

CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

JANUARY TERM, 1837.

*LESSEE of JOSEPH MARLETT, Plaintiff in error, *v.* JOHN SILK and JOHN McDONALD.

State decisions.

A tract of land, situated in that part of the state of Pennsylvania, which, by the compact with the state of Virginia, of 1780, was acknowledged to be within the former state, was held under the provisions of an act of assembly of Virginia, passed in 1779, by which actual *bonâ fide* settlers, prior to 1778, were declared to be entitled to the land on which the settlement was made, not exceeding four hundred acres; the settlement was made in 1772. On this tract, in the year 1786, a survey was made, and returned into the land-office of Pennsylvania, and a patent was granted for the same; the title set up by the defendants in the ejectment was derived from two land-warrants from the land-office of Pennsylvania, dated in 1773, under which surveys were made in 1778, and on which patents were issued on the 9th of March 1782. The compact confirms private property and rights existing previous to its date, under and founded on, and recognised by, the laws of either state, falling within the other; preference being given to the elder or prior right; subject to the payment of the purchase-money required by the laws of the state in which they might be, for such lands. *Held*, that the title derived under the Virginia law of 1779, and afterwards perfected by the patent from Pennsylvania, in 1788, was a valid title and superior to that asserted under the warrants of 1773, and the patent founded on them, and issued in 1782.

*The title derived under the act of the legislature of Virginia, of 1779, commenced in 1772, [*2 when the settlement was made; and therefore, stands as a right, prior in its commencement to that originating under the warrant of 1773. The question of the title between the contending parties is not to be decided by the laws or decisions of either Pennsylvania or Virginia, but by the compact of 1780.

The principles on which the case of *Jackson v. Chew*, 12 Wheat. 163, are decided, are not affected by the decisions of the court in this case. In the case of *Jackson v. Chew*, the court said, that it adopted the state decisions, when applicable to the title of lands; that was in a case the decision of which depended on the laws of the state, and on their construction by the tribunals of the state. In the case at bar, the question arises under, and is to be decided by, a compact between two states, where the rule of decision is not to be collected from the decisions of either state, but is one of an international character.

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ERROR to the District Court for the Western District of Pennsylvania. The plaintiff in error, a citizen of the state of Ohio, instituted an action of ejectment against the defendants, at October term 1831, to recover a tract of land situated in Allegheny county, Pennsylvania; and the case was tried before the district court for the western district of Pennsylvania, in October 1835. A verdict and judgment, under the charge of the court, were rendered in favor of the defendants, and the plaintiff having taken exceptions to the charge, prosecuted this writ of error.

The case, as stated in the opinion of this court, was as follows:—Thomas Watson, under whom the plaintiff in error claimed, on the 25th of April 1780, obtained from certain commissioners of Virginia, a certificate, entitling him to 400 acres of land, by virtue of an act of assembly of Virginia, passed in May 1779; the fourth section of which, after reciting that great numbers of people had settled in the country upon the western waters, upon waste and unappropriated land, for which they had been hitherto prevented from suing out patents, or obtaining legal titles, &c., enacted, “that all persons who, at any time before the first day of January, in the year 1778, have really and *bonâ fide* settled themselves, or their families, or at his, or her, or their charge, have settled others, upon any waste or unappropriated lands on the said western waters, to which no other person hath any legal right or claim, shall be allowed, for every family 400 acres of land, or such smaller quantity as the party chooses to include in such settlement.” This certificate
*3] was granted in right of a *settlement which had been made by Watson, in the year 1772. This evidence of right under Virginia, was subsequently transferred to the land office of Pennsylvania (the land having, under a compact between that state and Virginia, been ascertained to be within the limits of Pennsylvania), and on the first of November 1786, a survey of his claim was made and returned to the land-office of that state, and a patent issued thereon by that state, in the year 1791, including the settlement made in 1772, and including the land in controversy. The defendants claimed under Edward Hand, who, by virtue of two land-warrants, granted by Pennsylvania, one for 300 acres, dated 24th November 1773, the other, for the same quantity, dated 27th November 1773, caused surveys to be made on both, on the 21st January 1778, and on the 9th of March 1782, obtained patents on both surveys, embracing the land in controversy.

Both Pennsylvania and Virginia having claimed the territory, of which the land in controversy was a part, as being within their limits, the dispute was finally adjusted by a compact made between them, which was ratified by Virginia on the 23d of June 1780, with certain conditions annexed; and absolutely, by Pennsylvania, on the 23d of September 1780, with an acceptance of the conditions annexed by Virginia. The compact declared, “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, shall be secured and confirmed to them, although they should be found to fall within the other; and that in 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 said states, in whose boundary the same 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.”

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The case was presented to the court, on printed arguments, by *Forward* and *Fetterman*, for the plaintiff in error; and by *Ross*, for the defendants.

It was contended for the *plaintiff*, that, in the construction given, the district court had erred. The rights of the parties to this cause will turn upon the construction that may be given to the compact for the settlement of *boundaries, entered into between Virginia and Pennsylvania, [*4 in the year 1780, and finally ratified in 1784. 2 Smith's Laws 261; *Sims's Lessee v. Irvine*, 3 Dall. 426. "It was a condition of the compact, 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 secured and confirmed to them, although they should be found to fall within the other, and that in 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 states 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."

Thomas Watson, in 1772, entered, with his family, on a tract of vacant land, of which the land in dispute is a part; he continued to reside on and cultivate the tract, until his death in 1806; he sold, from time to time, parcels of this land; and in the year 1790, transferred and conveyed part of the tract, including his mansion-house and improvements. At the same time, he removed to the piece now in dispute, where he built a house, commenced a new clearing, and resided until his death. His heirs, and those claiming under them, continued the possession, until expelled by the sheriff, under a writ *habere facias possessionem*, issued in 1830, pursuant to a judgment obtained in the case of *Brien v. Elliot* (2 P. & W. 49). Whether Watson entered on the lands originally, as a Virginia settler, did not appear. But the land commissioners of that state being in his neighborhood, he appeared before them, on the 25th of April 1780, and caused his claim to be entered agreeable to the requisition of an act of assembly of Virginia, passed in May 1779, § 8, 10. (Henning's Statutes at Large, p. 42-3, 45-6.) After the ratification of the compact, in 1784, his Virginia entry was transferred to the land-office of Pennsylvania; and on the first of November 1786, a survey of his claim was made, returned and accepted in the land-office, and a patent issued in 1791. The amount of purchase-money paid by Watson to the state of Pennsylvania, was the same that he would have paid to the state of Virginia, had his title been completed in that state.

The defendant gave in evidence three Virginia entries, dated in February 1780. Upon these entries, no surveys had ever been made, nor had the inequity, *which they are alleged to have conferred, been [*5 prosecuted in any way by the owners or holders thereof. It was not shown, that those entries described or called for the land in dispute; nor did it appear in evidence, that the improvement, which, by the law of Virginia, was made the basis of a Virginia entry, had ever been made. Having no legal foundation, and being moreover abandoned, the defendant's Virginia entries are regarded as mere nullities, and undeserving of further notice.

The defendant's title rest upon warrants issued by the land-office of

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Pennsylvania, on the 24th of November 1773, surveyed in January 1778, and patented the 9th of March 1782; and the important question is this, whether, under the compact between Pennsylvania and Virginia, this title is to be preferred to that of Watson, which, although perfected by a patent from the government of Pennsylvania, was, in its inceptive state, recognised by the state of Virginia. It is admitted by the court below, that if Watson had waived his Virginia entry, and prosecuted his earlier settlement right under Pennsylvania, there could be no doubt of the plaintiff's right to recover. "Watson had it in his power to obtain a warrant from Pennsylvania, and to charge himself with interest from the date of his settlement; if he had done so, his survey, made under such warrant, would have given him the preference; but having his election, he chose to resort to a Virginia entry in 1780, thereby asserting a different jurisdiction, &c." A like concession is found in the opinion of the chief justice of the supreme court of Pennsylvania. "As an improver under Pennsylvania, Watson might have appropriated the land in dispute, by a survey, in a reasonable time." This improvement was begun in the year 1760 (1772), "but as a Pennsylvania settler, he had no survey at all." (2 P. & W. 60.) It is proper to remark here, that in Pennsylvania, a right founded on a prior actual settlement which has not been abandoned, is just as valid in law as a right vested by a prior warrant or patent. "Title by settlement and improvement, is now as well established as any species of title in Pennsylvania; and very often has been preferred to warrant, survey and patent." *Lessee of Bonnet v. Devebaugh*, 3 Binn. 175; *Nicholls v. Lafferty*, 3 Yeates 272; *Lessee of Elliot v. Bonnet*, 3 Ibid. 287.

It is not even necessary to the validity of a settlement right, so long as the settler remains in actual possession, that his boundaries be defined by an official survey; and if encroached upon, or expelled from his possession, *6] he may recover in ejectment. *Davis v. *Keefer*, 4 Binn. 161, and *Gilday v. Watson*, 2 S. & R. 410. The only difficulty is, that without a survey, the claim of the settler is so indefinite, that an action cannot be supported, by reason of the uncertainty of the land to be recovered. But in the first place, it cannot be denied, that the land on which a man has built a house, and that also which has been cultivated and inclosed by him, may be ascertained with absolute certainty. Neither do we think it can be denied, that in the case now under consideration, the claim of the settler may be reduced to certainty, because it is bounded by the lines of adjoining surveys. So likewise may a claim by a settlement be precisely ascertained, when the settler has defined his limits by an unofficial survey, marked on the ground, and made known to the neighborhood: *TILGHMAN*, Ch. J., in *Luck v. Duff*, 6 S. & R. 191. The holder of a later warrant is not permitted to encroach upon a prior settler, and cut off land adjacent to his improvement, under the pretext that there is surplus land, and that the settler can fill his claim in another direction. Such encroachment was held unlawful, although made in 1814, upon a settlement which commenced in 1775, and upon which no legal survey had ever been made: *Blair v. McKee*, 6 S. & R. 193; and the same principle is recognised in *Creek v. Moon*, 7 Ibid. 330, 335.

These cases show how settlement-rights have been appreciated in Pennsylvania. They demonstrate not only that Watson, by waiving his Virginia

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entry, and obtaining a warrant and patent under Pennsylvania, might have held the lands against the patents of the defendants, but that by waiving his Virginia entry, he might have held it under his actual settlement alone. Had a controversy arisen in a Pennsylvania court, between Watson and Hand, prior to the ratification of the compact in 1784, Watson's settlement-right would have been adjudged, without hesitation, to be valid; and Hand's title would have been treated as a nullity. The fact, if true, that Watson originally settled under what he supposed to be the rightful jurisdiction of Virginia, or that he had acknowledged her jurisdiction, by appearing before her land-commissioners, and procuring an entry of his land, would not have impaired, or in the least affected the merits of his settlement-title. Pennsylvania always favored and encouraged actual settlements, and they were sanctioned and held sacred, without any inquiry as to the opinion which the settlers might have entertained upon the abstruse and doubtful question *of state jurisdiction. Had Pennsylvania receded from the contest, [*7 and yielded to Virginia, without any compact, the territory which included the land in dispute, Watson's title would have been unquestionable. For although it may be true, that before the passage of the Virginia act of May 1779, the land in dispute might have been entered and patented under that state, by any person, notwithstanding a prior settlement by another; and although the same act of assembly of 1779 may "apply only to controversies between mere settlers;" yet the fourth section of that act enacts, "that all persons who, at any time before the first day of January 1778, have really and *bonâ fide* settled themselves and their families upon any waste lands on the said western waters, to which no other person hath any legal right, a claim shall be allowed for every family so settled, of 400 acres of land:" and as Watson had really and *bonâ fide* settled himself, with his family, on the lands in dispute, in 1772; was residing on it as a *bonâ fide* settler, in January 1778, and May 1779, he was, therefore, entitled, as a settler, to the protection of the act, until a superior title by settlement, warrant or patent, under Virginia, should appear against him. No such superior title has been shown to have existed in General Hand; and as against him, Watson's title, in a Virginia court, would have been valid and undeniable. How then does it happen, that this title, which in the absence of the compact would have prevailed, without difficulty, in the courts of either state, is, under and by the compact, rendered worthless? The reason assigned by the court below for this strange result is, that Watson, instead of obtaining a warrant from Pennsylvania, has lost his preference, by resorting to his Virginia entry, and thereby asserting a different jurisdiction.

Had the compact been less careful in saving and preserving the rights of property originating under the respective governments, than we find it to be; had the claimants under Virginia been thrown upon the courtesy or compassion of Pennsylvania, without a guarantee or stipulation in their behalf; it might be very properly urged, that a party who persisted in holding on to his bad title, because it was the cheapest, should not have the benefit of a good one, which he had thereby repudiated. But the compact is not silent on the subject of Virginia claimants. Their rights are anxiously guarded by clauses which would seem to exclude the possibility of their being either postponed or frittered away by any effort of construction. [*8

"The private property and rights of all persons acquired under or *re-

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cognised by the laws of either country, are saved and confirmed to them, although they should fall within the other; and preference shall be given to the elder or prior right, whichever of the said states the same shall have been acquired under, such person paying the same purchase-money which would have been due to the state under which they claimed the right." The reasoning of the court below is repugnant, not only to the sense and spirit of the above provision in the compact, but is flatly opposed to its words. If Watson could not, without disadvantage or peril, obtain a patent upon his settlement and Virginia entry, on paying the price originally due to Virginia; then the stipulation which proposed to set forth the terms upon which all his rights should be saved, was a mere decoy or trap. The injustice of this exposition is not limited to settlers under Virginia; it would be equally fatal to the claim founded upon warrants and surveys under that state. The right to perfect such title by a patent from Pennsylvania, on payment of the Virginia price of the land, if not already paid, rests upon a footing neither broader nor more safe, than that of the settler with a Virginia entry. The rights of both are secured by the same words; and if the non-payment of the Pennsylvania price of the land, with interest from the origin of the title, is a fatal delinquency in the one case, it must be equally so in the other; and the consequence must necessarily be, that the holder of a Virginia title, of any description, which has been completed by a patent from Pennsylvania, on paying the same purchase or consideration money, which would have been due from him to Virginia, must fail, in a conflict with a Pennsylvania title; although the Pennsylvania title be not the elder or prior right. These considerations show that the construction given to the compact, by the court below, is hostile to its terms; and would be, if carried out in practice, disreputable to Pennsylvania.

The titles of Watson and Hand constituted one of the subjects of controversy, in the case of *Brien v. Elliot*, 2 P. & W. 49. In that case, the court was equally divided; and the opinion which appears in the printed report would not, aside of its intrinsic merits, be entitled to any weight, in an inferior court of the state in which it was pronounced; much less will it be regarded here as conveying the views of the supreme court of Pennsylvania upon the question under consideration, as, under the law of Pennsylvania, one verdict and judgment are not conclusive; and it is perhaps

*9] due *to the learned chief justice, to remark, in conclusion, that his opinion may have been influenced by an unfortunate misconception of the facts of the case. He supposed the title of Hand to have originated in a location bearing date the 3d April 1768, three years *before* the settlement of Watson. But the commencement of Hand's title was the warrant of 1773, above referred to. No location was given in evidence by either party, applicable to this land. But even if it were so regarded, the construction given by that court, to the compact with Virginia, although regarded with all proper deference, would not be adopted by this court, as a matter of course. The possibility, if not the certainty, of a different and opposite construction prevailing in the courts of Virginia, makes it both proper and necessary, that the true meaning of the compact should be sought for and declared by this court, unfettered by the opinions of others. It is found, in its terms, to recognise and save every description of right. The high contracting parties designed that the benefits secured by it to the

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claimants under both governments, should be equal and reciprocal; and that their titles should have, respectively, all the advantage and efficacy that could be derived under the laws of either. This is so plain, as never to have been questioned or doubted, in any case arising under the compact. In the case of *Brien v. Elliot*, 2 P. & W. 60-61, it is premised, as the basis of the argument of Chief Justice GIBSON, an argument which conducted him to a conclusion directly opposite to the premises from which it was drawn. His language is as follows: "Whatever may have been the case, originally, the titles of both 'states' were, as regards the question of priority, put, by the compact, exactly on a footing, and are, by a fair construction, to be treated as if they had always been so. Unless they were considered to have been, in relation to each other, valid co-existent rights from the beginning, as far as regards jurisdiction, how could there be any comparison as to dates?"

The very basis of the compact is an admission that the jurisdiction shall be taken to have been in common, and that claimants under the one state shall be entitled to the same protection against claimants under the other, "that they would be entitled to between themselves." Upon this construction of the compact, it would seem necessarily to follow, that Watson, in a contest with Hand, who claimed under Pennsylvania warrants, would be entitled to all the advantages of a Pennsylvania settler, and must, of course, prevail. But this natural inference was rejected by the learned chief justice; *and instead of allowing to Watson's improvement the merit to which, under his own proposition, it was entitled, he treats it as a [*10 mere Virginia settlement, giving no color of title till 1779; and then, by transmitting Hand's Pennsylvania warrants into Virginia warrants, he discovers, that they are the "elder or prior title." With all possible respect for the learned chief justice, we must be allowed to say, that in this instance, the use made of his own construction of the compact is most inapt and injurious. It is not true, that as against Pennsylvania warrants, Watson had no color of title, prior to 1779; as against those warrants, his title under the laws of Virginia, was valid from the date of his settlement. But the learned judge supposed, that by the compact, Hand's Pennsylvania warrants were converted into Virginia warrants; and that the rule applied in the case of *Jones v. Williams*, 1 Wash. 231, which was a conflict between Virginia claimants, unaffected by the compact, was decisive of the present case. We contend, however, that if, under the compact, a Pennsylvania warrant is clothed with the merit and efficacy of a Virginia warrant, a Virginia settlement is also invested with all the attributes and advantages of a Pennsylvania settlement. This is not only the clear import of the compact, but it is adopted by the learned chief justice himself; and it is only by denying to his own rule, the reciprocity secured by the compact, and dictated by every principle of reason and equity, that Watson's title can be rendered doubtful.

The learned chief justice says, that Virginia "having recognised the grants of another state as being equally valid as her own, it is fair to say, she recognised them as being attended with all the incidents of her own, against which, it appears by her own court, the doctrine of priority by relation never prevailed." This reasoning of the learned chief justice may be very pertinent and true, but if it be so, then it must follow, that Pennsyl

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vania also having recognised the rights of all persons acquired under, founded on, or recognised by, the laws of Virginia, as being equally valid as her own; it is fair to say, she recognised them as being attended with all the incidents of her own: consequently, that Watson's settlement is, in the compact, recognised by her, as equally valid as a Pennsylvania settlement. This is plain reasoning, and a fair exposition of the compact. The error of the learned judge is in applying it to the claims originating under Pennsylvania, while he denies its application to claims originating under Virginia.

*[Keeping in view the application of the compact, as made by the
*11] learned judge, to the case of a Pennsylvania warrant in conflict with a Virginia settlement, it may be inquired, what would be the fate of a Virginia warrant, dated in 1773, in conflict with a Pennsylvania settlement originating in 1772? The reasoning of the learned judge requires the postponement of the Virginia title in this case also; and thus, while a Pennsylvania warrant is made to prevail against a prior Virginia settlement, a Pennsylvania settlement will prevail against a Virginia warrant. Further, it has been shown, that such settlement is, by the laws of Pennsylvania, a perfectly valid title, from its commencement, and cannot be overreached or affected by a later warrant, and survey and patent. Such being the case, the argument of the learned judge would give to a settler under Pennsylvania, who may have entered in that character, upon Watson's tract, in 1778, an older and better title than Watson's; and had such settler been removed by an action of ejectment, at the suit of Watson, *before* the compact, he (like a Pennsylvania warrantee or patentee, removed in the same manner) might, *after* the compact, have re-entered upon Watson and turned him out by action of ejectment. Proving thereby, that the law and the rights of the parties were one way *before* the compact, and another way *after* the compact. The learned chief justice appears to have foreseen this result of his reasoning, and he has accordingly provided for it, by asserting (2 P. & W. 61), that "the power of the two states to regulate questions of title to the soil, even at the expense of rights previously vested under either, is not now to be questioned; the compact is necessarily founded on an assumption of it. Here was no constitutional limitation on either side, and the parties, acting in the capacity of sovereigns, were fettered by no rule but their sense of expediency and justice. The consideration was the compromise of an international dispute; and the individuals whose titles were jeopardised, had no right to call on the state under which they held, to assert their rights to the soil." This is dealing very plainly with the compact, and with titles claiming its protection. The fact that Watson had a vested right, prior to the date of the compact, which might have been maintained, under either government, against the warrants and surveys of Hand, has been clearly demonstrated; and the fact, that by the judgment of the supreme court of Pennsylvania, the compact, which expressly guaranteed his right, has been made the instrument of its destruction, is equally certain.

*12] A latent intention which the compact expressly *repels, by the declaration of a contrary intention, is finally imputed to it; and as Virginia had the power of annihilating the vested rights of claimants to whom her faith was pledged, it is insinuated, that she has actually done it. If such be not the meaning of the learned judge, then his language is inapplicable

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and out of place. We insist, that this implied imputation upon the faith and honor of Virginia, rests on nothing better than mere assumption ; that it is disclaimed by her, in express terms, and repudiated by the confirming act of Pennsylvania, cited by the learned judge, in support of his opinion referred to. "Although the conditions annexed by the legislature of Virginia to the ratification of the boundary line agreed to by the commissioners of Pennsylvania, Virginia and Maryland, may seem to countenance some unwarrantable claim which may be made under Virginia, in consequence of pretended purchases or settlements pending the controversy ; yet this state does agree to the condition proposed by the state of Virginia," &c. *Sims's Lessee v. Irvine*, 3 Dall. 426. Such was the understanding of the legislature of Pennsylvania ; and like every other document emanating from the government of either state, respecting their controversy about limits, their desire to save and protect every description of private right, is a fact beyond cavil ; and when it is recollected, that neither state proposed to compromise or touch any rights of soil previously vested in individuals ; that the controversy was carefully restricted to the adjustment of boundaries, and that it terminated in an explicit, recorded disclaimer of any purpose to unsettle or jeopard private rights ; a construction of the compact which displaces a pre-existing valid title, by one that is proved to have been comparatively worthless, is a violation of its terms, and a palpable breach of the public faith.

The learned chief justice remarks (2 P. & W. 62), that the confirming act of Pennsylvania was doubtless an agreement to close with Virginia on her own terms, and to encounter the danger of fraud and imposition of surreptitious titles which these terms rendered more imminent ; not to waive all scrutiny, and submit to fraud and imposition when it might be detected. If, by this language, a suggestion is intended to be conveyed, that Watson's title is liable to the imputation of fraud, or that the case before the supreme court of Pennsylvania involved any question as to his Virginia entry having been fraudulently obtained ; then the case was totally mis-conceived by the learned chief justice. For it was neither proved nor pretended, that Watson's title was *surreptitious or fraudulent. If [*13 the learned chief justice intended to express a truism which no one ever disputed, and to take the risk of its being adopted by others, as a proper and the only basis of his conclusion ; then his language was inapplicable to the case.

The cases of *Smith v. Brown*, 1 Yeates 516, and *Hyde's Lessee v. Torrence*, 2 Ibid. 440, referred to by the learned chief justice, afford no countenance whatever to his opinion. In the case of *Smith v. Brown*, the plaintiff claimed under Pennsylvania, by a title originating in an actual settlement, which commenced in 1769. The defendant claimed under a Virginia entry, reciting a settlement commenced in 1770, but which was not proved on the trial. It was decided, that the recital of the settlement in the Virginia entry, was not conclusive as against the Pennsylvania claimant. In that case, the general rule of the compact is affirmed, viz., that there can be no reason for making a distinction between settlers under Virginia and Pennsylvania. 1 Yeates 517. In the case of *Hyde's Lessee v. Torrence*, 2 Ibid. 440, 442, the court reiterated the principle decided in the case of *Smith v. Brown*. In both cases, however, the question whether

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prior settlements had been made under Virginia, was regarded by the counsel and court as material, if not vital: and in this respect they are authorities in favor of Watson's title.

Ross, for the defendants, argued:—A preliminary question arises, whether the decision of the supreme court of Pennsylvania, in this very controversy, must not be deemed conclusive. An attempt may be made to break its force, by asserting that the judges were divided on the point now brought up. Where is the evidence of such division? A great number of points—some of them of little importance—were discussed on that occasion; and a difference of opinion, upon any one of them, would lead to the brief memorandum of dissent made by the reporter. But aside from this consideration, is it not enough, that in the state courts of Pennsylvania, this controversy, relating to a tract of land within her boundaries, would be considered as closed? In 12 Wheat. 167, Mr. Justice THOMPSON, delivering the opinion of the supreme court of the United States, says, “this court adopts the state decisions,” because they settle the law applicable to the case; and the reasons assigned for this course apply as well to rules of construction growing out of the common law, as the statute law of the state, when *applied to the title of lands. And such a course is indispen-
*14] sable, in order to preserve uniformity; otherwise, the peculiar constitution of the judicial tribunals of the states of the United States would be productive of the greatest mischief and confusion.” The civil jurisdiction of the federal tribunals was conferred, in order to secure to the foreigner, or to the citizen of another state, an impartial hearing; and the institution is perverted, when litigation may there be renewed, long after it had been put an end to, as between citizens of the state whose soil is the subject of controversy.

Supposing, however, the opinion of the supreme court of Pennsylvania to be open to criticism and reversal, can it be successfully assailed? Previous to the act passed by the legislature of Virginia, in 1779, a title to waste lands in that state could not be acquired by improvement. “Before that time, those lands might have been entered and patented, notwithstanding prior settlements by others; and even this act, which considers settlers entitled to some compensation for the risk they had run, allows them a preference only to such settlements as at that time were waste and unappropriated. As to the priority of settlement, it might still remain a question between persons, both of whom claim under the same sort of title; but the law of 1779 does not set up rights of this sort, so as to defeat those legally acquired under warrants; it applies to controversies between mere settlers.” Such are the words of the president of her court of appeals, in delivering its opinion in *Jones v. Williams*, 1 Wash. (Va.) 231. It is said, however, that this is predicated of prior appropriations under grants by Virginia, and not those of Pennsylvania, which were disregarded before the period of the compact: be it so. But whatever may have been the case originally, the titles under both were, as regards the question of priority, put, by the compact, exactly on a footing; and are, by fair construction of it, to be treated as if they had always been so. Unless they were considered to have been, in relation to each other, valid co-existent rights, from the beginning, so far as regards jurisdiction, how could there be any comparison as to dates? The very

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basis of the compact is an admission, that the jurisdiction shall be taken to have been in common; and that claimants under the one state shall be entitled to the same protection against claimants under the other, that they would be entitled to between themselves. If, then, the plaintiff's title under Pennsylvania *was perfected, before Watson had even color of title, [*15 by the laws of Virginia, will an *ex post facto* law, which, it is conceded, would not give him his title by relation, against a prior grantee of Virginia, be more efficient against a grantee of Pennsylvania? It is an unfair construction, to say, that a Virginia title shall be judged of, as it happened to stand by the laws of that state at the time of the compact. If the actual origin of a title under either state be the earlier, it is not to be overreached by a law of the other, assigning to the opposing title a fictitious origin, by the doctrine of relation. Granting, Virginia might lawfully declare that an unauthorized improvement should be taken to have vested title from its inception, against herself, yet having recognized the grants of another state as being equally valid as her own; it is fair to say, she recognised them as being attended with all the incidents of her own, against which, it appears by the judgment of her own court, the doctrine of priority by relation never prevailed. Neither is the power of the two states to regulate questions of title to the soil, even at the expense of rights previously vested under either, now to be questioned; the compact is necessarily founded in an assumption of it. There was no constitutional limitation on either side; and the parties, acting in the capacity of sovereigns, were fettered by no rule but their sense of expediency and justice. The consideration was the compromise of an international dispute; and the individuals whose titles were jeopardized, had no right to call on the state from which they held, to assert their rights to the soil.

In the act of ratification by Pennsylvania, it was 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 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 (Pennsylvania), determining to give to the world the most unequivocal proof of its desire to promote peace and harmony with a sister state, so necessary in this great contest with the common enemy, does agree to the conditions proposed by the state of Virginia, in its resolves of the 31st of June last." And this was, at one time, supposed to be a waiver of objection to any Virginia title that should be certified. It was, doubtless, an agreement to close with Virginia on her own terms, and to encounter the danger of fraud and imposition of surreptitious titles, which those [*16 terms rendered more imminent; not to waive all scrutiny and submit to fraud and imposition, where it might be detected. Such a construction would, in all cases, have made the certificate conclusive evidence of the facts stated in it; which it was held, in *Smith v. Brown*, 1 Yeates 516, and the *Lessee of Hyde v. Torrence*, 2 Ibid. 445, not to be. In the latter, it was declared, that a Pennsylvania claimant may show fraud, mistake or trust; or that the Virginia claimant was not in the country, before the 1st of January 1778—the point of time limited for the commencement of his settlement.

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The following in a true history of the whole controversy : 1779, August 31 : Compact between Virginia and Pennsylvania entered into. 1780, June 23 : Ratified by Virginia, with conditions annexed. 1780, September 23 : Ratified by Pennsylvania, absolutely ; with acceptance of the annexed condition. The compact was closed, and took effect on the 23d of September 1780. Both titles were then conclusively settled. The states might compensate losers ; but could not alter the right.

At that epoch, the title of Gen. Hand stood thus : Warrant in name of Edward Hand for 300 acres, dated the 24th of November 1773, surveyed the 21st of January 1778, 389 acres. Warrant in the name of John Elder for 300 acres, dated the 27th of November 1773, surveyed the 21st of January 1778, 371 acres. Three Virginia certificates for 400 acres each, in right of these settlements, made in 1770. All regularly entered with the Virginia surveyor, and transcribed in his entry-book. The title of all his lands in that disputed region was effectually protected against both states. When the compact was finally closed, Gen. Hand, on the faith of it, had all his surveys returned into the land-office and accepted. The purchase-money and surveying and office-fees paid, exceeding (on the two tracts), \$260 ; and on the 9th of March 1782, patents issued on both surveys, and actual possession of both tracts by his tenants occupying the land. At this period of time, there was no *caveat* by Watson, nor any other person ; there was no dispute, no complaint.

*17] *Thomas Watson, in 1780, April 25th, obtained a Virginia certificate, for 400 acres, in right of his settlement made in the year 1772. His cabin and improvements were distant half a mile from the nearest part of any of Hand's surveys. No lines run or marked ; no request made, after the compact, to the surveyor in Pennsylvania to inclose his claim, until the 1st of November 1786, when he caused a survey to be made and returned to the land-office. But it was here found to interfere with the patented surveys of other persons, and returned to him to be corrected ; on the 17th of March 1791, he presented the corrected re-survey, and obtained a patent for 273 acres, "corrected and altered agreeably to a request of the surveyor-general." [Hand's patent was dated the 9th of March 1782. That such proceeding in Pennsylvania was illegal and void, see 13 S. & R. 23.] On this false suggestion, he obtained his patent, which is now the basis of the plaintiff's title. He then sold all the survey, outside of Hand's land, and removed from his house and improvement, and took possession of the cabin and land now in dispute. Soon afterwards, West Elliot set up a claim to these forty-seven acres, and gave notice that he would prosecute a suit against Watson, unless he would give up the land to him.

In the autumn of 1794, Gen. Hand came with the army to Pittsburgh, and went out to visit his lands. Soon after his return to town, he and Watson came to the house of Gen. Gibson, where they stated, that Hand had agreed to protect Watson against Elliot, and let him hold the forty-seven acres, for his lifetime, he (Watson) paying yearly a bushel of Indian corn ; and desired Gibson to defend him, and get counsel for him when necessary. To this, Watson agreed, and several times afterwards, called on Gibson to explain the threats used by Elliot, but Gibson encouraged him to persevere and hold on. He did continue on the land during his life. Nor

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is it known, that he at any time expressed any dissatisfaction at this arrangement. After his death, speculators purchased the supposed rights of his children, and employed counsel to bring and prosecute suits to recover these forty seven acres, which are now the subject of controversy.

Gen. Hand's titles under Pennsylvania and Virginia are clearly the eldest, and under the compact, must prevail.

It is an unalterable regulation, founded in equity, to preserve the honor and good faith of both states so far as possible; each had *made grants for the same lands; let the good old rule prevail "*prior in tempore, potior est in jure.*" [*18 Watson was culpably negligent; he never indicated his claim or boundary, until he made an erroneous survey, the 1st of November 1786, four years after Hand's patents had been issued; five years afterwards, he sends an amended survey to the office, falsely pretending he had corrected his errors and thrown out the interfering patented lands. This trick would, of itself, postpone and preclude him, and all claiming under him, for ever, from sustaining any suit in a court of justice. Besides this, he surrendered to Gen. Hand all his claim to the premises, for a life-estate, which he enjoyed and with which he was satisfied so long as he lived; and the plaintiffs, for a trifle, have bought up the claim that he had ceased to assert and was too honest to revive.

Hand's lands were patented the 9th of March 1782; Watson's the 17th of March 1791, nine years afterwards. Watson's assignees being now plaintiffs, and holding under the junior grant, cannot maintain an ejectment, or recover in a court of the United States against the eldest patent. More especially, must Watson's patent fail, when a solemn compact has established the relative efficacy of each, and expressly stipulated that all conflicting titles in the disputed territory shall, without exception, be governed by this rule. A survey breaking into and including patented land, is void; was always illegal and inoperative, in Pennsylvania. 13 S. & R. 23.

Upon the whole, therefore, of this record, the defendants in error submit, with great confidence, that the judgment of the district court of the United States will be affirmed, with costs.

BARBOUR, Justice, delivered the opinion of the court.—This is a writ of error to the district court of the United States, for the western district of Pennsylvania, in an action of ejectment, in which the plaintiff in error was plaintiff in the court below; and in which judgment was given for the defendant in that court. It comes up upon two bills of exception, taken by the plaintiff in error to the opinion of the court, at the trial; the one, in relation to the admission of certain evidence which he alleges to have been improperly received; the other, to the ruling of the court, upon several points of law, in its charge to the jury. We think it unnecessary to discuss any of these points but one, *which we consider decisive of the case. And that is the relative priority of the respective rights [*19 under which the parties claim.

The facts of the case are these: Thomas Watson, under whom the plaintiff in error claims, on the 25th of April 1780, obtained from certain commissioners of Virginia, a certificate entitling him to 400 acres of land, by virtue of an act of the assembly of Virginia, passed in May 1779; the fourth section of which, after reciting that great numbers of people have settled in

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the country, upon the western waters, upon waste and unappropriated lands, for which they have been hitherto prevented from suing out patents, or obtaining legal titles, &c., enacts, "that all persons, who, at any time before the first day of January, in the year 1778, have really and *bond fide* settled themselves, or their families, or at his, her or their charges, have settled others, upon any waste or unappropriated lands on the said western waters, to which no other person has any legal right or claim, shall be allowed, for every family so settled, 400 acres of land, or such smaller quantity as the party chooses to include in such settlement." This certificate was granted in right of a settlement which had been made by Watson, in the year 1772. His evidence of right under Virginia was subsequently transferred to the land-office of Pennsylvania (the land having, under a compact between that state and Virginia, hereafter more particularly noticed, been ascertained to be within the limits of Pennsylvania), and on the first of November 1786, a survey of his claim was made and returned to the land-office of the latter state, and a patent issued thereon, by that state, in the year 1791, including his settlement made in 1772, and including the land in controversy.

The defendants claim under Edward Hand, who, by virtue of two land-warrants, granted by Pennsylvania, the one for 300 acres, dated the 24th of November 1773, the other, for the same quantity, dated the 27th of November 1773; caused surveys to be made on both, on the 21st of January 1778; and on the 9th of March 1782, obtained patents on both surveys, embracing the land in controversy.

Both Pennsylvania and Virginia having claimed the territory, of which the land in controversy is a part, as being within their limits, the dispute was finally adjusted by a compact made between them, which was ratified by Virginia on the 23d of June 1780, with certain conditions annexed; and *20] absolutely, by Pennsylvania, on the 23d *of September 1780, with an acceptance of the conditions annexed by Virginia. That compact, *inter alia*, contains the following stipulation: "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 thereof, be secured and confirmed to them, although they should be found to fall within the other, and that in disputes thereon, preference shall be given to the elder or prior right, whichever of the states the same shall have been acquired under; such persons paying to the states in whose boundary their land 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."

The rights of the parties must be decided by the true construction of this stipulation, as applied to the foregoing facts of the case. What is that construction? In the first place, it is declared, that the property and rights of all persons, acquired under, founded on, or recognised by, the laws of either country, previous to the date of the compact (that is, the year 1780), shall be secured and confirmed to them. The act of Virginia of May 1779, before cited, is, in point of chronology, previous to the date of the compact. Is not the settlement of Watson, made in 1772, recognised by the act? It is, in explicit terms, because the act makes an allowance of 400 acres of land to all those who shall have *bond fide* made a settlement on waste and unappropriated land, before the first of January 1778; and it has been seen, that Watson's settlement was made in 1772. What was the motive which induced

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the legislature of Virginia to make this allowance? We find it declared, in the preamble to the fourth section of the act of May 1779: it was, that persons who had made settlements, had been prevented from suing out patents, or obtaining legal titles, by the king of Great Britain's proclamations, or instructions to his governors, or by the then late change of government, and the then present war having delayed, until that time, the opening of a land-office, and the establishment of any certain terms for granting lands. And what was the consideration, we do not mean pecuniary, but valuable, on which the allowance was founded? The same preamble informs us, that it consisted in the justice of making some compensation for the charge and risk which the settlers had incurred in making their settlements. It is apparent, then, that the legislature did not pass the law in *question as making a donation, but as allowing a reasonable compensation, for [*21 something of value, on the part of settlers; not of money, indeed, paid into the coffers of the state, but of charge and risk incurred by the settlers. We think, then, that the allowance, thus made, is, in the language of the compact, a right recognised by the law of Virginia, previous to the date of that compact. Considering it as thus recognised, and consequently, as secured and confirmed, we come now, in the order of the argument, to the other part of the stipulation aforesaid; which declares, that in disputes thereon, preference shall be given to the elder or prior right, whichever of the said states the same shall have been acquired under.

How is this question of priority to be decided? In answering this question, we think, that the first thing to be done is, to ascertain the character of the rights of the parties, as settled by the laws of the states, under which they respectively claim, as these laws stood at the date of the compact. In this aspect of the subject, it has been seen, that the defendants claim under warrants granted by Pennsylvania, in 1773, and surveyed in 1778. But the act of Virginia of 1779, having allowed 400 acres of land to those who had made a settlement before the first of January 1778, and having founded that allowance on the charge and risk which they had incurred; in our judgment, the equitable claim, or the inchoate right of the parties, must, consequently, be referred, for its commencement, to the period when the charge and risk were incurred—that is, in the case at bar, to the year 1772. If, as we think, this principle be correct, this mere comparison of dates would decide the case. It has, however, been argued, that if this case were in a Virginia court, it would be decided in favor of the right under which the defendants claim, because that is by warrant, before the act of 1779; and in support of this, the court has been referred to the case of *Jones v. Williams*, 1 Wash. (Va.) 230, in which the court of appeals of that state says, that before the act of 1779, those lands (that is, lands on which settlements had been made) might have been entered and patented by any person, notwithstanding prior settlements by others; that the act of 1779 applies to controversies between mere settlers; that it does not set up prior rights of this sort, so as to defeat those legally acquired under warrants. The error of this argument, as we conceive, consists in this; that the doctrine here stated, however true in itself, does not apply to the case at bar. That was laid down, in a case between two persons, *both of whom [*22 claimed under Virginia, and was, therefore, governed by the laws of Virginia alone; whereas, in this case, one of the parties claims under Penn-

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sylvania, and the other, under Virginia ; and the case is to be decided, not by the laws of either state, by themselves ; except that, as before remarked, the character of each right is to be fixed by the laws of the state, as at the time of the compact under which the right is claimed ; and then the comparison between the two is to be made, not under the laws of either state, but under the stipulation in the compact before referred to. Thus, to illustrate, the origin of the plaintiff's claim, being, in our opinion, as operated upon by the act of Virginia of 1779, to be referred to the period of Watson's settlement in 1772 ; and that of the defendants, as affected by the laws of Pennsylvania, being of later date ; the foundation being thus laid for deciding which is the prior or elder title ; we then apply to the case the compact, which declares, that the preference shall be given to the prior or elder.

We suppose, that it will scarcely be denied, that by the act of 1779, Virginia recognised the inception of the title of settlers, as being of the date of the settlement, as against herself ; if so, can it be imagined, that by the compact, she intended their title to take its date from a later period ? If it should be said, that so also Pennsylvania cannot be supposed to have intended to impair the force of the titles claimed under her ; the answer, that each state intended that its own laws should settle the character of the right claimed under it, as to the time of its inception, and in every other respect ; and then, that according to the inception thus fixed, the rule of priority should decide, as provided for in the compact.

It was argued, that the question had been settled in the supreme court of Pennsylvania ; and the doctrine stated in 12 Wheat. 167, was referred to, where it is said, that this court adopts the state decisions, because they settle the law applicable to the case ; and the reasons assigned for this course, apply as well to rules of construction growing out of the common law, as the statute law of the state, when applied to the title of lands. To say nothing of the division of the court, in the case referred to, it is a decisive answer to this argument, to say, that the principle does not at all apply. It was laid down in reference to cases arising under, and to be decided by, the laws of a state ; and then the decisions of that state are looked to, to ascertain what that law is ; whereas, in the case at bar, the question arises under, and is to be decided by, a compact between two
*23] states : where, therefore, the rule of decision is not to be collected from the decisions of either state, but is one, if we may so speak, of an international character. Upon the whole, we are of opinion, that the judgment of the court below is erroneous, in charging the jury, that the title of the defendants was the elder and prior right, and was, therefore, protected by the compact ; on the contrary, we think that of the plaintiff was the elder and prior ; the judgment must, therefore, be reversed, and a *venire facias de novo* awarded.

TANEY, Ch. J., and McLEAN, Justice, dissented.

McLEAN, Justice.—The Chief Justice and Justice McLEAN think, that the condition of the compact, “ 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 secured and confirmed to them, although they should be found to fall within the other ; and that in disputes

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thereon, preference shall be given to the elder or prior right, whichever of the said states the same shall be acquired under," placed the land in controversy under the common jurisdiction of both states; and that the first appropriation of the land, under the authority of either state, must be considered, under the compact, as the prior right.

The Pennsylvania warrant which was located on this land, was surveyed on the 21st of January 1778. At this time, the Virginia claimant, though he lived on the land, had no color of right; he was, in fact, a trespasser. The Virginia act of 1779 provided, "that all persons, who, at any time before the 1st of January 1778, had *bonâ fide* settled upon waste or unappropriated lands, on the western waters, to which no other person hath any legal right or claim, shall be allowed four hundred acres," &c. Now, if the land in controversy was subject to the jurisdiction of both states, and might be appropriated by either, was it not appropriated under the Pennsylvania warrant, before the Virginia claimant had any right under the act of 1779? This is too clear to be controverted. In the language of the compact, then, had not the Pennsylvania claimant "the prior right?" The act of 1779 does not purport to vest any title in the settler *anterior to its passage. The settler, to bring himself within the act, must show that he [*24 was a *bonâ fide* settler, before the 1st of January 1778; and this entitled him to 400 acres of land under the act, provided, "no other person had any legal right or claim to it." At this time, the land, as has been shown, was appropriated under the Pennsylvania law, and which appropriation, if effect be given to "the prior right," under the compact, does constitute within the meaning of the act of 1779, a "right or claim to the land."

In 1 Wash. 231, the court of appeals of Virginia says, that the law of 1779 does not "set up rights, so as to defeat those legally acquired under warrants." This land, by the compact, was considered as liable to be appropriated by a Pennsylvania as by a Virginia warrant, before the act of 1779; and in ascertaining the priority of right, the time of the appropriation is the fact to be established.

This cause came on to be heard, on the transcript of the record from the district court of the United States for the western district of Pennsylvania, and was argued by counsel: On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court, with directions to award a *venire facias de novo*.