipt for the composition money hereinafter mentioned, and pay the office fees, he or she shall forfeit his or her right and title; but upon performance of these requisitions, shall be entitled to a grant for such tract of land, as in other cases.

"'§ 3. And be it enacted, that all orders of council or entries for land in the council-books, except so far as such orders or entries respectively have been carried into execution by actual surveys, in manner hereinbefore mentioned, shall be, and they are hereby declared void and of no effect; and except also a certain order of council for a tract of sunken grounds, com-

monly called the Dismal Swamp, in the south-eastern part of this commonwealth, contiguous to the North Carolina line, which said order of council, with the proceedings thereon, and the claim derived from it, shall hereafter be laid before the general assembly, for their further order therein. No claim to land within this commonwealth for military service, founded upon the king of Great Britain's proclamation, shall hereafter be allowed, except a warrant for the same shall have been obtained from the governor of Virginia, during the former government, as before mentioned; *or where *431] such service was performed by an inhabitant of Virginia, or in some regiment or corps actually raised in the same; in either of which cases, the claimant, making due proof in any court of record, and producing a certificate thereof to the register of the land-office, within the said time of twelve months, shall be admitted to a warrant, entry and grant for the same, in the manner hereinbefore mentioned; but nothing herein contained shall be construed or extend, to give any person a title to land for service performed in any company or detachment of militia.'

"The jury find *in hæc verba* another law of Virginia enacted also in May 1779, entitled 'An act for establishing a land office and ascertaining the terms and manner of granting waste and unappropriated lands;' the material parts of which law are expressed in the following terms:

"'§ 3. And be it enacted, that upon application of any person, their heirs or assigns, having title to waste or unappropriated lands, either by military rights, or treasury rights, and lodging in the land-office a certificate thereof, the register of the said office shall grant to such person or persons, a printed warrant, under his hand and the seal of his office, specifying the quantity of land and the right upon which it is due, authorizing any surveyor, duly qualified according to law, to lay off and survey the same, and shall regularly enter and record in the books of his office, all such certificates and the warrants issued thereupon; which warrants shall be always good and valid, until executed by actual survey, or exchanged in the manner hereinafter directed, &c.

"'Any person holding a land-warrant upon any of the before mentioned rights, may have the same executed in one or more surveys, and in such case, or where the lands on which any warrant is located shall be insufficient to satisfy such warrant, the party may have the warrant exchanged by the register of the land-office for others of the same amount in the whole, but divided as best may answer the purposes of the party, or entitle him to so much land elsewhere as will make good the deficiency, &c.

"'Every person having a land-warrant, founded on any of the before mentioned rights, and being desirous of locating the same on any particular waste and unappropriated lands, shall lodge such warrant with the chief surveyor of the county wherein the said lands or the greater part of them lie, who shall give a receipt for the same, if required. The party shall direct the location thereof so specially and precisely, as that others may be *432] enabled with certainty to locate *other warrants on the adjacent *residuum*; which location shall bear date the day on which it shall be made, and shall be entered, by the surveyor, in a book to be kept for that purpose, in which there shall be left no blank leaves or spaces between the different entries, &c.

"'No entry or location of land shall be admitted within the county and

limits of the Cherokee Indians, or on the north-west side of the Ohio river, or in the lands reserved by act of assembly for any particular nation or tribe of Indians, or on the lands granted by law to Richard Henderson & Co., or in that tract of country reserved, by resolution of the general assembly, for the benefit of the troops serving in the present war, and bounded by, &c., until the further order of the general assembly, &c.

"'All persons, as well foreigners as others, shall have right to assign or transfer warrants or certificates of survey for lands; and any foreigner, purchasing warrants for lands, may locate and have the same surveyed, and after returning a certificate of survey to the land-office, shall be allowed the term of eighteen months, either to become a citizen, or to transfer his right in such certificate of survey to some citizen of this, or any other of the United States of America.'

"The jury find *in hæc verba* another law of Virginia, enacted in October 1779, entitled 'An act for explaining and amending an act entitled an act for adjusting and settling the titles of claimers to unpatented lands under the present and former government, previous to the establishment of the commonwealth's land-office.' The law is expressed in the following terms:

"'§ 1. Be it enacted by the general assembly, that whereas, doubts have arisen concerning the manner of proving rights for military service, under the proclamation of the king of Great Britain, in the year 1763, whereby great frauds may be committed: Be it declared and enacted, that no person, his heirs or assigns, other than those who had obtained warrants under the former government, shall hereafter be admitted to any warrant for such military service, unless he, she or they produce to the register of the land-office, within eight months after the passing of this act, a proper certificate of proof, made before some court of record within the commonwealth, by the oath of the party claiming, or other satisfactory evidence that such party was *bonâ fide* an inhabitant of this commonwealth, at the time of passing the said recited act, or that the person having performed such military service, was an officer or soldier in some regiment or corps (other than militia) actually raised in Virginia, before the date of the said proclamation, and had continued to serve until the *same was disbanded, had been discharged on account of wounds or bodily infirmity, or had died in [*433
the service, distinguishing particularly in what regiment or corps such service had been performed, discharge granted, or death happened, and that the party had never before obtained a warrant or certificate for such military service: provided, that nothing in this act shall be construed in any manner to affect, change or alter the title of any person under a warrant heretofore issued.

"'§ 2. And whereas, the time limited in the before-recited act, to the commissioners for adjusting and settling the claims to unpatented lands within their respective districts, may be too short for that purpose: Be it further enacted, that all the powers given to the said commissioners by the said recited act, shall be continued and remain in force, for and during the further term of two months, from and after the expiration of the time prescribed by the said act, and no longer. And where it shall appear to the said commissioners, that any person, being an inhabitant of their respective districts, and entitled to the pre-emption of certain lands, in consideration of

an actual settlement, is unable to advance the sum required for the payment of the state price, previous to the issuing of a warrant for surveying such land, the said commissioners shall certify the same to the register of the land-office, who shall thereupon issue such pre-emption warrant to the party entitled thereto, upon twelve months credit for the purchase money, at the state price, from the date of the warrant. The said register shall keep an exact account of all such warrants issued upon credit, and shall not issue grants upon surveys made thereupon, until certificates are produced to him from the auditors of public accounts of the payment of the purchase-money respectively due thereon into the treasury; and if the same shall not be paid within the said term, the warrant, survey and title founded thereon, shall be void, and thereafter, any other person may obtain a warrant, entry and grant, for such land, in the same manner as for any other waste and unappropriated land: provided, that nothing herein contained shall be construed to extend to any person claiming right to the pre-emption of any land, for having built an house or hut, or made any improvements thereon, other than an actual settlement as described in the said recited act. No certificate of right to land for actual settlement, or of pre-emption right, shall hereafter be granted by the said commissioners, unless the person entitled thereto hath taken the oath of fidelity to this commonwealth, or shall take such oath before the said commissioners, which they are hereby empowered and directed to render and administer; except only in the particular case of the inhabitants of the territory in dispute between this commonwealth and that of Pennsylvania, who
*434] shall be entitled to certificates *upon taking the oath of fidelity to the United States of America.

"'§ 3. And be it further enacted, that all persons, their heirs or assigns, claiming lands by virtue of any order of council, upon any of the eastern waters, under actual surveys made by the surveyor of the county in which the land lay, may, upon the plats and certificates of such surveyors being returned into the land-office, together with the auditor's certificate of the treasurer's receipt for the composition money of thirteen shillings and four pence per hundred acres due thereon, obtain grants for the same, according to the rules and regulations of the said office; notwithstanding such surveys or claims have not been laid before the court of appeals. And all other claims for lands, upon surveys made by a county surveyor, duly qualified, under any order of council, shall, by the respective claimers be laid before the court of appeals, at their next sitting, which shall proceed thereupon in the manner directed by the before-recited act. Any person claiming right to land surveyed for another, before the establishment of the commonwealth's land-office, may enter a *caveat* and proceed thereupon, in the same manner as is directed by the act of assembly for establishing the said office, and upon recovering judgment, shall be entitled to a grant, upon the same terms, and under the same conditions, rules and regulations, as are prescribed by the said act in the case of judgments upon other *caveats*, upon producing to the register a certificate from the auditors of the treasurer's receipt for the composition money of thirteen shillings and four pence per hundred acres due thereon.'

"The jury find that the court of the county of Prince William, in Virginia, issued a certificate in favor of the said Charles Sims, in the words following:

"'Prince William Court, the 4th day of April 1780. Charles Sims, gent. produced to the court a commission from Francis Bernard, Esq., formerly governor of the province of New Jersey, with the seal of that province affixed, and dated the 15th day of March 1759, appointing William Douglass major of a regiment of foot, to be raised in the province of New Jersey, whereof the honorable Peter Schuyler was colonel. He also produced the affidavit of the Reverend David Griffith, taken before William Ramsay, Esq., a justice of the peace for the county of Fairfax, the first day of this instant, that William Douglass, commonly called Major Douglass, who formerly resided on Staten Island, did actually serve as an officer, in the corps of provincials raised by the province of New Jersey, in the late war between Great Britain and France; and a certain George Beardmor, in *open court, upon his oath saith, that he served as a soldier a campaign with the [*435 said Douglass, in the late war of Great Britain with France, and hath reason to believe the said Douglass served the time for which the said regiment was raised. The said Charles Sims likewise produced to the court an assignment indorsed on the back of said commission, dated the 16th day of January 1779, signed William Douglass, in these words: "In consideration of the sum of 100*l.* current money, as well as for other good causes of consideration; I, William Douglass, of the state of New Jersey, do make over, assign, transfer and convey unto Charles Sims, of the state of Virginia, all my right, title and interest to the lands which I am entitled to, by virtue of the within commission under the king of Great Britain, and his proclamation issued in the year 1763. Given under my hand and seal, this 16th day of January 1779." The said Charles Sims made oath that he believed the said William Douglass, who made the before assignment, is the same person whom the Reverend David Griffith mentions in his affidavit, and that the said assignment was made to him for a valuable consideration, and that he has never before made any claim nor received any lands in consequence of the beforementioned assignment; and the same is ordered to be certified: And the court doth further certify that the said Charles Sims is, and hath always been, from the time of his birth, an inhabitant of this state.

Teste, Robert Graham, Clerk Court.

"'The within is a copy taken from one of the vouchers, upon which a military warrant, No. 915, issued to Charles Sims, the 7th day of April 1780.

July 21st, 1796. Wm. Price, Re. L. Off.'

"The jury find that the register of the Virginia land-office, on the 8th of May 1780, issued to the said Charles Sims, assignee of the said William Douglass, one military warrant, in the usual form; that the said Charles Sims delivered the warrant, on the 30th of May 1780, to the surveyor of Yohagany county (within which Montour's island lay), in Virginia, and directed it to be entered and located on several parcels of land, of which Montour's island aforesaid was one; that the said surveyor did, on the same day and year last mentioned, enter and write in his book, kept by him as surveyor, the said warrant on the said parcels of land, and indorsed the said entry and location on the said original warrant; and that the said two several papers (or minutes) refer to and mean one and the same warrant, though the warrant is dated on the 8th of May 1780, and the record in the register of the land-office is under date of 7th of April 1780.

*"The jury find, that the governor of Virginia transmitted, in the year 1784, a just and true list of the entries of land made under the authority of Virginia in the disputed territory, to the executive of Pennsylvania, which list, among others, contained the following item in relation to the military warrant of the said C. Sims: '30 May 1788, Charles Sims, Military, 5000. Racoon;' '30 May 1780, Charles Sims, Military warrant, 3000. Racoon.'

"The jury find, that the said list of entries, included the said entry and location of the lessor of the plaintiff's, and was transmitted to the land-office of Pennsylvania, in the said year 1784; and that upon the said entry of the lessor of the plaintiff with respect to 3002 acres on Racoon creek, a survey was made, and a patent, dated 6th January 1795, had been issued under the authority of Pennsylvania.

"The jury find, *in hæc verba*, another law of Virginia, enacted on the 20th of June 1780, at a session which commenced on the 1st of May preceding, entitled 'An act for giving further time to obtain warrants upon certificates for pre-emption rights, and returning certain surveys to the land-office, and for other purposes;" the material parts of which law, are expressed in the following terms:

"'Whereas, the time fixed by an act entitled An act for adjusting and settling the titles of claimers to unpatented lands, under the present and former governments, previous to the establishment of the commonwealth's land-office, for surveying and returning surveys to the land-office upon entries made with the surveyor of a county, before the 26th day of June 1779, for lands lying upon the eastern waters, and for returning the plats of legal surveys made upon the western waters, under the former government, and exchanging military warrants granted under the royal proclamation of 1763, and not yet executed, will shortly expire, and many persons be thereby deprived of the benefit of such warrants and surveys: Be it therefore enacted, that all persons having such warrants, shall be allowed until the first day of July 1781, to exchange such warrants; and that the like time shall be allowed for returning such surveys to the land-office, to such who were entitled to land for military service, for which certificates have not yet been obtained.

"'§ 4. And be it further enacted, that the further time of eighteen months be given to all persons who may obtain certificates from the said commissioners for pre-emptions, on their obtaining warrants from the register of the land-office to *enter the same with the surveyor of the respective counties in which their claims were adjusted: provided, that the court of commissioners for the district of the counties of Monongalia, Yohogany and Ohio, do not use or exercise any jurisdiction respecting claims to lands within the territory in dispute between the states of Virginia and Pennsylvania, north of Mason's and Dixon's line, until such dispute shall be finally adjusted and settled.

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"'§ 5. And be it further enacted, that all surveys upon entries, the execution of all warrants, and the issuing of patents for lands within the said territory, shall also be suspended until the said dispute shall have been finally adjusted and settled; but that such suspension shall not be construed in any manner to injure or affect the title of any person claiming such lands. And whereas, the business of such commissioners for settling the claims of

unpatented lands, will be much lessened in the counties of Monongalia, and Yohogany and Ohio, &c.

"'§ 7. And whereas, some doubts have arisen upon the construction of the acts, directing the granting warrants for land due for military service under the king of Great Britain's proclamation in the year 1763: It is hereby declared, that no officer, his heirs, executors, administrators or assigns, shall be entitled to a warrant of survey for any other or greater quantity of land than was due to him, her or them, in virtue of the highest commission or rank in which such officer had served, nor in virtue of more than one such commission, for services in different regiments or corps, nor shall any non-commissioned officer or soldier be entitled to a bounty for land, under the said proclamation, for his services in more than one regiment or corps.

"'§ 8. And it is further declared, that the register shall not issue to any person or persons whatever, his or their heirs or assigns, a grant for land for more than one service, as above described, nor to those who have received warrants for services, since October 1763, notwithstanding a warrant or warrants may have been heretofore issued, and the land surveyed, unless the claimant shall, within six months from the end of this present session of assembly, produce to the said register the auditor's certificate for the payment of the state price of forty pounds per hundred, for the quantity of land in such warrant or warrants; and if such money is not so paid, that then the said warrants or surveys shall be to all intents and purposes void; and that the register may be able to comply with this law, he is hereby directed to make out, and keep an alphabetical list of all military warrants issued under the former as well as the present government; *in case of any assignment, marking therein the name of the assignor; and the several surveyors with whom military warrants obtained under the former government, have been lodged or located, are directed to transmit to the register, in the month of November next, or before that time, a list of all such warrants.' [*438

"The jury find a variety of orders issued by the late supreme executive council of Pennsylvania; and of proceedings entered into by the board of property, in relation to running the boundary, and to the list of Virginia claims and entries on lands within the disputed territory, &c.; a variety of patents issued by Virginia, for islands in the Ohio; sundry treaties with the Indians, and cessions made by them, particularly at Fort Stanwix, on the 5th of November 1768, and on the 30th of October 1784; and they find the constitution and laws of Virginia, respecting the right of purchasing lands occupied by the Indians; but which findings it does not seem necessary to set forth more particularly.

"The jury find, that Presly Neville and Matthew Ritchie, two deputy-surveyors, received from the surveyor-general a list of entries made under the authority of Virginia, which said list included the entry for the land in the declaration mentioned; that their commission was dated the 4th of April 1785, appointing them deputy-surveyors of all that part of Washington county, lying within the specified boundaries; and that on the 13th of April 1787, they surveyed Montour's island, and returned the survey *in hæc verba*, into the surveyor-general's office, some time in March 1788; the return of the survey setting forth, that it was made for Charles Sims, assignee of William Douglass, and under the Virginia warrant, entry and location.

"The jury find, that before the year 1779, the Indian tribes, in consequence of hostilities between them and the United States, retired to the north-west side of the Ohio river, having abandoned and relinquished all the lands, except on the north-west side of the said Ohio river; and that by various treaties since made with the United States of America, the boundary line of their hunting-grounds is very distant from the north-west side of the Ohio river aforesaid.

"The jury find, that according to the practice of Virginia, no money was required to be paid, since the passing the said act, entitled 'An act for giving further time to obtain warrants upon certificates for pre-emption rights, and returning certain surveys into the land-office, and for other purposes,' by the holder of a military warrant for lands, except where more than one warrant is issued for the same service.

*439] * "The jury find, that the defendant, William Irvine, had actual notice of the claim of the lessor of the plaintiff, some time before the 25th of December 1783, which was before the said defendant made any payment of money to Pennsylvania, whose first and only payment was of the sum of 283*l.* 13*s.* 6*d.*, on the 18th of April 1787."

II. Defendant's title. "The jury find a law of Pennsylvania, enacted the 24th of September 1783, entitled 'An act to grant the right of pre-emption to an Island known by the name of Montour's Island in the Ohio river, to Brigadier-General William Irvine;' which law is expressed in the following terms:

"'§ 1. Whereas, Brigadier-general William Irvine, during his separate command at Pittsburgh, hath rendered essential service to this state, particularly the frontier settlements thereof: In consideration whereof—

"'§ 2. Be it enacted, and it is hereby enacted by the representatives of the freemen of the commonwealth of Pennsylvania in general assembly met, and by the authority of the same, that the island, situated in the Ohio river, below Pittsburgh, known by the name of Montour's island, and every part thereof, be, and the same is hereby, granted unto the said William Irvine in fee, to have and to hold the same unto him, his heirs and assigns for ever; subject to such purchase-money as a future house of assembly may direct.

"'§ 3. And be it further enacted by the authority aforesaid, that the supreme executive council be, and they hereby are, empowered to direct the surveyor-general of this state, at the proper cost and charge of the said William Irvine, to lay out the said island, and cause it to be returned into the office for confirmation.

"'§ 4. Provided always, that nothing in this act shall be taken or deemed to bar any person or persons, their heirs or assigns, who may have obtained any just or lawful right to the said island, or any part thereof, before the passing of this act.'

"The jury find another law of Pennsylvania, enacted on the 8th of April 1785, entitled 'An act to provide further regulations whereby to secure fair and equal proceedings in the land-office, and in the surveying lands;' which act contains a section in these words:

"'§ 1. Whereas, the time for opening the land-office of this state, for the lands contained within the purchase lately made by the commonwealth of the Indian natives, of all the residue of waste lands within the charter bounds of Pennsylvania, as the same have been adjusted between this state and the

*state of Virginia, is fixed to be from and after the first day of May next, when it is probable that numerous applications will be made to the said land-office at the said time, for lands within the bounds of the said late purchase, and the officers of the land-office must necessarily be obliged to give preference to some persons, before others whose applications may be made equally early, and thereby great dissatisfaction must arise, unless some provision be made by law to regulate the same,' &c.

"The jury find, that the defendant, on the 19th of April 1787, having previously returned a survey into the office of the surveyor-general of Pennsylvania, of the lands in the declaration mentioned, obtained a patent for the same, in due form, dated the 19th of April 1787.

"The jury find another law of Pennsylvania, enacted the 26th of March 1785, entitled 'An act for the limitation of actions to be brought for the inheritance or possession of real property, or upon penal acts of assembly'; which law contains the following section:

"'§ 5. And be it further enacted by the authority aforesaid, that no person or persons that now hath or have any claim to the possession of any lands, tenements or hereditaments, or the pre-emption thereof, from the commonwealth, founded upon any prior warrant, whereon no survey hath been made, or in consequence of any prior settlement, improvement or occupation, without other title, shall hereafter enter or bring any action for the recovery thereof, unless he, she or they, or his, her or their ancestors or predecessors, have had the quiet and peaceable possession of the same, within seven years next before such entry, or bringing such action: Provided always, that if any person or persons, so claiming as aforesaid, hath been forced or driven away from his, her or their possessions, by the savages, or by the terror of them, or any other persons, or by any other means, except by the judicial authority of the state, hath quitted the same, during the late war, then such person or persons, and his, her or their heir or heirs shall or may, notwithstanding the said seven years be expired, bring his, her or their action, or make his, her or their entry, within five years from the passing of this act.'

"And the jury find the lease, entry and ouster in the declaration mentioned. And if upon the whole matter, &c."

After an assignment of the general errors, *in nullo est erratum* pleaded, and issue joined, the cause was argued by *Lewis*, *E. Tilghman* and *Dallas*, for the plaintiff in error; and by *Lee*, *Ingersoll* and *Rawle*, for the defendant: the former contended, that the title of the lessor of the plaintiff was defective both in law and equity; but admitting that it was an equitable title, they insisted, that the remedy was in equity, and not at law.

*I. The title of the lessor of the plaintiff is defective, because:

1st. The special verdict does not find that William Douglass was [*441 entitled to the bounty, under the proclamation of 1763, as being an officer within the description, and complying with the conditions of the gift. To be entitled, he must have been a reduced officer; he must have served during the war of 1763; the service must have been in America; he must have been resident there; and he must have made a personal application for the benefit of the bounty. Not one of these requisites is clearly stated in the verdict, and some of them are entirely omitted. The rule, with respect to

special verdicts, is, that they must find facts, not the evidence of facts; and no implication, however pregnant, will be allowed. In trover, for instance, the jury must find an actual conversion; finding a demand and a refusal, though these are evidence of a conversion, will not be sufficient. Here, some of the facts are found, but not all of them; and setting forth the proclamation, *in hæc verba*, will not cure the partial finding. 7 Bac. Abr. p. 6, pl. 5, p. 7 (new edit.). It is particularly important, that a personal application of the donee should have been found, since the inducements of the government in making the gift in that form, independent of an acknowledgment for past services, evidently arose from the policy of insuring the settlement of military men on an exposed frontier; and a desire to prevent frauds and speculation.

2d. If the special verdict does not find the facts, which were indispensable to entitle William Douglass to the bounty of the proclamation, it follows, of course, that nothing passed by the assignment of his right to Charles Sims. It is true, that William Douglass had a just claim to the bounty, and might be considered as having a right to it, even before a personal application; but without a personal application, he could never reduce it to possession and enjoyment himself, nor sell and transfer it to another. An assignment is not a substitution of one person for another, but a transfer of something from the assignor to the assignee.

3d. The assignment from W. Douglass to C. Sims was made on the 16th of January 1779, before any law was enacted in Virginia, in relation to claims and rights of this description; and therefore, its validity and operation must depend upon the terms and conditions of the proclamation, unless it shall be found, that the legislature of the state afterwards altered and improved the condition of the assignee: this, therefore, must be investigated.

4th. The first act of the Virginia legislature upon the subject, passed in May 1779, uses the terms, "all persons, their heirs or assigns," claiming lands under proclamation warrants *for military service, shall be admitted to grants for the same as in other cases: but whether the claim was by the donee, or his assignee, the provision (if at all applicable to the bounty of the proclamation of 1763) can only be expounded to embrace claims that were fairly vested by the donee's making personal application, and proving a conformity to the other conditions of the gift. This part of the law, however, has a variety of other cases upon which it must attach, and which were unquestionably of an assignable nature. It cannot, therefore, be regarded as creating or recognising an assignable quality in the bounty of the proclamation, which the proclamation itself does not create or support; and if no assignment could take place under the proclamation, unless there had been a previous personal application by the donee, the words, "heirs and assigns," coupled in the law with the donee, must be construed to refer to cases, in which the donee has duly obtained warrants and surveys.

*442]

But the material section (§ 3) in the act of May 1779, provides that no proclamation claim to lands shall hereafter be allowed, except in the following cases: 1st, where a warrant had been obtained during the former government: or 2d, where the military service was performed by an inhabitant of Virginia; or 3d, where the military service was performed in some Virginia corps; and in either case, the claimant must make due proof in a

court of record, and produce a certificate of it to the register of the land-office, within twelve months. Now, it is manifest, that the case of the lessor of the plaintiff is not within any of these provisions: a warrant had not been obtained for W. Douglass' bounty, under the old government: William Douglass had never been an inhabitant of Virginia: nor were his military services performed in any Virginia corps. William Douglass himself, therefore, would not have been entitled under the law; and so far, likewise, the claim of his assignee can only be maintained upon his title. By the revolution, Virginia, within the boundaries of the state, acquired all the territorial rights, with greater powers, than the king of Great Britain previously possessed: the king was bound by his gift, and could neither defeat, nor modify the rights of the donee; but Virginia, with the establishment of her independence and sovereignty, became the absolute proprietor of the unappropriated soil; and was at liberty to impose conditions, to give the law, in relation to antecedent inchoate gratuities and grants of the British monarch. In the exercise of this authority, she opened her land-office to claims for old military services, upon the reasonable stipulation, that a warrant should already have issued, or that the services should have been performed by a person inhabiting the state, or in a corps belonging to it.

*5th. But by the preceding law, it is evident, that two things are ambiguously expressed: It is not clearly defined, who is meant by [*443 the claimant, in the 3d section; and it is not ascertained, to what period the inhabitancy of the person performing the military services, refers—to the time of the service, or to the time of the claim. Hence arose the necessity of introducing the law of October 1779, which was passed (as its title declares, and great respect has been paid to a title in construing an ambiguous law, Hob. 232), "for explaining and amending" the act that has just been examined; and the doubts that had arisen, are recited in the preamble to the first section—"doubts concerning the manner of proving rights for military service, under the proclamation of the king of Great Britain in the year 1763, whereby great frauds may be committed."

The first enacting words are "that no person, his heirs *or* assigns, other than those who had obtained warrants under the former government, shall be hereafter admitted to any warrant for such military service, unless he, she or they produce, &c., a proper certificate of proof, &c., by the oath of the party claiming, or other satisfactory evidence," 1st. That such party was *bonâ fide* an inhabitant of Virginia, at the time of passing the preceding law (May 1779); or 2d. That the person having performed the military service, was in a Virginia corps, before the date of the proclamation, and continued in it until the corps was disbanded, or he was discharged or died. Now, in order to a fair understanding and exposition of the law, it should be remembered, that it contains no repealing clause or expression; and consequently, the two laws, being *in pari materia*, must be so construed as to be rendered consistent and operative in all their parts. 1 Bl. Com. 82. Under this impression, the act of October 1779, is evidently a restraining, and not an enlarging statute. By the act of May 1779, the donee, claiming under the proclamation, must have been an inhabitant of Virginia, or have served in a Virginia corps; and the act of October 1779, without impairing or altering that requisite, in the case of the donee himself, only fixing the period of his inhabitancy to the passing of the former act, superadds that, in the case

of an assignment, the assignee or claimant must likewise have been an inhabitant of Virginia. William Douglass would not, it is clear, be entitled under either law; and is it not extravagant, to insist, that the assignee shall take, when the assignor is excluded?

When the act of October 1779, speaks of "the party claiming," it must, indeed, intend a party who can legally claim, but it by no means describes who shall be a legal claimant; and when it speaks of "such party," the *444] reference (which is not *always to the next immediate antecedent; 18 Vin. Abr.; Hard. 77), must, in order to preserve the sense of the context, be applied to the donee, or to the heirs and assigns of a donee, duly entitled, according to the requisites of the proclamation and law.(a) Besides, the same section provides for proof being made, "that the party had never before obtained a warrant or certificate for such military service;" which must be applied to the party performing the service, since it would not surely be enough to prove that an assignee had not, though the assignor might have, before obtained a warrant. And it may be observed, by the bye, that the special verdict does not find the fact that no warrant had issued on Douglass' claim, before the warrant which issued to the lessor of the plaintiff.

6th. In addition to the exceptions already stated, another objection arises upon the Virginia law, enacted the 20th of June 1780, which provides that only one warrant shall issue to one person, founded on claims for military service; nor shall even one warrant issue, unless the claimant shall, within six months from the end of the session, in which the law was enacted, prove a payment of 40*l.* per hundred for the quantity of land in the warrant. This payment is not found by the special verdict, nor has it ever, in fact, been made, either to Virginia, or to Pennsylvania, acquiring all the rights of Virginia under the compact; but in aid of this defect, the verdict finds, that it was not the practice of Virginia to require the money to be paid by the holder of a military warrant for lands, except where more than one warrant issued for the same service. This finding, however, that the money was not required to be paid in Virginia, cannot prove that it was not due and payable to Pennsylvania; and a mere practice of office in one state (which could not have been a practice of a long continuance when the compact took effect), is not sufficient to control the plain provisions of a law, or to affect the rights of another state. Whatever, therefore, might previously have been the pretensions of the lessor of the plaintiff, his non-compliance with the stipulated payment, is an abandonment or forfeiture of his claim.

7th. But Montour's Island lay within the district of country occupied by the Indians, and therefore, it could not be the subject of location, for satisfying a private claim to lands. The proclamation of 1763, the constitution and laws of Virginia and the laws of Pennsylvania, all concur on this point. *445] It is *true, the special verdict finds, that before the year 1779, the Indian tribes had retired to the north-west side of the Ohio, having abandoned and relinquished all the land, except on the north-west side of the river, and that by various treaties, since made with the United States, the boundary line of their hunting-grounds is very distant from the north-west side: but it is to be remembered, that it is also found by the special verdict,

(a) Ellsworth, C. J.—The rule is, that "such" applies to the last antecedent, unless the sense of the passage requires a different construction.

that the retreat of the Indian tribes was, "in consequence of hostilities between them and the United States." A retreat, under such circumstances, is neither a dereliction nor a cession. Acquisitions of territory, in consequence of hostilities, do not pass in full sovereignty; the transfer is not complete, unless confirmed by the treaty of peace; and even if it was an acquisition in war, it was a national acquisition, and inured to the use of the United States. It appears, however, that the abandonment of the lands was owing to the necessities of war, and not with a view to a dereliction; for, afterwards, at the treaty at Fort Stanwix, in the year 1784, this very property is ceded by the Indians, and the cession is made to Pennsylvania, not to Virginia. There may be an appropriation (which, it is said, is the effect of a warrant and survey) of an equitable estate; but, in the present case, the entry of the surveyor, in the year 1787, was the entry of the public officer, not of the agent of the lessor of the plaintiff; it did not constitute an actual possession; and could not be effectual for any other purpose, than creating an appropriation of an equitable or executory estate.

8th. Though the treaty or compact between Virginia and Pennsylvania, ought to be held sacred, it cannot be so construed as to change the pre-existing state of property; rendering that perfect which was before imperfect, and making valid what was before void. The compact secures private property of every description; but it does not convert claims into rights, nor equitable rights into legal estates. The rights confirmed are those which would have been good against Virginia: complete rights are confirmed, without any act to be done by the party; and incomplete rights are confirmed in the precise situation in which they were, at the date of the compact, to be rendered complete according to the law of the state acquiring the jurisdiction and sovereignty. It must be conceded, that the warrants granted by Virginia, on lands which proved to belong to Pennsylvania, were *ipso facto* void; though it was reasonable and just to recognise them on a settlement of the territorial controversy. Reason and justice do not require, however, that such a recognition should be construed into a confirmation of the title (Co. Litt. 295), giving to the compact *the legal operation of a patent, without express words to produce that effect. Nor can the [*446
state be regarded as a trustee under the compact, for the use of the lessor of the plaintiff; for she had granted the pre-emption right to the defendant; and the defendant, in a court of equity, would have been regarded as the trustee, if any trust could be raised by implication.

What, then, were the circumstances of the parties at the date of the compact and afterwards? So early as the year 1783, the defendant had procured an actual survey of the premises; and according to the adverse doctrine, was thereupon in possession. But the lessor of the plaintiff never attempted to procure a survey, until the year 1787 (which could not divest the defendant's previous possession), and he rested simply on his Virginia warrant and entry; though a survey was surely requisite, if not to locate the land (inasmuch as naming the island might, in that respect, be deemed a sufficient designation), at least, to ascertain the quantity. It is to be considered, indeed, that in the very list of entries in the land-office, transmitted by the executive of Virginia to the executive of Pennsylvania, there is no specific mention of a location on Montour's island; and though the special verdict finds that Neville and Ritchie received a list of Virginia entries, including an

entry for the lands in the declaration mentioned, the list is not set forth *in hæc verba;* and the entry, for aught that appears, may have been made subsequent to the compact, or it may be in favor of the defendant.

Besides, there was a general prohibition as to surveying islands in the Ohio (2 Dall. Laws, 317, § 13); and the survey of Neville and Ritchie was, in fact, unauthorized by their commission, which circumscribes their district to limits, not including Montour's island. The commission authorizes them to survey in a district formed of a part of Washington county: now, Montour's island lay, originally, within Westmoreland county; it lies at present within Allegheny county; but it never was at any time included in Washington county. (1 Dall. Laws, 874; 2 Ibid. 595.) If, then, the survey itself is not lawful, it cannot be brought in aid of the title of the lessor of the plaintiff.

9th. It only remains, on the question of title, to show that the Pennsylvania act of limitations, is a bar to the claim of the lessor of the plaintiff. The act was passed on the 26th of March 1785; and it declares, "that no person having a claim to lands, or to the pre-emption thereof, founded upon any prior warrant, whereon no survey hath been made, &c., shall hereafter *447] *enter, or bring any action for the recovery thereof, unless he, or his ancestors or predecessors, had the quiet and peaceable possession, within seven years before such entry, or bringing such action." The present case, it is insisted, is plainly described in the law; and the right of Pennsylvania to legislate in relation to all the lands within her territorial boundary, cannot be denied, on general principles, and is not impaired by the terms or meaning of her compact with Virginia.

II. From this review, it was concluded, that the title of the lessor of the plaintiff was defective both in law and equity; but admitting, that it was an equitable title, the counsel for the defendant urged, that the remedy was in equity, and not at law.

The title of the lessor of the plaintiff rests on the Virginia warrant and entry, coupled with the Pennsylvania survey; no patent has been issued by either state; and the compact between them, though it gave a right to have the title completed, did not *ipso facto* complete it. On this statement, therefore, it is contended, that the legal estate has not yet been vested in the lessor of the plaintiff; and that a court of equity is alone competent to supply the defect of the conveyance. It is true, that in Pennsylvania, where no municipal court of equity exists, necessity has compelled the judges to apply a legal remedy, in every instance of an equitable title; but the same necessity does not occur in a case before the federal tribunals, which have an equitable, as well as a legal jurisdiction; and the act of congress that adopts the laws of the several states as rules of decision, does not adopt their forms of action, nor their modes of proceeding. (1 U. S. Stat. 92, § 34.) A contract made in Pennsylvania may furnish a subject for litigation in any country upon earth; and though the law of Pennsylvania would be regarded in expounding the contract, wherever the ligitation took place, the remedies of that place, and not the judicial remedies of Pennsylvania, would be applied to investigate and enforce it.

If it is only an equitable title, will the legal process of an ejectment afford a plain, adequate and complete remedy? (1 U. S. Stat. 82, § 16.) Ejectment is merely a possessory action: a judgment in favor of the lessor of

the plaintiff will not cure the defect in his title. But a court of equity could decree the defendant to convey to the plaintiff; the only remedy that can be complete.

It will be said, however, that a warrant and survey constitute a legal title in Pennsylvania: but the position is incorrectly taken, by confounding the nature of the estate, with the necessity which compels the use of a legal remedy for effectuating *justice. The application of a legal remedy to protect an equitable estate, still leaves the estate an equitable one. [*448 The principle applies to a variety of cases, as well as to the present. Thus, where an estate is held simply by articles of agreement, covenanting to convey, the widow of the covenantee shall be endowed, by the law of Pennsylvania: where the trustee sells the estate for a valuable consideration, without notice of the trust, the grantee shall hold it: And, generally, where there is an equitable estate, it shall descend like a legal estate. (2 Dall. 205.) But never was it conceived, that a legal estate, and an equitable estate, were synonymous terms in Pennsylvania; or that a warrant and survey came within the former description. A warrant was merely a direction from the proprietary, authorizing a survey of the lands specified; it contained no words of grant; and after the survey was made and returned, a patent became essential, not only to the title of the patentee, but to declare and secure the proprietary purchase-money, quit-rents, reservations of mines, &c. Until the patent issued, the terms of the bargain were not settled; nor had the proprietary parted with the fee: and is it just or legal to contend, that the proprietary could never evict a warrantee, who refused to pay the price of the lands, and to enter into the usual stipulations of the patent; or that the legal estate could exist in two persons, the proprietary and the warrantee, at the same time? The practice of Pennsylvania, in the application of legal remedies to equitable rights, has given rise, perhaps, to a seeming confusion of ideas and expressions, in the decisions that have occurred on the subject; but it does not appear in the report of *Fothergill's Lessee* v. *Stover*, 1 Dall. 6, whether the defendant's was a legal or an equitable title; and in *McCurdy* v. *Potts*, 2 Dall. 98, it is probable, that the words "*legal* possession" were inadvertently used by the judge, or the reporter, instead of the words "*lawful* possession," since the case naturally points at the latter; and a possession may, certainly, be lawful, without being legal.

Upon the whole, it was insisted, that the lessor of the plaintiff had no right that could in law or equity divest the possession of the defendant, whose title was complete in all its parts—a legislative grant, carried into effect by a regular survey and patent.

The counsel for the lessor of the *plaintiff* answered the objections to his title, and to his remedy, under the following general considerations: 1st. His rights before the compact between Virginia and Pennsylvania: 2d. The true construction of that compact: 3d. The right of the lessor of the plaintiff to be relieved in the present form of action.

*I. The right of the lessor of the plaintiff before the compact between [*449 Virginia and Pennsylvania, is, undoubtedly, founded on the previous right of William Douglass, under the proclamation of 1763; but the right of William Douglass is no longer questionable, since the special verdict expressly finds the fact, that "by the proclamation, the king gave to him, his heirs

and assigns, a right to a bounty of 5000 acres of land." When it is found, that he took by virtue of the proclamation, it follows, that he had complied with all the requisites; for otherwise, he could not so have taken. It is agreed, that if a jury collect the contents of a deed, and find them, and then find the deed, *in hæc verba*, the court must regard the deed itself, and not the construction; because the jury are not to judge of the law; and the very circumstance of their finding the verdict specially, shows that they disclaim judging of the law, and submit it to the court. (Vaugh. 77.) But when a deed contains certain facts, without which the party cannot take, the finding that he did take, and the deed that shows he could not have taken, exclusively of those facts, is a finding of the facts themselves. If upon an inspection of the proclamation, it should appear to contain no words implying a grant, or to be insufficiently expressed in that respect, it is a matter of law on which the court will judge; though always with a favorable countenance to support the verdict. (Hob. 54; 2 Burr. 700.) But the terms of the grant are unequivocal; the power of the crown to make the grant was incontrovertible; the description of the persons to receive it, is comprehensive and plain; and the finding of the jury settles the right of the lessor of the plaintiff.

Having considered the operation of the proclamation, connected with the finding of the special verdict, to vest a right in William Douglass, the next step is, to trace the course of the title from him to the lessor of the plaintiff, under the sanction of the laws of Virginia; which, even after the revolution, fulfilled the intentions of the royal donor, with liberality and justice. (Wythe Rep. 40; Washington's Rep. 230.) For the general gift of the proclamation was not reduced to specific appropriation, until the royal authority had ceased; and until Virginia, had she been unjust, or even ungenerous, might have refused a compliance.

The first and second laws of Virginia, both enacted in May 1779, before the lessor of the plaintiff had taken out a warrant, ought to be considered together. The first law, it is true, excludes claims for military services, unless the service was performed by an inhabitant of Virginia, or in a Virginia corps: but the special verdict does not exclude the possibility that
*450] *Douglass was an inhabitant of Virginia, although it finds that the corps in which he served was raised in New Jersey. It is not necessary, however, to resort to this hypothesis, since the meaning of the inhabitancy here spoken of, is expounded in the second law, so as to meet precisely the case of the plaintiff. But the first law substantiates, at least, the assignability of military rights, inasmuch as the first section, after classing charter or importation rights, treasury rights and military rights, expressly entitles the heirs and assigns of each class, to take out and locate warrants. The principle runs throughout the law: the 5th section provides that officers, &c., or their assignees, may locate their claims on waste and unappropriated lands; and the 11th section provides, that certain regulations shall not extend "to officers, soldiers, or their assignees, claiming lands for military service." These passages embrace all military rights; and whatever may have been the necessity of a personal application of the donee, under the proclamation of the British king, it is thus obviously dispensed with by the legislature of Virginia.

Under an erroneous interpretation of the first law, however, inhabitants

of Virginia had paid their money, in numerous instances, for what might be denominated foreign rights—rights of persons, who never inhabited the state, and never served in a corps belonging to it. Discovering the error, the legislature deemed it just and politic to come to the aid of the purchasers, being her own citizens; and by the second law, virtually ratified their purchases. Without keeping this policy in view, without admitting such claims as the claim of the lessor of the plaintiff, some words of the law of October 1779, will be nugatory. A Virginian, serving in a New Jersey corps, or a citizen of New Jersey serving in a Virginia corps, would have been entitled under the preceding law; but a third description was to be favored, the Virginia purchasers of military rights; and hence, the phraseology of "he, *she* or they," which cannot refer to the officers or soldiers, but to their assigns.

Soon after the law of October 1779, was passed, within the period of eight months, the lessor of the plaintiff obtained his warrant, and entered it, with a location on Montour's island, in the register's office. The warrant, entry and location are all in conformity to the laws and practice of Virginia. The description of the island possesses sufficient certainty; and it is found by the verdict, to be on the north-west side of the Ohio, not within any prohibited district of country. From the 20th of June 1780, when the law enacted that all proceedings to execute warrants on the disputed territory, should be suspended, until the compact and cession to Pennsylvania, it was impossible *for the lessor of the plaintiff to pursue any measures for effectuating his title: but his rights were not impaired, nor was the [*451 warrant annihilated, because it was not executed and returned; and the subsequent survey of Neville and Ritchie amounted to an entry and possession on behalf of the lessor of the plaintiff. There is, perhaps, no decision in Virginia that places a warrant and location on the footing of a legal title; but a military warrant has always been deemed a good equitable right. (Wythe's Rep. 40; Washington's Rep. 230.)

It has been contended, however, that the non-payment of 40*l.* per hundred acres, either to Virginia or Pennsylvania, within the stipulated period of six months, amounts to an abandonment or forfeiture of all the pre-existing rights of the lessor of the plaintiff. But the special verdict finds a usage directly opposed to this construction; and usage is a safe expositor of the law. The fraud intended to be guarded against was the issuing of two warrants for one claim; and the court will not presume that more than one had issued upon the present claim, in which case, the 40*l.* was never required or exacted, for a warrant founded on military services. But it is impossible to consider the provision as applying to lands in this predicament for the following reasons: 1st. Before the expiration of the six months which the law, passed on the 20th of June 1780 (2 Dall. Laws 208), allowed, the lands, and the right to the price, were ceded by Virginia to Pennsylvania, to wit, on the 23d of June 1789. From the time of her cession, Virginia had no right to the price; and Pennsylvania never fixed a time for paying it, nor imposed a penalty for a neglect or refusal. If, then, the performance of a condition becomes impossible by the act of the party, he shall never himself take advantage of the failure (Doug. 659). 2d. By suspending the powers of the commissioners, in relation to the execution of warrants, within the disputed territory, those lands were virtually excepted from the general provision of the act. It is harsh, indeed, to subject a man to a penalty for

not paying for lands, which he could neither locate nor possess. If the forfeiture does not apply, the result is, that the money, if payable at all, must be paid, before a patent can be obtained. Virginia thought the warrant still in force, for it was certified in the list transmitted by her executive; and Pennsylvania has also manifested her opinion on the subject, by issuing a patent for the lands located on Racoon creek, under circumstances exactly similar. It is here proper to add that, although the law was passed during a session, which commenced on the 1st of May 1780, it was not, in fact, enacted until the 20th of June 1780; so that it can have no effect to invalidate
*452] the warrant and location, *which were made by the lessor of the plaintiff, on the 8th and 30th of May, respectively. The relation of laws to the first day of the session of the legislature, is a legal fiction, which will never be allowed to work an injury. (Comb. 431; 2 Mod. 310.)

But it is another objection, that Montour's Island lay within the country which belonged to the Indians; and could not, therefore, be the subject of a lawful location, under a private warrant. Without confessing the aboriginal title of the Indian tribes, it is enough for the lessor of the plaintiff to allege, upon the finding of the special verdict, that before the year 1779, they had abandoned and relinquished all the lands, except on the north-west side of the Ohio; and that in pursuance of treaties, they have since receded very distantly from that boundary. Lands may be acquired by conquest; and a relinquishment, in consequence of hostilities, is tantamount to conquest. (*a*) (2 Bl. Com. 9.) The lands are likewise found to have been within the charter boundaries of Virginia; so that as far as royal jurisdiction and Indian surrender are involved, the sovereignty and property of that state were complete. It is said, however, that after this dereliction, possession should have been taken; and here too the special verdict meets the objection, by finding that the lands mentioned in the declaration were included in the bounds of Yohagany county.

It is not honorable to the character, nor consistent with the practice, of Pennsylvania, to urge the treaty at Fort Stanwix, in the year 1784, as a proof that the Indian title had not been previously extinguished. Rather let it be said, that she purchased tranquillity from the Indians, for the benefit of all who held lands within their hunting-grounds; and that the deed inured to their use, for their respective proportions, and to her use only for the *residuum*. Besides, the Virginia rights were original charges on the land, which she was bound to support and defend; and the success of her operations, whether by treaty or by arms, could never abridge or destroy them. It does not now lie with her, to dispute the right of Virginia, even if usurped; for she is estopped by her own act.

II. This leads to a second general consideration—what is the true construction of the compact between Virginia and Pennsylvania? The compact was ratified by the former, the 23d of June 1780; by the latter, on the 23d of September 1780; when it became mutually obligatory, and
*453] neither state could afterwards disable herself from complying with its *terms. On the contrary, indeed, each party was bound to the other, and to the individuals concerned, that every necessary act should be performed

(*a*) Ellsworth, C. J.—The finding of the jury is that the lands became derelict; and it is no matter, from what cause.

to effectuate the objects of the agreement and cession. That no private right, antecedently acquired, should be diminished or destroyed, was expressly contemplated; and with that view, the list of entries in the land-office of Virginia was transmitted by the executive of that state to the executive of Pennsylvania; with that view, the list was communicated to the land-officers and surveyors of Pennsylvania; with that view, all the precautions were taken, which appear in the records of the executive council and of the board of property: and with that view Neville and Ritchie surveyed and returned a draft of the island, in favor of the lessor of the plaintiff. Previously, however, to the Virginia list of warrantees, though after the compact, the legislature of Pennsylvania, by a law, enacted the 24th September 1783, had granted the pre-emption of Montour's Island to the defendant; but in doing this, it must have been remembered, that the premises lay within the disputed territory; and therefore, with a laudable caution, a proviso was inserted, "that nothing in the act shall be taken or deemed to bar any person or persons, their heirs or assigns, who may have obtained any just or lawful right to the said island, or any part thereof, before the passing of the act." (2 Dall. Laws, 150, § 4.) It is said, that the list transmitted by the governor of Virginia does not specify the location of Montour's Island; but it is found that the list on which Neville and Ritchie made their survey for the lessor of the plaintiff, did comprise the lands mentioned in the declaration; and the defendant had full notice of the Virginia claim, before he paid any part of his purchase-money.

Having, then, precisely ascertained the spot by the location (and in the present case, a survey was unnecessary, either to identify the island, or to ascertain the quantity of land it contained) the lessor of the plaintiff acquired a right under Virginia, which wanted no other form or act than the ratification of the compact, to make it complete. That ratification is accordingly given on the express condition, "that the private property and rights of all persons acquired under, founded on, or recognised by, the laws of either country, previous to the date hereof, be saved and confirmed to them, although they shall be found to fall within the other." The right of the lessor of the plaintiff, it is repeated, was acquired under, founded on, and recognised, by the laws of Virginia, and that right is not only saved, but confirmed, by a covenant or law of Pennsylvania. That a new warrant was not necessary, after the session, is proved by the proceedings on the Virginia location upon Racoon creek; and *there is no magic in the description of a patent, which may not be supplied by something equivalent; [*454
as, in the present case, by a solemn compact. The property of the island originally belonged to one or other of the states—one of them grants it to the lessor of the plaintiff, and the other confirms the grant—what form of conveyance can be more effectual and conclusive? Co. Litt. 295 *b* (1); Ibid. 301 *b*; Ibid. 302 *a*; 2 Dall. 98.

In this view of the subject, it is easy to dispose of other objections that the defendant's counsel have suggested: Thus, the act of limitations (2 Dall. Laws 282) relates only to Pennsylvania warrants, or improvement rights; whereas, the lessor of the plaintiff claims entirely under a Virginia warrant. Again, the reservation and exception of islands in the Ohio from applications for warrants and surveys, can only operate where the islands belong to Pennsylvania; they are reserved and excepted from applications,

under a particular section of the law, but not from applications founded on a previous lien; and there is a saving of the defendant's pre-emption right, which is virtually, and by reference to the proviso in his grant, a saving of the right of the lessor of the plaintiff.

With respect to the title of the defendant (though the lessor of the plaintiff must succeed upon the strength of his own title, and not by the weakness of his antagonist's), it may be permitted generally to observe, that it is founded on a grant made out of the usual course; that it is made subject to all previous rights; that the patent was taken out with express notice of the Virginia right: and that, under such circumstances, if the lessor of the plaintiff has a good title, the defendant's patent must be merely void.

III. But it remains to consider the right of the lessor of the plaintiff to be relieved in the present form of action: and it is surely extraordinary, after his suit has actually been dismissed in equity, because his remedy in Pennsylvania was at law, that he should now be told, that he must fail at law, because his remedy is in equity—doomed to be for ever suspended between the two jurisdictions, like Mahomet's coffin between heaven and earth! But the title of the lessor of the plaintiff is a legal title; and even if it were only an equitable title, the remedy by ejectment is the only one in Pennsylvania.(*a*)

The 34th section of the judicial act (1 U. S. Stat. 92) adopts the laws of
*455] the several states, as rules of decision in trials *at common law: Now, as in England, the laws are defined to be general customs, local customs, and acts of parliament (1 Bl. Com. 63); so, in Pennsylvania, the laws must be defined to be the common law, as modified by practice and acts of the general assembly. If, therefore, a plain, adequate and comp ete remedy can be had at law, according to the laws of Pennsylvania, the lessor of the plaintiff is not entitled to resort to a court of equity. Such a remedy can be had, to the extent of the present demand. A plaintiff may (consistently with the principles of law) frame his demand for the whole, or for a part, of his right: he may claim a portion of it, as possession of the estate, at law; and if he thinks it necessary, he may resort to equity for a conveyance, or an injunction, to fortify and secure his possession. The lessor of the plaintiff asserts a legal right of possession; and an action of ejectment is a possessory remedy. (3 Bl. Com. 205, 180; 1 Burr. 119.) It is immaterial, how minute his interest is, if it is a legal interest (Run. 9); and it may easily be shown that the title is a legal title in Pennsylvania, against the state, and against all claimers under the state. By the charter of Pennsylvania, the system of feudal tenures was recognised; and lands were held in socage, so that seisin was a technical principle, originally incorporated into the tenure of our estates; but what constitutes a seisin, is, perhaps, still as uncertain, as it was formerly thought to be by Lord Mansfield, who says in a general definition, that "seisin is a technical term, to denote the completion of that investiture, by which the tenant was admitted into the tenure; and without which, no freehold could be constituted or pass." (1 Burr. 60,

(*a*) It is true, that the cause was originally instituted on the equity side of the court, but owing to some objection on account of the citizenship of the parties, as well as to an opinion that a legal remedy was applicable to an equitable title in Pennsylvania, the bill was dismissed.

107.) To effectuate this seisin, shorter and easier modes, by deeds executed, acknowledged and recorded, were soon adopted in Pennsylvania, than feoffments at common law, or conveyances under the statute of uses. (1 Dall. Laws 111, § 85; Ibid. app'x, 27–8.) And though these modes alone are adopted by positive statutes, long usage has given the same force and effect to other evidences of title; as a warrant and survey; a contract to purchase lands, and payment or tender of the consideration; which give a legal estate, and produce all the consequences of a feoffment; namely, dower, tenancy by the curtesy, forfeiture, escheat, &c. 2 Dall. 98. But the title of the lessor of the plaintiff, though it sprung from the proclamation, and though it is fortified by the usage of Pennsylvania, will be found, on still higher ground, to be a legal title: it emanates from the legislature, and therefore, from the commonwealth; it is, emphatically, a law, and therefore, superior to any mere executive exemplification; it is a public covenant; it must be construed as a patent from the sovereign; and wherever *two constructions arise on any instrument of grant or confirmation, that which gives effect to it shall prevail. (9 Co. 131 *a*; 10 Ibid. 67 *b*; 9 Ibid. 27 *b*; 6 Ibid. 6 *a*. [*456

From this mode of granting, it is also to be remarked, a legal title only can be derived; for where a title of an equitable nature arises, it must be supported by an express or implied trust in the grantor; and in relation to a sovereign, or to a corporation, the strict rules of the common law will not allow either to stand in the predicament of a trustee (2 Bac. Abr. 11, tit. "Corporation," 5th edit.; Gilb. on Uses and Trusts, 5, 170). Founding the rights of the lessor of the plaintiff on legal principles, there is no pretence for considering the defendant as his trustee, under a patent afterwards obtained, and which is merely void. But words of grant used in the legislative act of a republican government, such as the compact, must always be construed to pass the legal estate, unless a trustee is expressly appointed.

The Chief Justice, on the last day of the term, delivered the opinion of the court as follows:

Ellsworth, Chief Justice.—It appears that William Douglass, for services rendered, acquired, under the king's proclamation of 1763, a right to 5000 acres of unappropriated land in America; which right he assigned to Charles Sims, the lessor of the plaintiff below. And although by the terms of the proclamation, the personal application of Douglass was requisite to obtain a land-warrant on the said right, yet the laws of Virginia, passed subsequently to her independence, dispensed with such personal application, and made a warrant issuable to the assignee, Sims, he being an inhabitant of that state, on the 3d of May 1779. A warrant he accordingly obtained, and the same duly located on Montour's Island, the land in question; which his warrant was more than sufficient to cover, and which, from its description as an island, was perfectly aparted and distinguished from all other land. By which means, Sims acquired to the said island a complete equitable title, and one which needed only a patent of confirmation to render it a complete legal title. A confirmation of this equitable title, as effectual as that of any patent could have been, was afterwards comprised in the compact between Virginia and Pennsylvania, and in the ratification of the same by the legislative act of the latter. The terms therein of "reserve and confirmation" of

the "rights" which had been previously acquired under Virginia, in the territory thereby relinquished to Pennsylvania, must, from the nature of the transaction, be expounded favorably for those rights, and so that titles, *457] before substantially good, should not, *after a change of jurisdiction, be defeated or questioned for formal defects.

It further appears, that Sims, since the said compact and ratification, has, without any *laches* that would prejudice his claim, obtained a legal survey of the said land, under Pennsylvania: In which state, payment, or, as in this case, consideration passed, and a survey, though unaccompanied by a patent, give a legal right of entry, which is sufficient in ejectment. Why they have been adjudged to give such right, whether from a defect of chancery powers or for other reasons of policy or justice, is not now material. The right once having become an established legal right, and having incorporated itself, as such, with property and tenures, it remains a legal right, notwithstanding any new distribution of judicial powers, and must be regarded by the common-law courts of the United States, in Pennsylvania, as a rule of decision.

The judgment of the circuit court affirmed.

Iredell, Justice.(*a*)—Though I concur with the other judges of the court, in affirming the judgment of the circuit court, yet, as I differ from them in the reasons for affirmance, I think it proper to state my opinion particularly. In order to do this with the greater distinctness, it is necessary that I should observe upon the nature of this title, according to my ideas of it, from its origin to what may be deemed its consummation, at least, for the purpose of maintaining this ejectment. My observations, therefore, will be under the following heads of inquiry:

1st. Whether it sufficiently appears, that William Douglass was entitled to a military right, such as it was, under the proclamation of 1763.

2d. Whether the right of Douglass, in case he was so entitled, was assignable, under the royal government, or since.

3d. Whether the lessor of the plaintiff in the ejectment, had a title, and if any, of what nature it was, under the laws of Virginia.

4th. Whether he had any title, subsequently to the compact, under the laws of Pennsylvania.

5th. Whether, if he had a title, it was such as was sufficient to maintain this ejectment.

1. *The first question is—Whether it sufficiently appears that *458] William Douglas was entitled to a military right, such as it was, under the proclamation of 1763?

Though the finding be not altogether so correct as it might have been, yet, I think, it may be fairly inferred, that William Douglass had all the requisites to entitle him to a military right under that proclamation, especially, as the jury have said, generally, that the king gave to him the right in question, by that proclamation, which could not have been, in fact, true, had any of the requisites been wanting, and though a general finding, inconsistent

(*a*) The Chief Justice observed, at the conclusion of the opinion of the court, that Judge Iredell (whose indisposition prevented his attendance) concurred in the result, but for reasons, in some respects, different from those which had been assigned. As I have since been favored with a copy of Judge Iredell's notes, I should think the report of the case imperfect, without publishing them.

with a particular one, cannot stand, yet I am of opinion, a particular finding, consistent with a general one, may.

2. The next question is—Whether the right of Douglas was assignable, under the royal goverment, or since?

The grant was general, to all who were the objects of it, and required only evidence of proper service, and the usual steps towards obtaining a grant under any of the then provinces. The royal faith was pledged, that in such a case, a grant should issue. It was immaterial, at that time, in what province the grant was obtained, as all belonged equally to the crown. The grant was for meritorious services, already performed, and therefore, it was an interest, though in some degree indefinite in its nature, sanctioned by every principle of moral obligation, and such as the party entitled might, on the most solemn principles of public justice, confidently demand. Upon a large scale, the crown was certainly a trustee for all those persons to whom its faith was pledged; and therefore, so far as no particular prerogative of the crown interfered, it was rational to consider it in the light of any other trust. It has been doubtful, whether the crown could in any case be a trustee, so as to be the object of any municipal decision, but the law could never presume (however the fact may be), that the crown would not faithfully perform any trust belonging to it. The only difference between that and a private trust, is, that the latter is clearly enforceable by a court of equity; the former, perhaps, must be left to the conscience of the crown itself. But this makes no difference in the nature of the interest. If this had been a private trust, it would, at least, have amounted to what, in equity, is called a possibility, and it has been long settled, that a possibility is assignable in equity, for a valuable consideration. I see no reason why that principle cannot apply here. The necessity of a personal application was undoubtedly indispensable, under the royal government; but the two things are, in my opinion, perfectly compatible. Suppose, such an assignment *had been made, a personal application was still necessary, and very [*459
probably, for the judicious reasons signed at the bar; but after the grant, obtained on such personal application, if the interest had been fairly assigned before, the assignee would have been entitled to a conveyance. If none had been made, which would have been an acknowledgment of the fairness of the transaction, chancery only could have been applied to, to compel a conveyance. The assignor, or his heir, would then have had to answer on oath, and an examination of all particulars might have been made, after which, if the court had entertained the least doubt of the fairness of the transaction, they would not have ordered a conveyance. This would be a sufficient guard against fraud. But the assignment, previous to an actual grant, might have been necessary, even to save an officer from starving. How hard would have been his condition, if he could have made no immediate use of a bounty of the crown, expressly intended as a provision for him, but which circumstances might prevent his receiving for years?

Thus the case stood, as I conceive, under the royal government. By the revolution, the circumstances of it were, in some degree, changed, but not so as, in my opinion, materially to alter the nature of the title in this respect. The duty of the crown, substantially, devolved on the several states, who became possessed of the territory formerly belonging wholly to the crown; but as it might be an unreasonable thing, to burden any one state with the

whole of these provisions, some modification of the title might be expected, so as prevent this injury. This, however, does not seem to afford any reason why it should not remain an assignable interest, subject to the restriction I mentioned before, in case a personal application was still insisted upon, which it was undoubtedly optional in the states to require or not. I, therefore, am of opinion, that the interest still remained assignable, subject only to such regulations as each state might think proper to require.

3. The next subject of inquiry is, whether the lessor of the plaintiff in the ejectment had a title, and if any, of what nature it was, under the laws of Virginia?

I confess, I have had great difficulty in construing the two Virginia acts of May and October 1779, and if the latter act had admitted of such a construction, that I could, without absurdity or manifest injustice, have confined the words "or assigns" in that act, to mean only the heirs or assigns of those specially named in the former, I should, undoubtedly, have preferred that construction; because, in the last act of May 1779, the Virginia legis-
*460] lature expressly designated the objects, for whom they *meant to provide; and whatever I might think of that proviso (though I am far from thinking it an unjust one), I should deem it unwarranted, to extend it to any others, by constrruction of a subsequent law, without plain words of extension, unless there was an irresistible implication to authorize it. Such an implication, I think, exists here. The first act specifies the various objects of its provision: 1st. Those who had obtained a warrant from the governor of Virginia, under the former government. 2d. Where the service was performed by an inhabitant of Virginia. 3d. Where the service was performed in some regiment or corps actually raised in Virginia. The act of October 1779, introduces a new provision for some persons or other, viz., a residence in Virginia, at the passing of the former act (the 3d of May 1779), but they expressly except from the operation of this provision, those who had obtained warrants under the former government, and those who had performed military service in some regiment or corps actually raised in Virginia, and had served under the circumstances particularly described in the act. They also except persons who had obtained a title under any former warrant. They do not, however, except in any manner one description of persons, who were provided for in the former law, viz., persons who were inhabitants of Virginia, and had performed military service in some other than a Virginia regiment or corps, unless they or some persons claiming under them had previously obtained a warrant for it. But the act affords no indication from which we have a right to infer, that the legislature meant to repeal any of the provisions in the former law; and if they did not, then, upon the construction of the counsel for the plaintiff in error, the provision, as to the persons I have last mentioned, in plain English, would stand thus: "We are willing to reward the services of any of the inhabitants of our own particular state, when under the royal government, by giving full effect to the royal proclamation, by which the faith of the former government was pledged, provided the person, his heirs or assigns, actually resided in Virginia, on the 3d of May 1779. But if such person moved out of this state, before that day, or died and left heirs or assigns, who either never resided in Virginia, or did not actually reside there, on the auspicious 3d of May 1779, he, she or they, shall receive nothing for such service." Such a provision would,

undoubtedly, be highly ridiculous, for the grant under the proclamation was for services actually past, services of a highly meritorious nature, the risk of life, and sacrifice of private ease, by entering into the army, at a critical period, for the defence of their country; and to such persons certainly no additional merit could attach by a *residence in Virginia on the 3d of May 1779. I, therefore, am compelled, upon principles of respect [*461 to the legislature, to abandon this construction; and then there remains no other, but to suppose, that they meant to provide, by implication, for a new description of persons (though under negative, informal and incorrect words), viz., persons who had fairly obtained titles under any military grant, though not of the special description before enumerated, if such person, his heirs or assigns, actually resided in Virginia, on the 3d of May 1779. Willing, in short, to confirm all fair purchases made by permanent, not occasional, residents in Virginia (of which the residence at that time should be a test), when they might innocently have supposed, either that Virginia was bound to provide for all military rights presented, or would be disposed, upon a large and liberal scale, to do so, and had thus laid out their money from a kind of definite confidence in the future conduct of their own legislature: And the word "hereafter," that has been commented upon (in the 3d section of the act of the 3d of May 1779), and the express saving in the act of October 1779, of all titles under warrants formerly issued, independent of the saving of titles under warrants from the former government, seem strongly to favor this construction. By construing the act in this manner, though some difficulties yet remain, they are, in my opinion, fewer than upon the other construction; and as they are more consistent with equity, justice and common sense, I deem it my duty as a judge, to support the construction which will tolerate these, in preference to one which is attended with greater difficulties, and accompanied with absurdity and injustice: especially, as that construction will make both acts consistent in their main objects, and the other (without any indication from the apparent meaning of the legislature) would amount to an express repeal of an important provision; and nearly, in effect, revoke a grant actually made, which, if within the competency of a legislature, is undoubtedly one of the most odious acts of its power, and which nothing but absolute necessity should force us to say they intended.

The title, therefore, so far, under the laws of Virginia, I think, was a vested right. But it seems to me now material to inquire, whether the title under the laws of Virginia was complete or incomplete. It is admitted, that a patent was regularly necessary to complete the title, even had a survey been made, and it is, at least, doubtful, whether a warrant and survey would have given any legal right of possession at all. But in this case, it is contended, a survey was not necessary, for two reasons: 1. Because the location of an island was certain, and the whole island would not exceed the quantity he was entitled to. *2. Because no money was to have been [*462 paid upon it. These reasons do not satisfy me, that a survey was unnecessary. A survey, I consider, in all instances, to be highly useful, in order that it may be officially ascertained, and officially known, not only what land in particular is taken up, but also its exact quantity, so far as it is material to specify it, for the information of the public, from whom the grant is to be obtained, as well as that of any individual who may have in-

terfering claims or pretensions. The private knowledge of a few particular persons, who may know the spot thoroughly, is by no means equal to the authentic information which an actual survey, a regular report, and a correct record, can convey; and the instances are so very few, where exact information can otherwise be obtained, that there is no occasion, for the sake of those, to make an exception. It would do no good, and might lead to endless difficulties. I think, therefore, the necessity of a survey ought to be deemed general and indispensable, and there being none in this case, previous to the compact made with Pennsylvania, the title so far was incomplete. But I admit, had a survey been unnecessary, and had such steps been taken in Virginia, as would, of course, have entitled the defendant in error to a patent, then the compact and the act of confirmation, in consequence, might have been deemed a complete and perfect assurance of it, and as effectual as if a patent had been actually granted, before the compact, under the laws of Virginia.

With respect to the payment of 40*l.*, it is clear to me, that as that was meant as full purchase-money for land, to which the person who entered had no right before, it never can apply to a case where the grant was for service already performed, unless the legislature had wanted both common sense and common honesty. I have not hesitated a moment to reject that construction, the words in no manner requiring it, and easily admitting of the construction given by the counsel for the defendant in error.

The finding in this case, I think, sufficiently establishes a relinquishment of the Indian title, previous to the year 1779, so as to authorize an entry and location in the river Ohio, at the times the entry and location on behalf of the defendant in error took place, without a violation of any duty either to a particular state or to the United States.

4. I come now to the next head of inquiry—Whether the defendant in error had any title, subsequently to the compact, under the laws of Pennsylvania?

I do not consider that this compact, and the act in confirmation of it, immediately converted all inchoate and imperfect rights under Virginia, *463] into absolute and perfect ones, under *Pennsylvania, but that the intention was, such as the title was under Virginia, it should substantially be under Pennsylvania, in reference to any younger right that might have been obtained in any manner, under Pennsylvania. If the manner of proceeding on both sides was the same, then the Virginia claimant had nothing to do, but to proceed under the laws of the latter, as if his original title had been obtained from Pennsylvania. If the manner of proceeding in both states had been different, then I should have supposed, it would have been proper for Pennsylvania to pass a new law, adequate to this new case, that the faith of the state might have been duly observed. But I conceive under both states a survey was indispensable, the same reasons which I have urged on this subject, in considering the case of the Virginia right, applying equally to both states. The survey that was accordingly had, under the state of Pennsylvania, I think, was a valid one, notwithstanding the objection as to the bed of the river, for as the law is general (such at least it appears to me), that where two countries, or two counties, border on a navigable river, the middle of the bed of the river is the boundary line,

[see nothing in this case to prove it an exception, and consequently, the survey appears to have been made by the proper authority.

With regard to the objection, that in the 9th finding, it is stated, that the governor of Virginia transmitted, in 1784, a just and true list of entries, made under the authority of Virginia, in the disputed territory, in which list the island in question is not comprehended, and therefore, the verdict impliedly excludes it, I answer: 1st. If the governor had or had not transmitted a perfect list, this could not have deprived any party really entitled of showing a title which had been omitted, either designedly (though that could not be presumed, but I state it as the strongest case) or inadvertently, on the part of the governor, where, at least, an adverse claimant under Pennsylvania was not prejudiced by such omission, but had early and sufficient notice of the prior right, before he had completed his own. 2d. It may be a true list, so far as it goes, but not perfect, for want of a complete knowledge of all particulars, some of which might have been omitted to be ascertained in the usual and proper manner. 3d. The implication in this case cannot have the effect contended for, because the 10th finding refers to that list, as including the entry and location of the defendant in error, and the 4th finding declares, that two deputy-surveyors under the surveyor-general of Pennsylvania did, in 1785, receive from the surveyor-general's office, a list of entries made under the authority of Virginia, which list included the entry for the land in the declaration mentioned.

The survey being, in my opinion, good, though it was subsequent [*464
*to the grant to the plaintiff in error, shall be deemed to relate to the time of taking out the warrant, not only in consequence of the compact which secured all prior rights of Virginia, and the act in confirmation of it, but also on account of the express saving or all prior rights in the grant to the plaintiff in error, by the commonwealth of Pennsylvania, who seem to have guarded with solicitude against any supposed breach of public faith, and therefore, it is immaterial to inquire, what would have been the case, had Pennsylvania expressly violated it. But where a legislature has constitutional authority to pass any law, I can conceive a manifest distinction between right and power ; between the obligation on the part of the legislature, upon principles of morality, to give effect to a solemn compact, and their, in fact, making a law in violation of it, which it is the duty of the courts to obey. The legislature is restricted, indeed, in this particular by the constitution of the United States ; and a treaty of the United States is, by its own authority, *de facto*, as well as morally, binding, while it continues in force, because it shall be the supreme law of the land. But until this constitution did pass, I should doubt very much, whether, if the legislature had actually violated the compact, the court could here set up the compact against the law, upon principles which I have stated at large, in my argument on the subject of the British debts, and to which I beg leave to refer, as it is now publishing in Mr. Dallas's reports.(*a*) I say this only incidentally, on account of observations on this subject at the bar, in which I by no means acquiesce.

5. The warrant and survey being thus by me deemed complete and unexceptionable, under the commonwealth of Pennsylvania, the only remaining

(*a*) *Ante*, p. 256.

inquiry is—Whether if the defendant in error had a title, it was such as was sufficient to maintain this ejectment?

Two objections are stated under this head. 1. That the title, such as it is, is only an equitable, not a legal one, and therefore, will not maintain an ejectment. 2. That it is not brought within proper time, but is barred by the statute of limitations.

As to the first objection, did this title stand merely as an equitable one, I should strongly incline against it, if not deem it altogether insufficient. It is of infinite moment, in my opinion, that principles of law and equity should not be confounded, otherwise, inextricable confusion will arise; neither will be properly understood; and instead of both being administered with useful guards, which the policy of each system has devised against abuse, an heterogeneous mass of principles, not intended to assort with each other, will be
*465] blended together, and the substance *of justice will soon follow the forms calculated to secure it. I totally reject all the modern cases introduced by Lord MANSFIELD, and supported by some other judges, but lately, wisely, as I conceive, discountenanced by the present court of king's bench, of taking notice of a *cestui que trust* at all, in any other right than as holding in fact possession, with the concurrence of the legal trustee. So far, consistent with legal principles, a court may go, but not, as I conceive, one step farther, and that it violates the most important principles of the common law, to consider a *cestui que trust* as having an iota of legal right against the trustee himself. Whatever excuse a court may have for doing this, when the want of a court of equity may urge them to procure substantial justice, by a deviation from legal strictness as to form, I should hesitate long, before I should deem myself warranted in assenting to such a practice, when both powers are vested in the very same court, but each has different modes of proceeding prescribed to it. But I think we are relieved from any dilemma of this kind, by strong and unequivocal declarations of highly respectable gentlemen of long experience in this state, that a warrant and survey, where no money remained to be paid, and a patent was only to ascertain that all previous requisites had been complied with, has been uniformly deemed a legal title, as opposed to an equitable one; and has all the consequences as such, even as to dower, which affords a strong presumption in favor of the supported legal title, for it has been so long held (though I think erroneously at first), that there should be no dower of a trust estate, that, perhaps, no judge would be warranted in a court of chancery in allowing it. Whether this opinion was originally right or not, yet having been the ground of many titles, it would be improper in the court to shake it. I am not certain also, but it may properly be considered, that the proprietor under a warrant and survey (according to long usage) is at least in the nature of a tenant at will to the public, and as such has a right of possession against all others, except some person having a better right, claiming under the public, which better right does not, for the reasons I have given, exist in this case, in the plaintiff in error. This point, however, I merely intimate, it not being necessary to deliver an opinion upon it.

Another circumstance has occurred to me, which I suggest with diffidence, as it was not spoken to at the bar, that though the compact and confirming act did not render a survey unnecessary, yet when a survey was made, it being a right derived from compact alone, the title ought to stand

on that ground alone, and not depend on a patent, which imports a grant by the *state, at its own discretion, of property of its own, and seems to imply that the state is the sole agent in the conveyance of the title. [*466

With respect to the objection from the statute of limitations, it is sufficient to say, that that act, in my mind, clearly contemplates other objects, and neither in its letter or spirit, is to be applied to this new and peculiar case; but admitting that it did, the facts in this case do not come within the provisions of it, there appearing to have been no such *laches* as the act contemplated to prevent.

Judgment affirmed.

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