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after argument, the motion was overruled; and it was observed by WASHINGTON, Justice, that although he was not satisfied with the verdict, nor should he have assented to it as a juror; yet, the question of damages, or of interest in the nature of damages, belonged so peculiarly to the jury, that he could not allow himself to invade their province; while he felt a determination to prevent on their part, any invasion of the judicial province of the court. (a)

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\*APRIL TERM, 1805.

Present—WASHINGTON, Justice, and PETERS, District Judge.

## HUIDEKOPER'S Lessee v. DOUGLASS. (b)

*Warrantee.—Settlement.*

A grantee by warrant, of lands lying north and west of the Ohio, &c., who was prevented from making such settlement as the law requires, for the space of two years from the date of his warrant, but who, during that period, persisted in his endeavors to make the settlement, although he afterwards made no such attempt, is entitled to hold his land in fee-simple: it is not every slight or temporary danger, which will excuse him, but such as a prudent man ought to regard.<sup>1</sup>

THIS was an ejectment brought for a tract of land, lying north and west of the rivers Ohio and Allegheny and Conewango creek. The lessor of the plaintiff made title under the Holland Company, to whom a patent was issued, upon a warrant and survey. The defendant claimed as an actual settler, under the act of the 3d of April 1792. A great many ejectments were depending upon the same facts and principles; (c) and on the trial of another ejectment, at a former term, WASHINGTON, Justice, had delivered a charge to the jury, coinciding, generally, with the construction given by the supreme court of Pennsylvania, to the act of April 1792, from which Judge PETERS dissented. It was, therefore, upon the recommendation of the court, determined to submit the questions, upon which the opinions of the judges were opposed, to the supreme court of the United States, under the provision made, in case of such a disagreement, by the act of the 29th of April 1802. (2 U. S. Stat. 159, §) 6. The questions were, accordingly, stated, at the last October term, in the following form:

"1st. Whether, under the act of the legislature of Pennsylvania, passed on the 3d day of April 1792, entitled 'an act for the sale of the vacant lands within this commonwealth,' the grantee by warrant of a tract of land lying 'north and west of the rivers Ohio and Allegheny and Conewango creek,' who, by force of arms of the enemies of the United States, was prevented from settling and improving the said land, and from residing thereon, from

(a) For the report of the case, on the motion for a new trial, see 1 W. C. C. 202.

(b) s. c. 1 W. C. C. 253.

(c) For a general view of this important controversy, see *Commonwealth v. Coxe, ante*, p. 170; *Attorney General v. The Grantees, ante*, p. 237; and *Balfour's Lessee v. Meade, ante*, p. 363.<sup>1</sup> See note to *Commonwealth v. Coxe, ante*, p. 237.

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the 10th day of April 1793, the date of the said warrant, until the 1st day of January 1796, but who, during the said period, persisted in his endeavors to make such settlement and residence, is excused from making such actual settlement, as the enacting clause of the 9th section of the said law prescribes, to vest a title in the said grantee.

"2d. Whether a warrant for a tract of land, lying north and west of the Ohio and Allegheny and Conewango creek, granted in the year 1793, under and by virtue of the act of the legislature of Pennsylvania, entitled 'An act for the sale of vacant lands, within this commonwealth' to a person, who, by force of arms of the enemies of the United States, was prevented from settling and improving the said land, and from residing thereon, from the date of the said warrant, until the first day of January 1796, but who, during the said period, persisted in his endeavors to make such settlement and residence, vests any, and if any, what title in or to the said land, unless the said grantee shall, after the said prevention ceases, commence, and within the space of two years thereafter, clear, fence and cultivate, at least two acres contained in his said survey, erect thereon a messuage for the habitation of man, and reside or cause a family to reside thereon, for the space of five years next following his first settling the same, the said grantee being yet in full life.

"3d. Whether a grantee in such warrant as aforesaid, who has failed to make such settlement as the enacting clause of the said ninth section requires, and who is not within the benefit of the proviso, has thereby forfeited his right and title to the said land, until the commonwealth has taken advantage of the said forfeiture, so as to prevent the said grantee from recovering the possession of said land in ejectment, against a person who, at any time after two years from the time the prevention ceased, or at any subsequent period, has settled and improved the said land and has ever since been in possession of the same."

The questions were argued in the supreme court, at February term 1805, by *E. Tilghman*, *Ingersoll*, *Lewis* and *Dallas*, for the plaintiff; and by *McKean* (attorney-general of Pennsylvania) and *W. Tilghman*, for the defendant. (a)

The opinion of the court was delivered by the Chief Justice, in the following manner.

MARSHALL, Chief Justice.—The questions which occurred in this case, in the circuit court of Pennsylvania, and on which the opinion of this court is required, grow out of the act passed by \*the legislature of that state, [\*394 entitled "An Act for the sale of the vacant lands within this commonwealth."

The ninth section of that act, on which the case principally depends, is in these words: "And be it further enacted by the authority aforesaid, that no warrant or survey, to be issued or made in pursuance of this act, for lands lying north and west of the rivers Ohio and Allegheny and Conewango creek, shall vest any title in or to the lands therein mentioned, unless the grantee has, prior to the date of such warrant, made or caused to be made, or shall, within the space of two years next after the date of the same,

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(a) For a report of the case, before the supreme court, see 3 Cr. 1.



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make or cause to be made, an actual settlement thereon, by clearing, fencing and cultivating at least two acres for every hundred acres contained in one survey, erecting thereon a messuage for the habitation of man, and residing or causing a family to reside thereon, for the space of five years next following his first settling the same, if he or she shall so long live; and that in default of such actual settlement and residence, it shall and may be lawful to and for this commonwealth to issue new warrants to other actual settlers for the said lands, or any part thereof, reciting the original warrants, and that actual settlements and residence have not been made in pursuance thereof, and so as often as default shall be made, for the time and in the manner aforesaid; which new grants shall be under and subject to all and every the regulations contained in this act. Provided always, nevertheless, that if any such actual settler, or any grantee in any such original or succeeding warrant, shall, by force of arms of the enemies of the United States, be prevented from making such actual settlement, or be driven therefrom, and shall persist in his endeavors to make such actual settlement, as aforesaid, then, in either case, he and his heirs shall be entitled to have and to hold the said lands, in the same manner as if the actual settlement had been made and continued."

The questions to be considered, relate particularly to the proviso of this section; but to construe that correctly, it will be necessary to understand the enacting clause, which states what is to be performed by the purchaser of a warrant, before the title to the lands described therein, shall vest in him.

Two classes of purchasers are contemplated. The one has already performed every condition of the sale, and is about to pay the consideration-money; the other pays the consideration-money in the first instance, and is, afterwards to perform the conditions. They are both described in the same sentence, and from each, an actual settlement is required, as indispensable to the completion of the title. In describing this actual settlement, it is declared, that it shall be made, in the case of a warrant previously granted, within two years next after the date of such warrant, "by clearing, fencing \*395] and cultivating at least \*two acres contained in one survey, erecting thereon a messuage for the habitation of man, and residing or causing a family to reside thereon, for the space of five years next following his first settling of the same, if he or she shall so long live."

The manifest impossibility of completing a residence of five years within the space of two years, would lead to an opinion, that the part of the description relative to residence, applied to those only who had performed the condition, before the payment of the purchase-money, and not to those who were to perform it afterwards. But there are subsequent parts of the act, which will not admit of this construction, and consequently, residence is a condition required from the person who settles under a warrant, as well as from one who entitles himself to a warrant by his settlement.

The law requiring two repugnant and incompatible things, is incapable of receiving a literal construction, and must sustain some change of language, to be rendered intelligible. This change, however, ought to be as small as possible, and with a view to the sense of the legislature, as manifested by themselves. The reading suggested by the counsel for the plaintiff, appears to be most reasonable, and to comport best with the general language of the section, and with the nature of the subject. It is, by changing the participle, into the future tense of the verb, and instead of "and residing or

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causing a family to reside thereon," reading, and shall reside, &c. The effect of this correction of language, will be to destroy the repugnancy which exists in the act, as it stands, and to reconcile this part of the sentence to that which immediately follows, and which absolutely demonstrates that, in the view of the legislature, the settlement and the residence consequent thereon, were distinct parts of the condition; the settlement to be made within the space of two years from the date of the warrant, and the residence in five years from the commencement of the settlement.

This construction is the more necessary, because the very words "such actual settlement and residence," which prove that residence is required from the warrantee, prove also, that settlement and residence are, in contemplation of the law, distinct operations. In the nature of things, and from the usual import of words, they are also distinct. To make a settlement, no more requires a residence of five than a residence of five hundred years: and of consequence, it is much more reasonable to understand the legislature as requiring the residence for that term, in addition to a settlement, than as declaring it to be a component part of a settlement.

The meaning of the terms, settlement and residence, being understood, the court will proceed to consider the proviso. That part of the act treats of an actual settler, under which term is intended as well the person who makes his settlement the foundation of his claim to a warrant, as a warrantee, who had made an actual settlement, in performance of the conditions annexed to his purchase, and if "any grantee in any such original or succeeding warrant," who must be considered as contradistinguished from one who had made an actual settlement. Persons thus distinctly circumstanced are brought together in the same sentence, and terms are used appropriated to the situation of each, but not applicable to both. Thus the idea of "an actual settler," "prevented from making an actual settlement," and, after "being driven therefrom," "persisting in his endeavors" to make it, would be absurd. To apply to each class of purchasers all parts of the proviso, would involve a contradiction in terms. Under such circumstances, the plain and natural mode of construing the act, is to apply the provisions, distributively, to the description of persons to whom they are adapted, *reddenda singula singulis*. The proviso, then, would read thus, "Provided always, nevertheless, that if any such actual settler, shall be driven from his settlement, by force of arms of the enemies of the United States; or any grantee, in any such original or succeeding warrant, shall by force of arms of the enemies of the United States, be prevented from making such actual settlement, and shall persist in his endeavors to make such actual settlement as aforesaid, then, in either case, he and his heirs shall be entitled to have and to hold the said lands, in the same manner as if the actual settlement had been made and continued." The two cases are the actual settler, who has been driven from his settlement, and the warrantee, who has been prevented from making a settlement, but has persisted in his endeavors to make one.

It is perfectly clear, that in each case, the proviso substitutes something for the settlement to be made within two years from the date of the warrant, and for the residence, to continue five years, from the commencement of the settlement, both of which were required in the enacting clause. What is that something? The proviso answers, that in case of "an actual settler," it is his being "driven from his settlement, by force of arms of the



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enemies of the United States," and in case of his being a grantee of a warrant, not having settled, it is "persisting in his endeavors to make such actual settlement." In neither case, is residence, or persisting in his endeavors at residence, required. Yet the legislature had not forgotten, that by the enacting clause, residence was to be added to settlement; for in the same sentence they say, that the person who comes within the proviso, shall hold the land "as if the actual settlement had been made and continued."

It is contended on the part of the defendant, that as the time during \*397] which persistence shall continue, is not prescribed, the person \*claiming the land, must persist, until he shall have effected both his settlement and residence, as required by the enacting clause of the act: that is, that the proviso dispenses with the time, and only with the time, during which the condition is to be performed. But the words are not only inapt for the expression of such an intent; they absolutely contradict it.

If the proviso be read, so as to be intelligible, it requires nothing from the actual settler who has been driven from his settlement; he is not to persist in his endeavors at residence, or in other words, to continue his settlement, but is to hold the land. From the warrantee, who has been prevented from making a settlement, no endeavors at residence are required: he is to "persist in his endeavors," not to make and to continue such actual settlement, but "to make such actual settlement as aforesaid." And if he does persist in those endeavors, he is to hold the land, "as if the actual settlement had been made and continued." The construction of the defendant would make the legislature say, in substance, that if the warrantee shall persist in endeavoring to accomplish a particular object, until he does accomplish it, he should hold the land, as if he had accomplished it. But independent of the improbability that the intention to dispense only with the time, in which the condition was to be performed, would be expressed in the language which has been noticed, there are terms used, which seem to restrict the time during which a persistence in endeavors is required. The warrantee is to persist in his endeavors "to make such actual settlement as aforesaid:" now, "such actual settlement as aforesaid" is an actual settlement, within two years from the date of the warrant, and as it could only be made within two years, a persistence in endeavoring to make it, could only continue for that time.

If, after being prevented from making an actual settlement, and persisting in endeavors, those endeavors should be successful, within the two years; after which the person should be driven off, it is asked, what would be his situation? The answer is a plain one. By persisting, he has become an actual settler; and the part of the proviso which applies to actual settlers protects him.

If, after the two years, he should be driven off, he is still protected. The application of external violence dispenses with residence. The court feels itself bound to say so, because the proviso contains a substitute, which, in such a state of things, shall be received instead of a performance of the conditions required by the enacting clause; and of that substitute residence forms no part.

In a great variety of forms, and with great strength, it has been argued, that the settlement of the country was the great object of the act; and that

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the construction of the plaintiff would defeat that object. \*That the exclusive object of an act to give lands to settlers, would be the settlement of the country, will be admitted; but that an act to sell lands to settlers, must have for its exclusive object the settlement of the country, cannot be so readily conceded. In attempting to procure settlements, the treasury was certainly not forgotten. How far the two objects might be consulted, or how far the one yielded to the other, is only to be inferred from the words in which the legislative intention has been expressed. How far the legislature may have supposed the peopling of the district in question to have been promoted by encouraging actual settlements, though a subsequent residence on them should be rendered impracticable by a foreign enemy, can only be shown by their own language. At any rate, if the legislature has used words dispensing with residence, it is not for the court to say, they could not intend it, unless there were concomitant expressions, which should explain those words, in a manner different from their ordinary import.

There are other considerations in favor of the construction to which the court is inclined. This is a contract, and although a state is a party, it ought to be construed according to those well-established principles which regulate contracts generally. The state is in the situation of a person, who holds forth to the world the conditions, on which he is willing to sell his property. If he should couch his propositions in such ambiguous terms, that they might be understood differently: in consequence of which sales were to be made, and the purchase-money paid, he would come with an ill grace into court, to insist on a latent and obscure meaning, which should give him back his property, and permit him to retain the purchase-money. All those principles of equity and of fair dealing, which constitute the basis of judicial proceedings, require that courts should lean against such a construction.

It being understood, that the opinion of the court on the first two questions, has rendered a decision of the third unnecessary, no determination respecting it has been made. (a) It is directed, that the following opinion be certified to the circuit court.

1. That it is the opinion of this court, that under the act of the legislature of Pennsylvania, passed the 3d day of April, in the year of our Lord 1792, entitled "An act for the sale of vacant lands within this commonwealth," the grantee, by a warrant, of a tract of land lying north and west of the rivers Ohio and Allegheny and Conewango creek, who, by force of arms of the enemies of the United \*States, was prevented from settling and improving the said land, and from residing thereon [\*399 from the 10th day of April 1793, the date of the said warrant, until the 1st day of January in the year 1796, but who during the said period persisted in his endeavors to make such settlement and residence, is excused from making such actual settlement as the enacting clause of the 9th section of the said law prescribes, to vest a title in the said grantee.

2. That it is the opinion of this court, that a warrant for a tract of land lying north and west of the rivers Ohio and Allegheny and Conewango

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(a) Although no opinion was publicly delivered, on the third question, it was understood, that the subject had been generally considered by the court; and my information (which does not, however, proceed from the judges themselves) states the result to have been favorable to the grantee.



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creek, granted in the year 1793, under and by virtue of the act of the legislature of Pennsylvania, entitled, "An act for the sale of vacant lands within this commonwealth," to a person who, by force of arms of the enemies of the United States, was prevented from settling and improving the said land, and from residing thereon, from the date of the said warrant, until the 1st day of January in the year 1796; but who, during the said period, persisted in his endeavors to make such settlement and residence, vests in such grantee a fee-simple in the said land; although, after the said prevention ceased, he did not commence, and within the space of two years thereafter, clear, fence and cultivate at least two acres for every hundred acres contained in his survey for the said land, and erect thereon a messuage for the habitation of man, and reside or cause a family to reside thereon, for the space of five years next following his first settling of the same, the said grantee being yet in full life.

Upon this opinion of the supreme court, the cause was again brought before a jury; the title was legally deduced from the state to the lessor of the plaintiff, and the facts of a prevention from making an improvement and settlement, under the 9th section of the act of April 1792, by a subsisting Indian war, as well as the facts of a persistence in the endeavor to make such improvement and settlement, were established, in detail, as they appear in the case of *Commonwealth v. Cox*, ante, p. 170. After argument, by *Ingersoll*, *E. Tilghman*, *Lewis* and *Dallas*, for the plaintiff; and by *McKean*, *W. Tilghman* and *M. Levy*, for the defendant, the following charge was delivered to the jury.

WASHINGTON, Justice.—The plaintiff appears before you with a regular paper title from the warrant to the patent.

When this cause was tried before, the counsel for the defendant insisted, that the plaintiff's title was built upon a contract, which he had not complied with, that he was to make a settlement, such as the enacting clause of the 9th section requires, unless prevented from doing so, by the enemies of the United States; in which latter case, he was not only to prove a persistence in endeavors \*to make the settlement, during the period of  
\*400] the war; but was to go on to make it, after the prevention ceased. This question was so difficult, as to divide, not only this court, but the courts of this state. The question was adjourned to the supreme court, who have decided, that a warrantee, who, from April 1793, to the 1st of January 1796, was prevented by the enemies of the United States, from making such settlement as the law required, but who, during that period, persisted in his endeavors to make such settlement, is entitled to hold his land in fee-simple, although, after the prevention ceased, he made no attempt to make such settlement. This we must consider as the law of the land, and govern our decision by it.

The questions then are: 1st. Was the Holland Company, from April 1793, to January 1796, prevented from making their settlement? and 2d. Did they persist in endeavors, during that period, to make it?

What is the legal meaning of prevention, and persistence in endeavors? Were they prevented, and did they persist, within this meaning? The first are questions of law, which the court are to decide; the latter are questions of fact, proper for your determination. What were they prevented from

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doing, in order to excuse them? The answer is, from clearing, fencing and cultivating two acres of land in every hundred acres contained in their warrant, from building a house thereon, fit for the habitation of man, and from residing or causing a family to reside thereon. To what extent were their endeavors to go? The answer is, to effect these objects. It was not every slight or temporary danger, which was to excuse them from making such settlement, but such as a prudent man ought to regard. The plaintiffs stipulated to settle, as a society of husbandman, not as a band of soldiers. They were not bound to effect everything which might be expected from military men, whose profession is to meet, to combat and to overcome danger. To such men, it would be a poor excuse, to say, they were prevented by danger from the performance of their duty. The husbandman flourishes in the less glorious, but not less honorable walks of life. So far from the legislature expecting, that they were to brave the dangers of a savage enemy, in order to effect their settlements, they are excused from making them, if such dangers exist. But they must persist in their endeavors to make them, that is, they are to persist, if the danger is over, which prevented them from making them. For it would be a monstrous absurdity, to say, that the danger, which, by preventing them from making the settlements, would excuse them, would not, at the same time, excuse them from endeavors to make them, so long as it existed. It would be a mockery, to say, that I should be excused from putting my finger into the blaze of this candle, provided I would persevere in my endeavors to do \*it, because, by making the endeavors, I could do it, although the consequences would be such as [\*401 I was excused from incurring. If, then, the company were prevented from making their settlements, by dangers from a public enemy, which no prudent man would or ought to encounter, and if they made those endeavors, which the same man would have made, to effect the object, they have fully complied with the proviso of the 9th section.

How then are the facts? That a public war between the United States and the Indian tribes subsisted, from April 1793, and previous to that period, until late in 1795, is not denied; and, though the great theatre of the war lay far to the north-west of the land in dispute, yet it is clearly proved, that this country, during this period, was exposed to repeated irruptions of the enemy, killing and plundering such of the whites as they met with, in situations where they could not defend themselves. What was the degree of danger produced by those hostile incursions, can only be estimated by the conduct of those who attempted to face it. We find them sometimes working out in the day-time in the neighborhood of the forts, and returning within their walls, at night, for protection; sometimes, giving up the pursuit in despair, and retiring to the settled parts of the country; then returning to this country, and again abandoning it. We sometimes meet with a few men, hardy enough to attempt the cultivation of their lands, associating implements of husbandry with the instruments of war, the character of the husbandman with that of a soldier; and yet I do not recollect any instance, where, with this enterprising, daring spirit, a single individual was enabled to make such a settlement as the law required. You have heard what exertions were made by the Holland Company, you will consider what was the state of that country, during the period in question, you will apply the prin-



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ciples laid down by the court to the evidence in the cause, and then say, whether the title is with the plaintiff or not.

Verdict for the plaintiff.

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\*OCTOBER TERM, 1805.

Present—WASHINGTON, Justice, and PETERS, District Judge.

PENN's Lessee v. KLYNE. (a)

*Land titles in Pennsylvania.*

The Penn family were originally the sole owners of the soil of Pennsylvania; and prior to 1779, had a legal right to withdraw from the general mass of property, any land not appropriated to other persons, and to appropriate the same to their individual use.<sup>1</sup>

The claimant of a proprietary tenth or manor, must make title under the divesting law of 1779, and show that that it was known by the name of such manor, and duly surveyed and returned into the land-office, prior to the 4th of July 1776.

A warrant and survey, if the consideration be paid, is a legal title, as against the proprietary; if the consideration be not paid, the warrantee has an equitable title, which he may perfect by payment of the amount due.

A survey, under a warrant of resurvey, is good as an original survey, though it recite another which is invalid.

By an act of the general assembly of Pennsylvania, passed on the 27th day of November 1779 (1 Dall. Laws, 622), the estates of the late proprietaries were vested in the commonwealth, subject to the following proviso:

"Sect. 8. Provided also, that all and every the private estates, lands and hereditaments of any of the said proprietaries, whereof they are now possessed, or to which they are now entitled, in their private several right or capacity, by devise, purchase or descent; and likewise all the lands called and known by the name of the proprietary tenths or manors, which were duly surveyed and returned into the land-office, on or before the 4th day of July, in the year of our Lord 1776, together with the quit or other rents, and arrearages of rents, reserved out of the said proprietary tenths or manors, or any part or parts thereof, which have been sold, be confirmed, ratified and established for ever, according to such estate or estates therein, and under such limitations, uses and trusts, as in and by the several and respective reservations, grants and conveyances thereof are directed and appointed."

The present suit, and a number of other ejectments, were brought for tracts of land, lying in York county; in all of which, the general question was, whether the land was included in a tract called and known by the name of a proprietary manor, duly surveyed and returned into the land-office, on or before the 4th day of July 1776?

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The title of the lessor of the plaintiff to the premises in dispute, was

(a) 1 W. C. C. 207.

<sup>1</sup> Conn v. Penn, Pet. C. C. 496; Hurst v. Durnell, 1 W. C. C. 262; Penn v. Groff, Id. 390; Kirk v. Smith, 9 Wheat. 241.