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REPORTS OF CASES

RULED AND ADJUDGED

IN THE SEVERAL

COURTS OF THE UNITED STATES

AND OF

PENNSYLVANIA,

HELD AT THE SEAT OF THE FEDERAL GOVERNMENT.

BY A. J. DALLAS.

Atque eo magis necessaria est hæc opera, quod et nostro sæculo non desunt, et olim non defuerunt, qui *hanc juris partem* ita contemnerent, quasi nihil ejus præter inane nomen existeret.—GROTIUS.

VOL. IV.

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EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

FREDERICK C. BRIGHTLY,

AUTHOR OF THE "FEDERAL DIGEST," ETC.

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OF THE

NAMES OF THE CASES COMPRISED IN THIS VOLUME.

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CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

AUGUST TERM, 1799.

Present, ELLSWORTH, Chief Justice, and PATERSON, CHASE and WASHINGTON, Justices.

STATE OF NEW YORK *v.* STATE OF CONNECTICUT *et al.*

Injunction.—Equity process.

An injunction will neither be granted by the court, nor a single judge, without reasonable notice to the adverse party, or his attorney: what is reasonable notice.

An injunction will not be granted, to stay proceedings in common-law suits, at the instance of a state, not a party thereto, nor interested in their decision.

A *subpœna* in equity must be served sixty days before the return-day.

BILL in Equity. "The State of New York, one of the United States of America, by Josiah Ogden Hoffman, the attorney-general of the said state," filed this bill in consequence of the rejection of the motion to grant writs of *certiorari*, for the removal of *Fowler* v. *Lindsey* and *Fowler* v. *Miller* (3 Dall. 411),[1] from the circuit court of Connecticut into the supreme court The plaintiffs in those suits were made defendants to the present bill; and the complainant, after setting forth the title of New York to the lands in question, prayed (*inter alia*) for an injunction against them. The notices to the defendants, that the injunction would be moved for, were delivered on the 25th and 26th of July; but on the 6th of August,(*a*) *Ingersoll*, who appeared for the individuals, though not for the state, referred to the act of congress, which provides, that "no writ of injunction shall be granted, in any case, without reasonable previous notice to the adverse party or his attorney, of the time and place of moving for the same. (1 U. S. Stat. 334–5, § 5.) And he contended, that reasonable notice had not been given in this case.

(*a*) The term commenced on the 5th of August, but a *quorum* of the judges did not attend until the day following; and CUSHING and IREDELL, Justices, were prevented by indisposition from taking their seats on the bench, during the whole term.

[1] In Fowler *v.* Lindsey, a *certiorari* was refused, because the state was not a party to the record; in this case, an injunction was denied, because she was not interested in the ejectments.

Hoffman (the Attorney-General of New York) contended, that the notice was reasonable in relation to its present object; though it might not be sufficient for requiring the defendant to put in an answer or demurrer to the bill. The injunction prayed for is not a perpetual one, but only until answer, and further order of the court. Nor ought the section of the act of congress to be extended by construction; for a universal application of the rule would be unreasonable, and in many cases, enable the party to defeat the very purpose of an injunction. It is questionable, indeed, whether the section at all relates to a motion, either in the supreme court or the circuit court, for an injunction; since its only object seems to have been, to vest in a single judge the same power that the courts previously possessed, to grant the writs of injunction and *ne exeat*. But at all events, if the court shall think notice of such a motion necessary, they will construe the shortest notice to be reasonable notice, for the purpose of preserving peace, and effectuating justice.

Ingersoll, in reply.—With respect to the state of Connecticut, it is a fact, that since the decision on the motion for a *certiorari*, at the last term, there has not been a meeting of the legislature; so that it is impossible to ascertain what course she will adopt on the occasion; and with respect to the individual plaintiffs in the circuit court, it is a matter of great importance, that a trial on their rights should not be suspended, by the interposition of a state, whose interests cannot be affected by any decision that may be given below. It is enough, however, that by the positive provisions of the act of congress, it is contemplated, that no injunction shall issue, in any case, unless satisfactory reasons are assigned; and that, therefore, reasonable notice of an application for the writ, must be given to the adverse party.

The opinion of the Court was delivered by the Chief Justice.

Ellsworth, Chief Justice.—The prohibition contained in the statute, that writs of injunction shall not be granted, without reasonable notice to the adverse party or his attorney, extends to injunctions granted by the supreme court or the circuit court, as well as to those that may be granted by a single judge. The design and effect, however, of injunctions, must render a shorter notice, reasonable notice, in the case of an application to a court, than would be so construed, in most cases of an application to a single judge: and until a general rule shall be settled, the particular circumstances of each case must also be regarded. Circumstanced as the present case is, the notice which has been given, is, in the opinion of the court, sufficient, as it respects the parties against whom an injunction is prayed.

*3] *Same Cause.

The bill in this case contained an historical account of the title of New York, to the soil and jurisdiction of the tract of land in dispute; set forth an agreement of the 28th of November 1883, between the two states, on the subject; and prayed a discovery, relief and injunction to stay the proceeding in the Connecticut ejectments. 3 Dall. 411. As the state had not appeared, the question of injunction was the only one now argued.

Hoffman (the Attorney-General of New York), in support of the prayer for an injunction, and the general merits of the bill, urged various points,

with great force and ability. 1st. It is necessary to execute the special agreement between the states: it is a principle of equity, that wherever there is an agreement as to a right, whether it is a mere franchise, or a right of soil, it shall be enforced and rendered conclusive upon the parties, by the interposition of the court. The agreement admits that the tract of land belonged to New York; and the bill states, that notwithstanding this admission, Connecticut has since undertaken to grant a part of it to the plaintiffs in the ejectments. Hence, it became necessary (or the bill would have been incomplete) to make those plaintiffs parties to the present suit. The agreement, indeed, only gives the equitable title to New York; while the plaintiffs below possess the legal title, and must, of course, recover in the ejectments. A specific performance of the agreement being decreed against Connecticut, would not be an adequate and complete remedy; and all parties in interest, however remote, must be brought before the court, or they cannot be affected by its proceedings. 2d. It will prevent a multiplicity of suits. The bill is emphatically a bill of peace; since, considering the character of the parties to the principal controversy, without this remedy, the consequences upon the public tranquillity can hardly be conjectured. It is true, however, that the right of the state of New York cannot be affected by a decision in the circuit court; but until that right is lawfully settled, the number of suits, by individuals, must be indefinitely great; and merely to avoid a multiplicity of suits, to cut off, by one decision, various sources of strife and litigation, is a substantive ground for the exercise of a chancery jurisdiction. 1 Atk. 282; 2 Ibid. 484. 3d. It is a bill for the discovery of title, which parties in interest, as well as parties in possession, may certainly maintain. 1 Ves. 249.(*a*) 4th. It is a bill to settle a question *of boundary between two states. Of this question, the court can, incontestably, take [*4 cognisance; and it will not allow the decision of the principal matter to be interrupted or prevented by collateral considerations; particularly, when the decision of the principal, will settle all the inferior matters in dispute. In *Penn* v. *Baltimore*, 1 Ves. 454, the bill was sustained upon similar principles; and the jurisdiction there assumed, upon principle, in a case of contested provincial boundary, may surely be exercised here under the additional sanction of the constitution. 2 Dall. 442, 415, 419; 3 Ibid. 1, 412. But it is not simply a bill to settle a question of boundary between two states; it involves the right of soil, which, in relation to a great part of New York, results from the right of jurisdiction; so that, deciding the latter, is virtually a decision of the former. In this respect, New York is, perhaps, distinguished from her sister states, whose claims of territory are, generally, founded upon positive grant; while her claim of soil is a mere incident of the sovereignty and jurisdiction with which the revolution invested her.(*b*)

(*a*) WASHINGTON, Justice.—Does the bill state, that the plaintiff is ignorant of the defendant's title?

Hoffman.—Yes, expressly.

WASHINGTON, Justice.—Then you are aware, that if the injunction should be granted, upon that ground, it must, of course, be dissolved, as soon as the discovery is obtained.

(*b*) PATERSON, Justice.—Generally speaking, the proposition is true, that, as to states, jurisdiction and the right of soil go together.

Ingersoll, against granting the prayer for an injunction.—In the suits below, the state of New York is not a party, and cannot be affected by their decision; while the defendants below are not parties to the present bill, though they are the persons most likely to be injured by those suits. But no part of the bill states that any of the land belongs to New York; so *non constat* that she is interested in the question of soil; and the question of state boundary cannot be decided, as between the states, in the circuit court.(*a*) There is no instance of the interposition of a court of *equity, by way of injunction, unless upon the application of a party immediately interested in the subject of the common-law suits, or there is property likely to be withdrawn. 1 Ch. Prec. 186–7; Gilb. Ch. 19; 2 Dall. 402; 5 Bot. Car. Canc. 439; Hind. Ch. 585. Besides, there is a regular course, in which the judgment of this court, independent of its equity character, may be obtained; as, by a writ of error, on a demurrer to evidence, the construction and effect of the alleged agreement between the states might here be revised, and authoritatively declared; and "suits in equity cannot be sustained in any court of the United States, in any case where plain, adequate and complete remedy may be had at law."(*b*) (1 U. S. Stat. 82, § 16). Cowp. 215–6; 2 H. Black. 187. An eventual responsibility cannot constitute a party to the suits below. The several states should, in justice, refund the price of the confiscated estates, if those, who have now brought suits against the purchasers under their respective laws, should succeed; and Pennsylvania was bound, in honor, to compensate General Irwine for the loss of Montour's Island, on the failure of the title derived from her grant (3 Dall. 425); but surely, such considerations will not constitute parties to a judicial proceeding. As to a discovery of title, by whom and

*5]

(*a*) Ellsworth, Chief Justice.—If the bill contains no averment of a right of soil in New York, I think, it must be defective, and lays no foundation for an injunction. To have the benefit of the agreement between the states, the defendants below (who are the settlers of New York) must apply to a court of equity as well as the state herself; but in no case can a specific performance be decreed, unless there is a substantial right of soil, not a mere political jurisdiction, to be protected and enforced. Besides, is not the bill, likewise, defective for want of making the defendants below parties to it?

Chase, Justice.—The validity of the grant of either state must depend upon the question of boundary; for neither New York nor Connecticut could grant land, which it did not own. Hence, I think, the question of boundary must necessarily arise in the suits below.

Paterson, Justice.—On the question just proposed by the chief justice, it may be remarked, that some difficulty would occur in sustaining a bill in this court, at the suit of the defendants below. But it does not appear to me, that any of the cases in the books apply to the present case. What does the bill present? A case of disputed boundaries between two states; and the question of soil, on their conflicting grants, must be decided by the question of jurisdiction. The state of Connecticut has granted out the Gore: the state of New York has also granted out the Gore. The grantees of Connecticut have brought suits in Connecticut, against the grantees of New York, and will obtain possession of the land. If the grantees of New York are thus evicted, they will brings uits in New York, and, on their possession. But where will this feud and litigation end? It is difficult and painful to conjecture, unless this court can, under the constitution, lay hold of the case, to decide the question of boundary, which will be a decision of all the appendages and consequences.

(*b*) Paterson, Justice.—The rule was so before, and is so, independent of the provision in the act of congress.

against whom is it sought? One party to the suit does not require it from another, but a third person requires it, in a suit to which he is not a party, and the decision in which cannot affect his right, whatever it may be.

Lewis, for the complainant, in reply.—The difficulties of the case are obvious to all; and unless the present remedy is applied, the difficulties will dangerously increase. If the lands are not in Connecticut, the ejectments are *coram non judice:* if they are not in New York, suits there would be equally objectionable. Neither state will be satisfied, however, by the judgment of a court held in the other; and for want of a peaceful *forum* to decide the controversy, an odious and vindictive litigation may be perpetuated. But this court has a constitutional jurisdiction on a question of boundary between states; and upon such an occasion, will be eager to exercise it. The interest of New York, too, is sufficient to justify the exercise of it, upon her application. The right and possession of a sovereign state, are not to be treated like the usufructuary right, the *possessio pedis*, of a farmer. A sovereign state possesses what she governs. But is not New York interested, even in a pecuniary point of view, so as to claim the interposition *of this court, to which her settlers, the defendants below, cannot originally resort? It is a fundamental principle of the law of [*6 nature and of nations, that every government is bound to preserve peace and order, to protect individuals, to indemnify those who trust to its faith, and to prevent a dismemberment of its territory. This political and moral obligation, enforced by a regard to her public improvements, and fiscal operations, creates an interest of the highest character in the government of New York; and such as the court will cherish with all its benevolence and authority. 21 Vin. Abr. 181, pl. 1; Ibid. 183, pl. 4, 5, 7; Ibid. pl. 8, 11; 3 Black. Com. 255–6.

The Court, after advisement, delivered their opinion, that as the state of New York was not a party to the suits below, nor interested in the decision of those suits, an injunction ought not to issue.

Injunction refused.(*a*)

Same Cause.

As the state of Connecticut did not appear, *Hoffman* moved that she should appear on the first day of next term, or that the plaintiff be then at liberty to proceed *ex parte*. (3 Dall. 335.) But *Lewis* observed, that the rule required that a *subpœna* issuing in a suit in equity, should be served

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(*a*) *Hoffman.*—In every grant by New York, there is a reservation of gold and silver mines, and of five acres per cent. for roads. The bill might, besides, be amended, by averring the state to be interested in a *residuum* of the land, if that would be sufficient to sustain the prayer for an injunction.

Washington, Justice.—The amendment would not satisfy me; for my opinion is founded upon the fact, that New York is not interested in the suits below.

Chase, Justice.—It is a mere bill to settle boundaries; and we must take it as we find it, not as it might be made.

Ellsworth, Chief Justice.—If there had been a quorum of judges, without my attendance, I should have declined sitting in this cause. As it is, I am glad, that the opinion of my brethren, dispenses with the necessity of my making a part in the decision.

sixty days before the return; which had not been done in the present case The first motion was, thereupon, waived; and an *alias subpœna* awarded. (3 Dall. 320.)

HAZLEHURST *et al. v.* UNITED STATES.

Practice.—Non-pros.

IN error from the Circuit Court for the district of South Carolina. A rule had been obtained by *Lee*, the Attorney-General, at the opening of the court, that the plaintiffs appear and prosecute their writ of error within the term, or suffer a *non-pros.:* but it was found, that errors had been assigned in the court below, and *a joinder in error entered here. The *7] rule was, therefore, changed to the following: "that unless the plaintiffs in error appear and argue the errors to-morrow, a *non-pros.* be entered." The plaintiffs not appearing, the writ of error was non-prossed, according to the rule.

TURNER, administrator, *v.* ENRILLE.

Averment of jurisdiction.

Where the jurisdiction of the federal courts depends on alienage, or the citizenship of the parties, it must be set forth on the record.
Bingham *v.* Cabot, 3 Dall. 382, re-affirmed.

ERROR from the Circuit Court of South Carolina. The record, as abridged for the judges, presenting the following case:

The Marquis de Caso Enrille instituted an action on the case, against Thomas Turner, the administrator of Wright Stanley, in the circuit court of North Carolina, of June term 1795.

A declaration in case was filed by the Marquis de Caso Enrille, of ——— in the island of ———, of June term 1796, in which it is set forth, that Wright Stanley (the intestate) and John Wright Stanley and James Greene were "merchants and partners, *at Newbern, in the said district:*" that Wright Stanley survived the other partners; that on the 4th of June 1791, in the lifetime of all the partners, they were indebted unto the said Marquis in ——— dollars; and in consideration thereof, assumed to pay, &c. The 2d count, *insimul computassent*, when the said partners were found in arrear to the said Marquis, in other ——— dollars, &c. The plaintiff concluded with the usual averments of non-payment, to the damage of the said Marquis, ——— dollars, &c.

On the 30th November 1796, the defendant appeared, and pleaded—1st. *Non assumpsit intest.:* replication and issue. 2d. The statute of limitations as to the intestate: replication, an account-current between merchant and factor: rejoinder, and issue. 3d. Set-off, that the plaintiff was indebted to the intestate, on the 1st of January 1792, in more than the damages by the plaintiff sustained, &c., to wit, in $4000, for money had and received by the plaintiff to the intestate's use, which sum is still due to the defendant, as administrator: replication, that plaintiff owed nothing, &c.: rejoinder, and issue. 4th. The statute of limitations, as to the administrator: replication,

that the demand was made within three years, &c: rejoinder, and issue. 5th. *Plene administravit:* replication, assets: rejoinder, and issue.

On the 1st of June 1799, the issues were tried, a verdict was given on all the issues for the plaintiff, and the jury assessed damages at $3289.65. Judgment for damages, costs and charges.

Writ of error. Errors assigned: 1st. That it does not appear on the pleadings, &c., that either plaintiff or defendant was an alien, or that they were citizens of different states: 2d. That there are blanks in the declaration for places, dates and sums: 3d. The general errors. Plea, *in nullo est erratum:* replication, and issue.

*For the defendant in error, *Dallas* lamented the obvious irregularities on the face of the record, though the merits were incontestibly established in his favor, by the verdict and judgment. He thought, however, that the court would give every reasonable intendment to the allegations of the record, in support of the judgment and verdict; and therefore, endeavored to distinguish the present case from the case of *Bingham* v. *Cabot*, 3 Dall. 382. In *Bingham* v. *Cabot* the defendant's place of residence was not even stated; here, the defendants are stated to be merchants of Newbern, in the district of North Carolina. There, the plaintiffs were described generally of Massachusetts, &c.: here, the plaintiff is described specially of an island; and the cause of action is found to arise on accounts between merchant and factor. It has not been judicially decided, that the averment of alienage, or of citizenship of different states, as a foundation for the federal jurisdiction, must be positive; and it is sufficient, in reason, if circumstantial evidence of the fact can be collected from the record. As to the blanks in the declaration, in relation to the sums, *Dallas* requested an opportunity to consider how far the defect was cured by the verdict, or might be amended, if the court was not decisively against him on the first point. [*8

Ingersoll, for the plaintiff in error, observed, that the case was so very desperate, that it had been virtually abandoned by the opposite counsel. He should, therefore, decline troubling the court.

By the Court.—The decision in the case of *Bingham* v. *Cabot* must govern the present case. Let the judgment be reversed with costs.

Turner, administrator of Stanley, plaintiff in error, *v.* The President, Directors and Company of the Bank of North America, defendants.

Jurisdiction.—Parties.

Where an action is brought upon a promissory note, in a federal court, by an indorsee, against the maker, not only the parties to the suit, but also the payee, must be stated on the record, to be such as to give the court jurisdiction.[1]

Error from the Circuit Court of North Carolina. This was an action upon a promissory note, made in Philadelphia, by Stanley, the intestate, in favor of Biddle & Co., and indorsed by Biddle & Co. to the Bank of North America.

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[1] Mollan *v.* Torrance, 9 Wheat. 587; Bradley *v.* Rhiner, 8 Wall. 393; Morgan *v.* Gay, 19 Id. 81.

The declaration (which contained only a count upon the note itself) stated, that the president and directors of the bank were citizens of the state of Pennsylvania; and that Turner, the administrator, and Stanley, the intstate, were citizens of the state of North Carolina; but of Biddle & Co., the payees and indorsers of the note, there was no other designation upon the record, than "that they used trade and merchandise in partnership together, at Philadelphia or North Carolina."

*9] The error assigned and insisted upon, to wit, an insufficient description of Biddle & Co., was founded *on that part of the 11th section of the judicial act (1 U. S. Stat. 79) which declares, that no district or circuit court "shall have cognisance of any suit to recover the contents of any promissory note, or other *chose in action*, in favor of an assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

Ingersoll, for the plaintiff in error, argued, that unless it was averred upon the record, that the original parties to the note, as well as the parties to the suit, were of different states, or one a citizen, and the other an alien, it could not judicially appear, that the circuit court had jurisdiction of the cause. Though the federal courts are not to be regarded as inferior courts, they are courts of a limited jurisdiction. The jurisdiction of the state courts is general; but the jurisdiction of the federal courts is special, and in the nature of an exception from the general jurisdiction of the state courts. That the parties are citizens of different states, is one ground for the exception; and so far as respects the immediate parties to the suit, the ground for the exception sufficiently appears upon the record. But if an action is brought by the indorsee of a promissory note, he cannot have the benefit of the exception, unless he shows that his indorser, as well as himself, was entitled to resort to a federal tribunal. Congress knew, that the English courts had amplified their jurisdiction, through the medium of legal fictions; and it was readily foreseen, that by the means of a colorable assignment to an alien, or to the citizen of another state, every controversy arising upon negotiable paper might be drawn into the federal courts. Hence, the original character of the debt is declared to be the exclusive test of jurisdiction, in an action to recover it. Unless the original character of the note furnished a subject of federal jurisdiction, it is emphatically declared, that "no district or circuit court shall have cognisance of the suit;" and a court of special jurisdiction cannot take cognisance of the suit, unless the case judicially appears by the record to be within its jurisdiction. *Lord Coningsby's Case*, 9 Mod. 95. So, wherever a party takes advantage of a clause in a statute, to which a proviso is attached, he must not only bring his case within the general clause, but show that it is not affected by the proviso. 5 Bac. Abr. 666; Plowd. 410; Ld. Raym.

Nor is the present too late a period to take advantage of the defect. Silence, inadvertence or consent cannot give jurisdiction, where the law denies it. In *Bingham* v. *Cabot*, 3 Dall. 382, the ground of jurisdiction was more strongly laid; and yet a similar defect was successfully assigned for error.

Rawle, for the defendant in error.—It is not intended to controvert the

general proposition, that where a suit is brought before an inferior court, the circumstances that gave it jurisdiction *must be set forth on the record; and if they are omitted, it may be taken advantage of upon [*10 a writ of error. But the circuit court is not, in technical language or intendment, an inferior court; and this consideration alone destroys the application of most of the English authorities. It is, then, to be remarked, that the judicial power is the grant of the constitution; and congress can no more limit, than enlarge the constitutional grant. In the second section of the third article, the constitution contemplates the parties to the controversy, as alone raising the question of jurisdiction; and if the existing controversy is "between citizens of different states," the judicial power of the United States expressly extends to it.(a) By the opposite construction, however, congress has imposed a limitation upon the judicial power, not warranted by the constitution, when, without regard to the immediate parties to the controversy, the law excepts from the cognisance of the federal courts, suits upon promissory notes, which, by assignment, have placed the immediate parties in the relation of citizens of different states. If the circuit court is not an inferior, neither is it, in the sense asserted, a limited jurisdiction, but it is a court of general jurisdiction, having some cases expressly excepted from its cognisance. It may be compared to the king's bench in England, from whose general jurisdiction is excepted the cognisance of cases, belonging to the counties Palatine. Carth. 11, 12, 354; 1 Saund. 73; 2 Mod. 71–3. As to such courts, it is sufficient, if it appears to the appellate authority, that, from the subject-matter, the court below might have jurisdiction; and at all events, it would be too late, on a writ of error, to take the exception—an objection not suggested in *Bingham* v. *Cabot*. Then, here, the parties are stated to be citizens of different states; the place was not exempt from federal jurisdiction; and the nature of the controversy did not, of itself, deprive the circuit court of its general cognisance of suits between citizens of different states.

The Chief Justice delivered the opinion of the Court, in the following terms:

Ellsworth, Chief Justice.—The action below was brought by the president and directors of the Bank of North America, who *are well [*11 described to be citizens of Pennsylvania, against Turner and others, who are well described to be citizens of North Carolina, upon a promissory note, made by the defendant, payable to Biddle & Co., and which, by assignment, became the property of the plaintiffs. Biddle & Co. are no otherwise

(a) Ellsworth, Chief Justice.—How far is it meant to carry this argument? Will it be affirmed, that in every case, to which the judicial power of the United States extends, the federal courts may exercise a jurisdiction, without the intervention of the legislature, to distribute and regulate the power?

Chase, Justice.—The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to congress. If congress has given the power to this court, we possess it, not otherwise: and if congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the constitution might warrant.

described, than as "using trade and merchandise in partnership together," at Philadelphia or North Carolina: and judgment was for the plaintiff. The error assigned, the only one insisted on, is, that it does not appear from the record, that Biddle & Co., the promisees, or any of them, are citizens of a state other than that of North Carolina, or aliens.

A circuit court, though an inferior court, in the language of the constitution, is not so in the language of the common law; nor are its proceedings subject to the scrutiny of those narrow rules, which the caution or jealousy of the courts at Westminister long applied to courts of that denomination; but are entitled to as liberal intendments or presumptions in favor of their regularity, as those of any supreme court. A circuit court, however, is of limited jurisdiction: and has cognisance, not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace. And the fair presumption is (not as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction, until the contrary appears. This renders it necessary, inasmuch as the proceedings of no court can be deemed valid, further than its jurisdiction appears, or can be presumed, to set forth upon the record of a circuit court, the facts or circumstances which give jurisdictiou, either expressly, or in such manner as to render them certain by legal intendment. Among those circumstances, it is necessary, where the defendant appears to be a citizen of one state, to show that the plaintiff is a citizen of some other state, or an alien; or if (as in the present case) the suit be upon a promissory note, by an assignee, to show that the original promisee is so: for by a special provision of the statute, it is his description, as well as that of the assignee, which effectuates jurisdiction.

But here, the description given of the promisee only is, that "he used trade" at Philadelphia or North Carolina; which, taking either place for that where he used trade, contains no averment that he was a citizen of a state, other than that of North Carolina, or an alien; nor anything which, by legal intendment, can amount to such averment. We must, therefore, say that there is error. It is exceedingly to be regretted, that exceptions which might be taken in abatement, and often cured in a moment, should be reserved to the last stage of a suit, to destroy its fruits.

Judgment reversed.

*FEBRUARY TERM, 1800.

Present, CUSHING, PATERSON, CHASE and WASHINGTON, Justices.

MOSSMAN, surviving executor, Plaintiff in error, *v.* HIGGINSON, surviving partner, Defendant in error.

Amendment.—Description of parties.

A writ of error, regularly tested, with a blank for the return-day, was allowed to be amended, the term to which it was returnable, the time when it was filed in the court below, and when in the supreme court, appearing by indorsements on the writ.[1]

In proceedings in a federal court, in equity, to foreclose, it is as necessary to describe the parties, as in any other suit.

To give jurisdiction to a circuit court, it is not enough that an alien is a party; it must also appear that the other party is a citizen.[2]

THIS was a writ of error, to remove the proceedings on a bill in equity, from the Circuit Court for the district of Georgia, tested the 27th November 1798, returnable on the —— next. The case, on the bill and pleadings, was briefly this:

Alexander Willy, an inhabitant of Georgia, being indebted to Higginson & Greenwood, British merchants, gave them a bond and mortgage, payable the first of January, 1773. In the year 1778, Willy was banished from the state of Georgia, and his estate confiscated by law. The mortgaged premises were seized and sold by the commissioners for forfeited estates, to certain purchasers, who afterwards sold the same to James Houston; and the property remained in his possession, or in the possession of his executors, until the 12th of September 1796, when it was levied upon, sold and conveyed to William Mien, by the creditors of Houston; notice of the mortgage having been given to Mossman, the executor of Houston, to Mien, the agent for his creditors, and to the marshal, before the sale. In March 1797, Higginson, the surviving mortgagee, filed the present bill, to foreclose the equity of redemption, stating himself to be a subject of Great Britain; but in no part of the proceedings, were the defendants, or any of them, stated to be citizens of the United States. The defendants pleaded the confiscation laws of Georgia in bar, and answered *to the merits; but WASHINGTON, Justice, overruled the pleas, and decreed, that unless William [*13
Mien paid the principal and interest of the debt, before the 17th of February 1799, the equity of redemption should be foreclosed. The merits of the decree were not, however, discussed on the writ of error, but the following points occurred:

I. *Dallas*, for the plaintiff in error, moved to amend the writ, by inserting the return-day of the present term, in the blank. The writ is regularly tested, and by indorsements, it appeared, when it was filed below, and when it was filed here. The clerk of the circuit court had also indorsed, "Returnable to February term 1799." There is, therefore, sufficient matter to amend

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[1] And see Course *v.* Stead, *post*, p. 22.

[2] Jackson *v.* Twentyman, 2 Pet. 136; Picquet *v.* Swan, 5 Mason 35; Wilson *v.* City Bank, 2 Sumn. 422; Prentiss *v.* Brennan, 2 Bl. C. C. 162; Robson *v.* Bernard, 3 Id. 245.

by; and the amendment is within the provision of the act of congress. (1 U. S. Stat. 91, § 32.)

By the Court.—Let the amendment be made.

II. It was objected by *Ingersoll* and *Dallas*, for the plaintiff in error, that the jurisdiction of the court did not appear upon the record, as there was no designation of the citizenship of the defendants. 3 Dall. 382, 369; *Turner* v. *Enrille* (*ante*, p. 7).

It was answered, by *E. Tilghman* and *Reed* (of South Carolina), that as no process was prayed against Willy, he was not, in legal contemplation, a party to the suit (1 P. Wms. 593); that the prayer of process against Mossman, who never held the land, was irregular, and to be regarded as mere surplusage; that there was no pretence to charge Houston; and that Mien, being expressly stated to be the purchaser of the land, the court will take notice of the law of Georgia, by which no alien can hold real estate; and by necessary implication, the purchaser must be a citizen. Besides, it is enough, under the constitution, the treaty of 1783, and the 11th section of the judiciary act, that an alien is a party to the suit, whose real object is the thing mortgaged, a proceeding *in rem*, and not a personal recovery. At all events, the court will permit the defect to be amended.

Ingersoll, in reply.—The judiciary act was only intended to carry the constitution into effect, and cannot amplify or alter its provisions. The constitution nowhere gives jurisdiction (nor has any judge ever countenanced the idea) in suits between alien and alien. It is not an exception to the rule, that the bill in equity is in the nature of a proceeding *in rem:* for there cannot be a foreclosure of the equity of redemption, without a personal suit. It is not like the case of a monition to condemn a prize-ship, which is notice to all the world, and no party respondent is requisite; and the supposed inference of citizenship from purchasing land fails, when it is recollected that the purchase does not fix the use. The jurisdiction of the federal courts
*14] (Const. art. III. § 2) *is not, where a question arises that may be affected by a treaty, but where a case arises under a treaty; and if a question on the validity of a treaty arises in a state court, there is a special provision for transferring it to the supreme court. (1 U. S. Stat. 84, § 22.) But in the present instance, it does not appear that any question can arise under the treaty; for it is not referred to, directly nor indirectly, in any part of the record. As to an amendment, there is nothing to amend by. The citizenship of the defendants could only be judicially known, by the admission of the parties, or by evidence of the fact. It is not expressly or impliedly admitted; and this court cannot try an issue to ascertain it.

By the Court.—The decisions on this subject govern the present case; and the 11th section of the judiciary act can and must receive a construction consistent with the constitution. It says, it is true, in general terms, that the circuit court shall have cognisance of suits "where an alien is a party;" but as the legislative power of conferring jurisdiction on the federal courts, is, in this respect, confined to suits between citizens and foreigners, we must so expound the terms of the law, as to meet the case, "where, indeed, an alien is one party," but a citizen is the other. Neither the constitution, nor

the act of congress, regard, on this point, the subject of the suit, but the parties. A description of the parties is, therefore, indispensable to the exercise of jurisdiction. There is here no such description ; and of course,

The writ of error must be quashed.

Cooper *v.* Telfair.

Constitutional law.

A state legislature, before the adoption of the constitution of the United States, had power to pass a bill of attainder and confiscation, unless restrained by the state constitution.

The act of the legislature of Georgia, of the 4th of May 1782, inflicting penalties on, and confiscating the estate of such persons as are therein declared guilty of treason, is not repugnant to the constitution of that state.

Semble, that this court can declare an unconstitutional law invalid.(*a*)

Quære? Whether this court can invalidate laws enacted previously to the adoption of the constitution of the United States.

Error from the Circuit Court for the district of Georgia. The record exhibited the following case :

Basil Cooper, at present of the island of Jamaica, in the dominions of his Britannic majesty, formerly an inhabitant of the state of Georgia, brought an action in the circuit court of Georgia, to November term 1797, against Edward Telfair, of the district of Georgia, upon a bond for 1000*l.* sterling, equal to $4285.70, dated the 14th of May 1774.

After *oyer* of the bond and condition, the defendant pleaded in bar, 1st, Payment : 2d, "That on the fourth day of May 1782, an act was passed by the legislature of the state of Georgia, entitled 'An act for inflicting penalties on, and confiscating the estate of such persons as are therein declared guilty of treason, and for other purposes therein mentioned,' by which it is, among other things, enacted and declared, 'that all and every the persons, named and included in the said act, are banished from the said state ; and that all and singular the estate, real and personal, of each and every of the aforesaid persons, which they held, possessed or were entitled *to, in law or equity, on the 19th day of April 1775, and which they have [*15 held since, or do hold in possession, or others holding in trust for them, or to which they are, or may be, entitled, in law or equity, or which they may have, hold or be possessed of, in right of others, together with all debts, dues and demands of whatsoever nature, that are or may be owing to the aforesaid persons, or either of them, be confiscated to and for the benefit of this state.' That the said Basil Cooper is expressly named and included in the above in part recited acts ; and that he was, on the said 4th day of May 1782, and for a long time before, a citizen of the state of Georgia, and of the United States of America. That the said Basil Cooper, being a citizen, &c., owing allegiance, &c., on the 4th of May 1782, and for a long time before, adhered to the troops of his Britannic majesty, then at open war with the said state of Georgia and United States of America, and did take up arms with the said troops, &c. That the said Basil Cooper hath never since returned within the limits and jurisdiction of the said United States, or either

(*a*) The federal courts have the power to declare an unconstitutional law invalid. Federalist No. 78; Marbury *v.* Madison, 1 Cr. 137; Cohens *v.* Virginia, 6 Wheat. 386, 414.

of them. That by virtue of the above-recited act, and also of an act, entitled, 'An act to continue an act to authorize the auditor to liquidate the demands of such persons as have claims against the confiscated estates, and for other purposes therein mentioned,' passed the 13th February 1786: and of another act entitled 'An act to compel the settlement of the public accounts, for inflicting penalties on officers of this state, who may neglect their duty, and for vesting the auditors with certain powers for the more speedy settlement of the accounts of this state, with the United States,' passed the 10th of February 1787; the sum of money mentioned in the condition of the bond, and all interest thereon, have become forfeited and confiscated to the state of Georgia; and the right of action attached thereto; and no cause of action hath accrued to the said Basil Cooper to demand and have of the said Edward Telfair, the said sum of money, &c."

To this plea, the plaintiff replied, "that he was never tried, convicted or attainted of the crime of treason alleged against him; and that by the constitution of the state (in force at the time of passing the acts in the said plea set forth, to wit, on the 4th day of May 1782), unanimously agreed to in a convention of the people of this state, on the 5th of February 1777, it is ordained, that—

"Article 1. The legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other.

"Article 7. The house of assembly shall have power to make such laws and regulations, as may be conducive to the good order and well-being of the state, provided such laws and regulations be not repugnant to the true intent and meaning of any rule or regulation contained in this constitution.

*16] "Article 39. All matters of breach of the peace, felony, murder and *treason against the state, to be tried in the county where the crime was committed, &c.

"Article 60. The principles of the *habeas corpus* act shall be part of this constitution.

"Article 61. The freedom of the press, and the trial by jury, to remain inviolate for ever.

"And that the said recited acts, so far as they can operate to bar the said Basil from maintaining his action, are repugnant to the true intent and meaning of divers rules and regulations contained in the said constitution, and are, as to the action of the said Basil, null and void: without that, &c." The defendant demurred to the replication; and the plaintiff joined in demurrer.

On the 2d of May 1799, the circuit court, composed of ELLSWORTH, Chief Justice, and CLAY, District Judge, decided, that the replication was insufficient; that the plea in bar was sufficient; and that judgment on the demurrer be entered for the defendant. Upon this judgment, the present writ of error was brought, and the following errors assigned: 1. The general errors. 2. That the plea does not set forth the constitutional power of the legislature of Georgia, to deprive the plaintiff of his rights as a citizen; and on their own authority, to pass sentence of confiscation and banishment. 3. That the judgment decides that the legislature had cognisance of the treason alleged against the plaintiff, and could legally try, convict and banish him; whereas, they had no such power, on constitutional principles.

4. That by the judgment, it appears, the legislature could deprive individuals of their lives and property, without trial by jury, or inquest of office, contrary to the constitution of Georgia. 5. That the judgment gives effect to an act of Georgia, which is an union and usurpation of judicial, as well as legislative powers; which powers the constitution declares should be kept separate.

The case was argued by *E. Tilghman*, for the plaintiff, and by *Ingersoll* and *Dallas*, for the defendant, on the 7th of February 1800, upon the general question, whether the confiscation acts of Georgia, were repugnant to the constitution of the state, and therefore void?

For the *plaintiff*.—1st. If the law is contrary to the constitution, the law is void; and the judiciary authority either of the state, or of the United states, may pronounce it so. (2 Dall. 308, 410; 3 Ibid. 383.) 2d. The law is contrary to the constitution, inasmuch as it is an exercise of the judicial power by the legislative *authority, in opposition to an express prohibition of such an union of jurisdiction. That acts of attainder, [*17 banishment and confiscation are an exercise of judicial power, the English as well as the American authorities, clearly establish. (2 Woodes. Lect. 621–2; 11 State Trials, 25; 6 Ibid. 405; 4 Inst.; 2 Woodes. 147; 3 Dall. 389.) 3d. Whatever right Georgia had to confiscate the property of her enemy; yet, as the pleadings show the plaintiff to have been a citizen, his property could only be forfeited by the regular judgment of a court, upon a trial by his peers, or the law of the land. As the case is now presented, it is a legislative act, by which the property of an individual citizen is arbitrarily taken from him, and given to the state of Georgia. (3 Dall. 388, 389.)

For the *defendant*.—It is conceded, that if the law plainly and obviously violates the constitution of Georgia, it is void, and never was a valid rule of action. The only question, therefore, to be discussed, is, whether such a fatal collision actually exists? Or, in other words, whether the legislature of Georgia had a power, consistently with the constitution, to pass a law, confiscating the property of her own citizens, who had fled beyond the reach of the ordinary legal process? 1st. Georgia, at the time of passing the law, was a sovereign, independent state, with all the rights, prerogatives and powers resulting from that character; except so far as she had expressly devolved on congress a portion of her sovereignty; an exception that does not affect the present case. 2d. To a corporation of the most limited nature, the power of passing by-laws is a necessary incident. And to every sovereign legislature, an indefinite power of making laws is equally an incident, restricted only by impossibilities; for even if they should be against natural justice, Blackstone tells us, they would be valid. 3d. The constitution of Georgia does not declare, that "no bill of attainder shall be passed." There is, therefore, no express restriction of the sovereign legislative authority upon the subject; and to decide in favor of the restriction, would be to make, *ex post facto*, not to enforce, the constitution of Georgia. 4th. Such acts of attainder and confiscation were not novelties in America, any more than in England. (2 Woodes. Lect. 621, 624, 497, 498, 622. See Confiscation Acts of the several states.) They are exercises of political authority, rather than of judicial power; they are laws, not judgments. And as the

power of attainder, banishment and confiscation, is essential to the existence and operations of government, yet, cannot be exercised by the ordinary tribunals of justice; it naturally belongs to the sovereign, that is, to the legislature of the nation. 5th. But, independently of the necessity of the existence of such a power, and of the implication that it does exist under every constitution, unless it is expressly excluded, a just analysis of the various clauses of the constitution *itself (which contemplates a trial by jury only in the case of an offence committed within a county of the state), the contemporaneous construction of the legislature of Georgia, the corroborative example of other states, whose constitutions contain the same provisions, and even the authoritative recommendations of congress, with the recognitions of the treaty of peace; demonstrate the legitimacy and validity of the acts of attainder and confiscation, which naturally grew out of the revolutionary war. 6th. Attainder and confiscation acts are most common in England; yet, generally speaking, the judicial power and the legislative power, are there kept separate and distinct. (Blackstone, Woodeson, Montesquieu, De Lolme.) They are the exercise of a constitutional power of legislation. (2 Wood. 621, 647.) And to exercise a power, not within the scope of the judicial authority, cannot be confounding the distinct branches of the government.

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On the 13th of February 1800, the judges (except the Chief Justice, who had decided the cause in the circuit court) delivered their opinions, *seriatim*, in substance, as follows:

Washington, Justice.—The constitution of Georgia does not expressly interdict the passing of an act of attainder and confiscation, by the authority of the legislature. Is such an act, then, so repugnant to any constitutional regulation, as to be excepted from the legislative jurisdiction, by a necessary implication? Where an offence is not committed within some county of the state, the constitution makes no provision for a trial, neither as to the place, nor as to the manner. Is such an offence (perhaps, the most dangerous treason) to be considered as beyond the reach of the government, even to forfeit the property of the offender, within its territorial boundary? If the plaintiff in error had shown, that the offence with which he was charged, had been committed in any county of Georgia, he might have raised the question of conflict and collision, between the constitution and the law: but as that fact does not appear, there is no ground on which I could be prepared to say, that the law is void. The presumption, indeed, must always be in favor of the validity of laws, if the contrary is not clearly demonstrated.

Chase, Justice.—I agree, for the reason which has been assigned, to affirm the judgment. Before the plaintiff in error could claim the benefit of a trial by jury, under the constitution, it was, at least, incumbent upon him to show, that the offence charged was committed in some county of Georgia, in which case alone, the constitution provides for the trial. But even if he had established that fact, I should not have thought the law a violation of the constitution. The general principles contained in the constitution are not to be regarded as rules to fetter and control; but as matter merely declaratory and directory: for even in the constitution

*itself, we may trace repeated departures from the theoretical doctrine, that the legislative, executive and judicial powers should be kept separate and distinct.

There is, likewise, a material difference between laws passed by the individual states, during the revolution, and laws passed subsequently to the organization of the federal constitution. Few of the revolutionary acts would stand the rigorous tests now applied: and although it is alleged, that all acts of the legislature, in direct opposition to the prohibitions of the constitution, would be void; yet, it still remains a question, where the power resides to declare it void? It is, indeed, a general opinion, it is expressly admitted by all this bar, and some of the judges have, individually, in the circuits, decided, that the supreme court can declare an act of congress to be unconstitutional, and therefore, invalid; but there is no adjudication of the supreme court itself upon the point. I concur, however, in the general sentiment, with reference to the period, when the existing constitution came into operation; but whether the power under the existing constitution, can be employed to invalidate laws previously enacted, is a very different question, turning upon very different principles; and with respect to which, I abstain from giving an opinion; since, on other ground, I am satisfied with the correctness of the judgment of the circuit court.

Paterson, Justice.—I consider it a sound political proposition, that wherever the legislative power of a government is undefined, it includes the judicial and executive attributes. The legislative power of Georgia, though it is in some respects restricted and qualified, is not defined by the constitution of the state. Had, then, the legislature power to punish its citizens, who had joined the enemy, and could not be punished by the ordinary course of law? It is denied, because it would be an exercise of judicial authority. But the power of confiscation and banishment does not belong to the judicial authority, whose process could not reach the offenders: and yet, it is a power that grows out of the very nature of the social compact, which must reside somewhere, and which is so inherent in the legislature, that it cannot be divested or transferred, without an express provision of the constitution.

The constitutions of several of the other states of the Union, contain the same general principles and restrictions; but it never was imagined, that they applied to a case like the present; and to authorize this court to pronounce any law void, it must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative application.

*Cushing, Justice.—Although I am of opinion, that this court has the same power that a court of the state of Georgia would possess, to declare the law void, I do not think, that the occasion would warrant an exercise of the power. The right to confiscate and banish, in the case of an offending citizen, must belong to every government. It is not within the judicial power, as created and regulated by the constitution of Georgia: and it, naturally, as well as tacitly, belongs to the legislature. [*20

By the Court.—Let the judgment be affirmed, with costs.

WILLIAMSON, Plaintiff in error, *v.* KINCAID.

Jurisdiction in error.—Amount in controversy.—Supersedeas.

If the value of the matter in dispute do not appear on the record, it may be shown by affidavit; but in such a case, the writ of error is not a *supersedeas*.[1]

ERROR from the Circuit Court of Georgia. It appeared from the record, that "Marian Kincaid, of Great Britain, widow, demanded against John G. Williamson, the one-third of 300 acres of land, &c., in Chatham county, as dower. That the tenant pleaded: 1st. The act of Georgia (passed the 1st of March 1778) attainting G. Kincaid (the demandant's late husband), forfeiting his estate, and vesting it in Georgia, without office. 2d. The act of the 4th of May 1782, banishing G. Kincaid, and confiscating his estate. 3d. The appropriation and sale of the lands in question, by virtue of the said attainder and confiscation, before the 3d of September 1783 (the date of the definitive treaty of peace), and before G. Kincaid's death. 4th. The alienage of the demandant (who was resident abroad on the 4th of July 1776 and ever since), and therefore, incapable of holding lands in Georgia. That the demandant replied, that she and her husband were inhabitants of Georgia, on the 19th of April 1775, then under the dominion of Great Britain; that her husband continued a subject of Great Britain, and never owed allegiance to Georgia, nor was ever convicted, by any lawful authority, of any crime against the state. That the tenant demurred to the replication, the demandant joined in demurrer, and judgment was pronounced by the circuit court (composed of WASHINGTON, Justice, and CLAY, District Judge), for the demandant." On this judgment, the writ of error was brought, and the following errors assigned. 1. The general errors. 2. The attainder of G. Kincaid and the forfeiture and sale of his estate; so no right to dower accrued; and no land out of which it could be enjoyed. 3. The alienage of the widow, on the 4th of July 1776, and ever since, by which she was incapable to take and hold real estate in Georgia.

The principal question (whether an alien British subject was entitled, *21] under the treaty of peace, to claim and hold lands in *dower) was not discussed, as the judgment was reversed, for want of a sufficient description of the parties to the suit, on the authority of *Bingham* v. *Cabot*, 3 Dall. 382, and *Turner* v. *Bank of North America* (*ante*, p. 8). But an important point of practice was previously settled, relative to the mode of ascertaining the value of the matter in dispute, in an action like the present.

For the *plaintiff* in error, it was admitted, in answer to an objection, that the value of the matter in dispute did not appear upon the record; but it was urged that, from the nature of the subject, the demand of the plaintiff could not ascertain it; nor from the nature of the suit (like a case of ejectment, where the damages are only given for the ouster) could it be fixed by the finding of a jury, on the judgment of the court. 3 Bl. Com. 35–6. As, therefore, there was no act of congress, nor any rule of the court, prescribing a mode to ascertain, in such cases, the value in dispute, that the party may have the benefit of writ of error, it was proposed to continue the cause,

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[1] Course *v.* Stead, *post*, p. 22.

to afford an opportunity to satisfy the court, by affidavits, of the actual value of the property.

By the Court.—Be it so: let the value of the matter in dispute be ascertained by affidavits, to be taken on ten days' notice to the demandant, or her counsel, in Georgia. But, consequently, the writ of error is not to be a *supersedeas.*

Ingersoll and *Dallas,* for the plaintiff in error. *E. Tilghman,* for the defendant in error.

Blair *et al.*, Plaintiffs in error, *v.* Miller *et al.*

Practice.

A writ of error, not returned at the term to which it is returnable, is a nullity.

Writ of error from the Circuit Court of Virginia. The judgment was rendered in the circuit court, on the 28th of May 1799, and a writ of error issued, returnable to August term 1799; but the record was not transmitted, nor the writ returned into the office of the clerk of the supreme court, until the 4th of February 1800. *Swift* objected to the acceptance and return of the record and writ: And—

By the Court.—The writ has become a nullity, because it was not returned at the proper term. It cannot, of course, be a legal instrument, to bring the record of the circuit court before us for revision.(*a*)

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*Rutherford *et al.*, Plaintiffs in error, *v.* Fisher *et al.* [*22

Error.

A writ of error will only lie, in the case of a final judgment.

Error from the Circuit Court of New Jersey, sitting in equity. It appeared, that the defendants in the circuit court had pleaded the statute of limitations to the bill of the complainants; and that the plea was overruled, and the defendants ordered to answer the bill. On this decree, the present writ of error was sued out, and *Stockton* (of New Jersey) moved to quash the writ, because it was not a final decree, upon which alone a writ of error would lie. (1 U. S. Stat. 84, § 22.) *E. Tilghman,* for the plaintiff in error, acknowledged the force of the words, "final judgment," in the act of congress; and submitted the case, without argument.

Chase, Justice.—In England, a writ of error may be brought upon an interlocutory decree or order; and until a decision is obtained upon the writ, the proceedings of the court below are stayed. But here, the words of the act, which allow a writ of error, allow it only in the case of a final judgment.

By the Court.—The writ must be quashed, with costs.

(*a*) See Course *v.* Stead, *post,* p. 22.

The Charles Carter.

Blaine *v.* The Ship Charles Carter *et al.*

Error.

Whatever may be the original nature of the suit in a circuit court, it cannot be removed into the supreme court, except by writ of error.

This was an appeal from the Circuit Court of Virginia; and the preliminary question discussed was, whether such a process could be sustained? After argument—

The Court decided, that the removal of suits, from the circuit court into the supreme court, must be by writ of error, in every case, whatever may be the original nature of the suits.[1]

Course *et al. v.* Stead and wife, *et al.*

Amendment.—Jurisdiction in error.—Averment of citizenship.—Judicial notice.

The *teste* of a writ of error is amendable, of course.

The value of the land in controversy may be shown by affidavit, to sustain the writ of error, if it do not appear on the record.

If a new party and subject-matter be brought before the court, by supplemental bill, it must show that the court has jurisdiction, by reason of the citizenship of the parties to such supplemental bill.

The federal courts will take judicial notice, without proof, of the laws of the several states.

Error from the Circuit Court of the Georgia district, sitting in equity. On the record, it appeared, that upon the 5th of May 1795, an order has been made, in the case of *Stead et al., executors of Stead*, v. *Telfair et al.*, the legal representatives of Rae & Somerville,(*a*) "that 3634*l.* 14*s.* 7*d.* sterling, with interest at 5 per cent, from the 1st of January 1774, to the 5th of May 1795, deducting interest from the 19th of April 1775, until the 3d of September 1783, be paid to the complainants in that suit, with 5 per cent. *23] on the amount of principal and interest, *for making the remittance to Great Britain. That the partnership property of Rae & Somerville, admitted by the defendants to be in their hands, be first applied to the payment of the complainants. That the lands belonging to J. Rae, or J. Somerville, deceased, referred to in the answers of the several defendants, and the title-deeds of which they admitted to be in their possession, be sold by the marshal, and the proceeds be applied to satisfy the decree; the deeds to be deposited with the clerk in three months."

On the 15th of November 1796, a second order was made by consent (Paterson, Justice, presiding), upon the report of the clerk, that, on the 4th of January 1796, the reremained due to the complainants $11,196.77; "that the

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(*a*) The order was made when Blair, Justice, presided. The deduction of interest during the war (this being a British debt) has not received the sanction of all the federal judges. See 2 Dall. 104, in note.

[1] An appeal is allowed in cases of equity, admiralty and prize, by act of 3d March 1803 § 2 (2 U. S. Stat. 244); and R. S. § 692.

partnership property of Rae & Somerville, in the hands of Telfair, be sold, and the bonds, &c., delivered over, under a general assignment. That if these assets are not sufficient to pay the debt, the remainder of Somerville's property be sold; and after paying a prior judgment, shall be applied to the debt of the complainants. That a bond, admitted by W. Stephens, one of the defendants, to be in his hands, given by R. Whitfield & Co. to J. Rae, senior, be delivered to the complainants. That certain negroes, in the custody of S. & R. Hammond and J. Habersham, be sold, and applied to the payment of the complainants' debt."

On the 2d of May 1797, Elizabeth Course, executrix of Daniel Course was made a defendant, upon motion of the solicitor for the complainants; and on the 2d of April 1798, the supplemental bill was filed, which gave rise to the present writ of error, and on which a *subpœna* issued only against Elizabeth Course. This bill set forth the original bill of *Stead et al.* v. *Telfair et al.;* the orders and decrees above stated; and the outstanding balance on the 4th of April 1798, amounting to $8479.58. It then alleged, "that J. Rae, senior, was seised, in his lifetime, of a tract of 450 acres of land, which was subject to the decree in favor of the complainants; and that Elizabeth Course held the said tract of land unjustly, and without title. And it concluded with praying a discovery of the title, and surrender of the premises in satisfaction of the decree; and that the other defendants may disclose assets, &c."

On the 3d of April 1799, Elizabeth Course filed an answer to the supplemental bill, in which she set forth, "that she found among her late husband's papers a deed of the 5th of May 1792, executed by F. Courvoise, tax-collector of Chatham county, to him, as purchaser at public auction, of the said tract of land, for 128*l.* 19*s.* 4*d.*, for which a receipt was indorsed, and the deed recorded on the 24th of October 1792. That in virtue of the deed, possession was taken of the premises. That she believed the land came to J. Rae, by devise or descent from his father, was sold for non-payment of taxes, and was purchased, *bonâ fide*, *by her late husband, whose title, in fee, is warranted by the tax-laws of the state; and as such is claimed by the defendant for herself and children." [*24

The cause was heard, upon the former decree of 1796, the supplemental bill and answer before Ellsworth, Chief Justice, in May term 1799, when the court decreed, "that the pretended conveyance be set aside, and held as void; and the land sold to satisfy the debt of the complainants. Also, that certain negroes in the possession of William Stephens and Joseph Habersham, executors of Samuel Elbert, be sold and applied to the same object, &c."

The errors assigned upon the record (which consisted of a recital of the two orders of court, the supplemental bill and the proceedings on it, but not the original bill) were, in substance, the following:

1. It does not appear that the partnership property was first applied to the payment of the claimants' debt, conformable to the decree of the 25th of May, 1795: and, if so applied, it might have been sufficient.

2. The decree orders certain negroes in the possession of Habersham and Stephens, executors of Elbert, to be sold, whereas, it was denied, that the negroes were in their hands, but it was admitted that they were in the possession of the minor children of the said Elbert; and proof to the contrary was not made, nor were the children parties to the suit.

3. The negroes, presumed to be assets of J. Rae, are ordered to be sold, exclusively of property in the hands of the other defendants, without equality or apportionment.

4. The facts stated in the answer are to be taken as true, since the complainants did not reply; and thence it appears, that the purchase of the land was *bonâ fide*, for a valuable consideration, under the sanction of a public officer, whose acts were annulled by the decree, without any evidence of fraud or imposition.

5. The exhibits referred to in the supplemental bill (to wit, the two orders of court above mentioned) were not filed with the bill, and were inadmissible as evidence.

6. That all the heirs, as well as the widow of Daniel Course, should have been made parties, particularly the minors, who are under the peculiar protection of a court of equity.

7. Real and personal estate are on the same footing, by the law of Georgia, equally under the management of executors or administrators. And as there are other creditors to be affected by the decree, the legal representatives of Daniel Course should have been parties to the suit.

8. The facts on which the decree was founded do not appear on the record.

9. The court had not power, under the circumstances of the case, to order the sale of real estate.

*25] *Though this view of the record is given, for the sake of the points discussed and decided in the circuit court, the merits, on the errors assigned, were not discussed or decided in this court; [1] but the following points occurred.

I. *Ingersoll*, for the defendants in error, objected, that the writ of error was not tested as of the last day of the last term of the supreme court; nor, indeed, of that term at all; for the court had risen before the day of its *teste*.

Dallas observed, in answer, that there was no rule, either legislative or judicial, prescribing the date of the *teste* of a writ of error; that in Georgia, it might not be practicable, in many cases, to know the last day of the term of the supreme court, whose session was not limited; that if the writ is issued, in fact, after the preceding term, and returned, *sedente curia*, to the present term, it is regular; and that it is not like the case of a term intervening, between the *teste* of a writ of error, and the delivery of the record to the clerk of the court. (*a*)

By the Court.—The objection is not sufficient to quash the writ of error. The *teste* may be amended by our own record of the duration of the last term; and it is, of course, amendable.

II. *Ingersoll* objected that the writ of error was not directed to any circuit court; for its address was "to the judges of the circuit court, holden in and for the district aforesaid;" whereas, no district was previously named.

(*a*) See Blair *v.* Miller, *ante*, p. 21.

[1] For decisions on the merits, see Telfair *v.* Stead, 2 Cr. 407, and Stead *v.* Course, 4 Id. 403.

Dallas, in reply, observed, that the district of Georgia was indorsed on the writ, that the attestation of the record was in Georgia, and that the record returned was from the circuit court of the Georgia district.

By the Court.—The omission is merely clerical. We wish, indeed, that more attention were paid to the transcribing of records; but there is enough, in the present case, to amend by; and therefore, let the omission be supplied.

III. *Ingersoll* objected, that the value of the matter in dispute does not appear, upon the record, to be sufficient to sustain a writ of error. The land, which is the immediate subject of the supplemental bill, was sold for 128*l.* 19*s.* 4*d.*, and that is the only criterion of its value exhibited to the court.

Dallas.—The value of the property in dispute, must be its actual value for the purposes of jurisdiction. The price, at a forced sale for taxes, many years ago, cannot rationally be taken for the actual value of the land, with its meliorations. The court will, therefore, permit the plaintiff in error to ascertain the fact by affidavits, on notice to the opposite party. It was so done in *Williamson* v. *Kincaid* (*ante*, p. 20).

*By the Court.—Let the rule be entered on the same terms, as in the case of *Williamson* v. *Kincaid*.[1] [*26

These preliminary objections to the writ being obviated, and the depositions being returned, to prove the value of the land (which was sufficient to sustain the writ of error), *Dallas* argued for a reversal of the decree of the circuit court, on two grounds:(*a*) 1st, On the merits; and 2d, On the want of a description of the parties, so as to give a federal jurisdiction.

1st. *On the merits.*—The hearing on the bill and answer operates as a tacit admission of the facts stated in the answer; which is not contradicted in any respect; and which establishes Daniel Course's purchase of the land in question, as a fair and valid transaction. (Hind. Pr. Ch. 416–7, 289, 441.) The widow Course was not a party to the original bill; and cannot, therefore, be bound by the decree in that case. The defendants to the original bill are not parties to the supplemental bill; for process is only prayed and issued against the widow. Yet, the decrees in the original suit are referred to as exhibits, though not filed, in the supplemental suit; and in the supplemental suit, a decree is pronounced against the defendants in the original suit as well as against the widow, who is the sole defendant. Besides, the question is emphatically a question of assets to pay a debt, for which partnership property was first responsible; and the personal estates of the debtors before their real estates. Yet, no account is given of the partnership fund; and neither the minor heirs, nor other legal representatives of Daniel Course, are made parties to the suit, though their interest is expressly stated in the answer. (Hind. Pr. Ch. 2, 8, 10, 420, 283–4; Mitf. 39, 145.)

(*a*) The case was argued, on these grounds, at Washington, after the removal of the seat of government; but with this intimation, it is thought most convenient to continue the report, under the term in which it commenced.

[1] See Bush *v.* Parker, 5 G 257; Richmond *v.* Milwaukee, 21 How. 391.

2d. *On the want of description.*—The only descriptive addition to the name of Elizabeth Course, throughout the record, is that she is the "widow of Daniel Course, deceased;" not stating that either he or she was a citizen of the state of Georgia. (*Bingham* v. *Cabot*, 3 Dall. 382; *Mossman* v. *Higginson*, *ante*, p. 12; *Turner* v. *Bank of North America*, *ante*, p. 8; *Turner* v. *Enrille*, *ante*, p. 7.) It would be extravagant, to infer citizenship from mere residence, nor can it be successfully urged, that because the parties to the original bill (which, by the by, is not attached to the writ of error) were well described, this court has jurisdiction on the supplemental bill, against a new party, not described, not pledged by any joint contract, and not connected in privity or interest with the defendants to the original bill. (Mitf. 31.)

Ingersoll, for the defendant in error, answered: 1st. *On the merits.*—
*27] The decree of the circuit court was not pronounced simply *on the supplemental bill and answer; but on the decrees in the original suit, which liquidated and fixed the *quantum* of the debt; the conveyance to Daniel Course; and the tax-laws of the state of Georgia. The conveyance was charged to be a fraudulent, pretended deed, which was a matter of fact (3 Dall. 321); and it was ascertained (not merely by the inadequate consideration, but) by reference to the tax-laws, which did not authorize the sale at the time when it took place, nor at any time, if there were personal assets; and consequently, the court was bound to regard it as a nullity.(*a*) The objection, on the score of parties, cannot prevail against the decree, that virtually finds the conveyance to be fraudulent; and therefore, that no one claiming under it could derive a title or interest in the land. Besides, the widow Course is the tenant in possession of the premises, and the natural object of the supplemental bill; she must be presumed to have given notice to all proper persons; and after all, if the objection has weight, it is sufficient to answer, that no one will be bound by the decree, to whom, on principles of law and equity, it does not extend.

2d. *On the want of description.*—It is not necessary to describe the parties in the supplemental suit, which is merely an incident of the original bill, and must be brought in the same court. The citizenship, however, of the plaintiff in error does sufficiently appear, by reasonable presumption and necessary implication. It has never been decided, that the very term "citizens and aliens," must be used in the description; but if the description fairly imports, that one party to the suit is an alien, and the other party a citizen;

(*a*) When *Ingersoll* was about to read the statutes of Georgia, *Dallas* observed, that they were not recited on the record; and that it might be a question, whether their existence ought not to have been established, as a fact, in the court below. But the COURT said, there could be no ground to refuse the reading of a law of any of the states.[1] It appeared, however, that, on the point of time, *Ingersoll* referred to the statute for a tax of a different year, from that in which the sale was made.

[1] S. P. Gwings *v.* Hull, 9 Pet. 607; Griffing *v.* Gibb, 2 Black 519; Cheever *v.* Wilson, 9 Wall. 108; Junction Railroad Co. *v.* Bank of Ashland, 12 Id. 226; Gordon *v.* Hobart, 2 Sumn. 402; Woodward *v.* Spafford, 2 McLean 168; Jasper *v.* Porter, Id. 579; Starr *v.* Moore, 3 Id. 354; Jones *v.* Hays, 4 Id. 521; Miller *v.* McQuerry, 5 Id. 469; Mewster *v.* Spalding, 6 Id. 54; United States *v.* Quinn, 8 Bl. C. C. 48; Bennett *v.* Bennett, 1 Deady 299; Merrill *v.* Dawson, Hemp. 563.

or that the parties are citizens of different states; the court will assert its jurisdiction. Then, the purchase and possession of real estate announce the character of citizen; since aliens cannot purchase and hold real estate in Georgia; and the long residence of Daniel Course, the purchaser, and his family, in the state, is a circumstance strongly corroborative. If the widow is sufficiently described, to show that she was a citizen of Georgia; there can be no doubt, that the complainants are sufficiently described as aliens.

By the Court.—Having examined the record in the case of *Bingham* v. *Cabot*, we are satisfied, that the decision there must govern upon the present occasion. It is, therefore, unnecessary to form or to deliver any opinion upon the merits of the cause. Let the decree of the circuit court be reversed.

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*AUGUST TERM, 1800. [*28

Present—Paterson, Chase, Washington and Moore, Justices.

Priestman, Plaintiff in error, *v.* United States.

Forfeiture under the revenue laws.

Foreign goods, exceeding $800 in value, transported across a state, without a permit, in violation of the act of 18th February 1793, are liable to forfeiture, though not the property of the master, owner or any mariner of the vessel in which they were imported, and although the duties were paid on them, at the port of entry.

In Error from the Circuit Court for the Pennsylvania district. An information was filed in the district court in the following terms:

"Be it remembered, that on the 16th day of January 1798, into the district court of the United States for the Pennsylvania district, in his proper person, comes William Rawle, attorney for the said United States for the district aforesaid, who for the said United States in this behalf prosecutes, and for the said United States gives the court here to understand and be informed, that between the first day of November last past, and the exhibition of this bill, two hundred and three silver watches, three gold watches, two enamelled watches, two metal watches, two hunting watches, and seven pinchbeck watches, being articles of foreign manufacture, and liable to the payment of duties imposed by the laws of the United States, and being together of the value of $800 and more, were transported from the state of Maryland, across the state of Delaware, to the district of Pennsylvania, without a permit from the collector of any district in the said state of Maryland, for that purpose first had and obtained. And the attorney aforesaid, prosecuting as aforesaid, further gives the court to understand and be informed, that the said goods, wares and merchandises, so as aforesaid transported to *the district of Pennsylvania, were not, within twenty-four hours after the arrival thereof in the said district of Pennsylvania, [*29 reported to the collector of the said district of Pennsylvania, by the owner or consignee thereof, or by any other person whatever. Whereby, and by force of the acts of the congress of the said United States, the said two hundred and three silver watches, three gold watches, two enamelled watches, two

metal watches, two hunting watches, and seven pinchbeck watches have become forfeited to the said United States; and for the causes aforesaid have been seized by Sharp Delany, Esquire, collector of the said district of Pennsylvania, and are now in the custody of the marshal, &c. Wherefore, the said attorney, prosecuting as aforesaid, prays the advice of the court upon the premises, and due process, &c."

This information was founded on the act of congress, entitled "An act for enrolling and licensing ships or vessels, to be employed in the coasting trade and fisheries, and for regulating the same" (1 U. S. Stat. 313), and particularly, upon the 19th section of the act, which is in these words:

"§ 19. That it shall and may be lawful for the collector of the district of Pennsylvania to grant permits for the transportation of goods, wares or merchandise of foreign growth or manufacture, across the state of New Jersey, to the district of New York, or across the state of Delaware, to any district in the state of Maryland or Virginia; and for the collector of the district of New York to grant like permits for the transportation across the state of New Jersey; and for the collector of any district of Maryland or Virginia to grant like permits for the transportation across the state of Delaware to the district of Pennsylvania: provided, that every such permit shall express the name of the owner or person sending such goods, and of the person or persons to whom such goods shall be consigned, with the marks, numbers and description of the packages, whether bale, box, chest or otherwise, and the kind of goods contained therein, and the date, when granted; and the owner or person sending such goods shall swear or affirm that they were legally imported and the duties thereupon paid or secured: And provided also, that the owner or consignee of all such goods, wares and merchandise shall, within twenty-four hours after the arrival thereof at the place to which they were permitted to be transported, report the same to the collector of the district where they shall so arrive, and shall deliver up the permit accompanying the same, and if the owner or consignee aforesaid shall neglect or refuse to make due entry of such goods, within the time, and in the manner herein directed, all such goods, wares and merchandise shall be subject to forfeiture; and if the permit granted shall not be given up,
*30] *within the time limited for making the said report, the person or persons to whom it was granted, neglecting or refusing to deliver it up, shall forfeit fifty dollars for every twenty-four hours it shall be withheld afterwards: provided, that where the goods, wares and merchandise, to be transported in manner aforesaid, shall be of less value than $800, the said oath and permit shall not be deemed necessary, nor shall the owner or consignee be obliged to make report to the collector of the district where the said goods, wares and merchandise shall arrive."

William Priestman, the plaintiff in error, filed a claim for the watches, setting forth "that he had paid the duties upon them, and that he did not transport them from the district of Maryland, across the state of Delaware, into the district of Pennsylvania." The attorney of the district having filed a general replication to the claim, a case was made for the opinion of the court, in which the material facts were stated as follows:

"That the watches in question were of the value of $3899. That they were imported into the district of Maryland, and the duties thereon paid or secured, according to law. That they were afterwards carried by the claim

ant, or, his agent, from the district of Maryland across the state of Delaware, to the state of Pennsylvania, to wit, to the city of Philadelphia, without any license or permit so to do, first had and obtained from the collector of the port of Baltimore; and that no notice was given to the collector of the port of Philadelphia. That the watches were publicly offered for sale, next door to the custom-house, in the city of Philadelphia, with a number of other articles; and were afterwards seized as forfeited. That the watches did not belong to the master, owner or any mariner of the ship or vessel in which they were imported from beyond sea into Baltimore; nor was the claimant, captain, owner or mariner of the packet-boat in which they were brought from Baltimore to Frenchtown, or from Newcastle to Philadelphia."

The case was argued before the district judge, in December 1798, and a decree of condemnation pronounced; which was affirmed upon a writ of error to the circuit court, in April term 1880 ;(*a*) and, thereupon, the cause was removed into this court; *and argued upon the same facts, by the district-attorney (*Rawle*, in the absence of *Lee*, attorney-general), for the United States, assisted by *W. Sergeant*, for the informer; and by *Ingersoll* and *S. Levy*, for the plaintiff in error. [*31

For the *plaintiff* in error.—This is a penal act, and must, on general principles, be construed strictly. 1 Black. Com. 88, 92; Plowd. 109; 3 Co. 7; Plowd. 13 *b*; 19 Vin. Abr. 523–4; 8 Mod. 7, 65; 10 Co. 73; Cowp. 355, 660. In the particular case before the court, the facts call for the most liberal exposition in favor of the claimant; since, there is not the slightest ground to impute a fraudulent intention to him; nor could there be the smallest loss of revenue to the public. Taking, then, the 33d section of the

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(*a*) The circuit court was composed of CHASE, Justice, and PETERS, District Judge. The presiding judge, in delivering the opinion of the court, made the following observations:

CHASE, Justice.—By the rules which are laid down in England for the construction of statutes, and the latitude which has been indulged in their application, the British judges have assumed a legislative power; and on the pretence of judicial exposition, have, in fact, made a great portion of the statute law of the kingdom. Of those rules of construction, none can be more dangerous, than that, which, distinguishing between the intent and the words of the legislature, declares, that a case not within the meaning of a statute, according to the opinion of the judges, shall not be embraced in the operation of the statute, although it is clearly within the words; or, *vice versâ*, that a case within the meaning, though not within the words, shall be embraced. For my part, however, sitting in an American court, I shall always deem it a duty to conform to the expressions of the legislature, to the letter of the statute, when free from ambiguity and doubt; without indulging a speculation, either upon the impolicy or the hardship of the law. In the present instance, the clause of forfeiture is clear, direct, and positive. If the provision of the 33d section were equally clear, and necessarily connected with the subject of the 19th section, it would, undoubtedly, control the clause of forfeiture. But say, even, that the 33d section is obscure in its terms, and doubtful in its relation (which I do not admit), this would not induce me to supersede, control and annul, what is neither obscure nor doubtful, in the provisions of the 19th section. Upon the whole, the effect, in the present case, will, probably, be severe upon the claimant, if he has only been guilty of an act of negligence: but the law does not distinguish, as to the present object, between a careless, and a fraudulent, omission of the duty prescribed, and the court cannot do it.

same act of congress into view, to form a just conclusion from the whole, the watches in question are exempted from any forfeiture, because they did not belong to the master, owner or mariners of the vessel in which they were imported, and because the duties upon them had been previously paid or secured.(*a*) It must, indeed, be admitted, that there is an apparent contradiction between the 19th section, which imposes the forfeiture, if the owner or consignee of the goods neglects to perform the duties prescribed; and the 33d section, which exempts the goods from forfeiture, if they belong to any person, other than the owner, master or mariners of the vessel: but the different parts of statutes should be so construed, that each, if possible, may have an operation, consistent and harmonious with the rest. Admitting, therefore, that
*32] the claimant is within the *description of the 19th section, to incur a forfeiture, the apparent contradiction of the law will be obviated, by admitting also that the previous payment of the duties on the goods, exempts him from the forfeiture, under the 33d section. Besides, the information does not state, that the master of the vessel had no manifest; and to constitute the offence, the act of irregular transportation must be connected with the want of a manifest, conformable to the 18th section. The 19th section (and, indeed, the whole of the law, which is made emphatically to regulate the coasting trade), from the plain import of its language, applies to cases of water carriage, and cases of water carriage are equally the subject of the 33d section. Nor is there anything in the case stated, to show that the watches were not transported coast-wise; or brought in the owner's private carriage; and even the 19th section does not contain an injunction upon the owner to take out a permit for his goods, on which he has paid the duties, to whatever place he may choose to remove them.

For the *United States*.—Though penal laws are to be strictly construed, they are to be fairly and truly construed, according to the plain and natural signification of the words employed. 2 Ld. Raym. 1421; 1 Dall. 197; 10 Co. 73. If, however, the claimant's construction should prevail, the sweeping operation of the 33d section of the act would annihilate its most positive and most salutary sanctions: but a proviso, so repugnant to the enacting clauses, would itself be void. 1 Bl. Com.; 1 Co. Rep. 47. (*a*) The case stated brings the facts precisely within the information; and the information is precisely within the 19th section. The forfeiture is, therefore, complete, and must be enforced by the court, unless it is remitted by the operation of the 33d section. It becomes important, then, to inquire: 1st. What is the true meaning of this ambiguous, and, certainly, ungrammatical clause? and 2d. To what does the true meaning relate?

1st. The first difficulty that occurs, in settling the meaning of the 33d section, arises from the indefinite call for a noun, to correspond with the verb, where several nouns are introduced, and all cannot be applied. Is it the *ship*, the *master*, or the *cargo*, which, in the specified case, shall be exempted from any forfeiture? The marginal note declares the exemp-

(*a*) § 33. "That in all cases where the whole, or any part of the lading or cargo on board any ship or vessel, shall belong *bonâ fide* to any person or persons, other than the master, owner or mariners of such ship or vessel, and upon which the duties shall have been previously paid or secured, according to law, shall be exempted from any forfeiture under this act, anything herein contained to the contrary notwithstanding."

tion in favor of the ship ; but the argument of the claimant asks it for the cargo. The 33d section, however, is, in form and substance, a *proviso;* and as such, naturally refers to the next preceding section, where are to be found the offences from which the forfeiture springs, and the subject on which the forfeiture attaches ; § 32, to wit : 1st. The transfer of a licensed ship to an alien. 2d. The employment of a licensed vessel in a trade not licensed. 3d. The possession of a forged or altered license. 4th. The possession of a license granted for another ship. In these four cases, the ship and the *cargo on board, are declared to be the subject of forfeiture. [*33 But the exemption from forfeiture, contained in the 33d section, is not, in the generality of the expression, confined to the four cases ; but extends to " any forfeiture under this act, anything therein contained to the contrary notwithstanding." Must not the nature of the offence be considered, then, to qualify the generality of the expression ? In the 5th section, it is enacted, that if a vessel is found with a forged or altered license ; or makes use of a license granted for another vessel, the offending vessel, and the cargo on board, shall be forfeited. In the 6th section, it is enacted, that if a vessel is found in the coasting trade, or carrying on the fisheries, without being enrolled and licensed, and having a foreign cargo, or distilled spirits, on board, she and her lading shall be forfeited. In the 8th section, it is enacted, that if an enrolled or licensed vessel sails on a foreign voyage, without first surrendering her license, and taking out a register, she and her cargo shall be forfeited. And in the 21st section, it is enacted, that if a vessel, licensed for the fisheries, is found within three leagues of the coast, with foreign merchandise on board, exceeding in value $500, she and her cargo shall be forfeited, unless she had previously obtained permission to touch at a foreign port. Now, in all these sections, the forfeiture of the cargo is cumulative, derivative and accessary to the forfeiture of the vessel ; and the punishment is inflicted for offences committed by the master or owner of the vessel. Hence, the policy and justice of the provision of the 33d section, in contemplation of such cases, to prevent one man's suffering for another man's wrong, by exempting from forfeiture, the cargo on board the delinquent vessel, to whose owners, master or mariners, the cargo did not belong. With reference, therefore, to the nature of the offences enumerated in the next preceding section, the exemption from " any forfeiture under this act," must be confined to forfeitures of the same kind ; that is, to forfeitures of vessels and their cargoes, for the acts or omissions of the owners or masters of the vessels. But still, there are specific and appropriate forfeitures, arising from the misconduct of the owners of goods. Thus, if the owner of goods transport them, by water, from district to district, they must be accompanied with a manifest, or they will be liable to forfeiture, under the 18th section. And if he transport them by land, he must obtain a permit, under the same penalty, in compliance with the 19th section. The same principle which suggested the necessity of a manifest in the one case, required the permit in the other ; and if the goods are not included in the manifest, or, of course, if not included in the permit, they are forfeited. It is idle to argue from the supposed inutility of requiring the permit. It is an incident in a general system, that must be maintained in all its parts ; for at the slight st aperture, the most inconvenient mischiefs may enter.

*2. In answering the second general inquiry (to what does the true meaning of the 33d section refer?) it is proper more particularly to observe, that the 19th section clearly provides for the case of a transportation by land carriage: because it speaks of a transportation "across a state," which (as no canal is established) must be by land. If by land, it cannot involve the agency of a ship or vessel, and as the proviso of the 33d section refers to the forfeiture of a ship or vessel, and not of a wagon or stage, as it does not describe goods, generally, but a lading or cargo, on board, it is utterly inapplicable to a case of internal land carriage; and must be considered as referring only to cases of water transportation; or, in other words, to the coasting trade.

On the 15th of August, the judges briefly delivered their opinions, *seriatim*, concurring in the following result:

By the Court.—The case stated comes clearly within the 19th section of the act of congress, for enrolling and licensing vessels to be employed in the coasting trade and fisheries. The provisions of the section are salutary, and were made to guard against frauds upon the revenue, in the transportation of goods of foreign growth or manufacture, across the several states. Public policy, national purposes, and the regular operations of government require, that the revenue system should be faithfully observed and strictly executed. It is obvious, that the claimant is an offender, within the purview of the 19th section. To purge the offence, he relies upon the 33d section of the same act. But it is too plain for argument, that this section cannot, by any fair and rational construction, be made to refer to the 19th section. It is inapplicable, because the objects are entirely different.

Judgment affirmed.

The Amelia.[1]

Talbot *v.* The Ship Amelia, Seeman, Claimant.

Salvage.

The officers and crew of a ship of war are entitled to salvage, for the recapture of an armed neutral vessel, from a foreign belligerent, by whom she had been manned with a prize crew.

Error from the Circuit Court of New York. It appeared on the record, that Captain Talbot, of the frigate Constitution, having recaptured the Amelia, an armed Hamburg vessel, which had been captured by a French national corvette, and ordered to St. Domingo for adjudication, brought her into the port of New York. A libel was, thereupon, filed in the district court, by the recaptor, setting forth the facts, and praying that the vessel and cargo might be condemned as prize; or that such other decree might be pronounced as the court should deem just and proper.

A claim was filed by H. F. Seeman, for Chapeau Rouge & Co., of Hamburg, the owners, insisting that the property had not been changed by the capture, and praying restitution, with damages and costs. The District Judge, Hobart, decreed one-half of the gross amount of sales of ship and
*35] cargo, *without deduction (a sale having been made by consent), to be paid to the recaptors, in the proportions directed by the act of

[1] S. c. 1 Cr. 1.

congress for the government of the navy; and the other half, deducting all costs and charges, to be paid to the claimants.

The cause was brought by appeal before the circuit court, WASHINGTON Justice, presiding, who reversed the decree of the district court, so far as it ordered payment of one-half of the gross sales to the recaptors, "considering that, as the nation to which the owners of the said ship and cargo belong, is in amity with the French republic, the ship and cargo could not, consistently with the laws of nations, be condemned by the French, as a lawful prize; and that, therefore, no service was rendered by the Constitution, or by the commander, officers or crew thereof, by the recapture aforesaid;" and affirmed the rest of the decree. On the decree of the circuit court, the present writ of error was instituted; and the following statement of facts made a part of the record by consent:

"The following case is agreed upon by the parties, to be annexed to the writ of error in this cause, viz.: The ship Amelia sailed from Calcutta, in Bengal, in the month of April 1799, loaded with a cargo of the produce and manufacture of that country, consisting of cotton, sugars and dry goods in bales, bound to Hamburg. On the 6th of September, in the same year, the same was captured, whilst in the pursuit of her said voyage, by the French national covette La Diligente, L. I. Dubois, commander, who took out her captain and part of her crew, together with most of her papers, and placed a prize-master and French sailors on board of her, ordering the prize-master to conduct her to St. Domingo, to be judged according to the laws of war. On the 15th of the same month of September, the United States ship of war, the Constitution, commanded by Silas Talbot, Esquire, the libellant, fell in with, and recaptured the Amelia, she being then in full possession of the French, and pursuing her course for St. Domingo, according to the orders received from the captain of the French corvette. At the time of the recapture, the Amelia had eight iron cannon mounted, and eight wooden guns, with which she had left Calcutta, as before stated. From such of the ship's papers as were found on board, and the testimony in the cause, the ship Amelia, and her cargo, appear to have been the property of Chapeau Rouge, a citizen of Hamburg, residing and carrying on commerce in that place. It is conceded, that the republic of France and the city of Hamburg are not in a state of hostility to each other, and that Hamburg is to be considered as neutral between the present belligerent powers. *The Amelia and her cargo, having been sent by captain Talbot to New York, were there libelled in the district court, and such proceedings were thereupon had in that court, and the circuit court for that district, as may appear by the writ of error and return. [*36

ALEXANDER HAMILTON, of counsel for plaintiff in error.
B. LIVINGSTON, of counsel for defendant in error."

The cause was argued, on the 11th, 12th and 13th of August 1800, by *Ingersoll* and *Lewis*, for the plaintiff in error; and by *M. Levy* and *Dallas*, for the defendant in error. The general points of the discussion were these:

1st. Whether the Amelia could be considered, at the time of the recapture, as a French armed vessel, within the meaning of the act of congress, which authorizes the seizure of French armed vessels? (1 U. S. Stat. 572.)

2d. Whether Captain Talbot was authorized to make a recapture, the Amelia belonging to a power, equally in amity with the United States, and with France?

3. Whether on positive statute, or general principles, a salvage was due to the recaptors, for rescuing the Amelia from the French?

On the 18th of August, PATERSON, Justice, stated, that it was the wish of the court to postpone the cause, for further argument, before a fuller bench. It was, accordingly, argued again, at Washington, in August term 1801, by *Ingersoll* and *Bayard* (of Delaware), for the plaintiff in error; and by *M. Levy*, *J. T. Mason* (of Maryland) and *Dallas*, for the defendant in error. And MARSHALL, Chief Justice, delivered the judgment of the court, "that the decree of the circuit court was correct, in reversing the decree of the district court, but not correct in decreeing the restoration of the Amelia, without paying salvage. This court, therefore, is of opinion, that the decree, so far as the restoration of the Amelia without salvage is ordered, ought to be reversed: and that the Amelia and her cargo ought to be restored to the claimant, on paying for salvage one-sixth part of the net value, after deducting therefrom the charges which have been incurred."(*a*)

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*37] *The ELIZA.

BAS, Plaintiff in error, *v.* TINGY, Defendant in error.

State of war.—Salvage.

Every contention, by force, between two nations, in external matters, under authority of their respective governments, is a *public* war.

If a general war be declared, its extent and operations are only restricted and regulated by the *jus belli*, forming part of the law of nations; but if a *partial* war be waged, its extent and operation depend on our municipal laws. CHASE, J.

A belligerent power has a right, by the laws of nations, to search a neutral vessel; and upon suspicion of a violation of her neutral obligations, to seize and carry her into port for further examination. Ibid.

An American vessel, captured by a French privateer, on the 31st March 1799, and recaptured by a public armed American ship, on the 21st of April 1799, was condemned to pay salvage, under the act of congress of the 2d March 1799.

IN error from the Circuit Court for the district of Pennsylvania. On the return of the record, it appeared by a case stated, that the defendant in error had filed a libel in the district court, as commander of the public armed ship, the Ganges, for himself and others, against the ship Eliza, John Bas, master, her cargo, &c., in which he set forth that the said ship and cargo belonged to citizens of the United States; that they were taken on the high seas, by a French privateer, on the 31st of March 1799; and that they were retaken by the libellant, on the 21st of April following, after having been above ninety-six hours in possession of the captors. The libel prayed

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(*a*) A full report of the arguments, on the first hearing of this cause, was prepared; but they are found so ably incorporated with the arguments on the second hearing, in Mr. Cranch's Reports, that it has been thought unnecessary to publish it in this volume. 1 Cr. 1.

for salvage, conformable to the acts of congress; and the facts being admitted by the answer of the respondents, the district court decreed to the libellants one-half of the whole value of ship and cargo. This decree was affirmed in the circuit court, without argument, and by consent of the parties, in order to expedite a final decision on the present writ of error.

The controversy involved a consideration of the following sections in two acts of congress: By an act of the 28th of June 1798 (1 U. S. Stat. 574, § 2), it is declared, "That whenever any vessel the property of, or employed by, any citizen of the United States, or person resident therein, or any goods or effects belonging to any such citizen or resident, shall be recaptured by any public armed vessel of the United States, the same shall be restored to the former owner or owners, upon due proof, he or they paying and allowing, as and for salvage to the recaptors, one-eighth part of the value of such vessel, goods and effects, free from all deduction and expenses."

By an act of the 2d of March 1799 (1 U. S. Stat. 716), it is declared, "That for the ships or goods belonging to the citizens of the United States, or to the citizens or subjects of any nation in amity with the United States, if retaken from the enemy within twenty-four hours, the owners are to allow one-eighth part of the whole value for salvage, &c.; and if above ninety-six hours, one-half, all of which is to be paid, without any deduction whatsoever, &c. And by the 9th section of the same act, it is declared, "That all the money accruing, or which has already accrued from the sale of prizes, shall be and remain for ever a fund for the payment of the half-pay to the officers and seamen, who may be entitled to receive the same."

The case was argued by *Lewis* and *E. Tilghman*, for the plaintiff in error, and by *Rawle* and *W. Tilghman*, for the defendant; and the argument turned principally upon two inquiries: 1st. Whether the act of March 1799, applied only to the event of a future general war? 2d. Whether France was an enemy of the United States, within the meaning of the law?

*For the *plaintiff* in error, it was urged, that the acts, passed in immediate relation to France, were of a restricted temporary nature; [*38 but that the act of March 1799, established a permanent system for the government of the navy; and the designation of "the enemy" in that act, applies only to future hostilities, in case of a declared war. That on the just principles of government, every citizen has a right to the public protection; and therefore, no salvage ought, in strictness, to be allowed for the recapture of the property of a citizen by a public ship of war. Vatt. lib. 2, c. 6, § 71. And congress has manifested, in some degree, their sense on the subject, by making the salvage in that case less than in the case of recapture by a private armed vessel. That the word "enemy" must be construed according to its legal import (1 Str. 278); and that, according to legal interpretation, the differences between the United States and France do not constitute war, nor render the citizens of France enemies of the United States. Vatt. lib. 3, § 69, 70; 1 Black. Com. 257; 2 Ibid. 259; 2 Burl. 258, § 31; 261, § 39; 262. That a subsequent law does not abrogate a prior law, unless it contains contradictory matter; and where there are no negative or repealing, words, both must be so construed as to stand together. 11 Co. 61, 63; Show. 439; 10 Mod. 118; 6 Co. 19 *b*. That the act of March 1799,

contains no repealing or negative words; and may be applied, consistently, to the case of a future public war, leaving the qualified state of hostility with France, for the operation of the preceding law.

For the *defendant* in error, it was contended, that the relative situation of the United States and France, is that of "a qualified maritime war;" on the part of the French, aggressive; on our part, defensive; proceeding from a legitimate expression of the public will, through its constitutional organ, the congress, manifested by public declarations and open acts. That from such a state, the character of enemy necessarily arises; and that the designation being so understood by congress, was intended to be applied, and was actually applied, to France. That the act of March 1799 speaks of prizes, which could only be such as had been captured from France; and that taking the word prize, according to its legal signification, it means a capture, or acquisition by right of war, in a state of war. 3 Bl. Com. 69, 108; 2 Wood. 441; Doug. 585, 591; Rob. Adm. 283. That if a prize means a capture in war, it follows, of course, that it means a capture from an enemy; for war can only be waged against enemies. That war may exist, without a declaration; a defensive war requires no declaration; and an imperfect or qualified public war, is still distinct from the case of letters of marque and reprisal, for the redress of a private wrong, by the employment of a private force. 1 Ruth. lib. 1, c. 19, § 1, p. 470–1; 2 Ibid. 497–8, 503, 507, 511; Burl. 196, 189; Vatt. 475; 2 Burl. 204, § 7; Lee on Capt. 13–39; Puff. 843; Grot. lib. 3, c. 3, § 6; Molloy 46. That congress, *39] *by repealing the regulations respecting salvage, contained in the act of March 1798, has virtually declared, that those regulations were in force, in relation to France; and that the provisions in the act of March 1799, being inconsistent with the provision in the act of June 1798, the elder law is so far repealed. (*a*)

The judges delivered their opinions *seriatim* in the following manner:

Moore, Justice.—This case depends on the construction of the act for the regulation of the navy. It is objected, indeed, that the act applies only to future wars; but its provisions are obviously applicable to the present situation of things, and there is nothing to prevent an immediate commencement of its operation.

It is, however, more particularly urged, that the word "enemy" cannot be applied to the French; because the section in which it is used, is confined to such a state of war, as would authorize a recapture of property belonging to a nation in amity with the United States, and such a state of war, it is said, does not exist between America and France. A number of books have been cited to furnish a glossary on the word enemy; yet, our situation is so extraordinary, that I doubt whether a parallel case can be traced in the history of nations. But if words are the representatives of ideas, let me ask, by what other word, the idea of the relative situation of America and France could be communicated, than by that of hostility or war? And how can the characters of the parties engaged in hostility or war, be otherwise

(*a*) All the acts of congress, passed in relation to France, were cited and discussed by both sides, in the course of the argument; but it is thought unnecessary to refer to them more particularly in this report.

described, than by the denomination of enemies? It is for the honor and dignity of both nations, therefore, that they should be called enemies; for it is by that description alone, that either could justify or excuse the scene of bloodshed, depredation and confiscation, which has unhappily occurred; and surely, congress could only employ the language of the act of June 13, 1798, towards a nation whom she considered as an enemy.

Nor does it follow, that the act of March 1799, is to have no operation, because all the cases in which it might operate, are not in existence at the time of passing it. During the present hostilities, it affects the case of recaptured property belonging to our own citizens, and in the event of a future war, it might also be applied to the case of recaptured property belonging to a nation in amity with the United States. But it is further to be remarked, that all the expressions of the act may be satisfied, even at this very time: for by former laws, the recapture of property, belonging to persons resident within the United States, is authorized; those residents may be aliens; and if they are subjects of a nation in amity with the United States, they answer completely the description of the law.

*The only remaining objection, offered on behalf of the plaintiff in error, supposes, that, because there are no repealing or negative words, the last law must be confined to future cases, in order to have a subject for the first law to regulate. But if two laws are inconsistent (as, in my judgment, the laws in question are), the latter is a virtual repeal of the former, without any express declaration on the subject. [*40

On these grounds, I am clearly of opinion, that the decree of the circuit court ought to be affirmed.

WASHINGTON, Justice.—It is admitted, on all hands, that the defendant in error is entitled to some compensation: but the plaintiff in error contends, that the compensation should be regulated by the act of the 28th June 1798 (1 U. S. Stat. 574, § 2), which allows only one-eighth for salvage; while the defendant in error refers his claim to the act of the 2d March (Ibid. 716, § 7), which makes an allowance of one-half, upon a recapture from the enemy, after an adverse possession of ninety-six hours. If the defendant's claim is well founded, it follows, that the latter law must virtually have worked a repeal of the former; but this has been denied, for a variety of reasons:

1st. Because the former law relates to recaptures from the French, and the latter law relates to recaptures from the enemy; and it is said, that "the enemy" is not descriptive of France or of her armed vessels, according to the correct and technical understanding of the word.

The decision of this question must depend upon another; which is, whether, at the time of passing the act of congress of the 2d of March 1799, there subsisted a state of war between the two nations? It may, I believe, be safely laid down, that every contention by force, between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation; and all the members of the nation declaring war are authorized to commit hostilities against all the members of the other, in every place and under every circumstance. In such a war, all the members act under a

general authority, and all the rights and consequences of war attach to their condition.

But hostilities may subsist between two nations, more confined in its nature and extent; being limited as to places, persons and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities act under special authority, and can go no further than to the extent of their commission. Still, however, it is public war, because it is an external contention by force, between some of the members of the two nations, authorized by the legitimate powers.

*41] It is a war between the two nations, though all the *members are not authorized to commit hostilities, such as in a solemn war, where the government restrain the general power.

Now, if this be the true definition of war, let us see, what was the situation of the United States in relation to France. In March 1799, congress had raised an army; stopped all intercourse with France; dissolved our treaty; built and equipped ships of war; and commissioned private armed ship; enjoining the former, and authorizing the latter, to defend themselves against the armed ships of France, to attack them on the high seas, to subdue and take them as prize, and to recapture armed vessels found in their possession. Here, then, let me ask, what were the technical characters of an American and French armed vessel, combating on the high seas, with a view, the one to subdue the other, and to make prize of his property? They certainly were not friends, because there was a contention by force; nor were they private enemies, because the contention was external, and authorized by the legitimate authority of the two governments. If they were not our enemies, I know not what constitutes an enemy.

2d. But secondly, it is said, that a war of the imperfect kind, is more properly called acts of hostility or reprisal, and that congress did not mean to consider the hostility subsisting between France and the United States, as constituting a state of war. In support of this position, it has been observed, that in no law, prior to March 1799, is France styled our enemy, nor are we said to be at war. This is true; but neither of these things were necessary to be done: because, as to France, she was sufficiently described by the title of the French republic; and as to America, the degree of hostility meant to be carried on, was sufficiently described, without declaring war, or declaring that we were at war. Such a declaration by congress, might have constituted a perfect state of war, which was not intended by the government.

3d. It has likewise been said, that the 7th section of the act of March 1799, embraces cases which, according to pre-existing laws, could not then take place, because no authority had been given to recapture friendly vessels from the French; and this argument was strongly and forcibly pressed. But because every case provided for by this law was not then existing, it does not follow, that the law should not operate upon such as did exist, and upon the rest, whenever they should arise. It is a permanent law, embracing a variety of subjects, not made in relation to the present war with France only, but in relation to any future war with her, or with any other nation. It might then very properly allow salvage for recapturing of American vessels from France, which had previously been authorized by law, though it could not immediately apply to the vessels of friends: and

whenever such a war should exist between the United States and France, or any other nation, as, according to the law of nations, *or special authority, would justify the recapture of friendly vessels, it might, on [*42 that event, with similar propriety, apply to them, which furnishes, I think, the true construction of the act. The opinion which I delivered at New York, in *Talbot* v. *Seeman*, was, that although an American vessel could not justify the retaking of a neutral vessel from the French, because neither the sort of war that subsisted, nor the special commission under which the American acted, authorized the proceeding; yet, that the 7th section of the act of 1799, applied to recaptures from France, as an enemy, in all cases authorized by congress. And on both points, my opinion remains unshaken; or rather has been confirmed by the very able discussion which the subject has lately undergone in this court, on the appeal from my decree.

Another reason has been assigned by the defendant's counsel, why the former law is not to be regarded as repealed by the latter, to wit, that a subsequent affirmative general law cannot repeal a former affirmative special law, if both may stand together. This ground is not taken, because such an effect involves an indecent censure upon the legislature for passing contradictory laws, since the censure only applies where the contradiction appears in the same law; and it does not follow, that a provision which is proper at one time, may not be improper at another, when circumstances are changed: but the ground of argument is, that a change ought not to be presumed. Yet, if there is sufficient evidence of such a change in the legislative will, and the two laws are in collision, we are forced to presume it. What, then, is the evidence of legislative will? In fact and in law, we are at war: an American vessel, fighting with a French vessel, to subdue and make her prize, is fighting with an enemy, accurately and technically speaking: and if this be not sufficient evidence of the legislative mind, it is explained in the same law. The sixth and the ninth sections of the act speak of prizes, which can only be of property taken at sea from an enemy, *jure belli;* and the ninth section speaks of prizes as taken from an enemy, in so many words, alluding to prizes which had been previously taken; but no prize could have been then taken except from France: prizes taken from France were, therefore, taken from the enemy. This, then, is a legislative interpretation of the word enemy; and if the enemy, as to prizes, surely they preserve the same character as to recaptures,

Besides, it may be fairly asked, why should the rate of salvage be different in such a war as the present, from the salvage in a war more solemn or general? And it must be recollected, that the occasion of making the law of March 1799, was not only to raise the salvage, but to apportion it to the hazard in which the property retaken was placed; a circumstance for which the former salvage law had not provided. The two laws, upon the whole, cannot be rendered consistent, unless the court could wink so hard as not to see and know, that *in fact, in the view of congress, and to every [*43 intent and purpose, the possession by a French armed vessel of an American vessel, was the possession of an enemy: and therefore, in my opinion, the decree of the circuit court ought to be affirmed.

Chase, Justice.—The judges agreeing unanimously in their opinion, I presumed, that the sense of the court would have been delivered by the

president and therefore, I have not prepared a formal argument on the occasion. I find no difficulty, however, in assigning the general reasons which induce me to concur in affirming the decree of the circuit court.

An American public vessel of war recaptures an American merchant vessel from a French privateer, after ninety-six hours possession, and the question is stated, what salvage ought to be allowed? There are two laws on the subject: by the first of which, only one-eighth of the value of the recaptured property is allowed; but by the second, the recaptor is entitled to a moiety. The recapture happened after the passing of the latter law; and the whole controversy turns on the single question, whether France was, at that time, an enemy? If France was an enemy, then the law obliges us to decree one-half of the value of the ship and cargo for salvage: but if France was not an enemy, then no more than one-eighth can be allowed.

The decree of the circuit court (in which I presided) passed by consent; but although I never gave an opinion, I have never entertained a doubt on the subject. Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but if a partial law is waged, its extent and operation depend on our municipal laws.

What, then, is the nature of the contest subsisting between America and France? In my judgment, it is a limited, partial war. Congress has not declared war, in general terms; but congress has authorized hostilities on the high seas, by certain persons, in certain cases. There is no authority given to commit hostilities on land; to capture unarmed French vessels, nor even to capture French armed vessels, lying in a French port; and the authority is not given indiscriminately to every citizen of America, against every citizen of France, but only to citizens appointed by commissions, or exposed to immediate outrage and violence. So far it is, unquestionably, a partial war; but, nevertheless, it is a public war, on account of the public authority from which it emanates.

There are four acts, authorized by our government, that are demonstrative of a state of war. A belligerent power has a right, by the law of
*44] nations, to search a neutral vessel; and upon *suspicion of a violation of her neutral obligations, to seize and carry her into port for further examination. But by the acts of congress, an American vessel is authorized: 1st. To resist the search of a French public vessel: 2d. To capture any vessel that should attempt, by force, to compel submission to a search: 3d. To recapture any American vessel, seized by a French vessel: and 4th. To capture any French armed vessel, wherever found, on the high seas. This suspension of the law of nations, this right of capture and recapture, can only be authorized by an act of the government, which is, in itself, an act of hostility. But still, it is a restrained or limited hostility; and there are, undoubtedly, many rights attached to a general war, which do not attach to this modification of the powers of defence and aggression. Hence, whether such shall be the denomination of the relative situation of America and France, has occasioned great controversy at the bar; and it appears, that Sir William Scott also was embarrassed in describing it, when he observed, "that in the present state of hostility (if so it may be called) between America and France," it is the practice of the English court of admiralty, to

restore recaptured American property, on payment of a salvage. (*The Santa Cruz*, 1 Rob. 54.) But, for my part, I cannot perceive the difficulty of the case. As there may be a public general war, and a public qualified war; so there may, upon correspondent principles, be a general enemy, and a partial enemy. The designation of "enemy" extends to a case of perfect war; but as a general designation, it surely includes the less, as well as the greater, species of warfare. If congress had chosen to declare a general war, France would have been a general enemy; having chosen to wage a partial war, France was, at the time of the capture, only a partial enemy; but still she was an enemy.

It has been urged, however, that congress did not intend the provisions of the act of March 1799, for the case of our subsisting qualified hostility with France, but for the case of a future state of a general war with any nation: I think, however, that the contrary appears from the terms of the law itself, and from the subsequent repeal. In the 9th section, it is said, that all the money accruing, "or which has already accrued from the sale of prizes," shall constitute a fund for the half-pay of officers and seamen. Now, at the time of making this appropriation, no prizes (which *ex vi termini* implies a capture in a state of war) had been taken from any nation but France, those which had been taken, were not taken from France as a friend; they must, consequently, have been taken from her as an enemy; and the retrospective provision of the law can only operate on such prizes. Besides, when the 13th section regulates "the bounty given by the United States on any national ship of war, taken from the enemy, and brought into port," it is obvious, that even if the bounty has no relation to previous captures, it must operate from the moment of passing the *act, and embraces the case of a national ship of war, taken from France as [*45 an enemy, according to the existing qualified state of hostilities. But the repealing act, passed on the 3d of March 1800 (subsequent to the recapture in the present case) ought to silence all doubt as to the intention of the legislature; for, if the act of March 1799 did not apply to the French republic, as an enemy, there could be no reason for altering or repealing that part of it, which regulates the rate of salvage on recaptures.

The acts of congress have been analyzed, to show, that a war is not openly denounced against France, and that France is nowhere expressly called the enemy of America: but this only proves the circumspection and prudence of the legislature. Considering our national prepossessions in favor of the French republic, congress had an arduous task to perform, even in preparing for necessary defence and just retaliation. As the temper of the people rose, however, in resentment of accumulated wrongs, the language and the measures of the government became more and more energetic and indignant; though hitherto the popular feeling may not have been ripe for a solemn declaration of war; and an active and powerful opposition in our public councils, has postponed, if not prevented, that decisive event, which many thought would have best suited the interest, as well as the honor, of the United States. The progress of our contest with France, indeed, resembles much the progress of our revolutionary contest; in which, watching the current of public sentiment, the patriots of that day proceeded, step by step, from the supplicatory language of petitions for a redress of grievances, to the bold and noble declaration of national inde-

pendence. Having, then, no hesitation in pronouncing that a partial war exists between America and France, and that France was an enemy, within the meaning of the act of March 1799, my voice must be given for affirming the decree of the circuit court.

PATERSON, Justice.—As the case appears on the record, and has been accurately stated by the counsel, and by the judges who have delivered their opinions, it is not necessary to recapitulate the facts. My opinion shall be expressed in a few words. The United States and the French republic are in a qualified state of hostility. An imperfect war, or a war, as to certain objects, and to a certain extent, exists between the two nations; and this modified warfare is authorized by the constitutional authority of our country. It is war *quoad hoc.* As far as congress tolerated and authorized the war on our part, so far may we proceed in hostile operations. It is a maritime war, a war at sea, as to certain purposes. The national armed vessels of France attack and capture the national armed vessels of the United States; and the national armed vessels of the United States are expressly authorized
*46] and directed to attack, subdue and take the national armed vessels *of France, and also to recapture American vessels. It is, therefore, a public war between the two nations, qualified on our part, in the manner prescribed by the constitutional organ of our country. In such a state of things, it is scarcely necessary to add, that the term "enemy," applies; it is the appropriate expression, to be limited in its signification, import and use, by the qualified nature and operation of the war on our part. The word enemy proceeds the full length of the war, and no further. Besides, the intention of the legislature as to the meaning of this word, enemy, is clearly deducible from the act for the government of the navy, passed the 2d of March 1799. This act embraces the past, present and future, and contains passages which point the character of enemy at the French, in the most clear and irresistible manner. I shall select one paragraph, namely, that which refers to prizes taken by our public vessels, anterior to the passing of the latter act. The word prizes in this section can apply to the French, and the French only. This is decisive on the subject of legislative intention.

BY THE COURT.—Let the decree of the circuit court be affirmed.

HIGH COURT OF ERRORS AND APPEALS

OF PENNSYLVANIA.

JULY SESSION, 1799.

Present—McKean, Chief Justice, Shippen and Smith, Justices of the Supreme Court; and Rush, Riddle, Addison and Coxe, President Judges of the Common Pleas.

Ludlow, Plaintiff in error, *v.* Bingham. (*a*)

Conflict of laws.—Attachment.—Practice.

The law of the place where a promissory note first becomes binding as a valid contract, governs as to the rights of the parties.[1]

A promissory note, expressed in commercial form, was made in Philadelphia, dated there, and made payable at the bank of the United States, but it was delivered in New York: *Held*, that it was to be governed by the law of the latter place.

The note was indorsed in blank, and a foreign attachment was served on the maker, while the note was in the possession of the defendant in the attachment, who, after such service, passed the note to a third person, for a full consideration, without notice: *Held*, that the attachment could not be sustained.

This court can enter judgment for the plaintiff in error, without remitting the record to the court below, for that purpose.

In Error. This was an action by the indorsee, against the maker of a promissory note; and the following case was submitted for the opinion of the court.

"Sometime about the end of December 1792, the defendant, for a full and valuable consideration, that is to say, in consideration of William Duer, of the city of New York, relinquishing to him (the defendant), his, the said William Duer's, right to a certain portion of a contract, made with the state

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(*a*) The question involved in this cause had been argued in the supreme court; but before any opinion was given by the judges, and in order to avoid delay, a judgment was entered, by consent, for the defendant, on which the present writ of error was brought, with an agreement that the decision of the high court of errors and appeals, should also be binding in thecases of McEvers *v.* Bingham, Service *v.* Bingham, and McCrea *v.* Bingham, all depending in the supreme court on the same facts. The present report comprises the arguments in both courts.

[1] Tilden *v.* Blair, 21 Wall. 241; Ex parte Conrad, 8 Phila. 147; Wayne County Savings Bank *v.* Low, 81 N. Y. 566; Opdyke *v.* Merwin, 13 Hun 401; Weil *v.* Lange, 6 Daly 549; Bowen *v.* Bradley, 1 Sheld. 226; Hull *v.* Wheeler, 7 Abb. Pr. 411. And see Mott *v.* Wright, 4 Biss. 53.

of Massachusetts, for *the purchase of a large tract of land, caused to be paid and delivered, at the city of New York, to the said William Duer, the several promissory notes in the declaration mentioned; all of which were made by the defendant, payable at the Bank of the United States, to the order of Henry Knox, Esq., a citizen of Massachusetts, and indorsed in blank by him to the said William Duer, whose property they became by the said delivery; and continued so to be, until he parted therewith, as hereafter mentioned. On the 11th of May 1793, a foreign attachment issued out of the court of common pleas for Philadelphia county, at the suit of Nicholas Fish, a citizen of the state of New York, against the said William Duer, which was, on the same day, duly served in the hands of the defendant, with notice to him as garnishee; and on executing a writ of inquiry, in the said attachment, the sum of 4103*l.* 15*s.* 6*d.*, Pennsylvania currency, was, on the 8th of March 1794, found due to the plaintiff therein, from the said William Duer, and judgment thereupon rendered, which judgment still remains in full force and unsatisfied. At the time of issuing and serving the said attachment as aforesaid, the said notes remained in the possession, and were the property of the said William Duer, and continued so to be, until some time afterwards, in the same year, when they were paid away by him, in New York, to citizens of New York, for a full and valuable consideration, by delivery, and without his indorsement thereon; and afterwards, they were severally paid away and delivered, in New York, by the persons so receiving them, respectively (before the bringing of the actions), citizens of New York (except McCrea, who is a citizen of Pennsylvania), respectively, for full and valuable considerations, and without any knowledge on their parts of the said attachment having been served or issued, other than such knowledge as may be deemed to result from the record of the said attachment, and the proceedings thereon; and without any knowledge of the agreement so as aforesaid made between the said William Bingham and William Duer. It is agreed, that promissory notes were, at the time of negotiating the said promissory notes, and still are, negotiated and considered, in New York, upon the same footing as foreign bills of exchange, according to the custom of merchants.

"Questions submitted to the opinion of the judges: Were the sums of money, or any part thereof, due on the said notes, liable to the said attachment, and bound thereby in the hands of the defendant? Or, is he bound to pay the plaintiffs in these causes, notwithstanding the said attachment, and proceedings thereon, the amount of the said notes, or any part thereof? After an opinion shall be given on these questions, it is agreed, that the court shall be authorized to give such judgment in the several actions, as
*49] the facts here stated, and as the facts *that shall be brought forward, under the subjoined agreement, shall induce them to deem right."

The case was argued by *Ingersoll* and *Dallas*, for the plaintiff, and by *Lewis* and *E. Tilghman*, for the defendant.

For the plaintiff, *Dallas* premised, that the case admits all the facts essential to constitute a legal right of recovery: the note was originally issued for a valuable consideration: it was delivered in New York; all the parties to the note and the attachment, except Bingham, are citizens of New York or Massachusetts; it was attached before it was due; the note vested

in Duer by the delivery, and was afterwards divested for a valuable consideration, without notice of the attachment, by delivery and without Duer's indorsement; and promissory notes are on the same footing in New York as foreign bills of exchange. Whether, then, we consider, 1st, the nature of the contract between the original parties to the note: or 2d, the operation of the transfer, by delivery, from Duer to the purchasers of the note, the plaintiff is entitled to recover.

1st. The original contract was an agreement by Bingham, to give his own note, payable to Knox, or order, indorsed in blank by Knox, to Duer; and such a note is transferable merely by delivery. (Doug. 733–9.) This quality of transfer by delivery, was the essence of the contract; so that the person holding the note, on the day of payment, might be entitled to receive the amount. So long as it remained in the hands of Duer, it was susceptible of such a transfer; the right could not be changed, modified or defeated by Bingham himself; and though a creditor of Duer's might attach a debt due to him, he could not alter the conditions of the contract on which the debt arose; on the one hand, to release Bingham from the obligation of those conditions? or, on the other hand, to injure him for performing them.

But the place of negotiating the contract was New York, and the note was actually delivered there. The law of New York, therefore, is to be regarded in construing the contract and obligation of the parties. It is true, that the note is dated at Philadelphia, and is made payable at the bank of the United States: but Philadelphia merely designates the place of the drawer's residence; the note is not payable at his house; and being payable at the bank of the United States, does not necessarily make it payable in Pennsylvania. (1 U. S. Stat. 195.) The note never passed from the maker, in Pennyslvania; but continued in his hands, in the nature of an escrow, until it was delivered in New York. The delivery there first gave life to the note. It was, of course, contemplated (as the event has proved) that the note should be negotiated where it was delivered; that it should circulate there, until the day of payment; and that, on the day of payment, it should be presented at the bank of the United *States. Referring, therefore, to the *lex loci* as our guide, a promissory note must be [*50 regarded as a foreign bill of exchange, which can never be affected in the hands of a *bonâ fide* indorsee, on account of any circumstance, not appearing on the face of the instrument itself. 2 Dall. 396.

But even considering Philadelphia as the place of executing the contract, what would be the effect? It is the place where Bingham is to pay, according to the terms of the contract; that is, to pay to any *bonâ fide* holder by the indorsement of Knox, and the delivery of Duer; so that it could not be ascertained to whom he was debtor on the note, until the day of payment. There is no analogy between the present case and the case of *Mc Cullough* v. *Houston*, 1 Dall. 453.[1] There, the equity allowed was between the maker and payee, arising on a note, which was not like a foreign bill of exchange, but was of a restricted negotiable character, under an act of assembly. Even if this had been strictly a Pennsylvania transaction, Ludlow would only have taken the note, on the principle of *Mc Cullough* v. *Houston*, sub-

[1] The case of McCullough *v.* Houston has been subsequently overruled; see Bullock *v.* Wilcox, 7 Watts 329.

ject to the equity existing between Bingham, the maker, and Knox, the payee. Besides, the court have repeatedly decided, that the principle of that case did not apply to accommodation notes. It is likewise to be observed, that by the act of assembly, the maker is liable for no more than is due upon the note, at the time of the first assignment; and there is no question in the present case as to the amount, but merely as to whom the amount is payable.

2d. The operation of Duer's transfer by delivery is conclusive. It is a great ruling principle, that circumstances existing between parties to a contract shall not affect the rights of third persons. Nothing that passed between Bingham and Duer, which the face of the instument does not show; no right which Fish acquired against Duer, ought to affect Ludlow, without notice expressed or implied. A latent bar ought never to impeach the validity of an apparently good transfer of negotiable interests. 1 Loft's Gilb. Ev. 194–5. On the face of the note, the contract of Bingham has no relation at all to Duer; it does not appear, that Duer was ever interested in it; and though it may be presumed, that the first purchaser, who took the note by Duer's delivery, was apprised of the fact, the presumption will not in any degree apply to the plaintiff. The case admits, indeed, that there was no express notice of the attachment, and there is no ground to argue an implied notice from the record: for even if a citizen of New York, purchasing a note or bill of exchange in New York, is bound to respect the laws of Pennsylvania, and to examine the records of all our courts, before his purchase, to ascertain whether an attachment has not issued against every indorser of the note, what was there that could lead to such an examination, in relation to Duer, who is not party to the note, and might be an utter stranger to the present plaintiff? Again, if notice is to be presumed from the **lis pendens*, it applies to a negotiation in London or Amsterdam, as well as in New York; to a bill of exchange, or any other contract, as well as to a promissory note; and to a negotiation through a hundred persons, merely by delivery, as well as to such a negotiation by an individual. It is obvious, therefore, that the credit and facilities of commerce would be destroyed, should such a doctrine prevail.

*51]

The consequences of allowing the attachment as a bar would, likewise, be peculiarly unjust and injurious to the present holder of the note, who did not take it on the credit of Duer, and to whom Duer is in no wise bound. If, indeed, payment to Fish is a good payment of the note, it is a payment by the maker; and, of course, it extinguishes all remedy against the indorsers, whose undertaking is merely a collateral one, to pay on the maker's default: so that the plaintiff, the last indorsee, taking the note, perhaps, on the credit of the indorsers, more than on the credit of the maker, is deprived of every security, without any imputable *laches* on his part. But a fair holder, for a valuable consideration, of a bill of exchange, or note payable to bearer, is protected even against the true owner, who has been robbed, or has lost the instrument. 1 Burr. 452; 3 Ibid. 1516, 1524; 1 W. Bl. 485; 4 Bac. Abr. 705–6. The attachment cannot surely amount to more than a legal assignment: let it, therefore, be supposed, that Duer had assigned the note to Fish, with notice to Bingham; still, the plaintiff, a purchaser of a negotiable instrument, for a valuable consideration, without notice, would be entitled to recover. Or, let the stronger case be supposed,

that on such an assignment, the note itself had been delivered to Fish, but that he had lost it, or had been robbed of it, that Duer had found or had stolen it, and afterwards had sold it, the purchaser would be entitled to receive the money from Bingham, and not the assignee. The rule is exemplified in the fullest manner, by considering the note as payable to bearer; for unless Duer keeps it until it is due and payable, he is not the bearer contemplated by the contract; there is no engagement to pay him at all. Though, therefore, our law permits the attachment of debts due and payable, it is manifest, that unless Duer held the note until it was actually due, it could not be payable to him, and if not payable to him, it could not be attached as his debt. If the instrument of contract had expressly provided, that something being done by a third person, the debt should become the property of that third person, when the act was done, Duer's interest must surely escape, and nothing would remain upon which an attachment against him could operate. Though not by the words, yet, by the nature of the contract, the same effect is produced: for, a third person being the bearer on the day of payment, and presenting the note, at the place of payment, the contract is to pay him; and every antecedent transmissible interest, of which Duer was possessed, is effectually extinguished.

*For the defendant, *E. Tilghman* and *Lewis* (*a*) contended, that Fish having attached, while the note was in Duer's hands, obtained a legal lien upon the money mentioned in it; although the money was not then due from the drawer, nor had the note ever been in the possession of the attacher; and that having pursued his lien, without *laches*, he is now entitled to the money. The general principle of the attachment law, is clearly in favor of Fish; and his claim must prevail, unless the plaintiff in error shows, that the note was a species of property not liable to an attachment. [*52

In attempting to maintain this exemption from attachment, it has been urged, that the note is subject to the laws of New York, where promissory notes are upon the same footing with bills of exchange; and therefore, it was not attachable: but the fact, and the inference deduced from it, are alike denied. The note was executed at Philadelphia; it is dated there; it was there indorsed by Henry Knox; and it is payable at the Bank of the United States. It is true, that the note was delivered to Duer, in New York, agreeable to Bingham's contract; but Duer well knew that it had been previously executed in Philadelphia, and by the delivery in Philadelphia, Knox's indorsement took effect. An express stipulation, on the face of the note, made it payable at the Bank of the United States; and it is an established principle, that a contract for the payment of money is to be governed by the laws of the place where it is payable. Prec. in Chan. 128; 2 Burr. 1083–4; 1 W. Bl. 258–9. It is not a sufficient answer, that the Bank of the United States is not permanently fixed at Philadelphia; for the parties to the contract, in making it the place of payment, considered it as at Philadelphia; and there could be no idea of a removal of the bank, while Philadelphia continued the seat of the federal goverment; inasmuch

(*a*) *Tilghman* having embraced in his argument on the present occasion, all that had been suggested by *Lewis* in the supreme court, the latter declined entering again into the discussion, on the writ of error.

as it is expressly provided, that the officer at the head of the treasury department shall be furnished with weekly statements of the affairs of the institution, and should be entitled to inspect the general accounts in relation to such statements. (1 U. S. Stat. 195, § 7, art. 16.) The place of payment was evidently fixed for the maker's convenience: and although, if there is a place appointed for payment, a personal application need not be made to the maker of a note (2 Hen. Bl. 509), yet, stipulating that payment should be made at the Bank of the United States, shows that the law of Pennsylvania was to furnish the rule for construing the legal effect of the contract.

Again, it is urged, that the note was in the nature of an escrow, until it was delivered to Duer, at New York; and that receiving its life in New York, it must be governed by the law of the place of *its existence. *53] But the note is payable in four years from its date; and therefore, even considering it in the nature of an escrow, when the condition was discharged, it took effect, with relation to its date and execution, in Philadelphia. There is nothing to show, that with regard to this note, more than with regard to any other note executed and payable in Philadelphia, but delivered to the indorsee in New York, it was in the contemplation of the parties, that New York should be the scene of negotiation. It is in vain for the counsel to assert, that it could not have been put in circulation at New York, with a view to the laws of another state; for the date of the note, and the place prescribed for its payment, are premises from which the legal inference is insurmountable, that the law of Pennsylvania was contemplated. Let it be supposed, that on the day of payment, Bingham had tendered the money at the Bank of the United States, when no person was ready to receive it: the tender, if legal, would discharge him from any claim for future interest; but by what law would the validity of the tender have been tried? Or suppose, that the note had been invalid by the law of Pennsylvania, could it have been rendered valid by reference to the law of New York?

It has been objected, however, as another ground of opposition to the lien of the plaintiff in the attachment, that even an attachment cannot prevail against the *bonâ fide* holder of the note, for a valuable consideration, and without notice: while it remained in the hands of Duer, the adverse counsel admit, that it was subject to an attachment; but they contend, that the defendant in the attachment might defeat the lien, whenever he pleased, by the mere delivery of the note. It will hereafter be shown, however, that the concession and the argument cannot be reconciled. But the corner-stone of the defence is, that notes of this description are to be governed only by what appears on the face of the paper; and this, undoubtedly, is the law in England (whence the authorities have been adduced), except as to attachments. In Pennsylvania, however, the face of the paper is not the criterion, on which a *bonâ fide* purchaser is to judge. The distinction arises on this ground, that in England, the holder of a promissory note is not considered as an assignee, but in Pennsylvania he is so considered (Doug. 614), and although an indorsee, in England, is discharged from all equitable circumstances existing between the original parties, which do not appear on the instrument itself, an assignee of a note, in Pennsylvania, is bound to resort to the maker, to know whether there is any defence, equitable or legal. Showing, then, that the face of the note is not the criterion, we

destroy the very foundation of the plaintiff's claim. That the indorsee takes the note subject to all equity between the drawer and indorser has been expressly adjudged. (1 Dall. 442–4.) The negotiability of the note is qualified, not absolute. The first indorsee, indeed, is as innocent as any subsequent one; *and if the equity of the maker's defence against [*54
the indorser is to affect the first indorsee, there can be no just reason why it should not equally affect the second: the face of the note is the same in the one case, as in the other; the second indorsee can recover no more from the maker than the first; and it may as fairly be contended that a payee could defeat an attachment, by indorsement, as an indorsee, by delivery.

It is asked, whether it is reasonable to expect that the purchaser of the note in market, should inquire after attachments, or liens against Duer, whose name does not appear on the note? And yet the plaintiff himself relies on the supposed terms, on which the note was delivered to Duer in New York. But the fact is, that the note came to Duer, for a valuable consideration, as a common note, not merely as an accommodation note; and our argument is, that the face of the note affording no criterion to protect the holder from a set-off, or attachment against Duer, it was incumbent on the person purchasing it, to apply to the maker for information, not, particularly, as to the right of Duer, but, generally, as to the validity of the note.

The adverse counsel urge, that if payment by Bingham to Fish will be good, then the note will be extinguished, and the holder can have no remedy against any of the indorsers. But might not each indorser recover from the person with whom he dealt, in an action for money had and received? At all events each party to the note runs his risk; it is nothing more than the risk run in the case of notes given in England, upon usurious and gaming contracts; nor is it harder than the operation of the principle in *Mc Cullough* v. *Houston*, which would have produced the same decision, had there been twenty indorsers on the note then in controversy.

That Fish's right could not be stronger, as plaintiff in an attachment, than as the assignee of Duer, is a position not true to every intent. For instance, Fish might attach the debt before it was due. Again, in the case of an assignment, he would be guilty of *laches*, and ought to answer for not taking possession of the note, or for suffering it to be lost or stolen; but from the very nature of the attachment (a hostile process against Duer), Fish could not obtain the possession of the note, and the law will aid and supply the want of it. Nor is it correct to say, that Bingham was a debtor to no man, until the day of payment; and then only to the bearer of the note; for the obligation of the maker was coeval with the execution of the note, which was *debitum in præsenti, solvendum in futuro;* and a debt of that description is clearly attachable (2 Dall. 211). Though the maker is guilty of some negligence in making a payment, without indorsing it on his note; yet, even in his case, it has been shown, the payment will be allowed in Pennsylvania against a *bonâ fide* holder, without notice: and, surely, the case against *the garnishee is much stronger, the plaintiff in the at- [*55
tachment being in the prosecution of a legal right, and founding his demand against the garnishee upon the positive provisions of the act of assembly, which, though it is some respects analogous, in others, extends

further than the custom of London. The words of the original act speak only, it is true, of goods, chattels and effects; but they were always construed to include debts, and even lands; and the supplement expressly extends to the goods, chattels, moneys, effects and credits of the defendant: 2 Dall. Laws, 733. The attachment, *ipso facto*, secures the effects attached, to abide the judgment of the court: 1 Ibid. 60, edit. The words of the domestic attachment law (a law made *in pari materia*, and therefore, to be regarded on the present question of construction) expressly recognise "lands, goods, chattels and effects," as objects of attachment; and among the powers vested in the auditors under such attachment, they are authorized "to grant and assign, or otherwise to order or dispose of, all or any of the debts due, or to be due, to and for the benefit of the said defendants (in the attachments) to the use of their creditors. And that the same grant, assignment or disposition of the said debts, so to be made, shall vest the property, right, and interest thereof, in the person or persons, to whom it shall be so granted, assigned or ordered by the auditors; so that such assignees may sue for and recover the said debts, in their own names, and detain the same to their own use. And that after such grant, assignment or disposition, made of the said debts, neither the defendants, nor any other to whom such debts shall be due, shall have power to recover the same, nor to make any release or discharge thereof." (1 Dall. Laws, 194–8, § 2, 7.) The domestic attachment has, indeed, the effect of a bankruptcy; but if the plaintiff's doctrine is true, a bankrupt's agent may effectually, by mere delivery, pass away notes indorsed in blank.

In Carthew 26, it is said, that bills of exchange are attachable, according to the custom of London; and the adverse counsel admits, that the note was attachable, while it remained in the hands of Duer. But if so, how can the attachment be dissolved, without appearing to it, on the terms of the law? There is no *laches* on the part of the plaintiff; and if the note could be attached at all, it must be effectually attached. It is idle to allege, that the sucess of the attachment must depend on the note's remaining with the defendant, until the attachment had run its course. Suppose, a judgment had been obtained against the garnishee, before the note was due, with a stay of execution until it became due, could this lien be defeated by a subsequent sale and delivery of the note? Suppose, a suit instituted by the indorsee of a note against the maker, and the note afterwards lost or stolen; would the claim of a *bonâ fide* purchaser, in such cases, supersede the suit,
*56] or prevail against the plaintiff in it, after he had *obtained a judgment? Suppose, a bill of exchange protested for non-acceptance, a suit and judgment upon it, and afterwards, but before the day of payment, it was lost; a bill may be negotiated, after such a protest (2 Dall. 396), and yet, would a purchaser be preferred to the plaintiff in the suit, or could he recover a second time from the drawer? The attachment ought, in short, to be regarded in the nature of a suit brought by Duer himself.

The hardship of the case is not so great, nor so unprecedented, as to require an extraordinary interposition of the court to change or modify, on equitable principles, the operation of a positive law. In England, notes and other securities, given upon usurious or gaming considerations, are void in the hands of a *bonâ fide* holder, for a valuable consideration, without notice, even as against the maker, who was accessary to the injury and embarrassment by

issuing the note. In those instances, as well as in the present instance, no warning appears on the face of the paper; and the bar is, emphatically, a latent bar, no record existing by which it could be traced or ascertained. Is it not as reasonable, as just, that the attachment should operate in favor of a *bona fide* creditor of Duer, who had no power to obtain possession of the note, as that the original taint in the consideration of a gaming or an usurious contract, should operate in favor of a party to the illegal transaction?

Upon the whole, Fish has attached, when the property and the possession of the note, were both in Duer; and his opponents must convince the court, that an attachment, once operative, can be legally done away, without some *laches* or relinquishment on his part.

Ingersoll, for the plaintiff in error, in reply.—The question under consideration is novel, curious, and in its consequences, most extensive: it is not too much to say that the negotiable paper of Philadelphia, depends, for its circulation abroad, upon the event of the cause. The subject may be considered, with a view to support two positions; 1st. That the note, under the circumstances of the case, was negotiable, the property of which, after the indorsement in blank, passed by delivery, as a bill of exchange payable to bearer. 2d. That negotiable paper of this description, is not within the spirit, intent and meaning of the attachment law of Pennsylvania: especially, when put into circulation and negotiated out of the state.

1. The note passed by delivery, as a bill of exchange, payable to bearer. Under this general proposition, we derive the title of the plaintiff immediately from Henry Knox, not through William Duer; but against the proposition, several objections have been urged. It is said, that in Pennsylvania, promissory notes are not within the law-merchant; that they are regulated by the common-law principle, in pursuance of which every assignee takes the instrument *subject to every equitable consideration that [*57
affected the assignor; that the act of assembly places notes on a footing with bonds, enabling the indorsee to recover only what shall appear to have been due at the time of assignment; and that these doctrines have been exemplified and enforced by legal decisions. But the answers to these suggestions, will satisfactorily show, either that they are not founded in fact, or that they are inapplicable on the present occasion.

Promissory notes, in Pennsylvania, are governed by the statute of Anne, as far as respects the payee's remedy against the maker, in an action upon the notes themselves; and therefore, they are within the law-merchant. The act of assembly, when it provides a further remedy for the indorsee, implies and recognises the law to be so. At common law, a promissory note could not be declared on; all the declarations on record upon promissory notes, state the liability as arising under the statute of Anne; and the distinction in this particular has been repeatedly recognised by our courts. The statute of 9 & 10 *Wm. III.*, *c.* 17, placed inland bills of exchange upon a footing with foreign bills; and the statute of 3 & 4 *Anne*, *c.* 9, placed promissory notes upon a footing with inland bills: after an indorsement, therefore, promissory notes are to be regarded as foreign bills of exchange. It is true, that our act of assembly limits the maker's responsibility to an indorsee, by the measure of his responsibility to the payee; but nothing can be more

extravagant or unjust, than the deductions which have been attempted, at different times, from that provision, as recognised in *Mc Cullough* v. *Houston*, 1 Dall. 444. It was once, indeed, introduced as an authority to release the friendly indorser of an accommodation note, from all obligation to pay the indorsee: but the court declared, that the determination only applied to the case of a maker's being cheated by the payee, when, as in the instances of gambling and usurious notes in England, he should not be made liable to the indorsee. What analogy, however, can be suggested between *Mc Cullough* v. *Houston*, and the present case? The defendant is not called on to answer the holder of the note further than if the payee was plaintiff; there is no idea, that the defendant has been defrauded; the consideration for which the note was given, has not failed; the defendant has made no payment; he owes the full nominal amount of the note; and, in short, he is a mere stakeholder. In the cases that have been hitherto decided, the *dramatis personæ* were the maker, the payee or indorser, and the indorsee: here, a new corps of actors appears, the creditors of an intervening holder of the note, as plaintiffs in the attachment. In those cases, there was fraud; in the present case, the contest is between an innocent holder of the note, and a claimant by legal process. In those cases, if the remedy failed against the maker, it might be pursued against the indorser; in the present case, the debtor in the attachment is not an indorser, the person who *sold to the plaintiff, *58] is not an indorser; and, so far as appears by the state of the case, we are without remedy, unless this action succeeds.

The nature of the promissory note in question remains, then, to be ascertained, on abstract principles, public policy, general convenience, the reason of the case, and the design of the attachment law. On the face of it, the note appears calculated for general circulation, unaffected by local circumstances: it is payable at the Bank of the United States; and that institution was not stationary, for its commencement of business only was fixed at Philadelphia. A demand at the Bank of the United States, wherever its business was transacted, when the note became due, was the only condition that remained to be performed. (2 H. Bl. 509.) The note took effect and became operative by the delivery only, which was in New York. (*McKim* v. *Elton.*) (*a*) And there, promissory notes are on footing with bills of exchange. It was the intent and meaning of the parties that the note should circulate there, and be governed by the law of that state: *conventio vincit legem.* (*Reed* v. *Ingraham*, *post*, p. 169.) The act of assembly, indeed, cannot refer to notes delivered and put in circulation out of Pennsylvania; and surely, the objection arising under our local law, ought not to proceed from the plaintiff in the attachment, a citizen of New York, a party to, and bound by, the laws of that state. The note was originally in the form

(*a*) *McKim* v. *Elton.* This case was decided in the supreme court, some years ago. The defendant, proposing to give a preference to the plaintiff, in an arrangement with his creditors, drew a note in the plaintiff's favor, and signed it; but doubting afterwards the propriety of the measure, he put the note into his own desk. The plaintiff heard of this circumstance, and applied to the defendant's wife, in the defendant's absence, for the note; who having a key of the desk, unlocked it, and delivered the note to the plaintiff. It was adjudged, that the mere signing of the note, without a delivery by the maker to the payee, gave it no effect; and that the plaintiff could not take advantage of a possession surreptitiously obtained.

of a bank post-note; and after the indorsement in blank, it assumed the character of a common bank-note. It has, likewise, all the distinguishing characteristics of a bill of exchange: it is entitled to three days' grace; the indorser is answerable to the indorsee, without express covenant, though the note be forged; and immediate notice must be given to the indorser, if the note be dishonored.

2. But negotiable paper of this description is not within the spirit, intent and meaning of the attachment law of Pennsylvania. The opposite doctrine would render our act of assembly a perfect snare; and inevitably prevent the extra-territorial negotiation of any note or bill of exchange, on which any citizen of Pennsylvania was maker or acceptor. For, if Duer had purchased the note one hour, and sold it the next, after the attachment was laid, the rule contended for would equally apply. Such is the absurd and monstrous inconvenience to which this pretension leads, that neither the person *who sells, nor the person who buys, can know the injustice that they are concurring to practice: the one has sold what he had no right to [*59 part with, and the other has paid a valuable consideration for nothing; and yet, the former shall be innocent, and no negligence can be imputed to the latter! The *lis pendens* has no extra-territorial operation, and cannot be regarded as implied notice to citizens of other countries.

But the attachment cannot, surely, give a better right to Fish to claim payment from the maker, than a sale for value, with notice to the maker, though without delivery of the note; or (in the cases already put), a sale and payment, with delivery of the note, which is afterwards, however, lost or stolen, and negotiated *bonâ fide*. By the act of assembly, debts may be attached, and so may money: but suppose a sum of money had been specifically attached, and the garnishee had afterwards paid it away, could the money have followed into the hands of a *bonâ fide* receiver? If goods, indeed, are attached, and afterwards lost or stolen, they may be pursued, and if found again, will still be liable to the attachment; but not so, in the case of money; a distinction which exemplifies and establishes the rule on our part. For notes payable to bearer are regarded as money; and the reason applying equally to both objects, the law must be the same. Nor can an attachment alter the nature and conditions of a contract; as, in the present instance, the negotiable nature of the instrument, and the condition that it shall pass by delivery. It is the same thing, whether the condition is expressed by the parties, or implied by law. An attachment of real estate would not prevent a springing use, or a resulting trust; the estate might, therefore, change its owner, pending the attachment. And why not the property of a note, liable, by the nature of the contract to this contingency, that it shall cease to represent a debt owing to Duer, and become a debt owing to Ludlow, if Ludlow is the bearer on the day of payment? Debts, in general, are not liable to such contingencies and conditions; they are not negotiable; and therefore (though it is only by implication our law is extended to them), they may with certainty be subjects of attachments. But even stock-contracts, or bonds payable to a man or his assigns, cannot be affected by an attachment made in another state.

Does it, then, require a greater latitude of construction, than is authorized by precedent, to exempt negotiable paper, circulating abroad, from the meaning and operation of the attachment law? It is not to control our act

of assembly, by the law of New York, but to give to our act a reasonable interpretation. While paper credit remains in use, it should be regulated by plain and uniform rules (1 Dall. 270); and that the *bonâ fide* purchaser should only be affected by what appears on the face of the instrument, is the characteristic of negotiable paper. (1 Loft's Gilb. 195; *2 Dall. 396.) *60]
The departure from the strict terms of a law, in a variety of other instances, will authorize a much greater latitude of construction than the present case requires. The cases of the sick sailor, who remained in a foundering ship, of the surgeon who bled a man in the street, and of ecclesiastical leases, in England (1 Bl. Com. 60); as well as the case of unrecorded mortgages here (1 Dall. 434), are strong examples. But construction on the one side or the other forces itself upon the court. An indorser is guarantee for the payment of the note to the holder, if it is not paid by the maker; a payment to one not the holder, is not an exception known to the law-merchant; and can a municipal regulation alter the general law, operating on a negotiation out of the state? A statutory assignment by bankruptcy (which is an assignment of rights of action, and stronger than an attachment) will not enable the assignees to claim from the maker against a *bonâ fide* holder. A judgment in an attachment is not conclusive evidence of a debt out of the state, in which it is rendered (1 Dall. 261); and the death of the defendant, after interlocutory judgment, destroys the attachment, because there is not any party in court; because executors or administrators are not liable to enter special bail; and because no foreign attachment can issue against executors or administrators. 1 Dall. 248.(*a*)

The attachment law of Pennsylvania is a copy, in some measure, from the original mode established as the custom of London; and that the currency of bills and notes in London (which even pass under a bequest of money in a will (1 Burr. 358; 3 Ibid. 1516, 1524–5, 1530; 1 W. Bl. 485; 4 Bac. Abr. 705–6; 2 Burr. 675, 1225) should be impaired and endangered in this way, is so improbable, that the most authoritative precedents are necessary to induce belief. A precedent is, however, cited, but of so light a texture, that it will hardly bear examination: it is cited, too, against a *bonâ fide* holder, who never knew of Duer's interest or possession of the note; who may fill up the blank indorsement as he pleases (1 W. Bl. 296), who may deduce his title immediately from Knox (2 Burr. 1225, 1216), and who, in that way, can never be injured by anything which Duer has done. The solitary precedent is cited from Carthew 26, where it is said, that a bill of exchange is liable to attachment. But this was not the point of the cause, and ought, therefore, to be disregarded (1 Burr. 526; 3 Ibid. 1730); the only point turning on the question, whether a prohibition ought to issue. The debt due, and the debt attached, were both upon bonds, not on a bill of exchange. (Holt 179.) The incidental observations relied *on, did not *61]
proceed from the court, or any member of it; and the same case is reported in three other books, of superior character, without a word of a bill of exchange, even by way of allusion, from the court, the counsel or the

(*a*) The defendant died after final judgment, but before the money actually paid by the garnishee: *quære*, the effect of his death, since the attachment might be dissolved by entering special bail, at any time before such payment? This point was stated, but not relied on, by the plaintiff's counsel.

reporters. (Holt 179; 1 Show. 9; Comb. 109.) But even this precedent might be explained, consistently with our doctrine, by supposing it meant, that a bill of exchange might be attached, after it was due; for if negotiated after it was due, it can only be in a limited degree, liable to all exceptions as paper not negotiable. (2 Dall. 396.)

After consideration, the unanimous opinion of the Court was delivered, by the Chief Justice, who, having stated the case, proceeded as follows:

McKean, Chief Justice.—The first inquiry, which it is necessary to pursue, is, where was the note in controversy made, in Pennsylvania, or in New York? For, whether the act of assembly, relating to promissory notes, is to be introduced or excluded, in forming our judgment, depends upon the answer, that shall be given to this preliminary question.

It appears, then, that although the note was signed in Philadelphia, it was not delivered in Pennsylvania; but that the delivery was made by the order or direction of Henry Knox, the payee, to William Duer, in the city of New York, in pursuance of a contract, and for a valuable consideration. It is certain, that the bare signing of a note will not give it efficacy. It may be signed, with a view to deliver it to the payee, on his complying with some previous stipulation; so that, in case of a refusal, it would become useless, and might be cancelled by the drawer. A note is not, therefore, obligatory and valid, until it has been actually delivered to the party, for whose use it is drawn; and as it receives its life, existence and negotiable character, at the place where it is so delivered, the law of that place must regulate all its subsequent operations. Hence, we consider the present note, as having taken effect in New York, as being liable to the *lex loci* of that state (whether depending on positive statutes, or the adoption of the general commercial law), and as exempt from the provisions of our act of assembly, by which an indorsee is liable to all the equity that the maker could enforce against the payee.

The note having been thus paid or delivered in New York, was deemed, by the law of that state, to be as negotiable as a foreign bill of exchange; and it is the nature of a bill of exchange, when indorsed in blank, to pass from hand to hand, by mere delivery, like bank-notes payable to bearer. It is true, that the negotiability of the bill may be restrained by the qualified terms of an indorsement; but there must be express words to produce such an effect. In the present case, there was no restraint upon *the negotiability of the note; and in a due and fair course of circulation, it was [*62
delivered to Duer, he sold to a *bonâ fide* purchaser, that purchaser sold it to others, until at last, it became the property of the plaintiff. While, however, it was in the hands of Duer, an attachment issued at the suit of his creditors, and the maker of the note was summoned as garnishee.

And here the second great question arises, whether, under these circumstances, the money, due at that time, but not payable until long after, on a negotiable note, could be attached as the property of Duer, so as to defeat a subsequent purchaser, *bonâ fide*, and for a valuable consideration? In England, I believe, there would be no hesitation in deciding, that it could not. On the paper credit of that nation, much of its power and prosperity (if not its very existence) will be found to depend; and therefore, everything that can impede or injure the circulation of bills of exchange, promissory notes

and bank-notes, is anxiously guarded against. The situation of this country, however, is not the same; so that the legislature of Pennsylvania has not found it necessary to hold in equal respect the negotiability of promissory notes. When the act of assembly was passed, promissory notes were little used; they were given for small debts; and they seldom passed out of the hands of the payee, before payment. The object of the act was, simply, to enable the indorsee to sue the maker in his own name; but in giving this benefit, it was expressly provided, that he should recover no more than was due at the time of the indorsement. This, therefore, lets in the equitable claims of the maker against the payee, when he is sued by the indorsee; and even in England, there is no doubt, the consideration of a note may be inquired into, in an action between the payee and the maker.

The present case, however, arises from a commercial transaction in the city of New York, where the note was regarded in the light of a foreign bill of exchange. There is no judgment, or authoritative *dictum*, to be found in any book, that money due upon such a negotiable instrument, can be attached before it is payable; and in point of reason, policy and usage, as well as upon principles of convenience and equity, we think, it would be dangerous and wrong to introduce and establish a precedent of the kind. To adjudge that a note, which passes from hand to hand as cash; on which the holder may institute a suit in his own name; which has all the properties of a bank-note, payable to bearer; which would be embraced by a bequest of money; and which is actually in circulation in another state; should be affected in this way, by a foreign attachment, would be, in effect, to overthrow an essential part of the commercial system, and to annihilate the negotiable quality of all such instruments.[1]

It has been said, that the purchaser of the note (*toties quoties*) was bound to inquire into its validity, by applying to the maker before he
*63] bought it. But I cannot perceive the propriety, nor, indeed, *the utility, of imposing such a duty in this, or any similar case. The distance between the place of the maker's residence, and the place of the note's circulation; and the frequency of the transfers of negotiable notes, payable at long dates, would render such a course highly inconvenient, if not impracticable; while the information to be derived from it, could only assure the purchaser, that an attachment had not issued at the very moment of his application; but could not protect him from an attachment which might issue in less than an hour afterwards, and sooner than his purchase could be accomplished.

Upon the whole, we are, unanimously, of opinion, that the attachment cannot be sustained; and that the bearer of the note, on the day of payment, is entitled to recover the money from the drawer. The judgment for the defendant must, therefore, be reversed; and judgment entered for the plaintiff.

Smith, Justice.—The opinion of the court is certainly unanimous on the points that have been stated; but I wish it to be remarked, that my concur-

[1] In Kieffer *v.* Ehler, 18 Penn. St. 388, it was determined, that a promissory note, not yet due, may be attached in the hands of the maker; but that such attachment will not prevail against a *bonâ fide* indorsee, before maturity, without notice. And see Hill v. Kraft, 29 Id. 186.

rence rests entirely on the particular circumstances of this case. The delivery in New York, which gave effect to the note, and introduced the law of that state as our guide, is exclusively the ground of my assent.

Addison, Justice.—To me, it would have made no difference, had the delivery and circulation of the note been entirely in Pennsylvania. It is expressed in commercial form, and was negotiable upon commercial principles. On general grounds, therefore, as well as for the particular reasons that have been assigned, I think, the judgment of the court is right: and I should be surprised to find any doubt upon the subject, in a great commercial city like Philadelphia.

Shippen, Justice.—It is evident, that on the abstract question, the court do not agree; nor is it necessary that they should, as we are unanimous in the judgment pronounced, upon the grounds peculiar to this case. If, however, I were called upon to give an opinion, I should incline to the one expressed by Judge Addison.

The judgment below reversed; and judgment to be entered for Daniel Ludlow, the plaintiff in error.(*a*)

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*Johnson, Plaintiff in error, *v.* Haines's Lessee. [*64

Descent.

In every case of intestacy, the heir at common law will take the real estate, where its descent is not specifically altered by an act of assembly.(*b*)

Intestate died on the 13th February 1797, without issue, and leaving no widow, father, mother, brother, nor sister, but leaving nephews and nieces: *Held*, that the heir at common law was entitled to intestate's real estate, and that the act of assembly of the 19th April 1794, did not provide for this specific case.

In Error from the Supreme Court.(*c*) The question arose upon the following facts, which, by agreement, were to be considered as if found by a special verdict.

"Ejectment for a house and lot in Germantown, of which Rebecca Vanaken died seised on the 13th of February 1797, intestate, and leaving no father, mother, child, grandchild, brother nor sister living. But the intestate had had brothers and sisters, who died under these circumstances: 1. Richard, who died without issue. 2. Catharine, who married Casper Wistar, and left issue, Richard, Margaret, Catharine, Rebecca, Sarah and Casper, of this family; Richard, Margaret and Rebecca are dead; but all of

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(*a*) A question arose, whether this court should enter the judgment for the plaintiff in error, or merely remit the record to the supreme court, that the judgment might be entered there? In the present case, a decision was immaterial, as Mr. Bingham, being a mere stake-holder, was ready, at once, to pay the money, on the opinion which had been delivered; but as a precedent, it was thought important, and the court kept the point under advisement until the next adjourned session.

(*b*) This principle was adopted and confirmed in Preston *v.* Hopkins, 2 Yeates 545, and in Cresoe *v.* Laidley, 2 Binn. 279, but the rule has been abrogated by § 11 of the act of assembly of the 8th April 1833. (P. L. 319.)

(*c*) There had not been any opinion delivered in this case by the judges of the supreme court; but judgment was entered, by consent of the parties, to expedite the decision of the court of dernier resort.

them leaving issue. 3. Anne, who married ——— Lukens, and left issue, John, Mary, Daniel, Derrick and Rebecca; all of this family died in the life of the intestate, but all of them left issue. 4. John, who died in the lifetime of the intestate, but left issue Anthony (the plaintiff in error), John, Joseph and Margaret; and Margaret also died in the intestate's lifetime, leaving issue. 5. Margaret, who intermarried with Reuben Haines, and left issue Casper (the lessor of the plaintiff below), Catharine, Josiah and Reuben; Josiah is dead, leaving one son, who is now alive; and Reuben is dead, without issue. It was agreed, that Margaret, the daughter of Catharine, who was the sister of Rebecca, died in the lifetime of the intestate. And the questions submitted to the court are, whether the plaintiff in error is entitled to the whole of the premises? and, if he is not, how the premises are to be divided?"

The plaintiff in error claimed the whole of the premises as heir-at-law of the intestate: and the lessor of the defendant in error insisted, that the premises ought to be divided, on the principles of the act of the assembly, directing the descent of intestates' real estate. (3 Dall. Laws, 521.)

The ground of the claim of the *plaintiff* in error was, that the intestate had died, leaving the lineal representatives of brothers and sisters, but without leaving a father or mother, brother or sisters; that the partition of real estate was not provided for in such a case of intestacy, by any law existing at the time of the intestate's death; that this being a *casus omissus* in the act *of assembly, the estate must descend to the heir at the common law; and that the legislature had themselves considered it as a *casus omissus*, by passing a supplementary act to provide for it. (4 Dall. Laws, 154.) The first act was passed on the 19th of April 1794; the second act was passed on the 4th of April 1797; but the intestate died between the dates of those acts, on the 13th of February 1797. The following authorities were cited for the plaintiff in error: Chart. of Penn. § 6; 1 Dall. Laws, app'x, 21; Ibid. p. 723; Hale's Com. L. 148; 2 Bl. Com. 504; 3 Burr. 1634.

*65]

The *defendant* in error admitted, that there was no express provision of the act of assembly, passed in 1794, precisely in all its words defining the present case; but contended, that the case was within the general policy of the intestate law, which contemplates throughout, the partibility of estates; and that construing the law according to the spirit, policy and intention of the makers, consistently with reason, and the best convenience, the case was necessarily understood, implied and embraced in the frame and operation of several of the sections of the law, which were cited and analyzed. The following authorities were cited for the defendant in error, 1 Plowd. 344; 2 Ibid. 414; 1 Bl. Com. 87; 10 Co. 58; 1 Dall. 351, 175: 1 Ves. 421; 2 Eq. Abr. 245; 1 Str. 710; 2 Wils. 344; Burn. E. Law; Hob. 346; Vaugh. 179; 2 Vern. 431; Plowd. 467.

The unanimous opinion of the Court was delivered, to the following effect, by the Chief Justice, in the absence of Chew, President.

McKean, Chief Justice.—The intestate died, leaving the children of several of her brothers and sisters, and a grandchild of one of her brothers:

and it is now made a question, whether her real estate shall be divided among these surviving relations, or descend entirely to her heir-at-law?

By the sixth section of the charter granted to William Penn, the laws of England "for regulating and governing of property, as well for the descent and enjoyment of lands, as for the enjoyment and succession of goods and chattels," were introduced and established in Pennsylvania, to continue until they were altered by the legislature of the province. The common law being, therefore, the original guide, and the plaintiff in error being the heir at common law, his title must prevail, unless it shall appear, that an alteration in the rule has been made, by some act of the general assembly.

Now, when the intestate died, there was but one law in existence on the subject, the law of the 19th of April 1794; and though the sixth section of that law provides for the case of a person dying intestate, leaving, "neither widow nor lawful issue, but leaving a father, brothers and sisters," it does not provide, nor does any other of the sections provide, for the case of a *person dying intestate, without lawful issue, and leaving no father or mother, brothers or sisters. The descent of the real estate, in this specific case, was not, therefore, altered or regulated by any act of the general assembly, when the estate was vested in the person entitled to take, at the death of the intestate. [*66

It is probable, that if the case had been stated to the legislature, they would have directed the same distribution in the year 1794, that they have since done by the act of the year 1797: and it is urged, that as there is equal reason for making such a distribution, where no father survives, as where a father does survive the intestate, the court ought, upon the obvious principle and policy of the law, to supply the deficiency. But it must be remembered, that the system of distributing real estates, in cases of intestacy, is an encroachment on the common law; and wherever such an encroachment takes away a right, which would otherwise be vested in the heir-at-law, the operation of the statute should not be extended further, than it is carried by the very words of the legislature.

We are, upon the whole, unanimously of opinion, that the judgment below should be reversed; and that judgment should be given for the plaintiff in error. (*a*)

(*a*) Lands entailed, and trust estates, descend, in Pennsylvania, according to the course of the common law. Goodright *v.* Morningstar, 1 Yeates 313; Lessee of Jenks *v.* Backhouse, 1 Binn. 279.

*JULY SESSIONS, 1799.

Before Rush, Riddle, Addison, Henry and Coxe, Presidents of the Common Pleas.

Ewing and wife, Plaintiffs in error, *v.* Houston and wife.

Partition.— Variance.

A summons in partition, described the property to be divided, as follows: "One ferry at the river Susquehanna, in Hellam township, &c., six messuages, &c., with the appurtenances, in the same township of Hellam, in, &c.:" the writ of partition, in the recital of the summons, had these words: "with the appurtenances, in the same township of Hellam and Windsor, in, &c.;" and in the specification of the property, the ferry was omitted, though it was named in another part of the writ: the inquisition enumerated among the premises which were divided, the "ferry, and also a fishery on the river Susquehanna, at or near the said ferry, &c.:" *Held*, that these variances were not fatal.

It did not appear, by the return of the writ of partition, that the parties attended, or were warned to attend at its execution, and the inquisition did not state, that the property was assigned and delivered, but merely, that it was allotted: *Held*, that the partition was valid.

In Error from the Supreme Court. A writ of summons in partition was issued by the plaintiff in error, in the court of common pleas of York county, returnable to September term 1792, by which the defendant in error was summoned to show wherefore the following property, held by the parties, as tenants in common, should not be divided: to wit, "one ferry at the river Susquehanna, in Hellam township, in the county aforesaid, six messuages, one barn, four stables, four gardens, one orchard, 250 acres of arable land, and 371 acres of woodland, and the usual allowance of six per cent., with the appurtenances, in the same township of Hellam, in the said county of York." The writ being returned, "summoned," both the parties appeared by their attorneys, the plaintiffs filed a declaration, setting forth their title, and demanding partition of the same estates that were specified in the writ; and judgment was rendered, by consent, in general terms, "that partition be made." A writ of partition accordingly issued on this
*68] judgment, returnable *to December term 1792, when "the sheriff returned the writ, that partition had been made according to the command thereof;" both the parties appeared by their attorneys; and judgment was rendered, "that the partition so made be confirmed, and be and remain firm and stable for ever." The writ of partition recited the words of the writ of summons, except that in describing the place where the several estates were situated, the recital added the township of Windsor, to the township of Hellam, stating the premises to lie, "with the appurtenances, in the same township of Hellam and Windsor, in the county aforesaid:" It then proceeded to recite the judgment, "whereupon, it was considered by the said court, that partition thereof between the parties aforesaid be made:" and concluded with the mandatory clause to the sheriff: "Therefore, we command you, that taking with you twelve honest and lawful men of your bailiwick, &c., in your proper person, you go to the said ferry, &c.; and there, by the oaths or affirmations of the said twelve men, in the presence of the parties aforesaid, by you for that purpose to be warned (if upon being warned they will attend), and the said six messuages, &c., (specifying all the estates mentioned in the writ except the ferry), with the appurtenances (having respect

to the value thereof), into two equal parts you cause to be parted and divided, and one of the said equal parts to the said plaintiffs, &c., and the other equal part unto the defendants, &c., to hold to them in severalty, you assign and deliver, so that neither the said plaintiffs, &c., nor the said defendants, &c., have more of the said ferry, six messuages, &c., with the appurtenances, than to them of right belong or appertain: and the said plaintiffs, &c., their equal half part thereof to them allotted, and the said defendants, &c., the other equal part thereof to them allotted, may hold in severalty. And that the partition thereof, so openly and distinctly by you in form aforesaid made, you have before our judges, &c." The inquisition held under this writ of partition, after naming the persons constituting the inquest, stated, "that they were duly sworn and affirmed to divide and make partition of one ferry, at the river Susquehanna, in the township of Hellam, and county of York aforesaid, six messuages, &c., with the appurtenances, in the same township of Hellam and Windsor, in the county aforesaid, between the plaintiffs, &c., and the defendants, &c." And after dividing and parting the whole into two equal parts, the inquisition proceeded to a specification, that the inquest "have parted and divided the said ferry, messuages, lands and premises with the appurtenances into two equal parts, having regard to the true value thereof. And the lot marked on the annexed draft No. 1, containing the said ferry at the river Susquehanna, with all the flats, &c., thereunto belonging; the lot marked in the said draft No. 2, &c.; and *the tract of land marked No. 3, &c.; also a fishery on the river Susquehanna, at or near the said ferry, together with each and every of [*69 their rights, &c., they have allotted to the said plaintiffs, their heirs and assigns for ever," &c.(*a*) A writ of error was brought by the plaintiff in the partition, on the judgment of the common pleas, but that judgment being affirmed by the supreme court, the cause was removed into this court, by the same party.

For the plaintiff in error (who was also the plaintiff in the partition), *Lewis* made the following objections to the proceedings:

1. That the original writ, declaration and judgment, only calls for a partition of lands in Hellam township; but the judicial writ recites the original writ to have been for lands in Hellam and Windsor townships, and commands a division of them; and the return and final judgment are for lands in Hellam and Windsor townships. The declaration, judgment and execution must pursue the writ; and if the execution does not pursue the judgment, it is nullity. Execution is obtaining the actual possession of the thing recovered by law; but the lands in Windsor township never were recovered. (1 Inst. 154 *a*; Ibid. 289; 2 Bac. Abr. 329.) It is evidently an error of the attorney; but can he correct his errors in this way? The authorities, both in criminal and civil cases, show the contrary; for although it may not be necessary to name a township, town, street, &c., in the process and pleadings, if they are named, they must be proved. (2 Hawk. P. C. c. 46,

(*a*) Though there was no other description of the fishery, yet the defendant's counsel insisted that both the ferry and the fishery were appurtenant to lot No. 1; and the assertion seemed to be supported, on an inspection of the draft to which the inquest referred. The ferry was kept on a part of lot No. 1; and the fishery, being located within the boundaries of the same lot, would be "at or near the ferry."

§ 34 ; Salk. 661 ; Bull. N. P. 89 ; Hob. 37–8 ; 2 Inst. 513.) Is it possible, however, to maintain, that an execution can issue for a greater quantity of lands, or for different lands, than what is recovered by the judgment upon which it is founded? The law is incontestably established, that the slightest variance in the recital of a record, as between the count and the writ, so between the judgment and the execution, is fatal. (Cro. Eliz. 185, 329, 330, 829 ; 2 Lutw. 1179, 1181 ; 2 Vent. 153 ; Gilb. C. B. 50–3, 239.) Besides, the statutes of *jeoffaille* do not extend to judicial writs, when the party has no day in court : and under the authority of the present judicial writ, any other lands might as well have been divided as those demanded in the declaration and recovered by the judgment.

*70] 2. That the original writ, the declaration and the judgment, are for a ferry, six messuages, &c., but the judicial writ omits *the ferry in the mandatory clause ; and yet the ferry is divided by the inquest, who could only act to the extent of the command and authority in the writ of partition. This, too, is a mistake ; but the consequences would be ruinous, indeed, if it could not be arbitrarily corrected by the sheriff or the inquest. The sheriff must execute the command of the court, doing neither more nor less ; as he was not commanded to divide the ferry, he had no authority to do so ; and of course, the division is a nullity. (Hob. 37–8 ; Moore 19.)

3. That the inquest have assigned a fishery to the plaintiffs, which never was put in demand ; and the defendants sweep the same water. (2 Bl. Com. 190, 191 ; 2 Keb. 413, 580.)

4. That it does not appear, on the sheriff's return, that the parties attended, or were warned to attend, the execution of the writ of partition ; though this was commanded by the writ, is required by the law, and is recognised by all the precedents.

5. That the return to the writ of partition does not state that the premises were assigned and delivered to the respective parties, as the writ directs ; but merely that they were allotted.

These objections were answered by *Ingersoll* and *Hopkins*, for the defendant in error, substantially as follows :

1. That every intendment will be made in favor of a judgment (2 Keb. 413) ; and it is admitted, that all the proceedings are regular until the issuing of the judicial writ. In the execution of that writ, also, the court will presume the sheriff has acted lawfully and faithfully, until the contrary is shown. But it appears, on a connected view of the record, that the property demanded, is the same property that was divided, the words "same" and "thereof" applying relatively from the first to the last of the process, as designating the same specific property. It is true, that the name of Windsor township is first introduced in the judicial writ ; but if the introduction is not tolerated as an amendment for the sake of greater certainty, it ought to be disregarded as surplusage. The writ of partition was issued by the plaintiffs, who cannot take advantage of their own error (Moore 692 ; 5 Com. Dig. 301 ; 3 Bl. Com. 16) ; the judgment on the return, it will be presumed, was rendered at their instance, at least, they appeared by an attorney on the record ; and there has been a long acquiescence of the parties.

2. That the ferry, though accidentally omitted in one clause of the judicial

writ, is mentioned in other of its clauses, and is contemplated in every part of the record as an object of partition. It belongs to lot No. 1, and may be considered as appurtenant to it.

3. That the fishery was appurtenant to lot No. 1, and was named in the inquest, merely as a matter of detail and specification.

*4. That notice to the parties is proved, on two grounds; first, because the writ commands it, and the sheriff returns, that he has executed the writ according to the command thereof; and secondly, because the plaintiffs issued the writ, they were present by attorney when it was returned, and at that time never complained. But even if no notice had been given, there was another remedy; and the objection comes too late on a writ of error. (5 Com. 301.) [*71

5. That the writ of partition directs the premises to be divided, assigned and delivered; it is recited in the inquest; and the sheriff returns, that he has obeyed the command of the writ. When, therefore, the inquest declare that they have allotted the moieties to the respective parties, it must be deemed an allotment, according to the terms of the command and authority under which they acted.

On the last day of the session, the court mentioned, that some doubts had arisen, which would prevent a decision of the cause until the adjourned session; but that, in the meantime, for their own information, they should direct a *certiorari* to issue to the court of common pleas of York county, to inquire whether any precept had been given, authorizing the writ of execution, or judicial writ of partition, to issue; and if so, to return it. (*a*)

Cur. adv. vult.

At an adjourned session, held on the 17th of January 1800, the court unanimously affirmed the judgment of the supreme court.

Judgment affirmed.

Livezey *et al. v.* Gorgas *et al.*

Referees.—Damages.

In an action on the case, for the continuance of a nuisance, erected by the defendant's predecessor in the title, which is referred, the referees have no power to award, that future erections of a similar character shall be submitted to the determination of a jury of freeholders, to be summoned for that purpose.

In an assize of nuisance, the plaintiff is entitled to recover damages for the injury to the mere right, without reference to the actual damage sustained.[1]

Such action will lie against a devisee of the party by whom the nuisance was originally erected.

In Error from the Supreme Court. A declaration was filed in the court below, by the plaintiffs in error, against the defendants, in which they set

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(*a*) *Lewis* suggested a doubt, whether a *certiorari* could issue *per saltem*, to the common pleas, overleaping the supreme court, on whose judgment the writ of error was brought; but he agreed to give effect to any mode that might be taken to ascertain the fact in question, and to consider any precept that issued, as regularly annexed to the record.

[1] Miller *v.* Miller, 9 Penn. St. 74.

forth, "that on the ——— of ——— 1790, and thence continually, they have been seised in their desmesne as of fee, of and in a certain water grist-mill, with the appurtenances, upon Wissahickon creek, in Philadelphia county; that the defendants, all the time aforesaid, were, and still are, in possession of a certain other water grist-mill, with the appurtenances, upon the same creek, and below the mill of the plaintiffs; and that the defendants, intending to
*72] injure the plaintiffs, had raised their dam *higher, to wit, —— feet higher than the same had ever been before raised, and thereby unjustly penned back, pent up, and obstructed the water of the said creek, between the said mills, insomuch that the water of the creek, during all the time aforesaid, overflowed and greatly damaged, spoiled, injured and broke to pieces the said mill of the plaintiffs; to their great damage in their said hereditary estate, and whereby they were forced to expend a large sum, &c., in repairing, &c."

The defendants pleaded "not guilty, with leave to alter, and give the special matter in evidence:" and afterwards, "by agreement of attorneys in writing filed, all matters in variance between the parties, are referred to William Ward Burrows, Alexander Martin, John Holmes and George Eyre, who shall have full power to award whether any and what sum shall be paid to the plaintiff by the defendant, and *vice versâ*, to settle their respective claims to the waters of the Wissahickon creek, by fixing what shall be the height of the defendant's dam, and whether any alteration shall be made therein, and to direct articles to be executed accordingly: the report of any three to be conclusive."

All the referees concurred in filing a report, by which it was found and awarded: "1st. That the defendants, their heirs and assigns, shall and may erect and complete the mill-dam, to their mill now belonging, of a height corresponding with the bottom of the hole now bored in a certain rock, standing and being on the north-east side of Wissahickon creek, near the said mill. And the said dam, of the height aforesaid, shall and may for ever hereafter keep and maintain. And if the said defendants, their heirs and assigns, or either or any of them, shall and do, wilfully or negligently, cause or suffer the said dam to be raised higher than is hereinafter mentioned, then, and in such case, it shall be lawful for the plaintiffs, their heirs and assigns, to give a written notice to the defendants, their heirs and assigns, requiring them to reduce the said dam to its proper level, herein before directed: and if the defendants, their heirs and assigns, shall neglect or refuse so to do, for thirty days after such notice, the plaintiffs, their heirs and assigns, may summon three freeholders, being indifferent men, to view and examine the same; and if the said freeholders shall be of opinion, that the plaintiffs, &c., are injured by the said dam being carried up higher than the level herein directed, they shall give a written notice to the defendants, &c., requiring them to reduce the said dam to its proper level; and if, within thirty days thereafter, the defendants, &c., shall not reduce the said dam to its level aforesaid, the plaintiffs, &c., may lawfully enter upon the said dam, and abate and prostrate the same. 2d. In consideration of the foregoing privileges, the referees order and award, that the defendants, &c., holding the said mill, shall, yearly and every year, pay 10*l.* to the plaintiffs, &c., the
*73] first payment to be made on the 31st *of March 1797. And also, that the defendants do, on the 31st of March next, pay to the plaintiffs

50*l.*, which shall be in full of all claims and demands on the part of the plaintiffs against the defendants, on account of the said mill-dam. Lastly, the referees award and direct, that the said parties, respectively, shall mutually execute and deliver proper deeds and instruments in writing, for the granting, assuring and confirming, as well the said privileges hereby awarded to the said defendants, their heirs and assigns, as the said annual payment to the plaintiffs, &c.: and it is awarded and directed, that the parties divide the costs."

On the 21st of March 1796, "the report of the referees was read and confirmed, and judgment *nisi*." On the 22d of March, exceptions to the report were filed; but after hearing witnesses, and the argument of counsel, on the 14th of September 1796, "the report of the referees and judgment were confirmed:" and thereupon, the present writ of error was brought.

On arguing the case in this court, *Lewis*, for the plaintiff in error, took the following exceptions to the record:

1st. That the referees had exceeded the authority given by the submission of the parties, inasmuch as they have directed the plaintiffs to sell to the defendants a certain privilege, and have awarded an annual sum, to be paid by the defendants to the plaintiffs, as the price of the privilege, which were not matters in variance between the parties, nor included in the rule of reference.

2d. That the referees have directed deeds to be executed by the plaintiffs, for assuring to the defendants a new right, not for settling the old rights of the parties (which are alone contemplated in the submission) to the waters of the Wissahickon.

3d. That the referees have established a new tribunal for deciding the future controversies of the parties; a power which is inconsistent with the general principles of law, and not supported by the agreement or submission of the parties.

4th. That the referees have awarded the parties to divide the costs.

5th. That the judgment in confirmation of the report, being entered generally, part of it cannot be affirmed and part reversed. (Carth. 235; 2 Bac. Abr. 227.)

The objections were answered by *Rawle*, for the defendants in error, to the following effect:

1st. That the submission was general, and shows the real points in controversy between the parties: and on the principles of the law of awards in Pennsylvania, the present award ought to be enforced. (1 Dall. 364, 314.)

2d. That the report, so far as it awards the payment of money, comes strictly within the act of assembly; but on the other two *objects [*74
of the report (the grant of the privilege, and the execution of deed to assure it), there could be no judgment, and they remain in the record, as rules of court, to be enforced by attachment, of which no writ of error lies. (3 Dall. Laws, 97; 2 Bac. Abr. 215; 3 Inst. 31.)

3d. That the present record is informally sent up; but it may either be reduced to form by the court, or they may satisfy their consciences, by awarding a *certiorari*; which, however, the defendants in error have no right to issue. (2 Bac. Abr. 204–5; 5 Com. Dig. 166.)

4th. That supposing the present record, in all its parts, to be a subject for a writ of error, it is a maxim, that no one can assign that for error, which is for his own advantage. (2 Bac. Abr. 220.) Thus, the referees find that the defendants are entitled to the privilege, on paying for it; but by way of further security to the plaintiffs, and for their benefit, a summary examination by freeholders is provided, to restrain subsequent encroachments. This is obligatory on the defendants; but it is optional with the plaintiffs, who may have recourse to the ordinary legal remedies.

5th. That the report of the referees does not give anything new to the defendants. The subject in dispute and submitted was, whether the defendants had a right to raise their dam; and the referees find that they have such a right, by an old continued compact, paying an equivalent.

6th. That the referees had power to make an award touching real estate. (Kyd 34, 133, 136.)

On the last day of the session, the court mentioned, that they had not been able to form a decisive and satisfactory opinion on the authorities and arguments in this cause; and that, therefore, they would keep it under advisement, until the adjourned session. They added, that if the plaintiff in error was to be considered as restrained from pursuing the ordinary remedies of the law, and confined to the remedy prescribed in the report, in case of any future nuisance, or encroachment upon his rights, it was their present sentiment, that the referees had exceeded their authority. The point, however, was not made in the argument before the supreme court; and merits further consideration.

Cur. adv. vult.

At an adjourned session, held on the 17th of January 1800, the judges delivered their opinion, *seriatim*, but concurred in this general result.

By the Court.—The agreement of the parties constituted the referees the exclusive judges of the subject submitted to their decision. It gave them, however, no power to delegate their trust and authority to others; nor to erect a new and arbitrary *tribunal, to determine future con- *75]
troversies. If the first set of referees could proceed in this way, the set empowered by them, might exercise a similar authority; and so, *ad infinitum*, compel the parties, without their consent or control, to resort to a tribunal unknown to our laws. We are, therefore, unanimously of opinion, that the referees exceeded their authority; and as their report or award was confirmed, generally, by the supreme court, the judgment of that court must also be generally reversed.

Judgment reversed.(*a*)

(*a*) This judgment being a bar to another personal action, the plaintiffs brought an assize of nuisance in the court of common pleas for Philadelphia county, to December term 1807; which, after an unsuccessful effort to remove the same by *habeas corpus* (1 Binn. 251), was finally removed to the supreme court, by *certiorari*, the court holding that they had jurisdiction, as judges of assize, and power to resummon the jury who had viewed the alleged nuisance (2 Binn. 192). The case came on for trial, at *nisi prius*, before Brackenridge, J., on the 26th of May, 1811, and after argument to the jury by *Lewis*, for the plaintiffs, and *Rawle*, for the defendants (who contended that the action would not lie against a devisee of the party by whom the nuisance was

erected; and that the assize could only inquire into the plaintiff's actual damages), the court delivered the following charge to the jury:

BRACKENRIDGE, Justice.—The proprietor of the soil through which a stream runs, cannot divert it from its natural bed, save within his own bounds; and if even within his own bounds, he diverts it, he must be answerable that it is brought back to its bed, before it passes the boundary below; nor could he divert it, within his own bounds, so as to waste it, and lessen the quantity that would have come to him below. He must use his stream, so as not to diminish it to him to whom it is next to come. He cannot change its natural channel. The proprietor below has a right to the stream as it came to him by the usual supply of nature, so far as that no act of him above shall otherwise, than by a reasonable use, diminish it. The proprietor above cannot say, the stream is lessened, it is true, by the course I have given it, but it does you no damage; you have enough still.[1] That answer will not suffice; it goes only to the *quantum* of the injury, and the aggravation of it. It is sufficient, if the quantity of the water is reduced, unreasonably, that would otherwise have descended to him that is below. What is against his consent, is a wrong. He must be the judge of what he wants; and whether the lessening is a help or a hurt. This is not ideal. The owner of the soil above may have it in his power maliciously to waste the water, by turning it where it would sink in part and disappear, or he might, to serve another, turn the stream through his ground, and give it a new channel. I take it, that an action on the case would lie for such a deprivation.

Be that as it may, the law is clear that the owner of the soil above has a right to the stream in its natural state; unincreased in depth by him below. That is, he has a right to the fall and current of the stream through his land, with the same descent at the boundary below, that it had in its natural state. The proprietor below cannot increase the depth of the stream above, by any impediment, so as to be justifiable. But he cannot increase the depth above, otherwise than by flooding some of the soil, making that a part of the channel which was not before.

In the application of this principle, it is true, as in the application of the principles of law in all cases, the maxim *de minimis* occurs; the law will not regard small things. But what is the meaning of this maxim? It is, that the law will not force us to put on glasses to see the *minimum*. But if seen, it must be noticed. I will not say, that the throwing back the water a single line would force itself upon you, and compel redress. For it must be an excess that is visible to the naked eye; that is discernible to every vision that will call for the interposition of the law. This reduces it to the practicable in the affairs of men.

But admitting that there is even a line of flooding on the land of another, or swell of the water, by reason of an impediment of the current, and that it is ascertained to be so, how can I say, that it is not a trespass, and the subject of legal notice. Say, an increase that but begins to be such, yet if it is such, how can I get over it? Give an inch, take an ell—where shall we stop? Apply these principles to the case before us, and it will be seen whether a trespass exists. According to the testimony of some of the witnesses, it would seem to be a trespass, not of lines, nor of inches: but of feet. The backwater not only goes to the mill, the distance of many perches, but it rises on the wheel three and one-half inches, so that the wheel wades, as the phrase is, and is impeded in a revolution. If one inch at the mill, what must be the overflow at the division line? The how much, goes to the *quantum* of damages, the overflowing at all, goes to the trespass.

It has been alleged, that the swell at the mill is in part owing to rocks below, within the plaintiff's own ground. That may be in part, but it is not wholly so.

As to the agreement that has been given in evidence, it goes to show the understanding of the parties at the time, both as to what might be an overflowing, and a compensation for it. This will be considered. The question nevertheless is still open, whether there actually was a raising of the dam in this case, to throw back the water

[1] See Miller *v.* Miller, 9 Penn. St. 74; Wheatley *v.* Chrisman, 24 Id. 298.

and flood the soil of the plaintiffs. Nothing that has happened, by agreement, or otherwise, can bar the investigation.

I lay the legal questions out of the case. I reserve the points; though it would not seem to me at present, that there is a great deal in them. A devisee may be considered, as for some purposes, a transferee, or alienee; but is so identified in his interest with that of the testator, that his situation may seem to be different from that of a purchaser, so as to be considered such an alienee that the writ would not lie against him, or that notice should be necessary. But in this case, there has been notice by action and otherwise: the *lis pendens*, the notoriety of the dispute; the defendant, in doing acts himself, adding to the nuisance and continuing it. But these matters will be considered in bank. The jury need not charge their minds with a consideration of these at present. I will reserve them for the consideration of the judges in term; a mere matter of fact will at present be left to the jury; is there a trespass or nuisance, by the defendant, upon the land of the plaintiff, and how much the damages?

Verdict for the plaintiffs, damages $533.33.[1]

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*76] *JANUARY TERM, 1802.

Present, Smith and Brackenridge, Justices of the Supreme Court, and Coxe, Rush and Addison, Presidents of the Common Pleas.

Burd, Plaintiff in error, *v.* Smith, Lessee of Fitzsimons *et al.* (*a*)[2]

Assignment for the benefit of creditors.

A. being largely indebted, many of his creditors had commenced suit against him; and when some were on the eve of obtaining judgment, A. executed an assignment of several estates to B. and C., in trust to sell the same, and distribute the proceeds thereof, ratably and in proportion to the whole amount of the debts of A., among such of his creditors, as should, in writing, agree to accept the same, within nine months after the date of the assignment, and to pay to A. the shares of such creditors as should not so agree to accept their proportions, in order, that he might, therewith, compound with and satisfy such creditors: no schedule accompanied the deed; it was made without the consent of any of the creditors of A.; and there was no proof that the assignment was delivered to the assignees for more than two months after its date: *Held*, that the assignment was fraudulent in law, and void as against a creditor, who had obtained judgment previously to any one assenting to take under the assignment. Addison and Coxe, JJ., dissenting.

Semble, that voluntary assignments, stipulating for a general release to the debtor, or with a classification of creditors, according to which a priority of payment is to be observed, may be valid.(*b*)

(*a*) Chew, President, and Shippen, Chief Justice, declined sitting in the cause, on account of their connection with the parties. Yeates (who was also connected with the plaintiff in error), Henry and Riddle, Justices, were absent. The session of the court was adjourned, for want of a *quorum*, from July 1801, to the 12th of January 1802.

(*b*) Independently of bankrupt laws, voluntary assignments may contain a preference to some creditors, and stipulate for a release to the debtor. Mather *v.* Pratt, *post*, p. 224; Lippincott *v.* Barker, 2 Binn. 174; McAllister *v.* Marshall, 6 Id. 338; Passmore *v.* Eldridge, 12 S. & R. 201; Hower *v.* Geesaman, 17 Id. 251; Harman's Lessee *v.* Reese, 1 Bro. 11; Pearpoint *v.* Graham, 4 W. C. C. 232; Marbury *v.* Brooks, 7 Wheat. 556.

[1] The record, pleadings and evidence in this case will be found in Brackenridge's Law Miscellanies, 438–57.

[2] Of this case, Chief Justice Gibson says, in Thomas *v.* Jenks, 5 Rawle 225, that the reasons of the judges are so indistinctly set forth, and the discrepancies of their views is so remarkable, as to render it of little value as a precedent for anything.

Burd v. Smith.

ERROR from the Supreme Court, on a judgment entered in pursuance of the following agreement:

"Montgomery county:

Richard Smith, Lessee of Thomas Fitzsimons, William McMutrie, Samuel W. Fisher, Philip Nicklin and Isaac Wharton *v.* Edward Burd.

Ejectment for 130 acres of land in Perkiomen township, in Montgomery county.

It is agreed, that the above action be entered, as an amicable action of trespass and ejectment, on the circuit court docket of Montgomery county, as of March term 1800; that a declaration and pleadings be filed, and issue joined conformable thereto; *that the annexed state of a case be [*77
filed, as of June term 1800, in the nature of a special verdict, with an entry of the confession of lease, entry and ouster; that judgment be rendered thereon for the plaintiff, without prejudice to the title or right of either party; that a writ of error on the said judgment be taken from the supreme court, tested as of the last day of last December term, of the same court, and returnable in the same court, on the first day of March term following; that the said judgment be affirmed, of course, in the said supreme court, as of the same term, without prejudice to the right of either party: and that no advantage be taken of any error in the form of the said proceedings, but everything be done to give them validity."

The material facts, contained in the case, to which the agreement referred, were these: "That the title-deeds of the land, mentioned in the declaration, were delivered to Mr. Dallas, by Mr. Blair McClenachan, previously to the 2d day of September 1797, to enable him to draw a trust-deed from McClenachan to him and Mr. Huston; which was, accordingly, drawn and delivered by Mr. Dallas to Mr. McClenachan, for the purpose of having the same executed.

"That on the 2d of September 1797, Blair McClenachan was seised in fee of the premises; and at the same time, was indebted, on his separate account, and in partnership with P. Moore, to divers persons (some of whom resided in Europe, and in other places beyond seas), in large sums of money, amounting, in the whole, to $435,073, and upwards. Many of the creditors had commenced suits in the supreme court against Blair McClenachan, and against McClenachan & Moore, which were depending on the said 2d of September 1797; in some of them, judgments were obtained on the 4th of September 1797, to the amount of $216,018; in others, judgments were obtained in December and March terms then following, to the amount of $22,720; and on the said judgments, or some of them, executions had issued.

"That Blair McClenachan and P. Moore, jointly or separately, not being able to satisfy and discharge the said debts, Blair McClenachan, on the 2d of September 1797, made and executed a certain indenture, for several estates, including the premises in the declaration mentioned, to A. J. Dallas and John H. Huston, containing (among other things) the following trusts, conditions and stipulations:

"Upon the special trust and confidence, and to the sole intent and purpose, that they the said Alexander James Dallas and John H. Huston, and the survivor of them, and the heirs of the survivor, shall sell and dispose of

the lands and premises hereby conveyed and granted, in such manner as the said trustees, or the survivor, or the heirs of the survivor, shall deem most
*78] advisable for the *general interest of the aforesaid creditors, and upon the receipt of the purchase-moneys or securities for the same, the premises so sold, by deed or deeds, to grant and convey unto the purchaser or purchasers thereof in fee-simple; and that they, the said Alexander James Dallas and John H. Huston, and the survivor of them, and the heirs of the survivor, shall pay and distribute the moneys arising from such sale or sales (after all costs, charges and expenses attending this trust being deducted and paid) towards the payment and discharge of the debts of all such the aforesaid creditors, as shall in writing agree to accept the same, within nine months after the date hereof, at such times as the said trustees shall deem the most advisable, ratably and in proportion, according to the whole amount of the said debts of him, the said Blair McClenachan, and of the said partnership firm of Blair McClenachan and Patrick Moore, and to pay unto the said Blair McClenachan, his executors, administrators or assigns, the proportion of all such creditors as shall not signify their acceptance, within the specified time, to the intent that he may therewith and thereout compound with and satisfy such creditors. And if the moneys arising from the sale or sales of the lands and premises aforesaid shall be more than sufficient to answer the purposes aforesaid, that they, the said Alexander James Dallas and John H. Huston, and the survivor of them, and the heirs of the survivor, shall pay the overplus moneys unto the said Blair McClenachan, his executors, administrators or assigns. And the said Blair McClenachan, for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said Alexander James Dallas and John H. Huston, and each of them, and the survivor of them, and the heirs and assigns of them, and the survivor of them, in manner and form following, that is to say, that he, the said Blair McClenachan, and his heirs, shall and will, from time to time, and at all times hereafter, upon the reasonable request and at the proper costs and charges of them, the said Alexander James Dallas and John H. Huston or the survivor of them, or of the heirs or assigns of them, or of the survivor make, execute and deliver, or cause to be made, executed and delivered, unto the said Alexander James Dallas and John H. Huston, or the survivor of them, or the heirs or assigns of them, or of the survivor, all such further and other acts, deeds, conveyances and assurances in the law whatsoever, for the better and more perfect granting, conveying, assuring and vesting the lands and premises aforesaid in them, the said Alexander James Dallas and John H. Huston, and the survivor of them, and the heirs and assigns of them, and of the survivor, upon the trust and confidence aforesaid, as the said Alexander James Dallas and John H. Huston, or the survivor of them, or the
*79] heirs or assigns of them, or of the survivor, or their, or either of *their counsel learned in the law, shall reasonably devise, advise or require. And the said Blair McClenachan, and his heirs, the said lands and premises hereby granted, or mentioned or intended to be hereby granted, with the appurtenances, unto the said Alexander James Dallas and John H. Huston, and the survivor of them, and to the heirs and assigns of them, and of the survivor of them, against him the said Blair McClenachan, and his heirs, and against all and every other person or persons whomsoever, lawfully claiming

or to claim, by, from or under him, them, or any or either of them, shall and will well and truly warrant and for ever defend by these presents." And this indenture was acknowledged on the 4th of September 1797, by the said Blair McClenachan, in the absence of Mr. Dallas, one of the trustees, and no proof was given whether the other trustee was present or not. It was recorded in Philadelphia, on the 24th of November, and in Montgomery county, on the 27th of December 1797.

"That the yellow fever prevailed in the city of Philadelphia from the latter end of August, until the latter end of October, or beginning of November 1797; during which, the said trustees were absent from the city; but a communication with some of the printers of the city was kept open, during the whole period, by the medium of the post-office.

"That on the 4th day of September 1797, Edward Burd (the defendant in the ejectment) obtained a judgment in the supreme court, against the said B. McClenachan, for $5333.33, besides interest and costs, with a stay of execution for sixty days. A *fi. fa.* was issued and returned upon this judgment, in the usual form to ground a *testatum;* and on the 15th of November 1797, a *testatum fi. fa.* was issued to the sheriff of Montgomery county, which was delivered to the sheriff on the next day. On the 24th of November, levy was made upon the premises in the declaration mentioned; on the 8th of December, an inquisition was held on the premises, which were condemned; on the 7th of March 1798, a *vend. exponas* issued to the sheriff of Montgomery, and the premises were, thereupon, in due form, sold to the said Edward Burd, for 930*l.*; on the 27th of March 1798, the sheriff made and acknowledged in open court, a deed for the premises to the said Edward Burd; and shortly afterwards, delivered to him the possession.

"That the said Edward Burd had no knowledge or notice of the execution, or existence of the deed of trust to Dallas and Huston, or of the proceedings under it, until subsequent to the 12th of December 1797. That, on the 24th of November 1797, the trust deed was in the possession of the trustees, or one of them, by delivery of the said B. McClenachan; but when the same was so delivered is not known. The other title-deeds remained in the possession of Mr. *Dallas, during the yellow fever of 1797, and until they were delivered by him to the lessors of the plaintiff. [*80

"That on the 15th of December 1796, an advertisement was published, calling a meeting of the creditors of B. McClenachan, and of McClenachan & Moore; and at the meeting, on the 17th of December, the creditors appointed a committee, though the minutes of the appointment, &c., were not signed. This committee, on the 19th of December 1796, published an advertisement, called a caution against making any purchases, or accepting any conveyances of B. McClenachan's estate, from him or his children; to which McClenachan published an answer, on the same day; and on the 21st of December, the committee replied. That on the 12th of December 1797, Mr. Huston, one of the trustees, published a notice of the trust-deed, to the creditors of McClenachan, and McClenachan & Moore; and invited them to give notice of their acceptance in due time. On the 19th of December, the creditors met upon the subject, in pursuance of a call published in the papers of the 16th, 18th and 19th of December. At this meeting, the creditors expressed some dissatisfaction, relative to the assignment made as aforesaid to

Dallas and Huston, on a mistaken idea, that it contained a stipulation for a release; and the dissatisfaction went so far, that they determined not to accept the assignment on any such condition. But this mistake being corrected, the committee of the creditors, on the 31st of May 1798, gave notice of their acceptance of an interest under the trust; and on the 4th of June following, the trustees assigned the trust estate, including the premises mentioned in the declaration, to the lessors of the plaintiff, who continued to be the committee of the creditors, appointed by the minutes, as above mentioned, and were themselves creditors to a considerable amount. The assignment of the trust was acknowledged on the 9th of June, and recorded in Philadelphia, on the 12th of June 1798. That, on the 18th of March 1799, B. McClenachan applied to be discharged as an insolvent debtor; but was remanded by the court.(*a*)

The cause was argued, in this court, during the 12th, 13th, 14th and 15th of January 1802, by *Ingersoll*, *Lewis* and *McKean*, for the plaintiff in error; and by *L. Levy*, *Rawle* and *Dallas*, for the defendants in error. The immediate question to be decided was, whether, under the circumstances stated, the deed of trust from McClenachan to Dallas and Huston, was valid or void, in relation to the title acquired by the plaintiff in
*81] *error? But incidentally, the discussion embraced the general doctrine of the efficacy of voluntary conveyances by debtors, in trust for the benefit of creditors, upon specific conditions or stipulations. The points and authorities were as follows:

For the *plaintiff* in error.—1st. A voluntary conveyance of the description now under consideration, tends to defraud creditors of the just fruits of legal process. (2 Bac. Abr. 601; Cowp. 433.) And is, therefore, void under the statutes of 13 & 27 Eliz. On the face of the deed, it appears to have been intended to defeat judgment-creditors: to delay and hinder plaintiffs in their recoveries at law; or, to give it the most favorable construction, the deed was intended to preserve the property for creditors in general, instead of allowing those who were suitors in a court of law, the advantage due to their meritorious vigilance. 2d. The terms of the trust are indefinite as to its mode and time of execution, even in favor of the accepting creditors; while, from the very nature and operation of the deed, an interest is reserved for the debtor. Thus, only those who accept the trust, with all its appendages, can receive a benefit from it; and that benefit is confined to a share in the small part only of the debtor's estate, which the deed attempts to convey. Nine months are allowed for an election, to the creditors indiscriminately, during which, there could be no distribution, and after the lapse of that period, the debtor is entitled to the share of every non-accepting creditor, as well as to the intermediate perception of the rents, &c. But suppose, there was no accepting creditor, did not the property remain in the debtor? It did not pass to the general creditors; and the trustees had paid no consideration for it. 3d. Then, it is a fraud, where there is a conveyance to a trustee for the benefit of a debtor, and the strongest badges of

(*a*) Mr. McClenachan, on the first alarm of the failure of McClenachan & Moore, (whose business was left entirely to the management of Moore), made several voluntary conveyances to his children; and on this ground, principally, the supreme court refused to discharge him as an insolvent debtor.

fraud put in the books, are to be found in the present case: for the possession remains in McClenachan; the trust was not announced, even by recording, until the 24th of November 1797; the conveyance was made, pending suits, to avoid judgments; the deed is not made to a creditor, but to strangers, of the debtor's own nomination; and the possession of the land was never delivered in pursuance of the deed. (Cowp. 435; 3 Co. 80; 2 Lev. 147.) Nay, even the deed itself was not delivered to the trustees, for two months after its execution, during which period, McClenachan might have destroyed it; or he might have sold the land effectually to others, for a valuable consideration. (2 Vern. 510.) 4th. The acceptance of the creditors was a condition precedent to the raising of a use in their favor; and if no use was so raised, the conveyance to the trustees was merely voluntary, and void by the statute of Eliz., against creditors. Besides, the performance of the condition precedent was legally barred, by the lien which the *testatum* execution had previously secured for the plaintiff *in error. (2 Bac. Abr. 608; 1 Sid. 133; Cro. Jac. 454; 5 Vin. Abr. "Condition," 76, pl. 20; Ibid. 178, pl. 37; Ibid. 89, pl. 10.) 5th. By the express requisition of the deed of trust, the acceptance of the creditors must be in writing; and of course, no assent by implication, can render the use absolute. (Cowp. 117; 1 Cha. Cas. 141, 143; 3 Co. 28 *b*; Ibid. 29.) It is stated in the case, that the creditors did once refuse to accept; by which they had determined their right of election, and could not afterwards reverse it; particularly so, as to affect and destroy the liens of judgment-creditors. And even as to the act authorizing an acceptance, it is a mere minute of proceedings of a meeting; it is not subscribed by all the creditors at the meeting; and the notice from the committee can only operate, on the terms of the trust, as a notice in writing, for those who actually signed it; since, a parol delegation of power to a committee, could not be deemed a performance in writing of the condition precedent. 6th. The plaintiff in error obtained a lien upon the land by the delivery of the *testatum fi. fa.* to the sheriff, on the 16th of November 1797; and the acceptance of the creditors even by their committee, was not sooner than the 31st of May 1798. Then it would be contrary to the principles of equity, and to the rules of law that the estate thus vested by the execution, should be divested, by a relation from the time of the acceptance to the date of the trust-deed, against a person who is neither party nor privy to the acceptance, or the deed. 3 Co. 25, 27, 26; 2 Vin. Abr. 385, 286, 288, 287, pl. 3; 1 W. Black. 642; Plowd. 482 *b*; 2 Vent. 200 *b*; 13 Co. 21 *a*; Finch 6; Style's Pr. Reg. 367; 18 Vin. Abr. 162, pl. 1; 5 Co. 119 *b*. [*82

For the *defendant* in error.—1st. The title of the lessors of the plaintiff arises from a fair and honest transaction; though it would be enough to remark, that the silence of the verdict (as the case must be considered) is a legal negative of the insinuation of fraud. (10 Co. 56.) And there is a valuable consideration in law for the trust-deed, though it is no more than five dollars; which, however, coupled with a fair intention, completely vests the title in the trustees. (2 Bl. Com. 296.) 2d. The statute of 13 Eliz., c. 5, secures the right of creditors, against motives of "malice, fraud, covin, collusion and guile," by annulling the act which they produce. But if the present case is not so generated, it is not an act within the letter of the

statute, "to the end and purpose to delay, hinder and defraud creditors and others, of their just and lawful actions." In the construction of the statute, t must also be remembered, that there is an essential difference between "the end and purpose," of an act, and the consequence and result which naturally follow it. For, certainly, a creditor, on the eve of obtaining a judgment, may be hindered or delayed, as the necessary consequence of
*83] his debtor's *making a conveyance of his estate, unquestionably valid, upon a *bonâ fide* sale. To invalidate a conveyance, therefore, there must not only be an intent, which consequentially hinders and delays the creditor; but it must be a covinous and fraudulent intention, to that end and purpose. Giving, therefore, the statute the most liberal construction (and it ought to be liberally construed, Cowp. 434), still, the inquiry terminates, in ascertaining whether the conveyance is fraudulent, or not. (10 Co. 56; 1 Cha. Cas. 291; 1 Vent. 194; 1 Mod. 119; 1 Atk. 15; Cowp. 708, 434; 2 Ves. 11; 2 Atk. 481.) And what is fraudulent, depends on the moral intention; on the impulse of the will to perform the act, which necessarily produces the obnoxious consequence. (Bull. N. P. 257.) By this test, what taint or color of fraud appears in the present case? The object of McClenachan was not fraudulently to hinder and delay any creditor; but honestly to secure an equal distribution of the property among all the creditors. If the purpose was fair and lawful, the deed contains every formality that is necessary for carrying it into effect; and on the 2d of September 1797, the legal estate was absolutely vested in Dallas and Huston. 3d. Reviewing, then, the opposite argument, let us give to each point an answer. It is urged, that the conveyance is not all McClenachan's property. We answer, that this does not appear from the facts stated; but admitting it to be true, it strips the case of some of the badges of fraud imputed to it; and leaves a fund to which the dissenting creditors might resort for satisfaction. Again, it is urged, that the deed was made to trustees of his own choice. We answer, that there is no authority that declares this to be fraudulent. In the case of General Stewart's settlement on Mrs. Stewart, though the whole field of legal objection seemed to travelled over, this obstacle never occurred. But it is of the essence of a voluntary conveyance, that trustees should not be forced on the debtor; and as it is generally a case of confidence, not of interest, a friend or a brother is more naturally resorted to, than a creditor. If, indeed, the trustees were insolvent, or if any collusion could be charged upon them, it might be deemed a ground to suspect, repudiate and annul the act; but the circumstances of the present case exclude every idea of the kind; and a mere possibility of wrong affords no rule for argument. Again, it is urged, that the deed does not let in all creditors, but only such creditors as assent in writing, within a limited period. We answer, that the trust is open to all (Prec. Ch. 105), and that even if a particular class of creditors only had been included, the deed would have been valid. Again, it is urged, that the shares of the non-accepting creditors were to be paid to McClenachan, to enable him to compound with them. We answer, that there is no evidence in this, of a fraudulent intention; for it is merely an
*84] arrangement to pay the same debts, through different hands; *that it was a provision which depended entirely upon the creditors; for if they accepted, there would be nothing payable to McClenachan; that McClenachan's person was still liable to a *ca. sa.*, as no release was ex-

acted; and the effect of the arrangement is precisely the same, as would be produced by a *bonâ fide* sale of the premises. (4 T. R. 166.) Again, it is urged, that if the trustees had a right to sell, and did sell, before creditors assented, and none of them assented in nine months, the McClenachan must receive the whole of the money. We answer, that the objection proves too much; it attacks all voluntary assignments; and, indeed, almost all conveyances. Assent, *ex vi termini*, is a matter subsequent; and trustees never can certainly know, that the creditors will take their dividends. The rule is, that the legal estate must operate; and it vests, in the present instance, to the full extent of selling and conveying the property. If creditors will not then receive, does their refusal work an avoidance of the title of the vendee? The vendee, in fact and in law, has nothing to do with the creditors, though he is bound to see that the sale is in execution of the trust. (1 Vern. 260; 1 Ves. 173.) And the creditors may give notice, and afterwards claim. (1 Vern. 319.) Again, it is urged, that during the period of nine months, the trustees are restrained from making distribution. We answer, that it is proper in all such cases to fix a reasonable period of distribution; and that the bankrupt and the insolvent laws do so, as well as most voluntary conveyances. Whether the period of nine months is reasonable or not, must be determined; but it is unfair to argue, that the power to fix a reasonable period, carries with it a power to fix an unreasonable one. And here, it must be observed, that there is no right reserved by McClenachan to receive the rents of the premises, during that, or any other period. But if the trustees, either as to the sale, or the distribution, were guilty of any *laches* or irregularity, they might be controlled under the act of 1774. (1 Dall. Laws, 690.) Again, it is urged, that the possession was not changed. We answer, that the continuance of possession in the debtor, even of chattels (*à fortiori* of real estate), is not, in itself, fraudulent, but evidence of fraud, which may be rebutted. (1 Ld. Raym. 286; Prec. Chan. 285; 1 P. Wms. 321; 2 T. R. 587; Cowp. 435.) But the legal possession or seisin did pass to the trustees, according to the law of Pennsylvania, at the moment of executing the deed. Though no rent is paid, the possession of the lessee is the possession of the lessor. (4 Atk. 469; Shep. Touch. 65; Ambl. 599; 5 Co. 424–5; 1 Eq. Abr. 149; 1 Fonbl. 149.) Again, it is urged, that the deed was executed in secret, and not delivered to the trustees for some time after the execution; of which, too, the plaintiff in error had no notice until it was recorded, on the 24th of November 1797. We answer, that the execution of a deed does not call for publicity; that the case does not negative the fact, *that the [*85
deed was delivered to the trustees long before the 24th of November, but simply states that it was then in the possession of one of them; that the deed shows, by inspection, a sealing and delivering on the 2d of September, and the legal presumption, until the contrary is proved, is, that it remained with the trustees, from the time of the delivery; that the deed was recorded within six months, and thereby became good, even against a purchaser; and that there is no evidence or suggestion, that the plaintiff in error lost any opportunity of recovering his debt, by the transactions respecting the deed. (*Sheldon's Case*, Cro. Eliz. 7; Ibid. 483; 1 P. Wms. 205, 557.) 4th. Having thus reviewed and answered the opposite arguments, it remains to consider, in the abstract, whether the execution of the plaintiff in error, so intercepted

the interest in the land as to defeat the trust? From the very nature and operation of a trust, the legal title, an estate in fee, immediately passed from McClenachan to the trustees. (2 Bl. Com. 271.) Nothing was left to him, but a contingent equitable interest; if none of the creditors accepted; if only a part of the creditors accepted; or if there should be a surplus of property, after paying all the creditors. This equitable interest attaches to the land, if it is unsold; or it follows the proceeds of a sale, in the hands of the trustees; and this interest, and no more, is subject to the lien of a judgment-creditor (Gilb. Chan. 230; 2 P. Wms. 491; 2 Ves. 662; 1 Eq. Abr. 325; Pow. Mortg. 197), whose *testatum* into Montgomery county cannot, in this respect, enlarge his right or his security, beyond the effect of the judgment, upon lands in Philadelphia county. 5th. The right of a debtor to make a voluntary conveyance of his estate, independently of the statutes of bankruptcy, has never before been controverted, in England, or in Pennsylvania, even where a preference was given to one or more of the creditors, in exclusion of the rest. (1 Fonbl. 260; 5 T. R. 420; 8 Ibid. 521, 530; Prec. Ch. 105; 5 T. R. 530, 532.) The insolvent laws annul private family settlements made by a debtor. (1 Dall. Laws, 257, 259; 4 Ibid. 270), but as to voluntary assignments, the right to make them, and their validity when made, are expressly recognised. (1 Ibid. 690.) The practice of making them in various forms is notorious; sometimes, on condition of a general release to the debtor; sometimes, with a classification of property, according to which the sales must be effected; and sometimes, with a classification of creditors, according to which a priority of payment is to be observed. The courts of Pennsylvania have uniformly recognised and supported voluntary conveyances of these several descriptions, made *bonâ fide*, and not colorably, with a latent and fraudulent use
*86] for the debtor.(*a*) (1 Dall. 139, 430, 72; 2 Bl. Com. 333; *1 Co. 123; 2 Inst. 675, 671, 674–5; 1 P. Wms. 278; 1 Vern. 260; 10 Co. 56; Cro. Eliz. 550; 13 Vin. Abr. 554; 3 Ca. Chan. 85.) In *Mather* v. *Pratt et al.* (4 Dall. 224), the supreme court was of opinion, that the debtor might assign, for the benefit of one-half of his creditors, upon condition; and the plaintiff, a creditor, having sued the defendants, the voluntary assignees, without first complying with the condition of the assignment, was non-suited.

The Court, after taking time to deliberate, delivered opinions, *seriatim*, on the 20th of January 1802; of which the following is given as a general outline.

Smith, Justice.—The question to be decided, is, whether the deed of trust is void or valid, as against the plaintiff in error, upon a just consideration of all the facts that belong to the case? The ostensible reason for creating the trust, is a desire to make a fair division of the property among all the creditors of Mr. McClenachan; and if this is the real and operative motive, the deed ought to be liberally construed, in order to give it effect: for equality is equity. There can be no doubt, likewise, of the right of a debtor (and cases may be easily conceived, in which it would be a duty),

(*a*) This was agreed to be law by the counsel on both sides; and Smith, Justice (during the argument), declared, that it had been frequently so decided in the supreme court.

independently of the bankrupt laws, to give a preference to some of his creditors, in exclusion of the rest; and from such a preference alone, the court would not be disposed, hastily, to infer collusion, secret trusts or meditated frauds. Hence, it is incumbent upon us to support the present deed of trust, unless, in its provisions and in its operation, it is calculated unlawfully to hinder and delay, to deceive and defraud, the creditors of the grantor. The facts stated in the case, do, indeed, acquit Mr. McClenachan of any intentional or moral fraud; but it is a distinct inquiry, and the only one before the court, whether they constitute a legal fraud; so as to vitiate and destroy the act, without criminating the agent.

We are sufficiently impressed with the magnitude of the subject, in all its aspects; as it regards the immediate claims of a numerous body of creditors, and as it regards the precedent to be established for future times: but avoiding much extraneous matter, which was introduced into the argument, we shall form our judgments, exclusively, upon the facts contained in the special verdict. We find, then, that when Mr. McClenachan purposed to create the present trust, he was oppressed by an immovable weight of debt. He knew that many suits were instituted against him; that in some of these suits, judgments would certainly be obtained within forty-eight hours; and that in others, the delay of judgment could not exceed a term. The apprehension of these judgments produced the determination to make an assignment of the estate in trust. But still, if there is nothing unlawful in the mode of effectuating that determination, nothing to justify the suspicion of a latent unlawful purpose, the deed must, as *I have said, be sustained. The omissions, as well as the actions, of a man, will often, however, furnish evidence of his motives. In Mr. McClenachan's situation, why not call a meeting of his creditors? why not appoint some of them trustees? or why not openly state his object to be an equal distribution, and consult those who were most interested, as to the means of accomplishing that object? From the start, therefore, when things, which ought to have been done, in prudence, as well as candor, are not done, we find reason to suppose, that there is something more intended than is avowed. Again, when the deed is executed, no schedule designating the creditors, or explanatory of the debts and property, is annexed; so that the trustees remained ignorant (though the grantor was not) of the facts which were essential to the execution of the trust, until Mr. McClenachan's application to be discharged, as an insolvent debtor, in March 1789: and until that period, in fact, the absolute control of the uses of the trust continued with him. [*87

But on the very face of the deed, it is void in law. No debtor has a right to make his own trustees; and the very attempt would, under some circumstances, be considered as an act of bankruptcy. In a conflict between the debtor and his creditors, the trustees would generally prefer his interest; and it must be remarked, that the character and conduct of the present trustees cannot regulate the decision of a legal question. The assent of one party, as well as the proposition of the other, is necessary to complete every contract. (4 Burr. 2241.) The creditors could have no remedy against the trustees, before they assented; and if they did not assent, there was a resulting trust to the grantor, which placed them entirely at his mercy.

It is *petitio principii*, to argue on the ground that Mr. McClenachan might have sold and dissipated the property: and particularly, after the

caution published by their creditors, a purchaser would have run some risk in concluding this bargain. Lord MANSFIELD somewhere expressly states, that a purchase even for a valuable consideration, but with a view to defeat a judgment-creditor, is fraudulent and void.

On these grounds, therefore, that no schedule accompanied or followed the deed of trust; that the deed was made without the consent of any of the creditors; and that it contains a resulting trust to the grantor, thereby placing the dissenting creditors in his power; I think, the judgment of the supreme court ought to be reversed.

BRACKENRIDGE, Justice.—I think the deed of trust is void, for various reasons. 1st. The resulting trust, in case of a dissent on the part of the creditors, is for the debtor himself. 2d. The time for sale and distribution of the trust estate, is indefinite. 3d. The trust was not accepted by the trustees; or, at least, by the creditors. 4th. The trustees were appointed *88] by the grantor *himself. 5th. There is no covenant to compel a sale and distribution. 6th. There is no schedule of the creditors, by which the trustees could know to whom distribution was to be made.

I will add a general observation. It has been said, that a debtor may favor particular creditors. The right has been allowed, perhaps, on a principle of humanity; or in favor of just debts, to exclude debts in law, not strictly *ex debito justitiæ*. But I do not think, that the practice should be encouraged: it is calculated to create confusion, uncertainty and collusion. I see nothing that will prevent the mischiefs of voluntary settlements, and conveyances, but a general declaration that they are all void, as against creditors. The general consent of creditors might, perhaps, be a ground of exception: but not even that should be admitted, to give retrospective force to a deed, with a view to cut out and defeat an intermediate lien. The judgment of the supreme court should be reversed.

RUSH, Justice.—Although it has been thought expedient to interweave a great variety of facts into the statement of the case now before the court, yet the decision rests upon a narrow ground. It is a controversy between the creditors of B. McClenachan, and the general question turns upon the validity of the deed of the 2d September 1797; by which, the premises mentioned in the declaration, and much other landed property, were conveyed in trust, to A. J. Dallas and John H. Huston, to sell and dispose thereof, in such manner as they should deem most advisable for the general interest of the creditors; and also that they should pay and distribute the moneys arising from the sales, toward the payment and discharge of the debts of all such of the creditors, as shall in writing, agree to accept the same, within nine months, after the date thereof, at such times as the said trustees shall deem most advisable, ratably and in proportion, according to the whole amount of the debts of the said B. McClenachan; and also that they, the said trustees, should pay unto the said B. McClenachan, his executors, administrators and assigns, the proportion of all such creditors as shall not signify their acceptance, within the specified time, to the intent that he may therewith and thereout compound with and satisfy such creditors.

If this deed be legal and valid, there is an end of the question. The claim of the plaintiff in error must instantly vanish out of sight. It is there-

fore proper to inquire.: 1st. Is this deed fraudulent or not? 2d. If it be not fraudulent, what is the true construction and operation of it?

1st. The construction of all written instruments, is the peculiar and exclusive duty of courts. They alone decide on the face of *a deed, whether it be void or not; in which cases, such apparent fraud is [*89 called a fraud in law, because it does not depend upon any extrinsic matters of fact, but solely upon the inspection of the instrument, which must necessarily exclude the motive of the grantor.

The deed of September 2d, 1797, purports, on the face of it, to delay the creditors of their lawful suits, and is, therefore, within the statutes against fraud. Until the expiration of nine months, no distribution was to be made, nor any creditor paid, however vigilant he might have been. If a debtor may, in this mode, and by a device of this sort, frustrate his creditors for nine months, where shall the line be drawn? Why not delay his suit for nine years, as well as nine months? His right is the same, in both cases. As there is no law of the land that authorizes a debtor to pass an act of limitation in his own favor, I hope this court will never do it for him. The conduct of the debtor, reduced to plain language, is this: I will bid defiance to my creditors, for any period I shall think proper to fix; and this without their assent or concurrence. I will fix on such trustees as will favor me, by neglecting to advertise until the nine months are nearly expired, in order that a few creditors only may have notice of the trust, and signify their assent.

In deciding this cause, we are to consider it as a general question. The character of the present trustees is to be kept wholly out of view; for though they would act uprightly, there are other trustees that would act differently. Other trustees might advertise within the last month, in hopes, that only a few creditors would subscribe, and, consequently, the resulting fund be larger and more beneficial for the debtor.

The design of the statutes, is expressly to make void such deeds as tend to delay and frustrate creditors of their suits. It is not, therefore, material, whether the deed be made to trustees, for the benefit of the creditors, without their knowledge, if it produce this effect. The end shall in no case sanctify the means, and render that legal, which the law has pronounced fraudulent.

In the case before the court, we have an instance of a man plunged into debt, covered with law-suits, overwhelmed with judgments, and others impending over his head, suddenly and secretly, without the knowledge of a single creditor, conveying to trustees of his own nomination, an immense property, on such terms and in such manner as he has chosen to prescribe. I cannot conceive anything more dangerous, than to sanction by a judicial determination, a deed of this description. It will be vesting the debtor with unlimited power, at all times, over his property, to baffle his creditors, under the specious pretext of paying them.

*A decision of this sort is warranted by no adjudged case in the [*90 books. In *Estwick* v. *Caillaud*, 5 T. R. 420, all the creditors, except one, approved of the conveyance in trust, and that one had never sued Lord Abington, before the deed was executed. In *Inglis and others, assignees of Campbell, a bankrupt*, v. *Grant* (5 T. R. 530), it is expressly stated, not only

that the generality of the creditors assented to the trust, but the conveyance and covenant were with the creditors of Campbell.

The case of *Neeve and Ladbroke, assignees of Wilsmore*, v. *The Executors of Thomas Wilsmore*, was a conveyance in trust, to pay a debt due to one of the trustees; without any clause limiting the creditors in point of time, with respect to their demands on the trustees.

From the nature and operation of the deed of the 2d September 1797, as well as by the express terms of it, the grantor has reserved an interest in himself, which is an acknowledged badge of fraud. It should be remembered, that this is an unsolicited deed to trustees, with an important resulting trust; the value and amount of which is left entirely in the discretion of the trustees. By selling when they think advisable, and by omitting to give notice of, the trust for seven or eight months, nearly the whole property would, by these means, revert to the grantor. For these reasons, I am of opinion, the deed is fraudulent.

2d. But if it be not fraudulent, what are its true operation and construction, in point of law? It might have happened, and in fact was very near taking place, that the condition on which the deed was to operate had altogether failed. It was not until the 31st May, that any of the creditors signified their assent in writing, as the deed required. It is certain, if no creditor had ever assented, that the trust would have been defeated, and the estate have continued in the grantor. Until the creditors, therefore, or some one of them, assented to the deed, it could have no possible operation, so as to accrue to their benefit. Until this event, the trustees were seised to the use of B. McClenachan, and the property remained liable to execution as his. Between the 2d day of September 1797, and the 31st of May following, the title to the premises in question was legally vested in the plaintiff in error, and could never afterwards be divested by any fiction of law.

Upon both these grounds, I am of opinion, that the judgment of the lower court should be reversed.

Addison, Justice.—All the points in discussion are reducible to the two questions: 1st. Is the deed of trust valid? 2d. If it is valid, when did it commence its operation?

1st. The deed that was executed for an honest purpose; for the sole purpose of making an equal distribution of the property, among all the grantor's creditors; and there is not the slightest symptom *of meditated fraud, in any part of the transaction. But the motive and the effect of setting this deed aside, will be to prefer the exclusive claim of an individual judgment-creditor, to the distributive claims of the general creditors; so that by paying him the whole of his debt, they will be deprived of every part of their debts. I think it, therefore, a duty, by every legal and rational presumption, to support, if possible, the deed of trust; and I find no difficulty, in pronouncing it, in the first place, to be a valid deed.

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2d. I am likewise of opinion, that the deed took effect from its date. (*a*)

(*a*) The assent of a trustee to take the property conveyed to him is presumed, and the interest passes to him, from the time of the execution of the deed. Wilt *v.* Franklin, 1 Binn. 502; Nicoll *v.* Mumford, 4 Johns. Ch. 522.

It was susceptible of an honest execution; and it has, in point of fact, been honestly executed. But an honest execution might have been enforced, if there had been any disposition to evade it. One of the trustees drew the deed, and his name is inserted in it. This was such evidence of an acceptance of the trust, as would be sufficient, with respect to that trustee, at least, to enable the creditors to compel him to perform it.

If the deed were framed for an unlawful purpose, or if, in its operation, it must necessarily introduce dishonest and fraudulent consequences, it ought to be set aside. But this admission does not affect its validity, merely because it tended to delay some creditors. The motive of the party must be weighed. If a deed, which delays and hinders a creditor, is made upon selfish interests, or upon a mere impulse of benevolence, it is within the statute: but a deed made upon a principle of equal justice to all creditors, however it may intercept the views of a particular creditor, is good in law, equity and conscience.

I cannot persuade myself to think, that a deed, formally made, with such honorable views, can be destroyed by the extrinsic considerations, that the grantor appointed the trustees; that there was no general assent of creditors to the trust; or that a schedule of the creditors was not annexed. And as to the reservation of a contingent interest or use for the grantor, it is enough to remark, that it arose out of the nature of the transaction; that it could not take place, but by the negligence of the creditors themselves; and that any attempt of the trustees to favor the grantor, improperly or dishonestly, would be defeated by the powers of a court of justice.

Upon the whole, therefore, my voice is for affirming the judgment of the supreme court.

Coxe, Justice.—I have been led to consider the case, with a double aspect, to ascertain, 1st. Whether the deed is, in itself, a good legal conveyance? And 2d. Whether the trust created by the deed is such as a court of equity would support?

1st. We are bound by the facts stated in the case, or special verdict; and there (independent of the deed itself), no allegation or suggestion of fraud can be discovered. Consider the transaction *in its progressive steps. The very execution of the deed (which the case states) imports a delivery; and as the fact is not contradicted, it is a necessary legal presumption, that there was a delivery. The subsequent acknowledgment of the execution, is not inconsistent with this presumption; because it is an acknowledgment, before a magistrate, of a previous delivery, for the purpose of placing the deed on record. The pecuniary consideration, though a nominal, is a legal consideration; and this fortified by the equitable consideration, for which the deed was made, a payment of debts. Then, the acceptance of the trust, to execute it, is likewise a matter of legal presumption, from the delivery of the deed to the trustees; and indeed, any other evidence of acceptance, is seldom to be obtained. [*92

Still, however, the great question recurs: is the deed, on the face of it, a fraudulent, or a *bonâ fide*, conveyance? A candid and just interpretation of the trust must enable us to decide. It is true, that the trustees derive from the deed a power to sell the property, as they deem most advisable;

but this is a discretion to be exercised, expressly for the general interest of the creditors. It is true, that the trustees are only authorized to distribute the fund, among the creditors, who shall agree, in writing, within nine months, to accept their shares; but the exclusion from a share must be the act or omission of the creditor himself. It is true, that the shares of the non-assenting creditors are to be paid to Mr. McClenachan; but even this payment is to be made, "to the intent that he may therewith, and thereout, compound with and satisfy such creditors." These provisions, however, are the principal sources of objection to the deed itself, as inherent badges of legal fraud. But are there not, on the other hand, unequivocal marks of a fair and lawful trust, that must, at once, obviate and remove such slight and doubtful causes of suspicion? In the first place, there is an equal distribution of all the property conveyed, among all the creditors. In the next place, there is no stipulation for a release in favor of the grantor. And finally, the creditors, notwithstanding the acceptance of a share in this fund, are left free to pursue every legal remedy, for the recovery of a full satisfaction, against the person, as well as against any other property of their debtor. It is not to be denied, that the conveyance was made for the very purpose of hindering the lien of future judgments and executions upon the trust property; or, in other words, to preserve the property for an equal distribution among the creditors, instead of leaving it exposed to the priority of judgment-creditors alone: but so far from vitiating the deed, so far from justifying the imputation of fraud, this motive has been considered at the bar (and so I consider it) as the best foundation, in law and equity, for the trust. There is no positive statute, there is no rule of the common law, there is no principle of equity, to be traced in the code of England, or
*93] of Pennsylvania, *that would warrant us in declaring this deed void upon such a view of its intention and its effect.

I will consider, however, more particularly, some of the additional objections that have been made to the validity of the deed, by the counsel for the plaintiff in error. 1st. It is said, that the trust is general; but both in the manner, and in the time, of executing it, the trustees must act conscientiously, or they will incur a responsibility as for a breach of trust. 2d. It is said, that the assent of the creditors, in writing, within nine months, is a condition precedent, to the investment of the trust. I am rather disposed, however, to treat it as a condition subsequent, for obvious reasons. The legal title passed on the execution of the deed, and the trust immediately attached to the estate. The assent of the creditors must, to be sure, be given afterwards, in order to entitle them to distributitive portions of the fund; but how is the assent to be made a condition precedent, in relation to the legal estate, and the trust, both of which were previously established? The trustees might have sold the property, immediately after the execution of the deed, before any assent declared; and as to a declaration of assent in writing, this has always been regarded as a non-important part of the proceeding. 3d. It is said, however, that there should, in some form, be an assent of the creditors to the trust, in order to render it valid. A difficulty seems here to have arisen from confounding the particular assent, required by the deed to share in the trust fund; and the presumed assent in law, from the date of the instrument; for whenever a trust is raised for creditors, their acceptance of it is a legal presumption. Nothing remained in McClenachan from the execu-

tion of the deed, but a mere contingency; and even that contingency depended entirely upon the act of creditors. Until the trust was defeated, no judgment, or *testatum* execution, could affect the property; and, consequently, if it was a good subsisting trust, on the 2d of September 1797, it was good against all subsequent liens. 4th. It is said, that there was not a schedule of creditors annexed to the deed; but although this may be convenient to the execution of the trust, it does not appear to me to be essential to its validity. The trustees might easily have supplied the want of it, by calling a meeting of the creditors. And the nine months allowed for declaring their assent, and making a distribution, seems but a reasonable period, considering the dispersed state of the debts. 5th. It is said, that the payment of the shares of non-assenting creditors to McClenachan, placed them at his mercy; but suppose, the objection to this part of the deed should be well founded, does it follow, that the whole deed is void? Shall all the assenting creditors be deprived of their interest, because the dissenting creditors have produced a dilemma, in the appropriation of a part of the trust fund? I would rather say, that the trust is *bonâ fide* and operative, as to the assenting creditors; but void *in its modification, as to the shares of the dissenting creditors. (5 T. R. 432–4.) [*94

2d. It is my opinion, likewise, that the trust, created by this deed, would be supported and enforced in a court of equity. A condition subsequent (as I consider the assent in writing of the creditors to be) is seldom literally enforced in a court of equity, which looks only to the substance of the trust. For instance, either by negligence, or owing to the public calamity of the yellow fever, three months elapsed before the deed of trust was advertised; but chancery (where time, not being the material point, is often enlarged) would not allow this period to be lost to the creditors. It is not probable, therefore, that there would be an outstanding creditor, in such a case, as the present; and at all events, so remote a probability ought not affect the decision. A court of equity could, I think, mould all the powers and forms of the trust, so as to do complete justice to the parties. And what a court of equity would do, judges of Pennsylvania, deciding upon a subject of equity jurisdiction, are in the uniform practice of doing. For these reasons, I am of opinion, that the judgment of the supreme court ought to be affirmed.(*a*)

By the Court, however, let the judgment be reversed.

(*a*) The principle, that in a voluntary assignment for the benefit of creditors, any reservation for the advantage of the debtor or his family, is fraudulent and invalidates the deed, has been frequently recognised and adopted.

The case of Austin *v.* Bell, 20 Johns. 442, was decided chiefly on the authority of Burd *v.* Smith. The only question arising on the application of this principle, has relation to its effect upon the deed, as avoiding it in part, or in whole. It would seem, that assignments with such a reservation are totally void. Passmore *v.* Eldridge, 12 S. & R. 201; McClurg *v.* Lecky, 3 P. & W. 73; Hyslop *v.* Clarke, 14 Johns. 458; Tucker *v.* Welsh, 17 Mass. 164; Harris *v.* Summer, 2 Pick. 129. But see Murray *v.* Riggs, 15 Johns. 571; Prince *v.* Shepard, 9 Pick. 176.

*JANUARY SESSION, 1804.

Present—Chew, President of the Court, and Rush, Riddle, Henry and Roberts, Presidents of the Common Pleas.

Lea, executrix, *et al.*, *v.* Yard.

Hazlehurst *et al. v.* Dallas, Secretary of the Commonwealth.

An auctioneer's bond is a security for his private customers, as well as for the payment of duties to the government.[1]

Yard *v.* Lea, 3 Yeates 335, and Dallas *v.* Chaloner's executors, 3 Dall. 500, affirmed.

Error from the Supreme Court of Pennsylvania. These actions depended chiefly on the same facts and principles; and were argued together, both in the supreme court, and in this court. The facts were these:

John Chaloner was appointed an auctioneer for the city of Philadelphia, on the 1st of August 1791, and gave a bond to the secretary of the commonwealth, in the penal sum of 2000*l.*, with two sureties, namely, Leonard Dorsey and Thomas Lea, who are both since dead. Richard S. Footman was also appointed an auctioneer, on the 9th of June 1795; and gave a similar bond, with Isaac Hazelhurst and John D. Coxe, as his sureties. The conditions of the bonds were of the following tenor:

In Chaloner's case: "Whereas, the above-bounden John Chaloner was, on the first instant, re-appointed auctioneer, with authority to make sales by
*96] auction, at any place or places within the *city of Philadelphia, the district of Southwark, or the township of the Northern Liberties, or Moyamensing, according to law: Now, the condition of this obligation is such, that if the said John Chaloner shall well and faithfully execute the aforesaid office of auctioneer, according to law; and shall, from time to time, well and truly account for all public moneys which shall come into his hands, and pay the same into the treasury of the state, agreeable to the directions of the several acts of assembly of this commonwealth which relate to auctions and auctioneers; then the above obligation to be void, and of none effect, or to be and remain in full force and virtue."

In Footman's case: "Whereas, by a commission bearing even date with the above-written obligation, the above-bounden R. S. Footman has been duly appointed one of the public auctioneers in and for the city of Philadelphia: Now, the condition of this obligation is such, that if the above-bounden R. S. Footman shall well and faithfully discharge and perform all the duties of an auctioneer, and in all things truly and fully comply with, and execute the laws relating to the office of auctioneer, then the above-written obligation to be void, otherwise, to be and remain in full force and virtue."

While these bonds, respectively, were in force, Mr. James Yard delivered to Chaloner, as public auctioneer, a considerable quantity of goods to be sold for him. The goods were, accordingly, sold; but Chaloner retained $5011 of the proceeds, which he never paid over, nor accounted for, to Mr. Yard. And at the same time, he was considerably indebted to the state, for

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[1] Davis *v.* Commonwealth, 3 Watts 297.

duties received upon sales at auction. Mrs. Gapper, in like manner, delivered to Footman, as a public auctioneer, a quantity of goods to be sold for her; which were, accordingly, sold; but the proceeds never accounted for; although Footman had punctually paid into the state treasury, all the duties which he had collected.

Chaloner being dead, an action was brought upon his bond, against his executors, &c., for the use of the commonwealth, in which judgment was rendered, and the amount of the duties (being less than the penalty) was recovered.(*a*) Mr. Yard, thereupon, issued a *scire facias*, returnable to December term 1798, against the executors of Thomas Lea, one of Chaloner's sureties; while Mrs. Gapper instituted a suit upon Footman's bond, in the name of the secretary of the commonwealth, for her use. Cases, comprising the foregoing facts (*reddenda singula singulis*) were filed in the actions, respectively, with an agreement to consider them as special verdicts, for the purpose of a writ of error: and the general question submitted to the court was, whether an auctioneer's bond is a security for his private customers, as well as for the payment of the duties to the state?

*After argument, the opinion of the supreme court, was delivered, *seriatim*, on the 24th of March 1802, by SMITH and BRACKENRIDGE, Justices (Chief Justice SHIPPEN, and YEATES, Justice, declining to take a part in the decision, on account of their relationship to the defendants), conformable to which, judgment was entered for the plaintiff, in both suits: (*b*) And writs of error were brought upon these judgments. [*97

(*a*) See 3 Dall. 500.

(*b*) I have been favored with a note of what was said by the judges; from which, in substance, may be collected the following principles.

SMITH, Justice.—This is strongly pressed as a case of sureties, against whom an obligation ought never, it is said, to be extended, beyond the strict letter. 2 Co. 370. But the truth is, that where there is a joint obligation, the law does not, abstractedly, recognise the character of a surety: and after all, sureties must be bound, according to the true construction of the obligation, whatever may be the form of the expression. 1 Bro. Ch. 87.

The essential question, therefore, is, to what duties does the condition of the bond refer? It is a general rule, resulting from a view of our whole official system, that where an officer gives a bond for the performance of his duties, it shall operate to protect the individuals who are obliged by the law to resort to his office, as well as the public, by whom he is appointed. From many instances, it is sufficient to mention those of sheriffs, coroners and surveyors. The instance of an auctioneer, independent of the positive provisions of the statute, seems, at least, to be, as much as any other, within the reason, principle and policy of the rule. He is a public agent, with an exclusive authority to sell at vendue. Individuals cannot employ any other agent for the purpose of selling their goods; and it is the uniform practice, to leave to him too the collection of the purchase-money. Indeed, I cannot perceive how the owner of the goods could, consistently with the various provisions of the laws, maintain an action against the vendee for the price, in his own name. I grant, that the general rule is, that he who sells by another, is, in contemplation of law, the seller himself, with the right of action to recover the price; but that the rule applies only, where the owner of the goods may choose his agent, and not where he is obliged to employ the agent of the public. 2 Str. 1182. Inconveniences might easily be suggested, arising from the opposite doctrine. Auctioneers often advance money on goods sent for sale; would it be just, that the owner should still have the power to demand and recover the price from the purchaser? On a sale, the state acquires a right to the duty, as well as the owner

*The case was argued on the 16th, 17th, 18th and 19th of January 1804, by *M. Levy*, *E. Tilghman* and *Ingersoll*, for the plaintiffs in error, and by *Lewis*, *Rawle*, *S. Levy* and *Dallas*, for the defendants in error. And in the course of the argument, both sides referred to the following sections of the several acts of the general assembly relative to auctions.

1. An act was passed on the 14th of February 1729 (1 State Laws, 154, Gall. edit.), "for regulating peddlers, vendues, &c." The preamble recites, "whereas, of late, many idle and vagrant persons are come into this province, and under pretence of being hawkers or peddlers, and carrying goods, from house to house, within this province, to sell, have greatly imposed upon many people, as well in the quality as in the price of the goods, and under color of selling their wares and merchandises, have entered into the houses of many honest and sober people, in the absence of the owner or owners of the said houses, and committed felonies and other misdemeanors, to the great prejudice of the inhabitants of this province. For remedying of which inconveniences, and preventing such evil practices, and to the intent that no persons may be admitted to follow the business of hawkers and peddlers, within this province, but persons of known honesty and civil be-

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to the purchase-money: shall the owner be allowed to recover the duty, as well as the price; or must the vendee be exposed to two demands and two suits? If, then, upon motives of public policy, a public agent is imposed on the citizens for the sale of their goods, nothing but express words would warrant our supposing, that the legislature, while they took a bond to protect the collection of a small revenue, meant to leave unprotected so great an amount of private property.

The very smallness of the penalty of the bond, has, however, been urged as an argument, to show that it could not be the intention of the legislature, to embrace the interests of individuals, as well as the rights of the state. To this objection, I answer: 1st. That, in proportion to the responsibility, the penalty is larger, than in the case of sheriffs' bonds. 2d. That there are several auctioneers, each giving a bond in the same sum; and the vendor may consider which of them, and his sureties, may be most safely intrusted. 3d. That by the condition of the auctioneers' bond, the sums collected are to be immediately paid over; whereas, in the case of a sheriff, the moneys levied may be retained for a considerable time. Upon the whole, I think, judgment must be rendered for the plaintiff.

Brackenridge, Justice.—The act of the 23d of September 1780, is the first that reserves a *per centum* for the state, on sales at auction; but it will not be said, that adding to the duties of the auctioneer diminished the effect of the obligation. Every duty which an auctioneer is bound to perform, is embraced in the terms of the condition; and paying over the proceeds of the sales to his employers is expressly a duty. The reduction of the penalty of the bond from 20,000*l.* to 2000*l.*, might raise a presumption, that when a revenue was contemplated, the revenue only was to be protected; were not that circumstance rebutted, by considering the relative value of money, at the two periods of passing the laws. Then, the auctioneer is a public agent, who must be employed to sell goods at public vendue. He is not only the exclusive agent to sell; but the law, obviously, makes him the exclusive agent to collect the amount of the sales; the owner of the goods cannot forbid the payment to the auctioneer, and recover the purchase-money himself. In such a state of things, it is reasonable and just, that the law should protect the private citizens, who are compelled to trust a public agent, in this, as well as in any other instance; and although the penalty is small, it is, in my view, a positive provision to protect the customers of the auctioneer, as well as the revenue of the public. Judgment must be for the plaintiff.

havior," &c., the 6th section of the act provided, "That no person, or persons whatsoever, except as hereinafter is excepted, shall, after the publication of this act, take upon him, her or themselves, to sell or expose to sale, by way of vendue or auction, any wares, goods or merchandises, within the city of Philadelphia, unless such person or persons shall be recommended by the mayor, recorder and aldermen of the said city of Philadelphia, in their open sessions, to the governor of this province; and shall have given security to the mayor of the said city, for the time being, for the use of the corporation, in such sum as shall be agreed upon by the said mayor, &c., provided the same do not exceed the sum 500*l.*, for his or their honest and due *execution of the office of the vendue-master, within the city of Philadelphia, and for the due observation of the ordinances of the [*99 said city, touching the regulating vendues or public sales, or auctions, within the same."

2. An act was passed on the 26th of November 1779 (2 State Laws, 245, McKean's edit.), "for the effectual suppression of public auctions and vendues, &c.," to expire at the termination of the war. It provides for the appointment of a single "auctioneer of the city of Philadelphia;" and the 9th section declares, "that the said auctioneer shall, before he enters upon the duties of his office, become bound with two sufficient sureties, unto the president of the supreme executive council of this state, in the sum of 20,000*l.*, conditioned for the faithful performance of the duties required of him, and for the honest and just satisfaction and payment of his employers, and every one of them. And besides the usual attestation required of the officers of this state by law, shall take an oath that he will, to the best of his skill and abilities, faithfully perform and execute the duties required of him by this act."

3. An act was passed on the 23d of September 1780 (2 State Laws, 406, McKean's edit.), "to alter and amend," the preceding act; by the 2d section of which, the appointment of three auctioneers is authorized, "who shall continue for and during the will and pleasure of president, &c., and shall give bond to the president and his successors, with two sufficient sureties, in the sum of 20,000*l.* for the faithful discharge of their duties, and for well and truly performing the terms and payments in and by this act directed and required:" by the third section, it is provided, that the said auctioneers shall have an exclusive right to sell by public vendue, "rendering and paying to the state treasurer, for the use of the commonwealth, one *per centum* of the gross amount of the sales, so by him or them made as aforesaid, in manner following, that is to say—that each and every of the said auctioneers, shall once in every three months, render an account, upon oath, to the said treasurer, &c., of all the effects and property by him sold, at any time before the said time of rendering the same account, and since his last settlement, and shall then immediately pay to the same treasurer the full amount of the said one pound in the hundred pounds upon the same account. And upon any failure in rendering the same account, upon oath, or of payment of the said sum of one *per centum*, any auctioneer so failing or neglecting, shall be discharged from his place, and the said bond put immediately in suit:" And by the 8th section, it is provided, that the fees or recompense of the auctioneers, "for selling at public auction, collecting the money, and paying over the same,

without loss or waste, shall be, &c.," a per-centage, more or less, according to the nature of the specified articles.

*100] *4. An act was passed on the 13th of April 1782 (2 Dall. Laws, 55), by which the compensation of the auctioneers was reduced, "for their expenses and trouble in selling any property at public auction, collecting the money and paying over the same without loss; an additional one *per centum* was charged on the gross sales, for the use of the commonwealth, to be accounted for and paid over, as the preceding law directs, under the penalty therein mentioned; and it was declared, "that the several bonds given by the said auctioneers to the president, for the faithful performance of the duties of them required by the aforesaid act, shall be a security for the payment of the one *per centum* imposed by this act."

5. An act was passed on the 9th of December 1783 (2 Dall. Laws, 169), by which the previous acts (with certain exceptions) were made perpetual; auctioneers were prohibited from buying, at public sales, on their own account; and it was repeated, that if an auctioneer failed or neglected to account, he should be discharged from his place, and his bond put in suit.

6. An act was passed on the 19th of March 1789 (2 Dall. Laws, 680), by which the appointment of an auctioneer for Moyamensing was authorized, who should give bond, with two sufficient sureties, in the sum of 2000*l.* "for the faithful discharge of his duty, and for well and truly performing the terms and payments in and by this act, and the several acts of general assembly, to which this is a supplement, directed and required."

7. An act was passed on the 27th of March 1790 (2 Dall. Laws, 777), reducing the duty on sales to one *per cent.*, and authorizing the appointment of two additional auctioneers, who shall give bond "with two or more sufficient sureties, in the sum of 2000*l.*, conditioned for the faithful discharge of their and every of their respective duties, and for well and truly performing the terms and payments in and by this act, and the several acts of general assembly to which this is a supplement, directed and required."

8. An act was passed on the 26th of February 1791 (3 Dall. Laws, 91), by which the restriction upon the auctioneers to sell goods only within the districts, for which they were respectively appointed, was repealed and annulled. (*a*)

For the *plaintiff* in error.—1st. It is proper to premise, that the present suits are instituted against sureties, after the principals are insolvent and

*101] dead. And independent of any peculiar hardship *in this case, it is a rule of law, as well as of equity, that the responsibility of a surety shall never be extended beyond the strict letter of his contract. (2 T. R. 370; 2 Wils. 379; 4 Ves. jr. 788.) Nor is the contract to be regarded in the same rigor, as if it had been expressed by the parties themselves, in their own terms; instead of being prescribed by a legislative act. In such a case, the meaning of the terms employed by the legislature should be unequivocal, plain and clear, before it is adopted as the meaning of the surety, to bind

(*a*) It may be proper, after this recapitulation, to observe, that the conditions of the bonds, in the present cases, were not drawn strictly in the terms of the acts of assembly; but it was agreed, to argue and decide the general question, independent of any objection that might be made to the form of the bonds.

him in a manner so injurious and oppressive. 2d. The acts of the assembly of the years 1780, 1782, 1783, 1789 and 1790 were in force, when these auctioneers were appointed; they direct that bonds shall be given, and they prescribe the terms of the condition of the bonds; but they do not expressly, in any instance, declare the bonds to be a security for private customers. From the year 1729, until the 26th of November 1779, although several acts were in force to regulate sales at public vendue, there is, likewise, no express provision to be found, declaring the bond of an auctioneer to be for the use of the individuals who employed him. Then, the only act, in the whole of the system, with all its successive modifications, by which the bond is expressly appropriated to the protection of an injured customer, is the act of the 26th of November 1779. 3d. The act of the 26th of November 1779, by adding to a provision, "for the faithful performance of the duties required of the auctioneer," a provision "for the honest and just satisfaction and payment of his employers, and every one of them;" shows it to be the sense of the legislature, that the expressions of the former would not embrace the objects of the latter provision. 4th. The duration of the act of the 26th of November 1779, was limited, by its own terms, to the continuance of the war, and the limitation, of course, affected the supplemental acts of 1780 and 1782; but the act of the 9th of December 1783, rendered the supplements perpetual, and so much of the act of 1779, as was not thereby altered or supplied. Then, it is to be considered, that the act of 1780, made expressly "to alter and amend" the act of 1779, not only increases the number of auctioneers, but prescribes a new condition to be annexed to their bonds, to wit, "for the faithful discharge of their duties, and for well and truly performing the terms and payments in and by this act directed and required," totally omitting the passage in the condition before prescribed, "for the honest and just satisfaction and payment of the employers" of the auctioneer. 5th. The terms of the condition prescribed in the act of 1780, supplied and superseded the terms of the condition in the act of 1779; they do not mean the same thing, and particularly, they do not both embrace the rights of the individual employers, as well as the rights of the public. Thus, the duties referred to by the act of 1780, are the duty of keeping a regular register of horses, *and of accounting to the state; and of acting fairly between buyer and seller; while "the terms and payments" required to be [*102 performed, are those which are specifically directed and required "in and by this act;" and the act nowhere directs or requires a payment to the employers, but only to the public. It is true, that the act of 1780, as well as the act of 1779, declares that, "for selling at public auction, collecting the money, and paying over the same, without loss or waste," the auctioneer shall be allowed a per-centage; but there is in this provision no duty prescribed, no terms and payments stipulated; nothing that relates to a surety, or can affect him: it is merely an enumeration of the services to be performed by the agent, in consideration of the compensation which the law allows him to demand and receive. 6th. The legislative intention to limit the operation of the bond to a governmental security, may be fairly inferred from a variety of considerations: the smallness of the penalty; the change of expression, to exclude as it were the opposite construction, when a public duty was first imposed by the act of 1780; the increase of the number of auctioneers, which gave individuals a selection, and so far rendered a provision in their

favor unnecessary; the express provision uniformly made for individuals by the legislature in every other case of an official bond; and finally, the general understanding of the bar, expressed in various opinions given upon the case of *Major Boyd.* (3 Dall. Laws, 131.) 7th. It is not a sufficient answer to these arguments, that auctioneers are public agents, possessing a monopoly of the sales at public vendue, to whom private citizens are obliged to resort; and therefore, ought to be protected. In the first place, the regulations of the acts, though they compel individuals to employ the public auctioneer, do not prevent a special contract between them, as to the collection of moneys, nor even as to the rate of compensation. Besides, it is not true, that the acts expressly empowered the auctioneers alone to collect the proceeds of sales; and the general rule of law is well established, that where the dissenting principal declares himself, a vendee cannot be discharged by a payment to the agent. (2 Ves. 221.) Even in the case of a compulsive agency, if the employer pays the duty and commissions to the auctioneer, he may sue the vendee for the purchase money. (7 T. R. 359.) And in some cases, a contrary doctrine would be iniquitous; for, suppose the auctioneer becomes bankrupt, before the money is collected; may his assignees collect the money, and put the employer to a dividend? Or, suppose the sales are made for approved notes, at distant periods, shall it be deemed right and lawful, that the auctioneer shall take the notes, and hold them, or use them, at the risk of the employer, until the credit is expired; and possibly until the money is recovered upon them in an action at law?

*103] *For the *defendants* in error.—1st. The general question is, whether the official bond of an auctioneer is a security for his fidelity towards individuals, as well as towards the public? On this question, whatever is the meaning of the legislature in the acts of assembly, is the meaning of the parties in the bond. Both principal and surety are bound, according to that meaning; and beyond it, neither of them is bound. The only distinction here between the principal and surety is, that the principal may be liable, either at common law, or on the bond; but the surety can only be liable on the bond. (2 T. R. 105; 1 H. Black. 186.) On the true construction of the bond, however, the surety, as well as the principal, would be liable, even beyond the direct letter (though the present case requires it not). 4 Bro. P. C. 87. And the *obiter dicta* of Butler, in 2 T. R. 370, must be explained by the subject-matter; while the authority of 2 Wils. 379, yields to the contrary decision in 1 T. R. 291. 2d. Under every modification of the office, duties and bonds of auctioneers, the legislature meant to protect the customers that employed them, as well as the government that appointed them. On principle, it must be meant, since the legislature takes from private individuals the right of choosing their own agents; and from analogy to other public officers, it must be meant, for there is not a single instance in the whole of our code, where an official bond is not, either by express words, or the established, practical construction, held to afford remedy and relief to injured private persons; as in the cases of sheriffs, coroners, administrators, &c. Cowp. 140 (against Ambl. 183); 3 Atk. 248; 2 Inst. 650; Vaugh. 334; 12 Co. 30 *b.* But the same meaning is clearly and necessarily derived from the words of the legislature, in the acts under immediate discussion. Thus, the act of 1729 was passed, because street vendues, &c., had become

a nuisance; no revenue, or other public object, than to insure fair-dealing, was contemplated; and the condition of the bond was simply "for the honest and due execution of the office." No other honesty or duty could be in view here, than honesty and duty towards the customers of the auctioneer. True, the bond was given for the use of the corporation, and the customers had no personal remedy upon it; but still it operated as a penalty for their protection; and if the auctioneer was dishonest, or failed in any way to do his duty, the forfeiture was absolute under the act of 1729; while it is now contended, that under the act of 1780, so far as security is concerned, if he is honest to the public, there can be no forfeiture of the official bond, let him be ever so fraudulent towards the private citizen. The act of 1779 confirms expressly the legislative meaning to be in favor of giving a security to the employers of auctioneers, both in the terms of the condition of the bond, and the oath of the auctioneer; and although the phraseology is changed, the substance of the provisions remain the same; "an *honest and due execution of the office," under the act of 1729, certainly including [*104
"an honest and just satisfaction and payment of the employers," as well as a performance of the general duties of the office. But in the act of 1779, "the use for the corporation," is discontinued; no other use of the official bond is declared; the penalty, reduced by the scale of depreciation, is nearly the same as before; certain duties are prescribed in the 9th and 10th sections (such as a search for offenders, and collecting and paying over the proceeds of sales); but even under this act, no duty is contemplated to be raised on sales at auction. Then, the essential inquiry rests on the act of 1780, which, as well as all the subsequent acts, passed, not to repeal, but to alter, amend, supply or enlarge the provisions of the act of 1779; and being *in pari materia*, must be considered together, in order to ascertain the true meaning of the system. The act of 1780 is the first that contemplates a revenue from sales at auction; but independent of the provision to secure the revenue, it continues, in substance, the provisions to protect the employers; particularly, making it a duty, on which the right of compensation arises, to collect the proceeds of sales, "and pay over the same, without loss or waste." But it is urged, that the act of 1780, when it prescribes the condition of the bond, omits entirely the previous stipulation, "for the honest and just satisfaction and payment of employers;" and claims from auctioneers only "the faithful discharge of their duties, and well and truly performing the terms and payments, in and by this act directed and required." The omission suggested was correct; for in the previous act, the stipulation was tautologous and surplusage; as the duties of the auctioneer (which he was bound to perform) were emphatically to collect the money and make payment to his employers, no revenue being at that time in contemplation. The appointment of the auctioneer fixes his duties, as does the appointment of a sheriff, &c., without specification or detail. Selling, collecting and paying, form the great outline of those duties. The first and second are common both to the state, and to individuals; and as to the third, it branches into a payment of the tax to the state, and of the purchase-money to the individuals. Besides, "the terms and payments directed and required in and by this act," are also to be performed; and the payment to the employer is required by the act, as well as the payment to the state. In short, the two members of the condition of the present bond, fortifying and sustaining each

other, must embrace all the duties, all the obligations, which the laws impose upon an auctioneer, or the meaning will be constrained, and inconsistent with the general import of the words. 3d. But in opposition to the meaning of the legislature thus deduced, every kind of inference is offered, as well from the silence, as the expression of the laws. It *105] is said, that neither principal nor surety are liable to the employer, *for a performance of their duty to him; because the act of 1780, and the subsequent acts, do not say so, expressly, as the act of 1779 did; and because the penalty of the bond is inadequate to afford an indemnity for the injury to which, we contend, it applies. If, therefore, the words omitted had been retained, the controversy must so far have ceased; and the only question is, whether words equipotent, or even more extensive for the object, are not employed. But as to the second difficulty, it sounds in this absurdity, that because the bond is not sufficient to protect the employer entirely, it shall not protect him at all. Is the sheriff's bond, is a surveyor's bond, is every administration bond, found commensurate with the possible delinquency or defalcation? And is it conceivable, that because a surety is called on for less than the loss, that, therefore, he is to pay nothing? But the truth is, that the sum is more adequate now, than under the act of 1799, when its application to the relief of the employer is admitted. It is raised from the scaled value of 518*l.* (on 20,000*l.*, at 38½ for one) to the specie value of 2000*l.* The increase of the number of auctioneers, virtually augments the fund for the indemnity of individuals; the restriction to sell in their respective districts (while in force) limited the *quantum* of custom of each auctioneer; and the obligation to account quarterly with the state, under the penalty of an immediate dismission from office, reduced the demand of the state for an indemnity to a mere possibility. Neither the first tax of one *per cent.*, nor its subsequent accumulations, could, under such circumstances, require the protection of a penalty of 2000*l.* from six auctioneers. (Park. 273.) Something more must be protected than the revenue; the general provision of the act of 1713 (1 State Laws, 102, Gall. edit.) gives a ground of exposition from all official bonds; and when revenue only is meant to be protected; or the penalty is to operate as a punishment to the delinquent, not as a relief to the injured; in the English statutes, as well as in the Pennsylvania code, the language of the legislature is appropriate and unequivocal. (19 Geo. III., c. 56, § 7; 1 Anstr. 586.) 4th. If arguments *ab inconvenienti* may avail, what can be more forcible, than the inconvenience which proceeds from the opposite construction, when the auctioneer is regarded as a public agent, invested with the exclusive right to collect the moneys on sales at auction? The rule is different as to a common-law agency; where there are three voluntary parties, the owner, the agent and the buyer (2 Ves. 221), and the difference is not destroyed, though modified, in the case of an agent *del credere*. (Bull. N. P. 130; 7 T. R. 539.) Here, however, the licensed auctioneer is not only a legislative agent *del credere* to the buyer, but the state constitutes a fourth party, giving the law to every part of the transaction, to every degree of the responsibility. The auctioneer is, thus, *106] a trustee for the *state: he, not the owner of the goods, nor the buyer, must pay the duties to the state; and he gives the security, not the owner. It naturally follows (and so is the practice), that immediately upon a sale, the auctioneer becomes the debtor to the owner of the goods, as well

as to the state. The owner does not know the purchaser, and seldom inquires for him. The knowledge, or the inquiry, would be superfluous, as the auctioneer alone possesses the power to collect, as well as to sell: it is a vested right, by operation of law, and not, in its nature, assignable. (2 Dall. 174; 1 H. Black. 81; *Willing* v. *Rowland.*(*a*) But it is an universal principle, that where a power is given, a duty arises. The sheriff has a power to execute a *capias;* and therefore, it is a duty to do it. The coroner has a power to hold inquests; and therefore, it is a duty to hold them.

After deliberation, THE COURT were unanimously of opinion, that the auctioneer's bond was intended, by law, for the benefit of his private customers, as well as for securing the duties payable to the government: And therefore, the judgments of the supreme court were affirmed; and the records remitted for further proceedings.(*b*)

(*a*) Willing *et al. v.* Rowland *et al.*, in the supreme court, 1791,[1] before McKEAN, Chief Justice, and RUSH and BRYAN, Justices. This was an action of *assumpsit*, for goods sold and delivered. The goods were sent by the plaintiffs to the store of John Mease, a licensed auctioneer, and were sold, at public vendue, to the defendants. Mease became, soon afterwards, a bankrupt; and the defendants refused to pay the purchase-money to the plaintiffs, insisting upon a right to set off a debt due to them from the bankrupt. THE COURT were decidedly of opinion, that the plaintiffs could not maintain the present suit; that, by law, the right of action is vested in the auctioneer; and that the common-law rule in the case of factor and principal, did not apply to the case of a public auctioneer. A verdict was, thereupon, given in favor of the defendant.

Bowie and *Hallowell* (by the latter of whom this note is obligingly furnished), for the plaintiffs, cited Com. Dig., title "Merchant," B. 81; 13 Vin. Abr. 9; Roll. Rep. 337; 2 Vern. 638; 3 Bac. 519; 2 Str. 1182; Co. B. p. 236–7. *Bradford* and *McKean*, for the defendants, who cited Bull. N. P. 130, 280; 12 Mod. 514–5; Molloy 466.

(*b*) In the case of Dallas *v.* Hazlehurst, the defendants paid the amount of the penalty of the bond into the supreme court, to be disposed of as the court should direct. *Todd*, for several creditors who had not brought suits, or whose suits were subsequent in date to Mrs. Gapper's suit, asked the opinion of the court, whether the creditors of Footman were not entitled to share in the fund, *pro rata?* *Dallas* and *S. Levy* urged, that upon principal and authority, the creditor first suing was entitled to be first and completely paid, before other creditors were admitted. THE COURT were clearly of that opinion; and Mrs. Gapper's debt with interest was, accordingly, satisfied, leaving only the surplus of the fund for other creditors.

[1] This case was overruled in Girard *v.* Taggart, 5 S. & R. 19: and for some remarks upon Willing *v.* Rowland, see Id. 31, 33.

SUPREME COURT OF PENNSYLVANIA.

APRIL TERM, 1790.

GEYER'S Lessee *v.* IRWIN.

Privilege.

A member of the general assembly is privileged from arrest, summons, citation or other civil process, during attendance on his public business, but the benefit of his privilege must be duly claimed at a proper time.

Semble, that his suits cannot be forced to a trial and decision, while the session of the legislature continues.

THIS ejectment, depending in Allegheny county, was marked for trial on the list of causes at *nisi prius*. The defendant's attorney, after looking at the papers of the opposite party, confessed judgment.

But now, *Lewis*, producing an affidavit of a just and legal defence, moved to set aside the judgment, on the ground, principally, that the defendant was a member of the general assembly, attending his public duty at Philadelphia, at the time of marking the cause for trial, and confessing the judgment. He said, that the attorney had been compelled, either to go to trial, or to confess judgment; and that not being possessed of his client's proofs, he had preferred the latter course; but he insisted, that during the session of the legislature, every member was privileged against the necessity of attending to his private suits; and that, therefore, the cause had been irregularly placed upon the trial list.

Ingersoll, for the plaintiff, denied, that the legislative privilege extended to the present case; and urged, that even if it was a case of privilege, the attorney had waived it, by omitting to object at the proper time.

BY THE COURT.—A member of the general assembly is, undoubtedly, privileged from arrest, summons, citation or other civil process, during his attendance on the public business confided to him. And we think, that upon principle, his suits cannot be forced to a trial and decision, while the session of the legislature continues.

But every privileged person must, at a proper time, and in a proper manner, claim the benefit of his privilege. The judges *are not bound, *108] judicially, to notice a right of privilege, nor to grant it, without a claim. In the present instance, neither the defendant, nor his attorney, suggested the privilege, as an objection to the trial of the cause; and this

amounts to a waiver, by which the party is for ever concluded. We are, therefore, unanimously of opinion, that the judgment cannot now be set aside or opened.

Carson *v.* Hood's executors.

Verdict.

If debt be brought against executors, on simple contract, it will be bad on demurrer, but if they plead to issue, they cannot afterwards make the objection.

After a verdict, it will be presumed, that everything was done at the trial, which was necessary to support the action, unless the contrary appear upon the record.

Debt. Plea, *nil debet.* The principal point in this case was, whether debt would lie against executors, on a simple contract of the testator?

Bradford, for the plaintiff, stated the rule to be, that if the executors demur to the action, they are entitled to judgment; but if they plead to issue, they cannot, afterwards, make the objection; and the following authorities were cited to maintain the distinction. Cro. Eliz. 600, 557; Cro. Car. 187; Cro. Eliz. 121; 1 And. 182; Golds. 106; Leon. 165; Vaugh. 99; 1 Sid. 333; Plowd. 182; Palm. 32; Cro. Eliz. 435, 459; Yelv. 56; 1 Lev 200; 1 Vent. 139; Vaugh. 97.

The Court, being unanimously of this opinion, gave judgment for the plaintiff; having, on a preliminary point, decided, that after a verdict, the will presume everything was done at the trial, which was necessary to support the action, unless the contrary appeared upon the record. 3 Burr.1725; 1729; 1 Wils. 225; 2 Str. 1180.(*a*)

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*SEPTEMBER TERM, 1791. [*109

Donaldson *v.* Means.

Waiver of protest.

If an indorsee of a bill, which has been protested, promises to pay it (although the protest has not been transmitted to him), he is bound by such promise; unless, at the time of making it, some material fact was unknown to him.

This was an action brought by the indorsee of three bills of exchange, against the indorser. On the trial, it appeared, that the bills were drawn in April 1776, at thirty days' sight, by Nathaniel Newton, on Wilt & Hobson, of London, in favor of T. Armstrong, and indorsed, successively, by Armstrong, and by Means, the defendant; that the bills were presented, and

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(*a*) The proper title of this case is Carson *v.* Hood *et al.*, executors of Hood. The action was brought to September term 1788, and at July term 1789, the jury found a verdict for the plaintiff, with liberty to move for a new trial, on this ground, whether the action is supported by the evidence or not? A rule to show cause why a new trial should not be granted, was obtained by Mr. *Lewis*, but after argument, the court discharged the rule and gave judgment as above.

noted for non-acceptance, on the 24th of March 1777; and that they were presented, and protested for non-payment, on the 26th of April 1777.

The question to be decided, was, whether due notice had been given to the defendant of the protest of the bills; or he had done any act, which amounted to a waiver of notice?

On this point, a letter was produced from the plaintiff to his father, dated the 10th of May 1778, advising of the protest, and inquiring where Means resided. It was proved, that the father showed this letter to Means, as soon as possible after it was received, and Means repeatedly promised to remit the amount of the bills; but the protest was not exhibited to him, and never asked for; nor was any application made to the drawer, or to the first indorser, for payment. Another letter was produced, dated the 12th of August 1779, written by the defendant, at Philadelphia, to the plaintiff, at St. Eustatius, in which he mentioned, that he had received a letter of the year 1776, referring to the protested bills; expressed a hope that they would soon be paid; observed, that for want of a protest he had not been able to get payment from the drawer; but promising, nevertheless, to pay the amount to the plaintiff, whenever it was in his power to make a remittance.

For the *plaintiff*, it was contended: 1st. That during the war, when continental money was a tender, the holder of a bill of exchange *should not be required to pursue that strict punctuality, which might properly be exacted from him in a time of peace, and when his debt was not liable to be discharged in a depreciated paper currency. (1 Dall. 271.) That notice being in fact received of the dishonored state of the bills, it was not necessary in law to produce the bills and the protests; and that since the letter of August 1779, the plaintiff relied upon the defendant's new promises of payment. 2d. That even if a protest ought to have been transmitted, yet, as the defendant, with a full knowledge of all the circumstances, has made a new assumption, it is too late for him to take advantage of the omission in that respect. For although want of notice may be considered originally, as tantamount to payment; there are many cases in which the rule does not apply or is dispensed with. As where the drawer of a bil has no assets in the hands of the drawee; or where the drawer himself waives the right and benefit of notice. (1 T. R. 408–9; Bull. N. P. 272, 276; 2 T. R. 713.) And in the latter case, if he knows the fact, though he is ignorant of the law, he shall be bound by his waiver. (Doct. and Stud. 303.)

*110]

For the *defendant*.—Independently of the special promise alleged by the plaintiff, the defendant cannot be charged on the bills of exchange; for a protest is essential to enable any of the parties to recover against the others; and it must be exhibited. The law, in this respect, is founded on good sense. By exhibiting the protest, the holder of the bill shows that he looks to the person whom he addresses for payment; and by delivering the protest, upon receiving satisfaction himself, he enables that person to pursue his remedy against those who are ultimately responsible. But, 1st. There is nothing in the letter of August 1779, which can be regarded as an express, unqualified promise. The whole letter must be taken together. It complains of a want of the protest; and its general spirit is no more than a declaration, that "although the protest ought to have been sent, as it is presumed to have

been received, yet the holder shall not be permitted to suffer." 2d. Even regarding it, however, as a promise, it is not legally binding, if it was made under a mistake. (5 Burr. 2670; 2 T. R. 648; Cowp. 287; 1 P. Wms. 357; 2 Chan. Cas. 154.)

By the Court.—The law upon the subject is so clear, that the whole case resolves itself into the question of fact, on which the law is to arise. If the proof is satisfactory, that the defendant, under a knowledge of all the circumstances, absolutely promised to pay, he is, incontestably, bound by his promise.[1] But if his engagement was of a conditional nature, that he would pay, when the protest was transmitted: or if any material fact was unknown to him, at the time of making the promise, the verdict should certainly be in his favor.[2]

Verdict for the plaintiff.

Coxe, for the plaintiff. *E. Tilghman*, for the defendant.

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*Little *v.* Dawson *et al.*, Executors of Jones. [*111

Assumpsit.

If services are rendered, merely in expectation of a legacy, without any contract, express or implied, an action cannot be maintained for them.[3]

Case, for services rendered by Jane Little, the plaintiff, to Aquila Jones the testator.

The Court, in the charge to the jury, stated, that it was in full proof, that the plaintiff had served the testator, with great diligence, for a period exceeding eleven years, on which two questions arose: 1st. Was she entitled to any compensation? 2d. Had she received a compensation? As to the first, it was ruled, that if the services were rendered merely in expectation of a legacy, without any contract, express or implied, but relying, implicitly, on the testator's generosity, the action could not be maintained. The weight of the evidence, however, is, that he promised to take care of her, though he did not say how; that at one time he offered to marry her;

[1] Duryee *v.* Dennison, 5 Johns. 248; Trimble *v.* Thorne, 16 Id. 152; Meyer *v.* Hibsher, 47 N. Y. 265. A subsequent promise to pay, by an indorsee, dispenses with proof of presentment and notice, and casts on the defendant the burden of proving that it was made, without knowledge that he was discharged by the plaintiff's *laches*. Loose *v.* Loose, 36 Penn. St. 538. If made with full knowledge, it is a waiver of notice. Miller *v.* Hackley, 5 Johns. 375; De Wolf *v.* Murray, 2 Sandf. 166. Or, presumptive proof of demand and notice. Tebbetts *v.* Dowd, 23 Wend. 379. But the promise to pay must be explicit; it must refer to the particular bill; and be made out by clear and unequivocal evidence. Miller *v.* Hackley, *ut supra*. And whether it was made with full knowledge that he was discharged by want of presentment, is a question of fact upon the evidence. Moyer's Appeal, 87 Penn. St. 129. And a promise to pay, with full knowledge of the omission to make presentment, may be inferred from circumstances. Jameson *v.* Wolverton, 22 Leg. Int. 293.

[2] Martin *v.* Winslow, 2 Mason 241; Thornton *v.* Stoddert, 1 Cr. C. C. 534; Good *v.* Sprigg, 2 Id. 172; Gassaway *v.* Jones, Id. 334; Cram *v.* Colwell, 8 Johns. 384; Griffin *v.* Goff, 12 Id. 423; Sice *v.* Cunningham, 1 Cow. 397; Gawtrey *v.* Doane, 51 N. Y. 84; s. c. 48 Barb. 148.

[3] S. p. Walker's Estate, 3 Rawle 243; Neal *v.* Gilmore, 79 Penn. St. 421; Hartman's Appeal, 3 Grant 271. O'Kane's Estate, 2 W. N. C. 115. A contract to pay for services, by a legacy, ought to be established by clear proof. Thompson *v.* Stevens, 71 Penn. St. 161; Pollock *v.* Ray, 85 Id. 428.

and, at another time, he said that he would provide for her as a child.(a) As to the second question, it is merely a matter of fact, on which the jury must decide.

Verdict for the plaintiff.

For the plaintiff, *Rawle.*

For the defendant, *Sergeant* and *Roberts,* who cited 1 Vern. 98 ; 2 Atk. 251, 409 ; 2 Str. 728 ; 1 Dall. 265 ; 1 Burr. 157; Pract. Reg. 357 ; 3 Rep. Chan. 64 ; 2 Str. 910.

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*112] *JANUARY TERM, 1792.

BRADLEY'S Lessee *v.* AGNES BRADLEY.

New trial.

Where parol evidence had been allowed to be given of the contents of a deed and of a will, without previous notice to the defendant to produce it, and it appeared, that two of the jury had testified to their brethren, on the question in issue, after the jury had withdrawn, a new trial was granted.

EJECTMENT, tried in Dauphin county. The lands in question were once, incontestably, the lands of the defendant ; for the plaintiff claimed under her. The plaintiff set up an immediate title by the will of Samuel Bradley, deceased (the husband of the defendant), who devised the premises to him, the contents of the will being proved by the person who drew it ; but in order to prove a title in the devisor, parol evidence was also given that the defendant had previously conveyed to him in fee. To rebut this evidence, proof was produced, that the conveyance in fee was executed merely for the purpose of making the devisor a plaintiff in partition; and that, immediately afterwards, that conveyance was destroyed ; and a deed (which was exhibited) made to him for life. The principal question agitated in court was, whether the deed for life was genuine or forged ? But when the jury withdrew, two of them testified to their brethren, that although the defendant had bought the land, yet, the bonds, which she gave for the purchase-money, were unpaid, when she intermarried with the testator, and that the testator had been obliged to discharge them. On this representation, several of the jury, who were before in favor of the defendant's title, concurred in finding a verdict for the plaintiff : and a motion was made for a new trial, on the following grounds :

(a) If one (no matter with what expectations) does services for another, at his request, *assumpsit* will lie to recover a compensation for them. Roberts *v.* Swift, 1 Yeates 209. Although a person serves another from expectation of a legacy, in which he is disappointed, yet if the person for whom the service was done, promises to pay for it, an action can be maintained for the value of such service ; whether the promise be made before or after the service was performed. Snyder *v.* Castor, 4 Yeates 358. Where a solicitor, in expectation of a bounty by will, did not call for payment of a debt, he was not allowed to set it up afterwards, having been disappointed in that expectation. Alsager *v.* Rowley (cited by Sir S. ROMILLY, in the case of Platamore *v.* Staple, Cooper's Ch. Cas. 252, and reported on another point in 6 Ves. 748).

1. That the verdict was against evidence, and the opinion of the court.

2. That the jury had misbehaved, by hearing testimony which was not delivered in open court.

3. That evidence was allowed to be given of the contents of a deed, and of a will, without previous notice to the defendant to produce it.

*On arguing the motion for a new trial, *Ingersoll*, for the defendant, produced the depositions of two of the jurors, setting forth, [*113 that, after the jury had withdrawn, two other jurors had affirmed certain matters of fact, which (though the facts were denied at the time) had induced the deponents to find a verdict for the plaintiff: and also the depositions of two witnesses, contradicting the facts that had been so affirmed. *Lewis*, for the plaintiff, produced the depositions of six of the jurors, explaining their conduct, and averring, that the whole twelve were of opinion, that another deed, conveying the premises in fee, had been executed.

After commenting on the evidence, upon the first and second grounds of exception to the verdict, *Ingersoll* cited the following authorities upon the second ground, to show, that the evidence of the misconduct of the jurors was admissible (Cro. Eliz. 189; Moore 599; 2 Morg. Essay 25; 1 Str. 644; Salk. 647); and the following authorities upon the third ground, to show, that parol evidence of the contents of a deed can only be admitted, after notice to produce the deed itself (2 T. R. 43, 201; 4 Burr. 2489). He also urged, that it was a cause of value; and in every aspect, merited reconsideration. (1 Dall. 234; 12 Vin. Abr. 336, 347; 12 Mod. 347–8; Doug. 118, 123.)

For the plaintiff, *Lewis* observed, that the verdict was given on a question of fact, after a full hearing, in a case in which a recovery is not conclusive; and that the principle which influenced courts to interfere with the province of juries, by setting aside a verdict, did not apply to such a case. He investigated the evidence on the trial; and insisted, that it was not necessary for the plaintiff to produce the deed in fee, but only to establish that it once existed, for no subsequent destruction of it, could revest the estate in the grantor; that whatever difference of opinion might exist, on other points, the jury were unanimously of opinion, that such a deed was executed; and it was immaterial to the issue, on the question of title, whether the defendant had paid the purchase-money or not. As to the parol evidence of the will, the copy of one will was produced, and the scrivener who drew the other, besides testifying what passed on the occasion, when the defendant was present, exhibited the original rough notes of the draft. If this evidence was admissible, it was conclusive; for she knew of the devise to the plaintiff in fee, and she acquiesced in it. It was admissible, without notice to produce the will; because it was not offered to establish a title under the will, but to prove contemporaneous conversations and actions of the parties, from which the fact of an existing conveyance in fee, to the testator, might be inferred. The general rule, however, is conceded, that in order to introduce parol evidence of the contents of a deed, its existence and loss must be proved; or proof must be given that it was in the possession of the opposite party, who refused, *after reasonable notice, to [*114 produce it. But the evidence, in the present case, was not offered to prove the contents of a deed in the defendant's possession; but the contents

of a deed, which she had actually destroyed. The reason of the rule ceasing, the rule itself must cease. The only remaining topic for remark, respects the misconduct of the jurors; upon which, there is an essential variance in the evidence. But it is enough to say, that if the jury did misbehave, the proof of the fact, in order to affect themselves, or their verdict, must proceed from another quarter: it cannot be received on their own depositions. (1 T. R. 11.)

Ingersoll, in reply.—The motion for a new trial is as proper, and as much countenanced, in ejectments, as in any other suits. (4 Burr. 2221.) If a deed, given for a special purpose, be afterwards cancelled, and a subsequent deed is accepted by the grantee, for a less estate, the destruction of the first deed will operate as a revestment. Whether the deed in fee was given for a special purpose, constitutes the great inquiry in the present cause; and the establishment of the fact will be decisive, one way or the other. Nothing can fairly be inferred, from the supposed acquiescence of the defendant in the devise; for the devise does not specify the land in question; but includes it, if it is included, in a general sweeping clause, disposing of all his real and personal estate. The rule, as to giving the contents of deeds in evidence, is not susceptible of the qualifications suggested for the plaintiff; nor was there any idea, at the trial, that the deed was destroyed, though it was said to be secreted. As to the mode of proving the misconduct of a jury, it must be conceded, that the courts have varied in their opinions and practice. How far jurors should be permitted to accuse themselves of a high misdemeanor, is a doubt. Yet, in 3 T. R., a witness, who had received a bribe, was permitted to prove the act of corrupting him against the defendant; because, the necessity of the case required it. A similar necessity seems to furnish the same law, in cases like the present. In *Cowperthwaite* v. *Jones* (2 Dall. 55), the jury settled the damages by a mesne form, taken from a calculation of the several sums, which the jurors, individually, set down; and on a motion for a new trial, the affidavits of the jurors, proving the fact, were read, and considered by the court. That the matters stated were immaterial to the issue, cannot surely avail the plaintiff; when it is recollected, that they had a decisive effect against the defendant; and that they were false.

After advisement, THE COURT were clearly of opinion, that a new trial ought to be granted.

Rule for a new trial absolute.(*a*)

(*a*) In Cluggage *v.* Swan, 4 Binn. 157, Judge YEATES says, "This case is erroneously reported; I was of counsel with the plaintiff, on the trial, and the late Mr. Bradford, with the defendant. Neither of us took any part in the decision of the motion for a new trial. McKEAN, Chief Justice, was of opinion, that a new trial should be granted; but Judge SHIPPEN thought differently. The plaintiff obtained judgment on his verdict, the court 'being divided in opinion,' and it is thus entered upon the record. It is true, that the affidavits of two of the jurors, stating that two others of the jury had affirmed certain matters of fact, which had induced them to find a verdict for the plaintiff, were read in support of the motion; and also, the depositions of two witnesses contradicting the facts supposed to have been so affirmed; and that the affidavits of six other jurors were read, showing the grounds on which the whole twelve had found their verdict. But it is not usual, when a motion is made for a new trial, to object to

*115] SMITH *v.* BRODHEAD'S Executors.

Feme covert.

A *feme covert* gave bond to pay a debt of her husband; she was seised of a separate estate under a deed of settlement, with power to make a will; she did make a will, and in it directed the payment of her debts: *Quære.* Whether her estate, in the hands of her executors, was liable to pay the amount of the bond?

THIS cause was tried at Berks *nisi prius*, in October 1791, when the jury found the following special verdict:

"The jury find, that in the year 1785, the plaintiff sold a tract of land to Daniel Brodhead, Esq. (the husband of Rebecca Brodhead, the defendant's testatrix), for the sum of 500*l.*; that the land has since been sold, by execution, after the death of Rebecca Brodhead, the testatrix, for the proper debt of the said Daniel; that 150*l.* of the purchase-money was paid in hand, and the said Rebecca gave six bonds for the payment of the residue, in annual instalments; that the said Rebecca, at the time of executing the bonds, was a *feme covert*, living with her husband, and continued so to do, until her death; that she was seised of a separate estate, under a deed of settlement, with power, *inter alia*, to make a will; that by her last will, duly proved, she appointed the defendant her executor, and *inter alia*, directed the payment of her debts; that two of the bonds were duly paid in the lifetime of the said Rebecca; and the present action is brought upon another of the bonds.

"If upon the above case, the court should be of opinion, that the plaintiff is entitled to recover, the jury find for the plaintiff in this cause 60*l.* debt, 12*l.* 12*s.* damages, and six pence costs: otherwise, they find for the defendant."

The general question was, whether the bond of a *feme covert* bound her estate, in the hands of her executors, under the circumstances stated in the special verdict?

For the *plaintiff*, the case was discussed on several grounds: 1st. That a court of chancery would give relief upon the bond. 2d. That to prevent a failure of justice, the courts of Pennsylvania will amplify their jurisdiction, upon principles of equity. 3d. That the will of the testatrix, directing the

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the court's receiving evidence of the facts on which it is founded. The common course is, to lay the facts before the court, leaving it to them to judge of their legal operation. The plaintiff's counsel, in that case, went fully into the conduct of the jury, as well as the words of the two parties. They had no reason to fear the effect of the affidavits of the two jurors, while they had more weighty evidence to repel the facts sworn to, and fully explain the conduct of the whole jury. Certain it is, that nothing dropped from either of the members of the court, respecting the conduct of the jury; their difference of opinion rested in a comparison of the conflicting notes."[1]

[1] It is settled, that the testimony of the jurors themselves is not admissible, to impeach their verdict, on the ground of their own misconduct. Cluggage *v.* Swan, 4 Binn. 150; White *v.* White, 5 Rawle 61; Willing *v.* Swazey, 1 Bro. 123; Commonwealth *v.* Humes, 38 Leg. Int. 94. A juror cannot be examined as to what took place in the jury-room. Norton *v.* Breitenbach, 1 Pears. 467. But he may testify as to the misconduct of one of the parties to the suit. Ritchie *v.* Holbrooke, 7 S. & R. 458; Hutchinson *v.* Sandt, 4 Rawle 240; Thomas *v.* Chapman, 45 Barb. 98.

payment of debts, would make the bond a charge on the executors as a debt in equity. And the following authorities were cited to show the principle, on which a court of equity would interpose; and the extent to which the courts of Pennsylvania had exercised an equitable jurisdiction. (1 Ves. 517, 163: Prec. Ch. 328; Gilb. Eq. 83; 2 Ves. 193; Bro. Ch. 20; 2 Atk. 68; 1 T. R. 5; Pow. on Cont. 89; 1 Dall. 213–4, 339–40; Eq. Rep. Gilb. 84; 1 Dall. 17, 72, 428; 2 Vern. 225; Doug. 53; Cowp. 201–4.) The executors being bound to pursue the directions of the will, the devisee ought not to be permitted to resist it.

For the *defendant.*—A court of chancery would not do that for the plaintiff, which would be the consequence of a general judgment in his favor. *116] The wife's engagements have never *been satisfied in equity, beyond her personal estate, and the rents and issues of her real estate; but a general judgment, in Pennsylvania, would bind the real estate absolutely; so that it might be taken in execution and sold. If, indeed, this were a court of equity, the defendant might make many matters appear to rebut the plaintiff's equity, which it is too late to urge on a special verdict. And this court, as a court of common law, will never consider bonds as appointments, when the party could not legally enter into a bond. (*Norton* v. *Turville*, 2 P. Wms. 145; 1 Bro. Ch. 16.)

Cur adv. vult.(a)

Commonwealth *v.* Dillon. (b)

Confession of prisoner.

A boy, about twelve years old, indicted for arson, in burning some stables containing hay, &c., had made a formal, and, to all appearance, voluntary confession to the mayor of the city of Philadelphia, which was repeated at subsequent periods: previously, however, he had been visited by several persons, who represented to him the enormity of his crime, and that a confession would excite public compassion, and probably be the means of obtaining his pardon, adding that they would be his friends, while a contrary course, in case of his conviction, would leave him without hope; the inspectors of the prison, too, took him into the dungeon, and said, that he would be confined in it, dark and cold, without food, unless he made a full disclosure, which, if he did make, he should be well accommodated, and might expect pity and favor: *Held*, that this confession was admissible in evidence, and that the point for consideration was, whether the prisoner had falsely declared himself guilty of a capital offence.(c)

The prisoner (a boy about twelve years old) was indicted for arson, in burning several stables, containing hay, &c. He was examined before the mayor of the city of Philadelphia, on the 20th of December 1791, and then confessed the commission of the offences, with which he was charged. But as his own confession was the principal evidence (indeed, there was no other positive evidence) against him, his counsel insisted, that it was obtained under such duress, accompanied with threats and promises, as destroyed its legal credit and validity. The evidence on that point was, substantially, as follows:

(a) The reporter has not been able to trace the decision of this cause.

(b) The trial was held at a court of oyer and terminer, in Philadelphia, on the 31st of January 1792, before McKean, Chief Justice, and Shippen and Bradford, Justices.

(c) But see, on this point, 2 Starkie's Ev. 27.

On the 18th of December, the prisoner was committed to the jail of Philadelphia, and the next day was taken before the mayor; but at that time, he made no confession. On the 18th and 19th of December, he was visited and interrogated by several respectable citizens, who represented to him the enormity of the crime; urged a free, open and candid confession, which would so excite public compassion as probably, to be the means of obtaining a pardon; while a contrary course of conduct would leave him, in case of a conviction, without hope: and they added, that they would themselves stand his friends, if he would confess. The inspectors of the prison endeavored, likewise, to obtain from him a discovery of his offences and of his accomplices. They carried him into the dungeon; they displayed it in all its gloom and horror; they said, that he would be confined in it, dark, cold and hungry, unless he made a full disclosure; but if he did make a disclosure, he should be well accommodated with room, fire and victuals, and might expect pity and favor. The prisoner continued to deny his guilt for some time; and when his master visited him, he complained of the want of clothes, fire and nourishment. *At length, however, on the 19th of December, he made successive acknowledgments of the facts contained in his confession, which was formally, and, to all appearance, voluntarily, made before the mayor, on the succeeding morning; and which was repeated, with additional circumstances, at subsequent periods. [*117

In the *prisoner's* defence the following authorities were cited, principally to guard the jury against the danger of mere presumptive evidence, and an extorted confession of guilt, through force, hope or fear, particularly, in the case of an infant; 4 Bl. Com. 357; Fost. 243; 2 Trials per Pais 603; 2 Hale H. P. C. 225; 2 Bl. Com. 326; Leach C. L. 248, 319; 3 Com. Dig. 511; Staundf. 144; 2 Hale H. P. C. 284–5; 3 Bac. Abr. 131; 3 Inst. 232; 2 Hawk. 604; 8 Mod.; Fost. 11, 244.

For the *Commonwealth.*—The confession was delivered before the mayor, and afterwards repeated and enlarged, without the least appearance of constraint or terror. No public officer has improperly attempted to excite fear or hope, as the medium of extorting a discovery; and all that was said or done in that respect, proceeded from the avowed friends of the prisoner, and the known promoters of humanity. Besides, the confession itself bears intrinsic marks of its sincerity and truth; and neither the wildness of the boy's motive, for committing the crimes, nor his youth, can afford a satisfactory answer to the charge. (Fost. 70.) And, after all, to destroy the legal effect of the confession as evidence, it must be proved, 1st, that previous improper means were employed; and 2d, that the confession was the immediate consequence of those improper means.

By the Court.—The fact of the arson is established; and it only remains to decide, whether it was committed by the prisoner? The proof against him depends upon his own confession, slightly corroborated by the testimony of two witnesses. The confession was freely and voluntarily made, was fairly and openly received, before the mayor; and therefore, it was regularly read in evidence. But still, it has been urged, that it was thus apparently well made before the mayor, in consequence of improper meas-

ures previously pursued with the boy. The interference of the inspectors of the prison was certainly irregular; though the public anxiety, in which they participated, upon this extraordinary occasion, may be admitted as an excuse. The manner in which he was urged, though not threatened, by the citizens who visited him, may likewise be objectionable. But is it reasonable to infer, that all the prisoner's confessions were falsely made under the influence of those occurrences? Consider the nature of the offence. It cannot be openly perpetrated; for it would be instantly prevented; and if it is secretly perpetrated, how, generally speaking, can the offender be de-
*118] tected, *but by his own declarations? If such declarations are voluntarily made, all the world will agree, that they furnish the strongest evidence of imputed guilt. The hope of mercy actuates almost every criminal who confesses his crime; and merely that he cherishes the hope, is no reason, in morality, nor in law, to disbelieve him. The true point for consideration, therefore, is, whether the prisoner has falsely declared himself guilty of a capital offence? If there is ground even to suspect, that he has done so, God forbid, that his life should be the sacrifice! While, therefore, on the one hand, it is remarked, that all the stables set on fire, were in the neighborhood of his master's house; that he has, in part, communicated the facts to another boy; that his conduct had excited the attention and suspicion of a girl, who knew him; and that he expressed no wish to retract the statement, which he has given: the jury will, on the other hand, remember, that if they entertain a doubt upon the subject, it is their duty to pronounce an acquittal. Though it is their province to administer justice, and not to bestow mercy; and though it is better not to err at all; yet, in a doubtful case, an error on the side of mercy is safer, is more venial, than error on the side of rigid justice.

Verdict, not guilty. (*a*)

For the Commonwealth, *Ingersoll*, attorney-general. For the prisoner, *Sergeant* and *Todd*.

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*APRIL TERM, 1792.

Morris's Lessee *v.* Smith.

Decedent's debts.

The lands of a decedent may be taken in execution on a judgment obtained against the personal representative, notwithstanding an intermediate *bonâ fide* conveyance by the heir-at-law, for a valuable consideration.

Quære? Whether, in such case, a *scire facias* against the terre-tenant is required?

Ejectment for twenty-three acres in Philadelphia county. It was agreed, that John Hunt (under whom both parties claimed) died seised of the premises; and the lessor of the plaintiff's immediate title was derived under a judgment obtained against Hunt's executors, in June term 1786, at the suit

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(*a*) The humanity of the jury being gratified by an acquittal of the prisoner, from the capital charge, he was indicted and convicted, on the same facts, for a misdemeanor. By the reform of our penal code, arson is no longer a capital crime.

of Thomas Corbin, for 105*l.* 10*s.*; upon which there was an execution, a sheriff's sale, and a sheriff's deed to the plaintiff, dated the 5th of June 1787.

The defendant relied on this statement: Hunt died the 31st of March 1778, having made his will, and leaving an only son, who sold and conveyed the premises to William McCullough, on the 26th of December 1778, for a full and valuable consideration. But it was decided in the year 1786, (*a*) that such a conveyance by the heir-at-law, or devisee, was not sufficient to protect the real estate from creditors; and then, the widow and executrix of Hunt confessed a judgment to Corbin, upon which the premises were taken in execution, and sold to the lessor of the plaintiff, but, in truth, for the widow's use. John Hunt, the father, had also left a considerable real property in New Jersey; yet, to defeat McCullough's purchase, and to get clear of the law of Pennsylvania, that property was left unsold and unappropriated; and the premises pursued to satisfy this voluntary judgment.

But the plaintiff, to rebut the insinuation of collusion and fraud, proved satisfactorily, that Hunt had purchased the lands in Pennsylvania, as well as in New Jersey, with money borrowed from Corbin; for the amount of which he had given his bond, dated the 1st of January 1762; that several partial payments were indorsed *on the bond; that on the 26th of October 1768, the balance being then considerable, Hunt conveyed to Corbin [*120 a tract of land in New York, and several tracts of land in New Jersey, including the greater part of the property mentioned by the defendant; that on the 6th of September 1787, the plaintiff conveyed the premises to James Pemberton, for the nominal consideration of five shillings; and that Pemberton executed a declaration of trust, to the use of Corbin.

Upon this development of the case, however, two points were made, and at the request of the counsel, reserved for future argument:

1st. Whether the land could be sold by virtue of the judgment, without a *scire facias* against the *terre tenant?*

2d. Whether the land was liable for the testator's debts, after being aliened by the heir-at-law, *bonâ fide*, and for a *valuable consideration?* (*b*)

Verdict for the plaintiff. (*c*)

(*a*) Moore *v.* Few, 1 Dall. 170.

(*b*) It does not appear that these questions were ever argued in the present suit. But see Graff *v.* Smith, 1 Dall. 481.

(*c*) For a full report of the arguments of counsel, and the decision of the court in this case, on the second point, see 1 Yeates 230; where the opinions of the judges are to be found at length—all agree in the affirmative. The first point is not noticed in this report; but from an examination of the record in the supreme court (April term 1793), it appears, that both the points were argued, and that then judgment was entered in favor of the plaintiff.

Calhoun's Lessee *v.* Dunning.(*a*)

Record evidence.—Blunston's licenses.—Improvement.—Award.

A judgment against *cestui que trust* is evidence against the trustee, in a suit brought by him—the parties being substantially the same in both suits.

In ejectment, a record of an action of trespass between the defendant and one C., was offered in evidence by the defendant; C. had there pleaded *liberum tenementum*, and there had been a reference in the case, on which, the property at present in dispute was awarded to the defendant; and it appearing that the plaintiff had never controverted C.'s right, it was *held*, that the record was admissible.

Blunston's licenses have always been deemed valid, and many titles in Pennsylvania depend upon them.[1]

A mere improvement right, subsequent to a legal right vested in another, ought never to be rendered effectual in favor of a settler.[2]

An award of referees cannot give a right to land, but will settle a dispute about it, either in an ejectment, or in an action of trespass, and such an award may be conclusive, if this be the agreement of the parties.(*b*)

Ejectment. The inception of the plaintiff's title depended upon an extract from the record of licenses or grants by Blunston, dated March 1734–5, which was merely a minute in these words: "John Calhoun, 200 acres on Dunning's run, called the Dry Spring, between Jacob Dunning and Ezekiel Dunning." By the field-notes of Cookson, a surveyor, it appeared, that there was a survey of the land, on the 22d of March 1743–4, for Robert Dunning; but a memorandum was afterwards made by one Morse, a clerk to the surveyor, "that the land was claimed by the heirs of John Calhoun." John Calhoun having entered a *caveat*, the decision of the board of property was pronounced, on the 24th of November 1766, setting forth, "that under Blunston's license, J. Calhoun took possession and cleared three acres, built a cabin, and returned to Chester county, where he dwelt; that in 1743, one Armstrong got a warrant, but was told by Dunning, that the land belonged to Calhoun, of whom he had purchased it; that afterwards, Dunning took out a warrant in his own name, and got a survey made, on which a *caveat* was entered against him; that an ejectment was brought, in which Dunning lost the possession; that Dunning then purchased Armstrong's warrant, got
*121] a survey upon it, and now *claimed a patent; but the board of property ordered the patent to issue to Calhoun." By will, dated the 19th of September 1752, John Calhoun devised the premises to Rebecca Calhoun, who conveyed the same to James Calhoun, the lessor of the plaintiff, by deed the 20th July 1763; and he, having made a re-survey, on the 5th of September 1788, obtained a patent on the 3d of April 1789.

The defendant's claim depended on the following facts: In 1753, Dunning

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(*a*) Decided at Carlisle, in Cumberland county *nisi prius*, 11th May 1792, before Shippen and Bradford, Justices.

(*b*) See Lessee of Dixon *v.* Morehead, Addis. 216, 231 n. In ejectment, an award of referees, appointed under the act of assembly of 1705, is not conclusive of title. Duer *v.* Boyd, 1 S. & R. 203. But an award of arbitrators, under a submission at common law, fixing a boundary line between the land of the parties, is final. Davis *v.* Havard, 15 Id. 165.

[1] See Dunning *v.* Caruthers, 4 Yeates 13.

[2] Hepburn *v.* Hutchinson, 2 Yeates 329; Eddy *v.* Faulkner, 3 Id. 580; Pigou *v.* Nevil, 4 Id. 266; Pennsylvania *v.* Huston, Addis. 334; Adams *v.* Jackson, 4 W. & S. 55.

lived on the premises, and reaped corn on it, so late as 1788. In 1779, one Caruthers was making a fence on part of the land; he continued to live there, at the time of the resurvey in 1788; and he was considered as the owner by purchase from Calhoun. But in 1764, a survey was made for Dunning, under Armstrong's warrant, which, as the surveyor affirmed, left the disputed land entirely out of the lines. In an action of trespass, between Dunning and Caruthers (plea, *liberum tenementum*), there was a reference, in the year 1783, on which it was awarded, and the award affirmed by the court, that the line should be run between the parties, so as to leave the disputed land in the possession of the plaintiff, Dunning.

I. It was objected, that the record of the action of trespass, could not be read on the trial of the present ejectment, as it was not between the same parties. But it was answered, that Caruthers, the defendant then, was now the person really interested, as owner of the land; that Calhoun was merely a trustee; and that, as an action might be brought in the name of the *cestui que trust* (*Kennedy* v. *Fury*, 1 Dall. 72), the judgment ought to be admitted. And—

By the Court.—We can never acquiesce in an attempt so manifestly calculated to evade the truth and justice of the case. Shall it be in the power of a party, by suppressing a deed; or by employing the name of a trustee; to avoid the legal effect of a judgment rendered against him? In the action of tresspass, Caruthers pleaded *liberum tenementum*, as to the very lands now claimed by Calhoun; and Calhoun has never controverted his right. It is plain, therefore, that Calhoun's name is now employed, for the use of Caruthers; and that the parties are really, though not nominally, the same, in both suits.

Objection overruled.

II. In the charge to the jury, it was stated—

By the Court.—Blunston's licenses have always been deemed valid; and many titles in Pennsylvania depend upon them. The equitable right acquired by the lessor of plaintiff, under a license, has been perfected by a survey and patent; so that he clearly possesses a legal title to the land in dispute.

On the other hand, the defendant has no office-right, but rests his pretensions on an early possession, the exclusion of the disputed *land in the resurvey of 1764, and the award and judgment in the action of trespass. Of the equitable circumstances, the jury will judge, with this remark from the court; that a mere improvement right ought never to be rendered effectual in favor of a settler, when it commences subsequent to the existence of the legal right, regularly vested in another. [*122

The great objection, however, to the plaintiff's recovery, arises from the award and judgment. To be sure, an award cannot give a right to land; but a report of referees will settle a dispute about land, either in an ejectment, or in an action of trespass. In the case of *Fox's Lessee* v. *Franklin*, a similar report has been made, and affirmed. Indeed, such a report is more operative than a verdict: for a verdict in ejectment is not conclusive; but when parties choose to adjust their disputes amicably, they generally agree, that the award shall be final; and under such an

agreement, neither of them can hope again successfully to agitate the same points.

Under this charge, the plaintiff suffered a nonsuit. (*a*)

GANDER'S Lessee *v.* BURNS *et al.*

Conflicting locations.

In case of conflicting warrants, if there be ground enough to satisfy both, each party will be confined to what he purchased.

EJECTMENT for lands in Mifflin county. On the trial of the cause, the following general principles were stated in the charge to the jury.

BY THE COURT.—The first inquiry is, whether the location and warrant call for the same place. If they do, then, as there is ground enough to satisfy both, one shall not run away with all, but shall be confined to what he purchased. This is the rule in the board of property, and if Snedon's rights have not been abandoned, nor transferred to Dearmond, it is the rule that ought to be applied here. Those rights do not seem to have been abandoned; for in 1761, the children were infants, and were hardly of age, when this action was brought; *laches* cannot, therefore, be imputed.

Whether Dearmond purchased, must be left to the jury: he had the receipt, and that is some ground for presumption, added to his own declarations, which, as they come on the part of the plaintiff, are evidence.

But if the rights remain, then the next question is, how shall the location and warrant be laid? This must be determined, either by the description; or by the prior improvement; or by the priority of date. As to the description, Snyder calls for Everhart as his boundary, and Foster, for Buchanan, *123] at opposite ends of the whole tract: *so that, it would seem, one might begin on one quarter, and another on the other quarter, until they meet. But if the priority of improvement is clear, that being the spot designed by the improver, ought, perhaps, to be assigned to him.

If no other rule can be taken, the priority of date ought to give the preference to the party whose warrant is oldest, to locate it as he chooses.

Verdict for the plaintiff.

(*a*) In Duer *v.* Boyd, 1 S. & R. 213, Judge YEATES, who had been of counsel in the case of Calhoun *v.* Dunning, said, he was strongly inclined to think, that implicit confidence was not to be placed on the accuracy of the report of it. The case of Dunning *v.* Caruthers, 4 Yeates 13, appears to have been an action for the same land, which was in dispute in Calhoun *v.* Dunning, and as similar questions must have arisen in both suits, there is a great discrepancy between the two reports.

MASSEY *et al.*, executors of MASSEY, *v.* LEAMING. (*a*)

Legacy to a debtor.

Testatrix had, for some time before her death, been in a low state of health; the defendant had taken charge of her affairs, and had some accounts against her, but had borrowed 150*l.* from her, for which he had given a bond; the will contained a bequest of 200*l.* to him, "provided he brings no account against me and my estate. *Quære?* Whether the legacy is a release of the bond?(*b*)

DEBT. Plea, payment, with leave to give the will of testatrix in evidence. The case was simply this: Mrs. Massey, the testatrix, was in a low state of health, for some time before her death; the defendant took the charge of her affairs, and had some accounts against her; but he borrowed 150*l.* from her, for which he gave a bond, payable in one year, with interest. On the 5th of June 1784, she made her will, which was proved on the 21st of June, containing, among other things, this bequest: "I give to T. Leaming, in consideration of his many services to me, 200*l.* in real specie; provided, he brings no account against me and my estate; and if he happen to bring any account against me, or my estate, then this bequest to be void;" with a devise over of the testatrix's estate. The legacy was paid to T. Leaming; the present action was brought upon his bond; and the question of law arose, whether the bequest operated as a release?

The plaintiff's counsel suggested, that they were ready to prove, that there was a deficiency of assets to pay debts. Upon this suggestion, it was agreed, that a verdict be given for the plaintiff, subject to the opinion of the court, whether the bequest was an extinguishment of the debt? If it was so considered, then the plaintiff shall be at liberty to prove a deficiency of assets, for the payment of debts.

After depending for a great period on the docket, the suit was, finally, marked "not to be brought forward."

Tilghman and *Levy*, for the plaintiff. *Sergeant*, for the defendant.

(*a*) Tried at *nisi prius*, Philadelphia county, in May 1792.

(*b*) "There can be no pretence to say, because the testator gave a legacy of 500*l.* to the defendant Wood, therefore this was an argument, or evidence, that the testator intended to remit the former debt; but if a man gives a legacy to his creditor to the amount of the debt, this has been construed a payment or satisfaction of the debt." Jeffs *v.* Wood, 2 P. Wms. 132.[1]

[1] A legacy to a debtor is not, *per se*, a discharge of the debt; but it may be shown to have been so intended, by extrinsic proof. Zeigler *v.* Eckert, 6 Penn. St. 13; Strong *v.* Bass, 35 Id. 333. And see Richets *v.* Livingston, 2 Johns. Cas. 97; Smith *v.* Kearney, 2 Barb. Ch. 533; Stagg *v.* Beekman, 2 Edw. Ch. 89; Clark *v.* Bogardus, Id. 387; Negley's Estate, 25 Pitts. L. J. 99.

*SEPTEMBER TERM, 1792.

VAUGHAN *et al.*, Assignees of NANCARROW, *v.* BLANCHARD *et al.* (*a*)

Nonsuit.—Landlord and tenant.

The court will not direct a nonsuit, for want of proof, by the plaintiffs, of a material fact, where they have offered some evidence of it.[1]

If a landlord interrupt the tenant's enjoyment of the demised premises, the rent is suspended, unless it be shown that such an interruption was in pursuance of a reserved privilege.[2]

DEBT, for rent. The facts were these: Nancarrow advertised to let the room and front cellar of a house, which he rented from Pemberton; and the defendants agreed to take them at 130*l.* per annum, commencing the 27th of July 1784, and continuing until the end of Nancarrow's term in the house. A lease in writing was drawn, but never executed, though the defendants entered into possession of the premises, made some repairs, and paid a part of the rent. Soon, however, after the defendants had taken possession of the room and cellar, it was again advertised to be let, with directions to apply to them for particulars; and, accordingly, they let the premises to one Dixon; Dixon again let them to Fox, the agent of a merchant of the name of Leuffer; and Leuffer deposited a considerable quantity of merchandise in the cellar. Nancarrow now claimed a right to pass through the front cellar, into the back cellar; Leuffer objected to it; but, upon Nancarrow's persevering, he took another house, at the end of Dixon's time (six or nine months), to which he removed his goods. Leuffer's agent offered to pay his rent to Nancarrow, but Nancarrow refused to accept it, unless the receipt was taken, as from Blanchard. Under these circumstances, the present action was brought, to recover a half year's rent, on a demise (as stated in the declaration) to hold from the 27th of July 1784, until the expiration of Nancarrow's term in the premises, with an averment that Nancarrow had a lease from Pemberton. Blanchard then instituted an action against Fox, to whom the premises were underlet, for Leuffer; but declaring that he would only prosecute his claim, if he was compelled to pay the plaintiffs in the present suit.

*125] *I. *Sergeant* and *Ingersoll*, for the defendants, moved to nonsuit the plaintiffs, because there was no proof of a lease from Pemberton to Nancarrow, as the declaration averred. The only ground of recovery in this action, is, either that the defendants actually occupied the premises; or that the plaintiffs, in pursuance of the bargain, had vested them with a right of occupancy. Now, the lease of the defendants was made dependent upon the lease of Pemberton: and *non constat* that such a lease existed, as it has not been produced, nor any regular account of it. (Doug. 642–3.) But—

BY THE COURT.—Whether it is necessary, or not, in this action, to prove

(*a*) s. c. 1 Yeates 175.

[1] Stout *v.* Russel, 2 Yeates 334; Morse *v.* Bogert, 4 Den. 108; Labas *v.* Copton, 4 N. Y. 547; Colt *v.* Sixth Avenue Railroad Co., 49 Id. 671.

[2] Garrett *v.* Cummins, 2 Phila. 207; Doran *v.* Chase, 2 W. N. C. 609.

the existence of a lease from Pemberton, there is no ground for a nonsuit. The plaintiffs have offered some evidence to show that Nancarrow possessed a term in the house ; and of the operation and effect of that evidence, however it applies to the issue, the jury must judge and decide.

II. In the charge to the jury, it was stated by THE COURT, that the cause depends upon a single fact, whether Nancarrow had a right of passage through the front, into the back cellar? The affirmative, it was incumbent on the plaintiffs to prove ; but they had not proved it, either by written or parol evidence. Then, the law declares, that such an interruption in the enjoyment of the premises demised, will suspend the rent.

Verdict for the defendants.

COMMONWEALTH *v.* MARGARET BIRON.

Homicide.—Manslaughter.

INDICTMENT for the murder of Jane McGlaughlin. It appeared in evidence, on the trial, that Hugh McGlaughlin, the husband of the deceased, rented from the prisoner, a part of the house in which she lived ; that on the 10th of June 1792, while it rained hard, a noise was heard at the house, and the deceased was attempting to get in ; that she said, "You whore, let me come in ;" and the prisoner said, "You whore, you shan't;" that the deceased appeared to be then in liquor, though by all accounts, she was a very quiet woman ; that the prisoner opened the door, and she and the deceased began to struggle, when the former pushed the latter down the steps, and her head struck the wall ; that the deceased seemed to be bent by her fall, and the prisoner came out of the house, saying, "Ah ! this is the way I am troubled with this kind of people ! her husband has just left her in this situation;" that the witness observed, "You pushed her down," to which she answered, "I did not;" but after the deceased was carried into the house, she acknowledged that she had done it, and said she was in a great passion ; and that the deceased and the prisoner used before *to quarrel, but had not been seen to strike each other. On examining the deceased, Dr. [*126 Hutchinson said, that he found considerable injury done to the bone on one side of the head ; but that the wound was not necessarily mortal ; and he thought, from appearances, that the deceased must have been intoxicated, at the time of her fall.

BY THE COURT.—The circumstances present to the consideration of the jury, a case of atrocious manslaughter ; but in our opinion, no more.

Verdict, guilty of manslaughter, but not guilty of murder. (*a*)

(*a*) The indictment was tried in a court of oyer and terminer, in Philadelphia county, on the 19th of November 1792.

*APRIL TERM, 1793.

Bank of North America *v.* Pettit.

Notice of non-payment.

Notice of non-payment of a promissory note by the maker, must be given by the holder to the indorser, with a demand of payment from him, within a reasonable time.

What constitutes a notice within a reasonable time, still remains, in Pennsylvania, a fact for the jury to determine.

Case against the payee and indorser of a promissory note, made by George Henry, for $1100, payable in 45 days, and dated the 26th of March 1785. The defence was, that due notice had not been given of the maker's non-payment of the note; and the following evidence was produced *pro* and *con.*

For the *plaintiff*, the runner of the bank stated, that he believed he gave the maker notice when the note became due, as it was his custom to do; that it was also his custom, at the expiration of the three days' grace, to give the indorser notice; and he conceived, he must have called on the defendant on the evening of the last day of grace; but if not then, he was very clear, he called the next day, or the second succeeding day, at farthest; that he thinks he spoke to the defendant's son, and supposes he mentioned his business; that his reason for thinking he gave notice is, that he has a memorandum of Henry's notes lying over; and the president of the bank was very particular about them, and the indorsers; that when he called at the defendant's counting-house, he gave verbal notice, that the indorsement was unpaid, and the person he saw, told him that he would inform the defendant of it; that it was not then a practice to leave written notice; and finally, that he was not doubtful, but very clear, that he gave the notice.

For the *defendant*, his clerk declared that it was usual to leave notice of the protest of notes in writing; and that he did not recollect that either written or verbal notice was given in the present case. The defendant's son declared, that he had no recollection of receiving any notice; but, on the *128] contrary, he remembered, *that, upon making an estimate of his father's indorsements at the bank, the cashier said they amounted to $2300; and this being denied, Henry's note was produced; which was the first intimation that the son ever had of its existence, or of its being protested.

It was argued by *Tilghman* and *Lewis*, for the plaintiff, that although the cause turned upon a mere matter of fact; and that fact being established, the decision must be governed by the principles of the mercantile law, which, generally considered, are the same throughout the mercantile world; yet, that there are special usages, arising from local circumstances, or municipal policy, that must prevail, in modifying the operation of the general law of merchants. Thus, the general law of merchants declares, that the acceptor of a bill of exchange is bound by his acceptance; but how far he is bound, varies at different places. (*Burrow* v. *Jemino*, 2 Strange 733.) So, notice of the protest of a bill of exchange must be given, upon the principles of the general law; but there is a different usage, in different places,

as to the strictness of the time, within which the notice must be given. The statute of *Anne* introduced the negotiable character of promissory notes, and the process of declaring upon them as instruments. The practice of giving notice, in the case of promissory notes, soon followed in England, though the statute speaks nothing of the time; but, at first, a great latitude was allowed; and it is only, step by step, that the present degree of strictness on the subject has been there established. In Pennsylvania, however, promissory notes were scarcely to be regarded as a currency, before the revolution; insomuch that it is difficult to trace a suit on the records of the courts, by the indorsee against the indorser. The act of assembly of 1715, which gave the indorsee an action against the maker, in his own name, made no positive provision on the subject of notice; and the English practice was not adopted under the act. Punctuality, indeed, in paying such engagements, was rare, and almost impracticable, from the state of the country. The Bank of North America began the rule of punctuality; and originated the usage of notice; and upon that usage, a period of six, seven or eight days has been allowed for giving the notice. What, then, is the evidence of a demand of payment from the indorser, in a reasonable time, is the only question. The runner of the bank gave notice of the protest; and this, by the common understanding of our merchants, amounts to information, that the holder of the note looks to the indorser for satisfaction. The cases cited for the plaintiff were 2 Str. 1175, 1248; Ld. Raym. 744; *Robertson* v. *Vogle*, 1 Dall. 252; *Bank* v. *McKnight*, Ibid. 158.

It was argued by *Ingersoll* and *Sergeant*, for the defendant, that the holder of a dishonored note, must conform to the law-merchant, *which requires notice to be given to the indorser; as even the declaration [*129 shows, by the averment that notice was given: and they contended, that the notice in this case (if given at all) not being given to the defendant on the very next day, after the expiration of the days of grace; and not being accompanied with an explicit demand for payment, was not a sufficient notice, according to the law of merchants; which being, in this respect, founded on general principles of reason and equity (to prevent the indorser from suffering by the indulgence or negligence of the holder), was as applicable in Pennsylvania, as in any other country. They cited 1 Wils. 47; 2 Bl. Rep. 747; Doug. 650; 2 T. R. 713; 1 Dall. 252; Bull. N. P. 274–6; 1 Str. 508.

By the Court.—The defence is want of notice of the protest of the note in question, within a reasonable time. The law in England is very strict upon this subject. Before any tatutes existed there, to render promissory notes negotiable, such notes were often made; but they were only regarded as evidence of a debt, and could not, as instruments, ae declared upon in an action at law, until the provision was made in the statutes of *Wm. III.* and *Anne*. It is not material, however, to review the history of this paper medium, either here or in England; since it is clear, that in both countries, at this day, the law requires, that notice must be given by the holder, to the indorser of a promissory note, with a demand of payment, in a reasonable time after the note is dishonored by the maker. (*a*) What con-

(*a*) "Death, bankruptcy, notorious insolvency, or the drawer's being in prison, con-

stitutes a reasonable time, was formerly considered, by the English courts, in most cases, as a matter of fact, for the decision of a jury: and since it has been deemed by those courts, a matter of law, they have held, that if the parties live in the same town, an allowance of even a single day to the holder is quite sufficient. But in Pennsylvania, the question of reasonable notice still remains a fact for the jury to determine. Before the institution of the Bank of North America, promissory notes were few; there was no time fixed for giving notice; and two or three months have often elapsed, before it was given. The bank had, however, a right to introduce new rules, for transacting business with their customers; and those rules being understood and enforced, formed a law of the contract, binding on both parties. Indeed, the punctuality, and other beneficial consequences, flowing from those rules, seem to have given them a more general operation and force; so as to constitute a general usage, and not merely a usage of the bank. But notwithstanding the necessity of giving notice exists, on general principles, as well as upon the usage, its reasonableness, we repeat, still depends, here, upon the verdict of the jury. As soon as we can, consistently with the state of the country, its roads, and its posts, it will be wise to
*130] adopt the English law upon the *subject, for the sake of certainty and uniformity, in the administration of justice: and perhaps (such is the rapid progress of population and public improvement), the court may, in future, incline to adopt it.(a)

Stansbury *v.* Marks.

Defence of infancy.

In *assumpsit*, infancy can be given in evidence, under the general issue, but the jury may decide, whether it is a sufficient discharge.

Case. Plea, *non assumpsit.* The defendant offered to give infancy in evidence, on this plea; to which the plaintiff objected. But—

By the Court.—The evidence is clearly admissible. Under the general issue, however, the jury may decide, whether the evidence is sufficient to discharge him, or not. The position is generally true, that an infant can only bind himself for necessaries; yet, in the court of chancery, cases occur, in which a payment would be decreed, contrary to the strict rule of the common law. In this form of action, equity is the principal consideration; and from necessity, the courts of law, in Pennsylvania, adopt the principles of the English courts of chancery.

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stitute no excuses, either at law or equity; because many means may remain with him of obtaining payment, by the assistance of friends or otherwise, of which it is reasonable the indorser should have an opportunity of availing himself; and it is not competent to the holder to show, that delay in giving notice, has not, in fact, been prejudicial." Gibbs *v.* Cannon, 9 S. & R. 201.

(a) As to what is sufficient notice of non-payment of a promissory note, and when such notice must be given, see Steinmetz *v.* Curry, 1 Dall. 234–5 n.; Robertson *v.* Vogle, Id. 252–6 n.; Ball *v.* Dennison, *post*, p. 163; Smith *v.* Hawthorn, 3 Rawle 355. Verbal notice is sufficient, and a protest, with notice thereof, is not necessary. Rohm v. Philadelphia Bank, 1 Rawle 335.

Jacob Conrad *v.* Conrad *et al.*, Administrators of G. Conrad.

Assumpsit for work and services.

Where an illegitimate son works for his father, on an express promise, that he should be put on a footing with the legitimate children, he may recover the value of his services, to that extent, from the administrators.

Assumpsit, upon a special agreement of intestate, that if plaintiff would live with him, and work his plantation (consisting of 260 acres), until plaintiff was of age, intestate would give him 100 acres of it; he did so remain, but was maintained, &c., by intestate: intestate had three legitimate children (two sons and a daughter), and three illegitimate (plaintiff and two daughters); he had once intimated an intention of putting plaintiff on a footing with his own children. *Held*, that, considering the circumstances of the case, it would be excessive, to give the full value of the land in damages; that the jury might depart from that standard, and that the intimation of intestate, that he would give plaintiff a child's share of his estate, might be construed as explanatory of his former promise.

This was an action on the case, brought by Jacob Conrad, the natural son of George Conrad, against the administrators of his father, in which a declaration was filed, containing two counts: 1st. Upon a special agreement that if the plaintiff would live with the intestate, and work his plantation for six years, the intestate would give and convey to him 100 acres of the land. 2d. Upon a *quantum meruit*, for work and service. Pleas, *non assumpsit*, and the statute of limitations.

Upon the trial of the cause, it was proved, that Jacob Conrad having expressed an intention to leave his father's, and learn a trade, the father said to him, with some solicitude, "stay and work the plantation, until you are of age, and I will give you a hundred acres of it." It also appeared, that Jacob did remain with his father, and worked the plantation ably and diligently; that the father had three legitimate children, two sons and a daughter, and three illegitimate children, Jacob and two daughters; that the two legitimate sons worked with Jacob on the plantation; that the father once intimated an intention of putting Jacob on footing with his other children; that the plantation consisted of about 260 acres, and was appraised at 750*l.*; and that Jacob Conrad was well maintained, clothed and schooled, while he remained with his father.

*For the *defendants*, it was urged, that the action was a novelty; that on general principles, the service of a minor child (whether legitimate or not) was due to the parent, in consideration of his maintenance and education; and that the supposed special contract was unreasonable, and, consequently, void. (1 Black. Com. 449, 453, 450; Yelv. 17; 2 Str. 728; Doct. and Stud. 211, 212.) If, therefore, the plaintiff is entitled to recover anything, it must be on the count for a *quantum meruit*, when, considering him as a servant, the expense incurred for his clothing and education must be set off against a claim for wages. [*131

For the *plaintiff*, it was answered, that the contract was expressly proved, upon a good and valuable consideration, performed by the plaintiff; and that considering the rights of a bastard in relation to the father's estate, to be only such as he could himself acquire, the court would be anxious to support so meritorious a claim. (1 Black. Com. 459.)

By the Court.—This is an action to recover damages, for the non-conveyance of 100 acres of land, agreeable to an express promise of the intestate; with respect to which, the evidence certainly supports the declara-

tion. Considering, however, the relation of the parties, the other parental obligations of the intestate, and the extent of the property, it would seem rather excessive to give the full value of the land in damages, for a breach of the promise. Is there, then, anything in the evidence, that will warrant the jury in departing from that strict standard of the damages? We think, there is. The father's intimation, that he would place Jacob on a footing with his other children, may be fairly construed as a promise (explanatory of what he had before said), that he would give him a child's share of the estate. If the jury adopt the construction, however, the other illegitimate children must be put out of the calculation. On this principle, one-fifth would entitle him to a verdict for 150*l.* As to interest, it will depend upon the discretion of the jury: but if the eldest son took the estate, at the valuation, he must have paid interest to the younger children; and consequently, on the ground of equality, it would be right to allow it to the plaintiff.

Verdict for the plaintiff, 145*l.* damages. (*a*)

C. Hall, *C. Smith* and *Hartley*, for the plaintiff.
J. Smith, *Duncan* and *Tilghman*, for the defendant.

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*132] *Edgar's Lessee *v.* James Robinson, Jr., and William Robinson.

Parol evidence.

Parol evidence of a deed is admissible, without a notice to produce it, as against one, not a party to the deed; nor can he be compelled to produce it, if he is merely a witness thereto.

Ejectment, tried at York Town, in which defence was taken for one-third part of the premises. The title of the lessor of the plaintiff was deduced from a patent, dated the 10th of June 1734, to Thomas Lenton, who conveyed, on the 8th of January 1741, to James Rowland, and James Rowland afterwards conveyed to Robert Rowland, who devised the premises to his sons James, John and Matthew, by a will dated the 9th of January 1799. A sheriff's deed was then read, dated the 29th of April 1785, which recited a judgment and execution, at the suit of Andrew Leiper against Matthew Johnston and James Robinson for 30*l.*; and a sale of one-third part of the land, as the estate of James Robinson, to Samuel Edgar (the lessor of the plaintiff) for 40*l.* And parol evidence was offered to show, that James Rowland had conveyed one-third of the premises to James Robinson, senior (uncle of the defendants), who was the defendant in a former ejectment; and who was in possession of the land at the time of the judgment and sale. It was, thereupon, objected, that no parol proof could be given of a conveyance of real estate; nor, generally, of any instrument, without previous notice to produce it. But—

By the Court.—The present defendant, James Robinson, Jr., is not the party to the alleged deed; and therefore, no notice could be given to him,

(*a*) This cause was tried at York Town *nisi prius*, before Shippen and Bradford, Justices, in May 1793.

within the general rule, for the production of deeds nor, if he stands merely in the character of a witness to the deed, is he compellable to produce it. There is, therefore, no way of getting at the title, but the one proposed, if the defendant in an action chooses, under such circumstances, to conceal the muniments of the estate.

The witnesses were, accordingly, examined; and the plaintiff obtained a verdict, conformable to the charge of the court.[1]

Zantzinger *v.* Ketch.

Parol evidence.

Parol evidence was admitted to explain the meaning of the words "the deed of conveyance" in articles of agreement, as meaning a deed conveying the land, free from all incumbrances.(*a*)

This was an action of debt, on articles of agreement to pay 135*l.*, in two instalments, for lands bought by the defendant from the plaintiff; and in the articles it was stipulated, that "the deed of conveyance shall be made to the said Michael Ketch, at the first payment."

The defendant offered the parol testimony of a witness, who was present at the execution of the articles, to show that by the expression, "the deed of conveyance," the parties meant and understood, a "deed conveying the land, free of all incumbrances." *2 Ves. 299; *Hurst* v. *Fell*, in the supreme court of Pennsylvania. [*133

The evidence was opposed, as tending to contradict the deed, whose expressions were clear, and did not require explanation.

The Court, however, upon the authority of *Hurst* v. *Fell*, admitted the evidence, though with great reluctance; and declaring that they would reserve the point. But as the verdict was for the full amount of the plaintiff's demand, the question was not revived.(*b*)

C. Smith, for the plaintiff. *Hamilton*, for the defendant.

(*a*) See on the admissibility of parol evidence, in variance of a written contract, Thomson *v.* White, 1 Dall. 424, and the notes; O'Hara *v.* Hall, 4 Id. 340; Christine *v.* Whitehill, 16 S. & R. 98; Hultz *v.* Wright, 16 Id. 345; Chess v. Chess, 1 P. & W. 32; Ingham *v.* Mason, Id. 389.

(*b*) This cause was tried at Carlisle *nisi prius*, on the 15th of May 1793, before Shippen and Bradford, Justices.

[1] Of this case, Chief Justice Tilghman says, in Little *v.* Delancey, 5 Binn. 171: "The report is short, and I am satisfied the reporter was not present at the trial, or the case would have been stated with more clearness and precision;" and after analyzing the facts as above stated, he continues, "upon the whole, there appears to have been something particular in the circumstances of the case, under which it might have been proper to admit parol evidence, although it does not clearly appear what those circumstances were; at all events, it is not a case which can be set up as a general rule." And Judge Yeates says (p. 273): "There must certainly have been other facts, upon which the judgment of the court turned."

Eddowes *et al. v.* Thomas Niell.

Letter of credit.—Presumption of payment.

In order to render a letter of credit obligatory, it is not necessary, that it should be answered.[1]

A lapse of nineteen years, without notice of a default in payment, by the principal, is not, considering the circumstances of this case, such gross negligence, as to discharge the surety, and from the nature of this contract, such a lapse of time will not warrant a presumption of payment.[2]

This was an action on the case, for goods sold and delivered to William Niell, upon a special *assumpsit* by the defendant, Thomas Niell, to guaranty the payment of the price: pleas, 1st, *non assumpsit*, on which issue was joined; and 2d, the statute of limitations, to which, resident beyond seas, was replied, &c.

The plaintiffs were British merchants, from whom William Niell, a trader in Baltimore, was accustomed to import goods. On the 14th of January 1771, his brother, the defendant, wrote a letter to them, in which he said, "that to strengthen *his* brother's credit, he would guaranty all his dealings with their *house*." Several shipments of goods were made, both before and after the receipt of this letter; and William Niell continued to make payments on account, until the year 1775, when the revolutionary war began its agitations; and all commercial and amicable intercourse, between Great Britain and the United States was suspended, until the peace of 1783. In the year 1784, the plaintiffs sent a power of attorney to collect the debts due to them here; their agent applied to William Niell, who acknowledged the justice of the debt; but claimed an abatement of eight years' interest, on account of the war; and a further credit upon giving his bond for the amount; which the agent refused. In 1785, William Niell died, leaving the defendant his executor; to whom, in that character, the agent of the plaintiffs applied for payment; and he answered, by admitting the claim, and recommending a suit against the estate. No demand, however, was made, on the ground of the defendant's guarantee, until about the time of commencing the present action, in January 1790.

*134] *On these general facts, the *plaintiff's* counsel contended: 1st. That the demand was fair and legal, founded upon an unequivocal letter of credit, applicable, in its terms and meaning, as well to shipments made before, as after, it was received. 2d. That it was not necessary, to render the letter binding on the defendant, that the plaintiffs should answer it; nor that they should give notice to him of a default (as in the case of bills of exchange), at any period of the transaction. 3d. That there was no express waiver of the guarantee; and nothing can be implied, even in favor of a

[1] S. P. Smith *v.* Dann, 6 Hill 543; Union Bank *v.* Coster, 3 N. Y. 203. But in Kay *v.* Allen, 9 Penn. St. 320, it was decided, that a letter of credit does not create a liability on the part of the writer, unless he has notice of acceptance, or the guarantee and credit given were contemporaneous. See also, to the same point, Kellogg *v.* Stockton, 29 Penn. St. 460; Bay *v.* Thompson, 1 Pears. 551; Douglass *v.* Reynolds, 7 Pet. 113; s. c. 12 Id. 497; Lee *v.* Dick, 10 Id. 482; Adams *v.* Jones, 12 Id. 207; Wildes *v.* Savage, 1 Story 22.

[2] A continuing guarantor is not discharged, by the mere neglect of the creditor to enforce payment, in the absence of connivance, or of negligence so gross as to amount to fraud. McKechnie *v.* Ward, 58 N. Y. 541.

surety, since no new security was taken ; nor any negligence shown, in omitting to prosecute the principal, upon the demand of the surety.

For the *defendant*, it was urged: 1st. That the demand was a harsh and stale one ; founded on a letter, which had not, in fact, created any additional confidence or credit ; the receipt of which had never been acknowledged ; and the responsibility of which had never been suggested, for more than nineteen years. 2d. That the guarantee ought not to receive an indefinite interpretation ; but to be regarded as a credit, according to the course of the American trade, for a year ; and to forbear a suit for so long a time, during the life, and after the death of the principal, was, in fact, giving a new and independent credit ; which is tantamount to a release of the surety. 3d. That although the statute of limitations may not apply, as a plea in bar (the plaintiffs residing abroad), the lapse of time furnishes a presumption, that the defendant's letter never was accepted or relied upon, as a guarantee. 4th. That, on the most rigid construction, the guarantee can only apply to future, not to past transactions. And on these points, respectively, the following books were cited: 1 T. R. 167 ; 2 Bro. Ch. 579 ; 2 T. R. 366, 370 ; 1 Pow. Cont. 287 ; Ibid. 8, 9, 10.

By the Court.—Letters of credit are a common and useful instrument in the course of commerce. They are, however, of a very serious nature ; and the writer is bound to comply with the contents, according to their genuine and honest import. In order to render them obligatory as a contract, it is not necessary, that they should be answered, if credit is given upon them. Like the case of transmitting a bond, in a letter, acquiescence and acceptance are implied, in the silent receipt of the instrument.

It has been urged that the lapse of nineteen years, without notice of a default in payment by the principal, is a virtual abandonment of all recourse to the surety; on the principles applicable to bills of exchange, and to other negotiable instruments. But there is no analogy between the cases ; for the engagement of the letter of credit extends, in its very nature, to various future transactions, without reference to time or amount. It is true, however, that the gross negligence of a creditor, even of the *obligee in a bond, may operate to discharge a surety; as where the obligee is [*135 requested by the surety to proceed against the principal, in order to save the debt ; if he neglects or refuses to do so, the surety, both in law and equity, will be exonerated ; and this is the case in 2 Brown's Chancery Reports, 579. But does the evidence in the present action, justify an adoption of the rule? From the years 1771 and 1772, when the shipments were made, until the year 1775, when payments were first suspended, there could be no reason for calling on the defendant. From 1775, until the peace of 1783, the debtor was guilty of no default, which would warrant an application to the surety; for he was prevented, by the war, from corresponding with the creditor, and making any payment or remittance on account of the debt. As soon as the peace had restored the intercourse between the parties, the creditor applied for payment to the debtor, who acknowledged the debt ; claimed an abatement of interest ; and made some overtures for a settlement ; but died in the next year, without effecting anything in that respect. The agent of the plaintiffs then addressed the defendant, not as surety, but

as executor of his brother: and, indeed, it does not appear, that the agent knew of the letter of credit, until sometime afterwards.

On this review of the facts, we cannot perceive any culpable negligence, on the part of the plaintiffs, in pursuing their original debtor: nor is it clear, that they had any right to call upon the defendant, as a surety, until they had failed in their endeavors to recover from the principal; or the principal had become notoriously insolvent. The want of notice, therefore, in such a case, and under such circumstances, does not, in itself, furnish a bar to the demand; and although, in some instances of debts, a lapse of time will warrant a presumption of payment; yet, from the nature of this contract, no such presumption can arise here.

Verdict for the plaintiffs. (*a*)

Tilghman and *Bowie*, for the plaintiffs. *Ingersoll*, *Smith* and *Duncan*, for the defendant.

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*136] *JANUARY TERM, 1794.

SCHENKHOUSE *v.* GIBBS *et al.* (*b*)

Factors.—General average.

If a factor is employed by several foreign merchants, unconnected with each other, he may remit by a general bill, payable to one, with separate drafts on him, in favor of each of the others; but notice of such a remittance must be given to all the parties. In such a case, if a partial loss occurs, it must be borne, as a general average, by all who are concerned.

CASE. The facts on which the present cause depended, will be found in the report of *Ingraham, indorsee*, v. *Gibbs et al.* (2 Dall. 134); and the note annexed to it. (Ibid. 136.) The following charge was delivered to the jury.

BY THE COURT.—We are of opinion, that the mode of remitting by a general bill, payable to one merchant, with separate drafts in favor of each of the other merchants, who are interested in the amount of the bill, is a good and lawful execution of the trust and authority of a factor, employed by several distinct and unconnected merchants, resident abroad. No inconvenience can arise from the transaction, if all the parties are apprised of the distributive appropriation. It is essential, however, to such a remittance, that notice should be given to the parties. In the present case, there is no proof of express notice to the plaintiff: but this may be supplied by facts, which raise a fair presumption of the plaintiff's knowledge on the subject: and his delay in protesting and returning the bill, together with the draft on Portener, sent directly by the defendants to him, are facts of that description.

(*a*) This cause was tried at York Town *nisi prius*, on the 22d of May 1793, before SHIPPEN and BRADFORD, Justices.

(*b*) An outline of this case was annexed in a note to the case of Ingraham *v.* Gibbs, 2 Dall. 134; but it was thought of some importance, to add the opinion expressed by the court on the trial.

It only remains to observe, that Portener, the general trustee, could give no preference to any claimant on the fund; and that in case of a partial loss, it must have been borne, as a general average, by all the concerned.

Verdict for the defendants.

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*McEwen *v.* Gibbs *et al.* [*137

Witness.

Plaintiff, a certificated bankrupt, was admitted to prove a parol acceptance of a bill of exchange, the foundation of the action, after he had released his interest at the bar, his assignees having previously entered into security for costs.(*a*)

Case, on a parol acceptance of a bill of exchange. The plaintiff having become a certificated bankrupt, was called as a witness to prove the acceptance. *Dallas* objected to his competency, on the ground of the witness's liability for costs; and his interest in augmenting the estate surrendered under his commission.

But it appearing, that the assignees carried on the suit, and had entered into security for costs, The Court (after the plaintiff had released his interest at the bar) directed him to be sworn, upon the authority of *Scott* v. *Mc Clenachan.*

(*a*) A party to a suit is a competent witness to prove many facts, which are collateral to the issue; thus, a party is a competent witness to prove the service of notice to produce papers on the trial of a cause, and to prove notice of taking depositions. Jordan *v.* Cooper, 3 S. & R. 564. So, to prove that a subscribing witness to a deed is dead, to let in secondary evidence of its execution (Douglass's Lessee *v.* Sanderson, 1 Dall. 116; s. c. 1 Yeates 15); and that a material witness, whose deposition has been taken, is unable to attend court, by reason of advanced age and indisposition; Mean's Lessee *v.* Flora, cited, 1 Yeates 16; 2 Dall. 117. A person interested in a suit may be a witness to show the identity of blocks, taken from marked trees, on the different lines claimed by the parties. Lessee of Coxe *v.* Ewing, 4 Yeates 429. See also, The King *v.* Lukens, 1 Dall. 5, and note; Bank of Pennsylvania *v.* Hadfeg, 3 Yeates 560.

If no evidence is offered against a defendant to a suit, he may be a witness for his co-defendant, Wakely *v.* Hart, 6 Binn. 316; but if circumstances are proved, from which it is possible for the jury to presume facts amounting to guilt, the person against whom these facts have been proved, cannot be received as a witness. Pennsylvania *v.* Leach, Add. 353.

After a submission to an indictment, it is usual to hear the defendant's statement, but not under oath. Respublica *v.* Askew, 2 Dall. 189.

A party may be made a competent witness, wherever all his interest in the event of the suit can be removed. A plaintiff who, after the commencement of a suit, has made a voluntary assignment of all his property to creditors, and has also executed a release to the assignees, of all his interest in the money which may be recovered in the action, is a competent witness in the cause, provided all the costs are paid before he is sworn. Steele *v.* Phœnix Ins. Co., 3 Binn. 306. See also, Field *v.* Biddle, 2 Dall. 171–2, note; Bennett *v.* Fleshington, 16 S. & R. 193; Cook *v.* Grant, Id. 198. In replevin by R., the defendant avowed the taking, in a house occupied by N., for rent due by N. to defendant; the plaintiff replied no rent in arrear; *Held*, that N. was not a witness for the plaintiff, being liable to plaintiff for the costs of suit, in addition to the amount of rent recovered. Rush *v.* Flickwire, 17 S. & R. 82. See, on this subject, McIlroy *v.* McIlroy, 1 Rawle 433; Hart *v.* Heilner, 3 Id. 407; Kimball *v.* Kimball, Id. 469; Cox *v.* Norton, 1 P. & W. 412; Black *v.* Marvin, 2 Id. 138; Gallagher *v.* Milligan, 2 Id. 177.

*APRIL TERM, 1794.

Boyd's Lessee *v.* Cowan.

Ejectment.—Mesne profits.

The mesne profits can be recovered in an ejectment, by way of damages.(*a*)

Ejectment, tried at West Chester, in Chester county, on the 22d of October 1793. The jury gave a verdict in favor of the plaintiff, for the premises mentioned in the declaration; and also for 41*l.* 13*s.* 4*d.* damages, being the value of the mesne profits; subject to the opinion of the court on a point reserved; to wit: whether the mesne profits can be recovered in an ejectment, by way of damages? After argument, when the judges were about to deliver their opinions, the parties made an amicable settlement of their dispute: but the general question being of importance, no excuse will be offered, for inserting here, the opinion prepared by the chief justice.

McKean, Chief Justice.—In delivering my sentiments upon the point reserved in this cause, I shall first consider the objections made to the recovery of the mesne profits, in the action of ejectment; and then, the reasons in favor of such a recovery.

1. The leading objection (and which, at first sight, appears the strongest) is, that the action of trespass for the mesne profits, is always laid with a *continuando;* thus differing from the form of the action of ejectment, which alleges only a single act of entry and ouster. For which 3 Black. 205; 3 Wils. 118; 2 Bac. Abr. 181; and Runnington, 4, 5, 44, 164, have been cited.

2. Special bail can be required in the action of trespass for the mesne profits, but not in the ejectment. (2 Barnes 59.)

3. If damages are given for the mesne profits, in the ejectment, and an action of trespass shall afterwards be brought for the same cause, the former cannot be pleaded in bar.

4. The law has been against this practice, and cannot now be altered except by the legislature.

*139] *5. It would be inconvenient to allow the practice; because titles are frequently so complicated and difficult, as sufficiently to command the whole attention of the jury; and it would be too burdensome to impose

(*a*) The plaintiff in an action of ejectment may recover mesne profits, on giving notice to the defendant, that he intends to proceed for them. Lessee of Battin *v.* Bigelow, 1 Peters C. C. 452. "When the action of ejectment remained in its primitive state; while it was strictly a remedy for a lessee, *quare ejicit infra terminum*, there, the value of the land, during the time the defendant tortiously held it, was the measure of damages. When the proceeding came to be fictitious, nominal damages only were given; and this introduced the action of trespass *vi et armis*, generally called the action for mesne profits, and it would seem, that even in the fictitious action, the plaintiff may recover his real damages, by giving notice of his intention to the defendant. But the usual and safest course is, only to take a verdict for nominal damages, and recover the real damages in the action for the mesne profits, and that has been the unvaried practice, as well before as since the act introducing the writ." *Per* Duncan, J., Osbourne *v.* Osbourne, 11 S. & R. 58.

upon them, also, the ascertaining the value of the mesne profits by one verdict.

This is the amount of all that has been, or, I believe, that can be urged against the measure. My answer to the first objection is, that I agree that the form of the writ and declaration in an action of trespass for the mesne profits contains a *continuando* of the trespass, and that it cannot be changed but by positive law. This prevents the necessity of several actions of trespass, for every several trespass; and unless it is so laid, it nowhere appearing on the record that the trespass was continued for a certain time, it must be taken by the court and jury to be for a single act, and damages can be given for nothing more. But in an ejectment, there is no arrest, no writ, and the form of the charge in the declaration in the king's bench in England is, "that the defendant entered into the tenements, &c., of the plaintiff, with force and arms, &c., and ejected, expelled and removed him; and him being so ejected, expelled and removed, the defendant hath hitherto withheld from him, and still doth withhold, the possession, &c." (Jacob's Law Dictionary, title Ejectment; 1 vol. Attorney's Practice in K. B. page 424, 440; Lill. Ent. 192, 205.) Besides, it sufficiently appears on the whole record in the ejectment, that the plaintiff was in possession, that the defendants ousted him on a certain day, and detained the possession until the trial; so that the action is not for a single act of trespass; and therefore, the jury may well give damages for the whole time the wrong continued. At all events, the precedent may be so made, in the common pleas, as well as in the supreme court.

With respect to the second objection, that special bail can be required in the action of trespass for the mesne profits, but not in the ejectment: it is true, that, upon affidavit, the court of common pleas, in England, has ruled special bail in the action of trespass for mesne profits, though it has been held otherwise in the king's bench. (*Duncombe* v. *Motteram*, Pr. Reg. Com. Pl. 62.) However, there appears to be no weight in this, when it is considered, that this action is brought after the ejectment is determined, so that the plaintiff is in no worse condition (although he has no special bail in the ejectment) on that account, but rather a better; for if the value of the mesne profits is recovered in the ejectment, he may have a *fieri facias* for them immediately. If, too, the defendant should, before execution is executed, withdraw his person and effects from the jurisdiction of the court, the plaintiff would still be left in a better situation; for if he pursues the defendant, he may arrest him in an action of debt on the judgment, in any of the United States; whereas, in such a case, no action of trespass for the mesne profits could be brought (it being a local action), in a foreign country, and bail demanded.

*In answer to the third, I will only mention, that nothing appears plainer, than that the defendant may plead the recovery of the damages in the ejectment; with an averment that they were given for the mesne profits, in bar of the action of trespass. (1 Leon. 313, ca. 437; 3 Ibid. 194, ca. 242. [*140

The fourth objection, that this court cannot alter the law, is correct, beyond controversy; but there is no positive law respecting this action, or directing that the mesne profits shall not be recovered in it, as well as possession; and the court can alter the practice, and institute any rules in an

action of ejectment, which they may deem beneficial, or for the furtherance of justice, without legislative aid.

An ejectment is the creature of Westminster Hall, and has been gradually moulded into a course of practice, by the rules of the courts. It is, in form, a fiction; in substance, an action invented for the speedy trial of titles to the possession of lands. For a long time, damages only could be recovered in this action, the measure of which was always the mesne profits. (3 Wils. 118, 120.) In the 14 *Hen. VII.*, and not before, the term or thing, as well as damages, were allowed to be recovered. At first, there was a lease really sealed on the land, and the action was against the real tenant in possession. It came in place of the assize, in which action, the possession, as well as the mesne profits, was recoverable. Afterwards, casual ejectors were set up; and notice ordered to be given to the tenant in possession. Then the new practice was invented by Chief Justice Rolle. Not very long ago (in 1751), it was ruled in the common pleas, that if, after a recovery in ejectment against the defendant, he should bring a writ of error, he should give bail to the plaintiff in a sum equal to the value of, at least, two years' mesne profits. (2 Barnes Notes, 86.) Many other alterations have taken place; and the same authority which brought it thus far, may certainly carry it to a higher degree of perfection, as experience happens to show inconveniences or defects. Being under the control of the court, it may be modelled so as to answer, in the best manner, every end of justice and convenience. (3 Burr. 1292, 1295; 3 Bl. Com. 205; 2 Burr. 660.) Besides, by the 6th section of the act of assembly, entitled "an act for the more speedy and effectual administration of justice," it is declared and enacted, that "the justices of the supreme court have full power and authority to make such rules for the regulating the practice of the said court, and expediting the determination of suits, as they in their discretion shall judge necessary." Of the power of the court, therefore, in this particular, I entertain no doubt.

I shall now, briefly, consider the *argumentum ab inconvenienti;* which refers but to a single instance, to wit, the difficulty the jury may labor under, in deciding on the titles of the parties to the possession, and at the same time, in fixing the value *of the mesne profits, if the verdict shall be for the plaintiff. There can be no great hardship in this. In actions of waste, dower, assize, and all others where the thing itself, as well as the damages, is recovered, the jury are liable to the same inconvenience: nor can I perceive any great perplexity that can arise in determining the rent, or annual value of a house, or parcel of land, when complete evidence is given of it.

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It appears to me, that the inconvenience or hardship is the other way. After a person has been unlawfully kept out of his house or land, for a series of years, and undergone great trouble and expense in recovering a judgment for them; to give him the possession merely, without any satisfaction for the use and occupation, pending the action, does not seem complete justice. To tell him, "You must sue for the mesne profits in a new action, fee counsel, attend the courts, produce witnesses, and have a new trial, for the sole purpose of fixing their value," is certainly imposing an improper burden upon him, if justice can be had in a more speedy, cheap and easy way. Taking a verdict for the amount of the mesne profits, as well as on the title in

the ejectment, will prevent this circuity, delay and expense; and I believe it to be equally beneficial for the defendant; for if, on the trial, he shows a reasonable ground for controverting the plaintiff's claim, or a specious title in himself, a jury would be inclined to give but very moderate damages against him (of which the jury in the action for the mesne profits can have no consideration, as the title cannot in that action be again gone into), and he would certainly be saved the costs and expenses of the second suit.

It is in argument, in law and in logic, as it is in nature (*destructio unius, est generatio alterius*), that the destruction begets a proof. I shall, however, proceed to consider the arguments and proofs on the other side of the question. This improvement of the action of ejectment has been suggested by the court in the case of *Treherne* v. *Gressingham*, 2 Barnes Notes 59; *Whitefield's case*, 1 Lill. P. R. 680; Buller's Nisi Prius, 88. There has been no judicial opinion given on this subject, in the supreme court of Pennsylvania, prior to the revolution, that I have heard of, unless it was in the case of the *Lessees of James Dixon* v. *Thomas Hosack*, tried on the 15th of April 1775, when 41*l.* were awarded for the plaintiff; but such an opinion has been given in Delaware, above thirty years ago; and the general practice in that state has been, ever since, to take a verdict for the mesne profits. in the action of ejectment. Nay, my memory does not serve me, in recollecting a single instance, where an action of trespass for the mesne profits has been brought in Delaware, from the time mentioned; though, without doubt, it might have been done. There has been no similar precedent in Pennsylvania, since the revolution; but on the other hand, it has been recommended, *more than once, in the supreme court of this state, to take a verdict for the [*142 mesne profits, in the ejectment; and the point now before the court was argued, and the same case cited, by Messieurs *Tilghman* and *Sergeant*, in the case of *William Tharpe* v. *John Bell*, of September term 1787, when judgment was given in favor of the measure. So, in an ejectment, on the demise of *Jasper Yeates, Esq., and others* v. *Charles Stewart*, which was tried at *nisi prius*, at Chambersburg, for the county of Franklin, in June 1789, a verdict was taken for 130*l.* damages, for the mesne profits; and a judgment rendered upon it, for the plaintiff, *in banc.*

Upon the whole, as it appears that this court has the power of allowing a verdict to be given for the mesne profits, as damages in the ejectment; as the judges in England, so late as the year 1742, could see no reason why it should not be done; as it has been in use for many years in the state of Delaware, under similar authority, and no inconvenience from the practice has hitherto been there discovered; as it has been in precedent in this court, by judicial decisions: and as it is calculated, in my judgment, for the reasons assigned, to answer more fully the ends of justice and convenience, by avoiding unnecessary delay, a circuity of action, and a double expense to suitors, I still must hold the opinion, which my former brethren, as well as myself, unanimously, entertained upon the subject. If it shall be thought best by the court, that plaintiffs in ejectments should in all cases be turned round to an action of trespass, for recovering the mesne profits; yet, after what has passed, on former occasions, I conceive it ought not to be the rule in this action; but should be applied only to future cases; because, at the

present moment, the law in Pennsylvania is, that the verdict in this action is regular, and agreeable to the practice of the supreme court. *Est boni judicis, ampliare justitiam.*

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*143] *SEPTEMBER TERM, 1794.

COMMONWEALTH *v.* CHAMBRE.

Computation of time.

The computation of time must be by calendar months, in the exception (in the 10th section of the act of 1780, for the gradual abolition of slavery) of domestic slaves attending upon persons passing through, or sojourning in the state, &c., provided they be not retained therein longer than six months.

A *habeas corpus* was issued to the jailer of Philadelphia, to bring before Judge SHIPPEN, the bodies of Magdalen and Zare, two negro women, committed as the absconding slaves of Mrs. Chambrè. The judge, after hearing the case opened, adjourned it, for argument and decision, to the supreme court, on the 13th of September 1794, when the following facts appeared:

Mrs. Chambrè was a widow lady, in the island of St. Domingo, and owned the negroes in question as slaves: but on the conflagration at Cape François, she fled, bringing them with her to Philadelphia; where she resided five calendar months and three weeks; a period that exceeds six lunar months, in computation of time. She then removed with the negroes to Burlington, in the state of New Jersey, designing, as it was suggested, to avoid the operation of the act for the gradual abolition of slavery; but no proof was offered, that she had ever intended to settle in Pennsylvania. The negroes, absconding from Mrs. Chambrè, came to Philadelphia; and now they asserted their freedom, under the 10th section of the act, which declares all unregistered negroes and mulattoes to be free, "except (*inter alia*) the domestic slaves attending upon persons passing through or sojourning in this state, and not becoming resident therein: provided such domestic slaves be not aliened or sold to any inhabitant, nor retained in this state longer than six months." (1 Dall. Laws, 841.)

For the *negroes*, it was contended, that, upon authority, the general legislative expression, must be construed to mean lunar, and not calendar, months; for which were cited, 5 Co. 2; Cro. Jac. 167; 1 Str. 446; 2 Bl. Com. 141; 3 Burr. 1455; Doug. 446, 463. *And that, even if the computation by calendar months were more usual at common law, a different construction would be adopted in favor of liberty, and to prevent an evasion of the most honorable statute in the Pennsylvania code. Harg. Co. Litt. 145 *b*.

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But THE COURT (stopping the counsel for Mrs. Chambrè) said, that

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[1] It is now well settled, that mesne profits are recoverable in the ejectment suit, up to the time of the verdict. Duncan *v.* McGill, 4 Whart. 230. But the plaintiff must give previous notice of such claim. Cook *v.* Nicholas, 2 W. & S. 27; Bayard *v.* Inglis, 5 Id. 465.

they were unanimously of opinion, that the legislature intended calendar months;(a) that the same expression, in other acts of the general assembly, had uniformly received the same construction (*Brudenell* v. *Vaux*, 2 Dall. 302); that there was nothing illegal or improper in the conduct of Mrs. Chambrè, on the occasion; and that, therefore, the negroes must be remanded into her service.

Lewis, *Ingersoll* and *Franklin*, for the negroes. *M. Levy*, for Mrs. Chambrè.

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*SEPTEMBER TERM, 1795. [*145

Respublica *v.* Mulatto Bob.

Murder.— Witness.

Although murder in the first degree is, by the act of assembly, confined to the wilful, deliberate and premeditated killing of another, yet, the intention remains, as much as ever, the criterion of the crime.

A slave is not a competent witness.

Indictment for murder of the first degree. The charge of the court was delivered by the Chief Justice, who stated the facts and the law to the following effect :(b)

McKean, Chief Justice.—The evidence in this case may be comprised in a few words. It appears, that a wedding being fixed for Easter Monday, a considerable number of negroes assembled; and about 10 o'clock at night, a quarrel arose between mulatto Bob, the prisoner at the bar, and negro David, the deceased. For awhile, the parties fought with fists; and the prisoner was heard to exclaim "enough!" The affray, however, became general, and continued so for some time. When it was over, the prisoner went to a neighboring pile of wood, and furnished himself with a club; he was advised not to use it, but he declared that he would, and entered the crowd with it in his hand; after remaining there about ten minutes, he left the crowd, without his club; and again repairing to the wood-pile, took up an axe; being likewise dissuaded from returning to the crowd with the axe, he said "he would do it;" and striking the instrument, with great passion, into the ground, "swore, that he would split down any fellows that were

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(a) Months are to be considered calendar, in all contracts or transactions between man and man, Shapley *v.* Garey, 6 S. & R. 539;[1] but where a sentence of imprisonment was recorded, for the space of one month, the prisoner was discharged at the expiration of a lunar month. Respublica *v.* Oswald, 1 Dall. 329, in note.

(b) During the trial, the counsel for the prisoner offered a negro slave as a witness in his favor; but, the attorney-general objecting to his competency, he was rejected, without argument: and it was said by McKean, Chief Justice, that it was a settled point at common law, that a slave could not be a witness, because of the unbounded influence of his master over him; which was, at least, equal to duress; that the act of assembly was in aid of the common law, not to change its principles; and that it would be difficult to administer an oath to a slave, for want of knowing any religion he professed.

[1] Thomas *v.* Shoemaker, 6 W. & S. 179. The word "month," in a statute, means a calendar month. Moore *v.* Houston, 3 S. & R. 169.

saucy." Accordingly, he mixed once more among the people; a struggle
*146] *was immediately heard about the axe; the prisoner then struck the deceased with it, on the head; the deceased fell; and as he was attempting to rise, the prisoner gave him a second blow on the head, with the sharp edge, which penetrated to the brain. After languishing three days, death was the consequence of this wound.

From these facts, we are to inquire, what crime the prisoner has committed? Murder, in the first degree, is the wilful, deliberate and premeditated killing of another.(*a*) There are various inferior kinds of homicide; but on the present indictment, our attention is confined to a consideration of the highest, and most aggravated description of the crime. Then, let us ask, did the prisoner wilfully kill the deceased? It is not pretended, that there was any accident in the case; and therefore, the act must have been wilful. Was the killing deliberate and premeditated? or was it the effect of sudden passion, produced by a reasonable provocation? There had been a combat with fists; but this was over, when the prisoner, without any new provocation, first procured a club, and losing that weapon, afterwards armed himself with an axe. It cannot surely be thought, that the original combat was a sufficient provocation for the prisoner's taking the life of his antagonist. An assault and battery may, indeed, be resisted and repelled, by a battery more violent; but the life of a fellow-creature must not be taken, unless in self-defence.

It has been objected, however, that the amendment of our penal code, renders *premeditation* an indispensable ingredient, to constitute murder of the first degree. But still, it must be allowed, that the intention remains as much as ever the true criterion of crimes, in law, as well as in ethics; and the intention of the party can only be collected from his words and actions. In the present case, the prisoner declared, that he would split the skull of any fellows who would be saucy; and he actually killed the deceased, in the way which he had menaced. But let it be supposed, that a man, without uttering a word, should strike another on the head with an axe, it must, on every principle by which we can judge of human actions, be deemed a premeditated violence.

The construction which is now given to the act of assembly on this point, must decide, whether the law shall have a beneficial or pernicious operation. Before the act was passed, the prisoner's offence would clearly have amounted to murder; all the circumstances implying that malice which is the gist of the definition of the crime at common law; and if he escapes with impunity, under an interpretation of the act, different from the one which we have delivered, a case can hardly occur to warrant a conviction for murder in the first degree.[1]

*147] *Tenderness and mercy are amiable qualities of the mind; but if they are exercised and indulged, beyond the control of reason, and

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(*a*) 3 Smith's Laws, 187.

[1] In murder, if an intention to kill exist, it is *wilful;* if the intention be accompanied by such circumstances as evince a mind fully conscious of its own purpose and design, it is *deliberate;* and if sufficient time be afforded to enable the mind fully to frame the design to kill, and to select the instrument, or to frame the plan to carry this design into execution, it is *premeditated.* Commonwealth *v.* Drum, 58 Penn. St. 9; Green v. Commonwealth, 83 Id. 75.

the limits of justice, for the sake of individuals, the peace, order and happiness of society, will inevitably be impaired and endangered. So far as respects the prisoner, I lament the tendency of these observations; but so far as respects the public, I have felt it a sacred duty to submit them to your consideration.

Verdict, guilty.(*a*)

HOLLOBACK *v.* VAN BUSKINK, surviving administrator, &c.

RACROTH *et ux. v.* The Same.

Assumpsit.

Assumpsit will lie on the part of residuary legatees, against an administrator *cum testamento annexo*, without proof of an express assumption by him.[1]

THESE were actions on the case, in which the plaintiffs declared on a general *indebitatus assumpsit*, for money had and received by the defendant (who was the surviving administrator *cum testamento annexo* of Catharine Holloback) to their use, respectively. They claim, distributive shares in the *residuum* of the estate of Catharine Holloback, under her will: but it was questioned, whether such actions would lie, without proving an assumption on the part of the defendant.

THE COURT, however, declared their opinion, that the actions might be maintained, without proof of an express *assumpsit:* and verdicts were, accordingly, given for the plaintiffs, with leave to move for new trials. (*b*)

ANONYMOUS. (*c*)

Conditional verdict.

Case for obstructing a water-course, by which the plaintiff's meadow was watered. Plaintiff having proved his right to the course, his counsel executed and filed a writing, by which they bound him to release any damages, that the jury might give, if defendant should execute a deed, securing to plaintiff the enjoyment of the water, and the court advised the jury, on this condition, to find the full value of the meadow in damages.

THIS was an action on the case for obstructing a water-course, by which the plaintiff's meadow was watered. On the trial, it appeared, that the defendant had purchased a mill, with notice that the vendor had before sold the meadow in question to the plaintiff, covenanting that the plaintiff might use the water, over and above what was necessary for the mill. The defendant obstructed the water-course; and it seemed to have been his object, by so doing, to compel the plaintiff to sell the meadow to him.

On these facts, THE COURT recommended (with the concurrence of the

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(*a*) This indictment was tried at Easton, on the 21st of June 1795, before MCKEAN, Chief Justice, and SMITH, Justice.

(*b*) Decided before YEATES and SMITH, Justices, at Northampton *nisi prius*, in October 1795.

(*c*) The name of this case is Walker *v.* Butz, 1 Yeates 574, which is a better report.

[1] This is not law, at the present day; the remedy is now exclusively in the orphans' court. Ashford *v.* Ewing, 25 Penn. St. 213.

counsel on both sides) that the defendant should do *an act of justice in securing to the plaintiff, by deed, the enjoyment of the water-course; but he obstinately rejected the proposition. The plaintiff's counsel, thereupon, executed and filed a writing, by which they bound their client to release any damages that the jury might give, in case the defendant should execute such a deed as the court had proposed; and the court advised the jury, on this condition, to find the full value of the meadow in damages; which was, accordingly, done. (*a*)

Sitgreaves and *Thomas*, for the plaintiff. *Ingersoll* and *Clymer*, for the defendant. (*b*)

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*149] *DECEMBER TERM, 1795.

Graham *v.* Bickham.[1]

Damages.

Unless the penalty for breach of a contract, is a sum, agreed to be paid and received, absolutely, in lieu of performance, damages may be recovered commensurate with the injury suffered by a non-performance.

This was an action on the case for damages, which were laid at 10,000*l.* in the declaration, founded upon the following agreement, signed by the defendant:

"I do certify, that I have bought of William Graham 17,344 $\frac{76}{100}$ dollars, six per cents of the United States, to be delivered to me, on the 1st of July next, on my paying to him, on or before transferring the same, the sum of 22,318 $\frac{49}{100}$ dollars in specie. And for the faithful performance of the above agreement, I bind myself, my heirs and executors, in the sum of 1000*l.*, lawful money of Pennsylvania, to be paid to said Graham, or his order, in case the same is not fully complied with by me. Philadelphia, 17th January 1792."

On the trial of the cause, a verdict was given in favor of the plaintiff, for 1798*l.* 17*s.* 7*d.*, subject to the opinion of the court, on the question, whether the plaintiff could recover more than 1000*l.* in an action upon this agreement?

The case was argued by *E. Tilghman* and *Ingersoll*, for the plaintiff, on the position, that unless a certain sum is agreed by the parties to be paid

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(*a*) In the case of Clyde *v.* Clyde, 1 Yeates 92, which was a special action of *assumpsit* for a privilege of a water-course through the lands of the defendant, large damages were given by the jury, under the direction of the court, to compel the defendant to do justice. See, on the subject of conditional verdicts, Decamp *v.* Feay, 5 S. & R. 323; Coolbaugh *v.* Pierce, 8 Id. 418.[2]

(*b*) Decided before Yeates and Smith, Justices, at Northampton *nisi prius*, in October 1795. In delivering the charge to the jury, Mr. Justice Yeates referred to a similar case, before the Chief Justice and himself, in which the court had given, and the jury had adopted, the same advice.

[1] S. c. 2 Yeates 62.

[2] And see 1 Tr. & H. Pr. § 53, and notes.

and received, at all events, as the measure of damages, the plaintiff may waive the penalty of the agreement, and proceed for damages according to the actual injury. (4 Burr. 2228; 2 Atk. 371; 1 H. Black. 232; 1 W Black. 395, 373; 2 Atk. 190.)

Lewis and *Rawle*, for the defendant, insisted, that the contract ought not to be enforced, beyond the meaning and understanding of the parties; which was obviously to fix a sum, as the extent of the defendant's responsibility, in case of a non-compliance *with his engagement. (16 Vin. Abr. 301, "Penalty," pl. 3, 5, 10.) [*150

By the Court.—The substance of the agreement between the parties was, to buy and sell stock. The penalty was merely superadded as a security for performance; and not as a sum to be paid and received absolutely, in lieu of performance. The plaintiff is entitled (notwithstanding the penalty) to recover damages, commensurate with the injury suffered by a non-performance. The judgment must, therefore, be rendered in his favor, for the full amount of the verdict.

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*MARCH TERM, 1796. [*151

Febeiger's Lessee *v.* Craighead. (*a*)

Sheriff's sale.

A sheriff's sale of land, by virtue of a judgment and execution, subsequent to a mortgage to the trustees of the loan-office, does not destroy its lien.

At a court of *Nisi Prius*, held at Carlisle, a case was stated for the opinion of the court, containing these facts: A tract of land, in Cumberland county, was mortgaged by John Glenn to the trustees of the loan-office (whose rights, powers and duties, have been transferred by law to the plaintiff, as state treasurer), and the land was afterward levied upon, and sold at a sheriff's sale, to the defendant, by virtue of a subsequent judgment and execution. The question is, whether the mortgage remains a lien upon the land, against the purchaser at sheriff's sale? (*b*)

(*a*) s. c. 2 Yeates 42; and for C. J. Shippen's notes of this case, see 3 Rawle 117, note *a*.[1]

(*b*) Whatever may have been the effect of a judicial sale on other interests, both the policy and the practice of the legislature have been, to hold the lien of a mortgage to the state undischarged, by anything but actual payment into the treasury, and such mortgage is not divested by a judicial sale, on any other lien of the land mortgaged, nor is it to be paid out of the purchase-money raised by such sale. Duncan *v.* Reiff, 3 P. & W. 368. In the report of the case of Febeiger's Lessee *v.* Craighead, by Yeates, a *quære* is made, as to the effect, upon a prior mortgage to an individual, of a sale under an execution issued by virtue of a judgment subsequent to the mortgage. In the case of Moliere's Lessee *v.* Noe, 4 Dall. 450, which was a sale by order of an orphans' court, this point was suggested, and the judges expressed their opinion, in concurrence with that of the counsel on both sides, that a mortgage retains its lien on the premises, not-

[1] Said to be imperfectly reported, in 3 Rawle 137.

By the Court.—The case admits of no doubt. Judgment must be entered for the plaintiff.

Ingersoll, attorney-general, for the plaintiff. *Lewis*, for the defendant.

Bank of North America *v.* Wycoff. (*a*)

Notice of non-payment.— Witness.

The indorser of a promissory note must receive notice, within a reasonable time, of the non-payment of the note by the maker.

An executor, who is entitled to a share in the residuum of his testator's estate, which is interested in the suit, is not a competent witness to prove such notice, although the objection appear on his cross-examination.

Case, by the indorsee against the payee and indorser of a promissory note, made by Joseph Harrison.

The question was, whether the defendant had received notice within a reasonable time, of the non-payment of the note by the maker? Jacob Lawerswyler, the runner of the bank, was called as a witness, to prove the notice; but after a long examination in chief, he stated on his cross-examination, "that he was the executor of Jacob Winney, a stockholder in the bank of North America; and was entitled to a share in the residuum of the testator's estate."

*152] *The defendant's counsel then objected to the competency of the witness, on account of his interest in the bank. They insisted, that although this appeared after a cross-examination, it was sufficient for the rejection of his evidence altogether; and that, consequently, as there was no proof of notice, independent of his evidence, the plaintiff must be nonsuited.

The Court concurring, clearly and explicitly, in the opinion of the defendant's counsel,

The plaintiff suffered a nonsuit.

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withstanding such a sale. The question above stated was, however, presented to the supreme court, for the first time, for direct decision, in Willard *v.* Norris, 2 Rawle 56; and then it was held, that when land, subject to a mortgage, is sold under a judgment, obtained subsequently to the execution and recording of the mortgage, the purchaser at sheriff's sale takes the land discharged of the lien of the mortgage. This decision was received with astonishment by the profession, and alarm by the public; and at the ensuing session of the legislature, bills were simultaneously introduced into both houses, to preserve the lien of a mortgage, notwithstanding a sale under a junior incumbrance; subsequently, the act of 6th April 1830, was passed to that effect. Several decisions followed that in Willard *v.* Morris, sustaining and confirming it; McLanahan *v.* Wyant, 1 P. & W. 96; Fickes *v.* Ersick, 2 Rawle 166; Presbyterian Corporation *v.* Wallace, 3 Id. 109; in this case, the principle was fully discussed, as *res integra;* and the learned arguments of the counsel on both sides, and the elaborate and profound opinion of the court, present a complete disquisition on the subject. Notwithstanding the act of 1830, the lien of a mortgage may be divested by a sale under a junior incumbrance, if such be the agreement of the parties. Shultz *v.* Diehl, 2 P. & W. 273.[1]

(*a*) s. c. 2 Yeates 39.

[1] The decisions under the act of 1830, which are foreign to the point involved in Febeiger *v.* Craighead, will be found collected in Bright. Dig. 1103–4. And see 1 Tr. & H. Pr. § 1317–8.

Bell *v.* Andrews. (*a*)

Statute of frauds.

Where there has been payment of the price of land, under a parol agreement for the sale of it, an action will lie to recover damages for the non-performance of such a contract.[1]

This was an action on the case, to recover damages, for the breach of an agreement to sell and convey to the plaintiff, in fee-simple, a tract of land in Westmoreland county.

Hallowell, for the plaintiff, offered parol evidence of the agreement, as stated in the declaration; of the payment of the price of the land; of the defendant's subsequent acknowledgment of the sale and payment; and of the defendant's refusal to execute a conveyance.

S. Levy, for the defendant, objected to any proof of a parol agreement. for the sale of lands in fee-simple, as the act for the prevention of frauds and perjuries (1 Dall. Laws, 640; 1 Sm. Laws, 389), required, expressly, that all such agreements, to have the full effect, must be put in writing, and be signed by the parties, or their agents. But—

By the Court.—The payment of the consideration-money may, certainly, be proved by parol evidence. The agreement being then executed by one of the parties, is not affected by the act of assembly;(*b*) and it is settled, that the English statute against frauds and perjuries was never extended to Pennsylvania. The act of assembly does not make a parol agreement for the sale of lands, void; though it restricts the operation of the agreement, as to the acquisition of an interest in the land, and no title in fee-simple can be derived under it. But, certainly, an action will lie to recover damages for the non-performance of such an agreement.(*c*)

The objection to the evidence overruled.

(*a*) This case was tried at *nisi prius*, on the 25th of August 1796, before McKean, Chief Justice, and Shippen and Smith, Justices, and there was a verdict for the plaintiff. It appears by the record, that two witnesses were examined.

(*b*) Though the decision in this case is perfectly correct, yet the *dictum* of the court when ruling the question of evidence before them, must be attributed to the hurry of a jury-trial; for no aid from the doctrine of part performance could be necessary, in a case which depended for support, not upon the agreement being taken out of the operation of the act of assembly, by the equity arising from part performance of it, but upon the ground that the agreement was not rendered void by the act.

(*c*) Ewing *v.* Tees, 1 Binn. 450, in which Chief Justice Tilghman says, "in several cases at *nisi prius*, damages have been recovered on parol contracts for the sale of land."[2]

[1] Clyde *v.* Clyde, 1 Yeates 92; Sedam *v.* Shaffer, 5 W. & S. 529; Meason *v.* Kaine, 63 Penn. St. 335; s. c. 67 Id. 126; Thompson *v.* Sheplar, 72 Id. 160.

[2] As to the measure of damages, see Ellet *v.* Paxson, 2 W. & S. 418; Meason v. Kaine, 63 Penn. St. 335; s. c. 67 Id. 126; Bouser *v.* Cessna, 62 Id. 148; Harris *v.* Harris, 70 Id. 170. If no expenses have been incurred on the faith of the agreement, only nominal damages are recoverable. McCafferty *v.* Griswold, 29 Pitts. L. J. 269.

*DECEMBER TERM, 1797.

STROUD, assignee, &c., *v.* LOCKART *et al.*

Mortgage.

If the purchaser of property knows, at the time of his purchase, of the existence of a mortgage, which has not been recorded according to the act of assembly, the premises will be bound by the mortgage.(*a*)

Scire facias on a mortgage. The mortgage had not been recorded, conformable to the act of assembly; and Lockart had purchased the premises. But, on the trial, the plaintiff proved, that Lockart knew of the existence of the mortgage, at the time of his purchase, and said he would have to pay it, although it was not then recorded.

BY THE COURT.—The case is too plain for controversy. The plaintiff must have a verdict; and all the trouble of the jury will be to calculate the interest.

Verdict for the plaintiff.

SEAGROVE *v.* REDMAN *et al.* (*b*)

Evidence.

A book of original entries (some of which were made in the plaintiff's handwriting, and some in that of a clerk), relating to a mercantile transaction in a foreign country, produced and sworn to by the plaintiff, was admitted in evidence.

THE plaintiff resided in the Havana, and was the agent of the defendants in fitting out a privateer for them, during the war. On the trial of this cause, he produced, and swore to the authenticity of, his book of original entries (some of which were made in his own handwriting, and some in the handwriting of a clerk), to prove the disbursements for the privateer.

And THE COURT admitted the evidence, after opposition, upon the principle, that as it related to a mercantile transaction, which took place in a foreign country, a relaxation of the strict rules of the common law was reasonable, just and necessary.

(*a*) See, on this point, Levinz *v.* Will, 1 Dall. 430, and notes; Parker *v.* Wood, Id. 436.[1]

(*b*) s. c. 2 Yeates 254.

[1] And see Speer *v.* Evans, 47 Penn. St. 141. Actual notice is equivalent to constructive notice by recording. Id. 144; WOODWARD, C. J.

*DECEMBER TERM, 1798.

Nicholson's Lessee *v.* Wallis. (*a*)

Ejectment.—Limitation.

A decision of the Board of Property was pronounced, upon a *caveat*, in favor of the defendant, on the 14th of February 1796: a declaration, entitled as of April term 1796, was served by a private individual on the defendant, on the 10th of August 1796; and it was entered on the docket of the supreme court, on the 20th of that month; but contrary to expectation, the court had risen on the preceding day, which, of course, then ended the term: *Held*, that the ejectment was well brought, within the six months allowed by the act of 1792.

This cause had been decided by the board of property, in favor of the defendant, upon a *caveat* respecting land in Northumberland county, on the 14th of February 1796; but the patent was stayed for six months, within which time, the party is allowed, by the act of assembly, to enter his suit at common law, in the nature of an appeal. (Act 3d April 1792, § 11, 3 Sm. Laws, 74.) For that purpose, a declaration in ejectment was framed, entitled as of April term 1796; it was served by a private hand (not the sheriff), on the defendant, in Philadelphia, on the 10th of August 1796; and it was entered on the docket of the supreme court, on Saturday, the 20th of August 1796: but the court had risen (contrary to the usual practice, and the expectation of the bar) on the preceding day, when, of course, the term ended.

In April 1797, a rule was obtained, by the defendant, to show cause why the ejectment should not be stricken from the docket; on the ground, that it was not entered, within the six months allowed by the act of assembly. And upon the argument in chief, at the present term, it was contended, that the cause was not in the possession of the court, until the process was returned (6 T. R. 617); that, in the case of the sheriff, the court might have called for a return, but not in the case of a special agent, employed by the plaintiff to execute a writ (4 T. R. 119); and that a service of the declaration in ejectment upon the defendant, is not an entry of the suit, within the terms or meaning of the law.

The *plaintiff's* counsel urged the injustice that would be done, by a mere matter of accident and surprise, if the rising of the court, a day earlier than the usage, should be the ground of quashing the present suit. They further insisted, that the service *of the declaration in ejectment upon the [*155
defendant, was a commencement of the suit within six months, according to the spirit and intention of the law; that the declaration was the only process in ejectment (2 Sell. Pr. 164); that it might be served on the tenant himself, in any place; though, if the service was on a wife or servant, it must be on the premises (2 Cromp. Pr. 165; Runn. Eject. 155); that the sheriffs of the several counties were now obliged by law, to serve declarations in ejectment (3 Dall. Laws, 170, § 10); that the return is the certificate of the sheriff, stating what has been done touching the execution of the writ (Compl. Sheriff, 144; Dalt. 162); and that the proceedings of a special bailiff,

(*a*) s. c. 2 Yeates 416, reported as Nicholson's Lessee *v.* Wallace.

being recognised by law, as a competent person to serve the process in ejectment, must be as effectual as the proceedings of the sheriff.

After consideration, THE COURT were of opinion, that the ejectment was well brought, within the six months allowed by the act of assembly; and ordered that the rule to show cause be discharged.

Rule discharged.

KEPPELE *et al. v.* CARR *et al.* CARR *et al. v.* KEPPELE *et al.*

Bills of exchange.—Damages.

The damages on a protested bill belong to the party at whose risk it was remitted.

A. & B., being indebted to C. & Sons, foreign merchants, delivered a bill of exchange, drawn by one S., and indorsed by A. & B., to C., one of the firm of C. & Sons, but he refused to remit it on their account and risk: the bill was returned unpaid and protested, and then A. & B. tendered to C. the principal and interest of it, and demanded its restitution, with the protest, but he rejected this offer, saying, that he would settle it with S.; B. then told C., that they, A. & B., should consider the bill at the risk of C. & Sons, from that day: C. afterwards entered into an arrangement with S., and took his note for principal, damages and charges, but before the note became due, S. failed: A. & B. sued C. & Sons for the damages included in the note, with interest from its date; and C. & Sons sued A. & B., for the original consideration of the indorsement of the bill: *Held*, that A. & B. were entitled to their demand, and that their debt to C. & Sons was paid in law, by the conduct of the latter.

THE case was briefly this: Keppele & Zantzinger, Philadelphia merchants, being idebted to Carr & Sons, English merchants, for goods sold and delivered, bought a bill of exchange from John Swanwick for the amount, drawn in their favor, and indorsed by them; delivered the bill to one of the partners of Carr & Sons, who was in Philadelphia, but who expressly refused to remit it, on the account and risk of his house; and informed Carr & Sons by letters, dated respectively the 20th of May, and 20th of June 1796, "that the bill, when paid, will be in full for merchandise (high charged) to our G. Keppele, by your invoice, dated the 31st of March 1795." The bill was duly presented and protested for non-acceptance, on the 27th of June, and for non-payment, on the 29th of August 1796; and on its being returned with the protest, notice was regularly given to the drawer and indorsers. Keppele & Zantzinger then (about the 5th of November 1796) tendered to Carr the principal and interest of the bill, and demanded restitution of it, with the protest; but Carr refused to accept the tender, or to deliver up the bill; saying, "that he would settle the bill himself with Swanwick:" whereupon, Zantzinger declared, "we shall consider the bill at your risk, from this day." Carr then entered into an arrangement with Swanwick, took his promissory note for principal, damages and charges, and delivered to him the bill and protest. Before the note became due, *156] *Swanwick had failed; and Carr demanded payment from Keppele & Zantzinger, on the footing of the original account for goods sold. On the other hand, Keppele & Zantzinger demanded from Carr, the twenty per cent. damages, included in Swanwick's note, with interest from the date of the note. And upon these adverse claims, the present actions were instituted, and tried at the same time.

At the trial of the cause, three grounds were taken in favor of *Carr & Sons:* 1st. That the language of the letters, written by Keppele & Zantzinger

was not meant to retain an interest in the bill of exchange; but to preserve unimpaired the original contract, if the bill was not honored; or, at most, to protect them, as indorsers, from being liable for damages; but not to entitle them to receive any. Carr & Sons had a complete power over the bill; they might have cancelled it, after acceptance, for the acceptor's note; or they might have released it, upon any, or no consideration, to the drawer's agent in England; the only effect of which would be, to render the bill payment of the preceeding debt, as in *Watts* v. *Willing*, 2 Dall. 100. And *Chapman* v. *Steinmetz*, 1 Dall. 261, differs from this case; because the suit was there against the drawer of the bill, who was also the original debtor, expressly stipulating, that he should not be liable for damages; and here Carr & Sons do not sue Keppele & Zantzinger on the bill, for damages. 2d. That whatever might be the operation of the original contract, the claim of Keppele & Zantzinger to damages was extinguished, when Zantzinger declared, that "the bill would be considered, for the future, at the risk of Carr & Sons;" changing essentially the relative responsibility of the parties. 3d. That the suit brought by Keppele & Zantzinger, for the damages, was a disaffirmance of any implied contract, that the bill of exchange was paid or received in satisfaction of the precedent debt; and consequently, Carr & Sons are entitled to recover upon the old account, whatever may be their responsibility for the principal, as well as the damages of the bill. In that respect, too, Keppele & Zantzinger have chosen to regard them as agents; and can only be entitled to recover what Carr & Sons received, to wit, Swanwick's promissory note.

In favor of *Keppele & Zantzinger*, it was urged: 1st. That the remittance of the bill of exchange was, by express stipulation, upon their account, and at their risk; and the terms of the remittance came, pointedly, within the principle of *Watts* v. *Willing*, and *Chapman* v. *Steinmetz*. Until the bill was paid, in England; or, in case of a protest, until it was recovered from the drawer here, it was, exclusively, at the risk of Keppele & Zantzinger; and they, who were exposed to the whole risk, were entitled, in law and equity, to the whole benefit of an indemnity. *2d. That the declaration of Zantzinger does not, either in the intention or the [*157 expression, amount to a waiver of the claim for damages; nor can it, in any respect, impair or alter the conditional contract on which the remittance was made. 3d. That the conduct of Carr & Sons has made the bill of exchange an absolute fund for the payment of the precedent debt; and that debt was eventually extinguished and satisfied, by taking Swanwick's note: but their conduct creates no right to receive more than the amount of the precedent debt; and consequently, they are liable for the damages in one suit, though they cannot recover upon the account, in the other suit.

SHIPPEN, Justice.(*a*)—The sum in controversy is small; but the principle of the decision is of great and general importance. What is the law, the justice and the usage, upon the subject? It appears from two cases

(*a*) The Judges differing in opinion, each addressed the jury; but the Chief Justice, on account of indisposition, added only a few words, in affirmance of the sentiments of SHIPPEN, Justice.

that have been cited (1 Dall. 261; 2 Ibid. 100), to be the settled law, that where a bill of exchange is not paid and received, in satisfaction of a debt, due from a merchant to his correspondent, it goes at the risk of the debtor; and the creditor who remits it for acceptance and payment, stands on the footing of an agent only, until the bill is actually paid. Then, in point of justice, it seems but fair, to allow every incidental or casual profit and emolument, to the party who is exposed to all the hazard and inconvenience of the remittance. As to the usage, the jury are best able to ascertain it from personal experience; but so far as I have been able to collect information, there appears to be only one opinion among commercial men; to wit, that *he* is entitled to the damages, on whose account and risk the bill of exchange is remitted. To disturb this usage, would, obviously, operate very injuriously to the American merchant, in favor of foreign merchants; but if the usage were not established, or if it were an unreasonable one, our decision would not depend upon considerations of that nature: we should say, *fiat justitia, ruat cœlum!*

Let us, then, consider the facts of the present case, under this general view of the law, justice and usage of merchants. The debt was due and payable in London: the creditor refused to accept payment here, on account of the rate of exchange: the immediate loss and expense of the remittance fell, therefore, on the debtor, as well as the contingent risk of the bill. The creditor also refused to take the hazard of the remittance to himself; and, in effect, agreed to act as the agent of the debtor, in all that related to the bill of exchange. There is not, in short, the least doubt on this important fact, that the bill was remitted on account of Keppele & Zantzinger, though
*158] indorsed by them *to Carr & Sons. When the bill returned protested, the debtor demanded it, tendering the amount of principal and interest; but this overture to a payment was peremptorily rejected by Carr; and he assumed the sole management of settling the business with Swanwick. Whether it was settled by a cash payment, or by a promissory note, is not material; the bill being delivered up without the authority or consent of Keppele & Zantzinger; and Carr & Sons becoming, consequently, responsible to them for the full value of their interest in the bill. That interest was the amount of the damages, on the principles which have been suggested; particularly, because Keppele & Zantzinger defrayed the whole expense, and ran the whole risk of the remittance. Suppose, produce had been shipped to Carr & Sons, to be sold on account of the shippers, but the proceeds were to be applied to the payment of their debt, could it be pretended, that the consignees would be entitled to any profit on the sale; or that, in case of a loss, it must be borne by them? No, in that instance, and I think, with a parity of reason, in the instance before the court, Carr & Sons are neither to know profit or loss, in the transaction. It is surely enough for the British merchant to enjoy the fair profit charged upon the goods, which he sells and transmits to his American customers; without being allowed to speculate upon the damages on bills of exchange, the usual medium for paying his account, in a way, that enables him to pocket all the gain, and to cast upon them all the loss.

In justice to Carr & Sons, however, it is proper to take notice of another ground, on which their cause has been placed; the only ground, indeed, that has created any doubt or difference in the minds of the judges. On the 5th

of November 1796, when they refused to accept a tender of principal and interest, Keppele & Zantzinger made a declaration, which, at the first view, looked as if they relinquished every pretension to the bill of exchange: "We shall consider the bill as at your risk, from this day." This expression, however, cannot, in law, be regarded as constituting a new contract or agreement; for, certainly, there was no mutuality of bargain; no coincidence of proposition and assent. But it may, in point of fact, be regarded as an extinguishment of the conditional terms of the remittance; as an abandonment of all claim upon the bill of exchange; a fact which the jury must decide. It appears to me, however, that if law, justice and usage had previously vested the right to damages in Keppele & Zantzinger, it is too light, too equivocal, an expression, to be construed into a waiver of that right; particularly, when it may with, at least, equal propriety, be construed to mean, that they should consider Carr & Sons responsible, if Swanwick failed in payment.

On the action by Carr & Sons, against Keppele & Zantzinger, it is unnecessary to detain the jury with any explanatory *remarks. The account was settled; and, by the conduct of the plaintiffs, it has been completely paid, in law and justice. [*159

Smith, Justice.—I concur in the opinion of my venerable brother, as to the second action; and subscribe, indeed, to all the general principles, which he has stated, in reference to the first. But it is my misfortune to view in a different manner from him, the important transaction of the 5th of November 1796: for whatever may have been the antecedent rights of Keppele & Zantzinger, the conversation of that day, does, in my opinion, essentially change the situation of the parties. The bill was thenceforth entirely at the risk of Carr & Sons; and if Swanwick had failed, the very next day, before any arrangement for payment, or before any *laches* in the endeavor to obtain payment, Carr & Sons could never have recovered from Keppele & Zantzinger, either on the original account, or on the indorsement of the bill. The risk of Keppele & Zantzinger being thus at end, all their legal and equitable claim to the damages, on account of risk, must also be extinct.

In an early stage of the transaction, too, I think, there is some fallacy in treating Carr & Sons merely as the agents of their debtor, in relation to the bill of exchange. If they had lost or destroyed it; if, on the protest, the drawer's friend had paid it in London, for his honor; or, if Carr & Sons, after an acceptance, had released the acceptor, with or without a consideration; surely, in none of these instances, could a claim to twenty per cent. damages arise; and all that Keppele & Zantzinger could insist upon, in law, justice or usage, would be, that the bill, under such circumstances, should be deemed a payment of their debt, notwithstanding the conditional terms of the remittance.

In these sentiments, I am uninfluenced by any consideration of attachment to the American merchant, or of enmity to the British merchant; and I think, they will be found to conform best to the honor of all merchants, which, like the chastity of a female, should be free from suspicion, as well as free from taint.

McKean, Chief Justice.—Upon the refusal of the tender, in November 1796, Zantzinger declared, that the bill of exchange should be at the risk of

Carr & Sons for the future. The meaning of this declaration, I understand to be (at least, it is a reasonable interpretation), that Carr & Sons themselves should be answerable to Keppele & Zantzinger, for the principal, interest and damages, even if Swanwick should become insolvent. Under the view of the case, I concur with my brother Shippen, in all his remarks which he has delivered to the jury.

Verdict for Keppele & Zantzinger in both actions.

Ingersoll and Brinton, for Keppele & Zantzinger. *Dallas*, for Carr & Sons.

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*160] *MARCH TERM, 1799.

McClay *v.* Hanna *et al.*

Appeal.

An appeal from an orphans' court dismissed, because it did not appear that a definitive decree had been pronounced.

When and how an executor shall be charged with property conveyed to him on a secret trust, *quære?*

This was an appeal from the Orphans' Court of Dauphin county, under the following circumstances: John Harris, by his will, dated the 25th of May 1790, proved 2d of August 1791, bequeathed all his personal estate to his sons, David, Robert and James, and his daughters, Mary McClay and Mary Hanna, to be equally divided between them. He also ordered his executors to sell all his lands, not otherwise disposed of by his will, and divide the proceeds as aforesaid. He directed his executors to settle their accounts in the orphans' court, in one year after his decease, and continue to settle an account annually, until the estate was finally settled.

In January 1795, a citation was issued at the request of William McClay, one of the executors of John Harris, against David Harris, Robert Harris, John Andrew Hanna, Joseph Work and John McClay, the other executors, to appear at the next orphans' court for Dauphin county, to make a full disclosure of all effects and estate of the deceased which had come to their hands, possession or knowledge, and settle and abide the order and judgment of the court in the premises. The cause came to a hearing in the orphans' court, in September 1795; when a motion was made by McClay's counsel, that Robert Harris and John A. Hanna should answer on oath, to a charge of having received money for the sale of sundry lots, which had been conveyed to them by the testator, by absolute deed, on a secret trust to be accountable for the proceeds of the sales; and that they should bring the said proceeds into their administration account, and charge themselves therewith. The Court determined:—1st. That the said Harris and Hanna, should not be obliged to answer on their oath to the said charge: and 2d. That the *161] plaintiff should not be allowed to produce evidence, to substantiate the truth of his charge against the said John A. Hanna; but that the account of the said Harris and Hanna, as then exhibited to the court, should be received and passed. The plaintiff appealed from this judgment; and the cause came up on the appeal.

After argument, by *W. Tilghman* and *Dallas*, for the appellant; and by *Ingersoll*, for the appellees, THE COURT dismissed the appeal, because it did not appear, that the orphans' court had pronounced a definitive decree.

EWALT'S Lessee *v.* HIGHLANDS. (*a*)

Settlement.

Personal residence must accompany every settlement, on which a survey can be regularly made, unless such danger exists, as would prevent a man of reasonable firmness from remaining on the land; and even then, the *animus residendi* must appear: deadening an acre or two of timber, planting a few peach-stones, apple-seeds and potatoes, can never be circumstances amounting to a settlement, though a cabin should also be put up, if the party resides at a distance, and no tenant actually occupies the land. (*b*)

EJECTMENT for 400 acres of land at Gerty's Run, across the Allegheny, the plaintiff claiming under settlement and survey. From the evidence, it appeared, that on the 30th of April 1792, the lessor of the plaintiff passed the Allegheny, with two hands, to make an improvement; that they deadened about one acre of wood, returned, and about two weeks afterwards, went over again, and deadened a little more wood; that a cabin was erected, with a clap-board roof, eight feet square, and logs cut out for a door; that a few peach-stones, apple-seeds and potatoes were planted; but no other improvements were made; and neither the lessor of the plaintiff, nor any tenant for him, resided on the land. On the 9th of April 1794, a survey was made by Jonathan Leet, the deputy-surveyor of the district, under this settlement. On the 10th of Feruary 1796, Ewalt leased the land to P. Smith, who went over the Allegheny, kindled a fire in the cabin, stayed there an hour, and then removed; but Ewalt and his family constantly resided on the east side of the river; while, on the other hand, the defendant and his family lived for three years on the premises.

I. When Leet's survey was offered in evidence, the defendant's counsel objected; but it was admitted by THE COURT, upon the ground, "that in cases of title, under settlement and improvement of lands, north and west of the rivers Ohio and Allegheny and Conewango creek, the deputy-surveyor must, in the first instance, judge of the right; though subject to the opinion of the court and jury."

II. In delivering the charge, the following sentiments were expressed.

BY THE COURT.—It is now the province and the duty of the court and jury to decide, whether the survey in question was properly made, under the act of the 3d of April 1792. (3 Dall. Laws, 209.) The act itself has laid down no general rule *ascertaining what kind and extent of settlement and improvement will warrant a survey; nor is it the intention [*162

(*a*) Tried at Pittsburgh, May 1799, before YEATES and SMITH, Justices.

(*b*) The following cases are among the earliest and most interesting on this subject: Commonwealth *v.* Coxe, *post*, p. 170; Morris's Lessee *v.* Neighman, *post*, p. 209; s. c. 2 Yeates, 450; McLaughlin's Lessee *v.* Dawson, *post*, p. 221; s. c. 3 Yeates, 61; Balfour's Lessee *v.* Meade, *post*, p. 363; s. c. 1 W. C. C. 18; Huidekoper's Lessee *v.* Douglass, *post*, p. 392; s. c. 3 Cr. 1, and 1 W. C. C. 258; s. p. Lessee of Huidekoper *v.* Burrus, Id. 109; Huidekoper *v.* McClean, Id. 166.

of the court, upon the present occasion, to lay down any general rule upon the subject. It may, however, be observed, that personal residence must accompany any settlement, on which a survey can be regurlarly made; unless such danger exists, as would prevent a man of reasonable firmness from remaining on the land; and even then, the *animus residendi* must appear. Again, though we agree, that what constitutes a settlement will essentially depend on the circumstances of each case; we may state, negatively, that deadening an acre or two of timber, planting a few peach-stones, a few apple-seeds, or a few grains of corn, can never be deemed circumstances, amounting in themselves, to a settlement, in any case, though a cabin should also be put up, if the party resides at a distance, and no tenant actually occupies the land. If these can give no legal preference, much less will it be deemed a case of preference, contemplated by the act of assembly, that a man has set his foot, or his heart, on a tract, and claims it as his own. It is hardly necessary to add, that we do not think the acts of the lessor of the plaintiff, in the present case, constituted such an actual settlement, as authorized a survey; and consequently, he has no title to recover the land.

The plaintiff's counsel, finding the opinion of the Court thus decidedly against him, suffered a nonsuit.

Brackenridge, for the plaintiff. *Woods* and *Collins*, for the defendant.

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*163] *SEPTEMBER TERM, 1799.

Ball *v.* Dennison.

Notice of non-payment.

When a promissory note has been dishonored by the maker, the indorser is not liable to pay it, if the holder neglects to give him due notice of non-payment. What is due notice is, in Pennsylvania, a matter of fact to be decided by the jury. (*a*)

This was an action brought by the indorsee against the indorser of a promissory note for $5000, made by Samuel Emory, on the 26th of December 1795, and payable 65 days after sight. The maker failing to pay the note, it was regularly protested, on the 3d of March 1796; and the only question agitated upon the trial, was, whether reasonable notice of the non-payment was given to the indorser, or due diligence employed to give it?

The material facts were these: Emory and Dennison had purchased from the managers of the Schuylkill canal lottery, a number of tickets, for which a note was given to the president, the plaintiff in this action. The purchasers settled their accounts of the speculation, before the note became due, in consequence of which Emmory was bound to pay the note; but when it became due, Dennison agreed to continue his indorsement for the accommodation of Emory, though the joint interest had ceased; and

(*a*) See Donaldson *v.* Means, *ante*, p. 109; Bank of North America *v.* Pettit, *ante*, p. 127.

the plaintiff, by way of renewal, at the instance of Emory, took the note on which the present action was instituted. Dennison was not a permanent inhabitant of Philadelphia, but was domiciled at Havre de Grace, in Maryland. He had, however, an agent in Philadelphia, to whom the banks, in consequence of written instructions, delivered the notices of his paper engagements, payable there, on which he was maker (not indorser), during the years 1795 and 1796; and who, constantly, for that period, made the necessary payments; nor would he have hesitated (he declared) to pay the present note, if he had been informed of the default of the maker. It appeared likewise, that Dennison was, occasionally, in the city of Philadelphia, in the months of February, March, April, May, June, August and September 1796; and *in the month of May, Emory informed him [*164
of the protest; but at the same time, declared that he had made preparation to discharge the note. On the other hand, it was proved, that after the default of the maker, particular and repeated inquiry was made for the indorser, by the notary, as well from Emory as others; that the indorser was not then in Philadelphia, and the notary did not himself know that he had an agent here, for such purposes, though he knew there were transactions of business between him and the person who was said to have been his agent; that the notary heard Dennison lived at Havre de Grace, but at the same time, was told, he had gone to the eastward; that as soon as the plaintiff understood that Dennison was in the city (about six weeks or two months after the protest), the plaintiff's clerk called on Dennison, mentioned the facts, and demanded payment; when Dennison said, that he had received no part of the proceeds of the lottery-tickets; but that he would urge Emory to discharge the note.

The *defendant's* counsel contended, on these facts, that there was not reasonable notice of the protest of the note, nor due diligence to give it: that under the circumstances of the case, the defendant was not under a moral obligation to pay the note, and might fairly take advantage of the strict rule of law, according to 1 Dall. 234, 252, 270; 2 Ibid. 158, 192; that no notice was given to the indorser, until May 1796, though he was occasionally here, before that time, and subsequent to the protest; though he had an agent here; and though he lived in a neighboring state, to which the post would have carried notice, in the course of a few days; and that actual knowledge of non-payment is not sufficient to charge an indorser, unless the information is received promptly from the holder, with notice that he looked to the indorser for payment: Kyd on Bills, 79; 1 T. R. 167; 5 Burr. 2670; 1 T. R. 712.

The *plaintiff's* counsel insisted, that as the private arrangement between Dennison and Emory was unknown to the plaintiff, his claim upon the defendant, in morality, as well as law, could not be impaired by it; that the law was not controverted, on the authority of the cases cited; but still it left the matter of fact to be ascertained, what was reasonable notice of protest, under all the circumstances of the case? That the first important feature of the case exhibits the defendant as a non-resident of Philadelphia, a mere transient visiter; that notice sent south to Havre de Grace, when it was known he had gone north, would have been useless and idle; that the notary did not know, and the evidence is, otherwise, uncertain, in the

instance of the defendant's being an indorser, that he had any agent in Philadelphia: and that due and diligent inquiry was made for the indorser in Philadelphia, where the consideration arose, and the note was given.

*165] *As to the cases cited for the defendant, they are susceptible of answers, easily distinguishing them from the present case. Thus, in 1 Dall. 234, 270, the bill was kept two years and a half; the indorser lived in Poughkeepsie, only 130 miles distant; he was a man of note, in extensive business, and actually had some transactions with another of the indorsers. In 1 Dall. 252, the note was protested for non-payment on the 12th of June 1786; on the 5th of July and 23d of August, the plaintiff received partial payments from the maker; and it was not until after the last date, when the maker had become embarrassed, that notice was given to the indorser; who, during the whole time, lived and kept a counting-house in Philadelphia. In 2 Dall. 158, both parties lived in Philadelphia; and the jury thought three or four days was not too late to give notice. In 2 Dall. 192, the bill of exchange was drawn in September 1781, presented and refused acceptance in November 1781, and protested for non-payment in August 1782; but no notice was given to the indorser until the beginning of the year 1790. When the bill was presented, the drawee had funds of the drawer in his hands; but he had paid the amount to the drawer's agent, who died, and whose wife had lost the money.

Shippen, Justice.(a)—The cause depends upon one point, which is a matter of fact. The general law is, that when a promissory note is dishonored by the maker, the indorser becomes immediately liable; and the holder is entitled to recover the amount from him, unless he is discharged by the act of the holder, either in giving further time or credit to the maker; or in neglecting to give the indorser due notice of the non-payment. This notice is indispensable: so much so, that it is immaterial, whether the maker becomes insolvent before the notice, or not. Still, however, what constitutes due notice, is a point to be settled. In England (where it is regarded as a question of law), the rule is strict and positive, that the notice must be given on the next day, if the parties live in the same place; and by the next post, if they live in different places. But in Pennsylvania, it has hitherto been regarded as a matter of fact, to be decided by a jury, under all the circumstances of each case, as it arises. In deciding it, however, the jury will always be governed by a sound and reasonable discretion. They will allow but a short time for giving notice, where the parties reside in the same town; for, six weeks, in such a case, would certainly be too long; and fo giving notice in different parts of the country, they will bring into the calculation of a reasonable time, the facility of the post, the state of the roads, and the dispersion of the inhabitants in relation to the post-towns.

*166] *With these prefatory remarks, let us review the circumstances of the present case. The note was duly protested for non-payment; the notary, at the same time made diligent inquiry after the indorser; particularly from the maker, who was most likely to possess the necessary information. He heard that the indorser lived at Havre de Grace, but was then gone to the eastward. Proof has also been given of Dennison's repeatedly

(a) Shippen and Smith, Justices, were the only judges on the bench, at the trial of this cause.

visiting Philadelphia, after the protest; but it is not proved, that the plaintiff was acquainted with the fact; and without that proof, he cannot be legally charged with *laches*. It is proved, that J. B. Bond was Dennison's general agent in Philadelphia; but it is not proved, that he was a public known agent; nor (which is again essential to affect the plaintiff's claim) that the plaintiff was apprised of the agency. As to the fact that Dennison lived at Havre de Grace; and as to the argument, that notice ought to be given, wherever the indorser lives; it is important to remember, that the commencement of the transaction was in Philadelphia; that the note was dated there; and that all the parties contemplated Philadelphia as the place of payment. Besides, it would interrupt the negotiability of notes, and greatly embarrass the general operations of commercial credit, if an indorser was entitled to notice, on the strict terms suggested, though he lived in the East, or the West Indies; or though he was a mere itinerant, constantly shifting the place of his abode, and the scene of his business. It is, therefore, an object of leading influence, in the decision of this cause, to consider whether, under all the circumstances in proof, the plaintiff was bound to inquire for the defendant, beyond the city of Philadelphia? The case of *Steinmetz* v. *Curry*, 1 Dall. 234, 270, ought not to be a guide on the occasion; for there, the bill was kept by the holder for two years and a half, without giving notice to an indorser, who was known to reside constantly at Poughkeepsie, in New York. But upon the whole, it appears to the court, that the plaintiff did make a prompt inquiry for the indorser, in the city of Philadelphia; and that the defendant has not sufficiently established those facts, which would have made it incumbent upon him, either to send notice to Havre de Grace, or to serve notice upon the agent in Philadelphia. If the jury concur in the opinion, they will find for the plaintiff; but if they do not, it is their right, and their duty, to find for the defendant.

Verdict (delivered without the jury's retiring from the bar) for the plaintiff, $6051.13, and six cents costs.

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*DECEMBER TERM, 1799. [*167

Levy *v.* Wallis.

Presumption of fraud.

The act of suffering goods to remain in the hands of the defendant, after they have been levied on, furnishes no presumption of fraud; but if the intention of leaving them is fraudulent, a subsequent execution will be preferred. (*a*)

In this case, a *testatim fi. fa.* issued on the 27th of December 1798, returnable to March term 1799, which was levied on twelve horses. A *venditioni*

(*a*) In the United States courts, the decisions all sustain the principle, that when goods, of whatever kind they may be, upon which a levy has been made, are left in the possession of the defendant, by the permission of the plaintiff—or where proceedings are stayed, before a levy is actually made, though after the writ has been placed in the hands of the sheriff, the levy is void, as to a subsequent execution-creditor, or a *bonâ fide* purchaser; and there is no distinction between a suspension for one day, or one or

exponas issued to September term 1799; and an *alias vend. exp.* issued to December term 1799. On the last writ, the sheriff returned, that he had sold the horses to the amount of $1021; that Thomas Hamilton had bought seven of the horses for $630; but that, both before and after the sale, he had given written notice, that he claimed the money arising on the sales, by virtue of a levy previously made for him, upon an execution, by the former sheriff: and that, therefore, he claimed to retain the amount of his purchases, in part satisfaction of his execution; and the remaining money of the sales aforesaid, the said sheriff has ready, &c.

From the records, it appeared, that Hamilton had issued a *fi. fa.* against Wallis, on the 25th of January, returnable to March term 1798, which was levied (*inter alia*) upon seven horses; and that on the 11th of December 1798, a *vend. exp.* issued, but was never prosecuted.

It also appeared, that in the case of *Perit, executor*, v. *Wallis*, a *testatum fi. fa.* had issued to March term 1797, which was levied (*inter alia*) upon seven horses; that a *vend. exp.* issued; that an *alias vend. exp.* issued to September term 1798, on which the sales were put off, at the risk of the plaintiff; and that a *pluries vend. exp.* issued to September term 1799.

The general question was, whether the prior execution-creditors, Hamilton and Perit, had not lost their liens, by allowing the property levied upon to remain in the hands of the defendant?

The Court declared, that it had been repeatedly determined, and was become the settled law of Pennsylvania, that the act of *suffering
*168] goods to remain in the hands of the defendant, after they were levied upon, furnished no presumption of fraud here, as it did in England; and that

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more months. But the force and effect of the writ or levy may be restored by a countermand. It is not, however, necessary, that the officer should remove or sell the property immediately, but it must be removed or sold within a reasonable time. United States *v.* Conyngham, Wall. C. C. 178; Barnes *v.* Billington, 1 W. C. C. 29; Berry *v.* Smith, 3 Id. 60.

The rule adopted by the supreme court of Pennsylvania is, that if, after a levy upon goods, other than household furniture, the plaintiff suffers them to remain in the possession of the defendant, while they so remain, the lien of the execution is lost. The exception of household furniture was allowed from sentiments of humanity, and the peculiar necessities of the country at the time. Chancellor *v.* Phillips, *post*, p. 213; Eberle *v.* Mayer, 1 Rawle 366. But this exemption ought not to be extended to all the furniture of an innkeeper; and whether the exception ought to embrace all a debtor's furniture, however valuable, without limitation, may, perhaps, at some time, be worthy of serious investigation. The exemption of any species of property is to be regretted, as every day's experience shows, that it tends to produce collusion and fraud. (Rogers, J., 3 Rawle 343.) Even in the case of household furniture, if the plaintiff directs the sheriff to stay proceedings, until further orders, levy to remain, it is a waiver of his priority, in favor of a second execution, received by the sheriff, during the continuance of the stay. Commonwealth *v.* Strembeck, 3 Rawle 341. It is not necessary that the officer should remove the property, nor put a person in charge of the goods, nor sell them immediately, but this must be done within a reasonable time. Ibid. In general, all executions issued, or kept on foot, with intent to delay, hinder and defraud creditors, are avoided by statute 13 Eliz. If, therefore, the sale of personal property levied on, is hindered by the management of an execution-creditor, he will be postponed to a subsequent one. Snyder *v.* Kunkleman, 3 P. & W. 487. See also Water's Executors *v.* McClellan, *post*, p. 208, and note.

this departure from the English rule arose from sentiments of humanity, and the peculiar necessities of the country. In the interior of the state, particularly, it was the universal practice not to remove the goods, after a levy. If, however, the intention of leaving them with the defendant was fraudulent, a subsequent execution would be preferred, in Pennsylvania, as well as in England. In the present instance, there is no proof of fraud; the first levies are, of course, good; and the sheriff must pay the money arising from the sales accordingly.(*a*)

Pemberton's Lessee *v.* Hicks.

Forfeiture.

A tenant by the curtesy initiate, has not an estate forfeitable upon his attainder for treason.

This cause (which was argued in December term 1798, 3 Dall. 479) was kept under advisement, until the 23d of December 1799, when Shippen, Chief Justice, and Yeates, Justice, were of opinion with the plaintiff, and Smith, Justice, was of opinion with the defendant.

Judgment for the plaintiff.(*b*)

Kesselman's Lessee *v.* Old. (*c*)

Collateral warranty.

A collateral warranty of an ancestor, who had no estate, in possession, of the premises, is an estoppel to his heir. (*d*)
The Stat. 4 Anne, c. 16, § 21, is not in force in Pennsylvania.

By the statute of 4 Anne, c. 16, § 21, it is enacted, that "all collateral warranties, which shall be made after the first day of Trinity term, of any lands, tenements or hereditaments, by any ancestor, who has no estate of inheritance in possession in the same, shall be void against his heir."

In the present ejectment, the point was, whether the plaintiff was

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(*a*) In Chancellor *v.* Phillips, *post*, p. 213, and several other cases, the law has been stated in a similar manner. But in the case of the United States *v.* Cunyngham (Wall. C. C. 178), in the circuit court, before Judges Tilghman, Basset and Griffith, the same subject was fully discussed; and the court adhered to the common-law rule, notwithstanding the decision in Pennsylvania. The decision in the case of Howell *v.* Alkyn, 2 Rawle 282, sustains Levy *v.* Wallis; but they cannot be reconciled with the principle of many other Pennsylvania authorities, on this subject.[1]

(*b*) McKean, C. J., presided at the argument of the cause; but being elected governor of the commonwealth, in October 1799, he took no part in the decision. He informed the reporter, however, that his opinion was decidedly in favor of the defendant.

(*c*) s. c. 2 Yeates 509, reported as Lessee of Eshelman *et al. v.* Hoke.

(*d*) It appears in the report by Yeates, that sufficient real assets descended to the heirs.

[1] But see Keyser's Appeal, 13 Penn. St. 412, where it is said by Rogers, J., that although there is an appearance of contradiction, in the *dicta* of some of the judges, yet, it is the rule in this state, that merely leaving the property in possession of the defendant, though with the plaintiff's consent, is not *per se* fraudulent. The rule is, if goods be left in defendant's possession, even with the plaintiff's permission, the lien is not lost, unless there be fraud.

estopped by a collateral warranty of his ancestor, who had no estate of inheritance, in possession, of the premises?

After argument, and taking time to deliberate, the opinion of THE COURT was delivered by SHIPPEN, Chief Justice, that there was no trace of the extension of the statute of the 4 Anne, c. 16, to Pennsylvania, by legislative *169] authority, or judicial practice; and *consequently, that the collateral warranty of the ancestor operated as an estoppel to his heir, the plaintiff.[1]

Judgment for the defendant.

REED *v.* INGRAHAM. (*a*)

Negotiable instrument.

A contract to receive from J. B., or order, certain stocks, is negotiable.

ON a motion for a new trial, this cause came again before the court (3 Dall. 505), but after argument, the judges cited 4 T. R.; 2 Bl. 1269; and declared, that they were confirmed, upon mature deliberation, in the opinion, which had been given in charge to the jury, that the action was well brought in the name of the assignee of the stock-contract, promising to receive a transfer from "J. B. or order."

Judgment for the plaintiff.

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*170] *MARCH TERM, 1800.

COMMONWEALTH *v.* TENCH COXE, Esq.

Settlement.—Holland Land Company.

The settlement and residence made necessary by sect. 9th of the act of 1792, within the times respectively mentioned therein, are not excused by the proviso in the same section; but if a warrant-holder has been prevented from making such settlement, or has been driven therefrom, by force of arms, and has persisted in his endeavors to make such settlement, no advantage can be taken of him, from want of a successive continuation of his settlement.[2] YEATES and SMITH, JJ., and SHIPPEN, C. J., dissenting.

If the condition of a grant by the commonwealth has not been fulfilled, advantage can only be taken of a breach of a condition, by the commonwealth, in a method prescribed by law.[3]

Quære? Whether a *mandamus* can be issued against the secretary of the land-office, commanding him to prepare and deliver patents in favor of a warrantee of a tract of land.[4]

IN September term last, a rule was obtained, on behalf of a number of persons, who had associated under the denomination of "The Holland Company," for the purchase and settlement of lands, lying in the county of Allegheny, north and west of the rivers Ohio and Allegheny, and west of

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(*a*) s. c. 2 Yeates 487, where there is a full report of the case.

[1] But the collateral warranty only descends upon the eldest son, the heir at common law. Jourdan *v.* Jourdan, 9 S. & R. 268.

[2] Attorney-General *v.* The Grantees, *post*, p. 237; Patterson *v.* Ross, 22 Penn. St. 340.

[3] Morris *v.* Neighman, *post*, p. 209; s. c. 2 Yeates 450; Wilkins *v.* Allenton, 3 Id. 273; Eddy *v.* Faulkner, Id. 580.

[4] See Commonwealth *v.* Cochran, 5 Binn. 87.

Conewango creek, by which the secretary of the land-office was directed to show cause why a *mandamus* should not be awarded, commanding him to prepare and deliver patents to the company, for various tracts of land, for which warrants had previously issued in their favor, under the act of the general assembly, passed the 3d of April 1792. The attorney-general (*McKean*), *M. Levy*, *W. Tilghman* and *Cooper*, now showed cause for discharging the rule; and *Lewis*, *E. Tilghman*, *Ingersoll* and *Dallas*, argued for making it absolute. In order, however, to introduce, with perspicuity and advantage, a discussion of the important question involved in this case, it is necessary to give a general view of the facts and circumstances, which produced the controversy.

By the charter granted to William Penn, on the 14th of March 1681, he became the proprietor of the soil embraced within the boundaries of Pennsylvania. The charter title, however, was fortified, as well since, as before the revolution, by successive purchases from the Indians; whose claim may be considered as fairly and finally extinguished, throughout the territory of the state, by the treaty of Fort Stanwix, on the 23d of October 1784; and the treaty of Fort McIntosh, on the 21st of January 1785.(*a*) Independently *too, of the charter, the boundaries of the state have been defined and enlarged, by judicial decisions, by compact and by purchase. A [*171 controversy on the subject early arose between the proprietaries of Pennsylvania and Maryland; which was finally adjusted in the year 1750, by a decree in the chancery of England, enforcing the specific performance of an agreement, which the parties had entered into in the year 1732.(*b*) The visionary and extravagant pretensions of Connecticut, extending to lands westward, as far as the South Sea, began to annoy the peace of Pennsylvania so early as the year 1753;(*c*) and although the rights of sovereignty and jurisdiction, after much irritation and conflict, were, at last, in the year 1782, authoritatively decided to belong to the latter state, the intruders under the spurious title of Connecticut continued to assert a private right of soil over a considerable tract of Pennsylvania.(*d*) The western line of the charter boundary, corresponding with the meanders of the river Delaware, remained undefined by actual survey; and it was, for a while, difficult to ascertain the limits between the jurisdiction of Pennsylvania and Virginia; but the two states, actuated by a just and friendly spirit of compromise, appointed commissioners to run a line of separation; and their report upon the subject was adopted and established in the year 1784.(*e*) On similar principles, the jurisdiction and property of the islands in the river Delaware had been settled between Pennsylvania and New Jersey in the year 1783.(*g*) And in the year 1792, the state completed the present range

(*a*) For a reference to the purchases from the Indians, and to the laws respecting lands and the land-office, see 1 Dall. Laws, 5, 39, 248, 503, 891, 908; 2 Id. 21, 201; 3 Id. 209, and generally the proper titles to the index of that work.

(*b*) See Proud's History of Pennsylvania, 1 vol., 187; Penn *v.* Baltimore, Cases in Chancery, temp. Ld. Hardwicke, 332; s. c. 1 Ves. 444.

(*c*) For a history of the rise and progress of the claim, see a pamphlet published in the year 1774, by Dr. William Smith, the late provost of the college of Philadelphia.

(*d*) For the proceedings, which terminated in the decree of Trenton, see the Journals of Congress, for the year 1781, vol. 7, p. 169, 171, &c.

(*e*) See 2 Dall. Laws, 207.

(*g*) See 2 Dall. Laws, 143.

of her territory, by obtaining a formal grant from the United States of a triangular tract of land, bounded by lake Erie; which tract had been ceded and relinquished by resolutions of congress of the 6th of June, and 4th of September 1788; and the Indian title was purchased, and extinguished by commissioners, appointed by the state, in January 1789.

The settlement and cultivation of Pennsylvania have, at all times, been the favorite objects of her government. The proprietaries, while the soil and jurisdiction were vested in them, resisted every attempt of individuals to purchase lands from the Indians; but permitted a free access to the land-office, or board of commissioners which they instituted, either for the purpose of obtaining original grants, or for the purpose of completing equitable *172] *titles, within the territory over which they had themselves extinguished the Indian claim. The ownership of the unappropriate soil naturally passed with the political sovereignty, from the proprietaries to the commonwealth, upon the principles of the revolution; and accordingly, the legislature, on the 27th of November 1779, assumed the general territorial rights of the proprietaries; but at the same time, confirmed to them all their private estates, and such proprietary tenths of manors, with the rents reserved on them, as had been surveyed and returned into the land-office, before the 4th of July 1776: granting also a sum of 130,000*l.* sterling to the Penn family, as a mark of gratitude for the services of the founder of Pennsylvania.(*a*) This change in the ownership of the soil rendered it necessary to provide, under the authority of the state, for pre-existing claims to particular tracts of land, taken up and located under the proprietary grants, warrants and other office-rights. With that view, exclusively, a land-office was opened in the year 1781; (*b*) and in the ensuing year, a board of property was instituted, with power "to hear and determine in all cases of controversy or *caveats*, in all matters of difficulty or irregularity, touching escheats, warrants on escheats, warrants to agree, rights of pre-emption, promises, imperfect titles or otherwise, which heretofore have, or hereafter may arise, in transacting the business of the land-office."(*c*) The earliest direct appropriations of any of the territory of the state for public use, subsequent to the revolution, were two provisions; the first for laying off a tract of land, to redeem the depreciation certificates which had been issued to the officers and soldiers of the Pennsylvania line; and the second, for laying off another tract of land, to satisfy the donation which had been promised to the same troops, by a legislative vote of the 7th of March 1780; both tracts lying north and west of the rivers Ohio and Allegheny and Conewango creek.(*d*) On the 13th of April 1784, however, the land-office was opened, for granting and disposing of such of the unappropriated lands, as had been previously purchased from the Indians, at the rate of 10*l.* per hundred acres: (*e*) and soon afterwards, it was extended to the sale of lands within the purchase then made, or about to be made, at the rate of 30*l.* per hundred acres; (*g*) the proceedings being regulated, so as to secure impartiality in the treatment of applicants, by an act of the 8th of April 1785.(*h*)

(*a*) See 1 Dall. Laws, 822.
(*b*) Ibid. 891.
(*c*) See 5th April 1782, 2 Dall. Laws, 21.
(*d*) See act 12 March 1783, 2 Dall. Laws, 88.
(*e*) 2 Dall. Laws, 201.
(*g*) See act 21st Dec. 1784, 2 Dall. Laws, 234.
(*h*) Ibid. p. 311.

From this operation of the land-office, thus opened, the reservations were confined—1st, to islands within the rivers Susquehanna and its branches, the Ohio, the Allegheny and the Delaware; *2d, to the appropriated [*173 lands north-westward of the Ohio and Allegheny; 3d, to the triangular tract on lake Erie, purchased from the United States; and 4th, to certain bounties or gifts conferred on religious or scholastic institutions, and pre-emptive rights granted or recognised by law. But a great portion of the valuable land of the state being sold, an act was passed on the 3d of April 1792, for the sale of all the remaining vacant lands within the commonwealth. By this act, the price of the vacant land within the purchase of the year 1768, and all prior purchases from the Indians, was reduced to 50 shillings for every hundred acres; the price of the vacant land within the limits of the purchase of the year 1784, and lying east of the river Allegheny and Conewango creek, was reduced to 5*l.* for every hundred acres; and all other lands belonging to the commonwealth, lying north and west of the rivers Ohio and Allegheny and Conewango creek (not specifically appropriated), were offered for sale, "to persons who will cultivate, improve and settle the same, or cause the same to be cultivated, improved and settled," for the price of 7*l.* 10*s.* for every hundred acres, with an allowance of six *per centum* for roads.

The manner of locating, surveying and securing to the respective purchasers the tracts of land claimed, either upon warrants upon actual settlements completed, or upon actual settlements commenced, may easily be traced in the several sections of the act; but as the present case depends particularly on a construction of the 9th section, it is proper to recite it here at large: "And be it further enacted, &c., 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, 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 settlement of 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 [*174 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. (3 Dall. Laws, 212.)

As the dispensation contained in the proviso was to operate only in the case of an existing warfare, it was stated in the discussion of the present case, that, in fact, hostilities between the United States and the Indians, were never so entirely discontinued, from the period of the revolutionary contest, until General Wayne's treaty in the year 1795, as to render it practicable, with safety, to make actual settlements upon the lands in question. The position was shown, historically, from the military operations of the federal and state governments; judicially, from the opinions of the courts of justice; and experimentally, from the evidence of disinterested individuals. Thus,

After the European peace of 1783, an army was always maintained on the western frontier. During several years, General Harmer was employed in making hostile incursions into the Indian country; and in the year 1790, he was defeated. The progress of General St. Clair terminated also in defeat, on the 4th of November 1791, only five months previously to the date of the law. General Wayne succeeded to the command, prosecuted the war with vigor, and completely routed the enemy in the year 1794. This victory produced a treaty, which was signed on the 3d of August 1795, and was ratified on the 22d of December following. While these events occurred, the north-western frontier of Pennsylvania was constantly exposed to the sanguinary incursions of the Indians; many lives were lost; and in the very description of the proviso to the 9th section of the act, every actual settler or grantee was, "by force of arms of the enemies of the United States either prevented from making an actual settlement, or driven from it." The state of Pennsylvania, co-operating with the federal government, before the act passed, in the very session in which it passed, and so late as December 1795, called out parties of the militia, raised regular troops, and established military posts; and at one period, while negotiations for peace were carrying on, the state suspended her settlements, and plans of defence, in the country bordering on lake Erie, at the request of the federal government, lest the enemy might take umbrage and break off the treaty.(*a*) In fine,
*175] the result of these circumstances to prevent making and continuing actual settlements, during the Indian war, has been repeatedly recognised in the western county courts, and in the courts of *Nisi Prius*, held by the judges of the supreme court in Allegheny county, subsequent to the ratification of General Wayne's treaty.(*b*)

But the dispensation contained in the proviso, is likewise qualified with a stipulation, that the actual settler or grantee in any warrant, "shall per-

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(*a*) For the various military measures pursued by the state government, and the general opinion of danger, see the following laws, and the entries in the journals of the senate: 3 Dall. Laws, 19, 17th March 1791; 1 Journ. Sen. 272–3, 24th August 1791; Ibid. 27, 29, 37, 47, 54, December 1791, and January 1792; 3 Dall. Laws, 177, 20th January 1792; 2 Journ. Sen., 8th December 1792; 3 Dall. Laws, 335, 3d April 1793; 2 Journ. Sen., 288, 29th August, 1793; Ib. 294, 4th September 1793; Ib. 5th December 1793; 3 Dall. Laws, 464, § 2, 3, 28th February, 1794; Ib. 483, 8th April 1794; 2 Journ. Sen., 264–5, 2d September 1794; 3 Dall. Laws, 757, 13th April 1795; Ib. 763, § 13, 14.

(*b*) See Ewalt's Lessee *v.* Highland, *ante*, p. 161. McLaughlin's Lessee *v.* Dawson, *post*, p. 221; and Morris's Lessee *v.* Neighman, *post*, p. 209. Since this report was pre-

sist in his endeavors to make such actual settlement" as the law describes. The perseverance of the Holland Company, in time, in labor, and in money, was, therefore, exhibited in detail upon the present occasion. It appeared from various official documents and depositions, that the company had purchased and paid for 1162 tracts, of 400 acres each, situated in districts No. 1, 2, 3, 6 and 7, and that for these tracts, warrants of survey were issued, dated, respectively, in the months of April 1792, and of April and August 1793. From the day of issuing the warrants, until the present day, the endeavor of the company and their agents, to occupy, improve and settle the lands, has been incessant. Thus, as soon after the dates of the warrants, as the deputy-surveyors could be prevailed upon to attempt to execute the surveys, in the years 1794 and 1795, a general agent was appointed to superintend the business of the company, a large store was built at Cassewago, or Meadeville, and a sum exceeding $5000 was actually disbursed. In the year 1796, companies of settlers were invited, encouraged and engaged; ample supplies of provisions, implements, utensils, &c., were sent into the country; the expenses of transporting families were liberally advanced; a bounty of one hundred acres was given for improving and settling each tract; and a further sum of about $22,000 was actually disbursed..

In the year 1797, a sum of about $60,000 was further expended, in promoting the same objects, including payments *on contracts for settlement, and quieting adverse claims. In the year 1798, mills were [*176
erected, roads were opened, and other exertions were made, at a charge of not less than $30,000. In the year 1799, the sum of $40,000 and upwards was expended in improvements and settlements; in the salaries and wages of agents and workmen; in opening and repairing roads; and in patenting 876 tracts of land. And in 1800, the operations and advances of the company will, at least, be equal to those of any preceding year. In short, at the close of the present year, near $400,000 will be expended, according to the following view of the subject.

The amount of the purchase of the late James Wilson, Esq., including the purchase-money paid to the state, at the period of obtaining the warrants, was	222,071 10
The amount of disbursements for making improvements, settlements, &c., was	157,000 00
The amount of taxes and expenditures, for the year 1800, will be	18,000 00
	$397,071 10

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pared, the same question has been agitated in the circuit court of the United States, in the Lessee of Balfour *v.* Meade (*post*, p. 363). The evidence was conclusive, that until the spring of 1796, it was not safe to prosecute settlements in the country lying north and west of the rivers Ohio and Allegheny, and Conewango creek: and although the cause was decided in favor of the defendant, who claimed as an actual settler, upon other grounds, Judge WASHINGTON, in his charge to the jury, admitted the fact to be proved, and declared, that where the fact of prevention could avail the party, it operated during the whole war, and for a reasonable time (according to the circumstances of the case) after the treaty of peace.

And regarding the operations of the company, in another aspect, we find, that the gross amount of the expenditures, upon the quantity of land which remained for them to improve and settle, will furnish an average at the rate of $230 for each and every tract. For instance :

	Tracts.	
The original number of warrants called for, ...		1162
But, from this aggregate, there must be deducted, on account of prior occupants of the land, ...	113	
On account of tracts lost, upon resurveys, in district No. 1,	11	
On account of tracts lost, upon resurveys, in district No. 6,	3	
On account of bounties to actual settlers, who improved under the company, but at their own charge, one-fourth of 1021 tracts, ...	259	
		386
		776

Then, it is seen, that the gross amount of the expenditure to the present period, of $178,000, being equally apportioned to 776 tracts, furnishes, as has been stated, an average disbursement of about $230, for improving each tract ; a sum which, in ordinary times, would certainly have been competent to accomplish every improvement designated in the act of the 3d of April 1792.

*177] *But leaving these details, for a moment, to contemplate the general effect of the capital, industry and enterprise, which the Holland Company have thus employed and displayed ; and it is found, that by a conduct the most upright and conciliatory, they have avoided or adjusted every conflicting claim to any part of their purchase ; so that there does not now exist a single *caveat* on the files of the land-office, against the issuing of any patent they demand. The benefit of their exertions has extended, too, far beyond the limits of their own property : nor are they merely their neighbors who are accommodated and enriched ; but the opulence, population and security of the whole range of western frontier have been augmented beyond all calculation. Nay, the influence of the example has been diffused throughout the state, and is felt in every quarter of the Union.

Considering the terms of the act of the 3d of April 1792, it became a question at the land-office, in what manner the accomplishment of an actual settlement and residence, within the meaning of the enacting part of the 9th section, should be proved ; and also, upon what evidence the dispensation of the proviso was to be allowed. On the 1st object, the board of property, on the 16th of December 1797, prepared and published the form of a certificate, in the terms of the law, to be signed by the deputy-surveyor of the proper district, and by the district judge, or two justices of the peace, residing in the vicinity of the land : (*a*) and on the second object, they took the pre-

(*a*) The minute of the board of property, is in these words:

At a special meeting of the Board of Property, 16th Dec. 1797.

Present { Daniel Brodhead, S. G. / John Hall, Secretary, / Francis Johnston, R. G. } of the Land Office.

Resolved, That the following be the form of the certificate to be produced to the secretary of the land-office, before any patents shall issue for land lying north and west

caution of consulting the attorney-general, upon the form which they had drafted; and that gentleman, as it appears from the minutes of the board, dated the 21st December 1797, declared "the certificate proposed by them, respecting the lands lying north and west of the rivers *Ohio and Allegheny and Conewango creek, to be unexceptionable, if there was added a clause, conformable to the proviso contained in the ninth section of the act, that where the settler or grantee has been prevented making such settlement, or hath been driven therefrom, by force of arms of the enemies of the United States, and has persisted in his endeavors to make such settlement, he is entitled, as if such settlement had actually been made and continued."(a) [*178

*Upon such deliberation, and with such uniformity of opinion, in [*179

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of the rivers Ohio and Allegheny, and Conewango creek, and that the same be signed by the proper deputy-surveyor of the district where the land lies, and by the district judge, or two justices of the peace in the vicinity of the said land, and that the secretary cause the said form, with this resolution, to be published in the Pittsburgh Gazette.

We do hereby certify, that ——— ——— hath made, or caused to be made, an actual settlement on a tract of land containing ——— acres, lying north and west of the rivers Ohio and Allegheny, and Conewango creek, situate, &c. (here describe the land), by clearing, fencing and cultivating at least two acres for every hundred acres, contained in the survey of said tract; that he hath erected thereon a messuage for the habitation of man, and resided, or caused a family to reside thereon, for the space of five years next following his first settling of the same.

(A true copy.)

JOHN HALL,
Secretary of the land-office.

(a) The proceedings on this subject are as follows:

December 21st, 1797.

The Board, desirous of establishing a legal form of a certificate, to be produced to the secretary of the land-office, before patents shall issue for lands lying north and west of the rivers Ohio and Allegheny and Conewango creek, wrote to Jared Ingersoll, Esq., attorney-general, for his opinion and directions on this subject, to which they received the following reply, viz.:

"Gentlemen,

The certificate proposed by you, respecting the lands lying north and west of the rivers Ohio and Allegheny and Conewango creek, appears to me to be unexceptionable in its form, provided you add a clause conformable to the proviso contained in the 9th section, that where the settler or grantee has been prevented making such settlement, or hath been driven therefrom by force of arms of the enemies of the United States, and has persisted in his endeavors to make such settlement, he is entitled as if such settlement had actually been made and continued."

Whereupon, the board made the following resolution, adopting the annexed form of certificates, viz.:

Resolved, That the following be the form of the certificate, or certificates, to be produced to the secretary of the land-office, before any patent or patents shall issue for lands lying north and west of the rivers Ohio and Allegheny and Conewango creek, and that the same be signed by the proper deputy-surveyor of the district where the land lies, and by the district judge, or two justices of the peace, in the vicinity of the said land; and that the secretary cause the same form, with this resolution, to be published in the Pittsburgh Gazette:

"We do hereby certify, satisfactory proof having been made to us, that ——— hath made, or caused to be made, an actual settlement on a tract of land, containing ——— acres, lying north and west of the rivers Ohio and Allegheny and Conewango creek,

*180] all the officers of the government, the forms of patents as well *as the forms of the certificates of settlement, or of prevention, were fixed and declared. The Population Company (an association formed on

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situate, &c. (here describe the land), by clearing, fencing and cultivating at least two acres for every hundred acres contained in the survey of the said tract: that he hath erected, or caused to be erected, a messuage for the habitation of man, and resided, or caused a family to reside thereon, for the space of five years next following his first settling the same."

Or,

"We do hereby certify, that ——— the grantee or settler, hath been prevented from making a settlement on a tract of land, containing —— situate, &c. ——— conformable to the proviso contained in the 9th section of the act, entitled 'An act for the sale of vacant lands within this commonwealth,' passed the third day of April 1792, by force of arms of the enemies of the United States; and that he, the said ———, hath persisted in his endeavors to make such settlement."

I certify, that the above and foregoing is a true copy of a minute of the board of property of Pennsylvania, entered in minute of property-book, No. 5, pages 259 and 260, remaining in the office of the secretary of the land-office of Pennsylvania. In testimony whereof, I have hereunto set my hand and seal, in the land-office aforesaid, at Lancaster, this 14th day of February, 1803.

ANDREW ELLICOTT,
(L. S.) Secretary of the land-office.

The form of Patent adopted, in case of Prevention, and issued to the Company.

THE COMMONWEALTH OF PENNSYLVANIA,

To all to whom these presents shall come, Greeting:

KNOW YE, That in consideration of the moneys paid by
(L. S.) THO. MIFFLIN. John Melbeck, into the receiver-general's office of this commonwealth, at the granting of the warrant hereinafter mentioned, and of the sum of three pounds, eight shillings and nine pence, lawful money, now paid by Wilhem Willink, Nicolaas Van Staphorst, Pieter Stadnitski, Christiaan Van Eeghen, Hendrick Vollenhoven and Rutgert Jan Schimmelpenninck, into the said office; and also in consideration of the said Wilhem Willink, Nicolaas Van Staphorst, Pieter Stadnitski, Christiaan Van Eeghen, Hendrick Vollenhoven and Rutgert Jan Schimmelpenninck having made it appear to the board of property, that they were, by force of arms of the enemies of the United States, prevented from making such settlement on the hereinafter described tract of land, as is required by the 9th section of an act of the general assembly of this commonwealth, passed the third day of April 1792, entitled "an act for the sale of vacant lands within this commonwealth," within the time therein mentioned, and that they the said Wilhem Willink, Nicolaas Van Staphorst, Pieter Stadnitski, Christiaan Van Eeghen, Hendrick Vollenhoven and Rutgert Jan Schimmelpenninck have persisted in their endeavors to make such settlement, there is granted by the said Commonwealth unto the said Wilhem Willink, Nicolaas Van Staphorst, Pieter Stadnitski, Christiaan Van Eeghen, Hendrick Vollenhoven and Rutgert Jan Schimmelpenninck, of the city of Amsterdam, a certain tract of land called Normandy, situate in the district No. 2, north and west of the rivers Ohio and Allegheny, in Allegheny county, beginning at an ironwood; thence, by land of Charles W. Peale, south, three hundred and twenty perches, to a red oak; thence, by land of Michael Canner, west, two hundred and thirteen perches, to an oak; thence, by land of William Camron and land of Peter Baynton, north, three hundred and twenty perches, to a white oak; and thence by land of Isaac Paxton, east, two hundred and thirteen perches, to the beginning, containing four hundred and one acres, one hundred and fifty perches, and the allowance of six per cent. for roads, &c. (which said tract was surveyed in pursuance of a warrant, dated the eighteenth day of April 1792, granted

similar principles and with similar views) received, on the 4th of February 1799, patents for numerous tracts of land, upon exhibiting the proofs of prevention prescribed by the board of property. The Holland Company applied for patents for all their tracts, and have actually received patents for 876 racts; the other patents being then withheld, merely for the purpose of a resurvey, which the surveyor-general directed to be made, in consequence of the inaccuracy of the deputy-surveyor. But before the resurvey could be executed, a change had taken place in the land-officers; a new construction was given to the proviso attached to the 9th section of the act; it was insisted, that no patent could issue, unless the terms of settlement and residence were, at some period, completed, though the obligation to complete them, during the Indian war, was suspended; and the resolutions and proceedings of the former board of property, on the subject, were not deemed authoritative and conclusive upon the present board. At the same time, a number of persons intruded upon the lands of the warrantees, on the pretence that the forfeiture for non-settlement was absolute, at the expiration of two years from the date of the warrants, and set up claims as actual settlers. When, therefore, the Holland Company renewed their applications for the rest of their patents, the secretary of the land-office refused to issue them; and the present motion, was made, to compel him to do so, as an official duty, by a writ of *mandamus.*(*a*)

Such were the circumstances (collected from evidence of unquestionable notoriety, from testimony in the cause, or from concessions of counsel) upon which the controversy arose. The general question was, whether the Holland Company had performed the condition of improvement, settlement and residence, annexed to the sale of the lands: or were released, by the operation of the proviso to the 9th section of the act, from the obligation to perform it? And the arguments in support of the rule, embraced three distinct objects of inquiry: 1st. The facts relative to the hostile state of the country, and the persevering endeavors of the Holland Company to accomplish the

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to the said John Melbeck, who by deed, dated the fifth day of January 1791, conveyed the said tract to the said Wilhem Willink, Nicolaas Van Staphorst, Pieter Stadnitski, Christiaan Van Eeghen, Hendrick Vollenhoven and Rutgert Jan Schimmelpenninck, with the appurtenances. To have and to hold the said tract or parcel of land, with the appurtenances, unto the said Wilhem Willink, Nicolaas Van Staphorst, Pieter Stadnitski, Christiaan Van Eeghen, Hendrick Vollenhoven and Rutgert Jan Schimmelpenninck, their heirs and assigns, to the use of the said Wilhem Willink, Nicolaas Van Staphorst, Pieter Stadnitski, Christiaan Van Eeghen, Hendrick Vollenhoven and Rutgert Jan Schimmelpenninck, their heirs and assigns for ever, free and clear of all restrictions and reservations as to mines, royalties, quit-rents or otherwise, excepting and reserving only the fifth part of all gold and silver ore, for the use of this commonwealth, to be delivered at the pit's mouth, clear of all charges. In Witness whereof, Thomas Mifflin, governor of the said commonwealth, hath hereto set his hand, and caused the state seal to be hereunto affixed, the seventh day of October, in the year of our Lord, one thousand seven hundred and ninety-nine, and of the commonwealth, the twenty-fourth.

Attest,

James Trimble, Dep. Sec'ry.

(*a*) Several objections were made, in the course of the argument, to the form of the certificates produced by the Holland Company; but these and other objections in point of form, eventually yielded to a discussion and decision of the general question.

settlement prescribed by the act. 2d. The construction of the proviso attached to the 9th section of the act. 3d. The propriety of proceeding, in this case, by *mandamus*.

I. Of the facts relative to the hostile state of the country ; and the persevering endeavors of the Holland Company, to accomplish the settlement prescribed by the act.

*181] *Whatever may be the effect of the proviso in suspending or releasing the obligation to settle and improve the land, the case in which it operates cannot be mistaken. If a grantee in any warrant is prevented, by force of arms of the enemies of the United States, from making an actual settlement, it is the express case of the proviso : but it will not be contended, that the force of arms, here mentioned, means an actual application of military force, the tomahawk, or the rifle, either to drive a man from his settlement, or to prevent his entering upon the land, with a view to settle it. A well-grounded apprehension of personal violence and danger, from a public enemy ; a terror arising from the force of arms in the neighborhood ; are equally within the spirit and protection of the law.

The actual state of hostility is proved in every possible way. The army of the United States was opposed to the Indians, as to a public enemy, and with various success, from the year 1783 to the year 1795. At the time of passing the act of the 3d of April 1792 (and, certainly, this fact furnished the inducement for inserting the proviso to the 9th section), the whole of the north-western frontier of Pennsylvania was in constant danger and alarm. For some time after the act was passed, the deputy-surveyors did not dare to venture upon the execution of the duties of their office. And until the spring of 1796, not an actual settler inhabited the country, except, perhaps, a few bold and enterprising men, in the vicinity of a garrison. But the constitution of the United States has declared " that no state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war, in time of peace, &c., or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." Art. I. § 10. Now, the state of Pennsylvania did raise and maintain troops, for the defence of her western frontier, from the 17th of March 1791, until the spring of the year 1796, alleging " that there was imminent danger of being invaded by the Indian tribes, then at war with the United States ; and that it was necessary to take immediate and vigorous measures to prevent hostile incursions, and to provide for the security of the frontier inhabitants of this commonwealth." The military operations of the state must, therefore, be regarded, on constitutional ground, as the best evidence that a war existed ; and the effects of that war, in preventing the settlement and occupancy of lands lying north and west of the rivers Ohio and Allegheny and Conewango creek, cannot be more forcibly portrayed, than in the legislative and executive declarations and acts of the government. The judicial authority, indeed, has already settled the fact, that hostilities existed from the time of passing the act, until the ratification of General Wayne's treaty ; and without limiting the operation of the fact to a mere suspension of the condition

*182] of settlement, improvement and residence, the operation, so far, *at least, was expressly recognised, during the continuance of hostilities, in the case of *Morris's Lessee* v. *Neighman* (*post*, p. 209).

But notwithstanding the hostile state of the country, the Holland Company commenced and prosecuted their attempts to settle and improve the land, during the whole period of the war, in a manner equally meritorious and beneficial. It is true, perhaps, that an attempt was not made to settle each particular tract; but the general effort to settle the whole, was all that could be reasonably expected, under such circumstances; a combination of force and capital could alone diminish the danger to be encountered; and the result greatly contributed to establish a barrier against the incursions of the Indians. To the exertions during the years 1794 and 1795, while the war continued, must be added the perseverance of the company, in their endeavors to settle and improve in every subsequent year. During the war, the disbursements for purchase money, and charges of improvement, amounted to near $230,000; and since the war, besides the allowance to settlers, the disbursements of cash have exceeded $178,000. Nor ought it to be forgotten, that after the dangers of war had ceased, another evil, almost as embarrassing, interrupted, annoyed and, in many instances, frustrated the endeavors of the company. Rumors, raised and circulated by artful and interested men, and countenanced by the obscure and equivocal language of the law, were heard to insinuate, that the warrantees had incurred a forfeiture of their lands, by the lapse of two years from the dates of the warrants, notwithstanding the terms of the proviso. Some of those persons who had engaged to settle for the company, began to assert a right of settlement for themselves. Hordes of intruders were pressing eagerly into the possession of the best tracts; and in short, such was the doubt and solicitude universally excited upon this question of forfeiture, that the warrantees could hardly obtain assistance, in the business of settlement and improvement, upon the most liberal terms of participation in the land, or payment of expenses. Although these occurrences will sufficiently show the impracticability of settling each particular tract, even since the peace; and although they increased the difficulties to be surmounted, in the general effort to settle the whole; yet, the integrity, enterprise and perseverance of the company to effectuate the settlements, were uniformly displayed, and have, on every occasion, been candidly applauded. Upon motives of interest, as well as upon the principles of their contract, they "persisted in their endeavors:" for even after the board of property had decided, that they had acquired a legal title to the lands, and issued patents in their favor; even at the moment of the present discussion; they have been, and are, employed (anxiously, laboriously and expensively employed) in completing the settlement and improvement of every tract which they have purchased.

*Let it, then, be recollected, that this controversy does not arise between contending individuals, claiming under adverse titles; but [*183 between individuals, who have long paid for the lands, and the commonwealth, who annexed to the sale certain conditions, to be released on a certain event, which event has actually happened. Of the forfeiture, if a forfeiture has accrued, the state alone can take advantage; and independently of the strict legal question, will it be pretended, that on any principle of equity, the advantage of a forfeiture ought, in such a case, to be taken? The obstacle to a full compliance with the conditions of sale, proceeded from a public calamity, against which it was the duty of the government to protect its citizens, the existence and operation of which the individuals

could not avert or control; and for the consequences of which, they ought not, upon the soundest maxims of civil policy, to be condemned to suffer. But if it was the object of the state to replenish her treasury by the sale of her western lands, that object has been promoted by the sale to the Holland Company, far beyond what could reasonably have been hoped. If the object was to strengthen and secure the frontiers, that object too has been more effectually obtained, by the general operations of the company, than it could have been by the weak and unconnected efforts of particular men: and if it is the spirit and policy of our laws, that the country should be settled, its soil cultivated, and the arts of social life extended, what country was ever more rapidly, or more, by the exertions of a single association, converted from a desert and a wilderness, into a scene of population, industry and prosperity? Every inhabitant, every traveller, every writer, will be found in unison upon this subject; and even the secretary of the land-office, whose conduct has occasioned the present motion for a *mandamus*, has appeared as the eulogist of the Holland Company; exhibiting the merit and the success of their example, as an instrument to procure the public patronage for his own project of settlement, in other parts of the state.

Whatever, then, is the law, it must prevail: but it will not be denied, that a claim to a liberal and equitable construction of an ambiguous law, never was better founded. Prevented from accomplishing the settlements designated in the act, by a public enemy; opposed in the prosecution of those settlements by intruders, who derived, indeed, some color for their pretensions, from an imperfect expression of the legislative meaning; and thrown off their guard, by the deliberate decisions of the board of property, and the authoritative proceedings of the public officers, under the seal of the commonwealth; can it be conscientious, can it be just, can it be honorable, that the Holland Company, after a labor of eight years, and an expenditure of $400,000, should be condemned to a forfeiture of the lands, for which they have paid the full consideration, in favor of the state, who has received that consideration; who, if there has been error or mistake, the error or *184] mistake *lies in the persons of her officers; and who, if the doctrine of forfeiture prevails, will not only retain the consideration-money, but resume the soil, in absolute ownership, with all its ameliorations and improvements? Strange as it would appear, to exact a forfeiture, under such circumstances, for the benefit of the state, the occurrence would be still more extraordinary, if it had only the effect to take the land from a meritorious warrantee, and to give it to a lawless intruder. Until the forfeiture is regularly established, until the government has determined to take advantage of it, and until a second warrant has issued, reciting the default of the first warrantee, any attempt of an individual to seize and retain the possession of the land, merits, not reward, but punishment. If such conduct should receive an executive, a judicial or a legislative, countenance, a scene of conflict, litigation and tumult must inevitably ensue, fatal to the rights of property, and the peace of the community. The spirit of interested jealousy will extend its baneful influence over what has been sanctioned with the seal of office; intrusions and forcible entries will generate riots and civil feuds; the company will be despoiled of every benefit from their patents, their labors and their disbursements; and if right is not to be passively sur-

rendered to violence, the state will ultimately find another insurrection to suppress.

To avert the danger of such a scene, as well as to obtain a safe and certain guide for their conduct, the Holland Company have anxiously sought the opinion of this court; and they trust, that exceptions to form will not be permitted to defeat the present opportunity, to place the subject on a permanent foundation, just to the public, beneficial to settlers, and useful to warrantees. Unless, indeed, a judicial construction of the law can now be obtained, exertions and success will be in an inverse ratio: exertions will be greater, but settlements will be fewer, in each succeeding year; until despair takes the place of enterprise; and the whole business of settlement and improvement shall be abandoned to occupants, whose only title is force, without patent, without warrant and without purchase.

II. The construction of the proviso, attached to the 9th section of the act of the 3d of April 1792.

The exposition of the proviso, has produced a variety of propositions. 1st. By some, it has been supposed, that unless the terms of improvement, settlement and residence had been strictly performed, within the respective periods of two years and five years, a forfeiture accrued, though a war had raged throughout and beyond those periods. 2d. Others, admitting a qualified suspension of the condition, during a war, have, nevertheless, held, that no title could be acquired, until the performance of the terms of improvement, settlement and residence, though the war should last for a century; nor even then, unless the warrantee *had, during the whole war, persisted in his endeavors to perform them. 3d. A third construction maintains, that if a warrantee has been prevented, by force of arms, from accomplishing the improvement, settlement and residence, designated in the act, but has persisted in his endeavors to accomplish them, during the time mentioned in the 9th section, the proviso operates as an extinguishment of the condition, and the title becomes absolute. And 4th. It has been asserted, that a warrantee, having been prevented by war, from making the improvement, settlement and residence, during the time mentioned in the act, will acquire an absolute title, if he persists in his endeavors for a reasonable period, after the expiration of the war, though all his endeavors should prove ineffectual. [*185

1. The first opinion is at once extravagant and iniquitous. No rational man, during the existence of a war, which he could not resist or terminate, would have formed a contract of such a nature. Nor is it conceivable, if this were the design and meaning of the legislature, that the proviso would have found any place in the act, unless, indeed, fraud and deception can be imputed to its authors; and it is to be presumed, that an inconsistent, repugnant and ambiguous proviso has been employed, as the instrument to effectuate them? The enacting part of the 9th section prescribes a settlement to be finished in two years, and a residence to be continued for five years; and unless the proviso either dispensed with the settlement and residence altogether, or enlarged the periods for accomplishing them, it is utterly impossible to ascribe to it a motive or a use.

2. The second opinion is also pregnant with inconvenience, injustice and absurdity. If it affords the legitimate construction of the act, it applies equally to the case of the actual settler, before warrant, and to the case

of the warrantee, with a view to actual settlement. The price of the land could not, therefore, be collected for the use of the state, nor could a title be acquired by the individual, for a century, if the war should last so long; nay, even at the termination of a long protracted war, the individual would be without remedy, unless he could prove, that whatever might be the intermediate expense or danger, his endeavors to accomplish a settlement had never been suspended or remitted. Consider the state of the country, and such a condition annexed to the purchase of lands, would inevitably frustrate the primary intention of the legislature.

2 & 3. But it is not directly denied, that the right of the Holland Company is alive; and it is insinuated, that the opposite arguments do not militate against future grants, if the company shall go on to complete the settlements and residence described in the act. It is proper, therefore, to consider the second and third constructions of the 9th section, connected with each other, *and with the facts arising in the present case. The concession of the opposite counsel, is, indeed, an acknowledgment of the inception and progress, but a denial of the maturity, of the company's title: while it is contended, for the company, that although the enacting part of the 9th section constitutes a condition precedent to the vesting of a legal title in the warrantees, that condition is totally superseded or extinguished, if the case of the warrantee is embraced by the descriptions of the proviso; so that he, thereupon, acquires a legal title, without settlement, improvement or residence.

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By the act, two descriptions of settlers are contemplated: 1st. Those who have made improvements and settlements, without warrants; and 2d. Those who apply for warrants, with a desire to settle and improve. On both descriptions, it is imposed as a condition precedent, that they shall pay the price of the land, when warrants are taken out; that they shall pay the expense of surveys; and that they shall improve, settle and reside, in the manner, and for the period, prescribed. It is to be remarked, however, that a distinction is made, in one respect, between the settler and the warrantee; the former being bound to fulfil the condition precedent personally; and the latter being authorized either to do it himself, or to cause it to be done by others. This, which, at the first blush, might appear an advantage to the warrantee, is converted into a hardship and an injury, the moment the suspicion of forfeiture insinuates itself among the class of people who are to form the actual settlers. There is another distinction also, that the actual settler must pay interest from the date of the improvement; and he was bound to apply for a warrant within ten years after passing the act;(a) but, on the other hand, the land and personal property of the warrantee and actual settler were equally exempt from state taxes, for the same period; and it is urged, that the price of the land was trifling, compared with its real value. Let it be answered, however, that the exemption from taxes can hardly be regarded as a favor; and the lowness of the price affords no reasonable ground of argument. The settler without warrant is charged an interest, and the settler with warrant advances his money. From the fund created by warrantees, invested in the Bank of Pennsylvania and in public stock, the state has drawn a great

(a) The period has been enlarged. 4 Sm. Laws, 200.

portion of that revenue, which has been adequate, for many years, to all her objects of public expenditure and improvement. Besides, no state tax was then imposed, there was none likely to be imposed for ten years; and the fact is, that even at this day, a state tax is not in existence, nor in contemplation. The lowness of the price, too, arose from an avowed consciousness that a great part of the public lands would not sell higher; and as to the rest, the price would be exorbitant, *indeed, on the principles of the opposite construction. After all, the wealth of the state consists in [*187 its population, and advancement in the arts of agriculture, commerce and manufactures, not in the mere accumulation of coin.

These preliminary remarks are suggested, with a view to place the controversy on its real footing; on the footing of a bargain, in which the seller and the purchaser equally consulted their respective interests, and are equally bound (though the one is a state, and the other a private person), by the terms of the contract. It is agreed, that there was a condition precedent, which must be performed, or be dispensed with, upon the terms of the contract, before any title could vest in the warrantees. It is also agreed, that the condition precedent has not been strictly performed; for more than two years have elapsed since the date of the warrants, but no such settlement, improvement and residence have been made and continued, as the enacting part of the 9th section describes. What, then, is the operation of the contract, under such circumstances, connected with the Indian war? The adverse counsel will not explicitly aver, that the result is an absolute forfeiture of the lands; but they peremptorily deny that it amounts to a release or extinguishment of the condition precedent. Where, however, is the expression to be found, that the predicated event dispenses with the condition in part, and adheres to it in part; that dispenses with the limitation of time for performing the act, but, nevertheless, insists upon the act being performed? Even in the condition precedent, a residence of five years is not, in every case, necessary; for it is only required (independent of hostilities), if the warrantee or settler "shall so long live." That cause of absolute dispensation, with respect to residence, must often occur; and it is reasonable to conclude, that the existence of hostilities was likewise considered and intended as entitling the party to an equal degree of indulgence.

But after all, it must be agreed, that the wording of the act is, in some places, incoherent and absurd. Thus, on a grammatical construction, the actual settlement described by the 9th section, comprises a residence of five years; and yet, the same actual settlement is required to be made within two years from the date of the warrant. Subsequent passages, indeed, treat actual settlement and residence as distinct objects; but another confusion of ideas is introduced: for we find that the party is called "such actual settler," though he has been "prevented making such actual settlement," and it is provided, that "if he is prevented from making an actual settlement, but persists in his endeavors to make it, he and his heirs shall have and hold the lands, in the same manner, as if the actual settlement had been made and continued." From the difficulties of the language of the act, therefore, we must endeavor to rescue ourselves, by ascribing to the legislature a meaning, which, while it comports *with a rational exposition of the words, [*188 shall be consistent with public policy and the principles of justice.

The state, having received the money of the warrantees, was naturally

led, from the existing hostilities, to contemplate the injury to which their purchase was exposed. Whether the hostilities would prevent the settlement, or not, it might be difficult to foresee; but the legislature, in offering the lands for sale, must have held out the probability, that there would be a safe opportunity to settle; or the condition of settlement could never rationally and fairly have been proposed. If, therefore, the opportunity, implied in this overture, was defeated, it seems to follow, as a legitimate consequence, that the condition ought not to be enforced. Consider, for a moment, the situation of a warrantee, bound by the strict condition to settle, or, by the dispensing proviso, to persist in his endeavors to settle. He must explore, locate and survey each tract, before he can attempt to settle. He must collect, appropriate and apply the funds necessary to defray the various expenses of settlement, improvement and residence. He must be in constant preparation to seize and employ the opportunity for settling. Under such obligations, the mere pecuniary charge of watching for a safe occasion to enter upon his lands (independent of time, labor and anxiety) would, in most instances, be greater than the cost of actual settlement, in a season of public tranquility. Exhausted in money, perplexed by doubt and suspense, grown old and infirm in a course of exertion or persistence, what pretext could justify an accumulation of such disappointment, injury and loss, by exacting a forfeiture of the lands? The peace warrantee, who has waited until the storm has passed away; or the intruder, who, at the close of a war, usurps the name of actual settler, has none of these calamities to encounter; and yet, no greater price has been paid, no other conditions are imposed, in either of those cases, than in the case of the warrantee, who is defeated in all his exertions, and drained of all his resources, by the unavoidable operations of a public war!

Is there, then, no principle of justice and humanity, to claim relief from the legislature, upon the construction for which the Holland Company contend? Would it be unreasonable, to suppose, that under such circumstances, the legislature intended to vest in the persevering, but unsuccessful, warrantee, an absolute estate in the land, upon which he might establish a credit, to furnish means for renewing his exertions, and ultimately compensating his advances and his labors? If the supposition involves nothing unjust or irrational, the frame of words will sufficiently serve to give it body and effect. Thus, it is declared, that should the grantee "be prevented from making such actual settlement," and persist in his endeavors to make it, he shall hold the lands, as if it were made and continued: but the word prevented *189] implies *that he had failed; and persisting in an endeavor, does not import succeeding in it. Again, the grantee is to have the lands, if he persists in his endeavors to make such actual settlement: but this does not involve a condition, that he shall persist until he has made it, or so as to make it; and "endeavoring to make," is an expression that designates an attempt, not a performance. Again, if the grantee is prevented, but persists in his endeavors to settle, he is entitled "to have and to hold the lands, in the same manner as if the actual settlement had been made and continued:" but no title could vest in the grantee, unless the condition precedent was performed; and yet, by force of the proviso, he is to have the lands (not merely the benefit of a prolongation of the time for settlement), in a case where, from the hypothetical terms employed, it must be clearly understood that

the condition had not been performed. Again, the grantee, being prevented, but persisting in his endeavors to settle, is, by force of the proviso, to have and to hold the lands, "in the same manner," as if the condition precedent had been performed: but if the condition precedent had been performed, the grantee would have held the lands in fee, discharged from any limitation, contingency or incumbrance whatsoever; and consequently, in this case, to enable the grantee to hold in the same manner, persisting in his endeavors to settle, must be considered as tantamount to actual settlement and residence. In short, in every sentence of the proviso, the legislature plainly points at a certain state of things, at some concurrence of circumstances, when the grantee would be absolutely entitled to the land, before, and without, making and continuing an actual settlement.

The only question, then, must be, what is the nature of the endeavors prescribed; during what period, the endeavors are to be made; and how long the grantee is bound to persist? The actual settlement must be made or excused, within two years from the date of the warrant; and the residence must not only be five years, but five years next following the first settlement. The time, therefore, is a characteristic of the condition precedent; an ingredient in the definition, as essential to the contract, as the nature of the act required to be performed. If the time is as essential, it is as limited, as the nature of the act to be performed; and hence, does it not follow, that at the expiration of two years, as to the settlement, and of five years, as to the residence, the condition must be actually performed or virtually annulled? The excuse for non-performance is also limited; since, on an allegation of being prevented from settling or residing, the grantee must state the force of arms which prevented him, to be within, and until the end of two years (as to the settlement) next immediately after the date of his warrant; and within and until the end of five years (as to the residence) from the date of his first settlement; or his plea shows no dispensation from the condition. *Thus, the time, within which performance is to be effected, or an apology for non-performance to be received, is the same, or, at least, commensurate: and if the period within which the substitute for performance is exacted, within which the endeavor to perform must be shown, cannot be extended in favor of the warrantee, what right, express or implied, can there be, on the part of the state, to insist on a continuance of the endeavor, beyond the period within which the contract obliged her to accept it, as a commutation for the performance? Equality is equity, whoever may be the parties to the bargain—states or individuals: but it would be a doctrine of arbitrary prerogative, if performance, or endeavors to perform, should only avail the grantee, to release him from the condition, within a limited period; yet, that the obligation to perform, or to persist in the endeavor to perform, should be indefinite and perpetual. Nor is the idea correct, that the war excused the warrantees from endeavoring to effect a settlement, during its continuance; and that the law contemplated a perseverance only when it could be effectual. On the contrary, the law obviously required a perseverance in the endeavor to settle during the war; but left the degree of perseverance to be regulated by considerations of a reasonable discretion and personal safety. That this was the construction of the Holland Company, appears incontestably, from the immediate steps which they pursued to complete their surveys and improvements: and this is, in truth, [*190

the material ground of complaint against the opposite doctrine; that, by the contract, the grantees were obliged to make laborious, hazardous and expensive exertions, during the war; and, yet, at the conclusion of the war, derive no advantage from those exertions, in consummating the legal title to the lands.

On the doctrine, that the grantee or settler must persist in his endeavors to improve and reside, for any other periods, or beyond the respective periods of two and five years, let it be asked, when those other periods are to commence, and how long are they to be protracted? The law itself is silent; and yet, if an intention of that kind had been entertained, how easily, and how certainly, would the legislature have said, that "the grantee shall have the lands, if the settlement is completed within two years after the cessation of hostilities, and the residence continued for five years subsequent to the same epoch." But by whom shall the silence of the law be supplied? What power exists to add the slightest circumstance to the terms of the contract? The legislature, as a party, cannot explain or expound it. The courts of justice can only declare the meaning, from the fair and genuine import of the language of the act; they cannot diminish or enlarge the vested rights of individuals, any more than they can supersede the rights of the state. And on this occasion, the officers of the land-office have only a ministerial function to perform. Let it, therefore, be repeated, that *the proviso to the 9th section having rested the consummation of the grantee's title, simply upon the persisting in an endeavor, it would be creating a new contract, making a new law, introducing another principle, and amplifying the words of the legislature, to require, not a persevering endeavor, but an actual performance. Besides, would it be just, to fix upon the close of the war, as the period for commencing the endeavor, without giving some credit for the exertions of the grantee or the settler, *flagrante bello?* And yet, who shall make the apportionment of time, of labor and of expense; and upon what principle, can it be made? It often happens, that what is intended to afford an undue preference to a favorite, in a remote consequence, proves peculiarly injurious to him. The merits of the actual settler have sometimes been enhanced, in order, by an invidious comparison, to depreciate the claims of the purchaser or warrantee: but, it is obvious, that a determination upon the ground taken by the opposite counsel, would operate more severely, with greater cruelty, towards the actual settler, than any consequence that can flow from the construction urged in favor of the Holland Company. For instance, a man enters upon his lands, in the year 1792, with a view to make the improvements which the act requires. He is attacked by the Indians, and driven from his cabin and his field, before he has time to make any visible progress in building, clearing and cultivating; but he observes, in the words of the act, that being driven from his settlement, he shall, nevertheless, have title, as if he had completed his improvement and continued his residence, if he persists in his endeavors: he, therefore, returns the next year, and is again driven away, *re infecta;* and so on, for a succession of years. Shall such a perseverance be accounted as nothing? And is it not obvious, that to require that the actual settler shall be driven away, and constantly kept away, and yet shall complete the settlement and residence, places him in a condition

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more grievous than even the case of the warrantee, who is merely prevented from entering and improving the land?

Upon the whole, then, let the proviso operate as a release of the condition precedent, or let it be taken as qualifying the condition, and requiring a reasonable perseverance during or after a war, the claim of the Holland Company must be established. They persisted, in spite of every danger, while hostilities raged; and more than five years have elapsed since the Indian treaty, during which they have also persisted.

III. Of the propriety of proceeding, in this case, by a *mandamus*. In entering upon this part of the discussion, it is proper to inquire, whether the construction given by the board of property to the proviso is not conclusive. It was given after great deliberation, *and upon the legal advice of the law-officer of the state. Patents have been issued, in [*192 pursuance of the construction; and transfers have been made and accepted, upon the faith of the public grants, under the great seal. *Stare decisis* is a maxim to be held for ever sacred, on questions of property; and in the present instance, applies with peculiar force, as the rule was given by the state herself, through the medium of her officers; and with her alone, not with any individual, can a conflict arise. The board of property is of a judicial character, and had jurisdiction in the present case. (2 Dall. Laws, 21, § 2, 3; 3 Ibid. 2, 456; 4 Ibid. 476; 3 Ibid. 213, 311.) There is no revisory or appellate authority established for questions of this nature: and, certainly, the secretary of the land-office, though a constituent member of the board of property, is merely, as secretary, a ministerial officer, bound by the decisions of the board, though contrary to his own opinions. His ministerial duties (of which it is one, that he shall obey the orders of the board of property) are stated in the several laws relating to the land-office, and they have received a practical exposition, which devolves on him the care of preparing patents for the governor's signature, and the seal of the state. He is bound, then, to execute the public laws relating to the land-office; and, if he refuses to do so, the court will compel him by *mandamus*, on general principles, as well as on the authority of particular cases.

The general principle of the *mandamus* points at cases, in which there is no other legal, specific remedy; for a satisfaction in damages is not regarded, in such cases, as an adequate reparation: and then it may be awarded to any public, or private person. (1 Woodes. Lect. 118; 3 Black. Com. 110; 3 Burr. 1267, 1659; 4 Ibid. 2188; 2 Ibid. 1045; 3 T. R. 651; Ibid. 404; Doug. 568.) The particular instances are numerous. It lies to compel the ordinary to grant letters of administration. (1 W. Black. 640.) To compel the delivery of an administration-bond to be put in suit. (4 Bac. Abr. 508; Cowp. 140.) To compel the grant of a license to a curate, if refused without just reason. (4 Bac. Abr. 502, 506; 2 Str. 797.) To compel the proper officer to affix a seal. (4 Bac. Abr. 509.) Or to register a certificate, being merely a ministerial act. (Ibid. 508; 1 Wils. 283.) To compel the party to proceed in proving a will. (Ld. Raym. 235; 15 Vin. Abr. 203.) To oblige any officer to do his duty. (4 Com. Dig. 207.) To compel obedience to things enjoined by statute. (2 Str. 992.) To compel the enrolment of a testament, which, by custom, ought to be enrolled. (2 Roll. Abr. 106; 1 Sid. 443.) To compel a clerk of a company to deliver up books

(1 Str. 879.) To compel an old officer to deliver records to a new one. (1 Sid. 31.)

The arguments in opposition to the motion for a *mandamus*, were arranged
*193] under three considerations: 1st. What is the real *import of the condition precedent: 2d. What the Holland Company had performed, to vest in them a legal title to the lands: and 3d. Whether a *mandamus* does lie to the secretary of the land-office, even if the company are entitled to patents.

I. What is the real import of the condition precedent.

This general inquiry naturally divides itself into a view of what must be accomplished by persons who meet with no prevention from the enemies of the United States; and of what must be done, even by persons who are so prevented, in order to obtain a legal title to the land. The policy and object of the legislature are to be ascertained, by the circumstances which induced them to pass the act of the 3d of April 1792. Before it was passed, and at the time of passing it, there was a subsisting Indian war; and the treaty of 1794 between the United States and Great Britain, had not removed the causes of irritation and apprehension in relation to that power, which extended along the northern and western boundaries of the state. Hence, it became of the greatest importance to advance the range of settlement; and to interpose the barrier of a bold and hardy population, in the quarter where danger was so apparent. Treasure was, obviously, only a secondary consideration; and settlement itself was only stipulated, where the danger existed. Thus, the lands east of the Allegheny were offered for sale, unshackled with conditions of settlement; while those on the west could never be vested in any individual, upon any other terms, than those of actual settlement and residence. The steady caution of the legislature on this point, is conspicuous in almost every section of the act. The sale is only offered to persons, who will cultivate, improve and settle the lands. (3 Dall. Laws, 209, § 2.) An actual settler, without warrant, is so highly regarded, that although the law would deem him a trespasser, on general principles, the act prohibits any deputy-surveyor from surveying any settled land, but for the owner of the settlement. (§ 5, p. 210.) A period of ten years' credit is given to an actual settler for the price of his land. (§ 10, p. 210.) The land is exempt from direct taxes for an equal term. (§ 12, p. 213.) And when the legislature, in the year 1794, closed the land-office, it was with an express exception in favor of actual settlers. (3 Dall. Laws, 637.) (*a*) In addition to these proofs of the policy and design of the legislature, it must be of great force, to recollect, that shortly before the time of offering the land for sale at the rate of 7*l.* 10*s.* per 100 acres, the state had paid to
*194] the United States, at the rate of three-fourths of a *dollar for every acre, contained in the triangular tract bordering on lake Erie. (*b*)

(*a*) The land-office appears to have been closed, upon the suggestion of the governor, that warrants had issued for a greater quantity of land than the state owned; and not with a view to favor actual settlers. See the governor's message of the 2d of September 1794.

(*b*) The payment was made in public certificates; which, it was insisted, were greatly depreciated in value.

The language of the act ought, then, to be expounded, in consistency with the policy that gave it birth; and this can only be done, by considering the effect of a prevention by a public enemy, to be a suspension, and not an extinguishment, of the obligation to settle and reside upon the land. The legislature must have presumed that, notwithstanding the existence of the Indian war, there would be an extension of the western settlements; the accomplishment of a settlement was made a *sine qua non* to the investment of a legal title; and the proviso declares nothing more, in effect, than that the war shall be an excuse for non-settlement, while it continues, and the warrantee sincerely persist in his endeavors to settle. But an endeavor to settle must be shown, whether war raged or not; and the endeavor must be to settle every tract (each being the subject of a separate grant), not a general effort to improve an extensive and indefinite range of country. It being the spirit of the contract, that the land should be settled, no argument ought to avail, on the score of the warrantee's having paid the stipulated price; and the word settlement, wherever used, is pregnant with all the consequences of building, cultivation and residence, described in the 9th section of the act It is now too late to complain of hard terms. Whatever was intended and undertaken, by virtue of the law, it is just and lawful to enforce. Say, even, that a forfeiture has been incurred, and insisted on, it can be no reason, at this day, to reproach the government. That point, however, is not urged; for every argument, used on the present occasion, to oppose the *mandamus*, is perfectly consistent with the idea of future grants or patents being issued to the Holland Company, if they persevere, and in a reasonable time, comply with the requisites of the condition precedent.

II. What have the Holland Company performed, to vest in them a legal title to the lands?

It must be repeated, that every tract is the subject of a distinct grant; and that the condition precedent attaches to each tract. Nor does it affect the obligations of the condition, that the Holland Company are the holders of all the warrants in question; for the law is the same, as if each warrant belonged to a separate individual owner. Have the company, then, shown an actual settlement, or even an endeavor to settle, upon each of the tracts? The evidence exhibited by the company themselves establishes a contrary position. Can it be sufficient to say, that they have improved a great deal of the country, and therefore, are entitled to hold what they have not improved? The spirit of monopoly *was an evil against which the legislature meant to guard, by dividing the territory offered for sale into [*195 tracts, and restricting the right of purchase to a single tract. It is true, that the contrivance of opulent speculators has evaded the legislative precaution; and instead of each settler being the owner of the tract on which he resides, he is the mere instrument of an association of foreigners (who never have visited, and probably, never will visit America), to obtain, for their emolument, the lands which the state had offered for sale, with very different views of policy and benefit.

Let it be admitted, however, that the Indian war operated as an excuse for not settling each tract until the spring of 1796; yet, the ratification of General Wayne's treaty removed every obstacle, and was a warning to every warrantee, that the season had arrived, when, by persisting in his endeavors, he might consummate his legal title. If, indeed, no industry or care could

have enabled the company to comply with their contract, the condition would still, perhaps, be suspended: but it is not clear, that a settlement was impracticable at any time, and certainly, it has been practicable for five years past. The company have already obtained 876 patents, without a performance of the condition; and it is remarkable, that until the resurvey in 1799, they could not even ascertain what tracts were embraced by the remaining 153 warrants. As to the lands, therefore, for which patents are now claimed, nothing more has been done by the company, than to locate and survey them; and unless the Indian war operated as a release of the condition, there is no title acquired?

III. Whether a *mandamus* does lie to the secretary of the land-office, even if the Holland company are entitled to patents.

The Board of Property is a court of justice; and should be governed by the principles of law, in relation to the proof of matters within their jurisdiction. The certificate of prevention, framed by the order of the 21st of December 1797, is destitute of every characteristic of evidence; and it has even been evaded, in the manner of returning it; for the order required the signature of the proper deputy-surveyor, and two justices; but in many instances, the certificate is signed by the same person twice, once as deputy-surveyor, and again as a justice. Consider the order as a rule of practice; rules of practice are for ever in the power of the court, to alter or rescind; and the succeeding board of property could not be restrained in this respect, by the acts of their predecessors. Besides, the order of the 21st December 1797, is radically defective in other points. The board of property was bound to inquire for themselves, whether settlements had been completed or prevented, within the meaning of the law; it was a judicial authority, which could not be delegated; and yet, by this order, it was actually transferred
*196] to the deputy-surveyors *and justices; nor was the sanction of an oath required for the fidelity of their certificate; which, indeed, is not a statement of facts, but the declaration of a result. The introduction of such an order was, therefore, an error, and its revocation became a duty.

The secretary of the land-office, in his judicial capacity, as a member of the board of property, decided against the force of the certificate of prevention, to entitle warrantees to patents; and the effect of the *mandamus* would be, to compel him to do, as an executive officer, what he has declared, as a judge, ought not to be done. Nor is the act required within the duties of his office. The patent is an act of the governor; and affixing the state seal, is an act of the secretary of the commonwealth: but the secretary of the land-office can neither issue a patent, nor affix the seal, nor compel others to do so. It is to be remembered, likewise, that the board of property is established expressly as a tribunal to advise and regulate the proceedings of the land-office; and a *mandamus* ought not to issue to any of the ministerial officers, requiring an act to be done, which the board has prohibited. (2 Dall. Laws, 21; 3 Ibid. 3, § 3; 3 Bl. Com. 111.)

But there is, both in law, and in practice, a specific, appropriate and adequate remedy, which supersedes any pretext for issuing a *mandamus*. If the secretary of the land-office refuses to perform a duty, an application may be made to the board of property, whose orders he must obey; and if the decision of the board of property is not satisfactory to the applicant, he may institute an ejectment. By this course, order will be preserved,

justice will be administered, and the interests of the state, as well as of individuals, will be protected.

After taking time for deliberation, the judges delivered their opinions *seriatim*:(a)

Shippen, Chief Justice.—The legislature, by the act of the 3d of April 1792, meant to sell the remaining lands of the state, particularly, those lying on the north and west of the rivers Ohio and Allegheny. The consideration-money was to be paid, on issuing the warrants. They had likewise another object, namely, that, if possible, the lands should be settled by improvers. The latter terms, however, were not to be exacted from the grantees, at all events. The act passed at a time when hostilities existed on the part of the Indian tribes. It was uncertain, when they would cease: the legislature, therefore, contemplated, that warrants might be taken out, during the existence of these hostilities, which might continue so long, as to make it impossible for the *warrantees to make the settlements [*197
required, for a length of time; not, perhaps, until after these hostilities should entirely cease. Yet, they make no provision, that the settlements should be made within a reasonable time after the peace; but expressly within two years after the dates of the warrants. As, however, they wished to sell the lands, and were to receive the consideration-money immediately, it would have been unreasonable, and probably, have defeated their views in selling, to require settlements to be made on each tract of four hundred acres, houses to be built, and lands to be cleared; in case such acts should be rendered impossible by the continuance of the Indian war. They, therefore, make the proviso, which is the subject of the present dispute, in the following words: "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."

When were such actual settlements to be made? The same section of the act, which contains the above proviso, gives a direct and unequivocal answer to this question, "within the space of two years next after the date of the warrant." If the settlements were not made within that time, owing to the force, or reasonable dread, of the enemies of the United States, and it was evident, that the parties had used their best endeavors to effect the settlement; then by the express words of the law, the residence of the improvers for five years afterwards, was expressly dispensed with; and their titles to the lands was complete, and patents might issue accordingly. It is contended, that the words "persist in their endeavors" in the proviso, should be extended to mean, that if, within the two years, they should be prevented by the Indian hostilities from making the settlement; yet, when

(a) Mr. Justice Brackenridge having been retained, while he was at the bar, as counsel for the Holland Company, declined taking any part in the decision of this cause.

they should be no longer prevented by those hostilities, as by a treaty of peace, it was incumbent on them, then, to persist to make such settlement. The legislature might, if they had so pleased, have exacted those terms (and they would not, perhaps, have been unreasonable) ; but they have not done so : they have expressly confined the time of making such settlements, to the term of two years from the date of the warrant. Their meaning and intention can alone be sought for, from the words they have used, in which there seems to me, in this part of the act, to be no great ambiguity. If the contrary had been their meaning, they would not have made use of the word "endeavors," which supposes a possibility, at least, if not a probability, as things then stood, of those endeavors failing, on account of the hostilities ; *198] and would, therefore, *have expressly exacted actual settlements to be made, when the purchaser should no longer run any risk in making them.

The state having received the consideration-money, and required a settlement within two years, if not prevented by enemies ; and in that case, dispensing with the condition of settlement and residence, and declaring that the title shall be then good, and as effectual as if the settlement had been made and continued ; I cannot conceive, they could mean to exact that settlement, at any future indefinite time. And, although it is said, they meant that condition to be indispensable, and that it must be complied with in a reasonable time ; we have not left to us that latitude of construction, as the legislature have expressly limited the time themselves.

It is urged, that the main view of the legislature was to get the country settled and a barrier formed : this was, undoubtedly, one of their views, and for that purpose, they have given extraordinary encouragement to individual settlers ; but they had, likewise, evidently, another view, that of increasing the revenue of the state, by the sale of the lands. The very title of the act is "for the sale of the vacant lands within this commonwealth ;" this latter object they have really effected, but not by the means of the voluntary settlers ; it could alone be effected by the purses of rich men or large companies of men, who would not have been prevailed upon to lay out such sums of money as they have done, if they had thought their purchases were clogged with such impracticable conditions.

I have hitherto argued, upon the presumption, that the words "persist in their endeavors," relate to the grantees as well as the settlers ; but in considering the words of the proviso, it may be well doubted, whether they relate to any other grantee or settler, than those who have been driven from their settlements. The word "persist," applies very properly to such. The words of the proviso are, "if such actual settler, or any grantee, shall by force of arms of the enemies of the United States, be prevented from making such settlement, or be driven therefrom, and shall persist in his endeavors to make such actual settlement ; then, in either case, he and his heirs shall be entitled, &c." Here, besides that the grammatical construction of referring the word "persist" to the last antecedent, is best answered; the sense of it is only applicable to settlements begun, and not to the condition of the grantees. There are two members of the sentence, one relates to the grantees, who, it is supposed, may be prevented from making their settlements : the other to the settlers, who are supposed to be driven away from the settlements. The latter words, as to them, are proper; as to the

grantees, who never began a settlement, improper. The act says, in either case, that is, if the grantees are prevented from making their settlements, or *if the settlers are driven away, and persist in their endeavors to complete their settlements, in either case, they shall be entitled to the land. [*199

I will not say, this construction is entirely free from doubt: if it was, there would be an end of the question. But taking it for granted, as it has been done at the bar, that the words relate to the grantees, as well as to the settlers; yet, although inaccurate with regard to the former, it seems to me, the legislature could only mean to exact from the grantees, their best endeavors to make the settlements, within the space of two years from the date of their warrants; at the end of which time, if they have been prevented from complying with the terms of the law, by the actual force of the enemy, as they had actually paid for the land, they are then entitled to their patents. If the legislature really meant differently, all I can say is, that they have very unfortunately expressed their meaning.

The propriety of awarding a *mandamus*, is another question, which I mean not to discuss, as I presume a decision of a majority of the court will make it unnecessary.

YEATES, Justice.—I have long hoped and flattered myself, that the difficulties attendant on the present motion, would have been brought before the justice and equity of the legislature for solution, and not come before the judicial authority, who are compelled to deliver the law as they find it written for decision. The question has often occurred to our minds, under the act of the 3d of April 1792, which has so frequently engaged our attention in our western circuits.

The Holland Company have paid to the state the consideration-money of one thousand one hundred and sixty-two warrants, and the surveying fees on one thousand and forty-eight tracts of land; besides making very considerable expenditures, by their exertions, honorable to themselves, and useful to the community (as has been correctly stated), in order to effect settlements. Computing the sums advanced, the lost tracts, by prior improvements and interferences, and the quantity of one hundred acres granted to each individual for making an actual settlement on their lands; it is said, that, averaging the whole, between $230 and $240 have been expended by the company, on each tract of land they now lay claim to.

The Indian war, which raged previous to, and at the time of the passing of the law, and until the ratification of the treaty at Fort Grenville, must have thrown insurmountable bars in the way of those persons, who were desirous of sitting down immediately on lands, at any distance from the military posts. These obstacles must necessarily have continued for some time after the removal of impending danger, from imperious circumstances; the *scattered state of the inhabitants, and the difficulty of early collecting supplies of provisions; besides, it is obvious, that settlements, in most instances, could not be made, until the lands were designated and appropriated by surveys, and more especially so, where warrants have express relation to others, depending on a leading warrant, which particularly locates some known spot of ground. [*200

On the head of merit, in the Holland Land Company's sparing no expense to procure settlements, I believe, there are few dissenting voices

beyond the mountains: and one would be induced to conclude, that a variety of united, equitable circumstances would not fail to produce a proper degree of influence on the public will of the community. But we are compelled by the duties of our office, to give a judicial opinion upon the abstract legal question, whether, if a warrant-holder, under the act of the 3d of April 1792, has begun to make his actual settlement, and is prevented from completing the same, "by force of arms of the enemies of the United States, or is driven therefrom," and shall make new endeavors to complete the same, but fails in the accomplishment thereof, the condition of actual settlement and residence is dispensed with and extinguished?

I am constrained, after giving the subject every consideration in my power, to declare, that I hold the negative of the proposition, for the following reasons, collected from the body of the act itself:

1st. The motives inducing the legislature to enact the law, are distinctly marked in the preamble, that "the prices fixed by law for other lands" (than those included in the Indian purchase of 1768), "are found to be so high, as to discourage actual settlers from purchasing and improving the same." (3 Dall. Laws, 209.)

2d. "The lands lying north and west of the rivers Ohio and Allegheny and Conewango creek, are offered for sale, to persons who will cultivate, improve and settle the same, or cause the same to be cultivated, improved and settled, at and for the price of 7*l.* 10*s.* for every hundred acres thereof." By § 2, the price of lands is thus lowered, to encourage actual settlements.

3d. By § 3, "upon the application of any person who may have settled and improved, or is desirous to settle and improve, a plantation within the limits aforesaid, there shall be granted to him a warrant not exceding four hundred acres," &c.

The application granted, is not to take up lands; but it must be accompanied, either by a previous settlement and improvement, or expressions of a desire to settle and improve a plantation; and in this form, all such warrants have issued.

*201] *4th. By § 5, "lands actually settled and improved, prior to the date of the entry of a warrant with the deputy-surveyor of the district, shall not be surveyed; except for the owner of such settlement and improvement." This marked preference of actual settlers over warrant-holders, who may have paid their money into the treasury for a particular tract, even, perhaps, before any improvement of the land was meditated, shows, in a striking manner, the intention of the legislature.

5th. By § 8, "the deputy-survivor of the district, shall, upon the application of any person who has made an actual settlement and improvement on these lands, survey and mark out the lines of the tract of land, not exceeding four hundred, for such applicant." The settlement and improvement alone are made equivalent to a warrant; which may be taken out, by § 10, ten years after the time of passing this act.

6th. I found my opinion, on what I take to be the true and legitimate construction of the 9th section; in the close of which, is to be found the proviso from whence spring all the doubts on the subject. It has been said at the bar, that three different constructions have been put on this section.

(1.) That if the warrant-holder has been prevented by Indian hostilities,

from making his settlement within two years, next after the date of his warrant, and until the 22d of December 1795 (the time of ratification of General Wayne's treaty), the condition of settlement and residence is extinct and gone.

(2.) That though such prevention did not wholly dispense with the condition, it hindered its running within that period; and that the grantee's persisting in his endeavors to make an actual settlement and residence, for five years, or within a reasonable time thereafter, shall be deemed a full compliance with the condition.

(3.) That in all events, except the death of the party, the settlement and residence shall precede the vesting of the complete and absolute estate.

Though such great disagreement has obtained, as to the true meaning of this 9th section, both sides agree in this, that it is worded very inaccurately, inartificially and obscurely. Thus, it will be found, towards the beginning of the clause, that the words "actual settlement," are used in an extensive sense, as inclusive of residence for five years: because its constituent parts are enumerated and described, to be 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." In the mid- [*202 dle of the clause, the same words are used in a more limited sense, and are coupled with the expression "and residence," and in the close of the section, in the proviso, the same words, as I understand them, in a strict grammatical construction of the whole clause, must be taken in the same large and comprehensive sense, as they first conveyed; because, the terms "such actual settlement," used in the middle of the section, are repeated in the proviso, and refer to the settlement described in the foregoing part: and the words "actual settlement, as aforesaid," evidently relate to the enumeration of the qualities of such settlement. Again, the confining of the settlement to be within the space of two years next after the date of the warrant, seems a strange provision. A war with the Indian natives subsisted, when the law passed, and its continuance was uncertain. The state of the country might prevent the making of surveys for several years; and until the lands were appropriated by surveys, the precise places where they lay, could not be ascertained generally.

Still, I apprehend, that the intention of the legislature may be fairly collected from their own words. But I cannot accede to the first construction, said to have been made of the proviso in this 9th section; because it rejects as wholly superfluous, and assigns no operation whatever, to the subsequent expressions "if any grantee shall persist in his endeavors," &c., which is taking an unwarrantable liberty with the law. Nor can I subscribe to the second construction stated, because it appears to me to militate against the general spirit and words of the law, and distorts its great prominent features in the passages already cited, and for other reasons, which I shall subjoin. I adhere to the third construction, and will now again consider the 9th section. It enacts, in the first instance, that "no warrant or survey for lands, lying north and west of the rivers Ohio and Allegheny and Conewango creek, shall vest any title, 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, make or cause to be made, an actual settlement thereon, by clearing, &c. 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."

"Persist" is the correlative of attempt or endeavor, and signifies "hold on," "persevere," &c. The beginning words of the section, *restrict the settlement, "to be within two years next after the date of the warrant, by clearing, &c., and by residing for the space of five years, next following his first settling of the same, if he or she shall so long live;" and in default thereof, annexes a penalty of forfeiture, in a mode prescribed But the proviso relieves against this penalty, if the grantee is prevented from making such settlement by force, &c., and shall persist in his endeavors to make such actual settlement as aforesaid. The relief, then, as I read the words, goes merely as to the times of two years next after the date of the warrant, and five years next following the party's first settling of the same; and the proviso declares, that persisting, &c., shall be equivalent to a continuation of the settlement.

*203]

To be more intelligible, I paraphrase the 9th section thus:—Every warrant-holder shall cause a settlement to be made on his lands, within two years next after the date of his warrant, and a residence thereon for five years next following the first settlement, on pain of forfeiture, by a new warrant. Nevertheless, if he shall be interrupted or obstructed, by external force, from doing these acts, within the limited periods, and shall afterwards persevere in his efforts, in a reasonable time after the removal of such force, until those objects are accomplished, no advantage shall be taken of him, for the want of a successive continuation of his settlement.

The construction I have adopted, appears to me to restore perfect symmetry to the whole act, and to preserve its due proportions. It affords an easy answer to the ingenious question, proposed by the counsel of the Holland Company. If, say they, immediately after a warrant issues, a settler, without delay, goes on the ground, the 11th of April 1792, and stays there until the next day, when he is driven off by a savage enemy, after a gallant defence; and then fixes his residence as near the spot as he can, consistently with his personal safety, does the warrantee lose all pretensions of equity? Or, suppose, he has the good fortune to continue there, firmly adhering to the soil, for two or three years, during the Indian hostilities; but is, at length, compelled to remove by a superior force, is all to go for nothing, and must he necessarily begin again? I answer to both queries, in the negative—by no means. The proviso supplies the chasm of successive years of residence; for every day and week he resides on the soil, he is entitled to credit in his account with the commonwealth: but upon a return of peace, when the state of the country will admit of it, after making all reasonable allowances, he must resume the occupation of the land, and complete his actual settlement. Although a charity cannot take place according to

the letter, yet it ought to be performed *cy pres*, and the substance pursued. (2 Vern. 266 ; 2 Fonbl. 221.)

*It has been objected, that such a contract with the state, is unreasonable, and hard on those land-holders, and ought not to be insisted upon. It will be said, in reply, they knew the terms before they engaged in the bargain, and must abide by the consequences : the only question is, whether the interpretation given of it be correct or not. [*204

7th. A due conformity to the provisions of the act, is equally exacted of those who found their preference to lands on their personal labor, as of those who ground it on the payment of money. I know of no other distinctions between these two sets of land-holders, as to actual settlement and residence, than that the claims of the former must be limited to a single plantation, and the labor be exerted by them, or under their direction ; while the latter may purchase as many warrants as they can, and make, or cause to be made, the settlements required by law. (Addison, 340, 341.)

It is admitted, on all sides, that the terms of actual settlement and residence, are, in the first place, precedent conditions to the vesting of absolute estates in these lands ; and I cannot bring myself to believe, that they are dispensed with, by unsuccessful efforts, either in the case of warrant-holders, or actual settlers. In the latter instance, our uniform decisions have been, that a firm adherence to the soil, unless controlled by imperious circumstances, was the great criterion which marked the preference in such cases ; and I have seen no reason to alter my opinion.[1]

8th. Lastly, it is obvious from the preamble, and § 2, that the settlement of the country, as well as the sale of the lands, was meditated by this law ; the latter, however, appears to be a secondary object with the legislature. The peopling of the country, by a hardy race of men, to the most extreme frontier, was certainly the most powerful barrier against a savage enemy.

Having been thus minute, and I fear tedious, in delivering my opinion, it remains for me to say a few words, respecting those persons who have taken possession of part of these lands, supposing the warrants to be dead, according to the cant word of the day, and who, though not parties to the suit, are asserted to be implicated in our decision. If the lands are forfeited in the eye of the law, though they have been fully paid for, the breach of the condition can only be taken advantage of by the commonwealth, in a method prescribed by law. Innumerable mischiefs and endless confusion would ensue, from individuals taking upon themselves to judge when warrants and surveys cease to have validity, and making entries on such lands at their will and pleasure. I will repeat what we told the jury in *Morris's Lessee* v. *Neighman and Shaiver* (2 Yeates 453), "If the expressions of the law were not as particular as we find them, we should have no difficulty in *pronouncing that no person should take advantage of their own wrong, and that it does not lie in the mouths of men, like those we are speaking of, to say the warrants are dead ; we will take and withhold the possession, and thereby entitle ourselves to reap benefits from an unlawful act." On the whole, I am of opinion, that the rule should be discharged. [*205

Smith, Justice.—I have had a full opportunity of considering the opinion

[1] Denied, by Kennedy, J., in Campbell *v.* Galbreath, 1 Watts 81.

delivered by my brother YEATES; and as I perfectly concur in all its principles, I shall confine myself to a simple declaration of assent. I could not hope, indeed, to add to the argument; and I am certain, I could not equal the language which he has used on the occasion.

BY THE COURT.—Let the rule be discharged. (*a*)

(*a*) Since this decision was pronounced, the subject has been revived and agitated in various interesting forms. In the winter of 1801–2, several petitions were presented by the intruders, to the legislature, requesting their interposition, but the committee of the senate, to whom these petitions were referred, reported against them, and admitted, that the controversy belonged exclusively to the courts of justice. But soon after this report was made, a bill was introduced, entitled "An act," &c. which recites the existing controversies, gives a legislative opinion against the claim of the warrantees, and institutes an extraordinary tribunal, to hear and decide between the parties. The appearance of this bill produced two remonstrances from the Holland Company, but without effect. As soon as it became a law, the attorney-general and the counsel for the company were invited to a conference with the judges, on the carrying of it into effect; but, upon mature consideration, the counsel for the company declined taking any part in the business, and assigned their reasons in a letter addressed to the judges, dated the 24th of June 1802. An issue was then formed, by the direction of the judges, which was tried at Sunbury, on the 25th of November following, before YEATES, SMITH and BRACKENRIDGE, justices, and a report of the proceedings and decision on that occasion will be found in a subsequent part of the present volume.[2]

[1] Act 2d April 1802, P. L. 153.

[2] Attorney-General *v.* The Grantees, *post*, p. 237. The Holland Land Company thereupon instituted a number of ejectments in the circuit court of the United States, one of which was certified, on disagreement of opinion between the judges, to the supreme court, where the question was determined in favor of the title of the Holland Land Company, in opposition to the decision of the state court. Huidekoper *v.* Douglass, *post*, p. 392, more fully reported in 3 Cr. 1. And on a second trial, there was a verdict and judgment in favor of that title. 1 W. C. C. 258. But though this judgment settled the rights of the company, in the particular case, yet it is said by Judge KENNEDY, in Campbell *v.* Galbreath, 1 Watts 101, that the supreme court of the state never changed its decision. And it is very questionable, whether Huidekoper *v.* Douglass was rightly decided, since the 34th section of the judiciary act declares that the laws of the several states shall be regarded as rules of decision, in trials at common law, in the court of the United States, in cases where they apply. And accordingly, it has frequently been determined, that the federal courts are bound by the decisions of the highest state courts, as to the local law of real property, whether grounded on the construction of a statute, or on the unwritten law of the state. St. John *v.* Chase, 12 Wheat. 153; Bell *v.* Morrison, 1 Pet. 352; Henderson *v.* Griffin, 5 Id. 151; Green *v.* Neal, 6 Id. 291; Brashear *v.* West, 7 Id. 609; Beauregard *v.* New Orleans, 18 How. 497; Suydam *v.* Williamson, 24 Id.; Chicago *v.* Robbins, 2 Black 419; Sumner *v.* Hicks, Id. 352; Williamson *v.* Suydam, 6 Wall. 723; Williams *v.* Kirtland, 13 Id. 306; **Richmond *v.* Smith, 15 Id. 429.**

JACKSON *et al.* *v.* WINCHESTER. (*a*)

Practice.—Evidence.

Issues were joined on the pleas of *non assumpsit*, and payment: plaintiffs had been obliged to send a commission to another state, to prove the assumption; and when the jury was about to be impannelled, defendant moved to strike out the former plea: *Held*, that he should not be allowed to strike it out.

Nothing that passes before a judge, on a question of bail, can be evidence on the trial of a cause, unless it was clearly admitted as a fact, by the opposite party.

THE following points occurred in this case:

I. The issues in this case were joined on pleas of *non assumpsit*, and payment. When the jury were about to be impannelled, the defendant's counsel moved to strike out the former plea, by which (leaving only the affirmative plea of payment) he would be entitled to the conclusion in addressing the jury. The plaintiff's counsel objected, with an allegation, that upon the issues, as they now stood, they had been obliged to send a commission into another state, to prove the sale and delivery of the goods, for which the action was brought.

And THE COURT refused to allow the plea of *non assumpsit* to be stricken off. (*b*)

*II. The defendant alleged, that the plaintiffs had agreed to take payment of the debt, for which the action was brought, in Tennessee militia certificates, if David Allison approved of it. Allison approved in writing of the proposed payment, and the certificates were delivered to him; but it became a question, how far that delivery was satisfaction to the plaintiffs? And Allison being dead, M. Levy offered himself as a witness to prove that, on a question of bail, before MCKEAN, C. J., Allison deposed that the plaintiffs had debited him with the amount of the certificates in their account-current. The plaintiffs' counsel objected to the evidence, and— [*206

By THE COURT.—Nothing that passed before the judge, on the ques-

(*a*) s. c. 2 Yeates 529.

(*b*) A defendant has not a right to strike off a plea, but it rests with the court to allow or refuse him permission to do so; and if the plaintiff has not been put to any trouble or expense, to prove the issue made by a plea, the defendant may, on motion, obtain leave to strike it out, more especially, if the motion is made at a term previous to that of the trial of the cause. Wikoff *v.* Perot, 1 Yeates 38; Rankin *v.* Cooper, 2 Bro. 13; Waggoner *v.* Line, 3 Binn. 589; Weidman *v.* Kohr, 13 S. & R. 24. But a defendant will not be allowed, at the moment of trial, to withdraw his plea, and substitute another, changing the issue. McDaniels *v.* Train, 1 Bro. 342. Whilst this work was in the press, the same question occurred in the circuit court of the United States; and the judges decided, that where the pleas were *non assumpsit* and payment, the defendant might, of course, strike out the plea of *non assumpsit*, without applying to the court, at any time before the jury were actually sworn. They said, it operated to relieve the plaintiff, from the necessity of proving the assumption, and was, therefore, for his advantage. But they distinguished it from the case of adding a plea, as essentially different; that case requiring the authority of the court. Vuyton *v.* Brieulle, October term 1806 (1 W. C. C. 467). *Dallas*, for the plaintiff. *Ingersoll* and *Du Ponceau*, for the defendant.

tion of bail, can be evidence on the trial, unless it was clearly admitted, as a fact, by the party.

W. Tilghman and *Hallowell*, for the plaintiffs. *M. Levy* and *Dallas*, for the defendant.

Bussy *v.* Donaldson.

Collision.—Pilots.—Damages.

The fact that a ship is in charge of a licensed pilot, does not relieve her owners from liability for a collision, occasioned by negligence.[1]

In an action for a *tort*, the plaintiff is entitled to recover damages, commensurate with the injury, and equivalent to a full indemnity. Smith, J., dissenting.

This was an action on the case, against the owner of the ship Edward, for running foul of and sinking the brig Katy, at the piers in the river Delaware, by negligence, and improvident and unskilful management, &c. The defence was made on three grounds: 1st. That the injury was occasioned by unavoidable accident, for which no reparation ought to be exacted. 2d. That as the ship Edward was in the charge of a public pilot of the port (a person not the choice, nor the voluntary agent, of the owner), when the injury was committed, the owner was not legally responsible. And on this point, the following authorities were cited: 3 Bac. Abr. 591–2; 7 Geo. II., c. 15; 3 Dall. Laws, 422, § 8, 10, 15; Wesk. 395; Beawes, 122; 1 Emerig. 402–3; 1 Bl. Com. 431–2; 1 Dom. 241, tit. 16, § 3; Salk. 442, 440; 3 Bac. Abr. 560. 3d. That the amount of the injury actually sustained, is not the measure of damages, in the present action. *Purviance* v. *Angus*, 1 Dall. 180.

After argument, by *W. Tilghman*, *M. Levy* and *Rawle*, for the plaintiff, and by *Ingersoll*, *E. Tilghman* and *Lewis*, for the *defendant, the judges delivered their opinions to the jury, in substance, as follows:

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Shippen, Chief Justice.—The first object that naturally presents itself, is to ascertain, whether the injury complained of was the consequence of gross negligence, or of mere accident? This falls, exclusively, within the province of the jury; but if they shall think, that the injury was the consequence of gross negligence, then the plaintiff is entitled to recover damages; unless some rule of law interposes to prevent it, under the peculiar circumstances of the present case.

In considering the point of law, we are led into a field of inquiry equally interesting for its novelty and its importance; for although the defendant admits, that in ordinary cases, the owner of a ship is answerable, *civiliter*, for the injuries committed in the course of his service, by the master and crew; it is insisted, that a pilot, under the regulations of our act of assembly, for his examination and appointment, is not to be regarded as the agent or servant of the owner, but rather as the officer of the public.

Though it is not agreeable to deliver opinions on important points of law, suddenly started in the course of a trial, I think, I can safely pronounce,

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[1] The China, 7 Wall. 53; The Merrimac, 14 Id. 202; Sherlock *v.* Alling, 93 U. S. 100; The English law is otherwise. Smith *v.* Condry, 1 How. 28; The China, *ut supra*, and cases there cited.

on the present occasion, that the distinction which has been taken, is rather plausible than solid. The legislative regulations were not intended to alter or obliterate the principles of law by which the owner of a vessel was previously responsible for the conduct of the pilot; but to secure, in favor of every person (strangers as well as residents) trading to our port, a class of experienced, skilful and honest mariners, to navigate their vessels safe up the bay and river Delaware. The mere right of choice, indeed, is one, but not the only reason, why the law, in general, makes the master liable for the acts of his servant: and in many cases, where the responsibility is allowed to exist, the servant may not, in fact, be the choice of the master. For instance, if the master of a merchant vessel dies on the voyage, the mate becomes master; and the owner is liable for his acts, though the owner did not hire him, originally, nor expressly choose him to succeed the master. The reason is plain: he is in the actual service of the owner, placed there, as it were, by the act of God. And so, in the case under consideration, the pilot was in the actual service of the owner of the ship, though placed in that service by the provident act of the legislature. The general rule of law, then, entitles the plaintiff to recover; and we have heard of no authority, we can recollect none, that distinguishes the case of a pilot, from those numerous cases, on which the general rule is founded.(*a*)

As to the assessment of damages: it is a rational, and a legal principle, that the compensation should be equivalent to the injury. There may be some occasional departures from this principle; *but I think it will be found safest to adhere to it, in all cases proper for a legal indemnification, in the shape of damages. [*208

SMITH, Justice.—I perfectly concur in the opinion expressed by the Chief Justice, upon the responsibility of the owner of a ship. But I confess, that I am not prepared to accede to his opinion, on the assessment of damages. I take this distinction. In a case of contract; or in a case of damage by gross negligence; the jury should always, I think, give a compensation to the full amount of the injury actually sustained. But if an injury is

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(*a*) S. P. The Eliza *v.* The Decatur, 2 Whart. Dig. p. 685, § 524. A pilot, while he has charge of a vessel, is the agent of the owner, and although it is under the command of a pilot, who has the entire control and management of it, the owner is liable to the injured party, when, through the fault or negligence of any one on board, his vessel injures another vessel, by running foul of it. Yeates *v.* Brown, 8 Pick. 23. The rule was the same in England. Neptune The Second, 1 Dods. 467; Bowcher *v.* Noidstrom, 1 Taunt. 568. See also Fletcher *v.* Braddick, 5 Bos. & Pul. 182. But the liability of the master and owner, in such a case, was removed by Stat. 52 Geo. III., c. 39, § 30. Bennet *v.* Moita, 7 Taunt. 258; Ritchie *v.* Bowsfield, 7 Id. 309. If, in the case of a collision, the vessel in fault is under the command of a pilot, and the master is absent at the time, he is not responsible for the damage (Snell *v.* Rich, 1 Johns. 305), and it has been said that even if the master were present, he would not be liable in such a case. Yates *v.* Brown, *ut supra*. A captain of a sloop of war has been held not to be responsible for the damage done by a collision, when the accident happened during the watch of the lieutenant, since he acted independently of any authority from the captain. Nicholson *v.* Mouncey, 15 East 384; but see Bowcher *v.* Noidstrom, *ut supra*, and a case cited by LAWRENCE, J., 1 Taunt. 569.

done, in a way merely fortuitous and accidental, I think, the jury have a legal and salutary discretion upon the subject.

Brackenridge, Justice, concurred generally in the sentiments of the Chief Justice.

Verdict in favor of the plaintiff for $2500.(*a*)

Waters' executors *v.* McClellan *et al.* (*b*)

Fraud.—Retention of possession.—Distress.

The mere fact that a purchaser at a judicial sale permits the former owner to retain the possession, is not a badge of fraud, in Pennsylvania.(*c*)

One who shows title under a distress for rent, need not prove that it was made upon the premises, as against third persons.

In trespass, for selling the plaintiff's cattle, under an execution against a third person, lawfully in possession, the defendant may show, in mitigation of damages, that such third person had been to an expense in feeding them, which exceeded a fair compensation for their use.

Trespass for goods of the testator, taken and sold by the sheriff, on an execution issued against Dewees. The principal part of the goods were claimed by the testator, under a distress and sale, which he had also executed

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(*a*) The account exhibited for the whole expense of raising and repairing the brig, amounted to 1310*l.* 8*s.* 9*d.*

(*b*) Tried in the circuit court, West Chester, 29th of May 1800, before Shippen, Chief Justice, and Yeates, Justice.

(*c*) The rule is very old, that as to third persons, possession of chattels determines their ownership, and that all transfers of personal chattels, where the possession is not also changed, are fraudulent in law. The decisions on this subject have been uniform in the federal courts, and with few exceptions, the rule has been inflexibly upheld, by the courts of the state of Pennsylvania. The rule has been equally applied whether the contract was that of mortgage, or of absolute sale. Hamilton *v.* Russell, 1 Cr. 309; Meeker *v.* Wilson, 1 Gallis. 419; Clow *v.* Woods, 5 S. & R. 275; Cunningham *v.* Neville, 10 Id. 201; Babb *v.* Clemson, Id. 419; Welsh *v.* Bekey, 1 P. & W. 57: as to what is a sufficient delivery of possession, see Cameron *v.* Montgomery, 13 S. & R. 128. (Dawes *v.* Cope, 4 Binn. 258.) If, by a contract for the sale of chattels, the vendor and vendee agree, that the possession shall pass to the vendee, but that the property shall remain in the vendor, until the whole purchase-money shall have been paid, such agreement is fraudulent in law, and the goods may be taken in execution, as the property of the vendee. Martin *v.* Mathiot, 14 S. & R. 214.[1] But, after a public sale of chattels, by process of law, they may be left in the possession of the former owner, and they cannot be sold again for a debt due at the time of the sale, unless there is fraud in fact. Myers *v.* Harvey, 2 P. & W. 478.[2] The delivery of possession is, however, not necessary to the validity of an assignment, where such delivery has been rendered impossible, by an intervening execution, before the goods could be delivered to the assignee. Wilt *v.* Franklin, 1 Binn. 502. In what cases, transfers of chattels need not be accompanied by a change of possession, see Meeker *v.* Wilson, and Clow *v.* Woods, *ut supra.*

[1] Rose *v.* Story, 1 Penn. St. 190; S. P. Jenkins *v.* Eichelberger, 4 Watts 121; Hook *v.* Linderman, 64 Penn. St. 499; Wylie's Appeal, 90 Id. 210; Stadtfield *v.* Huntsman, 92 Id. 53; Heppe *v.* Speakman, 3 Brewst. 548; Stiles *v.* Whitaker, 1 Phila. 271; Euwer *v.* Van Giesen, 6 W. N. C. 363; Brunswick *v.* Hoover, 10 Id. 219; Boynton *v.* Isaacs, Id. 190.

[2] Craig's Appeal, 77 Penn. St. 448; Walter *v.* Gemant, 13 Id. 515; Maytier *v.* Atwater, 88 Id. 496; Besbing *v.* Third National Bank, 93 Id. 79; Miller *v.* Irvine, 94 Id. 405.

against Dewees; but he had left the goods in Dewees' possession for four or five years. The charge contained the following points:

SHIPPEN, Chief Justice.—1st. It is incumbent on the plaintiff, to prove his property in the goods, which were taken by the sheriff; and to do this, he has produced evidence of a former distress and sale of the same goods, for rent due from Dewees to him. But the defendants answer, that the distress was fraudulent; because (among other reasons) the goods were left in the possession of the debtor. In the case of a voluntary sale of goods, the law, both in Pennsylvania and England, regards the continuance of the debtor's possession as a badge of fraud. In England, the law is the same, where the sale is made by the sheriff;(*a*) but in Pennsylvania, a different rule, in that case, has prevailed; and where a relation or friend, after a fair purchase, at public sale, leaves the goods in the occupancy and use of the debtor, it never has been deemed a fraud upon creditors. As, therefore, the purchase, on the present occasion, was not by a private bill of sale; but at an open, public vendue; the continued possession *by Dewees [*209 does not, in the opinion of the court, justify the defendant's taking and sale.(*b*)

2d. It has been objected, for the defendants, that the plaintiff was bound to show, that the distress was made on the premises; whereas, at least, a part of the goods appears to have been distrained elsewhere. However available this objection might have been, upon a replevin between the original parties, we do not think, that third persons can take advantage of it.

3d. It is urged, that there were a number of young cattle taken on the distress; and that as these have been fed and reared, by the care and cost of Dewees, he had acquired a property in their increased value. Of the truth and operation of this allegation, the jury will consider; and if they are of opinion, that the expense of maintaining, has exceeded a fair compensation for the use of the cattle, they will make a reasonable deduction from the plaintiff's demand.

Verdict for the plaintiff.

(*a*) This was an erroneous statement; see Sturtevant *v.* Ballard, 9 Johns. 342.

(*b*) The defendant's counsel cited the following cases on this point: 3 Co. 81; 2 T. R. 594, 5, 6; 1 Wils. 44. But see Levy *v.* Wallis, *ante*, p. 167–8; Chancellor *v.* Phillips, *post*, p. 213; United States *v.* Conyngham, *post*, p. 358; s. c. Wall. C. C. 178.

Morris's Lessee *v.* Neighman. (*a*)

Settlement.— Vacating warrant.

The settlement required by the act of 1792, § 9, need not be made within the time prescribed therein, if the warrant-holder was, by force of arms, prevented from making such settlement, provided he persisted in his endeavors to effect it, after the removal of the force; and in that case, he has not incurred a forfeiture of his land.

Where a forfeiture of land, granted by the commonwealth, has been incurred, no advantage can be taken of it, except by the state, in the form directed by law.(*b*)

Ejectment for land on the north-west of the rivers Ohio and Allegheny and Conewango creek.

The plaintiff claimed under a warrant, dated the 4th of March 1793, on which a survey was executed, on the 12th of November, 1794; but he had made no endeavor to settle the land, until July 1796.

The defendant claimed as an actual settler, under a settlement commenced in the year 1796, prior to any attempt by the plaintiff; and upon a presumption that the plaintiff had incurred an absolute forfeiture of his rights, by not making a settlement within two years from the date of his warrant, according to the terms of the act of the 3d of April 1792. (3 Dall. Laws, 209.) But—

By the Court.—In the charge to the jury, two points were expressly decided: 1st. That the plaintiff did not forfeit his rights, by not making a settlement within two years from the date of his warrant. It is notorious, that an Indian war existed from the year 1790, until General Wayne's treaty, which was made on the 3d of August 1795, and ratified on the 23d
*210] of December 1795. The ratification of this treaty is to be considered as the *terminus à quo* *a man might safely begin a settlement on the western frontier of Pennsylvania; and if, after that epoch, actual settlers or grantees persisted in their endeavors to make a settlement, they would not incur a forfeiture of the land. 2d. That even if it were a case of forfeiture, no individual could take advantage of it, by entering on the land: the advantage could only be taken by the commonwealth, whose officers might issue new warrants, in the form prescribed by the act of assembly.

Verdict, accordingly, for the plaintiff.

Ross, for the plaintiff. *Brackenridge* and *Young*, for the defendant.

(*a*) Tried at Pittsburgh circuit court, May 1800, before Yeates and Smith, Justices. s. c. 2 Yeates 450; 2 Sm. Laws, 211, which are fuller reports of the case.

(*b*) See Ewalt's Lessee *v.* Highland, *ante*, p. 161; Commonwealth *v.* Coxe, *ante*, p. 71; McLaughlin's Lessee *v.* Dawson, *post* p. 221, and the notes to these cases.

Bell's Lessee *v.* Levers. (*a*)

Shifted warrant.—Evidence.—Fraud.—Laches.

A warrant that loses its descriptive location, by a prior warrant, may be laid on any vacant land.
A survey made on a shifted warrant, only confers title from its return.
The letter of a deputy-surveyor to his assistant, directing him to make a survey, is *primâ facie* evidence.
No person can derive title under a location, that claims under one who connived with a public officer in the commission of a fraud.
What is such lapse of time, as amounts to the dereliction of an inceptive right, by application.

Ejectment for land in Northampton county. The charge contained the following points:

By the Court.—1st. A warrant, which loses its descriptive location, by a prior warrant, may be laid on any vacant land. It has been the uniform practice of the surveyors so to do; and the practice has long received the sanction of the land-office.

2d. A deputy-surveyor gave an order to his assistant, to execute a survey; and before it was actually executed, he died; but it was alleged, that neither the assistant, nor the party, knew of his death, until after the execution of the survey. The truth of the allegation should be examined; but in an old transaction, if the title depends upon it, the examination should not be very strict; and every doubt should operate in favor of the validity of the survey.

3d. This is the case of a lost application; and in cases of this kind, above all others, there must be due diligence employed, to designate and effectuate the claim: for if the survey is made in a place different from that designated in the application, the land-office can have no notice of the fact, until a return is made; and it would be hard, that a subsequent purchaser, without notice, and without the means of obtaining notice, when he purchases, should be affected by the claim.

4th. In the case of a warrant, neither the negligence, nor the fraud, of the public officer, shall work an injury to the party. But if the party assists in committing the fraud, not only the party himself, but every person claiming under him, or deriving title directly through him, shall be debarred from taking advantage of the transaction.

5th. If an application, made and entered in August 1765, is not acted upon until 1773; and a *caveat*, entered in 1775, is the first notice of a survey, the lapse of time amounts to a dereliction of the inceptive right, as the courts of Pennsylvania have often decided. (*b*)

(*a*) s. c. 3 Yeates 23.

(*b*) This cause was tried in the circuit court, Northampton county, before Shippen, C. J., and Yeates, J.

*Beissell *v.* Sholl.(a)

Wagoner *v.* Same.

Riparian owners.

Every one has a right to use the water passing through his land, as he pleases, provided, he does not injure his neighbor's mill; and that, after using the water, he returns it to its ancient channel.[1]

Case, for diverting a water-course. The court left the facts to the jury, under this general statement of the law: "That every man, in this country, has an unquestionable right to erect a mill upon his own land; and to use the water, passing through his land, as he pleases; subject only to this limitation, that his mill must not be so constructed and employed, as to injure his neighbor's mill; and that, after using the water, he returns the stream to its ancient channel."(b)

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*212] *SEPTEMBER TERM, 1800.

Commonwealth *v.* Fitch.(c)

Forcible entry.

The inquisition in a case of forcible entry and detainer, stated, that A. "was possessed in his demesne as of fee, &c., and continued so seised and possessed," until "he was thereof disseised:" *Held*, that it was not error.

Certiorari, to remove the judgment and proceedings in a case of forcible entry and detainer, from Luzerne county. The inquisition stated, "that Nathan Beach was possessed in his demesne as of fee, &c., and continued so seised and possessed, until the defendant did enter, and him the said Nathan Beach thereof disseised," &c.

It was objected, that the prosecutor is stated to have been only possessed of the premises, whereas, the evidence proved him to have been seised. But—

By the Court.—There is some informality in the expressions; but

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(a) Tried in the circuit court, Northampton county, June 1800, before Shippen, C. J., and Yeates, J.

(b) But the common-law doctrine, that fresh water rivers, in which the tide does not ebb and flow, belong to the owners of the banks, has never been applied to the Susquehanna, and other large rivers in Pennsylvania. Such rivers are navigable, although there is no flow and reflow of the tide, and they belong to the commonwealth. Carson *v.* Blazer, 2 Binn. 475.

(c) s. c. 3 Yeates 49.

[1] A riparian owner is only entitled, as against a lower proprietor, to the use of so much of the stream as will not materially diminish its quantity, nor corrupt its quality. Wheatley *v.* Chrisman, 24 Penn. St. 298. He has no right to pollute the stream, so as to render it unfit for domestic purposes. Sanderson *v.* Pennsylvania Coal Co., 86 Id. 401; s. c. 94 Id. 302. But he may use the water for ordinary, reasonable domestic purposes, even to exhaustion. Slack *v.* Marsh, 11 Phila. 543.

surely, stating that the prosecutor was disseised, necessarily implies a previous seisin.(*a*)

Judgment affirmed.

SHARP *v.* PETTIT. (*b*)

Dower.

No damages or costs are recoverable, in dower, where the husband did not die seised.[1]

WRIT of Dower. The inquisition stated, that the husband did not die seised of the premises; and found damages for the detention of dower, with costs.

Ross moved to quash the inquisition, so far as respects the damages and costs.

BY THE COURT.—It must be so; but let judgment be entered for the demandant, without damages or costs.

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*CHANCELLOR *v.* PHILLIPS *et al.* [*213

Lien of execution.

If goods levied on, be suffered to remain in the defendant's possession, the lein is lost, as against a *bonâ fide* purchaser.

THE following case was submitted for the opinion of the court:

On the 2d of June 1798, a levy was made by the sheriff on a kiln of unburnt bricks, and other property, by virtue of a *fi. fa.*, for a debt of 149*l.* 15*s.*, with interest and costs. The bricks were suffered to remain in this state, until the 14th of April 1799, when, on advertising them for sale, it was found that one of the defendants had sold them to Thomas Harrison, on the 1st of December 1798, without giving any notice of the levy. The sheriff, at the time of the levy, employed a man to call at the brick-yard, occasionally, but did not keep any person constantly there; nor did it appear that T. Harrison had any notice of the bricks being subject to the above execution, until about the time of advertising them for sale.

The question proposed was, whether Harrison was entitled, under the circumstances of this case, to hold the bricks discharged altogether from the lien of the plaintiff's execution; or must account to the sheriff for the amount of the execution, not exceeding the value of the bricks?

SMITH, Justice.—It is useless, to cite English authorities in this case; for, it has been repeatedly decided in our courts, that the law is not the same in Pennsylvania.

SHIPPEN, Chief Justice.—There is, however, an obvious and material distinction between a levy on household furniture, and on merchandise or

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(*a*) This was not the principle upon which the court decided the case: see 3 Yeates 50.

(*b*) s. c. 3 Yeates 38.

[1] Benner *v.* Evans, 3 P. & W. 454; Barnet *v.* Barnet, 15 S. & R. 72; Leineweaver *v.* Stoever, 17 Id. 297.

goods for sale. In the former case, the court has never allowed the plaintiff to lose the lien of a prior execution levied, because, on principles of humanity, he allowed the furniture to remain on the premises, in the possession of the defendant. But it would be going farther than the reason of our decisions, and might introduce collusion and fraud, if we were to authorize or countenance such a practice, indiscriminately, in every case.

By the Court.—We are of opinion, therefore, that the purchaser of the bricks is entitled to hold them, entirely discharged from the lien of the execution. (*a*)

Morgan, for the plaintiff. *Hallowell*, for Harrison.

Anonymous.

Certiorari.

Quære? Whether a *certiorari*, to remove the proceedings in a case of forcible entry and detainer, operates as a *supersedeas*.

Certiorari, to remove the proceedings in a case of forcible entry and detainer. *Ingersoll* urged the immediate hearing of the case, in order to avoid the inconvenience of a sentence of restitution, when great error existed on the record.

By the Court.—It has often being decided, that a *certiorari* does not operate as a *supersedeas*, in a proceeding under the landlord and tenant act. 1 Dall. Laws, 617.(*b*) But it has never been so decided, in the case of a proceeding, under the statutes against forcible entry and detainer.

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*214] *Freeman *v.* Ruston.

Ca. sa.—Lien of judgment.

The lien of a judgment on the defendant's real estate is suspended, during his imprisonment on a *ca. sa.*; and if the land be sold, under the execution of a junior judgment-creditor, pending such imprisonment, the plaintiff in the *ca. sa.* is not entitled to participate in the proceeds of the sale, though the debtor be subsequently discharged under the insolvent law.

Venditioni Exponas. A rule being obtained on the sheriff of Philadelphia county, to bring into court the money levied on this execution; another rule was also entered, to show cause why Samuel Coates should not receive, out of the money, an equal dividend or proportion with other judgment creditors, whose judgments were entered on the same day, and who had not issued writs of *ca. sa.* And thereupon, a case was stated for the opinion of the court, comprising the following facts:

(*a*) The manuscript of this note was read on a recent trial, involving the same question; and the judges intimated a doubt of its accuracy. I find, however, that a difference between the law in England and in Pennsylvania upon this subject, has been repeatedly stated by the judges of the supreme court; Levy *v.* Wallis, *ante*, p. 167; Waters *v.* McLellan, *ante*, p. 208; though the rule has been adjudged to be the same, in both countries, by the circuit court of the United States, upon full argument and deliberation. See United States *v.* Conyngham, *post*, p. 358.

(*b*) Stewart *v.* Martin, 1 Yeates 49.

"On the 21st day of March 1796, Samuel Coates obtained a judgment in the supreme court against Thomas Ruston. A writ of error was taken out by the defendant, returnable to July 1797, and judgment affirmed in the high court of errors and appeals; and the record being remitted, a *ca. sa.* was sued out of the supreme court, returnable to December 1797, on which (and other writs of *ca. sa.* issued at the suit of other plaintiffs), the defendant was committed to jail; and remained in custody until the 21st day of November 1798, when he was discharged from confinement, by virtue of the several acts of assembly for relief of insolvent debtors, for the benefit of all of which he petitioned.

"Prior to his said discharge, the above *venditioni exponas* was issued, returnable to September term 1798; and on the 12th day of July 1798, certain messuages, &c., were sold by the sheriff, by virtue of the said execution, for $13,320. The purchasers at these sales were themselves judgment-creditors of the said Thomas Ruston. The sum of $11,451 was paid on account of the purchases, before the discharge of Dr. Ruston; and the purchasers have retained in their hands $1869, part of the purchase-moneys, on account of their own judgments; which judgments are, however, subsequent in *date to that of Mr. Coates; but no writs of *ca. sa.* were ever issued out thereon. The sheriff has paid sundry prior judgments out of the [*215 proceeds of the sales; and there remains in his hands, or within his power, the sum of $8866.17, including the balance of $1869, which the purchasers have retained on account of their judgments as aforesaid. All of which, however, for the purposes of this agreement, are considered as being in court, and liable to such distribution as the court shall direct.

"If the court shall be of opinion, that Samuel Coates is entitled to an equal dividend or proportion of the said moneys, with other creditors by judgment of the same date, who have not issued writs of *ca. sa.*, then the rule to be made absolute, and the parties in case of disagreement, as to the sums and portions, agree to appoint three men to determine their proportions."

Rawle, on behalf of Samuel Coates, referred to the 17th and 19th sections of the act of assembly(*a*), under which Ruston had *been discharged as an insolvent debtor (4 Dall. Laws, 274), and contended, [*216

(*a*) Sect. 17. "That no debtor, who shall obtain an order of discharge as aforesaid, shall, at any time thereafter, be imprisoned by reason of any judgment obtained for payment of money only, or for any debt, damages, costs, sum and sums of money, contracted, accrued, occasioned, owing or growing due, before the date of the said debtor's deed or assignment, but that upon every arrest upon such judgment, or for such debt, damages, costs, sum and sums of money, it shall and may be lawful for any judge of the court, where the process issued, upon showing a copy of the order of discharge, certified by the clerk of the court where the same is recorded, under seal of office, to release and discharge the said debtor out of custody, and the said judge is directed so to do, so that the said debtor, if arrested or detained on mense process, do give a warrant of attorney to appear to the action or actions on which he is so arrested or detained, and to plead thereunto: Provided, that the discharge of any debtor by virtue of this act,[1] shall not acquit any other person from any debt, sum or sums of money, or any part thereof, but that all other persons shall be answerable for the same, in the same manner as before the passing of this act, and all mortgages, judgments and exe-

[1] The word "act" is omitted in the original law.

that by the force of the terms there used, the judgment continued a lien, upon the debtor's discharge, notwithstanding a *ca. sa.* had been previously issued. Indeed, a judgment is constituted a lien by the constitution and laws of Pennsylvania, in the nature of a mortgage, and it must ultimately be satisfied out of the real estate, without regard to the process, either against person or goods, to which a plaintiff may first resort. (1 Dall. Laws, 262.) The law in England is different. There, a *ca. sa.* was considered so complete a satisfaction, that if the debtor died in prison, the creditor had lost all remedy, until the statute of 21 *Jac. I.*, *c.* 24, was enacted to afford him relief. But there are sufficient reasons for the difference. In England, real estate cannot be sold for the payment of debts, as it may in Pennsylvania. In England, too, the insolvent acts are gratuitous and occasional, temporary in duration, and restricted in objects; but in Pennsylvania, they are constitutionally ordained, permanent and universal. (Const. Art. IX., § 16.)

W. Tilghman, for the assignees of Ruston, contended, that Coates had lost the lien of his judgment, by issuing a *ca. sa.* That a *ca. sa.* amounts to a legal satisfaction of the debt, is the settled law of England; and there is no reason to depart from it here. *Bloomfield's case*, 5 Co. 86; Hob. 56–62. Nor can the terms or the principles of the insolvent law affect the case. The sheriff's sale was made on the 12th of July 1798, and Ruston was not discharged until the 21st of November following, before which the greater part of the purchase-money had been actually paid to the sheriff. The state of the fact and the law, when the property was sold and the price received, must govern the decision, not matter arising *ex post facto*. And the act of assembly, when it provides for the distribution of the lands of the debtor, at the time of his discharge, can never be fairly construed, retrospectively, to unravel, revise and cancel sales and payments, and distributions, all regular at the time that they occurred. It is true, that the 17th section of the act continues in force all judgments by which the debtor was bound, at the time of his discharge; but if the *ca. sa.* against the person

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cutions, whereby the goods and chattels, lands and tenements of the said debtor shall be bound, shall remain good and effectual in law, and shall be first satisfied out of the debtor's estate, according to their priority of lien, in the same manner as if this act had never been passed."

Sect. 19. "That notwithstanding the discharge of any debtor, by virtue of this act, all and every debt or debts, due and owing from such debtor, and all and every judgment and judgments had and taken against him, shall stand and be good and effectual in law, to all intents and purposes, against the lands, tenements, hereditaments, goods and chattels of such debtor, which he, or any other person or persons in trust for him, at the time of his assignment, hath or have, or at any time thereafter shall or may be any ways seised or possessed of, interested in, or entitled to, in law or equity, except the necessary wearing apparel and bedding for himself and his family; and if he be a mechanic or manufacturer, his tools, not exceeding in value the sum of fifty dollars; and it shall and may be lawful for any of his creditors, or his or their executors or administrators, to take out a new execution against the lands, tenements, hereditaments, goods and chattels of such debtor, except as before excepted, for the satisfaction of their debts respectively, in the same manner and form as they might have done, if the said debtor had never been taken in execution, any act, statute, law or custom to the contrary notwithstanding."

extinguished the lien upon the estate (which is the very point to be decided), then Ruston was not bound by Coates's judgment, at the time of his discharge; and such is the necessary exposition of the law, when *the [*217
17th and 19th sections are considered together, as to the fund, the existing fund at the time of discharge, which is to be distributed among the creditors. The adverse doctrine would give the execution-creditor two remedies, contrary to the principles of the common law: it would open a door for collusion between the debtor and his *ca. sa.* creditor, and it would involve the relative rights of creditors in endless perplexity and uncertainty, whenever an insolvency of a debtor happened or even the prospect of it was in view.

By the Court.—The case appears so clear to us, that we do not wish another moment for consideration. The law is settled in England, that a *ca. sa.* operates as a satisfaction of the debt, as an extinguishment of the lien of the judgment. We have no other rule prescribed to us in Pennsylvania, nor can we conceive that there would be any policy or justice in departing from it. Ruston was in actual custody upon Coates's *ca. sa.*, when the land was sold. He had no lien, no claim, to the proceeds of the sale, at that time; and we can perceive nothing in the fact or the law of the case, which has since revived his old right, or given him a new one, to the land itself, or to any part of the purchase-money. (*a*)

The rule must, therefore, be discharged.

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*DECEMBER TERM, 1800. [*218

Hepburn's Lessee *v.* Levy. (*b*)

Shifted warrant.

A survey on a shifted warrant will not prevail over a subsequent descriptive one, though the warrantee had notice thereof, before his own survey was made; otherwise, of a subsequent indescriptive warrant.

Ejectment, for land in Lycoming county. In the charge to the jury, it was ruled—

By the Court.—In the case of a lost warrant, it may be removed to other land, provided the removal affects no previous right; and if it is actually surveyed upon vacant land, returned into the land-office, and there accepted, it becomes an appropriation. If, however, any warrant issued, appropriating the land, before an actual survey upon the removed warrant, the right of such warrant must be preferred. The fact to be decided in the

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(*a*) The arrest of a debtor under a *ca. sa.* does not satisfy the debt, if he has been discharged from custody as an insolvent debtor, but if he has been released from such imprisonment, by his creditor, the debt is extinguished. Sharpe *v.* Spackenagle, 3 S. & R. 465; Palethorpe *v.* Lesher, 2 Rawle 272.

(*b*) Tried in the circuit court, Lycoming county, on the 24th October 1800, before Shippen, C. J., and Brackenridge, J.

present case, therefore, is, whether any warrant, particularly describing the land in question, was delivered by the defendant to the deputy-surveyor, before the survey was made for the plaintiff? A vague, indescriptive warrant will not be sufficient to affect the plaintiff's survey: and although fraud is said to vitiate every transaction; yet, the fraud of the deputy-surveyor cannot affect the rights of the defendant.(*a*)

Lessee of Weitzell *et al. v.* Fry.

Parol evidence.—Judicial sale.

Where land mortgaged to the trustees of the general loan-office, has been sold by the sheriff of the county, under an alleged precept from the state treasurer, issued by virtue of the act of 1st April 1790, and the writ has been lost, parol evidence of it is admissible.

The requisition of the act, that advertisements of the sale shall be posted at some public places, is merely directory to the sheriff, and where there has been no actual injury, it will not affect the title of a *bonâ fide* purchaser.

If a man who forbids a sale, or slanders a title, become himself the purchaser of the land, it is always, *primâ facie*, a mark of unfairness; and inadequacy of price, though not conclusive to avoid a sale, affords an argument of great weight, against a purchaser to whom fraud is imputed.

Ejectment, for 306 acres of land in Northumberland county. The case was this: On the 13th of September 1774, John Read, being seised in fee, mortgaged the premises mentioned in the declaration, to "The trustees of the general loan-office of the province of Pennsylvania," incorporated under the act of the 26th of February 1773. (1 Dall. Laws, 644.) *After various successive modifications of this trust,(*b*) the powers and duties of the trustees were transferred to, and vested in the treasurer of the state, by an act of the first of April 1790. 2 Dall. Laws, 792, § 9.(*c*) The sheriff of the county, in his testimony on the trial, stated, "that he had received a precept, dated in September 1792, for selling the lands, under Reed's mortgage, from the office of Mr. Febeiger, the state treasurer; that the precept, he believed, was signed by Mr. Febeiger, and attested by Mr. Ingersoll, the attorney-general; that he delivered the precept to Mr. Febeiger's clerk (who, it appeared, had left the country), indorsed, he believed (though he was not positive), with a written return, as it was his practice to make such indorsements; that he thought he had put up printed advertisements of the time and place of sale; and that he made the sale on the premises." It was proved, however, that on a strict search of the loan-office papers, no precept, in the present case, could be found, except one, which had no date, and which was not signed by Mr. Febeiger. And an advertisement of the sale, to be made on the 11th of December 1792, was read from the Sunbury and Northumberland Gazettes, dated the 6th of October preceding. At the sale, Thomas Reese became the purchaser, to whom the sheriff made a deed, on the 22d of February 1793, for the consideration of 189*l.* 7*s.* 6*d.*, and on the

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(*a*) See Belt's Lessee *v.* Levers, *ante.* p. 210.

(*b*) See the note subjoined to the act above cited. 1 Dall. Laws, 644.

(*c*) By an act of the 11th of April 1793, a grant was made to the Pennsylvania Hospital, payable out of the money due to the loan-office; and the managers of the hospital were constituted trustees for the purpose of collection. 3 Dall. Laws, 379.

20th of March 1793, Reese conveyed to the lessors of the plaintiff, for the consideration of 160*l.* But it was alleged by the defendants, and evidence was given tending to show, that Reese had been collusively employed by Richeson, one of the lessors of the plaintiff (the others being totally ignorant of this part of the transaction), to make the purchase for him, while, at the time of the sale, he set up a title to the premises, producing a deed from the county commissioners, dated the 25th of November 1792, when the land had been sold for taxes; menacing any purchaser with a law-suit; and in fact, prevented several persons from bidding, who had attended for that purpose; and some of whom avowed, that they would give 350*l.* for only 200 acres of the land.

On these facts, the *defendant* contended: 1st. That the authority of the state treasurer was a special authority, and ought to be strictly pursued: whereas, there was no official precept, as required by the act, to justify the sheriff's sale; nor any proof of advertisements put up at public places. 2d. That the fraud committed by Richeson, at the time of sale, vitiated the whole proceedings; particularly, when connected with the inadequacy *of the price. Cowp. 26; Hale Hist. Com. Law, 49; Cowp. 434; 2 Pow. Cont. 144, 163; 1 Bro. Chan. 163. [*220

The *plaintiffs* answered, that the weight of the evidence was in favor of the regular advertisement of the sale; that the blank precept, now produced, could not have been the precept under which the sheriff acted, as he swears that his precept was signed by the treasurer, and attested by the attorney-general; that the loss of the precept being evident, its existence and regularity are legally proved by the sheriff; that it might, perhaps, be contended, that the production of a written precept was not indispensable in this case (1 Ld. Raym. 166; 5 Mod. 387; 2 Salk. 467); that Richeson was bound to give notice of the commissioners' deed, whatever effect it produced on the sale; that this was the only ground to impeach the sale; and that fraud ought not to be presumed.

Shippen, Chief Justice.—There are two points of inquiry before the court and jury: 1st. Whether the proceedings upon the sale have been regular? 2d. Was there such an act of fraud, unfairness or contrivance, at the time of the sale, as ought to vitiate the whole transaction?

1st. It is alleged, on the first point, that there was no precept authorising the sale; and it is proved, that, on search, a regular precept has not been found in the treasurer's office. We think, that a precept was necessary to support the sale; and that the paper which has been produced, was not a regular precept. But on the other hand, the sheriff swears, that he received a precept, signed by the treasurer; and it is not probable, that he would have sold an estate under a blank form. As therefore, the party has not the custody of the precept, and ought not to be made responsible for its loss; the jury will consider, whether there is not sufficient evidence, to presume the existence of a regular precept, at the time of the sale.

It has also been urged, that there is no proof, that advertisements of the sale were posted up at public places; but if the sale was a fair one, we regard this, as a very feeble objection. The act of making such advertisements, is the duty of the sheriff; it is a matter merely directory; and unless

an actual injury has been sustained by an omission, it would be hard, indeed, that it should affect the title of a *bonâ fide* purchaser.(*a*)

2d. The chief ground of defence, however, is the allegation of fraud at the sale; and if Richeson did then attempt to get the land unfairly, he ought not to be allowed to benefit by his iniquity. It is always a mark, *primâ facie*, of unfairness, when a man who forbids a sale, or slanders a title, becomes himself the purchaser of the land. It is true, that Richeson might be bound to give notice of the commissioners' deed; but did he confine himself to giving a fair notice of the claim, without any sinister design, *221] *or conversation or action, to depreciate the estate, and to secure it for himself at an undervalue? No, he employed another person, secretly, to bid for him, while he deceitfully threatened his own bidder, and seriously threatened every other bidder, with a law-suit. And wherever there is an appearance of fraud, the inadequacy of price, though not conclusive, in itself, to avoid a sale, affords an argument of great weight against a purchaser to whom the fraud is imputed.[1]

Here, then, it is important, to remark, that from the special nature of the proceeding under the treasurer's precept, the defendant had no opportunity of applying to any court for immediate relief: but we do not hesitate to declare, that if a case were brought before us, under such circumstances, we should certainly set aside the sale.

It now, however, becomes the province of the jury to decide upon the evidence, whether Richeson's conduct was fair and proper; without a sinister view to get the land at an under price. If they think it was, the verdict will be in his favor. If they think otherwise, the defendant must prevail.

Verdict for the defendant.(*b*)

McLaughlin's Lessee *v.* Dawson.(*c*)

Settlement.

To constitute a legal settlement, there must be a personal residence, unless such danger exists, as would affect a man of reasonable firmness.

Ejectment, for 400 acres of land, lying north-west of the river Ohio. Both parties claimed under settlement-rights. The defendant's improvement commenced one day earlier than the plaintiff's; but the plaintiff had the first warrant; and he had been constantly resident on the land, except when he left it, through imminent danger from the Indians. The defend-

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(*a*) Where there is a mere error of judgment, by public commissioners, in the construction of an act of assembly, without fraud, or a pretence for imputing fraud; a sale by them, under the act, will not be vitiated, as against a *bonâ fide* purchaser, for a valuable consideration, without notice of any irregularity or omission on the part of the commissioners. King *v.* Stow, 6 Johns. Ch. 323.

(*b*) Tried in the circuit court, Northumberland county, on the 17th of October 1800, before Shippen, C. J., and Brackenridge, J.

(*c*) Tried at Pittsburgh *nisi prius*, October 1800, before Yeates and Smith, Justices. s. c. 3 Yeates 61, 2 Sm. Laws 209, where the case is better reported.

[1] s. p. Carson's Sale, 6 Watts 140; Swire *v.* Brotherline, 41 Penn. St. 135; 1 Pitts. 537; Tripp *v.* Silkman, 29 Leg. Int. 29; Lewis' Petition, Erb's Estate, 2 Pears. 160.

ant's improvements were greater than those of the plaintiff (for he was a richer man), but he was often absent from the premises, sometimes as a volunteer in the public service, and sometimes living at a distance with his father or brothers.

The Court, in the charge to the jury, strongly preferred the claim of the plaintiff, on account of his constant residence on the premises; except when obliged to retire, from a reasonable apprehension of danger. They mentioned the case of *Ewalt's Lessee* v. *Highlands* (*ante*, p. 162), and said, that the maturest reflection satisfied them of the propriety and correctness of the principle there laid down: to wit, that to constitute a legal settlement, it must be accompanied with personal residence, unless *such danger exists, as would operate on the mind of a man of reasonable firmness.(a) [*222

Verdict, accordingly, for the plaintiff.

Woods, for the plaintiff. *Ross*, for the defendant.

Pollock *v.* Hall. (b)

Same *v.* Same.

Discontinuance.

After a case has been referred, and several meetings have been held by the referees, at which the parties have exhibited their respective proofs, and have been heard, the plaintiff cannot discontinue the suit, without the leave of the court; which, in such a case, would not be granted, unless there were very cogent reasons.[1]

These causes were referred, on the 22d of January 1800, by agreement of the parties, and several meetings were held by the referees, at which the parties exhibited their respective proofs, and were heard by themselves or their agents. The plaintiff conceiving, however, that he had more evidence, which might be produced at a future period, or conjecturing that the referees were unfavorable to his claims, ordered the actions to be discontinued, on the 21st of April 1800, and gave notice of the discontinuance to the defendant. But the referees proceeded to decide upon the matters referred; and on the 10th of May 1800, filed a report, finding for the defendant the sum of $2300. To this report, exceptions were exhibited, alleging, among other objections to a confirmation, that the actions were discontinued. It became, therefore, a leading question, whether, under the circumstances stated, the plaintiff had a right to discontinue?

Dallas argued in the affirmative: 1st. That a plaintiff has a right to discontinue his action, at any time before the merits are judicially decided. It is true, that the English authorities say, it must be done by leave of

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(a) See Ewalt's Lessee *v.* Highlands, *ante*, p. 162; Commonwealth *v.* Coxe, *ante*, p. 170; Morris's Lessee *v.* Neighman, *ante*, p. 209, and the notes to these cases; Attorney General *v.* The Grantees, &c., *post*, p. 237.

(b) s. c. 3 Yeates 42.

[1] And see Schuylkill Bank *v.* Macalester, 6 W. & S. 147; Evans *v.* Clover, 1 Grant 164; Lacroix *v.* Marquart, 1 Miles 156; Horn *v.* Roberts, 1 Ash. 45.

the court; but before or after declaration filed; after demurrer joined and entered; after verdict on a writ of inquiry; and even after a special verdict; the leave of the court is granted, as matter of course. (Sherid. Pr. 534–5; Barn. 170; 6 T. R. 616; Cro. Jac. 35; 1 Salk. 178; Gilb. 272; 7 T. R. 6; Barn. 169; Carth. 87.) 2d. That the case of a trial by jury, and the case of a reference, do not, in this respect, differ. The act of assembly places a report of referees on the same footing as a verdict; and does not affect, in any manner, the power of the plaintiff over his suit. 3d. That the practice of Pennsylvania, both on general principles, and under the statute, has been uniform in favor of the plaintiff's right. A discontinuance, indeed, no more requires the act of the court, than a *non-pros.*, when the plaintiff prevents a verdict, though he could not prevent a trial. The records of the court will establish the right of discontinuance, before and after issue joined, by the mere act of the plaintiff: *Lloyd's Lessee* v. *Taylor*, 2 Dall. 223; **Plym's Lessee* v. *Skillenbergen*, Sept. T. 1765; *Chew* v. *Jones*, Sept. T. 1767; *Kerston* v. *Yeager*, Sept. T. 1766; *Neave* v. *Forbes*, Sept. T. 1771. So, after reference. *Davis* v. *Porteer*, Sept. T. 1798; *Foulk's Lessee* v. *Rennicks*, Sept. T. 1767. So, after judgment, plaintiff may open the judgment, and discontinue. *Pringle* v. *Vaughan*, Dec. T. 1797. So, after special verdict. *Leech's Lessee* v. *Armitage*, 2 Dall. 125.(*a*) So, even after a report of referees actually filed. *Sterret* v. *Chambers et al.*, Sept. T. 1757.(*b*)

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W. Tilghman and *Morgan* argued, against the right to discontinue. 1st. That, on general principle, there could be no discontinuance, without leave of the court, which would only be granted, on payment of costs. 2d. That after a jury was sworn, the plaintiff could not discontinue, though he might suffer a *non-pros.*, which had consequences differing from those of a discontinuance. 3d. That the statute reference was of a peculiar character; which implied the agreement of the parties to receive the report of the referees; and which, by the operation of a set-off, frequently converted the defendant into the real plaintiff, with the remedy of a *scire facias*. In the course of the argument they cited Styles 198, 199; Cas. temp. Hardw. 200;

(*a*) The special verdict was found, on the 21st of April 1775; and on the 22d of April, "the plaintiff, by Mr. Reed, his counsel, discontinues the action."

(*b*) The following is the docket-entry in this case:

Sept. 1757.

Ross. Chew, Dick. Gal. — James Sterret *v.* James Chambers, Nathaniel Smith, and Elizabeth his wife, Randle Chambers, William Chambers, Jean Chambers, Mary Cham, bers, John Chambers and Margaret Chambers.

At a court of *nisi prius*, held at Carlisle, the 18th day of May 1768. By order of court and consent of parties, the matters in variance between them are referred to the final determination of James Galbraith, John Byers, James Maxwell, Jonathan Hogge and John Montgomery, or any three of them, who are to make report to the supreme court, in next September. Rule, that the referees proceed *ex parte*, on twelve days' notice.

21st September 1768: Report of referees returned into the office, finding that the plaintiff hath no cause of action against the defendants.

24th September 1768: Before the sitting of the court, plaintiff came into the office, and discontinued his action.

Gilb. C. P. 219; Cromp. Pr. 119; Carth. 87; 2 W. Bl. 815; 1 Dall. 430, 143, 355, 514.

By the Court.—The case of *Sterret* v. *Chambers et al.* induced us to pause, before we decided the point now submitted to our consideration. It does not appear, however, that the right to discontinue was at all contested in that case; and the other cases, cited from our records, do not import any judicial decision, that would be binding upon us, as authority, on the present occasion.

In this situation, we think we are at liberty to deny the right for which the plaintiff contends; and that the policy of the legislature, *as well as the principles of justice, will sanction the denial. The act of assembly sought to compose strifes, to shorten litigation, by assigning an amicable tribunal, to which the parties might voluntarily resort: and when both have agreed to resort to that tribunal, it would be inconsistent with the general nature of an agreement, to permit one of them alone to withdraw from its jurisdiction. Feuds would be inflamed, instead of being allayed; and suits multiplied, instead of being diminished, by such a construction of the law. There may be cases, however, in which a plaintiff, alleging surprise or mistake, would be allowed by the court to discontinue his suit: but after an agreement to refer, a disclosure and hearing before the referees, and an opinion expressed or intimated by them, upon the merits, a discontinuance cannot be regarded as a matter of right, and would only be permitted upon very cogent reasons, such, perhaps, as would invalidate the report itself. (*a*) In the present case, we are of opinion, that the plaintiff had not a right to discontinue the suits; and that no sufficient reason appears, for allowing a discontinuance upon the authority of the court. [*224

On the discussion of other exceptions to the report (one of which was, that a single report was made, though two suits were referred), it was agreed to consolidate the actions, and to refer the disputed points again to the same referees.

(*a*) Though the plaintiff's right to discontinue is, generally, a matter of course, it is subject to restrictions. An action cannot be discontinued, after the jurisdiction of arbitrators has attached; which is considered as attaching from the moment of their appointment, and the cause is then out of court. Horn *v.* Roberts, 1 Ash. 45. So, a plaintiff will not be permitted to discontinue, where it will give him an undne advantage, or tend to vex and oppress the defendant. Mechanics' Bank *v.* Fisher, 1 Rawle 341. In replevin, where the goods have been delivered to the plaintiff, the court will not give him leave to discontinue; and there may be cases, where the court will refuse such leave, though the possession remains with the defendant, on his claim of property. Broom *v.* Fox, 2 Yeates 530. A party cannot discontinue his suit, after a *bonâ fide* assignment of the debt, to a third person, for a valuable consideration. McCullum *v.* Coxe, 1 Dall. 139. Under a plea of payment, proof of the discontinuance of a suit cannot be given in evidence; the defendant, by appearing and making defence, waives the objection. Latapee *v.* Pecholier, 2 W. C. C. 180.

Mather *v.* Pratt *et al.*

Assignment for the benefit of creditors.

Where there is an assignment for the benefit of such creditors of the assignors, as shall, within a certain period, execute a general release to them, a creditor who has not executed the release, cannot maintain an action against the assignees. (*a*)

This was an action brought by the plaintiff, as indorsee and holder of several promissory notes, made by Dorey & Bayhir, in favor of Joseph Mussi, against the defendants, to whom Dorey & Bayhir had assigned all their estate, in trust for the payment, *pro rata*, of such of their creditors, as should, within a certain period, execute a general release; and the dividend of the non-assenting creditors was to be paid to them. The plaintiff had not executed the release; and it was objected, that he could not sue the trustees, even for a dividend, in his own name, without performing the condition precedent.

The Court were unanimously, and clearly, of this opinion; and the plaintiff suffered a nonsuit. (*b*)

M. Levy, for the plaintiff. *Dallas*, for the defendant.

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*225] *MARCH TERM, 1801.

Commonwealth *v.* Addison.

Information.

If the presiding judge of a court of common pleas, wilfully prevent an associate from delivering his sentiments to the grand jury, after the president has concluded his charge; it is not an indictable offence, and therefore, not a case in which an information will be granted; but every judge has a right, and it is emphatically his duty, to deliver his sentiments, upon every subject that occurs in court.

The Attorney-General made a motion, for a rule to show cause why an information should not be granted against the defendant, the president of the courts of common pleas, in the fifth circuit; on the affidavit of J. C. Lucas, an associate judge of the court of common pleas of Allegheny county, stating that he had been wilfully prevented by Mr. Addison, from deliver-

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(*a*) Where a voluntary assignment has been made for the benefit of such of the creditors of the assignor, as shall, within a specified time, execute a release of their debts, a creditor must release within the time specified, or he will not be entitled to a dividend, though he should execute a release, before any dividend has been declared. Cheever *v.* Imlay, 7 S. & R. 510. It is not sufficient, that an offer to release has been made, within the specified time, nor will the acceptance of the trust by an assignee, who is a creditor, entitle him to the benefit of it, if he has failed to execute the release within the time. Pearpoint *v.* Graham, 4 W. C. C. 232. But a release, executed after the specified time, will discharge the debt, where there is neither fraud nor mistake. Coe *v.* Hutton, 1 S. & R. 398.

(*b*) After this nonsuit, the plaintiff issued a foreign attachment against Dorey & Bayhir, and attached the dividend in the hands of the defendants, which was, eventually, recovered.

ing his sentiments to the grand jury, after Mr. Addison, as President, had concluded his charge, &c.

In support of the motion, the *attorney-general* cited 1 Reeves Hist. Eng. Law, 201, c. 4; 2 Ibid. 2; Jacob's L. Dict. tit. "Chapitre;" 4 Bl. Com. 303; Const. Penn. art. V. § 4; 6 Mod. 96. But—

By the Court.—We are unanimously of opinion, that the case does not present to our consideration an indictable offence; and, of course, it is not a case, in which an information ought to be granted. But we are (with the same unanimity) of opinion, that every judge has a right, and, emphatically, that it is his duty, to deliver his sentiments upon every subject that occurs in court. We add, so far as the expression of our sense of decorum may have weight, that we think, it would be indecent and improper, in any presiding judge, to attempt to prevent his associates from the exercise of this right; from the performance of this duty.

Motion refused.[1]

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*Wainwright *et al. v.* Crawford. (*a*) [*226

Master of vessel.

The master of a vessel may bind his owners, personally, by borrowing money to make necessary repairs to the vessel, in a foreign port, if the lenders, after due inquiry, did not know that the master had sufficient funds to relieve the necessity.

This was an action on the case, brought by foreign merchants, against the defendant, to recover the amount of money lent to the master, to pay for disbursements in repairing and supplying his ship in a foreign port. It was proved, by the evidence of the master, that he had no funds belonging to his owner, or to himself; and that he borrowed the money from the plaintiffs, to make the necessary repairs of the ship, for the prosecution of her voyage.

Moylan, for the defendant, observed, that the power of the master of a ship, extended no further, than to authorize him to hypothecate the ship herself, in a foreign port, for absolute necessaries: but he contended, that the master could not, under any circumstances, personally bind the owners. Moll. c. 1, 6, 2, § 10, § 14; Beawes' L. M. 95–6; 1 T. R. 18; 2 Dall. 195; 1 Salk. 35; 2 Ld. Raym. 984.

Ingersoll and *Franklin*, for the plaintiffs, insisted, that every person who supplied a ship, had a triple security; to wit, the master, the owner and the ship; that, by the maritime law, the master was the authorized agent of the owners, in foreign ports; and that, independent of his power to bind the ship herself, he might bind the owners personally, upon proof that the money or supplies went to their use. Cowp. 636; 1 Ves. 443; 1 T. R. 73; 2 Vern. 643; 14 Vin. Abr. 300, pl. 9.

(*a*) s. c. 3 Yeates 131, which is a better report.

[1] Judge Addison was subsequently impeached for the cause assigned, and having been convicted, was sentenced to removal from office, and disqualification from thereafter holding the office of judge, within the state. See Addison's Trial, 154. And see Porter's Trial, 61.

SHIPPEN, Chief Justice.—If the jury are satisfied (and the evidence is strong upon the point) that there was an actual necessity for borrowing the money, to repair the ship, the plaintiffs ought to recover. The lender is bound, it is true, to make due inquiry, whether the repairs are necessary; and whether the master has effects in his hands, sufficient to defray the expense of repairing, without resorting to a loan: but he is not bound to know, nor to inquire, what is the state of the accounts between the owner and the master. If, therefore, the case of necessity existed; and the plaintiffs did not know (for we fix on their knowledge as the test) that the master had sufficient funds in possession, to relieve the necessity; we think that the contract of the master will bind his owners, personally.(*a*)

Verdict, accordingly, for the defendant.

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*227] *SEPTEMBER TERM, 1801.

AUSTYN *v.* MCLURE.

Consideration.

The smallest spark of benefit or accommodation is sufficient, to create a valid consideration for a promise.[1]

CASE, on a special *assumpsit.* The declaration contained three counts, of each of which, the following is the substance.

1st Count.—After stating that a controversy subsisted between the plaintiff and one Rowson (a British merchant, for whom the defendant was agent); that they had agreed to enter an amicable action and reference, in the federal circuit court, and that the referees met on the 12th of January 1798; the declaration proceeded, that at the said meeting, "it was agreed between McLure and Austyn, that in consideration that the said Austyn would waive all objections to the referees proceeding to arbitrate between the said Rowson and Austyn, and would submit the matters in controversy between them to the said referees; as also in consideration of the said Austyn's having promised, on demand thereof made, to give security to pay to the said McLure whatever sum the said referees might award to be paid to the said Rowson, should the said referees decide the said controversy and dispute against the said Austyn, he the said McLure undertook, &c., that he would well and truly pay the said Austyn whatever sum of money the said referees might award to be due from the said Rowson to the said Austyn." And the declaration then averred, "that Austyn did waive all objections, &c., and

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(*a*) The owner of a vessel cannot be made personally liable, by the contracts of the master, in a foreign port, when he has not authority to hypothecate the vessel; and he cannot hypothecate the vessel, while there are goods of his own, or of the owner, on board. Cuspino *v.* Perez, 2 Dall. 194.

[1] S. P. Greeves *v.* McAllister, 2 Binn. 591; Hassinger *v.* Solms, 5 S. & R. 4; Bull *v.* Allen, 11 Id. 53; Hind *v.* Holdship, 2 Watts 104; Smith *v.* Plummer, 5 Whart. 89; Mercer *v.* Lancaster, 5 Penn. St. 160; Cunningham *v.* Garvin, 10 Id. 366; Harlan *v.* Harlan, 20 Id. 303; Muirhead *v.* Kirkpatrick, 21 Id. 237.

always was ready to give to the said McLure the said security above mentioned, when he should be required by the said McLure. And that the referees awarded a balance of $1454.06 to be due from Rowson to Austyn, &c."

2d Count.—After stating the agreement to arbitrate between Rowson and Austyn, the declaration proceeded, that "in consideration that the said Austyn had, at the request of the said *McLure, promised and undertook, when he should be thereunto required by the said McLure, to [*228 procure good and sufficient security for the performance of the award which should be given by the said arbitrators, and for the payment of the sum which might be awarded against the said Austyn, the said McLure did, on his part, undertake, &c., to the said Austyn, to perform the said award on the part of the said Rowson, if it should be given against the said Rowson, by the said arbitrators, and to pay to the said Austyn, when thereto lawfully required, whatever sum of money might be awarded to be due from the said Rowson to the said Austyn, &c." The declaration then made an averment of the award as before; and "that the said Austyn was always ready and prepared well, &c., to perform his said promise and undertaking, and to give good and sufficient security, when he should be thereto required by the said McLure, &c."

3d Count.—After stating the same agreement to arbitrate, the declaration proceeded, "that in consideration that the said Austyn would not object to the said referees proceeding to hear and determine the disputes and controversies aforesaid, without delay, and in consideration that the said referees would so proceed, without delay, the said McLure promised, &c., that he would perform the award of the referees, &c." The declaration then averred, "that Austyn did not object, &c., that the arbitrators proceeded, without delay, &c., and made their award, &c."

On the evidence, it appeared, that after the referees had met, more than once, Austyn (whose circumstances were considerably embarrassed) observed, "that he wished to understand, in what situation he would be placed, if the award should be against Rowson; for if it went against him, he was present to answer the demand; or, should he be thought insufficient, he was ready to produce satisfactory security to answer it." McLure replied, "that he was Rowson's agent, and stood in Rowson's place or stead." The referees understood, that Austyn's offer of security was meant, "if it should be required by McLure," who did not ask it, though he never waived it: and that McLure's declaration was meant, "that he would himself be answerable, in case the award was against Rowson." The referees proceeded to hear and decide upon the case; and nothing further passed between the parties on the subject of security. Austyn, however, it appeared, had applied to Mr. Gallaudet to be his surety, at some time in 1797 or 1798 (the witness could not recollect when, nor what passed upon the occasion), and Mr. Gallaudet, having then funds of Austyn's in his hands, said, "that he would have become the surety, if it had been then further requested."

On these facts, the plaintiff's counsel (*Ingersoll*, *Hallowell* and *Todd*) contended, that the special assumption of the defendant *was proved; [*229 and that there was a good legal and equitable consideration to sustain it. In the course of the argument, they cited the following authorities. Cro. Eliz. 543, 703; 1 Com. Dig. 199; 5 Mod. 411, 412; Cro. Eliz. 67, 70;

3 Burr. 1666 ; 1 Com. Dig. 200 ; 1 Bac. Abr. 267 ; Com. Rep. 99 ; 12 Mod. 457 ; 1 Pow. Cont. 344.

The defendant's counsel (*Dallas*) contended, that whatever might be the impressions or inferences of the referees, the declaration of McLure did not, in itself, amount to an express *assumpsit;* that it was not a case, in which an implied *assumpsit* could be raised ; that, at most, it was a mere gratuitous undertaking, without any possible consideration, beneficial to McLure ; a *nudum pactum*, on which no action could be maintained ; and that the consideration was not proved by the evidence, as it was laid in the declaration. 2 Bl. Com. 445; 3 Ibid. 159 ; Bull. N. P. 147 ; Bulstr. 120 ; Dyer 272 ; 2 Burr. 1666 ; Cro. Eliz. 79 ; 2 Burr. 1671.

The Court delivered a charge to the jury, in which they stated, that the smallest spark of benefit or accommodation, was sufficient to create a valid consideration for a promise ; and intimated, that their opinion was decidedly in favor of the plaintiff.(*a*)

Verdict, accordingly, for the plaintiff.

Commonwealth *v.* Dallas, Attorney of the United States, &c. (*b*)

Recorder of Philadelphia.

The Recorder of the city of Philadelphia is not a judge, within the meaning of the 8th section of the 2d article of the constitution of the state of Pennsylvania.

Quo Warranto. The President having honored the defendant with an appointment, as attorney of the United States for the eastern district of Pennsylvania ; and the Governor having been pleased also to appoint him Recorder of the city of Philadelphia ; it was thought, by some of the members of the select and common councils, that the tenure of these offices, by by the same person, at the same time, was constitutionally incompatible. And in order to try the question, Mr. *Hopkinson*, the solicitor of the corporation, was instructed to move the supreme court, for leave to file an information (on the relation of the select and common councils),(*c*) in nature of a writ of *quo warranto*, to inquire by what authority the defendant exer-
*230] cised the office of recorder. *It was agreed, that the merits of the case should be discussed and decided upon this preliminary motion, in order to avoid any public inconvenience ; as the defendant declared his determination not to act as recorder, while a doubt rested upon his right.

The case turned principally on the construction of the 8th section of the 2d article of the constitution of Pennsylvania ; which is expressed in these words : "No member of congress from this state, nor any person holding

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(*a*) Brackenridge, Justice, seemed to dissent from the opinion of the court, with this remark : "The English books say, that there must be a spark of consideration (though a single spark is enough) to maintain an action upon a promise : but in this case, the court have blown out the spark; and I cannot perceive, whence they get light sufficient to enable them to decide for the plaintiff."

(*b*) s. c. 3 Yeates 300.

(*c*) The court declared, that upon a proceeding of this kind, it was necessary to name the relator, at whose instance it was instituted.

or exercising any office of trust or profit under the United States, shall, at the same time, hold or exercise the office of judge, secretary, treasurer, prothonotary, register of wills, recorder of deeds, sheriff, or any office in this state, to which a salary is by law annexed, or any other office which future legislatures shall declare incompatible with offices or appointments under the United States."

The argument was conducted, with great and equal ability and candor, by Messrs. *Hopkinson*, *E. Tilghman* and *Lewis*, in support of the motion; and by Messrs. *Ingersoll* and *McKean*, against it.

In *support* of the motion, it was stated, as a foundation, that the Recorder of the city of Philadelphia is a judge; and consequently, within the clause of the constitution, which excludes an officer of the United States, from holding or exercising the office of a judge, in this state. It was said, that the policy of the exclusion originated in a jealousy, lest the federal government should overshadow the state governments; and if there was a doubt upon the subject, that policy required a decision, affirming the incompatibility of the offices in question. The commission, duties and powers of the recorder were then analyzed, with a view to prove that his office was a judicial character; particularly, when he acted as the organ of the mayor's court; and that it was not the name (as a recorder, a justice, &c.), but the duty, which constituted a judge. 2 Dall. Laws, 658, § 14; Ibid. 660, § 19, 20; Ibid. 662, § 22; Const. Penn., Art. V., § 1; 4 Dall. Laws, 75. Nor, it was insisted, did he merely perform his judicial functions as a ministerial agent of the corporation; but he was, in fact and in law, a judge, within the meaning of the constitution, and the interpretation of the most authoritative writers. Cun. Law Dict. "Judge;" Johnson's Dict. "Real;" Jac. L. Dict. "Judge;" 1 Bl. Com. 269; 4 Ibid. 84, 125; 1 Bac. Abr.; 3 Bl. Com., in App. 3, 38–40; 4 Inst. 73, 23; 6 Co. 20; 9 Ibid. 118; 1 Hale H. P. C. 231; Cro. Car. 146; 1 Bl. Com. 269; 12 Wm. III.; 1 Geo. III.; 1 Tidd 426; Min. of Conv. 81, 85, 138, 139, 194, 198.

In *opposition* to the motion, it was premised, that further than the constitution has prescribed, a spirit of jealousy, between the federal and state governments, ought not to be encouraged: and *the argument was pursued upon the following general propositions: 1st. That the 8th [*231 section of the 2d article of the constitution, does not include in its prohibition, any other than the state officers. 2d. That the Recorder of the city of Philadelphia is not an officer of the commonwealth or state; but an officer of the corporation. 3d. That the recorder, according to the letter, the spirit and the meaning of the constitution, is not a judge. The following books were cited on these several propositions; Min. Coun. Cens. 139, 140, 141, 142; 2 Dall. Laws, 546, 334, 565, 634, 636, 658; Const. Penn. 1776, ch. 2, § 9; 2 Dall. Laws, 654, § 1, § 14; 4 Bl. Com. 84–5, 126; Cro. Car. 373; 1 Hale P. C. 58, 440; Ibid. 231; 9 Co. 118 *b*; 2 T. R. 87; Cro. Car. 138; Sir William Jones, 193; Cro. Eliz. 76; 3 Burr. 1615, 1616; 1 Sid. 305; Doug. 382; 2 T. R. 88; Priv. Lond. 16, 23, 25, 63, 64; 1 Kyd 426; 2 Ibid. 80, 82, 83; 1 Bl. Com. 76; 3 Ibid. 334, 60; 6 Co. 20; Cro. Car. 146; 9 Co. 1186; Str. 1103; 1 Burr. 542; 12 & 13 Wm. III., c. 2, § 3; 1 Geo. III., c. 23; Min. Conv. 39, 63, 78, 82, 126, 138.

The argument was, unavoidably, protracted until late in the last day

of the term; and the judges, declaring that the question was of too much importance to be decided without deliberation, directed a *curia advisare vult* until the next term; when the unanimous opinion of the court, was delivered by—

Shippen, Chief Justice.—That although the Recorder of the city of Philadelphia possesses some powers, and performs some duties, of a judicial nature, he is not a judge, within the terms, spirit and meaning of the 8th section of the 2d article of the constitution.

The motion for leave to file an information in the nature of a *quo warranto*, was, therefore, refused.

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*232] *MARCH TERM, 1802.

Falconer *v.* Montgomery *et al.*

Award.

Where, on a reference to two persons, with power to choose an umpire, if they should disagree, an umpire is appointed, who receives the statement of the case from the referees, in the absence of the parties, and without hearing them, the award will be set aside.[1]

This was a replevin for fifteen hogsheads of rum; and the matters in dispute were referred to James Currie and David Winchester, with power to choose an umpire, if they disagreed. The two referees met, by consent of parties, in Baltimore; and both sides were fully heard; the evidence being all in writing, and no part of it rejected. It appeared, however, that the plaintiff objected to the consideration and decision of any other matter than the claim to the rum, for which the replevin was brought; while the defendants insisted upon an investigation of all the commercial transactions between the parties. The referees divided in opinion upon these propositions; and appointing Joseph Williams, as an umpire, they stated to him (in the absence of the parties) the facts, as they had previously appeared to them. The umpire then examined the accounts produced to him (the parties being still absent), concurred in opinion with the referee, who thought that the reference was confined to the dispute about the rum; and signed, with him, a report, in favor of the plaintiff, for $1837.45; but the other referee, persevering in his opinion of the general nature of the subject submitted, declined joining in the report.

Exceptions were filed by the defendants; but the only one pressed in argument, upon the court, was, "that the umpire had not himself heard, from the parties themselves, their respective allegations and arguments on the merits of the controversy."

For the *defendants*, it was urged, that an umpire, being a judge, ought to hear for himself, and not through another, the evidence and the reasoning, on which he is to decide; that it is also the right of every suitor, to be heard himself, originally, *and not to have his cause depend

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[1] Passmore *v.* Pettit, *post*, p. 271.

upon a second-hand report of his proofs and arguments; and that, in the present instance, the umpire might have been induced to view the facts and principles of the case, in a different point of light, if they had been presented by the parties, who were alone interested to give them all their force. (1 Dall. 293.)

For the *plaintiff*, it was observed, that however widely the parties differed on facts and principles, the referees knew no diversity of sentiment, but upon the single question, how far the rule of reference extended. Their general statements, therefore, to the umpire, were in unison; and he examined for himself, all the accounts, which the parties had exhibited. It has been decided, in *Hall* v. *Lawrence*, 4 T. R. 589, that the award of an umpire will not be set aside, because he received the evidence from the arbitrators, without examining the witnesses himself, unless such a re-examination was expressly requested.

By the Court.—The case of *Hall* v. *Lawrence* was decided in 1792. It is not, therefore, binding upon us, as an authority; and upon principle, we cannot accede to the decision. The plainest dictates of natural justice must prescribe to every tribunal, the law, that "no man shall be condemned unheard." It is not merely an abstract rule, or positive right; but it is the result of long experience, and of a wise attention to the feelings and dispositions of human nature. An artless narrative of facts, a natural and ardent course of reasoning, by the party himself, will sometimes have a wonderful effect upon a sound and generous mind; an effect which the cold and minute details of a reporter, can neither produce nor supplant. Besides there is scarcely a piece of written evidence, or a sentence of oral testimony, that is not susceptible of some explanation, or exposed to some contradiction: there is scarcely an argument that may not be elucidated, so as to insure success; or controverted, so as to prevent it. To exclude the party, therefore, from the opportunity of interposing, in any of these modes (which the most candid and the most intelligent, but a disinterested, person, may easily overlook), is not only a privation of his right, but an act of injustice to the umpire, whose mind might be materially influenced by such an interposition.

Under these impressions, and upon the single ground to which they relate, we are, unanimously, of opinion, that the report of the referees must be set aside.

Report set aside.

M. Levy and *Franklin*, for the plaintiff. *Ingersoll*, *Moylan* and *Hopkinson*, for the defendants.

*Levy v. Bank of the United States. (a)

Banks.—Consideration.

Where a forged check of a customer is received by a bank, as cash, and passed to the credit of a depositor (who is ignorant of the forgery, and who has paid the full value of the check), it is equivalent to an actual payment, and if the depositor, after having been informed of the forgery, on a sudden misconception of his rights, agrees, that if the check is a forgery, it is no deposit; it will not constitute a promise to refund.

This was an action brought upon the following circumstances, which appeared in evidence upon the trial of the cause.

The plaintiff, Mr. Levy, kept his cash account with the Bank of the United States. On the 3d of August 1798, between 11 and 12 o'clock in the forenoon, his student presented for payment a check on the bank, dated the 31st of July 1798, purporting to be drawn by Charles Wharton, in favor of Joseph Thomas (to whom Mr. Levy had paid the money), or bearer, for $2600: and the amount was regularly and promptly entered to Mr. Levy's credit, in his cash-book, in the usual form, as of a deposit of cash. At the examination of the checks, in the afternoon of the same day, the check in question was discovered to be a forgery; the entry was cancelled in the bank-books; and one of the clerks was sent to Mr. Levy, about 4 o'clock, to inform him of it, to return the forged check, and to demand his check in lieu of it. This clerk, at first, told Mr. Levy, that the check was not good, because Mr. Wharton had not the money in bank; to which Mr. Levy replied, "that is nothing to me." The clerk then told him, that the check was forged; on which Mr. Levy, with great surprise, said, "that he would take until to-morrow, to consider of the propriety of giving his own check in exchange for it." The clerk urged an immediate exchange of checks, declaring, "that although he was not authorized by the cashier to give such notice, he was confident the amount of the forged check would be retained by the bank, in their account with Mr. Levy." The clerk deposed, that Mr. Levy thereupon answered: "On that score, we are perfectly agreed; if the check is a forgery, it is no deposit; but I wish some time, to ascertain the fact." On the 4th of August, however, Mr. Levy informed the president of the bank, that he would not refund the money, nor allow the entry to his credit, to be erased from his bank-book. He then drew a check on the bank, for the balance of his account, which was paid, except to the amount of the forged check; and to recover that amount, the present action was instituted.

It also appeared in evidence, that Thomas's forgeries were suspected by individuals, so early as the 31st of July, but the fact was not generally known until the 3d of August 1798; that between 9 and 10 o'clock of the night of the 3d of August, he executed, in Philadelphia, an assignment of his property, in trust for the benefit of his creditors; and that an hour or two afterwards, he absconded from the city.

The cause, upon these facts, underwent three several arguments: 1st, on the trial before the jury; 2d, on a motion for a new trial; and 3d, on a
*235] writ of error, in the high court of errors and appeals: but in every stage, the decision was in favor of the plaintiff; and the points of

(a) s. c. 1 Binn. 27, where the case is more fully reported.

argument, and the authorities cited, were the same, throughout the discussion.

For the *plaintiff*, it was contended: 1st. That the entry in the bank-book was tantamount to a payment in cash of the forged check; and that it was on the ground of that payment, not of the forgery, the plaintiff claimed. 2d. That the bank, the drawees of the check, had no power to rescind or annul the payment, on account of the subsequent discovery of the forgery. 3d. That the plaintiff's sudden misconception of his legal rights, in his conversation with the clerk of the bank, did not constitute a promise to refund, in law, equity or conscience. And the following authorities were cited, in the course of the argument: 2 Str. 946; 1 H. Bl. 316; 1 Salk. 127; 4 Vin. Abr. 265, pl. 3; 2 Barnard. 82; Bull. N. P. 273; 3 Burr. 1516; 7 T. R. 420; 3 Burr. 1355; 1 W. Bl. 390; 1 T. R. 655; Kyd on Exch. 134, 48, 100; 3 T. R. 127, 129, 132, 325, 335; 4 Ibid. 325, 335; 7 Ibid. 604, 612; Ambl. 503; Doug. 611, 637; 3 Woodes. 115; 7 T. R. 423, 430; 6 Ibid. 139, 143; Cowp. 565; Leach C. L. 189; 5 Burr. 2670; 1 T. R. 713; 2 Bro. Ch. Ca. 150; *United States* v. *Bank.*(*a*)

For the *defendant*, it was contended: 1st. That the entry to the plaintiff's credit, in the bank-book, was made by mistake; was corrected as soon as it was discovered; and was not, in its nature, nor in mercantile usage, equivalent to a payment in cash. 2d. That although there were some features of similitude between bills and checks, they were not so strictly analogous (for instance, there is no acceptance of a check, and so it is not taken on the acceptor's credit), that all the principles applicable in the one case, must govern in both cases. 3d. That the acceptor of a bill of exchange is not precluded from showing, that the drawer's handwriting is forged, in an action brought by the payee. 4th. That the plaintiff's conversation with the clerk of the bank amounted to a promise to refund; or, at least, induced the bank to suspend any inquiry for Thomas. 5th. That the plaintiff is not entitled to recover, because he claims through a felony. And the following authorities were cited: 1 Burr. 642; 6 T. R. 189, 143; 1 Ld. Raym. 743; 2 Str. 946; 1 H. Bl. 316; 1 Salk. 127; 2 Str. 1051; 1 Ibid. 648; Kyd 60, 90; 1 T. R. 654–5; 3 Ibid. 127; Cowp. 566; 6 T. R. 139; 2 P. Wms. 76; Ambl. 503; *2 Bro. Ch. 150; 2 T. R. 420, 424; Kyd 202–3; 1 T. R. 167; 1 Str. 508; 2 Ibid. 1175; 1 Ld. Raym. 444. [*236

The Court delivered a charge to the jury decidedly in favor of the plaintiff; the Chief Justice declaring, that he thought any attempt to distinguish between a credit in the bank-book of a customer, and an actual cash payment, as impolitic on the part of the bank, as it was unjust towards the individual, who accepted the credit, instead of his money.

The verdict found for the plaintiff the sum demanded and interest: and

(*a*) *United States* v. *Bank of the United States.* This cause was tried in the federal circuit court, on the 17th of October 1800, before Paterson and Peters, Justices. In the course of the discussion, *Ingersoll*, for the defendants, admitted and stated, that if a man accepts a forged bill or draft, he is not only conscientiously, but legally bound to pay it. And each of the judges expressly declared their concurrence in the admission.

(after an ineffectual motion for a new trial, as above stated) a judgment was rendered upon the verdict, which was affirmed upon a writ of error.

Ingersoll, *E. Tilghman*, *McKean* and *Dallas*, for the plaintiff. *Rawle* and *Lewis*, for the defendants.

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*237] *SEPTEMBER TERM, 1802.

ATTORNEY-GENERAL *v.* The GRANTEES under the act of April 1792.

Land-warrants.—Patents.

Warrants granted under the act of 3d April 1792, are not *ipso facto* void, where the conditions of settlement and residence, within the time specified therein, have not been performed: the case of every such warrant, must depend on, and be governed by, its own peculiar circumstances.

Patents, and prevention-certificates recited in the patents, are not conclusive evidence against the commonwealth, or any person claiming under the act, that the patentees have performed the conditions enjoined on them, although they have pursued the form prescribed by the land-officers.(*a*)

ON the 2d of April 1802, an act of the general assembly was passed, entitled "An act to settle the controversies arising from contending claims to land, within that part of the territory of this commonwealth north and west of the rivers Ohio and Allegheny and Conewango creek" (P. L. 153), by which the judges of the supreme court were directed to devise an issue, for trying the following questions, at Sunbury, in Northumberland county:

1st. Are warrants heretofore granted under the act of the 3d of April 1792, valid and effectual in law, against this commonwealth, so as to bar this commonwealth from granting the same land to other applicants, under the act aforesaid, in cases where the warrantees have not fully and fairly complied with the conditions of settlement, improvement and residence, required by the said act, at any time before the date of such warrants, respectively, or within two years after?

2d. Are the titles that have issued from the land-office, under the act aforesaid, whether by warrant or patent, good and effectual in law, against this commonwealth, or any person claiming under the act aforesaid, in cases where such titles have issued on the authority and have been grounded upon the certificates of two justices of the peace, usually called prevention-certificates, without any other evidence being given of the nature and circumstances of such prevention, whereby, as is alleged, the conditions of settlement, improvement and residence required by the said act, could not be complied with?

The judges, having devised and published the form of a feigned issue,
*238] on a wager, to try these questions; having given public *notice, that all parties interested in the issue would be heard at the trial; and having settled and prescribed the other necessary proceedings; three of

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(*a*) See McLaughlin's Lessee *v.* Dawson, *ante*, p. 221–2, and note.

them (YEATES, SMITH and BRACKENRIDGE, Justices) assembled at Sunbury, on the 25th of November 1802 ; when a jury was impanneled, and the case argued by the attorney-general (*McKean*), *W. Tilghman* and *Cooper*, for the commonwealth, in the negative of the propositions contained in the questions ; but no counsel appeared to argue in the affirmative.(*a*) On the next day, the presiding judge delivered the following charge to the jury :

(*a*) The reasons for not embracing this opportunity to discuss the subject, are assigned by the counsel of the Holland Company, in a letter addressed to the judges of the supreme court:

"Gentlemen—Having attentively considered the suggestions which were made yesterday, during the conference at the chambers of the Chief Justice, on the subject of the act of the general assembly, passed at the last session, with a view to settle the controversies arising from contending claims to lands north and west of the rivers Ohio and Allegheny and Conewango creek, we beg leave briefly to submit the result, as a justification for the advice that will be given to our clients.

1st. Although the Holland Company and their counsel cannot approve the terms of the preamble of the act, by which the legislature has undertaken to declare the meaning and construction of the original contract (the very point in controversy), and though they cannot admit the right or propriety of dictating a new, and, perhaps, unconstitutional mode of settling a judicial question, without the assent of all the parties in interest; yet they feel the importance of an early decision, and would cheerfully concur in any form of proceeding, by which the merits of the case could be fully and fairly investigated and decided.

2d. The merits of the case on the part of the Holland Company, as disclosed to the supreme court, on the motion for a *mandamus*, and as presented to the legislature, evidently involve the following considerations: 1st. Whether the company have complied with the condition of the 9th section of the act of April 1792? 2d. Whether the reasons assigned for a non-compliance with the condition, bring their case within the proviso? 3d. Whether the proviso operates upon cases that are brought within its terms, to discharge the condition entirely, or only to enlarge the time for performing it? 4th. Whether the company have so persisted in their endeavors to perform the condition, as to be still within the benefit of the proviso? And 5th. Whether the government, by prescribing the evidence, on which patents had actually issued, in cases brought within the proviso, could now take advantage of the forfeiture for a supposed non-compliance with the original condition?

3d. But the questions which the legislature has proposed, are the following? 1st. Are warrants heretofore granted under the act of the 3d day of April 1792, valid and effectual in law against this commonwealth, so as to bar this commonwealth from granting the same land to other applicants, under the act aforesaid, in cases where the warrantees have not fully and fairly complied with the conditions of settlement, improvement and residence required by the said act, at any time before the date of such warrants respectively, or within two years after? 2d. Are the titles that have issued from the land-office under the act aforesaid, whether by warrant or patent, good and effectual in law against this commonwealth, or any person claiming under the act aforesaid, in cases where such titles have issued on the authority, and have been grounded upon the certificates of two justices of the peace, usually called "prevention-certificates," without any other evidence being given of the nature and circumstances of such prevention, whereby, as is alleged, the conditions of settlement, improvement and residence required by the said act, could not be complied with? These questions, in our opinion, exclude an investigation and decision upon any other point than the following: 1st. Whether, if the Holland Company have not performed the condition, on which the warrants originally issued, within two years, though the residence could not be completed until the expiration of five years, the state is barred from granting the same lands to other applicants? And 2d. Whether patents having issued

*YEATES, Justice.—That the decision of the court and jury on the present feigned issue should "settle the controversies arising from contending claims to lands north and west of the rivers Ohio and Allegheny and Conewango creek," is an event devoutly to be wished for by every good citizen. "It is indispensably necessary that the peace of that part of the state should be preserved, and complete justice done to all parties interested, as effectually as possible." (Close of Preamble to the Act of 2d of April 1802, p. 155.) We have no hesitation in declaring, that we are not without our fears, that the good intentions of the legislature, expressed in the law under which we now sit, will not be effected. We hope, we shall be happy enough to acknowledge our mistake hereafter.

It is obvious, that the validity of the claims of the warrant-holders, as well as of the actual settlers, must depend upon the true and correct construction of the act of the 3d of April 1792, considered as a solemn contract between the commonwealth and each individual. The circumstances attendant on each particular case, may vary the general legal conclusion in many instances.

We proceed to the discharge of the duties enjoined on us by the late act.

*240] *The first question proposed to our consideration is as follows: Are warrants heretofore granted under the act of the 3d of April 1792, valid and effectual in law, against this commonwealth, so as to bar this commonwealth from granting the same land to other applicants, under the act aforesaid, in cases where the warrantees have not fully and fairly complied with the conditions of settlement, improvement and residence, required by the said act, at any time before the date of such warrants respectively, or within two years after?

It will be proper here to observe, that on the motion for the *mandamus* to the late secretary of the land-office, at the instance of the Holland Company, the members of the court, after great consideration of the subject, were divided in their opinion. The Chief Justice seemed to be of opinion, that if the warrantee was, "by force of arms of the enemies of the United

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on the evidence of prevention-certificates alone, they are not void, so as to authorize the state to sell the same land to other purchasers?

4th. On the first of these points, we observe, that it has never been contended that the Holland Company have performed the condition within two years; but only, that the condition was discharged or suspended by the operation of the proviso, on the facts of their case; particularly, the fact that an Indian war existed for several years, beyond the term of two years specified in the act of assembly. And on the second point, it is sufficient to say, that although the prevention-certificate was the evidence prescribed by the public officers, and ought, therefore, to be binding on the government, yet that, even waiving that objection, the patentees will be deprived of their land, when other satisfactory and legal evidence was, and is, in their power, to prove the circumstances which entitled them to patents.

Without recurring to the many other obvious objections to the form and provisions of the act of assembly, we are confident, that the view which has been offered upon he subject, will justify our advising the Holland Company to decline becoming a party to the suit proposed to be instituted; since, we repeat, a decision on the two abstract questions proposed by the legislature, would still leave untouched and undecided, the great and essential part of the controversy.

J. INGERSOLL,
W. LEWIS,
A. J. DALLAS."

Philadelphia, June 24, 1802.

States, prevented from making an actual settlement, as described in the act, or was driven therefrom, and should persist in his endeavors to make such actual settlement thereafter," it would amount to a performance of the condition in law. Two of us (YEATES and SMITH) thought, that in all events, except the death of the party, the settlement and residence contemplated by the act, should precede the vesting of the complete and absolute estate, and that "every warrant-holder should cause a settlement to be made on his lands, within two years next after the date of the warrant, and a residence thereon for five years next following the first settlement, on pain of forfeiture, by a new warrant; but if, nevertheless, he should be interrupted or obstructed by the force of the enemy from doing those acts, within the limited periods, and should afterwards persevere in his efforts, in a reasonable time after the removal of such force, until these objects should be accomplished, no advantage shall be taken of him, for the want of a successive continuation of his settlement." To this opinion, Judge BRACKENRIDGE subscribes.

It would ill become us to say, which of these constructions is entitled to a preference. It is true, that in the preamble of the act of the 2d of April 1802 (p. 154), it is expressed, that "it appears from the act aforesaid (3d of April 1792), that the commonwealth regarded a full compliance with those conditions of settlement, improvement and residence, as an indispensable part of the purchase or consideration of the land itself." But it is equally certain, that the true test of title to the lands in question, must be resolved into the legitimate meaning of the act of 1792, extracted *ex viceribus suis*, independent of any legislative exposition thereof. I adhere to the opinion which I formerly delivered *in banc;* yet, if a different interpretation of the law shall be made by courts of a competent jurisdiction in the *dernier* resort, I shall be bound to acquiesce, though I may not be able to change my sentiments. If the meaning of the first question *be, are titles under warrants, issued under the law of the 3d of April 1792, for [*241 lands north and west of the rivers Ohio and Allegheny and Conewango creek, good and available against the commonwealth, so as to bar the granting of the same land to other applicants, where the warrantees have not fully and fairly complied with the conditions of settlement, improvement and residence, required by the law, at any time before, or within two years after, the dates of the respective warrants, in time of profound peace, when they were not prevented from making such actual settlement by force of arms of the enemies of the United States, or reasonable and well-grounded fear of the enemies of the United States? The answer is ready in the language of the acts before us, and can admit of no hesitation.

"No warrant of survey for those lands shall vest any title, 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, make or cause to be made, an actual settlement thereon, by clearing, &c.; and in default thereof, it shall and may be lawful to and for the commonwealth to issue new warrants, to other actual settlers, for the said lands, or any part thereof, &c." (Act of the 3d of April 1792, § 8.) "For the commonwealth regarded a full compliance with the conditions of settlement and residence as an indispensable part of the purchase or consideration of the lands so granted." (Preamble to Act of 1802.)

But if the true meaning of the question be, whether, under all given or supposed, circumstances of peace or war, of times of perfect tranquillity, or imminent danger, such warrants are not *ipso facto* void and dead in law, we are constrained to say, that our minds refuse assent to the general affirmative of the proposition.

We will exemplify our ideas on this subject. Put the case, that a warrant, taken out early in 1792, calls for an island, or describes certain land, with accuracy and precision, by the course of waters, or other natural boundaries, distant from any military post, and that the warrantee, after evidencing the fullest intentions of making an actual settlement on the lands applied for, by all the necessary preparation of provisions, implements of husbandry, laborers, cattle, &c., cannot, with any degree of personal safety, seat himself on the lands, within two years after the date of the warrant, and by reason of the just terror of savage hostilities? Will not the proviso in the 9th section of the act of the 3d of April 1792, excuse the temporary non-performance of an act, rendered highly dangerous, if not absolutely impracticable, by imperious circumstances, over which he had no control?

Or, suppose another warrant, depending, in point of description, on other leading warrants, which the district-surveyor, either from the state of the country, the hurry of the business of his office, or other causes, could not survey, until the two years were *nearly expired, and the depredations of the Indians, should intervene, for the residue of the term, will not this also suspend the operation of the forfeiture? Nothing can be clearer to us, than that the terms of the proviso embrace and aid such cases; and independent of the strong expressions made use of, we should require strong proof to satisfy our minds, that the legislature could possibly mean to make a wanton sacrifice of the lives of her citizens.

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It is said in the books, that conditions rendered impossible by the act of God, are void. Salk. 170; 2 Co. 79 *b*; Co. Litt. 206 *a*; 290 *b*; 1 Roll. Abr. 449, *l*, 50; 1 Fonbl. 199. But conditions precedent must be strictly performed, to make the estate vest, and though become impossible, even by the act of God, the estate will not vest; *aliter*, of conditions subsequent. 12 Mod. 183; Co. Litt. 218 *a*; 2 Vern. 339; 1 Ch. Ca. 129, 138; Salk. 231; 1 Vern. 183; 4 Mod. 66. We desire to be understood to mean, that the "prevention by force of arms of the enemies of the United States," does not, in our idea, absolutely dispense with and annul the conditions of actual settlement, improvement and residence, but that it suspends the forfeiture, by protracting the limited periods. Still, the conditions must be performed *cy pres*, whenever the real terror arising from the enemy has subsided, and he shall honestly persist in his endeavors to make such actual settlement, improvement and residence, until the conditions are fairly and complied with.

Other instances may be supposed, wherein the principles of prevention may effectually be applicable. If a person, under the pretence of being an actual settler, shall seat himself on lands, previously warranted and surveyed, within the period allowed, under a fair construction of the law, to the warrantee, for the making his settlement, withhold the possession, and obstruct him from making his settlement, he shall derive no benefit from this unlawful act. If the party himself is the cause, wherefore the condition cannot be

performed, he shall never take advantage. Co. Litt. 206; Doug. 691; 1 Roll. Abr. 454, pl. 8; Gobd. 76; 5 Vin. 246, pl. 25.

We trust that we have said enough, to convey our sentiments on the first point. Our answer to the question, as proposed, is, that such warrants may or may not be valid and effectual in law against the commonwealth, according to the several times and existing facts accompanying such warrants. The result of our opinion, founded on our best consideration of the matter is, that every case must depend on, and be governed by, its own peculiar circumstances.

The second question for decision is, are the titles that have issued from the land-office, under the act aforesaid, whether by warrant or patent, good and effectual against the commonwealth, or any person claiming under the act aforesaid, in cases where *such titles have issued on the authority, [*243 and have been grounded on the certificates of two justices of the peace, usually called prevention-certificates, without any other evidence being given of the nature and circumstances of such prevention, whereby, as is alleged, the conditions of settlement, improvement and residence, required by the said act, could not be complied with?

It was stated in evidence, on the motion for the *mandamus*, and proved on this trial, that the board of property, being desirous of settling a formal mode of certificate, on which patents might issue for lands north and west of the rivers Ohio and Allegheny and Conewango creek, required the opinion of Mr. Ingersoll, the then attorney-general, thereon; and on due consideration, a form was afterwards adopted, on the 21st of December 1797, which was ordered to be published in the Pittsburgh Gazette, and patents issued, of course, on the prescribed form being complied with.

The received opinion of the supreme executive magistrate, the attorney-general, the board of property, and of a respectable part of the bar (whose sentiments on legal questions will always have great and deserved weight), at that day, certainly was, that if a warrant-holder was prevented, by force of arms of the enemies of the United States, from making his actual settlement, within two years after the date of his warrant, and afterwards persisted in his endeavors to make such settlement, that the condition was extinguished and gone. Persisting in endeavors, was construed to mean something; attempts, essays, &c.; but that did not imply absolute success, or accomplishment of the objects intended to be effected. By some, it was thought, that the endeavors were only to be commensurate as to the time of making the actual settlement, and were tantamount, and should avail the parties, "in the same manner as if the actual settlements had been made and continued."

The decisions of the court in *Morris's Lessee* v. *Neighman and others* (*ante*, p. 209), at Pittsburgh, May 1799, tended to make the former opinion questionable; and two of the justices of the supreme court adopted a different doctrine, in their judgment between the Holland Company and Tench Coxe (*ante*, p. 170). In the argument in that case, it was insisted by the counsel for the plaintiffs, that the board of property, in their resolves, and the governor, by his patent, represented the commonwealth, *pro hâc vice*; and that interests vested under them, which could not afterwards be defeated. We cannot subscribe hereto. If the conditions of settlement, improvement and residence are indispensable at all events; they become so

by an act of the different branches of the legislature. The governor who has
*244] a qualified negative in the passing of laws, *cannot dispense with their injunctions: and it cannot be said, that this case falls within the meaning of the 9th section of the second article of the constitution. "The governor shall have power to remit fines and forfeitures, and to grant reprieves and pardons, except in case of impeachment." It relates merely to penalties consequent on public offences. Nor can it be pretended, that the board of property, by any act whatever of their own, can derogate from the binding force of law. But the fact is, an intention of dispensing with the law of 1792, cannot, with any degree of justice, be ascribed to the governor, or board of property for the time being. They considered themselves, in their different functions, virtually discharging their respective duties, in carrying the act into execution, according to the general received opinion of the day; they never intended to purge a forfeiture, if it had really accrued, nor to excuse the non-performance of a condition, if it had not been complied with, agreeable to the public will expressed in a legislative contract.

The rule of law is thus laid down in England. A false or partial suggestion by the grantee of the king, to the king's prejudice, whereby he is deceived, will make the grant of the king void. Hob. 229; Cro. Eliz. 632; Yel. 48; 1 Co. 44 *a*; 51 *b*; 3 Leon. 5; 2 Hawk. 398; Bl. Com. 226. But where the words are the words of the king, and it appears, that he has only mistaken the law, there he shall not be said to be so deceived to the avoidance of the grant: *per* Sir Samuel Eyre, Justice, Ld. Raym. 50; 6 Co. 55 *b*; 56 *b*, accord. But if any of the lands concerning which the question arises, became forfeited by the omission of certain acts enjoined on the warrant-holders, they do not escheat to the governor for the time being, for his benefit, nor can he be prejudiced, as governor, by any grant thereof; they become vested in the whole body of the citizens, as the property of the commonwealth, subject to the disposition of the laws.

We are decidedly of opinion, that the patents, and the prevention-certificates recited in the patents, are not conclusive evidence against this commonwealth, or any person claiming under the act of 3d of April, 1792, of the patentees having performed the conditions enjoined on them, although they have pursued the form prescribed by the land-officers. But we also think, that the circumstances of recital of such certificates will not *ipso facto* avoid and nullify the patent, if the actual settlement, improvement and residence, pointed out by the law, can be established by other proof.

We must repeat, on this head, what we asserted on the former, that every case must be governed by its own peculiar circumstances. Until the facts really existing, as to each tract of land, are ascertained with accuracy, the legal conclusion cannot be drawn with any degree of correctness. *Ex facto oritur jus.*

2d. Here we feel ourselves irresistibly impelled to mention a difficulty,
*245] which strikes our minds forcibly. Our reflections on the *subject have led us to ask ourselves this question on our pillows: what would a wise, just and independent chancellor decree, on the last question? Executory contracts are the peculiar objects of chancery jurisdiction, and can be specifically enforced by chancery alone. Equity forms a part of our law, says the late Chief Justice, truly. (1 Dall. 213.)

If it had appeared to such a chancellor, by the pleadings or other proofs,

that the purchase-money had been fully paid to the government, by the individual, for a tract of land, under the law of the 3d April 1792; that times of difficulty and danger had intervened; that sums of money had been expended to effect an actual settlement, improvement and residence, which had not been accomplished fully; that by means of an unintentional mistake, on the part of the state officers, in granting him his patent (the officers not led to that mistake by any species of fraud or deception on the part of the grantee) he had been led into an error, and lulled into a confidence, that the conditions of the grant had been legally complied with, and therefore, he had remitted in his endeavors therein; would not he think, that under all these circumstances, thus combined, equity should interpose and mitigate the rigid law of forfeiture, by protracting the limited periods? And would it not be an additional ground of equity, that the political state of the country has materially changed since 1792, by a surrender of the western posts to the government of the United States, and peace with the Indian nations, both which render an immediate settlement of the frontiers, in some measure, less necessary than heretofore?

But it is not submitted to us, to draw the line of property to these lands; they must be left to the cool and temperate decisions of others, before whom the questions of title may be agitated: we are confined to the wager, on the matters before us; and on both questions, we have given you our dispassionate sentiments, formed on due reflection, according to the best of our judgment. We are interested merely as common citizens, whose safety and happiness is involved in a due administration of the laws. We profess and feel an ardent desire, that peace and tranquillity should be preserved to the most remote inhabitants of this commonwealth.

The jury found a general verdict in favor of the attorney-general, on the feigned issue; and judgment was rendered in these words: "Whereupon, it is considered by the court here, that the said attorney-general do recover of the said grantees, his damages, costs and charges aforesaid, amounting in the whole to $200.06, and the court accordingly render judgment thereon for the plaintiff, subject to the proviso in the 9th section of the act of assembly, passed the 3d day of April 1792."

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*DECEMBER TERM, 1802. [*246

Jones *et al. v.* Insurance Company of North America.

Insurance on freight.—Partial loss.—Exception.

The expenses incurred for seamen's wages, provisions and extra-pilotage, during an embargo on a vessel, are recoverable, as a partial loss, from the underwriter on freight.

A bill of exceptions to the charge of the court, may be tendered, at any time before the jury have delivered their verdict, even when they are ready to deliver it, and are at the bar.

Covenant, on a policy of insurance, dated the 30th of November 1792, upon the freight of the brig, called the Benjamin Franklin, valued at $3000, for a voyage "at and from Bordeaux to a port in the United States," against

"the seas, &c., arrests, restraints, detainments of all kings, &c.," in the usual terms of the printed policies. The premium was six per cent.; and, it was declared, that this insurance is made on the freight of the above brig, valued at the sum insured, for two-thirds thereof, &c."

On the evidence, it appeared, that the brig sailed from Bordeaux, on the 17th day of November 1792, bound for Philadelphia; but on the 20th of November, before she had reached the mouth of the Garonne, she was embargoed by the French government. The embargo continued until the 10th of January 1793; when the brig prosecuted her voyage; arrived at Philadelphia, on the 5th of March; and there, on delivery of the cargo, the assured received the amount of the freight, originally stipulated to be paid, from the respective shippers.

During the embargo, however, an expense was incurred, for the seamen's wages and provisions, and extra-pilotage, amounting to $875.13, for two-thirds of which (according to the proportion of freight insured), the plaintiffs claimed to be indemnified, by the underwriters upon the present policy: and the validity of this claim was the only matter in controversy, upon the trial of the cause.

For the *plaintiffs*, it was contended, that the expenses incurred during the embargo, were a direct consequence of the embargo, operating as a par-
*247] tial loss upon the freight; that, therefore, the sum *ought to be paid or reimbursed by the defendants, so far as the interest of the plaintiffs extended; that the expenses of the embargo might either be estimated by the jury, upon a consideration of the time, and the burden of the vessel; or from the actual disbursement (which the counsel for the defendants agreed and admitted), and that the premium, being paid for an insurance against the peril of an embargo, applied to a partial, as well as to a total, loss of the freight. In the course of the plaintiff's argument, the following books were cited: Mill. on Ins. 339; Park, 121, 124; Abb. 274–5, 282–6; 2 Marsh. 620, 628; 2 T. R. 414; 1 Val. Com. 168–170; 1 Emerig. 539; Park, 53; 1 T. R. 127, 129, 132; 4 Ibid. 208, 210, 211; 6 Ibid. 413, 419, 422, 423, 425; Park, 127; 1 Mag. 250, 254; 7 T. R. 421; Park, 78; 2 East 544; 1 Bos. & Pul. 203; Doug. 268, 586; 1 East 228; 2 Burr. 696.

For the *defendants*, it was insisted, that on this policy upon freight specifically, the expenses of seamen's wages, &c., during the embargo, were not recoverable; for the brig coming to her port of delivery in safety, had earned, and actually had received, her whole freight. Besides, it was contended, that such an allowance would be contrary to an established and uniform usage among merchants and underwriters; and it was attempted to prove by the testimony of witnesses, and the certificates of insurance brokers (admitted by consent), that such an usage existed. The attempt failed, however, on the investigation; and the verdict of the jury gave a negative to the usage. In the course of the argument for the defendants, the following books were cited: 1 T. R. 127; Park, 59; 2 Marsh. 628; 4 T. R. 210; Abb. 221–3; 2 Marsh. 570, 625–6, 628; 1 Emerig. 539; Pothier, "Charter Party," 35; Park, 116; Abb. 228–9; 2 Marsh. 467; Park, 124; Wesk. 252–3, 499, 135, 244; Beawes' L. M. 137; 4 T. R. 208; 1 Mag. 168–9, 170.

The Chief Justice delivered the unanimous opinion of the court (all the judges being present) in the charge to the jury.

SHIPPEN, Chief Justice.—There is no direct judicial authority in the books, upon the case now before the court. The case must, therefore, be decided either upon principle, or upon usage.

The present policy is an insurance upon freight, against the peril of an embargo, as well as against the other enumerated perils. The expense for seamen's wages and provisions, claimed upon the policy, was an immediate consequence of the embargo at Bordeaux. That expense, it has been often decided, does not fall upon the underwriters of the ship, or the cargo; but it is remarkable, that Judge BULLER (a judge of uncommon understanding and precision), when concurring in that opinion, emphatically adds, "the freight must bear it:" and if the freight must bear *it, the implication is strong, that the policy upon freight, must be the appropriate instrument of indemnity.(a) [*248

Considering the point, however, abstractedly, upon principle, it is naturally asked, why the law should admit, upon every other subject of insurance, a recovery against the underwriters, for a partial, as well as for a total, loss; and exclude such a recovery, in the instance of freight? Freight is exposed to a partial diminution of its value, as well as the ship, or the cargo; and equally with those, contributes to the payment of a general average, arising from a loss, in its nature partial. The assured on freight, too, may abandon to the underwriters, in the same cases of a loss, not actually, but constructively, total, in which the abandonment is permitted to the assured upon the ship or cargo. Where, then, is the ground of discrimination, upon the present question? Though the assured receive, nominally, the amount of the freight, from the shippers, they receive, in fact, so much less of the valued freight, than they would have received, if there had been no embargo, as is the amount of the expense which the embargo occasions. The injury is done exclusively to the freight; and if the detention were long, it might, in some cases, amount to the whole freight. Now, every insurance is meant to be an indemnity; but refuse to pay the assured upon freight, the extra-charge, a charge not contemplated in the ordinary course of the voyage, which falls upon freight, in consequence of an embargo (a risk insured against), and how can the insurance be called an indemnity? In short, though the case has not hitherto been expressly decided; and though we have not had much time for deliberation: yet, we think, that as far as the opinion of the judges of England can be ascertained, by a fair inference, from the expressions of the books; and we are confident, by a fair application of the principle of insurance, the plaintiffs are entitled to a verdict, unless there is a settled, uniform usage of commerce to the contrary.

The existence of such a usage was strongly stated, in the opening of the defence; and we expected to receive light and satisfaction from the evidence upon the subject; for the usages of any trade, but, above all, the usages of trade and commerce, in giving a practical construction to policies

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(a) The high court of errors and appeals reversed the judgment of the supreme court in this case, in 2 Binn. 547. The wages and provisions of the crew, and the other expenses incurred during the detention of a vessel by an embargo, do not constitute a charge against the freight; they should be brought into a general average. Ibid. But see Kingston v. Girard, *post*, p. 274.

of insurance, are of so high a consideration, that they are deemed to be a part of the express and written contract, whenever they are proved with sufficient certainty. Nor is a usage of trade to be scanned by the strict rules, for the allowance of a common-law custom. If it exists; if it is known and uniform; and if it is not, in itself, unlawful; it ought to prevail in the decision of a commercial controversy.

But we confess, that we have been disappointed in our own general expectations; though we leave it to the jury (whose exclusive province it is) to decide upon the proof of the usage, in the present case. It appears, that *249] the question has seldom occurred *among the merchants and underwriters of Philadelphia; and in the few instances in which it has occurred, the demand has been as often allowed, as it was rejected. Still, however, we repeat, the jury have a right to pronounce their own sense of the evidence. If they think, a commercial usage uhon the subject has been proved, in opposition to the claim of the plaintiffs, their verdict must be for the defendants. But in the absence of any commercial usage, the weight of authority and principle, seems to call for a contrary decision.

Verdict for the plaintiffs.

Dallas, for the plaintiffs. *Ingersoll*, *E. Tilghman* and *Moylan*, for the defendants.

SAME CAUSE. (*a*)

THE charge was delivered on Friday evening, the 17th of December, and the court immediately adjourned. On the next morning, when the jury were at the bar, ready to deliver a verdict, the defendant's counsel, for the first time, tendered exceptions to the charge of the court. The counsel for the plaintiff insisted, that the exceptions were tendered too late; and the court kept the subject under advisement, that the parties might examine the precedents.

At a subsequent day, the *plaintiff's* counsel admitted that there was a variance in the precedents; and that the statute of West. 2, 13 Edw. I. (which gives the bill of exceptions), is silent on the point. But he contended, that as all the books of practice declare, that the exception must be taken at the trial; and that the bill itself must be tendered before the verdict; the notice of the exception must be taken *instanter*, when the exceptionable matter occurs, though the form may be afterwards drafted. Bull. N. P. 315, 319; Tidd 312, 314, 315, 317; 1 Salk. 288; 2 W. Bl. 929; Cowp; 494; 1 W. Bl. 556; 11 Mod. 175–6; 8 Ibid. 220–1; 2 H. Bl. 200; 2 T. R. 54; 3 Burr. 1692; 1 Bl. Com. 556–7; Lilly's Ent. 249, 250, 275; 1 Bos. & Pul. 32; Cro. Car. 341; Doug. 122.

The *opposite counsel*, referring to the same precedents, relied upon the form in Bull. N. P., and insisted, that a bill of exceptions to the charge, might be tendered at any time before the verdict.

BY THE COURT.—On a consideration of the authorities cited, and of our own practice, we do not think that the defendants were too late in tendering their exceptions. The bill. therefore, may be reduced to form, and

(*a*) s. c. 1 Binn. 38.

will be allowed. (*a*) Even if we had *doubted on this point, we should have been inclined to afford an opportunity for the revision of our opinion minds, on the principal question; however satisfied we are, in our own, that it is correct in principle and law. (*b*)

Cochran *et al. v.* Cummings.

Rescission of fraudulent contract.

Where a vendor of goods has been fraudulently induced to accept in payment, a conveyance of a worthless tract of land, he may repudiate the payment, and recover the price of the goods.

Case, for goods sold and delivered. There was a special defence, that the defendant had sold and conveyed to the plaintiffs, a quantity of land in the county of Northumberland, in satisfaction of their demand; and the deed of conveyance, dated in June 1799, was produced. But the plaintiffs insisted: 1st. That they took the conveyance only as a collateral security: and 2d. That they were imposed upon by the defendant, as to the quality of the land.

On the first point, the evidence was contradictory; and The Court left it, implicitly, to be decided by the jury.

On the second point, it was proved, that the defendant had represented the land as very valuable; saying, that it was such as would sell, in two or three years, for a price, from two to six dollars an acre: but in fact, the land was a part of a mountain, commonly called "Jack's Second Mountain;" so rude, that it could not be cultivated; and so steep, that it was inaccessible, even to take off the wood, without incalculable expense and labor. In the charge of the court, on this point, it was said—

By Shippen, Chief Justice.—Wherever there is a gross misrepresentation of facts, relating to the subject of a contract, the contract is fraudulent and void. If, therefore, the jury shall be of opinion, that such a misrepresentation was made, in the present instance, they should consider the conveyance as no payment, although the plaintiffs agreed, under the deception, to accept it in satisfaction; and the verdict must be for damages to the whole amount of the demand.

Verdict, accordingly, for the plaintiffs' whole demand.

Ingersoll and *Heatly*, for the plaintiffs. *M. Levy* and *Porter*, for the defendant.

(*a*) Although the jury have agreed upon a verdict and sealed it up, until it has been opened and confirmed in court, it is, in fact, no verdict. 1 Binn. 38. It will be sufficient, if the substance of the exception be reduced to writing and tendered to the court, before the verdict has been delivered. The exception may afterwards be reduced to form, and the court is not bound to suspend the trial of a cause, until a bill of exceptions is drawn in form and sealed. Morris *v.* Buckley, 8 S. & R. 216; Stewart *v.* Huntington Bank, 11 Id. 267.

(*b*) In the case of Kingston *v.* Girard, *post*, p. 274, the court declared, that, after long and mature consideration, they were perfectly satisfied with their decision in Jones *v.* Insurance Company of North America. It was, however, subsequently reversed by the high court of errors and appeals. 2 Binn. 547.

*Fitzgerald *v.* Caldwell's executors.

Interest on judgment.

A judgment *nisi* was made absolute by an agreement, which stipulated that proceedings should be stayed, until the trial of certain foreign attachments, which had been laid, before the commencement of the suit, upon the funds in question: *Held*, that interest should be allowed on the judgment, but only from the time of the settlement of the principle involved in those attachments, by the trial of one of them.

The original cause being remitted to the supreme court, upon the decision of the high court of errors and appeals,(*a*) this *scire facias* was brought to enforce the judgment against Caldwell's executors, returnable to September term 1798; and issue was therein joined upon the plea of "payment."

To maintain the plea, the defendant's counsel recapitulated the facts set forth in the report of *Fitzgerald* v. *Caldwell*, 2 Dall. 215; and contended, that, while the attachments were depending, Caldwell was not liable for interest; that as soon as the original question had been decided, upon the trial of one of the attachments (in January 1793), favorably to the claim of the present plaintiff, Caldwell, at his own peril, paid the principal sum, due at the time the note was given to Fitzgerald;(*b*) that no question of interest was decided by the high court of errors and appeals; and that the judgment of that court is not a bar to the inquiry, in the present suit, whether anything is due, either for principal or interest.

For the *plaintiff*, it was urged, that by the agreement of the parties, the judgment *nisi* rendered on the report of the referees, in January 1791, was made absolute, with a stay of proceedings, until one of the attachments should be tried; that this judgment, being for a sum certain, to wit, 5009*l.* 5*s.* 1*d.*, carried interest, of course, unless the terms of the agreement, or the operation of law, in cases of attachment, affected the right (1 Dall. Laws, 13); that in point of morality, as well as law, Caldwell, who had long detained, and advantageously employed, the money of another man, was bound to make a reasonable compensation for the use; that the decision of the supreme court, releasing Caldwell from the payment of interest, was the very foundation of the writ of error; and that the high court of
*252] errors and appeals *(whose sentence could now be revised, modified, or annulled) had not only affirmed the judgment rendered in January 1791, for the fixed sum of 5009*l.* 5*s.* 1*d.*, but had expressly reversed the order to discharge Caldwell, on payment of the principal sum.

(*a*) See Addis. 119.

(*b*) The principal sum paid was the amount due in April 1782; not the amount reported to be due by the referees (5009*l.* 5*s.* 1*d.*) and for which the judgment was rendered absolute, as of January 1791. The claim of the plaintiff, on the *scire facias*, was, therefore, founded upon the following calculation:

Report of referees in January 1791	£ 5009 5 1
Two years, interest, until payment, in January 1793,	601 0 0
	5610 5 1
Deduct the amount paid in January 1793	3250 0 0
	2360 5 1
Interest on the balance, until payment,	

SHIPPEN, Chief Justice.—We have neither the power, nor the inclination to impair the judgment of the high court of errors and appeals, by asserting a contrary opinion, in point of law; nor by admitting evidence to undermine its authority with the jury. The judgment of January 1791, with all its legal incidents, can only now be affected, by proof of actual payment and satisfaction. As to the principal sum for which the judgment is affirmed (5009*l.* 5*s.* 1*d.*), there must be no dispute; and we can only now consider that part of the defendant's argument, which insists, that, at least, upon the amount of the judgment, no interest ought to be allowed.

An act of the general assembly has declared, "that lawful interest shall be allowed to the creditor, for the sum or value he obtained judgment for, from the time the said judgment was obtained, until the time of sale, or until satisfaction be made." (1 Dall. Laws, 13.) Interest is, therefore, generally speaking, a legal incident of every judgment: but it is contended, that the present case ought to be excepted from the rule, because an immediate payment was not contemplated by the parties themselves; and because the judgment was made absolute, on the express condition, that it should await the trial of certain foreign attachments.

The agreement on which the judgment was made absolute, is recognised in the decision of the high court of errors and appeals, "according to its terms." The genuine meaning of its terms can only be ascertained, by considering what was the real subject in dispute under the attachments. In the attachment that was tried in January 1793, the dispute appeared to be simply, whether the evidence of Moore's interest in the debt, due from Caldwell to Vance, Caldwell & Vance, amounted to an assignment, legal or equitable.(*a*) The meaning of the agreement, therefore, must have been, to stay proceedings on the judgment, until that subject was investigated. Now, the subject was completely investigated, on the trial to which I allude; and the jury determined, that the debt did not remain subject to attachments, as a debt still due to Vance, Caldwell & Vance; but had been previously appropriated and assigned to Moore & Johnson. It is true, that the decision of the high court of errors and appeals recognises the agreement generally; and that the agreement, in its own general terms, embraces a trial of all the attachments: but if the first attachment could not prevail, it is improbable, that any subsequent attachment would succeed; and I repeat, that in the *spirit of the agreement, a discussion and decision of the principle was alone contemplated. [*253

In this view of the case, the only point to exercise the discretion of the jury, will be (not whether any interest shall be allowed upon the judgment, but) from what period the interest shall begin to run. The judgment being made absolute by the agreement, a reasonable time should, perhaps, be allowed for a trial, as contemplated by the terms of the agreement; but when the trial in January 1793, had fixed the right of Moore & Johnson to the debt, as assignees of Vance, Caldwell & Vance; and when Caldwell himself had acquiesced in the verdict, by paying what he thought due, without demanding an indemnity, the court cannot perceive any legal or equitable ground upon which the right of interest should be longer suspended.

(*a*) See this case cited, 6 Binn. 355.

Upon the whole, we think, that interest ought not to be allowed, upon the sum fixed by the judgment of January 1791, until the decision in January 1793; but that the interest ought to run from that period. Although Caldwell himself asked no indemnity, on the payment which he made, we shall think it proper, in aid of the executors, to direct an indemnity against the attachments to be given, before the amount of the verdict, on this occasion, is paid.

Verdict for the plaintiff.(*a*)

E. Tilghman, Lewis and *Dallas*, for the plaintiff. *Ingersoll* and *McKean*, for the defendants.

COMMONWEALTH *v.* GIBBS.[1]

Elections.

Under the act of 15th February 1799, a judge of elections had no right to exact an oath from an elector, that he did not join the British forces, during the revolutionary war, or was not attainted of high treason.

A threat to the judge, made by the son of the elector, under such circumstances, is not an indictable offence; to constitute the offence of intimidation, there must be a preconceived intent to intimidate the officers, or to interrupt the election.

THIS was an indictment, on the 17th section of the election law (4 Dall. Laws, 342), which provides (among other things) that "if any officer of the election shall be threatened, or violence used to his person, or interrupted in the execution of his duty, every person who shall be guilty of such intimidation, threats, violence or interruption, being convicted thereof, shall be fined and imprisoned for the same, at the discretion of the court, not exceeding six months imprisonment, nor exceeding one hundred dollars fine."

The facts were briefly these: Mr. Beckley, the prosecutor, was appointed a judge, at the general election in October 1801. Mr. Gibbs, the father of the defendant, presented his ballot, but before accepting it, Mr. Beckley insisted, that he should answer the following questions: 1st. Did you, at any
*254] time during the *American war, join the British army? 2d. Or, take an oath of allegiance to the king of Great Britain? 3d. Or, were you attainted of treason against the United States, or the state of Pennsylvania? Mr. Gibbs declined answering the questions; and (after some altercation) his son, the defendant, shaking his fist at Beckley, said, "I will see you tomorrow."

Two grounds of defence were taken by *Ingersoll* and *Lewis:* 1st. That the judge of the election was not in the performance of a duty, when he proposed such questions to an elector. The act of assembly declares who may vote; and as to the enumerated requisites to constitute a right of voting, the voter's oath or affirmation may be demanded. After the repeal of the test laws, every citizen who had not been attainted, had a right to vote. But the questions are not pointed to the qualification designated in the act; the answers to those questions might tend to criminate the voter

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(*a*) The indemnity was given to the satisfaction of the judges, and the executors paid the amount of the verdict into court. Thus terminated, in 1802, a suit commenced, in fact, twenty years before, in 1782!

[1] S. C. 3 Yeates 429.

himself; for, it attainted, he would still be liable (notwithstanding the treaty of peace) to the corruption of blood, under the old state constitution, the treaty of peace not operating as a reversal of the attainder; and no lawyer ever suggested, or would assert, that a man's vote could be rejected, unless he answered questions thus tending to the exposition of his own guilt. 1 Styl. Pr. Rep. 675; 3 Bl. Com. 268, 363–4; Doug. 572; Salk. 153; 4 State Trials, 747. 2d. That it is material, on the present indictment, to prove that the defendant acted with design to influence unduly, or to overawe the election, or to restrain the freedom of choice: whereas, it is evidently the case of a son interposing, to protect an aged and infirm parent from insult; and his actions, as well as words, were the mere ebullition of sudden passion.

Reed and *Dickerson*, for the commonwealth, admitted that no answer could be exacted, which would expose a man to penal consequences; but they insisted, that the answers to the questions proposed (though in the affirmative) would not, at this day, involve the voter in any jeopardy of life, liberty, property or penalty. The answers could only prove him (if in the affirmative) to be an alien; and an alien may certainly be compelled to disclose his foreign birth. (Park. 164.) The questions were calculated to ascertain a fact, on which the right to vote depended. None but citizens can vote. Now, although every man (even a native of America) had a right to choose his party in the revolutionary war (1 Dall. 53), yet, if he took an oath of allegiance to Great Britain, or joined her armies, he determined his election; and in neither of these cases, any more than in the case of an attainder, could he vote at our elections, as a qualified citizen. If, then, the judges of the election acted within the limits of an official discretion, in proposing the questions, the *lifted fist and threatening words of the defendant, bring the case clearly within the description and punishment of the law. [*255

The Court delivered a full and decided opinion, in the charge to the jury, that the questions, proposed by the judges of the election, were illegal; that Mr. Beckley could not, therefore, be considered in the execution of his duty, when he insisted upon an answer to those questions; and that, consequently, the defendant was not liable to an indictment, under the election law (however he might otherwise be charged), for resisting, in the way that he did, the demand upon his father, to answer questions tending to criminate himself.

Verdict, not guilty.

Commonwealth *v.* Franklin *et al.*

Intrusion law.

The act of 11th April 1795, declaring, as criminal offences, the taking possession of lands, or conspiring to convey, possess or settle them, in the counties of Northampton, &c., under any title not derived from Pennsylvania, is not unconstitutional.

In August Session 1801 of the Court of Quarter Sessions, the grand jury of Luzerne county presented the following indictment:

Luzerne county, ss.

The Grand Inquest for the body of the county of Luzerne, upon their oaths respectively do present, that John Franklin, Elisha Satterlee and John

Jenkins, all late of the said county, yeomen, on the first day of August, in the year of our Lord, one thousand eight hundred and one, at the county aforesaid, and within the jurisdiction of this court, unlawfully did combine and conspire, for the purpose of conveying, possessing and settling on certain lands within the limits of the county aforesaid, under a certain pretended title not derived from the authority of this commonwealth, or of the late proprietaries of Pennsylvania, before the revolution, to the evil example of all others in like manner offending, contrary to the form of the act of general assembly of this state in such case made and provided, and against the peace and dignity of the commonwealth of Pennsylvania, &c.

And the jurors aforesaid, upon their oaths aforesaid, do further respectively present, that the said John Franklin, Elisha Satterlee, John Jenkins and Joseph Biles, all late of the county aforesaid, yeomen, on the first day of August, in the year of our Lord, one thousand eight hundred and one, at the county aforesaid, did combine and conspire for the purpose of laying out townships, by persons not appointed or acknowledged by the laws of this commonwealth, to the evil example of all others in like manner offending, contrary to the form of the act of assembly of this state in such case made
*256] and provided, *and against the peace and dignity of the commonwealth of Pennsylvania.

JOSEPH B. MCKEAN,
Attorney-General.

A *certiorari* issued at the instance of the defendants, to remove the indictment from the quarter sessions into the circuit court; directed, however, to the judges of the court of common pleas of the county, requiring the return of an indictment against the four persons named in the second count, for both offences; and actually returned by the associate judges of the common pleas.

On the trial of the indictment, in the circuit court, at a session held at Wilkesbarre, Luzerne county, in May 1802, the jury found a special verdict in these terms:

"And now a jury of the county being called, came, to wit, Thomas Duane, Lazarus Denison, Peter Grubb, John Cary, Nathan Beach, Thomas Wright, Ebenezer Slocum, Nathan Waller, Abel Pierce, Jacob Bedford, Timothy Beebe and Abiel Fellows, who being duly impannelled, elected, sworn and affirmed to try these issues, on their oaths and affirmations, do find, that the defendants, John Franklin and John Jenkins, did, after the 11th of April 1795, at the county of Luzerne, conspire and combine for the purpose of conveying, possessing and settling on lands within the said county, under a pretended title not derived from the authority of this commonwealth, or of the late proprietaries of Pennsylvania, before the revolution, contrary to the form of an act of general assembly of this commonwealth, passed the 11th of April 1795, entitled an act to prevent intrusions on lands within the counties of Northampton, Northumberland and Luzerne. And the jurors aforesaid, on their oaths and affirmations aforesaid, do further find, that the said John Franklin and John Jenkins, after the 11th of April 1795, at the county aforesaid, did conspire and combine for the purpose of laying out townships in the said county of Luzerne, by persons not appointed or acknowledged by the laws of this commonwealth, contrary to the form

of the act of the general assembly aforesaid; but whether the said defendants are guilty in manner and form as they stand indicted, they know not, and pray, therefore, the opinion of the court. And if the court here should be of opinion, that the said act of general assembly is not contrary to the constitution of the United States, or of the state of Pennsylvania, then they find the said defendants guilty in manner and form as they stand indicted, but if the court should be of opinion that the said act of general assembly is contrary to the constitution of the United States, or of the state of Pennsylvania, then they find the said *defendants not guilty in manner and form as they stand indicted. And the said Elisha Satterlee and Joseph Biles, they find not guilty, in manner and form as they stand indicted." [*257

Upon this finding of the jury, the defendant filed the following reasons in arrest of judgment.

1st. The law on which this indictment is grounded, is unconstitutional.

2d. The offences charged are not described with convenient and legal certainty.

3d. No act is stated, in either count, to have been committed in pursuance of the combination and conspiracy.

4th. Two different crimes are charged in the first count of the indictment.

5th. It is not stated in the second count, that the combination and conspiracy was to lay out townships within Luzerne county, or elsewhere, nor are the townships in any wise described.

6th. The cause was never pending in the circuit court.

7th. The *certiorari* is to remove an indictment against four persons, for two offences; and there is no such indictment.(*a*)

The act of assembly, to which the indictment and proceedings refer was passed on the 11th of April 1795 (3 Dall. Laws, 703), and the sections material, in the present case, were the following:

Sect. 1. "That if any person shall, after the passing of this act, take possession of, enter, intrude, or settle on any lands, within the limits of the counties of Northampton, Northumberland or Luzerne, by virtue or under color of any conveyance of half-share right, or any other pretended title, not derived from the authority of this commonwealth, or of the late proprietaries of Pennsylvania, before the revolution, such person, upon being duly convicted thereof, upon indictment in any court of oyer and terminer, or court of general quarter sessions, to be held in the proper county, shall forfeit and pay the sum of two hundred dollars, one-half to the use of the county, and the other half to the use of the informer; and shall also be subject to such imprisonment, not exceeding twelve months, as the court before whom such conviction is had, may, in their discretion, direct.

(*a*) The 6th and 7th exceptions were filed, at a subsequent stage of the cause, after the 1st exception had been overruled.

[1] The case was tried before Judges YEATES and BRACKENRIDGE, who differed in opinion as to the constitutionality of the intrusion law, but both concurred in submitting that question to the jury, which resulted in the special verdict. The court being divided, no judgment was given in the circuit court, but the question of the constitutionality of the intrusion law, and all others arising on the motion in arrest of judgment, were reserved for the supreme court *in banc*. 2 Am. Law J. 287. From the Luzerne Federalist of the 10th May 1802.

Sect. 2. "That every person who shall combine or conspire for the
*258] purpose of conveying, possessing, or settling on any lands within the *limits aforesaid, under any half-share right, or pretended title as aforesaid, or for the purpose of laying out townships by persons not appointed or acknowledged by the laws of this commonwealth, and every person that shall be accessary thereto, before or after the fact, shall, for every such offence, forfeit and pay a sum not less than five hundred, nor more than one thousand dollars, one-half to the use of the county, and the other half to the use of the informer; and shall also be subject to such imprisonment at hard labor, not exceeding eighteen months, as the court in their discretion may direct."

It was agreed by the attorney-general, and the counsel for the defendants, that the leading question, whether the act of assembly was constitutional, or not, should be argued in the supreme court, before all the judges. Notice was regularly given to the attorney of the defendants, that the case would be argued at the present term; but they did not appear, nor apply to counsel to appear for them, until the argument had actually commenced; and then, upon being refused a term's delay, their counsel (*Lewis*), for want of preparation, declined entering into the discussion.

The case was opened and argued, by *Duncan*, for the commonwealth. He traced the history of the Wyoming controversy, and referred to the decree of Trenton (30th December 1782, 8 vol. Journ. Cong. 83–4), as finally terminating the question of boundary and jurisdiction between the states of Pennsylvania and Connecticut, in favor of the former. From that period, every settler under a Connecticut title, must be regarded as a wilful trespasser. (2 Dall. 306.) The ordinary process of the law, however, was not sufficient to restrain or repel the intrusions upon our territory; the legislative attention was imperiously drawn to the subject; and an act was passed, on the 11th of April 1795, to punish, as criminal offences, the taking possession of lands, or conspiring to convey, possess or settle them, in the counties of Northampton, Northumberland or Luzerne, under any title not derived from Pennsylvania. (3 Dall. Laws, 703.) Upon the first and second sections of this act, the present indictment is founded; and a constitutional objection is raised, to quash the indictment, and defeat the beneficial operation of the act. This constitutional objection has, on other occasions, been branched into various points.

1. The act has been said to be a violation of the first section of the ninth article of the state constitution, which declares, "that all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."

*259] *We answer, property is a creature of society; and the right, in all its modifications, of acquisition, possession and transfer, is regulated by positive law. (2 Bl. Com. 2; 3 Dall. 391, 394.) From the very nature of the right of property, it is a perfect and exclusive right. The moment that it was established, that the boundaries of Pennsylvania embraced the Wyoming district of country, the right of property became absolute and exclusive in the state; it would be absurd, to suppose, that Connecticut

could also possess an exclusive right of property in the same land; and yet, without such a supposition, by what principle of general law, what positive statute, what express or implied contract, can her grants confer a possessory or usufructuary interest in the land? No man could obtain from Connecticut a legitimate right to acquire, possess and protect property, which belonged to Pennsylvania; and the constitution could only intend to recognise and sanction a legitimate right for those purposes.

2. The act has been said to be a violation of the constitutions of the United States and of Pennsylvania, inasmuch as it creates a new offence; punishes *ex post facto*, the exercise of a claim, legal in its origin; and impairs the obligation of contracts.

We answer, the intrusion, forcible or clandestine, upon the territory of a sovereign power, is an offence *malum in se*. It is an attack, not only upon the national property, but upon the national sovereignty. If done by individual citizens of another state, it is a high misdemeanor; and if done with the sanction of their government, it would be a just cause of war. But it is adding insult to outrage, when the citizens of the state itself, deny her right and authority, and parcel out her lands under the authority of another government. The offence is flagrant, against every principle of political economy; and always has been held indictable. (2 Hawk. P. C. 210; 4 Bl. Com. 128; 32 Hen. VIII., c. 9.) Long, however, before the Connecticut claim began to operate, Pennsylvania (in 1729–30) had introduced a similar law, to prevent purchases of land from the Indians; to annul all contracts for that purpose; and to extend the English statutes of forcible entries and detainers, to the case of entry upon lands, not located or surveyed by some warrant or order from the proprietary. (1 Dall. Laws, 248.) And even in the year 1700 (which law was enforced by additional sanctions, in 1769, Ibid. 503), it had been declared, "that if any person presume to buy any land of the natives, within the limits of this province and territories, without leave from the proprietary thereof, every such bargain or purchase shall be void, and of no effect." (Ibid. 5.) Say, then, that the Connecticut title originated in July, 1754 (as it is alleged), in a purchase from the Indians: by a positive subsisting law, the purchase was void; it could afford no lawful ground for subsequent contracts; and of course, no *contract could, [*260
in this point of view, be impaired by the act against intrusions. Say, that the contract is only to be regarded as between Connecticut and her grantees: the contract is neither annulled nor impaired, if the subject of it belonged to Connecticut; but surely a contract with Connecticut could give no right to enter upon lands that belonged to Pennsylvania. The obligation of the contract lies exclusively upon Connecticut; and Pennsylvania does not, in any degree, impair it, when she merely says, that it shall not be forcibly transferred to her. If, therefore, Pennsylvania had a right to legislate for the protection of her property, for the vindication of her sovereignty, is there in the manner of legislating, any violation of a constitutional or established principle of jurisprudence? No, the offence is defined, and the punishment prescribed, not *ex post facto*, in reference to past intrusions and conspiracies; but expressly contemplating those which shall occur, after the enacting of the law.

3. The act has been said to be a violation of the state constitution (art. ix., § 1), by destroying an equality of rights; inasmuch as its provisions

do not apply to the whole state, but to a particular district, composed of three counties.

We answer, the grievance is local, and the remedy ought, therefore, to be locally applied. The usurpation and intrusion prevailed only in the counties of Northampton, Northumberland and Luzerne; and the proceeding against the intruders, by eviction and restitution, is not a novelty in our law. In criminal cases, the award of restitution always follows a conviction; and in cases of forcible entry and detainer (when, too, the public dignity is not involved), restitution is the appropriate execution of the judgment, in favor of a prosecutor.

4. The act has been said to be a violation of the constitution, because it destroys or suspends the right of entry.

We answer, it cannot be seriously supported, as a legal proposition, that it is unconstitutional to deny a right of entry on lands in one state, under an authority derived from the government of another state. Even as to estates derived from herself, or as to estates belonging to her citizens, the state may, and positively does, by an act of limitation, destroy the right of entry. (2 Dall. Laws, 281–2.) But the act of assembly, in discussion, if fairly construed, does not effect a right of entry, to prevent the bar of the act of limitation, or to seal a lease, for the purpose of intruding and settling upon the lands, in pursuance of the spurious title of Connecticut.

5. The act has been said to be a violation of the state constitution, because it exercises a power, in its nature judicial, and not legislative.

*261] *We answer, the act neither undertakes to investigate facts nor to pronounce a judgment. It prohibitst he doing of certain acts; and if the acts are done, it leaves to the court of justice, the exclusive province of trying and deciding upon the case.

6. The act is said to be a violation of the second section of the third article of the constitution of the United States, so far as it provides, that the judicial power shall extend to controversies between citizens of the same state claiming lands under grants of different states.

We answer, the federal courts have no criminal jurisdiction, except in the cases expressly authorized by the constitution and laws of the United States; and the present case, considered as a criminal one, is clearly not included in the delegated authority of the constitution or laws. Considered as a civil case, it is necessary, for the claim of federal cognisance, to show that Connecticut had actually issued grants for the lands granted by Pennsylvania, which has never yet been pretended. For the 9th article of the confederation had taken cognisance of "all controversies concerning the private right of soil, claimed under different grants of two or more states, whose jurisdiction, as they may respect such lands and the states which passed such grants, are adjusted, the said grants, or either of them, being at the same time claimed to have originated antecedent to such settlement or jurisdiction." And the existing federal constitution also calls, expressly, for a claim of lands, under grants of different states, before the case of federal cognisance can arise. That the word "grant" is thus used in its legal, technical, sense (2 Bl. Com. 317), and that no such grant was ever made by Connecticut, prior to the decree of Trenton, will satisfactorily appear from the journals of congress. (8 vol. 74; 9 vol. 156; 10 vol. 294–9.) After all, the constitution of the United States only secures the right of action, which may subsist without

the right of entry, and is not destroyed or impaired by the act of assembly—an act of public police, for the purposes of internal self-government.

Dallas, in concluding for the commonwealth, divided the consideration of the general question (whether the act was constitutional?) into an inquiry—1st. Whether the subject of the law, was constitutionally proper? And 2d. Whether there was any departure from constitutional principles, in that regulations, for carrying the law into effect?

1. It is the duty of every government to protect the rights of property, and to preserve the public peace. An evil subversive of those rights, fatal to that peace, existed in Pennsylvania at the period of passing the act. The state laws, then in force, were incompetent to a cure of the evil. The federal government could not interpose, either with its legislative or judicial power. And *unless the state could administer to her own [*262 relief, the case was desperate and dreadful.

What was the evil that existed? By the decree of Trenton, it was settled, that Pennsylvania had the exclusive right of sovereignty, soil and pre-emption, as to the lands in question; by a retrospective recognition of the boundaries described in the charter from Charles II. to William Penn. The laws of Pennsylvania must, therefore, be applied to every transaction respecting those lands; and in the years 1700 and 1729, it had been made unlawful to purchase any part of them from the Indians. (1 Dall. Laws, 5, 248.) Yet, in July 1754, the Susquehanna and Delaware companies, in defiance of the laws, made a purchase from the Indians; and without a grant from Connecticut, or a grant from Pennsylvania, but merely under color of a grant from the Indians (which the acts of assembly declared to be null and void), they, and persons succeeding to their pretensions, have continued, from that time to the present, to annoy the peace, and to insult the government of Pennsylvania, by the most flagrant acts of outrage, usurpation and contumacy; insomuch that even an attempt was made to erect an independent state within her territory. (2 Dall. Laws, 82.) Reviewing, however, the transactions only subsequent to the final decree of Trenton (30th December 1782), we find, that the district of country, called the Seventeen Townships, was all that the Connecticut claimants then occupied. But still, as Pennsylvania had previously issued grants for the same land, she was bound to sustain the rights of her grantees. Every pacific and conciliatory instrument was employed for that purpose, before the state resorted to force or to denunciation. Commissioners were appointed to negotiate a compromise between the adverse claimants: and an act was passed on the 13th of March 1783, to suspend all process against the Wyoming settlers, during the negotiation (P. L. 146); but the commissioners were spurned, baffled and defeated; and the suspending law was repealed, on the 9th of September 1783, because it was evident, that the clemency and moderation of the legislature "had been mistaken and treated with neglect." (P. L. 197.) The spirit of conciliation was, nevertheless, indulged much longer. An act was passed on the 15th of September 1784, "for the more speedy restoring the possession of certain messuages, lands and tenements in Northumberland county, to the persons who lately held the same," and had been violently evicted. (P. L. 391.) An act of oblivion and pardon was also passed, on the 24th of December 1785, as to all crimes

and offences committed on or before the 1st of November preceding, under color of the Wyoming controversy ; but the supreme executive council was, at the same time, authorized, to employ a competent body of the militia, in support of the magistrates. To gratify the inhabitants, a part of North-
*263] umberland *was erected into a new county, and called Luzerne, on the 25th of September 1786. (2 Dall. Laws, 465, 486.) But the great effort for the restoration of harmony and order, was the act, usually styled "the confirming law," passed on the 28th of March 1787. This act recites, that "the interfering claims have occasioned much contention, expense and bloodshed ; and the assembly being desirous of putting an end to those evils, by confirming such of the Connecticut claims as were acquired by actual settlers prior to the termination of the dispute (by the decree of Trenton), agreeable to the petition of a number of the said settlers, and by granting a just compensation to the Pennsylvania claimants." Commissioners were again appointed for carrying the confirming law into effect; but " when they met, in pursuance of the law, they were interrupted in their proceedings by the combinations, threatenings and outrageous violence of certain lawless people in the county of Luzerne, and obliged to fly for the preservation of their lives ;" aided by persons who were severely wounded on the occasion. The confirming law was thereupon suspended (29th March 1788, P. L. 450, 530) ; and afterwards, on the 1st of April 1790, it was condemned and repealed, as unjust and unconstitutional. (2 Dall. Laws, 786.) During this period of legislative patience and conciliation, it is matter of public notoriety, that every pacific overture was contemned ; every coercive measure was resisted or evaded ; the powers of government were taken into the hands of voluntary associations of individuals ; the sheriffs and other public officers, were menaced and defied ; the commissioners of the government were insulted, assaulted and imprisoned ; the Pennsylvania claimants were waylaid and murdered ; the number of intruders was daily augmented ; and the extent of their encroachments was indefinitely enlarged.

For the magnitude of this evil, did the laws in force furnish an adequate remedy ? The Connecticut claim was now spread over the whole country, extending beyond the original seventeen townships, throughout the northwestern boundary of the state. Where the land was actually occupied by a Connecticut claimant, no Pennsylvania patentee could safely enter : and the danger increased, if the possession was vacant. The process of ejectment, or forcible entry and detainer, or any other civil process, was not effectual to give to the right of property, protection and enjoyment; and even the force of the militia had failed. The evil was an intrusion upon lands (not to try a title, not to submit to the dispensations of the judicial power, but) to seize, possess and hold by force, violence and terror. There was no law in existence that could afford a remedy ; and yet, there is no man who will contend, that a remedy ought not to be provided.

*264] *Could the federal government afford an adequate remedy? The case was not within their legislative or executive powers, either expressly, or as an incident to an express power. It is a case of domestic violence ; as to which the federal government can only interfere, "on application of the state legislature, or of the executive, when the legislature cannot be convened." (Const. U. S., art. IV., § 4.) Nor could the judicial power of the United States afford relief. It provides, indeed,

for a suit between citizens, claiming grants under different states; but it nowhere provides, for prosecutions by a state against its own citizens, committing offences against her municipal laws. (Ibid. art. III., § 2, Amendments; Acts Congress, 3 vol. 131; 1 vol. 53, § 9; Ibid. 55, § 11; Ibid. 57, § 12; Ibid. 58, § 13.) In *Commonwealth* v. *Cobbett*, 3 Dall. 467, the principle was discussed and settled; and in *Rush* v. *Cobbett*, the jurisdiction of the federal courts was adjudged to apply only to cases of contract; and not to a case of damages for a libel.

The competency of the state government to redress the evil, is a necessary inference from the incompetency of any other power, known to our constitutions and laws, unless it is expressly prohibited. Now, it is not expressly prohibited; and it cannot, by any act of perversion, be assimilated to an attainder law; to an *ex post facto* law; or to a law impairing the obligation of contracts. Nor is it a legislative encroachment upon the judicial department. It decides no question of personal guilt; it inflicts no punishment; it merely declares in this, as in every instance of the penal code, what shall constitute an offence, and how the offender shall be punished.

2. Having thus vindicated the subject of the law, from the imputation of being unconstitutional, it is next to be examined, whether there is any departure from constitutional principles, in the regulations for carrying it into effect.

In the construction of a remedial statute, the previous mischief is to be considered. Here, the act of assembly describes the offence, in the very terms of the mischief: 1st. "Taking possession of, entering, intruding or settling on lands, &c., by virtue, or under color of any conveyance of half-share right, or other pretended title, not derived from the authority of this commonwealth, &c." And 2d. "Conspiring for the purpose of conveying, possessing or settling on any lands, within the limits aforesaid, under any half-share right, or pretended title as aforesaid; or for the purpose of laying out townships, by persons not entitled or acknowledged by the laws of this commonwealth." If the description of the offence contains nothing unconstitutional, does the nature of the punishment? No, it is fine and imprisonment; and the offender is to be removed from the premises, of which he was tortiously and unlawfully possessed, after full notice of the law, by proclamation and publishing *in court. (3 Dall. Laws, 703, § 1, 2, 3, 6.) This proceeding by indictment, and the expulsion upon conviction, are said, however, to destroy the right of entry, upon which alone the civil remedy of ejectment can be pursued. But the law contemplates no such entry, in the description of the offence; for, let it be repeated, it is a tortious entry to hold by force; and not a lawful entry, to try a right, that the legislature condemns and punishes. [*265

After advisement and deliberation, the judges delivered their opinions, *seriatim*.

Shippen, Chief Justice, Yeates and Smith, Justices, concurred in declaring, that the act of assembly, on which the indictment is founded, was constitutional, in all its relations.

Brackenridge, Justice.—The second count in the indictment is founded upon the second section of the act of assembly; and the special verdict

finds expressly, that the defendants did conspire for the purpose mentioned in that section. The purpose was, "to lay out townships in the county of Luzerne, by persons not appointed or acknowledged by the laws of this commonwealth." Now, the term township indicates a local jurisdiction, for objects of local police, with powers and officers to effectuate the jurisdiction; and a conspiracy by individuals to erect such townships, is an encroachment upon the rights and authority of the state. It is an offence indictable at common law; and the legislature, with a view more effectually to prevent its commission, had an unquestionable power to increase the punishment.

As to the first section of the act of assembly, I am not prepared to pronounce, that it is unconstitutional; and, consequently, I could not, even on that ground, decide, at present, to arrest the judgment. But it is enough, to observe, that, on the finding of the jury, I shall be ready to give judgment for the commonwealth, on the second count of the indictment, when the subject is brought before us in the circuit court.(*a*)

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*266] *MARCH TERM, 1803.

THE MAYOR, &C., OF PHILADELPHIA *v.* MASON.

Penal action.

The return to a *certiorari* to remove the proceedings before the Mayor of Philadelphia, under an ordinance against huckstering, did not state a conviction, the offence, nor the place where the business was conducted: *Held*, that it was error.

THIS was a *certiorari* to remove the proceedings from the mayor into this court; to which he made the following return under seal:

The Mayor, Aldermen and Citizens (*b*) } November 19, 1800.
v. } Huckstering.
Elizabeth Mason. } Amicable action.

The defendant appeared before me by consent, and was charged, on the oath of Barney Cart, and the affirmation of W. Johnston, clerks of the High Street market, in her presence, with being a person who follows the business of a huckster, and selling provisions, &c., at second-hand. And that the defendant did this day offer for sale, within the limits of the said market, butter, veal, pork, fowls, eggs and nuts, contrary to an ordinance in that case made and provided. I, therefore, adjudge, that the defendant pay a fine of 1*l.* 17*s.* 6*d.*, and costs 2*s.* 6*d.*

To this return, a great variety of exceptions were filed; but the argument and decision proceeded principally upon the following:

(*a*) The cause was argued upon the other objections in arrest of judgment, before the supreme court, in December term 1804. See *post*, p. 316.

(*b*) An exception that the words "of Philadelphia" had been omitted in the corporate title, was waived. There were several other cases, depending on the decision in this case.

1. It is not stated, at what place the defendant followed the business of a huckster.

2. It is not stated, in what city High Street market is situated.

*3. It is not stated, against which clause of the ordinance the defendant had offended. [*267

4. It is not stated, that the defendant was convicted, though judgment is rendered against her.

The exceptions were supported by *McKean* and *Porter*, who cited, 1 Burn. 409, 142; Ordin. 29th March 1798, § 16; Bosc. 12; 1 Burn. 411; 5 State Laws, 265; 1 Burn. 413; 3 Mod. 159; 2 Burr. 1163; 4 Ibid. 2063; 5 T. R. 253; 2 Burr. 1176; Hullock 19, 200, 201; Bull. N. P. 333; Gilb. C. P. 225, 234–5; Salk. 378; 2 Hawk. 250; 1 Str. 316; 2 Ibid. 1120.

Dickerson (the solicitor for the corporation) endeavored to answer the exceptions, and cited 1 Str. 316; 10 Co. 125; 1 Bac. Abr. But—

By the Court.—Some of the objections are insurmountable. In the first place, it is not sufficient to state the evidence; but the magistrate must go on to declare, that the offence was committed, and the defendant thereof convicted. Here, neither the offence, nor the conviction, are to be found in the proceedings. In the next place, we have no statement where the defendant carried on the business of huckster; and it might be, where it was no offence to do so; or where the corporation had no jurisdiction to punish it as an offence.[1] The proceedings are, therefore, manifestly erroneous, and must be set aside.

Black, Plaintiff in error, *v.* Wistar.

Waiver of error.—Amendment.

Error may be waived, by consent.

Where there is a variance between the writ and the count, the writ may be amended by the *præcipe*, and if the execution varies from the judgment, the former may be amended by the latter.

In Error from the court of Common Pleas of Northumberland county. The case was briefly this: William Wistar brought an action of debt against James Black, in the common pleas, to April term 1798. The writ demanded a debt of 766*l.* 9*s.* 5*d.* The declaration demanded a debt of 766*l.* 4*s.* 5*d.*, on a bill obligatory for that sum, dated the 28th of May 1796, and payable in three months, with interest. On the 10th of September 1798, judgment was entered for 869*l.* 3*s.* 6*d.*, with costs. A *fi. fa.* issued to January term 1799, for 766*l.* 9*s.* 5*d.*, which was regularly returned, "stayed by order of plaintiff's attorney," with an additional indorsement, signed by Black, the defendant below, in these words: "I agree, that the sheriff return a levy on this writ, as of the term to which it is returnable:" and such a return was accordingly made, at a subsequent period. On the 18th of July 1800, the sheriff held an inquest, by virtue of the above *fi. fa.* and returned the inquest annexed to the writ. The inquest condemned the property; and it was afterwards sold on a *vend. exp.*, when Wistar became the purchaser.

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[1] S. P. Philadelphia *v.* Nell, 3 Yeates 475; Philadelphia *v.* Mintzer, 2 Phila. 43; Philadelphia *v.* Roney, Id. 43. Commonwealth *v.* Gillingham, 1 Brews 396;

*The following errors were now assigned :

1. The count varies from the writ, in the sum demanded.

2. The judgment varies from both writ and count, in the sum recovered.

3. The judgment was entered after the defendant's appearance, not in term time, nor at the settlement of the docket, nor according to any rule.

4. The execution varies from the judgment, in the sum for which it issued.

5. The execution was returned by the sheriff to January term 1799, as having been "stayed by order of plaintiff's attorney:" but after that, another return was made, to wit, "that the lands and tenements of the defendant had been levied upon;" and an inquest was held upon the estate, in July 1800, by virtue of which the land, &c., was condemned, without any other authority, than the *fi. fa.* that had been returned as aforesaid, to January term 1799.

6. The general errors.

The case was argued by *W. Tilghman*, for the plaintiff in error, who cited the following authorities, principally to show, that the variances in the writ, count, judgment, and execution were fatal. Cro. Eliz. 198, 434 ; 5 Com. Dig. 25, C. 13 ; Cro. Eliz. 829, 308 ; Boh. Inst. 534 ; Reg. Plac. 282; 8 Vin. Abr. 474, pl. 1, 4, A; 2 Bro. Error, pl. 7; 9 Hen. VI., 38; 9 Vin. Abr. 474, pl. 6 ; Co. Litt. 288 *b* ; 1 Dall. Laws, 73, § 9 ; 3 Bac. Abr. 369, P.; Ibid. 570 ; Roll. Abr. 778 ; 3 Com. Dig. 313, I., 3.

McKean, for the defendant in error, proved that the judgment had been entered by the consent in writing of the defendant's attorney, for the exact sum agreed upon. He then moved for leave to amend the execution by the judgment; citing the following authorities, to show the extent to which amendments had been permitted, in every stage of a suit. 8 Co. 157; 16 & 17 Car. II.; 1 Vent. 100 ; 5 Geo. I., c. 13 ; 2 W. Bl. 836 ; 1 Sup. Vin. Abr. 228, pl. 6 ; 1 T. R. 782 ; 1 W. Bl. 462 ; 2 Vent. 152 ; 8 Hen. VI., c. 15; 14 Edw. III.; 1 Wils. 303 ; 6 T. R. 450 ; 1 Sup. Vin. Abr. 210, pl. 9.

The Court (adverting to the proceedings by consent, to the means of amending the process by the *præcipe*, and the *fi. fa.* by the judgment) declared they had no doubt upon the case.

Judgment affirmed.

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*269] *Mitchell, Plaintiff in error, *v.* Smith. (*a*)

Illegal contract.

A bond given in consideration of the purchase of land in Luzerne county, under the Connecticut title, is void.

Error from the Court of Common Pleas of Luzerne county, where an action of debt had been brought by Smith, for the use of Cash, against

(*a*) A contract in fraud of the positive laws and public policy of the United States, which exclude an alien from any degree of interest in an American registered vessel, is void. Maybin *v.* Coulon, 4 Dall. 298; s. c. 4 Yeates, 24 ; Duncanson *v.* McClure, 4 Dall. 303. The courts of the United States cannot lend their aid to establish a demand founded upon a violation of the laws of the United States. Though an individual is not bound, in all cases, to take notice of the revenue laws of a country to which he does not belong; yet, if he make a contract to be completed in a foreign country, and

Mitchell, upon a single bill, or sealed note, dated the 11th of March 1796, for $483.33, payable in three years, with interest. The defendant pleaded payment, with leave to give the special matter in evidence: and thereupon, issue was joined. On the evidence, it appeared, that the note was given for 1500 acres of land, lying in the township of Smithfield, in the county of Luzerne, out of the seventeen townships, which Smith conveyed to Mitchell, at the time of the sale; that the land had been granted to Smith by the committee of the Susquehanna company; that Mitchell had been in the actual and peaceable possession of the land from the time of the sale; and that he had a full knowledge of the law of April 1795, against intrusions under the Connecticut title, as well as of the general dispute relative to lands in Luzerne county.

On the trial, in April term 1802, the defendant below insisted upon three points: 1st. That the consideration of the contract was illegal; and therefore, the bill or note was void. 2d. That the transaction was against the policy of the law. 3d. That the consideration had failed.

Rush, President, in his charge to the jury, delivered an opinion against the defendant, on all the points; and concluded with stating, that "if the jury are of opinion that the defendant knew, and was acquainted with, every material circumstance, relative to the bargain, it is their duty to make him pay the money, with the interest thereon. But if they are of opinion, that he was, in any degree imposed upon, or purchased ignorantly; in that case, they ought to find a verdict in his favor."(*a*) To this charge, a bill of

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such contract is repugnant to the laws of that country, he is bound to take notice of them. Cambioso *v.* Maffet, 2 W. C. C. 98. A contract for the purchase of goods, the importation of which is prohibited by law, is void, and the price cannot be recovered in an action against the buyer. Condon *v.* Walker, 1 Yeates 483. A promise to give a bond for a certain sum of money, is void, if made on the sole consideration of stopping a prosecution for fornication and bastardy. Shenk *v.* Mingle, 13 S. & R. 25. A promissory note, given by an applicant for the benefit of the insolvent laws, to a creditor, to induce him to withdraw his opposition, is contrary to the policy of the law, and void. Baker *v.* Matlack, 1 Ash. 68. An action founded upon a transaction prohibited by a statute, cannot be maintained, although a penalty is imposed for violating the law, and it is not expressly declared, that the contract is void. Seidenbender *v.* Charles, 4 S. & R. 157; Biddis *v.* James, 6 Binn. 329; Primer *v.* McConnell, cited, Id.; Barton *v.* Hughes, 2 Bro. 48. The test whether a demand connected with an illegal transaction, is capable of being enforced at law, is, whether the plaintiff requires the aid of the illegal transaction, to establish his case. If a plaintiff cannot open his case, without showing that he has broken the law, a court will not assist him, whatever his claims in justice may be upon the defendant. But if the illegality be *malum prohibitum* only, the plaintiff may recover, unless it be directly on the forbidden contract. Swan *v.* Scott, 11 S. & R. 164.

(*a*) The following was published, as a copy of Judge Rush's charge:

Rush, President.—With respect to the first point, that is, the illegality of the bond, this depends upon a sound construction of the intrusion law, and has already been decided by this Court.[1] The act is penal, and made the offences described in it indictible. The offences being wholly new and created by the act, the parties can be punished in no other way. The law says not a word with respect to contract; but points its penalties only against the persons of the offenders. Laws similar to this have been enacted in England, against forestalling, regrating and selling pretended titles; all

[1] Avery's Executors *v.* Jenkins.

exceptions was *tendered and allowed; and thereupon, the present writ of error was instituted.

The argument for the *plaintiff* in error turned upon this single proposition: "that as the transaction, on which the debt arose, was prohibited by the law of Pennsylvania, the bill or note (being made the evidence of the debt) contravened the policy of the law, and was, in its nature, a nullity: so that no court of Pennsylvania would sustain an action upon it; though

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which inflict penalties on the persons of those who shall transgress them; but it has never been supposed, that they affected or impeached the validity of the contract between the parties, in the smallest degree. For these reasons, it is the opinion of the court, that the intrusion law has not destroyed or vitiated the contract between David Smith and Reuben Mitchell.

The 2d reason assigned by the counsel for the defendant to set aside the contract, is, that it is against general or public policy. When the legislature pass a law upon a particular subject, it is the duty of the court to see it carried into execution in the manner described in the law, and in no other. Thus, when the English parliament enacted, that whoever shall buy any goods, wares, &c., on the way to market, &c., shall be liable to fine and imprisonment, the judges did not think proper to go a step beyond the law; though there cannot be the least doubt, that the crime of forestalling was repugnant to sound public policy, and against the policy of the law itself. The contract was admitted to be valid and binding between the parties, though they were punishable for their conduct.

It is readily acknowledged, that every such contract and sale of land, with delivery of possession, is contrary to the interests of the commonwealth of Pennsylvania: and so is every forestalling contract or sale of a pretended title, repugnant to the interests of that country, where the laws forbid such contracts, and inflict penalties on those who enter into them. The law itself supposes the contract to be injurious to the interests of the country. and against the policy of the law which forbids the act to be done. But unless the law expressly destroys the contract, I do not conceive a court of justice is authorized to do it on the ground of its being against the good of the public. It would be an assumption of legislative power.

The 3d and last reason for setting aside this contract is, that the consideration has failed. When we speak of the consideration of a contract failing, it is understood, that the bargain turns out different from what was expected. The rule is, where the party is deceived, or imposed upon, he is not obliged to pay his money. For example, if A. sells a Susquehanna title to B., who is ignorant of the total defect of such title; there is no doubt B. may avoid the sale, on the ground of want of consideration, and imposition. But that is not the case now before the court. Here, it is admitted, that Mitchell knew of the intrusion law, and the circumstances of the dispute relative to titles in this county. Mitchell, therefore, bought with his eyes open, and now comes forward to be relieved from his contract. In such case, what is the language of a court of chancery? If both parties meant what they did, and were acquainted with the whole circumstances of the bargain, and if neither was deceived, the agreement must stand. The maxim of law is true, that where two persons engage in an illegal transaction, the condition of the defendant shall be preferred; but as this maxim supposes the contract to be illegal, it cannot apply here.

Upon the whole, gentlemen, if you are of opinion that the defendant knew and was acquainted with every material circumstance relative to the bargain, it is your duty to make him pay the money, with the interest thereon; but if you are of opinion, he was in any degree imposed upon, or purchased ignorantly, in that case, you ought to find a verdict in his favor.

The jury retired a few minutes, and returned with a verdict in favor of the plaintiff, for the amount of the sum mentioned in the note, with interest.

the statute did not expressly declare it to be void." 3 Dall. Laws, 703; Cowp. 39, 729, 734; 3 Burr. 1568; 1 T. R. 55; 1 Ves. 276; 3 Burr. 2234; Yelv. 197; 2 Lev. 174; 1 P. Wms. 185; 5 T. R. 120; Doug. 671; 3 T. R. 456; 4 Ibid. 466; *5 Ibid. 599; Cowp. 341; Carth. 252; Cro. Eliz. 788; Hob. 165; Esp. 88; 2 Wils. 133; 32 Hen. VIII., c. 9; Moore 564. [*271

For the *defendant* in error, his right to recover the debt was maintained on various grounds: 1st. Because the bill or note is good at common law. 2d. Because the maker of the note received a consideration for it. 3d. Because it was given without fraud or imposition, under a knowledge of all the circumstances. 4th. Because it would be good, even as a voluntary bond. 5th. Because it is not rendered void by any statute; the acts of assembly subjecting an intruder to indictment and eviction, but never, in any instance, declaring a contract for the land, or a security for the price, to be unlawful and void. 6th. That it is not against the policy of the law (as in the cases cited upon smuggling) to allow a recovery of the debt. 3 Dall. Laws, 703; 4 Ibid. 198; 1 Burr. 545; Cro. Jac. 643; 1 Show. 398; Cowp. 524, 650; 2 Atk. 251; 2 Ves., jr., 422; 1 Wils. 229; 4 Burr. 2069; 3 T. R. 418; 2 Burr. 1077; 3 T. R. 456; 6 Ibid. 61; 7 Ibid. 601; Doug. 670; 1 Bos. & Pul. 3; 1 Esp. 18.

After great consideration, the judges delivered their opinions at large, *seriatim*, pronouncing the contract, on which the bill or note was given, to be unlawful, immoral and against the public policy of the law. They, therefore, decided, that no court of justice in Pennsylvania could lend its aid to effectuate such a contract; and, consequently, reversed the judgment of the court of common pleas.(*a*)

Judgment reversed.

W. Tilghman, for the plaintiff in error. *Rawle*, for the defendant in error.

Passmore *v.* Pettit & Bayard.

Award by umpire.

An umpire chosen under a rule of reference, by the referees, must not rely upon the information reported by them, but he must examine the case himself, in the presence of the parties.

An award will be set aside, if the referees have refused a party sufficient time to procure necessary evidence.

All the testimony should be heard, and all the documents seen by the parties, in the presence of the referees.

This case came before the court, on exceptions to the report of referees, who had exercised the right of appointing an umpire, under the rule of reference. After argument, by *M. Levy*, for the plaintiff, and by *McKean* and *Dallas*, for the defendants, the Chief Justice delivered the unanimous opinion of the court, for setting aside the report, on the following grounds:

(*a*) The same principle has been decided in Maybin *v.* Coulon, and in Duncanson *v.* McLure; both cases of contravening the act of congress, for registering vessels of the United States.

By the Court.—1st. When an umpire is chosen by referees, he stands in the same situation, precisely, as the referees themselves, both with respect to powers to be exercised, and duties to be performed. He may examine, and he ought to examine *the witnesses, and the documents, for himself, in the presence of the parties, without relying solely upon the information or facts reported by the referees. This rule was settled in the case of *Falconer* v. *Montgomery* (*ante*, p. 232); and it is highly important to the administration of justice, that it should be observed. It has not been observed upon the present occasion; and therefore, the report cannot be confirmed.

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2d. Again, it is essential to the fair and satisfactory investigation of facts, that an opportunity should be afforded to obtain and produce the necessary evidence, however distant the scene of the transaction may be. A court of justice will always allow time for the execution and return of a commission, when witnesses reside abroad. In the present case, the question turned upon the seaworthiness of a ship; and time was asked by the defendants to produce testimony from Halifax, where she had undergone a survey and repairs. This was refused, without any reason to suppose, that the object in asking it was mere delay and vexation. The refusal has deprived the party of the means of defence before the referees; and we cannot think it just, to place him out of the reach of all remedy, by confirming the report.

3d. On the subject of the reference, all the testimony should be heard, all the documents should be seen, by both the parties, in the presence of the referees. But it appears, that a paper, or *ex parte* affidavit, was produced before the referees and umpire, respecting the seaworthiness of the ship (the very gist of the controversy), which the defendants never had an opportunity of reading or examining. The referees and umpire are, undoubtedly, honest men; but they have erred in judgment; and their errors cannot be sanctioned, by an affirmance of the report, which their errors alone may have produced.

The report was, accordingly, set aside, and the judgment entered upon it opened.

Bell *v.* Beveridge.

Marine insurance.—Abandonment.

The plaintiff, a resident in Philadelphia, received notice, in August 1793, of the seizure by the French government, of goods which he had insured; soon afterwards, he left home, in consequence of the appearance of the pestilence in Philadelphia, and did not return until about the 19th November next ensuing, and then went to South Carolina on business; it was not, however, until the 21st January 1794, that he intimated to the underwriters an intention to abandon, when he stated in a letter to them, "that he meant to abandon:" *Held*, that by such a declaration, the plaintiff had made his election to abandon; and that there is no particular form of abandonment, though it must be made within a reasonable time after intelligence of the loss has been received: what is a reasonable time, is a question of fact.

This was an action upon an open policy, dated the 10th of March 1793, on goods on board the Andrew, Captain Macken, bound from Charleston

to Amsterdam. The ship sailing on the voyage insured, was captured, on the 11th of April 1793, by a French privateer, and carried into L'Orient, where, after a few days' detention, she was acquitted and restored. On the 26th of April 1793, however, the French government seized the cargo for public use, promising to pay a liberal fixed price for it to the owners; but after repeated solicitations, the consignee, in 1796, *abandoned the [*273 hope of seeing a performance of the promise, and returned to America. It appeared, on the trial of the cause, that the master's protest, dated the 17th of May 1793, had been transmitted to the owners of the ship, in Philadelphia, under cover of a letter from Amsterdam, dated the 17th of May 1793; and the notice of the capture was given by them to the plaintiff, at least as early as the month of August 1793. The yellow fever soon afterwards made its appearance in the city; and the plaintiff retired, with his family, into the country, on the 10th of September; but in common with the rest of the citizens, he returned after the calamity had ceased, about the 19th of November; and then went on a journey of business to South Carolina. It was not, however, until the 21st of January 1794, that he intimated to the underwriters an intention of abandonment; and even then, he did not directly abandon, but only stated, in a letter, "that he meant to abandon."

The general question was, whether the abandonment, had been made in due season, to entitle the plaintiff, in this case, to recover for a total loss?

The *defendant* contended, that the words of the letter from the plaintiff, did not amount to an actual abandonment; but only imported an intention to abandon; that by such equivocal language, he was enabled to take for himself all the chances of an advantageous settlement in France: while the defendant was not empowered to pursue the property on account of the underwriters; that, independent of the ambiguity of the letter, intimating his intention to abandon, the abandonment was not made in a reasonable time, on the 21st of January 1794, notice of the loss having been received in August 1793; and that the excuse of the yellow fever, though it would apply to a personal interview, would not apply to a communication by writing. Park, 161–2; 2 Dall. 284; 1 Burr. 349; 2 Ibid. 697; 5 Ibid. 1241; 3 Atk. 195; 2 Burr. 683; 2 Ibid. 1198, 1214; Doug. 219; 1 T. R. 608; 1 Esp. 237; Park, 192; 2 Mag. 175, 416; Park, 92, 82, 81, 172.

The *plaintiff's* counsel insisted, that under the peculiar circumstances of the case, the abandonment was made in due season; and that the terms of the abandonment were sufficiently positive.

The Court, in the charge to the jury, stated, that no particular form of words was necessary to constitute an abandonment; that by declaring he meant to abandon, the plaintiff had made his election, and could never afterwards retract. That an abandonment must be made within a reasonable time; but that what constituted a reasonable time, was a question of fact, depending upon the relative situation of the parties, the time and the place, *after notice to the assured of the loss; and that in the [*274 present case, there did not appear to have been any design to waive

the right of abandonment, though its exercise was suspended by a public calamity, and other fortuitous occurrences.

Upon the whole, the opinion of the Court was in favor of the plaintiff, and the jury gave a verdict accordingly. (*a*)

Kingston *v.* Girard.

Insurance.—Deviation.

If a vessel, which has been captured, carried out of her course, and afterwards released, remain, for the purpose of trading, a longer time than is necessary to prepare for her voyage, at the port to which she has been taken by her captor, it will be a deviation.

Case on a policy of insurance, to recover for a total loss by capture. On the trial of the cause, two points of defence were urged: 1st. That there had been a deviation; inasmuch as the vessel traded at the port to which she was carried by the captor. Park, 311, 312, 313, 295. 2d. That the extra-expenses for wages, provisions, &c., during a capture and detention, were not a subject of general average; but a charge on the freight. Park, 54–55; Abb. 285, 3; 1 East, 220; *Jones* v. *Insurance Company of North America* (*ante*, p. 246).

It was admitted by the plaintiff's counsel, that after the vessel was carried into the port of the captor, and before she was liberated, the extra-expenses were not a subject of general average; but they insisted, that the expenses, subsequent to the liberation, were general average. Park 54; 2 Marshall, 462, 1, 4.

By the Court.—If the vessel, after her release, remained at Martinique, to which she was carried by the captor, longer than was necessary to prepare for her voyage, and for the purpose of trading, it was a deviation; and the policy is void.

Whether the extraordinary expense incurred for seaman's wages, provisions, &c., during the detention of the vessel, upon a capture as prize, is a subject of general average, forms an important question. In the case of *Jones* v. *Insurance Company of North America*, we decided, unanimously (and our opinion is strengthened by mature reflection), that such expenses, during an embargo in a foreign port, in the course of the voyage insured, are not general average, but a charge upon the freight, for which the underwriters upon the freight alone must furnish an indemnity.[1] We think, that the same principle embraces the case of detention for the purposes of a quarantine. In the case of detention, by capture as prize, there is not, however, any direct authority to decide the responsibility; and the principle of the other cases does not embrace it. Elementary writers, Beawes and Magens, differ in opinion. It is, upon the whole, a safe, and the best, rule, to consider, whether the expense is incurred for the general benefit of all the parties interested in *ship, cargo and freight. If it is, then all the parties should contribute to defray it. If it is not (as in the cases of embargo and quarantine, where the delay and expense

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(*a*) For a better report of the charge of the court, which was delivered by Shippen, C. J., see 1 Binn. 52, note.

[1] Jones *v.* Insurance Co., was reversed by the high court of errors and appeals, in 2 Binn. 547.

are submitted to, merely that the vessel may earn her freight), then, the party who alone enjoys the benefit, should alone sustain the loss.

Lewis and *Hare*, for the plaintiff. *Ingersoll* and *Rawle*, for the defendant.

McFadden *v.* Parker *et al.* (*a*)

Discharge of indorser.

If the indorsee of a note, after obtaining judgment against the maker, should discharge him from custody under a *ca. sa.* issued by virtue of the judgment, the debt will be extinguished and the indorser released.

This was an action brought against Parker & Wharton, the indorsers of a promissory note, instituted at the same time that an action was brought against George Eddie, the maker of the note. There had been a trial, and verdict for the plaintiff, in December term 1801, subject to the opinion of the court upon a case stated, involving two questions: 1st. Whether a plea *puis darrein continuance* had not been entered too late by the defendants? And 2d. Whether the new matter pleaded, was sufficient to bar the plaintiff's recovery? After some argument on the case, at December term 1802, the parties made the following arrangement:

"That the judgment shall remain as a security, and an issue be formed and tried under this agreement. That the defendants be permitted to enter, at this time, a plea *puis darrein continuance*, with like effect, as if it had been entered at the day given for their next appearance, after the new matter occurred. That the plaintiff be allowed to give evidence of all facts and circumstances to show that the new matter pleaded ought not to operate as a discharge of the defendants. That the defendants be allowed to give evidence of all facts and circumstances to repel such evidence on the part of the plaintiff to show that such new matter ought to operate in their discharge; and to establish that the plaintiff has received actual value, or security, for the debt, from the maker of the note. And that it be admitted, on the trial, that notice, in due form of law, was given to the defendants, by the plaintiff, of the non-payment of the note, on which the suit is founded."

Under this agreement, the defendants relinquished all former pleas, and entered *puis darrein continuance*, the plea of payment, with leave to give the special matter in evidence.

On the trial of the cause, it appeared, that a *testatum ca. sa.* had issued into Northampton county, returnable to December term 1797, in the case of *McFadden* v. *Eddie*, upon which the defendant was arrested; that, while he was in custody, he gave a bond and warrant of attorney to confess judgment to the plaintiff, *intending that the judgment should operate upon lands which he claimed in Northampton county, but which [*276 eventually proved to be no security, though taken in execution and offered for sale, on a *venditioni exponas;* and that, on the 29th of November 1797, the plaintiff wrote to the sheriff in the following terms: "Sir, I request and desire that you discharge the defendant in the above writ mentioned; he having satisfied me of the debt, interest and costs;" and that the sheriff

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(*a*) s. c. 3 Yeates 496.

thereupon returned the writ, "*C. C.;* afterwards discharged from execution, by order of the plaintiff."

The *defence* was placed on two grounds: 1st. That the holder's acceptance of a security from the maker, in satisfaction, was a release of all the parties to the note; however inadequate the security accepted; and however defective the title to the property might afterwards appear. 1 Str. 691; Noy 104; 3 Mod 86.; 2 Show. 481; Doug. 236–7, 250; 2 Ves. 540; 4 Ibid. 824, 832–3; Ambl. 79; 1 Dall. 254; 7 T. R. 421. 2d. That the release of one of two joint-debtors, is the release of both; and the discharge of a defendant from a *ca. sa.* is tantamount to a payment or extinguishment of the debt. 4 Burr. 2482; 3 Wils. 14; 1 T. R. 557; 6 Ibid, 525; 2 W. Bl. 1237; (*a*) 1 Bos. & Pul. 665; 2 Ibid. 61.

For the *plaintiff*, it was premised, that there was no negligence imputable to him: that notice of the non-payment was regularly given, before any indulgence was shown to the maker of the note; and that every arrangement with the maker was, in fact, for the benefit of the indorser. It was then contended: 1st. That considering the relative situation of the parties, before the discharge from the *ca. sa.*, the holder's acceptance of a security from the maker, was not a bar to his remedy against the indorser. And 2d. That whatever might be the operation of the discharge from the *ca. sa.*, as to the maker, it did not extinguish the debt, as to the indorser.

1st. The maker and indorser of a promissory note, are not joint-debtors; but are indebted to the holder on separate and distinct contracts; the former being bound to pay at all events; the latter, only in case of the maker's default, and of the holder's giving due notice of it, and pursuing a recovery against the maker with reasonable diligence. Kyd, 22, 72–5, 110, 76. Upon notice of the maker's default, the indorser becomes an absolute debtor, not a surety; and it is a duty immediately to pay. If he delays payment, it is a wrong; and he shall not afterwards take advantage of it. The holder is
*277] not bound to *pursue the maker; but after notice to the indorser, he may do everything he can, to get, or to secure, his money from the maker; provided he does not thereby deprive the indorser of his remedy over. 1 Bos. & Pul. 655; Bull. N. P. 271.

2d. As no misconduct is imputable to the plaintiff, neither can it be said, that he has received an actual payment or satisfaction for the debt. The bond and warrant of attorney were obviously taken as a collateral security; and not with an intention to release the obligation of either of the parties to the note. Doug. 237. But even upon the strictest application of the rule of law, the arrest of one man upon a *ca. sa.*, cannot be deemed a satisfaction for another man's debt. The maker and the indorser cannot (like co-obligors or partners) be sued in the same action; and when judgments are obtained against them, in separate actions, a *fi. fa.* may issue on one judgment, and a *ca. sa.* upon the other. All the authorities cited for the defendants, are in cases of a joint *ca. sa.* But the authorities for the plaintiff are express, that it must be an actual, not a constructive, payment by one

(*a*) The case in 2 W. Bl. 1237, was cited by the defendant's counsel, as the single authority in opposition to their doctrine; but condemned as a bad precedent, in the worst of Sir William Blackstone's works.

debtor, to discharge another debtor, upon a distinct contract, though for the same sum. And the release of the debtor in execution, however it may affect the right and the remedy of the plaintiff in the execution, cannot affect the right or the remedy of any other person. Tidd 412 ; Hob. 59, 60, 61 ; 1 Wils. 46 ; 2 W. Bl. 1235 ; 4 T. R. 825. Thus, McFadden, the holder of the note, may sue Parker & Wharton, the idorsers ; and they, having paid the note, may sue Eddie, notwithstanding his discharge from the *ca. sa.*

The Court, in the charge, left it to the jury to consider, whether the plaintiff had accepted the bond and warrant of attorney, in satisfaction of the debt, due upon the note ; and thereupon, intended to release both the indorsers and the maker. (*a*)

The jury, upon this charge, gave the plaintiff a verdict for the amount of the note, with interest. But on a motion for a new trial, the counsel of the *defendants*, urged, that the extinguishment of the debt, by the discharge of Eddie from the *ca. sa.*, was a point of law clearly in their favor ; on which they cited additional authorities, and reasoned more at large, than at the trial ; that the agreement under which the issue was formed, did not waive the benefit of the strict rule of law ; and that the court, instead of leaving the case to the jury, ought to have charged expressly in favor of the defendants. 3 Bl. Com. 390 ; 2 T. R. 120.

The counsel for the *plaintiff* answered, that the verdict was conformable to the real justice of the case ; that the agreement, under which the issue was formed, was meant to bring the case *before the jury upon its equitable circumstances ; that the court fairly left the decision to the [*278 jury, upon the genuine principles of the agreement (Doug. 248 (236) 250 ; 2 Salk. 575 ; 8 T. R. 168 ; 2 Ibid. 4 ; 4 Ibid. 468 ; 1 Salk. 116 ; 2 Ibid. 646); and that even on the strict point of law, the plaintiff was entitled to a verdict ; none of the opposite cases applying to separate debtors, on distinct contracts, who could not be sued as joint debtors.

By the Court.—The case has been well argued at the bar; and the judges have enjoyed an opportunity to consider it, with more deliberation, than could be bestowed upon it, during the trial. We are now convinced, that the principal point of law should have been differently presented to the jury. It is clearly in favor of the defendants ; and ought to have been so stated in the charge.

The construction of the agreement, however, is a distinct subject for consideration. The counsel who drew the agreement, are essentially at variance upon its design and meaning ; and the court have not formed (nor is it necessary, at this time, that we should form) a decided opinion upon the subject. The intention of the parties to the instrument, will be properly left to the jury, on the new trial ; which, for the reason already assigned, it is our duty to award.

New trial awarded.

For the plaintiff, *Ingersoll* and *Dallas*. For the defendants, *E. Tilghman* and *Hallowell*.

(*a*) If the maker of an indorsed note give a mortgage, bearing the same date as the note, though not executed until some days afterwards, for securing the payment of the note ; the debt due on the note is not merged, nor the indorser discharged. Ligget *v.* Bank of Pennsylvania, 7 S. & R., 218.

*SEPTEMBER TERM, 1803.

SHARPLESS *v.* WELSH *et al.*

Trust.

Where a bill is remitted, with directions to appropriate the proceeds among certain creditors, in designated proportions, the party receiving it becomes a trustee for the creditors, and the money is not liable to be attached on the property of the debtor.

A. being indebted to several persons in Philadelphia, remitted a bill to B., in his favor, A. saying, at the same time, that in a few days, he would send directions about its disposition, which he accordingly did, and apportioned the proceeds of the bill among certain of his creditors; subsequently, one of them laid a foreign attachment upon A.'s funds in the hands of the acceptor of the bill, and of B.: *Held*, that B. became a trustee for the creditors, from the time of receiving A.'s appropriation, and that the creditors thereupon acquired such an interest in the trust fund, as could not be divested or affected by the attachment.

SCIRE FACIAS against John Welsh, Redman Byrne and the Bank of the United States, garnishees in a foreign attachment, issued by the plaintiff against M. Moore, of Charleston. The facts were these: Moore being indebted to several persons in Philadelphia, remitted to Redman Byrne, a bill of exchange, dated the 13th of November 1800, drawn by Joseph Byrne, in favor of Redman Byrne, on John Welsh, at sixty days' sight, for $1700; saying, in the letter that inclosed the bill, "I will send the duplicate, in a days, with directions what to do with it." Accordingly, on the 22d of November, he wrote again to Byrne, ordering the following disposition of the bill:

"To Martin Bernard..... 70*l.*
To Moore, surviving partner of Goldthwaite..... 29 dollars.
To Jesse Sharpless.....400 dollars.
To M. Shields.....300 dollars.
To Robert Campbell.....400
The balance to be divided equally between Mr. Carr and McGoffin."

Soon after the receipt of his letter, Byrne showed it to the plaintiff, and also to John Shields; told each of them of the appropriations; and promised to pay each the sum specified, when the cash should be received. And on the 26th of December 1800, he wrote to Moore, that the bill "should be disposed of, as his last letter directed." Subsequently to these communications, the plaintiff issued a foreign attachment, on which the present *scire facias* was grounded. Byrne informed Moore of the occurrence, and called for in-
*280] structions, on the 8th of January *1801; and on the 6th of February following, Moore answered, "I would rather, if by any means you could have it done, that Sharpless should be got to put up with 8 or 900 dollars; and the rest to be paid to the other people mentioned, as far as it will go." But Byrne, conceiving himself bound to pay, according to the first appropriation, did not mention this proposition to Sharpless. In the meantime, the bill of exchange, which had been accepted on the 28th of November, was regularly protested for non-payment—Welsh assigning the attachment, as the cause of his refusal to pay.

On the trial of the cause, it was contended, for the *plaintiff*, that the

property in the bill continued to be Moore's, at the time of the attachment; and that the creditors had acquired no lien upon it. (4 Burr. 2174.) The letter of appropriation is nothing more than a private order, to pay the money, when it was received; and Moore had a power to revoke or alter it (as, in fact, he did, in his letter of the 6th of February), at any time before actual payment to the creditors.

But it was insisted, by the counsel for the *defendants*, that the letter of the 22d of November amounted to an irrevocable appropriation and transfer of the fund; that Byrne became a trustee for the creditors named in the letter; and that the trust-fund was not liable to a foreign attachment. (Ambl. 297; 1 Atk. 124; 2 Ibid. 207; 1 Ves. 280; 1 Ves. jr. 331–2; 1 East 550; 5 T. R. 215, 494.

By the Court.(*a*)—The plaintiff had a legal right to institute the attachment, which cannot be divested, by any irregular attempts to obtain a preference from the trustee himself. The only question is, whether the fund attached, can be regarded, under the circumstances of this case, as the property of Moore?

The facts are few, but powerful. Moore remits the bill to Byrne, with express directions to apply the money to the payment of specific creditors in Philadelphia; and Byrne undertakes to do so. Independent of the communication to the plaintiff, Byrne mentioned the general appropriation to Shields, with a direct and positive promise to pay Shields his proportion of the money. Under these circumstances, it is clear, that there could be no revocation of the appropriation in favor of Shields; to whom Byrne himself had become responsible; but the doubt arises, as to the situation of those creditors who had received no intimation of the remittance. If, indeed, no notice had been given to any of the creditors, we do not think, [*281 that any of the creditors *would have acquired a vested interest in the fund, by the terms of the correspondence between Moore and Byrne. But it is a material fact for the consideration of the jury, that the plaintiff received information, not only of his own apportionment, but of the distributive shares of all the creditors; and that he never objected to this appropriation of the fund, until he issued his attachment. If the jury shall think, from this fact, that the plaintiff ratified or acquiesced in the distributive appropriation; the law will not permit him, afterwards, to monopolize the fund, in the way that the present suit contemplates.

Brackenridge, Justice.—The equity of the case is strongly in favor of the defendants; but I find it difficult to surmount the strict rules of law, as to those creditors, who, receiving no notice, acquired no right. The creditors who received notice, and assented to the appropriation, had clearly a vested interest. But I incline to think, the law in favor of the creditors stops there; unless the fact is sufficiently ascertained, to satisfy the jury, that the plaintiff, by his conduct, approved and assented to the whole appropriation, after he was fully apprised of it. That fact, the important one in

(*a*) The cause was tried at *Nisi Prius*, Philadelphia, on the 16th of June 1803, before Smith and Brackenridge, Justices.

the cause, if found affirmatively by the jury, must be decisive in favor of the defendants.

On the day succeeding that upon which the charge was delivered, the jury returned to the bar, and declared, that they could not agree upon a verdict; proposing, at the same time, several legal questions, for the solution of the court. But —

Smith, Justice, observed, that it would, probably, extricate the jury from their embarrassment, as well as relieve his own mind, to inform them, that since the adjournment, he had entirely changed his opinion, upon the principal legal point in the cause. He said, that he always thought it more honorable to retract an erroneous opinion, when the error was discovered, than to persist in it, upon the suggestions of a false and pernicious pride. He then declared, that on full reflection and research, during the recess, he had been convinced, that from the time of receiving Moore's letter, ordering specific payments to the enumerated creditors, Byrne became a trustee for those creditors; and that the creditors thereupon acquired such an interest in the trust-fund, as could not be divested, or affected by the plaintiff's attachment. (*a*)

The jury, having again retired, soon agreed upon a verdict, in favor of the plaintiff, for $400; being the sum to which he was entitled by the original appropriation of the bill of exchange.

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*282] *Commonwealth *v.* Baynton *et al.*

Sureties on official bond.

Where an officer is elected annually, and gives a new bond, on a re-election, his sureties are only responsible for a deficit occurring during the year.[1]

Debt, on the official bond of Peter Baynton, as state treasurer, dated the 11th of January 1797, against him, and his sureties, David Lenox, William Hall and Joseph Bullock. It was admitted, that there was a considerable balance due from Baynton to the state; but the defence taken for his sureties was on two distinct grounds: 1st. That the treasurer is elected annually; he is required to give bond on every election; and that his sureties in the present bond are only liable for any deficit actually incurred during the year, commencing in January 1797, and ending in January 1798. 2d. That by the conduct of the legislature, in frequent subsequent re-appointments of Boynton, as treasurer; and by the conduct of the accounting officers, who had the legal examination and control of his accounts; the sureties were virtually discharged. On the first point, were cited, Const.

(*a*) Brackenridge, Justice, expressed no opinion upon this occasion; but seemed silently to assent to the statement now made by Judge Smith.

[1] Farrar *v.* United States, 5 Pet. 374; United States *v.* Boyd, 15 Id. 187; United States *v.* Linn, 1 How. 104; United States *v.* Irving, Id. 250; Harris *v.* Babbitt, 4 Dill. 185; Bissell *v.* Saxton, 66 N. Y. 55. The presumption, however, is, that a balance due from an officer at the time of his re-appointment, was then in his hands, and his sureties are responsible for its due application; but they may relieve themselves, by showing that he was in fact a defaulter when they became his sureties. Bruce *v.* United States, 17 How. 437. See Wilson *v.* School Directors, 2 Am. L. Reg. 123.

Penn. art. VI., § 5 ; 3 Dall. Laws, 221 ; 2 Ibid. 756 ; 2 Saund. 411 ; Styl. 18 ; Alcyn. 10 ; Park. 277 ; Leon. 240 ; Moore 126, 274 ; 2 Vern. 518. On the second point, there was a general reference to the acts of assembly, and to the public records, in relation to the state treasurer's accounts, and to the repeated elections of Mr. Baynton ; and the following authorities were cited: Co. Litt. 206–7 ; 1 Roll. Abr. 457, 463 ; 2 Ves., jr., 540 ; 4 Ibid. 824 ; 2 P. Wms. 542 ; 1 T. R. 291 ; 2 Bos. & Pul. 62 ; 3 Bro. Ch. 1 ; 3 Dall. Laws, 132 ; Comb. 464 ; Vern. 24 ; 2 Brownl. 107 ; 12 Mod. 559.

On the part of the *Commonwealth*, a strict scrutiny was made into the bank deposits and drafts of Baynton, to ascertain the period when the deficit arose, and its subsequent fluctuations. And it was contended : 1st. That from the nature and extent of the obligation, the sureties were bound to indemnify the state, unless they could show that there was an express release ; that the recovery was barred by lapse of time ; or that a settlement with the principal had extinguished the claim upon the sureties. 2d. That the indemnity of the bond extended to the general duty of the treasurer, as well as to his fidelity in pecuniary transactions : and as soon as he had ceased to make the Bank of Pennsylvania the depositary of the public money ; or as soon as a false estimate of accounts was exhibited, the bond was forfeited. 3d. That from the very nature of the indemnity, its obligation is co-extensive with the continuance of the person in the office ; and the only questions are, whether the sureties could so engage, and whether they have so engaged? That on the facts (even supposing the indemnity of the bond to be limited, by an implied connection with the annual tenure of the office), there was a deficit of inactive public money at the end of *the year 1798, not found in the bank, nor accounted for in any public deposit or application. On these several points the following [*283 authorities were cited : 3 Dall. Laws, 132 ; 4 Ibid. 301 ; 4 Ves., jr., 829 ; Sayer 115 ; 2 P. Wms. 287 ; 1 Bos. & Pul. 419, 422 ; 3 Dall. Laws, 222, § 9, 10 ; 2 Ibid. 753, § 6, 7 ; 6 State Laws, 590 ; 3 Dall. 500 ; 2 Saund. 411 ; 1 T. R. 295, 293 ; Bunb. 275, 337 ; Hardr. 424 ; 3 Leon. 240 ; Moore 126, 274 ; 2 Chan. Ca. 84 ; Show. 216.

The Court, in the charge directed the jury, in point of law, to confine the responsibility of the sureties, to a deficit occurring during the year ensuing the date of the bond. But if, from the evidence, they were satisfied that there was a deficit, during that year, they thought, that a verdict should be in favor of the commonwealth for the amount,(*a*) verdict for the defendants.(*b*)

McKean, (attorney-general) and *Dallas* for the commonwealth.
Rawle, for the defendants.

(*a*) The condition of a bond, reciting that the defendants had agreed with the plaintiffs to collect their revenues "from time to time, for twelve months," and stipulating that "at all times thereafter, during the continuance of such his employment, and for so long as he should continue to be employed" he would justly account and obey orders, &c., confines the obligation to the period of twelve months mentioned in the recital. Liverpool Water Works *v.* Atkinson, 6 East 507.[1]

(*b*) It may be proper to observe, that Mr. Baynton did not appear, nor take defence,

[1] But see Walters' Appeal, 10 W. N. C. 146.

Waison *et al. v.* Insurance Company of North America. (*a*)

Marine insurance.—Partial loss.

Where there has been a capture and condemnation, but no abandonment to the underwriters, the jury may estimate the *spes recuperandi*, deduct it from the whole amount insured, and find the remainder as a partial loss.

In an action on a policy of insurance, in which the declaration was for a total loss, and it appeared, that the assured had demanded payment of a total loss, which was refused: but there was no actual abandoument, nor offer to abandon, and the proof was of a loss in its nature total; it was *held*, that the jury might find damages as for a partial loss.

This was an action on a policy of insurance, in which the declaration was for a total loss. On the trial, it appeared, that the assured had demanded payment of a total loss, which the defendants refused to pay; but there was no evidence of an actual abandonment, nor offer to abandon, to the underwriters, before the suit was instituted; and the proof was of a loss in its nature total. The jury gave a verdict in favor of the plaintiff, finding damages, as for a partial loss; subject to the opinion of the court, upon a motion for a new trial, to consider two points reserved: 1st. Whether a previous abandonment, or offer to abandon, was indispensably necessary, to enable the plaintiff to recover in this suit? And 2d. Whether, on a declaration for a total loss, and proof of a loss in its nature total, the jury can give damages for less than a total loss?

After argument, by *M. Levy* and *Lewis*, for the plaintiffs; and by *Moylan*, *E. Tilghman* and *Ingersoll*, for the defendants, The Court (consisting of Shippen, Chief Justice, and Yeates and Smith, Justices) were of opinion, that the jury might find damages for a partial loss; although the declaration claimed for a total loss; and although there was no proof of an actual abandonment, or an offer to abandon, to the underwriters.

*284] *But Brackenridge, Justice, said, that he thought there was sufficient evidence at the trial, to induce the jury to find an abandonment; and on that ground alone, he concurred, in refusing a new trial. For the general ground, on which the opinion of the rest of the court was founded, did not appear to him so conclusive, and so satisfactory, as it did to them.

Motion for a new trial refused: and judgment rendered on the verdict for the plaintiffs.[1]

Williams *et al.*, Executors of Fisher, *v.* Paschall *et al.*

Award.

Equity will not relieve against an award, unless on a plain error in law or fact, specifically as such.

In debt, in an arbitration bond, a plea charging mistake on the arbitrators, without setting out the particulars, is bad, on demurrer.

Debt, on an arbitration bond. Upon *oyer* of the bond and condition, it appeared, that the defendants, as heirs of Jonathan Paschall, had entered

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in this suit: the proceedings to recover from him having been instituted on the settlement of the comptroller.

(*a*) s. c. 1 Binn. 47, which is better report of the case.

[1] In Brown *v.* Phœnix Ins. Co., 4 Binn. 464, Chief Justice Tilghman said, that he did not consider the law as settled by this decision. The court was not unanimous. "It was not acquiesced in by the bar; and would have been carried to the court of errors and appeals, had

into a bond, dated the 14th of September 1796, in the penal sum of 500*l.*, conditioned for the performance of an award, by arbitrators mutually named by them and the plaintiffs, to be made "of and concerning all matters in controversy between them respecting a certain bond given by the said Jonathan Paschall to the said James Fisher (the testator), and respecting all accounts, which they the said heirs of Jonathan Paschall may exhibit as payments in discharge of the said bond, and of and concerning all and all manner of actions, &c., respecting the said bonds and accounts, &c." The award which was set forth on the record, after reciting the bond and submission, concluded that "the arbitrators are of opinion, that the defendants are justly indebted to the plaintiffs in the sum of 310*l.* 11*s.* 4½*d.*" The defendants pleaded specially, "that the plaintiffs ought not to have and maintain their action aforesaid against them, because they say, that the said arbitrators, in making the said award, at the time and place aforesaid, from a mere inadvertency, error, mistake and misapprehension of the law and right and justice of the case, calculated, allowed and added the full interest of six per cent. per annum, on the whole amount of the principal sum mentioned in the bond, submitted to their arbitrament, for a long time, that is to say, for twenty-six years and upwards; although within the same time, many payments and advances had been made by these defendants, and on their account, to the said James Fisher, in his lifetime, and after his decease, to the said plaintiffs, on account of the said bond, to the full amount of the principal and interest due on the said bond; but on which payments and advances, from a mere mistake, error and misapprehension of the law and right and justice of the case, no interest was calculated or allowed by the said arbitrators, in making and forming their said award; nor were the said payments and advances deducted, as by law and right they ought to have been, from the moneys *due on the said bond, at the respective times, when such payments and advances were made, or at any time or [*285 times, before publishing the said award. And this the said defendants are ready to verify, &c." To this plea, the plaintiffs demurred: and it was agreed, that the court should decide—1st. Whether the award was, in itself, good. 2d. Whether, if the award was good, the plea could be sustained?

E. Tilghman, in support of the demurrer, contended, that the award was good in itself; and that the plea, which entered into the merits of the original controversy submitted to the arbitrators, was bad. 1 Ves. jr. 365.

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the nature of the case admitted it. But being a determination on a case stated, it was supposed, that it could not be carried up by writ of error. There certainly are some weighty objections to the principle adopted by the court in that case. It takes away the necessity of abandonment, in any case whatever, without affording sufficient protection to the rights of the underwriter; because, instead of paying for the whole loss, and receiving an assignment of the whole chance of recovery, he is compelled to relinquish that chance, and may have to pay the whole loss, deducting a trifling sum for the value of the chance. Besides, there seems an impropriety in proving a total loss, and recovering for less than a total loss. There will be great difficulty, too, in reducing the rule to practice, for, by what standard are the jury to estimate the hope of recovery? It depends not on any known principles of law or justice, but frequently on the character, the temper, the caprice of the prince, or on secret political motives." He wished to be understood, however, as not having formed a decided opinion on the question. But Mr. Justice YEATES said, in the same case (p. 470), that he saw no reason for retracting the opinion which he formed in Jones *v.* The Insurance Co.

Lewis, for the defendant, admitted, that in a common-law court in England, the plea would be bad; but he insisted, that any plea, which contained matter proper for a bill in equity there, would here be sustained in a court of common law, from the necessity produced by the want of a court of equity. If, therefore, the award is bad on the face of it, the form of the plea is immaterial. And it has been decided in Pennsylvania, that an award is not good, unless it determines the whole matter in dispute and submitted; nor if it exceeds the subject submitted, unless the excess can be separated and rejected; nor if it decides matters submitted on one side, without deciding the matters submitted on on the other side. (*Huff* v. *Parker*, Com. Pleas Phila.; removed into the supreme court by writ of error, April 1787.)[1] If, in short, the arbitrators mistake in a plain point of law, their award ought to be set aside. (3 P. Wms. 362; 3 Atk. 486, 494, 529.) And in the present instance, the allowance of interest on the one side, and the rejection of it upon the other, is a plain error in law and justice.

Rawle, in reply, having cited 1 Burr. 277, was stopped by the court.

Shippen, Chief Justice.—We are, unanimously and clearly, of opinion, that the award is good in itself; and that the plea is bad. As to the equitable power of the court, we are often, for the sake of right, obliged to introduce a chancery relief; but it is only in cases where we can, by such an interference, do justice to both sides; never to aid one man at the expense of another. If, too, relief is granted in the case of an award, it must be on a plain error in law or fact, specifically set forth; which is not the present case.

Judgment for the plaintiff.

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*286] *DECEMBER TERM, 1803.

Crawford *et al. v.* Willing *et al.*

Interest.—Partners.

Interest is due on the ascertained balance of an account, from the time of a demand of payment.

In case of a war, the payment of interest on a debt due by a citizen of a belligerent country to one of a neutral state, will be enforced, unless a remittance cannot be made with safety.

A partner is liable for the acts of his copartner, in relation to partnership business, whether they be known to the former or not.

This was an action of account-render, brought by Crawford & Co., of Rotterdam, against Willing & Morris, of Philadelphia. There was a judgment *quod computent*, under which, the auditors reported, "that the sum of 1658*l.* 11*s.* 8*d.*, Pennsylvania currency, is due from the defendants to the plaintiffs, but not being agreed, with respect to an allowance of interest, they submit that point to the court." The plaintiffs thereupon filed a suggestion, "that the defendants ought to be charged 3770*l.* 15*s.*, for interest on the several sums of money by them accounted for, in their account, mentioned in the report of the auditors; and that the plaintiffs are entitled

[1] Cited, 3 Yeates 567.

to have and recover from the defendants the said sum of 3770*l.* 15*s.*, as well as the principal." To this suggestion, the defendants pleaded: 1st. "That they ought not to be charged with the said sum of 3770*l.* 15*s.* for interest, &c., and that the plaintiffs are not justly entitled to have and recover the same, &c,' because they say, that the same, or any part thereof, is not justly due from the defendants to the plaintiffs: and this they pray may be inquired, &c." 2d. Payment of the principal sum. 3d. The bankruptcy and certificate of Morris, one of the defendants. Issue was joined on the first plea; and the second and third were confessed.

On the evidence, it appeared, that the transactions on which the debt to the plaintiffs was founded, occurred before the year 1775; that during the years 1775 and 1776, and during several years after the war, the debt was repeatedly acknowledged, and a remittance of the amount promised, in a correspondence between the plaintiffs and Morris, as the acting partner of the defendants; *that the partnership commenced, by articles dated the 1st of January 1773, and continued for five years; that the [*287 partnership was renewed, taking Swanwick in as a partner, in the year 1783; that partial remittances were made by Morris, in the year 1786, which reduced the balance of the principal sum to the amount reported by the auditors; and that Willing never knew of the plaintiffs' demand, until the present suit was amicably instituted, by agreement with Morris alone, dated the 4th of August 1798.

E. Tilghman and *Ingersoll*, for the plaintiffs, proposed to inquire, 1st. Whether, considered as a commercial case, generally, it is not a case in which interest ought to be allowed? 2d. Whether the special circumstances of the case exclude the claim of interest, with reference to the law of partnership? 3d. Whether the case is affected by the existence and operation of the revolutionary war?

1. It is true, that, in the old books, the claim of interest upon simple-contract debts, is treated with great rigor, and allowed only in the case of a note; but the law, gradually accommodating itself to common sense and common honesty, is at length settled, that for money lent; for liquidated balances; nay, for goods sold and delivered, where the usual credit is expired; for money detained, which ought to be paid over, and during the continuance, as well as before the commencement of a suit; the creditor shall be entitled to interest. 1 Dall. 349; 1 Ves. Sen. 63; Rep. temp. Hardw. (Ridgeway) 286; 1 Ves. 310; 3 Bro. Ch. 436; Doug. 361. And under circumstances of vexatious delay, interest may be recovered, even beyond the amount of the principal. Atk. 80; 2 Ves. jr., 300.(*a*)

2. The debt was contracted, the correspondence was carried on, during the existence of the partnership, between Willing and Morris. Each partner was, therefore, liable, not as a surety, but as a principal, for the lawful contracts and transactions of the other, in relation to their joint business. 1 Wils. 682; 3 Ves. 277; Bankrupt Act of Congress, § 34; Doug. 629.

3. The courts of Pennsylvania (differing in their view of the subject from the federal courts) have made an abatement of interest, during the continuance of the revolutionary war (a period computed at seven years and a

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(*a*) 1 Dall. 265, note; Id. 288, note; 2 Dall. 104, note.

half), in suits brought by British creditors against American citizens, the immediate parties in the war; but there is neither law, justice nor precedent in any court, for applying the rule to suits brought by the citizens of a neutral or friendly nation: And as to the practicability, as well as the lawfulness, of a remittance, it is notorious, that the intercourse between the United States and Holland was never suspended, at any period of the contest.

Lewis, for the defendants, stated his general position to be, that interest *288] is not due, of course, upon an account-current; or an unliquidated *debt. 1 Wils. 376; 3 Ibid. 205; 1 Dall. 349; Doug. 361; 1 Dall. 265; 3 Ibid. 313; 1 P. Wms. 376; 3 Ibid. 205; Doug. 361; *Durdon* v. *Gaskill*;[1] and that the peculiar circumstances of the present case will not warrant a departure from the general rule. The cases cited for the plaintiffs are, indeed, inapplicable to the real point at issue. Thus, 1 Dall. 349, was the case of a single sum of money, received at one time, by the defendant, from the plaintiff's agent; not the case of an open running account. The cases in 1 Ves. 63, and Ridgw. 286, go no further than to show, that when a sum is ascertained to be due, by settlement, or liquidation of accounts, interest begins to run. The case in 1 Ves. 310, contains, indeed, the strong expression, that interest follows the principal, as a shadow does the substance; but the expression must be applied to the subject before the court: which was a legacy for the education of a child, bearing interest, from the very nature of the bequest. And the case in 1 Wils. 682, arose upon a joint and several bond.

To the general position, however, that interest is not payable, in cases of account-current, and other simple contract-debts, *Lewis* admitted there were various exceptions: 1st. Where there is an express contract to pay interest. 2d. Where the accounts have been settled, and a liquidated balance ascertained. 3d. Where a debt consists of a single sum of money, and no account-current has been raised between the creditor and debtor. 4th. Where there has been an unreasonable detention of money, after a demand of payment, or a refusal to come to a settlement. But he insisted, that there was no authority, in any case, to justify a verdict for interest, beyond the amount of the principal; not even upon a bond, if the creditor has neglected to demand payment for several years. 14 Vin. Abr. 460.

But, adverting to the peculiar circumstances of the case, *Lewis* contended: 1st. That there was a wide distinction between the responsibility of Morris and that of Willing: the correspondence being exclusively with the former, and no demand of payment, no notice of the claim, to the latter, until 1798, long after the dissolution of the partnership. The act or assumption of one partner, to bind the company, must take place during the continuance of the partnership; and here, the only promise made by Morris, during the partnership, was in the year 1775; before the money was received, and merely importing that the defendants would remit it, when it was collected; which, surely, is no foundation for the charge of interest. 3 Bac. Abr. 517; 2 Ventr. 151. So far, therefore, as respects Willing, it is a stale demand, against which every presumption will be made. Cowp. 215; 1 Wils. 742;

[1] Reported 2 Yeates 268.

1 Atk. 493 ; Gilb. Eq. 224. 2d. That the operations of the war, and the high state of exchange, afford a justification for not remitting until the peace of 1783 ; and after that epoch, no demand was made upon Willing, until the suit was brought.

*By the Court.(a)—The auditors have ascertained the principal sum that is due from the defendants to the plaintiffs ; leaving to the court the question of interest. The only point now to be decided, therefore, is, whether any, and what interest, ought to be paid upon the debt so ascertained ? [*289

The inquiry has been naturally and fairly pursued, under the considerations suggested at the bar : 1st. Whether, on general principles, it is a case in which interest can be allowed ? 2d. Whether any circumstances, peculiar to the case, in relation to the parties, should prevent the allowance of interest here, in opposition to a general rule ? 3d. Whether the effect of the revolutionary war was such, as to suspend the right to interest, for any, and for what, period ?

1. Whatever may have been the doctrine in former times, we have traced, with pleasure, the progress of improvement upon the subject of interest, to the honest and rational rule, that, wherever one man retains the money of another, against his declared will, the legal compensation for the use of money, shall be charged and allowed. From the single case of a promissory note, the instances, in which interest is allowed, have been so multiplied, year after year, that few remain to be added to the legal catalogue. In Pennsylvania, the policy is older, and still, perhaps, more extensive, than it is in England. There, even at this day, an action must be brought upon a judgment, in order to recover interest upon it ; but here, our act of assembly, so early as the year 1715, made the interest an inseparable incident of the judgment. For my own part, I am prepared to say, with the book cited, that interest ought to follow a debt, as the shadow does its substance. Even, in the case of goods sold and delivered, I would think it right to allow interest, as soon as the express or the implied term of credit had elapsed, and a demand of payment was made.(b)

In the present action, there can be no doubt, that the balance had long been ascertained and acknowledged. In England, it is the practice of merchants to balance their accounts annually ; and by that means, the interest of each year becomes principal, in the new account of the succeeding year. Without adopting that practice, it is clearly our opinion, that the defendants are liable for the interest actually claimed, unless some special reason exempts them from the general obligation of merchants.

*2. The circumstances suggested, to distinguish the responsibility of Mr. Willing from that of his partner, are not a sufficient legal or equitable answer to the demand of the plaintiffs. In Watson's treatise on the Law of Partnership, the cases on this point are collected and arranged. [*290

(a) This cause was tried before Smith and Brackenridge, Justices; the Chief Justice declining to sit on account of his relationship to Mr. Willing; and Yeates, Justice, being absent on account of indisposition. The charge was delivered by Judge Smith.

(b) In the course of the trial, Smith, Justice, declared, that the authority of 1 Dall. 265 (laying down the rule, that interest was not payable for goods sold and delivered), had been often overruled.

The result of the whole is, that during the partnership, all the partners are answerable for the acts of each. It is no ground of discrimination in this respect, which partner actually received the funds; which was intrusted to transact the business, or which was ignorant of the state of the debit and credit of the company books. If, indeed, a public notice is given by one partner of the dissolution of a partnership; and creditors, unreasonably neglecting it, will place funds in the hands of the other partner, they must take the consequence of their own imprudence. But the present case is free from every embarrassment of this kind. The debt was contracted during the partnership; and all that was written about it, both before, and after, the termination of the partnership, was written by Mr. Morris alone, without any objection on the part of Mr. Willing; whose conduct, on the contrary, gave reason to presume consent and approbation.

3. Nor will the effect of the revolutionary war, furnish the defendants with a justification or excuse against the claim of interest. We all know the eminent services of Mr. Morris to his country; and the pre-eminent credit of the house of Willing & Morris, throughout the war. But these very advantages show, that the defendants, of all men, had it in their power to remit the funds, for the payment of their debts due in neutral countries.

This, then, is our general position: the defendants are liable for the payment of interest, from the time the money was in their hands, demanded, and neglected to be paid, until the war; during the war, if remittances could safely be made; and (if they could not be safely made during the war) then, from the peace of 1783, until the actual recovery of the principal.

Unless, upon the whole, the jury can discover some ground of excuse, which we have not been able to trace, the interest ought to be allowed, in justice to the plaintiffs: and we will add, in justice to the commercial character of our country.

The jury found a verdict for the plaintiff, for $4422.89.(*a*)

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*291] *Cramond *et al.*, executors of Cay, *v.* Bank of the United States.(*b*)

Set-off.

A garnishee in foreign attachment, after the death of the attaching creditors, cannot set off against the claim attached, a responsibility of the attaching creditors to him, as indorser of a note, which matured after their decease.

A. & B., partners in trade, issue a foreign attachment against the effects of C., who is indebted to them, in the hands of D.; A. & B. were the indorsers of a note which was discounted by D., but before it became due, A. & B. died, and the note was protested, and the executors of B., who was the surviving partner, obtained judgment against C. and also against D., as garnishee: the debt due by A. & B. to D. cannot be set off against the debt due by D., as garnishee, to B.'s executors.

The following case was stated for the opinion of the court: "On the

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(*b*) This sum, it is plain, was not equal to one-half the interest claimed (and the calculation of interest was in a mode favorable to the defendants), but it was exactly equal to the principal sum reported by the auditors. It is presumed, therefore, that the jury thought the interest ought not to be allowed beyond the principal.

(*a*) s. c. 1 Binn. 64, which is a much better report of the case.

19th day of August 1793, David Cay and Andrew Clow, who then carried on business under the firm of Andrew Clow & Co., indorsed a note made by Henry Darroch, bearing that date, for the sum of $852.82 ; which note was discounted by the President, Directors and Company of the Bank of the United States, defendants in this action, and the amount paid to the indorsers. Before the note became due, the maker, and both the indorsers, died of the yellow fever ; and notice of non-payment was duly given to the executors of the surviving partner, David Cay. On the 11th of April 1793, Andrew Clow and David Cay laid a foreign attachment on the property of a certain James Brown, in the hands of the defendants. Judgment was obtained in December term 1793, in the names of the present plaintiffs, as executors of David Cay, the surviving copartner. A writ of inquiry has been issued and the sum of 25,543*l.* 2*s.* 3*d.* has been found due to the plaintiffs ; judgment was thereupon entered in the usual form. A *scire facias* issued against the defendants, as garnishees, in which, after the general proceedings stated on the record, there was a trial, on the 10th September 1801, when the jury found for the plaintiffs $3354; and on the same day, judgment *nisi* was entered.

"The defendants as garnishees of James Brown are in possession of thirteen shares of bank-stock, and of the dividends thereon arising and accruing, since the first day of July 1801, which are subject to this attachment. And they have received payment of $284.27 ; being a dividend of the estate of Henry Darroch, the drawer of the said note. The question for the opinion of the court is whether the defendants in this action are entitled to set off against the demands of the plaintiffs in this action, the sum of $568.55, being the balance of the note unpaid ?"

After argument, by *E. Tighman* and *Ingersoll*, for the plaintiffs; and by *Lewis* and *Rawle*, for the defendants.

The Court (absent Shippen, C. J.) decided, that the set-off was inadmissible.

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*McCulloch, administrator, &c., *v.* Young. (*a*) [*292

Foreign executors.

An action can be maintained in the courts of Pennsylvania, under the authority of letters of administration granted in another state.[1]

This was an action on the case, brought against the defendant, by John McCulloch, as administrator of Robert Parland, under letters of administration granted by the orphans' court, and tested by "the register of wills for Prince George county," in the state of Maryland, on the 8th of October 1799, addressed to John McCulloch of "Alexandria, in the state of Virginia."

The only controverted question in the cause was submitted to the court, all the judges being present : to wit, whether an action could be maintained

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(*a*) s. c. 1 Binn. 63; where the case is more fully reported.

[1] This case has long ceased to be law in Pennsylvania: Thompson, C. J., in Sayre *v.* Helme, 61 Penn St. 300.

in the courts of Pennsylvania under the authority of letters of administration granted in another state?

And after argument, by *M. Levy*, for the plaintiff, and by *Hopkinson*, for the defendant (in the course of which 1 Dall. 456; 1 Dall. Laws, 30, were cited):

The Court, adverting to the numerous instances, both since and before the revolution, in which such suits were maintained, unanimously pronounced—

Judgment for the plaintiff.

Commonwealth *v.* McKissick *et al.*

City lots.

The act of the 9th of March 1796, declared those Pennsylvania claimants who had complied with the terms of the confirming law (while the said law was in existence), entitled to the benefit of the same, and enacted, that the sums found due to them should be credited to them in taking out new warrants, in any part of the state where vacant land may be found: *Held*, that the act did not apply to warrants to be located on lots within the city of Philadelphia. (*a*)

On the 15th of March 1802, a rule was obtained upon the receiver-general, which was afterwards extended to the secretary of the land-office, to show cause why a *mandamus* should not issue, commanding them to receive a certain certificate, in payment for city lots, located by the late Thomas Billington.

The application for the rule was founded upon an act of the general assembly, passed on the 9th of March 1796 (4 Dall. Laws, 16), which contains the following enacting clause:

Sect. 1. "That it shall and may be lawful for the board of property, and they are hereby enjoined and required, to proceed upon the reports of the commissioners appointed by the act passed the 28th day of March 1787, entitled 'an act for ascertaining and confirming to certain persons, called Connecticut claimants, the lands by them claimed within the county of Luzerne,' which have been filed in the office of the secretary, and ascertain, as nearly as they can, from the documents so placed in the secretary's office, and from such further evidence as they may deem necessary, and
*293] *which shall be produced to them, what sum or sums ought, on the principles of the aforesaid law, to be allowed to the respective owners; and and the receiver-general shall thereupon deliver a certificate of such sum or sums to the respective owners, and enter a credit in his books for the same, which may be transferred to any person, and passed as credit, either in taking out new warrants, in any part of the state where vacant land may be found, or paying arrearages on former grants: Provided nevertheless, that the value of the land for which such certificates are so to be delivered to the aforesaid claimants, shall not be estimated otherwise than if the same had been made by the board of property, immediately after the report of the aforesaid commissioners, in pursuance of the law hereinbefore mentioned: And provided further, that the claimants, who are

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(*a*) And see Freytag *v.* Powell, 1 Whart. 536; Barton *v.* Bovier, 1 Phila. 523.

by this act intended to be compensated, shall, at the time of receiving the certificates aforesaid, release to the commonwealth their respective claims to the lands, for which they shall receive compensation."

Thomas Billington purchased several certificates, which had been issued under the authority of this act, and tendered them in payment for warrants to be located on certain lots in the city of Philadelphia, which he alleged to be "vacant land." The legislature having granted all the unappropriated city lots to the inspectors of the prison of Philadelphia, for public uses, the inspectors employed counsel, to oppose the rule for issuing a *mandamus*.

Accordingly, *Dallas*, in showing cause against the rule, stated two points, for the consideration of the court: 1st. Whether, upon a just construction of the act of March 1796, and acts *in pari materia*, the right of location could apply to land within the boundaries of the city of Philadelphia. And 2d. Whether, in the strictest sense of interpretation, city lots could be regarded as vacant land.

The act of March 1796 is engrafted upon the act of the 28th of March 1787, usually called "the confirming law" (P. L. 274), which, however, had been repealed by the act of the 1st of April 1790. (2 Dall. Laws, 786.) It was expressly intended to entitle those Pennsylvania claimants, who had complied with the terms of the confirming law, "while the said law was in existence, to the benefits of the same." (Preamble, 4 Dall. Laws, 16.) What, then, were the benefits conferred on Pennsylvania claimants by the confirming law? A right to an equivalent, for the land they surrendered, which might be taken "either in the old, or new purchase, at the option of the claimant." (P. L. 274, § 9.) And the act of March 1796 did not profess to enlarge, nor has it, in terms, enlarged the right thus conferred. Besides, the act *of March 1796, evidently restricts the location, under the Wyoming certificates, to those lands, for which the land-officers were previously authorized to grant warrants; and no authority was ever given to the land-officers to sell city lots, until the act of the 5th of April 1797. (4 Dall. Laws, 165.) [*294

Here, *Dallas* was stopped by the Court, who declared, that they could not conjecture upon what ground the rule was tenable; and desired to hear the opposite counsel. *Ingersoll* and *Rawle*, however, acknowledged, that they saw the subject in a point of view different from that, in which it was presented, when they made the motion; and declined any further argument.

By the Court.—Let the rule be discharged.

Crousillat *v.* Ball. (*a*)

Barratry.

Barratry is an act committed by the master of a vessel, of a criminal nature, without the license or consent of the owner; there must be fraud in the transaction, and should the act be done solely to benefit the owner, it does not constitute barratry.[1]

If the master be the general agent and consignee of the owner, the acts of the master, as such, cannot, any more than those of the principal himself, be denominated barratry.

Case, on a policy of insurance upon ship and cargo, containing a warranty against seizure or detention for any illicit or prohibited trade.(*b*) It appeared in evidence, that the vessel and cargo were owned by the plaintiff, and were insured on a voyage from Philadelphia to Cape François; thence to New Orleans; thence back to the Cape; and from the Cape back to Philadelphia. When the vessel had arrived at the Cape, on the return voyage, war had broken out between Great Britain and France; and the calamities of St. Domingo compelled a number of its inhabitants to seek an asylum in the United States. The master of the vessel (who was addressed to merchants at the Cape, and only in case of their absence, was intrusted with the disposition of the cargo), undertook to cover, as American property, a considerable quantity of coffee and cash, belonging to two of the fugitive Frenchmen; under a bargain, that they should pay to the owner of the ship a certain sum for passage-money, and for the freight of the coffee; and to the master, for his own separate emolument, 50 half-johannes in hand, for covering the cash, with a contingent of 200 half-johannes more, on its safe arrival in the United States; and a sum equal to the freight, for covering the coffee. The vessel was captured and carried into Jamaica, and both vessel and cargo libelled as prize, in the court of vice-admiralty. The master filed a claim for the ship and the plaintiff's part of the cargo, and for freight on the *295] covered *part of the property; but in his answers to the standing interrogatories, he had sworn that the whole cargo belonged to the plaintiff, and that there were no papers on board, except such as he had delivered. On searching the vessel, however, the bills of lading, letters and other papers relative to the covered property, were found concealed; the whole cargo, including the master's own adventure, was condemned; and though the vessel was acquitted, upon further proof of American ownership, sent by the plaintiff from Philadelphia, it was expressly without freight, on account of the master's fraud. When notice of the capture was received, the plaintiff abandoned to the underwriters, stating that the voyage was defeated, "and the cargo taken out of the hands of my agent," the master.

On two former trials of this cause, the argument turned entirely upon

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(*a*) s. c. 3 Yeates 375.

(*b*) This cause had been tried twice before, upon a declaration containing a single count, charging the loss to have happened by the capture, arrest and detention of a foreign prince. On the first trial, the jury could not agree; and on the second trial, a special verdict was found, but so imperfectly, that judgment could not be rendered upon it. A *venire facias de novo* was, therefore, awarded: and the plaintiff had leave to add a count to his declaration, averring the loss to have happened by the barratry of the master; on which point, new evidence was now given.

[1] Walden *v.* New York Firemen Ins. Co., Id. 451; Sturm *v.* Atlantic Mutual Ins. Co., 63 12 Johns. 513. Grim *v.* Phœnix Ins. Co., 13 N. Y. 77.

the question, whether the underwriters were responsible for a loss thus occasioned by the misconduct of the master, who was the agent of the owner? And the court were clearly of opinion, that by taking on board the property of Frenchmen, and covering it as the property of the plaintiff, the risk had been increased; that the perjury of the master had also involved the neutral property, in the jeopardy of the belligerent masked property; and that, in fact, his misconduct, from beginning to end, had produced and justified a condemnation. Considering him, therefore, as he must, in law, be considered, in the light of the plaintiff's agent, the court thought, that the plaintiff was not entitled to recover.

On the present trial, the *plaintiff* rested his right to recover, on the barratry of the master: and urged, 1st. That although fraud is essential to constitute barratry; yet, if a master of a vessel is guilty of a fraudulent act, with intent to benefit his owner, who is ignorant of the act, and neither authorized nor assented to it, it is a case of barratry, within the indemnity of a policy of insurance. (1 Str. 581; 2 Ld. Raym. 1349; Cowp. 154; 1 T. R. 259; 3 Ibid. 278; 4 Ibid. 36; 6 Ibid. 379; 2 Dall. 137.) 2d. That the master acted, on the present occasion, as master; and was guilty of a fraud, with a view to his own separate interest and emolument; which clearly amounted to barratry, though the ordinary freight and passage-money were secured for his owner. And if barratry is committed, the insurers are answerable, although the loss is not the direct and necessary consequence of the barratrous act. 3d. That the master was not the general agent and consignee of the plaintiff; and when he undertook to cover the property, he manifestly acted as master, for his own benefit, and not as agent, for the benefit of his principal, upon a commission to be paid by the principal. 4th. That a warranty against a seizure for illicit trade, means a seizure in the trade, in which the owner employs the ship; not a *seizure in a barratrous trade carried on by the master, without the owner's knowledge or consent. (3 T. R. 278.) [*296

The *defendant* contended, 1st. That the plaintiff was estopped from alleging barratry, after he had approved the conduct of the master (whom he expressly recognised as his agent, in the letter of abandonment), and endeavored, by further evidence sent from America, to maintain the claim in the court of vice-admiralty at Jamaica. 2d. That the master intended to benefit, and not to defraud, his owner, so no barratry was committed. 3d. That the master, being the consignee of ship and cargo, was not capable of committing barratry; which furnishes a conclusive distinction between the present case, and the cases cited from the books. (1 Emerig. 370; 2 Marsh. 442; 2 Dall. 137–9; Park 91; 6 T. R. 379; 7 Ibid. 505.) And 4th. That the seizure, detention and condemnation of the cargo, was on account of an illicit and prohibited trade, by covering belligerent property in violation of the law of nations, and the good faith of neutrals; as well as by a prohibited intercourse with a Spanish colony.

YEATES, Justice, delivered the charge of the court, to the following effect. In this action, evidence has now been given upon a ground distinct from any, that was taken on the former trials; and the only question to be decided is, whether the cargo insured was lost by the barratry of the master?

Barratry is an act committed by the master of a vessel, of a criminal nature, without the license or consent of the owner. There must be fraud in the transaction; a selfish and sinister design, for the master's own interest; for if the act is done solely to benefit the owner, it does not constitute barratry.

It is the province of the jury to decide upon the credit of the witnesses, and the amount of the evidence. The enormity of the *doceur*, the lapse of time, and other circumstances, are calculated to excite doubt and suspicion. If, however, the jury think, that the master meant to take the premium, for covering the property, to his own private benefit, in exclusion of his owner; and not, in the first instance, to pay it to the owner, expecting from him a gratuitous compensation or reward, the act of barratry is proved, and the plaintiff must recover; unless the evidence shall satisfy the jury, that the master was the general agent and consignee of the plaintiff, and acted as such. In that case, the law is equally clear, that the acts of a general agent cannot, any more than the acts of the principal himself, be denominated barratry.

The other objections that have been made by the defendant's counsel, appear to be satisfactorily answered, in the course of the evidence and the argument. The proof of interest in the cargo is strong; and most clearly, the case is not a case of illicit trading, within the meaning of the warranty. *297] The nature of the *indirect intercourse with New Orleans, a Spanish colony, was well known to the underwriters; and in truth, the trade would not be illicit, if it was fairly carried on. Even in that respect, therefore, the objection cannot be sustained; and as it respects the violation of neutral character, it is the very ground of the plaintiff's right to recover if the violation was committed for the private purposes of the master of the vessel. For, here we repeat, the sole question to be decided, is, whether the master, in breach or evasion of his orders, did a fraudulent act, in the course of the voyage, tending to his own benefit, and to the prejudice of his owner?(*a*) If he did, the verdict must be for the plaintiff. If not, or if what he did was in the character of a general agent, the verdict must be for the defendant.(*b*)

For the plaintiff, *E. Tilghman, Du Ponceau, E. S. Burd* and *Dallas.*
For the defendant, *Ingersoll* and *Rawle.*

(*a*) Barratrous acts are of two kinds, and are merely fraudulent or criminal. As to the first class of cases, it is always important to ascertain, whether the conduct of the master promoted his own interest; for if it did in any considerable degree, and especially, if his interest was in exclusion of his owners, the presumption is violent, that his intent was fraudulent. But the test of self-interest will not be sufficient to decide the second class of cases, which arise from crime. The crime which constitutes barratry, is "a wilful breach of law, to the prejudice of the owners." In this point of view, it is of no importance, whether the master acted with reference to his own interest or not. Wilcocks *v.* Union Insurance Company, 2 Binn. 580; Dederer *v.* Delaware Insurance Co., 2 W. C. C. 67. See also the opinion of BRACKENRIDGE, J., Calhoun *v.* Insurance Co., 1 Binn. 321. But see Hood's Executors *v.* Nesbit, 2 Dall. 137; s. c. 1 Yeates 114.

(*b*) In this case, the jury not being able to agree, were constituted referees, by consent of parties, and made a report in favor of the plaintiff.

*MARCH TERM, 1804.

MAYBIN, surviving partner, &c., *v.* COULON. (*a*)

COULON *v.* MAYBIN, surviving partner, &c.

Illegal contract.

An action cannot be maintained in our courts, founded on a contract between a citizen and an alien, by which the former undertook to purchase vessels and cargoes in his own name, for the latter, and in like manner, to import the return cargoes, in fraud of the registry and revenue laws of the United States. (*b*)

THESE actions having been referred, the referees reported that there was due, in the first, from the defendant to the plaintiff, as surviving partner of Joseph Anthony & Co., a sum of $30,708.16 ; and that in the second, there was no cause of action. To this report, Coulon filed a number of exceptions, of which it is only necessary to state the substance of the single exception, which was the ground of the decision of the Court : to wit, " That the balance reported to be due to Maybin, arose from a series of unlawful transactions, in violation of the acts of congress, respecting the registering of vessels, and the duties on tonnage and impost ; and consequently, no court of justice could lend its aid to enforce the recovery."

The facts were briefly these : Coulon, an alien, came to the United States in the year 1794, bringing with him a considerable quantity of merchandise, which he placed in the hands of Joseph Anthony & Co. He had also left a considerable property in the Isle of France ; and he was not only desirous to have that property brought to America, but to enter into various commercial speculations, with these and other funds, in the European, as well as Indian, markets. He accordingly entered into engagements with Joseph Anthony & Co. ; and in consideration of his making them the depositaries of his funds, with an allowance of ample commissions for services, and of interest for advances, they undertook to purchase vessels and cargoes for him, in their own names ; and in like manner, to import the return cargoes. Among the vessels purchased for Coulon (some carrying only a *sea-letter) was the America, which was registered in New York, [*299 as the property of Joseph Anthony & Co., American citizens ; and a cargo afterwards brought in the America, from the Isle of France, though entirely owned by Coulon, was entered at the custom-house of Philadelphia, as owned by them. From the accounts and correspondence produced in court, as well as before the referees, it clearly appeared, that the balance resulted from these illicit transactions ; and that the sum reported to be due to Maybin, was about the amount of the commissions for services, and the interest for occasional advances ; the net price of the vessels and cargoes having been actually paid from the funds of Coulon.

The counsel for *Coulon* insisted, that the referees had erred in point of law, by giving a sanction to the violation of the acts of congress (*c*) ; and

(*a*) s. c. 4 Yeates 24 ; where the case is more fully reported.

(*b*) See also Mitchell *v.* Smith, *ante*, p. 269, and the notes to that case.

(*c*) See the registering act, 1 U. S. Stat. 287 ; and the impost law, Ibid. 135.

that their report could not, therefore, be sustained or affirmed by the court. In the course of the argument they cited, 1 Pow. on Cont. 183, 195, 201, 203; 1 Bos. & Pul. 340; 3 T. R. 454; 4 Ibid. 466; 1 Bos. & Pul. 296; Cowp. 341; 5 T. R. 599; 1 Bos. & Pul. 556; 4 Burr. 2069; 3 T. R. 421; 6 Ibid. 61, 405; 3 Ves. jr. 373.

The counsel for *Maybin* argued, that advances were made, and services performed, to a great amount, independent of the vessels and cargoes, and were not involved in any illicit imputation; that it did not appear that the sum reported arose out of an illicit consideration or contract; that it was too late, after a reference and report, which liquidated the accounts, to object to the legality of the consideration and contract; and that, even if the general transaction were illicit, still the contract being executed between the vendor and the vendee of the property, the plaintiff, not being the actual vendor, had a right to recover the money paid by Joseph Anthony & Co. to the vendor, at the request, and for the use of the defendant. In support of this last position, the following authorities were cited: 1 Pow. on Cont. 200, 1; 4 Burr. 2069; 1 W. Bl. 633; Cowp. 343; 3 T. R. 418–9; 6 Ibid. 61; 7 Ibid. 14; 3 Ves. jr., 612–3; 8 T. R. 575, 577.

The cause having been argued, on these general grounds, during several days in December term 1803, and March term 1804, the unanimous opinion of the judges was delivered, upon full consideration, by SHIPPEN, Chief Justice, in substance, as follows:

BY THE COURT.—There is a just debt due from the defendant Coulon, to the plaintiff, Maybin; and therefore, so far as the court could lawfully act, they would be desirous to affirm the *report of the referees. Hence, *300] we listened, with particular attention and favor, to the attempt of the plaintiff's counsel to distinguish the origin of the sum reported, from the general mass of the illicit transaction. The attempt has not, however, been successful; so that we must decide the question on the principles of law, which are clearly established by the authorities that have been cited.

The positive provisions of the laws of the United States, respecting American registered vessels; the national policy of our navigation system; good faith towards the belligerent powers; and the very foundations of morality; have been violated in the course of the transaction, now exhibited to us. The act of the court is necessary to give effect to the report of the referees: but no court of justice of the United States can lend its aid, at any time, or in any degree, to recover a debt originating in a source so forbidden, so foul and so pernicious. The report cannot, therefore, be affirmed.(*a*)

Report set aside.

Ingersoll, E. Tilghman and *Levy*, for Maybin.
Du Ponceau and *Dallas*, for Coulon.

(*a*) It appeared, that one of the referees, upon discovering the illicit nature of the transaction, declined proceeding; but was persuaded to resume the business of the reference, in consequence of an urgent letter from Maybin, appealing particularly to the sympathy and benevolence of the referee. One of Coulon's exceptions to this report, was pointed at this *ex parte* communication; and the court, in delivering their opinion upon the general question, stated, in strong terms, their disapprobation of one of the parties

Deshler *v.* Beery.

Waiver of dower.

Testator, *inter alia*, bequeathed to his widow 1000*l.*, and appointed her and two others executors; before his death, he had sold and conveyed certain premises, taking bonds and a mortgage from the purchaser for the purchase-money; at the suit of the executors, judgment was obtained against the purchaser, and the same property sold, under an execution issued thereon; at the instance of the widow, one of the executors purchased it, for the use of the estate, who, with the consent and approbation of the widow, resold the premises; the widow, during these transactions, never suggested a claim of dower, and the testator's debts far exceeded his assets: *Held*, that if her conduct was an intimation to the public, and particularly to the parties, that she meant to waive her right to dower, her claim was barred.

This was an action of dower, by the widow of David Deshler, against the tenant of the premises, tried at Easton, Northampton county, the 27th of June 1804.

In point of fact, it appeared, that Deshler died, leaving a will, dated the 2d of November 1796, in which he bequeathed to his wife a legacy of 1000*l.*, his household goods, and a house for life; and appointed her executrix, and Neuhart and Schrudder, executors. Before his death, he had sold and conveyed the premises to George Eddy, taking bonds and a mortgage for the purchase-money; but Eddy's conveyance was not recorded. The executors instituted a suit, obtained judgment, and issued execution against Eddy; in consequence of which, the same property was levied upon and advertised for sale. At the instance of the widow (the present plaintiff), Neuhart, one of the executors, became *the purchaser, for the use of the estate; and the sheriff executed a deed to him, on the 9th of June 1801. And [*301 with the knowledge, consent and approbation of the widow, he resold and conveyed the property to Beery (the present defendant), on the 30th of July 1801. During these transactions, the widow never suggested a claim of dower; but there were several judgments against Deshler's estate, at the time of the sheriff's sale; and his debts, generally, far exceeded the assets for paying them.

The *plaintiff's* counsel insisted, that there was no relinquishment of the right of dower, on the sale to Eddy; that the sheriff's sale on the judgment against Eddy, for the price of his purchase, could not extinguish the right of dower; and that the present tenant, if he had not direct notice of the widow's claim, had notice by a legal and equitable presumption, as his title depended on deeds, that naturally led to the inquiry. (2 Bl. Com. 132; Co. Litt. 32–3; 1 Fonbl. Eq. 22; 2 Ibid. 147, 159; 9 Mod. 37; 2 Atk. 83; 3 Bro. Ch. 264.

For the *defendant*, it was urged, that in Pennsylvania, there is no claim of dower in lands sold by legal process for the payment of debts; that dower is barred, even in the case of a mortgage for a debt, though the wife does not join in the deed (2 Dall. 127); (*a*) that the money recovered from Eddy

addressing the referees, by way of confidence or solicitation, pending the reference, though the letter should not contain any remarks on the merits of the controversy.

(*a*) *E. Tilghman*, on the trial, reported Lacock's case, referred to in 2 Dall. 127, to be a decision, "that dower was barred, where the husband alone mortgaged land; and his executors, under a power in the will, with the consent of the mortgagee, sold the and for the payment of debts."

has been applied to the payment of debts; that there is no difference, as to the claim of dower, between the case of a power by will, to sell for the payment of debts, and the case of the widow's consent to make such a sale; and that the widow's silence, on the subject of this claim, throughout the transaction, operates as a bar and estoppel, to her enforcing it, against a *bonâ fide* purchaser, for a valuable consideration, without notice. (1 P. Wms. 393; 1 Fonbl. Eq. 151; 18 Vin. Abr. 112; Finch 103; Prec. Chan. 35; 1 Eq. Abr. 355, 356, ca. 8, 10; 9 Mod. 37; 2 Vern. 370, 580; Cowp. 201.)

Yeates, Justice.—Mrs. Deshler is entitled to recover her dower in the premises, unless the peculiar circumstances of the case operate as a bar. The circumstances relied upon to produce that effect, are these: she made Neuhart her agent to buy the land at the sheriff's sale; and she approved of the purchase, after it was made. She also knew and approved of the resale to the defendant, at a full price, and uncharged with dower; and until the de-
*302] fendant had paid the price, she never set up the present *claim. The motives of Mrs. Deshler, in observing this silence, cannot be positively ascertained; but she might think that, if the land sold high, in consequence of appearing clear of every incumbrance, there would be the better prospect that her legacy of 1000*l.* would be paid. Upon the whole, the jury will decide, whether Mrs. Deshler's line of conduct held up to the public, and particularly to the parties, that she meant to waive the claim of dower. If it did, the verdict should be against her. If it did not, and the jury think, that she always meant to assert her right of dower; then the verdict must be in her favor.

Verdict for the defendant.

Commonwealth *v.* Lyon.

Certiorari.

A *certiorari* to remove an indictment from a court of quarter sessions to a circuit court will be granted, on an application by the defendant, supported by his affidavit in the usual form, unless something is shown in relation to his character or conduct, to induce the supposition, that public justice is likely to be impaired by the removal. Smith, J.

The defendant having made an affidavit in the usual form, applied to Smith, Justice, for the allowance of a *certiorari* to remove this indictment from the quarter sessions of Northumberland county, into the circuit court.

Cooper (acting for the attorney-general) stated the reasons which had induced him to decline consenting to the removal; and the following authorities were mentioned. The removal of an indictment, at the instance of the defendant, is discretionary with the court; but the discretion ought not to be exercised, without special cause. (2 Hawk. 407–8, § 27; 4 Burr. 2458.) The removal is not usually allowed in cases of perjury, forgery, &c., because such offences should be discouraged; and removals not only tend to delay justice, but to discountenance prosecutions. (Ibid. 408, § 28.) The act of assembly contemplates the same principle; for, if the attorney-general does not consent to the removal, writs of *certiorari* are only to be specially allowed, and certified in writing upon the writ, by the

supreme court, or one of its judges, upon sufficient cause shown. (3 Dall. Laws, 92.)

Smith, Justice.—It is not the practice to enter into an argument upon applications of this nature. The defendant has made the usual oath, as a ground for allowing the *certiorari ;* and I shall, of course, allow it, unless something is shown, in relation to his character and conduct, which will induce me to suppose, that public justice is likely to be impaired or defeated by the removal.

Cooper declaring that the defendant's character was good, independent of its implication in the present charge : the judge immediately signed the *allocatur.*

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*SEPTEMBER TERM, 1804. [*303

Commonwealth *v.* Matlack.

Defalcation.

In an action at the suit of the commonwealth, the defendant cannot have a certificate of a balance in his favor.[1]

The defendant had been clerk of the Senate ; and in that character received $900, as a fund to defray the contingent expenses of the house, during several sessions. The committee of accounts called upon him for a settlement ; but he declined exhibiting his vouchers, unless they would allow him a certain retrospective compensation, to which he contended that he was entitled, under an act passed on the 22d of April 1794. The senate thereupon directed the comptroller to institute the present suit. Upon the trial, the defendant proved, that he had expended considerably more money, than he had received, for the use of the house ; and he claimed a verdict for the amount of his advances, as well as for the additional compensation allowed by the act of 1794.

But after argument, The Court declared, that the defendant could not indirectly recover from the state, a substantive independent claim, by way of set-off, any more than he could directly recover a debt due from the state, by bringing a suit against her. That the present action was brought to compel an account for money received for the use of the senate ; in which the defendant, if he proved that the money received was so applied, would be entitled to a verdict ; but that even then, he could not be entitled to a verdict for the amount of his advances ; which the senate alone was competent to allow.

Verdict, generally, for the defendant.

McKean, attorney-general, for the commonwealth. *Dallas,* for the defendant.

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[1] Reeside *v.* Walker, 11 How. 272; United States *v.* Eckford, 6 Wall. 484.

*Rundle *v.* Murgatroyd's assignees.

Bankruptcy.

Under the bankrupt law of 1800, a mortgage given by an insolvent, to secure a legacy bequeathed to his wife, which he had received and used in his business, is void, as against the assignee, though executed in pursuance of a previous agreement to secure the legacy, in case of insolvency.

The point agitated upon the trial of this cause, turned on the validity of a mortgage given to the plaintiff by Murgatroyd, to secure to his wife, the amount of a legacy which had been bequeathed to her, by her grandmother. It appeared, that in the year 1784, Murgatroyd had entered into articles of agreement with trustees, by which he engaged to secure the legacy, in case he should become insolvent. He received the money, and mixed it with his other pecuniary funds; but took no steps to secure the amount for his wife, until the execution of the present mortgage, in March 1802, when he was insolvent, and was soon afterwards duly declared a bankrupt. The case was considered, as a case of marriage settlement, by the counsel on both sides.

In *support* of the settlement, the following authorities were cited: 6 T. R. 154; 2 Bos. & Pul. 582; 6 T. R. 80; 2 Atk. 558; 1 Ibid. 192; 1 P. Wms. 459; 2 Dall. 199.

In *opposition* to the settlement were cited: 1 Fonbl. 271, 272; 2 Atk. 480–1; 8 T. R. 82.

Shippen, Chief Justice.—The mortgage given by Murgatroyd is resisted on behalf of his creditors, upon the general ground, that it was given in contemplation of bankruptcy. There is but one exception to the rule, which declares a conveyance so given to be void; namely, where a creditor obtains a preference, by urging his debtor for payment, and threatening him with legal process. The only question, therefore, is a matter of fact, whether Murgatroyd, at the execution of the mortgage, contemplated bankruptcy, and meant voluntarily to prefer the particular creditor? If the evidence proves the affirmative, the mortgage is void; but if otherwise, it is lawful and valid.

It has been urged, in favor of the plaintiff's claim, that whatever may have been the situation of Murgatroyd, at the time of executing the mortgage, the act was done in pursuance of a previous agreement, entered into for a valuable consideration, when he was perfectly solvent. It would be grateful to our feelings, on the present occasion, could we express sentiments favorable to the maintenance and fortunes of a wife and children; but we cannot seek that gratification, through a sacrifice of the established principles of law. The agreement was executory; and although it had relation to a possible insolvency, it might, perhaps, independent of the bankrupt law, have been carried into effect. But no antecedent contract can make the mortgage valid, upon the provisions and principles of the bankrupt law, if Murgatroyd
*305] *actually gave it, when he was insolvent, upon the eve of a legal bankruptcy. The general creditors had then acquired an interest in his estate; and it was too late to perform an engagement for giving preferences and securities, at their expense, to any particular creditor.

The law respecting marriage settlements, is the same in England and in Pennsylvania. It requires a fair motive, as well as a valuable considera-

tion ; and the interest must be actually declared and vested, at the time of a settlement, or it cannot prevail against the rights of honest creditors.

The present case by no means resembles the case of *General Stewart's* settlement. There, Mr. McClenachan, on his daughter's marriage, delivered to General Stewart a large sum, in certificates of public debt, expressly stipulating, that those certificates should be held and appropriated to the use of Mrs. Stewart and the children of the marriage. General Stewart always kept the fund represented by the certificates, distinct from his own immediate funds ; and although he subscribed them, first to the new loan of Pennsylvania, and afterwards, to the general loan of the United States, constituting the funding system, it was traced, and ascertained that the real estate specified in the deed of settlement (which, it is true, was made long after the marriage) had been, in fact, purchased with the actual proceeds of the original certificates, delivered by Mr. McClenachan upon the marriage. But here, the bequest of the legacy was made without stipulation, or condition ; the money being received by Murgatroyd, was blended with his other property, so that a separate existence or application could never be traced ; and, under these circumstances, he acquired a credit, which would be false and delusive indeed, were the property now withdrawn, upon an obsolete and latent pretence, from the creditors who trusted to it.

Smith, Justice.—I am likewise of opinion, that the mortgage must yield to the superior legal and equitable claims of the general creditors. It is a sound and uniform rule, that settlements made upon a wife and children, by persons who have not a sufficient estate to pay all their debts, are void against creditors. The decision upon *General Stewart's* settlement was not a departure from the rule ; but simply a recognition of the marriage portion of Mrs. Stewart, transformed and ascertained in a new shape. The late, as well as the present chief justice and myself, delivered our opinions at large in that case ; and united in the result, for the reasons that have been suggested ; none of which can be assigned in favor of the present claim, under the mortgage.[1]

The jury, according to the charge, found a verdict for the defendant.(*a*)

Rawle and ——, for plaintiff ; *Ingersoll* and *Tilghman*, for defendant.

(*a*) The validity of General Stewart's settlement was tried in December term 1799, in an amicable ejectment brought by Blanchard's Lessee *v.* Ingersoll. The facts proved upon the the trial may be reduced to the following case:

*On the marriage of General Stewart with the daughter of Mr. McClenachan, [*306 in the year 1781, he received, in real and personal estate, a portion of 40,000*l.* Pennsylvania currency ; of which loan-office certificates, for money loaned by Mr. McClenachan in 1777, constituted about a moiety, bearing interest at six per cent. per annum. In delivering the certificates, Mr. McClenachan told General Stewart, "that he might use the interest, but that the principal of the certificates should be settled on

[1] So long as trust property can be traced and distinguished, it is liable to the claim of the *cestui que trust ;* but the right of reclamation is at an end, when the subject-matter has been converted into money, and mixed with other funds. Thompson's Appeal, 22 Penn. St. 16 ; s. p. Reed's Appeal, 34 Id. 207 ; Robb's Appeal, 41 Id. 45 ; Keener *v.* Cross, 65 Id. 303. See Kepler *v.* Kepler, 80 Id. 153. Equity will follow a trust fund through every transmutation, if the rights of a *bonâ fide* purchaser, without notice, do not intervene. Sadler's Appeal, 87 Penn. St. 154.

his wife and children, and appropriated sacredly to their exclusive use and benefit;" and General Stewart promised expressly to make the stipulated settlement and appropriation. Soon afterwards, General Stewart entered into partnership with Mr. A. Nesbit, and prosecuted an extensive scene of commerce, upon funds chiefly furnished by Mr. McClenachan. In the year 1785, General Stewart went to England, leaving the certificates in the hands of his partner (with whom they had been specifically deposited several years before), and taking a written receipt and promise, to return them to him, or to his order, on demand. While in England, he made a will, dated the 7th of October 1787, which bequeathed the certificates to his wife and children, but did not refer to any previous agreement or promise to do so. He returned to America in 1787, and soon afterwards, assigned the certificates in trust to Mr. McClenachan and his partner, for the use of his wife and children, by a deed dated the 9th of June 1788; which was also silent as to any previous agreement upon the subject; but referred to the will of 1787, or any other last will which he might make, for the apportionment of the fund. The certificates were subscribed to the new loan of Pennsylvania; but were re-exchanged, and finally subscribed to the loan of the United States. The public stock having risen to its full nominal value, General Stewart proposed to Mr. McClenachan (Mr. Nesbit being dead), to sell it, and vest the proceeds in houses and city lots, as offering a better speculation; to which Mr. McClenachan assented, upon the original principle, that the investment should be for the use and benefit of General Stewart's wife and children. The stock was, accordingly, sold and transferred, between June 1791 and April 1792; and the property in question was purchased, between March 1792 and February 1793, to the value of about $25,000. On the 20th of May 1793, General Stewart executed a deed, before two witnesses, conveying this property to Mr. McClenachan, and his son, George McClenachan, in trust; and after reciting the deed of trust of 1787, the subsequent sale of the certificates, the investment of the proceeds, and the intention that the real estate shall be held to the same uses as the certificates, according to the apportionment of the will of 1787, or such other last will, as General Stewart might make, it concluded with reserving a power of revocation, by consent of both parties, to sell the trust estate, and to invest the proceeds in other funds, but in the name of the same trustees, and for the same uses. The deed being executed, General Stewart delivered it to Mr. McClenachan, who deposited it for safe-keeping (as he resided in the country), with other valuable papers belonging to himself, in an iron chest, kept by General Stewart in his counting-house. General Stewart died on the 14th of June 1796, having, a few hours previously, made a will devising and bequeathing all his estate, real and personal, with a power to sell and convey, for the payment of his debts, and constituting Mrs. Stewart an executrix, and Messrs. McClenachan, W. Tilghman and F. West, executors, without referring to the deed of settlement, or any previous agreement upon the subject. In May 1793, and at the time of his death, he was generally supposed to be in affluent circumstances; but about four months after his death, a contrary suspicion arose, which subsequent events confirmed. In taking the inventory of his effects, the deed of settlement was found; but the executors regarded it as incomplete and invalid. While, too, the executors thought the estate rich, Mr. McClenahan himself requested that the deed should be laid aside; and he and Mrs. Stewart joined the other executors in selling and conveying part of the trust property, for the payment of debts, under the power given in the will of 1796. The failure of Morris & Nicholson's notes (in which General Stewart and Mr. McClenachan had speculated largely), and other disappointments, proved fatal to the estate; and it was even ascertained that, on a fair estimate, the general balance of General Stewart's account
*307] of property and debts was against him, at the time that he executed the deed of 1793: but on the other hand, he was clearly solvent *when he executed the deed of 1788. Under these circumstances, Mrs. Stewart consulted her counsel on the validity of the deed of 1793, representing all the previous facts (which had not been adverted to, while General Stewart's estate was thought solvent), and was advised to prove and record it. This was done, on the 27th of February 1797, before any judgment had been obtained against General Stewart; and the trustees having surrendered and assigned

the trust estate to Mr. Ingersoll, in June 1797, an amicable ejectment was instituted, for the purpose of settling the conflicting claims of the widow and the creditors.

The counsel for Mrs. Stewart (*W. Tilghman*, *Lewis*, *Ingersoll* and *Dallas*) contended, that marriage was in itself a valuable consideration, to entitle the wife to a provision even out of her husband's estate, independent of her own; that a voluntary settlement after marriage, by a husband, not indebted, is valid, with or without a consideration on the part of the wife, against all subsequent creditors; that an agreement for a settlement, made in writing, before and in contemplation of marriage, will always be carried into effect; that a parol promise of a settlement, made before and in contemplation of marriage, is equally valid in Pennsylvania, although the law upon the subject has been altered in England, by an act of parliament; and that even where there is no previous agreement between the parties, a court of equity will never grant a wife's personal property to her husband, until he has made an adequate settlement upon her. As to the facts of the present case, it was argued, 1st. That before the marriage, a contract was entered into between Mr. McClenachan and General Stewart, *bonâ fide*, and upon a valuable consideration. 2d. That the settlement now controverted, was made in pursuance of that contract, from the proceeds of the certificates, specifically traced, which constituted the original consideration. 3d. That the performance of the contract was enforced by the principles of moral and social obligation; and was in strict conformity to the direction which a court of equity or of law would give to the appropriation of the fund thus ascertained. 4th. That it was not essential to the validity of the deed, that it should be proved and recorded, except as against purchasers and judgment-creditors, whose rights and interests are not in question. The following authorities were classed and cited by the counsel for Mrs. Stewart: 1 Atk. 15; 2 Ves. 18; 2 Eq. Abr. 51 *h*; 3 Cro. Jac. 454; 1 Ves. jr., 196; 1 Dall. 193, 430; 1 Atk. 168; 2 Ibid. 519, 520; Ambl. 121; 2 Atk. 448; Ambl. 586; 1 Eq. Abr. 19; Bunb. 187; 2 P. Wms. 316; 1 Vent. 194; Cro. Jac. 158; Cowp. 432; 2 Vern. 167; Prec. Ch. 208; 1 Fonbl. 88; 2 Atk. 419, 420; 1 P. Wms. 382; Prec. Ch. 548; Ibid. 22; 1 Dall. 414; 2 P. Wms. 414; Ambl. 409.

The counsel for the general creditors (*E. Tilghman* and *Levy*) urged the great inconvenience and injustice of allowing a mere verbal conversation, of eighteen years' standing, to be the foundation of withdrawing from creditors, so great a mass of the debtor's apparent property. The inception of the alleged contract, is without writing, and without any witness, but the father, who was a party to it. It is admitted, however, that even a parol agreement, if fairly proved, and legally carried into effect, must prevail in Pennsylvania. But transactions, honest between the parties themselves, often become fraudulent in relation to others; and the purest executory bargains between individuals are liable to be defeated, upon general principles of public policy, unless they are executed with strict legal publicity and form. In the present instance, everything conspires to beget caution in the admission of the widow's claim. The trust deed of 1788, makes no allusion to a subsisting contract between General Stewart and Mr. McClenachan; nor does it make an apportionment of the fund among the widow and children. The subject of the trust was a paper medium, as negotiable by delivery as a bank-note; and shifting, as it did, from new loan to federal stock, from stock to money, on what rational ground (considering, particularly, that General Stewart held similar certificates and similar stock in his own right), can it be sustained, that the purchase of the real estate was made with the proceeds of the identical certificates delivered on the marriage? But the settlement being made of land, it is a voluntary settlement, within the principles and the provisions of the statutes; and it is not to be conceded, that a verbal agreement to settle certificates, constitutes a valuable consideration, *for the settlement of lands, by the ostensible owner, having become actually indebted. [*308
The deed is not only void, as it contains a clause of revocation, and cannot be regarded as a legal settlement; but it is fraudulent, as it remained in the possession and power of the grantor. In the course of this argument, the following authorities were cited: 2 Bulst.

Duncanson *v.* McLure.

Title to vessel.—Illegal contarct.

An agreement for the sale of a ship, at a future day, the purchase-money being secured, is an immediate transfer of the title.

Murgatroyd *v.* Crawford, 3 Dall. 491, overruled.

One whose title to a vessel depends on a contract in fraud of the registry laws of the United States, cannot maintain trover for the same.

This was an action of trover for the ship Mount Vernon, which the defendant had purchased, under a sentence of condemnation as prize, pronounced by the French Provisional Tribunal of Prizes, established in the city of St. Domingo. The material facts of the case were these :(*a*)

Mr. Duncanson, an English gentleman, came to the United States with a view to settle ; and in order to manifest his intention, took an oath of allegiance to the state of Pennsylvania, though he had not been long enough in the country to entitle himself to naturalization, under the act of congress. Contemplating a circuitous voyage from America to England, and thence to the East Indies, he applied to Messrs. Willings & Francis, to procure a ship for him ; and those gentlemen agreed absolutely with Mr. Thomas Murgatroyd, for the purchase of the ship Mount Vernon, owned by him ; the bill of sale being made out, and delivered to them, upon terms of payment precisely ascertained. It, then, however, occurred to Mr. Duncanson, that as he had not yet acquired the rights of American citizenship, he could not enjoy the advantages which he proposed to derive from his projected voyage. For the trade from England to the East Indies is, by the law of that kingdom, a monopoly ; no British subject can, individually, embark in it, without incurring a forfeiture of his vessel and cargo ; though it has recently been adjudged in England, that an American citizen is entitled to carry on the trade, by virtue of express stipulations in the treaty of amity
*309] and commerce between the United States *and Great Britain.(*b*) Hence, it was deemed necessary to enter upon another operation. The bill of sale was sent back, and a new contract was formed between the parties, upon these principles : that Mr. Murgatroyd should remain the

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226 ; 3 Co. 81 ; 1 Burr. 475 ; 2 Vern. 510 ; 1 Atk. 168 ; 2 Ibid 481 ; 1 Ibid. 15 ; 2 Ves. 10, 11 ; 2 Vern. 510 ; 3 Co. 82 *b.* ; 2 Freem. 236.

The Court (composed of McKean, Chief Justice, and Shippen and Smith, Justices) delivered their opinions, unanimously, in favor of the settlement ; and the jury found a verdict accordingly.

(*a*) This introductory statement of the facts is transcribed from the charge of the court, in the action brought upon a policy of insurance, on the Mount Vernon. 3 Dall 491. Upon more mature consideration, the opinion there delivered was overruled in the present cause, by the same court ; and was virtually condemned in the circuit court of the United States, where an action of replevin had been first instituted in the name of Murgatroyd *v.* McLure. See *post*, p. 342. The name of Mr. Duncanson was now used without his knowledge or consent, for the benefit, it was suggested, of the underwriters, who had paid a total loss, under the former decision, and Messrs. Willings & Francis, who were in advance for the outfits of the ship. It was objected, that the names of the real parties should appear on the record ; but the objection was not sustained by the court.

(*b*) See Wilson *v.* Maryatt, 8 T. R. 31.

owner of the ship, and as such retain the register and make the insurance ;(*a*) that she should, however, be delivered to Mr. Duncanson or his agents ; that Messrs. Willings & Francis should procure a freight for her on Mr. Duncanson's account ; that Mr. Murgatroyd should empower Mr. Skirrow (a gentleman who went as a passenger) to assign and transfer the ship to Mr. Duncanson, in England, on the 1st of September ensuing, at which time Mr. Duncanson would be duly naturalized as an American citizen ; and that the consideration-money should be secured by the notes of Messrs. Willings & Francis, payable, at all events, in certain instalments.

The Mount Vernon sailed from Philadelphia, on the 10th of June 1796, with the usual documents of an American vessel. As soon as she had cleared the capes of the Delaware, she was boarded and taken possession of by "the Flying Fish," a French privateer, and carried into the port of St. John, in the Spanish island of Porto Rico. While she remained there, the ship and cargo were libelled by the captors, in the Provisional Tribunal of Prizes, at the city of St. Domingo, in the island of St. Domingo ; a court establishes by the republic of France in that city, for the determination of questions of prize. And on the 30th of August 1796, after various proceedings, the following sentence was pronounced, by the court:

"Thirteenth Fructidor, Fourth year.

Condemnation of the English ship Mount Vernon.

Extract from the books of the office of the provisional tribunal respecting prizes, established in St. Domingo.

We, Francis Pons, judge of the provisional tribunal respecting prizes established in St. Domingo, having looked over our sentence of the seventh Thermidor last, where all the papers exhibited by citizen Nadal, captain of the privateer Flier, against the ship Mount Vernon, are duly noticed, through which we had submitted the decision of this prize to the civil commission of Guarico, which applies again to our tribunal for pronouncing sentence of this subject ; having noticed also instructions which were officially given us by the citizen agent of the French Republic in this city, issued by the civil commission aforesaid, in whose archives they have been duly recorded, *from which it appears, first, that the papers having [*310
been thrown into the sea by the captain, in sight of the privateer which captured him, secondly, that the captain and supercargo having precipitately abandoned their ship, in spite of the good treatment received by them from the French captain, and the hints he gave them about remaining there, in order to plead their own cause, and thereby avoid her confiscation, thirdly, the behavior of the captured crew, fourthly, the captain being a Portuguese, without a certificate of his naturalization, fifthly, that the United States, in the last treaty which they concluded with England, having suffered to be added to the articles which have been looked upon till at present as contraband of war, staves, tackles, sail-cloth, iron-hoops, and finally all which can be made use of for vessels,

(*a*) The premium of insurance, however, was paid by Mr. Duncanson ; the ship actually sailed on the voyage insured at his risk ; and the recovery against the underwriters (3 Dall. 491) was applied to the reimbursement of the purchase-money, paid by Messrs. Willings & Francis, on account of Mr. Duncanson.

are sufficient motives to condemn said ship; after a serious examination we have judged and do judge that the ship Mount Vernon, captain George Dominico, Portuguese, with her cargo, has been duly and justly captured by the French privateer, commanded by citizen Nadal, to whom we adjudge her as property belonging to him, and of which he may dispose under the clauses and conditions made with his officers and crew, he being accountable for the duties of invalids and the costs of the tribunal, which he shall pay to the bearer of our notary's order. Santo Domingo, Fructidor thirteenth (August thirtieth), fourth year of the French Republic, one and indivisible. Signed in the register, Pons, Judge, and Despujeaux, Notary-public.

(Signed) PONS, Judge.
Depujeaux, Notary."

Under this sentence of condemnation, the Mount Vernon and her cargo were delivered to the captors, by the Spanish governor of Porto Rico, with permission to sell them there. At the public sale, Rousseau, a naturalized American, purchased the ship; and afterwards sold her for $22,000 to McLure, the present defendant, an American citizen, who brought her to Philadelphia. A replevin was then issued for the ship, in the name of Murgatroyd, from the circuit court for the Pennsylvania district; but it appearing on the trial, that Murgatroyd had received payment of all the notes, which Messrs. Willings & Francis gave for the purchase-money, the court declared, that he had no property in the ship, to maintain a replevin; and directed a nonsuit. In consequence of that defeat, the present action of trover was brought in the name of Mr. Duncanson.(*a*)

The cause was argued, at great length, upon the following general points:(*b*)

*311] *1st. Whether the ship Mount Vernon, at the time of her sailing and capture, was the *bonâ fide* property of Murgatroyd, a citizen of the United States; or was only registered and held in his name, in trust for Duncanson, an alien.

2d. Whether the capture of the Mount Vernon was a lawful, or a piratical act; considering the commission of the privateer, and the circumstances of the capture.

(*a*) *Post*, p. 349.

(*b*) The trial of the cause first came on, in March term, 1804; but after all the evidence was heard, and part of the arguments of counsel, some of the jury stated to the court, that they felt themselves embarrassed from the declaration of three of their brethren, "that consistently with their religious principles, and conscientious scruples, they could not, under any circumstances of proof, or any course of reasoning, find a verdict in favor of the party, who claimed the ship, under a condemnation as prize of war." It was wished, on both sides, to reconcile the objecting jurors to the discharge of a public duty, in which their consciences ought to be governed by the law of the land, and not by personal considerations: but every effort being ineffectual for that purpose, the court observed, that they could not, on the one hand, exercise the oppression of coercing a juror to act in contradiction to his real religious and conscientious scruples; nor on the other would they expose the defendant to the consequences of a trial, in which he might lose, but could not possibly obtain a verdict. Lamenting that so much time had been consumed before notice of the objection, the court directed a juror to be withdrawn.

3d. Whether the French court, established at St. Domingo, was a competent tribunal, to decide, in this case, the question of prize or no prize; the city of St. Domingo then belonging to Spain, or not being surrendered to France; the ship lying in a Spanish port, at another island, belonging to Spain; and the United States being at peace both with France and Spain.

In relation to these points, the *plaintiff's* counsel contended:

1. That the property of the Mount Vernon continued in Murgatroyd, until the power was executed by Skirrow; or, at least, until the last of the instalments of the purchase-money was actually paid; that the execution of the power, being prevented by superior force, capture and detention, ought not to affect the original rights and interests of the parties; that the contract with Duncanson was merely executory (a species of contract recognized by the law), and until the specified event had actually occurred, to wit, an arrival in England, and a transfer by Skirrow, no property could vest; and that there was no fraud upon belligerent rights, no violation of neutral duties, in the formation or affirmance of such a contract. 2 How. on Contr. 79; 3 Dall. 491; Adm. Inst. 218; 2 Journ. Cong. 114; 3 Rob. 24, 31, 39; Treaty between the United States and France, 1778 (8 U. S. Stat. 6), art. 6, 15, 21, 23.

2. That the capture of the Mount Vernon was piratical; for it is piracy, not only when a man robs without any commission at all, but when, having a commission, he despoils those whom he is not warranted to fight, or meddle with; such as are in alliance *or friendship with that state which has [*312 given him his commission. (2 Woodes. 422.) That at the time of the capture, the United States and France were in alliance and friendship; and therefore, it was piracy, even in a French commissioned vessel to seize, spoliate and sequester American property. And that, whenever the piratical taking is succinctly ascertained, it becomes a clear and indisputable consequence, that there is no transmutation of property; no right to the spoil vests in the piratical captors; no right is derivable from them to any recaptors, in prejudice of the original owners. (Ibid. 429–9.)

3. That capture, without condemnation, does not work a change of property. (2 Burr. 693; 2 Dall. 5.) That a condemnation, to be lawful, must be pronounced by a court of the captor, in the country of the captor, or of a co-belligerent. (1 Rob. 114; Sir Wm. Scott and Mr. Nicholl's letter to Mr. Jay.) That neither the island of Porto Rico, to which the ship was carried, nor the city of St. Domingo, where the condemnation was pronounced, belong to the country or jurisdiction of the captor; nor were France and Spain allies in the war, at the time of the capture. (5 vol. Debr. Col. Stat. Pap. 18–21.) That foreign judgments may be inquired into, wherever the court pronouncing them has not jurisdiction of the subject, on principles of the law of nations, as well as on principles of the common law. (2 Str. 1078; Doug. 1; Park 353 (4 edit.); 1 Rob. 114; 3 Dall. 15; 2 Rob. 174; 3 Ibid. 53; 3 Ibid. 82; Doug. 555; Park 363; 7 T. R. 523; 2 Show. 232; 1 Emerig. 232, 438.

In relation to the general points of the cause, the *defendant's* counsel contended:

1. That the case exhibits a manifest violation of the registering act; and

militates against the duty of a neutral character, by masking the real property of a belligerent alien. That the act of congress not only prohibits all open avowed ownership of an alien, in a registered vessel of the United States; but every species of secret or latent ownership in the ship, and her issues and profits, "by way of trust, confidence or otherwise." (1 U. S. Stat. 287, § 1, 2, 4, 7, 16; Ibid. 56, § 6.) That an ownership in trust, could never be more strongly characterized; for the ship was bought for him, and the price was paid by him, through his agents; she was insured at his charge; she sailed at his risk; and an agent named by him was possessed of an absolute power to transfer her to him. That the contract was not executory, in the sense contended for; as the intention was to pass an immediate right of property, an absolute usufructuary enjoyment, keeping back the formal title only, for a specific unlawful purpose; as there was no covenant to convey, depending on any event, but an absolute power and mandate to transfer; as there was no mutuality, the price being payable, at all events, *and Murgatroyd was never again capable of sharing in the profit or loss of the ship. That the property was so changed, at the time of sailing, that the ship would have been liable, as Duncanson's, to execution and attachment, and to the statutory assignment of the insolvent or the bankrupt law. That if such a mask could secure impunity, in violating the registering act, aliens, and particularly belligerent aliens, would soon be the owners of a great portion of the American tonnage. *Maybin* v. *Coulon* (*ante*, p. 298), 5 T. R. 112; 3 Dall. 495; 3 Rob. 243, note *a*; 4 Ibid. 91, 93, 95. That, indeed, in every aspect of the cause, an American common-law court ought not to interpose; not, if it is a breach of our navigation laws; not, if it is a cover of belligerent property; not, if Duncanson is an Englishman; and not, if it is a question of prize, which is exclusively of admiralty cognisance. 2 Rob. 111, 114; Wesk. 359; 1 Mag. 437; 3 Rob. 269; 2 Dall. 165; 4 T. R. 382; 3 Dall. 6; 3 Ibid. 25, 32; 7 T. R. 696; 8 Ibid. 444; Park 71; 2 Dall. 4; 2 Burr. 693–4; 2 Dall. 270.

*313]

2. That the capturing privateer had a lawful commission from the French republic; captured the Mount Vernon as prize, on the high seas; and sent her for adjudication to a court, established by the nation of the captor. Such a capture may be tortious, but it can never be piratical. In the present instance, however, the appearances, at the time, and the result of subsequent investigation, must equally justify the proceeding: for it is now notorious, that the Mount Vernon was an English owned ship, going to a belligerent port, and with false papers, describing a false destination. If, then, Duncanson was the owner of the ship, and was an enemy of France, who had not acquired the rights of neutral domicil, the capture was lawful; and the courts of this country could not interfere, before condemnation; nor, *à fortiori*, can they interfere, after condemnation and sale. (Vatt. lib. 3, c. 14, § 208, p. 583.)

3. That the city of St. Domingo was either to be considered as belonging to France, under the cession of the treaty between her and Spain; or as the country of Spain, an ally of France, on the eve of engaging in the war against Great Britain. (Treaty of 22d July 1795, art. 9.) That the French constitution had regarded the cession as complete, and the legislature of France had actually divided the Spanish side of St. Domingo into departments. (Const. art. 3.) That Great Britain, in her manifesto, had also

considered the cession from Spain to France as absolute. (New Annual Reg. p. 121, 1796.) That a recurrence to dates will satisfactorily show the relative situation of France, Spain and England, on the co-operation of the two former in hostilities against the last. Thus, the Mount Vernon was taken on the 9th of June, carried into Porto Rico on the 4th of July, condemned at St. Domingo on the 30th of August, sold on the 26th of October *1796, and kept under embargo until the 27th of May 1797. A treaty [*314
of alliance between France and Spain was signed on the 19th of August, and ratified on the 6th of September 1796, in which a joint war with England is contemplated; and accordingly, on the 5th of October 1796, Spain published a declaration of war. Thus, when the Mount Vernon was captured and condemned, France and Spain were in alliance, with a view to a war against England; and the joint war was actually declared and waged, while the ship remained within the territory and power of the allies. That, independently of the question of alliance and hostility, neither the place of condemnation, nor the place where the ship lay, can avail the plaintiff, if Spain permits and England does not complain. That the institution of courts for prize causes, in countries not belonging to the captors, nay, in neutral countries, has been practised, as well as recognised by England; and has been practised as well as recognised by America. 2 East 473; 2 Rob. 174; 4 Ibid. 34–5, 44; Carth. 474; 2 Danv. Abr. 269, pl. 8; 2 Brownl. 11, 29; Godb. 386; Park 353; 5 vol. Journ. Cong. 440 (30th Nov. 1779), Cochin. 708.

The Court delivered a long and elaborate charge to the jury, on the two principal points in the cause. 1st. They expressed considerable doubt, whether the condemnation of the Mount Vernon was pronounced by a competent court; inasmuch as the ship was not within the jurisdiction of the country of the captors; as the evidence did not satisfactorily prove, that France had taken possession of St. Domingo, in pursuance of the treaty of cession; and as Spain and France did not appear to be actually allies in the war, at the time of the capture and condemnation.(*a*) 2d. But they were clearly and decidedly of opinion, that the charge delivered in the case of *Murgatroyd* v. *Crawford* (3 Dall. 491), was erroneous and untenable. Acknowledging and retracting, therefore, with candor, the error which they had then committed, they declared, that the verdict must be in favor of the defendant; inasmuch as the plaintiff's claim to the ship was founded upon a transaction, in fraud of the positive laws and public policy of the United States, which exclude an alien from any degree of interest in an American registered vessel, by way of trust, confidence or otherwise.

Notwithstanding the explicit decision and direction of the court, one of the jurors refused, during four days, to concur in a general verdict for the defendant; declaring, in open court, "that although he stood alone, he would only lay down his opinion with his life: for he never could consent to cast the property of the ship upon the defendant, through the medium of such a

(*a*) In Baring *v.* Clagett, 3 Bos. & Pul. 201, which was an action on a policy of insurance, on this ship, warranted American, it was held, that the sentence of the French court, at St. Domingo, was conclusive evidence that the ship was not American.

capture and condemnation." At length, the form of a special verdict was submitted to the jury, by each side; and the jury adopted and returned the form prepared by the defendant's counsel.

*315] *When the special verdict was brought before the court, for argument, at December term 1804, the defendant moved for a new trial, on the ground, that although the facts were sufficiently found, for a judgment, on the point of a breach of the acts of congress; they were not sufficiently found, to enable this court, or the high court of errors and appeals, to decide upon the objections to the condemnation, because St. Domingo was Spanish territory, within which a French prize court was not competent to act; and because the ship was not within the jurisdiction of St. Domingo, but at Porto Rico, when she was condemned. Besides, in an action of trover, the jury are bound to give the actual value of the property, if they find for the plaintiff; and in this case, they have given only prime cost of $22,000 on the sale to the defendant; whereas, the value, according to the only evidence before the jury, was $40,000.

After repeated arguments, THE COURT determined that the facts were not sufficiently found, on the whole case; and although they adhered to their opinion, as delivered in the charge, in justice to the plaintiff, who had a right to a writ of error, as well as in consideration of the importance of the decision, it became necessary and proper to award—

A new trial. (*a*)

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*316] *DECEMBER TERM, 1804.

COMMONWEALTH *v.* FRANKLIN *et al.*

Certiorari.

A *certiorari* issued to remove an indictment from a court of quarter sessions of &c., to the circuit court, was directed to the judges of the court of common pleas of &c., and returned by the associate judges of that court: *Held,* that the direction and return of the writ were fatally irregular.

THE general question, upon the constitutionality of the intrusion act (3 Dall. Laws, 703), having been decided at the last term, in the affirmative, this case came again before the court, upon the remaining exceptions in arrest of judgment, as they are stated *ante*, p. 257; but the counsel for the defendants abandoned the third and fourth, and the argument and decision turned entirely upon the sixth and seventh exceptions.

For the *defendants.*—If the cause was never pending in the circuit court,

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(*a*) YEATES, Justice, thought that enough was found, upon the special verdict, to give judgment for the defendant, on the paramount and controlling question of a violation of the acts of congress. He was, therefore, opposed to a new trial, though the facts on the other questions were, he admitted, defectively found, and though he did not approve of the estimate of the damages, for which no evidence had been adduced at the trial. SMITH and BRACKENRIDGE, Justices, however, pronounced the decision of the court.

as the sixth and seventh exceptions allege, all the proceedings there, are, of course, *coram non judice;* and the judgment must be arrested. These exceptions will, therefore, be first considered. Then, 1st. The *certiorari* is directed to a wrong court. 2d. It is returned by unauthorized judges. 3d. It does not describe and identify the indictment, which is annexed to the return.

1. The courts of quarter sessions, and of common pleas, are courts of distinct and independent jurisdiction; though the same judges officiate in both courts. Each has its own seal, its own record and its own clerk; and the subjects of their cognisance are essentially different; the one relating to criminal prosecutions; and the other to civil suits. Const. Art. V., § 1, 7; 4 T. R. 499; 1 Bac. Abr. 572, 573; 2 Hawk. P. C. c. 27, § 80, 81, 72.

2. The return is made by the associate judges of the common pleas, to the judges of the supreme court, and not to the judges of the supreme court sitting as a circuit court. And *the authorities already cited, show that a writ wrongly directed, or wrongly returned, will remove [*317 nothing.

3. The indictment consists of two distinct counts, containing two distinct charges, of two distinct offences. Three of the defendants only are implicated in the charge of the first count: and yet the *certiorari* directs the removal of an indictment against the four defendants, for both offences. This is not such an indictment, and therefore, the proper record has never been removed. 2 Ld. Raym. 1199; 1 Ibid. 609; 2 Hawk. c. 27, § 82; 2 Ld. Raym. 1803.

For the *Commonwealth.*—The *præcipe* for the removal of the indictment was written by the counsel of the defendant; the *certiorari* was worded conformable to the *præcipe;* the writ was specially allowed, and issued at the instance of the defendants: and yet the defendants endeavor now to defeat the jurisdiction of the circuit court, by the irregularity of their own process. It is a general rule in civil cases, that no man shall take advantage of his own wrong. In criminal cases, too, it is a rule, that errors in form shall be taken advantage of, as soon as is reasonable after they occur, or a waiver of the advantage shall be inferred; and an indictment may be removed, without *certiorari*, by delivery of the justices, *per manu propria.* Here, the defendants appeared *gratis*, and never objected to the imputed errors, for a year after their trial. Hawk. B. 2, c. 27, § 102; 2 Str. 843; 2 Hale 213; 2 Ld. Raym. 1518–9.

But independent of this general course of reasoning and authority, the *certiorari* is well directed and returned. The true designation and official style of the judges must be "Judges of the Court of Common Pleas;" for their commissions are only in that character; and "Judges of the Court of Quarter Sessions," is a style of office unknown to the constitution and laws. The *certiorari* is directed "to the judges of the court of common pleas for Luzerne county, and every of them, to remove the indictment depending before them, or some of them." Now, the indictment must have been depending before them, or some of them, sitting as a court of quarter sessions. The only use of a description is, to ascertain the person required to do an act; and here the description does ascertain the persons, who composed the court of quarter sessions; who are, therefore, the persons before

whom the indictment was found; who ought to transmit the record to the superior court; and who have sufficiently done so, by returning it to the judges of the supreme court, those judges being the constituent members of the circuit court, sitting in the county of Luzerne.

Nor is the objection to the description of the indictment more valid than the objection to the description of the judges. The *certiorari* does not, in *318] fact, call for the removal of an indictment against *four persons for two offences; but it issued "to remove an indictment for combining and conspiring for the purpose of conveying, possessing and settling on lands, &c. And also for combining and conspiring for the purpose of laying out townships, &c., wherein the commonwealth is plaintiff, and John Franklin, Elisha Satterlee, John Jenkins and Joseph Biles are defendants:" that is to say, an indictment wherein the commonwealth is plaintiff, and those four persons are defendants, although it may contain a count, in which three only are charged; and an indictment which does, indeed, charge two offences to have been committed, though three of the defendants committed the first, and all of them committed the second. Even, however, suppose, that the *certiorari* had described an indictment against four persons, when only three were, in fact, indicted; yet, the record being transmitted, and the three persons indicted actually appearing, and being tried, there can be no injustice or irregularity in the proceeding. 4 Vin. Abr. 337, B. 2, pl. 2; 1 Roll. Abr. 395; 4 Vin. Abr. 338, pl. 6, in note; Ibid. pl. 7; 2 Hale H. P. C. 214; 4 T. R. 499.

Shippen, Chief Justice.—The objection to the direction of the *certiorari* is fatal. The power and cognisance of the judges of the court of common pleas do not extend to criminal cases. Those judges are, indeed, *ex officio*, members of another court, which possesses a criminal jurisdiction; but when sitting there, they are judges of the court of quarter sessions, not of the common pleas.

I am also inclined to think, that a *certiorari*, calling for the removal of an indictment against four, generally, will not remove an indictment, which charges only three persons, in one of its counts. It is true, that the circuit court may obtain the removal and cognisance of an indictment, as well upon the delivery of the record, by one of the judges of the court of quarter sessions, *per propria manu*, as upon the return to a *certiorari*. The present case, however, rests upon the authority of the writ; and though it is not without doubt, I am disposed to hold, that not only the direction and the return are irregular; but that the body of the writ is defective, in the description of the indictment to be removed.

Yeates, Justice.—The authorities cited for the commonwealth are in point, to show that the *certiorari* for the removal of an indictment against four, is sufficiently descriptive, to remove an indictment against three only, under such circumstances, as appear upon the present occasion. My only difficulty, therefore, arises from the direction and the return of the writ; which, on a question of jurisdiction, in a criminal case, must, I think, be deemed fatally irregular.

*319] *Smith, Justice.—I have hitherto declined taking any part in judicial proceedings against the defendants; because, I am personally in-

terested in the lands, on which, it is charged, they have unlawfully intruded. But as my opinion is favorable to them, on the present point, I will not abstain from delivering it.

The last objection is fatal, I think, to the proceedings. The direction of the *certiorari* was to the judges of a wrong court; and the return of the writ is, also, made by the judges of a wrong court. The judges of the court of common pleas never had cognisance of the indictment; nor could they have any power over the record of the court of quarter sessions, to transmit it to the circuit court. The trial was, therefore, *coram non judice.* Judge Brackenridge and myself determined the same point, the same way, in Centre county, upon the removal of an indictment by the commonwealth.

Brackenridge, Justice.—Having already decided the leading question, in the case referred to by Judge Smith, it is only necessary to add, that I have heard nothing, upon the present occasion, to induce me to change my opinion.

Judgment arrested.

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*MARCH TERM, 1805. [*320

Welsh *v.* Murray. (*a*)

Relation of judgment.

As between creditors, judgments do not relate to the preceding term, but they take priority according to the times of their entry.

Case stated for the opinion of the court. On the 1st of August 1804, judgment was entered, by confession, at the suit of *Ewing* v. *Murray*, in the common pleas of Philadelphia county; in which the declaration was entitled of June term preceding. On the 3d of August 1804, judgment was entered, by confession, in the supreme court, against the same defendant, at the suit of Welsh, the present plaintiff; and the declaration was entitled as of March term preceding.

The question submitted was, which judgment was entitled to a priority of payment, from the proceeds of the sale of the defendant's real estate?

Wallace, on behalf of Welsh, the present plaintiff, contended, that the supreme court judgment, though, in fact, last entered, had a legal relation to March term; and must be preferred to the common pleas judgment, which related only to June term. He cited authorities to show the relation at common law: 14 Vin. Abr. 616; 12 Mod. 519; 3 Bl. Com. 420; 6 Mod. 191; Yelv. 35; 3 Burr. 1596; 1 Wils. 39; 2 Saund. 9. And he argued, that neither the English statute of frauds, nor the Pennsylvania act of assembly, affected the legal relation of a judgment, except only in the case of *bonâ fide* purchasers; not in the case of conflicting judgments. 3 P. Wms. 398; Salk. 401; 7 Mod. 39; Salk. 87; 2 Ld. Raym. 776; Str. 882; 7 Mod. 93; Str. 1081; 6 Mod. 191; Barnes 266–8, 270; Willes 427; Cro. Car. 102;

(*a*) s. c. 4 Yeates 198; where the case is more fully reported.

1 T. R. 116; 7 Ibid. 20; 1 Saund. 219; 1 Dall. 450; 2 Burr. 950, 967; 1 Bl. Com. 69.

*321] *Rawle*, in support of the common pleas judgment, remarked, that his opponent was not content to enjoy an equality, but insisted upon a preference; and therefore, there was no equity in his favor. He then contended, that there was an essential difference between the law of England, and the law of Pennsylvania, on the subject; that, although the question would often arise here, as lands were subject to execution and sale, it would seldom arise there; that the practice had uniformly been to pay judgments, out of the sale of real estates, according to the actual date of entering them;(*a*) and that the point had already been adjudged in *Hooton* v. *Will*, 1 Dall. 187, 450.

By the Court.—We are clearly of opinion, that the judgment first entered, is entitled to be first paid. The plaintiff in the common pleas must, therefore, enjoy his preference.(*b*)

(*a*) The following certificates were founded on the fact of practice:

"I certify, that while I held the office of sheriff for the city and county of Philadelphia, I uniformly settled the payment of judgments, in the case of sales of real estates, according to the actual dates of those judgments certified by the respective prothonotaries, without reference to the terms of which the said judgments were entered. Philadelphia, December 18th, 1804. James Ash."

"I certify, that the above was also my practice, while I held the office of sheriff. Israel Israel."

"I certify, that the above was also my practice, while I held the office of sheriff. John Baker."

(*b*) A question of priority of judgments also arose in the common pleas of Philadelphia county, at June term 1806, in the case of Emerick *v.* Garwood.[1]

It was on a case stated between two creditors of the defendant, each of whom had entered judgment, by virtue of a bond and warrant, on the same day, at the distance of a few hours. It was held by the Court (Rush, President), that there should be no precedence between the judgments; but that the proceeds of the sales which arose from real estate, should be divided.

The reason chiefly assigned by the President, was the inconvenience of a contrary rule, there being several courts, in which judgment might be entered on the same day; and the authority on which he chiefly relied was Lord Porchester's case, as stated by Buller, in 1 T. R. 118.

Milnor, for the second creditor. *Rawle*, contrà.

[1] s. c. 1 Bro. 20; s. p. Steele *v.* Taggert, Id. 20 n.; Mitzler *v.* Kilgore, 3 P. & W. 245.

DUPONT *v.* PICHON.

Privilege of foreign minister.

A *charge d'affaires* is entitled to privilege from arrest, until his return home, although he has been for some months superseded by a minister plenipotentiary; the detention of the former being occasioned by his official business: the court will discharge him from arrest, without requiring proof from the department of state, of his reception in his diplomatic character, by president.

THE plaintiff had issued a *capias* against the defendant, in an action upon the case, &c., and a citation was served upon him, in the following terms:

* "SIR.—You are hereby cited to show your cause of action, and why the defendant, claiming privilege as *charge d'affaires* of the French republic, should not be discharged from the process issued against him, at the city-hall, in the city of Philadelphia, at 10 o'clock, to-morrow forenoon. [*322

Philadelphia, 1st of March 1805. EDWARD SHIPPEN."

The citation was returned to the judges of the supreme court, then holding a court of *Nisi Prius*;(*a*) and after argument by *Du Ponceau* and *Dallas*, for the defendant; and by *Ingersoll* and *Wallace*, for the plaintiff, the following order was made by the judges, who did not think, that individually, or sitting at *nisi prius*, they could quash the process:

"It is ordered, that the defendant be discharged on common bail; and that at the next supreme court, in bank, on the 4th day of this instant March, it may be considered by that court, whether the defendant should, or should not, be discharged from the process issued against him; or whether he should be held to bail, and the present order be discharged."

At the opening of the court, on the first day of the term (all the judges being present), *Du Ponceau* and *Dallas* moved, that the defendant be discharged absolutely from the process. They produced Mr. Pichon's credentials, by which it appeared, that he had not only been appointed commissary-general of commercial relations, but also *charge d'affaires* of the French republic; his continuance in the latter character, however, being limited, until a minister plenipotentiary should arrive in the United States from France. It appeared by Mr. Pichon's deposition, that the minister, General Toureau, had arrived in the United States, about the 12th of November 1804; that in compliance with Mr. Pichon's instructions from his government, he had been anxiously making all the necessary arrangements for his return to France with his family; that his detention in the United States, since the arrival of General Toureau, had solely and exclusively been owing to the business of closing his official transactions as *charge d'affaires*, and to the delay in receiving his public papers and documents, which were shipped in a vessel from Alexandria for Philadelphia, but were carried into New York, in consequence of the obstructed navigation of the Delaware: and to the impracticability of obtaining a passage for Europe, at the port of Philadelphia, for a considerable time past; that Mr. Pichon had never, in the

(*a*) SHIPPEN, Chief Justice, and SMITH and BRACKENRIDGE, Justices, composed the court.

slightest degree, abandoned or suspended his intention of returning to France; *323] but on the contrary, was determined to go thither, with all possible dispatch, as soon as the obstacles, which *he had stated, should be removed, and the condition of his family would permit. It was further stated in the deposition, that, during the time of Mr. Pichon's executing the functions of *charge d'affaires*, and before the arrival of General Toureau, it became his official duty to superintend and direct the equipment and supply of certain French frigates, lying in the harbor of New York; that he employed the plaintiff in that business, to make the necessary advances of money; and for his reimbursement gave him certain bills of exchange on France, drawn, however, on his private bankers; that the plaintiff well knew that Mr. Pichon acted in the premises, merely as public agent of the French republic, and is not indebted to the plaintiff on his private account; nor in any other manner, than as the drawer of the bills of exchange, which were delivered to the plaintiff, by the French consul at New York; and the fate of which Mr. Pichon had not definitively heard. (*a*)

Upon these facts, it was urged, that although no privilege was claimed for Mr. Pichon, as consul, he was entitled to privilege, as *charge d'affaires, eundo, morando et redeundo.* (1 U. S. Stat. 117–18, § 25–7; Vatt. lib. 4, c. 6, § 74–5, p. 675–6; Ib. c. 7, § 83, p. 682; Ib. c. 9, § 125, p. 726; Ib. c. 8, § 111, p. 713; Mart. 206.) That he was not bound to produce any testimonials of his diplomatic character, the notoriety of his reception by the President, being all that the nature of the case or uniform usage required; that a day's delay, in recognising the privilege of a public minister, to obtain certificates from our own government, must either compel him to give bail, or to submit to actual imprisonment; and that the precedent established on this occasion would attract the serious attention of every foreign minister and government. It, therefore, became highly important to claim and obtain the discharge, on the single ground of diplomatic privilege, without adverting to the official origin of the debt, for which the suit was instituted; and for which Mr. Pichon ought never to be deemed personally responsible. (*b*)

Ingersoll, *Wallace* and *Binney* disputed the extent of the privilege; and the sufficiency of the excuse for Mr. Pichon's protracted residence in the United States, after General Toureau's arrival. They insisted, that the appointment as *charge de affaires* was limited in its own terms; that his arrival and continuance in the United States were, principally, on account of *324] his consular commission; *and that, at least, proof should be produced from the secretary of state, of his reception as a minister, before he was discharged from the *capias*, upon the claim of privilege.

The Court were decidedly of opinion, that Mr. Pichon would be entitled to privilege as *charge de affaires*, until his return to France; but

(*a*) After Mr. Pichon was discharged from the process in this suit, the plaintiff issued another *capias* from the circuit court of the United States; but before the writ was served, information arrived, that the bills drawn in favor of the plaintiff had been paid by the French government; and the proceedings were suspended, after notice of a motion to quash the writ on the ground of privilege.

(*b*) See Jones *v.* Le Tombe, 3 Dall. 384.

Chief Justice SHIPPEN seemed inclined to wait for information, from the department of state, as to his actual reception by the President in that character. On its being intimated, however, that the attorney of the district had become responsible to the sheriff for Mr. Pichon's appearance, only until the sense of the court could be obtained; and that Mr. Pichon must now, probably, submit to imprisonment under the *capias*, the judges concurred in discharging him absolutely from the process.

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CIRCUIT COURT OF THE UNITED STATES

FOR THE

PENNSYLVANIA DISTRICT.

APRIL TERM, 1796.

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

SEARIGHT *v.* CALBRAITH *et al.* CALBRAITH *et al. v.* SEARIGHT.

Tender.—Foreign laws.

A tender is necessary, though the creditor require payment, exclusively, in a certain species of coin.

The contracts of American citizens are affected by foreign laws, in two cases only: 1. When they reside and trade in a foreign country: 2. Where the contract, plainly referring to a foreign country for its execution, adopts and recognises the *lex loci*. IREDELL, J.

SEARIGHT agreed, in February 1792, to sell to Calbraith & Co., a bill of exchange for 150,000 *livres tournois*, drawn upon Bourdieu, Chollet & Bourdieu, of London, payable in Paris, six months after sight; for which Calbraith & Co. agreed to pay at the rate of seventeen pence the *livre* (making in the whole, 10,625*l*. Pennsylvania currency), in their own notes, dated the 1st of May, and payable the 1st of July 1792. The bill was, accordingly, drawn and delivered to Calbraith & Co., who indorsed it to George Barclay & Co., of London, by whom it was presented for acceptance; and on the 27th of March 1792, Bourdieu, Chollet & Bourdieu accepted the bill, "payable at the domicil of Messrs. Cottin, Jonge & Girardot, at Paris." George Barclay & Co. afterwards indorsed and forwarded the bill to G. Olivier, who, on the 6th of October 1792, presented it for payment to Messrs. Cottin, Jonge & Girardot; and those gentlemen tendered payment in *assignats*, which, by the then existing laws of France, were made a lawful tender, in payment of debts. Mr. Olivier refused to receive the *assignats*, by order of George Barclay & Co., declaring, at the same time, that he would receive no other money than French crowns; and thereupon, each party protested against the act of the other. The bill being returned, under protest for non-payment, Searight, on the one hand, instituted a suit to recover the sum which Calbraith & Co. had originally stipulated to pay; and on the other

hand, Calbraith & Co. *instituted a suit to recover damages for the protest of the bill. And these suits were agreed to be tried together, by the same jury.

On the trial of the cause, evidence was produced, on both sides, to ascertain and fix the precise terms of the original contract for the sale and purchase of the bill of exchange; particularly, as to the stipulation of a rate for estimating the *livre;* as to the purchase being made for cash, or on credit; and as to the knowledge and view of the parties, relative to the existence of *assignats*, or the law of France making them a legal tender in payment of debts. And the great question of fact for decision, was, whether the parties contracted for a payment in gold and silver; or tacitly left the medium of payment to the laws of France, where the bill was payable? The law arising from the fact, was discussed at large, according to the different positions of the parties in interest.

For *Searight*, it was shown, by the decrees of the French government, that *assignats* were established as a circulating medium for the payment of debts, before and at the time of the contract for the bill of exchange (Decree of 16th and 17th April 1790, § 3; King's Proclamation of 19th April 1790); and this fact being known, it was contended, that the purchase of a bill, payable in France, must in itself import an agreement to receive in satisfaction, the lawful current medium of that country, unless the contract expressly provides against it, which, on the present occasion, was controverted and denied. In support and illustration of the general position, and its incidents, the following authorities were cited. 2 Burr. 1078–9, 1083; Davies 26–8; Dyer 82–3; 4 Com. Dig. 556, B. 7–8; 2 P. Wms. 88–9; 1 Ibid. 696; Prec. Ch. 128; 2 Vern. 395; 2 Atk. 382, 465; Skin. 272; 4 Com. Dig. 256, B. 8; 4 Vin. Abr. 258, O. 13; Holt 465; Davies 24; 10 Mod. 37; 2 Bro. Chan.; 1 Smith's Wealth of Nations, 41; 1 Dall. 257; 1 Bro. Ch. 376; Esp. N. P. 48, 26; 3 Wils. 211; Esp. N. P. 140–1; Doug. 628; 3 T. R. 683, 554; 3 Bl. Com. 435; Salk. 130, 126; 12 Mod. 192; Kyd 63.

For *Calbraith & Co.*, it was contended, that an express contract had been proved, to pay the bill in specie; that the very terms of the bill import the same understanding of the parties; that however binding the law of France may be on cases between French citizens, or between American and French citizens, it did not affect contracts between Americans; that, in legal contemplation, there had been neither a payment, nor a tender of payment; and that Searight had sustained no damage, nor shown any right to recover. 1 Pow. on Contr. 8; 2 Ibid. 158; Cun. B. of Ex. 258; Skin. 272; 3 Watson's Philip III., 136; 1 Ld. Raym. 735; *1 Lev. 111; *327] Esp. N. P. 169; Bull. N. P. 156; 6 Mod. 305; 3 Burr. 1353; 3 Black. Com. 435, 466; 6 Mod. 306; Davies 75–6.

IREDELL, Justice.—The contract for the purchase of the bill of exchange is sufficiently proved, as it is laid in the declaration, by the entry made, at the time, in the books of Calbraith & Co. The sole question, therefore, in the cause is, whether the tender of *assignats*, in payment of the bill, was a compliance with that contract? The notarial protest not only states the tender, but certifies that *assignats* where lawful money of France in pay-

ment of debts. A notary should, indeed, certify all the facts that occur, in relation to the protest (not merely the refusal to pay, according to the demand), but it is doubtful, whether his assertion would be conclusive, as to the lawfulness of the money tendered. Connected, however, with other evidence, it is proper for the consideration of the jury.

It has been objected, that as Olivier's demand was, exclusively, for a payment in French crowns, no proof of a tender in any other mode, is necessary; but I do not concur in this opinion. After such a demand, it was, perhaps, unnecessary for the party to exhibit the *assignats* to Olivier; but the form of the demand, on one side, cannot dispense with the obligation, on the other side, to make a tender of payment, agreeable to his own sense of the law and the contract. The jury must, therefore, be satisfied, that although the money was not produced and counted, it was actually in the possession of the party making the tender.

On the principal question, I thought, at first, that the risk, as to the mode of payment, must be run by the holder of the bill; but the case in Skinner 272, sanctioned by the high authority of HOLT'S name, transcribed, without remark, into Comyn's excellent digest, and uncontradicted by any other adjudication, must be respected in every court of law, and completely effaces the first impressions of my mind. Upon examination, too, the doctrine of that book appears to be founded in just and legal principles. Every man is bound to know the laws of his own country; but no man is bound to know the laws of foreign countries. In two cases, indeed (and I believe, only in two cases), can foreign laws affect the contracts of American citizens: 1st. Where they reside or trade in a foreign country; and 2d. Where the contracts, plainly referring to a foreign country for their execution, adopt and recognise the *lex loci*. (*a*) The present controversy, therefore, turns upon the fact, whether the parties meant to abide by the law of France? And this fact, the jury must decide.

As to the damages, if the verdict should be for Searight, though it is true, that in actions for a breach of contract, a jury should, in general, give the whole money contracted for and interest; yet, *in a case like the present, they may modify the demand, and find such damages as they [*328 think adequate to the injury actually sustained. But if the jury should, in the first action (*Searight* v. *Calbraith & Co.*), find, either wholly or partially for the defendant; in the second action (*Calbraith & Co.* v. *Searight*), they should find for the defendant, generally.

PETERS, Justice.—The decision depends entirely on the intention of the parties, of which the jury must judge. If a specie payment was meant, a tender in *assignats* was unavailing. But if the current money of France was in view, the tender in *assignats* was lawfully made, and is sufficiently proved.

When the jury were at the bar, ready to deliver verdicts, the plaintiff in each action, voluntarily suffered a nonsuit. It was afterwards declared, however, that in *Searight* v. *Calbraith & Co.*, the verdict would have been,

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(*a*) Courtois *v.* Carpenter, 1 W. C. C. 377; Cambioso *v.* Maffet, 2 Id. 104; Willings *v.* Consequa, 1 Peters C. C. 317.

generally, for the defendants; and that in *Calbraith & Co.* v. *Searight*, the verdict would have been for the plaintiffs, but with only six pence damages.

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*329] APRIL TERM, 1797.

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

SMYTHE *v.* BANKS.

Privilege of witness.

A witness is privileged from arrest, for a reasonable time, to prepare for his departure, and return to his home, as well as during his actual attendance upon the court.

CAPIAS. The defendant was a resident of Virginia, and had been subpœnaed as a witness in the case of *Sims's Lessee* v. *Irvine*, which was marked for trial at the present term, but was continued on the 20th of April. He was arrested on the 26th of April; and the following day, *Levy* moved, that he should be discharged from the arrest and process, on account of the privilege of a witness, *eundo, morando et redeundo.* 4 Com. Dig. 475; 2 Str. 1094, 986; Vin. Abr., tit. Priv.

BY THE COURT.—The witness is, undoubtedly, privileged from arrest for a reasonable time, to prepare for his departure, and return to his home, as well as during his actual attendance upon the court. But the privilege does not extend throughout the term at which the cause is marked for trial; nor will it protect him, while the witness is engaged in transacting his general private business, after he is discharged from the obligation of the *subpœna.*

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*330] *MAXFIELD'S Lessee *v.* LEVY. (*a*)

THE SAME *v.* THE SAME.

Jurisdiction.

A colorable and collusive conveyance to the lessor of the plaintiff in ejectment, for the purpose of bringing the suit in a federal court, will not give it jurisdiction; and the court will, on motion, dismiss the suit. (*b*)

This jurisdiction of a federal court is not *primâ facie* general, but special.

THE opinion of the Court was delivered in this case, in the following terms:

IREDELL, Justice.—A motion was made for a rule to show cause why these ejectments should not be dismissed, upon an allegation that it appeared, by an answer to a bill in equity, for a discovery, in this court,

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(*a*) An outline of this cause was given in 2 Dall. 381; but I comply with the subsequent request of the presiding judge (whose death was greatly lamented by the bench and the bar), in publishing the opinion of the court at large.

(*b*) A deed, executed for the purpose of giving jurisdiction to a federal court, will not avail in that respect. Hurst's Lessee *v.* McNeil, 1 W. C. C. 70.

brought by the defendants in these ejectments, against the lessor of the plaintiff, that they are in reality the suits of a citizen of this state (viz., Samuel Wallis), though under the name of a citizen of another state, to whom it is alleged conveyances were made, without any consideration, for the sole purpose of making him a nominal lessor of the plaintiff in these ejectments. A rule to show cause was granted, and, upon the day appointed, the case was fully heard and argued on both sides, the proceedings in equity on the bill for a discovery having been exhibited to the court and read.

The importance of the present question is evident, because it concerns the constitution and laws of the United States, in a point highly essential to their welfare, to wit, the proper boundaries between the authority of a single state, and that of the United States. This, not only the constitution itself has been anxious to ascertain, by precise and particular definitions, but the congress, in carrying into effect that part of the constitution which concerns the judiciary, has been solicitous to preserve with the greatest caution. The strong instance of this is a provision in the judicial act, to the following effect:

"That no district or circuit court shall have cognisance of any suit to recover the contents of any promissory note, or other *chose in action*, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." (1 U. S. Stat. 79, § 11.)

This I adduce as a strong instance to show the solicitude of congress on this subject, for the regulation extends to a *bonâ fide* assignment in the instances specified, as well as to one *malâ fide:* but the provision goes to all, more effectually to prevent any practices of deception by means of the latter.

*Nothing is more evident, than if this be a controversy between citizens of different states, it is a controversy determinable in this [*331 court, and of which, therefore, the court must sustain jurisdiction. On the other hand, if it be not a controversy between citizens of different states, but between citizens of the same state, it not being one of those cases which entitle citizens of the same state to any exercise of jurisdiction by this court it ought not to be determined here. But if it shall appear, from a consideration of the facts, that this is not a case which the lessor of the plaintiff was entitled to bring into this court, it will still remain to be inquired, whether the remedy pursued on the present occasion is proper.

The first question, therefore, is, whether it sufficiently appears to the court, that this is a controversy subsisting between citizens of the same state, and not between citizens of different states, so as to authorize a dismissal of the suit, in case the remedy be in point of law a proper one? The evidence, upon which the charge is alleged, is an answer to a bill filed in the equity side of this court, by the defendants in the ejectments, in order to obtain a discovery by the oath of the lessor of the plaintiff. This is admitted to be competent evidence, on a question at law, and therefore (supposing the method of proceeding in other respects proper), I am only to consider, if it affords satisfactory evidence of the facts suggested:

The facts admitted by the answer, in substance, are these: That there were certain applications to the land-office of this state, for 64 tracts of land, in the county of Luzerne, containing 27,400 acres: That the applica-

tions were made (as the respondent has been informed and believes) by and for the use of Samuel Wallis, of the county of Northumberland in this state: That in April 1784, conveyances where executed to Maxfield, the present lessor of the plaintiff, by which the legal title to the lands therein described was conveyed and assigned to Maxfield, as he apprehends and believes. That Maxfield paid no consideration, either pecuniary, or of any other nature, for the lands, and therefore, he apprehends and believes, that the equitable title is in Samuel Wallis. That Maxfield consented to stand the trustee of the lands, for the use and benefit of Wallis, and left the management, direction and prosecution of the business to Wallis, by whose direction Maxfield apprehends and believes, that the *caveats* mentioned in the complainant's bill were filed, and all subsequent proceedings had.

In comparing the facts thus admitted, with the bill he was called upon to answer, it is very remarkable, that the last interrogatory was expressed in such particular and pointed terms, that if it had been directly and positively *332] answered, it would have *been decisive one way or the other. But it is not so answered, and his own counsel now object, that he did not answer directly to the question, and therefore, the only remedy was to except to the answer for insufficiency, and compel a better answer. This objection, I think, may be easily obviated by the following considerations.

1st. If the question had been an improper one, it might have been demurred to. By that not being done, it is confessed that the question was proper, and of course, it ought to have been answered. And it is little short of an insult on the court, now, to tell it, that the lessor of the plaintiff purposely declined answering a question fairly put to him, which he might and ought to have answered, but by his not doing it he now sets the court at defiance.

2d. If, for want of a fuller answer, no evidence was before the court, the objection might possibly be of weight. But all the other facts admitted by the answer are open to all proper inferences, as well such as arise from this wilful and insolent omission, as from any other part of the case. The object was to effect a discovery, whether certain conveyances were actually given for the sole purpose of evading the constitutional limits, as to jurisdiction, prescribed to this court. Such a design could be expected only to be disclosed by direct confession, or a number of concurring circumstances.

3d. It does not appear, that he will ever give a better answer. He may choose to go through all the processes of contempt for not answering sufficiently, as he appears already to have done, for not answering at all. He may even submit to perpetual imprisonment. Is the case never to be decided, until he thinks fit to consent, it shall be?

4th. The jurisdiction of this court is not *primâ facie* general, but special.(*a*) A man must assign a good reason for coming here. If the fact is denied, upon which he grounds his right to come here, he must prove it.

(*a*) The courts of the United States have jurisdiction in a case between the citizens of the same state, if the plaintiff is only a nominal plaintiff, for the use of an alien. Browne *v.* Strode, 5 Cr. 303. If a citizen of one state should remove into another state, with a *bonâ fide* intention of abandoning his former place of residence, he may maintain an action in the circuit court of the state which he has abandoned; although it should appear, that his only motive was to enable him to bring a suit in a court of the United States. Lessee of Cooper *v.* Galbraith, 3 W. C. C. 554.

He, therefore, is the actor in the proof; and consequently, he has no right, where the point is contested, to throw the *onus probandi* on the defendant. As this, undoubtedly, is the general principle, I see no reason to depart from it, on the present occasion, when the knowledge of all the circumstances of the case is fully possessed by the lessor of the plaintiff, and he is regularly called upon to disclose them. For these reasons, I am clearly of opinion, that Maxfield's forbearing to give a fuller answer, is no reason for my not weighing the amount of the answer, which he has thought proper to give; and considering whether it sufficiently establishes the allegations of the defendants in these causes.

But it is objected, that Maxfield's answer, though evidence against him, is no evidence against Wallis, who is said to be the *cestui que trust*, and Maxfield a bare trustee. *Answer: Upon the face of these ejectments, Wallis's name nowhere appears. Maxfield, therefore, is the only person to be considered here. If a *cestui que trust* has a right to support an ejectment, but is forced, upon legal principles, to use the name of his trustee, he must take the consequences. This court, as a court of law, cannot punish the trustee for a breach of trust, though in another capacity it may. But if it had been material to have made Wallis a party, a great, if not an insuperable difficulty has been alleged in doing it. Wallis and the defendants being citizens of the same state, it is very doubtful, whether a bill in equity would have lain against Wallis, in this court, though it was merely incidental to the suit at law. But it is clear, that the objection in this case is merely frivolous, because, upon the return of the rule to show cause, an *ex parte* affidavit might be produced. Wallis's affidavit, undoubtedly, might have been, as well as any others. Why has it not been? No reason has been assigned, to show it could not be done, or that he desired, or that his counsel wished, he should do it. Nor has time been solicited for his putting in such an affidavit, though it is so seriously alleged, that it was highly important to him to have had an opportunity of answering this charge. [*333

It is alleged, that Maxfield was a trustee, and as such authorized to come into this court. A trustee! for what purpose? There is not the least shadow of evidence, that he was a trustee for any other purpose, than that Wallis should have a color for suing in this court, in his name. The deed is not even stated to have been delivered. No fair object of the trust is specified. Wallis lived in Pennsylvania; the land lies in Pennsylvania; Maxfield lived in Delaware. What was he to do? It appears, from his own acknowledgment, that he has done nothing hitherto, nor does he state he was to do anything.

But it is said, a man is not obliged to specify any object of a trust. He may create a trust from mere whim. Admitted: But the law cannot, without absurdity, permit a man to create a trust, for the purpose of defeating a solemn provision of its own. Nothing could be more ridiculous than such a principle. When the constitution has guarded, with the utmost solicitude, against the exercise of a particular authority, so as that, under certain circumstances, one man shall not sue another in a court created under it, can such a court for a moment support a doctrine, that it shall be in the power of such a man, by any contrivance, expressly calculated to defeat this object, to render it wholly nugatory? This, indeed, would be to render the laws of our country a farce; to make the constitution a mere shadow;

and deservedly to draw upon those entrusted with its execution, an odium which has been industriously, but I hope will ever be in vain, attempted.

*334] *But it is said, the system of fictions is not new; and an attempt has been gravely made, to induce this court, by flattering expressions, to add to the list of fictions in being, one of its own, in the face of the constitution we are sworn to support, and by every other sacred tie, bound to maintain inviolate. It is true, the courts of law in England have countenanced and supported some fictions. Such (for instance) as a fine and recovery, and an ejectment; and still more exceptionably, fictions to give a jurisdiction, which otherwise could not be maintained. It is sufficient to say of all these, that they originally took place, when very dark notions of law and liberty were entertained; that they are supported now solely on the authority of long usage; and that no court would now dare to set up a new one. No court in America ever yet thought, nor, I hope, ever will, of acquiring jurisdiction by a fiction. And the only fiction ever in general use in America (perhaps, with a few exceptions as to fines and recoveries), I believe, has been that of proceeding by ejectment, which is a mere form of action, and so modified as to do no possible injury. It cannot substantially affect any man's right whatever.

In order to encourage the court to countenance this scheme, it is said, that no injury can arise from this practice, because the decision in this court will be on the same principles, and it is to be presumed, with an equal regard to justice, in this court, as in a state court. If a serious answer to such an observation is required, it is surely evident, that we are not to assume a voluntary jurisdiction, because, we think, or any others may think, it may be exercised innocently, or even wisely. The court is not to fix the bounds of its own jurisdiction, according to its own discretion. A jurisdiction assumed without authority, would be equally an usurpation, whether exercised wisely or unwisely. But the fact assumed cannot be admitted to be true. If this court exercise a jurisdiction in such a case, it may do so, after all avenues to a state jurisdiction are for ever closed: that is alleged to be the fact in the present instance. There are also other differences, such as regard the place of trial, the venue of the jurors, and other circumstances omitted to be mentioned, because this part of the case is too plain to require any formal discussion.

On this occasion, it may be material to consider whether, on the facts now apparent to the court, Maxfield has any title, either in equity or at law, because, if he has not, it is evident, the title to be contested must be Wallis's, and not his; and of course, the subject-matter to be decided, is a title in question between two citizens of the same state.

1st. As to equity. He has none, by his own acknowledgment; he paid no consideration; he is to perform no duty; he only permits his name

*335] *to be used, for the support of a fraud on the jurisdiction of the court; a purpose which a court of equity would reject with the highest disdain.

2d. As little, in my opinion, can he support any title at law. 1st. Consider this as a mere bargain and sale. A bargain and sale is of no validity, where no money has been paid. Nothing gives a legal title under the act of Hen. VIII. (concerning uses) which was not an equitable one before that statute. At that time, no bargainee could have compelled a bargainor to

convey, who had received no money: therefore, since the statute, no use can arise on such a deed, without some money to support it. 2d. Allowing the highest efficacy to this deed, under the act of assembly. This can only mean, that what a man can lawfully grant, by any form of conveyance, shall be sufficiently granted in this form. Of course, if under any other form of conveyance, owing to technical difficulties, such a purpose could succeed, without redress, a deed, professedly a bargain and sale, is not to have its influence extended, merely that an illegal purpose should take effect, under color of form. The intent of the act certainly was, that the want of form should not defeat the intention of an honest, but unskilful conveyance; but surely not to smooth the path of injustice, by converting a rightful estate into a wrongful one. 3d. But admitting it to be any form of conveyance you please, then I say, that a court of law will not, any more than court of equity, support a deed formally good, but substantially fraudulent. And whether the fraud be of a moral nature, for the purpose of doing a wilful injustice, or the act be, as the lawyers term it, *in fraudem legis* (that is, to evade some law), the law will equally interpose, to prevent its own principles from being made mere instruments to defeat its own purposes.

There is no act in law, within my recollection, which fraud will not vitiate. It will vitiate a feoffment, which is a very strict conveyance, requiring no consideration, and passes by an actual livery. It will vitiate a fine, though a solemn transaction in a court of justice, and peculiarly favored. It will even deprive a party of the benefit of a judgment deliberately given. Conveyances to defeat creditors (however formally agreeable to law) are held absolutely void, at least as against them. So also, in the common case of usury, for which so many contrivances have been devised. No contrivance, no color, no form whatever, can protect any transaction, which really appears to have been usurious, from being declared so.

The application of these principles is obvious. If (as I observed before), the deed in question is to be considered as a mere bargain and sale, it is absolutely void for want of a legal consideration (which must be money alone) to support *it. If it is to be considered as any other kind of conveyance, it having no consideration whatever but an illegal one [*336 (that of defeating the constitution and laws of the United States in a most essential point), it is at least void as to that purpose, and, therefore, does not authorize Maxfield to come into this court. I, therefore, conclude, without difficulty, that Maxfield has neither a legal nor an equitable title to authorize him to come into this court.

The only remaining consideration is, as to the remedy, which, from the first, was the only difficulty I found. I will venture to lay it down as an unquestionable principle, that no grievance can arise in the law, but some remedy may be applied to it. The present grievance, therefore (which, if unredressed, will, in any case like the present, enable two persons, at their pleasure, to do injustice to a third, and force this court to exercise a jurisdiction never delegated to it), must admit of some remedy.

Only three have been suggested, in the present stage of the proceeding. 1st. The method now under consideration. 2d. A plea to the jurisdiction. 3d. An injunction in equity. I will consider the last two first; for if they are removed out of the way (as I think they must be), it will facilitate our consideration of the first.

As to a plea to the jurisdiction. This can be of no avail, unless not only the fact, at the proper time of pleading, be known to the defendant, but that he has disinterested proof of it. This, in a thousand instances, would be impossible; and in no instance, can be expected. To insist on this, therefore, as the only method, would leave the constitution and the law, in almost every instance, open to certain evasion. It, consequently, cannot be admitted, that this is the only method of redress.

With regard to a bill in equity. I will not say, equity ought not to interpose a remedy in any case. But it seems most proper, that a court of law should support its own jurisdiction, on its own principles, and if proof can be obtained, I conceive it is necessarily incident to every court, to take care that its jurisdiction be not encroached upon, or, in other words, that the court be not made, either voluntarily or involuntarily (if it can prevent it), an usurper of jurisdiction not belonging to it. In this case, the aid of equity may be useful (as it has been on the present occasion), in compelling a discovery; but there, I think, its interference ought to stop, unless the power of the law-court over the action has entirely ceased; as, for instance, after a judgment, in which case (but in which, perhaps, alone), equity might properly grant an injunction, to prevent a party availing himself of his own fraud.

*337] *The only remaining remedy suggested (or which occurs to me), in the present stage of the proceeding, is that now under consideration; and of course, this must be adopted, if an interference by the court in the present stage of the cause is proper. It is, however, objected, that the court ought not to interfere, at present, but permit the case to go before the jury, who may find for the defendants, if they believe the facts suggested, and apply the law accordingly. If this case had, indeed, gone before the jury, I should have had no difficulty in telling them, that admitting the truth of the facts as stated, the lessor of the plaintiff had, in my opinion, no title; and if the jury had found accordingly, redress (though late) could be obtained. But, at present, I do not think myself at liberty to submit the case to the jury, for the following reasons.

1. The court is the proper guardian of its own jurisdiction. It is alone responsible for it; and must, therefore, take care that it neither abandons a jurisdiction rightfully belonging to it, nor usurps that which does not.

2. Admitting that a plea to the jurisdiction is not the only remedy, for the reasons I have given, upon complaint made of any fraud on the jurisdiction having been practised, if the complaint is supported on good grounds, it is just, that an immediate inquiry should be made into it, in order that if any injury to a party has been hitherto unavoidably sustained, by any such fraud, it may be put a stop to, as soon as possible. To compel a party, in such a case, to stay in court, until a jury shall be summoned and convened, to try a general issue, would be a voluntary exercise of jurisdiction, after the court entertained reason to doubt, at least, whether they had any.

3. To swear a jury is an exercise of jurisdiction. With what propriety can I order that, after being fully convinced from evidence, admitted to be competent, that the court hath no jurisdiction at all?

4. Suppose, the jury in this case should find for the plaintiff, when the court was thoroughly convinced it had no jurisdiction of the cause? Can the court give judgment for the plaintiff in such a case? Surely not. If,

therefore, a verdict to that effect, could produce no good, why should a verdict be required of them? Because this would not be an ordinary case concerning a new trial; in which case, after two or three verdicts the same way, a court might be compelled to stop and proceed no further. But if there were a hundred verdicts in a case, in their opinion, not within their jurisdiction, they could not give judgment, without voluntarily usurping a power not belonging to them.

5. In this case, there is no occasion for a jury to try the facts, because the facts are not denied, and the court surely will *not call a jury to [*338
decide a question of law, and a question which, as I have just observed, they could not decide finally. Maxfield's allegations in this case, are either a direct confession, or as to some points (if the expression is proper) a *nil dicit.* In neither case, is a jury wanting: a complete denial can alone entitle a party to have facts tried by a jury. There is no denial in this case, but of the merits, upon which a jury can be sworn; which certainly would be premature when facts had already been confessed sufficient to oust the jurisdiction. Had he positively denied, indeed, the allegations of the bill in equity, the jury must have been sworn; for as a judge, I certainly could not, in any shape, determine on an issue of fact. But as he has not thought proper to deny them, but, in my opinion, substantially confessed everything to show that the court had no jurisdiction of the cause; I consider myself bound to order these ejectments to be dismissed, and do accordingly order them to be dismissed, with costs.(*a*)

Here, one of the counsel interfered, and asked the judge whether he would order costs, in a case where he declared the court had no jurisdiction.

THE JUDGE answered.—That that circumstance did not occur to him; he acknowledged he had committed a mistake in that part of the order. But if it was in his power, he would order double costs.(*b*)

(*a*) Mr. William Tilghman, one of the counsel for the defendants, quoted a case in Savill's Reports, p. 12, which Judge IREDELL thought much in point, and meant to have declared so, in delivering his opinion, but inadvertently omitted it. See Worlay *v.* Harrison, Dyer 249; 2 Inst. 215; 21 Viner 535, 536, tit. Vacat.

(*b*) In the case of Browne's Lessee *v.* Arbunkle, in the circuit court, at October term 1806 (1 W. C. C. 484), it appeared, upon bill and answer on the equity side of the court, that the lessor of the plaintiff was a citizen of the state of New York, and the defendant was a citizen of Pennsylvania; that the former was a member of the population company, who had purchased extensive tracts of land, on the north-western boundary of Pennsylvania; that the land so purchased was held by trustees (all citizens of Pennsylvania), for the use of the company; that the trustees had conveyed to the lessor of the plaintiff his portion of the land (including the premises mentioned in the declaration), in severalty; and that the present ejectment was founded upon that conveyance.

The defendant, upon these facts, and upon the authority of Maxwell's Lessee *v.* Levy, and Hurst *v.* Hurst, moved to strike from the record this ejectment, and others in the same predicament. But the motion was overruled by the court: and this distinction taken:

WASHINGTON, Justice.—In the cases cited, the deeds were executed, with a collusive intention, to give a jurisdiction to the court, which the court could not possess without them. The objection proceeded on two grounds: 1st. On the equity of the statute provision, which declares, that a suit shall not be maintained in a federal court, by the assignee of a promissory note, or other *chose in action* (with the single exception of foreign bills of exchange), unless it could have been brought there, by the original

*APRIL TERM, 1800.

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

O'HARA *v.* HALL.

Parol evidence.

Parol evidence is admissible to explain, but not to alter, a written contract.

In an action by the assignee of a bond, against the assignor, upon a written assignment, in general terms, parol testimony is not admissible, to show that the defendant had expressly guarantied the payment.

CASE. This was an action brought by the assignee of a bond, against the assignor, upon a written assignment, in general terms. On the trial, *Ingersoll*, for the plaintiff, offered parol testimony to show that the defendant had expressly guarantied the payment of the bond. *W. Tilghman* objected, that as the contract of the parties was in writing, no parol testimony could be admitted, on a trial at law, to vary its expressions and import. *Ingersoll* replied, that wherever there is an oral misrepresentation, at the time of a sale or transfer, even though the principal bargain is reduced to writing, the misrepresentation may be proved. A court of equity would, in such case, grant relief; and even the courts of law are now accustomed to regard actions on the case, like the present, as bills in equity. (*Moses* v. *Macferlan*, 2 Burr. 1005; 1 Dall. 428.)

CHASE, Justice.—You may explain, but you cannot alter, a written contract, by parol testimony. A case of explanation implies uncertainty, ambiguity and doubt, upon the face of the writing. But the proposition now, is a plain case of alteration: that is, an offer to prove by witnesses, that the assignor promised something, beyond the plain words and meaning of his written contract. Such evidence is inadmissible; and has been so adjudged by the supreme court, in *Clarke* v. *Russell*, 3 Dall. 415. As to the authority of *Moses* v. *Macferlan*, it has always been suspected, and has lately been overruled, on the principle, *that the previous decision, there brought into question, was pronounced by a competent court. I grant, that chancery will not confine itself to the strict rule, in cases of fraud and of trust. But we are sitting as judges at common law; and I can perceive no reason to depart from it.

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PETERS, Justice.—If we were sitting as judges in a state court, I should be inclined to admit the testimony, in order to attain the real justice of the cause; as there is no court of equity in Pennsylvania. But there is no such defect in the federal jurisdiction; and therefore, when the party comes to the common-law side of the court, he must be content with the strict common-law rule of evidence.

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party. And 2d. On the manifest attempt, by a fraud, to create jurisdiction. But in the case now under consideration, the lessor of the plaintiff would have had a right, as a citizen of New York, to apply to the equity side of the court, to compel the trustees to convey his share of the trust-estate to him: and if the trustees have only voluntarily made a conveyance, which the court would have decreed, surely we cannot call it a fraudulent deed, or refuse to take cognisance of a suit founded upon it, between a citizen of New York and a citizen of Pennsylvania.

United States v. Cooper.

Privilege.

A member of congress is not excempt from the service nor obligations of a *subpœna*, in a criminal case.

The defendant, being indicted for a libel on the President, applied to the court, for a letter to be addressed by them, to several members of congress (congress being in session) requesting their attendance as witnesses on his behalf.[1] In support of the application, a variety of similar cases, arising under the government of Pennsylvania, were referred to.

Chase, Justice.—The constitution gives to every man charged with an offence, the benefit of compulsory process, to secure the attendance of his witnesses. I do not know of any privilege to exempt members of congress from the service or the obligations of a *subpœna*, in such cases. I will not sign any letter of the kind proposed. If, upon service of a *subpœna*, the members of congress do not attend, a different question may arise; and it will then be time enough to decide, whether an attachment ought, or ought not, to issue. It is not a necessary consequence of non-attendance, after the service of a *subpœna*, that an attachment shall issue. A satisfactory reason may appear to the court, to justify or excuse it.

Peters, Justice.—I know the practice in Pennsylvania to be as it has been stated; for I have received such letters from the supreme court, while I was speaker of the house of representatives, requesting that members might be permitted to attend as witnesses. In the present case, I should have no objection to acquiesce in the defendant's application, with the concurrence of the presiding judge.

Motion refused.

Murgatroyd v. McLure. [*342

Illegal contract.

Replevin cannot be maintained for a vessel, by registered owner, who has received the full value of it from another, for whom he is mere trustee, in fraud of the laws of the United States.

Replevin, for the ship Mount Vernon. The defendant claimed property, under a capture and condemnation as prize, in the French Court of Prizes, established at the city of St. Domingo, in the island of St. Domingo, under the circumstances stated in the reports of the trials, relative to the same ship. *Murgatroyd* v. *Crawford*, 3 Dall. 491; *Duncanson* v. *McLure*, *ante*, p. 308. After hearing the evidence—

Chase, Justice, declared, that the whole transaction between Murgatroyd and Duncanson was a mere cover to evade the laws of the United States; that the former was a mere trustee for the latter; and that having been paid the full price for the ship, he had no property, on which the replevin could be maintained.

The plaintiff suffered a nonsuit.

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[1] See Cooper's case, in Wharton's State Trials 659.

EVANS, *qui tam*, &c., *v.* BOLLEN.

Jurisdiction.—Penal action.

The circuit court cannot take original cognisance of a suit for a penalty incurred by an offence against the laws of the United States: if the offence was committed within a state, it must be tried in such state.[1]

THIS was *qui tam* action, in which the following declaration was filed:

October Session, 1797.

In the Circuit Court of the United States for the Pennsylvania District, of the Middle Circuit.

District of Pennsylvania, ss.

George Bollen, late of the district of Pennsylvania, yeoman, was summoned to answer to the United States and to John Evans, who sues in this behalf, as well for the said United States as for himself, of a plea that he rendered to the said United States, and to the said John, who sues as aforesaid, the sum of $2000, which to them he owes, and from them unjustly detains: and whereupon, the said John, who sues in this behalf, as well for the said United States, as for himself, by Joseph Thomas, his attorney, saith, that the said George, on the first day of April, in the year of our Lord 1797, at the port of New York, to wit, at the district aforesaid, was aiding and abetting, in preparing and sending away from a port within the said United States, to wit, from the port of New York, a certain vessel called the Betsey, intending that the same should be employed for the purpose of procuring from a foreign country, to wit, from the coast of Africa, the inhabitants of such foreign country, to be transported to a foreign country, to wit, to the island of Saint Croix, to be disposed of as slaves, against the form of the statute in such case made and provided; by means whereof, *and by force of the statute in such case made and provided, an action hath accrued to the said John, who sues in this behalf, as well for the said United States, as for himself, to have and demand of and from the said George, the said sum of $2000: yet the said George (although often requested) hath not paid the said $2000, or any part thereof, to the said John, who in this behalf sues for the United States as well as for himself, but the same to him to pay hath hitherto wholly refused, and still doth refuse, to the damage of the said John, who sues as aforesaid, $500. And thereof he brings suit, &c.

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Pledges, &c. { JOHN DOE. / RICHARD ROE.

JOSEPH THOMAS, attorney for plaintiff.

The action was founded on the act of congress, "to prohibit the carrying on the slave trade, from the United States to any foreign place or country" (1 U. S. Stat. 347), of which the following were the material sections, in the discussion:

Sect. 1. "That no citizen or citizens of the United States, or foreigner, or any other person coming into, or residing within the same, shall, for himself or any other person whatsoever, either as master, factor or owner, build, fit, equip, load or otherwise prepare any ship or vessel, within any port or

[1] The Cassius, 2 Dall. 365; Hall *v.* Warren, 2 McLean 332.

place of the said United States, nor shall cause any ship or vessel to sail from any port or place within the same, for the purpose of carrying on any trade or traffic in slaves, to any foreign country; or for the purpose of procuring, from any foreign kingdom, place or country, the inhabitants of such kingdom, place or country, to be transported to any foreign country, port or place whatever, to be sold or disposed of as slaves: and if any ship or vessel shall be so fitted out as aforesaid, for the said purposes, or shall be caused to sail, so as aforesaid, every such ship or vessel, her tackle, furniture, apparel and other appurtenances shall be forfeited to the United States; and shall be liable to be seized, prosecuted and condemned in any of the circuit courts or district court for the district, where the said ship or vessel may be found and seized.

Sect. 2. "That all and every person, so building, fitting out, equipping, loading or otherwise preparing or sending away, any ship or vessel, knowing, or intending, that the same shall be employed in such trade or business, contrary to the true intent and meaning of this act, or any ways aiding or abetting therein, shall severally forfeit and pay the sum of $2000; one moiety thereof to the use of the United States, and the other moiety thereof to the use of him or her who shall sue for and prosecute the same."

*The facts were proved, as stated in the declaration, but the defendants counsel made two objections to the jurisdiction of the court: [*344
1st. That this was a suit under the second section, and the circuit court could not take original cognisance of a case of penalty or forfeiture, as the judicial act expressly declared, that the district court should have "exclusive original cognisance of all suits for forfeitures and penalties incurred under the laws of the United States." (1 U. S. Stat. 76, § 9.) 2d. That the offence was committed in the state of New York; and ought to be tried there, upon the principles of the common law, adopted by the constitution of the United States, and various acts of congress. Const. Art. III., § 2; Amend. Const. Art. VIII., IX.; 4 Black. Com. 350; 3 Ibid. 359, 360; 2 Dall. 335.

It was agreed, that a verdict should be given for the plaintiff, subject to the opinion of the court on these points; and after argument, by *E. Tilghman*, for the plaintiff, and *Levy*, for the defendant—

The Court declared, that they had no jurisdiction of the cause; and directed a *non-pros.* to be entered.

*OCTOBER TERM, 1800.

Present—Paterson, Justice, and Peters, District Judge.

Hollingsworth *v.* Fry.

Construction.—Time in equity.

The great rule of interpretation, with respect to deeds and contracts, is, to put such a construction upon them, as will effectuate the intention of the parties, if such intent be consistent with the principles of law.[1]

Equity will not interfere in favor of one who has been guilty of gross *laches;* a complainant must use legal diligence in the enforcement of his rights.

When the time of payment of the consideration-money mentioned in an agreement is made a substantial and not a mere formal circumstance, it enters into the essence of the contract; and a failure to pay at the day, will not be relieved against in equity.[2]

In Equity. The bill, after setting forth a variety of transactions between the parties, relative to a tract of land, mills and mill-race, in Dauphin county, stated, that on the trial of a writ of partition for the premises, they consented to withdraw a juror, and entered into the following agreement, dated the 19th of November 1790:

"It is mutually agreed, that judgment shall be entered for the defendant, on the day in bank, on the 3d of January next, unless the said plaintiff, or Robert Ralston, his assignee, shall, previous thereto, by such good and unexceptionable sureties, in such sum, and in such manner, as shall be approved of by the honorable judges of this court, engage for, and secure, the payment of one moiety of all moneys which the defendant hath advanced or expended, or shall appear to be reasonably entitled to, for or by reason of his improvement of the lands in question, or for any matter relative thereto, or of any other lands held in common or jointly between the said parties, within six months from the said 3d day of January next. But in case such unexceptionable security shall be given, and a question shall arise as to the *quantum* of the moneys to which the defendant shall be entitled, then John Kean, Joshua Elder and John Carson, gentlemen, or any two of them, shall determine the said sum, on full hearing of the said parties, their witnesses and proofs. And in case of a full conformity thereto, *and the money being
*346] fully paid and discharged as aforesaid, within the said period of six months, and not otherwise, that then judgment shall be entered in this action, not only for the lands in the declaration mentioned, but of all lands and mills held jointly or in common between them the said parties, by virtue of any article between them, or between them and John Fisher, made. But if the moneys so due shall not be paid and discharged, within the said period, the defendant shall hold the said lands free and discharged from the claims of the said plaintiff, and all persons claiming under him; and judgment shall in such case be entered for him in this action."

It also appeared, from the pleadings and exhibits, that the bond re-

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[1] Bradley *v.* Steam-packet Co. 13 Pet. 89.

[2] Garnett *v.* Macon, 2 Brock. 185; Stinson *v.* Dousman, 20 How. 461; Longworth *v.* Taylor, 1 McLean 395; s. c., 14 Pet. 172; Mason *v.* Wallace, 3 McLean 148; Lester *v.* McDowell, 18 Penn. St. 91; Patchen *v.* Lumborn, 31 Id. 314; Chew *v.* Phillippi, 32 Id. 205; Waters *v.* Waters, Id. 307.

quired by the agreement, was duly executed on the part of the plaintiff; that the referees undertook the business of the reference; and that on the 13th of April 1791, the following report was filed:

"We, the referees, &c., report, that after hearing the parties, their allegations and witnesses, and investigating their accounts and vouchers, we are of opinion, that George Fry is reasonably entitled to the sum of 3646*l.* 6*s.* 2¾*d.* specie; that being the one moiety or half part of his expenditures on the lands, mills and their appurtenances in question, after giving John Hollingsworth credit for the money by him expended on the same lands."

It also appeared, that the plaintiff filed a number of exceptions, which the supreme court, after argument, overruled, on the 2d of July 1791, and gave judgment on the report; and that on the 26th of September 1796, the complainant sent his son, to tender to the defendant the amount of the report in his favor; which the defendant refused to accept.

Upon these general premises, the bill proceeded to complain, that the defendant had appeared in the supreme court, by his counsel, on the 2d of July 1791, alleging the exceptions to the report to be untrue, whereas, the complainant averred that they were true; that although notice had been given to produce books and accounts, none were produced on the hearing in court; that the conduct of the referees was improper in various particulars; that the books, accounts and statements laid by the defendant before the referees, were untrue and fraudulent; that the defendant suppressed several material documents which he alone possessed; and that the value of a moiety of the property in dispute was at least 10,000*l.* The bill concluded with a prayer for a perpetual injunction against all proceedings on the judgment; for a discovery and account; for a partition of the premises; and for general relief.

*To this bill, the defendant filed a plea and answer: 1st. Plea in bar, a former bill in equity, for the same cause, filed by the complainant, on the 24th of April 1792; demurrer to the bill, and joinder in demurrer; and a decree, in April term 1796, pronouncing the demurrer to be sufficient, and dismissing the bill; which decree remained unreversed and in full force. 2d. Plea in bar, the judgment of the supreme court of Pennsylvania (a competent tribunal), upon the agreement, reference and report, which judgment remained still in force; with an averment that the complainant did not, within six months after making or filing the report, nor after the exceptions were overruled (which exceptions contained all the matter alleged in the bill) and the judgment rendered, pay or offer to pay to the defendant, the said sum of 3646*l.* 6*s.* 2¾*d.* or any part thereof. 3d. Answer, That the judgment was fairly obtained; that the defendant did not submit to the referees any books, accounts or statements that were untrue or fraudulent, nor suppress any material documents; that on the 26th of September 1796, the complainant's son came to him with a bank-bill; but never before that time; and that the defendant had been exposed to all intermediate expenses and casualties, &c. [*347

A general replication was filed; and after argument, the following opinion was delivered, Judge Peters declining to take a part in the decision:

Paterson, Justice.—The great rule of interpretation with respect to deeds and contracts, is, to put such a construction upon them, as will effec-

tuate the intention of the parties, if such intention be consistent with the principles of law. In the present case, there is no difficulty in coming at the intention, as it is clearly and forcibly expressed in the agreement, and is capable of receiving one construction only. The time of payment is made a substantial, and not a mere formal, circumstance; it enters into the essence of the contract; and therefore, must be observed.(*a*) The court cannot decree against the legal and express stipulation of the parties themselves. The situation of the parties, the nature of the property, and the speculative spirit of the project, were powerful inducements for drawing up the agreement, in the plainest and strongest terms, so as to leave no doubt as to the intention, and to render the time of performance a cardinal point.

Again, if the agreement would admit of another construction, the complainant, under the circumstances of the case, comes too late to avail himself of it. The door of equity cannot remain open for ever. The complainant did not make a tender of the money, until a lapse of five years after the termination of the time limited by the contract. So far was he from using legal diligence, that he has been guilty of gross delay.(*b*) In cases of the present kind, equity will not suffer a party to lie by, until the event of
*348] the *experiment shall enable him to make his election, with certainty of profit one way, and without loss any way. This mode of procedure is unfair, contrary to natural justice, and in exclusion of mutuality.

There is a strange mixture of legal and equitable powers in the courts of law of this state. This arises from the want of a distinct *forum* to exercise chancery jurisdiction; and therefore, the common-law courts equitize as far as possible. Whether, if relief be proper, the supreme court of this state could have extended it to the complainant, it is unnecessary to determine. Thus

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(*a*) Although it has been intimated in some cases, that time could not be made of the essence of contract, even by a positive stipulation of the parties, there has been no decision to that effect. In other and later cases, it has been admitted, that parties may make time of the essence of the agreement, and whether they have done so must depend on all the circumstances. McCrelish *v.* Churchman, 4 Rawle. 26. The principle seems to be firmly established, that time may be a circumstance of decisive importance, but that it may be waived by the conduct of either party. It is incumbent on a plaintiff, whether at law or in equity, to show that he has used due diligence in the performance of his part of the contract, or that if he has not, his negligence arose from some just cause, or has been acquiesced in; but it is not necessary for the defendant to show any particular inconvenience; it is sufficient, if he has not acquiesced in the negligence of the plaintiff. Ibid. In a deed conveying land, and reserving a rent-charge, the grantor covenanted to release and discharge the rent, if the grantee should, within seven years, pay a certain sum; it was held, that after a lapse of eighteen years from the time prescribed, he could not call upon the grantor to perform his covenant. In re Henry Shoemaker, 1 Rawle 89. So, where a judgment in ejectment was entered by agreement of the parties, to be released on the payment of a certain sum, on or before a certain day, time was considered the essence of the contract, and the money not having been paid, on or before the day, the judgment became absolute and indefeasible. Gable *v.* Hain, 1 P. & W. 264. See also Jordan *v.* Cooper, 3 S. & R. 564; Roberts *v.* Beatty, 2 P. & W. 63; Shaw *v.* Turnpike Co., Id. 454. But see Wilson's Adm'rs *v.* Lewis, 2 Yeates 467; Decamp *v.* Feay, 5 S. & R. 323.

(*b*) Time, generally speaking, is not essential in equity; but considerable delay, without sufficient reason to account for it, will be considered satisfactory evidence of an abandonment. Bellas *v.* Hays, 5 S. & R. 443.

much, however, might and ought to have been done, on the part of the complainant; he ought, when notice was given for him to show cause why judgment should not be entered, to have laid the equity of the case before the judges of that court, who, if they thought proper, might have deferred the entering of judgment, or ordered it to be entered on terms, to wit, to be vacated on payment of the awarded sum, by a limited period. But the complainant, although he had previous notice, did not avail himself of an appeal to the discretion of the court; but suffered judgment to pass against him, without making any objection.

There being no equity in the complainant's case, his bill must be dismissed, with costs.

Thurston *v.* Koch.

Double insurance.

In cases of double insurance, the assured may, at his election, sue either set of underwriters, and recover a full indemnity;[1] and if there be a recovery against one, the others are bound to contribute ratably, in proportion to the amount insured.[2]

This cause came before the court on the following case stated by the counsel, *Condy*, for the plaintiff, and *Ingersoll*, for the defendant.

"On the 13th of October 1796, William I. Vredenburgh, of the city of New York, merchant, caused himself to be insured, at the city of New York, in a certain policy of insurance, which was subscribed by the plaintiff, in the sum of $14,500, upon any kind of goods and merchandise, laden or to be laden on board the brigantine Nancy, Captain King, master, lost or not lost, at and from any port and ports in the West Indies, and at and from thence to New York, and there safely landed, beginning the adventure upon the said goods and merchandises, from the lading thereof on board the said vessel, at the West Indies.

"On the 17th of October 1796, the said William I. Vredenburgh, by Jacob Sperry & Co., his agents, caused himself to be insured, at the city of Philadelphia, in a certain other policy of insurance, which was subscribed by the defendant, in the sum of $1300, with other underwriters, in the whole amounting to $12,000, upon all kinds of lawful goods and merchandises, lost or not lost, laden or to be laden on *board the said brigantine Nancy, at and from Cape Nichola Mole, to any ports and places [*349
in the West Indies, to trade, at and from either of them, to New York, beginning the adventure from and immediately following the loading thereof on board the said brigantine, at Cape Nichola Mole, and so to continue, until safely landed at any ports and places in the West Indies, and at

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[1] Potter *v.* Marine Ins. Co., 2 Mason 475; Craig *v.* Murgatroyd, 4 Yeates 161. This has since been remedied by the introduction into policies of the clause respecting prior insurances. Gibson, J., in Peters *v.* Delaware Ins. Co., 5 S. & R. 481. The rule is the same in cases of fire insurance. Lucas *v.* Jefferson Ins. Co., 6 Cow. 635.

[2] In this, the court adopted the English rule, contrary to that adopted in this country, that the other insurers should contribute ratably, and not according to priority of contract. Stacey *v.* Franklin Fire Ins. Co., 2 W. & S. 542–3, Rogers, J. But to constitute a case of double insurance, there must be the same risk, and for the same person. Warder *v.* Horton, 4 Binn. 529; Columbian Ins. Co. *v.* Lynch, 11 Johns. 233. And see Peters *v.* Delaware Ins. Co., 5 S. & R. 473; Wells *v.* Philadelphia Ins. Co., 9 Id. 103; Sloat *v.* Royal Ins. Co., 49 Penn. St. 14.

New York aforesaid. The premium demanded upon this policy, was ten per cent., and was duly paid by the said Jacob Sperry & Co., on behalf of the said William I. Vredenburgh, to the defendant and the other underwriters upon this policy.

"On the 20th of October 1796, the said William I. Vredenburgh caused himself to be insured, at the city of New York, in a certain other policy of insurance, which was subscribed by the New York Insurance Company, for the sum of $2200, upon all kinds of lawful goods and merchandises, lost or not lost, laden or to be laden on board the said brigantine Nancy, at and from any port or ports in the West Indies, to New York, beginning the adventure from the loading thereof on board the said brigantine, at any port or ports in the West Indies, and so to continue, until safely landed at New York, &c.

"On the 12th day of September 1796, the said brigantine Nancy, with the said goods and merchandises so laden, on board, and insured and covered by the said policies as aforesaid, sailed from Cape Nichola Mole, in the West Indies, for St. Marks, likewise in the West Indies, and in the prosecution of the said voyage, from Cape Nichola Mole to St. Marks aforesaid, with her cargo, including the said goods and merchandises, so insured as aforesaid, was captured by a French privateer, and condemned; by which capture, the said goods and merchandises were wholly lost to the insured. Upon this, suits were brought into the supreme court of the state of New York, against the plaintiff, upon the policy by him subscribed, and against the New York Insurance Company, on the policy by them subscribed; in which suits, the insured, the said William I. Vredenburgh, recovered as for a total loss.

"The amount paid by the plaintiff (after the usual deductions) for the loss, was $12,740, with $1783.60 interest, and $418.32 costs. He has likewise paid to the said assured, $1083.60, being the amount of the premium upon the policy subscribed by the defendants (after the deductions allowed in the case of a returned premium), as a consideration for the assignment of the said policy to the plaintiff. The New York Insurance Company have paid to the assured $2156, being the amount of their policy (after the usual deduction in case of loss), with $301.84 interest. The several sums so paid have completely satisfied the loss, with all the interest and costs.

*350] *"Question for the opinion of the court. Is the defendant (one of the underwriters, on the Philadelphia policy, of the 17th of October 1796) liable to make any, and if any, what contribution to the plaintiff, upon the loss so paid as aforesaid by him? Or, in other words, is the defendant liable to pay more than the amount of the loss, beyond the sum previously insured? If the court shall be of opinion in the affirmative, then judgment shall be entered for the plaintiff, in such sum as, upon the principles established by the court, shall be found due. But if the court shall be of opinion in the negative, then judgment shall be entered for the defendant."

After argument, the opinion of the court was delivered by the presiding judge, in the following terms:

PATERSON, Justice.—The case before the court is that of a double insurance; and the question is, whether the insurers shall contribute ratably, or

shall pay according to priority of contract, until the insured be satisfied to the amount of his loss. The law on this subject is different in different nations of Europe, owing to the diversity of local ordinances, which have been made to regulate commercial transactions. By the ordinance of one country, the contract is declared to be void, and a forfeiture superadded; whereas, by the ordinance of other countries, the contract is merely void, without any forfeiture. By the ordinance of Spain, if a policy be signed, on the same day, by several persons, the first signer becomes first responsible, and so on, until the insured receive full satisfaction to the value of his loss; the posterior insurers being liable only for the deficiency, and that, too, according to the order of priority. But in such case, by the ordinance of France, the several insurers, on the same day, shall contribute ratably to make up the loss; whereas, by the same ordinance, if the policies bear date on different days, the rate of contribution is rejected, and that of priority established; or, in other words, if the first policy absorb the loss, or amount to the value of the goods insured, the posterior insurers are not liable, but shall withdraw their insurances, after retaining a certain per-centage. The solvency of the first insurer to the full value being assumed, the ordinance is predicated on the principle, that there remains no property to be insured, and of course, no risk to be run.

But suppose, the solvency of the first insurer should become doubtful, what course is to be pursued? As this is a risk, it ought to be provided against; and accordingly, we find, that some of these ordinances have declared, that such insurer's solvability may be insured. It is obvious, that this is a point of great delicacy; for by questioning the solvency of a merchant, you wound his credit, and perhaps, cast him into a state of bankruptcy. Most, if not all, of these ordinances, are of ancient date, and were calculated for the then existing state of commerce in *the several countries which formed them. [*351

It is, however, evident, that the law-merchant varies in different nations, and even in the same nation, at different times. The course of trade, local circumstance, commercial interests and national policy, induce to some variation of the rule. The law in this particular, as it was understood and practised in England, prior to, and at the commencement of, our revolution, was different from the rule which prevailed in France, Spain and other countries, under their local ordinances. A double insurance is, where the same man is to receive two sums instead of one, or the same sum twice over, for the same loss, by reason of his having made two insurances upon the same ship or goods. In such case, the risk must be the same. This kind of insurance is agreeable to the practice and law of England, and is considered as being founded in utility, convenience and policy. In the case of *Godin* v. *London Assurance Company*, in February 1758, Lord MANSFIELD, in delivering the opinion of the court, expressed himself as follows:

"As between them, and upon the foot of commutative justice merely, there is no color why the insurers should not pay the insured the whole: for they have received a premium for the whole risk. Before the introduction of wagering policies, it was, upon principles of convenience, very wisely established, 'that a man should not recover more than he had lost.' Insurance was considered as an indemnity only, in case of a loss: and therefore,

the satisfaction ought not to exceed the loss.[1] This rule was calculated to prevent fraud; lest the temptation of gain should occasion unfair and wilful losses.

"If the insured is to receive but one satisfaction, natural justice says, that the several insurers shall all of them contribute *pro rata*, to satisfy that loss against which they have all insured. No particular cases are to be found, upon this head; or, at least, none have been cited by the counsel on either side.

"Where a man makes a double insurance for the same thing, in such a manner that he can clearly recover against several insurers, in distinct policies a double satisfaction, the law certainly says, 'that he ought not to recover doubly for the same loss, but be content with one single satisfaction for it.' And if the same man, really, and for his own proper account, insures the same goods doubly, though both insurances be not made in his own name, but one or both of them, in the name of another person, yet that is just the same thing; for the same person is to have the benefit of both policies. And if the whole should be recovered from one, he ought to stand in the place of the insured, to receive contribution from the other, who was equally liable to pay the whole." (1 Burr. 492.)

*352] *In the case of *Newby* v. *Reed*, at sittings after term, in 1763, 2 W. Bl. 416, the same doctrine is laid down, agreed to, and confirmed. For, "it was ruled by Lord MANSFIELD, Chief Justice, and agreed to be the course of practice, that upon a double insurance, though the insured is not entitled to two satisfactions; yet, upon the first action, he may recover the whole sum insured, and may leave the defendant therein to recover a ratable satisfaction from the insurers."

These cases have never been contradicted, and must be decisive on the subject. The law, as stated in the above adjudications, is recognised by Park and Millar, two recent and respectable writers on marine insurances. Such being the law of England, as to double insurances, before and at the commencement of our revolution, it was also the law of this country, and is so now. It is of authoritative force, and must govern the present case. Besides, if the court were at liberty to elect a rule, I should adopt the English regulation, which divides the loss ratably among the insurers. It is the most convenient, equal and consonant to natural justice, and has been practised upon, nearly half a century, by the first commercial nation in the world. I am not clear, that the practice of France is not in conformity with this rule; for it is probable, that they open but one policy, bearing the same date, though signed at different times, or different policies of the same date; in either of which cases, by the French ordinance, the insurers contribute ratably to satisfy the loss sustained by the insured. If so, it is precisely the English and American rule. Equality is equity: this maxim is particularly applicable to commercial transactions; and therefore, the rule of contribution ought to be favored. The pressure, instead of crushing an individual, will be sustained by several, and be light. The result is, that the defendant must contribute ratably to make up the loss of the insured.

PETERS, Justice.[2]—The point in this cause is, whether in a case of double

[1] But see Aitcheson *v.* Lohre, 4 App. Cases 755, where it is said, that a policy of marine insurance is not a contract of mere indemnity.

[2] In the last edition, this opinion was printed in the appendix; it has now been transferred to its proper place.

insurance, the policies are to be taken according to priority; that is, whether the second is answerable, before the first is exhausted, if the loss is greater than the sum covered by the first? And if the loss is fully covered by the first, whether, if it be paid by the insurers on the first, they can oblige those on the second to contribute *pro rata?*

To be respectable abroad, and to facilitate and simplify mercantile business at home, we should have a national, uniform and generally received law-merchant. The custom or practice of one state, differing, perhaps, from that of another, must yield to general and established principles. There is, however, no custom of merchants, in this or any other district of the United States, stated in the case, and we cannot travel out of the statement, in giving our judgment.

I mention, as an extraneous fact, of which I have been informed by persons intelligent in business of insurance, that the rule in New York, where they followed the British practice, for a great length of time, was variant from that they now use. The custom in Philadelphia has been, for a long course of years, to settle losses, where there are double insurances, according to priority of policy in date, without regard to time of individual signature: that is, not to call on the second set of underwriters, if those on the first policy were competent, or had paid the amount of subscription or loss. In this event, those on the second policy return the premium, retaining one-half per cent. If this be so, and I have no reason to doubt, it is one of the very few subjects, in which I have been able to discover a decided and universal custom of merchants here. It may have originated, when the British rule was more similar to that of many other nations, than it is now, and was at the time of our revolution. It appears to me, that the custom here is agreeable to the general maritime custom and law of Europe, in this particular. The authorities produced in this cause, on the part of the defendant, warrant me in this opinion. All the European nations, it is true, do not agree: there may not, in every detail, be an exact conformity among any considerable number. But I conceive, that where the greater number of particular laws are coincident in a general principle, this will establish what is called general law. In the point before us, there are exceptions in the laws of Spain, and those of England, to what seems to be the general principle and rule among other trading nations. And the arrangements of those two countries differ from each other.

The law or custom of merchants in England was, formerly, more agreeable to the general custom and maritime law of other nations, than it has been decided, in latter times, to be. It is contended, that the British authorities do not show direct decisions of their courts on this point; yet, they are sufficient to satisfy me, of what the law there is. It appears to me, to be clearly settled as law, in England, that in cases of double insurances, if all the policies cover the same risks, there shall be a ratable contribution. It was so settled, at the period of our independence. It was their law-merchant, which, being part of the common law, was binding on us; and is now engrafted into our maritime code. The cases, before our declaration of independence, clearly show that the law was then so settled. And in cases since that declaration, it is recognised and agreed to be the law. Our insurances in that country being still considerable, the rule is yet useful, on that account, among others.

In France, agreeable to an ordinance of Louis XIV., the first policy is to be exhausted, before the second operates, if dated at different times. But different policies, of the same date, are considered as one, and there is a ratable contribution. In Spain, the date and time of individual subscription are attended to, and insurers are called on, according to priority of subscription, even on the same policy. I have had frequent occasions to recur to Spanish regulations. There is, in most of the Spanish maritime laws and customs, a peculiarity which creates an exception, rather than a rule, on many general principles.

I cannot see, that it will be materially disadvantageous to commerce, to settle this question, in either way contended for in this cause. It is of most importance, that the point should be clearly decided and settled in one or the other way; that merchants may know, and accommodate their affairs to the decision. This court can, at least, commence the means of final decision.

I believe, with Professor Smith, in his "Wealth of Nations," cited in this cause, that distributing the burden of losses among the greater number, to prevent the ruin of a few, or of an individual, is most conformable to the principles of insurance, and most conducive to the general prosperity of commerce. The wisdom and experience of the British nation, grown out of their more modern and extended state of commerce, have given additional value to this opinion. Whatever respect (and it is not slight) I may entertain for the laws of other nations, I deem myself bound to follow what was the established law and custom of merchants in England, at the time of our becoming an independent nation: not because it was the law merely of that country; but because it was, and is, our law.

There is sufficient evidence in my mind, in the cases produced out of the British books, to this point, to satisfy me of the law and custom there established on this question. I, therefore, conclude, according to the case of *Newby* v. *Reed* (W. Black. 410), that "the insured may recover the whole sum; and leave the insurer to recover a ratable proportion, from other insurers, on 'a double policy,' and the insured may elect which set of insurers, or which of the individuals, he will sue for the amount of actual loss; beyond which he cannot recover, as he can have but one satisfaction."

On the point stated (the details of which merchants can best adjust), I am of opinion, that the defendant is liable to pay to the plaintiff, a contribution, upon the loss paid by him as stated. This contribution must be made by all the insurers, on all the policies, ratably, as their respective subscriptions bear a proportion to each other, and all of them to the actual loss. The defendant, of course, must pay to the plaintiff his ratable proportion, on these principles, according to the amount of his subscription.

Judgment for plaintiff.

*MAY TERM, 1801.

Present—Tilghman, Chief Justice, and Basset and Griffiths, Circuit Judges.[1]

Hurst's Lessee *v.* Jones.

Costs of former suit.

A defendant cannot be compelled to proceed to trial, until payment of the costs of a former action, between the same parties, for the same cause, which had been *non-prossed.*

A former ejectment, between the same parties, for the same land, had been *non-prossed;* but the costs of suit remained unpaid.

The defendant's counsel objected to the trial of the present ejectment, until the costs of the former were paid.

By the Court.—The objection is reasonable and just. The defendant cannot, under such circumstances, be compelled to proceed to a trial.

The cause continued.

Rawle, for the plaintiff. *E. Tilghman*, for the defendant.

Hollingsworth *v.* Duane.(*a*)

New trial.

A verdict will not be set aside, on account of the alienage of a juror. *Semble*, that it is a cause of challenge, before he is sworn.

In this case (which was an action for a libel), the defendant filed a plea to the jurisdiction of the court, on the ground, that he, as well as the plaintiff, was a citizen of Pennsylvania. Issue being joined on that fact, it was found by the jury, that the defendant was not a citizen; and thereupon, in consequence of a previous agreement, a *venire* issued to ascertain the *quantum* of damages, which the verdict settled at $600. After *the verdict was given, it appeared, that one of the jurors was an alien; and [*354

(*a*) s. c. Wall. C. C. 47, 51, 77, 141.

[1] This was the court established under the act of 13th February 1801 (1 U. S. Stat. 89), under the Adams' administration. Hon. William Tilghman (afterwards and for many years Chief Justice of Pennsylvania) was commissioned as its president judge, on the 3d March 1801, to hold his office, during good behavior, as provided by the constitution. But on the 8th of March 1802, on the coming in of the Jefferson administration, the act was repealed (1 U. S. Stat. 132), and the judges were deprived of their offices, without the imputation of a fault. It is known, that Chief Justice Tilghman's opinion was against the validity of the repealing law; for, in a very able protest, published by Judge Basset, in which the breach of the constitution was strenuously asserted, he remarks: "If any difference between me and my associates in office exists, it relates merely to the point of time for expressing our sentiments. I can confidently assert that, on deliberation, they coincide with me in other respects." It is said, that Judge Tilghman, in after life, never alluded to the circumstance of his having been a judge of that court. Binney's Eulogium, 16 S. & R. 441. Its decisions are chief reported in Mr. John B. Wallace's reports, originally published in 1801, by Asbury Dickens. The constitutionality of the repealing act was mooted, in the case of Stuart *v.* Laird, 1 Cr. 299, but the judges avoided any expression of opinion upon the question.

Dallas obtained a rule to show cause, why the verdict should not be set aside for that reason.

On the argument in *support* of the rule, it was contended: 1st. That the trial by jury, entire, was anxiously adopted by the United States, as well as by this state; including the right and causes of challenge as at common law, in civil and in criminal cases. 1 Dall. Laws, App. 55, § 9, 11; Ibid. 58, § 25; 3 Ibid. 36, § 9, 6; 4 vol. Acts Cong. p. 25, art. 8, 9; 1 Dall. Laws, 134, § 4; 2 Ibid. 802, § 2; 3 Ibid. 606, § 16; 2 Ibid. 264, § 9, 12, 3; 1 vol. Acts Cong. 113, § 30; Ibid. 68, § 29. 2d. That on principle, as well as on authority, alienage was a cause of challenge to a juror, before verdict. 3 Dall. Laws, Const. art. VIII.; 1 Acts Cong. Const. art. VI.; Ibid. 67, § 29; 1 Roll. Abr. 657; Co. Litt. 156 *b*; 3 Bl. Com. 362; Gilb. P. C. 94; 1 Dall. 74. 3d. That if the cause of challenge was unknown, when the jury was qualified, it may be used to set aside the verdict, as for a mistrial. 3 Dall. 515; 11 Mod. 119; 2 Wood. 352; An. Reg. 1790, p. 46; 2 Ld. Raym. 1410; 1 Str. 640; 1 Acts Cong. 6, § 17; 2 Str. 1000, 593.

E. Tilghman and *Ingersoll*, in opposition to the rule, contended, 1st. That, in Pennsylvania, alienage was not a cause of challenge to a juror. But 2d. That the objection was too late, after the juror was sworn, and the verdict was given.

The Court, after a long advisement upon the subject, seemed to think, that alienage might have been a cause of challenge, before the juror was sworn; but upon an extensive review of the authorities, they decided, that advantage could not be taken of it, after verdict.

Rule discharged.(*a*)

Penn *v.* Butler. Butler *v.* Penn. Penn *v.* Penn.

Same *v.* Same.

Possession of securities.

The survivor of two joint obligees, is, at law, entitled to the possession of the joint securities; and a court of equity will not interfere with the disposition of them, unless some ground is laid for its interposition.

These were bills in equity, involving a great variety of facts, respecting the disposition of the estates of the late proprietary family: but the principal object of all of them, was submitted for the opinion of the court, on the following agreement:

"It is agreed, that these suits be submitted for the opinion of the court upon the following statement of facts, admitted by *all the parties, except the fact, that Anthony Butler, for his own accommodation, and without the consent, knowledge or approbation of John Penn, the elder, took, *inter alia*, in part payment of certain sales hereinafter mentioned, certain bonds and mortgages, in the joint names of John Penn, the elder, and John Penn, the younger, as obligees and mortgagees; which fact, it is agreed,

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(*a*) Since the discussion of this case, the marshal has been directed not to return aliens upon the panel; and, in many instances, when aliens have been returned, the state, as well as the federal, courts have discharged them, upon their own application.

shall be decided by the court, on evidence to be produced; and that such formal decrees be eventually drawn and entered in each, as will effectuate the opinion which the court shall pronounce.

Case. John Penn, the elder, and John Penn, the younger, after the act of assembly of Pennsylvania, passed November 27th, 1779, entitled "an act for vesting the estates of the late proprietaries of Pennsylvania in this commonwealth," remained seised and possessed, as tenants in common, of all their manors, reserved tracts, &c., in Pennsylvania, with power to sell in fee: three-fourth parts being the property of John Penn, the younger; and one-fourth part being the property of John Penn, the elder. On the 19th of November 1787, John Penn, the elder, appointed John F. Mifflin his attorney, with power to sell and convey, &c., to receive payment for lands sold, either in money or securities; and to substitute any agent or agents; and on the 23d of December 1787, John F. Mifflin substituted Anthony Butler. On the 29th day of June, in the year 1787, John Penn, the younger, appointed Robert Millegan and John F. Mifflin his attorneys, with power to sell and convey, &c., to receive payment for lands sold, either in money or securities; and to substitute any agent or agents. And on the 29th day of June, in the year 1787, Robert Millegan and John F. Mifflin substituted Anthony Butler. John Penn, the younger, afterwards revoked the power of attorney, which he had granted to Robert Millegan and John F. Mifflin; and on the 29th of April 1788, John Penn, the younger, appointed the said Anthony Butler his attorney, with power to sell and convey, and to receive in payment money or securities.

By virtue of the several powers above stated, Anthony Butler did, at sundry times, sell several tracts of land belonging to the said John Penn, the elder, and John Penn, the younger, as tenants in common, in the proportions aforesaid; and in payment therefor (*inter alia*) took, for his own accommodation, without the consent, knowledge or approbation of the said John Penn, the elder, certain bonds and mortgages, in the joint names of John Penn, the younger, and John Penn, the elder, as obligees and mortgagees. After the time of taking the said bonds and mortgages, to wit, on 9th of February 1795, John Penn, the elder, died, leaving Anne Penn and John F. Mifflin, executrix and executor of his last will and testament.

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*"There are in the hands of Anthony Butler a number of bonds and mortgages, taken as aforesaid, in each and all of which bonds and mortgages, the said John Penn, the younger, is interested three undivided fourth parts; and the aforesaid executors of John Penn, the elder, are interested the other one undivided fourth part.

"Questions. 1st. Whether John Penn, the younger, as surviving obligee and mortgagee, is entitled to have and receive from Anthony Butler, all the said bonds and mortgages, for the purpose of collecting and distributing the money thereby secured and made payable, according to the respective interests of the parties?

"2d. Or, whether the executors of John Penn, the elder, are entitled to receive one-fourth part in value of the said specific bonds and mortgages, for their separate use and benefit?

"3d. Or, whether the court will consider the bonds and mortgages, under the circumstances of the case, as several, as well as joint, to be followed with the consequences inferrible from such principle?"

On the hearing, Mr. Butler's testimony stated, "that he was, at first, the separate agent of John Penn, the younger, when Mr. T. Francis was the separate agent of John Penn, the elder; that during this period, the bonds for purchase-money of lands sold, were separately taken, according to the interest of the parties; that in September 1787, he became the agent of both the Penns, but continued, for some time, to take separate bonds; that the purchasers complained of the expense of giving separate bonds and mortgages, and he then determined to take them for the joint use of his principals; that he received no instructions upon the subject, from either party; and that he was not, in fact, aware of any difference between taking the bonds jointly, or severally." It also appeared, that Mr. J. R. Coates had been appointed the agent of John Penn, the younger; and the general question was, whether Mr. Butler should be directed to deliver up the joint bonds and mortgages to him, as the agent of the surviving obligee?

Ingersoll and *Mifflin* contended, against the claim of the surviving obligee: 1st. That it was founded merely on the mistake and misapprehension of the agent, acting for two parties, having distinct interests, and giving separate powers. 2d. That, under such circumstances, a court of equity can and ought to apportion the securities, by a fair division of them; so that each party may possess the entire interest and remedy in his proportion. 3d. That even if an apportionment could not be made, the court will appoint a receiver, to collect and divide the joint fund, in the regular proportions. On these points, the following books were cited: 3 P. Wms. *357] 158; 21 Vin. Abr. 509, pl. 4; Carth. 16; 1 Eq. Abr. 293; *3 Ves. jr., 628, 631, 399; 2 Com. Dig. 255, 258; 1 Eq. Abr. 290 *a*.

Rawle and *Dallas*, in support of the claim of the surviving obligee, urged, 1st. That the point of law is clearly in favor of the claim; and to set aside a plain rule of law, there must be strong, controlling principles of equity, in favor of the opposite party. 2d. That the act of taking joint securities was not a mistake or error; but a deliberate act, for the accommodation of purchasers. 3d. That there was no suggestion of a fraud, a breach of trust, wilful *laches*, or probable insolvency, in reference to the surviving obligee. 4th. That there is, therefore, no foundation for the interposition of the court to appoint a receiver; nor to justify a court of equity in compelling the parties to accede to an arbitrary apportionment of the securities. On these points were cited, Yelv. 177; Vent. 34; 3 Dyer 350; Sheph. 363, 356; 2 Brownl. 207; 1 Eq. Abr. 290; 2 Pow. 263; Ambl. 311; *Wallace* v. *Fitzsimons*, 1 Dall. 248; 2 Com. Dig. 110, 209, 213, 255; 2 Vern. 556.

The Court were decidedly of opinion, that, at law, the surviving obligee was entitled to the possession of the joint securities, that he might recover the amount; and that there was no ground laid, on the present occasion, for the interposition of a court of equity. (*a*)

(*a*) On this clear intimation of the opinion of the court, Mr. Coates liberally declared, that if the executors of John Penn, the elder, would concur in giving him immediate possession of the securities, he would not charge a commission for collecting and paying their proportion of the amount; and the proposition was, accordingly, agreed to.

*MAY TERM, 1802.

Present—The same Judges.

UNITED STATES *v.* CONYNGHAM *et al.*[1]

Execution.—Constructive fraud.

Goods, though chiefly household furniture, suffered to remain in the possession of the defendant, for more than a year after a levy, are liable to a subsequent execution.[2]

THIS cause came before the Court, on a case stated for their opinion, in the following terms :

"At the term of September 1798, judgment was obtained in the supreme court of Pennsylvania, at the suit of John Travis *et al.* v. Francis and John West, for 1365*l.* 3*s.* 9*d.* debt, and 6*d.* costs. A *fieri facias* issued under the said judgment, returnable to December term 1798, under which certain goods and chattels,(*a*) belonging to the defendants, were levied on and taken in execution, by the sheriff of the county of Philadelphia, on the 8th day of January 1799. The 8th of January 1799, the said John Travis and others, plaintiffs in the said action, for a full and valuable consideration, to them paid by the defendants in this action, assigned the judgment, and all the moneys due thereon, to them, the said David H. Conyngham and John M. Nesbitt. The goods and chattels so as aforesaid levied upon, were, with the assent and approbation of the said plaintiffs in the said judgment, before the said assignment, and by the defendants in this action, since the said assignment, and by the sheriff, with the assent and approbation aforesaid, permitted to be and remain *in the possession of the said Francis and [*359
John West, until the levying of the execution hereinafter mentioned.

"At the August sessions 1797, of the district court of the United States for the Pennsylvania district, judgment was obtained, at the suit of the United States, against the said Francis and John West, under which judgment, a writ of *fieri facias* was issued, and on the 13th day of January 1800, was levied on the same goods and chattels, then being in the possession of the said Francis and John West, or one of them. On or about the 20th day of April 1801, after a time had been fixed, by the marshal of the United States, for the sale of the property so levied on by him, at the suit of the United States, and after advertisements had been put up in the most public places of the city of Philadelphia, notifying the time and place of such sale, the present defendants, for the first time, gave notice of the prior execution before mentioned. Notice was given to the marshal, that if he proceeded on the sale, an action would be brought against him ; and it was, therefore, agreed, that the goods should be appraised by sworn appraisers, which was done, and the value thereof, according to the appraisement, amounting to $1557.75, is admitted to be in the hands of the defendants in this action.

(*a*) It was agreed, on the argument, to state, that the goods were principally household furniture.

[1] S. C. Wall. C. C. 178. [2] See the remarks of Judge DUNCAN, in Dean *v.* Patton, 13 S. & R. 345.

"The question submitted to the court is, whether, on the preceding circumstances, the execution issued by John Travis *et al.* can be supported against the execution subsequently issued by the United States. If the court shall be of opinion in the affirmative, then judgment to be given for the defendant, otherwise, for the plaintiff.

"January 30th, 1802. A. J. Dallas, for plaintiff.
Moses Levy, for defendant."

The question was discussed by *Rawle* and *Dallas*, for the plaintiff, and by *Lewis* and *Levy*, for the defendant; the former relying on the authorities in the English books: 1 Ves. 245–6; 1 Wils. 44; 7 Mod. 37; 10 Vin. Abr. 561, 568; Peake N. P. 65; 1 Salk. 320; Carth. 420; 2 Vern. 238; Ld. Raym. 251; Cowp. 712; 1 T. R. 729; 1 Esp. 205. And the latter relying on the decisions of the courts of Pennsylvania, varying the English rule of law, according to the peculiar circumstances of the country. See *ante*, p. 165, 208, 213.(*a*)

The Court, after great deliberation and research, delivered elaborate opinions, *seriatim*, upon the principles and authorities connected with the discussion; expressed their regret at differing from the decisions of the state courts; and unanimously gave judgment for the plaintiff.

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*360] *Knox *et al. v.* Greenleaf. (*b*)

Jurisdiction.—Citizenship.

A citizen of one state, removing to another, purchasing real estate, paying taxes and residing in the latter for about four years, becomes a citizen thereof, so far as regards the jurisdiction of a federal court; notwithstanding a temporary absence, during which he acquired and exercised municipal rights in a third state.

Case. The defendant filed the following plea in abatement:

"The said James Greenleaf, who is impleaded by the addition and description of a citizen of the state of Maryland, by Jared Ingersoll, his attorney, comes and defends the force and injury, &c., and says, that he, long before the arrest in the present action, and at the same time, as well as twelve months preceding the said arrest, and continually afterwards, was, and yet is, a citizen of the state of Pennsylvania, having his permanent domicil and residence in the said state or district of Pennsylvania, and not a citizen of the state of Maryland. And the said James Greenleaf, by his attorney aforesaid, further saith, that according to the constitution and laws of the United States, a citizen of Pennsylvania cannot be impleaded or compelled to answer by another citizen of the same state, before the judges of the circuit court, but only in the courts of the state, having competent jurisdiction of the case. And this he is ready to verify: therefore, he prays judgment, if he ought to be compelled to answer the said William to the said plea in court, &c.

The plaintiffs filed a replication, averring that the defendant was a citi-

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(*a*) See further, on this subject, Pritchett *v.* Jones, 4 Rawle 264.

(*b*) s. c. Wall. C. C. 108; which is a report of the case, on a motion to discharge the defendant on common bail.

zen of Maryland; and issue being thereupon joined, the question was tried before GRIFFITHS and BASSET, associate judges, the Chief Judge declining, on account of a family connection with the defendant, to take judicial part in the cause.

Upon the evidence, it appeared, that the defendant was a native of Massachusetts; that he came to Philadelphia in 1796, and purchased a valuable house in Chestnut street, in which he lived, until his pecuniary embarrassments and consequent imprisonment occurred, in 1798; that his clerks and servants continued afterwards to live there, until the house was sold to Mr. Tilghman; that being discharged by the Pennsylvania insolvent acts, in March 1798, he went to the southward, and returned to Philadelphia before the yellow fever of 1798 had subsided; that between the 5th of November 1798, and the 20th of January 1799, he applied to the legislature of Maryland, styling himself of that state, for the benefit of an insolvent act, in the nature of a bankrupt law, that on the 10th of January 1799, an act was passed accordingly, in which he was described as "of Prince George county," and by which it was provided, that the chancellor, before granting the benefit of the act, should be satisfied, by competent testimony, that the defendant was, at the time of passing the act, "a citizen of the United States, and of this state;" *that the defendant was discharged under this act, on the 30th of August 1799; that he returned to Philadelphia in February 1800; that he removed from Philadelphia to Northampton county, in June of the same year, had paid taxes there, and had never left the state since; and that he was arrested, in the present suit, on the 20th of February 1801. [*361

The principal point discussed, upon these facts, was, whether the defendant was a citizen of Pennsylvania, so as to exclude the jurisdiction of the federal court, the plaintiffs being themselves citizens of that state? (*a*)

For the plaintiffs, it was contended, by *Moylan*, that the defendant could only be regarded as an inhabitant, not as a citizen, of Pennsylvania; that he had represented and proved himself to be a citizen of Maryland, in August 1799, or he could not have enjoyed the benefit of the act of that state; and that he had not, upon the most liberal calculation of time, resided in Pennsylvania long enough to acquire the rights of permanent citizenship, upon the principle of the constitution. (1 U. S. Stat. 78, § 11; Const. Penn. Art. III. § 1.)

For the defendant, it was contended, by *Ingersoll* and *Dallas*, that a citizen of one state was constitutionally entitled to be a citizen of every state; that the acts of congress prescribe a mode for naturalizing aliens, but none for communicating the municipal rights of citizenship to a citizen removing from one state to another; that as to the naturalization of aliens, Pennsylvania leaves the subject to the acts of congress; and for the exercise

(*a*) This action was brought against Mr. Greenleaf, as indorser of notes issued by Morris & Nicholson, which he had pledged as security for his own notes, given to the plaintiffs. His own notes were due, before he was discharged under the insolvent act; but the notes of which he was indorser, became due afterwards. This afforded matter for argument, but did not appear to enter into the decision of the court. The plaintiff's counsel cited Howis *v.* Wiggins, 4 T. R. 714.

and enjoyment of every right of citizenship, her constitution only stipulates, that the party shall be a citizen, shall have resided for a specified time, and shall have paid taxes; that the three requisites must be complied with, in the case of a native, as well as of an adopted citizen, for the purposes contemplated; that, being a citizen, absence from the state does not disfranchise, except as to the right of electing and being elected, which depends on residence as well as citizenship; that a citizen of Massachusetts, coming into Pennsylvania, with a view to settle, acquiring real estate, and paying taxes, is a citizen of Pennsylvania, to every purpose, but that of electing or being elected, within the respective periods prescribed by the constitution; and that the laws of Maryland communicate, *instanter*, the rights of municipal
*362] citizenship, *to a citizen going thither from another state, without impairing the permanent domiciliated citizenship, to which he is entitled in his own state. (Const. art. IV. § 1; 2 Dall. 370; Const. Penn. art. I. § 3, 8; art. II. § 4, 8; art. III. § 1; art. IV. § 1; art. IX. § 20, 21; 4 Dall. Laws, 332, § 1; 1 Dall. 152, 158, 241; Maryland Laws, July 1779, ch. 6; Nov. 1789, ch. 24; Nov. 1792, ch. 14; Nov. 1793, ch. 26.)

THE COURT were clearly of opinion, that the defendant was entitled to be considered as a citizen of Pennsylvania; and the jury found a verdict accordingly.

Verdict for the defendant.

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*363] *APRIL TERM, 1803.

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

BALFOUR'S Lessee *v.* MEADE. (*a*)

Settlement.

To constitute a settlement, under the act of April 3d 1792, so as to vest in any one an inceptive title to the lands lying north and west of the Ohio, &c., there must have been an occupancy by him, accompanied by a *bonâ fide* intention to reside upon the land, either in person, or by a tenant: the making of improvements merely, is not such a settlement.

The proviso of the 9th section of that act applies solely to those who had incipient titles, which could only have been created by such occupancy or by warrant: a warrant of acceptance for these lands, not founded on such settlement, though containing a false recital of it, gives no title.

THIS was an ejectment for four tracts of land, lying north and west of the Ohio and Allegheny rivers and Conewango creek, in Pennsylvania. The plaintiff's title rested upon settlement rights, surveys and warrants.

In 1793, the plaintiff was a surgeon in the army, in garrison at Fort Franklin. He took some of the soldiers, went out, cut down a few trees, and built up five pens or cabins, about ten feet square, and without putting covers on them, returned back to the fort, in six or seven days. In April 1795, he had these five tracts surveyed in the name of himself, Elizabeth Balfour, and three others, each, four hundred acres. The deputy-surveyor

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(*a*) s. c. 1 W. C. C. 18.

had, upon application of the plaintiff, directed one Wilson to make the surveys, but something preventing him from doing it, the plaintiff employed one Steel to do it; and upon returning the surveys to Stokely, the deputy-surveyor, he prevailed upon him to write an authority to Steel to make the surveys, which Stokely says, he did: and ante-dated it, in order to make it appear to precede the surveys. In May 1795, he obtained warrants of acceptance for two of the surveys of two of the tracts, having paid the consideration-money for all.

In the autumn of 1794, Meade, the defendant, finding no person settled upon these tracts, built cabins upon the four tracts in controversy, covered them, or some of them, and then went off, not returning again, until November 1795, when he came, with his family, to reside in one of the cabins, and fixed settlers upon the other tracts. In July 1795, the plaintiff gave notice to the defendant, *that he claimed the tracts in question, that he intended to settle them, and forewarned him to proceed no further with his improvements thereon. In January 1796, the defendant *caveated* the plaintiff in form, and the same being tried before the board of property, in March 1800, the *caveats* were dismissed, and warrants were ordered to issue; but they never did issue, in consequence of doubts afterwards existing respecting the plaintiff's title. [*364

In April 1796, the plaintiff made engagements with some persons to settle these lands for him; but after they had seen and approved the lands, they declined going on them, on hearing of the defendant's claim.

It was in proof, by many witnesses, that the war with the Indians rendered it dangerous to settle that country, during the year 1793, 1794 and 1795, and that but few attempted, before the spring or autumn of 1796.

E. Tilghman and *Dallas* contended, that the plaintiff had acquired a good right by settlement, survey and warrant, to the lands in question, under the laws of Pennsylvania, and particularly the act of the 3d of April 1792 (3 Dall. Laws, 209); that the settlement of Meade, in 1795, was in violation of the plaintiff's prior right, and, of course, void; that the plaintiff had been prevented by the Indian hostilities, from settling or fixing settlers, until the treaty of Fort Grenville, made in August 1795, and ratified in December 1795, and that he had attempted to settle it in a reasonable time after that event. 1 Dall. 6; 2 Ibid. 98; 3 Ibid. 457; Addison 216, 354, 218.

Ingersoll and *McKean* contended, that the plaintiff never had made a settlement, within the meaning of the law, not having accompanied it with actual residence, or an intention to reside; that, of course, he never had an inceptive title, to be protected by the proviso in the 9th section of the act of the 3d of April 1792. They cited Addison, 248, 335; the case of the *Holland Company* v. *Coxe*, in the supreme court of this state (*ante*, p. 170), and the decisions of the judges of that court, in a feigned issue, tried at Sunbury (*ante*, p. 237).

Washington, Justice.—The importance of this cause led the court to wink at some irregularities in the argument at the bar, which have tended to protract it to an unreasonable length. Depending on the construction of laws of the state, and particularly on that of the 3d of April 1792, it

had, at first, the appearance of a difficult and very complicated case. It is not easy, at the first reading of a long statute, to discover the bearings of one section upon another, so as to obtain a distinct view of the meaning and intention of the legislature. But the opinion I now entertain was
*365] formed on Saturday, before we parted; open, however, *as it always is, to such alterations as ulterior reason and argument may produce.

The better to explain, and to understand, the subject, it will be necessary to take a general view of the different sections of the act of the 3d of April 1792, upon which this cause must turn. The 1st section reduces the price of all vacant land, not previously settled or improved, within the limits of the Indian purchase, made in 1768, and all precedent purchases, to 50*s.* for every 100 acres; that of the vacant lands within the Indian purchase made in 1784, lying east of Allegheny river and Conewango creek, to 5*l.*, to be granted to purchasers in the manner authorized by former laws. The 2d section offers for sale all the other lands of the state, lying north and west of the Ohio, Allegheny and Conewango, to persons who will cultivate, improve and settle the same, or cause it to be done, at the price of 7*l.* 10*s.* per hundred acres, to be located, surveyed and secured as directed by this law. It is to be remarked, that all the above lands lie in different districts, and are offered at different prices. Title to any of them may be acquired by settlement, and to all, except those lying north and west of the Ohio, Allegheny and Conewango, by warrant, without settlement.

The 3d section, referring to all the above lands, authorizes applications to the secretary of the land-office, by any person having settled and improved, or who was desirous to settle and improve, a plantation, to be particularly described; for a warrant for any quantity of land, not exceeding 400 acres, which warrant is to authorize and require the surveyor-general to cause the same to be surveyed, and to make return of it, the grantee paying the purchase-money and fees of office. The 8th section, which I notice in this place, because intimately connected with the third section, directs the deputy-surveyor to survey and mark the lines of the tract, upon the application of the settler. This survey, I conceive, has no other validity than to furnish the particular description, which must accompany the application at the land-office for a warrant. The 4th section, amongst other regulations, protects the title of an actual settler, against a warrant entered with the deputy-surveyor, posterior to such actual settlement.

The 9th section, referring exclusively to the lands north and west of the Ohio, Allegheny and Conewango, declares, "that no warrant or survey of lands within that district, shall give a title, unless the grantee has, prior to the date of the warrant, made, or caused to be made, or shall, within two years after the date of it, make or cause to be made, an actual settlement, by clearing, fencing and cultivating two acres, at least, in each hundred acres, erecting thereon a house for the habitation of man, and residing, or
*366] causing a family to reside, thereon, for five years next following his first settling the same, if he shall *so long live; and in default of such actual settlement and residence, other actual settlers may acquire title thereto."

Let us now consider this case, as if the law had stopped here. A title to the land in controversy, lying north and west of the Ohio, Allegheny and

Conewango, could be acquired in no other manner than by actual settlement; no sum of money could entitle a person to a warrant, unless the application was preceded by actual settlement on the land, or, if not so preceded by actual settlement, the warrant would give no title, unless it were followed by such settlement, within two years thereafter.

The question then is, what constitutes such an actual settler, within the meaning and intention of this law, as will vest in him an inceptive title, so as to authorize the granting to him a warrant; not a *pedis possessio;* not the erection of a cabin, the clearing, or even the cultivation, of a field: these acts may deserve the name of improvements, but not settlements. There must be an occupancy, accompanied with a *bonâ fide* intention to reside and live upon the land, either in person, or by that of his tenant, to make it the place of his habitation, not at some distant day, but at the time he is improving: for if this intention be only future, either as to his own personal residence, or that of a tenant, then the execution of that intention, by such actual residence, fixes the date; the commencement of the settlement, and the previous improvements, will stand for nothing in the calculation.

The erection of a house, and the clearing and cultivating the ground, all or either of them, may afford evidence of the *quo animo* with which it was done; of the intention to settle; but neither, nor all, will constitute a settlement, if unaccompanied by residence. Suppose, then, improvements made, the person making them, declaring at the time, that they were intended for temporary purposes of convenience, and not with a view to settle and reside: could this be called an actual settlement, within the meaning and intention of the legislature? Surely, no: but though such acts, against express declarations of the *quo animo*, will not make a settlement, it does not follow, that the converse of the proposition will; for a declaration of an intention to settle, without actually carrying that intention into execution, will not constitute an actual settlement.

How do these principles apply to the case of the plaintiff? In 1793, he leaves the fort at which he was stationed, and in which he was an officer, with a few soldiers; cuts down some trees, erects four or five pens (for, not being covered, they do not deserve the name of cabins), and in five, six or seven days, having accomplished this work, he returns into the fort, to his former place of residence. Why did he retreat so precipitately? We hear of no danger existing, at the time of completing these labors, which did not exist during the time he was engaged in them. What prevented him from proceeding to cover the cabins *and from inhabiting them? Except [*367
the state of general hostility, which existed in that part of the country, there is no evidence of a particular necessity for flight, in the instance of this plaintiff. It is most obvious, that the object of his visit to this wilderness was, to erect what he considered to be improvements; but they were, in fact, uninhabitable by a human being, and consequently, could not have been intended for a present settlement. He was, besides, an officer in the army, and whilst in that service, he could not settle and reside at his cabin, although the country had been in a state of perfect tranquillity. In short, his whole conduct, both at that time and afterwards; his own statements, when asserting a title to the lands, the recitals in his warrants of acceptance, and certificates of survey, all afford proof which is irresistible, that he did

not mean, in 1793, to settle. Mistaking the law, as it seems many others have done in this respect, he supposed that an improvement was equivalent to a settlement, for vesting a right in those lands. It is not pretended, even now, nor is it proved by a single witness, not even by Crouse, who assisted in making the improvements, that he contemplated a settlement. It has been asked, could the legislature have meant to require persons to sit down, for a moment, on land encompassed by dangers from a savage enemy? I answer, no: at such a time, it was very improbable, that men would be found rash enough to make settlements. But yet no title could be acquired, without such a settlement, and if men were found hardy enough to brave the dangers of a savage wilderness, they might be called imprudent men, but they would also deserve the promised reward, not for their boldness, but for their settlement.

The first evidence we have of an intention in the plaintiff to make an actual settlement, was in the spring of 1796, long after the actual *bonâ fide* settlement of the defendant with his family; for I give no credit to the notice from the plaintiff to the defendant, in July 1795, since, so far from accompanying it with actual settlement, he speaks of a future settlement, which, however, was never carried into execution. Everything which I have said with respect to the 400 acres surveyed in the name of George Balfour, will apply, *à fortiori*, against the three other surveys in the name of Elizabeth Balfour, &c., who it is not pretended were ever privy even to the making of the cabins, or ever contemplated a settlement upon those lands.

If the law, then, had stopped at the proviso, it is clear, that the plaintiff never made such a settlement as would entitle him to a warrant. But he excuses himself from having made such a settlement, as the law required, by urging the danger to which any person, attempting a residence in that country, would have been exposed. He relies on the proviso to the 9th section of the law, which declares, "that if any such actual settler, or any grantee
*368] 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 each actual settlement had been made and continued." Evidence has been given of the hostile state of that country, during the years 1793, 1794, 1795, and the danger to which settlers would have been exposed. We know, that the treaty at Fort Grenville was signed on the 3d of August 1795, and ratified the 22d of December, in the same year. Although Meade settled, with his family, in November 1795, it is not conclusive proof that there was no danger, even then; and, at any rate, it would require some little time and preparation, for those who had been driven off, to return to their settlements; and if the cause turned upon the question, whether the plaintiff had persevered in his exertions to return and make such settlements, as the law requires, I should leave that question to the jury, upon the evidence they have heard. But the plaintiff, to entitle himself to the benefit of the proviso, should have had an incipient title, at some time or other, and this could only have been created, by actual settlement, preceding the necessity which obliges him to seek the benefit of the proviso, or by warrant.

I do not mean to say, that he must have had such an actual settlement,

as this section requires to give a perfect title; for if he had built a cabin, and commenced his improvement, in such manner, as to afford evidence of a *bonâ fide* intention to reside, and had been forced off by the enemy, at any stage of his labors, persevering, at all proper times afterwards, in endeavors to return, when he might safely do so, he would have been saved by the proviso. But it is incumbent on the plaintiff, if he would excuse himself from the performance of what has been correctly called a condition precedent, to bring himself fully and fairly within the proviso, which was made for his benefit: this he has not done.

Decisions in the supreme court, and in the common pleas of this state, have been cited at the bar, two of which I shall notice, for the purpose of pointing out the peculiar mark which distinguishes them from the present, and to prevent any conclusions from being drawn from what has been said, either to countenance or impeach those decisions. The cases I allude to are, the *Holland Company* v. *Coxe*, and the feigned issue tried at Sunbury.

The incipient title, under which the plaintiffs claimed in those causes, were warrants, authorized by the 3d section of the law; the incipient title in the present case, is settlement. The former was to be completed by settlement, survey and patent; this was to precede the warrant; and for the more distinct explanation of this *distinction, it will be important to [*369 ascertain what acts will constitute an actual settler, to whom a warrant may issue, and what constitute an actual settlement as the foundation of a title. I have before explained, who may be an actual settler, to demand a warrant, namely, one who has gone upon and occupied land, with a *bonâ fide* intention of an actual present residence, although he should have been compelled to abandon his settlement, by the public enemies, in the first stages of his settlement: but actual settlement, intended by the 9th section, consists in clearing, fencing and cultivating, two acres of ground, at least, on each hundred acres, erecting a house thereon, fit for the habitation of man, and a residence continued for five years next following his first settling, if he shall so long live. This kind of settlement more properly deserves the name of improvements, as the different acts to be performed clearly import. This will satisfactorily explain what, at first, appeared to be an absurdity in that part of the proviso, which declares, that "if such actual settler shall be prevented from making such actual settlement, &c." The plain meaning is, that if a person has once occupied land, with an intention of residing, although he has neither cleared or fenced any land, and is forced off by the enemies of the United States, before he could make the improvements, and continue thereon for five years; having once had an incipient title, he shall be excused by the necessity, which prevented his doing what the law required, and in the manner required; or if the warrant-holder, who, likewise, has an incipient title, although he never put his foot upon the land, shall be prevented by the same cause, from making these improvements, &c., he, too shall be excused if, as is required also of the settler, he has persevered in his endeavors to make those improvements; &c. But what it becomes such a grantee to do, before he can claim a patent, or even a good title, is quite another question, upon which I give no opinion.

As to the plaintiff's surveys and warrants, they cannot give him a title. Not the surveys. 1st. Because they are a mere description of the land, which the surveyor is authorized by the 8th section to make, and the appli-

cant for the warrant is directed, by the 3d section, to lodge in the land-office at the time he applies for the warrant. It is merely a demarcation, a special location of the land intended to be appropriated, and gives notice of the bounds thereof, that others may be able to make adjoining locations, without danger of interference: that is not such a survey as is returnable, so as to lay the foundation of a patent. 2d. It is not authorized by a warrant. 3d. It was not for an actual settler. 4th. It was not made by an authorized surveyor, if you believe, upon the evidence, that the authority to Steel was ante-dated, and given after the survey was returned. Not the warrants. *370] 1st. Because it was not a warrant of title, but of acceptance. *2d. It is not founded on settlement, but improvement, and if it had recited the consideration to be actual settlement, the recital would have been false in fact, and could have produced no legal valid consequence.

As to the *caveat;* the effect of it was to close the doors of the land-office against the further progress of the plaintiff in perfecting his title. The dismissal of it, again opened the door, but still, the question as to title is open for examination in ejectment, if brought within six months, and the patent will issue to the successful party.

The plaintiff, therefore, having failed to show a title sufficient to enable him to recover in this action, it is unnecessary to say anything about the defendant's title; and your verdict ought to be for the defendant.

The jury found for the defendant.

Humphries *v.* Blight's assignees. (*a*)

Bankruptcy.—Set-off.

Where the holder of a negotiable note indorses it to a third person, after a commission of bankruptcy has issued against the payee, the indorsee may prove under the commission, but subject to all just off-sets, existing at the time of the bankruptcy.

This was an amicable action, to obtain a decision upon these general facts: Murgatroyd, being possessed of two notes, made by Peter Blight, payable without defalcation, and being indebted to Humphries, offered to give the notes in part payment, and cash for the rest of the debt. The notes had been due for some time; and a commission of bankruptcy had previously issued against Blight; but Blight, upon an application from Humphries, advised him to accept the proposition, without any intimation of a defence or set-off. The notes were, accordingly, indorsed by Murgatroyd to Humphries; but when presented by the indorsee, to be proved under the commission, the assignees of Blight claimed a right to set off a debt due from Murgatroyd to Blight; and for the trial of this claim the present action was instituted. Two questions, however, were discussed on the trial: 1st. Whether the holder of a promissory note, purchased after a commission of bankruptcy had issued against the maker, could prove the debt, under the commission? 2d. Whether the note, being purchased after it was due, had not lost its general negotiable character; and consequently, remained subject to any set-off, that would apply between the drawer and payee?

(*a*) s. c. 1 W. C. C. 44.

Hare and *Dallas* argued for the plaintiff, and cited 5 vol. Acts Cong. p. 68, § 34; 5 Geo. II., c. 30, § 7, § 28; 5 vol. Acts Cong. p. 15, 74, § 1, § 42; 1 Atk. 73; 2 Wils. 135; Cull. 99; Evans 220; Co. B. L. 19; 1 Atk. 119; 4 Dall. Laws, 102–3; 3 T. R. 80, 7 Ibid. 429; 2 Dall. 396; 2 Fonbl. 150; Anstr 427.

Rawle argued for the defendants, and cited 4 T. R. 714; 6 Ibid. 57; 2 Str. 1234; 3 T. R. 80, Co. 96; 5 vol. Acts Cong. p. 74, § 42. [*371

By the Court.—1st. We have no doubt upon the right of the assignee of the note, in this case, to prove the debt under the commission, and to receive a dividend. The certificate of the bankrupt would be a bar to a recovery, in an action by the present holder of the note against him; and wherever a certificate will be a bar, the right to prove the debt, under the commission, must be unquestionable.

2d. In the case of negotiable paper, or in the case of an assignable bond, we have always thought, that the assignee takes it discharged of all the equity (as between the original parties) of which he had no notice. But whenever the assignee has notice of such equity, either positively or constructively, he takes the assignment at his peril. The assignment, in this case, was taken after the commission of bankruptcy had issued; and the commission was legal notice, that wherever mutual debts subsisted between the bankrupt and his creditors, the right of set-off attached. The set-off claimed by the assignees must, therefore, be allowed: and this opinion is given, without admitting any distinction, whether the notes were due or not, before the assignment; but merely upon the ground that the assignment was subsequent to the commission.

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*APRIL TERM, 1804. [*372

Present—Washington, Justice, and Peters, District Judge.

United States *v.* Thomas Passmore.[1]

Perjury.—Repeal of statute.

Perjury, under the bankrupt law of 1800, was not indictable, under the act of 30th April 1790, § 18; that section only applies to perjuries committed in judicial proceedings.

An indictment cannot be sustained, under a statute which has been repealed, without any saving clause.[2]

The defendant, who had become bankrupt, was prosecuted by indictment, containing two counts, for perjury, in swearing before the commissioners, on the 20th day of September 1803, that he "could not tell exactly the time, but believed it was the latter (end) of 1799, that he first owned

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[1] S. c. 1 W. C. C. 84.

[2] United States *v.* Finlay, 1 Abb. U. S. 364; s. c. 3 Pitts. 126; Ex parte Landsberg, 11 Int. R. Rec. 150; United States *v.* Bennett, 12 Bl. C. C. 345. And the repeal of a penal statute puts an end to a pending indictment under it; United States *v.* Tynen, 11 Wall. 88; Commonwealth *v.* Duane, 1 Binn. 601; Genkinger *v.* Commonwealth, 32 Penn. St. 99; Hartung *v.* People, 22 N. Y. 95.

the brig Abigail. He ceased to own her, he rather thought, in the year 1800," when, in truth and in fact, he never did own her, but had covered the property for an alien under his name. He had before sworn at the custom-house (on the 31st of July 1799), that he "was the true and only owner of the brig Abigail; that there was no subject nor citizen of any foreign prince or state, directly or indirectly, by way of trust, confidence or otherwise, interested therein, or in the profits or issues thereof:" but no information, tending to falsify this oath, was received, until a prosecution was barred by the act of limitation. 1 U. S. Stat. 119, § 32.(*a*) On the 19th of December 1803 (2 Ibid. 248), an act of congress was passed, enacting, "that the act of congress, passed on the 4th day of April 1800, entitled 'an act to establish an uniform system of bankruptcy, throughout the United States,' shall be and the same is hereby repealed: provided, nevertheless, that the *373] repeal of the said act shall in nowise affect the *execution of any commission of bankruptcy, which may have been issued prior to the passing of this act, but every such commission shall be proceeded on and fully executed, as though this act had not passed."

The facts being laid before the jury, *Rawle* and *Dickerson*, made a defence, principally, upon two grounds: 1st. That the defendant was not guilty upon the merits. 2d. That the oath, charged to be false, was taken before the repeal of the bankrupt law; and in consequence of the repeal, could not be the subject of a prosecution, either under the bankrupt law, under the general penal law, or at common law.(*b*) On the first ground, they cited 4 Bl. Com. 136; 1 Ibid. 60; 1 Hawk. 331; 2 Ibid. 84; Cro. Car. 852; Cro. Eliz. 148; 1 Salk. 374; Bank. Law, § 18; 2 Esp. 281; 1 McNall. L. of Ev. 3; 1 Ld. Raym. 396; 1 Hale 706; 2 Salk. 513; 10 Mod. 335; Cro. Jac. 644; 3 Mod. 78; 2 Ld. Raym. 991; 1 Burr. 543; 4 Ibid. 2026; Cowp. 297; Leach C. L. 252, 268; Bank. Law, § 15, 21, 51; 4 vol. Acts Cong. 427, § 88; 3 vol. 337; 2 vol. 30; 2 vol. 21; 4 vol. 102, § 2; 2 vol. 157, 193. And on the second ground, they cited 1 W. Black. 451; 1 Hale 291, 525; 1 Hawk. 306; 4 vol. Acts Cong. 523, 202.

Dallas (the district-attorney) submitted to the court three propositions: 1st. That, notwithstanding the repealing act, the perjury charged was indictable, according to the first count of the indictment, under the bankrupt law, as an incident to the execution of the commission. 5 vol. 61, § 21; 6 Bac. Abr. 384, 390; 2 Leach 810; Co. B. L. 7; 5 Geo. II., c. 30, § 44; 6 vol. 95, § 14; 5 vol. 238; 6 vol. 93; 1 vol. 113, § 32; 2 Hawk. 87, c. 69, § 4; 6 vol. 80, § 5; 3 vol. 163; 6 vol. 58, § 1; 1 vol. 337, § 46; 3 vol. 97; 3 vol.

(*a*) In consequence of this, and other similar cases, occurring at the custom-house, the time allowed for prosecuting offences under the revenue laws, was enlarged. (1 U. S. Stat. 290.)

(*b*) Before the jury was sworn, *Rawle* said, that although he did not mean to move to quash the indictment, he should propose, under the sanction of the court, that the question of law arising upon the repealing act, should be discussed, as soon as the jury were sworn, and before any evidence was produced. The attorney of the district objected to the novelty of such a proceeding. And by THE COURT.—The trial must proceed, in the usual course: the evidence and law must both be laid before the jury, who will then give a verdict, under the charge of the court. If the verdict should be against the defendant, his counsel may move the point of law, in arrest of judgment.

334; 5 vol. 126; 4 vol. 456; 3 vol. 88; 1 vol. 236; 4 vol. 446, § 112; Ibid. 427; 1 Hawk. 306; Bro. Abr. 203; 1 Hale 291, 525; 2 Ibid. 190. 2d. That the perjury charged was indictable, according to the second count of the indictment, independent of the bankrupt law, upon the general penal act (1 vol. 108), inasmuch as the provisions of the bankrupt law, do not create the offence; are affirmative and not repugnant: and, with respect to the punishment, are cumulative. Cowp. 297; 2 Hale 705; 4 Burr. 2026; 23 Geo. II., c. 13; *Leach 253; 1 Hawk. 306, B. 1, c. 40, § 5; Leach, 715; 2 Hale 191–2. And 3d. That according to the opinions of some of the judges [*374 of the supreme court,(a) the perjury charged, was indictable at common law; and in that case, the conclusion of the indictment, "against the form of the statute," was to be regarded as surplusage. 2 Hawk. 83; *United States* v. *Ravara*, 2 Dall. 297; *Williams' case*, 2 Cranch 82, in note; *United States* v. *Worrell*, 2 Dall. 384.

Washington, Justice, delivered the charge of the court at large, upon the points of law; but cautiously abstained from giving any opinion upon the facts. He considered the repealing act as an absolute bar to the prosecution; and told the jury, expressly, that the defendant was, on that ground alone, independent of any question upon the merits, entitled to an acquittal.

On this charge, the jury immediately found a verdict of not guilty.

Willing *et al.*, Plaintiffs in error, *v.* United States. (b)

Shipping.—Registry.—American character.

The sale of part of a vessel, by parol, whilst at sea, to an American citizen, and a resale to the vendor, on her arrival in port, and before entry, does not forfeit her American character, nor render her subject to foreign duties; a new register is not necessary.

Error from the District Court of Pennsylvania. Upon the record, it appeared, that this was an action upon a bond, dated the 16th of November 1802, given by Willings & Francis and J. Miller, in the penal sum of $15,442, to secure the payment of $7720.41, being the amount of one-half of the duties payable on the cargo of the ship Missouri, on the 16th of May 1803. The defendants pleaded, 1st. That the duties on the goods in question amounted only to $14,036.73, on account of one-half of which ($7018.36) the bond was given. And 2d. Payment.

The plaintiff replied, 1st. That the ship was an American registered vessel, owned by the defendants, when she sailed from Philadelphia for Canton, on the 1st of December 1800; that after her departure, she was in part sold to Jacob G. Koch and others, on the 12th of February 1801; that on making the sale, the ship was not registered anew, nor was there any bill of sale executed, reciting her register; that the goods were imported into the port of Philadelphia, subsequent to the sale, on the 16th of Nov-

(a) The attorney of the district stated that the last point was made, in deference to the opinion of the court, on the question of a common-law federal jurisdiction, in criminal cases; and not as expressive of his own sentiments upon the subject.

(b) s. c. 1 W. C. C. 125, which is a better report of the opinion of Washington, J.

ember 1802; that the amount of the duties was $15,440.82, for one-half of which, payable in six months, the bond was given. 2d. *Non solverunt.*

The defendants rejoined, that they admit the sale to Koch and others, and the importation of the goods after such sale; but they *aver that *375] the ship was at sea, at the time of the sale, having her register on board, and that it was not, therefore, in the power of the defendants to deliver it up, at the time of the sale; that on her arrival, the 15th of November, the defendants did execute a bill of sale to Koch and others, reciting the register, and the master delivered up the register to the collector, whereupon, the ship was registered anew, as the joint property of the defendant and Koch and others; that on the 7th of January 1803, Koch and others resold to the defendants, and executed a bill of sale reciting the register last mentioned; and that, thereupon, the ship was registered anew as the property of the defendants, whereby she continued an American registered vessel, not liable to foreign duties, and that the domestic duties only amounted to $14,036.73, &c.

The plaintiffs sur-rejoined, that they admit, the ship was at sea, when she was in part sold to Koch and others; but aver, that she was not registered anew, nor was there a bill of sale, reciting the register, at the time of the sale, nor at the time of her arrival. That they also admit that the master delivered to the collector the register of the ship, at the time of his arrival; but they insist that it was long after she had been in part sold, without being registered anew, &c.; that the registry of the ship, on the 22d of December 1802, in the name of Koch and others and the defendants, was made after the resale by Koch and others to the defendants, when Koch and others had ceased to own any part; and that they admit, that Koch and others, having previously resold, did, on the 24th of January 1803, deliver up the register in their names, and the ship was then registered anew, as the exclusive property of the defendants. But they insist, that at the time of the actual resale by Koch and others (15th November 1801), she was not registered anew, nor did they then execute a bill of sale, reciting the register; that the registry of the 24th of January 1803, was made under color of a bill of sale executed by Koch and others to the defendants, long after the resale, and they had ceased to have any interest in the ship; and that at the time of the sale in part to Koch and others, of the resale by them to the defendants, of the arrival of the ship in the port of Philadelphia, and of her entry, she had ceased to be deemed a ship of the United States. The defendants demurred, generally, to the sur-rejoinder; and the plaintiffs joined in demurrer.

The general question, upon the demurrer, was, whether a registered vessel of the United States, being sold in part, to resident citizens of the United States, while she was at sea, without a bill of sale, reciting the register, and without being then registered anew, was liable, with her cargo, to the payment of foreign, or only to the payment of domestic, tonnage and duties, on her return to a port of the United States? And the argument *376] rested chiefly upon the terms and meaning of *the 14th section of the registering act, which is in these words:

"And be it further enacted, that when any ship or vessel, which shall have been registered pursuant to this act, or the act hereby in part repealed, shall, in whole, or in part, be sold or transferred to a citizen or citizens of

the United States, or shall be altered in form or burden by being lengthened or built upon, or from one denomination to another, by the mode or method of rigging or fitting, in every such case, the said ship or vessel shall be registered anew, by her former name, according to the directions herein-before contained (otherwise she shall cease to be deemed a ship or vessel of the United States), and her former certificate of registry shall be delivered up to the collector to whom application for such new registry shall be made, at the time that the same shall be made, to be by him transmitted to the register of the treasury, who shall cause the same to be cancelled. And in every such case of sale or transfer, there shall be some instrument of writing, in the nature of a bill of sale, which shall recite at length the said certificate, otherwise the said ship or vessel shall be incapable of being so registered anew; and in every case in which a ship or vessel is hereby required to be registered anew, if she shall not be so registered anew, she shall not be entitled to any of the privileges or benefits of a ship or vessel of the United States. And further, if her said former certificate of registry shall not be delivered up, as aforesaid, except where the same may have been destroyed, lost, or unintentionally mislaid, and an oath or affirmation thereof shall have been made as aforesaid, the owner or owners of such ship or vessel shall forfeit and pay the sum of five hundred dollars, to be recovered with costs of suit." In the district court, judgment was rendered for the United States. (*a*)

(*a*) Before the decision of the district court, on the principal question, a preliminary point of some importance was determined. By the 65th section of the impost law (4 vol. 386–7), it is provided, that "where suit shall be instituted on any bond for the recovery of duties due to the United States, it shall be the duty of the court where the same shall be pending, to grant judgment at the return term, upon motion, unless the defendant shall, in open court, the United States attorney being present, make oath or affirmation, that an error has been committed in the liquidation of the duties demanded upon such bond, specifying the errors alleged to have been committed, and that the same have been notified in writing to the collector of the district, prior to the commencement of the return-term aforesaid. Whereupon, if the court be satisfied, that a continuance until the next succeeding term is necessary for the attainment of justice, and not otherwise, a continuance may be granted, until next succeeding term and no longer."

In order to obtain a continuance of the cause, at the return-term, the defendants filed the following affidavit: "Thomas W. Francis, one of the above defendants, being duly sworn, deposeth, that an error has been committed in the liquidation of the duties demanded on the above bond, for which this suit is brought, inasmuch as the sum of $7720.41 is thereby demanded for duties on goods, *per* the ship Missouri, whereas, the sum of $7018.73 only was due for the same, the said ship, the Missouri, being a registered ship, belonging to citizens of the United States, and not a foreign or unregistered ship, or liable to foreign duties. And the said Thomas W. Francis further deposes, that the above errors have been notified in writing to the collector of the district of Philadelphia, before the commencement of this present term, being the return-term to which the above action was brought, and that this deponent did, in behalf of himself and the other obligors in the said bond, on the 16th day of May last, tender to the cashier of the bank of the United States, where the said bond was deposited for collection, the last-mentioned sum of money ($7018.73) being, as this deponent verily believes, the whole amount thereon due: that the said cashier of the bank refusing to receive the same, this deponent, in behalf of the aforesaid, tendered the same sum of money to the collector of the district of Philadelphia, on the 17th day of the same month, being as soon

*The cause was again argued in the circuit court, on the 6th and 7th of May 1804, by *Dallas* (district-attorney), for the United States, and by *Rawle* and *Lewis*, for the plaintiffs in error.

*378] *For the *United States*.—The general question is, whether the

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as he could ascertain by inquiry that the said bond had been returned from the bank of the United States to the collector. That the said collector also refused to receive the same; that this deponent afterwards, to wit, on the 7th of July last, did pay to the attorney of the district of Pennsylvania the said sum of $7018.73, say, seven thousand and eighteen dollars and seventy-three cents, on the terms and conditions expressed in a receipt, whereof a copy is hereunto annexed."

Dallas (the district-attorney) insisted, that the cause assigned for a postponement of trial, in the affidavit, was not an error in the liquidation of the duties; for the manifest policy and intent of the law, where to enforce a payment of the revenue, against every plea or pretext, except a plain error in fact; and here, no error in the calculation of figures, no accidental error in the rate of duties, was assigned; but a defence was suggested, upon a principle, which would equally apply to a charge of foreign duties, made in consequence of any other description of forfeiture and disability, under the acts of congress; though the secretary of the treasury was vested with a special power of remission and mitigation in such cases.

After argument, however (*Rawle* and *Lewis* being for the defendants), the district judge decided, that the cause assigned for a postponement, was within the terms and meaning of the act of congress.

The opinion of the court, on the principal question, was afterwards delivered in the following terms:

PETERS, District Judge.—This is a suit commenced on a custom-house bond, for one-half the duties due to the United States, by the defendants, Willings & Francis, on goods imported in the ship Missouri, from Canton. The bond is in the usual form, dated the 15th of November 1802; and was given with other bonds for duties, as charged at the custom-house, amounting to $15,440.82; being the sum chargeable on goods imported in a ship belonging to a foreigner. For the facts, I refer to the pleadings on file. The real point in dispute is, "Whether the goods imported in the ship Missouri are liable to foreign or domestic duties?" There is no doubt, and by the joinder in demurrer it is allowed, that the ship, when the goods were laden, and ever since, did belong to citizens of the United States. And if they had been the same citizens to whom the ship belonged at the time of her clearing out at the American custom-house, before her departure for Canton, only the domestic duties could have been charged. These would have amounted to $14,036.73, causing a difference in favor of the defendants, Willings & Francis, of $1404.09. This sum only is in dispute, at this time, though, it is said, the defendants are affected by the point in controversy, to a considerable amount. But the difficulty is created by a transfer having been made by Willings & Francis, the original owners, to Jacob Gerard Koch and others, also citizens of the United States, of a part of the ship Missouri, while at sea and on her voyage. No bill of sale, reciting the register of the ship, was made, until after her arrival at the port of Philadelphia. A parol sale was made which, though legal, *bonâ fide* and effectual, as between the parties, was not so conformable to the law of the United States, as to entitle the vendees to have their names inserted in a new register. Finally (after the sale by parol before mentioned and a resale to the original owners), a bill of sale was given agreeable to law, and the vessel obtained a new register, though the duties remained as at first charged at the custom-house. T. W. Francis, at the time of the entry, disclosed all the circumstances, and the whole proceedings are *bonâ fide* and without fraud, or any improper intention. The amount having been liquidated at the custom-house as for foreign duties, and the bond before mentioned, among others, given for their amount, a suit was commenced in this court thereon. At the return of the writ, the attorney of

cargo of the ship Missouri was liable to the payment of foreign duties, on the 15th of November 1802, when she returned to the *port of [*379
Philadelphia. It will be attempted to maintain the affirmative on two grounds: 1st. That she had not a register in force. 2d. That she was not then entitled to be registered anew.

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the district moved for judgment agreeable to the act of congress. The defendants filed an affidavit in legal form, requesting a trial or a continuance, because they alleged there had been an error in the liquidation of the account at the custom-house, owing to foreign, instead of domestic, duties having been charged. On mature consideration, and after diligent and careful examination into the technical meaning of the word "liquidation," as explained by the best authorities, both legal and philological, I was of opinion, that the court was bound to comply with the defendant's request. The authority of the court to give an opportunity for legal investigation, is grounded on the true meaning of this word liquidation, which comprehends the principles, as well as arrangements of accounts.

The case has been ably argued on both sides. The whole controversy turns on the 14th section of the act entitled "an act concerning the registering and recording of ships and vessels," passed the 31st of December 1792. A very extensive range has been taken by the counsel on both sides of the question. The principles, intent and policy of the act have been investigated with much ability and talent. I do not hesitate to say, that to me this question, on the words of the section, is difficult, though one of the counsel for the defendants seems to consider the case as perfectly clear. I do not give an opinion upon it, with confidence, though my duty requires it, and I must decide. Were I in a situation to say what the law ought, in this case, to have been, I should have a clear conviction, and would, accordingly, decide in favor of the defendants. I should be warranted in this opinion, by the law as it now is. The knotty part of the question, is that affected by the time *when*, in the 14th section. "*When* any ship or vessel, which shall have been registered pursuant to this act, or the act hereby in part repealed, shall, in whole or in part, be sold or transferred to a citizen or citizens of the United States, or shall be altered in form, &c."

On the part of the defendants, it is insisted, that the word *when* means any time after the arrival of the vessel, at the port where a new register can be legally obtained And according to Lord Coke's opinion, when one is bound to do an act, but no time fixed, the party has his whole lifetime allowed to perform it. Authorities were produced to show, that in the construction of even penal statutes, the spirit, and intent and policy of the law might be called in aid, where words are doubtful: that it is impossible to procure the new register, until the certificate of registry is delivered up: that this cannot be done, before her return from her voyage; and until it is done, provided it be accomplished before her proceeding on another voyage, she is still to be considered as holding her original character; and therefore, not subject to the disabilities attached to a foreign ship. That if it were otherwise, the law would be oppressive on our own citizens, although its policy is grounded in a system to serve them, while it prohibited foreign ships from trading, on terms so beneficial as those of our own nation. That if the word "when" could not be satisfied, but by a new register, procured at the time of the sale, it would amount to an unjust and burdensome exclusion of all sales to citizens, of our vessels, in whole or in part, while at sea or on their voyages; to the great injury of our commerce, and ruinous embarrassment of our merchants, whose necessities or plans required transfers of their vessels, either to relieve them from pressures, or enable them to form new speculations. That such a rigorous construction might be justifiable, when ships in port were sold or transferred, because their certificates of registry were attainable. But as the law does not compel parties to impossibilities (*lex non cogit ad impossibilia*), it is otherwise, when ships are at sea. It satisfies the law, if the new register is applied for, when the temporary impracticability is removed. True it is, that foreigners can never obtain new registers, under transfers or sales from American citizens. All the precautionary measures of the law are aimed at them. The oath at

*1st. The discussion does not turn upon the fact of American ownership, but upon the legal existence, of an American register. *381] *The object of the law was to secure to American citizens, the exclusive benefit of American tonnage and navigation. The means employed were directed, to ascertain, first, the fact that the vessel was American built; and secondly, to trace every change of ownership, in whole, or in part.

And the means being suited to the object, all theories, all arguments *ab inconvenienti*, must yield to the positive terms of the law, in this instance,

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the time of entry must disclose the owners; or foreign character will be presumed. This shows that if the oath is taken, and no foreign ownership appears, it is all the law requires to establish the American character. But the character of the vessel sold by one American citizen to another, was not even suspended, by the clause under consideration, until after her departure from the port whereat she could have obtained a new register, on her arrival from her voyage, during which the sale or transfer was made. It is, therefore, concluded that domestic, and not foreign, duties should have been charged on the goods imported in the ship in question. And that as to the law of the 3d March 1803, it neither has or should have any influence on a precedent transaction: it only fixes the time when a new register must be applied for, which was before uncertain: it also gives power to the secretary of the treasury to remit penalties and forfeitures and remove disabilities, in past as well as future cases.

On behalf of the United States, it was contended, that as no time was fixed in the law for renewing the register, it must be done *instanter*. Where a disability is the consequence, it cannot be removed, until the renewal is completed. If it cannot be done at the moment, owing to impediments not then to be overcome, the party laboring under them must suffer temporary inconveniences, which it was in his power to foresee. In England, where the character of the ship is not altered, an arrangement was made of sending information of the transfer immediately to the custom-house. According to British authorities, though they relate only to the validity of the transfer as between the parties, it is said, 2 East 404, that "if the act of parliament (dictating this measure) were to be considered as giving an indefinite time (or even a reasonable time, after the execution) for the compliance with its requisites; it would enable a transfer of property to be made to foreigners, who might remain concealed owners, until the return of the vessel to her port, which might not be for a great length of time." No time being fixed in the 14th section, it must be *instanter*. A number of extracts from the laws of the United States were produced, to show, that all these laws required the strictest attention to their injunctions, under the severest penalties and forfeitures. That it is not denied that one citizen may sell and transfer to another a ship at sea: but if it is done, the sale is subject to inconveniences on which the parties ought to calculate or take the consequences. The law is or ought to be known to everybody. Those who are shippers of goods should make themselves masters of the subject, both as it relates to sales to citizens and to foreigners, or suffer any inconveniences arising from want of caution. It was asserted, that the fiscal officers had uniformly construed the law as it is now contended for. The congress passing this law meant to exclude sales at sea, to prevent the use of our vessels covertly by foreigners. The register of the Missouri was vacated on the 12th February 1801: she was from that time subject to the disabilities of a foreign ship, until her character was revived: and that could not be done until after the 21st December 1802, when the legal bill of sale was made. No subsequent transaction can, by relation, operate on the duties chargeable, though the character of the ship may be restored. If the foreign character of the vessel existed at the time of the liquidation, no *ex post facto* proceedings can alter the then existing circumstances. There is no distinction in the law between a sale in port, or one at sea: an immediate application for a new register is required in both cases. If it cannot be had, on a sale at sea, it shows

as in numerous other instances of forfeiture under the navigation and revenue laws. In order to ascertain the changes or transfers of property, considerations respecting the transfer to an alien, whether the vessel was in port or at sea, on the one hand; and on the other hand, respecting the transfer to a citizen, whether the vessel was in port or at sea, naturally occurred. Now, no American vessel, wherever she may be, if sold to an alien, can be registered anew. In England, a bill of sale to an alien is void, without the consent of three-fourths of the owners, indorsed upon the certificate. In America, there is no such provision; but still, upon a clandestine sale of a part-owner

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the law meant to exclude the vessel for the time from her American character: *eo instanti*, that the property is changed, her character ceases or is suspended according as she is sold to a foreigner or a citizen. A number of British cases were produced; and said to be analogous, though in that country, they related to change of property. In this, the principles apply to change of character. 3 T. R. 406; 3 Bro. Ch. 571; 5 T. R. 710; 2 East 399, 404; 1 Bos. & Pul. 483; Parker 215. There is no distinction in the laws of the United States, as they relate to a sale either to a citizen or a foreigner, in the point of time, in which the American character ceases to operate: in both cases, the cessation is at the moment of sale. The citizen may revive it, but the foreigner never can.

The law of March 1803, was produced to show a legislative construction. And the custom of the fiscal officers was said to be a contemporaneous and continued interpretation. Although I may not have done justice to the arguments of the counsel on either side, I have thought it proper to recite them in a summary way, to show the conflict of opinion, on the subject.

For myself, I declare, that, although the interpretation given on the part of the United States, is not consistent with my ideas of what the law should have been, I do not see that I am authorized judicially to pronounce that it was not, as on the part of the United States, it is contended to have been, at the time of the transaction, which is the subject of discussion. It appears to me, that the congress enacting the law of 1792, in their zeal to exclude foreigners, did not see, or chose to think lightly of, the inconveniences to which, in such cases as the one now before me, they subjected our own citizens. It also seems to me, a case omitted, either accidentally or with design. The legislature alone were competent to remedy the defect: and they have done this, in cases occurring after their act of March 1803. In the department in which I am placed, I am not competent to give relief; or by interpretations of supposed spirit and intention, supply omissions, or add to the provisions of the then existing law. In cases attended with such unmerited penalties, it is consolatory, that the laws of our country have not left the parties without protection. The congress of 1803, sensible of the hardships consequent on a rigid construction of the former law, have specially and clearly authorized the secretary of the treasury to remit "any foreign duties, which shall have been incurred," by reason of disabilities, happening under the former laws, recited in the act of March 1803. There is no doubt in my mind, that this (the foreign duties having been incurred under the former laws, by a temporary disability and incapacity to obtain a new register) is a case proper for the deliberation of the officer vested with the power of mitigating or dispensing with the severity of fiscal laws. He may (if he so inclines, under the circumstances stated to him) give the relief which the austerity of judicial duty disables a court from affording. Although this is my view of the subject, I think it a hard case, and that it ought not to rest on my opinion. I shall deem myself bound to give every facility to an appeal. If other cases, depending on the same point, occur, I shall, on payment of the undisputed part of the demand, suspend judgment (or grant it on terms) for the contested sums, until the opinion of a superior court can be had; if the parties affected shall choose to take that course.

Let judgment be entered for the sum now due to the United States. I understand, that the domestic duties in part of the bond have been paid.

the innocent owners are protected to the amount of their interest in the vessel. 4 vol. Acts Cong. 11; Abbot, 45; 13 Geo. III., c. 26; 2 vol. Acts Cong. p. 131, § 16, 17, 7; Abbot, 30; 26 Geo. III., c. 60, § 15. Again, an American vessel, if sold even to a citizen, must, upon every sale, in whole or in part, be registered anew; the old register must be surrendered; the bill of sale must be in writing, containing a recital of the register; and on every entry at a port of the United States, the mesne transfers must be disclosed. 2 vol. p. 131, § 14, 17. In England, a distinct provision is made for cases, in which vessels are sold, when in port; and for cases, in which they are sold, while at sea. For the former, it is required, that an indorsement shall be made on the register; or that the vessel be registered anew, at the option of the remaining owners, without which the sale is void. (7 & 8 *Wm. III.*, *c.* 22, § 21; 34 *Geo. III.*, *c.* 68, § 15, 21.) And for the latter, it is required, in order to render the sale valid, that the bill of sale shall recite the register; that a copy of the bill of sale be delivered to the commissioners; that notice of the transfer be given at the ship's port; and that the indorsement be made on the register, when the ship returns. (Ibid.) But in America, the only provision in the case of a sale of a vessel at sea is contained in the 14th section of the law (2 vol. p. 131); while the sale of a vessel in port is anxiously guarded, as well by that section, as by the 14th, 11th and 12th sections. The registering bond does not embrace the case of a sale, while the vessel is at sea; the 17th section only requires a disclosure of the fact, without declaring any consequence; and in short, it is only in the 14th section, that any provision is made for a formal bill of sale, for a surrender of the old register, or for the taking out of a new one. And yet, the policy which prescribes such guards against unlawful transfers, while a vessel is in port, operates more forcibly in the *cases of a transfer, while a vessel is at sea. The [*382] legislative jealousy of sales abroad, is manifested, indeed, by the provision, which disqualifies citizens, resident in foreign countries (with a few exceptions) from being holders of American registered vessels. (2 vol. 132, § 2, 134, § 4.) Then, if the policy of the law is general, so are the words of the 14th section of the act, embracing every sale of a vessel, in whole or in part, at home or abroad; and to preserve the American privileges of the vessel, the requisites of the section are, a new register on the sale, a surrender of the old register, and a bill of sale, reciting the register. On the sale of the Missouri, to Koch and his associates, her old register ceased to be in force. A new one might be obtained, provided, at the time of applying for it, the old one was surrendered, and a bill of sale, in due form, was produced: but after vacating the old register by a sale, the ship ceased to be privileged, until a new register was obtained. A formal bill of sale is a *sine qua non*, in every case; and emphatically, it is necessary in the case of a sale, while a vessel is at sea, as the act of congress provides no other guard against an unlawful transfer. Besides, why should the 17th section merely require, upon the entry of a vessel from abroad, a disclosure of the fact, whether there has been any antecedent change of ownership, if it was not to bring the case within the provisions of the 14th section of the act? And if a vessel sold at home, is subject to the rigor of all the regulations of the 14th section, on what principle can a vessel sold abroad pretend to an exemption? Is it not more within the policy, spirit and language of the law, to say, that the vessel sold abroad, shall, like the vessel sold at home, lose her privilege upon the

sale; and as the danger of unlawful sales is greater abroad than at home, she shall remain unprivileged, until the actual renewal of her register? In illustration of the argument on this point, the following authorities were cited: 3 T. R. 406; 3 Bro. Ch. 571; s. c. 5 T. R. 710; 7 Ibid. 306; 2 East 399; 1 Bos. & Pul. 483.

2d. Nor was the Missouri even entitled to be registered anew, at the time of her return to the port of Philadelphia. There did not then exist a bill of sale, reciting the register; and the recital might as easily be made from the record at the custom-house, as from the certificate of registry carried with the vessel.

The construction now contended for, has uniformly prevailed in the treasury department; and contemporaneous construction ought to be regarded in deciding upon a doubtful law. (Park. 215.) Legislative construction is also in favor of the United States, for the very case of a vessel sold while at sea, has been specially introduced into the system (6 vol. 223, § 3); the power to remit the foreign duties incurred by such sale has been vested in the secretary of the treasury; and legislative construction of a legislative act, where the words are doubtful, ought to be conclusive. (Parker 217.)

*For *Willings & Francis.*—In the present case, there is no suggestion of alien ownership, or *mala fides* of any kind. The meaning [*383 of the legislature should, therefore, be perfectly clear, before a decision inflicting, in effect, a heavy penalty, on the plaintiffs in error, is pronounced. The general policy of the law is, to give an advantage to the American citizen; and if its language is at all obscure, he is entitled to the most beneficial interpretation. In this view of the controversy, the recapitulation of a few plain rules, will lead to a favorable result. 1st. A vessel can have but one register, at the same time. 2d. The certificate of the registry is delivered to the master of the vessel, when he leaves the port, and must be deposited at the custom-house upon his return. 3d. The register remains in force, until it has been legally vacated or cancelled. 4th. On a change of property, whether in whole or in part, a new register must be taken out; but no new register can be granted, until the old one is surrendered. 5th. The execution of a bill of sale, reciting the register, will not authorize the granting of a new register, without such surrender of the old one; but both must concur for that purpose.

In no part of the law, is a particular time prescribed, either for the execution of a bill of sale, or for the application for a new register. The 14th section amounts to nothing more than a declaration, that a vessel, which has been sold, in whole or in part, shall not enjoy the American privileges, until she is registered anew; but the word "when" is not used as an adverb of time; nor does the section require, that the vessel shall be registered anew, at the moment of the transfer. If, therefore, the bill of sale is executed, and the old register surrendered, when an application is first made for the enjoyment of American privileges, the words and policy of the law are satisfied; nor will the court go beyond the words of a law, to create a forfeiture. (1 Bos. & Pul. 483; 19 Vin. Abr. 512, pl. 8, 9; 3 T. R. 401; 2 East 399.) The 17th section of the act, however, seems to fix the sense of the legislature; for it obviously contemplates the disclosure of a transfer, while

the vessel was at sea ; and if the oath which it prescribes, is truly taken, there is no forfeiture of her American character.

The doctrine contended for, on behalf of the United States, would introduce the greatest mischiefs. Could congress mean (in an act, too, for the benefit of American tonnage and navigation), so to tie up the property in ships, that, while they are at sea, they could not be sold, without incurring a forfeiture of their privileges? And is it consistent with justice and reason, that the innocent shippers of a cargo on board an American vessel, should be taxed with the payment of foreign duties, in consequence of successive transfers, to which they were neither parties nor privies? To these inconveniences, the claim of foreign duties, in this case, adds the reproach, *384] that congress has required *an impossibility ; to wit, the immediate surrender of the register at the custom-house, while, in fact, it was on board of the vessel, at sea.

As to a contemporary construction, it is not clearly and uniformly shown, in favor of the adverse doctrine ; nor, if it were, could it prevail against the plain words and obvious meaning of the law. And as to a supposed legislative construction of the act of the 2d of March 1803 (6 vol. 223, § 3, 4), the act is merely affirmative ; and even if it were declaratory of the legislative opinion, upon the previous state of the law, it could not be binding upon the judges, who must exercise their own judgments upon the law itself, independent of legislative exposition.

WASHINGTON, Justice.—Although the pleadings, in this case, are lengthy, it has been agreed by both parties, that the only question to be considered and decided, upon the whole record, is, whether the cargo imported in the ship Missouri, is subject to the payment of foreign or of domestic, duties?

By the first section of the "act concerning the registering and recording of ships or vessels," passed on the 31st of December 1792, it was provided, that all vessels, registered pursuant to that law, should be denominated and deemed vessels of the United States : and all vessels of the United States, are entitled, by law, to certain benefits and privileges denied to foreign vessels ; so long as they shall continue to be wholly owned, and to be commanded, by a citizen or citizens of the United States.

The ship Missouri was a duly registered vessel of the United States, and has always continued to be owned and commanded by citizens. She was, therefore, entitled to the benefits and privileges of her American character, when she arrived at the port of Philadelphia, in November 1802 ; unless the partial sale made to American citizens, while she was at sea, deprived her of that character. Whether the transaction referred to, produced such an effect, may, I think, be decided upon a joint consideration of the fourteenth and first sections of the registering act alone ; though other sections will afford fair ground for reasoning and illustration.

The 14th section is composed of several sentences, which must be distinctly, as well as collectively, considered, to ascertain the general meaning and result. The first sentence declares, that when a registered vessel is sold to a citizen, she shall be registered anew, by her former name, or she shall cease to be deemed a vessel of the United States, and that her former register shall be delivered up, at the time of applying for a new one. The second sentence declares, that in every such case of sale or transfer, there

shall be a bill of sale, reciting, at length, the certificate of registry, otherwise the vessel shall be incapable of being registered anew. And the third sentence declares, generally, *that in every case, in which a vessel is required to be registered anew, she shall not be entitled to the [*385 privileges of a vessel of the United States, if she is not so registered.

It is difficult to conjecture, why, in the first sentence, the want of a new register should be declared, within a parenthesis, to deprive a vessel of her American character; and that, in the third sentence, the same effect should be again declared, for the same cause. The latter declaration, however, is obviously, tautology: for if the former declaration can be said to have destroyed the privilege, *eo instanti*, when the sale was effected; it was useless and superflous to repeat, that the vessel should not, at any subsequent period, be entitled to enjoy it. The clear meaning, however, of both sentences, appears to be, that the vessel should lose her American privileges, not simply upon the sale, but upon the neglect to obtain a new registry, after the sale. It is here, then, material to inquire, in what manner, and on what terms, a new registry can be obtained? A bill of sale, reciting the old certificate of registry, must be produced to the collector. The old certificate of registry must also be surrendered. Now, though a bill of sale might be formally executed, in the absence of the ship; yet, the ship is bound, by law, to carry the certificate of her registry with her; and consequently, it is impossible for her owner to surrender that instrument to the collector, while she is herself at sea. If, however, the surrender of the certificate must be made, or the privilege must be lost, it is manifest, that the law either requires the performance of an impossibility (which is not hastily to be imputed to the expression, and never to the intention of a law), or it prohibits, in effect, the sale of a ship, at sea, by one of our citizens to another.

There is no part of our navigation system, that expressly avows this to be the intention of the legislature; and from what principle of public policy can it be inferred or presumed? The cargo is not liable to the claim of foreign duties, until an actual sale of the ship; and why should the owner of the cargo lose his privilege, on account of the sale, which is an act of the owner of the ship alone? Or be punished as for a fault, on account of the neglect of the owner of the ship to take out a new register; an omission which the owner of the cargo can neither prevent nor supply? Even, however, with respect to the ship, why, I repeat, should the privilege be lost, and her owner punished as for a fault, in omitting to deliver an instrument to the collector, on shore, which the law directs to be kept on board her, at sea? A consequence more injurious would not proceed from a sale to an alien; and yet, in the case of a sale to an alien, the act of congress declares the forfeiture of the American privilege in express words; as being incurred, *eo instanti*, on the sale; but no such declaration is made, in the case of a sale to a citizen.

*It appears to me, that the fourth sentence of the 14th section of [*386 the act is also important; for it declares, that "if the former certificate of registry shall not be delivered up as aforesaid, the owner or owners of the ship or vessel, shall forfeit and pay the sum of $500:" And thus, if the construction contended for by the attorney of the United States is correct, the law not only prohibits the sale of a vessel at sea, by one citizen to another, on pain of forfeiting, at the moment of sale, the privileges of

the vessel; but subjects the owner to a penalty, although it is physically impossible, that he should do the thing, for the omission of which he is to be punished.

But an American vessel does not cease to be entitled to her privilege, any more by the act of sale, than by the act of altering her form or burden; both cases being embraced by the provisions of the 14th section. Let us suppose, therefore, that the construction of the vessel should be altered, either in the port to which she belongs, or in any other port: would she lose her privilege, before the owners could have an opportunity to apply for a new registry? And if not, why should the privileges be lost, before an opportunity occurs to make the application for a new registry, in the case of a sale? I can perceive no reason for a distinction.

As to the provisions of the 17th section, they are designed to compel a discovery of any transfers of a vessel, which may have been made, during her absence from the port; in order that it might appear, whether she continued to be a privileged vessel of the United States. If it appeared, that she had been transferred to a foreigner, her privileges were forfeited, from the moment of transfer; and if it appeared, that she had been sold to a citizen, the officers of the customs were enabled, by a knowledge of the fact, to exact the foreign duties, in future, should no application be made for a new registry.

I am, upon the whole, of opinion, that the appellants are not liable for higher duties, than are payable by vessels of the United States; and consequently, the judgment of the district court must be reversed.

Judgment reversed.(*a*)

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*387] *OCTOBER TERM, 1804.

Present—Washington, Justice, and Peters, District Judge.

Hurst's Case. (*b*)

Privilege of suitor.

A citizen of another state, who, when in attendance on court as a suitor, has been subpœnaed as a witness in another case, is privileged from an arrest in execution, issuing from a state court, while at his lodgings; and the sheriff will be indemnified, by an order of discharge of a court of competent jurisdiction.

On the affidavit of Timothy Hurst, it appeared that he had come from his residence at New York, to attend the trial of *Hurst* v. *Hurst* (in which he was a party), at the present term; that after his arrival, he had been subpœnaed as a witness, in the case of *W. Hurst* v. *Rodney*, which was also upon the trial-list; that yesterday (the 13th of November), while he was at his lodgings, in Hardy's tavern, he had been arrested by the sheriff, upon a *ca. sa.* issuing from the supreme court of Pennsylvania; and that he had come to Philadelphia, and was remaining here, at the time of the arrest, only upon the business of his suit, and in obedience to the *subpœna*.

(*a*) This judgment was affirmed by the supreme court, in 4 Cr. 48.
(*b*) s. c. 1 W. C. C. 186.

Ingersoll, upon these facts, moved that Hurst should be discharged from the custody of the sheriff. And he argued, in support of the motion: 1st. That the application was properly addressed to this court, and not to the supreme court. 2d. That a discharge from the *ca. sa.*, by order of the court, without the consent or concurrence of the plaintiff, would not operate as a satisfaction of the debt; and another execution might afterwards be taken out. 3d. That the discharge by a competent court, would excuse and protect the sheriff, in an action for an escape. Barnes 2; Ld. Raym. 1524; Bac. Abr. 631; 5 T. R. 686; 5 Bac. Abr. 617, 673; 1 H. Bl. 636; Tidd Pr. 61; 2 Str. 990; 1 Dall. 356;(*a*) 3 Ibid. 478; Dyer 60.(*b*) [*388

Rawle, in opposition to the discharge, insisted, that under the circumstances of this case, Hurst was neither privileged as a witness, nor as a party. 1st. Not as a witness: the arrest was made at the lodgings of the defendant; but although a witness is privileged, while he is going from home, while he is actually attending the court, and while he is returning to his home; he is not privileged while he is at home. 2d. Not as a party: if the privilege of a party is not limited to the same times and places, as the privilege of a witness, its extent is indefinite, and its operation unequal. Is a suitor in this court, residing in Georgia, protected from arrest, as soon as he receives the notice of trial, in his own state, and in every state through which he passes on his journey to Philadelphia? Again, is every resident citizen of Philadelphia, who has a suit depending, privileged during the trial term, not only while actually attending the court, but while at home, with his family? And if not, why should a non-resident suitor be protected at his lodgings, which are his home? There is, indeed, a distinction between the cases, favorable to the witness; for a witness is under an absolute obligation to attend the court; but a party may prosecute his suit by an attorney, without personal attendance. Besides, the sheriff will be bound to show a regular discharge, in an action for an escape; and if the supreme court should adhere to the rule in *Starret's case*, the order of this court will not be a justification. 1 Brownl. 15; Barn. 200; 5 T. R. 686; 2 Cha. Ca. 69; T. Raym. 100; 2 Ld. Raym. 1524; 6 Com. Dig. 89, 88; Wood's Inst. 478; 2 Bro. Abr. 159, tit. Priv., pl. 37.

Washington, Justice.—I will not examine the powers of the supreme court of the state, upon the present occasion. It is enough, to ascertain that the power of this court is competent to the object proposed. If, indeed, any injury would be done either to the plaintiff in the suit, or to the sheriff (both of whom have acted innocently, and without knowledge of the facts, on which the claim of privilege arises), by our interposition, we might be induced to pause upon the subject. But, as to the plaintiff, it is clear, that he may renew his execution, whenever the privilege ceases: and as to the sheriff, the order of a court of competent jurisdiction, touching the subject-

(*a*) It was admitted by the counsel, on both sides, that the authority of Starret's case, had been often doubted, both on the bench and at the bar, though never expressly overruled.[1]

(*b*) See also, 1 Dall. 357 note.

[1] But see the opinion of Yeates, J., in Hannum *v.* Askew, 1 Yeates 25.

matter, must be a conclusive justification in every other court, acting upon sound principles of law and justice.

To decide the principal question, therefore, I find it necessary to go no
*389] further than to state, that I think the witness was, in *this case, privileged, while he was at his lodgings. The *subpœna* was in force; and the arrest of the witness, at that place, has all the effects which could be produced by an arrest in the streets while coming to or going from the court.

Peters, Justice.—I concur in the sentiments that have been expressed by the presiding judge; and add, as my separate opinion, that the party is entitled to be discharged, upon both the grounds of privilege.

A special order of discharge was, accordingly, made and filed, at the instance of *Dallas*, who appeared for the sheriff.

Walker *et al. v.* Smith.

Factor.—Damages.

One who accepts a consignment, is liable in damages for a breach of instructions, though his services were rendered gratuitously.

Where there is a legal measure of damages, the jury are bound by it, though the action sound in tort.

Case. On the trial of this cause, the following facts appeared: The plaintiffs were merchants of London; and in March 1796, shipped and consigned to the defendant certain goods, invoiced at 270*l.* 14*s.* 8*d.* sterling, accompanied with a letter, stating that "these goods were shipped by order of Mr. J. B., and for his account; and he was to remit us the amount, on his arrival at Philadelphia: but since they were shipped, some circumstances have occurred, which have created some doubts in our minds, respecting his solidity; and by the advice of our friends, we have adopted this method to secure ourselves, through your friendly assistance, which we request on this occasion. As we do not want to deprive B. of the benefits to be derived from the sale of these goods, we wish you to hold them at his disposal, but not to deliver them to him, without being paid for the amount, or having such security given you therefor, as is satisfactory to yourself. Should he not be able to effect either of these, in a reasonable time, we would wish you to dispose of them for our account, and remit us the amount in good bills." The defendant duly received the goods, but delivered them over to B., without receiving payment, or exacting security; and shortly afterwards, B. failed. The defendant, however, representing other creditors of B., as well as the plaintiffs, made a composition, by which he received for the proportion of the plaintiffs, 151*l.* 16*s.* sterling, and remitted that sum to them, without charging commissions, in a letter dated the 11th of December 1800. The plaintiffs refused to ratify the composition, and brought the present suit to recover the invoice value of the goods, with interest, according to the usage of trade.

On the trial, *Ingersoll* assumed three grounds of defence: 1st. That there was no cause of action; as the defendant had accepted the consign-

ment, on principles of mere courtesy, without interest, directly or indirectly; and had exercised a fair and impartial *discretion, for the equal interest of all the creditors of B. 2d. That even if the action could be [*390 maintained, it is a case, in which the jury are at liberty to give less by way of damages than the amount of the loss actually proved. (1 Dall. 180; 2 Wils. 328; 2 Bac. Abr. 266; Bull. N. P. 156; 1 Esp. N. P. 179.) 3d. That the defendant, acting as a general consignee, may be considered as selling the goods to B., and, consequently, is not liable to his principal, for more than he actually received. (Willes 407.)

For the plaintiffs, *J. Sergeant* and *Dallas* contended: 1st. That although the defendant was not obliged to accept the consignment, yet, if he did accept it, he was answerable, like every other agent or factor, for a breach of the positive orders of his principal. (1 Beawes L. M. 44, 46; Moll. 493, 497; 4 Com. Dig. 227–8; 2 Cha. Cases 57; 4 Rob. 218; 1 Marsh. 206–7, 209, 210.) 2d. That although the jury had a great and useful latitude in cases of *tort*, and mixed cases of negligence and *tort*, where no precise standard of damages was established; the legal discretion of a jury could indulge in no capricious or conjectural estimate, in cases of contract, express or implied, where a mere calculation of figures furnishes a certain and uniform standard of right. (2 W. Bl. 942; 4 T. R. 654–5; 5 Ibid. 255; Barnes 455, 448; 1 Str. 425.) 3d. That on these principles, the defendant was liable for the debt, as if he were a purchaser of the goods; and every purchaser is chargeable with interest, after the usual term of credit is expired. (1 Dall. 265; Doug. 361; 2 Bos. & Pul. 337; *Crawford* v. *Willing*, *ante*, p. 286.)

The Court, in their charge to the jury,(*a*) expressly declared an opinion, that, on the evidence, the plaintiffs were entitled to recover the full amount of the original debt, with such reasonable compensation for the delay of payment, as the jury should think proper.(*b*)

The jury, however, gave a verdict for only $468.44, which was the amount of the plaintiffs' demand (after crediting the remittance), estimating the sterling money at par, allowing the defendant a commission, and deducting the interest. The jury added, that the plaintiffs should pay the costs.(*c*)

*The *plaintiffs*' counsel then moved for a new trial, because the [*391 verdict was against law, evidence and the charge of the court: but

(*a*) For a full report of the charge of Washington, J., see 1 W. C. C. 153.

(*b*) It appears by the record, that the action was brought to October Sessions 1801, and that the declaration was in *assumpsit*, with the following counts, two in *indebitatus assumpsit*, for goods sold and delivered and for money had and received, and one *quantum valebant*.

(*c*) The finding of the jury, that the plaintiffs should pay the costs, was, at once, abandoned by the defendant's counsel, on general principles; but *Ingersoll* stated, that the first judicial law provided, that the plaintiff should not be allowed costs, if he recovered a sum less than $500 (6 vol. 16, § 3; 1 vol. 61, § 20); and that although the action was instituted, when the sum required, in that respect, was only $400; yet he referred to a decision of Judge Chase, in the circuit court of Delaware, which pronounced, that the act repealing the latter provision, revived the former, and was to be applied to all suits, present or future. *Dallas* referred, however, to the acts of congress (5 vol. 237, § 11; 6 vol. 16, § 4). And the court declared that the plaintiffs were clearly entitled to costs.

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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*392] *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.[1]

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
*393] 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

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(*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.

[1] See note to Commonwealth *v.* Coxe, *ante*, p. 237.

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,

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

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

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 [*396 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

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

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 [*399
settling and improving the said land, and from residing thereon 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

(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.

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. *Coxe*, *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 per-
*400] sistence in endeavors *to make the settlement, during the period of 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

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

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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*402] *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.[1]

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
*403] of a proprietary manor, duly surveyed *and returned into the land-office, on or before the 4th day of July 1776?

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

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

[1] 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.

regularly deduced from the charter of Charles II. to William Penn,(a) provided there was a manor called and known by the name of Springetsbury, duly surveyed and returned, according to the terms and meaning of the act of November 1779.

The material facts, upon the controverted point, were these: At the time that Sir William Keith was governor of the province, the controversy between the prorietor and Lord Baltimore, had arisen; and many persons from Maryland intruded upon the adjacent lands in Pennsylvania. Under the pressure of these intrusions, Sir William, on the 18th of June 1722, issued a warrant to John French, Francis Worley and James Mitchell, in which he recited, "that the three nations of Indians on the north side of Susquehanna are much disturbed, and the peace of the colony in danger, by attempts to survey land on the south-west bank of the river, over against the Indian towns and settlements, without any right or pretence of authority so to do, from the proprietor, unto whom the lands unquestionably belong; that it is agreeable to treaty and usage, to reserve a sufficient quantity of land, on the south-west side of the Susquehanna, within the proprietor's land, for accommodating the said Indians: and that the Indians had requested, at a treaty, held on the 15th and 16th instant, that a large tract of land, right against their towns on Susquehanna, might be surveyed for the proprietor's use only; because, from his bounty and goodness, they would always be sure to obtain whatsoever was necessary and convenient for them, from time to time." Sir William's warrant then proceeded, that "by virtue of the powers wherewith he is intrusted for the preservation of his majesty's peace in this province, and with a due respect and regard to the proprietor's absolute title and unquestionable rights, he directs and authorizes the persons named in the warrant, to cross and survey, mark and locate, 70,000 acres, in the name and for the use of Springet Penn, Esq., which shall bear the name, and be called the manor of Springetsbury: beginning upon the south-west bank, over against Conestogoe creek; thence, W. S. W., 10 miles; thence, N. W. by N., 12 miles; thence, E. N. E., to the uppermost corner of a tract called Newberry; thence, S. E. by S., along the head line of Newberry, to the southern corner tree of Newberry; thence, down the side line of Newberry, E. N. E., to the Susquehanna; and thence, down the river side, to the place of beginning: and to return the warrant to the governor and council of Pennsylvania." The survey being executed on the 19th and 20th of June, was returned to the council, on the 21st of June 1722, according to the following boundaries: "From a red oak *by a run's side, called Penn's run (marked S. P.), W. S. W., 10 miles, to a chesnut, by a run's side called French's run (marked S. P.); thence, N. W. by N., to a black oak (marked S. P.), 12 miles; thence, E. N. E., to Sir Wm. Keith's western corner tree in the woods, 8 miles; thence, along the S. E. and N. E. lines of Sir Wm. Keith's tract called Newberry, to the Susquehanna; and thence, along the river side, to the place of beginning; containing 75,520 acres." [*404

Sir William Keith having communicated these proceedings to the council, on the 2d of July 1722, it was thereupon declared, that "so far as they concerned or touched with the proprietary affairs, they were not judged to lie before the board," which acted as a council of state, and not as commis-

(a) The original charter was given in evidence upon the trial.

sioners of property. Col. French (one of the surveyors who executed the warrant) then undertook to vindicate the conduct of Sir Wm. Keith to the council, stating that "the warrant specified his true reasons; and that it was, under all circumstances, the only effectual measure, for quieting the minds of the Indians, and preserving the public peace." The warrant and survey, however, could not be returned into the land-office at that time; for it was said, that the land-office continued shut from the death of W. Penn in 1718, until the arrival of T. Penn in 1732; nor does it appear, that they were ever filed in the land-office, at any subsequent period.

In order to resist the Maryland intrusions, encouragement was offered by Sir W. Keith, and accepted by a number of Germans, for forming settlements on the tract which had been thus surveyed; and in October 1736, Thomas Penn having purchased the Indian claim to the land, empowered Samuel Blunston to grant licenses for 12,000 acres (which was sufficient to satisfy the rights of those who had settled, perhaps, fifty in number), within the tract of land "commonly called the manor of Springetsbury," under the invitations of the governor. But in addition to such settlers, not only the population of the tract in dispute, but of the neighboring country, rapidly increased.

The controversy with Maryland was finally settled, in the year 1762, at which time James Hamilton was governor of the province; and on the 21st of May of that year, he issued a warrant of re-survey, in which it was set forth, "that in pursuance of the primitive regulations, for laying out lands in the province, W. Penn had issued a warrant, dated the 1st of September 1700, to Edward Pennington, the surveyor-general, to survey for the proprietor, 500 acres of every township of 5000 acres; and generally, the proprietary one-tenth of all lands laid out, and to be laid out; that like warrants had been issued by the successive proprietaries to every succeeding surveyor-general; that the tracts surveyed, however, are far short of the due proportions of the proprietary; that, therefore, by order of the then *commissioners of property, and in virtue of the general warrant aforesaid to the then surveyor-general, there was surveyed for the use of the proprietor, on the 19th and 20th of June 1722, a certain tract of land, situate on the west side of the river Susquehanna, then in the county of Chester, afterwards of Lancaster, and now of York, containing about 70,000 acres, called and now well known by the name of the manor of Springetsbury; that sundry Germans and others afterwards seated themselves, by leave of the proprietor, on divers parts of the said manor, but confirmation of their titles was delayed on account of the Indian claim; that on the 11th of October 1736, the Indians released their claim, when (on the 30th of October 1736) a license was given to each settler (the whole grant computed at 12,000 acres), promising patents, after surveys should be made; that the survey of the said tract of land is either lost or mislaid; but that from the well-known settlements and improvements made by the said licensed settlers therein, and the many surveys made round the said manor, and other proofs and circumstances, it appears, that the said tract is bounded E. by the Susquehanna; W. by a north and south line, west of the late dwelling plantation of Christian Elstor, called Oyster, a licensed settler; N. by a line nearly east and west, distant about three miles north of the present great roads, leading from Wright's ferry through York Town by the said Christian

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Oyster's plantation to Monockassy; S. by a line near east and west, distant about three miles south of the great road aforesaid; that divers of the said tracts and settlements within the said manor have been surveyed and confirmed by patents, and many that have been surveyed, remain to be confirmed by patents, for which the settlers have applied; that the proprietor is desirous, that a complete draft or map, and return of survey of the said manor, shall be replaced and remain for their and his use, in the surveyor-general's office, and also in the secretary's office; that by special order and direction, a survey for the proprietor's use was made by Thomas Cookson, deputy-surveyor (in 1741), of a tract on both sides of the Codorus, within the said manor, for the site of a town, whereon York Town has since been laid out and built, but no return of that survey being made, the premises were re-surveyed by George Stevenson, deputy-surveyor (in December 1752), and found to contain 436½ acres." After this recital, the warrant directed the surveyor-general "to re-survey the said tract, for the proprietor's use, as part of his one-tenth, in order that the bounds and lines thereof may be certainly known and ascertained." On the 13th of May 1768, the governor's secretary, by letter, urged the surveyor-general to make a survey and return of the outline of the manor at least; the survey was accordingly executed, on the 12th and 30th of June; and the plat was returned into the land-office, and also into the secretary's office, on the 12th of July 1768, *containing 64,520 acres; a part of the original tract of 70,000 acres having been cut off, under the agreement between Penn and Baltimore, to satisfy the claims of Maryland settlers. [*406

On the trial of the cause, evidence was given on each side, to maintain the opposite positions, respecting the existence or non-existence of the manor of Springetsbury; from public instruments; from the sense expressed by the proprietaries, before the revolution, in their warrants and patents; from the sense expressed by the warrants and patents issued since the revolution; from the practice of the land-office; and from the current of public opinion.

The general ground taken by the plaintiff's counsel (*E. Tilghman*, *Lewis*(*a*) and *Rawle*) was, 1st. That the land mentioned in the declaration is a part of tract called, or known by the name of a proprietary manor. 2d. That it was a proprietary manor, duly surveyed, within the true intent and meaning of the act of the general assembly. And 3d. That the survey was duly made and returned before the 4th of July 1776.

The defendant's counsel (*McKean*, attorney-general, *Hopkins* and *Dallas*) contended, 1st. That Sir William Keith's warrant being issued in 1772, without authority, all proceedings on it were absolutely void; and that neither the warrant nor survey had ever been returned into the land-office. 2d. That Governor Hamilton's warrant was issued in 1762, to re-survey a manor, which had never been legally surveyed, and was, in that respect, to be regarded as a superstructure, without a foundation. 3d. That the recitals of Governor Hamilton's warrant are not founded in fact; and that considering the survey, in pursuance of it, as an original survey, it was void, as

(*a*) Duncan, not Lewis, Mr. Rawle's MSS.

against compact, law and justice, that the proprietor should assume for a manor, land that had been previously located and settled by individuals.

The following charge was delivered to the jury:

WASHINGTON, Justice.—In this cause, there are two questions. 1st. Have the lessors of the plaintiffs a title to the land in question? If they have, 2d. Has the defendant a better right?

1st. The lessors of the plaintiffs, or those under whom they claim, were once the sole owners and proprietaries, not only of the government, but of the soil of Pennsylvania, not in a political, but in their private and individual capacities; not as trustees for the people, as to the whole, or any part of the soil, but in absolute fee-simple, for their individual uses, and this right was no otherwise defined, by concessions or agreements, by William Penn, or his descendants, than to render them trustees for such individuals, as should acquire equitable rights, to particular portions of land, under general or special promises, rules and regulations, which they may, from time to time, have entered into and established.

*407] *Their right to appropriate lands to their own use, was not derived from, nor founded upon, any such rules or concessions, but flowed from their original chartered rights, which bestowed upon them the whole of the soil. But as it was their interest to encourage the population and settlement of the province, they erected an office, and laid down certain rules for its government, and the government of those who might wish to acquire rights to the unappropriated lands in the province, reserving to themselves a right to appropriate one-tenth of the whole to themselves, for their private and individual uses. From hence, the following principles resulted: that all persons, complying with the terms thus held out, acquired a right to the proportion of land, thus appropriated, not only against other individuals, who might thereafter attempt to appropriate the same land, but even against the proprietor himself, unless he had previously, and by some act of notoriety, evidenced his intention to withdraw such land from the general mass of property, and to appropriate it to his individual use. As a necessary consequence of this principle, whenever such was his intention, or was made known by a warrant of appropriation and a survey, to make out, and locate the ground thus withdrawn, this was notice to all the world, that no right to the land, thus laid off for the proprietaries, could be acquired by individuals, without a special agreement with the proprietaries, which might or might not be upon the common terms, as the proprietors might choose. But if, before such special appropriation by the proprietaries, an individual had, in compliance with the office rules, appropriated a tract, within the bounds of the tract thus laid off for the proprietaries, such prior appropriation, would no otherwise affect the rights of the proprietaries, than in relation to the particular tracts thus claimed. Their right to the residue, remained unaffected. On this ground, the right of the first proprietor stood at the time of his death, and so continued to exist, in his legal representatives, until the year A. D. 1779, when a law of this state was passed, divesting the proprietaries of all their estate, right and title, in or to the soil of Pennsylvania, and vesting the same in the commonwealth. But in this law, certain portions of land within the commonwealth are excepted, and the right of the proprietaries, to such portions, is confirmed and established for ever. The lessors of the plaintiffs, who, most undoubtedly, are entitled to all

the rights of the proprietaries, are compelled to date their title from this law ; and therefore, it is necessary for them to show, that the land in question is part of a tract of land, called and known by the name of a proprietary tenth or manor ; which was duly surveyed and returned into the land-office, on or before the 4th of July 1776.

They are to prove, 1st, that this was, in 1779, called and known by the name of a proprietary tenth or manor. The words of the law are peculiar. As to their private rights, they must be such *whereof they were in [*408
1779 possessed, or to which they were entitled. But as to the tenths or manors, it was sufficient, if they were known by that name, and had been surveyed and returned, before the 4th of July 1776. These expressions respecting the manors, were rendered necessary, to avoid giving the word manor a technical meaning ; for there were no manors, in a legal acceptation of the word, in this state, but there were many tracts of land appropriated to the separate use of the proprietaries, to which this name had been given. The first inquiry, therefore, under this head, is, was the land in question part of a tract of land called and known as a manor, in the year 1776 or 1779? To prove this fact, the licenses granted by Thomas Penn, in 1736, to about 50 settlers, in different parts of the first, as well as second survey, in which this is called the manor of Springetsbury, is strongly relied upon, to show that, even at that early period, it had acquired this name : the tenor of the warrants afterwards granted for lands within this manor, varying from the terms of the common warrants, and this variance proved by witnesses, as marking this for manor land : the testimony of witnesses, to show that the west line of this manor was always reputed to go considerably beyond York to Oyster's : the practice of surveyors and public officers, whenever warrants were issued to survey lands in the manor. But even if this tract of land had never acquired the name of a manor, prior to 1768, the survey made of it in that year, as a manor, is conclusive. From that period, it acquired, by matter of record, the name of a manor, and so it appears, by the evidence in the cause, it was called and known.

2d. Was it duly surveyed and returned into the land-office before the 4th of July 1776? That it was surveyed in 1768, is admitted ; but it is contended, that it was not duly surveyed. It is so contended, because it was surveyed in 1722. That survey, it is said, was void, because made without authority, was not executed by the surveyor-general, and was returned into the council of state's office. The survey then being void, it is said, vitates the survey of 1768 : the former being considered as the foundation, and the latter as the superstructure. The survey of 1768 is executed, it is argued, under a warrant of re-survey in 1762, and consequently, the repetition of an act which has no validity, cannot give it validity. It is further argued, that the recital of the loss of the survey of 1722, is a mere pretence, a fraud, to enable the proprietaries to exchange bad land for good. Now, I do not understand this kind of logic : it is far too refined for the sober judgment of men who have to decide. If the invalidity of the first survey can have any effect upon the second, I should suppose it would establish it, beyond all doubt ; because, if the first survey was good, and if the warrant of 1762 was merely an order to retrace the lines of that survey, the counsel might, with some plausibility at least, argue that the surveyor was [*409
bound to pursue the lines *of the former survey ; and this would give

color to his observations, founded on the mistake of the public officers, as to the proper lines of the survey. But if the first survey was unauthorized and utterly void, then the second could not, in the nature of things, be a re-survey. Whatever words were used in the warrant, there is no magic in that word. If there never was a former survey, there could be no re-survey; and consequently, the survey of 1768 was an original survey, founded on a special warrant, marking out the lines and bounds, by which the surveyor was to go, and such is the fact in this case, although the survey of 1722 is referred to in the warrant of 1762, yet the lines to be surveyed under this second warrant, are specially described. To those he was confined, and had he departed from them, the survey would, unless it was rectified by acceptance, have been void, as against the proprietary, and he might have directed it to be made again. It is not denied, but that the survey of 1768 is in conformity with the warrant. It was accepted, as a valid survey, and I cannot see, upon what ground, the defendants, or any other person, can now say, that it was void. Had not the proprietary a right to appropriate to his private use, the land included within the survey of 1768, in part of the tenth, which he had always reserved to himself? And if the warrant and survey make the appropriation, what does it signify, whether there was a prior survey or not? or whether it was good or bad? True, if, previously to the warrant of 1762, third persons had acquired a right to parcels of this land, or had done so afterwards, and before the survey in 1768 (but without notice of the warrants), the proprietaries would have been bound to make them titles, upon their complying with the terms of the grants to them. But this could not impeach his title to the residue of the land, comprehended within the lines of the survey. Upon the whole, then, the court is of opinion, that this manor was duly surveyed; and it is admitted, that the survey was returned into the land-office, before the 4th of July 1776. If so, the plaintiff's title is unquestionable.

2d. Has the defendant a better title? He claims by warrant, in 1747, regularly brought down to him, for 95 acres. He has no patent, but yet, by the common law of this state, a warrant and survey, if the consideration be paid, is considered a legal title against the proprietary, as much so as if he had a patent. If the consideration be not paid, then the legal title is not out of the proprietaries; but still the warrant-holder has an equitable title, which it is in his power to render a legal one, by paying what is due to the proprietaries. No proof is given of payment by the defendant, or any one of those under whom he claims, but you are called upon to presume it from length of time. Now, in a case of this sort, there is no room for presumption, the very circumstance of the defendant appearing in court without a patent, or without showing or pretending, any ever was granted, destroyed *410] the *presumption, which length of time might have created. For if he had paid, he would have been entitled that moment to a patent: the one was the necessary consequence of the other. Men might long forbear to call for this confirmation of their titles, from the inconvenience of paying the consideration, but that he should pay, and not go on to perfect his title, is altogether improbable, and certainly not to be presumed; but if the jury could presume anything from length of time, yet that presumption may be repealed, and in this case is.

The deed of 1771, from Pence, the grantee, to Shultz, proved that he had

not paid, and the deed from Shultz's executors to Stump, in 1794, that it was then paid. The defendant, therefore, has not a legal title to authorize a verdict in his favor; but he has an equitable title, and may compel a grant upon paying or tendering what is due to the plaintiffs, with costs of this suit And if the plaintiffs should then refuse, this court, sitting in equity, would compel them, at the expense of paying costs. In the state court, I understand, the jury may make a kind of special or conditional finding, in consequence of the having no court of equity; but this court having equitable jurisdiction, your verdict must be general.

Verdict for the plaintiffs.(*a*)

Gupp *et al. v.* Brown.

Execution of commission.

A commission, issued to four commissioners jointly, was executed by three only, two of whom were of the defendant's nomination; on objection by the defendant to the reading of the depositions, it was held, that the commission was not well executed: commissioners do not derive their authority, from the parties, but from the court.

A commission had issued to four commissioners, jointly, to take the depositions of witnesses in England. It was executed and returned by three of the commissioners only, two of whom, however, were of the defendant's nomination.

At the trial of the cause, the defendant's counsel objected to the reading of the depositions; and cited 1 Bac. Abr. 202; 2 Inst.

The plaintiffs' counsel observed, that the commission had not issued in the usual form; but insisted, that as the defendant's *commissioners had attended, the objection could not be maintained on his part. [*411

By the Court.—The objection is fatal. The commissioners do not derive their authority from the parties, but from the court;(*b*) and as it is a special authority, it must be strictly pursued. The power given to four, cannot be well executed by three commissioners.(*c*)

The evidence overruled.

Ingersoll and *Todd*, for the plaintiffs. *Franklin* and *Dallas*, for the defendant.

(*a*) As some of the persons interested in the ejectments brought for lands in Springetsbury manor, had purchased from the state; and as the state would be entitled to all arrears of purchase-money, if the proprietary title should not be established; the legislature had authorized the governor to employ counsel to assist the counsel of the defendants. After the decision of the above case, the legislature appointed James Ross and James Hopkins, Esqs., to take defence in the next ejectment, Penn's Lessee *v.* Groff, which was tried in April term 1806; and upon the same charge, the same verdict was given. The defendant's counsel having tendered a bill of exceptions to the charge of the court, arrangements were made to obtain a final decision in the supreme court, upon a writ of error. It appears, however, from the journals, that the legislature is not disposed to interfere any further.

(*b*) Those who execute a commission, are appointed by the court, and although they may be nominated by the parties, they are not their agents. Gilpin *v.* Consequa, Peters C. C. 88.

(*c*) If a commission, directed to five commissioners, of whom three are named by the plaintiff and two by the defendant, is executed by three only, or by any number less

*APRIL TERM, 1806.

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

UNITED STATES *v.* RICHARD JOHNS. (*a*)

Habeas corpus.—Challenges.—Witness.—Evidence.—Casting away vessel.

Upon a *habeas corpus*, it can only be inquired, whether there is sufficient probable cause to believe, that the person charged has committed the offence stated in the warrant of commitment.

On an indictment under the act of congress of 26th March 1834, for casting away and destroying a vessel, of which the defendant was the owner, to the prejudice of the underwriters, the accused has the right of peremptory challenge, as at common law, on a capital charge.

The president of an incorporated company, by which a vessel has been insured, is a competent witness against the defendant, on such a prosecution.

A copy of a manifest, taken from the books of a custom-house, is a copy of a record, and it may be given in evidence, when properly proved.

An exemplification of a law of a state, under the great seal thereof, is admissible in evidence, without any other attestation.

The meaning of the word "destroy," in this act, is to unfit a vessel for service, beyond the hopes of recovery by ordinary means; casting away, is a species of destroying.

THIS was a prosecution, on the 2d section of the act of congress, of the 26th of March 1804 (2 U. S. Stat. 290), which is expressed in these words: "That if any person shall, on the high seas, wilfully and corruptly cast away, burn or otherwise destroy, any ship or vessel of which he is owner, in part or in whole, or in anywise direct or procure the same to be done, with intent or design to prejudice any person or persons that hath underwritten, or shall underwrite, any policy or policies of insurance thereon; or if any merchant or merchants that shall load goods thereon, or any other owner or owners of such ship or vessel, the person or persons offending therein, being thereof lawfully convicted, shall be deemed and adjudged guilty of felony, and shall suffer death."(*b*)

In the course of the prosecution and trial the following points occurred:

I. The defendant was brought by *habeas corpus* before the court, holding an adjourned session, on the 8th of January 1806, when it appeared that, on the 26th of December 1805, he *had been committed by the
*413] mayor of the city of Philadelphia, charged on the oath of Andrew Clarke, with having, on the 20th day of August last, or thereabouts, on the high seas, scuttled the schooner Enterprise, of Baltimore, with intention to defraud the underwriters, as he believes."

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than the whole, a deposition taken under it cannot be read, although the two commissioners named by the defendant, by whom the objection is made, were present. The authority of the commissioners is special, and must be executed according to the tenor of it. Armstrong *v.* Brown, 1 W. C. C. 34. See also Hoofnagle *v.* Dering, 1 Yeates 302. A joint commission cannot be executed by some of the commissioners, although the others refused to act. Munns v. Dupont, 3 W. C. C. 41. A deposition taken by a commissioner, in conjunction with a person not named in the commission, is not admissible in evidence. Willing *v.* Consequa, Peters C. C. 309.

(*a*) s. c. 1 W. C. C. 363.

(*b*) The second member of the section is so inaccurately expressed, that the attorney of the district thought, at first, there must have been some error of the press; but the secretary of state informed him, that the printed copy was found, upon a comparison, to agree exactly with the roll. See the analogous English statutes, 4 Geo. I., c. 12, § 3; 11 Geo. I., c. 29.

The *prisoner's* counsel objected, 1st. That the commitment was vague, and did not describe the offence, within the words of the act of congress. 2d. That the offence was not committed within the district of Pennsylvania; and no demand having been made for his surrender, by the executive of any other state, there was no law to warrant his arrest or detention. 3d. That the evidence was not sufficiently strong, to found an indictment against him, and he was entitled, at all events, to be discharged on bail.

It was answered by the *Attorney of the District*, 1st. That whatever might be the formal defects of the original commitment, the court, being now satisfied with the evidence, would remand the prisoner for trial. 2d. That it was not necessary, for that purpose, to give positive proof of guilt; but to show probable cause for the accusation. 3d. That the case did not come, at all, under the constitutional or legislative provisions for the surrender of a fugitive from the justice of another state; but it was the case of a crime against the United States, committed on the high seas; when the trial is directed to be in the district where the offender is apprehended. (1 U. S. Stat. 113, § 8; Ibid. 91, § 33.)

By the Court.—Upon a *habeas corpus*, we are only to inquire whether the warrant of commitment states a sufficient probable cause to believe, that the person charged has committed the offence stated. We have heard the evidence; and cannot doubt of its sufficiency to that extent. We do not think that the prisoner ought either to be discharged or bailed: he must be remanded for trial.

II. When the panel of jurors was called over, the prisoner's counsel claimed the right of challenging thirty-five jurors peremptorily, as the offence charged in the indictment, had been created, since the act of the 30th of April 1790 (1 U. S. Stat. 119, § 30); and the right of challenge remained as at common law. (4 Hawk. 389; 4 Bl. Com. 352.) The clause, respecting challenges is in these words: "If any person or persons be indicted of treason against the United States, and shall stand mute, or refuse to plead, or shall challenge peremptorily above the number of thirty-five of the jury; or if any other person or persons be indicted of any other of the offences herein-before set forth, for which the punishment is declared to be death, if he or they shall so stand mute, or will not answer to the indictment, or challenge peremptorily above the number of twenty persons of the jury; the court, in any of the cases aforesaid, shall, notwithstanding, proceed to the *trial of the person or persons so standing mute or [*414 challenging, as if he or they had pleaded not guilty, and render judgment thereon accordingly."

The *Attorney of the District* said, he was indifferent which way the court decided the point; but it was proper to remark, that the 28th section of the judicial act referred, generally, to the state law, for the rule relating to juries (1 U. S. Stat. 88); that the state law limited the right of peremptory challenge, in cases like the present, to the number of twenty; that the 30th section of the penal act (Ibid. 119) obviously considers the whole law of peremptory challenge provided for, in future, as well as existing, capital cases; and that it was improper to refer to a common-law rule, if a rule was prescribed by statute.

PETERS, Justice.—The words of the penal act when they restrain the common-law right of peremptory challenge, also expressly confine the operation of the restraint, to the offences before set forth in the act. For offences not set forth in the act, the only rule is furnished by the common law; and it is the privilege of the prisoner that it should be applied and enforced.

WASHINGTON, Justice.—The right of challenge was a privilege highly esteemed, and anxiously guarded, at the common law; and it cannot be doubted, but that at the common law, a prisoner is entitled, on a capital charge, to challenge peremptorily thirty-five of the jurors. If, therefore, the act of congress has substituted no other rule (and, in the present instance, it is clear, that none has been substituted), the common-law rule must be pursued. It is not easy, indeed, to assign a reason for introducing the words that confine the provision, respecting peremptory challenges, to offences before set forth in the act; but it is enough to bind our judgments, that the words are actually introduced.(a)

III. The indictment contained four counts: 1st Count. That the prisoner being owner, in whole, of a certain ship or vessel called the Enterprise, of Baltimore, "the Baltimore Insurance Company, by their president, and under their corporate seal, attested by their secretary, did subscribe and underwrite a certain policy of insurance upon the said ship or vessel, called the Enterprise, in the sum of $2700, upon a certain voyage, &c. And the said Richard Johns, well knowing the premises, with intent and design wilfully, corruptly, unlawfully, and feloniously to prejudice the said
*415] Baltimore Insurance Company, &c., and by means *of the aforesaid insurance, unjustly to acquire to himself unlawful and corrupt gain and advantage, on the, &c., with force and arms, on the high seas, &c., wilfully, corruptly, unlawfully and feloniously, did cast away and destroy the said ship or vessel, called the Enterprise, in and upon the voyage in the said policy of insurance, mentioned, &c., to the great damage of the said Baltimore Insurance Company, against the form of the act of the congress of the United States, &c." 2d Count. That he committed the felony, by feloniously boring auger-holes through the bottom of the vessel. 3d Count. That he feloniously directed and procured the vessel to be cast away and destroyed. 4th Count. That he feloniously directed and procured the vessel to be cast away and destroyed, by feloniously boring auger-holes through the bottom of the vessel.

1st. The president of the Baltimore Insurance Company was offered as a witness, to prove the order for insurance, and the subscription to the policy.(b) The prisoner's counsel objected to his competency; and cited 1 P. Wms. 595; 1 McNall. 52–3. But the objection was overruled.

2d. A copy of the manifest of the outward cargo of the Enterprise,

(a) In the case of the United States v. Russell, on an indictment for murder on the high seas, tried at October term 1806, the prisoner's counsel, at first, claimed the right of peremptorily challenging thirty-five jurors; but that being an offence set forth in the penal law, was expressly embraced by the provision limiting the peremptory challenges to twenty; and the claim was, accordingly, overruled.

(b) But see 1 W. C. C. 368.

certified under the hands and seal of the custom-house officers of Baltimore, was offered in evidence, after proof by the witness, that he had himself compared it with the record. The prisoner's counsel objected, that there was no evidence, that the original manifest was subscribed by the prisoner, or even delivered by him. The district-attorney answered, that by 21st section of the impost law (1 U. S. Stat. 642) it was made the duty of the collector of the port, "to record, in books to be kept for that purpose, all manifests;" and that being a record, the proof offered was unexceptionable.

By the Court.—In that point of view, the evidence is clearly admissible.

3d. The policy of insurance, under the corporate seal of the company, signed by the president and attested by the secretary, was offered in evidence. The prisoner's counsel objected, that the charter of incorporation must be produced, before any corporate act or instrument could be given in evidence. The attorney of the district opposed the objection, on account of the difficulty, which the precedent would create in future prosecutions: but the court deeming it necessary to establish the corporate capacity of the Insurance Company, he read the acts of the legislature of Maryland on that subject, from the statute book, published by authority; and these being limited in their duration, he offered an exemplification of a recent act, protracting the existence of the corporation at and beyond the time or subscribing the policy in *question. The exemplification, [*416
however, was under the great seal of Maryland, but was not attested by the governor, or any other principal officer of the state. The prisoner's counsel objected to the want of such attestation; but the objection was overruled.

By the Court.—The act of congress declares, "that the acts of the legislatures of the several states shall be authenticated, by having the seal of their respective states affixed thereto." (1 U. S. Stat. 122.) It does not require the attestation of any public officer, in this case; although in all the cases afterwards provided for, such an attestation is required. There is a good reason for the distinction. The seal is, in itself, the highest test of authenticity; and leaving the evidence upon that alone, precludes all controversy as to the officer entitled to affix the seal, which is a regulation very different in the different states.

4th. On the evidence in the cause, various grounds of defence were adopted by the prisoner's counsel, *Lewis*, *Rawle*, *S. Levy*, *S. Ewing* and *C. Ingersoll*, and controverted by *Dallas*, attorney of the district, of which the principal were these: 1st. That the second section of the act of congress does not expressly authorize an indictment against an American citizen; and it would be an usurpation of legislative power, to extend its operation to aliens, committing offences on the high seas. 2d. That the act does not expressly embrace the case of an insurance by a corporation; and a corporation is not included in the description of persons. 3d. That the indictment describes the Enterprise to be a ship or vessel, which is not sufficiently specific. 4th. That in fact, and in law, the vessel was not cast

away and destroyed. 5th. That if the vessel were feloniously destroyed, the evidence does not prove the prisoner to be the felon.(*a*)

THE COURT, in the charge to the jury, having reviewed and commented upon the facts, observed, that the objections, in point of law, would appear on the record, and might be taken advantage of, upon a motion in arrest of judgment. On the law, therefore, the court avoided giving any opinion at present, except in relation to the question, what constituted the destruction of a ship or vessel, within the meaning of the act of congress? On this question, they had deliberated much; and as the result, reduced to writing an opinion, which they delivered, in charge to *the jury, in these words: "To destroy a vessel, is to unfit her for service, beyond the hopes of recovery, by ordinary means. This, in extent of injury, is synonymous with cast away. It is the generical term: casting away is a species of destroying, as burning is. Both mean such an act, as causes a vessel to perish, or be lost, so as to be irrecoverable by ordinary means."

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The defendant was acquitted, owing, it is believed, to a doubt, whether he had bored himself, or directed any other person to bore, the auger-holes in the bottom of the vessel; which was a new vessel, picked up at sea, after she was abandoned, carried into St. Jago de Cuba, and there (the holes being discovered) soon repaired, and fitted again for sea.

SYMONDS *v.* UNION INSURANCE COMPANY. (*b*)

Marine insurance.—Total loss.

If a vessel be prevented, by a blockading squadron, from entering any of the enumerated ports, the voyage is broken up, and the assured may abandon, and recover for a total loss.

Insurance was effected by the plaintiff, who was the owner of a vessel, on her freight and cargo, by separate policies, "at and from New York to Cape Frangois, with liberty to proceed to another port, should Cape Frangois be blockaded;" the vessel sailed from New York, with instructions where to proceed, if she could not enter Cape Frangois; she was prevented from entering that port, or any other designated in the instructions given to the master, and was obliged by the blockading force to go to another place, where the master disposed of the goods and invested the proceeds in a return-cargo, with which the ship returned to New York: *Held*, that the insured might abandon, and recover as for a total loss.

THE plaintiff had effected, at the office of the defendants, three policies of insurance, dated the 12th of September 1803. The first on the schooner Diana, Nicholas, master, valued at $4500; the second, on the freight of the schooner, valued at $1500, and the third, on her cargo, valued at $4000; on a voyage, "at and from New York to Cape François, with liberty to proceed to another port, should Cape François be blockaded, and the vessel prevented entering that port, from that, or any other cause, and at and from thence, back to New York." The order for the insurance declared, "that

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(*a*) In the course of the defence, the following authorities were cited: 2 East P. C. 1097-8; Johnson's Dict. "Cast-away;" 8 Mod. 67, ca. 48; Ib. 74, ca. 52; 4 Hawk. 67, 62; 2 Burr. 1037; Plowd. 177; Rex *v.* Harrison, 1 Leach, 215; 2 Str. 1241; 8 Mod. 66; 1 Hale 635; 2 Id. 389; 3 Inst. 202; 4 Bl. Com. 881; Leach 109; Cow. Interp.; 2 Hawk. c. 25, § 82; 2 Rol. Abr. 30; 5 Mod. 137-8. The attorney of the district cited 1 Leach 215; 1 Bl. Com. 467; 2 Inst. 702; 1 Woodes. 195.

(*b*) s. c. 1 W. C. C. 382.

the assured is not to abandon, if she cannot enter the Cape, from blockade or other cause, but liberty is given to proceed to some other port."

The schooner sailed from New York, on the 19th of September 1803, with instructions "to proceed to Cape François; and if she could not enter, from blockade or other cause, to steer towards the Bite of Leogane, and enter either into Port-au-Prince, or some other port in the bite." On the 8th of October, she was boarded, off the island of St. Domingo, by an officer from the Blanche, a British frigate, who sent her papers on board the Bellerophon, another British ship of war. On the next day, Captain Nicholas was taken on board the Bellerophon, and was informed, "that the island of St. Domingo was blockaded by an English squadron, in consequence of which, no vessel would be permitted to enter any port or harbor in the said island;" and, to that effect, the register and papers of the schooner were indorsed. It appeared also from the master's testimony, "that he was told, he was not permitted to proceed on his intended voyage, nor to go to Cuba, but should proceed down to Kingston, Jamaica; that he was ordered to keep near the frigate Desire, until they had cleared the island of St. Domingo; that on his arrival at Kingston, he was also told by the custom-house officers, that he could not *clear out for Cuba, whither he was still desirous of going; and that, finally, the cargo was landed and [*418 sold at Kingston. The proceeds were then invested in another cargo, with which the ship returned to New York. On her arrival there, about the 17th of December 1803, the plaintiff abandoned the cargo and freight to the defendants, and claimed as for a total loss; to recover which (deducting the proceeds of the cargo, and accounting for the profits on the investment homeward), the present action was instituted.

On the trial of the cause, these grounds of defence were taken; 1st. That upon the specific terms of the contract, the assured had not a right to abandon. The consequence of being turned aside by a blockading force was contemplated by the parties, but not insured against; for the voyage insured was to the Cape, or to another unblockaded port of Hispaniola. The whole island being blockaded, another port must be sought at the risk of the assured; the conduct of the British being neither capture, nor arrest; but simply precaution, to prevent a breach of blockade. 2d. That on general principles, it is not a case of abandonment for a total loss. The cargo was not prevented from arriving at its place of destination, by any risk insured against, acting upon the subject insured immediately, and not circuitously. There has been no capture, with a view to condemnation; no arrest, for the purpose of an embargo, in the service of a foreign prince; the cargo remains specifically the same; the ship has returned; wages have been paid, and of course, freight has been earned; nothing, in short, has affected the voyage insured, but the act of preventing a breach of blockade, and the low state of the Kingston market; and for neither of these is the underwriter liable. 2 Marsh. 434; 2 Burr. 1198; 1 T. R. 187; 2 Marsh. 482; 2 Burr. 696; 3 Atk. 195; 2 Str. 849; 2 Marsh. 496; Doug. 219; 1 Esp. 237; 3 Bos. & Pul. 388; 5 Esp. 50; Mill. 305–6; 5 East 388.

The answer, for the *plaintiff*, was, in general, that the voyage insured had been destroyed, by the superior force of a foreign power; and that, in-

dependent of the means taken to prevent a breach of the blockade, the vessel had been constrained, against the express desire of the master, to proceed to a particular port, in exclusion of every other.

And THE COURT, in the charge to the jury, declared the law to be clearly with the plaintiff; on which, a verdict was found in his favor for the goods and freight, at the value insured, subject to a deduction of the proceeds of the homeward investment.

Rawle, for the plaintiff. *Dallas*, for the defendant.

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*419] *CONFRAMP *et al. v.* BUNEL. (*a*)

Lex loci contractus.

A contract is governed by the law of the place where it was made.
Where the *lex loci contractus* protects a party from execution, on a judgment upon a contract, he will not be liable to arrest on mense process, out of this court, for the same cause.

CAPIAS. On a rule to show cause why the defendant should not be discharged on common bail, the following facts were established by the plaintiff: That in the year 1787, the defendant gave his note for 55,000 livres, to a person of the name of Horguetand, payable in two instalments, for value received in 55 negroes. On the 8th of February 1787, the note was assigned to the plaintiffs, and several partial payments were afterwards indorsed upon it. In November 1789, a suit was instituted at Port-au-Prince, to recover the balance; and a judgment by default was entered for 36,666 livres; to recover which was the object of the present action.

For the *defendant*, it was shown, that all the parties to the contract were French subjects, resident in the island of St. Domingo, at the time the contract was made; that they continued French subjects at this time; that in August of the year 1793, the French commissioners (Polverel and Santhorax) had proclaimed, at Port-au-Prince, the abolition of slavery, and the freedom of the negroes; which the national convention ratified, in the February ensuing (4 Edw. Hist. West Ind. 146, 219); that, in consequence of this emancipation, the very negroes who had been purchased by the defendant, had been taken from him; and that with a view to the calamitous situation of the colony, the following laws had been enacted by the French government:

1st. Extract from the law of the 6th of September 1802.

Sect. 1. Until the 1st of Vendemaire, 16th year, all suits are suspended as well against the principal debtors, as their securities, for debts contracted prior to the 1st of January 1792, for the purchase of real property, or of negroes.

Sect. 6. The creditors may, however, take all conservatory steps for the preservation of their rights, and even have the amount of their debts liquidated by judgments, but the execution thereof shall be stayed according to the first section.

(*a*) s. c. 1 W. C. C. 340, reported as Camfranque *v.* Burnell.

2d. Supplement to the above law, of the 12th of April 1803.

The preamble states that doubts have arisen, as to the construction of the 6th article; and the supplement declares,

Sect. 1. That by the words "conservatory steps" (*actes conservatoires*) are not to be understood any acts, which would prevent the effect of the suspensive clause of the law, such as attachments of property, levies on real or personal estate, oppositions to the payments of rents, or other debts, &c.

Sect. 2. Oppositions (in nature of attachments) made to the payment of principal sums due to the debtors, shall not prevent such payments, but the debtor shall be bound to make it *appear, within six months, [*420 that he has employed those capitals, in improving his St. Domingo plantation, otherwise, he will not be entitled to the benefit of the law.

Upon these premises, the *defendant's* counsel contended, 1st. That the contract of the parties was to be expounded and enforced, according to the laws of France. 1 Bos. & Pul. 138; 3 Ves. jr. 446; 4 Ibid. 577; 1 W. Bl. 258; 1 H. Bl. 665, 690; 4 T. R. 184. 2d. That upon the general principles of the French law, the defendant was not liable to be personally arrested on this contract, which does not constitute a commercial debt 7 Tit. 1 Art. Ord. of Com. p. 386. 3d. That the right of action, to recover the debt, was expressly suspended by the law of the 6th of September 1802; and it was as irregular to commence the suit, before the suspension had run out, as it would be to obtain judgment and issue execution.

The *plaintiffs'* counsel answered: 1st. That this was a commercial debt, within the terms of the authority cited, for which a personal arrest was authorized by the law of France. 2d. That the law of the 6th of September 1802, applies to original causes of action, and not to cases in which judgment had been previously rendered. 3d. That even where the *lex loci* governs the contract, it is the law of the country in which the suit is brought, that must furnish the form of the remedy. Kaim's P. E. 567–8; 2 Vern. 540; 3 Dall. 373; 1 Bos. & Pul. 139, 140. 4th. That the utmost benefit, which the defendant can reasonably claim from the law of September 1802, is a stay of execution, until the specified period has elapsed: but in the meantime, the plaintiffs should be permitted to proceed to obtain judgment, and to secure the defendant's appearance eventually to answer it.

The Court were clearly of opinion, that the parties were bound by the law of the 6th of September 1802; that the present case was within the law; and that the suspension of the law applied as well to the commencement of the suit, as to the issuing of an execution.

The rule made absolute.(*a*)

Moylan, for the plaintiffs. *Du Ponceau* and *Dallas*, for the defendant.

(*a*) The defendant's counsel, proceeding on the grounds above stated, did not make, on this preliminary question, the objection, that the circuit court has no jurisdiction of a cause, in which both parties are aliens; an objection that has, repeatedly, been adjudged to be fatal.

*Russell, for the use of Crucet, *v.* Union Insurance Co. (*a*)

Insurable interest.—Abandonment.—Record of court of admiralty.

A surety for the payment of the value of a cargo, in case of condemnation by a foreign court, to whom it has been delivered for indemnity, has an insurable interest therein.

If the cargo, after effecting an insurance thereon, be taken out of the possession of such surety, by a decree of restitution, he may abandon for a total loss.

The record of a foreign court of admiralty is evidence to prove a condemnation; but between assurer and assured, it is only evidence of the cause of condemnation.

If the record of a foreign court of admiralty, containing copies of papers, the originals of which are not produced, be read in evidence, without objection, it is too late to object, after the argument has commenced.

Covenant, on an open policy for $10,000, at a premium of ten per cent., upon goods on board the ship Hibberts, on a voyage at and from the Havana to New York.

The case was this: The ship Hibberts and her cargo, the property of British subjects, were captured by a French privateer, and carried to the Havana. They were there claimed by Mr. C. Frazier (an English merchant), on the recommendation of Captain Vansittart, commanding a British frigate, for the British owners, and an order for restitution was granted by the Spanish government, on security being given for the appraised value (to wit, the ship $9655, and the cargo $22,400), to abide the issue of an appeal, made by the captor, from the order of restitution. The master had been removed, at sea, at the time of the capture, and sent to the United States; but the first and second mates, who went in the ship to the Havana, offered the security; which was given at their instance, by Mr. Felix Crucet (a Spaniard, constituted their attorney), and the ship and cargo were thereupon delivered to to him, on account of the original owners; but accompanied by a written declaration from Mr. Frazier, "that ship and cargo were subject to Crucet's orders, until he shall be finally indemnified for his disbursements for costs of suit, outfits, commissions, &c., and be released from his security." Crucet having determined to send the ship and cargo to the United States, wrote two letters, dated, respectively, the 7th and 23d of July 1804, to his correspondent, Henry Hill, at New York, in which, after representing the facts above stated, and ordering insurance, he proceeds in these words:

"In my letter of the 7th inst. ordering insurance on the ship Hibberts and cargo, I stated fully the footing on which she was delivered to me by the governor and auditor of war, on security and mortgage; and she now proceeds to your address, with all the papers then mentioned on board, besides the invoice and bill of lading of the cargo. From what are herewith inclosed, you will observe, that the mortgage and security have been given for $22,410, value of the cargo, and $9655, value of the ship Hibberts, to hold that amount of stock, being $32,065, subject to the order of the court here, until the appeal entered to the supreme council of war in Madrid, shall be decided. You will also observe, that my account of advances for law-costs, repairs, sails, rigging, provisions, advance wages, &c., for the ship, in this port, amounts to $6444.01¾; my commission of guarantee, on giving the security and mortgage, five per cent. on $32,065, is $1653.01, and my com-

(*a*) s. c. 1 W. C. C. 409.

mission for agency and trouble, two and a half per cent., $826.0[illegible], makes total $8923.07¾, *and that the last-mentioned sum of $8,923.07¾, must be paid to me here, and I must be entirely freed and released in this [*422 city, for the security and mortgage I have given for the ship and cargo, before giving up any part of the proceeds thereof. I have wrote to the concerned in England, apprising them of these circumstances, and that I shall give them due advice, from time to time, of the progress of the appeal. You will, I hope, exert yourself to dispose of the ship and cargo to the best advantage, for the benefit of the concerned, sending the account sales to me here, as soon as convenient, in order to be transmitted to them in England."

The letter of instructions from Crucet to the master of the Hibberts, directed him "to proceed direct to New York, and there deliver the letters, and other papers, to Mr. Henry Hill, Jun., and in his absence, to Mr. Samuel Russell, merchant there, to whom the cargo is consigned. These gentlemen will also take charge of the ship in New York, and will furnish you with money to pay off the officers and crew; and will pay you any balance that may be due to yourself." And the invoice was headed, "Invoice of the cargo on board the ship Hibberts, of London, John Haines, master, bound for New York, and consigned to Mr. Henry Hill, Jun., merchant there, by Felix Crucet, on account and risk of the owners, underwriters or others, in England, or those who may be concerned in said ship and cargo."

On the 13th of August 1804, I. S. Waln, for Samuel Russell (the consignee appointed by Crucet, in case of Hill's absence), effected the insurance which is the ground of the present action. The ship sailed on the voyage insured; but was captured by the Leander, off Sandy Hook, on the 16th of August 1804, and sent to Halifax, where she arrived on 31st of August. The vessel and cargo were there libelled in the court of vice-admiralty as prize, and claimed by the master, for Crucet: but by the decree of the court, pronounced on the 10th of October, the claim was rejected, and the judge "pronounced the ship and cargo to be the property of British subjects, recaptured by his Majesty's ship of war Leander, and decreed the said ship and her cargo to be restored to the original British owners, on payment to the recaptors of one-eighth part of the value thereof, and the claimant to pay costs." (*a*) From this decree, the claimant appealed; but the vessel and cargo were delivered, on security, to the agent of the original British owners, and sent by him to England.

When the ship was captured, it was notified to the defendants, who agreed to pay a just proportion of the expense of recovering *the [*423 property; but no actual abandonment, or offer to abandon was made, until the 2d of November, when the decree of the vice-admiralty had been received by the plaintiff.

On the trial of the cause, the plaintiff's counsel read to the jury, the policy, the orders of Crucet and his agents for insurance (which had been communicated to the defendants, at the time of effecting the insurance) and the whole of the record of the proceedings in the court of vice-admiralty;

(*a*) In speaking of the decree of restitution, taking the property from the hands of a Spaniard, who had so fairly obtained a lien upon it, the court was reminded, that although war was declared between Great Britain and France, on the 16th of May 1803, Spain did not become a party to it until the 11th January 1805.

but neither the original hypothecation to Crucet, nor the original bill of lading, nor the original invoice, nor any other proof of the special property of the plaintiff in the ship and cargo was produced: and as soon as the plaintiff's counsel began to argue upon the papers found on board the ship, and spread upon the record (to wit, the hypothecation, bill of lading and invoice) as proof of property, the opposite counsel objected, that although the whole record must be read, it was only evidence of the sentence of restitution.

The general *defence* was then placed on these grounds: 1st. That the abandonment was not made in due season; which, however, was an objection mentioned, but not strenuously urged. (Park 82, 81, 172; 1 T. R. 608.) 2d. That the insurance was effected upon ship and goods, on account and risk of the original British owners, not on the special interest of Crucet for his use and indemnity. (Park 267–8; 1 T. R. 309.) 3d. That the decree is conclusive to prove that the property was not in Crucet; and the restitution to the original owners was restitution to him as their agent. 4th. That the statements of Crucet and his agents to the underwriters, are not evidence of the facts contained in them upon the present trial; nor are the papers set forth in the record of the court of vice-admiralty, legal or conceded proofs of property.

For the *plaintiff*, it was contended: 1st. That his interest was of an insurable nature. 2d. That the nature of his interest was communicated to the defendants, at the time of effecting the insurance. 3d. That the loss of his possession, on the capture and restitution, was the loss of his lien, and in its effect total. 4th. That the record being read, without previous objection or restriction, every part of it became evidence in itself; and the property of the plaintiff was proved by it. 5th. That, however, the question of property was a question of fact; and the papers on the record must, at least, be regarded as corroborating the statements of the plaintiff and his agents, to prove his interest in the subject insured.

The charge of the court was delivered by the presiding judge, in substance as follows:

Washington, Justice.—Though the case involves points of some novelty, and of considerable difficulty, we have so far satisfied our minds, that we will not request the jury to reserve anything *for future consideration, *424] although either party is at liberty to move for a new trial.

The first and principal difficulty is, whether Crucet has proved his interest in the subject insured, by proper evidence. The record of a court of admiralty is always evidence to prove a condemnation; but, certainly, in cases between the insurer and insured, it is only evidence, according to the general rule, to prove the cause of condemnation. On the present occasion, however, the record was read to the jury, without opposition; and, on this ground alone, we decide it to be an exception to the rule. For if the objection had been made, the plaintiff would have enjoyed an opportunity to supply the proof by other means.

The record is, therefore, considered as proof of facts, so far as it exhibits documents, which, if now produced, would be evidence in the cause. This still excludes, on the one hand, letters written by Crucet; while on the other hand, it admits those papers, authenticated by other sources, that show the

extent of his advances, the nature of his engagements, and the lien which he acquired upon the ship and cargo.

Upon the evidence, thus admitted, Crucet appears clearly to have acquired a contingent interest in the property; but it was, at first, a question of great doubt with us, whether it was an insurable interest.(*a*) As to his actual advances of money, there could be no doubt, provided there was (as there is not) satisfactory evidence on that point, independent of what proceeds from himself. But to the right of insurance, the obligation of abandonment, in case of loss, would seem to be an inseparable incident; and we doubted, whether Crucet had anything in the property, which he could abandon upon a loss, and of course, which he was entitled to insure. On reflection, however, we conclude, that upon an abandonment, the underwriters acquire all Crucet's rights and remedies against the British owners: and as to the manner of insuring his interest, it is clear, that a person having a lien upon a cargo, may cover it by an insurance on goods.

It is true, that the assured should communicate to the underwriter the nature of his interest in the subject insured, though it need not be specified in the policy; and on this ground, a question of fact arises, for the consideration of the jury. If the insurance of the special interest, and not of the principal ownership, made a material difference in the risk, or would have altered the amount of the premium; and the fact was not sufficiently disclosed to the defendants, the omission would vacate the policy.

After this view of the case, it only remains to inquire, whether a loss has happened, which entitles the plaintiff to recover? He has lost his possession: and although we will not decide, whether the capture and sentence have *destroyed his lien; we think, that as they have rendered it [*425
necessary to pursue the property, through an expensive, troublesome and doubtful medium, he has a right to consider the occurrence as a total loss, and to recover the amount of the insurance.

Verdict for the plaintiff.(*b*)

Ingersoll and *Rawle*, for the plaintiff. *E. Tilghman* and *Dallas*, for the defendants.

(*a*) As to what is an insurable interest, see Sansom *v.* Bell, *post*, p. 439; Warder *v.* Horton, 4 Binn. 529; Wells *v.* Philadelphia Ins. Co., 9 S. & R. 103; Columbian Ins. Co. *v.* Lawrence, 2 Peters 25.[1]

(*b*) A motion was afterwards made for a new trial, on the single ground, that there was no proof of property in the plaintiff, except the ship's papers, spread upon the record of the court of vice-admiralty. An affidavit was filed, stating that Mr. *Ingersoll* had applied to Mr. *Dallas*, before the jury were sworn, to admit the record as proof of property, which was refused; and that the application of the record to that purpose (after it had been read), was opposed, as soon as it was attempted. But the motion was rejected, as Judge WASHINGTON adhered to the opinion delivered in the charge, and Judge PETERS said, that he had decided as well on that ground, as on the corroborative evidence, arising from the sameness of the documents found in the ship, and those described in the communications to the defendants, when the insurance was effected.[2]

[1] Also, Seamans *v.* Loring, 1 Mason 127; Aldrich *v.* Equitable Safety Ins. Co., 1 W. & M. 272; Bank of South Carolina *v.* Bicknell, 1 Cliff. 85; Insurance Co. *v.* Baring, 20 Wall. 159.

[2] For a report of the case on the motion for a new trial, see 1 W. C. C. 440.

*OCTOBER TERM, 1806.

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

UNITED STATES *v.* JAMES MCGILL. (*a*)

Murder on the high seas.

To constitute the crime of murder on the high seas, the mortal stroke must be given, and the death happen, on the high seas: the defendant had given a mortal stroke to one, in the haven of Cape Francois, but the deceased did not die, until his removal on shore: *Held*, that the offence was not cognisable under the 8th section of the act of congress of the 30th April 1790.[1]

THIS was an indictment for the murder of Richard Budden, containing three counts. 1st. Charging the murder to have been committed on the high seas. 2d. Charging it to have been committed in the haven of Cape Francois. 3d. Charging the mortal stroke to have been given on the high seas, and the death to have happened, on shore, at Cape Francois.

The indictment was founded on the 8th section of the penal law (1 U. S. Stat. 113), which provides "that if any person or persons shall commit,

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(*a*) s. c. 1 W. C. C. 463.

[1] It was decided by the circuit court for the District of Columbia, in 1809, in the case of United States *v.* Bladen, 1 Cr. C. C. 548, that where a mortal blow is given within the district, and death ensues in another jurisdiction the courts of the district have no power to entertain an indictment for murder. And the same point was decided in United States *v.* Rolla, 2 Am. L. J. 138. See also, United States *v.* Armstrong, 2 Curt. 446. But in Guiteau *v.* United States, 26 Alb. L. J. 89, the supreme court of the district arrived at an opposite conclusion, and the prisoner was executed, without being allowed an opportunity for a review of the conflicting cases. It is much to be feared, that the enormity of the crime, and the popular clamor for the infliction of the death penalty, had great influence in the denial of such review. That the decision of a subordinate court, upon the question of its own jurisdiction, in a case involving the life of a citizen, and overruling two former decisions of the court of which it is the successor, should not be reviewed by the court of last resort, is unheard of, in the annals of jurisprudence. The execution of a prisoner under the sentence of a court, without jurisdiction to pronounce it, is but a judicial murder. Such was the case of Mrs. Surratt, who was executed under the sentence of a military commission, which was subsequently decided by the supreme court, to have been without jurisdiction to try the case. Ex parte Milligan, 3 Wall. 2, 118, *et seq.* In Guiteau's case, the court sustained the jurisdiction, principally, on the ground, that the British statute of 2 Geo. II., c. 21, was in force in that part of the district ceded by the state of Maryland; and Judge BRADLEY, of the supreme court, refused an application for a writ of *habeas corpus*, to review the question of jurisdiction, on the same ground; holding, that no such question arose in the cases of McGill, Armstrong or Bladen, the latter having arisen in the portion of the district ceded by Virginia, in which the 2 Geo. II., c. 21, was, confessedly, not in force; and the court below, on examination of the record in Rolla's case, held, that the question of jurisdiction could not have arisen and been decided. The fact, however, still remains unanswered, that an important question of jurisdiction, in a capital case, arose, and that a review of it in the court of last resort was denied. Guiteau's crime was a terrible one; he, undoubtedly, labored under an insane delusion, but not to the extent of legal irresponsibility; he richly deserved his fate; but the American people could have afforded to await the decision of the court of dernier resort upon the important question of jurisdiction, which Judge BRADLEY admitted was in his favor, on common-law principles. The rules for determining whether a British statute, passed since the settlement of the American colonies, extends to those colonies, are stated in Mr. Wharton's note to 1 Dall. 1. They hardly seem to embrace the case of Guiteau; at all events, they raise a serious question of jurisdiction.

upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder, &c., every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death."

Upon the evidence, it appeared, that the prisoner was mate of the brig Rover, of which Richard Budden, the deceased, was master; that on the 3d of May 1806, while the brig lay in the harbor of Cape François, the prisoner gave the deceased a mortal stroke, with a piece of wood; that the deceased, languishing with the wound, was taken on shore, alive, the next morning: and that he died the day subsequent to that on which he was taken on shore.

After a defence on the merits, the prisoner's counsel (*Ingersoll* and *Joseph Reed*) objected, in point of law, that the death, as *well as the [*427
mortal blow, were necessary to constitute murder; and that both the death and the blow must happen on the high seas, to give jurisdiction to this court, under the terms of the act of congress. These positions were elaborately argued; and the following authorities were cited in support of them. 1 Hale 425-6; 4 Co. 42–6; 2 Hale 188; 3 Hawk. 188, 333; Plowd.; 1 Hale 427; Leach C. L. 723; 4 Bl. Com. 303; 2 Co. 93; 2 Inst; 1 Hawk. 187; East's C. L. 365; 1 Leon. 270; Cro. Eliz. 196; Leach's C. L. 432.

The *Attorney of the District* premised, that he was aware of this objection to the jurisdiction; but as there was no judicial decision upon it, he thought it a duty to bring it before the court, for an authoritative opinion; and with that view alone, he meant to submit all the ideas which he could suggest, in maintenance of the jurisdiction. He then considered the case:

1st. On the constitution and laws of the United States, which provide for the definition and punishment of felonies and murders on the high seas; Const. art. I. § 8 (1 U. S. Stat. 113, § 8), which provide for the locality of the commission of the offence, to vest a federal jurisdiction (§ 38); which provide for the place and tribunal of trial (Const. art. III. § 2; 1 U. S. Stat. 88, § 29; Ibid. 113, § 8; Ibid. 76, § 9, 11), which provide as to the manner of trial (Const. art. III. § 2; 1 U. S. Stat. 88, § 29), and which provide, generally, that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. Thus, for every crime, whether of common-law or admiralty jurisdiction, a common-law trial is provided by jury, and a place of venue prescribed; but two things are to be remarked; 1st. That there is no definition of the offence of murder (for instance), with a reference to the common law, any more than to the civil law, which is the law of the admiralty. 2d. That locality, as to the commission of a crime, is no further limited, than as it respects the high seas, or is out of the jurisdiction of any particular state.

2d. On the law of England. The case would be within the constable and marshal's jurisdiction, at civil law, if the blow and death were both in a foreign country; or the blow in a foreign country, and the death in England (13 Ric. II., c. 2; 3 Inst. 48; 1 Woodes. 139; 4 Bl. Com. 268). If the blow was on sea, and the death on land, neither the common law nor the admiralty have jurisdiction; nor is it a case under the statute of 28 *Hen. VIII.*, "for the murder was not committed on the sea;" but the constable and marshal may try it, by 13 Ric. II. Offences committed upon the seas,

or in any haven, river or creek, are triable by jury, in a county to be mentioned in a commission, issued under 27 Hen. VIII., c. 4; 28 Hen. VIII., c. 15. The 33 Hen. VIII., c. 33, provides that "persons, who have been examined before the king's council upon treasons, murders, &c., may *428] be tried in any shire to be named *in a commission," in whatever shire or place, within the king's dominions or without, such offence was committed. The 35 Hen. VIII., c. 2, provides for the trial of treasons, committed out of the realm, by a jury, in the king's bench, or before commissioners. The 11 & 12 Wm. III. provides for the trial of offences in the colonies. The 2 Geo. II., c. 21, provides for the trial of a murder, where the mortal blow is given on the sea, or out of England, and the death happens in England; or where the blow is given in England, and the death happens abroad. Then, the only statute that provides for the case of the mortal blow and the death both happening abroad, is the 33 Hen. VIII., c. 23, under the modification of a previous examination, &c., before the king's council: and in England, the admiral's civil-law jurisdiction, in criminal cases, is at an end.

3d. On the civil law. The judicial power of the United States extending to all cases of admiralty and maritime jurisdiction, *ex vi termini*, embraces criminal as well as civil cases; and the civil law being the law in such cases, it is to be considered, what the civil law defines to be murder, as to the act and the place. The intent, not the event, constitutes the crime. (Dig. ad Leg. Corn. l. 14; Dom. 211.) The crime is committed, if there be the will to commit it. (Ibid.) In France, where the criminal law is founded on the civil law, if a man strikes another, with intent to kill him, he is punished with death, though the man is not killed. (1 Denizart 585.) The doctrine of all the cases cited for the prisoner, which requires the stroke and the death to be in the same county, or within the same jurisdiction, is an incident to the common-law trial by jury; where the jury of the vicinage are supposed to know the fact of their own knowledge; but it clearly has no application, in cases where the jury does not come at all from the place, where any part of the crime was committed. *Cessante ratione, cessat et ipsa lex.* The civil law being considered, therefore, as the law of the admiralty, remains under the general delegation of judicial power to the courts of the United States, unless it is expressly modified by statute. So far as respects the definition of murder, it has not been modified; but the constitution and acts of congress do provide, that all crimes, wherever committed, shall be tried by jury; and that crimes committed on the high seas, shall be tried in the district where the offender is apprehended, or into which he may first be *429] brought. (1 U. S. Stat. 113, § 8.)(*a*) If, indeed, this reasoning fails, *it may be doubted, whether even congress can amend the law, so as

(*a*) After the death of Capt. Budden, McGill had been sent on board the Mediator, an armed vessel, there put in irons, and carried to Baltimore, from which place (without any arrest, or process issuing against him), he voluntarily came to Philadelphia; and surrendered himself for trial to a magistrate. The attorney of the district suggested, that, having been first brought into the district of Maryland, his trial must be there. But, after argument, Judge PETERS decided, that the provisions of the act were in the alternative; and that McGill, being first apprehended in Pennsylvania, might be tried, and ought to be tried, here.

to reach cases like the one under consideration, notwithstanding the power "to define and punish piracies and felonies committed on the high seas;" Const. art. I., § 8, since the crime of murder (adopting the common-law definition) must be consummate, in the mortal act and consequence, within the jurisdiction of the United States.

PETERS, Justice.—It is a general rule with me, to abstain from the exercise of jurisdiction, whenever I doubt my authority to exercise it. On the present occasion, it is not necessary to give an opinion, whether the present is a case of admiralty and maritime jurisdiction, upon the general principles of the admiralty and maritime law; for, confining myself to the 8th section of the penal act, I find sufficient to decide, that, at all events, it is not a case within the jurisdiction of this court. The court can only take cognisance of a murder committed on the high seas; and as murder consists in both the stroke and the consequent death, both parts of the crime must happen on the high seas, to give jurisdiction; not one part on the high seas, and another part in a foreign country.

WASHINGTON, Justice.—The point principally argued by the prisoner's counsel is so clear, that it can receive little elucidation from argument. The offence, of which we have cognisance, is murder, committed on the high seas. Now, murder is a technical term, of known and settled meaning; and when used by the legislature, it imports the same, as if they had said, that the court shall have jurisdiction, in a case of felonious killing upon the high seas. We have no doubt, therefore, that the death, as well as the mortal stroke, must happen on the high seas, to constitute a murder there.

But the more important question is, whether the present case remains unprovided for by the laws of the United States? The judicial act gives jurisdiction to the circuit court, of "all crimes and offences, cognisable under the authority of the United States." (1 U. S. Stat. 78, § 11.) There are, undoubtedly, in my opinion, many crimes and offences against the authority of the United States, which have not been specially defined by law; for I have often decided, that the federal courts have a common-law jurisdiction in criminal cases: and in order to ascertain the authority of the United States, independently of acts of congress, against which crimes may be committed, we have been properly referred to the constitutional provision, that "the judicial power shall extend to all cases of admiralty and maritime jurisdiction." But still the question recurs, is this a case of admiralty and maritime jurisdiction, within the meaning of the constitution? The words of the constitution must be taken to *refer to the admiralty and maritime jurisdiction of England (from whose code and practice we [*430 derive our systems of jurisprudence, and generally speaking, obtain the best glossary), but no case, no authority, has been produced to show, that, in England, such a prosecution would be sustained (independent of acts of parliament) as a cause of admiralty and maritime jurisdiction. Nor, am I disposed to consider the doctrine of the civil law, which has been mentioned, as furnishing a guide, to escape from the silence of our own code, as well as of the English code, upon the subject. Upon the whole, therefore, I am of opinion, that the present is a case omitted in the law; and that the indictment cannot be sustained. It is some relief to my mind, however, that I have no doubt of the power of congress to provide for such a case. It is

true, that it would be inconsistent with common-law notions to call it murder; but congress, exercising the constitutional power to define felonies on the high seas, may certainly provide, that a mortal stroke on the high seas, wherever the death may happen, shall be adjudged to be a felony.(*a*)

Upon this charge, the jury immediately acquitted the prisoner.

Snell *et al. v.* Delaware Insurance Company. (*b*)

Measure of damages.—Evidence of value.

On an open policy of insurance, the assured is entitled to recover according to the actual value of the vessel, at the time she was insured, and not according to her prime cost.

Evidence of prime cost is admissible, to show her real value, but it is not conclusive against the assured.

Covenant, on an open policy for $2500, at a premium of ten per cent., upon the brig Hound, on a voyage from Jamaica to New York.

The facts were these: the brig and cargo, belonging to the plaintiffs, sailed on a voyage from New York to Curaçoa, and back again; but, upon the return voyage, she was captured by a British cruiser, and carried into Jamaica, where vessel and cargo were libelled and condemned, on the 31st of July 1804, for a breach of blockade. The master, conceiving that the vessel would be sold, under her value, requested Messrs. Campbell & O'Hara, of Kingston, to buy her in for the owners, which was accordingly done, at the price of 1020*l.*, equal to about $3500. For the price of the vessel, amount of repairs, outfits, &c. (in the whole 1939*l.* 4*s.* 11*d.*), advanced by Campbell & O'Hara, those gentlemen took from the master an hypothecation of the vessel, to guaranty the payment of a bill of exchange, which he drew upon the owners: and on the 9th of August 1804, they requested Messrs. Savage & Dugan to procure insurance upon the vessel for $5000; which was effected at the office of the Phœnix Insurance Company, upon the following instructions:

*431] "Brig Hound, Thomas W. Fuller, master, at and from Jamaica to New York. We expect she sailed on or about 16th ult., and is represented as a fine coppered vessel: 5000 dollars. Said vessel was condemned at Jamaica and purchased for the former owners. This insurance was made to cover the sums advanced, whether the same be secured by a bottomry-bond or conditional assignment or otherwise howsoever. Premium five per cent.

"Phœnix Insurance Company."

The owners of the vessel being advised of these proceedings, stated to Savage & Dugan, that the above insurance was not sufficient to cover her real value, and directed a further insurance for $2500, which was effected by the present policy. The vessel sailed from Jamaica, in August 1804; but was never heard of afterwards. At the expiration of a year, the

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(*a*) See act 3d March 1825, 4 U. S. Stat. 115 (R. S. § 5339); which, however, has no application where the crime only amounts to manslaughter. United States *v.* Armstrong, 2 Curt. 446.

(*b*) s. c. 1 W. C. C. 509.

Phœnix Insurance Company paid the amount of their subscription; but the defendants refused payment, on which this suit was instituted.

At the trial of the cause, the only disputed question was, whether the plaintiffs could go into evidence to prove the actual value of the vessel insured; or were bound by the price which was paid for her under the condemnation, at Jamaica? On the first ground, the sums insured upon both policies, would be about the value; and on the second ground, the amount received from the Phœnix Insurance Company, would be about sufficient to cover the loss.(*a*)

Dallas, for the plaintiffs, maintained the first ground, and cited, 2 Marsh. 529, 534, 535; Park 282, 287; 1 Emerig. 263; Val. art. 8, p. 64, 56, 136; Mill. 247, 251, 264; 1 Caines 573; 2 Ibid. 20, 23.

Rawle and *Condy*, for the defendants, urged, that the plaintiffs had no right to insure more than the vessel cost them at Jamaica; that the court ought not to direct the jury to inquire into the value there, beyond the cost; and that the plaintiffs, having recovered the original value from the underwriters, upon the voyage to Curaçoa, had no right to resort to that criterion of value on the present occasion. But—

The Court were clearly of opinion, that the plaintiffs were entitled to prove and to recover the actual value of the vessel, at the time she was insured. They said, a contrary rule would operate as injuriously to the underwriters, as to the merchant. For, if the merchant could not insure a ship or goods, bought at a depreciated *price, under a forced sale, at their real value; neither would the underwriter, in a case of loss, be entitled to show, upon an open policy, the actual value of the property, independent of a fortuitous enhancement of the price in a foreign market.(*b*) [*432

The jury found a verdict for the plaintiffs, for $2378.32, taking, it is presumed, the value in the outward policy as the basis of their calculation.

(*a*) It appeared in evidence, that the vessel was built in 1802, when she cost $8500; that when she sailed from New York, in May 1804, she was worth between $7000 and $7500; that she was insured on the voyage to Curaçoa, in a valued policy, at $7000; and that she had been completely repaired at Jamaica.

(*b*) "As to the rule of ascertaining the value of a ship, it is agreed on all hands, that the sum she was worth, at the time of her departure, including certain expenses, is to govern, and the court can perceive no reason for establishing this rule, which does not apply to the case of goods:" *per* Washington, J., Carson *v.* Marine Ins. Co., 2 W. C. C. 472.

SUPREME COURT OF PENNSYLVANIA.

DECEMBER TERM, 1806.

Present—TILGHMAN, C. J., and SMITH and BRACKENRIDGE, Justices.

LYLE *v.* BAKER *et al.*

Removal of cause.

Under the 20th section of the act of assembly of the 24th February 1806, an action may be removed from a court of common pleas to the supreme court, on or before the first day of the term, next after that to which the original writ is returnable.

THIS action was instituted in the Common Pleas of Philadelphia county, at September term 1806; and a *habeas corpus* was taken out by the defendants, on the 1st of December following, to remove it into the supreme court. *Todd*, for the plaintiff, alleged that the *habeas corpus* had issued too late, and moved for a *procedendo*, on the 20th section of the act of the 24th of February 1806 (P. L. 342) which provides, "that no action shall be removed from any of the courts of common pleas, to the supreme or circuit courts, by consent or otherwise, unless the same is removed on or before the first day of the next term, after the said action shall have been commenced."

After argument in a full court (but Judge YEATES being now absent, owing to indisposition), the Chief Justice, on the 17th of January 1807, delivered the following unanimous opinion.

TILGHMAN, C. J.—The case turns entirely upon the construction of the 20th section of the act, "to alter the judiciary system of this commonwealth." Where the intention of the legislature is clearly expressed, it must prevail, whatever may be the consequences. But in the endeavor to discover the legislative intention, we must so construe the law, as not to reject any of its *words: and if there appears to be a contradiction in the expressions, we must seek and pursue, upon the whole, the prevailing object and intent of the law. Viewing, then, all the parts of the section under consideration, I am of opinion, that an action may be removed to the supreme court, at any time before or on the first day of the term succeeding that to which the original writ is returned. The expression, "first day of the next term, after the action shall have been commenced," taken by itself, would certainly limit the removal to the first day of the first term: but other expressions (I mean, particularly, the words, "on or before") must also be considered; and they cannot be satisfied, if the right of removal is

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restricted to the first day of the first term. It is impossible to remove an action, before the first day of the term to which the writ is returnable; as the writ of removal is directed to the court in which the action is brought, and the court can have no knowledge of the action, until its session, at the term next succeeding its commencement.

On this view of the subject, we are of opinion, that the intention of the legislature cannot be carried into effect, without so construing the act, as to admit of the removal of an action, on or before the first day of the term next after that to which the original writ is returnable.

Procedendo refused.

Ozeas *v.* Johnson, administrator of Foulke. (*a*)

Partnership.

One partner cannot maintain *assumpsit* against the other, to recover the balance of the proceeds of a partnership adventure, unless the partners have settled their account and struck the balance.

Case for money had and received, &c. The plaintiff and Foulke, the intestate, had been jointly concerned in a mercantile adventure from Philadelphia to New Orleans; but there was no evidence at the trial, that they had ever settled their accounts; and this action was brought to recover a balance claimed by the plaintiff. The jury, accordingly, gave a verdict in his favor for $320, subject to the opinion of the court, on a point reserved; to wit, whether the plaintiff, being a partner of Foulke's, and equally concerned in the adventure, could recover in the present form of action?

On arguing the point reserved, *S. Levy*, for the plaintiff, urged that the action of account-render was almost obsolete; that the action for money had and received was in nature of a bill in equity; that having no distinct court of equity, equity had become, in effect, a part of the common law of Pennsylvania, administered through her common-law courts; and that the sense of the legislature, on the subject, was manifested in the 6th section of the act of the 1st of March 1806 (P. L. 562), which provides, "that in all cases where any suit has been brought in any court of record within this commonwealth, the same shall *not be set aside for informality, if it appear, that the process has issued in the name of the commonwealth, against the defendant, for moneys owing or due, &c." (Wats. on Part. 221; 2 Ves. 239; 1 Bac. Abr. 31, 36, 37; Cowp. 795; 1 Dall. 428, 211.)

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Hopkinson, for the defendant, admitted, that if a partnership is dissolved, and the partnership accounts settled, the creditor partner may bring an action on the case for the balance (Wats. on Part. 221, 226); but he contended, that as this was the case of a special partnership, in which no account of the joint adventure had been settled, an action of *assumpsit* could not be sustained. (Wats. 116; 2 T. R. 476, 478, 479, 483; 2 Caines 293, 296; *Lamalere* v. *Caze*, in the circuit court of the United States, 1 W. C. C. 435.)

The opinion of the court was delivered by the Chief Justice, on the 1st

(*a*) s. c. 1 Binn. 191.

of January 1807, who, having stated the facts and point reserved, proceeded as follows:

TILGHMAN, C. J.—It was my wish to support the action, if possible; because the jury have decided on the merits of the cause. But upon a deliberate consideration of the nature of the action, and the authorities which have been cited, I am convinced, that the plaintiff cannot recover. Money received by one partner, during the partnership, is not received for the use of either, but for the use of both the partners. All that either partner is entitled to, is a moiety of what remains, after all the partnership debts are paid; and the proper remedy for one partner against the other, to obtain a settlement and payment, is an action of account-render. In short, no case has been cited by the plaintiff's counsel, to show that an action like the present can be maintained, unless the partners have settled their account and struck the balance.(*a*)

It is, then, of importance to the administration of justice, that the forms of action, which originate in good sense and public convenience, should not be confounded. The defendant has a right and an interest, to insist upon the preservation of the proper form of action, to enforce his partnership contract against him, of which this court possesses no power to deprive him. It is, indeed, most convenient, that partnership accounts should be settled before auditors. It would often be extremely difficult, sometimes it would be impracticable, to settle them by a jury. For these reasons, we think, that plaintiff cannot maintain the present action.

(*a*) An actual settlement must be made and a balance struck, by the act of both parties, before either can be charged in an action of *assumpsit*. It is not sufficient, that the balance may be deduced from the partnership books. Andrews *v.* Allen, 9 S. & R. 241. Until a partnership is dissolved, the accounts of the partners liquidated, and a balance struck, one partner cannot sue another in an action of *indebitatus assumpsit*. Lamalere v. Caze, 1 W. C. C. 435.[1]

[1] One partner cannot recover in *assumpsit*, against another, for advances, until a settlement of the partnership accounts, without proof of an *express* promise to pay, though the partnership has ceased to exist. Leidy *v.* Messinger, 71 Penn. St. 177. And *assumpsit* will not lie by one partner, to recover from the other, a balance due upon the settlement of their partnership account, without proof of an express promise. Killam *v.* Preston, 4 W. & S. 14. Otherwise, if an account be stated and rendered, which is returned without objection, for upwards of a year. Preston *v.* Killam, 1 Am. L. J. 168. And see Patton *v.* Ash, 7 S. & R. 116; McFadden *v.* Hunt, 5 W. & S. 458; Roberts *v.* Fitler, 13 Penn. St. 265; Ferguson *v.* Wright, 61 Id. 258. The law is otherwise, where there is a partnership, as to a single transaction; in such case, a creditor partner will not be put to his action of account-render. Galbreath *v.* Moore, 2 Watts 86; Wright *v.* Cumsty, 41 Penn. St. 102; Finlay *v.* Stewart, 56 Id. 183; Meason *v.* Kaine, 61 Id. 335; Cleveland *v* Farrar, 4 Brewst. 27.

*Bender *v.* Fromberger.

Covenant.—Pleading.—Damages.

In an action of covenant, it is sufficient to assign the breach, in terms as general as those in which the covenant is expressed.

The breach assigned was, that the defendant was not seised of a good estate in fee, &c.; and the defendant pleaded *non infregit conventionem*, and performance, with leave, &c., upon which issues were joined: *held*, that they were sufficient for the court to enter judgment upon.

A covenant that one is seised of an indefeasible estate in fee, may be broken, without an eviction.

A special warranty in a deed, has not the effect of controlling a precedent general covenant.

The covenantee of title cannot recover the value of improvements made by him, after his purchase from the covenantor.[1]

Covenant. On the trial of the cause, in March term, 1806, it appeared, that the defendant and his wife had sold and conveyed a tract of land to the plaintiff for $2390, by deed, dated the 8th of September 1797; and had therein covenanted that the defendant was lawfully seised of a good, sure and indefeasible estate of inheritance, in fee-simple, in the said land, and had good right, full power and authority, in his own right, to grant and convey the same to the plaintiff in fee. The deed, also contained a special warranty against the grantor and his heirs, and all persons claiming under them. Bender took possession of the premises and made considerable improvements, as well in fences and buildings, as in the cultivation of the soil; so that the property was valued, in May 1802, at $5000. An ejectment was brought, however, at the suit of Benjamin Hilton against Bender, in the circuit court of the United States; and after a trial, verdict and judgment for the plaintiff, an *hab. fac. possess.* issued, returnable to May term 1802, upon which the possession was delivered, on the 4th of February 1802.

Bender then instituted the present suit, in which the declaration stated the covenant that the defendant was seised of an indefeasible estate in fee-simple, and that he had a good right to convey the same to the plaintiff; and assigned as a breach, that the defendant was not so seised, nor had he good right to convey the said land in fee to the plaintiff: *profert* of the deed was made, but *oyer* was not demanded. The defendant pleaded *non infregit conventionem*, on which issue was joined; and also performance, with leave, &c., to which the plaintiff replied, generally, non-performance, and issue was thereupon joined. At the trial of the cause, in March term 1806, upon the recommendation of the court, and with the consent of the parties, a verdict was taken in these terms: "The jury find for the plaintiff $6232.50: but if the court shall be of opinion, that the plaintiff is not entitled to recover the value of the improvements made by him, after he purchased of the defendants, then they find damages $2979.14, and six cents costs."(*a*)

(*a*) At the trial of the cause, a question of some importance occurred. The defendant claimed under a sale, by the commonwealth, of the premises, as the forfeited estate of Joseph Griswold, who, it was alleged, had been attainted, by proclamation, during the revolutionary war. His counsel, with a view to maintain the validity of his title, offered to read the proclamation in evidence. The opposite counsel proved, that the defendant had due notice of Hilton's ejectment; took part in preparing evidence for

[1] S. P. Brown *v.* Dickerson, 12 Penn. St. 372; 68 Id. 400. And see Lanigan *v.* Kille, 97 Id 120. Cox *v.* Henry, 32 Id. 18; Terry *v.* Drabenstadt,

Bender v. Fromberger.

*Before the argument on the point which the jury had thus submitted to the court, a motion was made in arrest of judgment, on the following grounds: 1st. That the declaration was vicious, inasmuch as it did not assign a legal breach of the covenant. 2d. That there was not, in any part of the pleadings, sufficient matter, for the court to render judgment in favor of the plaintiff. 3d. That it is apparent on the record, that the plaintiff has no cause of action.

In support of these objections, it was argued, for the *defendant:* 1st. That the declaration does not aver that the recovery in *Hilton's Lessee* v. *Bender* was upon a title paramount. (Freem. 122; Hob. 12; 4 Co. 80; Cro. Jac. 674–5; Hob. 34; Cas. temp. Hardw. 271; Cro. Eliz. 917; Cro. Jac. 315; Cro. Eliz. 823; Cro. Car. 5; Vaugh. 118; 2 Vent. 61; Cro. Jac. 444; 1 Mod. 292; 1 Lev. 301; 3 Mod. 135; 3 T. R. 584.) 2d. That although the modern authorities admit, that it is sufficient, if the breach is assigned in the same general words as the covenant; yet, in that case, it is necessary, that the replication should be more specific and particular. (Cro. Eliz. 544; Cro. Jac. 171; 4 T. R. 620.) For *non infregit conventionem* is no plea, unless the breach is assigned affirmatively. (Co. Litt. 303–6.) And it is a rule in pleading, that you cannot go to issue on a general averment of performance. (3 Woodes. 93; Cowp. 578.) 3d. That the declaration contains a *profert* of the deed; and according to the practice of Pennsylvania, *oyer* must be presumed, *which spreads the deed upon the record. Then, as it will appear, that the deed contains a special [*438 warranty, in the conclusion, the antecedent express covenant that the

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the trial; and had, in fact, acceded to a settlement, in consequence of the eviction; and they contended, therefore, that the verdict in that ejectment was conclusive to establish a defect of title. After argument (in which the plaintiff's counsel cited, Cro. Jac. 304; Sid. 289; 2 Show. 460; Bradshaw's case, 9 Co. 60; and the defendant's counsel cited, 1 Str. 400; 2 Roll. Rep. 6, 28, 287; 8 T. R. 278), the chief justice delivered the unanimous opinion of the court:

Tilghman, Chief Justice.—Some difficulty has occurred in deciding this point; but the court have formed an unanimous opinion, that the evidence offered by the defendant, to prove that he had a good title to the land in question, is inadmissible. The title has been already decided in an ejectment, the only mode in which title to land can be directly decided; and of that ejectment, the defendant had full notice. If the defendant should now be permitted to give his title in evidence; and the jury should find a verdict in favor of it, the plaintiff's remedy by action of covenant on the deed, would be gone; and if his title should ultimately fail, on the trial of another ejectment, to be brought by him, he would lose both land and money. But on the other hand, if the plaintiff recovers in the present suit, it is in our power, by imposing terms upon him, to do justice to the defendant. Indeed, the plaintiff has made our interference unnecessary, by a voluntary offer to execute a conveyance to the defendant of all his right, upon receiving the damages awarded by the jury. He was not obliged (as the defendant's counsel allege) to tender this conveyance, before he brought the suit; it is sufficient, if the conveyance is executed, when the defendant pays the damages.

We do not decide, whether the defendant might have gone into evidence of the title, if he had given notice to the plaintiff, immediately after Hilton's recovery, that he was dissatisfied with the verdict, and meant, at his own expense, to prosecute an ejectment against Hilton, to try the question a second time. But, so far from pursuing this course, the defendant's conduct has shown an acquiescence in the verdict and judgment which Hilton obtained.

grantor was seised of an indefeasible estate, &c., is thereby restrained and controlled. (3 Lev. 46 ; 1 Ibid. 57 ; Rep. temp. Finch 96 ; 2 Bos. & Pul. 13 ; 3 Ibid. 565, 573.) Thus, independent of general authorities, the words "grant, bargain and sell," which, by themselves, are declared in an act of assembly, to import a general warranty, have always been considered as qualified and limited, if the deed contains a subsequent special warranty. (1 Dall. Laws, 109.) And on this construction of the deed, the plaintiff had no cause of action, when the suit was instituted.

For the *plaintiff*, it was answered : 1st. That the declaration is correct, in technical form ; for, in covenant, the breach may be assigned in as general words, as the covenant. (6 Vin. 421, pl. 2 ; 9 Co. 60 ; Cro. Jac. 304 ; 6 Vin. 424, pl. 3 ; 2 Show. 460 ; Sir T. Raym. 14 ; Cro. Jac. 369 ; 2 Bac. Abr. 84 ; 6 Vin. Abr. 422, pl. 1 ; Hob. 12 ; 2 Bos. & Pul. 14, in note ; 3 Woodes. 92 ; 5 Bac. 58, 60.) 2d. That the cases cited for the defendant arose upon a covenant for quiet enjoyment, which cannot be broken without an actual eviction ; but a covenant of title may be broken without eviction, upon proof that the grantor had not an estate in fee ; and in an action for the breach, it is neither necessary to allege nor to prove an eviction. 3d. That the declaration assigns the breach on the first covenant only ; and as *oyer* was never prayed, the second covenant is not even before the court. (2 Saund. 228 ; 1 Ibid. 233 ; 1 Lev. 88 ; 1 Saund. 9, 307 ; 1 T. R. 149 ; 1 Str. 227.) Besides, the covenants, though they cannot be regarded as one (which was the case in 2 Bos. & Pul. 13), are neither inconsistent nor contradictory : the one being a covenant, that the grantor has a good estate ; the other being a covenant of warranty ; the latter is introduced into deeds by the scrivener, of course ; but the former is only inserted upon the agreement and instruction of parties. A special covenant in fact, may restrain an implied covenant ; but here are two express covenants, which may operate together ; and each should be construed most strongly against the grantor. (2 Keb. 10, 15 ; 1 Sid. 289 ; 1 Lev. 183 ; 1 Sid. 215.)

The chief justice, after stating the pleadings, and the reasons assigned in arrest of judgment, delivered the opinion of the court, in the following terms :

Tilghman, Chief Justice.—As to the first point, although it was opened by the defendant's counsel, yet, I think, in the course of the argument, it was nearly abandoned. It certainly has not been supported ; for many cases have been produced, proving that it is sufficient to assign the breach in terms as general as those in which the covenant is expressed ; and more
*439] than one *of those cases were upon the very same kind of covenants as the one now in question.

The second point amounts, in substance, to this, that the issues were altogether immaterial. It is an undoubted principle, that verdicts, after a trial of the merits of a cause, are, if possible, to be supported. For this reason, many things are good after verdict, which would be bad, on demurrer. Many things, not alleged in the pleadings, may be presumed to have been proved on the trial ; because, unless they had been proved, the jury could not, properly, have given a verdict in the manner they did. One of the authorities (*a*) cited by the plaintiff's counsel, went to the point ; that,

(*a*) 5 Bac. Abr., Pleas, tit. Immaterial and Informal Issues, p. 59, 60.

upon a breach assigned, that the defendant was not seised of a good estate in fee, &c., to which the defendant pleaded *non infregit conventionem*, and thereupon issue was joined, the issue, though informal, was sufficient for the court to enter judgment on. Now, this is the very same issue as one of those joined in this cause.

But let us consider the other issue, joined on the plea of performance, with leave, &c. This kind of plea is peculiar to Pennsylvania, and is unknown in England. It was invented, to save the trouble of special pleading, and has been sanctioned by too long a practice, to be now shaken. In fact, it gives the defendant every advantage which he could derive from special pleading, and saves all the labor and danger: for upon notice to the plaintiff, without form, he may give anything in evidence which he might have pleaded. A great number of issues, in actions of covenant, have been joined precisely as this is; and if this judgment may be arrested, on account of the immateriality of the issue, all judgments founded on similar issues, are liable to be reversed, on writs of error. In considering the present motion, the court know nothing but what appears on the record. Now, how can they say, that an issue is immaterial, in which the defendant might, for aught that appears, have given evidence of all those special matters, on which the merits of his defence rested.

The defendant has contended, that it ought to have appeared, either in the plea or the replication, that the plaintiff had been evicted. But it is to be observed, that if the cases cited by him are examined, they will be found to be most, if not all, of them, on covenants for quiet enjoyment where the covenant was not broken, without an eviction by better title. But a covenant that one is seised of an indefeasible estate in fee, may be broken without an eviction; and in such case, the jury will give such damages as they think proper. Upon the whole, I am clearly of opinion, that this issue is not immaterial.

I will now consider the defendant's third point, which is, that it appears, by the record, that the plaintiff has no cause of action. *The defendant's argument is founded on this—that the plaintiff, by making a [*440
profert of the deed, has brought its whole contents before the court; that part of its contents is a clause of special warranty, by which they say, the general covenant on which the plaintiff has declared, is qualified and restrained; and of course, that the plaintiff has no cause of action, because the defendant only warranted against himself, and those who should claim under him. To this, it has been answered, by the plaintiff's counsel, and, I think, truly, that, *oyer* not having been prayed, no part of the deed appears to the court, but that which the plaintiff has declared on; and consequently, the court can take no notice of the special warranty.[1] But I think it best to deliver my opinion on the effect of the special warranty, that the defendant may not be disquieted, by supposing that he had a good defence, which he has lost the advantage of by a slip of his counsel. I subscribe to the principle laid down by Lord Eldon, in the case of *Browning* v. *Wright* (2 Bos. & Pul. 14), cited on the part of the defendant, that where it manifestly appears, from a consideration of every part of the deed, that no more than a special warranty was intended, it shall be so construed, although the deed,

[1] Mansley *v.* Smith, 6 Phila. 223.

in one part, contains words of covenant of more general import.[1] To this rule, I add the two following ones: that, in construing a deed, no part shall be rejected, unless it produces contradiction or absurdity; and that, in doubtful cases, a deed is to be construed in favor of the grantee. The deed in question contains a conveyance by the words grant, bargain and sell; a covenant that the grantor is seised of a good estate in fee-simple, subject to no incumbrances, but a certain ground-rent; and a covenant of special warranty.

It has been the prevailing opinion, that by virtue of an act of assembly, passed in the year 1715 (1 Dall. Laws, 109, § 6), the words "grant, bargain and sell," have the force of a general warranty, unless restrained by subsequent expressions. To qualify the general warranty, it has been the custom of scriveners, to insert a clause of special warranty. And, I believe, it is inserted, pretty much as a matter of course, unless in cases where the parties agree on a general warranty. I believe too, that in Pennsylvania the greater part of conveyances have, as Mr. *Ingersoll* has stated, been made with special warranty. Still, it remains to be considered, what was the intent of the grantor, in the present instance? The defendant contends, that his intent was, to give no more than a special warranty, because the clause of special warranty is inconsistent with and contradictory to a general warranty. Now, in this, I cannot agree with him. It is certain, that the special warranty and more, is included in the general one. It is an inaccurate mode of conveyancing; but there is no absurdity or contradiction in making one
*441] covenant against yourself and your heirs, and another against all *mankind. The special warranty was unnecessary, and is to be attributed to the ignorance of the scrivener, who, probably, thought it was a matter of course, without intending to affect the more general preceding covenant; or, perhaps, he might think it necessary to guard against the effect of the words "grant, bargain and sell," used in the first part of the deed; because the estate was subject to a ground-rent, as appears from the general covenant, in which it is said, that the estate is free from all incumbrances, except the said ground-rent. It has been urged, that it is all one covenant, because the special warranty is connected with the preceding general covenant, by the words "and that." It is very common to connect a covenant of warranty and a covenant for further assurance by these expressions. But what I rely on, is, the intent of the parties, manifested in the deed, considered altogether. I do not conceive it is possible, for a man of common sense to declare, that he engages that he had a perfect estate in fee-simple, and had a good right to convey such perfect estate, without intending to warrant to a greater extent than against himself and his heirs. There are no technical expressions, but such as every man understands, which is not the case with a special warranty. To a common man, it is not very intelligible, that there should ever be occasion to warrant and defend against himself and all persons claiming under him; for it is very natural to suppose, that when a man has used words sufficient to convey his estate to a third person, he has necessarily done enough to bar himself and all persons claiming under him, without calling in the aid of a special warranty. In short, the insertion of the clause of special warranty is generally the act

[1] An express covenant qualifies and restrains the generality of an implied one. Weiser *v.* Weiser 5 Watts 279. But see Funk *v.* Voneida, 11 S. & R. 109.

of scriveners; but I presume, that no scrivener could be so stupid as to insert a covenant, that "the grantor was seised of an indefeasible estate in fee," unless he had been told by the parties, that a general warranty was intended. I am, therefore, of opinion, that the special warranty in this deed, has not the effect of controlling the precedent general covenant, and that judgment should be entered for the plaintiff.

It is proper to add, that after the conclusion of the argument last night, I consulted with my brother YEATES, who concurs with my opinion, both with respect to the pleadings and the construction of the deed.

SAME CAUSE.

THE case now came before the court, on the point submitted by the verdict; and this turned upon the question, whether, in an action of covenant, founded upon a deed, in which the grantor covenants that he has a good title to the land conveyed, the grantee, being evicted, is entitled to recover the price of the premises, *at the date of the deed, or the improved value, at the time of the eviction? [*442

For the *plaintiff*, it was contended, that the measure of damages on all covenants, is the amount of the loss actually sustained, and though it would seem from the old books, that, in cases of warranty, the recovery is to be according to the value of the land, at the time of the warranty; it was a recovery, in those cases, of land only, and not (as in this case) of money for damages. This position was illustrated and supported by an elaborate argument, and these authorities: 2 Bl. Com. 299, 300, 304; 22 Vin. 145–6, "Vouchee;" 3 Bl. Com. 156; 1 Bac. Abr. 526; 3 Woodes. 91–2; 1 Ld. Raym. 107; 2 Ibid. 1126; T. Raym. 77; 30 Edw. III., 14, 6; 19 Hen. VI., 45–6; Ibid. 61; Sayer on Dam. 3, 4, 5, 6; 2 Caines 111; Bay 18, 263.

For the *defendant*, it was taken as conceded ground, that on a warranty, strictly speaking, the value of the land, at the date of the warranty, could alone be recovered, according to the law of England; and it was contended, that there was no legal or equitable distinction between that case and the general case of covenant, further than the enlargement of the remedy; which was limited by the former, to a recovery in land; but by the latter, the personal estate also becomes liable. 2 Bl. Com. 304; Godb. 152; 1 Johns. 379.

The opinion of the court, upon great consideration, was delivered, at an adjourned session, on the 17th of January 1807. The chief justice, after stating the facts, proceeded in the following terms:

TILGHMAN, Chief Justice.—The question submitted to us by the jury, has never been decided in this court. It is of importance, and has been well argued.

It may be taken for granted, that on a strict warranty, where the remedy for the party who loses the lands, is either by *voucher*, or writ of *warrantia chartæ*, the recovery is only according to the value of the land, at the time the warranty was created. This is conceded by the plaintiff's counsel, and very properly; for many authorities were cited directly to the point. But this kind of warranty, which is a covenant real, has long ceased, and has been succeeded by the covenants personal, introduced into modern conveyances. The latter have two advantages: the remedy by action of covenant is more easy in its form, and more comprehensive in its effects;

for it extends to the personal property of the warrantor, in the hands of his executors; whereas, the ancient recovery in value, was confined to the land. I know of no case in England, where it has been decided, whether a recovery in an action of covenant, could be carried so far as to include damages for improvements made after the purchase; but I must suppose, that Sir William
*443] Blackstone was of opinion, that such damages could *not be included, otherwise, he ought certainly to have mentioned it, when he was comparing the ancient warranty with the modern covenants, which, he says, have superseded them. His expressions are these: "If he covenants for his executors and administrators, his personal assets, as well as his real, are pledged for the performance of the covenant, which makes such covenant a better security than any warranty, and it has, therefore, in modern practice, totally superseded the other." A general warranty is as comprehensive in its expressions, as any words made use of in modern covenants. It undertakes to defend the land to the warrantee, his heirs and assigns, against all persons whatever. It is in its nature a covenant real; and since the recovery on it extended no further than the value of the land, at the time of the warranty made, the inference is very strong, that in these personal covenants, which have succeeded to it, the extension shall be no greater. But the plaintiff's counsel contend, that the reason why the recovery in value, on the ancient warranty, was confined to the value, at the time of its creation, is, because in real actions, no damages can be recovered. This reason is unsound. The value, at the time of the *voucher*, might have been recovered, without recovering damages; and this is evident from some of the cases which have been cited; particularly, the case of *Ballet* v. *Ballet*; where it is decided, that in a *warrantia chartæ*, if there be new buildings, of which the warranty is demanded, which were not at the time of the warranty made, the defendant must take care to show the special matter, and enter into the warranty, only for so much as was at the time of the making of the deed, otherwise, the plaintiff will recover, according to the value, at the time of entering into the warranty. The true reason, therefore, appears to be, that the intention of the parties was so understood, that the warranty should be limited to the value of the land, at the time of executing the deed.

The plaintiff's counsel cited a case from 22 Vin. Ab. 145, pl. 5, in order to prove, that upon the implied warranty, which arises on an exchange of land, the recovery in value, after eviction, is according to the actual loss sustained. As this seemed to be at variance with the general principles of warranty, I have examined it, since the argument of the cause, and find that the case was not properly explained. The words of the abridgment are as follows: "If a man recovers in value, upon a warranty in law, on an exchange, he shall have in value, according to the value which he has lost." In support of this, the *Case of Bustard*, 4 Co. 121, is cited. In the first place, it is to be remarked, that in the marginal note to pl. 6, in the same page of Viner, it is said, that the same case is reported in Cro. Eliz., Moore, and Yelverton, in neither of which is such point mentioned; and it is certain, from my Lord Coke's report, that the decision must have been extra-judi-
*444] cial; for *Bustard's case* turned on a different point. *Bustard being evicted of the land received by him in exchange, entered upon that which he had given in exchange, by virtue of the implied condition in law which is annexed to an exchange; and a re-entry was made on him;

in consequence of which he brought an action of trespass; and whether he could recover in that action, was the question: so that the court had nothing to do with the value of the land. But according to my Lord Coke's account of it, what they did decide concerning the value, is not applicable to the point now before the court. The decision is—that if A., who has received three acres in exchange, is impleaded for one acre, and vouches B. from whom he received them, and then the demandant recovers the one acre, A. shall recover in value from B., according to the loss, that is, one acre; but not a word is said concerning the time, to which the value of this acre is to relate. And that is the only question now under consideration.

It has been contended, that the true measure of damages, in all actions of covenant, is the loss actually sustained. But this rule is laid down too generally. In an action of covenant for non-payment of money on a bond or mortgage, no more than the principal and legal interest of the debt can be recovered, although the plaintiff may have suffered to a much greater amount by the default of payment. The rule contended for by the plaintiff's counsel, in its utmost latitude, applied to covenants like the present, would, in many instances, produce excessive mischief. Indeed, the counsel have, in some measure, given up this rule, by confessing, that when buildings of magnificence are erected to gratify the luxury of the wealthy, it would be unreasonable to give damages to the extent of the loss; but the ruinous consequences would not be less to many persons, who have sold lands, on which no other than useful buildings have been erected. The rise in the value of land, not only in towns on the sea coast, but in the interior part of the United States, is such, that it can hardly be supposed, any prudent man would undertake to answer the incalculable damages, which might overwhelm his family, under the construction contended for by the plaintiff. I have taken pains to ascertain the opinion of lawyers in this state, prior to the American revolution, and I think myself warranted in asserting, from the information I have received, that the prevailing opinion, among the most eminent counsel, was, that the standard of damages was the value of the land, at the time of making the contract. The title of land rests as much within the knowledge of the purchaser, as the seller; it depends upon writings, which both parties have an equal opportunity of examining. If the seller makes use of any fraud, concealment or artifice, to mislead the purchaser, in examining the title, the case is different, he will then be answerable for all losses which may ensue.

Cases have been cited from the civil law; but I throw them out of view, because this case can be decided only on the principles of the common law. *Cases have also been cited from the law reports, in the states of South Carolina and New York. Though they are not authority in this court, yet we shall always be happy to receive information of the opinions of the learned judges in our sister states, and always treat them with due respect. Upon the point now in question, it seems, there is a difference of opinion. In South Carolina, it has been held, that the plaintiff is entitled to recover, according to the value at the time of the action: in New York, that he can only recover according to the value at the time of the contract. On these cases, I will only remark, that the opinions of the judges in South Carolina, having been given during the hurry of a jury trial, do not appear to have been founded on such mature deliberation as those of the New [*445

York judges, who made their decision in the supreme court, sitting in bank.

Upon the whole, I am of opinion, that, by the true construction of the covenants in the case before us, the plaintiff is not entitled to recover the value of the improvements made by him, after he purchased of John Fromberger, and therefore, that judgment be entered for $2979.14, and costs. I am authorized to say, that Judge YEATES, whose absence is occasioned by sickness, concurs in this opinion.

SMITH, Justice.—The question now to be decided by this court is of great importance. I understand, that it has long been discussed among the most eminent counsel in Pennsylvania, and opinions have been given by some of them; but that it never has received a judicial decision. I believe, on inquiry, that it never came before any court in Pennsylvania, until the 24th of May 1804, when it came before the circuit court, holden for the county of Northumberland, by Judge BRACKENRIDGE and myself, in the case of *William Bonham* v. *John Walker's administrator*. We said, that "it is an important question, and it is proper that it should receive a solemn decision in bank; we, therefore, propose, that the measure of damages should be left to the jury, on each of these grounds, which is done accordingly." The jury found "a verdict for the plaintiff, for $1092.17 damages, on the ground of the original purchase-money; and on the ground of the value of the land at the time of the execution (eviction) $1602.21."

After my return, I was induced to make diligent inquiry, whether the point had ever been decided, and what had been the general opinion of eminent counsel on it, and the result was that expressed by the chief justice. Upon a very attentive perusal of that cases on the subject; the notes of which, taken by me then, and annexed to that case, are now before me: they did not, in my opinion, warrant me in drawing a different conclusion; but I saw difficulties, whether the question was decided one way or the other,
*446] which made me anxious to hear it deliberately argued: ready to *alter my opinion, if I should discover, that it was not well founded; or if the opposite opinion should be supported by law, be more conducive to the general interest, and be more agreeable generally to the intentions of the parties to such contracts.

I have heard it very well argued. If the very well-arranged and able argument of the ingenuous young gentleman who began (Mr. Sergeant) has not been able to shake the opinion which I had formed, I am induced to believe that it is well founded, on solid principles of law. I must, therefore, adhere to it upon the present occasion; it not being suggested that there was any fraud or concealment on the part of the vendor, nor any knowledge, when he sold, of any defect in his title. Had any of these circumstances occurred, I should be of opinion, that he would be liable to the amount of the loss.

Although the vendor, on a covenant like that in question, be liable to damages only to the value at the time of the deed; yet, he may enter into such a special express covenant, as will make him liable to the value at the time of eviction, and so much will the vendee, on such event, be entitled to. In the present case I agree, that judgment be entered for the plaintiff for $2979.14.

BRACKENRIDGE, Justice.—I concur in the decision of the other judges, for the reasons which have been assigned.

Judgment to be entered in favor of the plaintiff, for $2979.14, and costs. (*a*)

Lewis, *Rawle* and *J. Sergeant*, for the plaintiff.
McKean (Attorney-General) and *Ingersoll*, for the defendant.

DUTILH *v.* GATLIFF.

Marine insurance.—Abandonment.

If the vessel of a neutral be captured by a belligerent, and libelled as prize of war, though subsequently acquitted, the assured may abandon for a total loss.

A vessel having been captured and abandoned to the underwriters, the assured is entitled to recover for a total loss, notwithstanding her subsequent release, and arrival in port before the commencement of the suit.

An American vessel, insured at and from Philadelphia to Havana, was captured by British cruisers, carried into port by them, and there libelled as prize: a decree of restitution was subsequently obtained, after which, though before actual restitution, and without knowledge of the decree, she was abandoned; the insurance was effected, and the abandonment made by the agent for the owners, one of whom was with her, at the time of the decree of restitution: *Held* that the assured might recover as for a total loss.

THE following case was stated for the opinion of the court:

"Case. On the 24th of September 1799, the defendant, Samuel Gatliff, underwrote $750 upon a policy of insurance on the schooner Little Will, belonging to John Dutilh and Thomas Lillibridge, for whom the plaintiff was agent, on a voyage at and from Philadelphia to Havana. On the 26th of September 1799, the Little Will sailed on her voyage from Philadelphia to Havana, and on the 8th day of October following, she was captured by three British privateers, and carried into the port of Nassau, New Providence, where she arrived on the 13th of the same month. Upon her arrival in Nassau, the said schooner was libelled in the admiralty court, and on the 9th day of November following, was regularly acquitted; and in the whole, she remained thirty-seven days at Nassau, during thirty-five of which, she was in custody of the captors; but the fact of her acquittal was not known [*447
*to the plaintiff, until subsequent to the abandonment hereafter mentioned: although it was known to John Dutilh, one of the owners and supercargo, who was with her at Nassau. On the 13th day of November, the plaintiff wrote the letter of abandonment, inclosing the papers therein referred to, which was received by the defendant the same day. On the 20th November, the said schooner sailed from Nassau for Havana, where she arrived on the 21st of the same month, and sold her cargo, except three boxes, plundered at New Providence. Afterwards, the said schooner sailed from Havana for Philadelphia, where she arrived on the 26th or 27th of February, in the year 1800, with a cargo of sugars, on which freight became due, and was received by Stephen Dutilh, for the benefit of those who were entitled to it. Each party refusing to accept the schooner, she was sold for

(*a*) See, on the subject of covenants of title, 2 Wheat. 62, note *c*.

wharfage, and the whole proceeds of sale applied to the payment thereof. The schooner Little Will was American property, as warranted.

"The question for the court is, whether the plaintiff is entitled to recover as for a total loss? If the court shall be of opinion, that the loss was total, then it shall be referred, in the usual form, to three persons, to be appointed by the court, to ascertain what is due, after the legal and just deductions. If the court shall be of opinion it was not a total loss, it shall, in like manner, be referred to three referees, or any two of them, to be appointed by the court, to ascertain the partial loss, to which the defendant is liable."

J. Ingersoll, for the plaintiff.

W. Lewis, for the defendant.

After argument, the chief justice delivered the unanimous opinion of the court.

Tilghman, Chief Justice.—On the case stated, the question submitted to the court is, whether the plaintiff is entitled to recover for a total loss. In resolving this question, I shall divide it into two points. 1st. Did there ever exist a total loss? 2d. Supposing, that there once existed a total loss, has any circumstance occurred, which excludes the plaintiff from recovering for more than a partial loss?

I. The case before us includes one of the risks expressly mentioned in the policy, a taking at sea. But it has been objected that this taking was not by an enemy; and that when a belligerent takes a neutral, it is to be presumed that the taking is only for the purpose of searching for the property
*448] of his enemy, or goods contraband of war; and that, in the end, justice will be done to the *neutral. To a certain extent, there is weight in this distinction, but it must not be carried too far. At the time when the capture in question was made, the United States acknowledged the right of the British to detain their vessels, for the purpose of a reasonable search. The bare taking of the vessel, therefore, could by no means constitute a loss; and if, under suspicious circumstances, she should be carried into port, to afford an opportunity for a complete investigation, perhaps, even that ought not of itself to be considered as a total loss.(a) On this, however, I give no opinion. But when the captor, having carried the vessel into port, and completed the examination of the cargo and papers, instead of discharging her, proceeds to libel her as prize, I think the loss is complete. The property is no longer subject to the command of the owner, and it is unreasonable, that he should wait the event of judicial proceedings, which may continue for years. The case of an embargo is lesss trong; because, there, the confiscation of the property is not intended, and a temporary interruption of the voyage is all that, in general, is to be apprehended; yet the assured is not obliged to await the result, but may abandon, immediately on receipt of intelligence of the embargo. Not many judicial decisions have been produced on the point in question: where principles are strong, it is sufficient that there have been no decisions to the contrary. It appears, however, that in the state of New York, the precise point has been determined.

(a) A mere arrest and detention of a neutral vessel, by a belligerent, for the purpose of legal adjudication, will not authorize an abandonment. Duncan v. Koch, Wall. C. C. 37.

In the case of *Mumford.* v. *Church*, decided in the supreme court of New York, July term 1799 (1 Johns. Cas. 147), the assured recovered for a total loss, where there was a capture, carrying into port, and libelling by a British captor, although, after the abandonment, the property was restored. It is necessary, that some general rule should be established, some line drawn, by which the assured may know at what time he has a right to abandon. In most cases, the voyage is extremely injured by proceedings in the court of admiralty, and the event is doubtful. For it cannot be denied, that of late years, such extraordinary occurrences have taken place in war and politics, as have very much affected the principles and practice of foreign courts of admiralty. Whatever may be said of the law of nature and nations, and the immutable principles of justice, we see very plainly that the courts obey the will of the sovereign power of their country; and this will fluctuates with the circumstances of the times. I am, therefore, of opinion, that both by the words and spirit of a policy of insurance, the assured may abandon, when he receives intelligence of the libelling of his vessel.

II. This brings me to the consideration of the second point: Has any circumstance occurred, which limits the plaintiff to a recovery for only a partial loss?

It is contended, that such an event has occurred: that the vessel was acquitted by the decree of the court of admiralty; that after acquittal, she proceeded on her voyage, and that one of the *owners was on the spot, and knew of the acquittal. I do not think there is much weight [*449 in the circumstance of one of the owners being on the spot; because the general agent of all the owners was in Philadelphia. This general agent effected the insurance, and conducted all the business with the underwriters, and the owner, who was in New Providence, gave him intelligence of what occurred, from time to time, and by no means intended, from anything that appears, to restrain him from making an abandonment. It is true, that the vessel proceeded on her voyage, after she was restored; but it is not stated, nor can the court presume, that any of the owners acted in a manner inconsistent with the abandonment made by their agent. It was proper, at all events, to pursue the voyage, for the benefit of whoever might be interested in it. This is the usual practice, and a practice authorized by the policy, and very much for the advantage of the underwriters.

The only difficulty in the case before the court, arises from this circumstance; that before the action was brought, the vessel was restored, and even at the time of the abandonment, there was a decree of acquittal, although restitution does not appear to have been actually made, until some days after. The counsel for the defendant have relied much on the opinion of Lord MANSFIELD in the case of *Hamilton* v. *Mendez* (2 Burr. 1198), to establish this principle, that a policy of insurance, being in its nature a contract of indemnity, the plaintiff can recover no more than the amount of his actual loss, at the commencement of the action. There is no doubt of the soundness of the principle: I mean, that a policy is a contract of indemnity: the only question is, at what period the rights of the parties are to be tested by this principle; whether at the time of abandonment, or of the commencement of the action. I have considered attentively the case of *Hamilton* v.

[1] And see Slocum *v.* United Ins. Co., 1 Johns. Cas. 151; Livingston *v.* Hastie, 3 Id. 293; Dickey *v.* New York Ins. Co., 4 Cow. 222; s. c. 3 Wend. 658.

Mendez: It must be obvious to every one, that the decision in that case was perfectly right. It was simply this: that a man shall not be permitted to abandon, and recover for a total loss, when he knew, at the time of his offer to abandon, that his property, which had been lost, was restored, and the voyage very little injured. But in reading the opinion of Lord MANSFIELD, we find a want of accuracy, with which that great man was seldom chargeable. Sometimes, it appears as if he thought the period for fixing the rights of the insurers and assured, was the commencement of the suit; sometimes, the time of abandonment; and sometimes, he even seems to extend his ideas so far as the time of the verdict; but finally, he explicitly declares, that he decides nothing but the point before him. He seems to have felt a little sore, at the improper application of some general expressions used by him, in the case of *Goss* v. *Withers*. Anxious to cut off all pretence for doing the same in *Hamilton* v. *Mendez*, he has taken too much pains to avoid the possibility of misrepresentation: hence, his argument, considered in the detail, is not altogether clear and consistent. Upon the whole of this case of *Hamilton* v. *Mendez*, I think it most safe to confine its authority to the point
*450] *actually decided, which was very different from that we are now considering. Some period must be fixed for determining the right of the parties: to limit it to the time of commencing the action, would be of little service to the insurers; for the law being once so established, an action would be brought in every instance, on the first default of payment. The time of abandonment seems the most natural and convenient period; because the assured must make his election to abandon or not, in a reasonable and short time, after he hears of the loss, and the property, being transferred by the abandonment, can never after be reclaimed by the assured Want of mutuality is want of justice: there is no reason why the assured. should be bound, but the insurer left free to take advantage of events subsequent to the abandonment.

It has been contended by the plaintiff's counsel, that the right to abandon would not have been affected, even if the property had been restored, at the time of abandonment, because the restitution was unknown to the plaintiff. As to this, I give no opinion. It is unnecessary, because it is stated that the vessel remained in the custody of the captors, at the time of abandonment. The defendant's counsel have urged, that this was the fault of the master, or of one of the owners, who was at New Providence; because, after a decree of acquittal, a writ of restitution might have been sued out. But it not being stated, that there was any fault or negligence in the master or owner, I do not think, that the court can infer it. It being stated that the vessel remained in the custody of the captors, we must presume that the custody was legal. Whether for the purpose of giving the captors an opportunity of entering an appeal, or for what other purpose it was, that the restitution was delayed, we are at a loss to determine. But as restitution was not actually made, and as the plaintiff was ignorant, even of the decree of acquittal, his right to abandon remained unimpaired.

Upon the whole, we are of opinion, that the plaintiff is entitled to recover for a total loss.

Judgment for the plaintiff. (*a*)

(*a*) Since the decision of this case, the case of Rhinelander v. Insurance Company

Moliere's Lessee *v.* Noe.

Judicial sale.

The purchaser of lands of an intestate, sold by an order of an orphans' court, holds them discharged from the lien of a judgment obtained against the intestate in his lifetime.

Ejectment, for a house and lot in Union street, between Second and Third streets. The plaintiff's title was briefly this: George Fudge was seised of the premises, in the year 1796, when Moliere, as the assignee of one Muston, instituted three suits *against him, upon several bonds, [*451 returnable to March term 1796, in which judgments were regularly obtained. Fudge died, and the judgments were revived against his administrators, by writs of *scire facias*, returnable to December term 1799; judgments were thereupon entered, on the 27th of December; writs of *fi. fa.* issued, returnable the 28th of December, and were returned, "levied upon real estate, inquisition held, and property condemned." On the 15th of January, a *vend. exp.* issued, returnable to March term 1800, which was returned, that the premises had been sold to Moliere for $1000; and on the 3d of March 1800, sheriff Penrose executed a deed to the purchaser.

The defendant was tenant to Mary Beers, who claimed the premises under a sale made by order of the orphans' court, upon the petition of the administrators of Fudge—the intestate having left two minor children. The petition was presented in May 1797, with a list of the creditors of the estate, in which Moliere's judgments were referred to; the order of the orphans' court was made in June 1797; the sale was effected in July; and the administrators executed a deed to Mrs. Beers, for the premises (reciting the proceedings of the orphans' court), in consideration of $1200, on the 10th of August 1797. Subsequently to the sale, and receipt of the money, both of the administrators became insolvent.

On the trial of the cause, at *nisi prius*, in July 1806, two grounds of defence were taken: 1st. That Moliere had allowed Mrs. Beers to purchase and repair the estate, without giving her notice of his claim, though he was apprised of the order of sale by the orphans' court, and the proceedings under it. 2d. That upon the sale of the estate, by order of the orphans' court, it was discharged from all prior judgments, in the hands of the purchaser. On the first ground, both the Chief Justice (who sat at *nisi prius*) and the jury (as appeared from the charge and the verdict) were in favor of the plaintiff; and the second ground was reserved for the decision of the court in bank.

The point reserved was argued on the 10th of December 1806, by *Levy*, *McKean*, *S. Levy* and *J. Sergeant*, for the plaintiff, and *Ingersoll* and *Hopkinson*, for the defendant: and the following sections of several acts of assembly became material in the discussion.

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of Pennsylvania (4 Cr. 29), was argued in the supreme court of the United States, at Washington, in February term 1807, upon a writ of error from the circuit court of the Pennsylvania district: and that court (consisting of Marshall, Chief Justice, Chase, Johnson and Livingston, Justices) were of opinion, that in the case of neutral, as well as of belligerent, property, the assured has a right to abandon, and to claim for a total loss, as soon as the vessel is arrested, taken possession of, and carried out of the course of her voyage.

By the 6th section of the act of 1705 (Hall & Sellers, 34),(*a*) it is provided, "That if any person or persons shall die intestate, being owners of lands or tenements within this province, at the time of their death, and leave lawful issue to survive them, but not a sufficient personal estate to pay their just debts and maintain their children, in such case, it shall be lawful for
*452] the *administrator or administrators of such deceased, to sell and convey such part or parts of the said lands or tenements, for defraying their just debts, maintenance of their children, and for putting them apprentices, and teaching them to read and write, and for improvement of the residue of the estate, if any be, to their advantage, as the orphans' court of the county where such estate lies shall think fit to allow, order and direct, from time to time."

By the 21st section of the act of April 1794 (3 Dall. Laws, 530), it is provided, "that no lands, tenements, and hereditaments, so as aforesaid sold by the orphans' court, shall be liable, in the hands of the purchaser, for the debts of the intestate."

By the 2d section of the act of April 1794 (Ibid. 523), it is provided, "That no debts of deceased persons, except they be secured by mortgage, judgment, recognisance or other record, shall remain a lien on their lands and tenements, longer than seven years after the decease of such debtors, unless, &c."

By the 4th section of the act of April 1797 (4 Dall. Laws, 157), the same limitation is imposed on the lien of debts, unless a suit is brought, or a statement of the demand filed in the office of the prothonotary of the county where the lands lie, within the seven years.

For the *defendant*, it was insisted, that, by the act of April 1794, the purchaser, under an order of the orphans' court, held the land discharged of all the debts of the intestate, whether secured by judgments or not. The word debts includes judgments; and the legislature generally uses it, in that comprehensive sense. Hall & Sellers, 34, § 3, 6; Ibid. 132; 3 Dall. Laws, 522, § 1; Ibid. 523, § 1, 2; Ibid. 529, § 19; Ibid. 527; 4 Ibid. 157. This construction, however, does not extend to mortgages, which are a specific lien created by the act of the party; but only to judgments, to which, as the law gives the lien, the law may, also, take it away. 1 Dall. 481, 486. The words of the act are, then, clearly in favor of the purchaser; and it is not incumbent upon him to look to the application of the money. 9 Ann. c. 14, § 1; Lov. on B. 37; 2 T. R. 645; 2 Fonbl. 153.

For the *plaintiff*, it was answered, that the object of the act of 1794, was to provide for the sale of real estate, in order to pay debts at the instance of creditors, who had not obtained judgments, and therefore, could not themselves compel a sale of the land; that from the year 1705 to the year 1794, the sale was not accompanied with any condition, that the purchaser should hold the land free from the debts of the intestate; and the inconvenience to be remedied by that provision, arose from the latent claims,

(*a*) YEATES, Justice.—It has often been decided at *nisi prius*, that under this act, the orphans' court might order a sale of lands, although there were no minor children in the case.

referred to in 1 Dall. 481, not from judgments, mortgages, or other liens of record; and that words, however general, must *often be construed particular, in order to attain, without exceeding, the real object [*453 of the legislature. *Levinz* v. *Will*, 1 Dall. 430; Plowd. 109, 305; 2 East 135.

On the 20th of December 1806, the chief justice delivered the opinion of the court in the following terms.

Tilghman, Chief Justice.—This cause was tried before me at a court of *Nisi Prius*, held last July, when the point was reserved, which is now to be decided. Without entering into an unnecessary detail of facts, the question may be stated to be simply this: whether the purchaser of lands of a deceased person, sold by order of an orphans' court, since the 19th of April 1794, holds them discharged from the lien of a judgment, obtained against the intestate in his life.

Ever since the year 1705, the orphans' court have had power to order sale of such part of the land of persons dying intestate, as they judged necessary, for the payment of their debts, education and maintenance of their infant children, and improvement of the residue of the estate. But it was not until the passing of the act of the 19th of April 1794 (2 Dall. Laws 54), that any express provision was made with respect to the manner in which the purchaser should hold the land: I mean, whether it should be liable or not, in his hands, to the debts of the intestate. Yet, although there was no legislative provision, the public mind had, probably, received an impression from the sentiments of the late Chief Justice Shippen, delivered when he was president of the Court of Common Pleas, in the case of *Graff* v. *Smith's administrators*. (1 Dall. 481, 486.) The question before the court, in that case, did not, it is true, regard a judgment-creditor; yet the expressions of the president are very general, and seem strongly to intimate an opinion, that the purchaser should hold the lands discharged even from judgments. I do not mean, however, to say, that that point was decided. After this decision, in the year 1789, came the act of the 19th of April 1794, which I shall now consider. (3 Dall. Laws 526.)

The 19th section gives the same power, which had been vested in the orphans' court by the act of 1705, that is to say, to order sale of such part of the lands, as they should, from time to time, think proper, for the payment of debts, maintenance and education of children, and improvement of the residue of the estate. The 20th section forbids the court to order a sale, until they have ascertained, in the manner therein mentioned, the amount of the intestate's personal estate, and of the debts due from him. The 21st section declares, "that no lands or tenements so as aforesaid sold, by order of the orphans' court, shall be liable in the hands of the purchaser, for the debts of the intestate."

If we consider the plain meaning of these words, the lands thus sold, are discharged from the lien of judgments. I think, no man, learned or unlearned, would understand the word debts, as *excluding judgments. [*454 The counsel for the plaintiff do not contend so; but they argue, that although a judgment is a debt (taking the word debt in its largest signification), yet, to avoid great injustice and inconvenience, the legislature must be supposed to have intended only those debts, which were not a lien in the life of the intestate. The avoidance of injustice, and inconvenience, is

a most desirable object, and the court will always strive to attain it. But they must not overleap the bounds of their duty: they have power to construe laws, but not to make or alter them; and where the meaning of the legislature is plain, the court have no right to regard inconveniences. General expressions have sometimes been construed, so as to be restrained to particular cases; but to authorize such construction, it must appear, that the use of the words, in their general sense, would produce absurdity, contradiction or such flagrant injustice, as it could not be supposed the legislature meant to sanction. Upon a careful examination on the act in question, I cannot see that the discharge of the lands from the lien of judgment in the hands of the purchaser, will produce any such consequences. No inconvenience will result, if the orphans' court and the administrator do their duty. The lands will certainly sell better, for being discharged from liens; and it makes no odds to the judgment-creditors by what person they are sold, provided they are sold fairly, and the proceeds faithfully applied. I am clearly of opinion, that they must be applied to the payment, in the first place, of the liens which existed in the life of the intestate, according to their respective priority.(*a*) There is no intimation in any part of the act, to the contrary, and to say that judgment-creditors should not have a preference, in the application of such proceeds, would produce this monstrous injustice, that those creditors would preserve the benefit of their lien, in case a man made a will, but lose it, if he happened to die intestate.

Before I dismiss this subject, I will give my opinion concerning debts due by mortgage, which were mentioned in the course of the argument. I conceive them to stand on a different footing from judgments, because the mortgagee is, strictly speaking, the owner of the land, and may recover it in an ejectment.[1] The mortgagor has no more than an equity of redemption; nor have the orphans' court power to sell a greater estate than he is lawfully possessed of.(*b*) It will be seen, that in the 14th section of the act, where the order in which debts shall be paid is designated, there is no mention of mortgages, which evidently shows that the legislature took it for granted, that the mortgagee looked to the land for his security. The question now decided, is of importance to the public, particularly as different opinions have been entertained concerning it. As it must henceforth be considered as settled, I make no doubt, but the orphans' court, in the several counties, will

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(*a*) On a sale of an intestate's lands, by order of an orphan's court, judgment-creditors are to be paid according to priority in date. Girard *v.* McDermott, 5 S. & R. 128.

(*b*) Judicial sales of land divest all liens, whether general or specific. Thus, when a legacy is charged upon land, a sheriff's vendee or a purchaser under a sale by an order of an orphans' court would take the land discharged from the lien of the legacy. McLanahan *v.* Wyant, 1 P. & W. 96; Barnet *v.* Washebaugh, 16 S. & R. 410; Graff *v.* Smith, 1 Dall, 486 note; see also *ante*, p. 151 note. The act of the 6th April 1830, does not embrace the case of a sale by order of an orphans' court.

[1] This is a mere *dictum*, and has not been received as law. Bowen *v.* Oyster, 3 P. & W. 243. Prior to the passage of the act of 23d March 1867, an orphans' court sale, for the payment of debts, discharged the lien of a mortgage given by the decedent in his lifetime. Morse *v.* Shultz, 13 Penn. St. 98. And it still has that effect, except in certain counties of the state, for which special provision has been made local statutes. For the legislation on this subject, see Purd. Dig. (10th ed.) 479.

use proper vigilance to prevent injury to judgment-creditors. *They have full power to see that sales are made fairly, and with due notice, and to exact security from the administrator, in proportion to the increased funds which may come to his hands. These precautions, assisted by the attention of the creditors to their own interest, will, I flatter myself, produce sales to the greatest advantage, and faithful application of their proceeds.

My opinion is, that the defendant, the purchaser at the sale ordered by the orphans' court, holds the land discharged from the plaintiff's judgment.

YEATES, Justice, who was present at the argument, informed the chief justice that he concurred with his opinion; and—

BRACKENRIDGE, Justice, expressed his concurrence, generally.

Judgment to be entered for the defendant.

MORGAN *et al. v.* INSURANCE COMPANY OF NORTH AMERICA.

Insurance of freight.

Where a vessel sails upon a lawful voyage, but on her arrival at the port of destination, finds the same in the possession of another foreign power, and is prohibited from landing her cargo, the freight is earned; and there can be no recovery against the insurers thereof.

THIS was an action upon a yolicy of insurance, on the freight of the brig Amazon, valued at $3500, upon a voyage from Philadelphia to Surinam. The policy contained a warranty of American property, and the usual clause against illicit trade.

On the trial of the cause, before the Chief Justice, at *nisi prius*, in July 1806, it appeared that upon the 7th of August 1799, when Surinam was in possession of the Dutch, the vessel sailed on the voyage insured, and arrived at the river of Surinam, on the 17th of September following; that the brig was detained at the entrance of the river, by the commander of the British fort, who informed the master, that the colony of Surinam had been in possession of the British forces about twenty days; that the master, and a passenger of the name of J. G. Richter (who was an inhabitant of Surinam, and to whom the cargo was delivered there, on his paying $25,310, in pursuance of a contract with the plaintiffs, Morgan and Price) proceeded to the town of Paramanto, and the cargo was there tendered and agreed to be accepted by Richter, who gave security for paying the stipulated price, as soon as possible after the delivery, in conformity to the contract. On the 19th of September, the governor of the colony gave permission for the brig to be brought up to town, where she, accordingly, arrived the next day, for the purpose of discharging her cargo; that on reporting, however, to the custom-house, the collector declared that he would not permit any article to be landed, excepting the provisions (which did not amount to more than one-eighth of the cargo), and that permission to land the cargo generally, was repeatedly solicited by the master, but refused by the governor; in conse-

quence of which, it was brought back to *Philadelphia. Upon these facts, related in the master's protest,(a) the plaintiffs abandoned, and claimed for a total loss of the freight insured. And it was agreed to state them in a case, for the opinion of the court.

The general question was, whether the plaintiffs were entitled to recover. either for a total, or for a partial, loss of freight? And the solution was considered, by the counsel on both sides, as depending upon the inquiry, whether the freight had been earned, in whole or in part; and if not, whether the loss was occasioned by a peril enumerated in the policy.

For the *plaintiff*.—By the bill of lading, the master is obliged to deliver the goods (the danger of the seas only excepted), and freight is only payable on the delivery. Beawes Lex Merc. 137; Jud. 179, 183. If a foreign government prevents a landing of the cargo, it prevents an earning of the freight by an arrest, restraint and detainment; as much, surely, in the decided case, of the foreign government refusing to permit a cargo to be shipped for which the vessel was sent. 3 Bos. & Pul. 295; 8 T. R. 267; 1 Brownl. 21; 7 T. R. 385; Abbot 261; 3 Bac. 610; Lex Merc. 267; Park 292; 3 Rob. 152–3; 7 T. R. 383; 2 Vern. 170; *Perot* v. *Penrose*, in Supreme Court of Pennsylvania. A policy on goods continues in force, until the goods are landed (1 Marsh. 162), and all policies should be liberally construed, for the benefit of trade. (Ibid. 164–5.) In the present case, there is no proof of the delivery of the cargo at Surinam; but, on the contrary, it appears, that Richter agreed to pay for it as soon as possible after it was delivered; and as the delivery depended upon the landing, it is virtually disproved by the evidence, that the governor always refused to grant a permit for the landing.

For the *defendant*.—On the evidence, there was an arrival of the vessel at her port of discharge; and the tender and acceptance of the delivery of the cargo, entitled the owner to his freight. The owner of the ship was not bound to procure a permission to land the goods. Besides, it is not denied, that seamen's wages were paid; and wages are never payable, but in cases where the freight is earned. But even the loss, if established, was not occasioned by peril insured against. There was no arrest, no restraint, no detainment; but merely the refusal of a right of entry. Ord. Louis XIV.; 1 Val. 656, art. 15; Ib. 626, art. 7; Doug. 622, 626–7; Poth. 60, § 69; 2 Marsh. 434–7; 1 Ibid. 162, 164–5; Abbot 161; 2 Burr. 887.

*457] *The Chief Justice delivered the following opinion, in which Brackenridge, Justice, concurred:

Tilghman, Chief Justice.—This is an action on a policy of insurance on freight of the brig Amazon, from Philadelphia to Surinam, valued at $3500. The brig sailed from Philadelphia on the 7th of August 1799, with a cargo consisting of provisions and merchandise, and arrived in the river Surinam, on the 17th of September following. During the voyage, the colony of

(a) When the protest was offered to be read, the defendant's counsel observed, that the circuit court of the United States had refused to admit the protest in evidence, and submitted the competency of such evidence on the present occasion. But by The Court.—The practice of Pennsylania has been long settled: the protest has invariably been received as evidence in the state courts.

Surinam was conquered by the forces of the king of Great Britain. Permission was obtained from the British commander, for the brig to go up to the town of Paramanto, and she arrived there with her cargo, on the 20th September. On her arrival, the master of the brig, in pursuance of instructions from the owners, as well as in pursuance of an agreement between the owners and a certain J. A. Richter, who was a passenger in the said brig, offered to deliver the cargo to the said Richter, upon his paying, or giving security to pay, $25,310. Richter agreed to pay that sum, as soon as possible after the delivery of the cargo, and actually gave good security for the money. But the British collector of the customs, refused permission to land any article of the cargo, except the provisions, nor could such permission be obtained, although repeated petitions were presented to the government. The consequence was, that the cargo was not landed, and the master entered his protest. The brig remained at Paramanto until the 27th of September. The plaintiffs' were owners both of the brig and cargo. The question is, whether the plaintiffs are entitled to recover, either for a total loss, or for a partial loss, on this policy?

The plaintiffs' counsel contend, that they are entitled to recover for a total loss; that the landing and delivery of the cargo is an essential part of the contract between the owner and freighter, and not being complied with, no part of the freight has been earned; and that the circumstance of the same persons being owners of the brig and cargo, is immaterial, in a question between the insurers and assured. On the other hand, the defendants' counsel say, that there has been no loss, because the freight was completely earned.

No adjudged case in point has been cited on either side. The defendants' counsel relied on the case of *Blight* v. *Page*, 3 Bos. & Pul. 295 n., but I do not think that case applicable. The owner of a vessel agreed to go to a certain port, and take in a cargo of barley, to be carried on freight. When the vessel arrived at the port, the defendant could not furnish the cargo according to his agreement, because the government refused to permit the exportation of barley. The owner sued the defendant for not complying with his contract, and recovered damages equal to the amount of the freight. This only shows, that the interference of the government did not excuse the defendant from complying *with his contract. The plaintiff had done everything necessary on his part, and was prevented from earning his freight, by the breach of contract on the part of the defendant. No conclusion can be drawn from this case, under what circumstances freight may be earned, or not earned. For it was not an action for the recovery of freight, but of damages for not being permitted to earn freight. [*458

But although there is no adjudged case, the subject has not escaped the notice of writers on the marine law. In one of the ordinances of Louis XIV. (A. D. 1681), (*a*) it is declared, that on a charter-party to carry goods out and in, if, during the voyage, the commerce is prohibited and the vessel returns, the outward freight only is earned; and Valin, in his commentary on this article, says, the law is the same, if the vessel is freighted outward only. These ordinances, and the commentaries on them, have been received with great respect, in the courts both of England and the United States;

(*a*) 1 Vol. Ord. Louis XIV. 656, Art. 15, title Freight, cited by Abbot.

not as containing any authority in themselves, but as evidence of the general marine law. Where they are contradicted by judicial decisions in our own country, they are not to be respected; but on points which have not been decided, they are worthy of great consideration. I am strongly inclined to adopt the rule laid down by Valin, because I think it reasonable. The owner of the ship has been in no fault whatever; when he took the goods on freight, there was an open commerce between Philadelphia and Surinam; the goods were carried to the port of delivery; the vessel waited there seven days, and the master offered to deliver the cargo to the consignee, who refused to receive it. Nothing prevented it but the prohibition of the British government. It is not like the case of a vessel which is prevented from entering the port of delivery, by a blockading squadron; for there the voyage is not performed, and it is impossible to say, certainly, that it would have been safely performed, if there had been no blockade. I think it most agreeable to reason and justice, that the obtaining permission to land the cargo, should, in this case, be considered as the business of the consignee. That being established, it follows, that the freight was earned.

Upon the whole of this case, I am of opinion, that the plaintiffs are not entitled to recover, either for a total or a partial loss.

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*459] *SANSOM *v.* BALL.

Insurable interest.—General average.

Freight advanced, in consideration of which, the person making the advances, acquires a right to a certain proportion of the tonnage, is an insurable interest.

Where salvage is decreed, on a re-capture, and the vessel is restored, on payment of a sum of money, by way of compromise with the re-captors, this is matter of general average, to which underwriters on "freight advanced," must contribute.

CASE, on a policy of insurance, upon the freight of the ship Richmond, for a voyage at and from Philadelphia to Batavia, and thence back again. The premium was twenty per cent., "to return five per cent., if the ship proceeds only to Batavia and back to Philadelphia, and no loss happens;" and the insurance was declared to be "on freight advanced here, and which, by agreement, is valued at $13,500." The policy also contained the usual clause, that there should be no average loss recovered, if less than five per cent., unless it was general.

On the trial of the cause, it appeared, that the Richmond was owned by Messrs. Jesse and Robert Waln; that the plaintiff purchased from the owners three-eighths of the tonnage of the ship, for the voyage, at the price of $10,837.50, which was paid before the ship sailed; that the Richmond proceeded safely to Batavia, but on her return thence to Philadelphia, she was captured by a French privateer, who ordered her to Guadaloupe, and she was afterwards retaken by a British ship of war, who carried her into Martinique; that upon a libel for salvage, at Martinique, one-half of the full value of the ship and cargo was decreed to the re-captors, and the claimants charged with all costs; and that by agreement between the master and the supercargo, on the one hand, and the re-captors, on the other, one-half of the cargo was specifically delivered to the latter, and 2750*l.* fixed for the salvage

on the ship, which was paid by a draft on the owners at Philadelphia, secured by an hypothecation.

The present suit was brought to recover an average loss; and the case being submitted for the opinion of the court, two questions were discussed: 1st. Whether the subject described in the policy was an insurable interest? 2d. Whether, under all the circumstances of the case, the insurers were liable for a general average? (*a*)

1st. The *plaintiff's* counsel, contending that the interest was insurable, urged: 1st. That it was a lawful interest. It is the payment of a sum of money, for the benefit of bringing home a return-cargo, either as owner, or upon freight. There is no general law, no law of America or of England, against the payment of freight in advance, whatever may be the law of France (2 Marsh. 644); and there is scarcely a subject of property, for which *a price is paid and received, that may not be the subject of [*460 insurance, unless where general policy forbids; as in the case of seamen's wages. Park 9 (5th edit.); Ib. 103. Nor can this be considered as a double insurance; for it is a distinct interest; and different insurances may be effected by different persons, having different rights, in the same property. 1 Marsh. 282; Park 103. Nor is it a loan upon bottomry; for it was not advanced on the pledge of the ship herself, but for the use of her tonnage; and it is immaterial, that the valuation in the policy exceeds the actual cost; as the plaintiff had a right to cover the premium, charges, interest and profit, as well as his advance. 2d. The interest insured was liable to hazard and loss; and therefore, it was insurable. If the ship had been totally lost, the plaintiff's use of the tonnage, for which he had paid, was gone, and the owner of the ship could not be compelled to refund. 3d. The interest is well described in the policy. It is not a purchase of a share in the vessel; but of a right to convey goods in her, upon the voyage insured; and the transaction does not violate the registering act, on the point of ownership (1 U. S. Stat. 294, § 14); or even on the supposition of its amounting to a sale of a part of the vessel, it only forfeits the American privileges; it does not affect the insurable quality of the interest acquired. But again, when it is objected, that none but the owners of a ship can recover upon an insurance of freight; the objection obviously arises from confounding the purchase of the right of freight, paid in advance, with freight to be earned and received, at the end of the voyage. It is clear, that the owners of the ship could not insure (and certainly they did not attempt it) as freight, the tonnage purchased by the plaintiff. And when the plaintiff proposed the insurance, the intention of the parties, according to the facts disclosed, without objection at the time, ought to govern the construction of the policy. Park 439, 4th edit.

2d. On the second point, the plaintiff's counsel insisted, that whether the salvage was considered as freight, or as a charge upon goods, the interest

(*a*) Mr. Fitzsimmons, a merchant and underwriter of great intelligence and experience, proved, at the trial of the cause, that the interest acquired by the plaintiff in the tonnage of the ship, was a well-known subject of insurance in Philadelphia. He also proved that an adjustment of the average loss, on the present voyage, had been made; in which the insurance companies, and most of the private underwriters, had acquiesced. On the effect of the adjustment, the plaintiffs cited Park 118; Marsh. 244.

insured was liable to a general average; and, if so, the underwriters on the present policy were bound to furnish an indemnity. Ship, freight and cargo contribute to general average. Park 121; Abbot 215 (Am. Edit.); 1 East 220. If it is essential to a general average, that the loss should be voluntarily incurred surely the payment of salvage, upon a re-capture, is an act as voluntary, as throwing goods into the sea, upon the coercion of a tempest. Nay, it is within the express stipulation of the policy, that the assured shall labor to recover the property from any jeopardy, in which it is involved, by a risk insured against. Park 140–1, 123; Abbot 218; 2 Burr. 1213; 1 Mag. 245; 1 Rob. 86. And if ship, freight and goods should all contribute to a general average, the plaintiff's interest in the use of the
*461] ship could only contribute in this way; and contributing at all, is entitled *to an indemnity. 2 Marsh. 460; Park 124–6 (4th Edit); Abbot 290–1.

1st. The *defendant's* counsel, contending that the interest was not insurable, argued, that it was in the nature of bottomry; and therefore, not insurable, unless specifically; and even then, there could be no recovery for an average, but only for a total loss; that the idea of freight is inseparable from a completion of the voyage, and none but the owner of the ship can recover freight; and that there is no instance of a person, who is merely liable to pay freight, being liable to contribute to the payment of a general average. Abbot 179; 2 Bos. & Pul. 321–2; Marsh. 644; 1 Ibid. 93. If the purchase is considered a purchase of part of the vessel, then no legitimate contract can be founded on it, unless the vessel is registered anew. (1 U. S. Stat. 294, § 14.)

2d. On the second point, the defendant's counsel contended, that the decree of the court only affected the ship and cargo (not the freight) with the payment of salvage; that nothing but a general average can affect freight; and a general average calls for a voluntary sacrifice of a part, to preserve the rest of the property; whereas, the loss on the salvage was compulsory. (1 Johns. 406, 410; Abbot 220; Park 122, 130.)

The chief justice, after stating the general facts, delivered the unanimous opinion of the court, in the following terms:

Tilghman, Chief Justice.—In this case, two questions have been made: 1st. Had the plaintiff an insurable interest? 2d. If it was insurable, was it liable to a general average?

I. In order to determine whether the plaintiff's interest was insurable, we must first ascertain the nature of it. It seems to be a kind of interest, not much known in Europe, though well known in this city. The plaintiff advanced a sum of money to the owners of the ship, in consideration of which they gave him a right to fill up three-eighths of the tonnage of the ship, for that voyage, with goods, either his own or the property of others. It is called in the policy "freight advanced," an expression well calculated to show its meaning. All countries, and even all cities, have singularities of expression. All new inventions, either in commerce or the arts, give rise to new modes of speech, which, when once introduced into contracts, are recognised by courts of justice, whose duty it is to carry into execution the intention of the contracting parties. Now, what is there in this interest, which should exclude it from the benefit of insurance? there is nothing

unlawful in it. It is subject to loss; for whether the plaintiff used the tonnage for the transportation of his own goods, or of the goods of others, he would lose his money, unless the ship performed the voyage in safety. Indeed, I think Mr. *Ingersoll*, in *arguing for the defendant, conceded that the plaintiff's interest might have been insured, if it had been properly described; but he conceived it to be in the nature of bottomry. This it certainly cannot be; there was no loan of money. Messrs. Walns were obliged to make no payment to the plaintiff, but the plaintiff was entitled to make what he could from the tonnage he had purchased. Whether it was more or less, Messrs. Walns had nothing to do with it. The testimony of Mr. Fitzsimmons goes far towards proving, that the plaintiff's interest was well described, and was a proper object of insurance. In the case of *Gregory* v. *Christie* (Park 11), my Lord MANSFIELD thus expresses himself: "I should think that the words 'goods, specie and effects,' did not extend to the plaintiff's interest, if we were only to consider the words by themselves. But here is an express usage, which must govern our decision. A great many captains in the East India service swear, that this kind of interest is always insured in this way." Now, though there have not been a great many witnesses in this cause, yet there has been one, very much conversant in the business of insurance, who stands uncontradicted. Upon this first point, therefore, the insurability of the plaintiff's interest, whether it is considered on principle, or on usage, I have no doubt, but the law is with the plaintiff. [*462

II. But was the plaintiff's interest liable to general average? General average, or general contribution, is founded on principles of justice and sound policy. It arises, when a sacrifice of part has been made for the preservation of the residue, or when money is expended, to preserve the whole. Thus, the loss occasioned by cutting away of masts, or throwing goods overboard, to lighten the ship in a storm, or money paid to redeem ship and cargo, which had been captured, are subjects of general average; ship, cargo and freight have been benefited, and therefore, all must contribute. In the present instance, a compromise was made with the re-captors. Was it for the benefit of all persons concerned in ship, cargo and freight? for if it was, it falls within the rule of general average. It appears to me, that it was for the benefit of all concerned. It prevented a sale of both ship and cargo, which must have injured all concerned. It would certainly have injured the plaintiff, who had goods on board to a large amount, and he had paid in advance, for the freight of these goods. Of whatever nature the plaintiff's interest was, it was liable to salvage. Sir William Scott's opinion (*a*) is, that salvage is due, for ship, cargo and freight. But the defendant's counsel object, that general average never arises but from the voluntary act of man, and here, say they, was no voluntary act; for salvage was decreed by the court. This argument is rather too refined. Let us consider it. It is true, that the agency and consent of man must intervene, to produce a general average; but this agency and consent, though in one sense voluntary, are upon the whole, involuntary. When life is at stake, the mariner willingly *throws gold and diamonds into the sea. But was he willing to encounter the storm, which produced this dire necessity? General aver- [*463

(*a*) The Racehorse, 3 Rob. 86.

age always arises from actions produced by necessity. In the case before us, there was a capture, re-capture, and decree of salvage. The master and supercargo consented, under these circumstances, to a measure, which produced a general benefit. They surely exercised as much volition, as if they had thrown half the cargo overboard in a storm. Suppose, they had stood still, and suffered the ship and cargo to be sold, the underwriters would then have had to answer for the whole freight: it it better for them to be subject to a general contribution.

We are of opinion, that the plaintiff is entitled to recover on this poliey, according to his demand.

Lewis, *Rawle* and *J. Sergeant*, for the plaintiff. *McKean* (Attorney-General) and *Ingersoll*, for the defendant.

Donath *et al. v.* Insurance Company of North America.

Partial loss.—Return of premium.

Where an agent insures on account of his principal, though really for his own protection, there can be no recovery for a total loss, after a capture and restitution—the principal having accepted the property not lost or damaged; the loss, in such case, is but a partial one.

There can be no claim for return of premium, where the risk has once commenced, and the voy age is entire; otherwise, where the voyage is divided into parts, and on one of them, no risk has been run.

This cause was argued in March term last, on the following case stated for the opinion of the court.(*a*)

Case. The plaintiffs were in advance for money lent, and goods delivered, to Don Alvarez Calderon, according to their account stated (including commissions and premium of insurance), to the amount of $13,750; and addressed to the defendants, the orders of insurance, dated respectively the 22d of June, and 6th of July 1799, in these words:

"Philadelphia, June 22d, 1799.

"President and Directors of the Insurance Company of North America.

"Gentlemen.—Agreeably to your answer, we request you to insure $13,750 on sundry effects, shipped on board the schooner Daphne, captain Ripley, bound for Havana. This insurance is declared to be made by us, for and in behalf of Don Alvarez Calderon, king's attorney in the island of Cuba, on goods, or rather effects, they not being merchandise intended for trade, but wholly his property, consisting in clothing and wearing apparel, library, a vast quantity of house-furniture, coaches, &c., amounting together to $18,733, of which we only cover the above sum of $13,750, the same being the amount of our advances, inclusive of premium, commission, &c., *464] at and from Philadelphia to Havana, on board *the Daphne, an American bottom and property, and the returns from Havana to Philadelphia on board the same schooner, or any other American vessel, but if remittance should be made to us in bills of exchange, for the whole or in part of the sum so insured by us, a return-premium of seven and a half per cent.

(*a*) The case was stated with a reference to the various documents read in evidence; but it is necessary to incorporate the substance of them here, with the statement.

shall be allowed us, on the amount that may be remitted in bills. We further warrant that Don Alvarez Calderon has all necessary passports and protections for himself, suite and property, from the British, Spanish and French ministers, which we have caused to be registered in Clement Biddle's office."

"Philadelphia, July 6th, 1799.

"President and Directors of the Insurance Company of North America.

"GENTLEMEN—Please to cancel the policy of insurance effected on goods or effects, shipped by us, on board the schooner Daphne, for account of Don Alvarez Calderon, for $13,750, as the same have been re-landed and loaded on board the brig Currier, captain McKeiver, on which you will please to transport the same insurance, and on the same conditions.

JOS. DONATH & Co."

Previously to these orders, the plaintiffs had entered into an agreement with Don Alvarez Calderon, dated the 11th day of June 1799, of which the material passages were these:

"The said Jos. Donath & Co. contract to furnish a suitable vessel for the passage of the said Don Andres Alvarez Calderon, his suite, and goods and effects, from this port of Philadelphia to Havana. To procure insurance to be made of the goods and effects of the said Don Andres Alvarez Calderon, for the said voyage, to the amount of commissions, premium and charges, and the said goods and effects inclusive, and to comprehend in like manner the sums of $2000, advanced him by Stephen Dutilh, such insurance to be made at and from Philadelphia to Havana, and at and from thence back to this port of Philadelphia, and the policies of insurance, and authority to recover the same, in case of loss, to remain and be vested in the said Joseph Donath & Co.

"And the said Andres Alvarez Calderon further covenants, promises and obliges himself to the said Joseph Donath & Co., to pay to the said Joseph Donath & Co., or their correspondent at Havana, the full amount of said sums to be by them advanced, and also for the freight and other sums to be by him paid as aforesaid at Havana, in specie, to be loaded on board any vessel at Havana that they may require, clear of duties or risk; or at the option of said Andres Alvarez Calderon, to pay the said amount in sugars, or other *produce, in which last case, all the freight, charges, commissions at Havana, and risk of the said sugars or other produce of [*465
the said island of Cuba, shall be at the charge of the said Andres Alvarez Calderon, so that the net proceeds thereof, after deducting all charges, freight and insurance, as the same shall produce at Philadelphia, shall be to the credit of said Andres Alvarez Calderon, instead of the sum paid at Havana in specie. And it is declared and agreed by the said parties hereunto, that in case the said vessel should be captured, taken or lost on her said voyage, that the insurance to be recovered on the goods and effects, to be shipped and insured as mentioned in the third article before mentioned, shall be applied by the said Joseph Donath & Co., to the discharge of their advances, and in abatement or acquittance for so much of the bills or drafts to be drawn by the said Don Andres Alvarez Calderon for the said sums, so to be paid and advanced for his use by the said Joseph Donath & Co., as aforesaid."

On the 6th day of July 1799, Joseph Ball duly underwrote the policy for the defendants, and affixed their corporate seal, by which they insured goods on board the Currier outwards, and on board her, or any other good American vessel home, at and from Philadelphia to the Havana and back to Philadelphia, valued at $13,750, for a premium of twenty per cent. The property out was warranted to belong to Don Alvarez Calderon; and that he had all necessary passports and protections for himself, suite and property, from the British, Spanish and French ministers, resident in the United States. It was also stated in the policy, that the property homewards was to be shipped by Don Alvarez Calderon, or by his order, for account of the plaintiff; but if the remittance was made in bills of exchange, and not goods, there should be a return of seven and a half per cent. of the premium. The premium was duly paid; the warranty in the policy contained was complied with and performed; the policy has always remained in the possession of the plaintiffs; and the goods were shipped and consigned, as specified in the invoice and bill of lading, to wit, by Joseph Donath & Co. "for Don Alvarez, to Peter Blain, or his assigns," at the Havana. On the 19th June, and 8th July 1799, the plaintiffs wrote two letters to Peter Blain, the plaintiffs' agent named in the bill of lading, inclosing a copy of the contract with Don Calderon, and desiring him to secure payment before the goods were delivered; to which letters they received answers, dated respectively the 18th and 31st of October 1799, stating the refusal of Don Calderon to pay the drafts, and his desire that the plaintiffs would seek redress from the underwriters. The brig Currier, in the policy named, sailed from Philadelphia, on the 10th of July 1799, on the voyage insured, with the property insured on board; and while lawfully prosecuting the voyage, to wit, on the 31st of
*466] July 1799, she was captured by the British privateer *schooner Charlotte, Captain Thrift, and carried into New Providence, on the 3d day of August ensuing, where James McKeiver, master of the said brig, entered a protest. The brig and cargo were libelled in the vice-admiralty court, at New Providence, and were both condemned, except the property in the policy insured, touching which the following proceedings were had at New Providence.

On the 26th of August 1799, Don Calderon petitioned the court of vice-admiralty, stating that he was possessed of passports from the British minister, &c., and praying restitution of his effects. On the 2d of September, the judge pronounced sentence, which, so far as it relates to the present question, expressed a doubt upon the construction of the British minister's passport; and directed an inquiry to be made, whether it was the minister's intention to protect the effects of Don Calderon, to the extent claimed.(a) On the

(a) The opinion of the judge of the court of vice-admiralty (Judge KELSALL), upon the general character and operation of diplomatic passports, appears sufficiently interesting, to justify its insertion at length.

Decree. "The only shipment in this vessel, that has occasioned me any hesitation, is that of Don Alvarez. This gentleman is a Spanish subject, but to exempt his property (of the value of eight or ten thousand dollars) from the usual consequence of capture, he has produced a paper, which has given rise to no small argument and discussion. It is a letter of license from his majesty's ambassador with the American states, Mr. Liston, by which the commanders of vessels of war are requested to allow Don Alvarez to pass, with his domestics, baggage and effects. It is said, that this paper, from its language, not being mandatory, never was designed by Mr. Liston to be viewed as a safe-conduct; that it is merely an expression of civility, a complimentary act,

12th of September 1799, all the goods were *restored to Don Calderon, on his giving security to abide the final decree, except a trunk of valu-

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intended to procure to Don Alvarez polite treatment, and to protect himself, servants, baggage, and the customary *viatica*, or articles necessary for his use during the voyage, and no more; but by no means to enable him to carry furniture, carriages and other goods, to so great an amount as the property in dispute; that the document is not in the usual and proper form; and finally, the right of ambassadors, to protect by their licenses, more than has been here conceded to them, has been contested, on the ground, that it would defeat the operation of the prize act.

"The safe conduct of ambassadors will not, I apprehend, be often the subject of consideration here; and still more rarely will it happen, that there will be any greater occasion to dispute or deny the privilege claimed, than there exists in the present. If, however, the right of ambassadors to grant licenses, whereby enemy, or contraband goods may be protected from capture, during their passage through the sovereign's dominions (which is the case more especially alluded to by Blackstone, 1 Com. 259-60), or even to the territories of the enemy, which is the case here, be admitted in its fullest extent; still, it must be granted, that to insure proper respect to his act, attention should be paid to the forms prescribed or recommended by the writers on the law of nations; I mean, as Vattel expresses it, to enumerate and categorically express everything intended to be comprehended. Here, no enumeration has been made; but, instead thereof, a word has been inserted, of an import so general, that it may be construed to include anything and everything, of any amount and of any kind. I may, I trust, without derogating in the least from the respect due to his excellency, the ambassador, be permitted to doubt, whether, when he wrote the passport, he really meant to give it the full purport of which it is susceptible.

"The situation of judges of the vice-admiralty courts is well known to Mr. Liston. If, on the one hand, they are bound to respect the right of ambassadors, there are, also, duties to fulfil towards those who claim the benefits of the prize act. And hence, I do conclude, that in extending the privileges or immunities of a passport, beyond what is commonly done, he would have adopted a term of more precise and determinate signification, than the one he has used. Besides, it is very evident that Mr. Bond, the consul, who, I dare say, did see this license, and who ought, and I presume, does know better than any person here, what the ambassador really intended, takes no notice whatever of 'effects,' but confines his consular license or pass, which he granted eight days subsequent to that of Mr. Liston, to the persons and baggage of Don Alvarez and his servants. Don Alvarez himself, too, by insuring so carefully against capture, seems to have entertained a different opinion of this safe-conduct at Philadelphia, from that which he holds in this place. I will not, though, take upon me to say, that it is not possible, but that Mr. Liston might have been aware of the purpose to which his passport was intended to be applied; and that he might have deemed this a fit occasion, for the exercise of the extraordinary powers attached to his station and character. If this prove to be the case, I shall dismiss the libel, and leave the captors, if they think themselves aggrieved, to seek redress elsewhere. My duty, therefore, in the first place, is to be satisfied of what was the ambassador's meaning. For this purpose, I decree, that an exact enumeration of the articles (exclusive of the baggage, the books, and everything necessary for the prosecution of his voyage, which, if it has not been done, I direct may be immediately given up) that have been shipped by Don Alvarez, be made out, and that it be transmitted to his excellency, the ambassador, with a request that he would certify to this court, whether any or what things therein specified, were intended by him to be protected from capture by his license. In making this enumeration, I trust, that the greatest care will be used to prevent injury; and that the same be done in the presence of some person appointed by the claimant."[1]

[1] Upon receiving Mr. Liston's explanatory certificate, the whole of the property was ordered to be restored absolutely.

able articles, which had been lost after the capture; and for which the judge refused to make the captors responsible.

The property received by Don Alvarez Calderon, in consequence of those proceedings, was carried by him to the Havana, but never delivered to the said Blain, in the bill of lading mentioned, nor accounted for to the plaintiffs.

On the 31st day of August, and the 1st of October 1799, the plaintiffs abandoned the property insured to the defendants, stating in the former letter, particularly, that "they had received orders from Don Calderon to do so;" and thereupon, demanded payment for a total loss: which the defendants refused to pay, but offered to pay an average loss on the goods damaged and stolen. Don Alvarez Calderon has not paid to the plaintiffs the whole, or any part of their advances before mentioned: and no property insured on the homeward passage, has been shipped by him or his order, for account of the plaintiffs, nor hath any part of *the remittances in the policy mentioned, been made in bills of exchange.

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The questions for the opinion of the court are: 1st. Whether, under all the circumstances, the plaintiffs had an insurable interest in the property, mentioned in the policy, out and home, or either? 2d. Whether, if they had such interest, it is sufficiently insured by this policy, to entitle them to recover in the present action, as for a total loss? 3d. Whether, if they are not entitled to recover as for a total loss, they are entitled to recover as for a partial loss, and to what amount? 4th. Whether they are entitled to a return of premium on the return-voyage, and to what amount? It is further agreed, that the judgment of the court shall be rendered by them, in such form and for such sum, if any, as shall be best calculated to effectuate their opinion upon the foregoing questions.

The cause was argued, in March term, 1806, by *Levy* and *Dallas*, for the plaintiffs; and by *Ingersoll* and *Hopkinson*, for the defendants.

For the *plaintiffs*, it was insisted: 1st. That the advance and lien gave them an insurable interest in the effects of Don Calderon; Park 282; 1 W. Bl. 103; 1 Burr. 489; Park 267, 269; 8 T. R. 154; Park 11; 3 Burr. 1410; Park 270; 8 T. R. 13; 1 Bos. & Pul. 315, 323, 216; 6 T. R. 478, 483; 1 Marsh. 81, 91, 111, 112; 2 Bos. & Pul. 240, 75; that the nature of their interest was fully communicated to the defendants; that they had taken every precaution to secure the lien, by retaining the possession of the effects, and consigning them to their agent at the Havana, to be delivered to Don Calderon, only upon repayment of the money advanced; that the capture took from the plaintiffs the possession of the property, and with it, their lien; thereby constituting a total loss, on which they had a right to abandon (2 Burr. 694; 2 Emerig. 188, 194–5; 3 Poth. lib. 3, c. 3, art. 1, § 3); that the restitution to Don Calderon was not a restitution to the plaintiffs; but on the contrary, was destructive of their possession and lien; and that although the goods were, in fact, afterwards carried to the Havana by Don Calderon, they were never delivered at the port of destination, to the consignee of the plaintiffs, within the spirit and meaning of the policy, any more than if they had been carried thither by the captors. 2d. That the defendants have virtually acknowledged the right of the plaintiffs to recover, by offering to pay an average loss upon the property damaged and stolen. 3d. That, at all

events, the policy contemplates two distinct adventures ; to wit, an outward cargo, and a remittance, either in cargo, or in bills of exchange (providing, in the latter case, for an abatement of seven and *a half per cent. premium), and as no risk has been run of either kind, upon the return-voyage, there should be a proportional return of premium. Park 367 377–8 (5th edit.); 3 Burr. 1237; 2 Marsh. 564, 567, 569, 561–71; 1 Bos. & Pul. 172. [*469

For the *defendants*, it was insisted, 1st. That their contract was with Don Calderon, through the agency of the plaintiffs ; that the plaintiffs never had an insurable interest, or, if they had, they have not insured it; for the insurance is made on the effects of Don Calderon, on his account and risk; and, although they are consigned to Blain, at the Havana, it is expressly "for Don Calderon" (1 Ld. Raym. 271; 12 Mod. 156); that there was no idea of a lien, in the origin of the transaction, but a perfect reliance on the honor of Calderon; that, although two persons may insure distinct interests in the same subject, it must be upon distinct contracts, for distinct premiums; and that Don Calderon, in case of a legal loss, might have sued on the policy, though he had paid his debt to the plaintiffs; and thus, if they might sue, their debt not being paid, two interests would be insured by the same contract, for a single premium. 2d. That the defendants had complied with their contract, the property being restored to, and remaining in, the possession of its owners, for whom the insurance was made, at its port of destination; and that the insurance was against the perils of the sea, and of war, but it was not an insurance against the misconduct of Don Calderon, in retaining the property, without paying the debt. 3d. That the voyage was entire; for an entire premium of twenty per centum, varying the amount of the premium, but not the entirety of the voyage, acccording to the manner in which the returns should be made. Park 440, 377; 2 Marsh. 572; Doug. 751.

The cause was held under advisement, until the 17th of January 1807, when the opinions of the judges who had heard the argument were delivered.

Tilghman, Chief Justice.—My opinion on the first point will be rendered unnecessary, by the opinion which I shall deliver on the second point; because, granting that the plaintiffs possessed an insurable interest, I am of opinion, that it clearly appears from the facts stated, that they ordered no insurance, and that no insurance was made for them, in any other capacity, than as agents of Don Alvarez Calderon: consequently, they cannot recover for a total loss, as Don Alvarez Calderon has accepted that part of the property which was saved, and thereby made his election to claim only for a partial loss. The instructions of the plaintiffs for effecting the insurance, were to insure expressly for and on behalf of Don Alvarez Calderon. It is true, they insured only $13,750, although the whole effects of their principal amounted to $18,733; *and they give the reason, that $13,750 covered the amount of their advances, including premium, commissions, &c. The defendants might well suppose, that the plaintiffs were to hold this policy for their own security, in case of loss, although the insur- [*470

ance was made for Don Alvarez Calderon; and that this was the fact, appears from the agreement, dated the 11th of June 1799. But it is not stated, that this agreement was disclosed to the defendants: on the contrary, there is one circumstance which goes far towards convincing me that no such disclosure was made. It is this: by the agreement, the outward cargo was to be at the risk of Don Alvarez Calderon, but the memorandum at the foot of the policy contains a covenant, that the inward cargo should be shipped on account of the plaintiffs. The plaintiffs contend, that they had a lien on the goods, and that it so appears by the bill of lading, and their letter to Mr. Blain. But in my opinion, those papers prove directly the contrary. By the bill of lading, the goods are deliverable, for Don Alvarez Calderon, to P. Blain; so that Don Alvarez Calderon might have compelled Blain to give him possession of the goods, before the expiration of the fifteen days, which were allowed for payment of the plaintiffs' demand. The plaintiffs, in their first letter to Blain, declare that the respectability of Don Alvarez Calderon's character was a sufficient guarantee for the honorable execution of his agreement. And even in their second letter, although they began to apprehend difficulty from the capricious temper of the Don, they gave no intimation of any expectation, that their agent should hold the goods until he received payment of their demand.

Suppose, Don Alvarez Calderon had paid the plaintiffs' account; can it be contended, that he could not recover for his own use, on this policy, the amount of the loss, that he has actually sustained? And if he could, does it not inevitably follow, that the plaintiffs cannot recover for their own use? If they can, one insurance, effected for one premium, may be made to cover two different interests, vested in different persons. Besides, the plaintiffs attempt, most unreasonably, to make the defendants answerable for a risk, which they never meant to run; that is, for the integrity and good conduct of Don Alvarez Calderon. And after that gentleman has received the property, which was restored to him by the British court of admiralty, the defendants are called on to answer for it, as being lost. To render the impropriety of this demand the more complete, the plaintiffs made the abandonment, on which they found their claim, expressly by order of Don Alvarez Calderon. Nothing can be clearer than the plaintiffs, throughout the whole of the transaction of this insurance, acted not for themselves, but as the agents of Don Alvarez Calderon.

3d. On the third point, there is no difficulty. Undoubtedly, the plaintiffs may recover for the partial loss, sustained by Don Alvarez Calderon. *471] *The defendants do not deny it. I presume, the parties can easily adjust this loss. Indeed, I understood so, from what fell from Mr. Levy, in the course of his argument.

4th. The last question in this case is, whether the plaintiffs are entitled to a return of any part, and how much, of the premium? The general rule is, that where the voyage is entire, and the risk has once commenced, there shall be no return of premium. But when, by the course of trade, or the agreement of the parties, the voyage is divided into distinct parts; and on one of these parts, no risk has been run, there shall be an apportionment of the premium, and part shall be returned. A voyage may be entire, though the ship is to go to a number of different places, and to take in different cargoes. But if, in the contract of insurance, there are certain contingen-

cies introduced, which, at certain periods of the voyage, may operate so as to make the insurance void, it has been considered, that in such cases, the voyage may be supposed to have been divided, in the contemplation of the parties, into distinct parts. As in the case of *Stevenson* v. *Snow* (3 Burr. 1237), which was an insurance of a ship "at and from London to Halifax, warranted to depart with convoy from Portsmouth." The convoy was gone, before the ship arrived at Portsmouth; and by the judgment of Lord MANSFIELD, and the whole court of king's bench, there was a return of part of the premium. In the case before us, it appears to have been in contemplation of the parties, that on the voyage from the Havana home, there might be contingencies, which would either avoid the policy, for that part of the voyage, or lessen the risk, so far as to require a part return of premium. The goods shipped on the outward voyage, are warranted to be the property of Don Alvarez Calderon: it was doubtful, whether any goods would be shipped on the inward voyage. If a remittance was made in bills of exchange, there was to be a return of seven and a half per cent., part of the premium. If goods were shipped, they were warranted to be on account of the plaintiffs. It seems to be the spirit of this agreement, that the voyage may be divided; and that if no goods were shipped, there should be a return of seven and a half per cent.

On the whole of the case, I am of opinion, that the plaintiffs are entitled to recover for a partial loss, and a return premium of seven and a half per cent., with interest from the commencement of the action.(*a*) I do not think, that they should be allowed interest for a longer time, because they demanded more than they were entitled to, and have put the defendants to the expense of contesting their claim for a total loss.

YEATES, Justice, being indisposed, sent his opinion, in writing, to the court, and it was read by the prothonotary. He concurred in the decision, that the plaintiffs were entitled to recover a partial loss, for the goods lost and damaged; but he considered *the voyage as entire, and consequently, was opposed to the claim for a return of premium. [*472

SMITH and BRACKENRIDGE, Justices, concurred, generally, in the sentiments delivered by the chief justice.

And judgment was entered for the plaintiffs, accordingly; the *quantum* to be calculated by the parties.(*b*)

(*a*) The assured is entitled to a return of the premium, if the goods upon which the insurance was effected have never been put on board the vessel, or if she was not seaworthy, at the time the risk would have commenced, if it had commenced at all. Scriba *v.* Insurance Co. of North America, 2 W. C. C. 107. But fraud on the part of the assured, will bar him from demanding a return of premium. Schwartz *v.* United States Ins. Co., 3 Id. 170.

(*b*) On the question of interest, *Dallas* took the liberty of suggesting to the court, after the opinions were delivered, that the practice had uniformly been, to allow interest on the amount actually recovered, upon the expiration of thirty days, after depositing the proofs of loss; and that, on principle, the underwriters could only discharge themselves from interest or costs, by a tender, or payment into court, of the sum due. But the Chief Justice answered, that the subject had been considered, and was now decided.

APPENDIX.

COURT OF ERRORS AND APPEALS

OF THE

STATE OF DELAWARE.

SEPTEMBER TERM, 1788.

W. B., surviving partner, &c., appellant, *v.* LATIMER, respondent. (*a*)

Prize jurisdiction.—Effect of verdict.

In case of a capture on a navigable water, the question of prize or no prize, is within the jurisdiction of the admiralty, though the property seized belong to a citizen of the state in which the capture was made.

Upon a bill of exceptions to another point, and after a general verdict, the court is not bound to consider a judgment by default in replevin, as an affirmance of property.

THE facts, arguments and principles involved in the discussion of this cause, were stated by the first commissioned judge, in the following terms:

DICKINSON, J.—An action of trover was brought by the appellant and his partner, in the court of common pleas, in Kent, for the brig Endeavor and her cargo. There was a general verdict and a judgment for the plaintiff, in that court. The cause was then removed into the supreme court, by a writ of error, and there the judgment of the court below was reversed. The appeal, in this cause, is from that judgment of reversal.

Upon the trial in the county court, the plaintiff gave in evidence, "that the defendant, as marshal of the admiralty, appointed Ralph Walker to take the brig and cargo into his care and possession; that he did so, and continued possessed thereof, until they were replevied by virtue of the writ of replevin

(*a*) I have been presented with the report of this case, and of the next, by the learned and venerable judge who pronounced the judgments of the court; and their intrinsic merit, as well as the respect due to the judge, must render any apology for their publication unnecessary.

in the judgment hereafter mentioned ; and that the defendant, by a warrant in writing, appointed John Dawson, deputy-marshal, &c."

*ii.] *The plaintiff then offered in evidence, the record of an action of replevin, brought by him and his deceased partner against the said Walker and others, to February term 1782, upon which action, a judgment was entered, at the same term, by default, for the said brig and cargo. The defendant, by his counsel, objected to the same, inasmuch as he was not a party to the action of replevin ; but the court overruled the objection. To this opinion of the court, the defendant's counsel tendered a bill of exceptions, that was sealed by the judges, in which the facts before mentioned, were stated.

Upon the same trial, the defendant gave in evidence, " the transcript of the proceedings in the court of admiralty, by which it appeared, that the brig Endeavor and her cargo, had been condemned in the said court, as lawful prize, to and for the use of the captors, and had been sold by the defendant, as marshal of that court, under that decree. The plaintiff, by his counsel, objected to the operation of said condemnation, inasmuch as the said court of admiralty had not jurisdiction, the said brig and cargo being taken and seized as prize, at Whitehall landing, in Little Duck creek, in the body of Kent county, and belonging, at the time of seizure, to citizens and inhabitants of the said county, which objection, the court held to be sufficient, for the causes above stated." To this opinion of the court, the defendant's counsel tendered a bill of exceptions, afterwards duly sealed, in which the particulars before recited are set forth.

The capture was made, during the late war, in December 1781. It is contended by the counsel for the appellant, " that the action, in this case, against the officer of the court of admiralty, is maintainable, and two principal points are insisted on : 1st. That the court of admiralty had not jurisdiction ; and 2d. That if that court had jurisdiction, yet the judgment in replevin, subsequent to the decree of condemnation, is an affirmance of property in the appellant, of which, as such an affirmance, we are bound to take notice, and thereby to be concluded."

With respect to the first principal point, it is urged, " that the admiralty had not jurisdiction, by any principle of law, because its jurisdiction extends only to acts done upon the high seas ; and in cases of capture, is governed by the law of nations, which can apply only to questions between citizens or subjects of different states or kingdoms ; that it had not jurisdiction, under any resolutions of congress, because they do not reach to the present instance ; that there was but a bare intent to offend ; and that the legislature of this state had directed a particular mode of proceeding, in every such instance, by the act of assembly passed on the 20th day of May 1778."

A great number of cases has been read, in order to show that the *iii.] jurisdiction of the admiralty, extends only to acts done *upon the high seas. The same answer may serve for every one of them ; they all relate to causes civil and marine, and not to causes of prize. The question, " prize or no prize, belongs to the jurisdiction of the admiralty, whether the capture be upon the high seas, in ports, rivers or within the body of a county." It is not necessary to inquire how far this doctrine may be extended. The cause now to be determined, is of a capture upon a navigable

water. The decisions in the cases of *Le Caux* v. *Eden*, *Lindo* v. *Rodney and another*, *Brown and Burton* v. *Francklyn*, and *Key and Hubbard* v. *Pearce*, have removed every doubt upon this head.

The other branch of this objection is, "that, in cases of capture, the admiralty is governed by the law of nations, which can apply only to questions between citizens or subjects of different states or kingdoms." The law is as clear upon this, as upon the former, part of the objection.

Whether it be, that, in time of war, the usual forms cannot be observed; or that persons, engaged in enterprises favorable to enemies, are considered as connected with them in councils and interests; or that, as the welfare of a society depends on the issue of the war, therefore, the endeavors of the well-affected, amidst uncertainties and dangers, to guard the public happiness, give a peculiar sanction to their exertions, it is evident, that, upon captures as prize, the admiralty proceeds against the property taken, though it belongs to citizens or subjects of the state or kingdom, by the authority of which the court is established. If this rule be deemed essential to the general weal, in common wars, arising, perhaps, from disputes about borders, distant territories, or commercial benefits, how much more occasion is there for such vigilance and strictness, in a war like the last, a war of invasion, piercing into the heart of a country, and involving in its event, the freedom of a whole people and their posterity.

In the cases before referred to, not to mention any more, Brown and Burton were English subjects, and Key and Hubbard, Le Caux and Lindo, were British subjects. Thus, that law from which our jurisprudence is derived,(*a*) stands established, by a multitude of judicial determinations, for several ages. The courts of admiralty, in these states, proceed in the same manner. The court of admiralty, in this state, condemned a vessel, taken in Jones's creek, within the body of Kent county, and belonging to an inhabitant thereof;(*b*) yet no objection, that *we have ever heard of, was made to the jurisdiction of the admiralty. [*iv.

Here, it may be proper to recollect, that, in the present instance, the court of common pleas expressly held the objection of the appellant's, then plaintiff's, counsel, against the operation of the condemnation in the admiralty, "to be sufficient, because that court had not jurisdiction, inasmuch as the brig and cargo were taken and seized as prize, at Whitehall, in Little Duck creek, in the body of Kent county, and belonging, at the time of seizure, to citizens and inhabitants of said county."

The next allegation of the counsel for the appellant is, "that the court of admiralty had not jurisdiction, under any resolutions of congress;" particularly referring to those of the 25th of November 1775, and the 23d of March 1776. The second of the resolutions, in November, provides, that "all transport vessels, in the British service, &c., and all vessels, to whomsoever belonging, that shall be employed in carrying provisions, &c., to the

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(*a*) By the 25th section of our constitution, "the common law of England, and so much of the statute law as has been heretofore adopted in practice, shall remain in force, unless they shall be altered, &c."

(*b*) The facts here mentioned, that the vessel was taken in Jones's creek, within the body of Kent county, and belonged to an inhabitant thereof, were stated in the libel of Barret and others.

British army or navy, &c., shall be liable to seizure, and, with their cargoes, shall be forfeited." By the fourth, it is "recommended to the legislatures of the United Colonies, to erect courts of justice, or give jurisdiction to the courts now in being, for determining concerning the captures to be made as aforesaid, all trials in such cases to be had, by a jury, &c." By the fifth, "all prosecutions shall be commenced in the court of that colony, in which the captures shall be made; but if no such court be at that time erected, in the said colony, or if the capture shall be made on open sea, then the prosecution shall be in the court of such colony as the captor may find most convenient, &c." By the sixth, "an appeal, in all cases, shall be allowed to congress, or such persons as they shall appoint, &c."

By the fifth of the resolutions, in March, it is determined, that all vessels, &c., belonging to the inhabitants of Great Britain as aforesaid, and all vessels which may be employed in carrying supplies to the ministerial armies, which shall happen to be taken near the shores of any of these colonies, by the people of the country, or detachments from the army, shall be deemed lawful prize; and the court of admiralty, within the said colony, is required, on the condemnation thereof, to adjudge payment of charges, and distribution, &c."

It is said, "that if the words 'all vessels,' and 'all vessels to whomsoever belonging,' can be construed to extend to vessels owned by inhabitants of the United States, then colonies, yet the first set of resolutions wholly respects a condemnation upon trial by jury, and the second set, captures 'near the shores of any colony,' circumstances very different from those of the present instance; and both sets have regard, solely, to vessels
*v.] *employed in carrying, &c., though here, at most, was only a design of carrying."

The best way of discovering how far arguments, deduced from resolutions of congress, can be applied on this occasion, will be, to consider them, not separately, but conjointly, as forming a system, that existed in force at the time of the transaction. On the 8th of January 1780, long before the capture of the Endeavor, it was resolved by congress, "that the trials in the courts of admiralty, in cases of capture, be according to the usage of nations, and not by jury." It does not appear that any other material part of the foregoing resolutions in 1775 and 1776, was repealed. Therefore, the powers intended, in those resolutions, to be exercised by the courts of admiralty, remained; only the mode of exercising them was altered. The obligation of any of these resolutions has not been, and will not be, denied. Of course, the exception taken to the resolution of 1775, does not, in any manner, impeach the regularity of the proceedings in this cause.

As to the exception, founded upon these words, in the resolutions of 1776, "near the shores of any of the colonies;"(a) it would be a very singular distinction, if vessels, engaged in hostile projects, should be liable to seizure and condemnation, below the mouth of a river or creek, and should gain protection, by entering into it, for the very purpose of more effectually

(a) The libel of Barret and others, against the vessel, taken in June 1778, and afterwards condemned, stated that she was taken in "Jones's creek, and near the mouth thereof, in Kent county." This libel also set forth the resolution of congress on the 23d of March 1776, as the foundation of the prosecution.

carrying them on; especially, if it be considered, that congress certainly intended the resolutions of 1775 and 1776, to agree and co-operate. They did not undertake to say, that "the shores" of any colony, were the limits of that colony; and they expressly speak, in the 5th resolution of 1775, of captures made "in" a colony.

The exception taken against both sets of resolutions, states, that "they have regard solely to vessels employed in carrying, &c., and that here, at most, was only a design of carrying;" or, in other words, that the offence was not committed, but only intended.(*a*) On the other hand, it is set forth by the judge, in his decree, that the fixed design of the appellant and his partner, through all the transactions relating to this vessel, was to carry her and her cargo to New York, then in the possession of the British fleet and army; and that they had obtained a passport from the admiral, who was there, for this purpose; and it appears, from the plea and answer of the appellant, in the court of admiralty, and from other parts of the proceedings, that the brig Endeavor had *been purchased at Lewes Town, brought into Little Duck creek, as far up as Barker's landing, had there received a considerable part of her cargo, and then went down several miles to the place where she was captured. If she was going to New York, surely she was "employed in carrying supplies to the British army." [*vi.

This point has been deemed very important, and many ingenious arguments have been offered upon it. One remark may, perhaps, throw some light upon the subject. Whether the Endeavor was "employed in carrying supplies to the British army," is a question of fact. This court is now sitting to correct errors in law, "as was allowed under the old government in the last resort, to the king in council."(*b*) The cause now depending comes before us, after a removal into the supreme court, by a writ of error, upon a general verdict, and a judgment thereon below. Must there not be some great deviation from legal principles, in the method proposed for the decision of this business, since it leads to so extraordinary a conclusion, that, instead of being judges to determine what the law is, we are, in a case thus circumstanced, to become an imperfect jury, for the re-trial of a matter of fact?

The last objection of the appellant's counsel, comprehended in the first principal point, is, "that the legislature of this state, has directed a particular mode of proceeding, in every such instance as the present, by an act of assembly, passed on the 20th day of May 1778." By that act, "all provisions and supplies loaden on board any vessel or other carriage, in any place or port within the state, to the intent, &c., to be conveyed, &c., to or from the enemy, &c., shall be forfeited, with the craft, &c., carrying the same, to the use of the captors; and two justices of the peace of the county where such capture happens, may adjudge a forfeiture, and order sale, &c." Proceedings have been, accordingly, had, at least, in one instance, at New Castle, in July 1782.

At the time of making this law, the court of admiralty was subsisting in this state. Public acts and dates may here be material. In less than four

(*a*) The intention of supplying an enemy, manifested by such circumstances as in this case, is clearly criminal, at common law. Foster 217.

(*b*) Words of the act of assembly establishing the court of appeals.

months after the resolutions in March 1776, the declaration of independence was made. In less than three months from that time, with the same spirit of federalism, that has, on so many occasions, directed the conduct of this state,(a) our constitution was framed, candidly recognising the authority of "resolutions of congress," and among other things, requiring "a judge of admiralty." A judge was soon after appointed. It is not to be supposed, *vii.] that in the long interval, between November 1775, when congress recommended the establishment of courts, for condemnation of captures, taken in any part of united America, as well as elsewhere, until May 1778, when this act of assembly was made, there was no court here, vested with correspondent powers. The court of admiralty had cognisance in such cases. Principles of law, and the circumstances of our situation, required that it should have cognisance.

In that act, are no words that, positively, or by necessary implication, take away any authority then existing in another tribunal. The general assembly might think it advisable, in aid of that authority, to diffuse the jurisdiction given by the act, throughout every part of the state, among the justices of the peace, as the offences might be numerous, and it would, sometimes, be exercised upon occasions of very trifling moment. The law is clear, that where a court has jurisdiction in certain cases, and afterwards jurisdiction therein is given to another court, this provision is only cumulative, not privative; it does not abrogate the authority of the first; but both have a concurrent jurisdiction. (1 Black. Com. 89, 90.)

There was another question, moved in the course of argument, that seems not properly referable to either of the two principal points before mentioned. Several cases were produced to show, that "it is necessary in every suit in the admiralty, to allege in the libel, that the cause of action arose upon the high seas." One distinction solves all difficulties on that question. In causes civil and marine, such an allegation may be necessary; in causes of prize, it is not. 2 Douglas 608.

Thus far, induced by particular considerations, have we pursued the way marked out by the appellant's counsel, for examining this cause, of much importance, and of the first impression among us. Where does it begin, and to what does it lead? From a supposed right, in a court of common law, of scrutinizing, in an action of trover, a decree of the admiralty, in a cause of prize, after execution; to a power of reversing it in effect. Not a case has been produced by the learned counsel, to support this doctrine. It has been said, indeed, that "the capture, being within the body of a county, is properly triable in a court of common law, especially, where only citizens are concerned." There is no difference of this kind, upon captures as prize. It is well known, with what vigilance the judges in Westminster Hall have watched the admiralty jurisdiction, and with what vigor they have checked it, when unduly exercised. Yet, for this purpose, they never availed themselves of the circumstances now suggested. Besides, there are causes, triable by jury, that originate out of the county, and out of the state, in which the trial is had. Where, then, is their power, in causes of prize, to stop? It is likely, that more respect will be paid to the sentence of another

(a) The constitution was agreed to, the 10th of September 1776.

court of admiralty, than to that of our own? And ought not the *complaint of a stranger, a neutral, a friend, to be as much regarded in our courts of justice, as that of an inhabitant? If once such a contest shall be opened, between the jurisdiction of admiralty courts of prize, and that of common-law courts, courts founded upon different principles, and governed by different codes, it would be almost impossible to describe the confusions and mischiefs that must inevitably follow. The evil will appear to be still increased, if it be considered that this contest would be carried on, by a number of common-law courts, in several states, against an admiralty jurisdiction, necessarily blended with the very nature of their federal union.(a) The law delights in certainty and quiet, because, without these, there can be no liberty.

Much has been said in praise of trial by jury, and as much against admiralty courts, "in each of which," it has been alleged, "a single judge presides, who may draw actions into his jurisdiction, by giving them what name he chooses, and decree in them as he pleases." If any citizen of United America does not value trial by jury, at its justly high worth, he is incapable of duly estimating any of his political rights. But if, by the constitution and laws of our country, a jurisdiction is to be exercised in another manner, it is our duty to observe the constitution and laws, without perplexing ourselves by reflections on the excellency of trial by jury. Congress, after the experience of several years, found it requisite to resolve, that trials in the admiralty courts, in cases of captures, should not be by jury. And it is to be noticed, that the act of assembly, under which, it is contended, by the appellant's counsel, that this cause ought to have been tried, gives neither trial by jury, nor an appeal.(b)

Our constitution requires, to use its own words, "the appointment of a judge of admiralty." Our laws acknowledge his authority. Such a jurisdiction was established, throughout the British parts of this continent, before the revolution, and exists in every Christian maritime state and kingdom in Europe. The ease, the cautions, the dispatch, under this jurisdiction, are attended, in time of war, with great benefits to captors, claimants and all parties concerned.

*Admitting the government of a free state to be so degraded, that the "judge of the admiralty appointed by the joint ballots of the president and general assembly," as he is in this state, wants the integrity and knowledge he ought to possess, yet his irregularities are subjected to an immediate and effectual correction: for, by the resolves of congress, an appeal is given to that body, or to the persons by them delegated. [*ix.

When, to the care of that assembly, under Providence, the inhabitants of these states committed their liberties, lives and fortunes, surely there is no impropriety in supposing, that they might safely have been trusted to decide

(a) This is evident from the confederation; and before that was completely ratified, commissions to vessels of war, and instructions, were issued by congress, bonds were given to them, and appeals were reserved to them. These powers rested upon the same principles with those, by which congress was authorized to begin, and prosecute, the late war, thoroughout its various operations. To question the validity of those powers, would seem, plainly, to impeach the justice of those operations.

(b) There was a condemnation, without trial by jury, of the vessel taken by Philip Barret and others, in 1778.

on such a case as the property of the Endeavor and her cargo. Yet this plain and easy method of obtaining redress, if any injury had been done, a method agreed to, upon the maturest deliberation, by United America, has been declined, and the courts of common law, in this state, are to be engaged in trying causes of prize.

Let us now attend to the sentiments of judges,(*a*) eminently distinguished for their abilities and learning upon this subject. "The admiralty has jurisdiction, not only of the question, prize or no prize, but of all its consequences: this jurisdiction belongs to the admiralty, totally and exclusively; and the courts of common law have no jurisdiction at all, in such questions."

"Though for taking a ship on the high seas, trespass would lie, at common law, yet, when taken as a prize, though taken wrongfully, though it were acquitted, and though there were no color for the taking, the judge of the admiralty was judge of the damages and costs, as well as of the principal matter; and if such actions should be brought at common law, on plea of not guilty, the plaintiff could not recover."

"It is true, the sentence of acquittal in the admiralty, is conclusive, that the ship was not lawful prize: but it is evidence of a thing, which a court of common law cannot inquire into. If the original taking be not a trespass cognisable at common law, the sentence of the admiralty court cannot give a jurisdiction to a court of common law, which it had not before." Douglas.

"The validity of a sentence, by a court of admiralty, in a cause of prize, is not determinable by the common law." *Saunders, Redley and Dalbow* v. *Egglesfield and Whitall.*

Though the superior courts of common law, so strictly superintend the conduct of the admiralty, yet, "there is not one instance where a prohibition was ever granted in a cause of prize." The case of *Brown and Burton* v. *Franklyn*, in the time of William III., is remarkable in this respect. On motion for a prohibition, the plaintiffs suggested, that the defendant, *x.] *being the king's proctor, had libelled in the admiralty concerning a ship and cargo, &c., whereas, the ship was a wreck in the East Indies, and that there had been a sentence in the admiralty that all was prize; and that, upon this sentence, the defendant libelled against the plaintiffs, charging them with embezzlement, &c. The court inclined, that the plaintiffs ought to have an opportunity to be heard, and to controvert the matter of fact; but after hearing Dr. Lane, a civilian, and considering that, upon an appeal, the appellants would be let in to controvert the right, and to disprove the prize; and that prize or no prize, was a matter not triable at common law, but altogether appropriated to the jurisdiction of the admiralty, the prohibition was denied." Carth. 398, 474.

"The question, prize or no prize, is the boundary line." "The true reason why the jurisdiction is appropriated to the admiralty, is, that prizes are acquisitions *jure belli*; and *jus belli* is to be determined by the law of nations, and not by the particular municipal laws of any country."

"The jurisdiction of a court of admiralty, generally, is limited to matters arising upon the high seas, and is, in that respect, local; but it is not so in cases of prize; for in them, the jurisdiction does not depend on the locality,

(*a*) Hale, Holt, Lee, Mansfield, Buller, with the unanimous assent of their brethren, the other judges.

but the nature, of the question, which is such as it not to be tried by any rule of the common law, but by a more general law." Douglas.

If the validity of a sentence by a court of admiralty in a cause of prize, is not determinable by a court of common law; if, even after an acquittal by the admiralty, declaring the ship to be no prize, an action at common law is not maintainable for the capture, or for any transaction in consequence of it, certainly the proceedings in the court of common pleas, are not warranted by law.

We now proceed to the second principal point. It is contended by the counsel for the appellant, "that if the court of admiralty had jurisdiction, yet the judgment in replevin being subsequent to the decree of condemnation, is an affirmance of property in the appellant, of which, as such an affirmance, we are bound to take notice, and thereby to be concluded." As this assertion, if well founded, will be productive of very important effects, it deserves a strict investigation.

If the court of admiralty had jurisdiction of the original cause, that is, of the capture as prize, it is equally plain, from the books, that it had jurisdiction of all consequences, to the exclusion of every court of common law. The action of replevin, for the Endeavor and her cargo, ought not, therefore, to have been brought. The court of common pleas had no jurisdiction in the case. Again, if the court of admiralty had jurisdiction, an injury was done to the respondent, by the determination of the common pleas, that the court of admiralty had not jurisdiction; *and if, by the judgment in replevin, we are estopped from relieving him, though he applies to us for relief, in a legal manner, here is an injury that must for ever remain without a remedy; which the law justly abhors. [*xi.

These irregularities may be set right, by a due arrangement of the several parts of this cause. On the trial in the common pleas, the respondent tendered two bills of exceptions. In one of them, he objected to the record in the action of replevin being given in evidence against him, "inasmuch as he was not a party to the same: but the court overruled the objection." On this point, their judgment, supposing they had jurisdiction, appears to have been regular. In the other, he objected to the decision of the judges, that "the court of admiralty had not jurisdiction."

These bills are separate; these objections are distinct. If, on either of them, an erroneous decision was given, wrong was done to the respondent, or, to express it in other words, that was dealt out to him for law, that was not law: yet it is urged by the appellant's counsel, that they ought to be considered together, as utterly to deprive the respondent of all benefit by the last. (a)

The question before us, is not, whether a judgment by default in replevin, is an affirmance of property: but whether, in the present instance, we are obliged to consider it as such an affirmance. The judgment in replevin, was merely a piece of evidence given to the jury; it had its effect, mingled with other evidence, in the general verdict. It is impossible for us, with any respect for substantial justice, to separate it from the other evidence,

(a) If, upon a trial, a party takes several bills of exception; and upon a writ of error, succeeds in supporting only one of them, the judgment below is to be reversed, because he was injured by this decision against him, though he was not by the rest.

shut up in that verdict, because it is impossible for us to determine, what effect the proceedings in the court of admiralty would have had upon the jury, if the judges of the common pleas had not condemned them, by deciding, that "the court of admiralty had not jurisdiction." In what inextricable confusion should we involve the merits of this cause, by regarding the judgment in replevin, as an affirmance of property in the appellant, superseding every other consideration?

The question before us, on this point, finally resolves itself into the same that was before the judges of the common pleas, that is, whether the judgment in replevin, was regularly admissible as evidence, "inasmuch as the respondent was not a party to it," not, what was its legal operation on the property in contest. The law is clear, that "a bill of exceptions is not to draw the whole matter into examination again. It is only for a single point."(*a*) *Not one case has been produced, by the learned counsel for the appellant, to show, that, upon a bill of exceptions to another point, and after a general verdict, we are bound to consider a judgment by default in replevin, brought before us, as this is, as an affirmance of property; though struck with the position, we desired that such a case, if to be found, might be produced. Not a case has been offered, that can, by any analogy, be made to maintain the inference drawn in behalf of the appellant.

xii.]

The judgment of the supreme court affirmed.

ROBINSON *et al.*, appellants, *v.* Lessee of ADAMS, respondent.

Construction of will.

Testator devised as follows, "Item, I give to my two sons, namely W. and F., all my land at, &c., to be equally divided between them and their heirs for ever: If any one of my aforesaid children should die, before they come to lawful age, their lands to go to the survivors; that is, if T. should die before he comes to lawful age, I give his share of land, where W. now lives, to my daughter E., to her and the lawful begotten heirs of her body for ever; provided, T. have heirs, before he comes to lawful age, then to him and his heirs for ever; and likewise, if W. should die, without heirs, to go to F., and if A. should die, without heirs, to go to V.; and if J. should die, before he comes to lawful age, without heirs, then his share of land here, where I now live, I give to my daughter C., to her, and her lawful begotten heirs of her body for ever:" *held*, that W. took an estate in fee-simple, subject to an executory devise to F.

AN action of trespass of ejectment was brought by the respondent against the appellants, in the common pleas of Sussex, for a tract of land situated in that county. The action was removed into the supreme court, by *certiorari;* and upon the trial there, the jury found a special verdict.

The verdict states, "that Thomas Bagwell was seised in his demesne as of fee, of a moiety of a tract of land, called Long Neck, of which the land

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(*a*) Evidence is to be given in open court, in the presence of the parties, their attorneys, the counsel, and all by-standers, and before the judge and jury; each party having liberty to except to its competency, which exceptions are publicly stated, and by the judge are openly and publicly allowed or disallowed, in the face of the country; which must curb any secret bias or partiality that might arise in his own breast. If, either in his directions or decisions, he mis-states the law, by ignorance, inadvertence or design, the counsel on either side may require him, publicly, to seal a bill of exceptions, stating the point wherein he is supposed to err. 3 Blackstone 372; Buller 316.

in question is part, and, by his will, dated the 15th day of April 1690, devised the same in manner following :—'I, Thomas Bagwell, &c., for my worldly estate that the Lord hath endowed me with, do give and bequeath as followeth : Item, I make my dear wife the executrix. Item, I give to my two sons, namely, William and Francis, all my land at the Horekiln, in Sussex county, &c., to be equally divided between them, and their heirs for ever. Item, this plantation, where I now live, &c., I give to my son John, to him, his heirs for ever; that is, from a white oak, by the creek side, &c., to the head line. Item, I give to my son Thomas, the rest of my land here, to be equally divided, and he to have share in the orchard ; and likewise my part of the cedar island, I give to Thomas and John, to be equally divided between them, to them and their heirs for ever ; only my two daughters, namely, Ann Bagwell and Valiance Bagwell, to have an equal share of the said island, so long as they keep themselves unmarried, and no longer. Item, I give to my son Thomas, two hundred acres of land, adjoining William Burton's branch, to him and his heirs for ever. Item, I give to my son John, one negro woman. *Item, I give to my daughters, Ann and Valiance, two hundred twenty and five acres of land, adjoining John Abbot, Thomas Mills and Francis Wharton, to them and their heirs for ever. If any one of my aforesaid children should die, before they come to lawful age, their lands to go to the survivors ; that is, if Thomas should die, before he comes to lawful age, I give his share of land, where William now lives, to my daughter Elizabeth Tilney, to her, and the lawful begotten heirs of her body for ever ; provided Thomas have heirs, before he comes to lawful age, then to him, and his heirs, for ever : and likewise, if William should die, without heirs, to go to Francis ; and if Ann should die, without heirs, to go to Valiance ; and if John should die, before he comes to lawful age, without heirs, then his share of land here, where I now live, I give to my daughter Comfort Leatherberry, to her and her lawful begotten heirs of her body for ever. Item, I give to every one of my grandchildren a calf, to them and their heirs for ever ; to my daughters Ann and Valiance, a feather bed a-piece, to them and their heirs for ever ; to my four sons, Thomas, William, Francis and John, a gun a-piece, to them and their heirs for ever ; to my son Thomas, my pistols and holsters, for ever, &c. And all the rest of my personal estate, I give to my wife and my six aforesaid children, to be equally divided among them, to them and their heirs for ever ; to wit, Thomas, William, Francis, John, Ann and Valiance. I set my boys at age at eighteen, and my girls at sixteen ; and their estate to be divided presently after my decease, by my friends William Curtis, William Burton and William Parker, which I leave overseers over my children, &c.' [*xiii.

"That the testator died seised as aforesaid ; that his will was duly proved, the 16th of September 1690 ; that he left issue, all his sons and daughters before mentioned ; that after his death, William, his eldest son, entered into the premises in the declaration of the plaintiff mentioned, and being thereof seised, died intestate, leaving issue William, his only son, by one *venter*, and Agnes, his only daughter, by another *venter ;* that the said William and Agnes, after their father's death, entered into the premises of which he died seised, and made partition, as by the records of the orphans' court appeareth, and the lands in the declaration mentioned were allotted to the said William, the son, who died intestate, seised thereof,

leaving two daughters, Patience and Elizabeth, and a widow, Ann; that the said Ann, as tenant in dower, and the said Patience and Elizabeth, as heirs of the said William, entered, and were seised, &c.; that the said Patience and Elizabeth died without issue; that their mother, Ann, married Benjamin Burton, and died, leaving issue by him, two daughters, Ann and Comfort, who entered, and were seised, &c.; that the said Ann married Thomas Robinson, and died, leaving issue, the appellants; that Comfort died without issue; that Agnes, the daughter of William Bagwell, the first, married John Adams, by whom she had issue, several children, of whom John Adams, the lessor of the plaintiff, is the eldest son and heir-at-law; that he entered and demised, &c., upon whom the defendants entered, &c. But, whether upon the whole matter, &c., the jurors doubt, and pray the opinion of the court, &c. And if, &c., they find for the plaintiff, and assess damages, to five shillings and six pence for costs, besides the costs expended: but if, &c., they find for the defendant."

Upon this verdict, the supreme court, in April 1787, gave judgment for the plaintiff, from which judgment the defendants appealed. An *habere facias possessionem* was awarded to issue, for delivering possession to the plaintiff, upon security tendered, &c.

It is stated, by the counsel on both sides, that the only question in this cause is, whether William Bagwell, the son of Thomas Bagwell, took, under his father's will, an estate in fee-simple, or an estate in fee-tail. If he took an estate in fee-simple, then, by our intestate acts, that estate is vested in the appellants. If he took an estate in fee-tail, the land in question descended to the lessor of the plaintiff, now respondent, the heir-in-tail.

It is time that this controversy should be finally decided, or, large as the contested property is, it may prove ruinous to all persons concerned. We are informed, that several suits have been brought for this estate; verdicts given against one another; and contradictory opinions, of very eminent lawyers, in several parts of America, obtained. The present action has continued above fifteen years.

It is contended by the counsel for the appellants, that William Bagwell, the devisee, took an estate in fee-simple, subject to an executory devise to Francis Bagwell, contingent on William's dying under age, and without issue. Their argument opened with an observation, that "estates in fee-tail are no favorites of the law, and particularly ought not to be so, under republican forms of government, so that if there be any doubt in this case, the determination should incline rather towards the appellants, than the respondent."(*a*)

(*a*) It is greatly to be desired, that the persons appointed by our courts, for viewing and dividing lands among the children of intestates, would not suffer themselves so easily to be prevailed upon to report, that the lands will not bear a division. Thus, very often, an estate is adjudged, as incapable of division, to one of the children, that might well be divided into five or six, if not more, farms, as large as many in the eastern states, upon which the industrious and prudent owners live very happily. By the usual way of proceeding among us, one of the children is involved in a heavy debt, that frequently proves ruinous to him; or, if the debt of valuation is paid to the other children, it is in a number of such trifling sums, and at such distances of time, one from another, that they are of very little use to those who receive them. This matter deserves very serious consideration. It is much to be wished, that every citizen could possess a freehold, though some of them might happen to be small. Such a disposition

*"The intention of the testators," say the counsel for the appellants, "ought to prevail in the construction of wills; that these are presumed to be made in extreme weakness, and without good advice; that, therefore, great indulgence has been shown to improprieties of expression; and judges have frequently added, subtracted, changed and transposed words; that, according to this rule, these words in the will, 'and likewise, if William should die without heirs, to go to Francis,' should be read thus: 'and likewise, if William should die, before he comes to lawful age, without heirs of his body, his estate to go to Francis;' that this alteration is agreeable to the meaning of the testator, because, after having just before mentioned his children, and William amongst them, he says, 'if any one of my aforesaid children should die, before they come to lawful age, their lands to go to the survivors;' and then, immediately proceeds, binding this part and the following into one sentence, by these strongly connecting explanatory words, 'that is, if Thomas should die, before he comes to lawful age, I give his share of land, where William now lives, to my daughter Elizabeth Tilney, to her and her lawful-begotten heirs of her body for ever; provided, Thomas have heirs before he come to lawful age, then to him and his heirs forever; and likewise, if William Bagwell should die, without heirs, to go to Francis, &c.;' that this construction is consistent with the design of the testator, expressed in the foregoing part of his will, where he gives William an estate in fee-simple; that this estate, being given to the testator's immediate heir-at-law, ought not to be diminished by the following words, unless they necessarily require it so to be; that they do not thus require it to be diminished; that all the different parts of the will are reconcilable; that there was a fee-simple given to William, with an executory devise over to Francis, upon the contingency of William's dying before he came to lawful age, and without heirs of his body; that the contingency never happened; but William died seised of the fee-simple." Many authorities have been read, and ably applied, in support of these principles.

By the counsel for the respondent, it is urged, "that the construction contended for, on the other side, is arbitrary and inadmissible; that there is plainly an estate in fee-tail given to William Bagwell, because it is impossible, as was conceded *by the counsel for the appellants, [*xvi. that he could die 'without heirs,' as long as his brother Francis, to whom the limitation over is made, was living; and therefore, that limitation demonstrates, that by the words 'without heirs,' was meant, 'without heirs of his body;' that there is no necessity for overthrowing the fee-tail, thus evidently limited; that the words, 'if any one of my aforesaid children should die, before they come to lawful age,' &c., were proper, if only some of them were under age; that there is reason to believe, from the facts stated, of William's being the eldest son, and of his living by himself; and more especially, from the words made use of in the limitation over upon his death, in which there is no mention of his 'dying before lawful age,' that he was of age, at the making of the will; that this construction is con-

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of property cherishes domestic happiness, endears a country to its inhabitants, and promotes the general welfare. But whatever influence such reflections might have upon us, on other occasions, they can have little, if any, on the present, for reasons that will hereafter appear.

firmed by the limitations over, upon the deaths of Thomas and John, which are expressly made to depend not only upon their 'dying without heirs,' as with respect to William, but also upon their dying, before they come to lawful age;' that these words are omitted again, in the limitation over upon the death of Ann, and in all probability, for the same reason; that the testator has in this manner, repeatedly varied his language, in conformity to his own views; that these views, thus declared, ought not to be controlled by implications, and disappointed by additions, subtractions, changes or transpositions, supposed to be more agreeable to his mind; that this would be to make wills, not to interpret them; that the construction in favor of the respondent is more easy and natural than that in favor of the appellants, and is much recommended, by not offering such violence to the expression of the testator."

The counsel for the respondent have insisted on this construction, with a great force of argument, drawn from reason and authorities. We have, therefore, thought fit to employ a considerable time in our deliberations upon this cause.

It is agreed, by the counsel for the appellants and for the respondent, that the intent of the testators ought to govern in the construction of wills, except where a disposition is made contrary to law. As there is no such disposition now in question, the sole inquiry is, what was the intent of the testator? This intent is to be collected from the entire will, and not from any disjointed parts. Technical terms are not necessary for conveying it; and if such are used, their legal acceptation may be controlled by other words, plainly declaring the meaning of the testator. (2 Bl. Com. 379; 2 Burr. 770; 1 Ves. 142; Doug. 309, 327; Cowp. 239, 659; Vin. tit. Devise, 181.) No words are to be rejected, that can possibly have any sense assigned to them, not incompatible with clearer expressions, or manifest general intent. (Cases temp. Talbot 29; 6 Mod. 112.)

In the present instance, the testator, at first, certainly gives a *fee-
*xvii.] simple to his son William: yet, if the devise over to Francis, "if William should die without heirs," is a substantive clause, independent of the next foregoing clause, that begins with the words, "if any one of my aforesaid children should die, before they come to lawful age," the fee-simple is turned into a fee-tail. On the other hand, if these two clauses are but parts of one continued sentence, through the whole of which, the testator's disposing design holds on, uncompleted, until the conclusion, then the fee-simple remained in William, with an executory devise to Francis, dependent on the event of William's "dying without heirs" of his body, and "before he came to lawful age."

It has been strongly objected by the respondent's counsel, that the construction urged for the appellants, breaks through the words of the will, to let in an estate by implication, under the notion of a power being vested in judges to determine the intention of the testator, by adding to, or taking from, his words; a construction, so severe, that it may well be compared to the bed of Procrustes; if the expression is too short, rack it out; if too long, lop off part." The power of judges would, indeed, be as exceptionable as it is represented to be, if as extensive as it is supposed to be, in the objection: but the alteration of words, by judges, in considering wills, are not made, strictly speaking, to discover the intention of testators, but only

to express it properly when discovered. They do not introduce a supposed intention, but wait upon the true intention.

It was observed, in answer to this objection, by the learned gentleman who replied for the appellants, "that the respondent's counsel themselves, make use of implications, in sustaining their own construction; for in order to form the estate-tail, asserted by them to be limited to William Bagwell, they are obliged to this clause, 'and likewise, if William Bagwell should die without heirs,' to add these words, 'of his body;' and again, to render their construction consistent with reason, they are compelled to allow that the limitation over to Francis gives him a fee-tail, according to the intention of the testator, though only an estate for life, according to the words of the will." There is great weight in this observation. It proves the will to be so defective in expression, that, though the two parties are led into opposite deductions, yet each of them is under a necessity of being guided by implications. Nor is the use of implications, while bounded by legal limits, to be condemned; because they are to be admitted only for effectuating the general intent of testators. (1 Burr. 50, 51.)

We must, therefore, still recur to the original question, what was the intention of the testator? *The attempt of the respondent's counsel to show, that William was of age at the making of the will, is ingenious. However, the fact is not found, and we cannot suppose it. Indeed, it appears to be contradicted by these words, "All the rest of my personal estate I give unto my wife and my six aforesaid children, to be equally divided among them, to them and their heirs for ever, viz., Thomas, William, Francis, John, Ann and Valiance Bagwell. I set my boys at age at eighteen, and girls at sixteen, and their estate to be divided presently after my decease, by my friends, &c., whom I leave as overseers over my children, &c." Here the word "their" plainly refers to his "boys" under eighteen, and the words "estate to be divided presently, &c.," refers to the foregoing words, "to be equally divided among them, &c.;" and as William is named as one of the "six aforesaid children," among whom the residue of the personal estate was thus "to be equally divided, &c.," he and the other five children seem to be classed together, as being all under age. [*xviii.

It is true, that these words, "if any one of my aforesaid children should die before they come to lawful age, their lands to go to the survivors," do not prove, by their relation to what went before, that William was then under age, though he was one of the "aforesaid children:" for, as was observed by the respondent's counsel, the words may well be satisfied, if only some of them were under age. But these words, taken in connection with those that precede, and with those that follow them, acquire a very different and a decisive force. The directions, at first, are only general, relating, without name, to "any one of the aforesaid children," and without distinction, "to the survivors." These general terms are immediately succeeded by this explanatory specification: "that is, if Thomas should die, before he comes to lawful age, I give his share of land, where William now lives, to my daughter Elizabeth Tilney, to her and her lawful-begotten heirs of her body for ever; provided, Thomas have heirs, before he comes to lawful age, then to him and his heirs for ever; and likewise, if William Bagwell should die, without heirs, to go to Francis; and if Ann should die, without heirs, to go to Valiance; and if John should die, before he come to lawful age, without

heirs, then his share of land here, where I now live, I give to my daughter Comfort Leatherberry, to her and her lawfully-begotten heirs of her body, for ever."

Construing these words, "that is," according to the common manner of speaking, and so they ought to be construed, it is plain, that the testator designed, in his subsequent words, to be more particular or exact than he had yet been, and as in these, he mentions William again, and makes a substitution in case of his dying, it is evident, that William was meant, by the testator, as *"one" of his "aforesaid children," whose lands, if they "should die, before they came to lawful age," should "go to the survivors." *xix.]

It is remarkable, how much pains the testator employed, in this part of his will, to prevent his meaning from being mistaken. In the limitation over, if Thomas should die, he applies his former direction thus: "that is, if Thomas should die, before he come to lawful age, I give his share of land to my daughter Elizabeth Tilney, &c." And then, to guard against a misconstruction of these words, whereby Thomas's issue might be disinherited, in case Thomas should die, before he came to lawful age, leaving issue, subjoins, "provided, Thomas have heirs, before he comes to lawful age, then to him and his heirs for ever."

No point of law can be clearer, than that this devise gives a fee-simple to Thomas, with an executory devise to Elizabeth Tilney, if Thomas should die, without heirs of his body, and before he should come to lawful age. Why should not the like provision be extended to the case of William, when the testator, after this full exposition of his mind with regard to substitution, instantly adds, "and likewise, if William Bagwell should die without heirs, to go to Francis." The most obvious and natural construction of these words is, that William's estate should be no otherwise affected by the limitation over to Francis, than Thomas's was by the limitation over to Elizabeth; though, perhaps, the testator also meant, that Francis should take such an estate as Elizabeth would take on a similar contingency.

This construction is further recommended, by the consideration, that the limitation over to Francis is nonsense, it not being said, what is "to go" to him, unless it refer to the preceding words. The very imperfection in this part of the will carries strong evidence in it, that the testator, at the instant of using this expression, united it, in his idea, to the antecedent part, especially, as he employs the same peculiarity of phrase for transferring the estate, in both places.

The beginning of this explanation states Thomas to be under age: the conclusion of it states John to be under age: between these are comprehended the provisions respecting William and Ann. From first to last, the words are all connected by the word "and," without the intervention of any stop. If, then, the two extremes relate to persons under age, and are confessedly explanatory of the general directions first mentioned, the intermediate parts must also refer to persons under age, and be explanatory of the same directions as to them, for there is no period at which the explanation rests, before the end of the devise to Comfort Leatherberry.

We can easily account for inaccuracies in the testator's expressions, from sickness, hurry, want of knowledge or assistance: but we cannot account for such an inequality of distribution as *is required by the construction in behalf of the respondent. The testator's offspring appear to *xx.]

be alike objects of his parental affection and providing care. Yet, what a needless, useless and incumbering diversity of regulations is introduced, if Thomas took a fee-simple, with an executory devise to Elizabeth; William, a fee-tail, with an estate for life, or fee-tail limited to Francis; Ann, a fee-tail, with an estate for life, or a fee-tail limited to Vallance; and John, a fee-simple, with an executory devise to Comfort?

On the contrary, the construction in favor of the appellants, gives a sameness of arrangements, correspondent with the sentiments of the father towards his children. Each son took an unfettered estate, that is, a fee-simple, in the part devised to him; of course, if any son "came to lawful age," he might dispose of his share as he pleased; if any son died, "before he came to lawful age," leaving issue, the estate went to that issue; but if any son died, before he came to lawful age, and without leaving issue, the estate went to the substitute. This, we believe, to have been the testator's design; and we think, he manifested in it great prudence, and a paternal impartiality.

It has been observed, by the respondent's counsel, "that this construction would carry the estate entirely from the descendants of the testator into a strange family, and the respondent's lessor would suffer the peculiar hardship of being stripped of the inheritance, though he is heir of the testator and of the devisee."

It is impossible to calculate hardships of this kind, amidst the mutabilities of human affairs. It is to be remembered, that William Bagwell, the devisee and heir of the testator, was succeeded by his son William, and this William by his two daughters. Thus, the construction of the counsel for the appellants, allows a fee-simple to the heirs of the testator and devisee for several generations. About fifty years ago, as appears from the records of the orphans' court, the mother of the respondent's lessor obtained a partition with her brother William, the second, of the lands devised by the testator to William, the first, their father, as of an estate in fee-simple, and the lands assigned to her for her share are held under that partition to this day. It would have been thought, at that time, extremely hard, if it had been insisted, that William, the grandfather of the respondent's lessor, took in fee-tail the lands devised to him by this will, that, therefore, upon his death, the whole descended to his son William, and that his daughter Agnes was not entitled, under our intestate acts, to any part of so large an estate. Now, the complaint is directly reversed, and the construction that inured to the great benefit of the mother, is reprobated by the son, claiming under her title. Yet, if either of the daughters of William, the second, had issue surviving, the same interpretation of this will would now suit the respondent's *lessor, that heretofore was so advantageous to his [*xxi.
parent.

The true construction of a will is to be collected from the words; and is not to be affected by collateral circumstances; consequently, not by events subsequent, remote, uncertain, and utterly unconnected with the contingencies alluded to in the will. (3 P. Wms. 259; Salk. 232, 235; 3 Burr. 1581.) This rule cannot be departed from. The security of property, and the order of society, depend on an observance of the laws.

Our construction of this will, appears to us, to be strengthened by three considerations, which we shall now mention.

1st. It is very credible, that when a person undertakes to make a will, he means to dispose of all his property; and though we do not perceive any sufficient reasons why this well-founded presumption might not be generally adopted as a guide in the interpretation of wills, especially, in devises to children and other lineal descendants of the testator, (*a*) where the gifts dictated by fatherly affection, as its last acts of kindness, may justly be deemed as designed to be the most beneficial to the objects of it, if no restriction is declared; yet, it must be acknowledged, that we do not recollect any case where it has been so adopted. Judges, however, have availed themselves of short and slight intimations in wills to this purport; have exerted themselves to render the disposition commensurate to the intention; and have particularly relied on such words as are used in this will, "for my worldly estate, &c.," to prove that the testator designed to devise all his interest in an estate. *Ibbetson* v. *Beckwith*, Cas. temp. Talb. 157; *Tanner* v. *Morse*, Ibid. 284; *Tufnel* v. *Page*, Barnard. 9; Cowp. 355; *Grayson* v. *Atkinson*, 1 Wils. 333; *Frogmorton* v. *Holyday*, 3 Burr. 1622–3. This inference appears to be peculiarly apposite, where a question arises from various terms of limitation, or expressions tantamount, whether a devisee takes in fee-simple, or in fee-tail.

The respondent's counsel, though strenuous advocates for their client's pretentions, have been too candid to assert, that the estate given to William, and according to their idea, contracted to an estate-tail, should, on failure of his issue, expand into a fee-simple in Francis. They say, "Francis was to take the like estate that was limited to William, that is, an estate-tail." Of course, a reversion would remain undisposed of by the testator, contrary to his design, manifested not only by the preamble of his will, but also by the conclusion of it, in which last he uses these words, *"all the rest of *xxii.] my personal estate I give, &c." This clause, we believe, never would have been restricted to "his personal estate," if he had not been fully persuaded, that he had before disposed of all his real estate. (Cowp. 307; 3 Burr. 1622, 1623.)

2d. If it had been the intention of the testator, to give an estate-tail to any of his sons, what reason can be assigned, why he did not use plain words for that purpose? He well knew even the technical terms for creating such an estate; and repeatedly employed them, in limitations over to his daughters, Elizabeth and Comfort, that to each of them being "to her and the lawfully-begotten heirs of her body for ever." But such terms he never admitted in the devise to any of his sons, nor indeed to any of his unmarried daughters.

A case was quoted by the counsel for the respondent, from Pollexfen, to show, that where there is a variety of expression, there is a variety of intention. That case is very properly applicable here, for difference of language,

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(*a*) A remarkable distinction taken between a devise to a child, and a devise to a stranger, in Cro. Eliz., Fuller *v.* Fuller. In Modern Cases in Law and Equity, 132, it was held, that where a settlement is made by a lineal ancestor, in consideration of the marriage of his son, all the remainders to his posterity are within the consideration of that settlement; but when it is made by a collateral ancestor, after the limitations to his own children, all the remainders to his collateral kindred are voluntary.

not otherwise to be accounted for, must certainly proceed from difference of meaning. 2 Wilson 81.

3d. It is inconsistent with the testator's intention, to construe the devise to his son William to be a fee-tail, because it is inconsistent with that meaning which he himself has affixed to the words of the devise. (2 Abr. Ca. in Eq. 298, 302.) It is observable, that the testator, in the latter part of his will, gives personal effects to the legatees "and their heirs for ever." Though these words in such cases are not necessary; yet they incontestably show the donor's opinion of their force, and demonstrate his determination to give the most absolute estate he could give. The same was his determination, as he used the same words, in the devise to his son William, and therefore, the son took a fee-simple.

The judgment of the supreme court reversed.

PRIVY COUNCIL.

*APPEAL FROM NEW HAMPSHIRE. [xxiii.

JULY 1760.

DEERING, appellant, *v.* PARKER, respondent.,(*a*)

Tender.—Depreciation.

A bond was given, payable 30th July 1735, "in good public bills of the Province of Massachusetts Bay, or current lawful money of New England, with interest;" many partial payments had been made in a depreciated currency, and indorsed at their nominal amounts; in the year 1752, there had been a tender in bills of credit, current in New Hampshire; the province bills, contracted for, had been called in, and the currency of the country had gradually depreciated: *Held*, 1st. That the tender was not good, but that the partial payments ought to be allowed, according to the indorsements. 2d. That as to the balance due, the loss from the depreciated currency ought to be divided between the parties.

THIS was an appeal from New Hampshire, heard before a Committee of the Privy Council (Lord MANSFIELD being one of them), on the 10th of July 1760. The facts were these: One Parker had given a bond to Deering, payable the 30th of July 1735, conditioned for the payment of 2460*l.*, "in good public bills of the province of Massachusetts Bay, or current lawful money of New England, with interest." There had been many payments made and indorsed. About the year 1752, the defendant tendered a large sum, in the bills of credit then current in New Hampshire, which the plaintiff refused, brought his action, and recovered judgment for the penalty in the bond, upon the verdict of a jury, in December 1758. After which, the cause was heard in the Chancery of New Hampshire, and the court decreed for the sum of 354*l.* 6*s.* 9*d.*, in bills of credit of New Hampshire, new tenor, being

(*a*) This report is taken from a collection of manuscript cases, upon authority that appeared respectable when it was copied; but the name of the reporter is forgotten.

the nominal sum due at the time of the tender, deducting the sums paid and indorsed. So that the court went upon the principle, that the plaintiff should take the bills as tendered, and that the debtor was not bound to make good their depreciation, nor to pay in silver, or real money.

On the side of the *appellant*, or creditor, it was insisted, that the payment ought either to have been in bills of Massachusetts Bay (which, it seems, were all called in, and sunk, before the tender), or in silver money, agree-
*xxiv.] able to queen Anne's proclamation, *which, they insisted, was the true meaning of that clause or part of the condition, to wit, current lawful money of New England. It was also claimed by him to have all the sums indorsed, reduced in nominal sums down to the value of silver at the time of giving the bond, to wit, 27*s.* per ounce.

On the side of the *respondent*, or debtor, it was urged, that current money of New England then meant, and was understood to be, indifferently, the bills of credit of any or either of the New England colonies, received in that colony in payments. That, therefore, the tender was in the specie contracted for, and that the sums indorsed were not only, of course, upon that supposition, equal to the sums expressed; but that the creditor, by indorsing, had agreed to and accepted of so much as the same expressed, in real as well as nominal sums.

The Lord President and Lord Mansfield expressed themselves fully in favor of the creditor's construction of the words, "current lawful money of New England;" to wit, that it did not mean bills of credit of any colony, but the words were put in contradistinction thereto. Lord Mansfield further added, that he was clear, on the one hand, that the sums indorsed ought to be allowed according to the nominal sums so indorsed, equal to the same sums of money mentioned in the bond, and that the plaintiff had no right to have the same any way reduced or altered. On the other hand, his lordship thought that the tender was not good in any respect; for not only because it was made in a species of currency, different from that contracted for; but also because it was out of time, being many years after the time of payment was lapsed, and also without notice. "What (said his lordship), shall a man meet his creditor in the street unawares, and tender a debt to him? The chancery allows six months' notice of time and place to be given. The law of the province enabling the court to turn itself into a court of equity, and to reduce the bond to the sum due by the *auditem*, was a very good thing; and what Sir Thomas Moore, in his time, labored so hard to obtain an act of parliament for here. And because the judges (with whom he had several conferences about the matter) were for retaining the old artificial way, he declared, that he would always grant injunctions in such cases. In the present case (his lordship continued), he was at no loss to determine, that the judgment ought to be reversed: but he was at a loss what rule to go by, in determining the *quantum* of the debt. Since the province bills contracted for were called in and gone; with a desire to know the usage, he had inquired of Mr. I., a New England gentleman (who had practised the law), and was informed, that "when old tenor had been contracted for, it had been allowed to be tendered, although depreciated in value, if the tender was
*xxv.] made in season. That *towards the close of existence of old tenor, and after it had been called in and sunk, when judgment was given

for real money, this matter (of how much to give) was greatly agitated. Some were for giving the value of the old tenor, or bills contracted for, as it stood when the obligation was out, or the debt became due. Others would have it settled, as it was when at the last and worst period; and others again, were for taking a medium. But the more general method was, to take the value of the bills, when they should have been paid by the contract." Lord MANSFIELD observed, that from this information, he had received much light, and was relieved from his difficulty. That much might be said, for taking as a rule the value of the old tenor, at the time set by the bond for payment. That, upon the mention of it, it struck him as the rule of right in general: but that, in the present case, the bond had been outstanding so very long, the bills of credit, which were the currency of the country, had, in the meantime, sunk gradually, and became, in some measure, every one's loss: and that, therefore, in this case, he thought the loss ought to be divided between them.

THE BOARD, upon the whole, instead of taking the price of silver at the time of the contract, and time set for the payment (which was about 27*s.* per ounce), fixed it at 37*s.* per ounce, and computed the debt accordingly. This made about 100*l.* sterling in favor of the appellant, by which he got the opinion of the court in his favor; but as no costs are allowed upon appeal, he could not be much a gainer by the general result.

MAYOR'S COURT OF PHILADELPHIA.

APRIL SESSION, 1797.

COMMONWEALTH *v.* SCHAFFER.

Criminal jurisdiction.

The jurisdiction of the state courts extends to the case of a forgery of powers of attorney, to receive warrants for lands granted by acts of congress, for military services.

THE defendant was indicted and convicted for forging the names of several soldiers to powers of attorney, authorizing him to demand and receive their warrants for the donation of lands granted by acts of congress, for services during the revolutionary war. *Dallas* observed, that as the question of the common-law jurisdiction of the federal courts, in criminal cases, had not been decided, it was his duty, as counsel for the defendant (without declaring his own opinion), to bring it before the court, on the present occasion. He, therefore, moved in arrest of judgment, that the offence, charged in the indictment, arises under a law or laws of the United States; and is exclusively cognisable in their courts.

After argument, the Recorder stated the facts, authorities and principles of the case, in giving the judgment of the court.

WILCOCKS, Recorder.—The offences charged against the defendant in the indictment, are forgeries, committed in forging the names of Allen FOX, Ebenezer Drake, Robert Battersby and Samuel Griswald, to four several

powers of attorney, to demand and receive from the United States, for each of them, 100 acres of land; they having all been soldiers, who enlisted to serve during the late war with Great Britain, and who served through the war; and in consequence, under various acts of congress, each of them was entitled to a donation of 100 acres of land.

In support of this motion in arrest of judgment, made by Mr. Dallas, the constitution of the United States has been cited; Art. III., § 2, p. 12; *xxvii.] the Judiciary Act of Congress, § 9, p. 97; § 11, p. 98, 99; § 34, p. 112; 2 vol. Resolves of Congress, 16th *Sept. 1776, p. 357–8; p. 361; 18th Sept. 1776, p. 365; 20th Sept. 1776, p. 456; 12th Nov. 1776, p. 438; 30th Oct. 1776; Laws of U. S. p. 151, § 14; Const. U. S., art. I. § 8; 1 Black. Com. 245. It has been contended, that, under the 2d section of the 3d article of the constitution of the United States, its judicial power extends, *inter alia*, to all cases arising under the constitution and laws of the United states.

By the resolutions of Congress, in 1776, referred to, it was shown, that the soldiers, who enlisted to serve during the war, and served to the end of it, were, individually, entitled to a donation of 100 acres of land from congress. It has been said, that an inspection of the indictment will show, that the crimes charged against the defendant, consisted in forging certain writings, which, by the rules of office, were necessary to obtain from congress the soldier's right to lands. For this reason, and because the soldier's rights to lands are derived under the resolves or acts of congress, the conclusion is drawn, that a state court has no cognisance of this crime, because it arises out of a law of the United States. The 9th section of the judiciary law of the United States, it is alleged, gives to the district court, exclusive of the state courts, cognisance of all crimes and offences that shall be cognisable under the authority of the United States, where the punishment is whipping under thirty stripes, &c. And § 11, p. 99, gives to the circuit court exclusive cognisance of all crimes and offences cognisable under the authority of the United States, except where that act otherwise provides, or the laws of the United States otherwise direct.

It was contended, that, for the reasons before recited, showing that the offence arose out of a law of the United States, that, therefore, the courts of the United States had cognisance of it. And that, by the 9th and 11th sections of the judiciary law, their cognisance was declared to be exclusive of the state courts, unless otherwise provided by that or some other law of the United States; and it was said, that no such provision had been made, therefore, the conclusion was, that the state courts had no jurisdiction of this offence.

In answer to an objection, that the laws and constitution of the United States nowhere defined the crime of forgery, in such manner as to comprehend the offence charged in the indictment; nor was the common law of England, relating to crimes and offences, extended to the United States; nor was there any law of the United States which prescribed a punishment for forgeries generally. The act of congress for punishing certain crimes against the United States, Laws of United States, § 14, p. 151, and against *xxviii.] forgery of indents or public securities of the United States, were *cited, and the judiciary law, § 34, p. 112, which says that the laws of the several states, except where the constitution, treaties or statutes of the

United States shall otherwise require, shall be regarded as the rules of decision, in trials at common law, in the courts of the United States. It has been inferred from hence, that the rule of punishment, in this case, would be the rule of the common law, if it obtained in the state, or such rule as the law of the state provided. 4 Bl. Com. 245, has been referred to for the definition and punishment of forgery at the common law.

Henfield's case has been referred to, which was an indictment in the circuit court of the United States, for a misdemeanor; that he, being a citizen of the United States, entered on board a French privateer, to cruise against the British, with whom the United States were at peace, under a treaty. *Ravara's case* was also cited, who was a consul from the state of Genoa to the United States, and indicted in the district court of the United States, for a misdemeanor in sending a threatening letter to Benjamin Holland, for the purpose of obtaining money from him.

It was said, that there was no act of congress which either defined the offence or the punishment in those cases; but it was said, that the common law would give the rule for both. It was argued, that whatever was necessary to the existence of the United States, must not depend upon the state courts. That this offence was committed in prejudice, and to the injury, of the United States, and therefore, the jurisdiction of it belongs to the courts of the United States. That under the constitution of the United States, no power is given to punish the offence of stealing records, robbery, perjury, and the laws of congress (p. 153) prescribe the punishment of these offences in particular cases. As the laws of congress have made provision, in these cases, without any power given by the constitution expressly for the purpose; in the same manner, the authority of congress is competent to declare, by law, how the offence charged against John Schaffer, shall be tried and punished. And therefore, it is an offence not of state cognisance, but ought to be tried in the courts of the United States only.

Mr. Ingersoll and Mr. Thomas, in support of the jurisdiction of the court, referred to the following authorities. Const. of U. S. art. III. § 2; art. I. § 8, p. 8; 12th Amend. Const. U. S.; Resol. of Cong. vol. 8, p. 289; 4th July 1783, Ib. vol. 10, p. 366; 1st Aug. 1786, Ib. vol. 12, p. 114; 23d July 1787, 2 vol. Laws of Cong., p. 49, 52, 154; 2 vol. Federalist, p. 323, 324; Const. U. S. art. I. § 8; Laws of U. S. § 16, p. 151. *From these sources, a system of argument has been drawn, which, as it has been generally [*xxix. adopted by the court (in the sentiments they have formed) I shall forbear to state it minutely, but proceed to deliver the opinion of the court on the case before them.

The soldier who enlisted to serve during the war, and afterwards continued to serve to the end of it, had a right to demand and receive from the United States, a promised donation of 100 acres of land. This right had its inception under several resolutions of congress, passed in the year 1776, and it became a perfect right, at the close of the war, in the year 1783. The commonwealth of Pennsylvania, for a long course of time before the revolution, down to the present day, has always had subsisting laws, competent to the trial and punishment of every species of forgery that could be fabricated. In the year 1789, when the constitution of the United States was completely organized, it found this commonwealth in full possession of jurisdiction over this forgery. And as offences on this subject may have occurred after the

peace, and before the existence of the present constitution, it is possible, that some instances of prosecutions on similar papers, may have taken place in the courts of this state, before the establishment of it, as several have been known to take place, in this court, since that period; particularly in the cases of *Dixen*, and *Mc Conchlan and wife*.

The important question is—what has been the effect of the constitution of the United States (and the laws which have been enacted under it), to divest this commonwealth of a jurisdiction of which, at the time it was made, it found the state constitutionally possessed?

The 1st and 3d articles of the constitution of the United States principally affect this question; they respect the legislative and judicial powers, and contain an extensive enumeration of subjects whereon their legislative power may be exercised, and to which the judicial power shall extend; and it is reasonable to say, that there may be powers which are not enumerated in it, but ought to be considered as granted by the constitution; for instance, those (if such there be) which are essential to the independence of the government, to its protection and defence, to such as grow out of the constitution, and out of the constitutional laws of congress.

If it be true, that this offence may be considered as growing out of an act of congress, because, if congress had never engaged to give lands to soldiers of a particular description, there never could have been a forgery of such a power of attorney: yet, it still remains a question, whether, under all existing circumstances, this court has jurisdiction. If the authority of congress is competent to declare the false making such a paper to be a *xxx.] crime of forgery, to prescribe its *punishment, and to appoint the place of trial to be in the courts of the United States, exclusively of the state courts; yet, on examination, it will be found, that congress has not, by an act, legislated on any of these points. No act of congress has, either definitely or by general description, made the false fabrication of such a writing to be a forgery, nor has any act declared how such a forgery or forgeries, generally, shall be punished. No act has given jurisdiction to any court, either concurrent or exclusive, to try the crimes of forgeries generally.

If these positions be true, they tend to show it doubtful, whether, at this day, under the existing laws of the United States, this forgery could be tried and punished in their courts; however, future laws may make them so.

To say that the constitution of the United States operated any abridgment of the jurisdiction of the state courts, as to crimes generally, of forgery, perjury, larceny, merely because they related to the interest or concerns of the United States, or their officers, acting under their laws, before they themselves, by their own acts, shall have provided for the punishment of such crimes, and taken order as to the jurisdiction of them, would lead to this consequence, that for a time, consistent with such doctrine, some crimes would, by law, be subject to no prosecution or punishment.

In the 2d vol. of the Federalist, pages 323, 324, which may be called a commentary on the constitution of the United States, contemporary with it, it is held, that "the states retain all pre-existing authorities which may not be exclusively delegated to the federal head; and that this exclusive delegation can only exist in one of three ways: 1. Where an authority is, in

express terms, granted to the Union: 2. Or where a particular authority is granted to the Union, and the exercise of a like authority is prohibited to the states: 3. Or where an authority is granted to the Union, with which a similar authority in the states would be utterly incompatible. Though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think, that they are, in the main, just, with respect to the former as well as the latter; and under this impression, I shall lay it down as a rule, "That the state courts will retain the jurisdiction they now have, unless it appears to be taken away in one of the enumerated ways." (Page 324.) "I am even of opinion, that, in every case in which they are not expressly excluded by the future acts of the national legislature, they will, of course, take cognisance of the causes to which those acts may give birth."

But the present case is not one of those which comes within the exceptions of that writer. 1st. The jurisdiction of this crime is not exclusively granted to the Union. 2d. It is not prohibited to the states. 3d. Nor, if it is granted to the Union, is it a case where a similar authority in the states would be incompatible.

*In the act of congress (p. 147) "for the punishment of certain crimes," the murders or larcenies there mentioned, are such as may be [*xxxi committed within the forts, arsenals, dock-yards, federal district, places ceded by the states to the United States, or upon the high seas, perjuries in their own courts of justice under any act of congress, forgeries of indents or public securities. In general, they are those subjects submitted by the constitution to be legislated upon by them, and made subject to their judicial authority. Congress having exercised their power over many subjects submitted by the constitution, and to some arising under their laws; but never having touched the present subject, of which this state had a pre-existing cognisance, it may be considered as *casus omissus* by their laws; and until they shall, by some future act, exercise their authority over the subject by designating the crime, prescribing the punishment, and giving to the courts of the United States exclusive jurisdiction, this court may, constitutionally, take cognisance of the cause, and punish the offence, by the laws of this state. Therefore, the 11th section of the judiciary act, which gives to the circuit court exclusive cognisance of all crimes and offences cognisable under the authority of the United States, may be reasonably supposed not to have contemplated this case, which by no act of congress is designated as a crime, nor has it any appointed punishment.

The prosecution against *Henfield*, in the circuit court, was for a violation of his duty, as a citizen of the United States, in entering on board a French privateer, and cruising against the subjects of the king of Great Britain, with whom the United States were at peace, under the sanction of a treaty. This was contrary to the law of nations, to the treaty, and against the constitution of the United States. This was not a crime resulting from the regulations of an act of congress. *Ravara* was a public minister, a consul, and, therefore, the jurisdiction over him by the constitution was expressly to be exercised by the courts of the United States. Neither of these cases rests upon the principles on which the present case stands, and therefore, are no authorities.

The 34th section of the judiciary act (p. 112), which says, that the laws

of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise direct, shall be regarded as the rules of decision, in trials at common law, in the courts of the United States, plainly refers to trials of a civil nature, according to the course of the common law, and not to the trial of crimes by the rules of the common law.

Upon this comprehensive view of the question, the court are of opinion, that they are competent to the jurisdiction of this cause, and therefore, do overrule the motion that has been made in arrest of judgment, founded on the objection to their want of jurisdiction.

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