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ments to which account he pleases ; but if he fails to make the application, the election passes from him to the creditor. No principle is recollected, which obliges the creditor to make this election immediately. After having made it, he is bound by it ; but until he makes it, he is free to credit either the bond or simple contract.

\*321] \*Unquestionably, circumstances may occur, and perhaps did occur in this case, which would be equivalent to the declaration of his election on the part of the debtor, and therefore, the court was correct in instructing the jury, that if they should be satisfied, that the payments were understood to be made on account of the goods sold at vendue, they ought to apply them to the discharge of that account ; but in declaring that the election, which they supposed to devolve on the plaintiff, if the application of the money was not understood, at the time, by the parties, was lost, if not immediately exercised, that court erred.

Their judgment, therefore, must be reversed, and the cause remanded for a new trial.

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DAWSON'S LESSEE v. GODFREY.

*Alienage.*

A person born in England, before the year 1775, and who always resided there, and never was in the United States, is an alien, and could not, in the year 1793, take lands in Maryland, by descent, from a citizen of the United States.<sup>1</sup>

ERROR to the Circuit Court of the district of Columbia, sitting at Washington.

Russell Lee, a citizen of the United States, in the year 1793, died seised in fee of a tract of land called Argyle, Cowall and Lorn, situated in that part of the district of Columbia which was ceded to the United States by the state of Maryland. Mrs. Dawson, the lessor of the plaintiff, would be entitled to the land by descent, unless prevented by the application of the principle of alienage. She was born in England, before the year 1775, always remained a British subject, and was never in the United States.

The court below instructed the jury, that she was an alien, and could not take the land, by descent, from Russell Lee, in the year 1793.

The question having been fully argued, but not decided, in the cases of \*322] *Lambert's Lessee v. Paine* (3 Cr. 97), \*and *McIlwaine v. Cox's Lessee* (2 Ibid. 280), the counsel (viz., *Morsell* and *Jones*, for the plaintiff in error, and *P. B. Key*, for the defendant), agreed to submit it to the court, without further argument.

JOHNSON, J., (a) delivered the opinion of the court, as follows :—This case rests upon the single question, whether a subject of Great Britain, born before the declaration of independence, can now inherit lands in this country ? The general doctrine is admitted, that in the state of Maryland, in which the land lies, an alien cannot take by descent ; but it is contended,

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(a) The judges present were, CHASE, JOHNSON, LIVINGSTON and TODD.

<sup>1</sup> *Carter v. Godfrey*, 1 Cr. C. C. 479.

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upon the doctrine laid down in *Calvin's Case*, that the rights of the *ante-nati* of Great Britain formed an exception from the general rule. The point decided in the case of Calvin was, that a Scotsman, born after the union, could inherit lands in England. It is evident, that this case is not directly in point, for the only objection here to the right of recovery did not exist in *Calvin's Case*, as, whether in England or in Scotland, he was equally bound in allegiance to the king of Great Britain. It would be a contradiction in terms, to contend that Dawson or his wife ever owed allegiance to a government which did not exist at their birth. It is upon a supposed analogy, therefore, and the reasoning of the judges in *Calvin's Case*, that the argument for the plaintiff is founded. In the two cases of *McIlwaine v. Cox* and *Lambert v. Paine*, in this court, this doctrine was very amply discussed, and this case is submitted upon those arguments. The counsel there contended, that the relation of the *post-nati* of Scotland (after the union) to the subjects of Great Britain, was identically the same with the *ante-nati* of Great Britain (before our revolution) to the citizens of this country, and that the community of allegiance, at the time of birth, and not the existing state of it, when the descent is cast, is the principle upon which the right to inherit depends.

The latter proposition presents the weak point of their argument, for the community of allegiance at the time of \*birth and at the time of de- [ \*323  
 scent both existed in *Calvin's Case*. And if the court, in their argu-  
 ment, expressed opinions which appear to go the length contended for by  
 the counsel, they must be considered as mere *obiter* opinions, since the  
 decision of the cause did not depend upon them. We have no doubt, that  
 the correct doctrine of the English law is, that the right to inherit depends  
 upon the existing state of allegiance, at the time of the descent cast. And  
 that the idea that it depends upon community of allegiance, at the time of  
 birth, is a consequence that follows from the doctrines that a man can never  
 put off his allegiance, or be deprived of the benefits of it, but for a crime.  
 Community of allegiance once existing, must, upon these principles, exist  
 ever after. Hence it is, that the *ante-nati* of America may continue to in-  
 herit in Great Britain, because we once owed allegiance to that crown. But  
 the same reason does not extend to the *ante-nati* of Great Britain, because  
 they never owed allegiance to our government.

This idea will be best elucidated in the following manner. If an action  
 be commenced in England, by an *ante-natus* of America, for the recovery of  
 land, the plea of *alien born* could not be maintained, because inconsistent  
 with the fact; nor would a plea of the severance of these states avail  
 the defendant, because the act of his government, independent of any  
 crime of his own, does not deprive the plaintiff of his civil rights, al-  
 though it may release him from the obligation of allegiance. But if  
 a suit of the same kind is instituted here, by an *ante-natus* of Great  
 Britain, the plea of *alien born* could be maintained, for the plaintiff never  
 owed allegiance to our government. To avoid it, he would be put to  
 a special replication, by which he must of necessity acknowledge the truth  
 of the plea, and set forth circumstances which would amount to a recogni-  
 tion of his never having been a party in our social compact. Much of the  
 difficulty in satisfying the mind on this subject vanishes, upon a just view  
 of the nature of the right of inheritance. Gentlemen have argued upon its

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as if it were a natural and perfect right ; whereas, it has its origin in, and is modified to infinity by, the laws of society, in exercise of the right of territorial jurisdiction. To be entitled to inherit in the state of Maryland, a right should be made out, under the laws of that state. As the common \*324] law, which is the law of Maryland on this subject, \*deprives an alien generally of the right of inheriting, it is incumbent upon the plaintiff, to establish some exception in favor of his case. But I know of no exception, at common law, which gives the right to inherit distinctly from the obligation of allegiance, existing either in fact or in supposition of law.

Judgment affirmed.

## MOUNTZ and others v. HODGSON &amp; THOMPSON.

*When error lies.*

*Quære?* Whether the mayor of Georgetown, in the District of Columbia, is a justice of the peace of the county of Washington ?

Whether a writ of error will lie to the refusal of the court below to quash an execution upon motion ?

THIS was a writ of error to a supposed judgment of the Circuit Court of the district of Columbia, for the county of Washington, between Hodgson & Thompson, plaintiffs, and Jacob Mountz, John Mountz and Henry Knowles, defendants.

Hodgson & Thompson had recovered judgment in the court below, at December term 1805, against Jacob Mountz and George Reintzel. By the act of assembly of Maryland, 1791, c. 67, entitled "an act for regulating the mode of staying execution, and for repealing the acts of assembly therein mentioned," it is enacted, that no execution shall issue upon any judgment, provided the person or persons against whom such judgment is obtained, shall come before two justices of the peace of the county, where such person or persons shall reside, within two months after the rendition of such judgment, and, together with two other persons, such as the said justices shall approve of, confess judgment for his debt and costs of suit adjudged, with stay of execution for six months thereafter ; which confession shall be made in manner and form following, that is to say : "You, H. M., A. B. and C. D., do confess judgment to E. F.," which confession shall be signed by \*325] the \*justices before whom the same is made, and a certificate thereof shall be procured under the hands of the said justices, and such certificate shall be a sufficient *supersedeas* to the sheriff to forbear serving execution upon the body or goods of the person so obtaining such certificate. And it is further enacted, that the justices shall return the confession of judgment to the clerk of the court, where the first judgment was rendered, by the next court, in course, to be entered on record ; and after the expiration of the time limited in such confession, it shall be lawful to take out execution thereon, without a *scire facias* or any other delay, against either the principal or the security, or all or either of them for such judgment so confessed.

According to the provisions of this act, the original defendant, Jacob Mountz (with his co-defendant George Reintzel), went before John Ott and Daniel Reintzel, and, together with Henry Knowles and John Mountz, his